

SUPREME COURT OF QUEENSLAND

CITATION: *Smith v Amaca Pty Ltd & Ors* [2026] QSC 240

PARTIES: **ROBIN SMITH**
(plaintiff)
v
AMACA PTY LTD (FORMERLY JAMES HARDIE & COY PTY LTD) (ACN 000 035 512)
(first defendant)
NORTH QUEENSLAND BULK PORTS CORPORATION LTD (ACN 136 880 218)
(second defendant)
WORKCOVER QUEENSLAND (ABN 40 577 162 756)
(third defendant)

FILE NO/S: 570/2024

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 28 October 2026

DELIVERED AT: Supreme Court at Rockhampton

HEARING DATE: 17, 18, 19 and 20 August 2026

JUDGE: Crow J

ORDER: **I will hear from the parties as to the form of orders and costs.**

CATCHWORDS: TORTS – NEGLIGENCE – where the plaintiff was employed as a plumber – where there was a supply of goods from a manufacturer to the employers of the plaintiff – where the plaintiff suffers an occupational lung disease – where the occupational lung disease is asbestosis – whether there was a breach of the manufacturer’s duty of care to the plaintiff – whether there was a breach of the employer’s duty of care to the plaintiff

DAMAGES — ASSESSMENT OF DAMAGES IN TORT – PERSONAL INJURY – GENERALLY – where plaintiff suffers from asbestosis — where the plaintiff is currently classified in the moderate dependency stage – where the plaintiff requires at home personal care – where the plaintiff will eventually be in the high dependency stage and will require assistance with at home medical and nursing – where

the plaintiff will eventually be in the palliative care stage and require 24-hour care and assistance for self-care and daily living tasks – where there is a loss of life expectancy – where the plaintiff seeks damages for general pain, suffering and loss of amenities of life – whether damages should be awarded for loss of life expectancy, general pain, suffering and loss of amenities of life

DAMAGES - ASSESSMENT OF DAMAGES IN TORT - PERSONAL INJURY – PARTICULAR CASES – where the first, second and third defendants brought cross claims in contribution proceedings – where the first defendant was the manufacturer and the second and third parties were employers – assessment of relative culpability and relative causal contribution

COUNSEL: SJ Deaves KC and MJ Smith for the plaintiff
DA Priestley SC and L Newton for the first defendant
JM Hewson and M Heyworth for the second and third defendants

SOLICITORS: Slater & Gordon for the plaintiff
Mills Oakley for the first defendant
BT Lawyers for second and third defendants

Introduction

- [1] Mr Smith, currently 79 years of age, is a retired plumber. Mr Smith alleges that he suffers asbestosis as a result of using products manufactured by the first defendant, (Amaca) during his employment with three employers in various periods from 1963 to 2002. Liability and quantum are in issue between the plaintiff and the defendants. Amaca and the second and third defendants have cross claims in contribution proceedings.

Lay Evidence

- [2] Before Mr Smith was sworn in, he walked about 10 metres from the well of the court to the witness box in the court. During that short journey, he was audibly huffing and puffing. That short walk was difficult for him. After Mr Smith sat down, his shortness of breath eased, although he did have several instances of shortness of breath in the one-hour and forty-five-minute period in which he sat and gave evidence.
- [3] Mr Smith explained that he completed Grade 10 at school in 1962 and then worked for a short period as a storeman in a grocery shop. On 16 May 1963 Mr Smith was indentured as an apprentice plumber to JR Wyllie & Sons. Mr Smith completed his

plumbing apprenticeship over an extended period of six years as he suffered some injuries during his apprenticeship. He had some time off due to crushing of his fingers, and then in 1965 he suffered a serious leg injury in a motor vehicle accident which caused a fracture of his right leg that has caused him problems since.

- [4] During 1964-1965 Mr Smith was deployed by his employer for a period of about six months to work at the abattoir at the Bakers Creek Meatworks near Mackay. Mr Smith's recollection is that he worked for at least two to three months, mainly on a roofing project, which involved sheeting of a very large abattoir building with super six fibro sheeting. Although Mr Smith candidly conceded that he did not recall any packaging for the product, nor any markings upon the product, he recalled that the product was called "super six fibro".

- [5] Mr Smith confirmed the sheeting was as shown on page six of exhibit three, the "HARDIES FIBROLITE SUPER-SIX" brochure. With reference to page six of exhibit three, Mr Smith explained that his task involved cutting of mitres, that is cutting of the asbestos sheeting on the ground so that it could be installed on the roof. The system of work would appear to be rudimentary, that is, he was provided with a carpenter's rip saw, with large teeth, to be used by hand to cut the asbestos sheeting. Mr Smith explained that as he would cut the sheeting, dust would come off the sheeting and was deposited on his hands, his face, his shorts, his legs and it would create a "bit of a cloud of dust" which would slowly settle.

- [6] I accept Mr Smith's evidence that he inhaled the dust as he described. He was not provided with any masks or any other personal protective equipment and not warned and therefore was not aware that that dust could be harmful. During his cross-examination, Mr Smith estimated, and I accept, that he would typically cut 20-30 sheets per day as would others in his crew.

- [7] After he completed his apprenticeship in about 1968, Mr Smith obtained employment as a general plumber at the Racecourse Sugar Mill, Ooralea, Mackay. As a general plumber, Mr Smith worked on cable trays and did sheet metal work but also performed the task of "lagging pipes... and pans". Mr Smith explained how lagging was placed around steel steam pipes as a form of insulation. Mr Smith described the lagging as being half round fibrous pipes that looked like "Plaster of Paris" in appearance but was provided in half rounds. Mr Smith identified that the fibrous pipe

looked like those shown on page six of exhibit four. Exhibit four is the “Hardies Insulating Materials Manual” which bears the date 1964. Page six of exhibit four describes the product as “Hardies’ 85% magnesia is a durable, lightweight insulating material made from asbestos and light carbonate of magnesia...”.

- [8] With respect to lagging, Mr Smith described that in removing old lagging, he would smash it off with a hammer. During that process, dust would come off the lagging, land on his hands, face and clothes. Although he did not say so, I would infer because the dust landed on his face that he inhaled that dust. In the approximate four-year period that Mr Smith worked at the Racecourse Sugar Mill between 1969 and 1973, Mr Smith says that the tasks of demolishing lagging and installing new lagging would probably add up to three-four months in that total period of four years.
- [9] Although Mr Smith was asked to provide an estimate of the percentage of the time that he spent demolishing lagging as opposed to installing new lagging, Mr Smith gave a combined estimate for the total amount of time demolishing and installing the lagging as some three to four months in total. Mr Smith was then asked¹ “What do you think you spent more time doing, demolition or installation? --- Oh, the installation.”
- [10] When read literally from the transcript, it could be concluded that Mr Smith was in fact saying he spent a portion more than 50% of his time installing the new lagging, however such a conclusion ignores the way in which Mr Smith gave his evidence. Mr Smith did not say “Oh, the installation” in a questioning or uncertain manner, but rather answered quickly and definitively, from which I would infer that Mr Smith’s evidence is that much more time was spent installing the lagging than removing the lagging. In cross-examination, Mr Smith confirmed this², explaining in respect of the lagging, “Well, it doesn’t take long to remove. It takes a lot longer to replace.”
- [11] I conclude that in that three to four months, Mr Smith spent much more time installing lagging than demolishing lagging and performed all those tasks without any mask or any other personal protective equipment. When installing the lagging, Mr Smith’s evidence is that there were a lot of straight runs, but that he did have to use a hacksaw to cut the pipe when it got to a bend. Further, he would “mitre the pipe about the

¹ T2-16, line 22-23.

² T2-31, lines 44-49.

bends”. The cutting of the pipe was undertaken with a hacksaw which caused a cloud of dust. Mr Smith described the cloud of dust as being smaller because the hacksaw had smaller teeth as opposed to the carpenter’s ripsaw he had used earlier in his employment with JR Wyllie & Sons. Nonetheless, Mr Smith’s evidence is that the dust got all over his hands, his shirt, his legs and his arms.

- [12] In addition to cutting the piping, Mr Smith would also drill into the half pipe insulation in order to attach self-tapping screws to hold sheet metal covering over the insulation. I accept Mr Smith’s evidence that he inhaled the dust during the process of removing and installing lagging and that he inhaled almost all of that dust in the installation process as it took the vast majority of his time whilst doing lagging work.

- [13] Mr Smith ceased work at the Racecourse Mill in the middle of 1973 and then worked for about five years to 1978 cutting cane. After that, Mr Smith spent a year at a cane farm and then worked as a sale’s representative. Whilst on the cane farm, cutting cane or working as a sales representative, he has no recollection of handling any asbestos containing products.

- [14] Mr Smith then found employment as a plumber working for the second defendant, which he called the Mackay Port Authority, between 1980 and 2002. Mr Smith’s evidence was that as a plumber at Mackay Port, his main work was with water reticulation and performing work upon the “fibro water mains”. In July 1975, the first defendant published exhibit five, the “Hardie’s Pipelines A.C. Pressure Pipe Manual”. Mr Smith referred to page two of the brochure, showing a spigot and socket which joined pipes together. That page generally describes the pipes as “Hardies Fibrolite Pressure Pipes are seamless, homogenous, autoclaved, asbestos cement pipes for the transport of fluids under pressure.”

- [15] Page two also describes the “patented rubber rings” and the pipe ends being “machined to take Superlite jointing couplings”. Mr Smith who performed this task described the “v rubber for the seal...” and the socket being “recessed” and having a “taper”. These characteristics are clearly observable in the diagram on page two, particularly the V shape of the rubber. I conclude that Mr Smith was performing this task on Hardies AC pipes as described in the manual, that is with the Hardies patented rubber ring and tapered or machined pipe ends.

- [16] Mr Smith also referred to page 16 of exhibit five which showed a gibault joint installation. Page 16 also includes instructions as to cutting pipes with the use of bushman's saw, power hacksaws, high speed abrasive wheel pipe cutters or wheeler pipe cutters. Mr Smith's evidence is that he would cut the pipes to fit them in. Mr Smith did not see any labels attached to the water pipes, nor any packaging upon the pipes, nor any information in respect of the pipes.
- [17] Mr Smith explained that the pipes were cut with an engine-powered demolition saw. The saw had a petrol motor and a fibre disc. Mr Smith described that using the saw would cause "a hell of a lot more" dust than using a rasping saw or a hacksaw. Mr Smith explained that the use of the power saw created a "massive" cloud of dust such that he would disappear into a cloud of dust, which enveloped his entire body and the area around his body by about three feet. Mr Smith described that he had dust all over him. Mr Smith was not provided with a mask nor any other personal protective equipment. Mr Smith described that while cutting the pipes in the trench, that the dust did not dissipate but rather remained where it was as they were out of the breeze. Mr Smith was involved in both the installation of new pipe work and repairs to damaged pipes.
- [18] Mr Smith described that he performed work on the pipes right throughout his period of employment at the Mackay Port, however, there were some changes in the work procedures. Mr Smith recalls that it was in or about 1989 that PVC pipes were introduced for "new work", however, he still had to do repairs upon the older fibrolite pipes. Before the introduction of the PVC pipes, Mr Smith estimated that he would cut a pipe above ground about 8 times per shift and he would cut a pipe in a trench about two times a shift. After 1989 when the PVC pipes were introduced, Mr Smith still cut Fibrolite pipes in a trench on about two occasions per shift, but his aboveground work reduced from approximately 8 pipe cuts per shift down to four pipe cuts per shift. The decrease in above ground cuts of Fibrolite pipes after 1989 is explained by the use of PVC pipes when PVC was available.
- [19] In 1992 Mr Smith was sent on a house demolition course, but he only attended the theory part of the course that went for half a day. Mr Smith's evidence is that sometime after that course, he became aware that dust from the pipes could be harmful to his health. Mr Smith only attended the theory part of the course as, when

he was sent for the practical part of the course which included asbestos demolition tasks, he was told he could not undertake that practical assessment because his employer had not provided him with any PPE. Mr Smith recalled that the theory course had nothing to do with cutting pipes but had to do with removal of asbestos when demolishing a house.

- [20] Exhibit six appears to be some documents which relate to the training Mr Smith says he received in 1992. The examination report records that on 6 May 1992 he received a pass for theory in removal of asbestos, but the report does not have any rating with respect to the practical assessment nor oral assessment. This is consistent with Mr Smith's evidence. Mr Smith specifically says he received no direction or instruction from his employer on how to go about cutting pipes. Mr Smith does however say that some time after he completed the course, he asked his employer to provide him with a chain cutter to reduce dust. Mr Smith said that he had to talk his employer into getting the chain cutter and eventually was provided with a chain cutter.
- [21] Mr Smith's evidence is that even with the chain cutter there was still some dust coming from this task when he had to hit pipes with the hammer which caused dust to go on his hands and legs. Mr Smith's best recollection is that he was provided with the chain cutter in about 1994.
- [22] Mr Smith continued working at the Port until 2002 and then he retired. After a couple of years in retirement he went back into a different type of work, that is, in earth moving. In that employment Mr Smith was truck driving and general labouring and did not have any exposure to asbestos-containing materials. Mr Smith continued working in that industry until 2014 when he finally retired, aged 67. Despite his many comorbidities, as discussed below, Mr Smith had worked for about 51 years in manual employment.
- [23] After Mr Smith retired in 2014, he engaged in his main recreational activity of fishing from a "tinny". Mr Smith also enjoyed working in his vegetable garden and time with his family, particularly his grandsons. Mr Smith mentioned enjoying attending soccer with his eldest grandson and attending rifle shooting with his younger grandson. Mr Smith still attends shooting with his grandson, but only to the extent that he goes with his grandson in his car that is also driven by his grandson.

- [24] Mr Smith's evidence regarding quantum is largely contained in exhibit 1, his quantum statement. That statement was unchallenged. In it, Mr Smith asserted that his symptoms commenced in January 2021 and that he ceased fishing and gardening because of the difficulties he suffered with his breathing.
- [25] In his evidence-in-chief³, Mr Smith explained that his symptoms of breathlessness affected his fishing because it made him exhausted, and he was so exhausted he could not get in and out of the boat. The only inconsistency that I can detect in Mr Smith's evidence is that in cross-examination⁴. Mr Smith asserted that he stopped going out fishing in 2010 or 2011 and that after he ceased fishing, his boat sat in his yard for an unknown period but perhaps six to eight years before he sold it. Mr Smith also asserted that he did not cease fishing because of his back because he would fish mainly in the creeks. I accept the evidence of Mr Smith is self-contradictory.
- [26] In the occupational therapist, Ms Frame's report of 3 December 2024 at paragraph 55, Ms Frame has recorded that Mr Smith used to go out in his tinny to fish but sold it and that this was mainly due to his back pain which was aggravated by the jarring and the wind.
- [27] On page 11 of the 11 October 2023 report of Dr McKeon, thoracic physician, Dr McKeon has recorded that Mr Smith used to enjoy fishing but has not been able to do that recently because of back pain and breathlessness on exertion. Given that Mr Smith has had back pain for many years and currently can manage it on two Panadol a day it seems to me that whilst Mr Smith ceased his fishing activity, the reason for doing so is more related to his breathlessness than to his back pain, however, both have had some causative effect. It seems to me more probable than not that Mr Smith was in error in cross-examination when he attested that he had finished his fishing in 2010 or 2011 and that his boat had sat in the yard for a period of perhaps six to eight years. I think it is more likely than not that Mr Smith ceased his fishing in his "tinny" when he commenced experiencing his breathlessness in 2021 and his boat sat in his yard for perhaps a few years before being sold. This inaccuracy in Mr Smith's evidence does not cause me to doubt the credibility nor the general reliability of Mr Smith's evidence.

³ T2-25.

⁴ T2-42.

[28] Indeed, when first asked about fishing, Mr Smith's evidence was⁵:

“...Let's talk about fishing. Why did you give up fishing? --- Well, it's --- same thing. Breathing. And I got a crook back and it would play up but --- Just too difficult to do.”

[29] I consider that Mr Smith was an entirely honest witness. I further consider that Mr Smith was a highly reliable witness even though he did make the error in giving evidence against his own interest with respect to the timing of when he gave up his fishing pastime. There is no submission from the defendants that I would consider Mr Smith to be anything less than an honest and reliable witness and I accept his evidence.

[30] Mr Smith's evidence is that he suffers from breathlessness “pretty well all day”⁶ and that currently he cannot walk the length of his small house without having to stop and rest. I accept Mr Smith's evidence that he suffers a lesser degree of breathlessness when he is sitting down, but when he sits down he suffers from an increased level of back pain⁷. I accept Mr Smith's evidence that his breathlessness now is far worse than it was when it commenced in 2021, that he is aware that his condition is terminal, and that he has somewhat come to terms with his predicted early demise stating, perversely, that “To me, it's just life.”⁸

[31] In cross-examination, Mr Smith reiterated that the theory course that he completed in 1992 was a demolishers course that had something to do with asbestos, but when he did the course, he did not know there was asbestos in the pipes. Mr Smith asserted, and was not contradicted, that no one from his employer told him there was asbestos in the pipes, but rather “it was just something I sorta figured out meself”⁹. Mr Smith confirmed that his system of work did not change and that he continued to use the very dusty demolition saw to cut the asbestos pipes until about 1994 and then “eventually” he was provided with a chain cutter, but only after he asked for that chain cutter on several occasions.

[32] I accept Mr Smith's evidence that he was never advised to wear a mask in any employment. Although PVC piping was introduced to the port in about 1989,

⁵ T2-25, lines 35-37.

⁶ T2-28, line 40.

⁷ T2-29, lines 1-two.

⁸ T2-29, line 14.

⁹ T2-33, line 49.

Mr Smith continued working upon the asbestos pipes from 1989 right through to about 2000 or 2001, before retiring in 2002¹⁰.

- [33] Mr Smith made candid concessions relating to his comorbidities under cross-examination. Mr Smith's major comorbidity is the severely broken leg he sustained in the motor vehicle accident in 1965. Mr Smith described that it damaged his arteries and his nerves and caused vascular damage leading to the amputation of some of his toes on his right foot. Mr Smith described that the problem that he suffers from is that he has a very stiff right ankle and he has a right drop foot, the combined effect of which is to make him "wobbly" when he walks and cause him difficulty with squatting. There is no suggestion that comorbidity impacted upon Mr Smith's ability to carry out domestic tasks.
- [34] The second comorbidity is Mr Smith's back pain. Mr Smith admitted he had had three breaks to his back over the years and had a lot of back pain over the years but stopped taking prescription painkillers in 2005. Mr Smith now takes some Panadol for his back pain.
- [35] The third comorbidity is that Mr Smith suffered from five fractured ribs and a fractured sternum in a motor vehicle accident in 2009. Mr Smith said he had a lump on his sternum and that he occasionally got pain there and it spread. Again, there is no suggestion that the sternal pain or back pain impacted upon Mr Smith's ability to perform domestic tasks.
- [36] As to Mr Smith's other comorbidity, Mr Smith conceded that he is overweight, and he knew he had to lose some weight. From Mr Smith's perspective he "floats around" 100kg but he conceded it was possible he had hit 112kg when he saw a doctor in November 2023. Importantly, Mr Smith asserted that "It hadn't changed that much in the last 10 or so years."¹¹ Mr Smith could recall some other injuries or comorbidities. In September 2025, he twisted whilst getting out of the shower and sustained a crush fracture in his upper spine. He had previously had a compression fracture in his lower spine in 2009 and then also in 2009 he suffered perhaps another compression fracture when he was hooking his boat trailer to his car but missed the tow ball.

¹⁰ T2-26.

¹¹ T2-39, line 24.

- [37] Mr Smith conceded that when he was 65, he dislocated his shoulder and had trouble lifting his arm up, such that he would have trouble hanging washing on the line. This seems to be the only comorbidity which effected Mr Smith's ability to carry out his domestic tasks. Mr Smith conceded he still was carrying out some domestic tasks such as taking the bins up and down the driveway, which he found extremely difficult. Mr Smith was still able to gurney his driveway to clean it, although he could only do a little at a time, and only every six months or so. Mr Smith conceded he could still drive a car; he could still wash his own clothes because he put them in the washing machine and then transferred them to the dryer. Mr Smith said that he had recently ceased doing the vacuuming task which was formerly split between himself and Mrs Smith.
- [38] Mr Smith has ceased mowing the lawn because of breathing difficulties and pays a contractor \$80 a fortnight.
- [39] When working at Mackay Ports as a plumber, it was Mr Smith's recollection that he did all the cutting of the asbestos pipes, and in fact he does not recall anyone else using the demolition saw.
- [40] Mr Brian McCarthy was an employee of the second defendant who commenced working at the Mackay Port Authority on 2 July 1986. Mr McCarthy was employed as a trades assistant to assist with the work of all of the tradesmen working for the Port. Mr McCarthy's recollection is that he worked mostly with the carpenters, and particularly the carpenters since 1992. Mr Smith recalls Mr McCarthy working with him on the PVC pipe projects but does not recall him working on the asbestos pipe projects¹². Mr Smith could not recall Mr McCarthy working on the cutting of the asbestos pipes and concedes he may well have been when Mr Smith was off doing other work. Mr Smith does not recall seeing any workers wearing masks and did not know that they were available. Mr Smith was not told he could wet the asbestos cement pipes prior to cutting.
- [41] Mr Smith was cross-examined about the demolition course he attended in 1992 and recalls that the course entailed "like getting asbestos sheeting and double wrapping it in plastic to --- ah --- you know, for disposal."¹³

¹² T2-45, lines 10-15.

¹³ T2-46, lines 23-26.

- [42] Mr Smith recalled being told when moving asbestos sheeting it was to be double wrapped and that workers should use disposable overalls and goggles and gloves. Mr Smith described this process as “doing the whole hog”¹⁴. Mr Smith reiterated¹⁵ the course was all about demolishing asbestos sheets in houses and had nothing to do with pipe work. Mr Smith does not recall seeing any air filtered helmets.
- [43] Mr Smith’s recollection is that he did not work with Mr McCarthy until well into the nineties¹⁶. Mr Smith’s recollection is that he worked with Mr McCarthy “mainly PVC layin’... just on that one job.”¹⁷ That was for a period over two to three weeks.
- [44] Mr McCarthy’s recollection is that he did work with Mr Smith and his apprentice plumber on cracked or damaged pipes. Mr McCarthy’s recollection is that for the first two years, asbestos pipes were used to repair cracks or breaks in the existing asbestos pipe ware but that changed when PVC pipes were introduced.
- [45] Mr Smith, who thought he had commenced work in 1987 and not 1986, suggested that PVC pipes were introduced in about 1989. Mr Smith had the same recollection, and I find that PVC pipes were introduced in about 1989, however, Mr Smith continued cutting the asbestos cement in situ pipes regularly in his employment at the Port from 1980 through to in or about 2001.
- [46] Mr McCarthy describes the dust emanating from the use of the demolition saw as “bad”¹⁸. Mr McCarthy described the process that after the broken pipes had been cut, unless they were a big piece, the pipe would be further broken up and placed back in the trench and covered up. Mr McCarthy’s evidence did differ in aspects from Mr Smith’s evidence. An example is Mr McCarthy’s evidence that although they did not do it much, if there was water available, they would wet the pipes before cutting them¹⁹. That allegation was not put to Mr Smith and given Mr Smith’s description of being engulfed in dust, I reject that at the time Mr Smith performed cutting of the asbestos cement pipes that any water was used.

¹⁴ T2-46, line 46.

¹⁵ T2-47, lines 30-48.

¹⁶ T2-50, line 10.

¹⁷ T2-50, line 19.

¹⁸ T4-30, line 15.

¹⁹ T4-20, line 30.

- [47] Mr McCarthy's evidence²⁰ is that he had access to masks and would go and get wet masks from the workshop and he did so when he was on jobs with Mr Smith. Mr McCarthy's evidence is that the masks which "had a plastic round respirator thing" were available in 1987 and that he would sometimes wear a mask. Mr McCarthy recalls seeing Mr Smith wearing a mask back in 1987. I do not accept Mr McCarthy's evidence in this regard as although I consider him to be honest, I conclude that he is mistaken. It seems highly unlikely that any masks were used prior to the 1992 asbestos course. I accept Mr Smith's evidence that he did not wear a mask, as I consider Mr Smith to be an honest and reliable witness. Furthermore, had Mr Smith been deployed with masks, I would have expected that would have been easily proved by work records.
- [48] Mr McCarthy does recall the purchase of the chain cutter, which he says was in 1988 or 1990 or "somewhere around there"²¹. I consider Mr McCarthy is mistaken in this regard and that the chain cutter was purchased well after 1992, that is, after Mr Smith had attended the first part of the demolition course and only after Mr Smith insisted his employer purchase a chain cutter. Whilst Mr McCarthy suggested he always knew the pipes were asbestos pipes, he then clarified and said he learnt this in 1992 when he did an asbestos course and was told that asbestos was "bad for us"²². I accept Mr McCarthy's evidence that it was in that course that he was told not to cut asbestos with electric tools or any machinery, and I accept Mr McCarthy's evidence that Mr Smith was at the course with him for the theory part of the course, however, I also accept Mr Smith's evidence that he did not attend any more than the theory part of the course.
- [49] I conclude that Mr McCarthy was mistaken when he gave evidence that he observed Mr Smith doing a job cutting asbestos pipes after 1992 following the procedures taught in the asbestos demolition course.
- [50] As established in cross-examination²³, Mr McCarthy was asked to recall in 2024, events that had occurred 30 to 40 years earlier. Mr McCarthy fairly accepted that he did not have a particularly clear memory of what occurred in the 1980s or 1990s.

²⁰ T4-21.

²¹ T2-43, line 31.

²² T4-24, line 19.

²³ T4-27.

- [51] Whilst I accept Mr McCarthy's evidence that the demolition asbestos course did go for two to three days, I also accept Mr Smith's evidence that he only attended the theory part of the course for perhaps half a day. Mr McCarthy's evidence²⁴ that he worked with asbestos sheeting as well as asbestos pipes allows a satisfactory resolution of the conflict of the evidence of Mr Smith and Mr McCarthy. I accept Mr Smith's evidence that the theory course that he attended related only to asbestos demolition of houses and had nothing to do with asbestos pipes. I accept Mr McCarthy's evidence that he attended a two to three day practical asbestos course and then on some occasions at least, put the practices learnt in that course such as the wearing of masks, into effect when he was working with other trades, such as the carpenters when they were working with asbestos sheeting.
- [52] I do not, however, accept Mr McCarthy's evidence that he put any protective measures into place, such as masks, when working with Mr Smith. I accept Mr Smith's evidence in this regard and in particular that the course that he attended did not deal with pipe work at all and that he did not even know there was asbestos in the pipes for a couple of years after he had completed the course. If Mr Smith as the tradesman did not know this, it seems to me highly probable that his assistant labourer who rarely worked with him also did not know there was asbestos in the pipes for quite some time. As Mr McCarthy acknowledged²⁵, Mr Smith and Mr McCarthy did not work with each other much at all after 1992. Mr McCarthy frankly conceded²⁶ that Mr Smith would have a better recollection than himself.
- [53] Mr McCarthy was not sure whether he had undertaken one or more asbestos courses over his 40 years of work at the ports²⁷. Although Mr McCarthy worked with a number of trades, including carpenters, plumbers and a boilermaker, Mr McCarthy spent most of his time working with carpenters²⁸. Mr McCarthy frankly conceded he was not sure if he had seen Mr Smith wearing personal protective equipment or not²⁹.
- [54] After asserting that he was not sure, Mr McCarthy changed his evidence in re-examination that he did have a recollection of seeing Mr Smith in overalls and

²⁴ T4-29, line 41.

²⁵ T4-30, line four.

²⁶ T4-30, lines 15-30.

²⁷ T4-32.

²⁸ T4-32.

²⁹ T4-33.

wearing a respirator. I do not accept Mr McCarthy's evidence in this regard as his evidence is inconsistent, uncertain, and I accept Mr Smith's evidence was accurate in this regard.

Expert Evidence

- [55] Michael Kottek is a very experienced occupational hygienist. Mr Kottek was awarded a Bachelor of Science degree in 1987, a Masters of Science in 1993 and a Graduate Diploma in Occupational and Environmental Health from the Monash University in 1997. Mr Kottek is a published author in Australian and International industrial medicine journals specialising in occupational lung diseases including mesothelioma and asbestosis. Mr Kottek is a full member and certified occupational hygienist with the British Occupational Hygiene Society, an associate member of the Australian Institute of Occupational Hygienists, a certified industrial hygienist with the American Conference of Governmental Industrial Hygienists, an Honorary Associate of the American board of industrial hygiene and an Honorary Associate of the Asbestos Disease Research Institute. In short, he has vast experience in the expert area of occupational hygiene and in particular lung diseases such as asbestosis.

- [56] Mr Kottek's report of 28 August 2025 sets out in great detail the knowledge of the dangers of asbestos in published scientific and medical journals showing that asbestos products were known to cause harm to human beings for well over a century. As an occupational hygienist, Mr Kottek is qualified to and has given a number of calculations of the likely overall cumulative exposure of Mr Smith to asbestos during the course of his employment. There are different calculations based upon different assumptions in Mr Kottek's report of 28 August 2025, his report of 23 September 2025 and in exhibits 14, 15 and 16.

- [57] Occupational hygienists are able to perform calculations which provide an estimate of cumulative asbestos exposure in terms of fibre millimetre years ("f/ml.yr"). Mr Kottek's calculations showed a cumulative exposure between 27.5 f/ml.yr (on factual assumptions most favourable to the defendants) and 44.9 f/ml.yr (on factual assumptions most favourable to Mr Smith). The medical experts accept that any score in excess of 25 f/ml.yr is a sufficiently high exposure asbestos dose so as to be a likely cause of asbestosis. Although it is not a critical finding as each of the calculations exceed the 25 fibre mill year threshold, it seems to me that exhibit 14 with its

quantification of 44.9 f/ml.yr is the best estimate as it is based upon Mr Smith's evidence, which I accept, as to his exposure to asbestos containing products.

[58] Mr Kottek's calculations in exhibit 14 are based upon the factual premise that I accept. That is that between 1963 to 1968 Mr Smith worked for two to three months roofing an abattoir at Baker's Creek, making one to two mitre cuts with a rip saw for between 20 and 30 Super Six roofing sheets per day (that is the period that Mr Smith was working JR Wyllie & Sons). Then the period from 1969 to 1973 when working for Racecourse Sugar Mill, Mr Smith cut half pipe lagging with a hacksaw or demolished half pipe lagging with a hammer for a cumulative total of three to four months over the course of that employment. Then in the period when Mr Smith was employed at the Mackay Ports, with the second defendant, the assumptions are that between 1982 and 1989 Mr Smith cut asbestos cemented pipes above ground about eight times per shift and cut asbestos pipes in a trench about two cuts per shift, whereas from 1989 to 2002 (after the introduction of PVC piping), Mr Smith cut asbestos cement pipes above ground about four cuts per shift on average, then cut asbestos cement pipes on two cuts per shift on average.

[59] The acceptance of the evidence in exhibit 14 is of some assistance in Mr Smith's case, however, as discussed below, it is more relevant to the apportionment argument as between the defendants as, of the overall cumulative exposure that I find Mr Smith was subject to, namely 44.9 f/ml.yr, 0.9 of a percent of that related to the Super Six exposure working for JR Wyllie & Sons, 26 percent related to the installation exposure at the Racecourse Mill and 73.1 percent related to the asbestos exposure whilst working at the Mackay Ports for the second defendant.

[60] The only radiologist called to give evidence was Dr Michael Jones. Dr Jones is an Honours graduate of the University of Sydney receiving his MBBS in 1973. Dr Jones has been a fellow in the College of Radiologists since 1981 and has been studying lung diseases such as asbestosis for about thirty years, since 1996. Dr Jones has studied thousands of reports relating to lung diseases. Dr Jones was an impressive witness. Dr Jones pointed out that one could not make a diagnosis of asbestosis on the basis of any radiological findings alone. Dr Jones' evidence is that a careful study of the radiological evidence showed that for Mr Smith, he had several characteristic

features of asbestosis, such that the findings were “not ... inconsistent with a diagnosis of asbestosis.”

- [61] At Paragraph 7 of the file note of 11 August 2026, Dr Jones’ reasoning is exposed. Namely³⁰, Dr Jones emphasised that a diagnosis of asbestosis cannot be made upon radiological findings alone. Dr Jones said:

“Now, the radiological findings are not specific. They are – they are helpful, but they are not specific for asbestosis. ... So other factors need to be taken into account. In my first report, I talked about the presence of subpleural dots, lines and branching structures. And they are ... they are described as a characteristic feature of asbestosis. But they do occur in other interstitial lung disease. So the bottom line as far as my making of a diagnosis on the balance of probabilities ... to me that is the radiological findings are as stated in that they are not inconsistent with the diagnosis of asbestosis. Now, that’s a very important thing to establish...”

- [62] Dr Jones then went on to discuss the number of interstitial changes which are inconsistent with asbestosis and was able to rule them out on Mr Smith’s scans. Dr Jones then explained³¹:

“So to make the diagnosis, you’ve got to have the bilateral disease, it’s got to be relatively symmetrical, it can have any sort of pattern realistically, ... as long as its pulmonary fibrosis in an asbestos-exposed person then you know, the way medical diagnosis works, is that you make a presumptive diagnosis of asbestosis because that’s what the evidence points to...”

- [63] Dr Jones stated he was absolutely familiar with the figures in the Van Oyen Study, a broad study across Australian industries since 1943. Dr Jones explained that at a 25 f/ml.yr quantification related to a 1% risk of asbestosis, whereas 100 f/ml.yr quantification related to a 4% risk of asbestosis. Dr Jones stated that the effect of the study is that whether a person has asbestosis or not cannot be quantified from the dose. Dr Jones was familiar with the suggested threshold dose of 25 f/ml.yr but was not comfortable with accepting that as the “magic number”. Dr Jones explained, and I accept his explanation, that “it doesn’t work that way” and it preferable to determine if a person suffered a “sufficient” exposure. Dr Jones then expressed the difference between his clinical experience and the occupational hygienist’s perspective, stating

³⁰ T3-52.

³¹ T3-52.

“... if you looked at the tables of Van Oyen, which looks at all the different doses in occupations, you would think that almost nobody got asbestosis. But that’s not true; a lot of people have got asbestosis. So there’s a lot of variation --- between workplaces and between individual exposures.”

- [64] Mr Kottek, on page 12 of his report of 28 August 2025, also commented that great variability of exposure can occur even in workers carrying out the same task. Although Mr Kottek was careful in that he conceded that attribution of disease in any individual case was beyond his area of expertise, he was able to point to “Recent studies and review indicate a risk of asbestosis at cumulative exposures below 25 f/ml.yr.” As Mr Kottek pointed out, a 1983 study had shown that asbestosis had been caused with estimated cumulative exposure levels below 5 f/ml.yr. It seems to me this is relevant in terms of causation in that although it is a matter for the medical experts, asbestosis can be caused by a cumulative exposure of less than 5 f/ml.yr. Thus, with the acceptance of Mr Kottek’s opinion in exhibit 14, the Super Six exposure whilst Mr Smith was working for JR Wyllie & Sons was responsible for 0.4 of a f/ml.yr. Theoretically, therefore the Super Six exposure of itself could not have caused Mr Smith’s asbestosis, but it could have made a material contribution as 0.4 f/ml.yr sits at about 10% of the less than 5 f/ml.yr threshold the subject of the two cases of asbestosis in Dement 1983 report referred to on page 12 of Mr Kottek’s report. The process of assessing and apportioning exposure to asbestos fibres is extremely difficult is a point well made by Mr Kottek on pages 11 and 12 of his report, and I accept his opinion that an estimate of an individual’s cumulative exposure may not be particularly meaningful and may be little more than formalised speculation.
- [65] On page 4 of his principal report, Dr Jones opined that Mr Smith’s exposure in the course of his employment in Queensland caused or materially contributed to the development of his asbestosis diagnosis. Dr Jones was not asked any questions about the causal contribution of any of Mr Smith’s three employers. Accordingly, I accept Dr Jones’ unchallenged opinion that during all three periods of employment when Mr Smith was exposed to asbestos fibres, that caused or materially contributed to the development of Mr Smith’s asbestosis.
- [66] On page 18 of his report of 11 October 2023, Dr McKeon opined that “Mr Smith’s exposure to both asbestos and respirable crystalline silica dust at work between 1963 and 2002 has made a significant contribution to the development of his diffuse

pulmonary fibrosis (asbestosis).”. In terms of cumulative exposure, Dr McKeon said³² that “It’s accepted that anything over 25 f/ml.yrs is sufficient to cause asbestosis.” Dr McKeon identified the duration of exposure and the intensity of exposure as being relevant to determination of whether there had been sufficient exposure to cause asbestosis.

- [67] With respect to the issue of the threshold exposure, I prefer Dr Jones’ opinion that the 25 f/ml.yr parameter ought not to be viewed as a magic number because the precise measurements of duration of exposure and intensity of exposure are impossible and are really of the nature described by Mr Kottek. That is, they are not particularly meaningful and are little more than formalised speculation. As Mr Kottek points out at page 12 of his report, the 2019 review by Klebe et al had noted the estimated cumulative dose of asbestos required for the induction of asbestos had diminished over the years with some studies accepting a dose as low as 4.5 f/ml.yr may be causative of asbestosis.
- [68] It was put to Dr Jones that in terms of his opinion, there was radiology of Mr Smith’s lungs which was inconsistent with asbestosis, namely the opinion expressed by Dr Fanning that Mr Smith had idiopathic non-specific interstitial pneumonia (NSIP). Dr Jones convincingly explained by idiopathic NSIP was not the correct diagnosis for Mr Smith. Dr Jones provided a brief history of the diagnosis of NSIP with reference to radiological literature, stating that when NSIP was first described in literature, it preceded all of the “incredible blood tests that now can be performed” to make a diagnosis of all these other causes of interstitial lung disease.
- [69] Dr Jones went on to mention several of them including autoimmune diseases and vasculitis. Dr Jones explained that none of the more advanced blood tests which are now available existed when NSIP was first described. Dr Jones explained that medical thinking has changed greatly in the last 10-15 years, relating to the over- and mis-diagnosis of NSIP, referencing a study where a third of persons diagnosed with NSIP on radiology actually had UIP on histopathology. I accept Dr Jones’ opinion that NSIP is not a proper diagnosis for Mr Smith’s condition.

³² T3-9, lines 30-31.

[70] Dr Jones was also cross-examined on Dr Fanning’s opinion of radiological findings being inconsistent with a diagnosis of asbestosis being the absence of “visibility of ground glass opacity” and the lack of honeycombing. The suggestion from Dr Fanning was that ground glass opacity was relatively uncommon in asbestosis diagnosed cases. Dr Jones, the radiologist with 30 years’ specialised experience in asbestosis replied “No. No. I think it’s almost universal in asbestosis... I think every asbestosis will have ground glass opacity.”

[71] Furthermore, in respect of Dr Fanning’s thesis that the absence of honeycombing in Mr Smith’s lungs suggested that Mr Smith was not suffering from asbestosis, the question was succinct, as was the answer from Dr Jones. It was as follows:

“But does that not suggest to you that it is probably not an asbestosis diagnosis because honeycombing is a common feature? --- No. Honeycombing is not a common feature in asbestosis. Honeycombing occurs less often than asbestosis without honeycombing. ... Honeycombing occurs if it’s UIP pattern asbestosis, but most asbestosis isn’t actually UIP pattern, it’s not non-specific pulmonary fibrosis or if it’s early asbestosis, the description is pleural dots, lines and branching structures. Some honeycombing is actually less-commonly seen in asbestosis than other interstitial lung diseases.

[72] On pages two and three of his report of 18 December 2024, Dr Jones had opined that on two different CTs of Mr Smith’s chest, one dated 23 April 2021 and one dated 10 April 2024, asbestos pleural plaques affected “about 10% of the total costal and diaphragmatic pleural surface area.”

[73] It seems to me when a vastly experienced radiologist with a thirty-year specialty in asbestosis examines two different CTs and comes to the same estimate as to the amount of pleural plaques, that of itself carries considerable weight. This is to be contrasted with Dr Fanning’s estimate of one percent impact.

[74] Dr Jones was cross-examined³³ about the significant one percent or ten percent difference and was very frank in his evidence. Dr Jones’ evidence of the ten percent estimate was that:

“It’s not an accurate estimate. It’s an eyeball judgment. ... So to do it, you just look at the whole of the area of the pleura and look at the plaques and just make a guesstimate... Radiologists make lots of

³³ T3-51.

guesstimates on measurements and looking how big things are on scans. That's part of the job."

- [75] It was then put to Dr Jones that Dr Fanning's one percent estimate might influence his thinking as to the level of percentage of damage currently being shown on the scans. Dr Jones answered "It won't influence my thinking, no, everybody – if you ask ten people to look at a scan they'll all have ten different opinions. It's normal. I can give you my opinion, that's all I can give you."
- [76] I accept Dr Jones' evidence that estimating the percentage or level of pleural plaques is difficult, is done by an overall judgment and is in fact a guesstimate made by an expert in the area which is a normal part of that expert's occupation.
- [77] In the present case with the benefit of a radiologist who has spent 30 of the last 45 years of his professional career examining lung disease radiology and obtaining a great deal of expertise in asbestosis and an expert who is able to clearly and rationally explain his reasoning, it seems to me I can place great confidence in the guesstimate of Dr Jones that the pleural plaques do affect about 10% of Mr Smith's costal and diaphragmatic pleural surface area.
- [78] The plaintiff called Dr James McKeon, a thoracic physician, who has held his fellowship since 1985. The first defendant called Dr Matthew Fanning, a consultant respiratory and sleep physician who has held his fellowship since 2019. Dr Fanning's opinion that Mr Smith had interstitial lung disease in a fibrotic NSIP pattern which was not consistent with asbestosis but rather was an idiopathic NSIP was based upon occupational history of minimal exposure to asbestos dust. When Dr Fanning was asked to assume that Mr Smith had been exposed to more than 25 f/ml.yr of asbestos, Dr Fanning changed his opinion and joined the common opinion that Mr Smith indeed does suffer from asbestosis. It seems to me that is sufficient to deal with most of the differences of opinion between Dr Fanning on one side, and Dr McKeon and Dr Jones on the other.
- [79] Additionally, Dr McKeon had similar views to Dr Jones upon the issue of the presence of ground glass opacity or lack of honeycombing as not contraindicators to a diagnosis of asbestosis. As Dr McKeon carefully pointed out in his report by reference to recent medical journals, ground glass opacities were quite common in

asbestosis. I accept Dr McKeon's opinion that when it occurs, the honeycombing effect occurs only in the final stages of the diagnosis of asbestosis.

[80] The major difference of opinion between Dr Fanning and Dr McKeon centred upon the effect of comorbidities. Dr Fanning had expressed the opinion in his report of 6 November 2024 that "much of his limitation in activities are driven by other factors such as his obesity, multiple crush fractures from osteoporosis and degenerative spinal disease as well as his previous injuries from motor vehicle accidents."

[81] It seems to me Dr Fanning's opinion is based, in part, upon a premise that only one percent of the pleural area has been affected, whereas as discussed above, that is a vast under-estimate, as I accept the experienced Dr Jones' estimate of ten percent of the pleural area being affected by pleural plaques.

[82] With respect to pleural plaques, Dr McKeon's evidence³⁴ is that although it was hard to be accurate, the pleural plaques represented a 10% costal and diaphragmatic pleural surface area, that is, he agreed with Dr Jones.

[83] As to the effect of comorbidities, Dr McKeon was cross-examined upon the issue as follows:

"Well, what I want to suggest to you is that the combination of his morbid obesity and his severe kyphosis is more likely to be explaining at least the majority of his respiratory difficulties; is that not correct? ... No. No, that is completely incorrect because he has had --- he has been obese for a long time. And his breathlessness has only progressed over the last, um, I don't know, five or six years. Um, no. That's completely wrong."

[84] Dr McKeon explained that he studied a lot of literature upon the effect of thoracic kyphosis on lung function and had the considerable benefit of the use of his 41 years as a thoracic physician in reaching a view based upon the radiology "That his kyphosis would only cause a small impairment of his lung function. I think the majority of the impairment is due to his parenchymal lung disease, which is asbestosis."

[85] Dr McKeon then explained that the radiology did not support a thesis that the kyphoscoliosis would have any significant contribution. As pointed out by

³⁴ T3-7, lines five-10.

Dr McKeon³⁵, the fall of Mr Smith's KCO³⁶ from 92 in 2023 to 74 in October 2025 did not support a thesis that severe kyphoscoliosis was a likely significant contributing factor to his condition, but rather to the contrary.

- [86] Dr Fanning's opinion is in part based upon his acceptance of the results of a lung function test of 24 October 2024 and in comparison to that test, to the previous lung function tests of 3 June 2021, 3 May 2022 and 27 June 2023. As explained by Dr McKeon, the KCO is the carbon monoxide transfer coefficient which measures how efficiently your lungs transfer gas. As a coefficient, it consists of the equation derived from $DLCO \div AV$, with those acronyms being the diffusing capacity for the lung for carbon monoxide (DLCO) divided by the alveolar volume (AV). Dr Fanning adopted the 24 October 2024 result of a DLCO of being within 69% of predicted and therefore within normal limits and has utilised that metric on page two of his report of 24 October 2024 to state:

“The lung function testing is summarised in table above (converted to the Crapo reference range). Both the FVC and DLCO have declined since 2021. The KCO has remained within normal limits (most recently 81%) suggesting that Mr Smith's severe kyphoscoliosis is likely a significant contributor to his fallen gas transfer, given that the diffuse fibrotic lung disease would not typically be associated with a preserved KCO.”

- [87] The results of the pulmonary function tests are set out in the first eight pages of exhibit 12. The pulmonary function tests are carried out by various respiratory scientists. An important parameter in the calculation of alveolar volume is the patient's height. As Dr McKeon pointed out, in three out of the four pulmonary function tests, Mr Smith's height is specified as 159.5 cm yet, mysteriously on the relevant function test of 24 October 2024, Mr Smith's height has been reduced to 157cm. As Dr McKeon pointed out on page 10 of his report of 11 December 2024, he would “be very surprised if Mr Smith had lost 2.5cm height between 2023 and 2024.” I would likewise be surprised that having lost that 2.5cm, he regained it with Ms Frame recording a reported height of 159cm on examination on 12 November 2024.

³⁵ T3-12.

³⁶ KCO is the carbon monoxide transfer coefficient.

- [88] Dr McKeon has pointed out on page 10 that the height difference is important because with the proper calculation being done the predicted value for the DLCO is 23.92 units but as Mr Smith was measured at 15.72 units it proved that Mr Smith's lungs were functioning at 63% of their predicted capacity.
- [89] Dr McKeon was not challenged upon this analysis. I accept that his recalculated values are correct and accordingly Dr Fanning's opinion that the kyphoscoliosis was likely a significant factor to explain the fallen gas transfer is based on an incorrect assumption that the KCO had remained within normal limits. Accordingly, I do not accept Dr Fanning's opinion that much of Mr Smith's respiratory disability is due to the comorbidities of obesity and severe kyphosis. More importantly, as Dr McKeon has set out in his file note of 13 August 2026 at paragraph three, it is not appropriate to base any opinion upon the predicted KCO value as it is based on an assumption of 100% alveolar volume. As Dr McKeon has pointed out, there is an inverse exponential relationship between KCO value and alveolar value such that the lower the alveolar volume, the higher the KCO should be.
- [90] The 24 October 2024 respiratory lung report attached to Dr Fanning's report of 6 November 2024 records Mr Smith's height at 157cm whereas a pulmonary function test taken four days later on 29 October 2024 records Mr Smith's height at 159.5cm. I further note that the subsequent pulmonary function test of 8 April 2025 records Mr Smith's height at 159.5cm. I further note in the last pulmonary function test of 30 October 2025, it records Mr Smith's height at 157cm. This does not serve to demonstrate that Mr Smith has shrunk in height and then grown in height and then shrunken in height again, but rather it demonstrates that errors can be made, even by competent technicians. The error calls into question the 2025 KCO values, however no expert made comment upon that.
- [91] What I do accept as accurate is Dr McKeon's conclusion on page six of his report of 6 August 2026 that "There has been evidence of significant deterioration in the DLCO and FBC during that time, consistent with progressive disease."
- [92] As the facts show, Mr Smith had functioned very ably and well as an adult for several decades whilst suffering from kyphosis and obesity. I therefore accept Dr McKeon's

opinion³⁷ that based upon Dr McKeon's expertise and his study of "a lot of literature", that Mr Smith's kyphosis would only cause a small impairment of his lung function. I accept that Dr McKeon takes a similar view in respect of the obesity, and I accept Dr McKeon's logical opinion consistent with the history and the facts as I have found, that the vast majority of Mr Smith's lung impairment is due to the asbestosis that he suffers.

- [93] As Dr McKeon said,³⁸ Mr Smith has fourteen comorbidities, however, none of those comorbidities are likely to reduce Mr Smith's life expectancy and lead to his death. I conclude that the severe kyphosis that Mr Smith suffers from and his obesity have a minimal effect upon his lung function and that his extremely poor lung function is due to the asbestosis that he suffers.

Product Identification and In Situ Product Issue

- [94] These issues do not arise in respect of the exposure to asbestos that Mr Smith suffered in his employment with JR Wyllie & Sons between 1963 and 1968 at the Baker's Creek Meatworks. As the project involved the installation of a new roof with Amaca's Super Six sheeting, the product has been properly identified as Amaca's and there is no *in situ* asbestos to complicate the issue of the liability of the manufacturer.
- [95] The second period of exposure from 1969 to 1973 at the Racecourse Mill is in issue between the parties. Amaca as first defendant raises both issues, arguing that in respect of the asbestos lagging which was in situ and removed has not been shown on the balance of probabilities that it manufactured that lagging and secondly in respect of the new lagging installed, it has not been shown that Amaca manufactured that product. On behalf of Mr Smith an issue of fairness is raised with respect to Amaca's argument on in situ piping at the Racecourse Mill. On behalf of Mr Smith, it is argued that Amaca's failure to plead the issue deprived the plaintiff of obtaining evidence as to the supply of in situ product. On behalf of Mr Smith, it is argued that such an issue ought to have been pled pursuant to r 149(1)(c) and 157(a) of the *Uniform Civil Procedure Rules* 1999 (Qld).

³⁷ T3-11.

³⁸ T3-12.

- [96] On behalf of Mr Smith, it is submitted that by failing to plead the issue the first defendant ought not be permitted to raise the issue at the end of trial.
- [97] Examination of the pleadings show that by paragraph 4(b) of the further amended statement of claim, Mr Smith's case had been cast as working with both in situ asbestos lagging and the C-shaped half pipe pre-formed asbestos lagging, however, that distinction was removed in the second further amended statement of claim.
- [98] The amended defence of the first defendant to the plaintiff's second further amended statement of claim filed 13 August 2026 did not raise any distinction between the identity of the manufacturer of in situ lagging and C-shaped half pipe pre-formed asbestos lagging. The amendments to paragraph two in the amended defence of the first defendant raised the issue of manufacturer identity in paragraph (a)(iv) and in terms of an admission that the defendant was the manufacturer, distributor and seller of insulation products in the Hardie BI period from 28 September 1964 to 27 June 1974 and specifically raising the allegation that asbestos insulation products were also manufactured overseas and imported into Australia for distribution and supply "between on or about 1969 and about 1973".
- [99] I conclude that the *in situ* issue was not raised upon the pleadings. It would seem that as a result it is not the subject of a great deal of evidence. Although it was not raised in the pleadings, it seems to me that there is evidence upon the issue which sufficiently allows findings to be made. Although the difference between the in situ lagging and the new lagging was not the subject of detailed evidence from the plaintiff distinguishing between the two different types of lagging, it was the subject of some evidence. The plaintiff's evidence is that he referred to both the *in situ* product and the new product as looking like the product on page six of exhibit four. It seems to me Mr Smith's evidence can only be understood as referring to both the in situ lagging and the new lagging to be installed. Certainly, there was no attempt to make any distinction or clarification in the cross-examination of Mr Smith, again, probably because the issue was not raised on the pleadings.
- [100] It is true, as counsel for Amaca suggests, that Mr Smith's evidence of product identification is far from compelling. Mr Smith, an honest witness, could only say in

respect of the new lagging that the “pipes would be like half round, fibrous, well – looks fibrous a bit like, um, like Plaster of Paris in appearance but in half rounds.”³⁹

[101] Mr Smith then⁴⁰ after being shown Amaca’s pipe brochure, exhibit four, stated “Yes. Yeah, looks like the product.” In cross-examination⁴¹ in relation to the pipes shown in that brochure, Mr Smith agreed to the proposition that he worked with “that material” when installing and also when “removing and repairing” asbestos lagging. If that were all of the evidence upon the issue, then it seems to me that it would be proper to find that it was more probable than not that the in situ product was in fact the first defendant’s product. It would be a proper finding because, as I have said, Mr Smith is an honest witness and has described a product in the first instance almost precisely as shown in the photograph on page six of exhibit four, and then looked at the photograph and confirmed that it looked like the product.

[102] On the other side of the evidential dispute sits Amaca, a manufacturer who has known since the 1950s that its products may have caused serious lung disease and therefore ought have kept careful records of the places into which its products were sold, so that certainly some almost 20 years later in 1969 it ought to have been in a position to prove whether in fact it did or did not sell its product to be utilised for work at the Racecourse Mill between 1969 to 1973. The first defendant being in a position to prove that and choosing not to fairly raises in my view a *Jones v Dunkel*⁴², *Blatch v Archer* inference against it.

[103] It seems to me, however, I do not need to rely upon such an inference in finding of fact, and it is sufficient to rely on Mr Smith’s evidence alone. Amaca relied upon exhibit 30, the ABS statistics showing that there was potentially a small amount of asbestos pipes imported into Australia between 1968 and 1973. It seems to me the only proper inference to draw from exhibit 30 is that there is a very small possibility that the pipes were not manufactured by Amaca, however, that very small possibility, which could only be quantified by Amaca with its knowledge of market share was not stated by Amaca. Furthermore, questions of fact are to be resolved on the balance of probability, and it seems to me the statistical very small possibility that Amaca did

³⁹ T2-13, lines 35-40.

⁴⁰ T2-14.

⁴¹ T2-31, lines 44-45.

⁴² *Jones v Dunkel* (1959) 101 CLR 298; *Blatch v Archer* (1774) 1 Cowp 63.

not manufacture the pipes does not detract from a finding on the balance of probabilities that it did so.

- [104] The other important piece of evidence with respect to these issues are exhibits 28 and 29, being the witness statements of Mr Ron Hinton, deceased. Mr Hinton has signed two statements dated 2 June 2014 and 18 August 2014 detailing his employment with James Hardie & Co from 1945 until 1987. Mr Hinton progressed from a cadet chemist in 1945 working his way through to a works manager position in 1984 until his retirement.
- [105] Importantly, Mr Hinton appears to have worked at the James Hardie Company Camellia Insulation Factory in New South Wales from 1945 until he left for head office in 1972. Mr Hinton's statements which were obtained for use in proceedings between Amaca, CSR Ltd and Bradford Insulation Industries Pty Ltd in the Supreme Court of Victoria contain important information as to the likely identity of the pipe insulation.
- [106] The last page of exhibit four, the James Hardie insulation brochure, shows that James Hardie had two offices in New South Wales, namely Asbestos House in Sydney and another office in Newcastle west. Importantly, the only works in New South Wales was the Camellia factory. In paragraphs 12 to 16 of his statement, exhibit 28, Mr Hinton identified three high temperature insulation products manufactured by James Hardie & Co, namely 85% magnesium, K-Lite and Caposite. There is a submission on behalf of the first defendant that Mr Hinton's evidence related to perhaps the K-Lite or Caposite but not the 85% magnesium identified by the plaintiff, however, as stated in paragraph five of exhibit 29, Mr Hinton's evidence was provided in respect of each of those three products. From his position of great knowledge of the industry, Mr Hinton was able to say that "Approximately 95% of all high temperature thermal insulation product sales in Australia during the Hardie BI Partnership."
- [107] The Hardie BI period was identified as between 1964 until 1973. Prior to the Hardie BI partnership period, the high temperature thermal insulation products were manufactured by Hardies. Mr Hinton had been the factory superintendent of insulation since about 1958 until 1963. With its predominant market share of 95% of high temperature insulation sales being made by Hardies in the Hardie BI period, it

seems to me that this provides cogent support for the finding on the balance of probability that the new insulation products were manufactured by the first defendant in partnership with CSR during the Hardie BI period.

- [108] As stated above, Mr Smith's evidence is that most of the time he was dealing with the new insulation material and then with the older insulation material, he would simply lay into it with the hammer to remove it which would not take very long. The only indication in respect of the extent of the work undertaken upon the "old stuff" appears at T2-32, lines 34-35 to the effect that there was little work performed on the old stuff and when it occurred it was to "rearrange them in some way".
- [109] It seems to me the better inference from Mr Smith's evidence relating to rearranging them in some way is that it suggests that Mr Smith was performing work upon insulation which had not long been installed as it needed to be "rearranged". One of the points made on page six of exhibit four is that the pipe insulation is durable and accordingly it seems to me that the best inference is that if work needed to be undertaken to rearrange it, it is not because the durable lagging had failed, but rather the relatively recently installed lagging needed to be "rearranged".
- [110] On the balance of probabilities, it seems to me from Mr Smith's description of the lagging that it is proper to find, and I do find, that the lagging that he was working upon when removing or installing lagging was the first defendant's product. I further find that the amount of work being undertaken by Mr Smith upon in situ lagging was insignificant in terms of his exposure to dust as the task of the in situ lagging was undertaken very quickly with a hammer and caused only a small amount of dust to be emitted, as opposed to the cutting and drilling of the new pipe insulation which created much more dust.
- [111] I find that Mr Smith had spent the vast majority of his time installing new half pipe insulation manufactured by the first defendant and spent only minimal or very little time in the removal of *in situ* lagging. Although I accept Mr Kottek's evidence the cumulative exposure reached the sufficient exposure threshold at the Mackay Port, the exposure that preceded the Mackay Port exposure is important as the parameter is a cumulative parameter.

- [112] With respect to Mr Smith's work at Mackay Ports between 1980 and 2002, the first defendant has⁴³ admitted that it was the manufacturer of asbestos cement pipes from 1937. Certainly, in respect of the new pipes being installed, there is no issue as to the identity of the manufacturer. In respect of the in situ pipes, there is no pleading by Amaca that there were other manufacturers in Australia or that AC pipes were imported into Australia prior to 1937 which may be contrasted with Amaca's case upon the half pipe AC insulation, where similar allegations were raised.
- [113] As the issue was not raised, it is understandably the subject of limited evidence in Mr Smith's case. Had Amaca wished to contend that some other person had provided the in situ AC piping, or alternatively that it had been supplied such a long time ago that they could not be liable for it given the state of knowledge surrounding asbestos products, then it seems to me that that information is solely within the custody of either Amaca itself or both Amaca and the predecessor Port Authority to the second defendant. As a matter of fairness, if it were necessary, I would draw an adverse inference against Amaca that it was the supplier of the in situ products and they were supplied some time after they became the sole supplier in 1937.
- [114] As discussed above, however, that is not all of the evidence on this issue. When Mr Smith commenced at the Port in 1980, Amaca had been the sole manufacturer of AC pipes for the 43 years since 1937. The fact that Mr Smith, as the Port plumber, said his main duty was to repair those pipes suggests that he and prior plumbers were very frequently working upon the water pipes such that they were unlikely to be decades old. That alone supports a finding that it was more likely than not that Amaca manufactured the in situ pipes. More importantly, Mr Smith gave evidence of the description of the V rubber being the patented ring rubber referred to on page two of exhibit five and had described the machined pipe ends also referred to on page two of exhibit five. It seems to me even though this is limited evidence, together with the reference from Mr Smith upon the Gibault joints⁴⁴, leads me to infer that it was more probable than not that the in situ pipes that Mr Smith worked upon were manufactured by Amaca.

⁴³ In paragraph 2(a2) of the amended defence filed 13 August 2026.

⁴⁴ On page 16 of exhibit five.

[115] However, there is insufficient evidence to determine when such pipes were manufactured, other than concluding they were manufactured by Amaca some time after 1937. As discussed below, although, I am unable to make a finding as to precisely when the AC pipes were manufactured, other than saying it was after 1937. It matters little because as discussed below I accept the unchallenged opinion of Mr Kottek on page two of his report of 25 August 2025 that:

“In my opinion, from the 1930s onwards, it was well recognised that ongoing occupational exposure to asbestos was damaging to health. In forming this opinion, I rely on documents referred to in Appendix A, including the UK report of Merewether and Price in 1930 and the US report of Dreessen *et alii* from 1938.”

[116] The Appendix A that Mr Kottek referred to commences with an extract from the 1898 annual report of the British Chief Inspector of Factories who described asbestos dust “in any quantity “as having “evil effects” and being expected to cause injury to health. That report was published in 1900. As Mr Kottek has pointed out on pages 16-17 of his report of 28 August 2025, the British Medical Journal published “Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust” as early as 1924. Six years later in 1930, Merewether and Price produced a report concluding there was a relationship between exposure to asbestos dust and asbestosis and, inter alia, methods to limit exposure to asbestos dust. So, at least 17 years before Mr Smith was born on 16 May 1947, it ought to have been known by any asbestos manufacturer that they were manufacturing a potentially lethal product. The Merewether and Price report was referred to or otherwise reported in at least nine medical, engineering and industrial relations journals in 1930 alone. There were then numerous other studies in the early 1930s. As Mr Kottek points out on page 17:

“The first Australian case report of asbestosis in a mill hand in an asbestos works was published in 1935. This report was the Badham report being more formally described as “Report of the Director General Public Health, New South Wales, for the year 1933 Sydney Government Printer 63.”

[117] Accordingly, when James Hardie commenced as the sole manufacturer of AC pipes in 1937, it ought to have known that persons exposed to working with those asbestos pipes where dust was created may suffer from a fatal illness.

- [118] In the end result, however, it matters not when the in situ AC pipes were supplied nor who supplied them, as Mr Smith's case is cast on a broader basis than simply negligence attaching to work upon new product as opposed to in situ product.

Amaca's Negligence

- [119] Paragraph 10 of the second further amended statement of claim states:

- "10. At all material times, the first defendant owed a duty of care to the plaintiff, or to the class of persons of which the plaintiff was a member:
- (a) to investigate potential risks associated with the JH Asbestos Products that it designed, manufactured and supplied;
 - (b) not to design, manufacture or supply building products containing asbestos which created an unreasonable risk when the products were used in the manner or for the purpose for which they were intended; and
 - (c) to provide adequate warning to alter end users, potential users, consumers and the public, in a manner so that measures could be undertaken to reduce and minimise any risk."

- [120] Of importance is paragraph 8(a) of the amended defence of the first defendant to the plaintiff's second further amended statement of claim. At paragraph 8, Amaca has pled (in part):

"As to paragraph 10 of the SOC and subject to the plaintiff discharging the onus of proving that he was exposed to and inhaled asbestos dust and fibre from products containing asbestos manufactured by Amaca as pleaded in the SOC, which is not admitted:

- (a) Amaca admits that it owed the plaintiff a duty of care and says:
 - (i) from about 1977, brochures were distributed relating to the recommended practices for AC pipes to the following effect [there is then a long description of use of PPE and other measures to prevent creation of asbestos dust]."

- [121] Paragraph 11(a) of the second further amended statement of claim states:

- "11. At all material times, the employers, the first defendant and the second defendant knew or ought to have known:
- (a) end users of JH asbestos products, including plumbers, other tradesmen and labourers would handle, cut, rasp and otherwise work with JH asbestos products resulting

in the release of asbestos dust, fibre and RCSD into the air;

- (b) end users of JH Asbestos Products, including plumbers, other tradesmen and labourers would inhale or ingest asbestos dust and fibre and RCSD released from JH Asbestos Products, placing them all at serious risk of injury, illness or disease, including mesothelioma, lung cancer, asbestosis or ARPD;
- (c) end users of JH Asbestos Products, including plumbers, other tradesmen and labourers would be unlikely to take precautions to minimise or avoid exposure to the inhalation or ingestion of asbestos dust and fibres and RCSD released from JH Asbestos Products unless warned or informed of the risk of serious injury, illness or disease including mesothelioma, lung cancer, asbestosis or ARPD, that may result;
- (d) end users of JH Asbestos Products, including plumbers, other tradesmen and labourers would be unlikely to know of the nature, causes and consequences of mesothelioma, lung cancer, asbestosis or ARPD;
- (e) end users of JH Asbestos Products, including plumbers, other tradesmen and labourers were vulnerable by reason of the matters pleaded in subparagraphs (a) to (d) herein;
- (f) the plaintiff, as an end user of JH Asbestos Products, was vulnerable and at risk of serious injury, illness or disease including mesothelioma, lung cancer, asbestosis or ARPD, from the inhalation and/or ingestion of asbestos dust and fibre and RCSD released from the JH Asbestos Products.”

[122] RCSD is reference to Respirable Crystalline Silica Dust. The second and third defendants admit paragraph 11 and Amaca admits paragraph 11 but further pleads:

“Amaca first became aware ... during the mid-1950s that the inhalation of asbestos fibres could cause asbestosis but only in circumstances involving inhalation over a period of time of quantities of asbestos fibres contained in visible clouds of dust emanating from the handling of raw asbestos in a factory manufacturing asbestos-containing products...”

[123] As the plaintiff’s first work exposure occurs after 1963, Amaca has admitted that it knew of the dangers of health to workers using Hardie’s products and that they may inhale asbestos dust and suffer from asbestosis. As the chapeaux to paragraph 8 of the amended defence of the first defendant records, Amaca has admitted it owes Mr Smith a duty of care because as discussed above, he has proved he was exposed

to and inhaled asbestos dust from fibre products containing asbestos manufactured by Amaca.

[124] It is not in dispute that Amaca as the manufacturer of a dangerous product owed a duty of care to persons who may come in contact with any asbestos laden product.

[125] In *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* (1968) 120 CLR 635, Barwick CJ at 642 described the manufacturer's duty as "high but it was not absolute".

[126] In the present case, it is not in dispute that the duty of care owed by Amaca as manufacturer is that identified by McHugh J in *Graham Barclay Oysters v Ryan* (2002) 211CLR 540. That is, a duty of care owed by the manufacturer to a user of its product is a duty to take reasonable care to avoid injury to the user of the product. The identification of the content of the duty of care is the antecedent question of law. The subsequent question of fact is whether the duty of care has been breached. This was well explained by Giles JA in *Amaca Pty Ltd v AB & P Constructions* [2007] NSWCA 220 at [48] to [57]:

“[48] Referring to content when deciding whether a duty of care was owed should be distinguished from referring to content when deciding whether the duty of care has been breached. The latter is a usage in considering the reasonable response to the risk of injury in the manner described by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–8. It also gives rise to a danger of mixing duty with breach. In *Vairy v Wyong Shire Council* at [29] McHugh J said that it risks conversion of a question of fact, what is required to discharge the defendant's duty of reasonable care, into a question of law, what is the duty. There can be particular confusion if the two usages are not kept distinct.

[49] The error asserted by the appellant was not that its duty of care incorrectly descended to the specificity of a duty to warn of the risk to health from asbestos. The appellant embraced such descent, in order to make out a question of law. The asserted error was, as earlier noted, that the knowledge of risks in the use of asbestos cement products was at the time such that in the formulation of the duty of care there was no duty to warn users; so there was no breach in failing to warn.

[50] For two reasons, there was no error of law. First, the appellant's duty of care owed to Mr Lorizio was a broadly stated duty, not with the content of a duty to warn users, and on a proper understanding of the judge's reasons he did not give it that

content. Secondly, if there had been error in giving it that content, it would have been error of fact.

- [51] In *Leichhardt Municipal Council v Montgomery* (2007) 81 ALJR 687 ; (2007) 233 ALR 200 Gleeson CJ said at [8], speaking of the level of abstraction at which a duty of care should be formulated —

In any action in negligence, a proposition about a duty of care must be capable of being expressed in a manner that would enable a judge to direct a jury how to set about deciding whether there had been a breach. This is not difficult in well established areas such as litigation arising out of industrial accidents, motor vehicle accidents, occupiers' liability or professional negligence. It may be otherwise, however, in cases which lie at the boundaries of the law of negligence. There, the separation of issues of law (affecting duty) from issues of fact (affecting breach) may be more problematic. (In this context I include among issues of fact questions of normative judgment that often affect decisions about reasonableness).

- [52] The relationship between the appellant and Mr Lorizio was that of manufacturer of a product and user of the product. That is a well established area of litigation, not at the boundaries of the law of negligence. The content of the appellant's duty of care was at the general level of a duty to take reasonable care to avoid physical injury. The reasonableness of the appellant's conduct was then to be assessed by regard to the risk of injury and the response of a reasonable man to the risk, in accordance with the balancing described by Mason J in *Wyong Shire Council v Shirt*.

- [53] In *Graham Barclay Oysters Pty Ltd v Ryan* McHugh J said —

106 The duty of care owed by a manufacturer or producer to a consumer is a duty to take reasonable care to avoid injury to the consumer. To formulate the duty in more specific terms invites error because it is likely to mix a question of law (whether a duty existed) with a question of fact (whether a breach occurred). If the duty is formulated in specific terms, the issue on breach is whether the duty has been performed in accordance with the terms of the duty as formulated ...

- [54] *Graham Barclay Oysters Pty Ltd v Ryan* had many parties, but the oyster grower and the consumer of oysters were in the relationship of manufacturer and user. It was accepted that a general duty of care was owed, and the contest was over breach of duty, see at [41]–[42] per Gleeson CJ. [187] per Gummow and Hayne JJ, [253] per Kirby J. McHugh J at [101] referred to the scope of the duty owed, but by his [106] determined the scope as the general duty of care.

- [55] McHugh J cited *Donoghue v Stevenson* [1932] AC 562 at 599 for the first sentence of his [106] set out above. The citation is a

reminder that, apart from the famous “neighbour principle” for which the case is remembered, Lord Atkin there stated the narrower principle that —

... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.

- [56] In *Grant v Australian Knitting Mills Ltd* (1933) 50 CLR 387 (HC) ; (1935) 54 CLR 49 (PC) the duty of care of the manufacturer of underpants, founded on *Donoghue v Stevenson*, was to take reasonable care to avoid injury (per Starke J at 409) or to take care in its manufacturing process so as to avoid injury (per Evatt J at 439–41 and in the Privy Council at 63). In *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* (1968) 120 CLR 635, which concerned an inflammable adhesive, Barwick CJ at 642–3 described the manufacturer’s duty as a duty to take reasonable care, the parties accepting that “the relevant act in performance of [the manufacturer’s] duty” was giving an adequate warning of the dangerous qualities of the adhesive. In *Vairy v Wyong Shire Council* Gummow J observed at [63] that in many well-settled areas of the law of negligence the existence of a duty of care “presents no challenge”, and that after *Donoghue v Stevenson* “it was accepted that manufacturers of mass produced goods intended for human consumption owed a duty of care to ultimate consumers”.

- [57] The correct approach in the present case, then, was that the appellant owed to Mr Lorizio a duty to take reasonable care avoid risk of physical injury; and whether it was in breach of that duty involved determining the reasonable response to the risk of injury and any failure in that reasonable response. Giving a warning was not necessarily the reasonable response. The reasonable response of the manufacturer of a product may be to warn of the risks in its use, it may be to cease manufacturing the product (as was found in *Wright v Dunlop Rubber Co Ltd*), it may be to manufacture with different materials, or it may be to manufacture with greater care (as could have been the case in *Grant v Australian Knitting Mills Ltd*, although negligence was not found).” [my underlining]

- [127] In the present case, although Amaca admits it owes a duty of care, it has described the duty in paragraph 8(c) of its amended defence as simply a “duty of care”. The plaintiff’s formulation of duty in paragraph 10 of the further amended Statement of Claim is very specific. It seems to me, as a matter of law, that duty is correctly

described in the general terms, as set out in the above cases, as a duty to take reasonable care to avoid injury to a user of the product. The question of fact is whether there has been a breach of that duty. This involves determining the reasonable response to the risk of injury and any failure in that reasonable response.

[128] It may be observed from paragraph 12 of the second further amended statement of claim that Mr Smith's case is not limited to a failure to warn case, and includes an allegation that Amaca is in breach of its duty of care for failing to manufacture the product with different materials or ceasing to manufacture the product.

[129] As may be observed at [57] of *Amaca v AB & P Constructions*⁴⁵, depending upon the facts, the reasonable response of a manufacturer may be to warn of the risks of the use of the product or cease manufacturing the product or manufacture with different materials, or manufacture with greater care. As a matter of logic, it may be observed that the last three reasonable responses must be gauged at or about at the time of manufacture of the dangerous product. However, that time parameter does not apply to a manufacturer's duty to warn of the risks of a product's use. The manufacturer of a dangerous product is able to warn prior to the manufacture of the product, at the time of the manufacture of the product or subsequent to the manufacture of the product and this may extend to circumstances where a product, when manufactured, was not known to be dangerous but later known to be dangerous.

[130] This was demonstrated by the Full Court of the Supreme Court of South Australia in *Amaca Pty Ltd v Werfel*⁴⁶ where their Honours said:

“[158] It is perhaps obvious but we pause here to observe that the relevant time for determining the existence of a duty of care is not confined to the time of the manufacture of the goods. Asbestos is not the only product to suffer a latent defect which is discovered only after sale. The duty will not arise unless and until the risk is foreseeable and even then, only if the circumstances of the relationship support the imposition of the duty. That time may be many years after the product has been manufactured and supplied to others.

[159] If so, the standard of care required by the duty cannot be a retrospective demand that the product should never have been manufactured or supplied. It can only be to take reasonably practicable measures to recall, or warn, about the dangers of the

⁴⁵ [2007] NSWCA 220.

⁴⁶ [2020] SASCFC 125 per Kourakis CJ, Nicholson and Livesey JJ.

product. In those circumstances, the duty might loosely be described as a duty to warn.

[160] The relevant time for the imposition of a duty which can only be discharged by giving a warning will be the period before an injury is suffered during which an effective warning could practicably have been given. We also acknowledge that a consideration of the first point in time at which a duty with that content arises is material to the evaluation of the reasonable practicability of sustaining a long term warning campaign which would have been noticed by Mr Werfel at the time when he was exposed to asbestos dust. That issue is dealt with further below.”

[131] In the present case, as admitted in paragraph 9(a) of Amaca’s second amended defence, it knew since the mid-1950s that the installation of asbestos fibres can cause asbestosis. It then sought to limit that knowledge to persons who inhaled the dust whilst working in a factory manufacturing asbestos-containing products. I would reject that qualification on the basis of my acceptance of Mr Kottek’s unchallenged evidence.

[132] Mr Smith’s case in breach of duty is particularised in paragraph 12 of his second further amended statement of claim. I accept Mr Smith’s evidence that he received no warnings at all from Amaca or its predecessor and, as discussed above, I accept Mr Smith’s evidence that it was a couple of years after he performed his house demolition course in 1992 that he even realised that the AC pipes he was working with contained asbestos, and then he sought out a chain cutter for the pipes, which was eventually supplied.

[133] I conclude that Mr Smith has proved breach of duty of care in respect of the following six particulars of breach of duty of care set out in paragraph 12 of his second further amended statement of claim which provides:

“12. The plaintiff’s exposure to RCSD and asbestos dust and fibre pleaded in paragraphs three to 11 above was also caused by the negligence of the first defendant, by their:

- (a) Failure to warn the plaintiff of the dangers and risks to health arising from exposure to, and inhalation or ingestion of, RCSD and asbestos dust and fibre released from JH Asbestos Products.
- (b) Failure to warn the plaintiff of the need to avoid and/or minimise exposure to and inhalation or ingestion of

RCSD and asbestos dust and fibre released from JH Asbestos Products.

- (c) Failure to warn the plaintiff of the need to take precautions to avoid and/or minimise exposure to and inhalation or ingestion of RCSD and asbestos dust and fibre.
- (d) Failure to place any, or any adequate, warning on JH Asbestos Products as to the risks or dangers of exposure to, and inhalation or ingestion of, RCSD and asbestos dust and fibre released from JH Asbestos Products.
- (e) Manufacturing, selling and distributing JH Asbestos Products when the defendant knew that asbestos products were a serious health risk and may cause serious injury, illness or disease, such as mesothelioma, lung cancer, asbestosis or ARPD.
- (g) Failure to promote safe practices in relation to the use of JH Asbestos Products knowing that there was a risk of injury to those persons including the plaintiff who used and came into contact with JH Asbestos Products.”

[134] Amaca’s positive case as set out in paragraph 8 of its amended defence, which was not pressed in submissions, was an argument to the effect that Amaca had made reasonable attempts to inform Mr Smith of the risks involved in using AC pipes manufactured by it by distributing a brochure to some unnamed persons in 1977 and placing warning labels on AC pipes from about 1978.

[135] Although Amaca’s AC pipes were provided for works contained at Mackay Harbour, Mr Smith did not see any warning labels affixed to any of those pipes. Amaca did not seek to bring evidence to show that it had made any reasonable attempt to inform Mr Smith of the dangers that he may subject himself to in working with of Amaca’s products.

[136] Further, if I was wrong in my factual determination that Amaca was the manufacturer of the lagging pipes that were in situ and worked upon by Mr Smith at the Racecourse Mill between 1969 and 1973, or that Amaca was not the manufacturer of the AC pipes at the Mackay Ports that Mr Smith performed work upon between 1980 and 2002, then it would remain my conclusion that Amaca is in breach of its duty of care to Mr Smith by failing to warn Mr Smith of the dangers of inhalation of asbestos dust.

[137] As expressly stated on page 20 of exhibit five, Amaca’s AC pressure pipe manual, it was always contemplated by Amaca that AC pipes may be the subject of repair and

maintenance which would require cutting and joining. Thus, even if it were the case that the AC pipes were manufactured by someone else prior to 1937 or even by Amaca at a time when it did not have knowledge of the risks of asbestosis being caused by asbestos fibres, Amaca certainly had that knowledge, as it admitted, from the 1950s.

[138] In those circumstances, Amaca knew or ought to have known that workers such as Mr Smith would be utilising their products to repair in situ asbestos pipes or lagging, thus exposing themselves to serious injury. In those circumstances, the failure to warn and breaches of duty of care must, in my view, apply equally to work upon any in situ asbestos product.

[139] Accepting, as I do as set out above, the evidence of Mr Kottek, Dr McKeon and Dr Jones, the exposure of Mr Smith to the asbestos dust has caused him to suffer from asbestosis and has discussed below has caused him to suffer from damages.

[140] Employers owe their employees a non-delegable duty to take reasonable care to avoid exposing an employee to unreasonable risk of injury⁴⁷. An employer's duty is to:

- (a) Provide and maintain a safe place of work⁴⁸.
- (b) Establish and maintain and enforce a safe system of work⁴⁹.
- (c) Prevent accidents at work⁵⁰.
- (d) Provide and maintain proper and adequate materials and equipment⁵¹.
- (e) Provide competent staff⁵².
- (f) And supervision⁵³.

[141] Importantly in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 308-309, Mason, Wilson and Dawson JJ said

Furthermore, it has long been recognized that what is a reasonable standard of care for an employee's safety is "not a low one"

⁴⁷ *Hamilton v New Roof (WA) Pty Ltd* (1956) 96 CLR 18 at 25.

⁴⁸ *ACI Metal Stamping and Spinning Pty Ltd v Boczulik* (1964) 110 CLR 372.

⁴⁹ *McLean v Tedman* (1984) 155 CLR 313.

⁵⁰ *McLean v Tedman* (1984) 155 CLR 313.

⁵¹ *Wilsons and Clyde Coal Company v English* (1938) QC 57 at 84-85 Lord Wright.

⁵² *Wilsons and Clyde Coal Company v English* (1938) QC 57 at 84-85 Lord Wright.

⁵³ *Condis v State Transport Authority* (1984) 155 CLR 672.

[...]

“...[I]t is undoubtedly true, as McHugh J.A. said, that what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community. This must be so, because in every case the tribunal of fact, be it a judge sitting alone or a jury, must determine whether or not in the circumstances of the particular case the employer failed to take those precautions which an employer acting reasonably would be expected to take. What is considered to be reasonable in the circumstances of the case must be influenced by current community standards. Insofar as legislative requirements touching industrial safety have become more demanding upon employers, this must have its impact on community expectations of the reasonably prudent employer.”

[142] In *New South Wales v Fahy* (2007) 232 CLR 486, Kirby J said at 519:

“[102] At common law the general rule is that a person “is not bound to do acts for others’ benefit; he may sit still and let things take their course”. However, by long authority, the very nature of the employment obligation creates a duty of care between those party to it. Indeed, it is a relationship that obliges the employer affirmatively to establish and enforce a safe system of work. In the employment relationship, the employer is responsible for keeping abreast of technological and scientific knowledge and for taking positive action to consider, and respond to, the needs of accident prevention in accordance with “changing ideas of justice and increasing concern with safety in the community”. Some of the most important contributions to the perception of the last-mentioned necessity, according to our law, were written by McHugh J.

[103] Merely prescribing a safe system is not enough to discharge the obligation that is owed to employees. The system must be enforced. This must be done even against employee resistance...” [footnotes omitted]

Negligence of the Second and Third Defendants

[143] The second defendant is the statutory successor of Mr Smith’s employer at Mackay Port from 1980 to 2002 and is indemnified by its statutory insurer, WorkCover Queensland. WorkCover Qld as the third defendant is the statutory insurer of the employer JR Wyllie and Racecourse Sugar Mill and is pursued under s 300(2)(b) of the *Workers’ Compensation and Rehabilitation Act 2003* (Qld) as each of the prior employers were corporations that have been wound up. As the second defendant was the employer and the third defendant stands in the shoes of the employers, they admit

that they owe the plaintiff a non-delegable duty of care to take reasonable care to avoid exposing Mr Smith to unnecessary risks of injury.

[144] In respect to Mr Smith's employment with JR Wyllie & Sons from 1963 to 1968, the second defendant's argument is that Mr Smith did not discharge his onus of proving the state of knowledge at the time of his exposure between 1963 and 1968 to asbestos products sufficient to require the employer in the position of JR Wyllie & Sons to take the precautions alleged in paragraph 11A of the second further amended statement of claim. I do not accept this argument.

[145] As Mr Kottek points out, by 1930 in England there had been a major study, the Merewether and Price report on the affects of asbestosis. In 1933, Professor Cleland of Adelaide University had published an article which noted that dust from crude asbestos was capable of causing diseases in workers handling the material. There were numerous other studies, as stated above, and as recorded in page 17 of Mr Kottek's report of 28 August 2025, there was the first Australian case of reported asbestosis in 1935. That was 27 years before Mr Smith commenced work and, as Mr Kottek ably demonstrates, there had been an enormous amount of public information upon the dangers of asbestos published prior to 1963, even a report in the Courier Mail in Brisbane in 1950. In these circumstances, I conclude that the second defendant has breached its duty of care to Mr Smith as set out in paragraph 11A(a) through to (k) inclusive as follows:

“11A. The plaintiff's exposure to asbestos dust and fibre and RCSD pleaded in paragraphs 3 to 9 above was caused by the negligence of the employers and the second defendant by their failure to:

- (a) devise, institute and/or maintain a safe system of work;
- (b) devise, institute and/or maintain safe gear, plant and equipment;
- (c) devise, institute and/or maintain a safe place of work;
- (d) devise, institute and/or maintain any or any effective protective clothing for the plaintiff in sufficient time or at all, so as to eliminate or reduce the risk of injury to the plaintiff;
- (e) supply the plaintiff with a respirator, mask or other protective respiratory device in sufficient time, or at all, so as to eliminate or reduce the risk of injury to the plaintiff;

- (f) devise, institute and/or maintain any, or any effective, exhaust equipment in all areas where asbestos dust and fibre and RCSD was liberated;
- (g) devise, institute and/or maintain any or any adequate ventilation in all areas where asbestos dust and fibre and RCSD was liberated;
- (h) restrict the liberation of asbestos dust and fibre and RCSD into the atmosphere by water dampening or otherwise;
- (i) issue any or any adequate warning to the plaintiff of the risk of injury to which he was exposed as a consequence of working in an atmosphere contaminated with respirable asbestos dust and fibre and RCSD;
- (j) devise, institute or perform dust surveys to ascertain the level of airborne asbestos dust and fibre and RCSD in the atmosphere in which the plaintiff was required to work;
- (k) use materials that did not contain asbestos and which were not injurious or likely to be injurious to the health of the plaintiff;"

[...]

[146] In the period from 1969 to 1973 when Mr Smith was employed at the Racecourse Mill, the second defendant's position is that it admits breach of duty of care in respect of any exposure subsequent to the enactment of the Asbestos Rule on 1 July 1971 as it concedes that Mr Smith's employer, Racecourse Mill, ought to have been aware of the dangers of asbestos dust given the enactment of the Asbestos Rule in 1971.

[147] However, it seems to me that an employer in Australia ought to have been aware of the risks of asbestosis being suffered by an employee at least as early as 1935, that being the date of the publication of the Badham report, being a statutory report of the Director-General of Public Health New South Wales 1933 as referred to on page 17 of Mr Kottek's report of 28 August 2025. Accordingly, it follows that the third defendant is responsible for the negligence of Mr Smith's employer at Racecourse Mill from 1969 to 1973 as particularised in paragraph 11A(a) to (k).

[148] The second defendant admits it is in breach of its duty of care owed to Mr Smith in respect of him being exposed to asbestos and fibre in the course of his employment at the Mackay Port. I am satisfied that the second and third defendants' breaches of duty of care as identified or admitted have caused or materially contributed to the asbestosis suffered by Mr Smith. It seems to me that but for Mr Smith being required

in the course of his employment to carry out the activities he did, he would not have been exposed to asbestos dust of any significant quantity or at all (that is, to meet the fibre mill threshold referred to by the expert medical practitioners as a sufficient exposure) and would not have suffered from asbestosis.

[149] It was put to Dr McKeon⁵⁴ that the exposure to the Super Six fibro roofs at JR Wyllie & Sons causing approximately 1% of cumulative exposure would be properly characterised as “only a very small contribution”. However, Dr McKeon did not accept that proposition but asked for the question to be rephrased. The rephrased question was put in different terms, namely, would Mr Smith likely have developed asbestosis if he had not had the 1.1% exposure (at JR Wyllie & Sons). Dr McKeon answered in the affirmative, that Mr Smith would have developed asbestosis from all his other exposure. With Dr McKeon not answering the question that the JR Wyllie exposure was only a very small contribution results, it seems to me, in the acceptance of Dr McKeon’s opinion on page 18 of his report of 11 October 2023 that it was all three periods of employment, including JR Wyllie, which made the significant contribution to the development of the asbestosis. Having accepted Dr Jones’ opinion and Dr McKeon’s opinion that all three relevant periods of employment made a significant contribution to the development of the asbestosis, I accept that Mr Smith has proved the periods of exposure at each of the three relevant workplaces has caused his asbestosis.

[150] As to Dr McKeon’s evidence at T3-14 that absent the exposure at JR Wyllie & Sons, Mr Smith would have suffered from asbestosis from all his other exposure, I consider the principles of apportionment from [73] - [80] of the reasons of Basten JA in *NSW v Burton* [2006] NSWCA 12 are applicable. The evidential difficulty is, however, that there is no evidence as to when or in what part of the other exposure would in any event have caused Mr Smith to suffer from the asbestosis. The question of apportionment is therefore very much in the nature of a jury type question as discussed by Stewart-Smith LJ in *Holtby v Brigham & Cowan (Hull) Ltd* [2000] EWCA Civ 111 2003 3 All ER 421. In view of the uncertain nature of the evidence, it seems to me that only a small portion would be attributable to the liability of JR Wyllie & Sons as suggested at [255] below.

⁵⁴ T3-14.

[151] In *Allianz Australia Ltd v Sim* [2012] NSWCA 68, Basten JA (with whom Allsopp P and Maher JA agreed) at paragraphs 139 to 145 analysed several leading causation authorities before concluding that in circumstances where the negligence of each defendant was insufficient to effect the damage suffered by the plaintiff, but the combined force of two was sufficient, then each should be held liable in respect of an indivisible outcome; that is, each should be held liable to the plaintiff in respect of the whole of the damage. In my view, that principle applies to the facts as I have found them in the present case.

[152] As discussed above, the medical evidence that I accept from Drs Jones and McKeon is that the exposure at each of the three employers has made a material causal contribution to Mr Smith's asbestosis. Although the acceptance of Mr Kottek's evidence suggests that asbestosis may be caused by as little as less than 5 f/ml.yr exposure, it seems to me more likely than not that the threshold dose, that is, the sufficient dose to be causative of asbestosis is, on Mr Kottek's evidence, to be in the range of 5-25 f/ml.yr. Accepting as I do that exhibit 14 sets out the best estimate of the quantification of Mr Smith's exposure, the threshold dose was probably reached some time in Mr Smith's employment at the Mackay Port. Accordingly, whilst it is true that the first and second exposures at JR Wyllie & Sons and Racecourse Mill were probably each alone insufficient to affect the damage, those exposures combined with the exposure at the Mackay Port was sufficient to cause asbestosis. The consequence is that with respect to causation, Mr Smith has proved his case against each defendant and each should be held liable in respect of an indivisible outcome. That is, they are jointly and severally liable to the plaintiff in respect to the damages assessed.

Damages Assessment

[153] Section 308 of the *Workers' Compensation and Rehabilitation Act* 2003 introduced a statutory constraint upon the awarding of damages for gratuitous assistance. Pursuant to s 2(2) of that Act, section 308 commenced on 1 July 2003. As Mr Smith had ceased work in 2002, section 308 did not apply to him. Under s 308(2), a former Act that was in force at the time the injury was sustained applies in relation to the injury. Section 308 was not retrospective and does not apply to limit Mr Smith's recoverable damages.

[154] Act No. 50 of 2005, the Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2005 introduced s 36A which provided as follows:

36A Date of injury

- (1) This section applies if a person—
 - (a) is diagnosed by a doctor after the commencement of this section as having a latent onset injury; and
 - (b) applies for compensation for the latent onset injury.
- (2) The following questions are to be decided under the relevant compensation Act as in force when the injury was sustained—
 - (a) whether the person was a worker under the Act when the injury was sustained;
 - (b) whether the injury was an injury under the Act when it was sustained.
- (2A) However, subsection (2)(b) does not apply if the latent onset injury is a specified disease and section 36D applies to the person.
- (3) Section 131 applies to the application for compensation as if the entitlement to compensation arose on the day of the doctor's diagnosis.
- (4) Subject to subsections (2) and (3), this Act applies in relation to the person's claim as if the date on which the injury was sustained is the date of the doctor's diagnosis.
- (5) To remove any doubt, it is declared that nothing in subsection (4) limits section 236.
- (6) Subsections (2) to (4) have effect despite section 603.
- (7) In this section—

relevant compensation Act means this Act or a former Act.

[155] That section 36A applies to Mr Smith's rights to compensation under the *Workers' Compensation and Rehabilitation Act 2003* (as amended) is not in dispute. What is in dispute is whether s 36A has any effect upon Mr Smith's common law rights to recover damages for the tort of negligence. As Mr Smith has received statutory compensation, it can be assumed that s 1 has been satisfied and s 36A applies. The questions to be decided under s 36A(2) are questions which relate solely to Mr Smith's compensation rights under the Act. Section 36A(2A) does not apply as Mr Smith was not a firefighter and even if it did, then the s 36D(2)(a) question is only

relevant to an applicant's entitlement to compensation and not any applicant's common law right to bring an action for damages for the tort of negligence.

[156] Section 131, as referred to in s 36A(3), relates solely to an application for compensation being lodged within six months of the injury for which the entitlement to compensation arises. It is subsections 36A(4) and (5) which cause the issue to arise as to whether s 36A applies only to a compensation claim or to a damages claim. As s 36A(5) refers to s 236 and as it is the fourth section in Ch 5 Access to Damages, it can support a submission that s 36A ought to be interpreted as affecting a person's rights to make not only a claim for compensation but a person's right to make a "claim for damages". The difficulty with the acceptance of that interpretation is that the Schedule 6 definition of "claim" as referred to in s 36A(4) does not support that conclusion.

[157] Schedule 6, the dictionary to the Act, defines claim and claimant as follows:

claim—

- (a) for chapter 6B, see section 325E; and
- (b) for chapter 12, part 1A—see section 532L.

claimant—

- (a) generally, means a person who lodges an application for compensation; and
- (b) for chapter 5, see section 233; and
- (c) for chapter 6B and chapter 12, part 1A—means a person mentioned in paragraph (a) or (b).

[158] Section 36A(4) does not refer to claimant, but to a person's claim. The definition in of "claim" in the Sch 6 Dictionary relates only to Ch 6B and Ch 12 Pt 1A, which do not deal with damages claims. It is therefore a matter of construing the Act as a whole to determine what is meant by reference to the word "claim" in s 36A(4). The starting point is consideration of sections 9 and 10 of the Act which clearly distinguish between compensation and damages, and it is a distinction which is maintained throughout the Act.

[159] The first four chapters of the Act deal with compensation being claimed. Chapter 3 of the Act is entitled "Compensation" and Part 5 of Ch 3 is entitled "Compensation Application and other Procedures". It commences with s 131 and refers to an

application for compensation being lodged by a claimant. Similarly, s 132 requires an application for compensation to be made in an approved form by a claimant and to be lodged with the insurer.

[160] Chapter 5 is entitled “Access to Damages” and it has its own definitions in s 233 and it is only for the purposes of access to damages. Chapter 5 defines a claimant as a person entitled to seek damages. Section 233 includes in the definition again only for the purposes of Chapter 5 of a worker as follows “Worker, for a claim, means the worker in relation to whose injury the claim is made”. As stated above, the Schedule 6 definition of claimant is, as it says, generally a person who lodges an application for compensation as opposed to a notice of claim for damages and, it is in my view, important to observe the difference in definition of claim and claimants in the Sch 6 definition. Accordingly, in s 36A(4), when there is reference made to a claim it seems to me that on a proper construction of the Act, it is a reference to a person’s claim for compensation under the Act as opposed to a person’s damages proceeding. It seems to me the purpose of s 36A(4) is to allow a person who suffers from a latent onset injury to obtain compensation under Chapters 1 to 4 of the Act based upon the provisions of the Act that applied at the time that the doctor made the diagnosis of the latent onset injury and not at the time when the latent onset injury was insidiously suffered.

[161] In Mr Smith’s case that means that he was to be assessed for his compensation entitlements at the time of diagnosis in 2021 under the WCRA then in application and not under the various Workers Compensation Acts between his first exposure in 1963 and his last exposure in 1982. The purpose of s 36A(4) is to provide a clear, fair and logical scheme for compensation rights for persons who suffer from latent onset injuries. If Parliament had intended to interfere with such a person’s common law rights to damages, it would need to have said so in the clearest possible terms.

[162] Section 36A(5) is declaratory, it has been inserted to ensure that it is clear that nothing in s 36A could be interpreted to effect the application of a time limitation defence under the *Limitation of Actions Act* 1974. Section 236 must be read with s 238 which specifically provides a regime declaring which sections of Ch 5 apply to workers who have a terminal condition and which sections do not. Importantly sections 300 to 302 apply to workers with terminal conditions. s 302 allows for an

extension for the period of limitation were the notice of claim for damages procedure is complete or the proceeding is brought and one of the provisions of s 302(2) are satisfied. It seems to me therefore, on its proper interpretation, s 36A(5) does not support a construction that the person's "claim" as referred to in s 36A(4) includes the person's claim for damages for the tort of negligence – to the contrary, it is limited to the person's claim for statutory benefits under chapters 1 to 4 of the Act.

- [163] The third defendant submits that *Greenall & Anor v Amaca Pty Ltd* [2023] QSC 137 supports the submission that Mr Smith's gratuitous damages claim is subject to statutory restrictions in s 308 of the WCRA. I do not accept this submission. The first point is that Mr Greenall had died of mesothelioma and the significant claim the subject of the strikeout application was a claim for over \$1.1 million past and future loss of Mr Greenall's capacity to provide gratuitous domestic services to Mrs Greenall. That type of damage used to be called *Sullivan v Gordon* damages after the New South Wales Court of Appeal decision of that name⁵⁵ which, following Canadian, English and Scottish authority, accepted that such a claim was available at law. *Sullivan v Gordon* damages were, however, rejected as a head of damage by the High Court in its decision *CSR Limited v Eddy* (2005) 226 CLR 1.
- [164] Thereafter, various legislatures, including Queensland, made statutory provision to permit *Sullivan v Gordon* damages claims to be brought in Queensland. s 59A of the *Civil Liability Act* 2003 (Qld) is one example. That head of damage is a creature of statute. Mr Smith's claim is not for *Sullivan v Gordon* type damages. Mr Smith makes no claim for any services that he cannot render to Mrs Smith. To the contrary, Mr Smith's claim is an orthodox *Griffiths v Kerkemeyer* claim based upon Mr Smith's need for assistance as a result of the asbestosis which he suffers being sustained by Mr Smith entirely in the course of his employment which ceased in 2002. Accordingly there is no statutory impediment to Mr Smith's damages assessment. It is a common law damages assessment of damages in the same manner as damages are assessed against the first defendant Amaca.
- [165] As Mr Smith is retired, he does not claim any economic loss. Mr Smith's claim is limited to three heads of damage, that is; general damages for pain, suffering, loss of

⁵⁵ (1999) 47 NSWLR 319.

amenities of life and loss of life expectancy; *Griffiths v Kerkemeyer damages*; and past and future special damages.

General Damages

[166] The basic compensatory principle in the law of torts is that:

“The injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been if ... the tort had not been committed.”⁵⁶

[167] The focus of the compensatory principle is the injury suffered by a particular plaintiff and the damage occasioned by the particular injury to that particular plaintiff. It is important, therefore, to pay particular attention to the effect of asbestosis as suffered by Mr Smith and the expert evidence with respect to Mr Smith’s likely prognosis.

[168] As discussed above, I accept Mr Smith’s evidence that he first commenced suffering from breathlessness in 2021 and his condition has steadily progressed. This is in keeping with the expert opinion of Dr McKeon of a steady progression of asbestosis.

[169] In the past five years since his symptoms commenced, Mr Smith has described a very significant change in his lifestyle. Prior to suffering from breathlessness, Mr Smith was able to enjoy his retirement. He enjoyed his fishing and working in his vegetable garden and enjoyed his time with his grandchildren. Mr Smith was a tradesman since 1968 and was a capable man. Over the past five years he has lost his capability completely.

[170] As noted above, I observed him to walk less than 10 metres before being breathless. I accept Mrs Smith’s observation to the same effect, that is, her husband cannot walk even the length of the corridor in his small house without suffering breathlessness.

[171] In terms of assessment of pain, it seems to me that Mr Smith is not currently suffering from any high degree of pain. As a direct consequence of his asbestosis, however, I do accept he suffers from some increased back pain as he needs to sit frequently due to his breathlessness. The major effect of Mr Smith’s injury is that his breathlessness makes him unable to do much at all. Mr Smith suffers from extreme fatigue, even from doing virtually nothing. I accept Dr McKeon’s opinion that the radiological

⁵⁶ *Haines v Bendell* (1991) 172 CLR 60 at 63.

evidence and lung function tests show progressive parenchymal lung disease due to progressive asbestosis. The latest CT scan of Mr Smith's thorax of 17 June 2026 evidences the progression of the disease between the CT scans of 2025 and 2026. Dr McKeon has opined that Mr Smith is likely to die before the age of 84 years.

- [172] Appendix one to Dr McKeon's report of 6 August 2026 sets out Dr McKeon's opinion that in the next four years, that is from August 2026 to August 2030, Mr Smith will be classified in the moderate dependence stage. Dr McKeon's opinion is that in that period, Mr Smith will require assistance with self-care. Dr McKeon opines that "community support is likely if living alone" and that Mr Smith may only manage sedentary to light domestic chores such that he will be unable to manage his property, mow his lawn, perform any garden maintenance or clean the car. During that period, transport assistance will often be required, and community participation will be minimal. It seems to me that Mr Smith is well into his moderate dependency stage at the present time and as I mentioned is extremely limited in what he can do.
- [173] Dr McKeon's opinion is that in the fourth year hence, that is from August 2030 to August 2031, Mr Smith is likely to be in the high dependent stage where he will require a high level to full level of assistance with self care activities. That is, he will not be able to participate in any community or domestic activities, and he will be less able to attend medical appointments and will require medical and nursing assistance in his home. He will be severely dependent for that one year period. In the last month, Mr Smith will be totally dependent as he will be in the palliative care stage where he will likely require 24-hour care and assistance for all self care and daily living tasks, along with ongoing medical and safety monitoring. He will require nursing care.
- [174] Ms Frame is an experienced occupational therapist who conducted a home visit to examine Mr Smith on 12 November 2024. Ms Frame recorded that Mr Smith was pleasant and cooperative, a good historian and didn't appear to overstate his symptoms. I would agree with Ms Frame's assessment in this regard, it seems to me that Mr Smith had a strong tendency to understate his symptoms. That his symptoms have steadily increased is demonstrated by a comparison of the reports of Ms Frame who examined Mr Smith at home on 12 November 2024 and Mr Hoey, another experienced occupational therapist, who examined Mr Smith in his home on 7 August 2026.

[175] When examined by Ms Frame on 12 November 2024, Mr Smith was able to transfer on and off his bed without help and was independent with bed mobility as well as being independent with all transfers, that is, in and out of the shower, on and off chairs, in and out of bed and on and off the toilet.

[176] Twenty-one months later, when Mr Hoey has assessed and examined Mr Smith on 7 August 2026 he observed:

“At examination I had the claimant transfer on and off the toilet, in and out of the shower recess, on and off the bed and walk about the house. On completion he was holding his waist and gasping for air. He required seated rest before the interview could continue. These are basic transfers and short distance ambulation within the home. The observed response is consistent with the measured capacity of 2.45 METs, which those tasks approach or meet.”

[177] On examination by Ms Frame, she recorded that Mr Smith was not observed to cough at all during the assessment and reported he was not particularly troubled by coughing in recent times. On examination by Mr Hoey, Mr Hoey observed that Mr Smith became short of breath while answering questions during the interview and he coughed repeatedly.

[178] As Mr Smith’s radiology and serial lung function tests have shown a deterioration in Mr Smith’s condition, it seems to me that Mr Smith’s condition has deteriorated in the 21 months between Ms Frame’s assessment and Mr Hoey’s assessment. As it is the most recent assessment, I accept Mr Hoey’s assessment and consider that Mr Hoey’s report of 7 August 2026 provides reliable evidence of the difficulties that Mr Smith currently has as a result of his asbestosis. The report details Mr Smith’s current levels of pain, suffering, loss and amenities of life and severe restrictions upon domestic and recreational activities. In summary, everything that Mr Smith does in his life, including simply speaking, causes him breathlessness and fatigue, with the extent of the breathlessness and fatigue depending upon the amount of activity Mr Smith undertakes.

[179] Even though Mr Smith does not report any significant pain, he has suffered immensely and will continue to do so, and I consider he has lost a vast majority of the ability to enjoy the amenities of life.

[180] In his report of 16 December 2025, Dr McKeon opined that Mr Smith was suffering from a class three impairment in Table 5-12 of AMA5. Dr McKeon selected the 44% whole person impairment within that range. I accept Dr McKeon's opinion as to Mr Smith's level of permanent impairment under AMA5 as at 16 December 2025 was 44%. As stated above, I accept Dr McKeon's opinion that Mr Smith's severe kyphosis and obesity have not contributed in any significant way to that impairment.

[181] As Dr McKeon stated in his report of 6 August 2026, things have worsened since then and having regard to the progression of the disease as shown on Mr Hoey's report, it seems to me that Mr Smith's current permanent impairment under AMA5 is somewhat more than 44%. It seems to me, however, to put any assessment of level of permanent impairment under AMA5 into its proper context, it does not and has never purported to measure pain and suffering. As exhibit 23 shows, the concept of permanent impairment under AMA5 is an attempt to quantify the effect of any condition upon any individual's ability to perform activities of daily living as specified in Table 1-2. In respect of Table 1-2, the AMA5 guide provides:

“Impairment permanent percentages or ratings developed by medical specialists are consensus – driven estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding work*. Impairment ratings are designed to reflect functional limitations and not disability. The whole person impairment percentage as listed in guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work as listed in Table 1-2.”

[182] There are eight activities listed in Table 1-2, namely self care and personal hygiene, communication, physical activity, sensory function, non-specialised hand activities, travel, sexual function and sleep. Whilst not irrelevant, the percentage of permanent impairment therefore provides only limited assistance in helping to assess general damages as it is relevant only to one aspect of a general damages assessment, that is, the individual's ability to perform activities of daily living as defined.

[183] At paragraph 104 of the written submissions of the second and third defendant, it is submitted that having regard to *Greenall v Amaca Pty Ltd* [2026] QSC 16 and seven other cases dealing with awards for general damages in asbestos and mesothelioma cases, to conclude that a proper award for general damages would be \$150,000, calculated as 45% of an award of \$280,000 because of the effect of Mr Smith's

comorbidities. As discussed above, I consider although Mr Smith certainly has comorbidities, in terms of general damages, they are not of significant effect.

- [184] Firstly, in respect of Mr Smith’s severe kyphosis and obesity, I accept that there is no evidence by which the defendants can satisfy their disentangling onus as discussed in *Watts v Rake* (1961) 108 CLR 158, *Purkess v Crittenden* (1965) 114 CLR 164. I accept, therefore, that the principles in *Malec v JC Hutton* ought to be applied in which it was held⁵⁷ as follows:

“The court assesses the degree of probability that an event would have occurred or might occur and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded ... the approach is the same whether it is alleged the event would have occurred before or might occur after the assessment of damages takes place.”

- [185] Whilst I accept Dr McKeon’s opinion that as Mr Smith has asbestosis and severe pulmonary dysfunction and that his obesity and severe kyphosis contributes in a small manner to his severe pulmonary dysfunction, it seems to me applying *Malec v JC Hutton* there is no evidence to suggest and no reason to accept that absent Mr Smith suffering from his asbestosis that he would suffer from any pulmonary dysfunction as he aged. Mr Smith, after all, had been, it seems suffering from his severe kyphosis and obesity for many years and was able to work actively in manual industries for over 50 years. In my view, the same approach ought to be adopted in respect of Mr Smith’s other comorbidities. In particular, his right leg disability. The only comorbidity which differs is Mr Smith’s back pain which has been increased as a result of his asbestosis because he needs to sit often to relieve his breathlessness, and sitting increases his back pain. Theoretically the damages ought to be increased because of that comorbidity, however it seems to me the increase ought to be quite minimal as Mr Smith quite stoically deals with his back pain by simply consuming Panadol.

- [186] I do not consider the comparative cases in the second and third defendant’s submissions to be of much assistance. In my view, the correct approach is that which is set out succinctly by the Court of Appeal of the Supreme Court of Victoria by

⁵⁷ (1990) 169 CLR 635 at 643

Beech JA, Niall JA (as his Honour then was) and J Forrest AJA in *Lapetina v Elgee Park Pty Ltd* [2024] VSCA 39 at paragraphs [81]-[84] where their Honours said:

“[81] In *Planet Fisheries*, the High Court said in a ubiquitous passage:

It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases. We cannot think that the passage cited from *Chulcough v Holley* should be understood as expressing a contrary view. The principle to be followed in assessing damages is, in our opinion, not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other parties in other actions, even if some similarity between their situations may be supposed to be seen.

[82] The High Court made those observations in the context of rejecting a submission by the appellant in that case that the trial judge’s award of damages was excessive, by reference to a range of specific cases that the appellant argued established a norm or standard of the amount to be awarded for general damages in cases of injury of the kind suffered by the respondent.

[83] Other awards of damages do not provide set points of reference, nor do they operate as a precedent. At the same time, as the Court observed in *Planet Fisheries*, a trial judge will be aware of and may give weight to ‘current general ideas of fairness and moderation’. Further, it is not impermissible for a judge to be mindful of what was done in other cases when asked to consider whether a particular award of damages is excessive or inadequate. In the appellate context, it has been said that other cases are not entirely irrelevant, and that there remains some utility in looking generally at past cases as a guide by which an appellate court can assess the reasonableness of an award.

[84] In our view, the brief reference to other cases does not evidence error on the part of the judge. The judge did not treat the other kinds of cases referred to as establishing a norm or standard as to the appropriate amount to be awarded. Further, the assessment of general damages arrived at in the impugned paragraph has to be read in the context of the Reasons as a whole. The judge had the benefit of seeing the applicant give evidence and formed impressions as to the impact that the injury

had on her. Undoubtedly, he was influenced by a variety of matters, including the fact that she was able to travel and enjoy overseas holidays and spend time with family.”

[footnotes omitted]

- [187] Accordingly, while the comparative cases are not irrelevant, and I may be mindful of what was done on those other cases, it seems to me that the focus must be on the effect of asbestosis upon Mr Smith. Those other cases include the cases as set out in annexures A and B to Smith J’s decision in *Greenall v Amaca* [2026] QSC 16. I do not consider it is helpful to deeply analyse any of these or other cases and then attempt to grade the cases with pluses and minuses depending on the myriad factual differences which one would expect in dust disease cases. I would however respectfully agree with Smith J’s observation at [111] of *Greenall* that jury verdicts are helpful and with his Honour’s conclusion at [135] that interstate authorities are included in the class of cases into which an assessing judge may be mindful of. I also agree with Smith J’s observations in paragraphs [143] to [145] that the cases show that over the last 10 years awards of damages have increased in both in defamation and personal injury cases. The high mark in defamation cases being the \$850,000 awarded to the actor Geoffrey Rush for non-economic loss. I also accept as a principle the observation of Diplock LJ in *McCarey v Associated Newspapers Ltd (No 2)* where his Honour expressed the view that “The law is no more jealous today of a man’s reputation than of his life and limb.”
- [188] It seems to me as a matter of principle that it is a mistake to equate awards in asbestosis cases with awards in mesothelioma cases. Mesothelioma is a cancer that one ordinarily expects to cause a sufferer’s death within a relatively short period of time, whereas asbestosis is non-cancerous and expected to cause death but over a much longer period of time. Perhaps it is debatable as to which are the lesser of the two evils – that is a much shorter extremely painful death, or a much longer period of increasingly severe disability leading to a thoroughly miserable one year of high dependence before one month of extreme dependence and an extremely painful death.
- [189] In Mr Smith’s case, the medical evidence suggests that Mr Smith will suffer a great deal over a period of more than a decade and he currently has five more years to live with extreme disability. As is demonstrated by Smith J’s decision in *Greenall v Amaca* (supra) loss of expectation of life may be the subject of a separate head of

damage. Whilst a claim for loss of life expectancy was particularised as a separate head of damage in the original statement of claim, it is included in the further amended statement of claim as part of a general damages claim. Dr McKeon, whose opinion I accept, has opined that Mr Smith has lost five years, in that absent his asbestosis, his projected life expectancy was 89 years, whereas currently he is likely to die before the age of 84. It seems to me that a five year loss of expectation of life of itself were it claimed as a separate head of damage would justify an award of at least \$20,000.

[190] The plaintiff's pleaded claim for general damages in paragraph 16A of the second further amended statement of claim is for the sum of \$800,000. In my view, the appropriate award for general damages for Mr Smith in view of the many factors that I have discussed above is that he ought to be awarded \$780,000 for his pain, suffering, loss of amenities of life and a further \$20,000 for loss of life expectancy, to quantify a total award of \$800,000 for general damages.

[191] But for the WorkCover lump sum payments, I would allow interest upon \$200,000 of that sum, as although Mr Smith has suffered from the symptoms of breathlessness due to asbestosis for a period of over five years, he has coped reasonably well until relatively recently and the future indeed looks dire and that is when most of the pain, suffering and loss of amenities will occur.

[192] I make no allowance for interest as Mr Smith has received more than \$200,000 from Workcover in permanent impairment and additional lump sum compensation payments.

Domestic Assistance

[193] The factual basis for the assessment of *Griffiths v Kerkemeyer* damages proceeds upon the acceptance of the unchallenged evidence of Mr and Mrs Smith. As both Mr and Mrs Smith have serious health issues, a lot of the domestic chores and cleaning in the Smith household are simply not done. This is plain upon the photographs included in Ms Frame's report. Mrs Smith is somewhat embarrassed by this.

[194] On behalf of Mr Smith, it is submitted that I ought to follow the decision of Jackson J in *McQuitty v Midgley & Anor* [2016] QSC 36 and allow past care on the basis of Mr Smith's properly assessed need regardless of whether that need was met with

actual services. In *McQuitty*, Jackson J assessed the plaintiff's need at 6.5 hours per day but found the care provided in respect of past care was five or six hours per day. Nonetheless, Jackson J allowed past care on the basis of the higher need analysis of 6.5 hours per day, rather than the actual care provided at five or six hours per day.

[195] The focus, however, of Jackson J's judgment was upon the proper interpretation of s 59 of the *Civil Liability Act* 2003 (Qld) and its requirement for a plaintiff to prove that the domestic services that were necessary were in fact provided or were to be provided for a period of at least six hours per week and for a period of six months. I respectfully agree with Jackson J's analysis upon the proper interpretation of s 59. However, the interpretation of s 59 does not arise in the present case. As discussed above, the assessment of Mr Smith's damages must proceed on a pure common law basis.

[196] On appeal, the Court of Appeal did not interfere with Jackson J's assessment, but only on the Elford⁵⁸ basis, that is the principle that the Court of Appeal should not interfere with a damages assessment in respect of relatively minor quantum issues.

[197] It is correct, therefore, as senior counsel for Mr Smith submitted that the Court of Appeal in Queensland has not determined the issue of whether unmet needs can be compensated. In *McQuitty* at [27], Dalton J, with whom Gotterson and Morrison JJA said:

“ ... And in *CSR Ltd v Eddy* it does seem that the High Court interpreted the statements in *Van Gervan v Fenton* as meaning that compensation is limited to services in fact provided to a plaintiff, notwithstanding that there was an unfilled need for services before trial. These latter statements are *obiter*, so it seems to me that there is uncertainty about the law in this respect.”

[198] As I am pressed by counsel to decide the hitherto undecided question, it seems to me that reference should be made to paragraphs 20 and 21 of *CSR v Eddy* where Gleeson CJ, Gummow J and Heydon J said⁵⁹:

“[20] *The actual basis of Griffiths v Kerkemeyer*. However, the Griffiths v Kerkemeyer line of cases does not turn on a "post-accident" or an "accident-created need" in the abstract. In *Van Gervan v Fenton* Mason CJ, Toohey and McHugh JJ

⁵⁸ *Elford v FAI General Insurance Company Ltd* [1994] 1 Qd R 258.

⁵⁹ *CSR Ltd v Eddy* (2005) 226 CLR 1.

said: "the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her". That passage was concurred with by Brennan J and quoted with approval by Gaudron J. When later in their judgment Mason CJ, Toohey and McHugh JJ referred to "need", it was to "need" in that sense. Thus they immediately thereafter asserted the proposition that "it is the need for the services which gives the plaintiff the right to an award for damages". They reiterated it later when they spoke of "the services required by the injured person" and "the services which the plaintiff reasonably needs". Although Dawson J did not agree with the majority's approach in *Van Gervan v Fenton*, he accepted in *Kars v Kars* that the basis of *Griffiths v Kerkemeyer* was that a "plaintiff receives the value of services voluntarily provided by way of damages as compensation for the loss suffered by reason of the injuries which manifests itself in the form of a need for those services", and what was in issue was "the voluntary provision of services to a plaintiff". The majority in *Kars v Kars* (Toohey, McHugh, Gummow and Kirby JJ) described the principle as permitting recovery of damages "in respect of the cost to a family member of fulfilling the natural obligations to attend to the injuries and disabilities caused to the plaintiff by the tort." The later reference to "the injured plaintiff's ... needs" must be understood in the same sense. So must references to the plaintiff's needs in *Grincelis v House*.

- [21] In short, as the appellants submitted, *Griffiths v Kerkemeyer* damages are awarded to plaintiffs to compensate them for the cost (whether actually incurred or not) of services rendered to them because of their incapacity to render them to themselves, not to compensate them for the cost of services which because of their incapacity they cannot render to others. In each instance there may be a "need" for services, but it is a different kind of need, and the recipient of the services is different." [footnotes omitted]

[199] The focus of the plurality's judgments in paragraphs 20 and 21 was placed upon "the need of the plaintiff for those services provided for him or her" and that "a plaintiff receives the value of services voluntarily provided by way of damages as compensation for the loss suffered by reason of injuries which manifests itself in the form of a need."

[200] In paragraph 21, emphasis was placed upon compensation for the cost "of services rendered to them". The focus of the common law assessment for past *Griffiths v Kerkemeyer* damages is therefore to make a factual determination of the services in fact provided and then determine whether it can be said that part or all of those services arise from an accident-created need. It follows that if services have not been

provided, i.e. the concept of unmet needs, that they cannot be compensated in respect of past *Griffiths v Kerkemeyer* damages.

- [201] The situation is obviously different for future services as there is no first step in determining what in fact has been provided as it is all to be provided in the future. It seems to me on principal that in respect of future *Griffiths v Kerkemeyer* damages, the focus is solely upon the reasonable need of the particular plaintiff that has been created by the injury sustained in the accident. This was the approach adopted by the unanimous full court of the Supreme Court of South Australia in *Amaca Pty Ltd v Werfel*.
- [202] From soon after he was diagnosed with asbestosis in January 2021 until about mid-2024, Mr Smith's son-in-law mowed his lawn when he could manage it. Since mid-2024 until present Mr Smith pays Brian's Garden Care \$80 a fortnight for mowing. In the approximately two-and-a-half-year period, from January 2021 to mid-2024, it seems reasonable to allow mowing performed by Mr Smith's son-in-law at the commercial rate of \$80 per fortnight and similarly from mid-2024 until present, that at \$80 per fortnight.
- [203] Although that period is over 5.5 years, it seems reasonable, given Mr Smith's suggestion that his son-in-law was unable to mow as often as required, to allow five years loss at \$40 per week, a total of \$10,400 in respect of past mowing assistance.
- [204] Mr Smith's unchallenged evidence concerning the actual past care provided to him is the subject of paragraphs 31 to 39 of Exhibit 1, his quantum statement. In the main it was unchallenged. It did not need to be extensively challenged as it is modest and in any event, Mr Smith and Mrs Smith in their evidence in chief reduced or otherwise cast doubt upon the extent of domestic services claimed to be provided. An example of this relates to laundry which Mr Smith said in evidence in chief that he did his laundry simply by throwing it into the washing machine and then taking it out of the washing machine and throwing it into the dryer. I accept that is accurate in respect of past laundry, it seems to me in view of the progressive nature of his condition that even those simple tasks of laundry will be beyond him in the future. I will make no allowance in respect of past laundry.

- [205] The allowances that I consider ought to be made are two hours a week for assistance with grocery shopping; four and two-thirds hours per week for assistance in dinner preparation and two hours per week for cleaning assistance consisting of 10 minutes per day for making the bed and about an hour a week for vacuuming. As discussed below, I accept Mr Hoey's evidence that far more than eight and two-thirds hours per week was actually needed by Mr Smith, however, Mr Smith is unable to receive compensation for his unmet need for past domestic assistance. Whilst I accept Mrs Smith's evidence that she largely performs the driving now, even though Mr Smith has an ability to drive, I have not made any allowance in the past for driving assistance.
- [206] I accept Mr Hoey's evidence of the cost of house and yard work rate as being \$55.03 per hour. Although Mr Smith has been suffering from asbestosis since January 2021 and has received domestic services from about that time, it seems to me reasonable to allow the services for a slightly reduced period of about 5.5 years. An allowance of eight and two-thirds hours per week for 5.5 years at \$55 per hour quantifies past domestic assistance at \$136,326.
- [207] In addition to this is the \$10,400 mowing assistance to make a total for past domestic assistance of \$146,726. It seems to me, however, there ought to be some small discount in the vicinity of 10% applied to this quantification as the evidence in respect to domestic assistance is, as it often is in cases of this type, devoid of intricate specification. Indeed it is hard to plot averages across a period of time when the disease has progressed so significantly, particularly in the last two years. There is also the evidence that both Mr and Mrs Smith had been hospitalised for unspecified but short periods of time in which a care assessment would be, in the main, inappropriate. I therefore quantify past *Griffiths v Kerkemeyer* damages at \$130,000.
- [208] This ought to bear interest at 2% for 5.5 years, a further \$14,300.
- [209] With respect to future domestic assistance, there is contest between two experienced occupational therapists. Mr Hoey and Ms Frame both have over 28 years' experience as occupational therapists. Mr Hoey has delivered papers both domestically and internationally and was involved with the scientific committee of the World Federation of Occupational Therapy Congress from 2003 to 2006. Perhaps more importantly, Mr Hoey's practice includes providing therapy services to persons

suffering from asbestosis and other lung diseases. Both Mr Hoey and Ms Frame presented as independent and well-reasoned expert witnesses. In particular, Ms Frame fairly accepted that a more recent examination is more likely to produce more accurate results as to Mr Smith's current functional capacity⁶⁰. This is important because Ms Frame performed her home visit on 12 November 2024 and Mr Hoey examined Mr Smith at his home in Bucasia as recently as 7 August 2026. I conclude on this basis alone I ought to prefer Mr Hoey's evidence over Ms Frame's evidence.

- [210] Another important reason for the preference of Mr Hoey's opinion over Ms Frame's opinion is that Mr Hoey's opinion upon care needs is based upon the ACSM metabolic prediction equation using the metabolic equivalent task (MET) value, whereas Ms Frame has used the modified Barthel index. The modified Barthel index was initially designed for patients with Musculo skeletal disorders but has been more broadly adapted. The MET analysis specifically measures metabolic activity based on the six-minute walk test. It seems to me that is an important and appropriate testing regime when one is considering the effect of a lung disease such as asbestosis. This is appropriate because the significant decrease in the function of the lungs very directly impacts upon the patient's exercise capacity.
- [211] When Mr Hoey interviewed and examined Mr Smith on 7 August 2026, it was his observation that Mr Smith pushed himself to do things above his METs capacity. An example⁶¹ is that Mr Hoey observed Mr Smith get on and off the toilet, get in and out of the shower, get in and out of bed or walk down the hallway, which caused him to be so exhausted he could not speak and would stand with his hands on his hips. Mr Hoey explained how the asbestosis illness caused Mr Smith's needs to be unpredictable.
- [212] Mr Hoey explained⁶² how the six minute test establishes a MET value which is a reliable measure of desaturation of oxygen in the person tested. Mr Hoey explained that that direct testing revealed Mr Smith suffers a noteworthy pulmonary constriction. In addition to MET testing, Mr Hoey relied upon Dr McKeon's opinions concerning Mr Smith's ECOG status and KPS.

⁶⁰ T4-10, line 45.

⁶¹ T3-24.

⁶² T3-25.

- [213] At Paragraph 11 of his report of 18 June 2024, Mr Hoey explained that ECOG is the Eastern Cooperative Oncology Group performance status and that KPS is the Karnosky Performance Status with the KPS being used since 1949 and the ECOG scale being used since 1960.
- [214] Mr Hoey explained⁶³ that the ECOG stage three is the high dependency stage which is the mainstay of Mr Hoey's clinical practice. Mr Hoey's evidence is that people typically in ECOG stage three have a severe risk of falling, suffer from dyspnoea distress, where they feel like they're choking. Commonly, patients in ECOG level three have falls in the toilet. Mr Hoey explained that patients in ECOG three are bed-bound for 50% of the day, essentially unable to move. Mr Hoey explained how patients with severe pulmonary illness are in a completely different paradigm to aged care patients.
- [215] Mr Hoey gave a concrete example⁶⁴ of visiting one of his ECOG three patients the day before he gave evidence. Mr Hoey was required to visit his patient in hospital as he had had a fall the day before and then lay on his floor in his home in respiratory distress. The consequence was that that patient was likely to never leave hospital.
- [216] Mr Hoey explained that the consequences of not having active care are dire for patients in the ECOG three stage and emphasised that respiratory illnesses ought to be assessed differently from injuries of other types.
- [217] Mr Hoey explained that it is not simply the falls risk which is the difficulty with ECOG three, but the unpredictable nature of the pulmonary distress which may manifest itself in the patient feeling like they were choking. In Mr Hoey's experience, often those patients tend to stand up to try to breath and then they may fall. Mr Hoey gave the example of a patient who had respiratory distress and was unable to toilet themselves.
- [218] Mr Hoey took into account the acknowledged comorbidities suffered by Mr Smith, but emphasised that oxygen desaturation that Mr Smith was suffering during the MET tests was attributable to his pulmonary illness and not his comorbidities. Mr Hoey

⁶³ T3-26.

⁶⁴ T3-27.

explained the six-minute test⁶⁵ where the standard international benchmark was to instruct a person to walk at their own pace for six minutes whilst they were welcome to take rest breaks. What is being tested is the oxygen desaturation during the process. Mr Hoey explained⁶⁶ how the MET test was the “absolute benchmark of assessment across the world ... it’s been tested since the 60s and 80s ... by the American Thoracic Association and is part of and fundamental to the assessment that medical specialists will do as part of the AMA guides”.

[219] Mr Hoey explained⁶⁷ that in his usual practice on a weekly basis he received referrals from general practitioners and thoracic physicians to attend at a patient’s home and that the referral always includes the ECOG level and if the six-minute test is available, the results of that test. Mr Hoey then uses that information together with his own assessment at the patient’s home to develop an appropriate care strategy for the patient. Mr Hoey then explained⁶⁸ why the WORKHAB functional capacity assessment and JobFit system assessment utilised by Ms Frame was extremely helpful in assessing a patient’s ability to engage in any particular occupation but not helpful in terms of assessing respiratory distress.

[220] It seems to me therefore that whilst both Mr Hoey and Ms Frame were competent, independent and reasoned experts, Mr Hoey’s train of reasoning, particularly with respect to the applicability of the MET test regime and the very limited utility of the WORKHAB functional capacity assessment and JobFit systems assessment, render Mr Hoey’s opinion as to the likely required levels of care to be the opinion that I accept. Additionally, as discussed above, Mr Hoey’s assessment was more recent and that is important for someone with Mr Smith’s illness as his function has deteriorated over the last year.

[221] Accepting as I do Mr Hoey’s opinion, I would quantify future care as follows:

- (a) August 2026 to August 2030 – 4 years (5% discount factor 190) at \$1,970.15 a week (moderate dependence for 17 hours per week) = \$374,328.50

⁶⁵ T3-31.

⁶⁶ T3-31.

⁶⁷ T3-32.

⁶⁸ T3-33.

- (b) August 2030 to August 2031 – one year of high dependence at \$9,155.15 per week (multiplier 51) but deferred for 4 years (0.823) is \$384,269.11
- (c) One month in 2031 (4.25) at \$14,405.15 a week (complete dependence) deferred for five years (0.784) is \$47,997.69

[222] Total future care assessment is therefore \$806,595.57. I would round this down to \$750,000 as each of the stages are estimates.

Special Damages

[223] In respect of past special damages, paragraph 162 of Exhibit 34, the plaintiff's trial submissions quantify special damages at \$8,465.85. This is not disputed by the second and third defendants. On behalf of the first defendant, it is submitted that an award of \$5,000 ought to be made as there was limited evidence called beyond the plaintiff's quantum statement to prove special damages. Whilst the first defendant is correct in that regard, the plaintiff's evidence in his quantum statement was not subject to challenge. In the plaintiff's quantification at \$8,465.85, \$1,000 is allowed in respect of travel expenses and \$2,000 is claimed as a global claim on account of an estimated gap in medical expenses other than the gap in respect of Dr De Silva's expenses. It seems to me reasonable to reduce the plaintiff's special damages by \$1,000 as the \$3,000 sum is devoid of specific evidence such that in my view there ought to be some discount. Accordingly, I allow \$7,465.85 for special damages.

[224] Interest ought to be allowed on \$2,979.05 at 5% for 277 weeks from 21 April 2021 to present, a sum of \$793.

[225] The plaintiff's trial submissions (Exhibit 34 paragraphs 165 and 166) total Mr Smith's claim for future special damages at \$254,768.93. That consists of the bathroom renovation quote both occupational therapists support in the sum of \$30,311.97, together with the estimation of future expenditures as listed on pages 23-24 of Dr McKeon's report of 11 October 2023.

[226] On behalf the of first defendant, the submissions for future special damages is at \$50,000 based upon Ms Frame's analysis and a discount for pre-existing and co-morbid conditions. As I do not accept Ms Frame's opinion as to the likely course of Mr Smith's care needs, I do not accept that the award ought to be based on Ms Frame's opinion, nor do I accept that the pre-existing or co-morbid conditions

would cause any need for the future expenses which are, apart from the bathroom, wholly medical expenses contributable to Mr Smith's severe respiratory illness. Whilst the second and third defendants join in the submission for an award of \$50,000 for future special damages, there is no real analysis as to why that award is appropriate. Although I accept Dr McKeon's opinion, I note that Dr McKeon's opinion with respect to future medical expenses was based in his report on 11 October 2023 where Dr McKeon had opined a life expectancy of 10 years, whereas, given Mr Smith's deterioration and recent scans, Dr McKeon's current opinion is that Mr Smith has only a life expectancy of up to five years. Accordingly, Dr McKeon's original opinion as to the likely future costs needs to be recalculated to take account of this alteration.

[227] As to future medical needs, adopting Dr McKeon's opinion but making the allowance over a period of five years, then I would assess Mr Smith's future medical expenses to be as follows:

- (a) Expenses likely to be incurred every year \$3,140 or \$60 per week, five year discount factor 231, a sum of \$13,860.
- (b) Expenses likely to be incurred intermittently as described by Dr McKeon, approximately one half of the total claimed at \$67,155 is \$32,500.
- (c) Expenses in the last 12 months of life \$39,600 (deferred for four years 0.823) at 5% deferral rate is \$33,578.
- (d) Expenses in the last month of life \$42,900 (deferred for four years 0.823) is \$35,307.
- (e) Occupational therapy consultancy \$4,000.
- (f) Home aids \$1,165.
- (g) Equipment Hire – moderate dependency at \$135 per week for four years (190) \$25,650
- (h) Equipment hire – high dependency at \$435 per week for 1 year (51) but deferred for four years (0.823) \$18,258

[228] Future special damages is therefore \$194,720 being \$30,312 for the bathroom and the sum of the paragraph above.

[229] In summary I calculate Mr Smith's award as:

General damages	\$800,000.00
Interest on general damages	\$0
<i>Griffiths v Kerkemeyer</i> (past)	\$130,000.00
Interest on past GvK	\$14,300.00
<i>Griffiths v Kerkemeyer</i> (future)	\$750,000.00
Special Damages (past)	\$7,465.85
Interest on past special damages	\$793.00
Special Damages (future)	\$194,720.00
TOTAL	\$1,897,278.85

Contribution

[230] Section 7 of the Law Reform Act 1995 (Qld) provides:

“7 Amount of contribution and power of the court

In any proceedings for contribution under this division the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.”

[231] In *Podrebersek v Australian Iron and Steel Pty Ltd* (1995) 59 ALJR 492 at 494 paragraph 10, the High Court stated:

“The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42–49 and *Broadhurst v Millman* [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case...”

[232] In determining a tortfeasor's responsibility for the damage, Courts looks to the relative blameworthiness or culpability of each of the parties and also the relative

causal potency or causal contribution of the negligence of each party⁶⁹. In terms of relative culpability or blameworthiness, it is, as the High Court said, the whole of the conduct of each negligent party in relation to the circumstances of the accident which must be subject to comparative examination.

- [233] As to causal potency, accepting as I do the opinion of Mr Kottek as set out in exhibit 14, it may be observed that the threshold diagnostic criteria of sufficient exposure was likely reached at some undefinable point during the AC pipe exposure at Mackay Harbour. The expert evidence of Mr Kottek in this case does not lend itself to a conclusion which supports a diagnosis of a divisible disease⁷⁰. The medical evidence does not support a conclusion that each of the separate exposures separately increases Mr Smith's asbestosis.
- [234] In terms of both Dr McKeon's and Dr Jones' opinions, they are based upon a history of exposure over the period of Mr Smith's employment with JR Wyllie & Sons, Racecourse Mill and the Mackay Harbour. Mr Kottek's opinion with respect to causal potency (exhibit 14) is that 0.9% is attributable to the Super Six exposure with JR Wyllie & Sons, 26% is attributable to the exposure at Racecourse Mill and the remaining 73.1% is attributable to the work performed by Mr Smith at Mackay Port.
- [235] As to relative culpability or blameworthiness, the second and third defendants submit for apportionment of 80/20 in favour of the second and third defendants with respect to Mr Smith's employment with JR Wyllie & Sons and Racecourse Mill but a 60/40 apportionment in favour of the second and third defendants for exposure at Mackay Port. In the second and third defendant's submission, the increasing knowledge in the employers generally and at the port specifically due to an effluxion of time is said to affix the port with a greater degree of culpability than the prior employers.
- [236] As discussed above in *Podrebersek v Australian Iron and Steel Pty Ltd* (supra), in determining culpability of tortfeasors, the question is the degree of departure from the standard of care of the reasonable person. As discussed above, Barwick CJ has described the manufacturer's duty as a high duty of care and the plurality of the High

⁶⁹ Per Jackson J in *Reddock v ST and TP Pty Ltd* [2022] QSC 293 at 126; *Macquarie Pathology Services Pty Ltd v Sullivan* (NSW Court of Appeal Unreported) 28 March 1995 per Clarke JA; *Amaca Pty Ltd v Wallaby Grip Ltd & Ors*; *Re Eton* (2006) NSW DDT 13 at [9] per O'Meally as applied in *Amaca Pty Ltd v The University of Queensland (Re: John William Starr)* (2020) NSW DDT 1.

⁷⁰ *Seltsam Pty Ltd v Ghleb* [2005] NSWCA 208.

Court in *Brastinia* has described the employer's duty as "not a low one". This perhaps is nothing more than a brief expression of the expectation of the community that employers and manufacturers take a great deal of care to ensure that their work or products do not harm workers or consumers.

[237] The defendants referred to several apportionment cases. In *BI (Contracting) Pty Ltd v Myer Emporium Ltd* [2005] NSWCA 305, the plaintiff's employer, Myer, was apportioned 10% of liability and 90% of liability was apportioned to BI (Contracting) Pty Ltd. The plaintiff, Mr Jantzen, was an apprentice carpenter employed by Myer in Adelaide at a time that the Myer store was being rebuilt and renovated. BI (Contracting) Pty Ltd was a specialist contractor who sprayed asbestos insulation into steel structured beams that formed part of the buildings.

[238] The principal period when the injury occurred was January 1960 to May 1965 and Myer took no steps to warn or protect Mr Jantzen or other of its employees who were working in the vicinity of the asbestos spray. Walker J in the Dust Diseases Tribunal had adopted the description of the culpability of BI (Contracting) as its conduct being "callous and indifferent to the rights of others" and "simply ignored questions of safety when promoting its commercial interests".

[239] Walker J balanced that against the high duty of care placed upon Myer as employer and concluded that Myer did nothing to discharge its duty to protect its workers such as Mr Jantzen from asbestos exposure. Importantly, BI (Contracting) was a specialist asbestos contractor and Myer was a department store only peripherally concerned with the building industry as a consumer of its services and as a retailer of hardware products. Myer was accepted to be a huge employer in Adelaide, second in size only to General Motors Holden and a large employer of labour Australia-wide. Walker J held in respect of the size of Myer that "A corporation of such size and power had the resources to research such concerns and take precautions to protect workers, but took no interest in the matter."

[240] In balancing all of these features, Walker J apportioned liability 10% to Myer and 90% to BI (Contracting). BI (Contracting)'s appeal against the apportionment was

unanimously dismissed by the New South Wales Court of Appeal⁷¹ by Mason P, Handley JA and Windeyer J.

[241] In *BI (Contracting) Pty Ltd v the Public Trustee of South Australia & Anor* [2005] NSWCA 306, the New South Wales Court of Appeal again unanimously dismissed an appeal against an apportionment in liability of 25% to the employer and 75% to the asbestos supplier. The plaintiff, the late Alfred Richardson, was employed as a painter in 1974 for a period of 12 months in which his task was to remove and clean panels that formed the false ceiling beneath the cement slab that was the first floor of the building. That area had been sprayed by BI (Contracting) and so when Mr Richardson performed his work, he was covered in asbestos-laden dust and in circumstances where he was not provided with any protective equipment.

[242] The primary judge, Tucker J, substantially relied upon the stated knowledge of the defendants in apportioning liability 75% against BI and 25% against the employer. The Court of Appeal at [56] cited *Pennington v Norris* (1956) 96 CLR 10 at 16 in which the High Court said:

“... by culpability we do not mean moral blameworthiness but degree of departure of the standard of care of the reasonable man...”

[243] The court approved as a factor in the culpability calculus the difference between actual knowledge and knowledge that a tortfeasor ought to have known at [60] as follows⁷²:

“These appeals were heard on 10 August 2005. On the following day the Court, differently constituted, heard two further appeals by BI (Contracting) Pty Ltd. A central issue in those appeals was the one currently under consideration. At the start of the hearing of those appeals the Court drew the attention of the parties to *Higgins v William Inglis & Son Pty Ltd* [1978] 1 NSWLR 649; *Downs v Chappell* [1997] 1 WLR 426 at 445 and *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie and Co Pty Ltd* (2001) 53 NSWLR 626 at 647[136]-[137], 648 [144]. In light of those authorities, Mr Fernon SC for BI withdrew the submission that it was irrelevant to give weight to the fact that a defendant has actual knowledge of the risk attending its conduct when considering apportionment vis-à-vis another defendant whose negligence stems from unreasonable failure to respond to what it ought to have known. That concession was properly made. There is no merit in the second basis of attack on the apportionment.”

⁷¹ [2005] NSWCA 305.

⁷² *BI (Contracting) Pty Ltd v Public Trustee (SA)* [2005] NSWCA 306 at [60].

[244] In *Zwiersen v Field & Hall Pty Ltd* [2016] VSC 16, Rush J apportioned contribution 20% against the employer and 80% against asbestos producers. Mr Zwiersen was an electrician employed with Field & Hall Pty Ltd from 1964 to 1971 and again from 1976 to 1981, and with AEC Contracting (Vic) Pty Ltd from 1972 to 1976.

[245] As an electrician Mr Zwiersen was working in boiler rooms and service tunnels with asbestos lagging. Mr Zwiersen described that there was dust “floating around like snow”. In coming to his conclusion of an 80/20 apportionment against the asbestos producers, Rush J said:

“[40] I consider it appropriate to adopt a common sense approach, weighing up obligations of the employer and the employee relationship including what I perceive to be because of the absence of evidence an element of inertia on the part of the first defendant in failing to make any inquiry as to the conditions it directed the plaintiff to work in, against the resources of the large companies involved in large scale production of asbestos insulation who were the repositories of knowledge concerning the dangers of asbestos and could have, by warning, alerted the employer to the problem.

[41] I consider the appropriate apportionment against the first defendant is 20%. In reaching this percentage figure, I have taken into account evidence of the plaintiff of being exposed to asbestos dust in making up and installing telephone switchboards primarily in the first period of employment with the first defendant. That exposure in the context of the overall heavy exposure to the Hardie-BI product in the first period of employment is close to insignificant.

[42] I see no basis to distinguish between the culpability and relevant importance of the acts of the third and fourth defendant. They were in partnership at the time, both were large Australian companies with very significant resources, including the ability to research. The knowledge of one is to be considered the knowledge of the other. I consider it appropriate to apportion 40% to the third defendant and 40% to the fourth defendant.”

[246] On behalf of Amaca, reference is made to *AB & P Constructions Pty Ltd v Amaca; Re: Lorizio* [2006] NSW DDT 19 in which Duck J at paragraph 47 after having made reference to the 90/10 apportionment in *BI (Contracting) v Myer Emporium* said:

“That is a 90/10 division weighted against the distributor having knowledge. It is very much a matter of impression. I have identified the factors that I think are relevant. I think the burden of the award should be borne equally between the supplier on the one hand and the employer on the other, 50/50.”

- [247] The two factors identified by Duck J as significant in terms of Amaca's liability was the actual knowledge of Amaca of the dangers posed by asbestos, continuation of the marketing of the product before asbestos was taken out of it with ineffective and inadequate warnings. As to the employee's responsibility, Duck J at [46] referred to not only the young age of the plaintiff at 16 when commencing his work, but also the steps taken by the employer. The evidence showed that the employee's representative, Mr Restuccia saw the warning signs placed upon Amaca products but paid no attention to them. Mr Restuccia admitted he was unaware of any government legislation attempting to minimise the risk of exposure to asbestos and when eventually becoming aware of the risks of asbestos, did nothing to provide masks or provide warnings or provide any advice to his employees.
- [248] In determining the degree of departure from a standard of care of a reasonable man as applicable to each tortfeasor, close regard must be had to the evidence in the case, and not to contribution apportionments made in other cases on other evidence.
- [249] In the present case, none of the employer entities were particularly large employers. None had an Australia-wide presence such as Myer. There is no evidence that JR Wyllie & Sons Pty Ltd or Racecourse Mill had any knowledge at any stage of the dangers of the use of asbestos products. With respect to the second defendant, North Queensland Bulk Ports, it had actual knowledge of the dangers of asbestos at least since 1992 when it provided a house demolition asbestos course to its employees. Although Mr Smith did undertake the theory part of the course, he did not undertake the practical part of the course which was the majority of the course because he was not provided with personal protective equipment that Mr McCarthy was.
- [250] As can be seen in exhibit 17, the asbestos rule came into effect on 11 July 1971. It was made under the *Factories and Shops Act* 1960 (Qld). That has been analysed in *Caltex Refineries (Qld) Pty Ltd v Stavar*⁷³. It is an agreed fact that the asbestos rule applies to Mr Smith's work after 11 July 1971, however, it seems to me it cannot be shown that North Queensland Bulk Ports Corp had actual knowledge prior to 1992. On the acceptance of Mr Kottek's evidence, North Queensland Bulk Ports ought to have known of the risks contained in cutting asbestos cement pipes since 11 July 1971.

⁷³

[2009] NSWCA 258.

- [251] In paragraph 8A of the amended defence of the first defendant, Amaca pleads that from 1997 it distributed brochures relating to amended work practices for AC pipes with a warning, and it also alleges from 1978, warning labels were affixed to AC pipes.
- [252] Amaca, however, did not prove that it had undertaken any of those steps. There was no evidence that warnings were brought to the plaintiff's attention, nor to North Queensland Bulk Ports' attention, being the only relevant employer post-1977. According to exhibit 17, since 1957, Amaca had been actually aware of the danger of suffering from asbestosis to workers in the "asbestos gang". The in-house letter of 21 February 1962 notes that since 1954, twenty people may have a recognisable degree of asbestosis. There are then multiple Amaca documents showing the company had actual knowledge of the risks of asbestosis well prior to Mr Smith commencing work at the Racecourse Mill in 1969. I would characterise Amaca's departure from the standard of reasonable person as that adopted by Walker J in *BI (Contracting) v Myer* as referred to in paragraph [17] of the Court of Appeal's decision as "callous and indifferent to the rights of others" and that it "simply ignored questions of safety when promoting its commercial interests".
- [253] Of the many factors identified by the above cases, it seems to me that the degree of departure from the standard of care of the reasonable person in terms of Amaca's negligence is very high as its actions could properly be characterised as "callous and indifferent to the rights of others". I would gauge the employer entities' departure from the standard of care of the reasonable man as a serious departure, however, it falls far short of the departure of Amaca. I conclude that Amaca had actual knowledge of the danger of its product, whereas the employing entities did not until 1992 when the North Queensland Bulk Ports had actual knowledge of the dangers of asbestos. Given Mr Kottek's evidence, I accept that the employing entities ought to have had knowledge of the dangers of asbestos well prior to their employment of Mr Smith. JR Wyllie & Sons as plumbing contractors had a specialty with respect to the building industry, but the other two employers did not, rather they were consumers of the products of the building industry. None of the employers could be said to be large employers.

[254] As to the relative causal potency or causal contribution of the negligence of each party, accepting as I do Mr Kottek's opinion, the causal potency of the breach by JR Wyllie & Sons has been shown to have only a small causal contribution.

[255] In balancing the factors that I have identified, it seems to me that Amaca ought to bear the lion's share of the apportionment. I apportion liability 75% to Amaca and 25% to the employer entities, being the second and third defendant. As between the second and third defendants, Mr Smith suffered 0.4 f/ml.yr exposure while working for JR Wyllie & Sons and a further 11.7 f/ml.yr whilst working at Racecourse Mill which is a total of 12.1 f/ml.yr. The total AC pipe exposure at Mackay Port was 32.8 f/ml.yr, which accords with about 75% of the total exposure occurring at the Mackay Port. Accordingly the second defendant ought to bear around three quarters of the 25% apportioned to the employing entities and so the second defendant, North Queensland Bulk ports ought to bear 18.75% and the third defendant WorkCover Queensland as insurer of JR Wyllie & Sons Pty Ltd and at the Racecourse Mill 6.25%.

Orders

[256] I will hear from the parties as to the form of orders for judgment and costs.