SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

AMACA PTY LTD v WERFEL

[2020] SASCFC 125

Judgment of The Full Court
(The Honourable Chief Justice Kourakis, The Honourable Justice Nicholson and The Honourable Justice Livesey)

21 December 2020

TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - DUTY OF CARE - REASONABLE FORESEEABILITY OF DAMAGE - PARTICULAR CASES - DANGEROUS THINGS OR SUBSTANCES

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - FUNCTIONS OF APPELLATE COURT - FINDINGS ON ISSUE OF NEGLIGENCE - GENERALLY

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - RIGHT OF APPEAL - WHEN APPEAL LIES - ERROR OF LAW - PARTICULAR CASES INVOLVING ERROR OF LAW - FAILURE TO GIVE REASONS FOR DECISION - ADEQUACY OF REASONS

The respondent plaintiff was exposed to asbestos from products manufactured by the appellant, James Hardie, whilst employed by fencing contractors retained by the South Australian Housing Trust between 1994 and 1997. The plaintiff was again exposed to asbestos when undertaking domestic renovations in 2000 and 2001 on his home at Pooraka, and again in 2004 when working on his home at Parafield Gardens. These products had been manufactured by James Hardie, and sold to and installed by others, many years before the plaintiff worked on them.

The plaintiff was diagnosed with a rare form of mesothelioma in August 2017, when he was just 40 years old. The plaintiff's mesothelioma was, for the purposes of the law of negligence, caused by his exposure to products manufactured by James Hardie. The

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On Appeal from SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL (HER HONOUR DEPUTY PRESIDENT JUDGE FARRELL) [2019] SAET 159

Appellant: AMACA PTY LTD Counsel: MR G WATSON SC WITH MR M J HOOPER AND MR T BESANKO - Solicitor: HOLMAN WEBB LAWYERS
Respondent: MATHEW HARRISON WERFEL Counsel: MR P SEMMLER QC WITH MR S TZOUGANATOS AND MS A HOFFMAN - Solicitor: TURNER FREEMAN

Hearing Date/s: 06/02/2020 to 07/02/2020, 10/02/2020

File No/s: SCCIV-19-1036

plaintiff is now 44 years old and, based on evidence accepted by the trial Judge, has a life expectancy of a little more than two years, rather than the statistical average of in excess of 40 years.

At first instance, the trial Judge found James Hardie negligent and awarded damages of just over $3 million in the plaintiff's favour. James Hardie appealed to this Court, complaining that the trial Judge's reasons were inadequate and that, in any event, the trial Judge should not have found that it owed the plaintiff a relevant duty of care, that it breached that duty of care, and nor that any breach caused the plaintiff's injury. James Hardie also complained that the assessment of damages was affected by error or manifestly excessive, particularly the assessment of $400,000 for non-economic loss, the assessment of Griffiths v Kerkemeyer damages, the assessment of Sullivan v Gordon damages, and the assessment of exemplary damages.

Held by the Court: allowing the appeal, but only to the extent of reducing the total damages award to $2,228,478.

Adequacy of Reasons

1. The provision of adequate reasons is an essential aspect of the judicial function and the failure to provide them is inimical to the open and transparent resolution of litigation.

2. It is most unwise to engage in wholesale copying of submissions without attribution. Whether the judicial function of furnishing adequate reasons has been satisfied is not determined by a mechanical assessment of what has, or has not, been copied, but by whether the reasons nevertheless perform their essential function.

3. The inadequacy of reasons will not vitiate the decision unless the inadequacy relates to material aspects of the case, being issues on which the parties were divided, the resolution of which affected the outcome.

4. The trial Judge made no attempt to engage with the case made by James Hardie on a number of issues in contest on appeal and, in numerous respects, the reasons were inadequate.

Duty of Care

5. The combined circumstances required the imposition of a duty on James Hardie to take care to avoid injury to persons who might occasionally remodel, repair or remove its asbestos-cement products.

6. At least by 1980 James Hardie ought to have known that there was a material risk of contracting mesothelioma from the occasional exposure to asbestos dust which would arise from tradespeople and householders remodelling, repairing or removing asbestos-cement products in residential buildings.

7. By 1990 there was strong evidence that there was a material risk of contracting mesothelioma from even occasional exposure to asbestos dust when working with asbestos-cement products of which James Hardie, acting reasonably, would have known, which, together with other salient circumstances placed James Hardie under a duty of care.

8. Defined, as the duty must be, prospectively, the class to whom the duty to take reasonable care is owed is those existing or future occupiers of homes containing asbestos-cement building products who may come to remove, remodel or repair those products, and the tradespersons they might engage to do so.

Causation

9. The plaintiff would have become aware of the risk that exposure to dust from asbestos-cement products might cause mesothelioma from at least the time he worked for a fencing contractor if James Hardie had more actively and strongly warned of the danger from 1990.

10. The plaintiff would have acted on those warnings and he would not have contracted mesothelioma. The plaintiff's employment as a workplace safety representative strongly supports the inference that he would have taken recommended precautions.

Damages

Pain and suffering and loss of amenities

11. When determining an award of damages for pain and suffering and loss of amenities interstate authorities are not irrelevant, but primary emphasis must be given to awards made in this State. The trial Judge erred in giving primary emphasis to an award made in the New South Wales Dust Diseases Tribunal.

12. Differences between damages awards for pain and suffering in South Australia and interstate must be addressed incrementally, with the benefit of whatever submissions and materials the parties and their representatives choose to put before this Court.

13. Where a plaintiff knows that life expectancy has been curtailed, the consequential anguish and pain must be reflected in the award made for general damages for pain and suffering and the loss of the amenities of life.

14. The award of $400,000 made by the primary judge for general damages and loss of amenities was affected by error and was manifestly excessive. It must be set aside. The appropriate award is $280,000, with interest on past loss at a rate of 4 per cent.

Loss of expectation of life

15. The award compensates for something which is incalculable, being the “objective” aspects of life having been shortened. There is no authority in this Court or the High Court which supports the approach taken by the trial Judge of awarding damages for loss of expectation of life at a rate of $1,000 for each of the “lost years”.

16. The sum of $40,000 awarded by the trial Judge was made on an incorrect basis and represents a great deal more than is usually awarded for this head of damage in this State. The award should be set aside. On reassessment, the award should be a conventional sum of $20,000.

Griffiths v Kerkemeyer damages

17. By simply repeating the plaintiff’s submissions, based on contested expert evidence, the Judge did not engage with the issues presented to her for decision. In addition, no attempt was made to reconcile the differences between the evidence led from the plaintiff and his wife and the assumptions made in the expert evidence of the occupational therapist.

18. In addition, the Judge did not make adequate findings addressing agency and award rates. On the evidence, the average award rate of $20 per hour was appropriate given the plaintiff’s capacity to retain carers, and the unskilled nature of the services, at least until after remission and the recurrence of illness until the end of life, when professional care at agency rates was appropriate.

19. Damages awarded under the Griffiths v Kerkemeyer principle are intended to compensate a plaintiff for the care and services gratuitously provided to the plaintiff personally, whereas damages awarded under the Sullivan v Gordon extension to the Griffiths v Kerkemeyer principle, at least as reflected in s 9(3) of the Dust Diseases Act

2005 (SA), are intended to compensate for a plaintiff's impaired capacity to provide gratuitous domestic services to members of the plaintiff's household. This distinction was not reflected in the evidence or the findings. There was a failure to provide adequate reasons.

20. The Judge erred in awarding Griffith v Kerkemeyer damages for unspecified services provided to the plaintiff by his wife in connection with all of the plaintiff's hospitalisation and treatment. However, in accordance with Wilson v McLeay, some moderate allowance would be made in addition to the cost of travel.

21. Accordingly, the award must be set aside and the damages reassessed. On reassessment, the award for gratuitous services provided to the plaintiff in the first two years after diagnosis will be $25,000 in lieu of the trial Judge's allowance of $92,413.05, plus interest on past loss at a commercial rate of 6.5 per cent.

22. The award for the future gratuitous services to be provided to the plaintiff in the three years until likely death is $125,000 in lieu of the trial Judge's allowance of $187,862.

Sullivan v Gordon damages

23. The occupational therapist's calculations were based on her assessment of what services could or should have been provided to the household rather than on the evidence of the plaintiff and his wife about the domestic services the plaintiff in fact provided to his family before illness and during remission.

24. In addition, some modest reduction needed to be made for the services which the plaintiff required personally, as well as the likely reduction in services provided by the plaintiff to his children as they matured.

25. The Sullivan v Gordon assessment was erroneous and must be set aside. On reassessment, for the five year period from diagnosis until the plaintiff's assumed date of death the award will be $70,000, plus interest on past loss at a rate of 6.5 per cent. The award for the services that the plaintiff would have provided during "the lost years" will be $175,000. The award will be $245,000 in lieu of the trial Judge's allowance which exceeded $606,000.

Exemplary damages

26. The finding by the trial Judge that James Hardie had "the requisite knowledge" is consistent with a finding of imputed knowledge, not actual knowledge, sufficient to justify an award of exemplary damages pursuant to s 9(2) of the Dust Diseases Act 2005 (SA), but not at common law. That finding is indicative of inadequate reasoning.

27. It is inappropriate to use the exemplary damages award of $250,000 made in Amaca v Latz as a template for the making of an award in this case as the circumstances are different and the plaintiff is in a different class of claimants.

28. The award of exemplary damages should be set aside and the damages reassessed.

29. Where the criteria under s 9(2) are satisfied, an award should usually be made. An award made under s 9(2) will be characterised by moderation. It is a separate and additional question whether the common law criteria for making an award of exemplary damages are satisfied. No findings were made which supported an award of exemplary damages at common law having regard to the negligence proved in this case.

30. Where the outer limits of the appellant's potential liability are not known to the Court, it is not possible to know whether this and other awards yet to be made against the appellant will be mitigated by the award made in Amaca v Latz.

31. In the circumstances of this case, it is appropriate to award $35,000 for exemplary damages pursuant to s 9(2) of the Dust Diseases Act 2005 (SA).

Dust Diseases Act 2005 (SA) s 9(2), s 9(3), s 8(2); *Civil Liability Act 1936* (SA) s 22, s 23, s 58, s 58A; *Competition and Consumer Act 2010* (Cth) Sch 2; *Lord Campbell's Act* (UK); *Trade Practices Act 1974* (Cth); *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth); *Trade Practices Revision Act 1986* (Cth) Pt 5 Div 1A, s 65B, s 65F, s 65J, referred to.

Anderson v Corporation of the City of Enfield (1984) ASC 55-302; *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109; *Amaca Pty Ltd v Latz* (2017) 129 SASR 61; *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649; *Benham v Gambling* [1941] AC 157; *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329; *Clark v Chandler* (1973) 5 SASR 416; *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] 2 SCR 357; *Electro Optic Systems Pty Ltd v State of New South Wales* (2014) 10 ACTLR 1; *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303; *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 187 CLR 354; *Latz v Amaca Pty Ltd* [2017] SADC 56; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22; *Miller v Jennings* (1954) 92 CLR 190; *Nguyen v Nguyen* (1990) 169 CLR 245; *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118; *Sharman v Evans* (1977) 138 CLR 563; *Skelton v Collins* (1966) 115 CLR 94; *Sullivan v Gordon* (1999) 47 NSWLR 319; *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298; *Teubner v Humble* (1963) 108 CLR 491; *Thompson v Johnson & Johnson Pty Ltd* (1989) ATR 80-278; *Van Gervan v Fenton* (1992) 175 CLR 327; *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560; *Wilson v McLeay* (1961) 106 CLR 523; *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255, discussed.

Beck v Farrelly (1975) 13 SASR 17; *BHP Billiton Ltd v Parker* [2012] SASCFC 73; *Burton v Grocke* [2014] SADC 195; *Diamond v Simpson (No 1)* (2003) Aust Torts Reports 81-695; *Dunning v BHP Billiton Ltd* [2014] NSWDDT 3; *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; *Flint v Lovell* [1935] 1 KB 354 (CA); *Fox v Percy* (2003) 214 CLR 118; *Geyer v Resi Corporation* [2013] SADC 122; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *H West & Son Ltd v Shepherd* [1964] AC 326; *Hannell v Amaca Pty Ltd* (2006) WASC 310; *Hirsch v Bennett* [1969] SASR 493; *Hospital Contribution Fund of Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 483; *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* [1986] ATPR [40-654]; *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475; *John Pfeiffer Pty Ltd v Canny* (1981) 55 ALJR 683; *Lamb v Cotogno* (1987) 164 CLR 1; *Lee v Lee* (2019) 266 CLR 129; *Lowes v Amaca Pty Ltd* [2011] WASC 287; *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] ATPR [41-971]; *Nicholson v Nicholson* (1994) 35 NSWLR 308; *Packer v Cameron* (1989) 54 SASR 246; *Parkin v Amaca Pty Ltd* [2020] WASC 306; *Rose v Ford* [1937] AC 826; *South Australian Housing Trust v Development Assessment Commission* (1994) 63 SASR 35; *Suosaari v Steinhardt* [1989] 2 Qd R 477; *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88; *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447; *Wise v Kaye* [1962] 1 QB 638; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, considered.

AMACA PTY LTD v WERFEL
[2020] SASCFC 125

Full Court: Kourakis CJ, Nicholson and Livesey JJ

THE COURT.

Introduction

1 The plaintiff, Mr Mathew Werfel (**Mr Werfel**), was born on 6 October 1976 and is presently 44 years old. He was diagnosed with a rare form of mesothelioma, being mesothelioma of the tunica vaginalis testis, in August 2017.[1]

2 Mr Werfel underwent radiotherapy, chemotherapy and three surgeries, including the removal of his right testicle. After diagnosis in August 2017, and a difficult first 12 months, he was in remission by the time of trial and had returned to full time work (albeit on more limited, sedentary duties) as the office manager of a Federal politician. Mr Werfel was also attending the gym a few times each week and had resumed some home duties. Nonetheless, he remained tired, lethargic and anxious about his future. Based on medical evidence accepted by the Judge, Mr Werfel has a life expectancy of less than two years until August 2022, rather than the statistical average of in excess of 40 years.

3 It is not disputed that Mr Werfel was exposed to asbestos fibres liberated from asbestos cement in products manufactured by the appellant, Amaca Pty Ltd, which was formerly known as James Hardie Proprietary Limited and as James Hardie & Coy Pty Ltd, (**James Hardie**). It is not disputed that Mr Werfel's mesothelioma was, for the purposes of the law of negligence, caused by that exposure.

4 The exposure to asbestos from James Hardie products occurred when Mr Werfel worked on asbestos fencing in 1994 and 1997 whilst employed by fencing contractors retained by the South Australian Housing Trust (**SAHT**),[2] and again when Mr Werfel undertook domestic renovations in 2000 and 2001 on his home at Pooraka (**the Pooraka house**). Mr Werfel was again exposed in 2004 when working on his home at Parafield Gardens (**the Parafield Gardens house**).[3] These products had been manufactured by James Hardie, and sold to, and installed by, others many years before Mr Werfel worked on them.

5 Because Mr Werfel's life expectancy is short, his trial against James Hardie was brought on urgently, and heard between 3 April and 1 July 2019.

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1 Sometimes referred to as "MTVT".

2 Amaca joined the Housing Trust as a third party, seeking contribution, but failed at trial and did not press the claim on appeal.

3 See the reasons of the Judge, *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [18]-[52].

On 6 August 2019, the Judge found James Hardie negligent and awarded damages of just over $3 million.

6 James Hardie complains that the Judge's reasons are inadequate and that, in any event, she should not have found that it owed Mr Werfel "a relevant duty of care",[4] that it breached "a relevant duty of care",[5] or that any breach caused Mr Werfel's injury.[6] In addition, James Hardie complains that the assessment of damages was affected by error and/or manifestly excessive, particularly the assessment of $400,000 for non-economic loss, the assessment of *Griffiths v Kerkemeyer* damages,[7] the assessment of *Sullivan v Gordon* damages under s 9(3) of the *Dust Diseases Act* 2005 (SA) (**Dust Diseases Act**)[8] and the assessment of exemplary damages under s 9(2) of the *Dust Diseases Act*.

7 These reasons address the following matters:

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4 Appeal ground 3.1.
5 Appeal ground 3.2.
6 Appeal ground 3.3.
7 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.
8 *Sullivan v Gordon* (1999) 47 NSWLR 319.

Adequacy of reasons

8 James Hardie submitted that well over two-thirds of the reasons of the Judge were, in fact, written by Mr Werfel's legal team. That is, 71 of 91 pages, 242 of 359 paragraphs and 19,854 of 29,929 words in the reasons came *verbatim*, without attribution or analysis, from Mr Werfel's written submissions. It was submitted that, as a result, the Judge did not make findings on contested issues and it could not otherwise be inferred that she had done so. As a consequence of this "copying", James Hardie submitted that the decision was "vitiated".[9]

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[9] *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2002) 6 VR 1, [104]-[105], [163]-[165], [172] where the recording of "only one side of the judicial equation" was said to "vitiate" adverse credit findings.

9 James Hardie also emphasised that the Judge had refused the parties the opportunity to put their final addresses other than in writing. When asked about the consequence of that complaint on this appeal, James Hardie then accepted that it had acquiesced to this course at trial. No separate complaint was thereafter made about the inability to put oral submissions to the trial court.

10 Mr Werfel responded to the criticisms of the reasons by contending that, whilst the reasons were "not ideal", the matters about which James Hardie complained were, either, not in issue, or otherwise not material to the decision made. Without gainsaying the submission of James Hardie about the extent of the copying, Mr Werfel highlighted that the Judge had on occasion made minor corrections to the written submissions made by Mr Werfel, and submitted that it could be inferred that she had done so by reference to her own reading of the documents.

11 Mr Werfel relied on the decision in *Whisprun Pty Ltd v Dixon*, in which Gleeson CJ, McHugh and Gummow JJ explained that a Judge need not address every argument:[10]

> A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of Judges would soon become longer than they already are if a judge's failure to mention such facts and arguments would be evidence that he or she had not properly considered the losing party's case.

12 Mr Werfel also referred to a number of cases where complaints about copying had been rejected. In some, the issue on judicial review was whether the decision-maker had constructively failed to exercise jurisdiction,[11] whilst in others, the fact of copying was not in itself regarded as decisive.[12] For example, in *James v Surf Road Nominees Pty Ltd*, the New South Wales Court of Appeal held that copying may be acceptable:[13]

> Adoption of one party's submissions by a judge, and so acknowledged, is one method of providing adequate reasons. It may not be the choice of every judge but it is impossible to say that it necessarily or in this case falls short of the judicial duty to provide reasons.

13 Generally, cases in this last-mentioned group emphasise that the copying of one party's submissions should be "acknowledged". That was not done in this case. In the Canadian case of *Cojocaru v British Columbia Women's Hospital and Health Care* (***Cojocaru***), McLachlin CJ, speaking for the Supreme Court of

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10 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, [62]-[63].

11 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, [91]. In *Juneja v Tax Practitioners Board* (2017) 72 AAR 407, [91] Besanko J said, "many of the factual matters stated by the Tribunal were either expressly not in dispute or were not reasonably capable of being disputed".

12 *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475, [168] (Beazley, Tobias and McColl JJA).

13 *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475, [168].

Canada when upholding reasons that entailed very substantial copying, explained:[14]

> In a case such as this, the essence of the complaint is not that the reasons are functionally insufficient — the parties agree that on their face, the reasons explain what was decided and provide a basis for appellate review — but rather that the judge's wholesale incorporation of the material of others shows that he did not put his mind to the issues and decide them impartially. It is a complaint not about sufficiency, but about process, … whether the presumption of judicial impartiality has been rebutted.
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> …
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> Approached from this perspective, a number of the criticisms advanced against copying fall by the wayside. One such criticism, made by the majority of the Court of Appeal in this case, is the judge's failure to attribute the incorporated material to the original author. This criticism is connected to the idea that the reasons should be the "original" product of the judge's mind, and that to the extent they are not, the judge should ac knowledge her sources. Failure to attribute sources and lack of originality, without more, do not assist in answering the ultimate question — whether a reasonable person would conclude from the copying that the judge did not put her mind to the issues to be decided, resulting in an unfair trial. The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing; on the contrary, it is part and parcel of the judicial process. It may not be best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.
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> …
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> Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge's decision to be set aside. While the theoretical basis on which the result is explained varies, this is the position in England, various Commonwealth countries, the U.S. and in Canada.

14 Chief Justice McLachlin then reviewed cases from various jurisdictions, including the Australian cases of *James v Surf Road Nominees Pty Ltd* and *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd*.[15] The Supreme Court concluded that "copying alone is not grounds for appellate

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[14] *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] 2 SCR 357, [26], [31], [37] (McLachlin CJ). At [10] it was explained that: "The trial judgment, rendered some time after a lengthy trial, consisted of 368 paragraphs. Only 47 were predominantly in the judge's own words; the balance of 321 paragraphs was copied from the plaintiffs' submissions. This raises the concern that the Judge did not put his mind to the issues, the evidence and the law as he was sworn to do, but simply incorporated the plaintiffs' submissions."

[15] *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2002) 6 VR 1.

intervention".[16] The ultimate question is whether the judge has independently considered the issues and impartially addressed them:[17]

> … However, if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the Judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside.
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> This does not negate the fact that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in her own words her conclusions on the facts and the law. The process of casting reasons for judgment in the judge's own words helps to ensure that the judge has independently considered the issues and come to grips with them. As the cases illustrate, the importance of this may vary with the nature of the case. In some cases, the issues are so clear that adoption of one party's submissions or draft order may be un controversial. By contrast, in complex cases involving disputed facts and legal principles, the best practice is to discuss the issues, the evidence and the judge's conclusions in the judge's own words. The point remains, however, that a judge's failure to adhere to best practices does not, without more, permit the judge's decision to be overturned on appeal.

15 Whilst in *Cojocaru* the Supreme Court of Canada carefully addressed "the extent of the copying, the quality of the copying, the lack of attribution for the copying, the nature of the case and the failure to fulfil the basic functions of reasons for judgment",[18] that was not the approach of James Hardie. Rather, as mentioned, it relied on the bare fact of the copying and its extent.

16 As a general rule, it is most unwise to engage in wholesale copying of submissions without attribution. Where a decision-maker has appeared only to have adopted the submissions of one side, it is not difficult to understand why the opposing side will view the resulting decision with a justified sense of disquiet, particularly where the decision follows, or largely follows, the submissions of one side. That disquiet is understandably pronounced where the submissions of the opposing side appear to have been left out of account and do not appear to feature in the decision-making process.

17 Nonetheless, we are not prepared to find that where there is extensive copying without attribution then, without more, the reasons are thereby inadequate and the resulting decision necessarily vitiated. Much depends on what has been copied and whether, nevertheless, the decision-maker has performed the task of engaging with the case of each party and making decisions on what divides the parties, whether they be matters going to evidence, or matters referable to legal principles and the proper application of those to the evidence before the court.

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[16] *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] 2 SCR 357, [45] (McLachlin CJ).
[17] *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] 2 SCR 357, [49]-[50].
[18] *Cojocaru v British Columbia Women's Hospital and Health Care* [2013] 2 SCR 357, [52].

18 Having said that, we reject the approach of defending impugned reasons by reference to whether, regardless of the content of those reasons, there exists some material that supports, or which is capable of supporting, the ultimate decision made by the judge. As the Victorian Court of Appeal said in *Fletcher*:[19]

> In our opinion it does not follow from the fact that evidence exists to support a conclusion drawn by the judge that errors of significance, or substantial inadequacy, in the reasons for arriving at the conclusion are to be disregarded. The limitations in the conduct of the trial to which the parties agreed no doubt placed a severe burden on the judge (and, for that matter, the parties and their legal advisers) and may have played some part in the making of the errors we have identified in the judge's reasons. But these limitations do not in our view require the losing party to accept a verdict in which such errors played a significant, and possibly crucial, role, nor to accept a verdict arrived at, say, by coincidence, in circumstances where it cannot be said that only one proper conclusion, or set of conclusions, was open on all the evidence. Nor did those limitations justify the want of, or inadequacy of, reasoning.

19 The provision of adequate reasons remains an essential aspect of the judicial function and the failure to provide them is inimical to the open and transparent resolution of litigation, whatever the nature of the case.[20] Whether the judicial function of furnishing adequate reasons has been satisfied is not determined by a mechanical assessment of what has, or has not, been copied, but by whether the reasons nevertheless perform their essential function.

20 So, it is necessary for the Judge to "engage with the case presented"[21] and to "expose his or her reasoning on points critical to the contest between the parties", whether as to evidence or as to argument.[22] The reasons must deal with the substantial points that have been raised, including findings on "material questions of fact".[23] Where a "party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected".[24]

21 As has been said many times, this is necessary so as to avoid the losing party entertaining a justifiable sense of grievance, as well as to facilitate the conduct of any appeal.[25] The appeal court should not have to speculate about the basis for any particular finding made at trial.[26]

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19 *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1, [169].

20 See *DL v The Queen* (2018) 266 CLR 1, [32]-[33] (Kiefel CJ, Keane and Edelman JJ); *R v Sexton* [2018] SASCFC 28, [170]-[181] (Kourakis CJ), which concerned criminal trials by judge alone.

21 *Whalan v Kogarah Municipal Council* [2007] NSWCA 5, [40] (Mason P, Ipp and Tobias JJA).

22 *DL v The Queen* (2018) 266 CLR 1, [131] (Nettle J).

23 *DL v The Queen* (2018) 266 CLR 1, [130].

24 *Hunter v Transport Accident Commission* [2005] VSCA 1, [21] (Nettle JA).

25 See *SZKLO v Minister for Immigration and Citizenship* (2008) 102 ALD 115; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 431, 441-442 (Meagher JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 257-258 (Kirby P).

26 *Resi Corporation v Munzer* [2016] SASCFC 15, [71] (Lovell J).

22 Nonetheless, the extent of the obligation to provide adequate reasons varies, depending upon the nature and conduct of the particular case. There are no "set standards" nor any "optimal, even desirable, level of detail required".[27]

23 As well, even if the reasons (or aspects of the reasons) are apparently "inadequate", this alone does not necessarily vitiate the entire decision under appeal. Rather, the inadequacy must relate to "material" aspects of the case. That is, issues on which the parties were divided, the resolution of which affected the outcome.

24 In *Sydney Water Corporation v Caruso*, the New South Wales Court of Appeal considered the test to be applied in determining whether legal error vitiates a decision. The case concerned the assessment of compensation payable on the compulsory acquisition of land by the appellant. An issue arose as to the way in which the primary judge had made findings about expert valuation evidence. The Court articulated in different ways what is required to establish a material error, and there was disagreement as to which party bears the burden of persuasion with respect to whether error vitiated the decision. Allsop P was of the opinion that:[28]

> A decision will be impaired, or spoilt or corrupted or "vitiated" if the error went to a central issue for consideration and the appellate court cannot be persuaded to a relevant degree of satisfaction that the resolution of the central issue has not been affected.

25 Tobias JA did not agree. In his view, it is not for the party responding to the allegation of error to persuade the appellate court that the resolution of a central issue has not been affected. Rather, "it is for the party asserting error to satisfy the appellate tribunal that the error has affected the relevant decision in the sense that it was one upon which the decision depended".[29]

26 The third member of the Court, Sackville AJA, though in general agreement with Tobias JA, reserved his opinion on these questions. His Honour warned that, to ask whether a legal error is material if it might have affected the decision, or only if it did in fact affect the decision, and who bears the burden of persuading the court, will not necessarily be answered the same way in all cases. His Honour cautioned that the nature of the inquiry may differ, depending on the circumstances.[30]

27 Whilst we are generally obliged to follow decisions of other intermediate appellate courts on the common law of Australia, unless convinced that they are plainly wrong,[31] in *Sydney Water Corporation v Caruso* there is no majority

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[27] *Resi Corporation v Munzer* [2016] SASCFC 15, [71].

[28] *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298, [25] (Allsop P).

[29] *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298, [132] (Tobias JA).

[30] *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298, [198] (Sackville AJA).

[31] *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, [49]-[51] (Gummow, Heydon and Crennan JJ); *Hasler v Singtel* (2014) 87 NSWLR 609; *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81.

decision on the degree of materiality required, nor the question of onus. In any event, there are at least three difficulties associated with the resolution of these questions in this case. The first is that neither party addressed these questions. The second difficulty is that neither party wanted a retrial. That is, even if the decision was vitiated (however that might be determined), neither party wanted the decision set aside and the matter retried. This common approach suggests that, whether or not the reasons were inadequate, this Court is not being asked to make a finding that the decision as a whole is vitiated. Analysis of the adequacy of the reasons of the Judge is therefore necessarily confined to the conclusions reached on discrete issues the subject of appeal.

28 A third difficulty with resolving these questions in this case is that many of the issues agitated on appeal were argued by both sides at such a high level of generality that it is difficult to determine what was actually in contest, or remained in contest, and what was considered by the parties to be "material" or "operative" to any particular decision or conclusion which remains the subject of contest or challenge on appeal.

29 For example, whilst the finding by the Judge on the issue of foreseeability at paragraph [164] was criticised by James Hardie, Mr Werfel maintained that there was, in fact, no real dispute about that aspect of the case at trial. At paragraphs [157]-[163], the Judge referred to the documentary and other evidence on the issue of foreseeability, largely copying Mr Werfel's submissions, before concluding:[32]

> I have rejected Amaca's submissions relating to foreseeability.

30 This conclusion is announced without any reference to what the submissions from James Hardie were, nor why they were rejected. It is hard to imagine a clearer instance of inadequate reasons. There has been, with respect, no attempt at all to engage with this aspect of the case made by James Hardie against Mr Werfel. This Court is left to speculate about why the case against Mr Werfel was rejected on the issue of foreseeability.

31 In all of these circumstances, we propose to address the issue of the adequacy of reasons as an adjunct to the determination of the issues arising on the appeal. Those issues concern whether, and from when, James Hardie owed Mr Werfel a duty of care and, if so, whether that duty was breached in a way which caused Mr Werfel's mesothelioma. And, as will be seen, those issues are also concerned with various aspects of the assessment of damages.

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[32] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [164].

An appeal by way of rehearing

32 We agree with the parties that a retrial would be most undesirable unless unavoidable. This appeal is in the nature of an appeal by way of rehearing. As was explained in *Fox v Percy*[33]

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of ''weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect''. In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
> > ''[I]n general an appellate court is in as good a position as the Judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the Judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the Judge but, once having reached its own conclusion, will not shrink from giving effect to it.''
>
> As this Court there said, that approach was ''not only sound in law, but beneficial in . . . operation''.
>
> After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of Judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the Judge sees but the appellate court does not. Three important decisions in this regard were *Jones v Hyde*, *Abalos v Australian Postal Commission* and *Devries v Australian National Railways Commission*. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with Judges.
>
> (Footnotes omitted)

33 The approach required of this Court was recently restated in *Lee v Lee*:[34]

> A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the Judge has erred in fact or law. Appellate restraint with respect to interference with a Judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences" is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the Judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts.

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[33] *Fox v Percy* (2003) 214 CLR 118, [25]-[26] (Gleeson CJ, Gummow and Kirby JJ).
[34] *Lee v Lee* (2019) 266 CLR 129, [55] (Bell, Gageler, Nettle and Edelman JJ).

> Thereafter, "in general an appellate court is in as good a position as the Judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the Judge". Here, the Judge's findings of primary fact were not disturbed.
>
> (Footnotes omitted)

34 On this appeal, James Hardie challenges the Judge's analysis and application of the relevant legal principles, together with some of her Honour's findings (or absence of findings) of fact. James Hardie accepted that this Court ought proceed on the Judge's generally favourable assessment of the credibility and reliability of the evidence of Mr and Mrs Werfel. We are satisfied that we are in as good a position as was the Judge to review the evidence and to make findings of fact and draw inferences with respect to the issues which still divide the parties and which are material to the determination of appeal.[35]

Duty of care and breach – generally

35 The Judge found that James Hardie owed a duty of care to a category of persons which included persons in the circumstances of Mr Werfel. Notwithstanding, the various different times and circumstances of Mr Werfel's exposure, the Judge described the duty of care owed as a single duty and in general terms.[36]

> [James Hardie] owed a duty of care to Mr Werfel as a member of a class of persons who cut, sawed, sanded and drilled [James Hardie's] asbestos cement products occasionally, intermittently or from time to time. [James Hardie] had a duty to take reasonable care to avoid injury being suffered by members of that class using the products as intended or in a manner in which they were known to be used.

This formulation was taken directly from Mr Werfel's trial submissions.[37] In adopting this formulation, the Judge provided only limited reasoning in support.[38]

36 A duty of care in virtually identical terms to that adopted by the Judge was found to have been owed by James Hardie to a home handyman at first instance in *Hannell v Amaca Pty Ltd*[39] and, on appeal in *Amaca Pty Ltd v Hannell*.[40] However, the Judge made no reference to *Hannell* nor the reasoning in the Court of Appeal in this or any other context.

37 Mr Hannell acquired a house property in or about May 1982. The house and a number of its fences had been constructed in the late 70s and incorporated

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35 *Warren v Coombes* (1979) 142 CLR 531.
36 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [154].
37 Paragraphs 5.16 and 2.19.
38 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [142]-[153].
39 *Hannell v Amaca Pty Ltd* [2006] WASC 310.
40 *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109, [354] (Steytler P and McLure JA; Martin CJ dissenting on this point). The plaintiff failed at the level of breach. Special leave to appeal to the High Court was refused but the question of duty of care was not considered, [2007] HCA Trans 626.

asbestos cement products manufactured by James Hardie. Mr Hannell was exposed to respirable asbestos fibres when carrying out non-occupational handyman work on the fences and house eaves during three short periods in 1983, 1985 and 1990. He subsequently contracted mesothelioma.

38 The majority in the Court of Appeal reasoned as follows.[41]

> Where the existence and scope of a duty of care is settled by authority, it is unnecessary to identify and apply the legal principles that govern the determination of those questions. The existence and scope of the duty of care owed by the appellant to the respondent were in issue in this case.
>
> There has been a return to the words of Lord Atkin in *Donoghue v Stevenson* as the foundation for all modern considerations of duty of care. Reasonableness is the test for the imposition of a duty of care. Gleeson CJ said in *Tame*, that it is the reasonableness of a requirement that a person should have certain persons or interests in contemplation that determines the existence of a duty of care. Further, reasonable foreseeability is to be understood and applied with due regard to whether it is reasonable to require a person to have in contemplation a risk of the injury that eventuated.
>
> It is an error to formulate the duty of care with such particularity as to in effect circumvent the requirement of reasonableness at the breach stage of the analysis. On the other hand, to formulate a duty at too high a level of abstraction may provide an inadequate legal means by which to determine the issues in a particular case; it will be too abstract if it is divorced from the facts said to enliven the duty.
>
> The appellant contended that it was necessary at the duty stage of the analysis to determine the existence and scope of the duty by reference to the particular breach relied on; that is, the trial Judge was required to determine whether the appellant owed to the respondent a duty to warn.
>
> That approach is certainly used in novel situations where it is otherwise only possible to formulate a duty of care at such a high level of abstraction as to be of no practical assistance. A good illustration of this is in *Cole v South Tweed Heads*. When faced with that situation, the duty analysis brings to account the same considerations as are relevant in determining whether the specific breaches relied on would constitute a breach of any duty however formulated.
>
> Save in medical negligence cases where it has been authoritatively determined that a medical practitioner owes to his or her patient a duty to warn, ordinarily the question whether the provision of a warning is within the scope of the duty in a particular case is determined at the breach stage of the analysis by assessing whether a failure to warn constitutes a breach of duty. However, the result should be the same regardless of the approach.
>
> The trial Judge found that the appellant owed a duty of care to the respondent as a member of the class of persons who cut, saw, sand or drill the appellant's asbestos cement products occasionally, intermittently or from time to time, the duty being to take reasonable care to avoid injury being suffered by members of that class using the product as intended or in a way in which the product was normally used. The duty is formulated at an appropriate level of generality and does not circumvent the requirement of

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41 *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109, [348]-[354].

> reasonableness at the breach stage of the analysis. We would dismiss the appellant's challenge to the trial Judge's formulation of the duty of care.
>
> (Citations omitted)

39 *Hannell* concerned exposures experienced by a home handyman in 1983, 1985 and 1990 to products first installed and, by inference, manufactured in or about the early 1970s. However, as will be demonstrated below, Mr Werfel as an employed fencing repairer and home handyman was exposed in 1994 to 1997 to fencing product manufactured at an unknown time, and in 2001 and 2004 to flat sheet product manufactured in or about 1964, 1966 and 1977. The respective periods of manufacture and of exposure are markedly different. As a consequence, the questions of the existence of any duty of care owed to Ms Werfel, of its scope and of any breach will be informed by different considerations.

40 The four respective times at which relevant product was manufactured and the three respective times at which Mr Werfel was exposed to relevant product are all potentially relevant to each of the questions. As it happens, in Mr Werfel's case, once the evidence concerning these times is properly analysed, a number of the issues that divide the parties can readily be resolved without having to consider and resolve all of James Hardie's complaints concerning the Judge's findings of a duty of care and of breach.

Mr Werfel's three cases

41 By the end of the trial, Mr Werfel's claim had crystallised to three "cases" or bases for liability described by the Judge in the following terms.[42]

> Mr Werfel submitted[43] that [James Hardie] should have done the following:
>
> - by the late 1960s, have removed asbestos fibres from the building materials it sold to Australians, and
>
> - by the 1960s, have affixed a warning on all Deep Six and Super Six corrugated asbestos cement sheets it manufactured and distributed; and
>
> - from the early to mid-1980s, warned members of the very large class of people who might be at risk from exposure to asbestos dust from *in situ* asbestos cement products, of which Mr Werfel was one, of the dangers to which they were exposed.

42 Her Honour ultimately accepted Mr Werfel's three propositions and found[44] that James Hardie breached a duty of care owed to a class of persons including Mr Werfel in that:

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[42] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [171].

[43] Paragraph 7.48 of Mr Werfel's final written submissions at trial. The same propositions although differently worded were put in paragraph 2.44 of Mr Werfel's trial submissions.

[44] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [209].

> From the mid-1960s [the appellant] should have placed a warning on its corrugated asbestos cement building materials, from the late 1960s ceased incorporating asbestos into its building products and from the mid-1980s conducted a warning campaign of the same kind as it was when then conducting to sell its products and distance itself from asbestos.

43 Mr Werfel's three cases or bases for liability need to be considered or analysed with reference to each of the occasions when building products containing asbestos were manufactured by James Hardie and each of the occasions when Mr Werfel was exposed to any of those products.

When did James Hardie manufacture the asbestos products with which Mr Werfel came into contact?

44 It is common ground on the appeal that Mr Werfel was exposed to James Hardie's manufactured products containing asbestos at a number of different times and locations. Exposures occurred:

(i) when Mr Werfel worked on asbestos fencing for contractors retained to work on SAHT sites between 1994 and 1997;

(ii) when Mr Werfel did home handyman maintenance and renovations on his Pooraka house during the period December 2000 to early 2001;[45] and

(iii) when Mr Werfel did home handyman maintenance and renovations on his Parafield Gardens house in 2004.[46]

45 The resolution of the contested issues concerning whether or not the appellant owed a duty of care to the respondent at a relevant time, whether or not the appellant breached any duty of care and whether or not any breach was causal of Mr Werfel's loss will depend, in part, on findings as to when the products that were worked on by the respondent at each of the three locations were manufactured by James Hardie. The Judge made findings only of a general nature and James Hardie has challenged some of these findings as not being supported by the evidence.

Asbestos fencing exposure 1994-1997

46 James Hardie accepts that, between 1994 and 1997, Mr Werfel worked on in-place fencing made of corrugated cement panels containing asbestos (asbestos fence panels) manufactured by James Hardie. There were no protective measures (such as warnings, masks, damping down) in place and Mr Werfel was exposed, including by inhalation, to large clouds of asbestos dust. The dust comprised crocidolite, amosite and chrysotile asbestos fibres. It is common ground that the asbestos fence panels had not been painted.

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[45] Mr Werfel's evidence was that he bought Pooraka on 8 December 2000 and undertook maintenance and renovations as soon as he moved in.

[46] Mr Werfel's evidence was that he bought Parafield Gardens on 22 July 2004 and performed maintenance and renovations soon thereafter.

47 As to when the asbestos fence panels had been manufactured, the Judge found:[47]

> It is likely that the fences were manufactured from the mid 1950s to the 1970s or later.

James Hardie contends that there is nothing in the evidence to support the qualification "mid" 50s or that part of the finding "or later". This contention must be accepted. However, the question arises whether there is evidence sufficient to support even a modified finding – "1950s to 1970s".

48 In fairness to the Judge, the evidence on this topic was unsatisfactory. Mr Werfel explained that he had performed fencing work in the northern suburbs of Adelaide, in suburbs surrounding Port Adelaide, in Tea Tree Gully and the Adelaide CBD, and that 60 to 70 per cent of the work was SAHT related. He worked for two employers during the 1994 to 1997 period and did predominantly the same type of work in the same localities. Mr Werfel grew up in the northern suburbs and expressed the opinion that the SAHT houses "were all the same vintage, 1960s-70s".

49 However, the actual asbestos fence panels with which the respondent came into contact more likely than not were not SAHT fences. The Judge made a finding that it is more likely than not that Mr Werfel's exposure to asbestos arose as a result of fencing work undertaken on properties unrelated or adjacent to but not on SAHT properties.[48] That finding is supported by the evidence as will be shown. It is an important finding for reasons to be explained. Mr Werfel gave this evidence.

> WITNESS: So, the main jobs supplied through the contractor were Housing Trust related work and also they did work, we did work for what we called the Aboriginal part of the Housing Trust as well in which a lot of these jobs were what we called reuse jobs where we would knock the old fence down, smack all of the iron sheets off with a crowbar or even by hand because they were nailed into Jarrah fencing rails which had quite often deteriorated and the fences effectively just fell apart.
>
> MR SEMMLER:[49] All right, and these reuse jobs, what materials were you reusing?
>
> WITNESS: So, we were reusing the galvanised iron from the existing fences, discarding all of the Jarrah posts and Jarrah rails.
>
> MR SEMMLER: Now, in addition to those types of fences did you come across other kinds of fences in the course of your work assisting Alan?
>
> WITNESS: So, we also did brand new fences, good neighbour fences, ARC mesh, high spear, low spear tubular fences.

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47 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [71].
48 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [39].
49 Senior counsel for the respondent at trial and on appeal.

MR SEMMLER: All right, and did you come across any other fences that were in place that weren't made of the materials you've mentioned?

WITNESS: So, when we were doing jobs for the Housing Trust, as well as private jobs, we would build the fences in between properties. Quite often *they would interact with the backs and side fences and, indeed, front fences of other houses*.

MR SEMMLER: And what were those fences made of?

WITNESS: Those fences I now know to be made out of asbestos. They were a corrugated - - -

MR WATSON:[50] I object.

WITNESS: They were - - -

MR WATSON: I'm sorry. I object. The witness can describe the - - -

HER HONOUR: What he believes them to be and nothing more.

MR SEMMLER: That's all that we're putting forward. Could you perhaps now describe what these fences looked like?

WITNESS: They were a corrugated cement-type fencing material - - -

MR SEMMLER: Yes, and how big were the - - -

WITNESS: - - - and in panels.

MR SEMMLER: What was the gap in the corrugations approximately?

WITNESS: They were a bigger corrugation than corrugated fencing iron. I believe the corrugations were about 12 centimetres, 12 to 15 centimetres across.

MR SEMMLER: What's that in inches? I can only deal in inches.

WITNESS: Five - - -

MR SEMMLER: You're indicating with your two forefingers there.

WITNESS: Yes, 5 or 6 inches across.

MR SEMMLER: All right. Thank you. What was the material that these corrugated fences that you came across like? How would you describe it?

WITNESS: It was like a cement-type material.

MR SEMMLER: Yes, and how would it react?

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[50] Senior counsel for the appellant at trial and on appeal.

WITNESS: We'd come across them in which sometimes they had broken and crumbled. They looked very brittle. Some of them contained like a capping, a rectangular-type capping on the tops of the sheets.

MR SEMMLER: And how did the appearance of that material, the capping, compare to the appearance of the rest of the fence?

WITNESS: So, it looked like it was the same type of material, a cement type of material.

MR SEMMLER: *When you came across these fences, when they were adjoining a new fence that you were putting up or a fence that you were erecting from the old materials, the reused fences*, what did that, if anything, involve you doing in relation to each fence?

WITNESS: So, when we were rebuilding the fences, whether it was a side fence or a back fence or, indeed, a front fence, *whenever there was interaction with a neighbour's fence or an adjoining fence* you would try, for example, to get the post that you were putting in to erect your new fence as close as you could to the adjoining fence in order to then make sure that it fit flush. You would then put the rails of the new fence on and sometimes that interacted with the old adjoining fence and sometimes that meant modifying the adjoining fence to allow for the post and the rail to fit flush accordingly.

MR SEMMLER: And did the need for modifications, did that apply to the corrugated fences you've been describing?

WITNESS: Yes, that's correct. So, the modifications would be, on some circumstances, to shave some of the fencing sheet, the cement-type fencing, corrugated fencing sheet off to allow for the posts and the rail to become flush and sometimes it also meant the capping to be cut to indeed allow for that to occur, or sometimes it was in order to allow the rail to sit flush up against the existing fence.

(Emphasis added)

50 A little later, whilst still giving evidence in chief and in the context of his working on asbestos fence panels for the second employer, Mr Werfel added this:

MR SEMMLER: Did you deal with such fences in the same circumstances and in the same way you've described in your work with Alan?

…

WITNESS: Yes, it was with interaction with other fences from other properties.

Mr Werfel here affirmed that his exposure to asbestos occurred when he interacted with other fences on other properties. As such, the Judge misrecorded or misconstrued this evidence in a significant way when her Honour observed[51] that:

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[51] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [22].

> [Mr Werfel] clarified that [the asbestos fence panels he worked on] were fences *that interacted* with other fences from other properties.
>
> (Emphasis added)

51 According to Mr Werfel's evidence in chief, he performed work on SAHT homes fences and private homes fences. The fencing materials he worked on in these respects were iron sheets, Jarrah fencing posts and rails, "good neighbour" fences, ARC mesh and high spear and low spear tubular fences. Even so, Mr Werfel's opinion (or, indeed, any other witness's opinion) as to the age of the SAHT houses could not assist directly with the age of the SAHT houses fencing. That fencing may not have been erected at the same time as the houses were built, although an inference of reasonable proximity as to timing is probably available.

52 However, the asbestos fence panels with which Mr Werfel interacted were part of fences "of other houses", "a neighbour's fence" or "an adjoining fence". As such, his opinion does not assist at all with the age of these asbestos fence panels in the absence of an available inference that those fences also were constructed at or about the time the SAHT houses were built. Furthermore, 30 to 40 per cent of Mr Werfel's work was "private" and had no connection with the Housing Trust at all.

53 When cross-examined by counsel for James Hardie, Mr Werfel confirmed that the asbestos fence panels on which he worked, apart from one, were only on properties that adjoined the SAHT properties. Not surprisingly, he was unable to say when they had been installed.

54 Mr Werfel's evidence in chief was qualified during cross-examination by counsel for the SAHT.

> MR ROBERTS: You've said that on occasions you would need to modify the existing fences along the back of the property where it would abut with the fence that you were rebuilding.
>
> WITNESS: Or the sides, or indeed the front.
>
> MR ROBERTS: Now, was - were the modifications to the fences on properties that you understood to be Housing Trust properties, or on a neighbouring property?
>
> WITNESS: I can't be sure. I can't be sure of that.
>
> MR ROBERTS: You weren't told by Alan, or Mr Burton which property was which?
>
> WITNESS: No.

During re-examination, Mr Werfel gave this evidence.

> MR SEMMLER: Thank you. You were asked some questions by Mr Watson, and indeed by Mr Roberts, about the fences and the houses where the

fences were located, and I think you gave some evidence that the vintages of the houses were then 60s or 70s. That was your assessment.

WITNESS: Yes.

MR SEMMLER: How old did you think the corrugated fences appeared to be?

WITNESS: Of the - - -

MR WATSON: I object to that.

…

MR SEMMLER: What was your impression as to how old these concrete fences were - cement fences?

WITNESS: They looked like they were old and had been there since the establishment of the house.

MR SEMMLER: Right. Thank you.

WITNESS: Same age as the house.

55 Leaving aside the weight, if any, which this opinion evidence might properly bear, the evidence is, at best for Mr Werfel, ambiguous. The opening question or proposition put by counsel, to which Mr Werfel agreed, misstated his earlier evidence. He had earlier given a "vintage" of the SAHT houses not, as counsel asserted, of the "houses where the fences were located". Further, Mr Werfel's answers "they looked like they … had been there since the establishment of the house [singular] and same age as the house [singular]", would appear to be a reference to the house to which each fence in question belonged, rather than the SAHT *houses* which were thought to have been constructed in the 60s or 70s.

56 On a reading of Mr Werfel's evidence as a whole, whilst he expressed an opinion as to the age of the SAHT houses he provided no reliable evidence concerning the age of the asbestos fence panels to which he was exposed. On the basis of his evidence, each such fence may have been constructed earlier or after the time the relevant adjacent or nearby SAHT house had been constructed.

57 Mark Manuel, a witness called on behalf of the SAHT, also gave brief evidence concerning this issue. At the time of giving evidence, he was employed by the SAHT as manager for Quality and Compliance. He had been with the SAHT since 1986, initially as a Maintenance Clerk in the Port Pirie office. After 1990, he worked as a maintenance clerk in the northern suburb of Salisbury and in 1991 assumed the role of a housing manager working in the Elizabeth office and responsible for some hundreds of houses in various northern suburbs of Adelaide. Part of his job was to identify the need for and supervise repairs to fencing. When asked for the "appropriate built age" of the SAHT homes in the

northern suburbs that he managed for the SAHT, he said "50s, 60s, I would imagine". However, in cross-examination he agreed ("yes") with this proposition put by counsel for the respondent.

> The houses that are in the northern suburbs of Adelaide that are Housing Trust houses, characteristically they were built in the 50s and 60s and 70s. Would that be right?

58 When asked if during his time working at Elizabeth he saw any asbestos fences either in SAHT houses or neighbouring houses, Mr Manuel replied "not in my patch". Mr Manuel had experienced asbestos fences in the old industrial areas of Port Adelaide and in Port Pirie and was able to describe them in detail and quite accurately. He had received training in identifying products containing asbestos.

59 Kevin Bignell was also a witness called on behalf of the SAHT. Mr Bignell started with the SAHT in 1984. He has worked in various positions at various locations. Between 1993 and 1999, he worked as a housing manager at the Modbury office. He was responsible for some hundreds of houses in a range of northern suburbs in his "patch". His work also included responsibility for identifying the need for and supervising fencing repairs. The area he looked after contained homes ranging from older properties built in the 1950s and 1960s to newer style brick veneer properties. He also did not encounter any asbestos fencing in SAHT or neighbouring houses in his "patch".

60 Anthony Porritt, another SAHT employee, gave similar evidence with the exception that he could recall seeing a couple of asbestos ("deep six") fences on *adjacent* neighbouring properties and that this was "very rare".

61 The evidence of Messrs Manuel, Bignell and Porritt, as imprecise as it was, focussed on the period during which the SAHT homes, in only some of the areas in which Mr Werfel worked, were built. The evidence is not of direct assistance with respect to the question of when the fences adjacent to or abutting the fences on which Mr Werfel worked, were built.

62 The Judge paid little regard to the evidence of Messrs Manuel, Bignell and Porritt. Her Honour accepted their evidence to the effect that they had not encountered asbestos fencing in the general area where Mr Werfel had worked but found that it was not necessarily inconsistent with that given by him.[52] One of the difficulties with the evidence on this topic generally is that it is not clear as to the extent to which the three SAHT officers' "patches" coincided with the areas in which Mr Werfel worked.

63 Ultimately, the question arises as to what, if any, inference can be arrived at from this body of evidence on a balance of probabilities as to the period during which any of the asbestos fence panels with which Mr Werfel interacted was installed. If such a finding could be made, it might be inferred that the asbestos

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[52] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [33].

fence panels had been manufactured during or prior to but reasonably proximate to that period. However, there is no support in the evidence for a finding that any of the asbestos fence panels worked on by Mr Werfel, possibly apart from one, were on or part of SAHT properties. Further, the basis on which Mr Werfel formed an opinion that one fence might have been on a SAHT property is not at all clear and, given his evidence on this topic as a whole, this aspect of his evidence must be treated as unreliable.

64 It follows, that there is no evidence from which an inference as to the time of manufacture of the asbestos fence panels worked on by Mr Werfel can be drawn. The only finding available on the evidence is that the asbestos fence panels that came to be worked on by Mr Werfel were manufactured some time between when James Hardie first manufactured fence panels containing asbestos for distribution in South Australia and when it last manufactured this product for distribution in South Australia.

65 Those two dates are not clear on the evidence in this case. However, they are a date quite some time before "the 1950s" and a date some time after "the 1970s", respectively.

66 Given this state of the evidence, counsel for James Hardie during the appeal, made the following submission.

> Could I say this? There's some legal issues which turn on this because submissions were made which mean that these dates are critical. I'll come back to it but we say that to the extent that the plaintiff had to prove a case the allocation of the ordinary burden meant that it would be necessary for the court to say 'Can't be found that they were manufactured after the 1950s'. The importance of that, I'll come back to.

However, later in his oral submissions, counsel appeared to accept that the asbestos fence panels could have been manufactured in the 50s, 60s or 70s.

> I want to go to normative causation, this applies more to the or only to the fencing exposure. I've already announced some of this, the products are manufactured in the 1950s, 60s or 70s, the work was carried out somewhere between - I should just pause … taking it from the evidence the corrugated sheets in the fencing *could* have been manufactured in the 50s, 60s or 70s. The work was carried out somewhere between - and this is Mr Werfel's word - 25 or 45 years after the products had been manufactured leaving a great deal of knowledge for that period.
>
> (Emphasis added)

67 An important aspect of Mr Werfel's case is the contention that James Hardie owed a class of persons (of which he came to be a member) a duty of care which was breached *at the time* James Hardie manufactured and distributed in South Australia the asbestos fence panels ultimately worked on by Mr Werfel. That duty is said to have been breached by James Hardie not manufacturing

fence panels that were free of asbestos or that had some form of warning label permanently affixed to and permanently visible on them.[53]

68 In order to determine whether a duty of care with this scope was assumed by James Hardie and, if so, whether such a duty was breached at the manufacturing stage, it is first necessary to know when the panels were manufactured. This will be a prerequisite to ascertaining various factual matters necessary to these determinations including, but not limited to: what was reasonably foreseeable at that time with respect to the class or classes of potential victims and the nature and extent of any harm that might be caused; what in the then circumstances was technically feasible by way of manufacturing a comparable product free of asbestos and affixing a warning label that would be indefinitely visible to anyone coming into contact with each panel; what would be the cost of any such response; and what other advantages and disadvantages of any such response might follow. In essence, what at the time of manufacture would have been an available and reasonable response by James Hardie, according to the analysis in *Wyong Shire Council v Shirt*.[54]

69 Even if a finding that the asbestos fence panels were manufactured in the "50s to 70s" were to be adopted, the factual considerations relevant to each of the above questions and therefore the answers are likely to be markedly different according to when, during that period, the asbestos fence panels to which Mr Werfel was exposed were manufactured.

70 The evidence does not permit the identification of a point in time or even a confined period of years when the asbestos fence panels were manufactured sufficient to permit the questions of duty and breach in these two respects, as relied on by Mr Werfel, to be addressed. Mr Werfel did not discharge the onus of proof that rested on him in this fundamental respect. Even if the asbestos free and permanent labelling cases with respect to the asbestos fence panels were to be considered in accordance with the (modified) Judge's finding that the panels were manufactured from the 50s to the 70s the same insuperable difficulties would arise.

71 The asbestos free and the permanent labelling cases with respect to the asbestos fence panels should have failed at trial *in limine*.

The Pooraka house exposure – 2001

72 It is accepted by James Hardie that, at the Pooraka house, Mr Werfel worked on in-place previously painted asbestos cement flat sheets which he cleaned, sanded using an electric sander and repainted and, on occasion, cut with a saw. Again, no protective measures were in place. The work was done over

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[53] Mr Werfel also relied on a third contention with respect to the asbestos fence panels – that the appellant breached the duty owed by not pursuing a public warning campaign in and from the mid-1980s.

[54] *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

three or four weekends. That the Pooraka house was built in 1964 and a second storey renovation was approved in 1977 is common ground. Mr Werfel worked on both areas. It can be inferred that any asbestos product on the ground floor was manufactured during or sometime before 1964. Whilst there is no evidence of when the extension was actually built, James Hardie accepts that any asbestos products used were manufactured during or some time before 1977. It is not possible to reliably draw a more definite inference. In particular, and bearing in mind that the onus of proof rests with Mr Werfel, an inference on the evidence that the product was manufactured at a time after 1977 is not open.

The Parafield Gardens house exposure – 2004

73 It is accepted by James Hardie that Mr Werfel performed tasks at Parafield Gardens similar to those performed at Pooraka and in similar circumstances. Again, no protective measures were in place and the work was done over three or four weekends. The Parafield Gardens house was built sometime following the subdivision in 1966 of the land on which it sat. James Hardie has conceded, on appeal, that any asbestos product used in its construction would have been manufactured during 1966 or sometime earlier. Again, bearing in mind the onus resting with the respondent, it is not open to infer, on balance, that any asbestos product was manufactured at a time after 1966.

Conclusions to this point

74 The evidence supports the conclusions in (i) to (iv) below.

(i) The asbestos fence panels were manufactured at an indeterminate time or times, sometime between when such product was first manufactured for distribution in South Australia and when such product was last manufactured for distribution in South Australia.

(ii) The Pooraka ground floor asbestos cement flat sheets were manufactured during or prior to but reasonably proximate to 1964.

(iii) The Pooraka first floor extension asbestos cement flat sheets were manufactured during or prior to but reasonably proximate to 1977.

(iv) The Parafield Gardens asbestos cement flat sheets were manufactured during or prior to but reasonably proximate to 1966.

75 Unlike with respect to the asbestos fence panels, the Judge made no finding as to when the Pooraka and Parafield Gardens asbestos products had been manufactured by James Hardie. However, her Honour did make some findings of primary fact from which it was open to draw the inferences set out in (ii) to (iv) above. Whilst these inferences or conclusions might be seen as implicit in her Honour's reasons, they were not expressly relied on by her Honour when forming her conclusions as to the existence and nature of any duty of care, any breach of duty or causation of loss.

The fencing exposure

76 We have already found that Mr Werfel's case based on James Hardie's failure to have eliminated asbestos from, or to have affixed a permanent warning label to, each of the asbestos fence panels worked on between 1994 and 1997, had to have failed at trial. The Judge erred in finding that, at any relevant time, James Hardie owed Mr Werfel a duty of care the scope of which embraced either such obligation and that any such duty had been breached.

77 In any event, as will be shown later in these reasons, Mr Werfel has failed to establish that James Hardie was in a position to produce asbestos free product at a time prior to the mid-1980s or later.

78 Furthermore, Mr Werfel's case that warning labels should have been affixed to the fencing panels and such would have protected him from exposure during the late 90s, faced insuperable difficulties, whether analysed at the duty, breach or causation stage, none of which were analysed by the Judge. These included the following.

(i) In order to ensure that individual workers who might in the indefinite future be exposed to a single fencing panel when doing repair work (such as Mr Werfel) a permanently visible label would need to be fixed to each side of every panel manufactured.

(ii) Such a label on every panel, if sufficiently visible to capture attention and be effective, would be very unsightly rendering it highly likely that the initial owner would remove or cover them in some way by painting or otherwise, upon or soon after installation.

(iii) The evidence did not permit a finding that it was technically possible to prepare and affix a label that would survive the elements and remain visible indefinitely or, on Mr Werfel's case, for 30 years or more.

(iv) The lay out and content of any such warning label was not the subject of any evidence. The likely effectiveness of any such warning would be informed by its size, prominence and wording. The more aggressive or shocking, the more likely it would be effective and the greater would be likely damage to sales; the less aggressive or shocking, the less effective and the less effect on sales. The question of what would be a reasonable response in this respect would depend on circumstances as they changed over the years including, in particular, foreseeability of harm to particular classes of persons.

79 For similar reasons, the notion of affixing permanent warning labels on fencing panels was rejected by the Court of Appeal in *Hannell*.[55]

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[55] For example, at [226]-[228], [362].

80 The liability issues still to be determined with respect to the asbestos fence panels are:

(i) whether at any time prior to 1997 James Hardie owed Mr Werfel a duty to exercise reasonable care to avoid harm being caused to Mr Werfel in the circumstances in which he came into contact with James Hardie's asbestos fence panels;

(ii) whether the failure by James Hardie prior to 1997 to engage in a public media campaign warning of the dangers of asbestos constituted a breach of any such duty; and

(iii) if "yes" to (i) and (ii), whether that breach caused compensable loss to Mr Werfel.

The Pooraka and Parafield Gardens houses

81 During the hearing of the appeal, Mr Werfel indicated that he abandoned that aspect of his liability case which asserted that James Hardie was in breach of a duty of care owed to Mr Werfel by having failed, at the time of manufacture, to affix permanent warning labels on each or any of the asbestos flat sheets worked on by Mr Werfel in the Pooraka and Parafield Gardens houses. It had become apparent during the appeal (if not before) that this aspect of Mr Werfel's case on liability faced insuperable causation difficulties.[56]

82 The liability issues still to be determined are:

(i) whether, at the times of manufacture of the asbestos flat sheets worked on by Mr Werfel (1964 and 1977 (Pooraka) and 1966 (Parafield Gardens)), James Hardie owed Mr Werfel a duty to exercise reasonable care to avoid harm being caused to Mr Werfel in the circumstances in which he came into contact with James Hardie's product;

(ii) whether, at any of these times of manufacture, James Hardie's failure to have eliminated the asbestos from the product ultimately worked on by Mr Werfel constituted a breach of any such duty;

(iii) if "yes" to (i) and (ii), whether that breach caused compensable loss to Mr Werfel;

(iv) whether the failure by James Hardie, prior to Mr Werfel's 2001 (Pooraka) exposure or 2004 (Parafield Gardens) exposure, to engage in a public media campaign warning of the dangers of asbestos constituted a breach of the duty in (i) and;

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[56] *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109.

(v) if "yes" to (i) and (iv), whether either breach caused compensable loss to Mr Werfel.

The manufacture of asbestos free product

83 James Hardie ceased manufacturing any building products containing asbestos in the early 1980s.[57] According to a former sales manager for James Hardie between 1984 and 1994, the use of asbestos fibre in cement products was phased out from about 1983.[58]

84 At trial, it was not submitted that James Hardie should have ceased producing and withdrawn from the market all building products containing asbestos at a time before asbestos free substitutes became available.[59] However, Mr Werfel did submit that James Hardie could have and should have removed asbestos from its building products by *the late 1960s* in which case Mr Werfel would not have been exposed to respirable asbestos dust. The causation conclusion in this proposition follows from its premise with respect to Mr Werfel's exposure at the time of the Pooraka second story renovation (manufacture 1977) but on a balance of probabilities not with respect to his exposure to the Pooraka ground floor (manufacture 1964), the Parafield Gardens exposure (manufacture 1966) or the fencing panels exposure (indeterminate time of manufacture). However, and in any event, the premise, that James Hardie could have and should have removed asbestos by the late 1960s, upon further consideration is to be rejected.

85 The Judge accepted Mr Werfel's submission in this respect and it was one of the independent bases upon which her Honour determined liability in favour of Mr Werfel. The Judge's reasoning on this issue was economical and unsound. It considered entirely of the following.[60]

> **The response of a reasonable manufacturer in Amaca's position**
>
> Mr Werfel submitted that Amaca should have done the following:
>
> - by the late 1960s, have removed asbestos fibres from the building materials it sold to Australians … .
>
> …
>
> Mr MacFarlane, managing director of the defendant between 1978 and 1990 testified in a dust disease claim by Mr Wickham that he knew of no reason why Amaca's decision to eradicate asbestos from its building products could not have been taken in 1970.

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57 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [56].

58 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [59].

59 A contention along these lines wsa rejected in *AB & P Constructions v Amaca Pty Ltd*; *re Lorizio* [2006] NSWDDT 19 at [48] and *State of New South Wales v Amaca Pty Ltd* [2016] NSWDDT 2, [301], in the context of other building products containing asbestos.

60 *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [171], [172], [209], [220] and [221].

…

Breach of duty of care: findings of fact

I am satisfied on the evidence before me that in accordance with the principles set out in Shirt, Amaca breached its duty of care to a large class of Australians, of which Mr Werfel was a member. The magnitude of the risk of members of this class contracting mesothelioma was vast. The consequences of the risk were the deaths of many Australians. The probability of the risk occurring was certain. It had occurred in the past and the numbers were increasing, to the knowledge of Amaca. Amaca had resources with which it could and should have taken steps to minimise or obviate the risk of death in this class … [F]rom the late 1960s [it should have] ceased incorporating asbestos into its building products … . For all of the reasons referred to above, the balancing exercise mandated by *Shirt*, required Amaca as a reasonable manufacturer of a mass produced potentially lethal product, to take those steps. In consequence, it breached its duty of care, and Mr Werfel will die of mesothelioma.

…

If Amaca had chosen to do so, it could have developed asbestos free building materials from the late 1960s. The technology which it later used to do so in the late 1970s and early 1980s was not new and had been used in the paper industry for decades prior to the early 1960s.

The reasonable response of a manufacturer of asbestos cement building materials in the position of Amaca to the foreseeable risk of injury to the class of persons of which Mr Werfel was a member was to cease incorporating asbestos in its building materials from the late 1960s, not twenty years later.

86 The only evidence in support of this analysis expressly referred to by her Honour is that relating to evidence apparently given by a Mr McFarlane in 2014 in a matter involving James Hardie and a Mr Wickam. It is common ground that this aspect of Mr McFarlane's evidence was not admitted in Mr Werfel's trial. Her Honour erred in relying on it. However, her Honour's reference to purportedly available technology in the fourth paragraph quoted above would appear to imply reliance on an aspect of the evidence given by a Vidas Ridikas also in the *Wickam* matter in 2014 which evidence was before her Honour. Mr Werfel had relied on the evidence of Mr Ridikas at trial and did so again on appeal.

87 The evidence primarily relied upon by James Hardie in this context is a statement of John Pether dated 25 July 2003, provided in connection with and admitted in earlier litigation involving James Hardie. By the time of this earlier trial, Mr Pether had passed away; as such, whilst his statement was admitted there was no cross-examination. The statement is part of the bundle of documents originally marked in this trial as MFI D31 but later admitted as exhibit D31. The Judge admitted the Pether statement over Mr Werfel's objection. James Hardie relied on s 34C of the *Evidence Act 1929* (SA) and s 8(3)(a) of the *Dust Diseases Act*; her Honour did not indicate the basis on which the Pether statement had been admitted. The admission of this evidence has not been challenged on appeal. The weight it might be given will be affected

by the fact that, unlike in the case of Mr Ridikas, at no time had Mr Pether been cross-examined.

88 The Judge's finding that James Hardie could have and should have ceased manufacturing asbestos free building products by the late 1960s must be set aside on the basis of inadequate reasoning. Her Honour failed to identify those aspects of Mr Ridikas' evidence relied on (if, in fact, she did rely on his evidence) failed to provide any justification for any such reliance, failed to refer to and explain why she apparently rejected Mr Pether's evidence and expressly relied on the evidence of Mr McFarlane which had not been admitted at trial. Nevertheless, the question remains whether this Court might make that or a similar finding on appeal. Neither Mr Ridikas nor Mr Pether gave oral evidence before the Judge. The matter fell to be determined, essentially, on the basis of the written statement of Mr Pether and the record of evidence earlier given by Mr Ridikas. This Court on appeal is in the same position as was the Judge in assessing the probative value of that evidence.

89 Mr Pether was a qualified and experienced engineer; a Fellow of the Institution of Engineers of Australia. He was employed by James Hardie, commencing as an engineer and thereafter in various positions of increasing seniority, between 1964 and 1994. By 1979, he was Assistant General Manager of Research and Engineering, between 1980 and 1993 he was General Manager of Research and Development and between July 1993 and June 1994 he was the Group Research and Development Executive. Whilst the General Manager for Research and Development between 1980 and 1993, he was among those responsible for "mapping out future policy … including the development of asbestos-free fibre cement materials for building materials and pipes".

90 Mr Pether explained the value of asbestos as a reinforcing fibre because of its strength, toughness and filtration properties. The latter characteristic allowed a fibre cement sheet to be formed from slurry. He explained the different reinforcing and filtration properties of the three types of asbestos fibre used by James Hardie – amosite, crocidolite and chrysotile. He expressed these opinions.[61]

> 2.5 The inclusion of an asbestos fibre, usually chrysotile, in fibre cement flat sheets was also thought to be essential in the 1950s and 1960s. Although Neil Gilbert, the Factory Manager of JHC's plant in Brooklyn, Victoria, had started to use cellulose in flat sheets to provide a certain degree of flexibility and toughness, asbestos was still required for its reinforcing properties in the manufacture of flat sheets. The fact that highly refined cellulose could perform the same reinforcing task was not discovered until many years later in the late 1970's when high-powered cellulose refining equipment was purchased by JHC for experimental work to develop asbestos free products. The cellulose was added to the sheets in about 1958. The cellulose was added to impart a degree of toughness, making it easier to hammer a standard nail into a sheet.

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[61] CB vol 27, pg 365-366.

> 2.6 Because corrugated fibre cement sheets were often used for roofing; they needed to be particularly strong and lightweight. During the 1950s and 1960s, it was believed that an amphibole[62] fibre was necessary for the production of corrugated sheets to ensure that the sheets could be manufactured at an optimum rate and at maximum density to obtain sufficient strength and impermeability.
>
> …
>
> 2.4 [sic: 2.9] Through the 1960s and the early 1970s there were [sic] no viable alternative to asbestos fibre for reinforcing fibre cement products.
>
> (Citation supplied)

91 Mr Pether summarised what he described as the increasing public awareness of the health hazards posed by asbestos products that had arisen by the mid to late 1970s and observed that by 1979 James Hardie was "starting to come under increasing pressure in the market over asbestos". He said this.

> 3.2 By 1978, asbestos had become a strong issue in the press and on commercial building sites. The issue was being raised on commercial building sites by the unions at this time.
>
> 3.3 JHC's Research and Development Department had been working since around 1976 to 1977 attempting to replace asbestos with cellulose fibres in its products.
>
> 3.4 By 1979, JHC was starting to come under increasing pressure in the market over asbestos. A research and development project was commenced to develop a new product line in the form of an asbestos-free fire protection board.
>
> **Decision to Go Asbestos-Free**
>
> 4.1 Faced with media identifying the potential risks of asbestos and the pressure from unions, JHC in or about 1978 recognised the growing problems posed by continuing to manufacture asbestos-containing products. The problem at this stage was that the Research and Development Department of the company had not yet developed the technology to produce asbestos-free products. It was not feasible to cease production of the asbestos-containing products without having a viable alternative.
>
> 4.2 By 1979, the Managing Director of JHC, David Macfarlane, commissioned the Fibre Cement Executive General Manager, Harry Hudson, and the Manager of Factory Operations, Pat Collins, to move full speed ahead toward producing an asbestos-free product. In 1979, initial trials were run in the Welshpool factory in Western Australia by the then Factory Manager, Bill Waters. These trials were not successful due to a lack of equipment and knowledge in relation to the production of an asbestos-free product.
>
> 4.3 In 1980, I became the General Manager of JHC's Research and Development Department which comprised 80 people. The first task given to me was to develop an asbestos-free product.

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[62] Amphibole fibre in this context refers to amosite and crocidolite but not chrysotile which falls into the serpentine fibre category.

5. **Development of Asbestos-Free Production**

5.1 Two other possible product manufacturers in England had attempted to develop and asbestos-free product prior to JHC's decision to commit to developing asbestos-free products. Cape Boards and Panels began marketing asbestos-free insulation in around 1976 and Turner & Newall began marketing a Cemfil alkali resistant glass fibre reinforced external cladding product called Tacboard in 1978. The Tacboard external cladding products were a failure because asbestos-free technology was not sufficiently developed at this stage. Tacboard in particular was a disaster for Turner & Newall, with an estimated £10 million worth of warranty claims being incurred because it was too brittle and split within a year or two of installation.

5.2 I was given virtually unlimited resources by JHC to develop an asbestos-free fibre cement product in late 1979 and early 1980. By mid-1980 what appeared to be an acceptable product had been developed on the pilot scale plant of the Research and Development Department.

5.3 Before the viability of this product had been proven, JHC made an investment decision in early 1980 to convert the Welshpool No. 4 line in Western Australia to asbestos-free manufacture on a trial basis. This conversion required the addition of a cellulose treatment and refining plant at a cost of $1.5 million.

5.4 The first product came off this line around March 1981, and it was marketed in around May 1981, without any field trials, as a direct substitute for asbestos cement. As soon as JHC marketed these asbestos-free alternatives, the asbestos cement products that they substituted were taken off the market.

5.5 In late 1980 before any of these asbestos-free products has passed the trial phase, JHC made an investment decision to convert all plants to asbestos-free manufacture at a total capital cost of approximately $16 million.

5.6 The first product converted at Welshpool was Hardflex in March 1981. This was followed by an asbestos-free Villaboard product in July 1981.

5.7 Although JHC made an irrevocable decision in 1980 to take asbestos out of its fibre cement products as rapidly as possible, the development of an asbestos-free alternative was not an easy thing to do.

5.8 The first asbestos-free products which appeared on the market in 1981 proved to be defective, in that they were not durable and split in hot dry climates. These defects resulted in massive customer claims for rectification, but JHC was not prepared to return to asbestos cement manufacture while the defects were wrinkled out of the products. The transition out of asbestos was permanent and as each line was converted the machinery to permit a return to asbestos was removed and scrapped.

5.9 The development of an asbestos-free product line was a lengthy process. Defects were not finally removed from the products until 1986, although the products were improved in the intervening years from 1982 to 1986. Even when the defects were removed in 1986, the company could not be sure that they had been removed as it often took 2 years or more for the defect to manifest itself. It was therefore about 1990 before JHC could be certain that its transition to an asbestos-free product had been successful. The process of developing an asbestos-free product line took

> approximately 10 years from the initial research stage to the removal of all defects in the asbestos-free product.
>
> 5.10 An estimate of the costs of field rectification is around $10 million to $20 million over the years.
>
> . . . .
>
> 6.4 The development of the asbestos-free technology of the 1980s was facilitated to a large extent by the arrival of computers to carry out data analysis and testing of thousands of test specimens, by the arrival of data bases of technical literature which permitted searching literature by computer for technical solutions to problems, and by systematic progression in the industry of knowledge concerning the treatment and use of cellulose fibre as a reinforcing fibre for fibre cement products.
>
> 6.5 I am of the opinion that the successful development of the 1980s products in the 1960s would not have been possible as the industry at that time did not have a sufficient level of development of the enabling technologies of formulation knowledge, manufacturing technology and manufacturing machinery to permit them to be further extended resulting in asbestos free products.
>
> . . . .
>
> 6.9 It would only have been possible to cease using asbestos in JHC's products by continuing to sell asbestos-containing products while the development of an asbestos-free product was achieved. If, at the end of 1967, JHC had decided to get out of asbestos altogether, then a product would not have been available for manufacture within 4 to 5 years. However, a viable product would only have been able to be produced for the market well after 8 years from the time the decision had been made to go asbestos-free. It would have taken in excess of 10 years to get asbestos out of corrugated sheets. This was only possible when JHC used Eternit technology to put corrugated sheets through presses.

92 This history and the opinions canvassed by Mr Pether received support from a substantial number of contemporaneous internal business records that were also before the Judge.[63]

93 Mr Ridikas commenced employment with James Hardie at Camellia (an industrial suburb of Sydney) in 1966. He was part way through a chemistry certificate course at Sydney Technical College and had been looking for a laboratory assistant job. Initially, he did physical testing of products and raw material testing of asbestos. He performed that type of work until he "got onto the asbestos free project" in about 1978. During his first 12 years with James Hardie, Mr Ridikas finished his chemistry certificate course and completed a diploma in science at the New South Wales Institute of Technology. In his evidence, Mr Ridikas explained what was involved in the physical testing of products and the raw material testing of asbestos that he undertook during that first 12 years.

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[63] Exhibit D31; CB vol 27, pg 447-548, 575-592.

94 According to Mr Ridikas, he became a member of a team of four persons at the Camellia factory in about 1978, tasked with finding a way to remove asbestos from James Hardie products. Mr Ridikas was assigned the task of finding an alternative fibre. The other members of the team were a Brian Sloane who had two non-university certificates (one in moulding plastics) and Ray Toms, a New South Wales University science graduate. Bill Spark was the team leader. The work involved was divided three ways: Mr Ridikas was to find an alternative fibre; Mr Sloan was involved in "modifying the matrix" (everything else in the formulated product but for the fibre); and Mr Toms was in charge of "the actual manufacturing process". Mr Spark supervised and advised.

95 Mr Ridikas explained the nature of the work he performed in undertaking his role in this project including extensive references to technical detail, the reliability of which it is not possible to assess, given the limited evidence available. The essence of Mr Ridikas' evidence was that he undertook an extensive, and ultimately successful, trial and error process in the laboratory to test and assess alternative fibre structures and compositions. In his view, the experts the team consulted at the CSIRO were "useless" and other experts at universities were of no assistance.

96 The evidence from Mr Ridikas ultimately relied on by Mr Werfel in support of his contention that asbestos free building products could have been made available in the late 60s was contained in the following exchange.[64]

> MR SEMMLER
>
> Q. Given the basic ingredients of this substitute for asbestos being cellulose from radiata pine that had been used in Hardies products at least since the mid-60s, and second, the processing of that first with the disk refiner machine that had also been around since the mid-60s and then the use of the Hatscheck machine which had been around since the 1890s I think you said, and the fact that the process of finding the replacement involved trial and error, could the result have been achieved in about the same time, which I think is about four or five years, if you'd been asked to do it, say, in 1970?
>
> MR MILLER
>
> I object. It's like criticising Thomas Edison for not inventing the telephone –
>
> HIS HONOUR
>
> No it's not.
>
> Q. Mr Ridikis [sic] if you had been asked to do all these things that you did in 1966 instead of 1978 could you have done them then. A---That's the difficult question for me to answer because that's a hypothetical and I don't deal with hypotheticals, I deal with facts. *I don't know if I could have done it six years or ten years before. I think all the processes were in place but that's a hypothetical. But certainly the processes were in place and the materials were in place*.

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64 Ridikas evidence, CB vol 14, pg 39-40.

MR SEMMLER

Q. Mr Ridikis [sic], is the problem that you have with hypotheticals, is that because you as an industrial chemist you deal with concrete facts and things under the microscope rather than lofty postulated propositions. A---Yes.

Q. Is that right. A---Yes.

Q. So you have difficulty with it in that respect. A---*Yes. I can't extrapolate backwards*.

Q. No but that unfortunately is what courts do all the time because they look at events in the past and they have to do it, do you understand. A---Yeah.

Q. Using your knowledge and your expertise in the field of industrial chemistry, and knowing what you know about how you developed the substitute for asbestos can you tell us whether there was any ingredient in that process of developing it that wasn't available, say in the 60s that you brought to bear in 1978?

MR MILLER

I object your Honour.

HIS HONOUR

I'll allow it.

MR SEMMLER

His Honour is allowing you to answer it.

HIS HONOUR

Yes you can answer it. A---*Look it [sic] we could do it now I guess we could do it earlier because –*

MR SEMMLER

Q. When you say, *"now" you mean 78*. A---*Yeah.*

Q. Yes. A---*But I really can't answer this, I mean – I know it's frustrating me too. I just, yes. The processes are in place, the materials in place, the knowledge wasn't there.*

Q. Sorry. A---*The knowledge wasn't available; we had to learn that. And if that exact team was put backwards and everything else was equal, I guess, then the answer's yes.*

HIS HONOUR

Q. *When you say the knowledge wasn't there, do you mean the knowledge that you acquired by your trial and error process.* A---*Yes.*

(Emphasis added)

97 In cross-examination, Mr Ridikas agreed that the new product came on to the market in about 1982 or 1983 but after its release "it had a lot of failures" and was not successful as a durable product. Mr Ridikas said this.[65]

> Q. How many failures were you getting and where were they. A---The product as released, as far as I know, in Western Australia first and I don't know the statistical number of failures but they were high and they were due to the poor qualities of material. It failed in two areas, it failed in interlaminar bond –
>
> Q. What bond sorry. A---Interlaminar bond.
>
> Q. Slow down and say it for someone who is going to have to type it. A---A fibro sheet if you like is made out of layers.
>
> Q. Yes. A---Interlaminar bond is this bond between the layers. So it's laminated, and also too, after a little while – that was the first failure coming off the walls, very difficult to keep on walls. The second failure was that the product didn't have enough strain to cope with carbonation and moisture with it, so when these things got wet and carbonated, it would move, the product would shrink and induce tensile loads in the product and that – but the product couldn't sustain those tensile loads and cracked.
>
> Q. Now this was something that to your recollection was being observed in the market some period of time after it was released in about 82/83. A---That's correct, we didn't observe it in the laboratory.
>
> Q. But you had not done the sort of pressure testing that might take one, two years or seasons and leaving it out in different climates to see how it performed in the field, correct. A---Yes.
>
> Q. You agree with me that that has not been done. A---Not a lot.
>
> Q. Not a lot. So you end up finding that there are failures after two or three years. What then happens to the product. Back to the drawing board. A---Well, back to the drawing board, correct. Matrix only. Matrix only.
>
> Q. Right, and then what happened to the matrix to your knowledge. A---Well, it was modified. We added aluminium trihydrate and 4% and the problem disappeared.

Later in the cross-examination, counsel for James Hardie corrected the record to the effect that replacement, asbestos free, board went into the marketplace in Western Australia around May 1981. During cross-examination, Mr Ridikas accepted that the period of development was 1977 to 1981. Mr Ridikas then gave this evidence.[66]

> Q. You were asked some questions yesterday about Mr Pether who I think you said was the managing director of research and development towards the end of the process from 77 to 81, correct. A---That's right, yes.

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65 Ridikas evidence, CB vol 14, pg 41-42.
66 Ridikas evidence, CB vol 14, pg 52.

Q. Your understanding am I right of what he did was to oversee or take the project from the point of the lab into production is that right. A---That's right, yes.

Q. Now, do I take it that you personally – did you ever go to Welshpool WA in that period. A---Not in that period no.

Q. Do I take it then that you have no knowledge of the fact that in 1981 in March 1981 that there was asbestos sheet trialled in the facility in Welshpool in WA. A--- I knew there were trials going on but I can't recall the date, the year.

Q. And you would not be able to tell us from your knowledge, precisely when the product then was placed into the market after the first trials. A---No I don't know that.

Q. You were in the laboratory doing the R and D work and production matters, taking your laboratory information and putting it into production with matters that were being dealt with by others, correct. A---That's right, correct.

Q. Do I take it that because of – and I am not being critical about this – but because your narrow focus was as you have described of laboratory directed inquiry that you do not know and cannot assist us in telling us precisely how many trials were run in factories around Australia and elsewhere. A---No I can't tell you that.

Q. You could not tell us how much it cost. A---No.

98 According to Mr Ridikas, James Hardie was well ahead of the competition in developing asbestos free board.[67]

Q. What I am trying to get to is that by 1981 to your knowledge, Hardies was the only entity in the world that had developed asbestos free board, correct. A---Correct.

Q. Notwithstanding that there were large manufacturers of asbestos board in South Africa, England, the United States amongst other places, Hardies was the first one to be able to do it. A---Yes.

Q. And in undertaking that work, I take it that you went about it diligently correct. A---Correct.

Q. You were not kicking tyres and wasting time, you were doing it as promptly and as quickly as you could. A---Yes, correct.

Q. No one told you to go slow. A---No.

Q. And you did not perceive that you were going slow or anyone that you were working with was going slow, correct. A---Well, I wasn't going slow, no.

Q. And what you and the team you were working with was doing to your observation was following down an iterative research and development process from scratch, using your judgment and your expertise to come up as quickly as you could with an asbestos free board, correct. A---Correct.

Q. And that took between around 1977 to the beginning of 1981. A---Yes.

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[67] Ridikas evidence, CB vol 14, pg 54.

Q. You did that, you would agree, utilising expertise where available and needed within the company and if it was not there, you would go and source that expertise outside the company where you could, correct. A---Yes, correct, the early work was done on our own.

Q. And if you had perceived a need to go outside to get assistance you would have asked for it correct. A---We went to CSIRO and later on we engaged the – my memory's coming back, we engaged the services of Macquarie University, Sydney University, New South Wales University and possibly UTS, and they contributed zero to the project, less than.

Q. But you engaged them and you asked for their assistance and their assistance turned out to be of no utility, but my point was that where you thought there might be some benefit to be gained by going and engaging people you went and did just that correct. A---Correct.

Q. From your own personal knowledge do you know if any other of the manufacturers at that time that you were doing your R and D work, that is manufacturers either in Australia or overseas were also trying to come up with asbestos free board. A---I had no knowledge of that.

Q. At the time you did not know whether they did or did not. A---That's right.

Q. Do I take it that part of what you were doing as your research and development was literature searches. A---Bill Spark was more or less involved in that part of it, I was too busy trying to make samples.

Q. Did you yourself ever do any literature searches. A---I did, I looked at fibre properties, wood properties. The wood which delivered certain fibre properties, so I looked at that.

Q. But when you say Mr Spark did it, you explained to me yesterday that Mr Spark had a coordinating role with the three different subdisciplines along the production path, correct. A---Not the production path, in the laboratory.

Q. Along the R and D path. A---R and D path, correct.

Q. And to the extent that there might have been any base literature searches being undertaken, is it your understanding that that was something that he was involved in. A---Is my understanding yes.

99 There is no basis on which to find that either Mr Pether or Ms Ridikas was untruthful in their evidence. The starting point is that each was attempting to assist the Court according to his recollection of events. In this respect, Mr Pether had the advantage of access to the James Hardie Group's contemporaneous records whereas Mr Ridikas appears to have given his evidence in 2014 solely from his memory of events that occurred more than 30 years earlier. Furthermore, Mr Pether was significantly more highly qualified and experienced with a greater all round knowledge and understanding of and responsibility for the problem and how it might be addressed. Mr Ridikas, on his own account, had very limited qualifications and experience and was involved only in the factor floor trial and error process forming one aspect of a very complex research

and product development operation. For these reasons, on matters where their evidence differs in a material respect, we have formed a preference for that of Mr Pether. Further, on matters where Mr Pether's evidence is not challenged, we see no reason not to accept it.

100 The following matters derived from Mr Pether's evidence are not inconsistent with or challenged by Mr Ridikas' evidence.

(i) Through the 60s and the early 70s, there were no viable alternatives to asbestos fibre for reinforcing fibre cement products.

(ii) The fact that highly refined cellulose could perform the same reinforcing task was not discovered until the late 70s when high-powered cellulose refining equipment was purchased for experimental work.

(iii) The James Hardie Research and Development Department had been working since around 1976 to 1977 in an attempt to find a replacement.

(iv) As at 1978, the technology to produce asbestos free products had not been developed.

(v) In 1979, initial trials in Welshpool were not successful due to lack of relevant equipment and knowledge.

(vi) Mr Pether was provided with "virtually unlimited resources" in late 1979 and early 1980 to solve the problem.

(vii) Two other product manufacturers in England had failed in the endeavour, in 1976 and 1978 respectively, at great expense.

(viii) In 1980, James Hardie converted plant and equipment in advance of being able to market an asbestos free product, costing some $17.5 million.

(ix) Some asbestos free alternative products were first introduced into the market in the first half of 1981.

(x) The development of successfully modified products took some years after they were first marketed with costs of in field rectification estimated at $10-$20 million.

(xi) The process of developing an asbestos free product line took approximately 10 years from initial research to the removal of all defects.

(xii) It was in or about 1990 that James Hardie could be certain that the transition had been successful.

(xiii) In the late 1960s and early 1970s, James Hardie did not have the technology to go asbestos free. After nearly a decade of development efforts by James

Hardie's Research and Development Department they finally developed a product which remains as durable and economical as its predecessor.

(xiv) The development of asbestos free technology in the 1980s was facilitated to a large extent by the arrival of: computers enabling data analysis; large searchable databases of technical literature; and systematic progression in the industry of essential knowledge.

101 It is convenient to set out again Mr Pether's ultimate conclusion.

> I am of the opinion that the successful development of the 1980s products in the 1960s would not have been possible as the industry at that time did not have a sufficient level of development of the enabling technologies of formulation knowledge, manufacturing technology and manufacturing machinery to permit them to be further extended resulting in asbestos free products.

102 Notwithstanding this expression of opinion, Mr Pether appears to have qualified it in a later paragraph in his statement, also set out earlier.

> It would only have been possible to cease using asbestos in JHC's products by continuing to sell asbestos-containing products while the development of an asbestos-free product was achieved. If, at the end of 1967, JHC had decided to get out of asbestos altogether, then a product would not have been available for manufacture within 4 to 5 years. However, a viable product would only have been able to be produced for the marked well after 8 years from the time the decision had been made to go asbestos-free. It would have taken in excess of 10 years to get asbestos out of corrugated sheets. This was only possible when JHC used Eternit technology to put corrugated sheets through presses.

This qualification, if correct, leaves open a small window of opportunity for the flat sheet product worked on by Mr Werfel as part of the Pooraka second storey renovation (manufactured prior and proximate to 1977) to have been asbestos free, had James Hardie commenced its research and development in 1967. However, Mr Pether's posited qualification suffers from the same major difficulty that unpins the evidence of Mr Ridikas (in (iv) below), and cannot be accepted as reliable.

103 Mr Werfel relied in particular on the emphasised passages in the evidence of Mr Ridikas, set out earlier at paragraph [96], in submitting to the effect that the achievements of Mr Ridikas' team could have been replicated if they had started on the project in 1966. There are a number of difficulties with this expression of opinion that render it of virtually no assistance.

(i) The statements to this effect by Mr Ridikas were very much qualified on the basis that he was being asked to consider a hypothetical. He initially said "I don't know if I could have done it six years or ten years before" and then later, "if … everything else was equal, I guess, then the answer's yes".

(ii) Mr Ridikas was only involved in one part of a much bigger and more complex operation.

(iii) Mr Ridikas is not shown to have had the expertise or experience sufficient to provide an opinion of this type; this is consistent with his own expressed uncertainty.

(iv) The process outlined by Mr Pether leading to asbestos free product was complex, very time consuming, and very expensive to conduct. It relied on, *inter alia*, the state of the experience and expertise of the particular personnel involved, the Group's financial and market position, the technical knowhow from both within and without the organisation, the computer power and the research and development data base relevant to the task and, as to each of which, as it was available throughout 1977 to 1981 and thereafter during the post-initial marketing development years. Without a time responsive evidentiary analysis of these variables, it is not possible to transplant that experience to an earlier time, let alone as early as the late 60s, so as to arrive at a reliable conclusion that the same result could have been achieved with a similar effort at that earlier time.

104 The difficulty summarised in (iv) above also renders Mr Pether's apparent qualification of no probative value. Mr Werfel on whom the onus lies has not established on balance that James Hardie could have produced and marketed replacement, asbestos free, building products at a time materially earlier than it did, and certainly not as at 1977 or earlier. It follows that Mr Werfel's claim that James Hardie breached a duty of care by not removing asbestos from its building products in the late 60s or, indeed, at some earlier time such that Mr Werfel would never have been exposed to respirable asbestos had to have failed at trial.

105 As such, the question of "should" James Hardie have done this cannot arise. If it were to be assumed, contrary to the above analysis, that James Hardie could have produced asbestos free products sometime earlier than it did, the answer to the "should" question still would be dependent on a number of variables as to which it would not be possible to make reliable findings, such as when it would have been possible and at what cost to the company. The need to know when it would have been possible would also be relevant to considerations of foreseeability (at that time) and reasonableness of response.

106 Mr Werfel's sole remaining pathway to liability is the contention (accepted by the Judge) that James Hardie owed Mr Werfel a duty of care to warn him by way of a public or mass media campaign. This pathway requires a more detailed consideration of the relevant evidence insofar as it bears on the questions of duty of care, breach and causation in this specific context.

The duty of care

Introduction

107 It is a necessary, but not sufficient condition, for the imposition of a duty of care in the use of a product, that the manufacturer or distributor ought to have foreseen that risk. In this case Mr Werfel must prove that James Hardie should

have foreseen a material risk that persons engaged only occasionally in working on in-place asbestos home building products, as tradespeople or householders, could contract mesothelioma. The other circumstances supporting the imposition of a duty to warn, or negating it, are to be found in the matrix of circumstances connecting the manufacturer or distributor with, or distancing it from, the person who suffers a foreseeable injury. In this case, those circumstances include:

- the commercial nature of James Hardie's manufacture and distribution of asbestos-cement products;
- the extensive and widespread use of those products in Australia's post-war residential construction;
- the continual operations of James Hardie in manufacturing and distributing asbestos free materials after 1987;
- the large number of people, tradespersons and home handypersons who would come to work on those products over a long period of time;
- the lack of any direct commercial relationship between those tradespersons and handypersons in respect of the asbestos-cement products on which they worked; and
- the adverse effect on James Hardie's business were it to warn that people who worked on asbestos-cement products might contract mesothelioma.

108 For the reasons which follow, we would hold that by 1990, the combined circumstances required the imposition of a duty on James Hardie to take care to avoid injury to persons who might even occasionally remodel, repair or remove its asbestos-cement products.

Foreseeability of risk

109 The review of the scientific material set out below shows that James Hardie ought to have foreseen that there was a material risk to occasional users of asbestos-cement products from at least 1980. In the following decade, the scientific literature strongly confirmed that even low dose exposure to asbestos dust could cause mesothelioma. In the same period, the frequency and extent of rework or demolition of asbestos-cement home building products increased as homes built in the 1950s and 1960s aged and came to be occupied by the next generation of homeowners. In the 1980s and in particular after it ceased production of asbestos-cement building products in 1987, James Hardie actively marketed its asbestos free building products as cladding for homes constructed of asbestos-cement products.

110 The recognition of the capacity of asbestos dust to cause illness extends back to the nineteenth century. In 1898, the *Inspector of Factories Report* (UK) reported that a microscopic examination of asbestos dust had revealed its

glass-like characteristics and its capacity to cause injury to respiratory tracts. References to the health risks of asbestos dust in the early twentieth century focused on the need to take measures to reduce exposure, but did not warn against using the product at all.[68] In 1948 the Director General of Public Health in New South Wales, Dr Smith, recommended the use of magnesia instead of asbestos for the insulation of crucibles used to mould steel. In 1953, the Lancet published an article by AI McLaughlin entitled 'The Prevention of the Dust Diseases' which cast doubt on the validity of the then prophylactic maxima allowable concentrations of asbestos dust which had been formulated by a number of government agencies.

111 An article published in the *Medical Journal of Australia* on 15 December 1962[69] noted an apparent relationship between a relatively short period of exposure to blue asbestos (crocidolite) in the development of pleural mesothelioma. The findings were taken as confirmation of the concern published in a 1961 article "that these tumours may arise after transitory exposure to crocidolite in susceptible persons".

112 A letter published in the *British Medical Journal* on 3 November 1962[70] from Mr W J Smither, chairman of the Asbestos Research Council, referred to recent discoveries in South Africa, Great Britain and elsewhere of an association between diffuse mesotheliomas of the pleura and peritoneal cavities, and exposure to asbestos dust. It observed that there was no apparent correlation between the severity of pulmonary asbestosis and the occurrence of the tumours with the exposure to dust sometimes being minimal. A responding letter from researchers at the Queens University of Belfast was published on 24 November 1962.[71] They summarised their observations of diffuse pleural mesotheliomas collected on necropsy. In a total of 15 mesotheliomas, asbestos bodies were found in 12, but only in one case were the fibres plentiful. Such histories as were obtained by the researchers showed intermittent or no definite exposure. They noted that in most of the cases exposure to asbestos was not continuous or prolonged.

113 Evidence was received on the trial of this action that in mid-1963 a factory safety officer in one of James Hardie's factories raised his concerns about the dangers of exposure to asbestos dust with James Hardie's Chief Medical Officer. The evidence was in the form of the transcript of that safety officer's testimony in another trial. The effect of the conversation was that when the safety officer

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[68] Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry (1930); Cook, 'The Occupational Disease Hazard' (1942) 11(4) *Industrial Medicine* 192; Merewether and Price, 'Silicosis and Asbestosis' (1932) *Quarry and Roadmaking* 420.

[69] JC McNulty, 'Malignant Pleural Mesothelioma in an Asbestos Worker' (1962) 49(2) *The Medical Journal of Australia* 953 (CB vol 21, pg 1237).

[70] WJ Smither, JC Gilson and JC Wagner, 'Mesotheliomas and Asbestos Dust' (1962) 2 (5313) *The British Medical Journal* 1194 (CB vol 21, pg 1235).

[71] WTE McCaughey, OL Wade and PC Elmes, 'Exposure to Asbestos Dust and Diffuse Pleural Mesotheliomas*'* (1962) 2 (5316) *The British Medical Journal* 1397.

raised his concern about the risk to, amongst others, the users of James Hardie's asbestos-cement products, the Chief Medical Officer responded that he did not think that James Hardie had an obligation after the product was sold. In another conversation, the safety officer also urged the cessation of manufacture of all asbestos products.[72] Use of that evidence is problematic. It is not clear to what extent the exchange was a private or personal one, or one in which the Chief Medical Officer was stating a considered company position. Moreover, whether or not James Hardie had an obligation to end users is a question of law and the opinion of a single safety officer is not determinative of what a reasonable manufacturer in the position of James Hardie ought to have foreseen. However, the exchange does demonstrate that knowledge of the literature exposing a material risk to health from exposure to asbestos dust had trickled down to persons in their respective positions. A reasonable manufacturer should, by that time, at least have appreciated the need to monitor the growing body of knowledge of those risks.

114 In 1964, the *Journal of the American Medical Association* published an article on asbestos exposure.[73] The lead author was Selikoff, a prolific and authoritative publisher on the subject. The authors commented on South African and British investigations which found pleural and peritoneal neoplasms among individuals who had chance environmental exposure to asbestos. They warned that asbestos exposure in industry is not limited to the particular craft that works with the material, because the floating fibres "do not respect job classifications".

115 In February 1965, Professor Bryan Gandevia of the Prince Henry Hospital wrote to James Hardie's personnel manager informing him that "[recent published work] leaves no doubt of this association [between asbestos and mesothelioma], and the exposure can be quite small".[74] The letter also noted the long latency period between exposure and contraction which explained the increasing frequency of cases. We refer to this letter further below because it is inconsistent with the opinion of Professor Gandevia, given in other proceedings but received in Mr Werfel's trial, on which James Hardie relies.

116 In an article published in the *British Journal of Industrial Medicine* in 1965,[75] the comment is made that the present evidence indicates that carcinoma of the lung is not limited to exposure to any one type of asbestos fibre and that further investigations were urgently needed. It observed that evidence from several countries suggested that exposure to crocidolite may be of particular importance in the contraction of mesothelioma, but that it could not be concluded that only that form of asbestos fibre is implicated.

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[72] CB vol 18, pg 2213-2219.

[73] Irving J Selikoff, Jacob Churg and E Cuyler Hamond 'Asbestos Exposure and Neoplasia' (1964) 188(1) *Journal of the American Medical Association* 22 (CB vol 21, pg 1253).

[74] CB vol 15, pg 527.

[75] The Geographical Pathology Committee of the International Union Against Cancer, 'Report and Recommendations of the Working Group on Asbestos and Cancer' (1965) 22(3) *British Journal of Industrial Medicine* 165, 166.

117 In 1965, the *British Journal of Industrial Medicine* published an article by Newhouse and Thompson entitled 'Mesothelioma of the Pleura and Peritoneum Following Exposure to Asbestos in the London area'.[76] The paper considered the cases of 83 patients from the London Hospital who were diagnosed with mesothelioma confirmed by necropsy or biopsy. The series consisted of 41 men and 42 women, 27 of whom had peritoneal, and 56 pleural, tumours. The earliest death was recorded in 1917, but 48 per cent of the deaths occurred between 1960 and 1964. In 52.6 per cent of the cases, the relevant history was either of occupational exposure, or of residence with an asbestos worker. Of the other histories, 30.6 per cent lived within half a mile of an asbestos factory. The latency period was between 16 and 55 years. The authors concluded:[77]

> There seems little doubt that the risk of mesothelioma may arise from both occupational and domestic exposure to asbestos.

118 There was no record of mesothelioma contracted from occasional handyperson or domestic work on asbestos-cement sheets. However, the absence of a finding of mesothelioma related to handypersons or domestic renovation could not have given a rational producer of asbestos-cement home building products much comfort. On the contrary, the timing of the introduction, and growth in the use, of asbestos-cement building products and the, by then known, long latency period between exposure and disease, should have put the reasonable manufacturer on notice of the need to continue to monitor ongoing public health research on the subject.

119 In 1965, the *New England Journal of Medicine* published the article 'Relation Between Exposure to Asbestos and Mesothelioma' by Selikoff and others.[78] The paper was based on a study of 2,500 autopsies conducted between 1953 and 1964 and examined the association between the presence of asbestos bodies or pulmonary fibrosis, and mesothelioma. The authors concluded that there was a causal relationship between exposure to asbestos and mesothelioma, which was not limited to exposure to crocidolite. They accepted that mesothelioma might be caused by "relatively light and intermittent asbestos exposure".

120 In 1964, a conference on the biological effects of asbestos was held in New York. Its proceedings were published in 1965 in the *Annals of the New York Academy of Sciences*. One participant in the proceeding, from the Department of Health in Washington DC, stressed that disease may originate in even light exposure from "minor uses" of asbestos, like the machine sawing of asbestos

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[76] Muriel L Newhouse and Hilda Thompson, 'Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area' (1965) 22(4) *British Journal of Industrial Medicine* 261 (CB vol 21, pg 1263).

[77] Muriel L Newhouse and Hilda Thompson, 'Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area' (1965) 22(4) *British Journal of Industrial Medicine* 261, 266 (CB vol 21, pg 1268).

[78] Irving J Selikoff, Jacob Churg and E Cuyler Hammond, 'Relation Between Exposure to Asbestos and Mesothelioma' (1965) 272 *New England Journal of Medicine* 560.

bags.[79] A participant from an English asbestos manufacturer stated that his firm did "not believe there is any safe limit" for asbestos dust exposure.[80] Another contributor stated that his conclusion was that "the only safe amount of asbestos dust exposure [is] zero" and that "as far as a safe level of asbestos dust is concerned … there is no safe level. The safe level is nil and anything above the safe level represents certain risk".[81] The opinions expressed in the proceedings of this international conference of leading experts ought to have alarmed all participants in the asbestos industry. They ought to have prompted the major manufacturers of asbestos-cement products to review the measures which they could, and should, reasonably take to protect workers engaged in the production, and all subsequent users, of their products.

121 In March 1966, James Hardie's Personnel Manager distributed extracts of the papers delivered at the 1964 conference, including the reference to there being no safe limit. In July 1966, James Hardie's Chief Medical Officer, in an address to factory managers, warned that cancer was a health risk, that there was no safe limit, that courts would generally attribute cancer amongst asbestos workers to their occupation and that sales may be affected.

122 In February 1966, the Chairman of James Hardie, Mr Reid, received a newspaper article published in October 1965 warning of the connection between mesothelioma and exposure to asbestos from sharing an asbestos worker's home.

123 A paper published in the *Medical Journal of Australia* in 1966 noted exposure to asbestos dust as an aetiological factor in the development of mesothelioma, even in the absence of pulmonary fibrosis.[82] The use of masks as an effective protection against insulation of asbestos dust was noted in the annual report of the Department of Public Health and the Central Board of Health of South Australia on 31 December 1966.

124 The Asbestos Research Council of Australia published a code of practice for the handling of asbestos products in 1966 and recommended that the cutting of material containing asbestos be undertaken in a segregated area where there is good air circulation.

125 In 1967 an article, published in the *British Medical Journal*,[83] discussed the difficulty in linking asbestos disease with a particular industry or occupation because the labour force in the asbestos manufacturing industries is "highly mobile and distributed over a large number of small units". Relevantly to this appeal, it also observed, prophetically, that "[i]n addition there is a vast number of 'do-it-yourself' enthusiasts who may be exposed intermittently to highly

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79 (1965) 132(1) *Annals of New York Academy of Sciences*, 21-22 (CB vol 21, pg 1299).
80 (1965) 132(1) *Annals of New York Academy of Sciences*, 335 (CB vol 21, pg 1302).
81 (1965) 132(1) *Annals of New York Academy of Sciences* at 336 (CB vol 21, pg 1303).
82 RJ Riddel, 'Three Cases of Mesothelioma' (1966) 2(12) *Medical Journal of Australia* 554, 558 (CB vol 21, pg 1310).
83 'Asbestosis' (1967) 5557 *British Medical Journal* 62, 62-63 (CB vol 21, pg 1329).

concentrated asbestos dust". It noted that the biological significance of pulmonary asbestos bodies is not yet clear but that they had been found in large proportions in necropsies in widely diverse regions, and that many cases of asbestosis were, in the past, diagnosed as other respiratory or pulmonary conditions. The authors continued:

> Two aspects of the asbestos - mesothelioma association are very disturbing. In some cases, extremely short exposures have been reported. There is also growing evidence that residents in asbestos mining or manufacturing districts and those at risk by the brushing and washing of contaminated working clothes, can develop mesenchymal tumours or the bizarre pleural fibrosis and calcifications which seem to be associated with exposure to asbestos.
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> (Citations omitted; Emphasis added)

126 In the same month, an article in the *South African Medical Journal* entitled 'Asbestos – The Lethal Dust'[84] warned that it was not only persons directly engaged in the asbestos industry who developed asbestosis or its complications. The article referred to press reports in England of the contraction of mesothelioma by family members of asbestos workers. It also referred to two studies in the United States which showed that mesothelioma was not peculiar to crocidolite exposure.

127 An article published in the *Journal of the American Medical Association* in 1967 entitled 'Mesothelioma and Its Association with Asbestosis'[85] discussed 17 cases of mesothelioma, nine of the pleura, and eight of the peritoneum, found on surgery at a community hospital. The pleura and peritoneal mesotheliomas found were in workers exposed to crocidolite and amosite fibres. Two of the patients with the malignancy had environmental exposure only from living in a community adjacent to an asbestos mill.

128 In 1967, an article by Lieben and Pistawka in *Archives of Environmental Health* concluded:[86]

> If we assume that asbestos may be the causative or trigger agent for malignant mesothelioma in some cases described above we must admit that the minimal dose-effect relationship and duration of a latent period are unknown. The occupational exposure of insulation workers or asbestos textile workers were certainly many thousand times higher than those of the neighbourhood cases or family contacts.

129 The First Australian Pneumoconiosis Conference (**the Australian Conference**) was held at the University of Sydney in February 1968. It was opened by the then Minister for Health, the Honourable AJ Forbes. A paper presented by Dr Outhred, a medical consultant with the Coal Board, commented

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[84] (1967) *SA Medical Journal* 639, 641-642 (CB vol 21, pg 1331).

[85] Maxwell Borow, Alfred Conston, Lawrence Livornese and Norbert Schalet, 'Mesothelioma and Its Association with Asbestosis' (1967) 201 (8) *JAMA* 587 (CB vol 21, pg 1339).

[86] J Lieben and H Pistawka, 'Mesothelioma and Asbestos Exposure' (1967) 14(4) *Archives of Environmental Health* 559 (CB vol 21, pg 1324).

on the strong relationship between malignancies and exposure to crocidolite in particular. A report was also given to the conference of a case of mesothelioma in an electrician aged 63, whose exposure to asbestos was in lining fuse boxes with asbestos sheets over a period of about five years. Each job only took about half an hour and was performed on about two occasions a month. That report was included in material circulated within James Hardie. Of course, even without actual knowledge of the proceedings of the Australian Conference, as one of the largest manufacturers of asbestos-cement sheets in Australia, James Hardie ought to have kept itself informed of its proceedings. The emerging evidence of the serious health risks arising out of exposure to asbestos dust when working on asbestos-cement products should have heightened concern about latent dangers in its products.

130 An article published in The New Yorker in 1968 on the link between asbestos exposure and mesothelioma and the case of a 14-year-old boy contracting mesothelioma after helping his father saw asbestos sheets and quoted Selikoff that quite small exposures may damage health.[87] The article was received into evidence on the basis that it was available to James Hardie at about the time of its publication.

131 An article published in the *Medical Journal of Australia* on 26 October 1968 noted widespread concern at the development of mesotheliomas after minor exposure to asbestos. A text entitled 'The Diseases of Occupations', published in 1969, recommended that amateur handy persons sawing material containing asbestos wear a lightweight dust mask and either work out-of-doors or in a well-ventilated room.

132 It is to be observed that no scientific literature or other commentary, to this point, had recommended cessation of the manufacture of asbestos-cement building products. The use of asbestos-cement building products was by then widespread. Houses constructed using those products were accommodating much of the post-war boom in the Australian population. By 1970, the asbestos-cement products on which Mr Werfel had worked, and which caused his mesothelioma, had been manufactured.

133 An article published on 6 July 1974 in *The Bulletin*, a then popular and well-regarded current affairs magazine, perhaps a little extravagantly, claimed that the suburban house constructed of material containing asbestos is one of the most familiar features of the Australian landscape. The article warned that mesothelioma might be caused by very low intensity exposures, and that with one exception all the variations of asbestos can, to some degree, cause mesothelioma. It warned of the danger of even environmental exposure. It reported a widely shared view amongst occupational safety practitioners, that the demolition of buildings containing asbestos was a health risk. The article included a report that a medical practitioner at the Industrial Medical Clinic in

[87] CB vol 16, pg 878-879.

Stockholm, had undertaken x-ray investigations of 48 persons engaged in the repair of buildings which showed the presence of asbestos fibres. The article noted that very few workers involved in demolition work in Australia took precautionary measures.

134 Model asbestos regulations published by the National Health and Medical Research Council of Australia (**NHMRC**) in October 1975 strongly urged the provision of exhaust ventilation and protective equipment when engaged in dusty work on asbestos products.

135 In the text *Asbestos and Disease*, published in 1978, Selikoff and Lee noted:[88]

> The situation with asbestos-induced mesothelioma is complicated by three or four peculiarities:
>
> (a) While most carcinogenic processes involve a long delay between the initial causative exposure and the appearance of the tumour, the lapse time is particularly long with mesothelioma caused by asbestos.
>
> (b) The trigger dose may be small, in some cases extraordinarily so.
>
> (c) High levels of exposure may bring about a rapid development of pulmonary fibrosis and the death of the patient before he completed the lapse period necessary to the appearance of mesothelioma ('competitive risk').

136 Neither James Hardie nor Mr Werfel called occupational physicians or other medical experts to testify in the trial, about when it became foreseeable that mesothelioma could be caused by occasional work on asbestos-cement products. However, James Hardie relied on reports and evidence given by experts in other proceedings. A serious shortcoming in that approach is that the evidence was not focussed on the period of time leading up to the work performed by Mr Werfel.

137 One such report was that of Professor Ferguson, an occupational physician with extensive experience. Professor Ferguson was the chair of the Occupational Health Committee of the National Health and Medical Research Council (**the NHMRC Committee**) in which time the NHMRC Committee decided that "it was undesirable to label asbestos-cement products for end-use, because it would create unnecessary concern". However, the NHMRC Committee acted after the event to endorse James Hardie's unilateral decision to place labels on some of its asbestos-cement products in late 1978. Professor Ferguson's conclusion, after surveying the knowledge available from the 1960s through the 1970s, was:

> In view of all of the above considerations, it was not reasonably foreseeable prior to 1983 that given his level of exposure as a carpenter, the plaintiff would have been at risk of developing any respiratory conditions.

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[88] Irving Selikoff and Douglas Lee, *Asbestos and Disease* (Academic Press, 1978), 262.

138 In cross-examination, Professor Ferguson dogmatically clung to that view in the face of evidence which suggested an earlier time. His attention was drawn to a publication in 1967 by the Asbestosis Research Council of the United Kingdom (**ARCUK**) which suggested precautions should be taken by asbestos-cement end-users. Professor Ferguson was asked whether, on reading that publication in 1967, it raised a question in his mind about why the ARCUK was recommending such a precaution if, as Professor Ferguson maintained, injury was not foreseeable before 1983. Professor Ferguson answered, "All I can say is that the Occupational Health Committee of the National Health and Medical Research Council, which was responsible for advising the Federal Government and State Governments on this issue, didn't believe it was necessary to advise about any risk with end-use until the early 1980s".

139 Only when pressed did Professor Ferguson respond, "it would raise the question in our mind [referring to Australian researchers] … and certainly we discussed these issues and because of what I've just mentioned about the lack of evidence to the contrary we did not believe that action was called for". On further questioning, it appeared that Professor Ferguson did not have a recollection of the "discussion" to which he had alluded in that answer but was relying on the practice of the NHMRC Committee to discuss a wide range of material from around the world which was brought to its attention. Professor Ferguson gave evidence that he first became concerned that exposure to crocidolite from the use of formed asbestos-cement sheets, and the risk of it causing mesothelioma in the early 1980s. He continued "I told you that I certainly was concerned about the outcome in people who had been exposed to crocidolite in the – before 1968, but after that period when crocidolite was omitted, we still thought it was undesirable that people continued to be exposed cumulatively to inhaling asbestos dust in the sense that it was just undesirable to expose people unnecessarily to a known hazard".

140 Professor Ferguson's opinion appears to be that there was no concern about exposure to cutting asbestos-cement sheets after 1968 because crocidolite was not used thereafter. However, asbestos-cement products containing crocidolite were, obviously enough, not recalled. Concern about inhaling dust or fibres from asbestos-cement sheets which were manufactured before 1960 ought to have remained. On Professor Ferguson's evidence, however, he only became concerned about that in the early 1980s. Indeed, he later testified, "Well there would have been concern that people who were handling products that still contained crocidolite might be at risk but there was no concern as I said of mesothelioma after crocidolite was omitted".

141 Evidence which had been given in other proceedings by Janet Sowden, a consulting occupational hygienist, was also received in Mr Werfel's trial. Miss Sowden referred to the increasingly cautious approach adopted by the NHMRC Committee after 1979 when it recommended for the first time that all asbestos exposures should be minimised regardless of the exposure standard.

Miss Sowden's report stated that that recommendation reflected a growing concern emerging in the literature. Her conclusion focussed on the relevant time in the other proceedings:

> I consider that until [1979] it was not reasonably foreseeable that end-users of asbestos-cement products would develop any disabling asbestos related disease (including mesothelioma) where those products did not contain amosite or crocidolite and where chrysotile exposures were kept below the regulatory levels.

142 That conclusion is consistent with the finding we make below. Her opinion was that the risk from an asbestos-cement product containing amosite only was also foreseeable but the risk was highly unlikely. Her opinion was that it was reasonable for James Hardie not to have warned end-users of potential health hazards from the use of asbestos-cement products until 1978. That opinion was based on a 1979 recommendation in the United Kingdom that there should be an overriding requirement to reduce exposure to the lowest level reasonably practicable. That recommendation was adopted in Australia in 1980. In Miss Sowden's opinion, it was then reasonable for any manufacturer of asbestos containing material to place warning labels on them. Miss Sowden's opinion was that the warning labels placed on some asbestos-cement products from 1978 to 1982 were factually correct and appropriate.

143 Finally, James Hardie also relied on the evidence given in other proceedings of Professor Gandevia. Professor Gandevia was a respiratory physician with extensive experience. In his report, he made the observation that until 1970 there were few people in Australia who were specialist occupational physicians. In his opinion, a paper published by Wagner in 1960 did not demonstrate a link between asbestos dust exposure and mesothelioma. In his opinion, that link was only demonstrated by studies in the mid to late 1960s and in particular those studies around dockyards.

144 Professor Gandevia expressed his views strongly. He referred to Wagner's presentation to the Johannesburg conference in 1959 as a "very poor paper". He said of it that "I had never seen a case myself in those days [of mesothelioma] and it was in a population of people who were ethnically different [South African residents] and who worked under conditions which were totally foreign to a western society". Professor Gandevia concluded:

> … all in all I would say it was exceedingly interesting paper, but one which I put for a year or so to one side, and that applies to the exposures as well as to other aspects of causation.

145 Professor Gandevia also made the point that the relative pathogenicity of different types of asbestos did not emerge until the late 1960s; the identification of the role of particular fibres in the development of mesothelioma was only clarified from 1970.

146 Professor Gandevia's report stated that a concern that the use of asbestos-cement products might conceivably cause mesothelioma only arose from the early to mid-1970s but that view was not a widely held one if the product did not contain crocidolite. He stated that by the 1970s some concern was expressed at the possibility of contracting mesothelioma from the use of asbestos-cement materials containing crocidolite. His opinion was that "By the late 1970s, it would have been foreseeable that a risk was associated with using crocidolite containing material, although it would still be considered low risk relative to some other types of asbestos-containing material". Professor Gandevia's evidence was that disease was not foreseeable in the use of asbestos-cement products which did not contain crocidolite.

147 Professor Gandevia reported that his review of the literature failed to find a reference to any case of mesothelioma specifically attributable to asbestos cement products. However, he qualified that statement explaining that his review was not comprehensive.

148 Professor Gandevia was the author of the letter referred to in paragraph [114] above to the personnel manager at James Hardie saying that the exposure could be quite small. It was shown to Professor Gandevia in cross-examination in the other proceedings. He explained the inconsistency between that letter and his evidence by saying that he was speaking in relative terms. Professor Gandevia's professional independence was challenged by questioning him about an overseas trip he made to England in 1963. He could not recall whether he asked James Hardie for funding for that trip but accepted that he may have.

149 Professor Gandevia was asked how it came about that by the late 1960s it was accepted that there was a foreseeable risk of mesothelioma from exposure to crocidolite. He answered:

> Greater understanding of the pathogenicity of the fibre types, the emergence of the concept of the … persistence of amphibole fibre. I think apart from the general trend towards avoiding crocidolite or banning it I can't go further than that.

150 Professor Gandevia accepted that by the early 1970s a warning light had come on for him with respect to the use of material containing crocidolite.

151 In answer to questions from the Judge, the following exchange occurred:

> Q. Doctor, in February 1965 you wrote to Hardies pointing out that there was no doubt an association with asbestos containing a crocidolite and mesothelioma.
>
> A. I think I was exceptionally well informed at that stage, your Honour.
>
> Q. You pointed out that the exposure can be relatively small.
>
> A. Yes, your Honour.

> Q. At that stage I suppose you would have taken the view that it would be in the mind of a person knowing those two things have been prudent to warn persons against relatively small concentrations of crocidolite.
>
> A. Yes, I might have thought so, your Honour, but it is hard to say whether that can be generalised. I also think that I was under the impression that there was no crocidolite in – I can't swear to this but there was no crocidolite or negligible crocidolite if I can use that term in asbestos cement products at that time in Australia.

152 Two points need to be made. First, accepting that Professor Gandevia was "exceptionally well informed", that high level of knowledge was brought to James Hardie's attention by his letter. Secondly, it is difficult to understand how Professor Gandevia thought the problem had become "negligible" because use of crocidolite in asbestos-cement products was banned in the 1970s, when so much of that product was already in place in homes throughout Australia. That is all the more so given the long latency period.

153 We do not find the expert evidence on which James Hardie relies persuasive and indeed, in some respects, it supports a finding of foreseeability well before Mr Werfel's exposure to asbestos.

154 On a review of that literature published in leading medical journals, the article published in *The Bulletin*, and the expert evidence before the Judge, we find that at least by 1980 James Hardie ought to have known that there was a material risk of contracting mesothelioma from even the slight and occasional exposure to asbestos dust which would arise from tradespersons and householders remodelling, repairing or removing asbestos-cement products in residential buildings.

155 We accept that it is a relevant consideration that there had, to this point, not yet been a confirmed case of the contraction of mesothelioma from occasional, non-occupational work on asbestos-cement products. However, applying the scientific method to the available empirical evidence, there was a foreseeable risk that mesothelioma could be contracted by exposure of that kind. Moreover, it was a risk to which reputable scientific papers and journals had referred. The long latency period went a long way in explaining why that body of medical opinion had yet to be confirmed.

156 James Hardie also ought to have known, from those reports and from a common understanding of prevailing Australian attitudes to the taking of safety precautions when performing work of that kind, that many tradespeople, handypersons and home renovators were probably not taking even elementary precautions against the risk posed by asbestos dust.

157 We acknowledge that there is evidence on which foresight of that risk may well be attributed to James Hardie at an earlier time and, in particular, at about the time of the Australian Conference. It is unnecessary to determine whether the

risk to persons occasionally exposed to asbestos dust from working on asbestos-cement products was foreseeable any earlier, because Mr Werfel's exposure did not commence until the 1990s.

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 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 waring 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.

161 Mr Werfel submitted that the above conclusions are independently supported by s 8(2) of the *Dust Diseases Act* because no proof to the contrary was proffered by James Hardie. However, we prefer not to found our finding exclusively on the presumption. First, the presumed fact that James Hardie knew that any exposure to asbestos dust could result in a dust disease is very general. Foresight of a mere possibility may be insufficient to enliven a duty of care depending on the other salient features. Secondly, actual knowledge is not necessary to support a finding of the foreseeability; it may be imputed.

162 For now, it is necessary to continue the survey of medical research, because, as we have just observed, an increasing awareness of the risk, and its magnitude, affects the relative weight to be given to the competing criteria which affect whether or not, and when, a duty to warn arose and the measure and standard of care demanded by that duty.

163 The NHMRC Committee published a report on the health hazards of asbestos in 1982 which was adopted in its ninety first session in June 1981. It warned of the risk of contraction of asbestos related lung disease from building demolition, and recommended statutory provision for the control of demolition and structural alterations to buildings. It recommended, belatedly because James

Hardie had already adopted the practice, fixing a label on all products containing asbestos similar to the following:

- Caution
- Contains Asbestos Fibre
- Avoid Creating Dust
- Breathing asbestos dust may cause serious damage to health, including cancer
- Smoking greatly increases the risk

164 The NHMRC Committee accepted that based on knowledge at that time there was no threshold below which there is no evidence of risk and commented on what future research might reveal. In 'The Australian Mesothelioma Surveillance Program' (1979) published in 1987 in the *Medical Journal of Australia*,[89] it was reported that the program began to collect cases in New South Wales in a pilot study from 1979, but did not attempt to cover all of Australia until May 1981. The program had received notifications of 903 patients to 31 December 1985. Thirty-two cases were later reclassified as not having been mesothelioma. Fourteen subjects had used asbestos-cement products for domestic construction, and 13 subjects lived next to an asbestos-cement factory or with an asbestos worker.

165 The extent of the risk of contracting mesothelioma after only occasional and low-dose exposure to asbestos was emphasised at a conference of international experts held in New York in 1990.[90] The report on the conference includes the following:[91]

> We report 12 mesothelioma deaths among school teachers. For 9, the only likely source of asbestos exposure was to in-place ACBM [Asbestos Containing Building Materials]. Two teachers, with similar peritoneal mesotheliomas were sisters. All previous sibling clustering of mesothelioma reports have identified asbestos exposure to the siblings. This suggests that our two teachers must have been exposed to asbestos, most likely during each of their 40+ years of teaching.

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89 David Ferguson et al, 'The Australian Mesothelioma Surveillance Program 1979-1985' (1987) 147 *The Medical Journal of Australia* 167, 168.

90 Philip Landrigan, 'The Third Wave of Asbestos Disease: Exposure to Asbestosis in Place – Public Health Control – preface' (1991) 643 *Annals New York Academy of Sciences* xv, xvi; Papers published in the *Annals New York Academy of Sciences* vol 643 December 1991.

91 Henry Anderson et al, 'Mesothelioma among Employees with Likely Contact with in-place Asbestos-Containing Building Materials' (1991) 643 *Annals New York Academy of Sciences* 550, 570.

166 Another paper which considered four cases of mesothelioma among school teachers concluded:[92]

> That these mesotheliomas may be caused by low level asbestos exposure is indicated by instances where it has been related to environmental neighbourhood domestic or short-term exposure. This situation has raised concerns regarding past use of asbestos in public buildings, schools being one of the main areas of concern.

167 We find that by 1990 there was strong evidence that there was a material risk of contracting mesothelioma from even occasional exposure to asbestos dust when working with asbestos-cement products and that a major manufacturer of asbestos-cement products, acting reasonably, would have so known.

Other salient features

168 As we have already emphasised, foreseeability alone is not a sufficient condition for the imposition of a duty of care. We turn now to those features, other than foreseeability, of the relationship between James Hardie and that class of person who occasionally engaged on the remodelling, repair or removal of asbestos-cement building products, which support, or contraindicate, the imposition of a duty to warn.

169 The commercial manufacture and wholesale supply by James Hardie of the asbestos-cement building products is the obvious starting point. A duty to take reasonable steps to avoid harm to the users of manufactured products will generally be imposed on those who manufacture products for commercial gain. Indeed, the origin in the 20th century of the general duty of care in tort can be traced to a commercial relationship of that kind.

170 James Hardie was the predominant manufacturer and supplier of asbestos-cement products, one of the most commonly used building materials in the post-World War II Australian domestic construction boom. In determining whether James Hardie owe a duty of care, and in the formulation of that duty of care to subsequent users of those products, it must be imputed with the knowledge of the reasonably available literature published in leading national and international medical journals and the information disseminated in the mainstream media. The producer and wholesaler of a product cannot escape liability by turning a blind eye to the scientific assessment of the dangers that product poses to human health.

171 It is necessary to notice immediately that the relevant class of persons, to whom the duty postulated in this case is owed, is not the first purchasers or users of the product. Nor is it the builders who constructed the homes using asbestos-cement products, or the first occupants of those homes. The class of persons who later remodelled, repaired or removed asbestos sheets is quite distant

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[92] David Lilienfeld, 'Asbestos-Associated Pleural Mesothelioma in School Teachers: A Discussion of Four Cases' (1991) 643 *Annals New York Academy of Sciences* 454.

chronologically, and contractually, from the first supply by James Hardie of the asbestos-cement products to the public.

172 However, there is no requirement to limit the duty of care applicable to building products in the same way as it might for consumables. It is in the nature of the asbestos-cement building products that they will be durable and therefore need to be repaired, remodelled or removed by successive occupants of the houses constructed with them, or by the tradespersons those occupants engaged. Moreover, as will appear in paragraphs [307] to [312] below, in the 1970s and 1980s, James Hardie promoted the use of asbestos-cement products for home renovations and extensions. Later, it promoted its asbestos free products to replace or clad houses constructed of asbestos-cement products. It follows that James Hardie knew, or reasonably ought to have known, that its asbestos-cement products would, over time, come to be removed, remodelled or repaired. Over that same period of time, the medical evidence that even occasional exposure to asbestos dust could cause mesothelioma was accumulating. Moreover, James Hardie knew, and moved to profit from, the upward trend in the renovation, repair or demolition of houses built by marketing first its asbestos-cement products and, later, its asbestos free products.

173 The measure of the duty of care for which Mr Werfel contends, on the premise that James Hardie was not otherwise negligent in manufacturing and distributing the asbestos-cement products without a warning label, is one to disseminate a warning by public statements and disclosures of information about the health risks in working with asbestos-cement products. Plainly enough, once the building products were in place on private premises, James Hardie was not in a position to take any other prophylactic steps. A supplier of building products knows, and intends, that those products will remain in use for a substantial period of time. It will therefore generally be reasonable to impose a duty of care with respect to foreseeable risks and dangers that may arise from those products many years after they have been supplied, and a duty with respect to those risks to persons other than the initial customers and users.

174 In general terms, the imposition on manufacturers and suppliers of products of a duty to take reasonable care not to cause injury to the consumers of their products is uncontroversial. It is also well established that the standard of care may extend to warning of known dangers and to instruct on appropriate precautions.[93] The duty is a continuing one, such that a manufacturer or supplier who subsequently becomes aware of a product danger must take such reasonably practicable measures as are available to recall or warn.[94] It is an element of the duty to take active steps to discover possible product dangers.[95] Moreover, it is recognised that discharge of the duty may extend to instructing third parties, such

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93 *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218*; Suosaari v Steinhardt* [1989] 2 Qd R 477; *Anderson v Corporation of the City of Enfield* (1983) 34 SASR 472.

94 *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255.

95 *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88.

as health care workers, on symptoms that they should be alert to for the purposes of diagnosing the effects of a defective product.[96]

175 The question whether James Hardie ought to have given a warning to potential occasional users of its asbestos-cement products strictly arises on the issue of breach of duty. However, James Hardie contends that the statement of the duty by the Judge as one to take reasonable care to avoid injury to persons who occasionally worked on its asbestos-cement products was so abstract as to be devoid of meaning. It contends that the duty so expressed fails to provide an adequate yardstick against which to measure discharge of the duty. Importantly, it contends that the elliptical statement of the duty concealed insurmountable difficulties in the imposition of any duty at all.

176 The submission that the generality of the Judge's statement of the duty was, in itself, an error must be rejected. In *Amaca Pty Ltd v AB & P Constructions Pty Ltd*,[97] the Court of Appeal of New South Wales dismissed an appeal from the Dust Disease Tribunal which had found Amaca liable in negligence for the mesothelioma contracted by a construction worker who worked on asbestos-cement building products. The Judge in that case formulated the duty owed to the worker as one to warn of the risks in using those products. The Judge had cited passages from the judgment of King CJ in *Anderson v Corporation of the City of Enfield*,[98] and the judgment in *Thompson v Johnson & Johnson Pty Ltd*[99] which spoke in terms of a "duty to warn". Amaca appealed on the ground that the duty was wrongly expressed at that level of particularity. Giles JA explained:[100]

> [47] Many cases, however, have said that ordinarily the inquiry into the content of the duty of care is "at a relatively general level of abstraction": the phrase is from *Neindorf v Junkovic* (2005) ALJR 341, (2005) 222 ALR 631 at [50] per Kirby J. As was said by Gummow and Hayne JJ in *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 468 at [56], the more specific the formulation of the duty of care, the greater the prospect of mixing the anterior question of the existence of the duty with questions of fact in deciding whether a breach has occurred. In *Neindorf v Junkovic* Kirby J described at [52]-[55] the reasons why defining the scope of the duty of care "in an overly specific fashion" (at [52]) should be avoided. The danger of mixing duty with breach by an overly specific duty of care has been noted in, for example, *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [309] (Hayne J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [106] (McHugh J); and *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [20]-[29] (McHugh J), [58]-[61] (Gummow J), [118]-[119] (Hayne J).
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> [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

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96 *Thompson v Johnson & Johnson Pty Ltd & Anor* [1991] 2 VR 449.
97 *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220.
98 *Anderson v Corporation of the City of Enfield* (1983) 34 SASR 472, 476.
99 *Thompson v Johnson & Johnson Pty Ltd* (1989) ATR 80-278.
100 *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220, [47]-[60].

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*.

…

[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).

[58] It was not essential that the judge elaborate the separate steps in the correct approach. In the conduct of a trial much is often common ground, and goes unstated or brings shorthand expression of a central issue for determination. It occurs not infrequently that, a motorist's duty of care owed to other motorists being common ground, the issue for determination is stated in terms such as whether the defendant was under a duty to keep a proper lookout. The broadly stated duty not being in doubt, that means whether in the particular case the defendant breached the duty of care. The expression of a duty with the content of keeping a proper lookout is incorrect, but does not bring error if on the reading of the reasons as a whole the issue is determined as one of breach rather than formulation of the duty of care. That was the case in *Anderson v The City of Enfield*. King CJ noted at 475 that the plaintiff's case was that the manufacturer owed a duty to give a reasonable warning of the danger inherent in the product, and the case proceeded to the issue of whether the warning given was adequate.

[59] As is evident, the judge did not expressly proceed by stating a duty to take reasonable care to avoid physical injury to users of the products, then finding that the reasonable response to the risk of injury was to give an adequate warning, and then finding that the warning given was inadequate. He stated a duty of care as a duty to give adequate warning of the risks of asbestos, then asked whether the warnings given were sufficient and found that they were not.

[60] This did not articulate the correct approach. But a judge's reasons must be read as a whole, and in my opinion the judge spoke of a duty to give adequate warning of the risks of asbestos as the expression of a central issue for determination. I do not think he took giving an adequate warning of the risks of asbestos as the content of the duty of care. Rather, he treated an adequate warning as the reasonable response according to a *Wyong Shire Council v Shirt* assessment.

177 Nevertheless, we accept that before imposing on James Hardie a duty of care in those general terms, it is important to bear in mind that the only practicable method of discharge is likely to be the giving of a warning. The nature of that burden, the problematics of fixing the date on which the duty arises, and the standard of conduct it demands should be considered. It is to those considerations we now turn.

178 In *Wright v Dunlop Rubber Co Ltd*, Sachs, Megaw and Lawton LJJ stated the continuing duty of manufacturers of products which are to be used by others as follows:[101]

> What, then, are the consequences in law? The relevant principle of law by which the question whether or not I.C.I. were in breach of a duty owed to the plaintiffs falls to be decided seems to be clear, viz., that the duty of the manufacturer to the purchaser's workmen in a case such as this is the same as the duty of a manufacturer towards his own workmen, subject only to one proviso. That proviso is that the manufacturer knows how the goods are going to be sued [used] by the purchaser. So far as the present case is concerned, the proviso creates no difficulty [sic] for the plaintiffs. …

[101] *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255, 12-13.

> I.C.I. then, owed a duty to Dunlops' employees in respect of Nonox S. What was the extent of the duty? It was a duty to take all reasonable steps to satisfy themselves that Nonox S was safe: 'safe' in the sense that there was no substantial risk of any substantial injury to health on the part of persons who were likely to use it or to be brought into contact with its use, the method of the use being such as was intended or contemplated or was at least reasonably to be expected as normal and proper use.
>
> It is obvious that the answer to the question: "What are reasonable steps?' must depend upon the particular facts. It is obvious, also, that the duty is not necessarily confined to the period before the product is first produced or put on the market. Thus, if, when a product is first marketed, there i[s] no reason to suppose that it is carcingenic, but thereafter information shows, or gives reason to suspect, that it may be carcinogenic, the manufacturer has failed in his duty if he has failed to do whatever may have been reasonable in the circumstances in keeping up to date with knowledge of such developments and acting with whatever promptness fairly reflects the nature of the information and the seriousness of the possible consequences.
>
> If the manufacturer discovers that the product is unsafe, or has reason to believe that it may be unsafe, his dut[y] may be to cease forthwith to manufacture or supply the product in its unsafe form. It may be that in some circumstances the duty would be fulfilled by less drastic action: by, for example, giving proper warning to persons to whom the product is supplied of the relevant facts, as known or suspected, giving rise to the actual or potential risk. Factors which would be relevant would be the gravity of the consequences if the risk should become a reality, and the gravity of the consequences which would arise from the withdrawal of the product. In the present appeal, we do not, however, have to consider that question for it is not suggested on behalf of I.C.I. that, if they ought to have realised the carcinogenic qual[i]ties of Nonox S before the time when the plaintiffs were exposed to it, they could, or would, have refrained from at once ceasing its manufacture and supply, as they in fact did in August 1949.

179 The approach to the formulation of duty and standard, in respect of a manufacturer's liability for dangerous products, was considered by the Supreme Court of Victoria in *Thompson v Johnson & Johnson Pty Ltd & Anor*.[102] In that case, the user of tampons manufactured and distributed by the defendants claimed damages for toxic shock caused, or contributed to, by that use. The claim failed at trial and on appeal for two primary reasons. First, there was only a period of some weeks between the time at which the defendant ought to have foreseen the risk that the use of the tampons might contribute to toxic shock and the purchase by the plaintiff. Secondly, there was no evidence at all about whether warnings could practically have been formulated and disseminated in a way which may have come to the plaintiff's attention.

180 At trial, Vincent J made this general statement of principle:[103]

> In making these assessments the nature and extent of the risk thought to have arisen, the economic and other costs involved in addressing that risk as well as the practical difficulties in doing so, and the seriousness of the potential consequences would all have to be taken into account.

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[102] *Thompson v Johnson & Johnson Pty Ltd & Anor* [1991] 2 VR 449.
[103] *Thompson v Johnson & Johnson Pty Ltd & Anor* [1991] 2 VR 449, 469.

As a general proposition it appears to me to be obvious that where the possible consequences of the contraction of a condition include death, even though the risk of any contraction may be very small, a potential purchaser is, at least, entitled to know of the existence of that risk and to be able to choose whether or not it will be accepted. This does not mean that it is necessary to provide warnings with respect to every conceivable possibility which might arise from the use of every conceivable product. Many risks are well understood through ordinary human experience, others are clearly not so and in relation to them a proper compliance with the duty of care resting upon a manufacturer or distributor may well require that reasonable steps be taken to provide appropriate information.

Another dimension might be perceived in dealing with this question where, as in the present case, a new problem could be seen to have arisen in relation to what has been long regarded as a generally safe product. Such a history might well be relied upon by consumers as indicating to them that no possible danger could arise from its use. Accordingly they could be, in some situations, misled into assuming a higher degree of safety than that which is either recognised as existing by the manufacturers and distributors of the product or than that which ought to have been reasonably recognised as existing by those persons.

Accepting these propositions it is nevertheless important that the obligations which it is considered rest upon a manufacturer or distributor should be kept in perspective in terms of the precise circumstances and the level of knowledge which exist at the relevant time. Among the matters to be considered are, of course, the possible consequences of the adoption of one form or another of response to the existence of a perceived risk.

181 In the Court of Appeal, it was held:[104]

Accordingly the duty of care cannot be categorised in the circumstances of such a case as this as being merely a duty to warn or alternatively to withdraw the product from the market. The duty is a duty to take reasonable care in the *Donoghue v. Stevenson* sense to avoid injury or harm being suffered by those using the product as intended. In some circumstances a discharge of such duty of care might require and demand that the product be withdrawn from the market so as to prevent it being used. In other circumstances in order to discharge the duty it might be necessary to give adequate warning as to the risks involved in its use. It does not follow that the failure to warn with respect to those risks will necessarily constitute a breach of duty. In each case it will be necessary for the tribunal of fact to determine whether in all the circumstances those marketing the goods failed to take reasonable care and whether that failure was a cause of the injury suffered by the user.

It follows that the fact that no warning was given in all the circumstances of this case must be examined in the light of the duty of the manufacturer and distributor to take reasonable care. In *Wyong Shire Council v. Shirt*, at pp 47-8, Mason J said: 'In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which

[104] *Thompson v Johnson & Johnson Pty Ltd & Anor* [1991] 2 VR 449, 490-492.

> the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> 'The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not of itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.'
>
> In his judgment the learned trial judge said, [1991] 2 V.R. 449, at p 468: 'Lying at the heart of this matter, however, is the necessity to ensure, as far as possible, that consumers are not unnecessarily or, through no fault of their own, unknowingly exposed to the risk of injury or other adverse consequences being suffered by reason of their use of products available to them in the marketplace.'
>
> Again he said, at p 469: 'As a general proposition it appears to me to be obvious that where possible consequences of the contraction of a condition include death, even though the risk of any contraction may be very small, a potential purchaser is, at least, entitled to know of the existence of that risk and to be able to choose whether or not it will be accepted.'
>
> If by those expressions his Honour meant that a manufacturer and/or distributor of goods to which such a risk as last referred to is attached and which risk would not ordinarily be apparent it has a duty or an obligation in order to satisfy that entitlement to warn of such risk as distinct from a duty to take reasonable care, we would disagree. If such was the case it would promote the duty to take reasonable care to an absolute duty to warn of such risk. The consequences of risk, which possibly may result in dealt, does not of itself give rise to a duty or obligation to warn of the risk. However, it would be a very material consideration to be regarded along with other material considerations when assessing whether the duty to take reasonable care in all the circumstances had been fulfilled.

182 It should be observed that even though Vincent J found that the defendants were negligent in failing to alert medical practitioners to the symptoms of toxic shock, he found that the evidence did not show that the failure to do so contributed to the failure of the plaintiff's doctor to quickly diagnose her condition. On appeal, the finding of breach in that respect was set aside, but only on the ground that the Judge did not properly evaluate all of the relevant evidence. The proposition that in some circumstances the standard of care extends to educating third persons who are in a position to save a plaintiff from harm was not rejected.

183 James Hardie objects to the finding of a duty because there has never been a campaign, of the type for which Mr Werfel contends, in Australia or anywhere in the world. That is an important consideration, but it cannot be conclusive. To a large extent, it simply demonstrates the unique nature of the public health risk posed by asbestos-cement building products. Asbestos-cement building products may be contrasted to cigarettes which are consumables. There is little point conducting a public advertising campaign to warn past smokers of the risk with respect to the cigarettes they have already smoked. However, ongoing warnings

to continuing smokers can be, even in the absence of a legislative requirement, placed on a cigarette packet. On the other hand, we acknowledge that because asbestos-cement building products are no longer sold, placing warnings on those products like the one postulated by the NHMRC Committee is not now possible and, as we earlier found, not reasonably practical, because unlike cigarette packets, labels on building products are almost always covered over. However, James Hardie continued to produce asbestos-free cement products for about a decade before it stopped trading. Those products could both have been labelled as asbestos free and labelled with information on the risks of remodelling, repairing or removing the asbestos-cement building products which they might replace.

184 James Hardie also submitted that the absence of authority, holding that a warning campaign of the kind for which Mr Werfel contended was necessary to discharge a duty of care, strongly contradicted the imposition of any duty at all. The scope, measure and content of the duty to take reasonable care imposed by the common law reflects and adapts to changing community expectations. That adaptation is necessarily incremental and cautious because the duty is imposed and applied in the exercise of judicial, and not legislative, power. Furthermore, the judicial method necessarily imposes constraints on the material to which a court may have regard. Nonetheless, it is permissible to have regard to uncontentious manifestations of the community's expectation. In contending that there was no duty to warn users like Mr Werfel, James Hardie emphasised both the novelty of the warning strategies propounded in Mr Werfel's case and the adverse effect it would have on its business interests. It is appropriate therefore to consider governmental and community attitudes on the responsibility of corporations to inform the public of risks posed by the products they distributed.

185 In 1970, the National Commission on Product Safety in the United States presented its final report to the President and Congress. It contained a chapter on consumer education efforts. It noted that "mass media advertising may sometimes afford an appropriate vehicle for conveying warnings or information on the safety of product performance to consumers". It also observed that provision of information can be most valuable at the point of sale.[105]

186 There was a significant shift in the standards accepted of the producers and distributors of goods in Australia in the 1980s. In January 1987, the Commonwealth National Consumer Affairs Advisory Council published a report on product safety. The report was presented to the Attorney-General on 31 January 1987. In the introduction to the report, the Council said:

> Product safety is universally acknowledged as a basic right of consumers. It has been one of the major concerns of the Organisation for Economic Co-operation and Development (O.E.C.D.) Committee on Consumer Policy since its creation in 1969. The United

[105] *National Commission on Product Safety: Final Report Presented to the President and Congress* (1970).

> Nations Guidelines for Consumer Protection, which were adopted unanimously by the United Nations in April 1985, call on governments to adopt, or encourage the adoption of, appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.

187 Clause 11 of the guidelines adopted by the United Nations in 1985 was as follows: [106]

> 11. Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities and, as appropriate, the public without delay. Governments should also consider ways of ensuring that consumers are properly informed of such hazards.

188 In its conclusions, the Council relevantly noted the following:

> 9.21 Community safety announcements on radio and television provide relatively low-cost effective information transmission. The US. CPSC carried out some studies in the 1970's which showed that their public service safety announcements reached as many as 60% of all TV viewers in the United States.
>
> 9.22 The use of paid radio can provide information to a wide audience on product hazards, and would be particularly useful in country areas where there is lesser daily print media penetration. Paid multi-media advertising of product bans will alert specific segments of the community to hazard products in use, and lead to increased awareness and return of the product to retailer or manufacturer.

189 The *Trade Practices Revision Act 1986* (Cth)[107] (**the Revision Act**) added Division 1A to Part 5 of the *Trade Practices Act 1974* (Cth). Section 65B authorised the Minister to publish a notice in writing in the Gazette stating that particular goods are under investigation to determine whether the goods will or may cause injury, and warning of possible risks involved in the use of goods of the kind specified. That power was conferred on the Minister as a safeguard of last resort should corporations engaged in trade or commerce not make or not comply with consumer product safety standards. Section 65F conferred on the Minster a power to order a mandatory product recall. In the second reading speech, the Hon Lionel Bowen MP explained that the provision is proposed for use where voluntary recall measures do not exist or recall action taken by suppliers is unsatisfactory. Section 65J provided an opportunity for suppliers who would be affected by a recall notice to seek a conference with the Minister and the Trade Practices Commission before the notice was issued.

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[106] *Guidelines for Consumer Protection*, GA Res 39/248, 2nd Comm, 39th sess, 106th plen mtg (9 April 1985) annex 1.

[107] No 17 of 1986 assented to 13 May 1986.

190 Between 1987 and 1991 warning notices were issued pursuant to Division 1A with respect to oven mitts, a portable electrical battery charger and T-seats (seats supported by a single shaft).[108]

191 It is trite that a failure to meet statutory standards is not conclusive of a breach of common law duty. Moreover, there is no evidence that the powers conferred by Division 1A were ever engaged in respect of asbestos-cement products. However, the importance of the Revision Act is that it is a manifestation of a community expectation, reflecting increasing consumer protection sentiment in the last half of the 20th century, that manufacturers and distributor would alert the public to dangers in the products which they supply.

192 That public expectation has become entrenched in legislative policy. A product warning and recall scheme is incorporated into the *Australian Consumer Law* which commenced operation on 1 January 2011.[109] In the second explanatory memorandum accompanying the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth), the following was said:

> Product safety regulation should not hinder the efficient operation of markets and safe consumer products by imposing unnecessary costs on businesses or unduly limiting the ability of businesses to supply products with varying price/quality levels demanded by consumers. The primary objective of product safety regulation is to promote consumer confidence in the market through eliminating risks that cannot be mitigated by market force alone and, in doing so, to enhance demand. There are also savings in health and welfare costs for individuals and the community associated with improved product safety regulation, which impacts broadly across the community since most citizens and businesses regularly engage in consumer transactions.

193 Independently of dangerous product warning schemes, trade practices legislation has provided for corrective advertising orders as a remedy for false and misleading conduct. Corrective advertising orders have been litigated in Australia since the mid-1980s.[110]

194 James Hardie also denies that it owed the later occupants of houses containing asbestos-cement products and their contractors a duty of care to warn of the risk of contracting mesothelioma when working on those products because the class of person to whom the duty would be owed is indeterminate. At trial, Mr Werfel described the class to whom the duty was owed as "the class of persons who cut, sawed, sanded and drilled Amaca's asbestos-cement products occasionally, intermittently or from time to time". The Judge accepted that definition of the class.[111] James Hardie correctly submits on appeal to this Court

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[108] Allan Asher, 'Danger!: Government Action in the Market' in Dr Ellen Beerworth, *Product Liability Law* (The Federation Press, 1991), 55.

[109] Schedule 2 of the *Competition and Consumer Act 2010* (Cth) adopted in State and Territory jurisdictions as part of a national scheme.

[110] *Hospital Contribution Fund of Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 483. See also *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] ATPR [41-971]; *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* [1986] ATPR [40-654].

[111] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [154].

that, so defined, using the past tense, the class was retrospectively identified. Plainly enough, by the time an action is brought, the plaintiff will have undertaken that work. When the work is performed after a point in time at which the law fixed James Hardie with a duty to warn, there will be a natural tendency to speak of both duty and breach in the past tense.

195 However, that is a largely semantic objection. Defined, as the duty must be, prospectively, the class is those existing or future occupiers of homes containing asbestos-cement building products who may come to remove, remodel or repair those products, and the tradespersons they might engage to do so.

196 James Hardie then objects to a duty so formulated because the class is indefinite or at least very large, and because it would require it to warn successive generations of users. James Hardie makes the point that it would require it to warn members of the class, including for example Mr Werfel, when they are still children. That admittedly absurd conclusion implicitly depends on two false premises, the first of which is that the duty is fixed, in respect of all existing and future members of the class, at a single point in time when the degree of foreseeability, and combination of other salient features, first results in the imposition of the duty. That is not so. The duty may be a continuing one. The second of the false premises is that the duty is to warn everyone who might one day come to remodel, repair or remove an asbestos-cement product, whether or not they ever perform that work, and even if they are unlikely to undertake the work for a long time. However, the duty would be limited to taking reasonable steps to warn members of the class in a way, and at such times and occasions, so that the dangers are brought to mind if and when they work on the asbestos-cement products. We acknowledge that that means that, at any point in time when a warning is given, it may be heard both by persons who are about to work on asbestos-cement products and those who may not work on such products for a long time or at all. However, that observation simply illustrates why the duty to warn must be a continuing one. Whether or not measures can reasonably be taken to discharge a long running duty of that kind arises on the issue of discharge or breach, but does not of itself deny the existence of the duty.

197 The common law objection to imposing a duty of care to take reasonable steps to avoid injury to an indeterminate class of person may be explained by the elemental requirement of the rule of law, that persons subject to a legal duty should have the capacity and ability, if they turn their mind to it, to ascertain the scope of their obligation and, if possible, to discharge it. It may also be explained on the pragmatic ground that the heavy burden of an indefinite duty unreasonably stifles industry and commerce.

198 However, there is a distinction between a large class and an indeterminate class. A person, in particular a major supplier of goods or services, may expose a great many people to harm if those goods or services are dangerous. The greater the market penetration of the business, the greater will be the size of the class at

risk if the product is dangerous. The size of the class of persons exposed to risk from in place asbestos-cement building products is a function of the commercial and technical success of James Hardie and its products. Success in dissemination of a dangerous product cannot immunise the manufacturer/distributor from a common law duty of care it would otherwise carry if it were not as successful.

199 Despite the large size of the class postulated by this claim, the membership of it is readily and clearly identifiable. The determinants are:

- the owners and occupiers of homes built with James Hardie asbestos-cement building products;
- the tradespeople who are, or may in the future be, engaged by the owners and occupiers to remove, remodel or repair the product; and
- subsequent owners or occupiers who may remove, remodel or repair the asbestos-cement building products, or procure that work to be done.

200 We acknowledge that once identified those members of the class must still be found. We do not underestimate the enormity of the task of compiling the addresses where one will find what *The Bulletin* described as one of the most familiar features of the Australian landscape, but it would undoubtedly be possible to locate most of them. Moreover, the mass media and other forms of public communication available for the dissemination of information in the 1980s and 1990s renders it largely unnecessary to locate and warn individuals in that way.

201 We also interpolate here that, obviously enough, it is not possible to anticipate every individual who will join the class at some point in the future. That is commonly the case even in long-established categories in which a duty of care is imposed. A driver of a car, when he or she commences a journey, has a duty of care to all other road users on his or her route, even though there can be no certainty as to the identity of the particular drivers and passengers who will come to share the road in the course of the journey. So too for managers and occupiers of public venues or private commercial premises who, for obvious reasons, cannot anticipate the identity of the individual members of the public who will enter their premises in the future.

202 There is a distinction between the widespread dissemination of a dangerous product in accordance with the production and marketing designs of the producer, and the damage caused by the operation of natural forces acting on a situation which may have been negligently caused by human action. Bushfire cases are an example of the latter. In *Electro Optic Systems Pty Ltd v State of New South Wales* Jagot J explained: [112]

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[112] *Electro Optic Systems Pty Ltd v State of New South Wales* (2014) 10 ACTLR 1, [353].

> It is not simply that the individual members of the class cannot be identified. The class itself is indeterminate. Membership may extend to property owners who are located in all directions from the park to an unknowable extent depending on factors outside the defendant's control … The class may change from moment to moment depending on those other uncontrollable factors. These considerations also weigh heavily against the existence of the posited duty of care.

203 At the time a fire is negligently lit, or managed, the weather conditions over what can be a lengthy period of time, the dynamics of the fire as it progresses and the terrain over which it travels, cannot be known. The class, therefore, can be said to be indeterminate. However, that circumstance may not preclude the existence of a smaller, determinate class of landowners immediately adjacent to the seat of the fire.

204 As we earlier suggested, it would not be possible to discharge a duty to warn subsequent users of asbestos-cement building products on a single occasion. That is a function of the nature of the building material, and its longevity. We acknowledge that it may nonetheless be necessary to limit the period of time over which the duty is imposed, on economic grounds or for other practical reasons. Moreover, the scope and content of the duty may also be limited by what is reasonably practicable. But rarely will a manufacturer and distributor of a product be excused from giving any warning whatsoever of the dangers of its products which it sells for commercial gain.

205 James Hardie also advances several other objections to the imposition of a duty to conduct a mass media campaign. To a large extent, those submissions conflate the question of duty and breach. The duty is to take reasonable care to avoid injury to persons who occasionally worked on James Hardie's asbestos-cement products. A mass media campaign is a way in which a duty to warn might be discharged. If a mass media campaign is not reasonably practicable, the duty to warn might be discharged by regularly making other forms of public acknowledgements of the risk of mesothelioma, and encouraging the adoption of precautions. Whether or not the reporting of those statements would have avoided injury in a particular case is another matter which must be addressed when considering the question of causation.

206 James Hardie objects that a duty should not be imposed which harms its commercial interests. The profitability of many manufacturers would most probably improve if they were not bound to build in safety features or warn of dangers which remain. Balancing personal interest and advantage against social harm lies at the core of the law of negligence.

207 James Hardie also relies on the need for certainty explained by Gleeson CJ in *Leichhardt Municipal Council v Montgomery*:[113]

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[113] *Leichhart Municipal Council v Montgomery* (2007) 230 CLR 22, 28 [8].

> 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.

208 However, the precise form of a proposed warning need not be articulated within the formulation of the duty of care. Indeed, it is likely to be an error to do so because the formulation of the duty would elide the question of breach. It is sufficient that the duty is formulated in a way against which the reasonable practicability of steps to discharge it can be evaluated.

209 James Hardie strongly submits that it was not possible to formulate a "non-negligent" media campaign, because the complexity of the problem meant that there was no "single location, person, or message required to be delivered by a warning". It submits that the required content and method of giving the warning were intrinsically important in determining duty and breach. Its submission continues that the message would necessarily be a complex one, delivered by multiple channels to millions of people of different sex, ages and backgrounds. It emphasised that not all of those people will be able to read or speak English. That can be accepted. However, it should be remembered that a reasonably practicable measure, which will be sufficient to discharge the duty, need not be a measure which would protect all persons from the risk of exposure to asbestos dust. A risk management exercise is involved here. In the application of the common law of negligence to a wide range of human activity, the reasonably practicable measures required to discharge that duty will often not be sufficient to protect everyone. To reason backwards, from a measure which would achieve that Herculean task, to argue that it is not reasonably practicable and that it is therefore not possible to formulate a "non-negligent" standard of care, is to commit an error of retrospective analysis which is the converse of the errors which James Hardie contends the trial Judge made in this case.

210 Only if there is no measure which could reasonably be taken to discharge a postulated duty could it be suggested that no duty of care should be imposed. At that point, the distinction in the analysis between the existence of the duty of care and its discharge vanishes.

211 James Hardie relies heavily on the decision of the Court of Appeal of Western Australia in *Hannell* as authority against the imposition of a duty to warn in this case.[114] However, Steytler P and McLure JA upheld the trial Judge's finding that Amaca owed a duty of care to Mr Hannell who had limited exposure to asbestos dust when using asbestos-cement sheets on handyman projects around his home. In any event, even though a decision of an intermediate Court

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[114] *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109. *Hannell* was the subject of an unsuccessful application for special leave to the High Court of Australia: *Moss and Hannell v Amaca Pty Ltd* [2007] HCATrans 626.

of Appeal of another Australian State or Territory is, of course, very persuasive authority. A finding that one person owes another a duty of care is a normative, but nonetheless fact sensitive, judgment. Much will depend on the degree of foresight of the risk in question at the time which it is alleged there was a duty. So much is clear from the reasons given by Martin CJ in *Hannell* for finding, on the evidence and with respect to the relevant time in that case:[115]

> [294] It follows from this conclusion that on the evidence adduced in this case, it should be concluded that Amaca did not owe a duty to warn those who, like Mr Hannell, might undertake occasional work on asbestos-cement products which comprised mainly chrysotile cement. The perception of the level of risk created by such work was not of such a magnitude to impose a duty to warn, let alone a duty to embark upon an advertising programme which would have been sufficiently extensive to come to Mr Hannell's attention.

212 It is convenient to set out now a short summary of the evidene adduced on Mr Hannell's trial, although its primary importance lies in analysing the question of breach. Mr Hannell was born in the United Kingdom in October 1942 and grew up in and around London. He left school at aged 15 and worked as a gardener and drove a black cab. In 1981 he immigrated to Australia. In May 1982, he and his wife purchased a home in suburban Perth. The home was constructed in the late 1970s and it included asbestos-cement building material in the eaves, the perimeter fences and a garden fence made of hardiplank in the backyard. Perimeter fences were corrugated asbestos sheet. Mr Hannell moved the hardiplank fence in the first half of 1983. He used hand tools to demolish the fence and to put it back together in a different location. The process created dust. He used an electric drill. He inhaled the dust.

213 In February or March 1985 for about a month Mr Hannell painted the underside eaves of the house. He brushed, sanded and washed down the eaves. He did this work above his head.

214 In February 1990, he painted the corrugated asbestos fence on both sides of his home. He brushed down the fences and the ridge capping with a hard wire brush. Mr Hannell was diagnosed with mesothelioma in November 2005 after suffering some niggling pain in his right ribs in the preceding months. The trial Judge found that the asbestos sheets were supplied by James Hardie.

215 In *Hannell* there was some evidence that James Hardie had placed literature which included warnings about the dangers of asbestos on literature racks in hardware and other outlets. Most of the literature related to moulded products, hardiplanks and roofing, and not flat sheets. Most of the warning labels were applied by hand. Mr Warwick Gazzard, a former James Hardie employee, had never seen a warning label attached to a flat sheet, a hardiplank, nor corrugated sheet. There was also evidence that "a roadshow" was organised to demonstrate safe handling methods. The roadshow visited hardware stores. Mr Hannell did

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[115] (2007) 34 WAR 109, 175 [294].

not see any warnings on any of the asbestos-cement products round the house. The Judge commented that he would not have seen any labels on the flat sheets, nor on that part of the corrugated fencing sheets that overlapped other sheets. The Judge also observed that warning labels may have been covered with paint.

216 The Judge found that the process of placing warning labels on James Hardie's asbestos-cement products occurred progressively commencing in 1979, and the process of placing warning labels on all products was only in place by 1981. Warning labels were stuck on individual sheets by workers. The Judge found that the first products to receive warning labels were not flat sheets nor corrugated sheets. He found that no warning labels were placed on the asbestos-cement products on which Mr Hannell worked. The labels cautioned that the product contained asbestos and that breathing in asbestos dust could damage health. The labels warned users:

- When sawing, drilling, etc work in a ventilated space or outdoors.
- Use hand tools, or if using a power saw use one with a dust suppression attachment.
- Avoid drilling overhead.
- Damp down waste dust.

217 They appear to be the same as the labels put in evidence in this trial and referred to in paragraph [241] below.

218 The label included the reassurance that asbestos-cement sheets present no unknown risk to health when fixed in position. Later labels contained the caution that breathing asbestos dust may cause serious damage to health, including cancer, and that smoking greatly increases the risk. The Judge found that the first labels placed on the asbestos-cement products were inadequate because they warned only that breathing asbestos dust could damage health. The Judge found that the caution failed to bring the reader's attention to the seriousness of the injury that might result. The Judge found that even those labels warning that breathing in asbestos dust may cause cancer failed to inform the reader that cancer or mesothelioma might be contracted from inhaling only a small amount of asbestos dust and there was no known threshold dose below which no risk of mesothelioma exists.

219 The Judge found that in 1983 it was reasonably foreseeable to a person in James Hardie's position that home handypersons or other casual users of asbestos-cement building products would suffer mesothelioma as a result of inhaling asbestos dust. He found that mesothelioma was a reasonably foreseeable consequence of James Hardie's failure to take reasonable care to avoid injury to persons cutting, sawing, drilling, brushing or scraping asbestos-cement building products. The Judge found that manufacturers of products owed

a duty of care to the ultimate recipients of those products with respect to a foreseeable injury. The use to which the products were put were anticipated by James Hardie. He found therefore that James Hardie owed Mr Hannell a duty of care. The Judge found that the scope of that duty extended to warning end users like him.

220 The Judge did not set out the articles from medical journals and other reputable sources that were put in evidence before him. He relied primarily on the evaluation of those journals and articles by medical experts who gave evidence before him. The matters relied on by those experts were:

- Hunter's 1967 text 'The Diseases of Occupations', which stated that the inhalation of dust from sawing or sanding material containing asbestos presents a hazard of mesothelioma within, and outside, industrial contexts;

- The recording in 1974 in the UK mesothelioma register of several cases of mesothelioma following hobby exposure when sawing asbestos, which drew attention to the *possibility* of mesothelioma occurring at a low dose;

- That the risk of mesothelioma from household contact had been mentioned before 1983;

- The documentation of non-occupational domestic exposure causing mesothelioma before the 1980s and early 1990s after even a brief, transient and low dose exposure; and

- The evidence that serious dangers to health occasioned by even small exposure should have been evident by 1961.

221 Professor Musk relied on proceedings of the Pneumoconiosis Conference in Johannesburg in February 1959, however the cases relied on appeared to have been primarily crocidolite exposure. Wagner's work was published in the *British Journal of Industrial Medicine* in 1960. Musk also relied on the work of Dr Newhouse in 1965, which reported cases of mesothelioma found among relatives of asbestos workers.

222 Dr Leigh relied on the 'Diseases of Occupations' text which observe that industrial safety asbestos regulations could not protect private users. He referred to the UK mesothelioma register which described a range of industrial exposures leading to mesothelioma, but also cases of hobby workers. The 'American Review of Respiratory Diseases' in 1976 showed that mesothelioma could be caused by low level of exposures. He referred to reports that it is not possible to establish a threshold value below which a carcinogenic effect of asbestos cannot be identified. An occupational hygienist, Dr Francis said that from the early 1980s to 1990, and by 1983, asbestos was recognised among occupational health specialists as a carcinogen for which there was no threshold of safe exposure.

223 On appeal, the majority, Steytler P and McLure JA, upheld the decision of the trial Judge that Amaca owed Mr Hannell a duty of care to take reasonable care to avoid injury to him from the occasional use of its products. We have set out the relevant passages from the judgment of the plurality in paragraph [38] above.

224 The duty formulated by the Judge in this case is in the same terms as the statement of the duty approved by the plurality in *Hannell.* Moreover, in the period between the relevant times in *Hannell* and this case, the body of medical evidence demonstrating a substantial risk of contracting mesothelioma from occasional exposure to asbestos-cement dust had grown significantly.

225 We accept that there is an impermissible tendency in negligence cases to look first to the injury, and if something could have been done to avoid it, conclude that it was caused by the breach of a duty to avoid that harm By contrast, the above analysis commences with an assessment of the degree of foresight that mesothelioma may be caused by occasional work on asbestos-cement products, followed by an identification of the affected class and a consideration of the salient features of the relationship between James Hardie and that class.

226 For the above reasons, we find that by 1990:

- the degree of foresight that occasional exposure to asbestos by remodelling, repairing or removing asbestos-cement home building products may cause mesothelioma;
- the magnitude of that risk; and
- the other salient features of the relationship;

combined to justify the imposition of a duty on James Hardie to take reasonable care to avoid injury to the occupiers of homes constructed with asbestos-cement building products, and the tradespersons they engaged, who occasionally remodelled, repaired or removed its asbestos-cement building products.

227 The finding made so far leaves open what James Hardie ought to have done by way of warnings to discharge the duty. It leaves unanswered also whether or not any reasonable practicable warning, which James Hardie was bound to give, would have avoided the injury suffered by Mr Werfel.[116] It is to those questions we now turn.

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[116] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555 [8] (Gleeson J).

Breach – a failure to warn

228 Mr Werfel pleaded his case on James Hardie's breach of duty of care by failing to warn the public of the risks of performing removal or repair work on asbestos products in paragraph [10] of the Second Statement of Claim as follows:

> …
>
> (o) Whilst possessing sufficient financial and personnel resources to do so and with knowledge of risk to health from inhaling asbestos dust and fibre, failing to devise, organise, administer and implement out of its Australian headquarters located at Sydney, New South Wales a national scheme for warning end users of the building materials and those who may cut, drill, sand, demolish or otherwise interfere with the building materials of the risks to health from inhaling asbestos dust and fibre. Such a national scheme ought to have included the dissemination of warnings and/or information in newspapers, radio, television, magazines and hardware stores about the health risks of inhaling asbestos dust from cutting, drilling, sanding, demolishing or otherwise interfering with the building materials.
>
> …
>
> (q) Failing to warn the State of South Australia including the South Australian Housing Trust that houses and properties which it owned contained the building materials and that workers carrying out repairs, renovations and maintenance upon such houses including cutting, drilling, sanding, demolishing and/or otherwise disturbing the building materials were at risk of inhaling asbestos dust and fibre and developing asbestos related illnesses including mesothelioma.

229 The submissions at trial and in this Court often treated this allegation of breach as a failure to engage in a mass media advertising campaign. That description unduly focussed attention on only one element of the postulated campaign. Properly formulated, the duty is to warn those members of the public engaging in the remodelling, repairing or removing of domestic asbestos-cement home building products of the risk in doing so.

230 The most obvious first step in discharging the duty to warn is a frank public acknowledgement by James Hardie itself of the risk, that even occasional work on asbestos-cement building products can cause mesothelioma. The labels it placed on some asbestos-cement products were hedged with qualifications which diminished the danger. The labels were also a relatively limited publication. The same holds for the warnings in the promotional material referred to in paragraph [307]-[311] below.

231 The sobering effect on the Australian community of an unequivocal and very public warning that an activity might cause cancer should not be underestimated. Such an acknowledgement by James Hardie, and an endorsement by it of the precautions which occasional users should take, would have been inherently newsworthy and was likely to have been published and republished by the mainstream news media, by government and non-government agencies, by trades associations, building hardware suppliers and by public

health and occupational safety authorities. Moreover, in the absence of a comprehensive acknowledgement by James Hardie of those risks, the commentary of others naturally enough was, as we shall see, guarded.

232 The expert evidence called by Mr Werfel and James Hardie concerned the reasonable practicability of *additional* measures James Hardie might reasonably have taken to maximise the reach and longevity of such an acknowledgment and its associated warnings.

233 Before turning to that evidence, it is convenient to set out what James Hardie did do in response to the going concern over exposure to asbestos dust because that reveals something of the avenues which were open to it to provide strong warnings if it had been minded to do so. Documents referred to as the Reid family papers which were discovered for the first time in the course of Mr Werfel's proceedings, disclosed James Hardie's strategic approach to the growing concern about the health risks associated with working with asbestos.

234 In 1978, the Manager for Community Relations with James Hardie, Mr Bolton, entered into correspondence with public relations consultants, Neilson McCarthy & Partners (**Neilson**) about recent adverse publicity concerning asbestos related disease. On 14 June 1978 Neilson wrote to Mr Bolton referring to action that CSR was taking to look after its employees. Neilson described it as a "good 'insurance' policy, both from the humanitarian/PR aspect and that of building up gradually a sizable fund over a period of years". The letter also referred to a proposal to establish an "Asbestos Association".

235 On 21 July 1978, Neilson again wrote to Mr Bolton. It can be inferred from that letter that Neilson had been engaged to look "at certain aspects of James Hardie's corporate identity and also at some aspects of the asbestos problem". It mentions James Hardie's discussions with another public relations firm, Eric White Associates. It suggested that both consulting firms could work together. The letter continued:

> There is a natural division between what might be done for James Hardie specifically and what might be done on an industry basis through the Association. We could not argue that the two functions should necessarily be handled separately, but if two firms were engaged there are advantages that could be taken from that arrangement.
>
> We would have no objection to working in parallel with Eric White Associates if a decision were made to proceed in this way and there is no doubt that the two firms can co-operate. … the logic in a division of functions is that though the association can take James Hardie out of the firing line to some extent, the company cannot leave everything to it. To do so would weaken the credibility of the industry association on the one hand and make James Hardie appear to be evasive on the other.
>
> The Association should probably handle the general asbestos issue without becoming the spokesman for an individual company. Otherwise it would brand itself as a James Hardie front and not a genuine voice.

> We would therefore see two programs in parallel, and that could be so whether one or two public relations firms were involved.
>
> The industry programme would obviously handle as much as possible of the general asbestos issue.
>
> The Hardie program should have to concern itself with:
>
> 1. Hardie's position when the company is named in an asbestos controversy or becomes the target of any direct attack or confrontation.
>
> 2. The maintenance of Hardie's good name as a company during the currency of the asbestos debate.
>
> 3. The planned projection of a consciously developed Hardie corporate image; that of a broadly-based corporation with an evolving range of products and activities … not simply an asbestos company.

236 On 27 July 1978, James Hardie published a "news release" through Eric White Associates. It reported on the address of its Chairman, Mr JB Reid, to shareholders at the company's annual general meeting. The news release commenced:

> It was extremely important that the danger to health posed by asbestos dust be recognised but not exaggerated, particularly in relation to products manufactured by the James Hardie Group.

237 Mr Reid's address noted that James Hardie no longer mined asbestos but manufactured asbestos-cement products "which contained only a small percentage of asbestos bound in by cement and other agents". Mr Reid asserted that there was asbestos-cement in some form in almost every building in Australia. The news release continued:

> Once asbestos-cement sheets were fixed in position, the fibre remained locked in and did not escape into the atmosphere.
>
> "We believe that the general public is not at risk in the use of asbestos-cement products manufactured by the company", Mr Reid said.

238 On 1 August 1978, Eric White Associates wrote to Mr Bolton giving him the following advice on the question of labelling products:

> [W]e believe that the company would be well advised to take the initiative and proceed with labels of its own wording as soon as possible. The company has announced its intention to proceed with labelling and any further delays, whether caused by outside influence or not, will leave the company vulnerable to accusations of 'stalling'.

239 It suggested that the company take the high ground by, in effect, announcing:

> [W]e think it's high time that the consumer was given some advice on the safe use of the product and the label we are using is better than none at all. If officialdom wants to

> debate the wording with us later on, we are happy to do so. However, in the meantime, the consumer will have been afforded some protection.

240 The attached letter to the Executive Officer of the Australian Consumers Association (**ACA**) referred to the ACA's concern over the labelling of asbestos-cement products. It explained that following upon the Chairman's announcement at the annual general meeting that James Hardie would proceed to label its products within two months. It notified the ACA that it would use a similar label to that used by the asbestos industry in Britain, but would go further. The labels would not merely warn about the danger of working with asbestos-cement products but would also list some safety rules.

241 From late 1978, James Hardie placed warning labels on certain asbestos-cement products. The labels warned that the products contained a small percentage of asbestos firmly bound into the sheets but that breathing asbestos dust could damage health. It noted that when in a fixed position asbestos-cement sheets present no known risk to health. It recommended sawing and drilling in a ventilated space, using bespoke hand tools, not drilling overhead and dampening down dust. In 1981, the label was amended to specify cancer as one of the health risks.

242 On 15 September 1978, Eric White Associates reported to the General Manager of James Hardie that it had agreed with Mr Bolton an annual figure of $10,000 to $15,000 for their work "in both health and product promotion work at anticipated levels". A public relations action plan submitted at about the same time proposed the following:

- documenting the case for continuing use of asbestos-cement products;
- supporting the labelling program which was to begin in October by:
  - providing a booklet covering asbestos-cement risks to all James Hardie sales personnel;
  - a statement to architects and major asbestos-cement users explaining the reasoning for the labelling and emphasising that the health problems associated with asbestos-cement products are related to heavy exposure to dust over a protracted period and that the risk to end users was negligible;
  - a statement to stockists explaining the reasons for the label and reassuring them that there is no health hazard in the normal handling of asbestos-cement products and encouraging the stockists and retailers to bring to the attention of customers the safety rules on the label;

  - a "Hints for the Handyman" leaflet expanding on the safety rules for distribution through retail outlet showrooms and the like with emphasis on informing them that the tests carried out by James Hardie showed that if the safety rules were followed "dust concentrations remain well within the accepted safe levels"; and

  - a booklet on techniques for working for asbestos-cement pipes;

- informing banks and other providers of finance for the reasons for the labels;

- that James Hardie take the initiative in communicating its case to the news media;

- that Dr McCullagh and Mr Russell be trained in media interview techniques so that they can act as spokespersons for the company;

- advice given to the Ministers for Health and senior officers in State and Commonwealth health departments concerning the labelling;

- informing union officers already involved in the employee health and education program of the labelling as a matter of courtesy; and

- conducting research on the extent to which users of James Hardie products connect them with asbestos, the degree of awareness and concern about health problems associated with asbestos and the likely reaction to the warning label.

243 The action plan also adumbrated a longer-term strategy which included audio visual presentations, promotional evenings aimed at reassuring stockists and users that the product was safe and making available new evidence of the safety of asbestos-cement products as it came to hand. It suggested a "gradual process of educating the media and through it the public on the negligible health risks involved in the manufacture and use of asbestos-cement products. This means responding immediately to criticism, correcting erroneous statements when they appear in the press and taking advantage of every opportunity to publicise the steps being taken by the company to minimise any health hazards to people making or using its products".

244 The action plan recommended "general publications" to inform and reassure the general public. It also suggested the production and the use of films for that purpose. Importantly, it recommended the development of a "statement on the safe use of asbestos-cement products" which was to be distributed to educators in the building and design fields "such as architecture and civil engineering lecturers, and teachers in technical colleges where building trades are taught". It also recommended the development of material for secondary school

teachers. The paper recommended the establishment of an Australian fees and expenses budget of $65,000 per annum.

245 The above described documents reveal the following. First, James Hardie was aware of the growing amount of scientific literature on the risks of working with asbestos-cement products and was concerned about its dissemination into the public domain. Its strategy was to acknowledge but minimise that risk through the public statements of its managing director and by labels in promotional material. To some extent, the warning campaign which Mr Werfel contends was necessary to discharge James Hardie's duty differed only by a matter of degree. Thirdly, the documents show that James Hardie had at its disposal a developed strategy plan for the widespread dissemination of any message it determined to put out; a network which could also have put out a more realistic risk assessment and more useful information about where asbestos-cement products might be encountered and how to safely work on them.

246 Mr Werfel relied on the evidence of an experienced strategic marketing consultant, Ms Julie Pascoe, on the issue of whether an effective product warning advertising campaign could have been undertaken by James Hardie. Ms Pascoe's formal academic qualifications are a Bachelor of Arts from Sydney University, a Graduate Diploma in Marketing from Charles Sturt University and a Certificate in Governance for NFP from the Governance Institute of Australia.

247 Ms Pascoe worked in marketing from 1982, and in that time was employed by global companies with extensive experience with strategic marketing. She worked in local and multi-national advertising and media firms on well-known household brands. She is a provider of marketing management and marketing strategy. She is a Qualified Practicing Market Researcher for the Australian Market and Social Research Society, a Fellow of the Australian Institute of Company Directors and a Graduate of the Governance Institute of Australia. She has been a non-executive director of a number of corporations and is the Chair of the Board of a health insurance fund. Her board experience includes commercial and charitable organisations. She worked as a Strategic Marketing and Business Diversification Consultant between 2008 and 2011. She worked as a Marketing Director for SC Johnson ANZ between 2004 and 2007 reporting to a local board and international advisory committee.

248 The strategy propounded by Ms Pascoe was centred on a frank acknowledgement and communication by James Hardie of the risk of mesothelioma caused by asbestos dust released when removing or reworking asbestos-cement products, followed by the maintenance of an ongoing education campaign for 20 years, or perhaps longer having regard to the mesothelioma latency period. The strategy included the dissemination of information on how to recognise asbestos-cement products and the giving of advice on precautionary safety measures. Ms Pascoe proposed benchmarks against which the effectiveness of the program could have been monitored over time.

249 Ms Pascoe's opinion was that the strategy would have commenced with a mass-media campaign to gain initial awareness, with follow up re-runs from time-to-time. Ms Pascoe proposed measures like:

- providing visual depictions of the material as it appeared on site;
- using a mix of media "to maintain an ongoing, affordable presence" amongst all target groups; and
- working with public health, authorities, State Governments, lending and educational institutions and retailers "to assist with distribution of the required information and material and save costs". (Ms Pascoe pointed out that the educational material need not be branded as James Hardie material).

250 Ms Pascoe identified the primary target group to be professional builders, renovators and home handypersons. The secondary target group included trade associations and related educational bodies, architects, engineers and surveyors, and members of the public who may inadvertently disturb the product.

251 Ms Pascoe adumbrated an indicative campaign. It primarily relied on television to get the initial message out quickly. Material wold be disseminated to professional and amateur builders through the Master Builders Association, local council development approvals, hardware stores, housing authorities and lending institutions. Other media which could be used included radio programs, trade journals and other publications.

252 Ms Pascoe identified 11 elements of the campaign:[117]

i. Television advertising launch for 3 weeks @ all people 18+ 3x. Would recommend an advertorial style of campaign in shows most likely to attract target to assist with discussion of issues;

ii. Develop education brochure to be used as mail-box drop and to be distributed with all home purchases when contracts are exchanged. Distribute via local councils with all building applications;

iii. Annual PR and advertising campaign on regional radio and on regional newspapers as these are considered key sources of information for regional targets;

iv. Ongoing warning in Hardie employee newsletter (11,000 employees);

v. Comprehensive training of sales reps and other key employees to educate tradespeople and retail sales assistants;

vi. Inclusion in curriculum for all Building Trade universities and colleges. Inclusion in curriculum of relevant University faculties including engineering, architecture;

[117] CB vol 2, pg 157.

vii. Initial broad-based direct mail campaign of brochure similar to the 'asbestoswise' copy style and inclusion of brochures in local council development application approvals and house purchase contracts;

viii. Maintain a presence on regional and remote radio programmes as these are known sources of reference for these populations;

ix. Build and maintain an Asbestos Hotline to assist with enquiries;

x. After the first year, then at three yearly intervals, conduct research studies to assess the understanding of the dangers and handling requirements of asbestos amongst the target market. Set benchmarks to define acceptable levels of public awareness and readvertise when awareness slips. Maintain this stance into the future;

xi. Conduct asbestos education segments for use in emerging lifestyle programmes.

253 She formulated the following message topics:[118]

i. What you know as fibro contains asbestos if it was made before 1983

ii. What asbestos dust could do if it is released from fibro or asbestos-cement (disease, death)

iii. This is what the product looks like including description and photos

iv. How you can tell if you have asbestos

v. This is where it is likely to be

- Type and age of houses
- Geographies
- Places like carports and fencing

vi. Other brand names it may have been purchased or be labelled under

vii. If you leave it alone it is safe

viii. These are the potential consequences of liberating dust from fibro

ix. This type of behaviour (i.e. drill, saw, etc.) will cause the risk

x. If you think you may have broken into asbestos-cement accidentally, here's what to do

xi. We can help you and here is what you do to get our help

xii. If you are unsure, here is the number to call

Please note that not all these messages would have had to be included in all communications. For example, television advertising is of short duration and must be very single-minded. Television could have been used to gain broad awareness of the issue

[118] CB vol 2, pg 158-159.

and direct the target market groups to sources of further information. Advertorials and brochures could include greater detail.

254 Ms Pascoe identified the costs of other public safety campaigns conducted in the 1980s:[119]

- 1987 - Grim Reaper campaign for the prevention of HIV Aids spent $3 million, allegedly in three weeks
- Mid 1980s - Federal Government Anti-Smoking education spent $5 million per annum
- Post mid 1980s - Federal Government Anti-Smoking education $13-15 million per annum
- Early 1990s NSW State Government spent $8 million dollars per annum on road safety campaigns targeted to just over a third of the Australian population

255 Ms Pascoe distinguished those campaigns from an effective campaign to inform and educate persons like Mr Werfel, in that the former had "more difficult mandates as they are trying to change complex, higher order behaviours such as lifestyle choices and involve addiction issues which have far broader implications ...". By contrast, Ms Pascoe observed that exposure to asbestos dust is unlikely to be linked to a similar higher order motivation and could better be likened to informing a consumer on how to use a hazardous product like an acid or caustic product. The campaign she proposed was also more closely aligned to a product recall warning campaign.

256 Ms Pascoe accepted that the campaign would have to be executed nationally in both metropolitan and regional markets. In that respect, Ms Pascoe noted that a research report by a James Hardie employee, R Bolton, in June 1970 demonstrated that James Hardie were tracking the use of their asbestos-cement fencing materials by South Australian suburb and by ownership by the SAHT. She described reaching tradesmen and home handypersons through an organisation like the SAHT as an excellent form of communication. The information might also have been disseminated in the name of SAHT.

257 Mr Werfel also called Mr Roberts, a corporate communications consultant of 20 years standing. He has provided consultancy services to organisations in Europe, the United States, Africa and the Middle East following 10 years of service with the BBC, at which his last position was Head of Communications for BBC News.

258 As a consultant, he developed a communication strategy for a multinational food manufacturer implicated in the European horsemeat substitution crisis in 2013. He also devised a strategy to address the demise of the tourist operator XL Leisure in 2008, which left 85,000 Britons stranded overseas.

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[119] CB vol 2, pg 160.

259 Mr Roberts differentiated in his report between public relations and marketing. The former concerned "earning" and attracting appropriate media coverage, whilst the latter involved purchasing both the content and publishing space of promotional material. He observed that the earned nature of public relations coverage affords the reporting greater credibility. He emphasised that a communication strategy should include both public relations and advertising elements.

260 Mr Roberts referred to the Reid papers. In particular, he referred to papers concerning James Hardie's communications campaigns between 1970 and 1983. Mr Roberts stated in his report that it appeared to be a critical part of the James Hardie business strategy to place its products front-of-mind for retailers and consumers. He noted, in particular, the following documents:

- Document 12 citing the spending of $42,000 in 1970 ($477,000 in 2017 terms).
- Document 32 referring to spending of $303,000 in 1972 ($3.06 million in 2017 terms).
- Document 68 referring to spending of $65,000 for public relations consultants in 1979 ($302,000 in 2017 terms).
- Document 91 referring to allocating $1 million for community relations in 1980 ($4.21 million in 2017 terms).
- Document 135 referring to the allocation of $2.4 million for community relations to be spent in 1983 ($7.5 million in 2017 terms).

261 Mr Roberts explained that a spend of $302,000 in 2017 terms on public relations consultancy would place James Hardie in the top three winning clients of most, or all, of Australia's public relations agencies.

262 On the basis of the nature and sophistication of the communication strategies set out in the Reid papers, Mr Roberts opined that James Hardie had the capacity to conduct a campaign to warn members in the community about the risk of injury, including mesothelioma, from the inhalation of small quantities of asbestos dust when remodelling, repairing or removing asbestos-cement building products.

263 Mr Roberts' report disclosed that, in 2008, commercial television reached 93 per cent of the Australian population over the age of 13, with Australians watching an average of three hours and 18 minutes of television a day in 2003. The Reid papers showed that appearances had been arranged for advocates of James Hardie products on television and radio. He noted that there were three well established talk-based radio networks in Adelaide: the ABC Radio National,

ABC Radio Adelaide and FIVE AA. There were 20 music channels available on the FM frequency, all of which carried news bulletins.

264 Mr Roberts also detailed the readership of newsprint media up until the early 2000s. The two major national papers, the Australian Financial Review and the Australian, used by James Hardie in its campaigns, were mentioned in the Reid papers. The Adelaide Advertiser had a circulation of 468,000 in 2009, and the Sunday Mail a readership of 675,000. Messenger newspapers published nine free weekly papers in the Adelaide metropolitan area, with a collective weekly readership of 710,000.

265 It was Mr Roberts' opinion that media outlets would have been receptive to any approaches made by James Hardie to communicate the health risks of exposure to asbestos dust, because of the sensitivity and newsworthiness of the issue. He accepted that a long running campaign would have to be carefully planned to ensure that the messages were heard and/or seen by the consumers. Nonetheless, it was his opinion that the public relations and corporate communication firms engaged by James Hardie in the 1970s and 1980s were up to the task of developing a successful campaign.

266 In his report Mr Roberts explained:

> It's my opinion that the most effective public relations campaign would be a combination of media relations and community relations. Such a campaign would need to run for a calendar year, considering the inherent cost in human health of not informing the audience. Such long running campaigns work in terms of spikes of sporadic media activity, … . Such spikes function as campaign 'milestones', while between these, there is a constant stream of community relations with primary groups, such as suppliers, consumers (handymen) and architects. The first quarter to such a campaign is also about the 'planting' whereby relationships are established with key partners, which come to fruition later in the year.

267 Mr Roberts explained that dissemination of information about the dangers of reworking asbestos products would have been complementary to the "Don't Move, Improve" campaign mentioned in the Reid papers.

268 Mr Roberts also explained that James Hardie could have partnered with a credible research body.

269 In his report, Mr Roberts described the initial stages of the campaign contemplated by him, including a press release foreshadowing the program for the following year. It would inform the public of the risks of working on asbestos-cement products, and announce that James Hardie had stopped the manufacture of asbestos-cement products that it will be committed to a long-running customer awareness campaign. Mr Roberts elaborated on the first year of the campaign as follows:

- a second press release announcing an asbestos awareness week, comprising a number of related activities;

- a print interview with the managing director;[120]
- a community engagement plan commencing with the appointment of community relations officers;
- publication and distribution of leaflets on the do's and don'ts of asbestos, with key partners like hardware stores, trade organisations and libraries;
- asbestos safety demonstration tents at major sporting and community events;
- the launch of a competition; and
- collaboration with a coalition of cross-party political representatives.

270 The program adumbrated in the report did not extend beyond the first year, but when he testified, Mr Roberts explained that he envisaged shorter, less intense follow up publicity in subsequent years. Exposing his narrow focus on New South Wales, Mr Roberts nominated Rugby League as the sport which would accommodate the demonstration tents. There is, of course, no reason why the tents he had in mind could not also be set up at AFL games in those States which prefer Australia's national game.

271 Mr Roberts explained that an element of any such campaign would include the monitoring of "out-takes", by conducting public surveys to determine how well the message was understood and retained. The ultimate goal would be to measure whether the communications, materials and messages which were disseminated have resulted in attitudinal and/or behaviour changes of the targeted audience.

272 Mr Roberts compared a campaign warning about working with, or removing asbestos-cement home building products, with campaigns on quitting smoking, healthy eating and alcohol consumption. Mr Roberts emphasised that changing practices when working with asbestos "was a very simple required behavioural change" in comparison to the subject of those campaigns. Mr Roberts had "little doubt" that, if James Hardie had engaged in a public relations campaign of that kind, the "campaign messages would have reached Mr Werfel. He expressed the opinion that the campaign would [have] been effective in saving Mr Werfel and others from the dangers of inhaling asbestos dust from the breaking of in-place asbestos-cement products."

273 We interpolate here that whether or not Mr Werfel would have received any warnings disseminated by such a campaign, and whether or not he would have heeded those warnings, was a question of fact for the Judge on which expert

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[120] Mr Roberts agreed that there was a risk that a current affairs program might, at least initially, provide negative coverage.

public relations or marketing opinions could offer little by way of direct assistance. The matter which does fall within his area of expertise is whether there was a reasonably attainable and affordable strategy which would reach a significant number of members of the class exposed to the danger and effect attitudinal change. The opinion of Mr Roberts mentioned in the preceding paragraph is to that effect.

274 Mr Roberts accepted that the campaign would probably reduce sales by James Hardie, but only in the short term. His opinion was that the business would have bounced back financially because of the "reputation capital engendered by such a campaign". An effective campaign would fix James Hardie "as one of the most responsible, trusted and considerate businesses in Australia" in the eyes of consumers.

275 In responding in his report to the question whether there was, at relevant times, available media outlets through which James Hardie could have reached the target audience, including Mr Werfel, Mr Roberts qualified his response with "a degree of circumspection". In his oral evidence, Mr Roberts explained that he gave that qualification because his research revealed only limited information about the reach of the various forms of media between 1987 and the early 2000s, which we set out in paragraph [272] above:

> No. I give you what information I have in terms of the consumption – Australian consumption in terms of print media, radio and television, born of my knowledge of the time I've been here, conversations with others, but principally best-of research. What I'm saying, this was an exhaustive research of what's available out there in terms of consumption, in terms of media, television and radio in South Australia and elsewhere.

276 During the course of his cross-examination, it appeared that Mr Roberts was not familiar with the relationships between the companies in the James Hardie group, and that he approached the questions asked of him on the assumption that the resources and know-how of the group as a whole was available to James Hardie. As summary of the financial and corporate arrangements between James Hardie and JHIL are set out in an appendix to this judgment. It is not obvious to us that the distinct corporate entities of the members of the group presented any legal or practical obstacle in this respect, because of the substantial flow of dividends and management fees from James Hardie to JHIL.

277 Mr Roberts agreed there was no indication that the James Hardie Group had received any expert public relations advice to launch a campaign of the kind adumbrated by Mr Roberts. The duty of care required by the common law is not always eagerly adopted by commercial entities. It is not surprising, and says nothing about the reasonableness of the duty and standard proposed, that James Hardie did not request, and that no advertising agency volunteered, a marketing campaign of the kind contended for by Mr Werfel. Mr Roberts also agreed that he had found no evidence of any other asbestos producer embarking upon a

campaign of that kind. However, it will be remembered that James Hardie had received advice that it could manage the adverse publicity about asbestos by both acknowledging the risks in its products and encouraging sensible safety precautions.

278 Mr Roberts' knowledge of the number of mesothelioma deaths annually was tested in cross-examination.[121] However, the point of that cross-examination is not obvious. Plainly enough, the extent of the risk is an element of the *Shirt* calculus,[122] but that is a matter for the Court. Mr Roberts' second-hand knowledge of the number of mesothelioma deaths is hardly relevant.

279 Mr Roberts was also tested on whether or not the hardware chain Bunnings operated in South Australia in the 1980s. It is sufficient to observe that, however branded, there were hardware stores throughout Australia at that time, and indeed well before, albeit hardware superstores are a more recent phenomenon.

280 Mr Werfel also called Mr Kottek, an occupational and environmental health consultant with particular expertise in chemical and physical hazards.[123] Mr Kottek ventured the opinion that because of the poor levels of information in the 1990s, James Hardie could have approached the State public health and labour departments and encouraged them to discharge their responsibilities to inform the public and workforce of the hazards posed by in-situ asbestos-cement.

281 Mr Kottek reported that in the 1990s there was, and there still continues to be, widespread ignorance of the hazards of asbestos in the domestic construction centre. Mr Kottek gave evidence of an asbestos awareness campaign which was launched in 2011 by the Asbestos Education Committee (**the AEC campaign** and **AEC** respectively). The AEC comprised not-for-profit, energy and building corporations, government and union entities, asbestos-related diseases support groups and research organisations. James Hardie was a member. The AEC's campaigns were directed at home renovators and home handypersons and celebrities were engaged to promote its messages. The AEC worked to increase awareness of the dangers of asbestos with a focus on increasing awareness among home renovators and tradespersons by:

- alerting them to the dangers of asbestos;
- alerting them of the products which may contain asbestos and where in homes those products may be found; and

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[121] He responded that there currently were 770 claims annually and that in 1985 there were 152. He did not know how many of those deaths were caused by James Hardie's products.

[122] *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

[123] From 1997 to January 1999, Mr Kottek was the senior scientist with the public health branch of the Department of Human Services, where he gave advice with respect to mines, chemical plants, and public inquiries on asbestos. Mr Kottek had conducted literature searches on occupational hazards including asbestos-cement products. He holds a Bachelor of Science (Hons) from the University of Melbourne and a Master of Science from the University of Melbourne, having majored in History and Philosophy of Science. He also holds a law degree.

- advising them on the steps which ought to be taken by people planning home renovations or who otherwise identify asbestos products in their homes.

282 There was a paucity of evidence on just how the AEC's information was disseminated. The evidence before the trial Judge did not disclose the spread or depth of any print, radio or television advertising. The AEC did have a website, but the number of "clicks" on that website was not disclosed. Attached to Mr Kottek's report were some printouts from that website. It included photographs of the residences in which asbestos might be found. It pointed out that asbestos might be found in any Australian home built or renovated before 1987. A two-dimensional plan of a home indicated materials which may include asbestos: insulation of hot water pipes, eaves and gables, loose-fill insulation, corrugated asbestos roofing and fences. It contained a warning against cutting, drilling or in any way reworking or demolishing asbestos-cement products. The website explained that undisturbed there was little risk from asbestos-cement products and directed visitors to a website to explain how damaged asbestos could be re-sealed. It did not suggest that a professional person should be consulted to carry out the work. However, it did suggest contacting assessors who could confirm whether the material was asbestos or not if in doubt. It set out as its cardinal rule:

> If you think that it might be asbestos, treat it as if it is asbestos and take all the necessary precautions ensuring you manage it safely.

283 It explained that it was usually not necessary to remove asbestos-cement products but it recommended engaging professionals in the event that it was removed. It recommended filling out a checklist, which could be downloaded from the site, to indicate those elements of the building which might contain asbestos and those which needed repair. It gave practical advice on the sealing of asbestos. It advised how homeowners could safely make small, simple repairs on, or remove a small amount of asbestos-cement product safely. It provided fact sheets for that purpose.

284 Mr Kottek reported that a 2014 survey commissioned by the Asbestos Safety and Eradication Agency (**ASEA**) revealed that 30 per cent of DIY home renovators were not confident about their ability to identify situations in which there was a danger of asbestos exposure, and that even 12 per cent of tradespeople were not confident of their ability to identify material containing asbestos. It should be recalled that an important message of the AEC campaign was that precautions should be taken if it was suspected that the material might contain asbestos. Mr Kottek testified that there was little change in those respects in the 2018 ASEA survey:

> A high level of ignorance remains within the domestic and do-it-yourself construction sector. There continues to be rather high levels of ignorance regarding asbestos and its related dangers. In a 2014 survey commissioned by the Federal Government Asbestos

> Safety and Eradication Agency (ASEA), 30% of DIY home renovators were not confident in their ability to identify situations where they or others may be in danger of exposure to asbestos while even 12% of tradespeople were not confident of their ability to identify materials that contain asbestos. The most recent 2018 survey results showed that rates of perceived levels of knowledge amongst tradespeople, DIY renovators and the general public had not changed much since 2014. When the most recent results were presented at the 2018 ASEA annual conference; many delegates expressed their concern at the ongoing level of ignorance.

285 There are difficulties in drawing conclusions from a general survey of that kind. It does not differentiate as between the age of the respondents, or their experience of living in houses containing asbestos. It fails to differentiate between handypersons and people with no such experience. The baseline knowledge before, and after, the AEC campaign is not qualitatively and quantitively identified.

286 Neither in Mr Kottek's report, nor in his cross-examination, were the following questions about the AEC campaign and the survey asked or answered:

1. what proportion of respondents had seen any of the campaign;

2. what proportion of the respondents worked on asbestos-cement products; and

3. what proportion of the respondents had taken any, and what, precautions when working with asbestos-cement product and was that proportion different as between those who had seen the AEC campaign and those who had not.

287 We accept that Mr Kottek's second-hand account of the ASEA campaign and survey results show that it cannot be assumed that public awareness campaigns will be effective. However, in the absence of a close analysis of the survey data itself against the detail of the AEC campaign and other relevant public health advice, the survey results are far from conclusive evidence that a campaign of the kind identified by Ms Pascoe and Mr Roberts would have been ineffective.

288 Mr Kottek also gave evidence that there were steps which James Hardie may have taken to warn the public of the risk of the careless handling of in place asbestos-cement products. He suggested that warnings about handling asbestos-cement products could have been placed on James Hardie's asbestos-free cement sheeting. Mr Kottek commented on the effectiveness of a grapevine effect generated by public discussion of a warning campaign as it was rolled out.

289 It is convenient here to draw attention to a particular aspect of the breach of duty on which Mr Werfel relied. Mr Werfel testified that he did not appreciate that the eaves of the homes on which he worked were asbestos-cement sheets. His case was that occupants of homes made of those products should have been

alerted to where they might encounter asbestos-cement products. That was one of the objectives of the AEC campaign. Advice of that kind would be necessary to make warnings of the dangers of working with asbestos-cement products effective. However, it is a distraction to focus on the difficulty of definitively identifying asbestos-cement products. Given the prevalence of asbestos-cement products, the warning need only have alerted householders to the type of construction and era of homes which were likely to contain such products. A message which emphasised erring on the side of caution was necessary.

290 In its defence, James Hardie called Mr Toby Ralph an advertising executive. Mr Ralph's experience included arranging and advising on widespread advertising and communications campaigns for both private industry and government and non-government public organisations. He had particular experience in the advertising of building products.

291 In what appears to be a generic letter of instruction for use in actions brought against James Hardie generally, dated 21 June 2016, Mr Ralph was asked relevantly to assume the following:

> 1. Since the Second World War Amaca has been Australia's market leader in building products containing asbestos.
>
> …
>
> 3. The building products were made of asbestos-cement - a product commonly known as '*fibro'*. Amaca's asbestos-cement products were typically made of cement and sand and contained 8 - 15% asbestos, depending on product. … In their typical use, asbestos-cement materials were usually sealed in some way … .
>
> 4. Asbestos-cement building products were widely used. Asbestos-cement could be used as roofing, in eaves, as external and (more rarely) as internal lining, and as flooring (especially in wet areas such as the bathroom or laundry). … Some estimates suggest that as many as one or maybe two out of every three houses built in Australia between 1945 and 1985 would have contained some asbestos-cement.
>
> 5. Not all of the asbestos-cement products were manufactured by Amaca. …
>
> 6. Once in place it can be difficult to discern whether a particular product is asbestos-cement or another comparable product which did not contain asbestos. …
>
> 7. When in place asbestos-cement products are safe - no asbestos is liberated while the products are left alone. The only risk arises is when the asbestos-cement is disturbed in some way - and then it needs to be disturbed sufficiently, so that the asbestos fibres contained in the product can be released and made airborne. If that occurs, then asbestos may be inhaled by a person in the vicinity - but even then (as explained below) the risk of an asbestos-related injury is <u>very small</u>.
>
> 8. Given the number of ways and places in which the products were used, it is reasonable to assume that the products could be disturbed. … It could occur during the process of renovation or refurbishment - in which event the asbestos-cement product might be removed. In some cases the product might be broken up before

disposal. In some instances there might be minor disturbances, such as when a painted fibre surface is sanded in preparation for a new coat of paint.

9. The manner in which an asbestos-cement product might be disturbed is important. The risk of contracting an asbestos-related disease is related to the dose of asbestos inhaled. Some aggressive practices - such as the use of power tools, or the deliberate smashing of the product for disposal - are likely to produce more free asbestos than other, less aggressive measures. For example, lightly sanding a painted surface to prepare it for a fresh coat of paint would be unlikely to produce any free asbestos.

10. Because of the difficulty in discerning whether a particular product is asbestos-cement or not, there is a chance that persons informed of an asbestos risk in general terms will apply unnecessary precautions - such as taking precautions when the product actually contains no asbestos at all.

11. In about 1985 Amaca phased out its asbestos-containing building materials. By 1987 Amaca has ceased making any new asbestos-containing materials.

12. Knowledge as to the risks of inhaling asbestos slowly developed over time. By 1978 the general risks associated with inhaling asbestos would have been reasonably wellknown amongst professions attached or associated to the building industry - such as architects, builders, carpenters and plumbers, etc.

13. The issues which we ask you to address do not arise in respect of those groups who would have had particular reason to know about asbestos risks, rather we are looking at a group who had no particular reason to know of asbestos risks, and who were entirely unaware or only dimly aware of those risks. Given that it is suggested that they should have been targets of a mass media campaign, it is convenient to describe this group as the '*Target Group'*.

14. This Target Group could include persons who owned or rented domestic or commercial premises which contained asbestos-cement (or products which might be asbestos-cement) and who were considering repairs or renovations or activities which could disturb the products. The Target Group might also include persons who were asked to undertake similar tasks in their employment. The key feature is the person's lack of knowledge of the risks from asbestos exposure.

15. Because they were not occupationally or routinely exposed to asbestos-cement building materials, it is likely that members of the Target Group would not have inhaled much asbestos. Given the low dose of asbestos likely to be inhaled by a member of the Target Group, the only asbestos-related disease that could be inflicted is the disease known as mesothelioma - a cancer usually found in the lining of the lungs.

16. The risk to Target Group is very grave - mesothelioma is invariably fatal. However, the incidence of mesothelioma is very low.

17. Mesothelioma is a rare disease - the incidence rate for mesothelioma is roughly 2.5 cases per 100,000 population. Of that, only a small proportion of those 2.5 cases would fall into the Target Group. By way of comparison the rate for lung cancer was 43 persons per 100,000, and the incidence rate for deaths from cardiovascular disease was in the order of 200 per 100,000.

18. Amaca manufactured the products but did not undertake retail sales itself. It only sold the building products through authorised resellers. In the main, those resellers were hardware stores. Some were large, but most were smaller-style suburban hardware stores.

19. Although the clear market leader in asbestos-cement building materials, since the cessation of the use of asbestos, Amaca has been in a highly competitive market, competing with other manufacturers for market share and brand identification.

20. At all of the relevant times Amaca was experienced with marketing campaigns, and even though it did not sell its asbestos-cement products by retail, it advertised its products widely and by different means. These means included:

    (a) Product brochures which were placed with retailers;

    (b) Conducting '*in store promotions'* and training courses;

    (c) Television advertisements;

    (d) Advertisements in metropolitan and country newspapers, and trade journals;

    (e) Sponsorship of sporting teams (eg the Parramatta Eels);

    (f) Sponsorship of sporting events (eg the Hardie Ferodo 500);

    (g) Sponsorship of social programs (eg Life Be In It).

21. At all of the relevant times Amaca was a generally profitable company, and sufficiently profitable to be able to afford a wide-reaching advertising program to sell its products.

22. Profits, of course, varied from year to year, but for the purposes of this report please assume that Amaca was able to afford a sophisticated advertising campaign.

23. It is impossible to generalise about the potential Target Group. For example, it would be impossible to generalise about the age of the members of the Target Group - some may have been born long ago, while others may have been born after Amaca ceased using asbestos in its products. It would be equally impossible to generalise about their education, or whether they lived in urban or rural places, or about their habits in terms of watching television, reading newspapers, or listening to the radio. It would not even be possible to assess what proportion of Target Group clearly read or understood the English language.

(Underlining added)

292 The following observations can be made about those assumptions. The percentage of asbestos the letter admits, or is prepared to assume for the purpose of the proceedings, by paragraph 3 was present in its products would not universally be regarded as "small". The admission, or assumption made for the purpose of the proceedings, of the prevalence of asbestos-cement products in paragraph 4 is significant. The degree of risk described as very small in paragraph 7, and elaborated on in paragraph 17, is a matter for a court and not Mr Roberts to evaluate, but may have affected Mr Ralph's conclusions. The

assumption in paragraph 12 is not at all helpful. It is not clear whether the general risks included mesothelioma and is unclear as to the understanding of the extent of exposure which created the risk. The assumption in paragraphs 21 and 22 are ambiguous. They may mean only that James Hardie could afford extensive advertising to sell its products but they may mean that it could also afford a campaign to warn of the dangers of its asbestos-cement products. Paragraph 20 is an admission, or a concession for the purposes of the proceedings, that James Hardie had available to it a range of outlets for a warning campaign that Ms Pascoe and Mr Roberts also assumed.

293 The report of Mr Ralph is not particularly persuasive. It is didactic and simplistic in tone. In his report, Mr Ralph conflates the question of the effectiveness of a warning campaign relative to its cost, which is within his area of expertise, with the question of whether or not James Hardie, or any other corporation, would conduct such a campaign unless required to do so. He answered the second question by making the trite observation that a commercial corporation is unlikely to voluntarily invest substantial monies to educate the community on the potentially lethal consequences of its products. Much depends, in this context, on the meaning of voluntary. It can be accepted that commercial corporations would rather not sacrifice profits, and the interests of their shareholders, unless there was a good reason to do so. However, a corporation may accept that it is necessary to take some steps to ensure long-term reputation, and sustainable profits, at the expense of its business's short-term profitability. There is also a tension between the profit imperative of commercial corporations and the premise of tort law, that in some circumstances an individual's personal interest and autonomy must be subjugated to the welfare of his or her neighbour. Those competing interests must be resolved, by a trial court, against the reasonableness standard. It is not a matter to be determined by an advertising consultant.

294 It can, however, be accepted that the reasonableness and cost-effectiveness of a warning campaign must be evaluated against its effect on the commercial viability of the business, in this case James Hardie's asbestos-cement business. On that primary question, certain assumptions made by Mr Ralph undermine his conclusion that the campaign would be ineffective. First, Mr Ralph emphasised that it cannot be assumed that simply informing people about the dangers of asbestos-cement products would have led a majority of them to act in a different way. That is so, but that simply marks the beginning, and not the end of the enquiry. The question remains whether such warnings as could have been given, were likely to affect the behaviour of a sufficient number of people to justify the direct and indirect costs of doing so. In short, were these reasonably practicable remedial measures to address the risk of disease and death amongst persons who worked on or demolished James Hardie's asbestos-cement products?

295 Mr Ralph assumed that the message of the campaign would be that householders and tradespersons should not touch any material in and around

domestic premises which might contain asbestos. He assumed that the message would be that the householder should call in an expert, or obtain a laboratory report, and if the material contains asbestos, engage an expert to remove it at the expense of the householder. A campaign with that objective would be, as Mr Ralph observed, "extraordinarily ambitious". However, in the law of negligence, perfection is not the enemy of what is reasonable and practicable. More modest warnings to take prophylactic steps, such as mask wearing and ensuring proper ventilation, when it is known, or even only suspected, that the building product is made of asbestos-cement, might nonetheless be effective enough to save enough of the class from harm to justify the expense of disseminating the warnings. Whether or not such a campaign would have been seen or heeded by Mr Werfel is another question which goes to causation and not breach. We deal with that question from paragraph [358] below.

296 The essential reasons advanced by Mr Ralph in support of his opinion that the campaign would not be effective were:

- the target audience will not have seen many people dying from asbestos-related diseases so the threat would be abstract;
- the target audience will have seen asbestos products as "unthreatening" objects; and
- the target audience will be deterred from following the recommended actions because it would be slow and expensive to do so.

297 The first two observations can be accepted, but it is for those very reasons that a warning campaign might be required. Moreover, the premise that people will not take a threat seriously if they have not seen others die from it is most doubtful. Most Australians have a healthy caution about swimming in its seas, walking through its long grass, or exposing themselves to the sun without having witnessed a shark attack, snake bite, or a death from skin cancer. Moreover, neither the sea, countryside nor sun are particularly threatening. There can be a sensible middle message about the risks of remodelling, reworking or removing asbestos-cement products, just as there is about enjoying the Australian environment. As to the third reason, even though always calling in an expert will be slow and expensive, masks and ventilation are cost effective and reasonably practicable measures which can be adopted even when it is only suspected that the building material to be worked on is asbestos-cement.

298 Mr Ralph's reliance on the Commonwealth Government initiative to test for bowel cancer by sending stool testing kits to householders, is two-edged. Mr Ralph referred to the statistic that "the kits are being ignored by two thirds of recipients". However, the corollary is that one in three persons took advantage of the kit. Moreover, the percentage who did not do so must be adjusted for those men to whom the kits were sent but who obtained their own medical advice and undertook other investigations. Finally, at least for some, the simple precautions

which householders and tradespersons would have been encouraged to take would present less of a physical and psychological obstacle than returning a bowel sample.

299 Mr Ralph opined that "[a] core consideration for a company that authors a campaign such as the one proposed is the brand image and consequent financial harm that flows from it". That may be accepted. The law will seldom impose a duty of care on a corporation which imperils the very viability of its business. However, on the question more squarely within his area of expertise, Mr Ralph did not address James Hardie's capacity to manage adverse business consequences, given that:

- James Hardie had stopped using asbestos-cement product in 1987;
- James Hardie was manufacturing and distributing asbestos free building products;
- James Hardie commenced placing warning labels on some asbestos-cement products in late 1978 and which expressly referred to a risk of contracting cancer from early 1982;
- the change in product range might have allowed warnings about the dangers of asbestos-cement products to stand alongside a promotion of the asbestos free alternatives; and
- James Hardie was in any event already the subject of adverse publicity for its operations in mining and manufacturing asbestos-cement products about which James Hardie was sufficiently concerned to consult public relations consultant.

300 Mr Ralph offered very little evidence for his conclusion that a campaign advising that the recommended precautions be taken before working on asbestos-cement products, was in any way analogous to anti-smoking and anti-speeding campaigns. So too with respect to his dismissal of the product recall analogy. Mr Ralph's report also ignores the special characteristics of the target audience of people who enjoy, and have building skills. Nor did Mr Ralph address the growing awareness of the need to take safety seriously when undertaking home maintenance and renovation.

301 On the issue of breach, James Hardie again relied on the decision in *Hannell*. The plurality held that duty to warn did not extend to conducting a mass media campaign, for the following reasons:[124]

> [363] The remaining issue is whether the appellant should have advertised in the mass media. There are two points about that: one goes to the effectiveness of warnings in the mass media as a tool for modifying behaviour and the second to the practicality

[124] *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109, [363]-[366].

> of that course of action. The evidence establishes that there was very extensive news and current affairs coverage in the print and electronic mass media in the second half of the 1970s and the first half of the 1980s concerning the dangers of asbestos, the need for product labels warning of the risk of asbestos and the need to handle the products with care. There was also coverage of the risk to handymen. Based on that evidence, it would be reasonable to expect that a person who was an adult in Western Australia in that period would have a general understanding of the risks of asbestos and asbestos-cement products. The respondent arrived in Australia from the UK in 1981. He gave evidence, accepted by the trial judge, that he did not know that exposure to asbestos could cause cancer. That is an illustration of the limitations of mass communication of news and current affairs.
>
> [364] Another important factor is whether it is reasonably practicable to warn persons in the class of which the respondent was a member. An impression of the nature and extent of the advertising required for the information to come to the respondent's attention is revealed in the trial judge's finding on causation. The trial judge found (at [327]):
>
> > It may be inferred, and I do infer, that if in or before 1983 the [appellant] had made public announcements or placed advertisements in a Perth daily or weekly newspaper monthly or more frequently saying that a handyman or casual user of asbestos-cement building products ran a risk of contracting mesothelioma and that the risk could be minimised by the taking of certain steps then that information is likely to have come to the attention of a person such as the plaintiff who watched the news, listened to the radio and regularly read a newspaper, even if only weekly.
>
> [365] When assessing reasonableness, a hindsight analysis is to be avoided. Further, what is reasonable has to be assessed by reference to all members in the class, present and future. The advertising would have to apply to all geographic areas in which the products were distributed for a period commencing in 1979 and ending at some unspecified time in the distant future as new generations of adults purchased homes containing asbestos fences and other asbestos-cement products.
>
> [366] The frequency and scope of the advertisements that would be necessary to reach the majority of the members of the class (membership of which class would continuously change) would itself communicate a warning of a kind that is disproportionate to the very low risk of harm involved. That would be so regardless of the actual content of the communication which would be in line with the message on the second product label. Further, it would be impossible to reach all members of the class, such as for example, new arrivals, non-English speakers and those who avoid commercial media outlets. Mass media advertising of a very low risk of serious harm, particularly having regard to the myriad of sources of such risks to which people are exposed on a daily basis, is not a reasonable or practicable response to the risk. This assessment is consistent with and reflected in the standards and regulations in the period. Accordingly, we would uphold the appeal on this basis.

302 It is not obvious from reasons for judgment of the plurality why 1979 is selected as the relevant year when the Judge's finding was that the exposure commenced in 1983. It appears from paragraph [301] of the reasons that the plurality proceeded on the basis that foreseeability was to be determined from the

time of the alleged breach of duty. The plurality took that to be 1979[125] which is when the sheets were sold to the builder who constructed the home for the original occupant from whom Mr Hannell purchased the home. That date was apt for a consideration of an alleged breach by failing to place warning labels on the asbestos-cement sheet. It is with respect doubtful that that could be the date of any breach of duty by failing to warn Mr Hannell, who was then still living in London. The breach by a failure to warn could only have occurred after he emigrated to Australia and before 1990 when he last worked on asbestos-cement products in the home. The difference in time frame depending on the breach in question illustrates the importance of keeping in mind the various ways in which the duty may be discharged when fixing the time at which the duty was enlivened. Be that as it may, the judgment in *Hannell* rests ultimately on a finding of fact as to the degree of foreseeability in 1979 and the prophylactic response which was reasonable, measured against the foreseeable risk at that time.

303 It should also be observed, from paragraph [366] of the reasons, that the majority appear to frame the question in terms of whether it would have been reasonably practicable to undertake a campaign which would reach all of the members of the class at risk, including those who could not speak English. Just as it is an error to determine whether there was a breach by asking whether there were reasonably practicable warnings which would have reached Mr Werfel, it is an error to ask whether there were reasonably practicable measures which would have reached all or even a majority of members of the class. If a duty of care is established, the next enquiry is as to the scope and extent of the measures which should reasonably be taken having regard to the degree of risk on the one hand and the costs, practicality and effectiveness of the measures on the other. The final question is whether the failure to take those measures caused the plaintiff in the action injury. In the context of a failure to warn case, the question is primarily whether the warning would have saved the plaintiff from injury. The question is not whether the warning would have saved all members of the class from injury.[126] Of course, if a measure is unlikely to save any, or many, members of the class, it is unlikely to be a reasonably practicable measure to take. On the other hand, in the application of the *Shirt* formula, it may be reasonably practicable to take even a measure which would save only a significant minority of users in order to spare them, and their dependents, the loss which flows from death by mesothelioma.

304 Finally, in paragraph [363], their Honours placed some weight on the limits of what can be achieved through the mass media, illustrated by Mr Hannell's evidence that he did not know that asbestos was carcinogenic. Their Honours observed there was extensive news media of the dangers of asbestos. However, a survey of the information published in the mass media and put into evidence in

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[125] See also *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109, [304], [346].
[126] *Hannell v Amaca Pty Ltd* (2006) WASC 310 (Le Miere J).

this case shows that cancer was rarely expressly mentioned as a risk to persons who worked with asbestos-cement products only occasionally. It is also common experience that people take greater notice of information which may affect or is otherwise relevant to them than others. There was also little information in the media on the precautions which should be taken.

305 Ultimately, the question of breach is a factual one. In the course of the decade after 1979 (the relevant year in *Hannell*), medical research increasingly discovered and warned of the risk of mesothelioma from occasional work on asbestos-cement products. Nor was the extent of the capacity of James Hardie to engage in a sophisticated campaign put into evidence in *Hannell*.

306 In determining the reasonably practicable steps which James Hardie ought to have taken to warn persons who repaired, remodelled or removed asbestos-cement sheets, even only occasionally, it is useful to consider the warnings which James Hardie did give.

307 In 1978, James Hardie published a brochure concerning one of its asbestos-cement products called Villaboard – an internal lining board from which internal walls were constructed. That, and like brochures, were made available on racks in hardware stores. The brochure contained extensive and detailed information on how to fix the boards using nails or screws, how to cut it to size by scoring and snapping it, or using cutting guillotine or sawing it.

308 A 1981 brochure on exterior claddings suggested using drills to drill out holes needed for plumbing fixtures and electrical conduits, or using a saw. A paragraph under the heading "Caution" was largely in the same terms as the labels to which we have earlier referred. It commenced with an assurance that James Hardie's asbestos-cement building products present no known risk to health when fixed into position. It advised that the boards contained a "small percentage of asbestos" which was bound firmly into the product by cement. It warned that breathing asbestos dust can damage health, but did not mention cancer as one of the health risks. It advised "as a precaution" keeping dust levels down by working in a well-ventilated space, using hand tools or a power saw with a dust suppression attachment.

309 Another brochure published in August 1978 promoting an exterior finish known as Hardiplank gave similar information as to the cutting to size and fixing of the board, and provided a similar caution. A publication on home improvements for the handyman in October 1978 gave the following warning:

> Hardie's asbestos-cement building products contain a small percentage of asbestos, bound firmly into the products by cement and other materials. Asbestos dust can damage health, but under normal circumstances, this is unlikely when using asbestos-cement sheets. As a precaution however you should keep dust levels down by following these simple safety rules: …

310 Rules designed to minimise dust inhalation were then set out.

311 In the early 1980s, James Hardie published brochures promoting and giving instructions for its asbestos-free fibre cement building products but did not include in them warning about working on its in-place asbestos-cement products and where those products were likely to be encountered. The products included cladding which could be placed over existing cladding.

312 James Hardie sales staff regularly held promotional evenings for its products in which they would speak to stockists, that is hardware store operators to whom James Hardie wholesaled its products, and who then sold them to the ultimate consumers, builders or handypersons.

313 On the evidence in this case, the foreseeable risk as at 1990 was significant although not capable of mathematical quantification. The occurrence per 100,000 residents, which is now known, was not known in the late 1980s. However, there was by then a consensus that even occasional work on asbestos-cement product could cause mesothelioma and there were, having regard to Australia's population, millions of persons throughout Australia moving in and out of homes with asbestos-cement product who might work on those products themselves or be in proximity to someone else who did. The consequences of contracting mesothelioma were, of course, catastrophic, as illustrated by Mr Werfel who is still only in his 40s. It must also be remembered that the one and the same warning campaign would speak to both occasional users and to tradespeople who worked more frequently on asbestos-cement products.

314 The critical question on breach in this case is whether a clearer and stronger acknowledgment and more frequent and widespread warnings of the risk were likely to be efficacious. On this question, we find the opinions of Ms Pascoe and Mr Roberts, on the significance of a stronger and more frank acknowledgement by James Hardie of the risks, persuasive. It would have generated significant momentum for the dissemination of the necessary warnings. Ongoing warnings could have been attached to James Hardie's asbestos free building products, to the effect that precautions should be taken if attaching them to asbestos-cement products, or when performing other work on asbestos-cement products, because asbestos dust can cause cancer. Clearer and stronger warnings could also have been included in "advertorials" for James Hardie's asbestos free products, like those described below in paragraphs [336] and [339]. James Hardie could have established and joined partnerships, like the AEC, earlier if it had moved more quickly to admit the risk posed by its asbestos-cement products. Even modest advertising campaigns and community relations strategies are likely to have greatly amplified and extended the reach of James Hardie's public announcements and its product information sheets if they had more closely accorded with the clear medical consensus.

315 The evidence of Ms Pascoe and Mr Roberts, on its face, demonstrated reasonable, practicable ways of delivering the warning which need not have destroyed the viability of the James Hardie business. Indeed, as we have seen,

James Hardie did refer to some of the risks of working with asbestos when promoting its asbestos-free products but the warnings it gave were weak. James Hardie was, of course, in the best position to lead evidence about the peculiarities of its business which made it more likely to permanently lose substantial sales in order to rebut that inference. It did not do so, relying instead on the generalised asseverations of Mr Ralph. Mr Ralph's scepticism about the effectiveness of such a campaign lacked substance.

316 There were two sources of the evidence of James Hardie's financial position before the Judge. Evidence of the dividends and management fees James Hardie paid to JHIL and of its retained profits from 1990 and 2000 appeared in the report of the Jackson Inquiry. James Hardie's trading statements for the years 1970 to 2005 and statements of its net assets and retained profits for the years 1983 to 2000 were also received. Dividends paid to JHIL after 1990 were often more than $20 million and, in 1996, totalled $101 million. James Hardie's net and retained profits were a substantial percentage of its net assets. James Hardie paid annual management fees to JHIL which the Jackson Inquiry found exceeded what was reasonable by millions of dollars. The evidence clearly shows that James Hardie had the financial capacity to afford substantial advertising even after taking into account payments made on asbestos claims in that period. As we observed, James Hardie's letter to Mr Ralph asked him to assume as much. Indeed, it was in a position to suffer some downturn in trade and maintain its profitability even after taking into account the payments it was making on asbestos claims as set out in the report of the Jackson Inquiry.

317 James Hardie contended that it was caught in a dilemma between spending resources on a warning campaign and saving for future claims. The dichotomy is a false one. Financial savings could be made elsewhere. Money spent on a campaign would reduce future mesothelioma numbers, not only amongst the class of occasional users but also amongst tradespeople who more frequently worked with asbestos. James Hardie did not produce evidence, which it was peculiarly suited to provide, that the calculus necessarily, or even strongly, contra-indicated spending resources on a warning campaign.

318 We acknowledge that it may be that James Hardie was bound to commence a warning campaign in the mid-1980s. However, those few additional years add little to the expense and difficulty in sustaining the campaign.

319 It may be that it would not have been reasonably practicable to adopt all of the elements of the strategies which Ms Pascoe and Mr Roberts proposed. However, James Hardie did not defend the action at that level of detail, arguing instead that any campaign of that kind was generally impracticable or pointless. We find that it was reasonably practicable for James Hardie to make stronger, more frequent public statements about the risk of mesothelioma to persons who occasionally worked on its asbestos-cement products. One particular medium through which James Hardie ought to have, but did not, deliver that message was

the advertorials it placed in newspapers with which we deal below. We illustrate below examples of James Hardie's failure to take opportunities available to it to warn handypersons/occupants of homes built before 1980 as to where they might come across asbestos-cement products and how to safely work on them when dealing with the newspaper publications which James Hardie contends should have alerted Mr Werfel to the danger of the work he was performing. If James Hardie had given such warning it could then have amplified them by a mass media advertising campaign and through community events and partnerships. It failed to do so.

320 For the above reasons, we find that James Hardie breached its duty to take reasonable care to avoid injury to persons who might occasionally repair, remodel or remove its asbestos-cement products by failing to make frequent public announcements that there was a material risk of contracting mesothelioma from work of that kind and by failing to adopt strategies and campaigns to the effect of those suggested by Ms Pascoe and Mr Roberts.

Causation

321 James Hardie contends that Mr Werfel did not prove that he would have noticed or heeded the warnings it might have given about its products, because the same or similar warnings had appeared regularly in the news media, with no apparent effect on Mr Werfel's conduct. It also contends that it was not reasonable to impose a heavy financial obligation on James Hardie to cause warnings to be given when much information on the risks posed by working or reworking with asbestos-cement building products was being published by others.

322 In order to evaluate those contentions, it is necessary to examine the public information on which James Hardie relies in some detail, and for that reason it is convenient to deal with both contentions together, by reference to the media reports on which James Hardie relies. However, four general observations can be made at the outset. First, very little of the information was specific to asbestos-cement products. Secondly, James Hardie's submissions underestimate the effectiveness of a clear public acknowledgement, given by a manufacturer, of the dangers posed by its product in capturing the attention of the community generally, and the users of the product in particular. Thirdly, it would be an unusual case in which the efforts of others could, in effect, discharge a defendant's duty entirely. Fourth, one should not underestimate the grapevine effect as at the 1990s (the time of Mr Werfel's first exposure) of an intensive public awareness campaign started in the 1980s. Large numbers of the population have a basic understanding of the risks to health from drinking alcohol without themselves being confronted with advertising or warnings to that effect.

323 In February 1985, a reader's question sent to the column 'What's your problem?' published in the Adelaide Advertiser, asked about risks associated

with the asbestos exterior walls of a beach shack. The column appeared on the same page as the comic strips and weather, towards the back of the newspaper. The response explained that the asbestos in asbestos sheeting was tightly held within a cement matrix. It reassured the reader that asbestos fibres would only be released on the application of "mechanical force e.g. sawing, sanding, drilling and so on with power tools". It recommended painting to prevent the release of fibres. It continued:

> There is no evidence to suggest that living in houses which were constructed from asbestos-cement represents a health risk. However, care may be necessary to avoid unnecessary exposure to high concentrations when carrying out maintenance work on asbestos-cement products. The SA Health Commission can provide further advice about appropriate precautions when maintenance operations are to be carried out.

324 It is to be noticed that the tone of the response is reassuring. It recommended that care be taken only to avoid "unnecessary exposure to high concentrations" when working on the product. The risk of which the article warns is limited to high concentrations of asbestos dust. The risk of contracting mesothelioma is not mentioned. That advice may be contrasted with the then published scientific consensus that the contraction of mesothelioma was not necessarily dose related. Readers are not counselled to wear a mask. It is not difficult to draw the inference that the column would have attracted more attention if it had been possible to also report that James Hardie had warned that working on its products might cause cancer, and was urging that masks be worn when doing so.

325 In March 1985, the Advertiser reported on the trial of a class action in San Francisco with respect to 24,000 claims for injury or death resulting from asbestos exposure. The claim was one made by the manufacturers of asbestos products against their insurance companies. The dispute appears to have been over the terms of the insurance policy. There is no reason on the face of the article to link the underlying asbestos claims with reworking asbestos-cement building products.

326 In 1988, there were a number of articles in South Australian newspapers about claims made by workers at the Wittenoom asbestos mines. They did not concern asbestos-cement building products. There were also several articles reporting on union concern about the removal of asbestos. There were also reports in the news media of other States concerning claims by Wittenoom miners.

327 A damages award made in the Supreme Court of South Australia to a former boiler-maker employed at the Whyalla steel mill and shipyards for asbestos-related lung disease, not mesothelioma, was reported in the Advertiser on 24 January 1998.

328 The question of asbestos-cement wall sheeting was again addressed in a 'What's your problem?' column in the Adelaide Advertiser on 22 March 1988.

The reader asked whether asbestos house walls were a health hazard. The reader was reassured that there was no risk if the sheets were painted and in good condition. The response spoke of a "slight risk" from brushing against heavily weathered unpainted walls, but without specifying the risks. It advised that "precautions" should be taken when drilling holes, but did not give examples of the precautions which might be taken. It gave a contact telephone number for an information officer at the Asbestos Advisory Board. We repeat the observation in paragraph [324] above about this column, which was published just before the time we have found that the duty to warn first arose. We add that the very sending in of the letter, and the decision of The Advertiser to include it in the column is evidence of an emerging concern about the risk of working on asbestos-cement building products. An inference can be drawn that there was fertile ground for planting a warning about the risk of contracting mesothelioma in the public consciousness.

329 In October 1988, there were newspaper articles about the risk posed by asbestos sheets in an abandoned winery in an outer Adelaide suburb. It was also reported that unions had stopped work at a James Hardie factory in another outer Adelaide suburb at which asbestos fibro-cement products had been manufactured.

330 On 12 November 1989, the Sunday Mail reported on a recommendation by a paint manufacturer, Wattyl, to apply its paint products over fibre cement fences and rooves to reduce the danger of breathing in loose fibres. The recommendation was supported by a person describing himself as the president of the Asbestos Diseases Society.[127] It is again to be observed that cancer is not mentioned. The publication of Wattyl's opportunistic promotion of its product illustrates how other stakeholders could amplify and extend the warnings given by James Hardie directly if it had chosen to do so.

331 On Wednesday, 15 November 1989, when Mr Werfel was aged 13 years,[128] an article was published in the Adelaide Advertiser on calls by the South Australian United Trades and Labor Council for a deadline for the removal of all asbestos from buildings in South Australia. It referred to the risk that asbestos particles might cause asbestosis and lung cancer. It referred to recent reports that large amounts of asbestos fibre dust were created during the demolition of the Pennington Migrant Centre site. The article did not refer to risks in undertaking domestic renovations and repairs.

332 On Saturday, 2 December 1989, the Advertiser reported on compensation payments made for the death of workers employed at the Wittenoom blue asbestos mine. A further report of a compensation payment to a Wittenoom worker, who had contracted mesothelioma, appeared in the Advertiser on 1 June 1990.

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[127] CB vol 4, pg 866.
[128] Mr Werfel was born on 6 October 1976.

333 The Advertiser again reported on calls by unions for the removal of asbestos from building sites on 12 April 1990.

334 On 20 October 1990, the Advertiser reported that State Government agencies had denied that asbestos roofing at the Enfield High School was a potential health hazard. The introduction of strict health regulations governing the use and installation of raw asbestos and asbestos insulation was reported in the Advertiser on 8 May 1991. A clear link between mesothelioma and white asbestos was reported.

335 On 5 February 1991, there was yet another "What's your problem?" question and response concerning asbestos-cement wall sheeting and corrugated asbestos roof sheeting. The reader enquired as to the risks in demolishing the shed and as to precautions which might be necessary. The response, having calculated the size of the shed, informed the reader that a licenced asbestos removalist must be engaged. It noted that there were regulations concerning the disposal of the product, which was controlled by the Waste Management Commission. It provided a contact number for a list of licenced removalists. The response did not suggest precautions which a householder might take when removing smaller quantities of asbestos-cement sheets. It did not refer to the risk of reworking asbestos-cement products and did not mention cancer. The response is likely to have included that information if James Hardie itself had made frequent frank acknowledgments of the significant risk of contracting mesothelioma from even occasional use of asbestos-cement products.

336 In May 1991, an article in the Sun Herald newspaper in Sydney, in the Home and Garden section, entitled "It's cool to be clad", discussed the use of cladding over old and weathered exteriors as an alternative to painting. It spoke of using brick veneer and pointed out some disadvantages to using aluminium and vinyl cladding. It then turned to do-it-yourself cladding and spoke of a "bewildering range of cladding material" manufactured by James Hardie. It said of those materials that it could "give [homes] a big lift". It explained that most of the Hardie cladding products were made from fibre cement which is "hardwearing, doesn't burn and is immune to water damage". It mentioned, in particular, "Hardiplank" which was a traditional cladding product which came in a smooth or woodgrain finish. It mentioned that all of Hardie's cladding materials could be fixed to fibro or weatherboard. It quoted from Hardie's New South Wales sales manager, who gave the reassurance that "most competent do-it-yourselfers could reclad their homes using Hardie's products". It continued:

> If you want to replace panels on a fibro home with new fibro, Hardie's also produces the latest fibro sheeting called Hardiflex, similar to the older material but it contains no **asbestos**. And this raises a final important point about recladding or veneering a fibro home.

> Safety: Homes built before 1980 would have used material containing some **asbestos**. If you're doing a recladding job yourself and are cutting, sawing or drilling fibro and creating dust, you will need to take some precautions.
>
> While most building experts agree the **asbestos** risk from home fibro is small, it's still a good idea to use a full-face breathing mask with the appropriate filter for **asbestos** dust and make sure you have good ventilation.

337 The publication of that newspaper article is important in a number of respects. First, James Hardie had significant input into it through one of its high-level sales executives. The content can fairly be described as an advertisement for James Hardie's products, even if not actually paid for by it directly, or by the placing of advertisements in the Sun Herald. The article's promotion of the use of its asbestos free products to reclad or replace asbestos-cement product shows both that James Hardie was aware at that time that householders were renovating the original asbestos-cement home, and that James Hardie was promoting the use of its asbestos free products for that purpose. Secondly, it is notable for the careful way in which the warning was expressed. It failed to mention that even a low exposure might result in the contraction of mesothelioma. It selectively chose to quote only those experts (not specified or identified) who were of the view that there was a low risk, but failed to refer to the substantial body of reasonable medical opinion that there was no safe dose. In short, this article is unlikely to have imprinted the risk of contracting cancer on the relevant class, or to have impressed on them the importance of taking precautions. However, it does expose the lost opportunity occasioned by James Hardie failing to publicly acknowledge in any way the degree of risk. Finally, it shows how a message could be delivered about the need to take precautions when working on homes built before 1980 because they were likely to contain asbestos-cement products whether or not they could be definitively identified as such.

338 The closure of the office of Tourism SA because of a concern about asbestos fibres was reported in the Advertiser on 26 November 1991. The article recorded that unions had forced the closure of the office. A union representative stated that large amounts of raw asbestos had been found in air conditioning ducts.

339 Another article in the Home and Garden section of the Sun Herald about cladding was published on 10 May 1992. It featured a Lithgow builder who chose to have his 36-year-old fibro house reclad with James Hardie's Colorbond, which is a pre-painted fibre cement product. He chose it over vinyl cladding products. It also mentioned a farming couple who clad a former timber mill with James Hardie's (asbestos free) Hardiplank to convert it into extra accommodation for their workers. On the other hand, brick veneering was described as a "big job [that] can be expensive". Aluminium and vinyl cladding was also briefly mentioned. There then appeared a heading "DIY". It referred to James Hardie's "huge range of cladding products and related building materials

to give your home a lift". Hardiplank and Colorbond were mentioned. The article said that James Hardie's cladding materials could be fixed to "fibro or weatherboard".

340 Under a subheading "Safety", the following appeared:

> FIBRO homes built before 1975 would have contained some white and brown **asbestos**. If you're doing a recladding job yourself – cutting, sawing or drilling fibro and creating dust, take some precaution.
>
> The best protection is a full-face breathing mask with an appropriate filter for asbestos.
>
> If you're in doubt about how to handle and dispose of **asbestos** material call … the Workers' Health Centre …

341 This article is an advertorial. Even though it recommends sensible precautions, it is silent on the possibility of contracting cancer. It is difficult to overstate the attention-grabbing effect of doing so. It is not surprising that the risk of cancer is so heavily emphasised in the public health messaging on other possibly carcinogenic products.

342 In May 1992, there was an Advertiser report on the removal of asbestos from the head office of the Electricity Trust of South Australia (ETSA) on Anzac Highway.

343 On 22 May 1992, the Advertiser reported on a "crackdown" by the Labor Minister, aimed at removing the last vestiges of asbestos from South Australian workplaces. The Chamber of Commerce and Industry was reported as saying that it was "tired of the big-stick approach adopted by the Department of Labor".

344 An article in the Advertiser on 5 February 1994 referred to the potential increase in cases of mesothelioma as "a time bomb". The warning was given by the Occupational Health and Safety Commission (Worksafe Australia). A spokesperson, Professor David Ferguson, was quoted as saying "Although mesothelioma is a relatively rare cancer, we still have an epidemic". It was reported that "Those most likely to have been exposed worked in the shipbuilding, cement, railways, wharf laboring, power and boilermaking industries …". If James Hardie had embarked on a program of public warnings of the risk of contracting cancer from working on its asbestos-cement building products, that risk is likely to have been mentioned in this Advertiser article.

345 An article in the Sydney Morning Herald on 26 March 1994 quoted a product liability litigation lawyer's comments on a damages award made to a Victorian office worker. The lawyer said a "third wave" of persons at risk of contracting asbestos-related disease included those who "built their homes or holiday homes" using asbestos.

346 An article published in the Sydney Morning Herald in April 1994 warned that mesothelioma may be contracted from even "tiny doses of asbestos fibre".

The article reported on a number of legal cases and different exposures, and a case of mesothelioma resulting from working on a fibro-house was mentioned. Another Sydney Morning Herald article on the same day reported on the death of a politician and former shipwright from his occupational exposure to asbestos logging. Yet another article on the same day reported on a downturn in the asbestos removal industry. It stated that "asbestos is of little risk if it is fixed in cement form", but did not elaborate on those risks. In the same month, there was a reference to the danger of asbestos used as lagging in industrial contexts. A note at the foot of one of the articles warned against using power tools on asbestos sheets.

347 On 29 September 1994, an article in the Australian Financial Review reported on asbestos products in commercial buildings. It reported that asbestos-cement sheets are best left alone if properly sealed, but that they can become lethal if worked on with power tools, generating a "deadly cloud".

348 An article in the Sydney Morning Herald in October 1994, and another in the Daily Telegraph in August 1996, reported on the closure of schools after asbestos was detected on their grounds.

349 A report in the Sunday Mail on 19 March 1995 again reported on the rapid escalation of asbestos poisoning deaths.

350 On 21 May 1995, an article appeared in the Sunday Mail on the importance of checking houses for asbestos. It recommended that prospective purchasers of houses check for hazards such as weak handrails and stairs and "dangerous materials such as asbestos".

351 A warning that vinyl flooring used in the 1950s and 1960s contained asbestos was published in the Sunday Mail on 24 March 1996.

352 An advice column of The Sunday Telegraph on 22 September 1996 informed a reader that asbestos is dangerous in dust form, but said that an asbestos ceiling board was harmless if left untouched. It did warn that an asbestos ceiling board would become dangerous when sawn or drilled, and counselled the wearing of a mask. Mesothelioma was not specifically mentioned as a health risk, nor was the low dose risk mentioned.

353 An article on home renovation in the Sydney Morning Herald on 26 September 1996 warned of many dangers, two lines of which stated only that asbestos was a dangerous material.

354 The last five articles in widely read newspapers shows significant public interest and concern about dealing with asbestos-cement products in home renovations. Information from James Hardie itself, if provided, is also likely to have attracted the attention of home renovators and is likely to have been reported on.

355 On 2 November 1996, the Advertiser reported that the Victorian Government had set aside millions of dollars for future claims for asbestos-related disease arising out of the operation of its power stations.

356 A Daily Telegraph article in 1998 reported on statutory reforms to facilitate asbestos claims. It quoted a representative from the Asbestos Diseases Society who said that one in every five Australian houses contained the "potentially lethal substance".

357 The removal of asbestos from the Adelaide Festival Centre was reported in the Advertiser on 7 April 1999.

358 A report on the asbestos-related lung disease suffered by workers in the building and construction industry appeared in the Advertiser on 30 December 1999. It was a response to a question from a reader as to why and where asbestos was used. The unique features of asbestos: its flexibility, tensile strength, heat insulation, electrical insulation and chemical inertness, were mentioned. It was observed that it was the only natural mineral that can be spun and woven like cotton or wool into fibres and fabric. Its use in fibro-sheeting, corrugated roofing, asbestos-cement pipes, thermal insulation, fire-proofing and as an additive to paints, textiles, gaskets and brake-linings was mentioned. The response to the question concluded that "there are active programs in most areas to safely remove any asbestos where it remains a health risk, and all states have regulations to cover this". It gave a phone number for an entity referred to as "Asbestos Advice and Information".

359 On 26 November 2000, an article in the Sydney Sunday Telegraph reported on the proposed establishment of an asbestos disease research institute. It reported the widespread use of asbestos in thousands of Australian workplaces and homes built with "asbestos fibro roofs, floors and walls".

360 Articles in Sydney newspapers on 1 and 2 December 2000 reported on an award of damages made in favour of a woman who contracted mesothelioma from renovating a bathroom using asbestos sheets with her father over several weeks in the 1970s.

361 We turn to Mr Werfel's evidence of his habits and practices in keeping up with current affairs in order to evaluate whether the announcements and warning campaign we have adumbrated would have come to his attention.

362 Mr Werfel testified that there were daily newspapers in and around his home when he grew up. They included the Advertiser, the Sunday Mail and a local suburban newspaper. Watching the news and television was a regular activity. After he left home he continued to read the Sunday Mail and Saturday Advertiser.

363 When he worked at Woolworths in the late 1990s and early 2000s, there was always a newspaper in the lunch room. He would read them every day or every second day. When he worked at the Shop, Distributive and Allied Employees Association (the **SDA**) he would read the Australian and the Financial Review. He continues to read the Advertiser and peruse the Australian, the Financial Review and local newspapers. From when he left school until 2005 he would have the radio on in the car at the worksite. There was a radio broadcast at his workplace in Woolworths. Those radio broadcasts included news bulletins. Mr Werfel testified that he always had an interest in news, community affairs and current affairs. He was a particular fan of Derryn Hinch. Mr Werfel testified that he took a particular interest in things like product recalls and general notices of a community nature in the paper. He would read the government tenders. He was the owner of a VC Commodore when there was a recall warning put out with respect to them. He saw the notice placed by way of advertisement in the papers. It was a quarter page of the newspaper.

364 Mr Werfel was asked whether, if he had seen an advertisement in the period up until the end of his home renovation on the second house which warned that working on the house in a way which created dust could cause him to die from inhalation of the liberated dust, he would have done anything in relation to that work. Mr Werfel answered that he would not have undertaken the works in the first place. Secondly, he would have organised for some testing of the materials within his house to determine whether they contained asbestos, and thirdly, if works needed to be done, he would have organised for a properly qualified person to do so.

365 The failure of Mr Werfel to recall the newspaper articles relied on by James Hardie does not support a finding that Mr Werfel would also not have become aware of warnings published by James Hardie in accordance with the proposals of Ms Pascoe and Mr Roberts. Express warnings of the risk of contracting mesothelioma by Australia's predominant manufacturer of asbestos-cement sheeting would have galvanised the attention of a large part of the Australian population, and tradespersons and home handypersons in particular, and advertisements would have been amplified through news stories. Public health authorities, trades associations and building product retailers would have repeated the warnings. The home improvement sections of newspapers and the do-it-yourself segments on radio would also have run with the message. It is likely that the message would have been passed down from employers to apprentices and other employees. It is a message which is likely to have quickly become embedded in the consciousness of those persons who would work on in places with asbestos-cement products. There was nothing about Mr Werfel's education, understanding of English and interaction in current affairs which I set out below which suggests that he would not have noticed and heard those warnings.

366 Mr Werfel remembered Mr Greg Combet being involved in a campaign to secure entitlements for victims of asbestos in the period 2004 to 2006. His understanding up until 2005 was that the workers at risk were those who either mined it or were in factories producing asbestos products. He had gleaned that people had died from exposure in that way. In his work at Woolworths he sat on a health and safety committee as a union organiser. He had 60 to 70 occupational health and safety representatives on all of his sites. He trained them, he gave them information. He was conversant with the *Occupational Health and Safety Act*. He was aware of an investigation at one Woolworths' distribution centre when it was thought that there might be asbestos from brake linings in trucks in the environment.

367 From 2004, Mr Werfel worked for the SDA until 2007. He was an organiser in retail and warehouse sites. He was employed at the Gepps Cross distribution centre of Woolworths in 1997. He drove forklifts and worked as an order selector for six and a half years. He was a safety representative on the afternoon shift at Woolworths' Gepps Cross distribution centre. He said that if he had known about the risk of dying from working on the corrugated asbestos-cement fences he would not have engaged in that work. He would have worn protective equipment, but only if it was guaranteed to be safe.

368 Mr Werfel's evidence that he took an interest in dangerous product notifications was challenged in cross-examination. He brought to mind an article concerning potentially poisonous dog food and an advertisement concerning a particular toy that was made of a carcinogenic material. He was taken through newspaper publications in the 1990s and 2000s. He could not bring to mind particular warnings in the 1990s and 2000s. That is not surprising. If they did not involve products he was likely to come into contact with it is unlikely he would have brought them to mind generally, and it is especially improbable in the short time he has to turn his mind to questions in the witness box. For example, he was asked about a product called Viox and did not know or remember its name. Similarly, he was asked to recognise particular articles relating to asbestos and generally could not recall them. However, he had given evidence that he was aware of asbestos being a problem in miners and producers.

369 Mr Werfel agreed that he did not wear goggles, ear plugs or gloves when working on fences. He gave evidence that his fencing employer was not very safety conscious. He was aged 19. He agreed that he did not wear goggles when working on his houses even though it was dusty work. Mr Werfel's response was that he did not see a need for protection for health purposes from sawdust, dirt and non-toxic substances.

370 The Judge rejected James Hardie's submission that Mr Werfel did not pay attention to media warnings:[129]

> [159] Mr Werfel gave evidence that between hearing the word asbestos for the first time while doing fencing work in 1997, and 2005, he had some awareness of the dangers of asbestos. He described reading the odd newspaper article and occasional television reference. He had some awareness, particularly when he worked with a union, of Bernie Banton and his fight with James Hardie. He recalled seeing Bernie Banton on television.
>
> [160] Mr Werfel said "… *my understanding of it was it was mainly workers in the factories that produced and mining. It seemed to be those people that were afflicted".* He had *"gleaned from the articles is that in some cases these people had died and, indeed, all were severely injured as a result of their exposure".* Over the period from 1997 onwards, Mr Werfel had no appreciation of the different types of asbestos. He said: *"Apart from the fencing sheets I had no idea that asbestos was contained within other products, like other housing type products*". He did not know whether a small or large amount of asbestos would hurt a person.
>
> …
>
> [206] Amaca argues that the publication of articles in Adelaide newspapers from 1985 to 1999, proves that Mr Werfel paid no attention to media and that he would not have received or acted upon any warning if it had run a public awareness campaign.
>
> [207] I reject that argument. Of the articles published in Adelaide newspapers only three in a 15 year period made any mention of asbestos in homes. The word "fibro" or "fibre cement" was used to describe its products rather than "asbestos" or "asbestos cement". Asbestos-free products which were physically indistinguishable from previous products which contained asbestos were by that time being sold and becoming part of Australian homes. A large proportion of the Australian public remained (and continued to remain) ignorant of the dangers of asbestos that surrounded them in their homes and everyday lives.
>
> [208] I accept the submission put on behalf of Mr Werfel that he is an intelligent, careful, risk averse, responsible man who knew from 1997 that as a generic substance asbestos was dangerous, but did not know that the parts of his house which he was cutting, drilling and sanding contained asbestos.
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> (Footnotes and citation omitted)

371 Even though the last paragraph is an unacknowledged reproduction of Mr Werfel's submission, James Hardie did not submit on appeal that the Judge's findings on the credibility and reliability of Mr Werfel should be ignored. It was James Hardie's submission that the matter should not be remitted for a new trial and that this Court should make all necessary findings of primary fact. The Judge's findings accord with our assessment of the evidence. James Hardie has failed to demonstrate any proper ground for departing from those findings.

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[129] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [159]-[160], [206]-[208] (Farrell DPJ).

372 We find that Mr Werfel would have become aware of the risk that exposure to dust from asbestos-cement products might cause mesothelioma from at least the time he worked for a fencing contractor if James Hardie had more actively and strongly warned of the danger of working on asbestos-cement products from 1990.

373 The Judge found that Mr Werfel would, on becoming aware of the risk of contracting mesothelioma, have then taken precautions:[130]

> [226] Had Amaca taken the reasonable steps referred to above, Mr Werfel would not have been exposed to asbestos dust in renovating his properties at Pooraka and Parafield Gardens. If Amaca had designed, implemented and monitored a public awareness campaign of the kind referred to above with necessary "course corrections" to ensure its efficacy in conveying the message to the Australian public so that it formed part of the community conversation or fabric of the community, Mr Werfel would probably have received the message, directly or indirectly, and refrained from working with any of Amaca's products, or alternatively used respiratory protection to obviate his inhalation of asbestos.

374 Mr Werfel's employment as a workplace safety representative strongly supports the inference that he would have taken recommended precautions. We find that, if James Hardie had given public warnings in the form and manner which we have found was necessary to discharge its duty of care, Mr Werfel would have acted on those warnings. We also find that if he had done so he would not have contracted mesothelioma.

375 Finally, James Hardie contended that the notwithstanding those factual findings, its failure to warn was not legally causative of Mr Werfel's mesothelioma because Mr Werfel's fencing employers breached occupational health and safety legislation in the supervision of his work. That submission must be rejected. This is not a case in which a plaintiff seeks to impose a duty on a person to take steps to prevent another from offending. It falls within the very risk which James Hardie was duty bound to take reasonable steps to discharge that persons working with its dangerous products may be careless. James Hardie's conduct remains causative even if the carelessness of third parties with a responsibility to guard against injury to Mr Werfel extends to offending against occupational safety legislation.

The assessment of damages

376 Before undertaking her damages assessment, the Judge explained:[131]

> In dealing with this aspect of Mr Werfel's claim I have not referred to those submissions of Amaca relating to prognosis because I have determined that issue in favour of Mr Werfel. I have found as a fact that it is more likely than not that Mr Werfel will die from

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[130] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [226] (Farrell DPJ).

[131] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [244], apparently referring back to the analysis of causation and prognosis which commenced at [68]-[74] and which concluded at [140]-[141].

> MTVT. It is more likely than not that Mr Werfel will suffer a recurrence within about 2 years and will die within about six to twelve months of the recurrence.

377 In this way, the Judge appears to have found, on balance, that Mr Werfel has a life expectancy of no more than three years from trial and judgment, ending in around August 2022. Elsewhere the Judge found that, but for his mesothelioma, Mr Werfel could have expected to live for another 40 years or so.[132] This is the period described as the "lost years".[133]

378 The Judge made the following award of damages:

Pain and suffering and loss of enjoyment of life	$400,000
Interest on past pain and suffering	$8,000
Loss of expectation of life	$40,000
Past economic loss and interest	$23,817
Future economic loss — the lost years	$1,300,000
Past medical expenses	$12,034
Future medical expenses	$150,895
Past gratuitous services to Mr Werfel	$98,419
Future gratuitous services to Mr Werfel	$187,862
Past gratuitous services by Mr Werfel to family	$20,000
Future gratuitous services by Mr Werfel to family	$326,160
Future gratuitous services to Mr Werfel's children	$260,000
Exemplary damages	$250,000
Total	**$3,077,187**

379 In this Court, James Hardie contends that the Judge's assessment of each head of damage was at the highest end of the range, or beyond the highest end of the range, because she adopted virtually every submission made by Mr Werfel at trial (appeal ground 3.4). It is contended that this led to error in the assessment of particular heads of damage, namely general damages and loss of expectation of life (appeal ground 3.5), damages for past and future gratuitous services

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[132] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [253]. That is, another 40.51 years after the year in which the plaintiff turns 45 in October 2021.

[133] *Skelton v Collins* (1966) 115 CLR 94; *Fitch v Hyde-Cates* (1982) 150 CLR 482.

(appeal ground 3.6), damages awarded under s 9(3) of the *Dust Diseases Act* (***Sullivan v Gordon* damages**) (appeal ground 3.7), and finally, exemplary damages under s 9(2) of the *Dust Diseases Act* (appeal ground 3.8).

380 We deal with each ground of appeal in turn.

Ground 3.4 – the assessment of damages

381 For the reasons earlier given, we do not propose to address the adequacy of the reasons in any general sense, confining ourselves to whether the reasons adequately address the cases made and the conclusions reached in connection with those particular heads of damage which are the subject of the appeal.

Ground 3.5 – general damages and loss of expectation of life

The Judge's reasons

382 In awarding Mr Werfel $400,000 in general damages, the Judge accepted his submission that his case "is outside the norm and is an extreme example of pain, suffering and loss of enjoyment of life caused by mesothelioma".[134] Among other matters, she noted that Mr Werfel was only 42 years old at the time of judgment with three young children who, as the result of his illness, had to move into a much smaller family home. The Judge also accepted that Mr Werfel had undergone two surgeries and had been hospitalised three times. She accepted that he had a grim future given his limited options for future treatment and the impact his illness has had on his working hours and career ambitions.[135]

383 Mr Werfel submitted at trial that an award for general damages in the amount of $500,000 would be appropriate, as Mr Werfel's case was comparable to that of the plaintiff in *Dunning v BHP Billiton Ltd*.[136] Nevertheless, the Judge distinguished *Dunning* on the basis that it involved a "significant psychological component", and the period of suffering the plaintiff was expected to endure was "about two or three years longer than Mr Werfel is likely to live".[137]

The parties' submissions

384 In this Court, James Hardie submitted that the award of $400,000 was manifestly excessive. This was evidenced, it was contended, by the fact that it was 75 per cent more than the $230,000 award made by the District Court in *Latz v Amaca Pty Ltd*.[138] This represented the previous highest award in a comparable case in this State, although it was conceded that *Latz* was a different

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[134] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [248].
[135] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [248].
[136] *Dunning v BHP Billiton Ltd* [2014] NSWDDT 3; *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [248].
[137] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [250].
[138] *Latz v Amaca Pty Ltd* [2017] SADC 56.

case and involved a "conventional" claim of an "end-user" who was using newly manufactured product.

385 James Hardie submitted that the Judge had made a number of errors of law. In particular, the Judge appeared to have been heavily influenced by cases in other States, even though emphasis ought only to have been placed on decisions made in South Australia, particularly *Latz*. Further, instead of undertaking a proper survey of the awards made in other cases, the Judge appeared to rely only on the decision of the New South Wales Dust Diseases Tribunal in *Dunning*, to the point where she used the exact amount awarded in that case – $500,000 – as a benchmark for the award made in this case.

386 In any event, James Hardie submitted, many of the factors taken into account in arriving at the award for damages for pain and suffering were absorbed under the head for loss of expectation of life, for which the Judge separately awarded $40,000. James Hardie contended that these errors were sufficient to vitiate the assessment, and that this Court should instead award $175,000 for pain and suffering, in addition to $10,000 for loss of expectation of life.

387 Mr Werfel responded that the Judge had not acted on an incorrect principle of law, nor was the award manifestly excessive. He contended that James Hardie's complaint about the award of general damages in this case, and the comparison with *Latz*, was misplaced:

> The award of $230,000 to Mr Latz, was to a 70 year old man with pleural mesothelioma. He had suffered symptoms for only 10 months and had a prognosis of about 8 months. Mr Latz had not undergone chemotherapy or radiotherapy treatment and had a "better than usual past pain and suffering". In contrast, Mr Werfel is 42 years old, has three young daughters whom he will not see grow up, has undergone two exquisitely painful invasive surgeries to a very private area of his body, has had his right testicle surgically removed, underwent six weeks of radiotherapy, four rounds of chemotherapy, and experienced horrific side effects from these treatments.
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> (Footnote omitted)

388 There was no basis, Mr Werfel submitted, for James Hardie's submission that the Judge was heavily influenced by awards in other jurisdictions, and particularly by *Dunning*. Whilst the Judge referred to *Dunning*, she did not use it as a benchmark.

389 Mr Werfel submitted that the proposed award of $175,000 was actually comparable to the 2013 award in *Geyer v Resi Corporation*.[139] The plaintiff in that case was 85 years old at the time of judgment, had not undergone chemotherapy or radiotherapy treatment and had co-morbidities.[140]

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[139] *Geyer v Resi Corporation* [2013] SADC 122.
[140] *Geyer v Resi Corporation* [2013] SADC 122.

390 It was submitted that James Hardie's complaint about the $40,000 award for the loss of expectation of life was misplaced because the allowance (approximately $1,000 for every year Mr Werfel will lose in life expectancy by reason of his mesothelioma) is commonly made when determining damages under this head. And, in any event, acceptance of James Hardie's submission that there was only a "chance" that the appellant's life expectancy was curtailed by mesothelioma, and that therefore an award of only $10,000 was appropriate, was contrary to the expert evidence which had been accepted by the Judge.

Applicable legal principles

391 In *Miller v Jennings*, Dixon CJ and Kitto J described the function of an appeal court when called upon to review an award for damages by a Judge.[141] In that case, the assessment was of loss suffered as the result of a motor accident caused by the negligence of the defendant, which had resulted in the plaintiff suffering a number of disabilities, including permanent brain damage. After referring to the decisions of the House of Lords in *Nance v British Columbia Electric Railway Co Ltd* and *Davies v Powell Duffryn Associated Collieries Ltd*,[142] Dixon CJ and Kitto J clarified that, before an appeal court can interfere with an award of damages, it must be satisfied that the primary judge "has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered".[143] An "erroneous estimate of the damage", they explained, is one beyond the limits of what a sound discretionary judgment would reasonably adopt, being either "so inordinately low or so inordinately high" as to be beyond the party's entitlement.[144]

392 In *Planet Fisheries Pty Ltd v La Rosa*, a differently constituted High Court revisited the manner by which an appeal court determines whether an award of general damages is manifestly excessive or inadequate.[145] After referring to *Miller v Jennings* with approval, Barwick CJ, Kitto and Menzies JJ considered that a sound discretionary judgment as to an award of damages is one where the award is proportionate to the particular injuries suffered and the disability caused by those injuries.[146] This, their Honours held, was to be determined in light of current ideas of "fairness and moderation" emerging from the decided cases

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141 *Miller v Jennings* (1954) 92 CLR 190.

142 *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 606 (Lord Simon), *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 616-617 (Lord Wright).

143 *Miller v Jennings* (1954) 92 CLR 190, 196, citing *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 616-617.

144 *Miller v Jennings* (1954) 92 CLR 190, 195.

145 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 (Barwick CJ, Kitto and Menzies JJ).

146 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 124-125. See also *Aerospace Engineering Services Pty Ltd v Ibrahim* [2007] WASCA 33, [39] (McLure JA, with whom Roberts-Smith and Pullin JJA agreed).

generally. However, they warned that decided cases are not to be relied upon as if they constitute some sort of tariff for the amount of damages to be awarded.[147]

393 Whilst the cautionary words of the High Court in *Planet Fisheries* are to be borne in mind, in *Hirsch v Bennett*, Bray CJ explained:[148]

> … the remarks of the High Court in *Planet Fisheries Pty Ltd v La Rosa* do not prevent a judge from using his knowledge of the general range of awards in his own jurisdiction … The general experience to which their Honours refer is no doubt an experience which can be in part at least vicarious and derived from what the judge has read and heard of the cases in his own jurisdiction as well as from his knowledge of cases in which he has been personally concerned either at the bar or on the bench.

394 And in the same case Travers and Walters JJ said:[149]

> … so long as a judge heeds the warning against the formulation of any norm or standard of compensation by reference to other cases, it is not out of place for him, in his essay to gather the general consensus of judicial opinion on present levels of damages, to search for any trend of awards in reasonably comparable cases and to use any current pattern as a guide in making his assessment in the case under consideration.

395 Indeed, as Cox J explained in *Packer v Cameron*, damages cannot be assessed "by some kind of innate impulse":[150]

> There is no obvious or natural relation, of course, between the experience of pain and a particular sum of money. There is no logical reason why a man's non-economic damages, for any given loss, should be assessed at $10,000, say, rather than half of that amount, or double. In the end the foundation for any particular assessment is that it is reasonably proportionate to the damages that have been awarded in other cases that are more or less comparable with the plaintiff, although the overall standard may be subject to periodic revisions to accord with the courts' appreciation of the general level of damages awards that the community, as represented by the insured motorists, can fairly be expected to accept. We were referred to the of-quoted judicial statements that eschew tariffs and emphasise the need to fasten on the situation of the particular claimant and not the situation of other claimants in other actions. See, for example, *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118. However, no-one has suggested that damages can be sensibly be assessed by some kind of innate impulse. The court in *Planet Fisheries* (supra) acknowledged that "a judge who is making an assessment will be aware of and give weight to current general ideas of fairness and moderation" (at 126), which must be an allusion to a general knowledge of other cases. That is why any new judge whose practice has not given him an insight into the notions of fairness and moderation that find their expression in damages awards in personal injury claims will acquire it as quickly as he can by rapidly scanning a sufficient number of published or digested awards. Certainly the High Court discountenanced any attempt to establish on appeal the correctness or otherwise of an award by comparing it with specific cases, but that is another matter: cf

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147 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 124-125.

148 *Hirsch v Bennett* [1969] SASR 493, 494.

149 *Hirsch v Bennett* [1969] SASR 493, 499. See also *Joyce v Pioneer Tourist Coaches Pty Ltd* [1969] SASR 501.

150 *Packer v Cameron* (1989) 54 SASR 246, 250-251 (Cox J, with whom Duggan and Mullighan JJ agreed).

> *Hirsch v Bennett* [1969] SASR 493 at 497-499; and *Moran v McMahon* (1985) 3 NSWLR 700.

396 Since then, this Court has generally accepted that it is permissible, and indeed desirable, to have "appropriate regard to appropriate awards in comparable cases" when determining an award for damages at first instance, as well as when an appeal court is called upon to assess the adequacy or otherwise of an award for damages.[151]

397 In *Ewins v BHP Billiton Ltd*,[152] Doyle CJ accepted the proposition that an award of damages must be made having regard to the general level of damages awarded in this State.[153] As his Honour explained:[154]

> I think there is nothing new in this, namely, in the proposition that in awarding damages in this State I should have regard, in a general way, to the general level of awards of damages for personal injury made by courts of this State. I inform myself about that matter by reading decisions of courts in this State, and by my experience as a member of the Bench.

398 *Ewins* was a mesothelioma case. The Chief Justice heard the claim at first instance and assessed damages for pain, suffering and loss of expectation of life in circumstances where, but for the onset of mesothelioma, Mr Ewins "had a reasonable life expectancy, probably 10 years or more".[155] This was shortened to "about six months".[156] Doyle CJ considered the general level of awards in this State to be his primary guide when fixing an award of damages for pain, suffering and loss of amenities. However, his Honour accepted that the level of awards in other States was not irrelevant,[157] referring to the judgment of this Court in *Chakravarti v Advertiser Newspapers Ltd*, a defamation case where the level of damages awarded was increased by the Full Court, having regard to the level of awards made in other States.[158]

399 Whilst the Chief Justice appreciated that there may be an apparent unfairness where a plaintiff's injuries might have attracted a higher award if heard in another State, that apparent anomaly was the result of the need for

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[151] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, 330 (Blue J, with whom Kourakis CJ agreed).

[152] Before the High Court cross-vested the proceedings in *BHP v Schultz* (2004) 221 CLR 400 from the Dust Diseases Tribunal of New South Wales to the Supreme Court of South Australia, dust diseases cases from South Australia were regularly litigated in the Dust Diseases Tribunal. By the time of *Ewins*, dust diseases cases involving South Australians were regularly being litigated in South Australian courts and the assessment of damages was listed before the Chief Justice so that he might resolve various issues of principle.

[153] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [60]-[61], citing *Packer v Cameron* (1989) 54 SASR 246, 250-251 (Cox J); *Hirsch v Bennett* [1969] SASR 493, 494 (Bray CJ), 498-499 (Travers and Walters JJ); and in defamation, *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 214 (Mason CJ and Deane J), 222 (Toohey J), 239-240 (McHugh J).

[154] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [62].

[155] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [17] (Doyle CJ).

[156] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [40].

[157] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [63].

[158] *Chakravarti v Advertiser Newspapers Ltd (No 2)* (1998) 72 SASR 361 (Doyle CJ and Perry J, with whom Williams J agreed).

consistency of approach in this State.[159] His Honour considered it the function of the Full Court, and not of a single Judge, to decide whether the general level of damages should be increased, having regard to approaches taken in other courts or States.[160]

400 Doyle CJ assessed general damages for pain and suffering at $100,000, apportioning one third to the past.[161]

401 When addressing damages for loss of expectation of life, Doyle CJ explained that this award "has usually been determined on what has been a conventional basis; that is, by reference to a figure or standard established by a series of decisions about the right amount under this head", with the result that the award "is to be a moderate amount", before awarding $10,000:[162]

> I have regard to the general level of awards made under this head in this State. I regard $10,000 as an appropriate sum under this head. Although it is an arbitrary amount, it is intended to compensate Mr Ewins for the loss of what should have been a number of happy years in retirement.

402 In *BHP Billiton Ltd v Hamilton*, Blue J and Stanley J, in separate reasons, agreed that it is permissible for the appeal court to pay appropriate regard to awards made in comparable cases in this and other jurisdictions when deciding whether an award in this State is manifestly excessive or inadequate.[163] *Hamilton* was another mesothelioma case. Mrs Hamilton sued BHP Billiton Ltd, as executor of her deceased husband's estate and in her own right, in the District Court of South Australia in negligence for damages. It was alleged that BHP's negligence had caused or contributed to the deceased's contraction of mesothelioma when working at BHP's Whyalla shipyards in the 1960s. The trial judge upheld Mrs Hamilton's claim and awarded damages, which included an award of $115,000 for pain and suffering and loss of amenities of life, in addition to $15,000 for loss of expectation of life.[164] BHP appealed to this Court against the judgment on liability, whilst the plaintiff cross-appealed on general damages, but not against the award for loss of expectation of life.

403 The Full Court dismissed BHP's appeal and allowed the plaintiff's cross-appeal. The plaintiff invited this Court to review the prevailing level of general damages awards made in South Australia in mesothelioma cases, having regard to awards made interstate, as Doyle CJ had suggested was appropriate in *Ewins*. On this basis, the plaintiff submitted that the trial judge's award for pain

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[159] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [71].

[160] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [70].

[161] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [72], [74].

[162] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [58]-[59], following *Kite v Malycha* (1998) 71 SASR 321, 340 (Perry J), where $5,000 was awarded in a case where around 41 years were to be "lost", citing *Skelton v Collins* (1966) 115 CLR 94.

[163] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [97], [102], [118] (Blue J with whom Kourakis CJ agreed) and at [316]-[318] (Stanley J with whom Kourakis CJ agreed).

[164] *Hamilton v BHP Billiton Ltd* [2012] SADC 25, [416], [428] (McCusker DPJ), allowing $1,000 for each year, where a life expectancy of around 15 years was "lost", citing *Ewins* at [59].

and suffering and loss of amenities was manifestly inadequate. The plaintiff submitted that the award of $115,000 should be doubled.

404 BHP contended that, when assessing the adequacy of awards for pain, suffering and loss of amenities, it was impermissible for this Court to have regard to awards at first instance, awards in other jurisdictions and awards by courts or tribunals not subject to appeal. Alternatively, BHP submitted that, if any first instance decisions were to be considered, they should be confined to decisions at the Supreme Court level.

405 In rejecting BHP's contention that it was impermissible for this Court to have regard to awards made at first instance, Blue J, with whom Kourakis CJ agreed, explained:[165]

> It is the role of this Court, as the final appellate court in South Australia (subject to the grant of special leave to appeal by the High Court) to oversee damages awards and ensure overall consistency.[166] Accordingly, in considering comparable awards, primacy should be given to awards considered by this Court.
>
> This is not to say that no regard can or should be had to first instance decisions from which an appeal lies, or ultimately lies, to this Court. There is a right of appeal to this Court from an assessment of damages by a judge of the District Court of a justice of this Court at first instance. There is a right of appeal from an assessment of damages by a magistrate to a justice of this Court and, by permission, to this Court. All such awards are potentially subject to the supervision of this Court. However, the regard had to first instance decisions should take into account that there may be reasons other than merely prospects of success why in a particular case no appeal is taken from an assessment. Caution should be exercised in relation to such awards particularly where the general level of awards in the relevant category has not been the subject of recent consideration by this Court.

406 Later in his reasons, Blue J cautioned against considering awards of general damages made in a forum such as the Dust Diseases Tribunal:[167]

> If there is no effective appeal from a damages award at first instance, it cannot be the subject of a review or correction at intermediate appellate court level. For that reason, the weight which those awards should be given is much reduced. Extreme caution should therefore be exercised before regard is had to such first instance decisions.

407 Blue J held that there were no compelling reasons why awards in other jurisdictions should not be considered when determining whether an award in this State is manifestly excessive or inadequate.[168] In reaching this conclusion,

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[165] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [102]-[103].

[166] *Hirsch v Bennett* [1969] SASR 493, 498-499 (Travers and Walters JJ); *Joyce v Pioneer Tourist Coaches Pty Ltd* [1969] SASR 50, 502-503 (Bray CJ), 505 (Mitchell and Chamberlain JJ agreeing); *Chakravarti v Advertiser Newspapers Ltd* (1998) 72 SASR 361, 378 (Doyle CJ and Perry J, Williams J concurring), and *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [70] (Doyle CJ). See also *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 59 (Mason CJ, Deane, Dawson and Gaudron JJ).

[167] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [121].

[168] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [112].

Blue J noted that, if inconsistent damages assessment regimes in each State or Territory were maintained, then it would encourage forum shopping and "would be contrary to the contemporary approach to the fundamental unity of Australian common law and harmony of the Australian judicial system".[169] His Honour illustrated this with the following example:[170]

> If two otherwise identical cases from Albury and Wodonga in which there were a large disparity between damages assessments were to reach the High Court at the same time, it would be incongruous if, in the absence of relevant legislative differences, the High Court were to uphold the reasonableness of each assessment.

408 Further, and as had been established previously,[171] it would be incongruous if this Court could have regard to personal injury awards on appeal against an assessment of damages in a defamation case, and yet was not permitted to consider personal injury awards in comparable cases in other jurisdictions when considering an appeal against a personal injuries assessment in this State.

409 Blue J recognised that the vast majority of personal injuries claims are resolved before trial and do not proceed to an assessment of damages at trial. Even fewer awards reach courts of appeal. Very few of these are terminal illness cases. Accordingly, Blue J allowed the plaintiff's cross-appeal and considered it appropriate for this Court to undertake the review which was sought, increasing the plaintiff's award of damages for pain, suffering and loss amenities of life to $190,000 (which was in addition to $15,000 for loss of expectation of life).[172]

410 In his separate reasons, Stanley J agreed that the award of damages for pain, suffering and loss amenities of life should be increased to $190,000,[173] while making observations about consistency in damages awards across Australian jurisdictions:[174]

> There is no principle that the general level of awards of damages should be consistent between jurisdictions. Nonetheless, an award of damages for pain, suffering and loss of amenities differs from an award of damages for loss of earning capacity. There is less reason to place differing monetary values on the experience of injured persons in different

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[169] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [108]-[110] (Blue J), citing Sir Owen Dixon's papers "Sources of Legal Authority" and "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (1965), and the reference to a "common law of Australia" by Griffith CJ in *Chanter v Blackwood* (1904) 1 CLR 39, [57]; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 and 67 (Brennan J, see also 15, Mason CJ and McHugh J; 77, Deane and Gaudron J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [2], [3] and [15] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[170] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [110] (Blue J).

[171] Blue J referred to *Chakravarti v Advertiser Newspapers Ltd (No 2)* (1998) 72 SASR 361 (Doyle CJ and Perry J, with whom Williams J agreed).

[172] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [147] (Blue J).

[173] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [330] (Stanley J, with whom Kourakis CJ also agreed).

[174] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [317].

> jurisdictions based on wage levels, earning power, or property values. It is appropriate to have regard to awards in other jurisdictions to ensure that, in giving weight to current general ideas of fairness and moderation, there is not a glaring inconsistency between the value courts in this State place on an injured person's pain and suffering compared to the value placed on a comparable experience in other jurisdictions.

411 Stanley J also considered it appropriate for this Court to undertake the review sought by Mrs Hamilton. Whilst his Honour, relying on *Planet Fisheries*, disapproved the use of other cases as "tariffs" in the assessment of damages for personal injury, and emphasised the need to focus on the particular circumstances of the case before the Court, his Honour reiterated that:[175]

> *Chakravarti* establishes that where the Full Court is considering the adequacy of a particular award, it is permissible to have regard to comparable awards in other jurisdictions to determine whether the Full Court should increase the award under review to indicate to the courts of this State an appropriate level of damages.

Consideration

412 With respect, the reasons given by the Judge were not adequate. Though her Honour addressed certain of the key submissions made by the parties, she did not explain why it was appropriate to regard *Dunning* as any form of benchmark given that the circumstances of that case were distinguishable (as she acknowledged), and in view of the criticisms made of it by James Hardie.

413 In particular, the Judge did not undertake any review (nor even acknowledge) any awards apart from *Dunning*, whether made in this State or elsewhere. For example, no reference was made to the award of $190,000 made in *Hamilton* in 2013, nor the award of $230,000 made in *Latz* in 2017.[176] Likewise, no review was undertaken of decisions here, or interstate. The review undertaken by Corboy J in *Lowes v Amaca Pty Ltd* in 2011 was cited to the Judge, but not mentioned in her Honour's reasons.[177] Both sides provided extensive references to awards made both here, and interstate.

414 That is not to say that it was necessary for the Judge to address every case cited, or to embark on her own review of awards made across Australia in the years since *Hamilton*. Rather, it was necessary to engage with the case made against Mr Werfel in respect of the reliance placed on *Dunning*, and to heed the warning given by this Court in *Hamilton* that the weight to be given to awards made in the Dust Diseases Tribunal "is much reduced … [e]xtreme caution should … be exercised" before having regard to them, because appeals from that Tribunal are confined to errors in point of law.[178]

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[175] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [318].
[176] *Latz v Amaca* [2017] SADC 56 (Judge Gilchrist).
[177] *Lowes v Amaca Pty Ltd* [2011] WASC 287, [814]-[829] (Corboy J), where $250,000 was awarded for general damages in addition to $15,000 for loss of expectation of life.
[178] *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [121] (Blue J, with whom Kourakis CJ agreed).

415 Quite apart from the inadequacy of the Judge's reasons on this issue, the reference to the decision of the Dust Diseases Tribunal in *Dunning*, as if it provided some form of benchmark in this State, is inconsistent with the approach of this Court in *Hamilton*, and revealed an error of law.

416 As to the amount awarded, though we are aware of recent interstate decisions in mesothelioma cases where the awards have been made in the order of $350,000 to $430,000,[179] the review of the award of damages made in this case must give primary emphasis to the general level of damages awarded in South Australia. Whilst interstate awards are not irrelevant, particularly on appeal, we were not asked to review awards made for general damages across Australia since *Hamilton* was decided in 2013. Neither party on the hearing of this appeal furnished the Court with anything like the material made available in *Hamilton*. Neither party, particularly Mr Werfel, suggested that a review of awards of the kind undertaken in *Hamilton* furnished a basis for the conclusion that, in the circumstances of this case, an award more than twice that made in *Hamilton* can be justified by awards made here or interstate, or on the grounds of inflation and CPI movements since 2013, when *Hamilton* was decided.

417 Nonetheless, we accept that there remains a difference in awards of damages for pain and suffering and loss of amenities across Australian jurisdictions in terminal illness cases. Any apparent anomaly caused by a difference in awards between the Australian jurisdictions flows from the need for consistency of approach within each jurisdiction.[180] For example, in 2013, the Full Court in *Hamilton* decided to award general damages of $190,000, rather than the sum claimed of $230,000, even though interstate authorities supporting a higher award were cited to it, such as the Western Australian case of *Lowes v Amaca Pty Ltd*, in which $250,000 was awarded in 2011.[181]

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[179] *Parkin v Amaca Pty Ltd* [2020] WASC 306, [153]-[168] (Le Miere J), where $360,000 was awarded for general damages, and $15,000 was the "objectively determined amount" for loss of expectation of life, because in "Western Australia a conventional award of $15,000 is usual"; *Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd* [2020] NSWDDT 7, [156]-[180] (Judge Scotting) where $350,000 was awarded for general damages at common law, $430,000 was awarded for general damages having regard to s 10A of the *Civil Liability Act 2002* (WA) and $8,000 was awarded for each year of life "lost" as damages for loss of expectation of life.

[180] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [71] (Doyle CJ); *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [97], [102], [118] (Blue J with whom Kourakis CJ agreed), [316]-[318] (Stanley J with whom Kourakis CJ agreed).

[181] *Lowes v Amaca Pty Ltd* [2011] WASC 287, [814]-[829] (Corboy J). No attempt was made in this case to address or explain the effect of s 10A of the *Civil Liability Act 2002* (WA) on awards made in WA. See *Hannell v Amaca Pty Ltd* [2006] WASC 310, [334] (Le Miere J); *Lowes v Amaca Pty Ltd* [2011] WASC 287, [820] (Corboy J); *MR & RC Smith Pty Ltd (trading as Ultra Tune (Osborne Park) v Wyatt (No 2)* [2012] WASCA 110, [130] (Pullin JA, with whom Newnes JA agreed): "[w]hile cases from outside Western Australia are relevant, attention should be paid to relevant comparable decisions in courts in this jurisdiction …". See also Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Lexis Nexis, Sydney, 2001, [7.1.5]. The Victorian Court of Appeal distinguished *Lowes v Amaca Pty Ltd* in *Amaca Pty Ltd v King* (2011) 35 VR 280, [178] (Nettle, Ashley and Redlich JJA) because there is no equivalent to s 10A in Victoria.

418 It may be accepted that historical changes in the value of money over time will generally support an incremental increase in the level of general damages awards made over time across Australia.[182] However, the result in *Hamilton* serves to show why, in our view, it would be wrong to fail to give primary emphasis to awards made in this State. Though there is no reason why the pain and suffering of a South Australian should be assessed at anything less than the pain and suffering of any other Australian, there remain differences nevertheless. These must be addressed incrementally over time, with the benefit of whatever submissions and materials the parties and their representatives choose to put before the Court.

419 Regardless of the inadequacy of the reasons of the Judge, and the error of law which vitiates her assessment, in our opinion the award of $400,000 made in this case for general damages for pain and suffering and loss of amenities was manifestly excessive and out of step with the general level of damages awarded in this State. It must be set aside.

420 Before reassessing general damages for pain and suffering and loss of amenities, consideration should first be given to the award of $40,000 made for loss of expectation of life. This is because James Hardie argued that "factors taken into account in pain and suffering damages are relevantly absorbed into the separate allowance for loss of life expectancy",[183] and that, in any event, this head of damage ought be reassessed in an amount of $10,000.[184]

421 In order to address this submission, it is first necessary to determine what is properly the subject of compensation by way of general damages for pain and suffering and loss of amenities, and the extent to which that is, or is not, "absorbed" into damages for loss of expectation of life.

Three general observations – assessing general damages

422 Before addressing the leading authorities on these issues, it is appropriate to make three general observations.

423 One may start with the observation that, at one time, an award of general damages for pain and suffering and loss of amenities necessarily included an element for loss of expectation of life. Between the decisions of the High Court in *Arthur Robinson (Grafton) Pty Ltd v Carter*[185] and *Sharman v Evans*,[186] can be seen the development of the trend towards the making of assessments of damages

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[182] A generally consistent feature in Australia before and since the High Court's decision in *Todorovic v Waller* (1981) 150 CLR 402, 409. See also *Amaca v King* (2011) 35 VR 280, [175]-[184] (Nettle, Ashley and Redlich JJA).

[183] Citing *Simon Engineering (Aust) Pty Ltd v Brieger* [1990] NSWCA 165, 4-5 (Clarke JA).

[184] James Hardie's Submissions, [198]-[200].

[185] *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, 653 (Barwick CJ): "the award must be of a lump sum once and for all".

[186] *Sharman v Evans* (1977) 138 CLR 563. See also *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 188-189 (Mason J).

in personal injury cases by reference to separate "heads" of damage. In *Arthur Robinson (Grafton) Pty Ltd v Carter*, Barwick CJ explained:[187]

> It is the verdict as a single sum which must be juxtaposed to the condition of the plaintiff which has resulted from the jury and its propriety considered. So to say is not to deny the utility of segregating some of the items which would necessarily have to have been considered in arriving at the ultimate figure. But, in my opinion, this does not justify deciding the proportion or the lack of proportion of the verdict to the injury merely by quantifying those items in isolation and then aggregating them to compare their total with the verdict.

424 However, in *Sharman v Evans*, Gibbs and Stephen JJ explained the desirability of Judges exposing the assessment process, really as an aspect of providing adequate reasons, so as to furnish "an adequate opportunity of seeking the correction of error on appeal":[188]

> That the learned Judge should have engaged in a close scrutiny of each head of detriment was, we think, inevitable; that in doing so he should seek to evaluate that detriment in money terms was a necessary consequence of the fact that it is only by recourse to those terms that the plaintiff can be compensated for the wrong done to her. Criticism was directed both to this separate examination of the conventional heads of damage and also to the ascertainment of a sum appropriate as a starting point for compensation under a particular head of damages, followed by a process of discounting or deduction from it. We regard this criticism as misconceived; so long as courts are careful to avoid the risk, inherent in such a procedure, of compensating twice over for the one detriment there seems no better way of applying processes of reasoning and the realistic and methodical evaluation of probabilities to the task of assessing compensation. In cases of any complexity any other approach is open to serious objection, especially in times of rapid inflation. In such times what Salmon L.J. described in *Fletcher v. Autocar & Transporters Ltd*. as the "uncertain role" of instinct, and what this Court has described as a "general awareness", a knowledge of "current general ideas of fairness and moderation" (*Planet Fisheries Pty. Ltd. v. La Rosa*), while still of use in determining, as a matter of first impression, the general level of appropriateness of an award, tends to become blurred by the constant shift of money values. Moreover where the assessment of damages is undertaken by a judge sitting without a jury it is, we think, most desirable that the process of assessment should be described in the reasons for judgment. As was pointed out by Sachs L.J. in *George v. Pinnock* it is only by the setting out in a judgment of the main components of an award of damages, or at least of the approach taken to each component, that the parties may obtain a proper insight into the process of assessment and an adequate opportunity of seeking the correction of error on appeal.
>
> (Footnotes omitted)

425 Accordingly, whilst it was once the practice to award as damages an undifferentiated lump sum for all aspects of loss, whether economic or

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[187] *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, 655 (Barwick CJ). The Chief Justice adhered to these views in *Sharman v Evans* (1977) 138 CLR 563, 566.

[188] *Sharman v Evans* (1977) 138 CLR 563, 571-572.

non-economic in character, by the 1970s it was the practice in Australia to award damages by reference to conventional "heads" of loss and damage.[189]

426 A second observation is that an award of general damages for pain and suffering and loss of amenities was usually regarded as incorporating an element for loss of expectation of life, at least where the plaintiff was aware of her or his plight, probably as part of the allowance for loss of the amenities of life. An award of damages for loss of expectation of life was first explicitly recognised by the English Court of Appeal in *Flint v Lovell*.[190] *McGregor on Damages* suggests that this loss "probably always formed an implicit part" of the award,[191] as was assumed in *Rose v Ford* by Lord Atkin and Lord Wright.[192] However the need to identify with some precision what award was made for loss of expectation of life, as a separate component in a general damages award, became acute in two kinds of cases. The first were "death" cases where the action was brought for the benefit of the deceased's estate pursuant to the *Law Reform (Miscellaneous Provisions) Act 1934* (UK).[193] The second were cases where the plaintiff suffered catastrophic injuries, a dramatically reduced life expectancy, and was rendered permanently unconscious. In that kind of case, there could be no prospect of an award of damages for pain and suffering, nor for the anguish and pain of knowing that life expectancy had been curtailed. The best-known Australian example of that kind of case is *Skelton v Collins*.[194]

427 As will be seen, the debate at times has centred on the so-called "subjective" and "objective" elements of loss of expectation of life, with the subjective elements brought to account as part of pain and suffering and loss of amenities, and the objective elements under loss of expectation of life.

428 Finally, from *Benham v Gambling* onward, [195] a practice has developed of awarding a separate amount, sometimes described as a "conventional sum", to compensate for the fact that life expectancy had been reduced. These awards tended to be "moderate" because they represented an attempt to compensate for something that could not adequately be measured or reflected in monetary terms, and because under this head, no attempt was being made to compensate for the "subjective elements" of the loss, that is, the anguish and pain associated with knowing that life has been curtailed.

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[189] See, for example, *Clark v Chandler* (1973) 5 SASR 416, 426 (Bray CJ) and Michael J Tilbury, *Civil Remedies Vol II, Remedies in Particular Contexts* (Butterworths, 1993), [9016]. See also *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 163 (Gibbs CJ).

[190] *Flint v Lovell* [1935] 1 KB 354 (CA).

[191] James Edelman, *McGregor on Damages* (Thomson Reuters, 20th ed, 2018), [40-262].

[192] *Rose v Ford* [1937] AC 826, 834 (Lord Atkin), 848-849 (Lord Wright).

[193] *Rose v Ford* [1937] AC 826 is an example. This head of loss was abolished in the UK by s 1(1)(a) of the *Administration of Justice Act 1982*. By s 1(1)(b) of that Act the award of damages for pain and suffering "shall take account of any suffering" caused by awareness that "expectation of life has been reduced". *McGregor on Damages* suggests that this put the law "back to the healthier position in which it was before *Flint v Lovell*", [40-263].

[194] *Skelton v Collins* (1966) 115 CLR 94.

[195] *Benham v Gambling* [1941] AC 157.

Assessing damages for personal injury – pain and suffering, the lost years and loss of expectation of life

429 The High Court has classified the three, traditional types of damages claims for negligently inflicted personal injury as being:[196]

(a) non-pecuniary loss, being loss of the amenities of life;

(b) loss of earning capacity; and

(c) actual financial loss, being outgoings incurred by reason of the injury.

430 An influential decision on awards of damages is *Teubner v Humble*, in which Windeyer J explained that:[197]

> … it is important to remember that an amount to be awarded for general damages is a single amount that is appropriate in the circumstances of the case, and that it is not the sum of rigidly separate and independent items. So-called principles of assessment of damages for personal injuries can be made the subject of almost endless discussion. The consequences of such injuries are not all susceptible of evaluation in money, and seeming logic can be pushed too far. Some "principles" are much a matter of an individual approach to a particular case. The conventional headings, economic loss, deprivation of amenities, and pain and suffering, provide a convenient reminder of matters that ought not to be forgotten. But it is not always appropriate, I think, to consider them as if they were distinct items in a balance sheet; for one may overlap and impinge upon another.
>
> Broadly speaking there are, it seems to me, three ways in which a personal injury can give rise to damage: First, it may destroy or diminish, permanently or for a time, an existing capacity, mental or physical: Secondly, it may create needs that would not otherwise exist: Thirdly, it may produce physical pain and suffering.

431 *Teubner v Humble* was a case where a "News" photographer was hit by a car on a wet night after stopping to take photographs on the way back from Port Adelaide. He sustained catastrophic injuries, including brain damage, the loss of a leg and some paralysis. His life expectancy was curtailed, he could never work again, and was likely to spend his remaining years in a wheelchair or bed at what was then known in Adelaide as "the Home for Incurables". When grappling with general damages for pain and suffering in an award of damages for pain and suffering and loss of amenities, Windeyer J explained that what is usually contemplated is "actual physical pain", and:[198]

> … [o]f all forms of damage this is perhaps the one that is least susceptible of monetary assessment. But in so far as the possession of money can in a particular case give pleasure or provide comfort, money can properly be said to compensate for pain and suffering. It is of some importance that persons who calculate damages under separate heads should bear in mind that the distress of mind and the feeling of frustration that come from an

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[196] *CSR v Eddy* (2005) 226 CLR 1, [28]-[31], [122] (Gleeson CJ, Gummow and Heydon JJ, with whom Callinan J agreed); *Amaca v Latz* (2018) 264 CLR 50, [6] (Kiefel CJ and Keane J), [88] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

[197] *Teubner v Humble* (1963) 108 CLR 491, 505 (Windeyer J, with whom Dixon CJ and McTiernan J agreed, Owen J *contra*).

[198] *Teubner v Humble* (1963) 108 CLR 491, 507-508.

> incapacity to take part in activities are often spoken of as involved in "loss of amenities". If so they are not to be introduced again under the heading "pain and suffering".

432 Ultimately, Windeyer J concluded that:[199]

> The damages of a more general character—for loss of the capacity to enjoy life and destruction of so much that made life worth living, for past and continuing pain and discomfort, for emotional disturbances, and other sad consequences of the accident—the learned judge allowed £5,000. I do not think this part of his Honour's assessment should be disturbed by an appeal court.

433 In the course of *obiter* remarks, later adopted by the High Court,[200] Windeyer J doubted the correctness of two decisions of the English Court of Appeal which had required that the "lost years" be disregarded when assessing damages for loss of earning capacity,[201] before observing:[202]

> If the view of the Court of Appeal be correct then I see no answer to Dr. Bray's proposition that damages for loss of an expectation of life ought not to be arbitrarily limited.

434 Precisely what was intended to be compensated by an award of damages for loss of expectation of life arose directly for decision in *Skelton v Collins*.[203] The case concerned a plaintiff who, at 17 years, sustained severe brain damage in a motor accident in which he was rendered unconscious. The medical evidence was that the plaintiff would never regain consciousness and would likely survive only three years. That is to say, death was likely to occur six months after the trial.

435 The High Court in *Skelton v Collins* decided two questions. The first concerned the proper approach to the assessment of damages for loss of expectation of life. The second concerned whether the Judge should make an allowance for a plaintiff's "destroyed earning capacity" during the "lost years".[204] As to the second question, Taylor J explained that, before the *Law Reform Miscellaneous (Provisions) Act, 1935* (UK), "it was the rule in assessing damages for a destroyed or diminished earning capacity to have regard to the probable working life of the plaintiff unaffected by his injuries".[205] The rule then changed. After explaining why decisions of the Court of Appeal were based upon a misapprehension of decisions made by the House of Lords, Taylor J concluded:[206]

> Accordingly in my view damages in the present case should have been assessed under this head [of economic loss] having regard to the plaintiff's pre-accident expectancy and

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[199] *Teubner v Humble* (1963) 108 CLR 491, 510.
[200] *Skelton v Collins* (1966) 115 CLR 94.
[201] *Oliver v Ashman* [1962] 2 QB 210; *Wise v Kaye* [1962] 2 WLR 96.
[202] *Teubner v Humble* (1963) 108 CLR 491, 511.
[203] *Skelton v Collins* (1966) 115 CLR 94.
[204] *Skelton v Collins* (1966) 115 CLR 94, 113-115 (Taylor J).
[205] *Skelton v Collins* (1966) 115 CLR 94, 114.
[206] *Skelton v Collins* (1966) 115 CLR 94, 121.

> not only to the expectancy of life remaining to him after the receipt of his injuries. Any assessment should, of course, take into account the vicissitudes and uncertainties of life and also the fact that if the plaintiff had survived for the full period it would have been necessary for him to maintain himself out of his earnings and, no doubt, his expenditure on his own maintenance would have increased as his earnings increased.

436 In deciding these questions, the High Court reiterated what had been held in *Parker v The Queen*,[207] namely, that the policy based on *Piro's* case would no longer be followed,[208] so that if the High Court concluded that a decision of the House of Lords was wrong, the High Court would act in accord with its own views.[209]

437 On the first question concerning the assessment of damages for the loss of expectation of life, the Judge had made no allowance for pain and suffering, which "was plainly right",[210] and had allowed £1,500 for "loss of expectation of life and a loss of amenity during the reduced lifespan".[211] Kitto J emphasised that the English authorities had "varied greatly" as to how these damages should be assessed:[212]

> … It is hard enough to fix compensation and money for injuries complained of by living persons; hard enough, for example, to fix an appropriate amount for pain and suffering, including the distress that arises from the knowledge that life has been shortened; but what estimate of life itself do you adopt in order to put a figure on a period of living, objectively considered?

438 The House of Lords had given two decisions which appeared to be in conflict. In the first, *Benham v Gambling*, the plaintiff was two and a half years old, and rendered unconscious by an accident until he died later on the same day, as a result of the accident.[213] The cause of action for loss of expectation of life having been recognised previously,[214] it was held on the facts in *Benham v Gambling* that there could be no "subjective aspect of the loss", and, as Kitto J explained:[215]

> The sole question was how much should be allowed as compensation for the objective element, the loss of such chance as the child had had, immediately before the accident, of living longer than he did. Should that charge be treated as having been worth much or little, when a judge or jury is trying to find an appropriate sum to award as fair compensation for the loss?

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[207] *Parker v The Queen* (1963) 111 CLR 610.
[208] *Piro v W Foster and Co Ltd* (1943) 68 CLR 313.
[209] *Skelton v Collins* (1966) 115 CLR 94, 104 (Kitto J), 122 (Taylor J), 124 (Menzies J, *contra*), 133-134 (Windeyer J), 138 (Owen J).
[210] *Skelton v Collins* (1966) 115 CLR 94, 96 (Kitto J).
[211] *Skelton v Collins* (1966) 115 CLR 94, 96.
[212] *Skelton v Collins* (1966) 115 CLR 94, 96.
[213] *Benham v Gambling* [1941] AC 157.
[214] *Flint v Lovell* [1935] 1 KB 354 and *Rose v Ford* [1937] AC 826.
[215] *Skelton v Collins* (1966) 115 CLR 94, 97 (Kitto J).

439 In the course of his speech, Viscount Simon LC explained that the many uncertainties included not only how long the child might have otherwise lived, but whether those years would have involved happiness or unhappiness:[216]

> The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life … the ups and downs of life, its pains and sorrows as well as its joys and pleasures … have to be allowed for in the estimate … In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness; the test is not subjective and the rights to award depends on an objective estimate of what kind of future on earth the victim might have endured, whether he had justly estimated that future or not…

440 Having considered the difficulty in fixing a solatium for a person who has died, and explaining that putting a money value on a prospective balance of future happiness was an attempt to equate "incommensurables",[217] his Lordship concluded that the damages for a disabling injury were likely to be much greater than for deprivation of life. Referring to this decision, Kitto J explained:[218]

> … it is simply impossible to select any substantial figure as compensation for the loss of years of living (as distinguished from the mental distress due to realization of the loss) and feel any degree of satisfaction with it as fair compensation. This the decision underlined quite dramatically by reducing an award of only £1,200 for the shortening of life to a mere £200.

441 After the decision in *Benham v Gambling*, the Court of Appeal split in *Wise v Kaye*, a case where the plaintiff had been rendered permanently unconscious and her expectation of life had been reduced.[219] The majority upheld an award of £400 for loss of expectation of life, as well as a separate award of £15,000 for general damages. Subsequently in *H West & Son Ltd v Shepherd*, the House of Lords, by a majority, departed from *Benham v Gambling*.[220] Nonetheless, Kitto J was firmly of the opinion that *Benham v Gambling* remained correct and ought be followed in Australia:[221]

> I do not find myself able to put aside *Benham v. Gambling* as affording no guidance for such a case as the present. It treated of life not as a state of being, a mere physical phenomenon, but as a thing to be lived and lived consciously. Thus, what was meant by every reference to loss of expectation of life was, in truth, loss of the possibility of conscious experience. The whole burden of the Lord Chancellor's speech was the legal impropriety of attempting to place any but the most modest figure on a human being's capacity to experience the varied quality of life; and I cannot bring myself to say that although the law sees the impropriety where a person has died it does not see it where he has lost all capacity for thought and feeling.

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[216] *Benham v Gambling* [1941] AC 157, 166 (Viscount Simon LC).
[217] *Benham v Gambling* [1941] AC 157, 165, 168 (Viscount Simon LC).
[218] *Skelton v Collins* (1966) 115 CLR 94, 98.
[219] *Wise v Kaye* [1962] 1 QB 638 (Sellers and Upjohn LJJ, Diplock LJ *contra*).
[220] *H West & Son Ltd v Shepherd* [1964] AC 326.
[221] *Skelton v Collins* (1966) 115 CLR 94, 102.

442 Later, Kitto J explained:[222]

> In the present case, could anyone really regard any figure as fairly proportioned to the closing of the door to experiences the quality of which, individually and on balance, is in the nature of things unknowable?

443 In the result, Kitto J declined to disturb the award of £1500. Taylor J observed that *Benham v Gambling* represented an attempt to set a standard of uniformity for the assessment of damage for loss of expectation of life where there was no mental suffering.[223] In the opinion of Taylor J:[224]

> … mental suffering caused by the knowledge that … life expectancy has been diminished will entitle a plaintiff to damages in excess of those for loss of expectation of life simpliciter.

444 Taylor J observed that this raised an issue of "fundamental principle" where there was a "sharp conflict in the House of Lords" and where, ultimately, the High Court "was free to solve the problem according to our own considered views …", noting that some Australian decisions had already preferred the *obiter* views expressed in *Teubner v Humble*, as well as the dissenting speeches of Lord Reid and Lord Devlin in *H West & Son Ltd v Shepherd*.[225] Ultimately, Taylor J agreed with the assessment made by the Judge:[226]

> It may be said, of course, that a person who is completely incapacitated as a result of his injuries suffers such a loss whether or not his injuries are of such a character to render him insensible to his loss. But, in my view, a proper assessment can be made only upon a comparison of the condition which has been substituted for the victim's previously existing capacity to enjoy life and where the mind is, as it were, willing and the body incapable there is, in my view, a much higher degree of loss than where the victim is completely insensible to his lost capacity. Perhaps, in other words, it may be said that a person who is obliged for the rest of his life to live with his incapacity, fully conscious of the limitations which it imposes upon his enjoyment of life, is entitled to greater compensation than one who, although deprived of his former capacity is spared, by insensibility, from the realization of his loss and the trials and tribulations consequent upon it.

445 Later, Taylor J emphasised that, when Viscount Simon in *Benham v Gambling* had referred to a loss which was "in fact incapable of being measured in coin of the realm with any approach to any real accuracy", he was referring to damages for loss of expectation of life.[227]

446 In the course of his analysis, Windeyer J emphasised the compensatory nature of a damages award:[228]

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[222] *Skelton v Collins* (1966) 115 CLR 94, 103.
[223] *Skelton v Collins* (1996) 115 CLR 94, 111, citing *H West & Son Ltd v Shepherd* [1964] AC 326.
[224] *Skelton v Collins* (1966) 115 CLR 94, 111.
[225] *Skelton v Collins* (1966) 115 CLR 94, 112.
[226] *Skelton v Collins* (1966) 115 CLR 94, 113.
[227] *Skelton v Collins* (1966) 115 CLR 94, 120.
[228] *Skelton v Collins* (1966) 115 CLR 94, 128.

> The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to compensate the injured person for what he has suffered and will suffer in mind, body or estate. Only so far as they can do so is he entitled to have them.

447 After agreeing with Taylor J that damages for the destruction or diminution of any capacity should be assessed so as to include the "lost years",[229] Windeyer J then addressed the difficulty in assessing damages associated with the loss of expectation of life:[230]

> A man whose capacity for activity, mental or physical, is impaired, so that no longer can he get satisfaction and enjoyment from things that he was accustomed to do and cannot do what he had planned or hoped to do, has not lost a thing the value of which for him can be measured in money by any process of calculation or estimation that I can understand.

448 The dilemma of assessing that which is incalculable clearly troubled Windeyer J:[231]

> Still less can I grasp the idea that a man's life is a possession of his that can be valued in money. This must be for many people repugnant to opinions, sometimes half felt sometimes deeply held, about the meaning of life and death, duty and destiny. And for others, less attached or persuaded in their opinions, it must be unacceptable simply because life and money are essentially incommensurable. And the idea does not become more easily acceptable when the measure of the worth of life is said to be a balance of happiness over unhappiness. In some of the judgments and articles that I have read the postulated inquiry seems to depend upon some doctrine of Epicurean hedonism, in others upon a conviction that tribulation endured does not deprive life of value. The differing views have been eloquently expressed. But for myself I doubt the relevance to the present question of any particular philosophy. For the question is not, I think, Is life a boon?—but, Are the years of life that a man expects something that belongs to him, the loss of which can be measured in money?

449 Acknowledging that the assessment does "not consider the individual but the lot of mankind in general", Windeyer J explained that Viscount Simon's reference to Aristotle's Ethics and the word "happiness" was probably to be understood in the wider sense of "welfare or well-being".[232] Windeyer J then reflected on the decision in *Benham v Gambling*, and expressed misgivings about some of the reasoning by later courts before referring to "two kinds of damage" being "recompense" and "solace" which, his Honour thought, "provides the solution to the question that we have to consider".[233]

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[229] *Skelton v Collins* (1996) 115 CLR 94, 129.
[230] *Skelton v Collins* (1966) 115 CLR 94, 130.
[231] *Skelton v Collins* (1966) 115 CLR 94, 130.
[232] *Skelton v Collins* (1966) 115 CLR 94, 131, citing *Benham v Gambling* [1941] AC 157, 166 (Viscount Simon LC): "[t]he question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law, but in view of the earlier authorities, we must do our best to contribute to its solution".
[233] *Skelton v Collins* (1966) 115 CLR 94, 132.

450 Nonetheless, his Honour confessed to "knowing no real measure that can be used. The only guide suggested is fairness and moderation, whatever those may denote".[234] Ultimately, "for the sake of conformity … but not from conviction", he agreed to follow *Benham v Gambling*, even though "the sum of £1,500 awarded in this case was more than was justified on the basis of *Benham v Gambling*, I, again for conformity agree in the order proposed".[235] Windeyer J concluded his reasons with the hope that:[236]

> Some day the law will provide some better way of meeting the consequences of day-to-day hazards than by actions for negligence and the measuring of damages by unprovable predictions, metaphysical assumptions and rationalised the empiricism.

451 Owen J agreed with Taylor J regarding his assessment of damages for the "lost years", and with Kitto J regarding his preference for *Benham v Gambling*.[237]

452 The approach taken to the "lost years" in *Skelton v Collins* was subsequently followed by the House of Lords,[238] and again by the High Court in connection with the assessment of damages for dependency claims made under the New South Wales iteration of *Lord Campbell's Act* in *Fitch v Hyde-Cates*.[239]

453 A later, influential authority on the assessment of damages for catastrophic personal injury is the decision of the High Court in *Sharman v Evans*.[240] In addition to entrenching the method of assessing damages according to traditional "heads" of damage, and the need to assess damages by reference to a plaintiff's "reasonable" rather than "ideal" requirements,[241] the Court reaffirmed the practice of awarding only a "conventional sum" by way of damages for loss of expectation of life. According to Barwick CJ:[242]

> … his Honour evidently included a substantial sum in his award for the shortening of the life expectancy of the respondent. I am of opinion that this loss calls only for compensation by the inclusion of a nominal sum. Nothing in the case, bearing in mind other items to be the subject of compensation, calls for that nominal sum to exceed the sum of $1,250.

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[234] *Skelton v Collins* (1966) 115 CLR 94, 132.
[235] *Skelton v Collins* (1966) 115 CLR 94, 136.
[236] *Skelton v Collins* (1966) 115 CLR 94, 136.
[237] *Skelton v Collins* (1996) 115 CLR 94, 137 (Owen J).
[238] In *Pickett v British Rail Engineering Ltd* [1980] AC 136, the House of Lords overruled *Oliver v Ashman* (1962) 2 QB 210, where the Court of Appeal confined damages for loss of future earning capacity to the plaintiff's shortened period of life.
[239] *Fitch v Hyde-Cates* (1982) 150 CLR 482, 488 (Mason J, with whom Gibbs CJ, Stephen J, Aickin J and Brennan JJ agreed).
[240] *Sharman v Evans* (1977) 138 CLR 563.
[241] *Sharman v Evans* (1977) 138 CLR 563, 573 (Gibbs and Stephen JJ) following *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, 661 (Barwick CJ).
[242] *Sharman v Evans* (1977) 138 CLR 563, 568.

454 Stephen and Gibbs JJ were prepared to allow $2,000, remembering that the Court is not engaged in awarding "perfect" compensation:[243]

> The last two heads of damages which call for particular mention are those conventionally described as pain, suffering and loss of the enjoyment and amenities of life and damages for shortening of life expectancy. As to the latter it bears no relationship to lost earning capacity during "lost years" but is rather the loss of a measure of prospective happiness (*Skelton v. Collins* , per Taylor J.); it is not compensation for "the mental distress due to the realization of the loss" (per Kitto J). That forms instead a part of the general damages for pain and suffering: compare Windeyer J. In the present case a figure "of the order of" $6,000 was allowed for this item in reliance upon the views expressed by Windeyer J. in *Skelton v. Collins*. If it be correct that compensation under this head is not to take into account the anguish of mind which any appreciation of the loss may cause, that being compensated for under another head, then Windeyer J.'s suggested maximum figure of $6,000, which reflected this very factor, may be thought to have been excessive at the time and to depart from the general standard of the "conventional sum" which the courts have quite arbitrarily fixed upon ever since *Benham v. Gambling*. The amount awarded may properly take into account a fall in the value of money (*Yorkshire Electricity Board v. Naylor*) but is to be no more than a quite conventional sum, very moderate in amount. In our view, despite the fall in the value of money, $6,000 departs from previous notions of what is appropriate under this curious and unsatisfactory head of damages. We would have thought that the sum of $2,000 is about the amount now appropriate as the conventional award under this head.
>
> It remains only to say something about damages for loss of the enjoyment and amenities of life. It is in this field that there exists the need to recall what has often been said about fairness, moderation and the undesirability of striving to provide an injured plaintiff with "perfect" compensation. The warning against attempting perfectly to compensate means, we think, in the case of pecuniary loss, no more than the need to make allowance for contingencies, for the vicissitudes of life, compensating for probable rather than for merely speculative detriments. But when a non-pecuniary detriment is in question the injunction against "perfect" compensation means rather more. It cannot refer to the exclusion of all question of punishment of the wrongdoer; the word "compensation" standing on its own would be sufficient to do this; rather is it designed to remind that the maiming of a plaintiff and its consequences cannot wholly be made good by an award of damages and that the recognition of this fact is to be no occasion for any instinctive response that no amount is too large to atone for the plaintiff's suffering. Such a response will be unfair to the defendant and may be of little advantage to the plaintiff; many consequences of injury are not capable of remedy by the receipt of damages, particularly those of the most personal character—the loss of the opportunity of a fulfilling marriage, of parenthood, of sexual satisfaction, of the realization of ambitions. It is very much at these detriments that the warning against any attempt at "perfect" compensation must be aimed. The authorities also require, as does good sense, that to the extent that damages awarded under other heads produce freedom from economic uncertainty and the availability of funds for pleasurable activities, the less will be the loss to be compensated under this head. This will be of particular relevance when a considerable sum is assessed for lost earning capacity.

455 Murphy J declined to assess this aspect of the plaintiff's loss separately from damages for pain and suffering and loss of the amenities of life.[244]

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[243] *Sharman v Evans* (1977) 138 CLR 563, 584-585.

456 Later still, the High Court in *Amaca v Latz* made brief reference to this issue when dividing on whether a plaintiff was entitled to any damages for the loss of a superannuation pension during the "lost years".[245] In dissent, Kiefel CJ and Keane J referred to *Skelton v Collins* and *Sharman v Evans* before explaining:[246]

> A plaintiff denied the opportunity to enjoy an income derived from sources other than his or her capacity to earn is entitled to recover for the loss of that enjoyment by his or her untimely death, not as compensable economic loss, but, if at all, as an aspect of the loss of the amenities of life. For that loss only a modest conventional allowance has ever been made.[247]

457 The majority addressed the question by emphasising the principle of compensation, and the development of a number of subsidiary principles:[248]

> First, it is necessary to identify Mr Latz's loss. If a loss is identified then, as Lord Wilberforce stated in *Pickett v British Rail Engineering Ltd*, the law has to answer a question: is that loss the loss of "something for which the claimant should and reasonably can be compensated?"
>
> At the outset, it is important to recognise the obvious point that the claimant claims *compensation* for negligently caused personal injury. That claim focuses attention upon the interests of the victim. Those interests are addressed by awarding damages as *compensation* for *actual* loss (either loss already suffered or loss that will probably be suffered) – an award guided by the compensatory principle.
>
> There are inherent difficulties in the assessment of damages and, as Windeyer J wrote more than once:
>
> > "So-called principles of assessment of damages for personal injuries can be made the subject of almost endless discussion. The consequences of such injuries are not all susceptible of evaluation in money, and seeming logic can be pushed too far".
>
> As a result, the compensatory principle has yielded, or resulted in, the development of a number of principles.

The "assessment" of damages for loss of expectation of life

458 But, to proceed by reference to the principle of compensation only serves to highlight the difficulty which taxed the High Court in *Skelton v Collins* – if the award is not subsumed in the allowance made for pain and suffering and loss of amenities, how does one proceed to make an assessment of damages for loss of expectation of life?

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[244] *Sharman v Evans* (1977) 138 CLR 563, 595-596.
[245] *Amaca Pty Ltd v Latz* (2018) 264 CLR 505.
[246] *Amaca Pty Ltd v Latz* (2018) 264 CLR 505, [59], [77] (Kiefel CJ and Keane J).
[247] *Rose v Ford* [1937] AC 826, 838, 842, 852, 861; *Benham v Gambling* [1941] AC 157; *H West & Son Ltd v Shephard* [1964] AC 326; *Skelton v Collins* (1966) 115 CLR 94, 97-99, 116-117, 119-120; *Gannon v Gray* [1973] Qd R 411, 427-428.
[248] *Amaca Pty Ltd v Latz* (2018) 264 CLR 505, [84]-[87] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

459 Historically, the common law has not taken the view that the inherent impossibility in making any meaningful calculation should result in the rejection of any allowance by way of damages for loss of expectation of life.[249] Despite the difficulties associated with this head of damage, an allowance is made because it reflects, as Windeyer J put it in *Skelton v Collins*, "the meaning of life and death, duty and destiny". Nonetheless the award cannot be large because the loss of life yet to be lived cannot properly be reflected by or calculated in any sum,[250] and the anguish and pain associated with knowing that life has been curtailed is elsewhere reflected in general damages for pain and suffering and the loss of amenities of life.

460 In recent years there have been two approaches taken to the assessment of this loss. The first, along the lines of that which was undertaken in *Skelton v Collins*, is to treat the matter as one for the allocation of a "conventional sum", bearing in mind that there is but limited scope for anything other than a "nominal",[251] "modest",[252] or "moderate",[253] allowance. The second approach, reflected in a number of New South Wales Dust Diseases Tribunal decisions, allocates $1,000 for each of the "lost years" – the longer the period lost, the larger the award.

461 The first approach to the assessment accords with *Skelton v Collins*, and its acceptance of *Benham v Gambling*, and can be seen in decisions made at first instance in this Court over a number of decades. For example, in *Clark v Chandler*, Bray CJ assessed the damages of a severely brain-damaged plaintiff with a slightly reduced expectation of life. He was likely to require institutional care. Dr Bray assessed damages for pain, suffering and loss of the enjoyment and amenities of life at $15,000. For loss of expectation of life, the former Chief Justice allowed $500 as a "conventional sum" as follows:[254]

> I must give him something for loss of expectation of life. I accept Dr Begg's estimate of five years. But in view of my awards under other heads I think the award for this should be only a conventional sum. I allow $500.

462 Later, Perry J awarded $5,000 in *Kyte v Malycha*,[255] and Doyle CJ awarded $10,000 in *Ewins v BHP Billiton Ltd*.[256] On this approach, the "conventional

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[249] Contrast *Harriton v Stephens* (2006) 226 CLR 52, [257], [270], [276] (Crennan J, with whom Gleeson CJ, Gummow Callinan and Heydon JJ agreed), where the type of damage (a child's claim for wrongful birth) was not amenable to being apprehended and evaluated".

[250] *Skelton v Collins* (1966) 115 CLR 94, 130 (Windeyer J).

[251] *Sharman v Evans* (1977) 138 CLR 563, 568 (Barwick CJ).

[252] *Amaca Pty Ltd v Latz* (2018) 264 CLR 505, [59], [77] (Kiefel CJ and Keane J).

[253] *Kite v Malycha* (1998) 71 SASR 321, 340 (Perry J); *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, [58] (Doyle CJ).

[254] *Clark v Chandler* (1973) 5 SASR 416, 426 (Bray CJ).

[255] *Kite v Malycha* (1998) 71 SASR 321, 340.

[256] *Ewins v BHP Billiton Ltd* (2005) 91 SASR 303, 310. Whilst the allowance made by Doyle CJ happened to correspond with the estimated ten "lost years", there is no suggestion that the second approach was followed. That would have been inconsistent with the citation of *Kite v Malycha*, where that approach was obviously not followed.

sum" will, over time, fluctuate with movements in the value of money over time because, as Windeyer J explained in *Skelton v Collins*:[257]

> This sum is now to be increased because the purchasing power of money has fallen, so that the money value of life has risen.

463 Further examples of this approach can be found in Western Australian decisions in which, over the last decade, an amount of $15,000 seems to have been awarded.[258] The same approach is reflected in decisions in Queensland,[259] and from time to time in New South Wales,[260] whether at first instance in the Dust Diseases Tribunal or the Supreme Court, or on appeal. In *CSR Ltd v Young*, the plaintiff had a life expectancy of 47 years and the Court of Appeal accepted the trial judge's conventional award of $20,000 for the loss of expectation of life.[261] Handley JA stated that this nominal amount was justified because $150,000 was to be awarded for pain and suffering and loss of amenities of life.[262] In *Olson v CSR Ltd*, the 34-year-old plaintiff was awarded $20,000 for loss of expectation of life under the "conventional sum" approach (in addition to general damages for pain and suffering and loss of amenities).[263]

464 On this approach, the incalculability of the award is reflected in convention and moderation.

465 Apart from New South Wales' decisions, the second approach appears to feature in a number of decisions made at first instance in the District Court of South Australia.[264] On this approach the practice of awarding $1,000 for each of the years likely lost during the "lost years" is rarely explained or justified, and no attempt seems to have been made to demonstrate how it accords with decisions of this Court, or more importantly, the High Court. This approach is susceptible to the criticism that it is indeed arid to measure life's value merely by reference to the years it may last.

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[257] This was regarded as an appropriate allowance in *Skelton v Collins* (1966) 115 CLR 94, 131 (Windeyer J).

[258] See, by way of example only, *Lowes v Amaca Pty Ltd* [2011] WASC 287 (Corboy J) and *Parkin v Amaca Pty Ltd* [2020] WASC 306 (Le Miere J) where, in each case, $15,000 was awarded.

[259] *Gannon v Gray* [1973] Qd R 411, 429-430 (Williams J), where was $1,000 awarded.

[260] *Traecev v Churchill* [1980] 1 NSWLR 442 (CA), where the headnote suggests that $3,000 was awarded.

[261] *CSR Ltd v Young* (1998) 16 NSWCCR 56.

[262] *CSR Ltd v Young* (1998) 16 NSWCCR 56.

[263] *Olson v CSR Ltd* (1994) 6 DDCR 147, [158] (O'Meally J): "[a] sum commonly awarded in the Tribunal, in cases of plaintiffs in their late 50s, or in their 60s or 70s, is $12,500. The plaintiff is a relatively young woman and therefore, in my view, is entitled to a sum greater than that ordinarily awarded to older plaintiffs. However, I am constrained by authority to award but a modest amount. I think the sum appropriate to award the plaintiff for loss of expectation of life, is $20,000". This may be contrasted with the move to the second approach by his Honour just four or so years later in *Putt v James Hardie & Co Pty Ltd* (1998) 16 NSWCCR 10.

[264] See, by way of example only, *Kennedy v Cimic Group Ltd* [2020] NSWDDT 7 (Judge Scotting) where $8,000 was awarded, and *Reynolds v Comcare* [2006] SADC 136, [39] (Judge Soulio) where $15,000 was awarded.

466 The Judge made clear factual findings to the effect that Mr Werfel was not suffering from any obvious co-morbidity and, on the balance of probabilities, lost something more than 40 years of life expectancy. On the findings made by the Judge, the award of $40,000 reflects an assessment made on the second approach.

467 Whilst both approaches represent an attempt to grapple with assessing that which is, in truth, incapable of assessment, no authority of this Court or the High Court was cited to justify the second approach utilised by the Judge in this case. As well, the sum of $40,000 represents a great deal more than is usually awarded for this head of damage in this State. In our opinion, this aspect of the assessment was erroneous and must be set aside.

Reassessment of damages for pain and suffering and loss of expectation of life

468 As earlier mentioned, one complaint about these assessments was the prospect of double compensation. *Skelton v Collins* demonstrates, starkly, given the facts of that case, that the proposition advanced by James Hardie in this case on that question is contrary to authority and wrong in law: the factors to be taken into account in the assessment of damages for pain and suffering and loss of amenities in a plaintiff who is fully aware of her or his plight are not relevantly absorbed into the separate allowance made for loss of expectation of life. There is no reason for confusion between these two heads of damage.

469 Granted, where a plaintiff knows that her or his life expectancy has been curtailed, the consequential anguish and pain must be reflected in the award made for general damages for pain and suffering and the loss of the amenities of life.

470 Having reflected on these matters, and recognising the need to reassess general damages, in our opinion, the appropriate award for general damages for pain and suffering and loss of amenity in this case is $280,000.

471 An appropriate award for loss of expectation of life, which reflects both moderation and the adoption of a conventional sum would, we think, be $20,000.

Ground 3.6 – damages for past and future gratuitous services to Mr Werfel

The trial Judge's reasons

472 The Judge accepted Mr Werfel's claim that he was entitled to an amount of $92,413.05 plus interest for gratuitous services provided to him in the past, in addition to an amount of $187,862.00 for gratuitous services that would be provided to him in the future.

473 In support of these awards, the Judge was presented with a medico-legal report prepared prior to the trial by an occupational therapist, Ms Anne Morgan. This report contained a recitation of Mr Werfel's history of illness and described the assistance he had received since his diagnosis, surgery and treatments.

It provided a helpful, high-level chronology of treatment, surgeries and hospital in-patient and out-patient attendances. However, it did not record the dates when, for example, Mr Werfel received chemotherapy ("approx. 4 sessions"). At times, it recorded Mr Werfel's estimated need for care if he lived alone, which was contrary to the evidence as Mr Werfel lived with his wife and three young daughters.

474 Mr Werfel gave evidence of broad estimates of the time which he had spent on his domestic activities, without clearly distinguishing between what care and services were required by him, and what care and services were provided to the Werfel household. This distinction was rarely recognised in the occupational therapy report. The evidence from Mrs Werfel was similarly very general and did not clearly make this distinction.

475 Where the parties consent, or at least acquiesce, in the taking of evidence on gratuitous services (or indeed on any other relevant topic) by reference to a medico-legal report, there can be no objection in principle, but the technique tends to become problematic where, as here, there remained considerable dispute about the assumptions upon which the occupational therapist's opinions were based, and her assumptions and estimates were not revised in light of the evidence adduced at trial. Almost no consideration was given to the need to ensure that the factual assumptions made by the occupational therapist were proved, and her calculations were made independently of what Mr and Mrs Werfel described in their evidence. Rather, Ms Morgan seemed to take the topics they described, and fashion her own time estimates according to her own views of what could or should have been required. Consequently, there was no correlation between the oral evidence given at trial and the calculations made by the occupational therapist which were repeated in submissions to the Judge, and used by the Judge for the purposes of her findings and awards.

476 Though James Hardie mounted a sustained attack on the occupational therapist's evidence, it seemed to overlook the preliminary points that there needed to be a clear delineation between what Mr Werfel reasonably needed by way of care in the setting in which he lived, as distinct from the needs of his wider household, and the absence of evidence to prove the bases for the occupational therapist's opinions, with the consequence that much of her expert evidence, as revealed by her calculations, was neither relevant nor admissible at common law.[265] We leave to one side the evidence Ms Morgan gave about Mr Werfel's need for care, particularly professional and respite care, at the end of his life. Ms Morgan was both sufficiently qualified and experienced to be able to

[265] In South Australia, the common law determines the admissibility of expert opinion evidence, see for example, *Ramsay v Watson* (1961) 108 CLR 642 and *Dasreef v Hawchar* (2011) 243 CLR 588, [64] (Heydon J).

assist the Court on that issue, and it is unlikely that Mr and Mrs Werfel could make other than general observations about it.[266]

477 Mr Werfel's case for gratuitous services was consequently advanced on the basis of estimates and tables about which there remained criticisms from James Hardie. Without either party offering any alternative tables or estimates, Mr Werfel submitted to the Judge that she should act on the written evidence prepared before trial, whereas James Hardie submitted that the written evidence prepared before trial must be rejected. The Judge did not ever reconcile these two extreme positions.

478 Rather, the Judge recited the general effect of, and accepted, the evidence of Mr Werfel and that of his wife, Mrs Werfel. Among other things, they said that since Mr Werfel's illness, Mrs Werfel had "taken on a lot more of the indoor work",[267] that she had provided Mr Werfel with nursing and emotional support during the three occasions he was in hospital, and she accompanied him on all of his medical appointments. They said that Mr Werfel's step-father now assisted with outdoor gardening and maintenance work twice a week, for which he had received the sum of $50 each week.

479 The oral evidence and the report of Ms Morgan were simply accepted by the Judge, without addressing in any detail the criticisms made of it. For example, the Judge did not herself set out anything like a comprehensive chronology of findings which addressed the criticisms of James Hardie, nor did she otherwise explain, except in general terms on one or two issues, how she reconciled the competing cases.

480 Ms Morgan assessed Mr Werfel on 26 September 2018 in his home at Bibaringa (before he moved to his present home in Pooraka, on a smaller block), and estimated what she described as his past, current and future need for assistance, even where the care and services were not personal to Mr Werfel, but required by the household. Whilst she acknowledged that it would be "impossible to predict the exact course/progress of Mr Werfel's expected future mesothelioma illness", she divided his estimated life expectancy evenly between the future levels of care that she thought he would require.[268]

481 Her general costings for the services she said were required to meet Mr Werfel's past, current and future needs were based on the average of a number of agency hourly rates obtained from Adelaide care agencies.

482 Ms Morgan provided various tables, setting out her estimates regarding costs, services, care and rates. As mentioned, this material did not draw on precisely what Mr and Mrs Werfel did, nor the time actually spent. Similarly, it did not draw any clear distinction between what Mr Werfel reasonably needed,

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[266] *Clark v Ryan* (1960) 103 CLR 486.
[267] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [279].
[268] Exhibit P19, p 23.

and the needs of the household generally. These questions of fact were generally overlooked. For the purposes of assessing damages under *Griffiths v Kerkemeyer* and *Sullivan v Gordon*, those needs are not the same and, though it may be difficult at times, they ought not be conflated.

483 The first table prepared by Ms Morgan comprised "once off costs associated with hospital admissions/outpatient appointments", which documented the commercial cost of the transport and help that Mr Werfel had received from his wife whilst attending hospital and other medical appointments. A further table was prepared for "past need for assistance", which was based on hourly rates of assistance between November/December 2017 and January/April 2018. Another table documented the "current estimated need for assistance" between May 2018 and the end of 2018. Four more tables indicated the future weekly cost of estimated care from early to mid-2019 to mid to late 2020. The estimated cost of required equipment was also provided.

484 In awarding Mr Werfel damages for past and future gratuitous services provided to him, the Judge accepted the rates charged for services by commercial agencies as set out in Ms Morgan's report, and rejected James Hardie's submission that the services should be valued at the applicable industrial award rates. Her Honour said:[269]

> Amaca argued that [the] services could be provided to Mr Werfel at the rate set out in the Cleaning Services Award. I reject that argument entirely. The Award rate is not a sound basis for assessing the appropriate rate. If Mr Werfel could find someone to work at those rates of pay he would need to set up systems of work assessing health and safety. He would have to meet obligations to calculate and pay entitlements to superannuation, leave and allowances. He would be required to meet workers compensation payments and generally maintain the records in the same way as an employer. An onerous task for a dying man.

485 We shall return to Ms Morgan's evidence and report later in these reasons.

Applicable legal principles

486 For the sake of convenience, we refer to the damages awarded for past and future gratuitous services provided to a plaintiff as "*Griffiths v Kerkemeyer* damages".[270] As McHugh J said in *CSR Ltd v Eddy*:[271]

> *Griffiths v Kerkemeyer* illustrates the truth of Holmes' dictum[272] that the "life of the law has not been logic: it has been experience".

487 The decisions of *Griffiths v Kerkemeyer* and *Van Gervan v Fenton* have been considered anomalous for at least two reasons.[273] First, they involve the

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[269] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [310].

[270] *Griffiths v Kerkemeyer* (1977) 139 CLR 161. Although in South Australia they are also known as "*Beck v Farrelly* awards": *Beck v Farrelly* (1975) 13 SASR 17, 18 (Bray CJ).

[271] *CSR v Eddy* (2005) 226 CLR 1, [91] (McHugh J).

[272] Oliver Wendell Holmes, *The Common Law* (1881), p 1.

provision of compensation in circumstances where there is no obligation on the plaintiff to recompense the carer for the services provided. Secondly, they operate on the basis of a legal fiction as to the rate to be applied, namely the "market cost" of the services provided gratuitously, a cost which may never be paid.

488 In 2005, the High Court in *CSR v Eddy* rejected an extension of the *Griffiths v Kerkemeyer* principle which permitted claims to be made where a plaintiff could no longer provide domestic services to others (*Sullivan v Gordon* damages).[274] The High Court then described the *Griffiths v Kerkemeyer* principle as not merely anomalous, but controversial as well.[275] In *Diamond v Simpson*, the New South Wales Court of Appeal drew the inference from various decisions of the High Court that "*Griffiths v Kerkemeyer* should be strictly confined in its application".[276] The effect and reach of the principle has been targeted by legislation across Australia, particularly over the last two decades, which either limits or prevents the recovery of damages for gratuitous services.[277]

489 In *Griffiths v Kerkemeyer*, the High Court held that a plaintiff is not precluded from recovering damages for the value of services provided to him or her gratuitously where those services are required by reason of the plaintiff's injuries. Mason J described the "relevant loss" as the plaintiff's "incapacity to look after himself as demonstrated by the need for nursing services and this loss is to be quantified by reference to the value or cost of providing those services".[278]

490 In *Nguyen v Nguyen*, Dawson, Toohey and McHugh JJ, in the context of a claim for dependency following a "fatal accident" under an Australian iteration of *Lord Campbell's Act*, considered *Griffiths v Kerkemeyer* to be authority for the

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[273] *Kars v Kars* (1996) 187 CLR 354, 371; *Grincelis v House* (2000) 201 CLR 321, [25]-[28] (Kirby J), [50]-[60] (Callinan J).

[274] *Sullivan v Gordon* (1999) 47 NSWLR 319.

[275] *CSR v Eddy* (2005) 226 CLR 1, [26]-[27] (Gleeson CJ, Gummow and Heydon JJ), it "can produce very large awards – some think disproportionately large compared to the sums payable under traditional heads of loss". Similarly, in *Kite v Malycha* (1998) 71 SASR 321, 351 Perry J warned, "the award must be maintained within reasonable limits. It must be recognised that some services rendered, for example, services rendered intermittently at very early or late hours during the day would be difficult to meet by the provision of commercially available services".

[276] *Diamond v Simpson (No 1)* (2003) Aust Torts Reports 81-695, [231].

[277] *Civil Liability Act 1936* (SA), ss 58 and 58A. In *CSR v Eddy* (2005) 226 CLR 1, [8] (Gleeson CJ, Gummow and Haydon JJ), the High Court referred to the following interstate provisions: *Common Law (Miscellaneous Actions) Act 1986* (Tas), s 5; *Motor Accidents Compensation Act 1999* (NSW), s 128; *Civil Liability Act 2002* (NSW), s 15 (which does not apply to dust diseases litigation: s 3B(1)(b)); *WorkCover Queensland Act 1996* (Qld), s 315; *Civil Liability Act 2003* (Qld), s 59; *Accident Compensation Act 1985* (Vic), s 134AB(24)(b); *Transport Accident Act 1986* (Vic), s 93(10)(c); *Wrongs Act 1958* (Vic), s 28IA; *Motor Vehicle (Third Party Insurance) Act 1943* (WA), s 3D; *Civil Liability Act 2002* (WA), s 12; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 23.

[278] *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 193 (Mason J).

principle that the plaintiff's loss, for the purposes of assessing damages, is represented by the plaintiff's "need" for the services:[279]

> In reaching its conclusion [in *Griffiths v Kerkemeyer*], the Court followed the decision of the Court of Appeal in *Donnelly v. Joyce*[280], and viewed the damages in question as damages for one component of the plaintiff's loss occasioned by his physical disability. The disability gave rise to the need for nursing and other care. The need was met by the services gratuitously provided. The value or cost of those services was, in the circumstances, an appropriate means of quantifying that aspect of the plaintiff's loss which was represented by the need. As the need represented the loss, the value of the services required to fulfil that need served as a means of assessing the loss. The fact that there were persons, prompted by motives of concern for the plaintiff, who were prepared to provide the services gratuitously was, it was held, not something which should diminish the damages to the advantage of the defendant.

491 In *Van Gervan v Fenton*, the focus upon the "need" of the plaintiff was repeated:[281]

> [I]t should now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that the plaintiff does not have to show ... that the need 'is or may be productive of financial loss'.

492 In *Kars v Kars*, the High Court accepted that damages for gratuitous services could be recovered by a plaintiff even where those services were supplied by the defendant, ostensibly in mitigation of the plaintiff's loss and the defendant's liability. Toohey, McHugh, Gummow and Kirby JJ explained that the principle in *Griffiths v Kerkemeyer* is directed to the loss of capacity suffered by a plaintiff and that, although the resulting need for care is quantified by reference to what the care provider does, the focus remains on the plaintiff's need:[282]

> The plaintiff might, or might not, reimburse the provider. According to the repeated authority of this Court, contractual or other legal liability apart, whether the plaintiff actually reimburses the provider is entirely a matter between the injured plaintiff and the provider.

493 And further:[283]

> The starting point to explain our conclusion is a clear recollection of the principle that the Court is not concerned, as such, to quantify a plaintiff's loss or even to explore the moral or legal obligations to a care provider. It is, as has been repeatedly stated, to provide the injured plaintiff with damages as compensation for his or her need, as established by the evidence.

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[279] *Nguyen v Nguyen* (1990) 169 CLR 245, 261-262.
[280] *Donnelly v Joyce* [1974] QB 454.
[281] *Van Gervan v Fenton* (1992) 175 CLR 327, 329-330, 333 (Mason CJ, Toohey and McHugh JJ), 340 (Brennan J), 341-342 (Deane and Dawson JJ) and 347 (Gaudron J).
[282] *Kars v Kars* (1996) 187 CLR 354, 372.
[283] *Kars v Kars* (1996) 187 CLR 354, 379 (Toohey, McHugh, Gummow and Kirby JJ).

494 In *Van Gervan v Fenton*, the High Court grappled with the basis upon which this element of compensation is to be valued. The plaintiff had been injured in a motor accident caused by the negligence of the defendant. As a result, the plaintiff was in need of almost constant care. That care was provided at home by his wife. She had to forgo her employment as a nurse's aide so as to provide the care her husband required.

495 In the plaintiff's action for damages in the Supreme Court of Tasmania, the Judge awarded the plaintiff damages in the sum of $54,000, which approximated the net wages lost by his wife. The sum of $137,000 was awarded for future care on the assumption that his wife would care for him for five to 10 years, and that he would thereafter be hospitalised for the remaining years of his life. The value of the wife's services was assessed at $277 per week, and the value of the hospital services at $347 per week.

496 The Full Court upheld the trial judge's assessment in respect of these awards for damages. The plaintiff appealed to the High Court on the ground that these damages ought to have been assessed by reference to the market value of the services needed by him as a result of the defendant's negligence, rather than by reference to the loss sustained by his wife.

497 The High Court recognised that the quantification of damages "is necessarily imprecise",[284] and that it "is neither an exact science nor an exercise that proceeds by reference to objective and non-controversial criteria".[285] Nevertheless, in allowing the plaintiff's appeal, Mason CJ, Toohey and McHugh JJ, with whom Brennan J agreed, articulated the basis upon which claims for *Griffiths v Kerkemeyer* damages are to be valued as follows:[286]

> Once it is recognized that it is the need for the services which gives the plaintiff the right to an award for damages, it follows that the damages which he or she receives are not determined by reference to the actual cost to the plaintiff of having them provided or by reference to the income forgone by the provider of the services. As Stephen J. pointed out in *Griffiths*, the principle laid down in *Donnelly* "is concerned not with what outlays of money the plaintiff will in fact incur as a consequence of his injuries but with the objective monetary 'value' of his loss". Because the market cost of services is ordinarily the reasonable and objective value of the need for those services, the market cost, as a general rule, is the amount which the defendant must pay as damages.
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> (Footnotes omitted)

498 Their Honours continued, refining the approach required in the determination of the "market cost":[287]

> But in some cases the market cost may be too high to be the reasonable value of the services. Where, for example, the cost of providing the services at a remote location is

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[284] *Van Gervan v Fenton* (1992) 175 CLR 327, 340 (Brennan J).
[285] *Van Gervan v Fenton* (1992) 175 CLR 327, 348 (Gaudron J).
[286] *Van Gervan v Fenton* (1992) 175 CLR 327, 333-334.
[287] *Van Gervan v Fenton* (1992) 175 CLR 327, 334.

> much greater than providing those services in a densely populated area, it might be necessary to discount the market cost or value of the services needed by the plaintiff on the ground that the market cost or value was unreasonable in the circumstances. In other cases, there may be so little competition to provide the services that, judged objectively, the market cost is not the reasonable value of the services. No doubt the circumstances of particular plaintiffs may reveal other cases where the market cost of the services provided is not the reasonable value of the services reasonably needed.

499 A further issue addressed by the High Court was the proposition that *Griffiths v Kerkemeyer* damages would be awarded even where the services had been supplied before the plaintiff's injury. As the Court put it:[288]

> If the defendant has created the need for the services, that person is not entitled to have the damages reduced because, before the accident, the plaintiff elected to pay for similar services or had the benefit of having them performed gratuitously. By the tort, the defendant has transformed the *choice* of the plaintiff to pay for such services or to have them done voluntarily into the *need* for the plaintiff to have those services performed for him or her.
>
> (Original emphasis)

500 The parties in that case agreed to the rates charged by an agency which supplied home nursing care by a non-medically trained person. However, as the rates were not the subject of evidence before the Judge, their Honours considered it appropriate that the matter be remitted to the Judge to hear the evidence and assess the damages accordingly.

501 Brennan J qualified his agreement with the reasons of Mason CJ, Toohey and McHugh JJ by adding:[289]

> … when an injured plaintiff and the person who provides care for him or her are living together as husband and wife or in some other personal and permanent relationship. In such a case, a question arises as to whether the spending of time together and the provision of other minor services of the kind that were incidental to their relationship before the injury (hereafter "those services") should be the subject of pecuniary compensation when the plaintiff's injury creates a need that is satisfied by those services. The question is not easily solved. On the one hand, it can hardly be said that the provision of those services is to be attributed to the need created by the plaintiff's injury when those services would have been provided to the plaintiff, whether or not he or she had a need for them. On the other hand, the rendering of those services in such a relationship is usually mutual and the injury may well have deprived the service provider of the mutual services which the injured plaintiff would have rendered to her or him. The former consideration tends against inclusion in the award of a sum corresponding to the market cost of providing those services; the latter consideration shows that, if nothing were allowed in respect of the provision of those services, the plaintiff must be made to depend on the self-sacrifice of the care provider to answer some of the needs created by the injury.

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[288] *Van Gevan v Fenton* (1992) 175 CLR 327, 338.
[289] *Van Gervan v Fenton* (1992) 175 CLR 327, 340.

502 After accepting the impossibility of quantifying "with any pretence at precision the net benefit to an injured plaintiff" the company and minor services enjoyed "by reason of the personal relationship", or the value of these had there been no injury, Brennan J explained that not all company and services ought be included in the assessment:[290]

> In my view, the only way to take this factor into account is this: it is appropriate to omit from the list of services to be paid for by the defendant some of the time spent or some of the minor services rendered by the care provider to the plaintiff where those services would have been provided in any event as an incident of an antecedent personal relationship between them, *provided* the plaintiff is able to offer services to the care provider in return.

503 Gaudron J added the following observations as to how gratuitous services were to be valued:[291]

> It was accepted in *Griffiths v. Kerkemeyer* that damages can be recovered with respect to care or services provided gratuitously. I say "with respect to" because the real loss for which damages are awarded is the loss which gives rise to the need for care or services. In this respect I adopt the reasons of Mason C.J., Toohey and McHugh JJ. and their Honours' conclusion that "the true basis [for compensation] is the need of the plaintiff for those services provided for him … the plaintiff does not have to show … that the need 'is or may be productive of financial loss'". What follows from this is that compensation for that need must be calculated by reference to the value of the services concerned.

504 Deane and Dawson JJ, whilst in dissent as to the outcome, held that "the reasonable cost or commercial value of services which are or will be provided or obtained to attend the plaintiff's accident-caused needs constitutes a *prima facie* reference point for quantifying the additional injury … represented by that loss of capacity".[292] They then addressed the issue that troubled Brennan J, which arose because the plaintiff was in a stable domestic relationship, and the service provider continued to receive "countervailing services" from the injured plaintiff:[293]

> The assessment of damages for personal injuries in a negligence action is not an exact science. It must always be governed by considerations of practical common sense in the context of the circumstances of the particular case… the ordinary incidents of that relationship and the give-and-take activities of the parties to it provided a significant part of the active services and passive attendance in and about the matrimonial home which were necessary to look after the appellant's accident-caused needs. In assessing compensatory damages in that context, the ordinary incidents of a particular continuing relationship, such as joint activities and companionship, cannot, in our view, legitimately be seen as transformed by the injury to one spouse into "services" rendered or to be rendered by the other spouse even if they obviate a need for such "services" which would otherwise exist. Nor, subject to an important qualification, can domestic services which are undertaken, as part of the mutual give-and-take of marriage, by persons in a marital relationship for the benefit of one another and of their matrimonial establishment,

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290 *Van Gervan v Fenton* (1992) 175 CLR 327, 340-341.
291 *Van Gervan v Fenton* (1992) 175 CLR 327, 347.
292 *Van Gervan v Fenton* (1992) 175 CLR 327, 342.
293 *Van Gervan v Fenton* (1992) 175 CLR 327, 343-344.

> legitimately be seen as converted into *additional* services necessary to attend to the accident-caused needs of an injured plaintiff in circumstances where they would have been performed in the same way and to the same extent in any event. The qualification is that such services will be taken out of the area of the ordinary give-and-take of marriage to the extent that the injuries to the wife or husband preclude her or him from providing any countervailing services.

505 Accordingly, three members of the High Court in *Van Gervan* questioned whether all of the company and minor services enjoyed "by reason of the personal relationship"[294], or the services provided in the context of a "matrimonial establishment"[295], should legitimately form part of the assessment of *Griffiths v Kerkemeyer* damages. In *Vail v Formato*, King CJ made a similar point regarding the "rearrangement of domestic chores" within a household.[296] Later, this Court held that gratuitous services damages would not be awarded where some services had previously been provided gratuitously in respect of a plaintiff's pre-existing needs, unrelated to the plaintiff's tortiously inflicted injuries.[297]

506 An important feature of *Griffiths v Kerkemeyer* damages was emphasised in *CSR v Eddy*. In identifying the actual basis of the decision in *Griffiths v Kerkemeyer*, the notion of an "accident-created need" in "the abstract" was rejected and the following explanation was offered:[298]

> In *Van Gervan v Fenton*[299] Mason CJ, Toohey and McHugh JJ 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[300] and quoted with approval by Gaudron J.[301] When later in their judgment Mason CJ, Toohey and McHugh JJ referred to "need", it was to "need" in that sense.
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> (Emphasis added in *CSR v Eddy*)

507 Later, the importance of the services being rendered to the particular plaintiff was emphasised:[302]

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294 *Van Gervan v Fenton* (1992) 175 CLR 327, 341 (Brennan J).

295 *Van Gervan v Fenton* (1992) 175 CLR 327, 344 (Deane and Dawson JJ).

296 *Vail v Formato* (1989) 10 MVR 12, 17 (King CJ, with whom Mohr and Prior JJ agreed), where it was held that domestic chores did not sound in damages because the plaintiff's family was "merely performing a share of the work which is necessary in any household to enable it to run. That work is done by them for the joint benefit of the whole of the family including themselves". See similarly *Burnicle v Cutelli* [1982] 2 NSWLR 26, 27G-28B per Reynolds JA, 36G-37B per Mahoney JA; and *Hodges v Frost* (1984) 53 ALR 373, 380 (Kirby J), citing *Griffiths v Kerkemeyer*, 168 (Gibbs J): "the mere rearrangement of domestic chores".

297 *Doherty v Footner* (1993) 170 LSJS 100 (Duggan J, with whom King CJ and Perry J agreed) concerning the pre-existing needs of children "until the age of say 18". See similarly, Harold Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002), [4.6.3].

298 *CSR v Eddy* (2005) 226 CLR 1, [20] (Gleeson CJ, Gummow and Heydon JJ).

299 *Van Gervan v Fenton* (1992) 175 CLR 327, 333 (emphasis added).

300 *Van Gervan v Fenton* (1992) 175 CLR 327, 340.

301 *Van Gervan v Fenton* (1992) 175 CLR 327, 347.

302 *CSR v Eddy* (2005) 226 CLR 1, [21] (Gleeson CJ, Gummow and Heydon JJ).

> 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…

508 The distinction between the services which have in fact been provided to a plaintiff gratuitously, and those which the plaintiff can no longer provide to others, lies at the heart of the ruling made in *CSR v Eddy*: *Griffiths v Kerkemeyer* supports the recovery of damages measured by reference to the market or commercial cost of providing services to the plaintiff, but it does not support the recovery of damages for the plaintiff's inability to provide services to others. In that latter respect, *Sullivan v Gordon* was overruled and earlier authorities such as *Burnicle v Cutelli* were approved.[303] In *Burnicle v Cutelli*, Mahoney JA (who agreed with Reynolds JA) explained:

> The plaintiff's claim in the present case is different. She has had included in her damages amounts in respect of her need and the services gratuitously supplied by her daughter to satisfy it. Her claim is, in addition, for services now supplied not to her but to others. I do not think that the public policy on which the *Griffiths v Kerkemeyer* principle is based extends to requiring that a plaintiff be compensated because others have lost the benefit of the services she would have provided to them.

509 The requirement that the services be rendered to the plaintiff personally is fundamental. There is nothing new about that. In 1975 Bray CJ had spoken of "the plaintiff's right to recover in respect of voluntary services rendered to him".[304]

510 The difficulty that can sometimes emerge, which is essentially a factual question turning on the evidence in any particular case, occurs when considering a service which is said to be rendered to the plaintiff, but which in fact benefits others within that plaintiff's family or household. Where the service is personal to the plaintiff, such as Mrs Werfel's massaging of Mr Werfel's leg in this case, no difficulty arises. The same can be said about services which the plaintiff previously performed for the plaintiff alone, such as dressing or toileting in catastrophic injury cases. However, where the service is not necessarily specific to the plaintiff, particularly where the plaintiff was previously performing a domestic or gardening service which benefitted the household of which the plaintiff remains a member, distinctions of some subtlety can arise. Those distinctions cannot be resolved by simply hypothesising that the plaintiff lives alone when the plaintiff has lived, and will likely remain living, with others. Ultimately the issue must be addressed by clear factual findings because the

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[303] *Burnicle v Cutelli* [1982] 2 NSWLR 26; *Maiward v Doyle* [1983] WAR 210; *Weinert v Schmidt* (2002) 84 SASR 307, [5]-[11] (Perry and Williams JJ, Gray J dissenting) where it was emphasised that "there is no claim for an award on this head, as opposed to loss of voluntary services to be provided *to* the plaintiff" (original emphasis). See also *Kite v Malycha* (1998) 71 SASR 321, 340-342 (Perry J); and Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002), par [4.1.13] headed ``Housekeeping Services provided to Others" at p 259.

[304] *Beck v Farrelly* (1975) 13 SASR 17, 18 (Bray CJ).

evidence will determine whether the gratuitous services the subject of the claim are services provided to the plaintiff.

511 As well, the requirement of reasonableness must be considered, as it always must when considering the recovery of damages. As Reynolds JA put it in *Burnicle v Cutelli*:[305]

> *Griffiths v Kerkemeyer* … deals with … the compensation of an injured person in whom has been created a need, the satisfaction of which calls for the provision of services for which it is reasonable to pay.

512 In some cases, even if a plaintiff's need for a service which has been gratuitously met by others can be identified, it may not necessarily be reasonable to expect the defendant to meet the cost of providing it, particularly where it is minor, or clearly benefiting others as well.

513 In *Waller v Metway Insurance Ltd*, the Queensland Court of Appeal addressed the determination of the "market cost" of gratuitous services.[306] In that case, the appellant suffered catastrophic injuries in a motor accident. It was common ground that the appellant required round-the-clock care. One of many issues in dispute was the extent and content of that care, including how the services should be valued. More particularly, whether the value of the services required to meet the appellant's needs should be assessed by reference to what a carer would be paid (that is, in accordance with the industrial award rates), or by reference to what an employment agency who engaged carers and made them available to persons such as the appellant would charge. The difference in amount was explained by the agency's profit margin and by its obligation as an employer to fund the ordinary on-costs of employment. Put simply, the difference reflected whether the services should be valued on the basis that they were sourced directly from the service provider or indirectly through an agency.

514 Chesterman JA, with whom the Chief Justice agreed, emphasised that the "market cost" is the cost to buy the services of a carer on the open labour market,[307] and that what is required by a plaintiff in any particular case is a question of fact driven by an analysis of the services the plaintiff needs.[308]

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[305] *Burnicle v Cutelli* [1982] 2 NSWLR 26, 28.

[306] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560 (de Jersey CJ, Chesterman JA, A Lyons J).

[307] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [29].

[308] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [25], [33], [35]. See also *AAI Ltd v McQuitty* [2016] QCA 326, [29] (Dalton J, with whom Gotterson and Morrison JJA agreed): "There are no arbitrary rules. In *Waller* there was evidence that carers could be engaged directly, ie, not through an agency, for a price which was lower than the agency rate *Waller* was a case where constant care was needed. In both these respects the facts proved in *Waller* were unlike the facts proved in this case. While there was cross-examination as to the amounts which the agency paid its carers, this evidence did not establish that Mr McQuitty could have employed carers by paying them that rate, much less that he could have employed them regularly and reliably for the times he required them".

515 Chesterman JA considered that both "the rate at which a carer would be paid" and "the higher rate … which the employer of the carer would charge for her services" could, in that case, both be described as the "market cost".[309] However, his Honour said that if a plaintiff could reasonably engage carers directly, and thus avoid an "agency fee", there was no reason, either in fact or in principle, why damages should be assessed at the higher rate.[310] Chesterman JA rejected the appellant's contention that, at all times, and in all places, an injured plaintiff is entitled to have his or her need for services valued by reference to the cost of engaging an agency:[311]

> There will, of course, be cases in which a plaintiff's particular needs will be reasonably met by paying an employment agency to supply carers. In such cases the market cost of meeting that particular plaintiff's needs will be the amount which includes the agency fee. In this case however, the learned Judge found that only part of the appellant's needs for care is reasonably met by the purchase of an employment agency's services. The other part can, for the next two decades, be met by the purchase of services on behalf of the appellant without the intermediation of an employment agency.
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> … The market costs of providing services is a question of fact. The evidence at trial supported the Judge's assessment. It established that carers could be engaged and paid at the award rate and that it was not necessary to purchase their services through an employment agency. Given that the services had been in the past, and will continue to be provided by Mrs Waller on a continuous basis the award rate represented the reasonable and appropriate market cost.
>
> In my opinion the assessment should have been made by reference to the casual rate not the permanent rate. If one assumes, for the purposes of the assessment, that a permanent carer was to be employed then the appellant, in addition to paying the carer's hourly rate of $18.92 would have to make provision for those costs than an employer must pay to provide the employee with superannuation, sick leave etc. This cost must be included in the rate take as the basis for assessment. Alternatively the higher causal rate should be paid on the assumption that the casual employee would make her own provision for her entitlements. …

516 In separate reasons, Ann Lyons J emphasised that, when valuing the services needed by the plaintiff it is irrelevant whether the plaintiff is likely to pay anything for that service.[312] Relying on *Goode v Thompson*, her Honour held that the question of the market cost is a question of fact, affected by the nature of the services required and the capacity of the plaintiff to organise those services.[313] Furthermore, if an agency fee or administrative charge is part of the market cost, then generally that is the cost to be recovered, subject to the qualifications expressed in *Van Gervan v Fenton*.[314]

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[309] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [30].
[310] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [27].
[311] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [33]-[36].
[312] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [75], [81] citing *Hills v State of Queensland* [2006] QSC 244, [68] (McMurdo J).
[313] *Goode v Thompson* [2001] Aust Torts Reports, 81-617.
[314] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [82]-[83] (Ann Lyons J).

517 Apart from the questions whether the award rate or the agency rate should invariably be used, as well as whether the market cost will necessarily include an agency fee or an administrative charge, there are a number of decisions where the nature of the services, and the fact that they are to be provided by an unskilled member of the plaintiff's household, have resulted in the damages sometimes being assessed on the basis of an hourly rate which is less than an award rate or an agency rate.[315] It is to be recalled that Mason CJ, Toohey and McHugh JJ warned in *Van Gervan v Fenton*:[316]

> … in some cases the market cost may be too high to be the reasonable value of the services. ... it might be necessary to discount the market cost or value of the services needed by the plaintiff on the ground that the market cost or value was unreasonable in the circumstances.

518 Whilst these decisions about the reasonable need for care and services, and the appropriate market cost or rate, are invariably dependent upon the particular evidence led at trial, they demonstrate that there are additional considerations or questions relevant to the recoverability of *Griffiths v Kerkemeyer* damages, and the determination of the "market cost", which will include the following:[317]

1. An identification of the nature of the plaintiff's disabilities, and the relationship between those and the plaintiff's reasonable need for care, services or assistance. Some precision is required to determine what physical or psychiatric disabilities give rise to any, and if so what, particular needs in the plaintiff at particular times.

2. An identification of the services which have been, or will be, reasonably provided to meet the plaintiff's reasonable need for care, services or assistance. Broad descriptions and generalised, vague time estimates made without the benefit of contemporaneous records must be viewed with care.

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[315] *McChesney v Singh* [2003] QCA 498, [40] (Williams JA, with whom Davies JA and Wilson J agreed), $15 per hour for unskilled services provided by family members, rather than an award for the hourly rate, before tax, for a Level 1 carer of $18.00 per hour or an agency rate of $32.60 per hour; *Abi-Mosleh v Fantis* [2006] SADC 75, [41]-[42] (Judge Anderson), where the *Disability Services Award* rate of between $12.36 and $14.57 per hour was used; *Hick v Frisby* [2008] QSC 161, where $20 was awarded for cleaning rather than $25 per hour under the award relevant to Level 2 carers; *Terry v Leventeris* (2011) 109 SASR 358, [38] (Gray J with whom Sulan and Vanstone JJ agreed): "an hourly rate of $22 … would be appropriate … using, as a yardstick, the evidence … that about $30 per hour through the use of an agency was the going commercial rate for general household cleaning services"; *Brooks v Zammit* [2011] QSC 181, [47]-[67] (McMeekin J), where $24 per hour was awarded, based on the casual rates payable under the *Disability Workers' Award – State* and the *Social Community Home Care & Disability Services Industry Award*. This rate was awarded rather than agency rates between $35 and $44.44, which unnecessarily included both an agency fee and allowance for a Certificate 3 in Community Care; *Burton v Grocke* [2014] SADC 195, [238]-[240] (Judge Chivell), where a rate of $30 per hour was awarded, rather than the agency rate of $43.68, "the plaintiff's use of an 'agency rate' does not distinguish between levels of care. For example, room cleaning and clothes washing calls for a different rate than more specialised services such as wound dressing, assistance with showering and the like".

[316] *Van Gervan v Fenton* (1992) 175 CLR 327, 334.

[317] Leaving aside, of course, the additional requirements or impediments to recoverability now imposed by various legislation across Australia.

3. It is important to determine whether the plaintiff is a member of a household or in a genuine domestic relationship. If so, will that likely continue? There is little point receiving evidence about the plaintiff's needs, or assessing damages, on the assumption that the plaintiff lives alone if that is not the case. Whilst evidence led about the plaintiff's needs given on the hypothesis that the plaintiff lives alone might possibly assist to delineate the plaintiff's capacities and potential need for reasonable care and services, this ought not be allowed to deflect the assessment from an accurate determination of the plaintiff's reasonable needs in the true context revealed by the evidence. What comprises the reasonable provision of services to a plaintiff who lives alone is likely to be different when compared with the provision of services to a plaintiff who lives in a large household. Nonetheless, where the plaintiff is unlikely to continue living with others, that too will be relevant.

4. Can it be said that the plaintiff's reasonable need for services has been, or will be, met by a re-adjustment of domestic arrangements within the household by members of that household? If so, can it be said that members of the household are providing services to the household, and not merely to the injured plaintiff? Where cleaning, laundry, meal preparation or gardening is taken up by members of the household, it may be difficult to say that the services are provided to meet the plaintiff's reasonable needs. Though undoubtedly the plaintiff benefits from these services, so do all other members of the household.

5. What is the extent of the plaintiff's pre-existing or unrelated needs, and the plaintiff's residual capacity to participate in a household or genuine domestic relationship? Where a plaintiff's need for services is reasonably referable to a pre-existing or unrelated need (particularly in the case of the young or disabled), their continued provision might be seen to meet the pre-existing need, rather than any reasonable need for care and services created by the defendant's wrongdoing. Where a plaintiff's reasonable need for services (such as, but not limited to, company or supervision) can reasonably be met by remaining in an ongoing genuine domestic relationship, or as part of the ordinary functioning of the plaintiff's household, it may at least be a case where, as Mason CJ, Toohey and McHugh JJ warned in *Van Gervan*, it is "necessary to discount the market cost or value of the services needed by the plaintiff on the ground that the market cost or value was unreasonable in the circumstances".[318] Indeed, where a plaintiff retains a residual capacity to participate in a household or genuine domestic relationship, it may be unreasonable to award damages for gratuitous services that are, in truth, merely incidents of remaining in a household or a genuine domestic relationship. Of course, where the evidence discloses the prospect that the plaintiff may live alone (and not in

[318] *Van Gervan v Fenton* (1992) 175 CLR 327, 334.

any shared care or institutional setting) then a different approach may be warranted. In some cases, the reasonable need for care and services will therefore not be met gratuitously, but on an arm's length, commercial basis.

6. Where the plaintiff retains a residual capacity to arrange for carers or other service providers, that will tend to indicate that it is not necessary to engage an agency, nor meet agency rates and overheads.

7. Where the evidence shows that service providers could reasonably be engaged on award rates or other genuine market arrangements, particularly over longer terms, then it may be difficult indeed to justify the engagement of an agency.

8. Where the services reasonably required to meet the plaintiff's reasonable needs could be met by unskilled providers, then discounted award or casual rates may provide a better guide to "market cost", particularly where the services are being provided by unskilled members of the plaintiff's household.

519 Naturally, there may well be legislative requirements which, in addition to the requirements imposed by the common law, regulate or restrict the recovery of damages for gratuitous services.[319]

520 It is with these authorities and considerations in mind that we consider the parties' submissions on appeal.

521 In the present case, James Hardie submitted that the amounts awarded for past and future *Griffiths v Kerkemeyer* damages were grossly excessive. In addition, it contended that the Judge's reasons reflected a "wholesale adoption" of Mr Werfel's submissions, which merely recited the 17 October 2018 medico-legal report schedules prepared by Ms Morgan. James Hardie otherwise made five complaints about Ms Morgan's evidence.

522 We shall address each in turn.

The "market cost" of the gratuitous services provided

523 James Hardie's first complaint is that Ms Morgan calculated the entitlement to gratuitous care by reference to the commercial rates charged by an agency. Referring to the decision of the District Court in *Burton v Grocke*,[320] James Hardie submitted that agency charge out rates are an inappropriate basis for the calculation because they make allowances for overheads, insurance and profit which grossly inflate the rate. According to James Hardie, the award rates for the kinds of services involved, which averaged to an amount of $20 per hour,

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[319] See for example the analysis undertaken by Besanko J in *Short v Wenham* [2002] SASC 369 (FC).
[320] *Burton v Grocke* [2014] SADC 195.

more accurately reflected the commercial value of the gratuitous services provided to Mr Werfel.

524 Mr Werfel submitted that, as the appellant adduced no expert evidence at trial to contradict Ms Morgan's opinion, the Judge was entitled to rely on Ms Morgan's report as a basis for calculating these damages. In any event, it was submitted that a rate of $20 per hour in accordance with the various award rates was misconceived, as it was only two-thirds of the rate allowed in *Burton*, which was decided approximately 10 years ago.

525 We now return to Ms Morgan's report and the various agency and award rates tendered at trial.[321] The costings Ms Morgan relied on in her report had been obtained by her from "a number of Adelaide-based services". More particularly, the hourly rates were based on an average of rates from five or six commercial agencies.[322] In cross-examination, Ms Morgan conceded that their charges would have included something well in excess of the amount which the person who carried out the work would be paid. She was also cross-examined about not having taken into account the *Cleaning Services Award 2010*, as well as other awards. The following exchange occurred in the course of cross-examination:[323]

> MR WATSON: … if you just have a look at, for example, the cleaning, we've spoken about that, at $55 an hour, did you have a look at the award applicable for cleaning services? Did you do that?
>
> …
>
> WITNESS: No, I did not.
>
> MR WATSON: Why not?
>
> WITNESS: Because my assessment is based on the commercial cost of providing the care if Mr Werfel was not relying on gratuitous services, and was applying to pay for that care from an organisation that guaranteed reliability, and offered a range of services that would accommodate all his needs.

526 And later:[324]

> MR WATSON: … do you think you might have exaggerated the cost per hour?
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> WITNESS: The cost per hour are obtained as an average hourly rate from an average of a number of Adelaide-based private services that provide services in the area where he [Mr Werfel] lives. So they do come from an average of five or six organisations. They're not just made up.

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[321] Exhibits P19, D22, D23 and D24.
[322] T 668.
[323] T 660.
[324] T 658.

527 James Hardie tendered the July 2018 rates of pay under the *Cleaning Services Award 2010*, the *Gardening and Landscaping Services Award 2010* and the *Nurses Award 2010*. It submitted that these rates represented the "commercial rates" of the services provided to Mr Werfel. More particularly, James Hardie adduced evidence to show:

- The rate at which a person is paid for domestic services or cleaning around the house is $20.21 per hour, which is the hourly pay rate that a full-time adult would receive if classified as a Level 1 cleaning service employee under the *Cleaning Services Award 2010*. This is in contrast to the hourly rate of $54.95 that Ms Morgan estimated for the cleaning services that Mr Werfel would require to meet his current need for assistance.

- The rate at which a person is paid for gardening work is $18.93 per hour, which is the hourly pay rate that a full-time or part-time adult would receive at the introductory level under the *Gardening and Landscaping Services Award 2010*. In contrast, Ms Morgan had estimated a rate of $66.37 per hour to meet Mr Werfel's current and future need for garden maintenance.

- The rate at which a person is paid for providing nursing services is $20.66 per hour, which is the hourly rate that a full-time or part-time adult would receive at the "nursing assistant, first year" level under the *Nurses Award 2010*. James Hardie submitted before the Judge that, "[p]laced into context, anyone supplying those services within the household is untrained and unskilled".[325]

528 Rounding all of these award rates, James Hardie submitted that these various rates equated to an average hourly rate of $20.

529 Significantly, in our view, the Judge made no attempt to make any findings of the kind described in *Waller v Suncorp Metway*.[326] No consideration appears to have been given, whether at trial or on appeal, to whether Mr Werfel was capable of retaining carers himself, or whether, and if so when, he might find it necessary to engage the assistance of a care agency.

530 For example, the Judge rejected the proposition that Mr Werfel could retain carers himself because that would represent an "onerous task for a dying man".[327] However, at the time of trial, Mr Werfel was apparently in remission and there was no suggestion that he was then unable to carry out a number of these activities nor retain carers if that were necessary. Rather, it is likely that during particular periods (especially towards the end of his curtailed life expectancy), Mr Werfel will become unable to carry out these activities and he will require the

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[325] James Hardie's Closing Submissions, [436].
[326] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560.
[327] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [310].

services of a care agency. Those particular periods, however, cannot be confused with the entire period the subject of the award made by the Judge.

531 With respect, this is a particularly clear instance of a failure to provide adequate reasons. By simply repeating Mr Werfel's written submissions on the topic, which themselves largely repeated the content of a medico-legal report which was challenged, the Judge did not engage with the issues presented to her for decision. As importantly, the Judge made no real attempt to make findings about the particular factual assumptions upon which Ms Morgan had proceeded, nor about the alternative factual findings for which James Hardie contended.

532 Absent a clear statement of the factual basis for the expert opinion, as we have explained, it was open to doubt whether all of Ms Morgan's opinion remained both relevant and admissible.[328] There was no real attempt to correlate the evidence from Mr and Mrs Werfel (which the Judge accepted) with the assumptions made by Ms Morgan in her report.

533 For example, whilst the Judge recited a great deal of the evidence given by Mr and Mrs Werfel, much of it was expressed in general terms. Mr Werfel did his best to estimate the times he used to spend doing domestic chores in the house (eight to 10 hours per week),[329] and the time he spent on the property and outside the house (10 hours each week),[330] as well as the time Mrs Werfel spent with Mr Werfel each day when he was in hospital (depending upon whether the children were with her, two to four hours each day).[331] However these estimates were not relied on by Ms Morgan, and they were, in any event, of doubtful relevance when determining what it was that Mr Werfel was still able to do around the house, and for his family, after he was in remission and able to return to work and resume gym attendances.

534 For these reasons, the award made must be set aside and the damages reassessed. That reassessment must proceed having regard to the evidence which the Judge accepted, as well as the evidence which was before her about both award rates and agency rates. Nonetheless the reassessment is difficult in the absence of clear evidence and findings, or indeed absent any considered alternative to the estimates offered by Ms Morgan.

535 Whilst it was for the plaintiff to prove his case, it was not seriously disputed that he was entitled to an award of significance,[332] because there was some substantial element of loss which the court was required to take into account

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[328] *Ramsay v Watson* (1961) 108 CLR 642, cf *Boothy v Morris* [2002] SASC 126 (Mullighan J, with whom Doyle CJ and Williams J agreed), where it was accepted that it is necessary for counsel to object or make it clear before the close of the case of the opposite party if the factual foundation for an opinion is in issue.

[329] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [273].

[330] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [275].

[331] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [291].

[332] See, for example, *Giorginis v Kastrati* (1988) 49 SASR 371, 375-376 (von Doussa J, with whom King CJ and Legoe J agreed).

when assessing damages.[333] As will be seen, insofar as it is necessary to adopt an award rate when evaluating the services provided to or by, Mr Werfel, on the evidence led at trial in this case, we are prepared to accept an average hourly rate of $20.

Damages allowed whilst Mr Werfel was in hospital

536 Contrary to authority, James Hardie submitted, the Judge used Ms Morgan's report as a basis for awarding damages for gratuitous services whilst Mr Werfel was in hospital or for periods when care was unnecessary.

537 Mr Werfel submitted that the appellant had failed to explain what the "unnecessary" care was that Mr Werfel had received. Further, he contended, damages for in-hospital care provided by family to persons dying of mesothelioma have routinely been allowed in South Australia.[334]

538 At trial, James Hardie submitted that the care provided to Mr Werfel in the nature of moral and emotional support was not compensable. The time his wife spent with him in waiting rooms during other treatment and accompanying him to hospital was also not compensable.

539 On the hearing of the appeal, James Hardie submitted that the award made for care provided whilst in hospital was contrary to authority. Reliance was placed on the following passage from *CSR v Eddy*:[335]

> In short, as the appellant 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.

540 James Hardie also relied upon the following passage from the decision of the New South Wales Court of Appeal in *Nicholson v Nicholson*:[336]

> The services performed by the appellant's sister, which certainly helped improve his level of comfort, could not be classified as fulfilling a relevant "need" in view of the fact that the appellant was already enjoying full time hospitalisation. Although it may not be realistic to expect the nursing staff at all times to apply the creams to the appellant, the respondent already bears the burden of providing compensation for the costs of hospitalisation. I do not believe that it should be required to compensate the appellant's

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[333] Cf *Russell v J Hargreaves & Sons Pty Ltd* [1956] 30 ALJ 533.

[334] Citing *van Soest v BHP Billiton Ltd (No 2)* [2013] SADC 95, [108] (Judge Parsons), "I have reduced the total claimed by half to reflect that part of the period would have been spent in companionship rather than assistance. I allow that part of the claim at $945"; *Reynolds v Comcare* [2006] SADC 136, [83]; *Hamilton v BHP Billion Ltd* [2012] SADC 25, [419]-[420].

[335] *CSR v Eddy* (2005) 226 CLR 1, [21] (Gleeson CJ, Gummow and Heydon JJ).

[336] *Nicholson v Nicholson* (1994) 35 NSWLR 308, 323 (Kirby P, with whom Mahoney and Meagher JJA agreed). See also *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560, [10]-[11]; *Wormleaton v Thomas & Coffey Ltd (No 4)* [2015] NSWSC 260; and *Parkin v Amaca* [2020] WASC 306, [116]-[117] (Le Miere J).

sister as well for their minor activities. Her Honour was entitled to find that the appellant's sister's services did not represent services within *Griffiths v Kerkemeyer*.

541 In our view, it was indeed erroneous to award *Griffiths v Kerkemeyer* damages for all of the unspecified services provided to Mr Werfel whilst he was hospitalised or at appointments, without explanation. Apart from providing companionship and support, no real attempt was made to demonstrate what was provided by Mrs Werfel over and above the services provided by the nurses and staff in hospital or in clinics. We do not say that an award could never be justified in these settings. Rather, it is a matter for evidence. There was a paucity of evidence in support of an award on these aspects of the time spent by Mrs Werfel. The evidence did not show that Mr Werfel was always unable to drive or travel, though we accept that that may have been so on occasions. This aspect of the award must be set aside.

542 Nonetheless, it has been traditional in South Australia to make an award in accordance with the decision of Taylor J in *Wilson v McLeay*.[337] Long before *Beck v Farrelly*,[338] or *Griffiths v Kerkemeyer*, allowances had been made for the costs outlaid by relatives to visit an injured plaintiff in hospital, at least where the "comfort and assistance" of relatives was, "according to the medical evidence, … of some importance in the alleviation" of the plaintiff's condition."[339] In *Wilson v McLeay*, a modest additional allowance was made over and above the cost of the parents' travel to and from hospital.

543 The ongoing application of this authority seems to have never been questioned, despite the doubts and concerns expressed about *Griffiths v Kerkemeyer* damages generally. It is certainly possible that it has been regarded as subsumed within the *Griffiths v Kerkemeyer* principle. In *Griffiths v Kerkemeyer* both Stephen J and Mason J appeared to treat the allowance made in *Wilson v McLeay* as an early example of, or at least a forerunner to, the *Griffiths v Kerkemeyer* principle.[340] Nevertheless, traditionally in South Australia at least, this distinct head of damage has been preserved and the awards have tended to be very moderate.[341] Whilst we have no real evidence regarding the costs incurred by Mrs Werfel in connection with her hospital and treatment visits, we propose to make a moderate allowance which is intended to reflect at least a number of Mrs Werfel's visits, in addition to the cost of those attendances, as a *Wilson v McLeay* element within gratuitous services.

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[337] *Wilson v McLeay* (1961) 106 CLR 523, 527-528 (Taylor J), see also Luntz, *Assessment of Damages for Personal Injury and Death*, Lexis Nexis, 4th ed, (2001) [4.7.2], "the leading case".
[338] *Beck v Farrelly* (1975) 13 SASR 17.
[339] *Wilson v McLeay* (1961) 106 CLR 523, 538 (Taylor J).
[340] *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 171 (Stephen J), 191 (Mason J).
[341] *Komisars v Guardian Assurance* (1973) 5 SASR 515, 522 (Walters J), *Richardson v Schultz* (1980) 25 SASR 1, 23-25 (Williams J), where $350 was allowed; and *Hillier v Lucas* (2000) 81 SASR 451 (FC), [3], [548]-[557] (Lander J with whom Duggan and Bleby JJ agreed), where an allowance of $3,000 was set aside.

The premises upon which Ms Morgan's report was based

544 James Hardie's third complaint was that many of the bases upon which Ms Morgan's report was based were wrong. For example, it pointed to the fact that Ms Morgan made an incorrect assumption regarding life expectancy and the period during which Mr Werfel's condition would deteriorate as well as the rate of deterioration. Despite these inaccuracies, Ms Morgan's report was adopted by the Judge "without adjustment for any other possibilities or uncertainties".

545 One of the criticisms made by James Hardie at trial, and perhaps to an extent on appeal, was that there was some prospect of cure and that Mr Werfel may never relapse from remission. This argument has however been rejected given the unchallenged findings made by the Judge about Mr Werfel's grim prognosis and life expectancy.

546 Mr Werfel contended that the Judge was entitled to accept Ms Morgan's evidence when formulating Mr Werfel's future care needs, given her experience in assessing patients with mesothelioma at all stages of the illness. In any event, the adjusted claim was different from that set out in Ms Morgan's report, given that it was adjusted based on the life expectancy proffered by Professor Pittman at trial.

547 To a large extent, this criticism replicates the earlier point made about the lack of a clear correlation between the evidence led at trial and the basis upon which Ms Morgan expressed her opinions, as set out in her report and schedules. Having said that, whilst the variation between the evidence led and Ms Morgan's assumptions must be addressed, the Judge was entitled to rely upon Ms Morgan's about the likely costs to be incurred during the period when Mr Werfel's condition is likely to deteriorate, particularly the extent that he will be in need of very significant care toward the end of his life.

Damages awarded for work to be done on the properties that the appellant owned but in which he did not reside

548 James Hardie submitted that Ms Morgan allowed damages for work to be done at the various properties owned by Mr Werfel (but in which he did not reside), which falls outside the recognised areas covered by *Griffiths v Kerkemeyer* damages. Mr Werfel contended otherwise.

549 It seems to us that the Judge has proceeded upon a misapprehension. *Griffiths v Kerkemeyer* damages compensate a plaintiff such as Mr Werfel for his reasonable need for care and services to be provided to *him*. The provision of services by way of work to be done at various properties has very little to do with meeting the kind of need to which the *Griffiths v Kerkemeyer* principle is directed. Rather, if properties such as these could be said to have been income-producing assets, Mr Werfel's inability to provide services by way of work should have been reflected as an aspect of his earning capacity. To the extent that they might have reflected the provision of services to others, whether they

were recoverable depended on the principle in *Sullivan v Gordon*, to which we return later in these reasons. In our view, they fall outside the scope of a *Sullivan v Gordon* claim, at least as preserved by s 9(3) of the *Dust Diseases Act*. It was in any event erroneous to include these services as part of any assessment of damages pursuant to *Griffiths v Kerkemeyer* because they fell outside the scope of the care and services Mr Werfel personally required by reason of his "need" for care and assistance.

Damages were allowed for costs known to not have been incurred

550 James Hardie contended that Ms Morgan allowed damages for services that it was known would not be incurred. For example, it submitted, Ms Morgan allowed $465 per week for gardening during a period when only $50 per week was paid for the same work undertaken by Mr Werfel's step-father. Similarly, she allowed $68 per hour for car washing when Mr Werfel's children were washing the car. Mr Werfel submitted that the Judge was correct to consider that commercial rates should be used for these services.

551 Respectfully, it is erroneous to award *Griffiths v Kerkemeyer* damages if the evidence demonstrates that the relevant service is being, or will be, met at a cost incurred by the plaintiff. That is a matter which falls outside the *Griffiths v Kerkemeyer* principle and, if it is to be recovered, it is usually recoverable in accordance with ordinary principles.[342] Accordingly, if Mr Werfel incurred a legal liability to meet the weekly cost of gardening which he could no longer perform, then, if that is recoverable, the amount actually paid would ordinarily represent the appropriate measure of his loss. As was said in *Van Gervan v Fenton*:[343]

> It is true that, where the plaintiff has entered into a binding agreement for the provision of the required services, the defendant's liability is confined to the contractual cost of the services unless the cost exceeds the reasonable cost of the services. In such a case, the defendant and not the plaintiff obtains the benefit of any bargain which the plaintiff has acquired in obtaining the services at below market cost.

552 No claim was made in this case for the amounts paid and we express no view about whether the outlays were recoverable in accord with ordinary principles.

553 However, the issue here was also complicated by the fact that the payment was made to a relative who did not live with Mr Werfel and his family. Had the gardening been undertaken gratuitously by a family member living in the household, it may have been open to question whether damages for gratuitous

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[342] Of the kind considered by the High Court in decisions such as *Blundell v Musgrave* (1956) 96 CLR 73, 79-80 (Dixon CJ), 92-94 (Fullager J); and *Sharman v Evans* (1977) 138 CLR 563. It is at least necessary that the expense have been incurred even if not paid. For a time, plaintiffs entered into arrangements, or gave undertakings, to reimburse others for gratuitous services. The undesirability of these arrangements was commented upon by Taylor J in *Wilson v McLeay* (1961) 106 CLR 523 and by Stephen J in *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

[343] *Van Gervan v Fenton* (1992) 175 CLR 327, 334 (Mason CJ, Toohey and McHugh JJ).

services would lie in respect of a service which so clearly benefited the household.

554 Nonetheless, in the course of argument on appeal, Mr Werfel contended that the payment did not reflect the "market cost" of the service. Whilst some evidence was led from Ms Morgan on the point, no evidence appears to have been led from the service provider. No authority was cited.

555 We accept that, depending on the evidence, there may be cases where it is open to contend that even where a service is provided at a cost, it is a markedly discounted cost, in truth provided as a form of charitable subvention. Where the evidence shows that it was never intended that the defendant should benefit from that charitable subvention, the defendant usually remains liable to meet the loss even where the third party has paid or otherwise met the relevant loss or outlay.[344] There was, however, no evidence led from the service provider to show that what was paid was in the nature of charity, or indeed anything other than what the service provider was prepared to accept.

556 In any event, this did not meet the real difficulty that, by the time of trial, Mr Werfel was not shown to have been unable to undertake the relevant service and, in any event, the service was not provided to Mr Werfel personally, but to his household.

557 As the claim was not pressed on the basis of the actual outlays made, and leaving to one side the absence of evidence led from the service provider, recoverability would usually depend upon determining whether or when Mr Werfel would be unable to perform the service, and whether or not it should form part of any award of *Sullivan v Gordon* damages for services which he could no longer provide to others.

Reassessment of past and future gratuitous services

558 For the reasons we have given, it is necessary to consider a reassessment of the damages recoverable under the *Griffiths v Kerkemeyer* principle.

559 We do so having regard to the principles, considerations and evidence already discussed. Nonetheless, the reassessment of *Griffiths v Kerkemeyer* damages is rendered problematic by the high level of generality at which the parties addressed the issues in this case. For example, apart from making the five points already addressed, James Hardie put the following submission to this Court:[345]

> The failure of the Judge to undertake any independent analysis of the evidence and to make any findings relevant to this issue beyond the adoption of Ms Morgan's report,

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[344] See the discussion of *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 by Stephen J in *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

[345] James Hardie's Submissions, [210].

> makes the task now of recalculating *Griffiths v Kerkemeyer* damages very difficult. The appellant stands by the submissions which it made at trial.

560 A consideration of the submissions made at trial reveals that the same five criticisms were made, together with the additional criticism that Ms Morgan "acted like an advocate".[346] However, the thrust of the case made at trial was that Mr Werfel was not relevantly in need because, for example, he was not unable to drive to and from appointments or hospital, and he had resumed his work. So far as past care was concerned, James Hardie submitted that the allowance should be based on an allowance of $200 per week for the first 12-month period ending in August 2018. James Hardie submitted that the past allowance should be no more than $10,400. No reference to any particular evidence was provided.

561 So far as the future was concerned, James Hardie emphasised that Mr Werfel likewise had no inability to perform the tasks claimed, he remained fit and active, riding bikes and doing squats in the gym several times each week. Nonetheless, James Hardie accepted that allowance needed to be made for the risk of a future relapse, and suggested that the allowance should be $25,000.

562 So far as the case for Mr Werfel was concerned, he based his damages claim at trial on Ms Morgan's report, largely replicating the times, rates and calculations she provided in her schedules. So far as the case on appeal was concerned, and as can be seen, Mr Werfel advanced arguments in opposition to the five criticisms made but, as to the assessment, merely said this:[347]

> The calculations in relation to damages submitted by Mr Werfel and which formed the basis of the award, adjusted the claim for care based on the life expectancy proffered by Professor Pitman at trial (and accepted by the Judge). the [sic] adjusted claim was different from that set out in Ms Morgan's report. Further, it is not a valid criticism of Ms Morgan's report, or indeed the award for future care, to highlight the inevitable imprecision which attends calculating such damages.
>
> (Footnote omitted)

563 The difficulty confronting the appeal court in these circumstances is obvious. The absence of adequate reasons is compounded by the apparently convenient method adopted by the parties at trial of eliciting evidence by reference to a medico-legal report which remains the subject of numerous, unresolved criticisms. Having said that, and for good reason, the parties urged that this Court reassess damages rather than remit for reassessment.

564 We are prepared to reassess gratuitous service damages. It is convenient to do so by reference to separate periods. The first period is the first year following diagnosis, which incorporates the periods of treatment, surgeries and hospitalisation between August 2017 and July 2018. The second period incorporates the period of remission to trial between August 2018 and August

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[346] James Hardie's Closing Submissions, [450].
[347] Mr Werfel's Submissions, [164].

2019, and the third period from September 2019 incorporates the balance of the period of remission, then relapse and final illness to the assumed date of death in August 2022. The first two periods are roughly 104 weeks, and the third roughly 156 weeks.

565 Whilst these periods have the appearance of precision, they are merely convenient ways of approaching that which defies precision, particularly the uncertain periods of remission and final illness, as the common law award of damages requires a "once and for all" assessment.[348]

566 In the first year after diagnosis, Mr Werfel was largely unable to work and was admitted to hospital three times. He was debilitated for around six weeks after six weeks of radiotherapy, and for around two weeks after each of the four chemotherapy sessions between January and April 2018. Ms Morgan calculated the care and services associated with hospital admissions, outpatient appointments for radiotherapy and chemotherapy and each time Mr Werfel returned home. Broadly, these claims tallied $61,000 to May 2018 (which loosely corresponds with the first period).

567 Ms Morgan then tallied the claims made for care and services from around May 2018 until August 2019 at Mr Werfel's homes at just over $31,000 (which loosely corresponds with the second period).

568 Each claim is overstated. First, claims are made for all of the time Mrs Werfel spent driving and accompanying Mr Werfel to hospital and to various appointments. Whilst James Hardie attacked all of the attendances in hospital, and the notion that Mr Werfel was unable to drive, and notwithstanding the paucity of evidence, we accept that some assistance was required with some travel, particularly after treatments, and that some limited allowance for travel and company in hospital can be made in accordance with *Wilson v McLeay*.[349]

569 Secondly, for both the first and the second periods, most of the allowances are concerned with services required by the household, such as property and home maintenance, cleaning, laundry, meal preparation and shopping for the family. Some aspects of some of these services may well have been directed to Mr Werfel's needs. Some allowance, necessarily broad, must be made for care given to Mr Werfel. However, at least as presented, the claim addressed the needs of the entire household, or assumed erroneously that Mr Werfel lived alone. As well, significant aspects of these services were previously performed by Mr Werfel and, if recoverable, must be reconsidered under *Sullivan v Gordon*, at least to the extent that what was tabulated reflected what Mr Werfel formerly did for his family.

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[348] *Todorovic v Waller* (1981) 150 CLR 402.
[349] *Wilson v McLeay* (1961) 106 CLR 523, 527-528 (Taylor J).

570 Thirdly, the claims made during the second twelve month period, and part of the third, concern a time when Mr Werfel has been (or will be) in remission, relatively well and able to work and participate in family activities, albeit without the same degree of energy and function.[350]

571 Fourthly, and nevertheless, there is some evidence that Mrs Werfel did provide personal care and services to Mr Werfel alone. One example is the massages she gave him reasonably regularly, a number of times each week.[351] Regrettably, those particular services do not appear in Ms Morgan's tables or in the claims made to the Judge. The evidence is not precise.

572 Having regard to these observations, and the matters to which we have earlier referred, the allowances in favour of Mr Werfel can only be very broad.

573 We would allow around half the amounts claimed for transport and accompanying Mr Werfel to hospital and to various appointments, an amount of $5,000.

574 For the balance of the two-year period, in so far as care and services were provided to Mr Werfel personally, rather than for his family (around 100 weeks), we allow around 10 hours each week at $20 per hour or $200 each week, and a total of $20,000. This is necessarily very broad, given the evidence. It reflects that, in the weeks following treatments in the first year, and for some time until the end of that year, the time spent meeting Mr Werfel's illness-related need for services may have been greater, and that by the time Mr Werfel resumed work and attending the gym in the second year, the time required to meet his needs would have been less. It also allows something for car cleaning.

575 In our view, an appropriate award for the first two years to trial (the first period and the second period) would therefore be $25,000 in lieu of the sum allowed of $92,413.05.

576 So far as the future is concerned, the claim and allowance was $187,862.42 over a period of roughly three years.

577 The underlying assumption made by Ms Morgan, with which the Judge agreed, was that services and care would be required whilst Mr Werfel is in remission until March 2021 (approximately 83 weeks). There would then be a period in which Mr Werfel experienced a recurrence of his mesothelioma. After remission ended Mr Werfel would become increasingly unwell for approximately 39 weeks. There would also be two periods of a week each spent in hospital, and a final four weeks spent in hospice care.

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[350] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [298]-[299].
[351] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [296]-[297].

578 Again, these claims are overstated, particularly in the earlier part of the period.

579 It seems to us that it would be preferable to assume that, after the recurrence of Mr Werfel's mesothelioma, the time during which he will become increasingly unwell will last around 67 weeks, rather than 39 weeks. This makes a total assumed period of 156 weeks rather than around 128 weeks. This broadly corresponds with the estimated three-year life expectancy following the trial.

580 As with past gratuitous services, claims are made for services required by the entire household, such as property and home maintenance, cleaning, laundry, meal preparation and shopping for the family. We accept that Mr Werfel may have some need for illness-related services, but they cannot be confused with what was required to run the household. There is also a question of Mr Werfel's residual capacity to meet his own needs and those of his family. To the extent that services reflect what Mr Werfel was doing for his family and not himself, these must be revisited under any allowance made for *Sullivan v Gordon* damages.

581 Having said that, though not tabulated, allowance must also be made for the fact that Mrs Werfel will provide personal care and services to Mr Werfel alone. That is only likely to increase in the final year before death. In addition, some allowance should be made for transport and company when in hospital or in a hospice under *Wilson v McLeay*.[352] Finally, particularly toward the end of the period, the care and services needed are likely to be professional services, rather than unskilled services, and arranged through an agency, at agency rates.

582 For the first 83 weeks of the final three-year period, when Mr Werfel is likely to remain in remission, we propose to allow an amount similar to the past, or $200 per week for the gratuitous services to be provided to Mr Werfel. We also propose to allow $6,000 for the cost of travel and company in connection with hospital and hospice attendances during a six-week period, in accordance with *Wilson v McLeay*.

583 For the next 41 weeks after recurrence, excluding two weeks spent in hospital, and before the final six months preceding hospice care, we propose to start with the same allowance as for the past ($200 per week for gratuitous services), but add an allowance for additional services associated with assisting with Mr Werfel's increasing debility at five hours a week in the first 31 weeks, and then five hours a week in the next 10 weeks. For the first 31 weeks, this assistance is at award rates ($20 per hour), but for the second part (10 weeks) it is arranged through an agency, at agency rates ($51.07 per hour).

584 For the final six months (or 26 weeks) of the final three-year period (roughly), before the four weeks in hospice care and the assumed date of death, it

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[352] *Wilson v McLeay* (1961) 106 CLR 523, 527-528 (Taylor J).

may be expected that Mr Werfel will become increasingly unwell and in need of professional services and assistance, beyond what it may be expected his family could reasonably provide. In the circumstances, we allow roughly that which was claimed, except we make no allowance for household and property services required by the household generally because, to the extent Mr Werfel has an illness-created need it is allowed for, and to the extent that he formerly provided these types of services to his family, it will be revisited under the allowance to be made for *Sullivan v Gordon* damages. That is, we allow seven hours a week attendant day care (at $51 per hour) and 35 hours per week passive day care ($51 per hour), together with eight hours passive night care ($30 per hour), and one hour active night care ($60 per hour) in the first 13 weeks, and then 21 hours a week attendant day care (at $51 per hour) and 52.5 hours per week passive day care ($51 per hour), together with eight hours passive night care and one and a half hours active night care, and 10.5 hours nursing care ($100 per hour) in the second 13 weeks.

585 One therefore starts with the allowances of $16,600 for gratuitous services and assistance in the first 83 weeks, as well as $6,000 for the *Wilson v McLeay* allowance (which marginally exceeds the cost of travel and visits for the six weeks during hospitalisation and whilst in hospice care), a sub-total of $22,600.

586 The next 41 weeks starts with $200 per week for gratuitous services ($8,200), to which must be added an addition five hours services a week in the first 31 weeks at $20 per hour ($3,100) and, in the final ten weeks, five hours a week at agency rates of $51.07 per hour as Mr Werfel's debility increases ($2,553.50), a total of $13,853.50 (rounded down to $13,850.00).

587 For the final 26 weeks, the tally of the professional care at agency rates is $103,616.50.

588 The total of these allowances for future gratuitous care (which is likely to be provided professionally toward the end of the last three years) is $140,070. After an allowance for contingencies, the award for future care becomes $125,000, rather than the $187,862 allowed by the Judge.

Ground 3.7 – Sullivan v Gordon damages

The Judge's reasons

589 The appellant challenges the award of *Sullivan v Gordon* damages made pursuant to s 9(3) of the *Dust Diseases Act* on the basis that it was manifestly excessive and reflected error. Section 9(3) provides:

> Despite any other Act or law, the District Court or SAET (as the case may be) must, when determining damages in a dust disease action, compensate, as a separate head of damage, any loss or impairment of the injured person's capacity to perform domestic services for another person.

Note—

This section is intended to restore the effect of *Sullivan v Gordon* (1999) 47 NSWLR 319.

590 The Judge made three separate awards pursuant to s 9(3) of the *Dust Diseases Act* – the first was $20,000 for the past loss of Mr Werfel's capacity to perform services for his children, the second was $326,160.64 for the loss of capacity to perform future services to the household, and the third was $260,000 awarded for Mr Werfel's loss of capacity to provide services to his children in the future. In making these awards the Judge reasoned:[353]

> The language of s 9(3) is, by comparison to similar provisions in other states, extraordinarily wide. There are no thresholds, caps, or qualifications. The beneficiary of the services does not need to be a member of Mr Werfel's family or household.
>
> The claim under s 9(3) of the Act is in respect of the domestic services that Mr Werfel would have supplied to his wife and children but for his condition of mesothelioma.
>
> I accept that the measure of the loss or impairment of Mr Werfel's capacity to perform the range of domestic services which he used to provide, should be compensated at the commercial cost of those services.
>
> I will assess Mr Werfel's damages pursuant to section 9(3) on the basis of the commercial cost of replacing those services: *Amaca Pty Limited v Latz*.
>
> I reject Amaca's submission that only an allowance of 2 hours per day should be made.
>
> Mr Werfel made no claim for any past loss of domestic services around the house such as cleaning and home and garden maintenance. This was said to be because credit needs to be given for the overlapping in the claim for *Griffiths v Kerkemeyer* damages for the same period.
>
> The only claim for past loss of services relates to the lost ability to provide services to his children, such as supervision, transport, cooking etc. Despite the fact that Mr Werfel has been unable to resume his previous role in providing these services, he only claims a closed period of 6 months when he was undergoing treatment including multiple surgeries, radiotherapy and chemotherapy. I accept Amaca's submission that the claim for past section 9(3) damages of $39,000 must be trimmed to exclude overnight care. I will award the sum of **$20,000** for this head of damage.
>
> In respect of the future, Mr Werfel claims two categories of lost services. He claims the loss of ability to provide domestic services to his wife and family. This claim has been limited to the "lost years", again to avoid any overlap with the claim for *Griffiths v Kerkemeyer*/paid care damages for the same period and claimed only until Mr Werfel is aged 75. These lost services comprise the household services, both indoor and outdoor that Mr Werfel provided his wife and family. I accept the evidence supporting the claim and I accept that **$326,160.64** is properly claimed for the services claimed for future loss of domestic services.

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[353] *Werfel v Amaca Pty Ltd v The State of South Australia* [2019] SAET 159, [319]-[328].

> The second category comprises the loss of services to Mr Werfel's children. This is claimed from the time that Mr Werfel is expected to suffer a relapse (July 2021) until his youngest daughter will turn 16 years old (8 years). The claim is based on the hourly rates and hours set out in the schedule to Appendix D appropriately discounted.
>
> I accept the submission put on behalf of Amaca that time spent sleeping should be included in this head of damage. I will halve the amount claimed of $525,911.10 and round it to $260,000 for Mr Werfel's loss of capacity to provide services in the future to his children.
>
> (Footnotes omitted)

The parties' submissions

591 James Hardie submitted that the Judge erred in a number of ways.

592 First, there was an absence of any critical analysis of the facts or evidence proving a need for the services to be replaced. For example, the appellant submitted that the Judge had not considered the need to reduce the sum awarded for services to the children to allow for his three children needing less care as they grew up.

593 Secondly, Mr Werfel's calculations were based on the agency rates which were not the appropriate or correct measure of damages for the reasons earlier given concerning gratuitous care. It was contended that the damages awarded did not reflect the true loss because "rather than looking at the real situation as to the services provided by Mr Werfel that they were likely to have been lost, the Judge simply accepted Ms Morgan's estimates and calculations".[354]

594 Thirdly, the Judge did not consider which services currently performed by Mr Werfel were likely to be replaced gratuitously or by commercial contractors if Mr Werfel lost the capacity to perform those services.

595 Finally, the Judge failed to grapple with an important question of principle that had arisen, namely "[a]re s 9(3) damages available when the services were being provided concurrently by two persons, so that nothing will alter in respect of the care which is provided should one person become unable to provide those services?", or, put simply, "[i]s there any *loss* in those circumstances?"[355]

596 Mr Werfel rejected all of these contentions.

Applicable legal principles

597 Sub-section 9(3) is an unusual provision, restoring an extension to the *Griffiths v Kerkemeyer* principle that had long been doubted,[356] before it was

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[354] James Hardie's Written Submissions, [312(c)].
[355] James Hardie's Written Submissions, [214].
[356] *Burnicle v Cutelli* [1982] 2 NSWLR 26; *Maiward v Doyle* [1983] WAR 210; *Weinert v Schmidt* (2002) 84 SASR 307.

finally over-ruled by the High Court in *CSR v Eddy*.[357] In *Amaca Pty Ltd v Latz* Stanley J considered s 9(3) of the *Dust Diseases Act* and explained its scope:[358]

> … As the text of s 9(3) makes clear, what is compensable is the loss or impairment of the plaintiff's capacity to perform domestic services for another person. Damages are not awarded pursuant to s 9(3) for the plaintiff's incapacity to meet his own need for domestic services. The award depends on the loss or reduction of the plaintiff's capacity to provide services of a particular kind, namely domestic services, to another person. The cross-appellant submits that the words of s 9(3) should be construed to give the fullest relief which the fair meaning would allow. "[A]nother person" could be anyone if those words are given their widest amplitude. I do not consider that to be the correct construction of those words as used in s 9(3). Those words take their meaning from the concept of "domestic services". Those domestic services must be services rendered or which would have been rendered to a member of the plaintiff's household, i.e. a person residing in the plaintiff's home. In that way, the concept of domestic services informs the qualification of the person or persons who are or would be the recipient of those services.
>
> While the Note does not form part of the Act it is nonetheless available, like a Second Reading Speech, as an extrinsic aid to interpretation. It can be seen that the term "domestic" imposes some limit on the nature of the services which are compensable. In addition, it also imposes some limit on the identity of the other person referred to in the subsection. The award of damages pursuant to s 9(3) is confined to compensating any loss or impairment of the injured person's capacity to perform such services for a member of the plaintiff's household. It does not extend to compensating for the loss or impairment of the injured person's capacity to perform such services to persons outside his or her household.
>
> To the extent that there is any ambiguity in the phrase "for another person" so as to suggest that the liability for damages pursuant to s 9(3) extends to any loss or impairment of the plaintiff's capacity to perform such services for any other person beyond the plaintiff's household, recourse can be had to the Second Reading Speech and the Note to the subsection.
>
> Consideration of the second reading speech reveal that the mischief towards which s 9(3) is directed is to ensure that care would continue to be provided to dependent children and spouses of persons injured by exposure to a dust disease.
>
> The Note provides that the subsection is intended to restore the effect of *Sullivan v Gordon*. The context in which s 9(3) was enacted was the High Court's decision in *CSR v Eddy* which overruled the decision in *Sullivan v Gordon*.
>
> *Sullivan v Gordon* held that a plaintiff who is rendered unable to provide gratuitous personal or domestic services for another because of personal injury, is entitled to recover as damages an amount calculated by reference to the commercial value of those services. The New South Wales Court of Appeal allowed the recovery of damages for the loss of the capacity of the plaintiff to care for her daughters.

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[357] *CSR v Eddy* (2005) 226 CLR 1, [21]-[27] (Gleeson CJ, Gummow and Heydon JJ).

[358] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [193]-[199] (Stanley J, with whom Hinton J agreed). Whilst *Amaca Pty Ltd v Latz* was subsequently appealed to the High Court, Stanley J's observations with respect to s 9(3) were not the subject of the appeal, see *Amaca Pty Ltd v Latz* (2018) 264 CLR 505.

> I accept that the compensable loss for which *Sullivan v Gordon* damages were, and are to be awarded pursuant to s 9(3), remains the loss to the injured person and is not the loss to the person to whom the services were and are to be provided. Nonetheless, that loss falls to be assessed in damages on the basis of the commercial cost of replacing those services.
>
> (Footnotes omitted)

Consideration

598 The starting point is that, again with respect, the Judge gave almost no explanation for her wholesale adoption of the claims made by Mr Werfel, and almost no reasons for rejecting the arguments of James Hardie. The absence of adequate reasons vitiates this aspect of the assessment.

599 Next, there is an obvious risk of overlap between the claims made for gratuitous services under *Griffiths v Kerkemeyer* and under *Sullivan v Gordon* where the claims are concerned with services formerly provided by the plaintiff to his household.

600 As earlier explained, damages awarded under the *Griffiths v Kerkemeyer* principle are intended to compensate a plaintiff for the care and services gratuitously provided to that plaintiff, not to the plaintiff's household and family. Damages awarded under the *Sullivan v Gordon* extension to the *Griffiths v Kerkemeyer* principle, at least as reflected in s 9(3) of the *Dust Diseases Act*, are intended to compensate a plaintiff for the plaintiff's loss of capacity to perform gratuitous domestic services for any member of the plaintiff's household. The risk of overlapping awards requires particular care in fact-finding, and this requirement was not addressed by the Judge in this case. This also suggests error in the assessments made.

601 Having said that, there was an abandonment of any *Sullivan v Gordon* claim for past services, and services until death, because of a concern about "overlapping" with any allowance made in the *Griffiths v Kerkemeyer* claim for past services and services until death. In part that concession reflected the failure to recognise the difference between the services which Mr Werfel previously provided to his family, and those which Mr Werfel personally required because of his illness-created needs under the *Griffiths v Kerkemeyer* principle. Nonetheless, the way in which the claim was made at trial means that the services which Mr Werfel may have provided in the past, and then in the future until death, must be reconsidered.

602 In these circumstances the award must be set aside. For the reasons earlier given, we are prepared to reassess damages despite the difficulties confronting the appeal court given the absence of adequate reasons and the way in which the evidence was led.

Reassessment of Sullivan v Gordon damages

603 It seems to us that any evaluation of the services which Mr Werfel might, but for his illness, have provided to his family in the past, and before his death, must commence with his evidence about what he formerly did, but could not continue doing. The assessment of the "market cost" of replacing those services must then recognise that Mr Werfel claimed no particular skill or expertise in what he did, and any postulated reasonable market cost or commercial rates must start with award rates rather than agency rates.

604 As for the "lost years", there is an obvious correspondence between this head of lost services and what might have been claimed by way of dependency by Mr Werfel's wife and children (for loss of services rather than financial support) under the South Australian iteration of *Lord Campbell's Act*, ss 22 and 23 of the *Civil Liability Act 1936* (SA).[359] Both kinds of loss will be assessed having regard to the principles that we have earlier outlined, as described in authorities such as *Nguyen v Nguyen*, which was a death case.[360]

605 For the avoidance of any doubt, we make it clear in what follows that we have rejected the calculations undertaken by Ms Morgan. These proceeded on her assessment of what services could or should have been provided, rather than on the evidence given by Mr and Mrs Werfel about the services Mr Werfel in fact provided to his wife and daughters. That is true also of the assumptions Ms Morgan made regarding overnight care, and supervision generally, regarding the children (which the Judge largely, but not completely, rejected anyway[361]). Likewise, we have rejected Ms Morgan's evidence about the use of agency rates because an average award rate represents a reasonable allowance for the "market cost" of the various, unskilled services performed by Mr Werfel for his family.

606 We deal first with the services which Mr Werfel might, but for his illness, have provided to his family in the past and before his death.

607 Mr Werfel estimated that he spent eight to ten hours each week doing "inside work", assisting with domestic chores and the children, and "10 hours per week plus on activities outside".[362] This included time spent doing various things with and for his three daughters, Mia (born 9 February 2009), Alana (born 13 December 2011) and Cadence (born 2 July 2013). It seems that, in addition, Mr Werfel made meals twice each week when his wife worked, and he assisted with meals on weekends.

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[359] See generally Part 5 of the *Civil Liability Act 1936* (SA), "Wrongful acts or neglect causing death", which also permits claims for solatium in an amount of $10,000 by parents as well as spouses or domestic partners.

[360] *Nguyen v Nguyen* (1990) 169 CLR 245, 261-262 (Dawson, Toohey and McHugh JJ).

[361] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [325]: "I accept Amaca's submission that the claim … must be trimmed to exclude overnight care".

[362] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [273]-[275].

608 Whilst an overall average of around 20 hours each week might be thought high, the evidence suggests that, were it not for his illness Mr Werfel was a "hands on" father, and that but for his mesothelioma, Mr Werfel undertook significant, routine outside work. In any event, the Judge accepted Mr Werfel's evidence, and he was not seriously challenged about his estimates.

609 Having said that, we accept that, at least to an extent, it could be said that some of this time must have been devoted to Mr Werfel's own needs. Because the evidence does not allow anything like a precise division between the services which Mr Werfel provided to the household and the services which might have been required for himself, we propose make a broad allowance for this factor.

610 We propose to proceed on the basis that Mr Werfel generally spent around 20 hours each week undertaking various kinds of services required by the household, and that this was largely, but not exclusively, for the benefit of his wife and children.

611 As before, it is necessary to make broad allowances given the way in which the evidence was elicited. The first year after diagnosis appears to be a year when Mr Werfel was largely, but not completely, unable to assist.

612 In the second year, Mr Werfel was better able to assist, but encountered some difficulty with lethargy and the like. In the postulated three years after trial, but before death, that position appears likely to continue until the final period when there is likely to be a recurrence of illness, and steadily increasing debility, until death. Because the evidence about these matters was by no means precise, we are not prepared to assume that during the period of remission Mr Werfel has been, or will be, wholly unable to provide services until there is a recurrence of illness, which is estimated to occur after 83 weeks of remission.

613 From the time of the likely recurrence of illness until postulated death (around 75 weeks), we shall assume that Mr Werfel will rapidly become completely unable to provide services to his wife and children.

614 Accordingly, we propose to proceed on the basis that, in the first year after diagnosis, Mr Werfel was generally unable to provide services at the rate of 20 hours each week. We accept that this estimate is more precise than some of the materials suggest. For example, it is likely that Mr Werfel was not completely incapacitated immediately after diagnosis, and he moved into remission well before the end of the first year. Nonetheless these and other issues remain unclear on the evidence. As there is no suggestion that these were particularly skilled services, despite their undoubted importance to the Werfel family, we refer to our earlier finding and adopt a market cost of $20 per hour as appropriate, making a sub-total of $20,800.

615 In the second year to trial, and then extending for another 83 weeks until the assumed date of recurrence of illness, we shall assume that Mr Werfel was

unable to provide roughly half the services he might otherwise have provided, being 135 weeks, at 10 hours or $200 per week, a sub-total of $27,000.

616 For the final 75 weeks, we shall assume that Mr Werfel will be wholly unable to provide the services that he might otherwise have provided to his family for most, but not all, of that period. We assess the loss of services to Mrs Werfel and their children in that final period at the rate of $200 each week, a sub-total of $30,000.

617 The total of the allowances for Mr Werfel's inability to provide services to members of his household from diagnosis to the assumed date of death becomes $77,800. Having regard to the uncertainties to which we have referred, including the prospect that some of the services would have benefited Mr Werfel alone, we round down that sum and assess the total *Sullivan v Gordon* claim to the assumed date of death at $70,000.

618 For the "lost years", we propose to start with the same assumption as we did for the period before the estimated date of death, namely, that Mr Werfel would, on average, have provided around 20 hours each week to his family, which was largely, but not exclusively, provided for the benefit of Mrs Werfel and their three daughters. Given the uncertainties, and the prospect that some of these services were required by Mr Werfel alone, we shall start with 17 hours each week. However, this estimate necessarily incorporates time spent with the children, and this element of Mr Werfel's services would likely progressively reduce as the children mature until the youngest daughter turns, say, 16 years of age. One might expect that more time during that period would then have been spent providing more services to Mrs Werfel. Nevertheless, over time one might also have expected that, during the "lost years", Mr Werfel would undertake less work in and around the house as he aged.

619 Implicit in this is that we reject the assumptions upon which Ms Morgan and the Judge proceeded. For example, it is unrealistic to assess care and services to the children alone at 50 hours each week, as claimed, or even at half that time, as allowed, when the evidence from Mr Werfel about all of the time he spent on all services did not come close to these estimates.

620 Likewise, by concentrating only on the services Mr Werfel might have provided, there can be no suggestion that all of the care required by the children has been compensated. In addition, in so far as Mrs Werfel might gratuitously undertake more of the services required by her children, she is not mitigating the defendant's loss. The loss or impairment of Mr Werfel's capacity to provide services for his children still sounds in damages under s 9(3) of the *Dust Diseases Act*. Naturally, it will be entirely a matter for Mrs Werfel whether nothing is done to replace the services Mr Werfel would have provided to their daughters, or whether more is done gratuitously by her or others, or whether more is done on a paid basis for their daughters. What Mr Werfel does, or for

that matter what Mrs Werfel does, once damages are awarded, is a matter for them.[363]

621 We shall proceed on the basis that, from the assumed date of death from say August 2022, until the youngest child turns 16 in mid-2029, the services provided for the benefit of Mrs Werfel and their daughters would have averaged 17 hours a week, and until Mr Werfel turned around 75 years of age, the services provided for the benefit of Mrs Werfel and their household would have averaged around eight hours each week. These are necessarily broad estimates, representing an attempt to predict that which may or may not occur. It is not possible to be precise. Again, we shall use the average award rate of $20 per hour.

622 For the first period commencing in two years and ending in nine years the calculation is based on 17 hours, or $340 per week. For the second period commencing in nine years, and ending in 2051, the calculation is based on eight hours at $160 per week. Broadly, these allowances are $105,804.60 and $97,184.26, a total of $202,988.86.[364] After some allowance for contingencies (just over 12 per cent), the allowance for the "lost years" is $175,000.

623 The total for *Sullivan v Gordon* damages under s 9(3) of the *Dust Diseases Act* becomes $245,000, rather than the amounts totalling $606,000 allowed by the Judge.

Ground 3.8 – exemplary damages

The trial Judge's reasons

624 The Judge made an award of exemplary damages of $250,000. The Judge commenced her reasons on this issue by setting out s 9(2) of the *Dust Diseases Act*, which is in the following terms:

> (2) The District Court or SAET (as the case may be) should make an award of exemplary damages in each case against a defendant if it is satisfied that the defendant—
>
> (a) knew that the injured person was at risk of exposure to asbestos dust, or carried on a prescribed industrial or commercial process that resulted in the injured person's exposure to asbestos dust; and
>
> (b) knew, at the time of the injured person's exposure to asbestos dust, that exposure to asbestos dust could result in a dust disease.

625 The Judge then made these findings:[365]

> I am satisfied that Amaca had the requisite knowledge based on the evidence before me.

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[363] *Todorovic v Waller* (1981) 150 CLR 402.
[364] Calculated by reference to the weekly rate, the deferred rate and the number of years using 3 per cent multipliers.
[365] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [345]-[347].

> In assessing the amount of exemplary damages I take into account both the retrospective and the prospective considerations including compensation, punishment and deterrence.
>
> In *Latz*, Justice Stanley found that even though Amaca was not in the business of making and selling asbestos products any more, there was still a role for deterrence. Part of the conduct complained of in this case, however, is still occurring, that is the lack of a warning to the general public concerning the ongoing risk of the dangers of Amaca's product in thousands of Australian homes. Deterrence is therefore a real and relevant factor in the award of exemplary damages to Mr Werfel.
>
> (Citation omitted)

626 The Judge then made a number of general observations, based on various authorities regarding recognised aspects of an award of exemplary damages at common law. Insofar as the Judge referred to James Hardie, this was done at a high level of generality and without specifying what particular evidence the Judge had in mind. For example, the Judge made the following observations:[366]

> Amaca was at the leading edge of knowledge regarding the potentially lethal effects of asbestos dust, even in circumstances where the exposure was small and remote. It knew the risk of mesothelioma in end users for many years before the plaintiff purchased homes containing its products. Despite the concerns of its safety officer, Mr Russell, regarding the absence of a warning to users of its product (in 1963) it took no steps to warn Mr Werfel. The sense of outrage described by Mr Werfel in his evidence is one that fair-minded members of the community would feel. It is these circumstances which set Amaca apart from other defendants ordered to pay exemplary damages under the Act, such as BHP and the State of South Australia.

627 The Judge found that, despite James Hardie's knowledge of the risks associated with the use of its product, it had "withheld such knowledge from end users like Mr Werfel",[367] and, in the absence of evidence from relevant James Hardie personnel to explain why a mailout or a public awareness campaign were not undertaken, she found "that its motive was financial gain".[368]

628 The Judge then found that it was "appropriate in all the circumstances" to award the sum of $250,000 as exemplary damages.[369]

The parties' submissions

629 James Hardie submitted that the Judge was in error to award exemplary damages at all and, alternatively, a modest sum should have been awarded "that better fit the circumstances of the case".[370] James Hardie complained that the Judge failed to consider the particular circumstances of this case and how they bore upon the award of exemplary damages. James Hardie submitted that the Judge "simply picked up and repeated – without attribution or acknowledgement

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366 *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [351].
367 *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [355].
368 *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [355].
369 *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [356].
370 James Hardie's Written Submissions, [216].

– the trial submissions of the respondent",[371] and awarded the precise sum requested by Mr Werfel.

630 James Hardie emphasised that this Court in *Amaca Pty Ltd v Latz* acknowledged that the high award of exemplary damages made in that case might need to be taken into account as a mitigating factor in later cases.[372]

631 James Hardie submitted that the "uncritical adoption" of Mr Werfel's submissions led to error,[373] and by way of example, insofar as there was said to be a continuing breach of duty, "that finding was clearly wrong, and was not based on any case pleaded, let alone proved".[374] James Hardie referred to decisions in other cases where the awards had generally ranged between $20,000 and $35,000.[375]

632 Mr Werfel met these submissions at an equally general level. According to Mr Werfel, the award was "appropriate" and was "well supported in the evidence demonstrating Amaca's appalling conduct".[376] There was "no legal error". In a revealing passage in his written outline, Mr Werfel submitted:[377]

> Amaca has not referred to *Latz* [220]-[221], [224], [225] and [228] where this Court held that the "damning findings" of "egregious" conduct by Amaca "were not only open on the evidence, but justified by the evidence".[378]

633 Mr Werfel relied upon the fact that the impugned conduct reviewed in *Latz* ceased in 1976 or 1977, whereas, in his case, it continued for a further 30 years, and included a failure to run a public awareness campaign "which [James Hardie] concedes … it did not conduct", despite observations about the need for a warning to be given to "the public at large" by the Victorian State Coroner and Mr Jackson QC.[379] Mr Werfel emphasised that the award was directed to the conduct of the defendant towards a particular plaintiff in a particular case, not its conduct generally.[380]

634 As for the observation made by Stanley J in this Court in *Amaca v Latz* about later awards being mitigated by the award made in that case, Mr Werfel countered that his Honour's observation was "implicitly rejected" by the Judge. Mr Werfel emphasised the finding that the impugned conduct was "still

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[371] James Hardie's Written Submissions, [221].
[372] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [230] (Stanley J, with whom Blue and Hinton JJ agreed).
[373] James Hardie's Written Submissions, [119].
[374] James Hardie's Written Submissions, [222].
[375] James Hardie's Written Submissions, [223].
[376] James Hardie's Written Submissions, [176].
[377] James Hardie's Written Submissions, [176].
[378] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [220]-[221], [224], [225] and [228].
[379] Mr Werfel's Written Submissions, [177].
[380] Relying upon what had been said by Judge Gilchrist in *Latz v Amaca Pty Ltd* [2017] SADC 56, [128]: "[M]y task is not to punish Amaca for all of James Hardie's misconduct. If it is to be punished, it will be in connection with the civil wrong that it caused to Mr Latz and no one else".

occurring", with the result that deterrence remained "a real and relevant factor in the award of exemplary damages to Mr Werfel".[381]

635 Mr Werfel relied upon observations made by this Court in *BHP Billiton Ltd v Parker* to the effect that exemplary damages would be "the norm" where the requirements of s 9(2) of the Act are satisfied.[382] As for the amount, Mr Werfel submitted that James Hardie's suggestion that the award should be in the order of $25,000, "one tenth of the exemplary damages awarded to Mr Latz by this Court, is extraordinary".[383] Mr Werfel continued:[384]

> Amaca's knowledge about the dangers of asbestos dust was vast, probably greater than that of any other company, authority or individual in Australia in the relevant era. It knew that people like Mr Werfel would be exposed to asbestos dust as a result of altering or removing *in situ* asbestos products. It knew that people were already dying in increasing numbers as a result of this type of work. It took no steps to inform Mr Werfel of these matters. It diverted significant funds to distance itself from the asbestos problem. It could have used part of its profits to warn those Australians who might come into contact with its products against cutting or drilling them. It remained silent while Australians continued to die.

Applicable legal principles

636 At common law, exemplary damages are awarded against a wrongdoer who is guilty of reprehensible conduct representing, as it is often said, a "contumelious disregard of another's rights".[385] Importantly, they are not intended to compensate. Exemplary damages are intended to punish. They are intended "to serve one or more of the objects of punishment – moral retribution or deterrence".[386] Importantly, as Brennan J explained in *XL Petroleum (NSW) Pty Ltd*:[387]

> As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories.

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[381] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [347].
[382] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [232]-[234] (Doyle CJ and White J).
[383] Mr Werfel's Written Submissions, [183].
[384] Mr Werfel's Written Submissions, [183].
[385] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138 (Taylor J); *Gray v Motor Accident Commission* (1998) 196 CLR 1, [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[386] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J); *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[387] *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471.

637 In *Lamb v Cotogno*, the High Court emphasised the broader purposes behind an award beyond punishment and deterrence, albeit stopping short of compensation:[388]

> It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace … When exemplary damages are awarded in order that a defendant shall not profit from his wrongdoing or even where they are described as a windfall to the plaintiff – … the element of appeasement, if not compensation, is nonetheless present.

638 In *Gray v Motor Accident Commission*, the High Court emphasised that exemplary damages are rarely awarded and, though they recognise and punish fault:[389]

> … not every finding of fault warrants their award. Something more must be found.

639 The High Court in *Gray v Motor Accident Commission* accepted that exemplary damages could not properly be awarded in a case of negligence absent "conscious wrongdoing", and, for that reason, they did not arise in "most negligence cases be they motor accident or other kinds of case".[390]

640 It is against this common law setting that the operation and effect of s 9(2) of the *Dust Diseases Act* must be considered:

> (2) The District Court or SAET (as the case may be) should make an award of exemplary damages in each case against a defendant if it is satisfied that the defendant—
>
> (a) knew that the injured person was at risk of exposure to asbestos dust, or carried on a prescribed industrial or commercial process that resulted in the injured person's exposure to asbestos dust; and
>
> (b) knew, at the time of the injured person's exposure to asbestos dust, that exposure to asbestos dust could result in a dust disease.

641 In *BHP Billiton Ltd v Parker* this Court considered s 9(2) and held that it empowers, but does not mandate, that exemplary damages be awarded when the specified pre-requisites are satisfied.[391]

642 The importance of the decision in *BHP Billiton Ltd v Parker* is that it recognised that s 9(2) "substitutes different criteria", to the effect that "if the defendant is in the defined category and had the requisite knowledge, an award of exemplary damages should be made".[392] Nonetheless, the use of the

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[388] *Lamb v Cotogno* (1987) 164 CLR 1, 9-10 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[389] *Gray v Motor Accident Commission* (1998) 196 CLR 1, [12] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[390] *Gray v Motor Accident Commission* (1998) 196 CLR 1, [22], see also *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, [1204]-[1214] (Gray J).

[391] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [228]-[233] (Doyle CJ and White J). See also *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329, [21] (Blue J, with whom Kourakis CJ agreed).

[392] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [211].

expression "exemplary damages" demonstrated that it was "not intended to alter the common law purpose" of the award, and that exemplary damages "should still be awarded for the punitive and other purposes contemplated by the common law".[393]

643 In rejecting the argument in that case that proof of the tortfeasor's actual knowledge was necessary, Doyle CJ and White J held that s 9(2) must be read "consistently with s 8(2)" of the *Dust Diseases Act* which provides:[394]

> A person who, at a particular time, carried on a prescribed industrial or commercial process that could have resulted in the exposure of another to asbestos dust will be presumed, in the absence of proof to the contrary, to have known at the relevant time that exposure to asbestos dust could result in a dust disease.

644 The Court held that the identical expression used in s 9(2)(b) should be given "the same meaning" as it bears in s 8(2), namely, that any person carrying on a process that could result in the exposure of another to asbestos dust, being any exposure at all, is presumed to know that it could result in a dust disease.[395]

645 Accordingly, the knowledge to which s 9(2) refers includes imputed as well as actual knowledge, and the presumption of knowledge created by s 8(2) is not confined to proof of the liability aspects of a plaintiff's claim, but also to proof of that which is required by s 9(2) to be proved to support an award of exemplary damages.[396]

646 In connection with the requirement that a Judge "should make an award of exemplary damages" if it is satisfied about the existence of the two statutory conditions, the Court in *BHP Billiton Ltd v Parker* accepted that, though an award will usually be made, the Court retains a discretion as to whether an award will be made, even where the statutory criteria are met. Reliance was placed upon the interpretation of the word "should" adopted in *South Australian Housing Trust v Development Assessment Commission* by King CJ, to the effect that the use of the word "should" did not indicate that the award was "mandatory".[397] The Court concluded that the use of the word "should" was "used in less than a mandatory sense but more than simply a permissive sense".[398]

647 The Full Court held that a sound reason not to make an award of exemplary damages would be where the defendant had already been subjected to a criminal sanction for the same breach.[399]

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[393] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [212].
[394] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [224].
[395] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [224]-[225].
[396] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [227].
[397] *South Australian Housing Trust v Development Assessment Commission* (1994) 63 SASR 35, 38.
[398] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [230].
[399] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [231], citing *Gray v Motor Accident Commission* (1998) 196 CLR 1.

648 In summary, the ruling in *BHP Billiton Ltd v Parker* was that s 9(2) established conditions which were sufficient for an award of exemplary damages to be made in a dust diseases action and that, where those circumstances exist, "an award should usually be made". Though there may be circumstances where the Court might exercise the discretion not to make an award, "those circumstances will be outside the norm".[400]

649 The Full Court recognised that the statutory requirement to "usually" make an award of exemplary damages in a dust diseases action would involve an award against a defendant in respect of a breach of duty which will have often occurred decades before, and where the defendant no longer has any involvement with asbestos. That is to say, against a defendant whose conduct does not, in the eye of the common law, presently warrant punishment, and in respect of whom notions of deterrence are of no, or limited, weight.[401] That, however, is the legislative intention. Importantly, the Full Court emphasised that:[402]

> The matters relevant to an assessment of exemplary damages at common law include the defendant's conduct, the need to punish the defendant, and the defendant's size and wealth. The punitive purpose of exemplary damages means that there is no requirement for proportionality between them and the compensatory damages.
>
> …
>
> In general, it is to be expected that awards of exemplary damages under s 9(2) will not be large, at least in those cases in which the court does not regard the defendant's conduct as reprehensible.
>
> (Footnote omitted)

650 In *Amaca Pty Ltd v Latz*, this Court was again required to consider the award of exemplary damages made pursuant to s 9(2), albeit in a case involving the present appellant, which was said to be the first case where an award of exemplary damages had been made against it.[403] The key features of the findings made in *Amaca Pty Ltd v Latz* were as follows:

1. James Hardie is party to a charitable trust which it established to compensate the victims of asbestos disease caused by that company, and by which a fund was established to deal with claims for which James Hardie is liable.[404]

2. The Judge had documentary evidence demonstrating that James Hardie knew about the risk to the health of its workers from asbestos dust by 1938, and this awareness increased over the years. By the early 1960s, James Hardie knew that asbestos sheeting could cause mesothelioma and that the

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[400] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [232].
[401] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [233].
[402] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [237]-[238].
[403] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [218] (Stanley J, with whom Blue and Hinton JJ agreed).
[404] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [219].

users of those products were at risk of developing that disease, but it made a conscious choice not to alert the public about that. By 1976, James Hardie knew of precautions that could be taken to minimise the risk of contracting asbestos related diseases as a result of cutting asbestos products and it implemented precautions for its own workforce.[405]

3. In 1963, a safety officer with James Hardie met with senior executives and raised concerns about the threat posed by the company's products as a result of cutting cement sheets made with asbestos. He suggested that those products be labelled. He also suggested that the company had a moral obligation not to give those who used James Hardie products the impression that there was no problem with asbestos. A senior executive and the company physician told the safety officer that, once a product had been sold, the company had no further obligation.[406]

4. In 1966, an executive of James Hardie referred to a newspaper article describing the lethal effects of mesothelioma and was concerned about "this sort of information getting around Australia". That same year, James Hardie's industrial physician addressed a conference of factor managers and told them that exposure to asbestos was dangerous and cumulative, and that it caused asbestosis and cancer. For commercial reasons, James Hardie continued to manufacture, market and sell asbestos products, including asbestos sheeting.[407]

5. James Hardie's conduct occurred in a context where it was fully informed about the lethal dangers of asbestos but did not warn its customers about the potential harm associated with using its products, and failed to advise of the known precautions that might have been used to minimise the harm. Stanley J found that this conduct "amounted to reckless indifference".[408]

651 Stanley J concluded in *Amaca Pty Ltd v Latz*:[409]

> The judge considered that the evidence gave rise to the irresistible inference that the company put profit ahead of public safety and was anything but a model corporate citizen. It was motivated in doing so by its thirst for profit which it valued ahead of the [plaintiff's] safety. While the judge considered that this conduct in the 1970s was less egregious than it would be today, it is implicit in that finding that he nonetheless considered that James Hardie's conduct at that time was egregious. These are damning findings.

652 Stanley J considered that these findings were sufficient to enable the conclusion that the conduct in *Amaca v Latz* was distinguishable from the

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[405] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [220].
[406] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [221].
[407] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [221].
[408] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [224].
[409] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [224].

conduct proved in *Parker*, because it was "of a reprehensible kind".[410] After allowing for the restraint traditionally exercised when awarding exemplary damages,[411] damages were re-assessed in an amount of $250,000. Stanley J concluded:[412]

> In assessing damages I am conscious that the purpose of the award is to punish [James Hardie], provide retribution, act as a deterrent to [James Hardie] and others minded to behave in a similar way and demonstrate the Court's disapproval of that conduct. In circumstances where this is a statutory award of exemplary damages made in the context of the Act, I accept that the need for deterrence is limited …

Consideration

653 The Judge made a finding in this case that there existed "the requisite knowledge", but she did not explain that finding.[413] That is significant because that finding is capable of being viewed as a finding of imputed knowledge, rather than one of actual knowledge.

654 Whilst a finding of imputed knowledge is sufficient to support the making of an award of exemplary damages under the *Dust Diseases Act*, the extent of the award will be affected by whether there is proof of actual, or only imputed, knowledge. In addition, the Judge did not explicitly find that the conduct of James Hardie was "reprehensible", although she did single it out from the conduct of other defendants who had been ordered to pay exemplary damages under the *Dust Diseases Act*.[414]

655 Whilst the Judge was perfectly entitled to draw upon her earlier findings without repeating them, it will usually be necessary for a Judge to at least specify what those findings were, if not where they were made, earlier in the reasons. The Judge's failure to specify her findings has the effect that this Court is left to speculate about what the Judge had in mind.

656 That absence of precision in the finding of knowledge is particularly important in this case, because there were a number of different bases upon which liability was pressed, and each raised different considerations regarding the conduct and state of knowledge of James Hardie at varying times. That is a particular difficulty in this case, because the period postulated for liability in negligence spans decades.

657 Quite apart from the fact that we have set aside most of the findings made by the Judge concerning liability in negligence, the Judge's failure to precisely identify the basis upon which she was satisfied that James Hardie had "the

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[410] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 [225].

[411] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [226]-[228], citing *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 463, *Johnstone v Stewart* [1968] SASR 142, 146, *Backwell v AAA* (1997) 1 VR 182; *TCN Channel 9 Pty Ltd v Anning* (2002) 54 NSWLR 333, [185].

[412] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [229].

[413] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [345].

[414] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [345], [351].

requisite knowledge", and when James Hardie had that knowledge, suggests inadequate reasoning.

658 In addition, the references to the previous decision of this Court in *Latz v Amaca*, and the use of the same award of exemplary damages as was made in that case, without addressing the parties' submissions concerning the utility or otherwise of the award made in that case, also suggests an inadequate reasoning process. In short, *Latz v Amaca* appears to have been inappropriately used as a template without justification or explanation.

659 As may be obvious from the findings earlier made in this case, even if one was to make the same assumptions that were made in *Amaca v Latz* about the knowledge James Hardie possessed regarding its products generally, Mr Werfel is not in the same category as Mr Latz. Mr Werfel is in a different class of potential claimants. Mr Werfel is a person who worked on James Hardie products some considerable time after they were first installed, as well as only after he purchased properties in which they had been installed, many years before. These obvious differences demonstrate the lack of utility of using the award made in *Latz v Amaca* as a template in a case raising different circumstances, and in which the findings of negligence cannot be equated.

660 Accordingly, the award should be set aside, and liability for exemplary damages reconsidered.

Reassessment of exemplary damages

661 We start with the proposition that the statutory preconditions for the making of an award of exemplary damages have been satisfied. James Hardie did not suggest that the requirements of s 8(2) and s 9(2) were not satisfied in this case. Starting with s 8(2) of the *Dust Diseases Act*[415]*:*

> A person who, at a particular time, carried on a prescribed industrial or commercial process that could have resulted in the exposure of another to asbestos dust will be presumed, in the absence of proof to the contrary, to have known at the relevant time that exposure to asbestos dust could result in a dust disease.

662 That is, during the relevant period, James Hardie carried on a prescribed industrial or commercial process that could have resulted in the exposure of another to asbestos dust, and is presumed to know that exposure to asbestos dust could result in a dust disease.

663 Next, turning to s 9(2)(a) of the *Dust Diseases Act*, James Hardie knew that Mr Werfel was in a class of people who would likely work on its products, years after they were installed, and was therefore at risk of exposure to asbestos dust. As for s 9(2)(b) of the *Dust Diseases Act*, James Hardie knew, at the time of

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[415] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [224] (Doyle CJ and White J), see also the *Dust Diseases Regulations 2006.*

Mr Werfel's exposure to asbestos dust, that exposure to asbestos dust could result in a dust disease.

664 Accordingly, the "District Court or SAET (as the case may be) should make an award of exemplary damages in each case against" James Hardie. Whilst we are not required to make an award, making an award will be "the norm", absent a contrary indication.[416]

665 When evaluating the extent of the award, we start with the absence of a finding made by the Judge about deliberate or conscious wrongdoing by James Hardie which was directed at Mr Werfel, or any other person in the class of which he is a member. Whilst that would preclude an award at common law, under the *Dust Diseases Act* it is a moderating factor. James Hardie is still to be punished for what it is deemed to have known and, in effect, for what it should have done, or refrained from doing, by way of negligent conduct.

666 Nevertheless, the Judge described the conduct of James Hardie in terms that suggested that it was worse than other defendants who had been ordered to pay exemplary damages under the *Dust Diseases Act*.[417] Whilst that is relevant, it is difficult to know exactly what the Judge had in mind when making the comparison. The only precise finding referred to by the Judge was the evidence regarding the concerns of the safety officer, Mr Russell, "regarding the absence of a warning to end users" in 1963.[418] That evidence was not otherwise referred to by the Judge in her reasons. This fact tends to reinforce the inadequacy of the reasons for decision on this topic generally.

667 The documentary evidence before the Judge demonstrated that a safety officer, Mr Russell, raised concerns in 1963, at a meeting of senior executives, about the release of asbestos dust when James Hardie products were cut. Mr Russell suggested that James Hardie products should be labelled because the company had a "moral obligation" to avoid giving the impression that James Hardie products were safe. A senior executive and the company physician countered that, after sale, the company had no further obligation.[419]

668 Whatever the justifiable indignation one might feel about this conduct well over half a century after it occurred, James Hardie has not been found liable to Mr Werfel on the basis of any failure to label its products.

669 Where a plaintiff wishes to bring to account, in addition to the statutory preconditions, any common law considerations which have been recognised as relevant to an award of exemplary damages, the burden remains with the plaintiff to adduce evidence and to prove those matters which it is said demonstrate a basis for punishment and condemnation. Whilst, in a general sense, one may

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[416] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [232] (Blue J, with whom Kourakis CJ agreed).
[417] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [351].
[418] *Werfel v Amaca Pty Ltd v The State of South Australia Pty Ltd* [2019] SAET 159, [351].
[419] This evidence was relied on in *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [221].

wish to punish and condemn James Hardie for its conduct, the award in favour of Mr Werfel must focus on the circumstances of its negligent conduct towards Mr Werfel, or the class of which he is a member, and identify exactly what it is about that negligent conduct that is deserving of punishment and condemnation.

670 That is, if a plaintiff wishes to demonstrate why at common law an award of exemplary damages ought be made, proof must start with the particular negligence finding made against the defendant, and then identify what it is about that conduct, necessarily beyond the statutory preconditions supplied by a combination of s 9 and 8 of the *Dust Diseases Act*, which justifies an award.

671 In this case, the finding is of a negligent failure by James Hardie to embark on a campaign which warned the public about the dangers of working with its products without taking precautions. That is conduct which extended over many years and, whilst it is deserving of condemnation, the Judge did not describe it as reprehensible. As well, it is difficult to categorise it as necessarily conscious and deliberate, though it potentially affected various classes of claimants within the Australian community who might have come into contact with James Hardie products, not merely the class of which Mr Werfel is a member.

672 This raises a further, difficult issue. In *Amaca v Latz* Stanley J (with whom Blue and Hinton JJ agreed) explained the award of $250,000 made in that case in the following terms, remembering of course that the award was sustained by different liability findings:[420]

> In assessing damages I am conscious that the purpose of the award is to punish [James Hardie], provide retribution, act as a deterrent to [James Hardie] and others minded to behave in a similar way and demonstrate the court's disapproval of that conduct. In circumstances where this is a statutory award of exemplary damages made in the context of the Act, I accept that the need for deterrence is limited to [James Hardie] and others who might be liable for claims pursuant to the Act. I accept that James Hardie is no longer manufacturing and selling asbestos products. Accordingly, the role of deterrence is further circumscribed, but others are still engaged in businesses which involve the handling of asbestos. Accordingly there is still a role for general deterrence in an award of exemplary damages. In any event, the award of exemplary damages is not confined to deterrence. The award exists to punish the cross-respondent, to provide retribution and to demonstrate the court's disapproval of the cross-respondent's conduct. Those factors loom large in this case.

673 Then, with respect, in a somewhat Delphic fashion, his Honour cautioned:[421]

> In that regard, I am conscious that Amaca might be exposed to further actions in the future in which a claim for exemplary damages could be made. This is the first award of exemplary damages made against the cross-respondent. It is for courts in the future who may have to assess a claim for exemplary damages to determine whether, if an award of such damages is to be made, it should be mitigated because of any earlier award made

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[420] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [229].
[421] *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [230].

against the cross-respondent for exemplary damages for the conduct which justified the award in this case.

674 Plainly what the Full Court in *Amaca v Latz* had in mind is that a relevant consideration when assessing exemplary damages is that there must be a conclusion to punishment, and that there may come a time when lesser awards ought be made before punishment is complete. An example of this type of consideration is the recognised principle that, even where an award of exemplary damages could be made, it will not be made if the defendant has already been subjected to an appropriate criminal sanction for the same breach.[422] That is, the defendant is not to be punished twice.

675 The concept of "mitigation" used in the passage cited from *Amaca v Latz* implies that the defendant's fault or wrongdoing has generally been ascertained, and that the end point or outer limit of proper punishment has been identified, against which each, successive award can be measured. So, in a case where a plaintiff's damages are assessed, but it is found that there was an unreasonable failure by the plaintiff to mitigate by unreasonably failing to undergo treatment,[423] or that some conduct by the defendant relevantly mitigates a plaintiff's loss,[424] the entire award is not made and some lesser award may be made having regard to the effect of the mitigation on the entire loss.

676 However, that approach does not easily fit *Amaca v Latz*, or the circumstances before this Court under the *Dust Diseases Act*. There was no suggestion in *Amaca v Latz* that the award of $250,000 could be equated to criminal punishment which wholly met the purpose of an award of exemplary damages and its associated purposes of punishment, retribution and the like in respect of all potential claimants. The Full Court in *Amaca v Latz* was not intending to punish James Hardie for all of the conduct which might be thought to be deserving of punishment in respect of all potential claimants. It was concerned only with Mr Latz who, on the evidence, was exposed to asbestos dust and fibre during the building, construction and renovation of his house between 1976 and 1977. He initially inhaled asbestos dust when cleaning up the site after construction, and he did so again when cutting to size and fitting asbestos sheets when he erected a fence shortly after his house was built.[425]

677 Neither party before us attempted the task, no doubt difficult, of explaining, still less proving, the outer limit of James Hardie's potential liability in respect of all potential claimants. Presumably there is up to date actuarial and statistical

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[422] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [231] (Doyle CJ and White J), referring to *Gray v Motor Accident Commission* (1998) 196 CLR 1.

[423] See, for example, *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345, 350 (the Court), where treatment was refused. See also *Fox v Wood* (1981) 148 CLR 438, 445-447 (Brennan J), where the receipt of workers compensation was regarded as mitigating loss, and the costs reasonably incurred in doing so (payment of income taxation on workers compensation) were recoverable.

[424] Such as an apology in a defamation case, which mitigates the damages award, *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 66 (Mason CJ, Deane, Dawson and Gaudron JJ).

[425] *Latz v Amaca* [2017] SADC 56, [3] (Judge Gilchrist).

evidence similar to that which was placed before Mr Jackson QC for the purposes of his inquiry. It seems unlikely in the extreme that this case and the case of *Amaca v Latz* will be the only cases in which awards for exemplary damages will be made against James Hardie under the *Dust Diseases Act*.

678 However absent a confident appreciation of the number and size of each of the classes of potential claimants, as might be undertaken in a class action, it is simply not possible for this Court to have any real understanding of the outer limits of this defendant's potential liability. This Court has no material with which it is able to estimate or assess the time at which a full appreciation of the liability of James Hardie will be known, and no means of evaluating when, if ever, later exemplary damages awards might be mitigated by awards already made, even in respect of identical conduct.

679 The Court is not making an award other than in favour of the particular plaintiff before it, and it is not necessarily addressing all of the recognised common law purposes behind an award of exemplary damages where the wrongdoing ceased some time ago, and it is, at least, unlikely that others remain to be deterred from manufacturing and supplying products containing asbestos. Having said that, though Mr Werfel has not succeeded with respect to the case mounted on manufacture and supply, he has succeeded with respect to a failure to warn, and so there remains some scope to bring to account deterrence. These considerations, and the fact that the award is made pursuant to statutory criteria which require that awards will usually be made even where the common law criteria are absent, suggest that the focus must remain on each particular plaintiff and be characterised by moderation.

680 If the statutory criteria necessary for the making of an award of exemplary damages under s 9(2) of the *Dust Diseases Act* are made out, and the Court is considering whether to make an award, and in what amount, we are, with respect, unable to see any "bright line" between cases where the conduct can be described as "reprehensible", and those where it might otherwise be described, for example, as deserving of punishment or condemnation.[426] Many, perhaps most cases where the defendant is liable to an award under s 9(2) of the *Dust Diseases Act* could, in a general sense, be described as "reprehensible". That does not, standing alone, say very much about whether or in what amount exemplary damages should be awarded.

681 The first question is whether the statutory requirements are made out. If they are, then an award will usually be made, as was explained in *BHP Billiton Ltd v Parker*.[427] It will be a separate and additional question whether the case is one where the common law criteria for an award of exemplary damages are also made out. The answer to that question will primarily be relevant to the size of the exemplary damages award. That question will be addressed by the usual

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[426] Cf *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, [225].
[427] *BHP Billiton Ltd v Parker* (20122) 113 SASR 206.

common law criteria, particularly whether there has been conscious wrongdoing in contumelious disregard of the plaintiff's rights and interests. As we have explained, that was not the finding made by the Judge in this case. No actual knowledge or deliberate wrongdoing featured in any findings made which are referable to the ground upon which James Hardie has been found negligent in this case.

682 In these circumstances, the award of damages to be made under s 9(2) of the *Dust Diseases Act* must in this case focus upon and be directed to the circumstances of Mr Werfel and the class of which he forms a part. Whilst the conduct of James Hardie is deserving of condemnation, the common law criteria for the making of an award of exemplary damages have not been made out. James Hardie may be punished again by further awards yet to be made under s 9(2) of the *Dust Diseases Act*. The award must, we think, therefore be characterised by moderation.

683 In our view, an appropriate award of exemplary damages in the circumstances of this case would be $35,000.

Conclusions on damages

684 We have indicated the assessments of damages that we propose to make on reassessment, for the reasons we have given. Nonetheless we have also reflected on the overall damages award in contemplation. In our view, it represents a reasonable allowance for the loss and damage sustained by Mr Werfel.

685 Allowance must be made for interest on past losses.

686 It is usual to apply interest over half the period to judgment so as to reflect the accruing nature of the loss.[428] On pain and suffering and loss of amenities, we apportion $175,000 of the $280,000 awarded to the past, and allow interest at 4 per cent. Accordingly, we allow the sum of $7,000.[429]

687 For past gratuitous services provided to Mr Werfel, the calculation must be at commercial rates.[430] The Judge used a rate of 6.5 per cent. Accordingly, the interest awarded on the $25,000 award for past gratuitous services is $1,625. For past *Sullivan v Gordon* damages in respect of the services that Mr Werfel would have provided to Mrs Werfel and their daughters, the allowance to trial is, for the first year, $20,800 and, for the second year until recurrence, $27,000. At a rate of 6.5 per cent the allowance becomes $3,107.

688 Accordingly, we set aside the Judge's assessment and substitute the following award of damages:

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[428] *Wheeler v Page* (1982) 31 SASR 1.
[429] Section 30C, *Supreme Court Act 1935*, *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657; *Wheeler v Page* (1982) 31 SASR 1, 6 (King CJ (with whom Jacobs and Prior JJ agreed).
[430] *Grincelis v House* (2000) 201 CLR 321.

Pain and suffering and loss of enjoyment of life	$280,000
Interest on past pain and suffering	$7,000
Loss of expectation of life	$20,000
Past economic loss and interest	$23,817
Future economic loss – the lost years	$1,300,000
Past medical expenses	$12,034
Future medical expenses	$150,895
Past gratuitous services to Mr Werfel	$25,000
Interest on past gratuitous services	$1,625
Future gratuitous services to Mr Werfel	$125,000
Sullivan v Gordon damages – including the lost years	$245,000
Interest on past *Sullivan v Gordon* damages	$3,107
Exemplary damages	$35,000
Total	**$2,228,478**

Final conclusion

689 The appeal against liability is dismissed. The appeal against damages is allowed in part. The Judge's award of $3,077,187 is set aside and replaced with an award of $2,228,478.

690 We will hear from the parties regarding the appropriate form of the orders to be made and as to costs.

Appendix: James Hardie – corporate structures and financial capacity

James Hardie was one of a group of companies, the shares in which were wholly or largely owned by James Hardie Industries Ltd (**JHIL**). James Hardie was a manufacturer and wholesaler of asbestos products generally and, relevantly to this matter, of asbestos-cement home building products in particular. It was one of the main operating companies of the companies controlled by JHIL (**the James Hardie Group**). James Hardie wound down its asbestos production in the 1980s, and finally ceased production and distribution in 1987.

In 2001 the James Hardie Group established the Medical Research and Compensation Foundation (**the MRCF**), to make provision for personal injury claims arising out of its asbestos operations. On 27 February 2004, an inquiry into the establishment and operation of the MRCF was initiated under s 4(1) of the *Special Commissions of Inquiry Act 1983* (NSW) (**The Inquiry**). Mr DF Jackson QC was the appointed commissioner. The report was received into evidence at Mr Werfel's trial. The facts set out in this section are drawn from that report.

The MRCF became the shareholder of Amaca Pty Ltd, which was then the name of James Hardie and of another company in the James Hardie Group then known as Amaba Pty Ltd (**Amaba**). In this judgment, the corporation which was first named James Hardie and later changed its name to Amaca Pty Ltd has been referred to as James Hardie. The net assets of both corporations as of 30 June 2004 were $179.2 million but were acquired by the foundation for no monetary consideration. Over time, JHIL made further contributions to the MRCF so that the value, as at the time of the Commissioner's report, of the total assets acquired by it, were $293 million. Even though an amount of $63.01 million was set aside against those assets to meet currently notified asbestos-related claims, Commissioner Jackson estimated the net present value of all future claims to be $1.5 billion. Commissioner Jackson found that the estimate of future liabilities, on the basis of which the MRCF was first funded, was calculated from overly favourable assumptions. Certain claims which James Hardie and Amaba might have against insurance companies was found to have a net present value of about $160 million. Commissioner Jackson found that MRCF's funds would be exhausted by 2007 if its funds were not augmented.

In October 2001, a scheme of arrangement was approved whereby the holding company of the James Hardie Group became James Hardie Industries NV (**JHI NV**), a Dutch company. The shareholders of JHIL became shareholders in JHI NV. The shares held by JHI NV in JHIL were only partially paid-up; JHIL was entitled to make a call for up to $1.9 billion if it were necessary for it to do so in order to maintain its solvency.

In March 2003, JHI NV and JHIL agreed to cancel the partly paid up shares. A new Foundation (**the ABN 60 Foundation**) then became the sole

shareholder of JHIL. At the time of that reconstruction, the net assets of JHIL were about $20 million. For some time after the establishment of the MRCF, the James Hardie Group refused to substantially increase its funding of the MRCF. In his report, Commissioner Jackson observed that there was no legal obligation on JHIL to fund the liabilities of James Hardie and Amaba simply because they were subsidiaries, but recognised the commercial interest of JHIL in making adequate provision for those liabilities. In a discussion which bears both on the commerciality of a large business accepting its product liability responsibilities and moving on, and on the public policy tensions between profit and responsibility for product liability which must be resolved within the law of negligence, Commissioner Jackson observed:

> The James Hardie Group has also indicated, subject to various matters dealt with in discussing Term of Reference 4 (including that it is under no legal obligation to do so), that it is prepared to fund the future asbestos liabilities of Amaca, Amaba and JHIL. In my opinion it is right that it should do so. There may have been no legal obligation on JHIL to fund the liabilities of Amaca and Amaba simply because they were its subsidiaries, but if it were thought, in the interests of JHIL, for it to be separated from those subsidiaries because of the shadow of asbestos liabilities they brought with them, it is hard to see why it would not have been in the interests of JHIL to provide the funding which was necessary to enable that to be done effectively. To do it effectively meant to do it in a way which would not result in the issue rearing its head again, as has happened here, with very adverse results to the public standing of James Hardie. If the interests of JHIL's shareholders were thought to lie in cutting loose the asbestos liabilities, what seems to have been overlooked, is what Mr Peter Shafron (the Group' Chief General Counsel) had said to the Board some twelve months before in his paper "Asbestos":
>
> > 'The overall US experience on reorganisations, as described by JH's US attorneys, has some admittedly fairly obvious lessons for us:
> >
> > > In sum, the US experience has shown thus far that a carefully planned reorganisation that makes fair provision for the asbestos claims has some chance of succeeding. But any attempt at reorganisation that does not leave significant assets for the asbestos claims will, at a minimum, spawn lengthy and costly litigation with the plaintiffs' bar, and may ultimately be unsuccessful.'
>
> I add two observations.
>
> The first is that I can understand how, the manufacture of asbestos products having ceased in the 1980s (finally in 1987), asbestos liabilities came to be described within the James Hardie Group as 'legacy issues' or part of the 'rump'. That mode of thought, however, tends to obscure the true legal situation. The negligence of the James Hardie companies occurred in the past, but the liabilities flowing from that negligence only arise day by day, now and in the future, as the diseases are acquired or manifest themselves. The exposure to asbestos may not even yet have occurred. The position in February 2001 was, as it remains, that members of the public will contract asbestos-related diseases over many years because of the negligence of Amaca and Amaba. The notion that the holding company would make the cheapest provision thought 'marketable' in respect of those liabilities so that it could go off to pursue its other more lucrative interests insulated from those liabilities is singularly unattractive. Why should the victims and the public bear the cost not provided for?

(Citations omitted)

The third term of reference of the Inquiry was to consider the circumstances in which any corporate reconstruction or asset transfers occurred, within, or in relation, to the James Hardie Group, prior to the separation of MRCF from James Hardie Group to the extent that this may have affected the ability of MRCF to meet its current and future asbestos-related liabilities. The effect on the ability of the MRCF to meet its future liabilities is, of course, not relevant to these proceedings. However, the evidence received by the Inquiry disclosed the financial resources available to James Hardie, out of which provision could have been made to fund its liabilities, or warn of the danger of asbestos products, in order to reduce those liabilities.

In 1995 James Hardie sold its core technology to a dedicated research and development company in the James Hardie Group for $75 million. In the same year, it sold other business entities for a net profit of $38.255 million.

James Hardie's operating profit before income tax for the year ending 31 March 1996 was $109,369,000. There were retained profits of $57,775,000. After adjustments for income tax, and taking into account certain abnormal items, its total operating profit was $110,195,000. After an adjustment for a change in accounting policy, the total available for appropriation was $166,734,000. Two dividends were paid totalling $100,900,000 during that year to JHIL or other companies in the James Hardie Group.

In the following financial year, James Hardie paid JHIL $43.5 million.

James Hardie ceased to be an operating company in 1998, when its business was sold to JHI NV and its real estate was leased to another company or companies in the James Hardie Group.