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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION

Between:

JAMES MOORE

Plaintiff/Appellant

and

HARLAND & WOLFF PLC
SOMEWATCH LTD

Defendants/Respondents

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Mr O'Donoghue KC with Mr Dornan (instructed by Andress Agnew Higgins, Solicitors) for the Appellant
Mr Ringland KC with Mr Maxwell (instructed by DWF Solicitors) for the First Respondent
Mr Keenan KC with Mr Spence (instructed by Tughans Solicitors) for the Second Respondent

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Before: Keegan LCJ, Treacy LJ and Kinney J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This case concerns a claim by the plaintiff who is now the appellant for provisional damages arising out of the development of pleural plaques. The writ of summons is dated 13 March 2015, the statement of claim is dated 29 June 2016. The notice of set down is dated 30 November 2018.

[2] The appellant is now a man over 70 years, having been born in March 1951. He has developed pleural plaques as a secondary victim having been exposed to asbestos from his father who worked as a pipe lagger at the Harland & Wolff shipyard from 1948-1983. During his working career the appellant's father was

either employed directly by Harland & Wolff or by specialist pipe lagging contractors such as the second respondent. Two other respondents were initially sued as defendants, however, as is frequent in these types of cases they have fallen away.

[3] The appeal is from a decision of Mr Justice McAlinden ("the judge") of 21 December 2022 whereby he dismissed the appellant's action and awarded costs to the first and second named respondents. There are two grounds of appeal as follows:

(i) On the facts as found, the judge erred in law in concluding that the appellant had not proven to the court on the balance of probabilities that his exposure to asbestos between November 1965 and 1974 materially increased his risk of contracting bilateral calcified pleural plaques.

(ii) That the judge erred in law in awarding costs against the appellant without affording the appellant any opportunity to make submissions to the court on the issue.

Background facts

[4] The background facts and governing law are uncontroversial and, so, we do not propose to repeat the entire history which is set out in the comprehensive judgment of the first instance court.

[5] At paras [70] and [71] of the judgment the judge summarises what are the foundational findings as follows:

> "[70] Having set out in detail the evidence that was adduced by the parties, I now turn to address the issues in the case. On the basis of the medical evidence adduced by the plaintiff on the specific issue of diagnosis, which was largely unchallenged, I am satisfied, on the balance of probabilities, that the plaintiff has developed pleural plaques (radiologically diagnosed in 2012) and that this condition has developed as a result of the plaintiff's exposure to asbestos dust and fibres. It is impossible to determine when the plaintiff developed pleural plaques or how much exposure it took for the plaintiff to develop this condition. All that can be said is that the risk of developing pleural plaques as a result of exposure to asbestos dust and fibres is dose related and dependent upon cumulative exposure. Following on from the case of *McGhee v National Coal Board* [1972] 3 All ER 1008, in order to succeed in this case, the plaintiff only has to establish, on the balance of probability that a defendant's breach of

> duty materially contributed to the risk of the plaintiff developing pleural plaques, even though it remains uncertain that any particular period of exposure was the actual cause.
>
> [71] I accept the plaintiff's evidence that he never worked with asbestos and, to the best of his knowledge, never worked in environments in which asbestos dust and fibres were generated. Having regard to the evidence, I am satisfied that the plaintiff's exposure to asbestos occurred in the domestic environment and the source of the asbestos dust and fibres in the domestic environment was the person and clothing of the plaintiff's late father who worked for the bulk of his working life with asbestos as a pipe lagger; an occupation which involved the production and generation of copious amounts of asbestos dust and fibres; so much so, that pipe laggers were known as "whitemen." I accept in its entirety the evidence of Mr Simmonds as summarised in paragraphs [29] to [33] above. I also have regard to the specific concessions made by the first and third defendant as set out in paragraphs [5] and [6] above."

[6] At this stage it also important to recite the concessions that were unequivocally made by the two respondents to this appeal. The concessions are as follows as recited in paras [5] and [6] of the judge's ruling as follows:

> "[5] In correspondence directed to the solicitors for the plaintiff by the first defendant's solicitors (that is Harland & Wolff), dated 25 November 2021, the first defendant, states that:
>
> > 'solely for the purposes of this Action but not further or otherwise, Harland & Wolff do not dispute the principle that until the mid-1970s workmen particularly insulators on occasions brought home work clothes contaminated with asbestos dust and particles and that family members were exposed to the dust and particles and years later developed pleural plaques.'"
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> [6] This correspondence was brought to the court's attention when the hearing of the matter recommenced on 28 September 2022. On this occasion, the court was also informed that the third defendant was 'prepared to

> concede that there would have been exposure to asbestos up to 1970 in relation to laggers, one of whom was obviously the plaintiff's deceased father, and that exposure would have led to family exposure up to 1970.' I interpret this concession to relate to the 601 day period made up of the three discrete periods between 1 November 1965 and 1 July 1966, 8 October 1969 and 24 October 1969, and 10 November 1969 and 16 October 1970."

[7] The above concessions tell us that in this case there was no real dispute about exposure up to the mid-70s and that it was accepted that this exposure was because of workers contaminating homes due to asbestos dust and particles on their clothes. Therefore, it was accepted that secondary victims such as the appellant were linked by the exposure thus described.

This case

[8] At para [53] of Mr O'Donoghue's skeleton argument on behalf of the appellant, he states that the main reason why the action had to proceed to trial was Harland &Wolff's desire to obtain a court ruling as to its liability in circumstances where it was an occupier and where the employer was a specialist asbestos contractor (Cape Insulation Ltd now Somewatch Ltd). That assertion was unchallenged and accords with the skeleton arguments that were filed at an early stage by Mr Simpson KC who represented the first respondent at the early stage of proceedings and Mr Keenan KC who represented the second respondent.

[9] However, it is also true that as the case developed a further issue arose as to the value of a claim for provisional damages for pleural plaques. Adjudication of this issue required consideration of the medical evidence which was admitted without objection and which we will discuss in due course and the evidence of various witnesses including the appellant himself.

[10] Having referenced the litigation context we refer briefly to the subject matter of this case which is the development of pleural plaques. Compensation for pleural plaques remains available in Northern Ireland because of the Damages (Asbestos Related Conditions) Act (Northern Ireland) 2011. This legislation had the effect of reversing the House of Lords ruling in *Rothwell v Chemical Engineering* [2007] UKHL 39 in which the House of Lords held that a plaintiff with asymptomatic pleural plaques could establish no compensatable harm and thus was not entitled to damages. The statute provides for a contrary position in Northern Ireland.

[11] The law in relation to secondary exposure to risk is now well established. An employer's failure to take reasonable steps to protect employees from exposure to risk from toxic substances such as asbestos dust may also result in the exposure of family members or members of the public to such risk. Whether there is liability will

depend upon the foreseeability of damage to the individual claimant. A threshold timeframe for liability was established in the case of *Maguire v Harland & Wolff Plc* [2005] EWCA Civ 1 in which the majority of the Court of Appeal rejected a claim by the wife of an employee who had developed mesothelioma as a result of exposure to asbestos dust when washing her husband's dusty work clothes. The majority of the court held that at the time when the exposure occurred in the early 1960s the risk of familial exposure was not recognised by the industry or the medical profession. In 1965 a major study into the effects of low-level exposure to asbestos by Newhouse and Thompson became available and, so, liability may be established post 1 November 1965 for this type of secondary victim but not before.

[12] Pleural plaques is a benign condition, sometimes described as a marker that evidences exposure to asbestos in the past. It is asymptomatic. However, it may result in a more serious condition and there is obviously associated anxiety that such a condition may arise. Pleural plaques, diffuse pleural thickening, asbestosis and lung cancer, other than mesothelioma are all considered to be divisible injuries. These conditions are all dose related and exposure related. As the judge in this case said at the portions of the judgment we have already recited at para [70] it is not possible many years after the event to measure quantitively the amount of asbestos inhaled by a claimant given the fact there will not have been monitoring of levels of asbestos in the environment when the claimant was exposed. However, because the injury is divisible pursuant to the decision of the English Court of Appeal in *Holtby v Brigham and Cowan* [2003] All ER 421, each employer is only responsible for the extent to which it is responsible for contributing to the claimant's condition.

[13] Accordingly, the uncontradicted position is essentially as Mr O'Donoghue states in para [15] as follows:

> "15. Since the introduction of what has become known as *Holtby* principles, cases involving claimants who claim damages for divisible injuries forego that portion of potential compensation that relates to a period of exposure caused by an employer who cannot be brought before the court or against who a judgment cannot be enforced.
>
> 16. Further, because it is not possible to establish scientifically or evidentially which of a number of employers may have been responsible for causing the divisible injury, be it pleural plaques, diffuse pleural thickening or asbestosis, the approach of the court is to assess liability by reference, not to causation, but to answering the question as to whether or not a particular defendant has materially increased the risk of the claimant developing a divisible injury. This is further explained as a time based approach."

[14] At this juncture we pause to observe that Mr O'Donoghue initially wished to take some issue with the *Holtby* principles, however, he abandoned that part of his case before the first instance judge, and he has not resurrected it. This means in simple terms that all parties proceeded on the assumption that the *Holtby* principles which appear to guide all cases of this nature in this jurisdiction, the majority of which are settled, apply. We proceed on that basis in the absence of any contrary argument.

[15] Given the clear consensus on law an obvious issue arises as to what the judge meant in one of the final paragraphs of his judgment at [97] when he said:

> "I appreciate that there has been a move towards dealing with pleural plaques cases in this jurisdiction on a simple time exposure basis. Despite the difficulties in grappling with the issue of the intensity of exposure, I consider it appropriate to remind practitioners that the issue of intensity of exposure cannot be ignored and in cases where it is raised as an issue it will have to be addressed and it is for the plaintiff in each such case to prove on the balance of probabilities that the relevant exposure (on a time/intensity analysis) has materially contributed to the risk of the development of pleural plaques."

[16] The above point is not developed by the judge as to whether, in this case, he applied a different method to the determination of liability as opposed to quantum. There is no discussion of the law because it was agreed. Therefore, we have a concern as to what exactly the judge meant and, more pertinently, whether or not counsel was sighted on the judge's application of the law which may, on the face of it, have diverged from the agreed approach in this case.

[17] There is a considerable body of case law in this area which has developed with time to meet the challenges posed by cases of this nature and to deliver justice. However, in this case there was no argument as to the law as the parties agreed that *Holtby* applied and therefore did not debate any of the authorities in this area. Only one passage from the *Holtby* decision was opened by Mr O'Donoghue. That passage is from the judgment of Stuart-Smith LJ at paras [21]-[22]. It discusses the case of *Bonnington Castings Ltd v Wardlaw* and *McGhee v National Coal Board* [1973] 1 WLR 1. Mr O'Donoghue stressed para [22] which contextualised an asbestosis claim in the following way:

> "There is no such problem here since the progression is linear depending on the amount of dust inhaled. All dust contributes to the final disability."

[18] We mention one other case which is referenced in the skeleton argument of Mr O'Donoghue, namely *Sienkiewicz v Grief Ltd/Wilmore v Knowsley Borough Council* [2011] UKSC 10. This was a case in which the respondent was a secondary victim, as she was the daughter of a lady who was exposed to asbestos and contracted mesothelioma. The judgment of Lord Phillips analyses what constitutes a material risk in a case of this nature. At para [107] of the judgment he says:

> "The parties were, I think, agreed that the insertion of the word "material" is intended to exclude an increase of risk that is so insignificant that the court will properly disregard it on the de minimis principle."

[19] At para [108] he continues:

> "I doubt whether it is ever possible to define, in quantitative terms, what for the purposes of the application of any principle of law, is de minimis. This must be a question for the judge on the facts of the particular case. In the case of mesothelioma, a stage must be reached at which, even allowing for the possibility that exposure to asbestos can have a cumulative effect, a particular exposure is too insignificant to be taken into account, having regard to the overall exposure that has taken place. The question is whether that is the position in this case."

[20] Lord Phillips concluded that the wrongful exposure to which the respondent was subjected materially increased her risk of contracting the disease. At para [111] he noted that in another 2007 case counsel for an employer conceded that exposure to asbestos dust for a period of one week would not be de minimis.

[21] At no stage was the issue of de minimis exposure ever raised by the defendants/respondents and it was not argued on this appeal. This appeal and the defence of this appeal boils down to a simple proposition that there was no evidence of exposure post 1965 that materially contributed to the risk of the development of pleural plaques and, therefore, the claim could not succeed. Defence of this claim was clearly bolstered by what the respondents both describe as unsatisfactory medical evidence produced by the appellant.

Test on appeal

[22] Before outlining our conclusions on the arguments made, we will discuss the test which we must apply as an appellate court. The test is set out in the skeleton argument of Mr Keenan drawing from the case of *Carlisle v Royal Bank of Scotland Plc* [2015] UKSC at paras [21] and [22]. There Lord Hodge discusses the role of the appellate court citing the cases of *McGrady and McGrady* [2013] UKSC 58, *Henderson v*

Foxworth Investments Ltd [2014] UKSC 41 and *Thomas v Thomas* [1947] AC 484. No issue was taken with any of this. In law the appellate court has a restricted role when considering questions of fact determined by the lower court. The appellate court should defer to the findings of fact of the first instance judge unless satisfied that he was plainly wrong. The rational for appellate restraint reflects the view that a first instance judge has significant advantages in assessing the credibility of witnesses and in fact finding. It is also driven by a pragmatic consideration that the reopening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be a negligible benefit in terms of factual accuracy. In this jurisdiction in *Weir v The Countryside Alliance Ltd* [2017] NICA 27, Gillen LJ discusses this issue at paras [8]-[15].

[23] Of course, before considering the factual conclusions reached, we observe that often issues can be, mixed questions of law and fact in a particular case and this case is probably one of those for the reasons we will give.

Consideration of the issues

[24] As we have said paras [70] and [71] of the judge's ruling must be the starting point. These paragraphs are clearly favourable to the appellant.

[25] Next, we note that the solicitor for the appellant, Mr Andress, was called to give evidence. This was because he had in correspondence referred to the appellant's claim in one letter as being related to 1965. There was quite considerable evidence given about these matters but ultimately at para [76] the judge says:

> "I am prepared to accept that the reference to 1965 was an unfortunate mistake and that Mr Andress meant to refer to 1975. However, in relation to the attendance notes and written instructions, I am entirely satisfied that these mainly describe the plaintiff's exposure during his childhood years and that Mr Andress, recognising this, did attempt to obtain from the plaintiff further details of the plaintiff's exposure post-1965 but that little by way of additional information was provided by the plaintiff."

[26] This finding can be drawn in aid by the appellant. The judge then goes on to consider two expert reports of a medical witness, Professor McGarvey which were filed in support of the appellant's case. The first report is dated 29 November 2015. It includes a history taken from the appellant which recounts his childhood in the following terms:

> "He believes he came into contact with asbestos as a child when living in the family home … His father was a pipe lagger and worked for Harland & Wolff and later for Cape Insulation and then Newells. He specifically

> remembers playing a game which involved hiding under his father's coat which hung at the bottom of the stairs. This was a regular occurrence, and he remembered every Friday night by way of routine he would play with his father's coat before going out to the sweet shop. He remembers the coat was white and dusty and there was a spikey feel to the dust. This would have continued from a very young child until he was 12 or 13 years of age. He tells me his father received a claim for industrial injuries following asbestos exposure."

[27] In the summary and conclusion section of this report the doctor recited this history and opined that it was almost certain his father's work coat was covered with asbestos dust and that this is the likely source of Mr Moore's asbestos exposure. Therefore, it is probable that the bilateral pleural plaques on the CT scan are due directly to this source of asbestos exposure.

[28] The second report of Professor McGarvey is dated 25 October 2018. This is a report which was commissioned as a result of pulmonary function tests and a medical report from a consultant radiologist. In addition, the doctor states in his report that he reviewed his original report. He did not see the appellant again. He sets out some background, he comments on the various tests and then his summary and opinion does change in emphasis because he says:

> "It is almost certain that his father's work clothes were covered with asbestos dust. Mr Moore is likely to have been exposed to this at home up until his father stopped working or Mr Moore left the family home. It is my view that Mr Moore has calcified pleural plaques that have arisen as a direct consequence of domestic exposure to his father's contaminated work clothing. There is no current clinical or radiological evidence to support the presence of other asbestos related lung disease such as asbestosis, diffuse pleural thickening or mesothelioma."

[29] A great deal of court time was taken up, it seems, with how the doctor could allegedly revise his opinion and give what was perceived to be a wider opinion that the exposure continued past 1965. The judge is clearly sceptical as to that. This is exemplified in paras [82]-[90] when he says that he has not got an explanation as to why the doctor gave what is perceived to be a wider analysis in the second report.

[30] Focus is also directed to paras [91] and [92] of the judgment. There the judge records that he had suggested to Mr O'Donoghue that he might wish to call Professor McGarvey to give evidence. That suggestion was ultimately not taken up. The judge does record at para [93] that Mr O'Donoghue submitted that the medical evidence in this case was initially obtained on the basis of a misunderstanding as to

the time periods of exposure but that the opinion evidence of Professor McGarvey in his second report is clear in that what he is saying is that the appellant's condition of pleural plaques has arisen as a direct consequence of domestic exposure to the father's contaminated work clothing and that this exposure continued up until the appellant married and moved out of the family home. It is clear that in relation to this issue that the judge does not quite agree that the point is made because he says, firstly, that Professor McGarvey does not expressly make the point that there was a period of exposure between 1965 and 1974 which materially contributed to the risk of the appellant developing pleural plaques and, secondly, because he cannot understand how the doctor was instructed to provide the second report.

[31] The judge then finds on the basis of the above that the appellant had failed to satisfy him on the balance of probabilities that the exposure to asbestos dust and fibres in the domestic environment in the period after the end of 1965 made a material contribution to the risk of the appellant developing pleural plaques. His rationale for this is found in para [95] as follows:

> "There are just too many short-comings, deficits and contradictions in the plaintiff's case for me to be able to simply sweep them all aside and conclude that because there was a period between 1965 and 1974 when the plaintiff probably experienced some exposure to asbestos dust and fibres then that exposure must have materially contributed to the risk of him developing pleural plaques, particularly when that period followed on from a 14 year period of what was in all likelihood a longer period of more intensive exposure."

[32] The first point we make in relation to this finding stems from the supplementary submissions which Mr O'Donoghue placed before the court for this hearing. These submissions highlighted the transcript of the submissions made on 11 November 2022 and the exchanges between Mr O'Donoghue and the judge. Having read it we do believe that this transcript casts a different light upon paras [91] and [92] of the judgment which refers to the potential of Professor McGarvey being called to give evidence.

[33] Without setting out the entire transcript in this judgment, we can see that there is a substantial debate between the judge and Mr O'Donoghue about what is at issue in this case. Some sections are particularly instructive as follows.

[34] First, Mr O'Donoghue in the course of submissions says:

> "Well, My Lord, if – I mean, my friends have made – addressed you on what is happening outside of these courts and – between practitioners and the reality is that these cases are being dealt with on a time basis."

[35] The judge then says:

> "Yeah, I mean, it strikes me that the adoption of a time-based solution to these cases is, in a sense, a principled attempt to try and achieve distributive justice rather than – the outworking and established scientific principles of causation."

[36] The judge further says:

> "I just don't see that we have that in the scientific literature or in the evidence. Well, certainly there has been very little expert evidence given in relation to causation and the impact of varying intensities of dosage, etc, in this particular case. So, I think, in the way this case is being run, I think, subject to what the two defendants say, but it certainly strikes me as the only legitimate basis on which we can proceed is the time basis."

[37] As a result of this exchange Mr O'Donoghue clearly did not propose to make any further submissions. Indeed, as has been pointed out neither Mr Ringland nor Mr Keenan made any contrary submissions to the judge's suggestion. Mr O'Donoghue therefore states in his supplemental submissions:

> "There can be no doubt that when all counsel were present and making closing submissions and there were various exchanges with the judge, everyone believed that the judge would proceed to make an award in favour of the plaintiff on a time apportioned basis in the event that he held as a fact (as he ultimately did) that the plaintiff was exposed to asbestos after 1965."

[38] To our mind there is some strength in this argument that the discussion was really focusing on the issue of intensity relative to the award and apportionment, rather than liability.

[39] In addition, we cannot lose sight of the fact that the medical evidence obtained from Professor McGarvey was not objected to. That does not mean that the respondents are taken to have agreed with the contents of the report. However, the reports were admitted without the need for formal proof. There was no request to have the witness attend court by the respondents to the case. Both of Professor McGarvey's reports had been served on the respondents pursuant to Order 25 of the Rules of the Court of Judicature in Northern Ireland 1981 and no objection had been taken. This was the only medical evidence presented to the

court. The respondents served no medical evidence although they were at liberty to do so.

[40] Further, the judge's conclusions found in paras [70] and [71] reflect the fact that having considered all of the evidence he was satisfied that the appellant's exposure to asbestos occurred in the domestic environment and the source of the asbestos dust and fibres in the domestic environment was the clothing of the appellant's late father. The judge does not limit this to exposure to the great coat of the father which the appellant described to Professor Mc Garvey.

[41] Accordingly, we consider that the judge has fallen into error and was plainly wrong to dismiss the appellant's claim on the basis of inadequate medical evidence without further explanation.

[42] Crucially, our conclusion on the medical evidence is also supported by an overall view of the case and the other evidence given in this case. The judge had considerable other evidence which he has not taken any issue with, and he has not queried the credibility of the witnesses. We summarise this evidence as follows.

[43] The appellant's evidence was that from the time of his birth up to his marriage in 1974 he lived with his mother and father at 69 Newcastle Street off the Newtownards Road in a small two-bedroom terraced house. He referred to the fact that when his father came in from work in the evening, he would throw the overcoat over the banister at the bottom of the stairs which led from the living room up to the bedrooms and he would wear his overalls while having his dinner with the family. On cold nights the coat would be placed on the bed. There is further reference to a description of the coat. Some reliance has been placed on questioning of the appellant who agreed with Mr Keenan that the exposure post the 12th or 13th birthday was possibly less because he was not playing so much with the coat. But the appellant did say in his evidence post 1965 "I was still in the same house where the same things were still happening, so you have to assume that I was still exposed." The judge does not record that he disbelieves the appellant in any way or finds him an incredible witness, and so that was additional evidence, we think, to establish exposure within the home over the longer period.

[44] There was also evidence given by the appellant's wife, and from an 83-year-old gentlemen, Mr Charles Simmons, who had worked in Harland & Wolff, who referred to the pipe laggers and confirmed that they would have brought a great coat to work in the winter and that his wife also had to regularly wash his overalls in the kitchen, and that either way, his coat was often covered in asbestos dust and fibres. The appellant's young brother, David Moore, also gave evidence.

[45] As we have said, the judge does not in any place in his judgment say that he disbelieves any of these witnesses nor did not find their evidence to be anything other than credible. In our view, the entirety of the evidence must be considered in order to decide whether or not there was domestic exposure to asbestos through

contact with the father's clothes over the period suggested. In actual fact, we think that the judge did make that finding. The defence also called no evidence in this case save a report from a Dr Jones which does not appear to have been greatly relied upon.

[46] Accordingly, we consider that this is a rare case where the judge has plainly erred in the ultimate decision that he reached. To summarise, we reach our overall conclusion on the following basis:

(i) The judge did, in fact, make a finding in favour of the appellant contained at paras [70] and [71] of his judgment which we have set out at para [5] above.

(ii) That finding includes exposure in the domestic environment, is not limited to a child playing with a coat and is not limited to childhood.

(iii) The concessions in this case were highly significant. These came from both of the respondents to this appeal to the effect that workmen on occasions brought home their work clothes contaminated with asbestos dust and particles and that family members were exposed to the dust and particles and years later developed pleural plaques until the mid-70s - 1970 in the case of the second respondent.

(iv) The medical evidence was admitted without objection. This means that the judge, unless he had decided not to rely on the medical evidence at all, erred in effectively dismissing the medical evidence in the way he did.

(v) Properly analysed, we do not think that the first report of Professor McGarvey is quite so limited as suggested by the respondents. There was clearly some inadequacy in the history given by the plaintiff but that is to be expected in a case of this nature when an elderly person is explaining the situation that prevailed when he was a child in his home. We think that a degree of latitude should be given in such circumstances.

(vi) The second expert report does raise some concern because there is no letter of instruction. However, to our mind, it would be wrong to automatically ascribe some nefarious purpose to this report in the overall circumstances of the case. We reach this view because the report is consistent with the other evidence.

(vii) There was consensus among counsel as to the law to be applied and it was agreed that the *Holtby* principles should be applied. This approach led to all counsel understanding that this was a time-based assessment. We think that the exchange between the judge and Mr O'Donoghue did lead Mr O'Donoghue to think with some justification that, what was happening was a discussion about apportionment and reduction for periods of intensity.

(viii) The reality of this case as the judge himself said at para [70], is that it is actually impossible to say when the appellant developed pleural plaques or how much exposure it took for the appellant to develop this condition. This line in the judgment which we have drawn from para [70] speaks for itself and accords with the case law and the science in this area. This is a special type of case which requires special consideration.

(ix) We have a concern as to whether the judge strayed beyond the legal principles that were uncontentious and agreed by virtue of the comments he made at para [97] of his judgment. This was without the citation of any authority in circumstances where the law was not contentious between the parties.

(x) Finally, having determined that the period of exposure was established on a time-based period this case really came down to a consideration of intensity and apportionment. We agree that rather than dismiss the case entirely that the judge should have considered whether the fraction 9/23 should be reduced further for the fact that during the second period post 1965 the appellant was a teenager and potentially had less exposure. That was a permissible route to take and is the route that we now approve.

Conclusion

[47] Accordingly, we allow the appeal on the first ground. We will allow a short period for the parties to discuss the issue of apportionment and the applicable fraction.

[48] It is unnecessary to decide the second ground of appeal given that we have found in favour of the appellant on the first ground of appeal. However, we will in due course hear submissions as to the costs of this case if required once the parties return to us having discussed the outcome in this case.

[49] Finally, we observe that there does not appear from the exchange we have seen to be much between the parties in terms of the very modest quantum that results in cases of this nature. With the benefit of highly experienced counsel, we would assume that this matter can now be resolved fairly swiftly without the need for remittal to a first instance judge (subject to the issue of apportionment between the respondents). That would simply occasion further costs and complication to what is now a relatively simple exercise to establish moderate provisional damages for the development of pleural plaques by this appellant.