OUTER HOUSE, COURT OF SESSION

[2026] CSOH 34

PD163/25

OPINION OF LORD HARROWER

in the cause

JOHN REID

Pursuer

against

MCM BUILDING & CIVIL ENGINEERING CONSTRUCTION LIMITED

First Defender

and

PYRAMID JOINERY & CONSTRUCTION LIMITED

Second Defender

Pursuer: C Wilson KC, Mutapi; Digby Brown LLP
First Defender: McNaughtan KC, Rolfe; DAC Beachcroft Scotland LLP
Second Defender: N MacKenzie KC, D Blair; Kennedys Scotland

1 April 2026

Introduction

[1] The pursuer is John Reid. He is a former labourer. The first defender is MCM Building & Civil Engineering Construction Ltd. The second defender is Pyramid Joinery & Construction Ltd. Between 1999 and 2003, the pursuer worked for the defenders on construction sites. He is now 53 years' old. In the summer of 2024, he was diagnosed with pleural mesothelioma. In the present action, he alleges that his illness was caused or

materially contributed to by asbestos dust or fibres to which he was negligently exposed during his employment with each of the defenders. The case called before me at a proof before answer, restricted to the question of liability.

Agreed facts

[2] The parties entered into a joint minute further limiting the scope of the proof. It was admitted that the pursuer suffers from mesothelioma. It was admitted that the first defender was involved in general construction and civil engineering works, and that the pursuer was employed by it during the tax year 1999 to 2000. It was further admitted that the second defender carried out window and door replacement work for local authorities, and that the pursuer was employed by it between the tax years 2000/2001 and 2002/2003. Each of the defenders admits that at the time of the pursuer's employment with them, it knew or ought to have known that exposure to asbestos dust and fibres was dangerous and carried a high risk of a person so exposed developing an asbestos-related lung condition. In the joint minute, the first defender had been prepared to agree that only an exposure to asbestos that the court accepted was more than *de minimis* would have been sufficient to cause mesothelioma. However, at the conclusion of the evidence, I was informed that the first defender no longer sought to advance any such argument. Accordingly, so far as causation is concerned, it was conceded on behalf of each defender that, if the pursuer established that he had been exposed to asbestos while working with it, then such exposure would have been sufficient to cause a material increase in the risk of his development of mesothelioma.

[3] As a result, I did not require to consider the sort of issue that had troubled the court in *Bannister* v *Freemans plc* [2020] EWHC 1256 (QB), and in *Kerr* v *Midlothian Council* [2024]

CSOH 112, regarding whether numerically low cumulative lifetime occupational exposure to asbestos could properly be described as material. Rather, it was agreed that the only issues at proof were (1) whether the pursuer was exposed to asbestos while employed by either or both of the defenders, and (2) if exposed to asbestos by both defenders, how liability should be apportioned between them.

Evidence

[4] In addition to the pursuer himself, I heard from Hugh Wright and Peter Wright, who worked with the pursuer for the second defender, and from Bernard Dunne, managing director of the second defender. I also heard expert evidence from Kevin Blyth, a professor of respiratory medicine and consultant respiratory physician, and from Tina Conroy, an occupational hygienist.

[5] On the first day of the proof, Mr McNaughtan sought leave to lodge late productions, in terms of RCS 43.8 which allows the court to vary the timetable for lodging documents, on cause shown. The productions consisted of an expert report from an occupational hygienist, an article by Hodgson and Darnton on the risks of developing mesothelioma on exposure to asbestos (2000), and three guidance notes from the Health and Safety Executive. The explanation offered was the fact that the first defender had no indication, other than what was on record, of what the pursuer's evidence might be, until a commission took place in November 2025. There had also been a delay in getting notes of the commission to the occupational therapist in order to allow her to complete her report. That report, it was suggested, would assist the court with regard to any apportionment of liability between the defenders that might be required.

[6] The motion was opposed in its entirety by counsel for the second defender, and in relation to the Hodgson and Darnton study only by counsel for the pursuer, on the basis that it came too late, it had not been explained to what use the documents would be put, and their late admission would cause prejudice to these other parties. In relation specifically to the Hodgson and Darnton study, although regularly cited in asbestos litigation, Mr McKenzie pointed out that its introduction at this late stage suggested that Mr McNaughtan intended to argue that any asbestos to which the pursuer might have been exposed while working for the first defender was *de minimis.* He had no record for that line of argument, and he should not be permitted to raise it now. I refused the first defender's motion on the basis that it came too late and that, if allowed, it would prejudice the other parties.

The pursuer

[7] The pursuer was born on 4 April 1972. He swore an affidavit on 3 November 2025, the contents of which he adopted as his evidence without objection. In it, he provided a detailed account of his employment history and identified instances of asbestos exposure throughout his career.

[8] He entered the workforce in 1988 at age 16, beginning at Allied Timber in Coatbridge via a youth training scheme. He remained there until approximately 1994, when he moved to Gavin Shanks & Sons Ltd, a subsidiary of the same company. His roles involved timber processing, specifically manufacturing pallets, sheds, and fence panels. While the factory roof contained asbestos, he did not recall any maintenance work that would have caused exposure during this time.

[9] Throughout the mid-to-late 1990s, Mr Reid worked as a labourer for various construction firms, including Cruden Building Renewals Ltd and WJ Harte Construction Ltd. His work for these companies primarily involved new-build housing where asbestos was no longer in use; consequently, he did not believe he was exposed during this period.

[10] The first significant exposure occurred between 1999 and 2000 while employed by the first defender. Working under the first defender's director, Ian Marshall, the pursuer served as a labourer and later a ganger. The company specialised in remedial work following property damage. He recalled a specific week-long project in Glasgow in which Mr Marshall instructed him and his colleagues to remove the corrugated asbestos roofing from a row of four concrete garages and replace it with modern OSB ("oriented strand board") sheets. The asbestos sheets, approximately 10mm thick, were degraded and leaking. To remove them, Mr Reid had to use a ratchet spanner on corroded bolts or break the sheets manually with a hammer. The sheets would also break when he pulled them off. The work was done predominantly from within the garage, though occasionally if a piece of roofing jammed, it would be approached from outside by means of a ladder.

[11] There were four men in the pursuer's team. They worked in pairs. If he was working on top, he would break off the sheets and the man underneath would catch it. If he was working underneath, the asbestos sheeting would come down on top of him. He would catch the larger pieces, while the smaller pieces landed on the floor. The broken asbestos material created a dusty atmosphere within the garages such that they would have to step outside for fresh air. The pursuer shovelled the debris into the corners of the garage, while they continued working, before removing it to skips, 15 to 20 feet away. The larger pieces would be carried over, and the smaller pieces taken in a wheelbarrow. Asbestos dust would rise up when you emptied the debris from the wheelbarrow into the skip. The vast majority

of work was done on the first day, with a bit of tidying up on the second day. Then they started installing the new OSB sheets which did not contain asbestos. By that stage the skips would have been taken away. The only asbestos dust remaining on site would have been on the floor. He would be working 6 to 7 hours a day on the garages. The first defender provided no masks, protective clothing, or safety training regarding asbestos.

[12] The pursuer also recalled a job he did for the first defender at a former "Laser Quest" in Clydebank where he handled thick floor sheets of a similar appearance, but did not know whether they contained asbestos.

[13] Between 2000/2001 and 2002/2003, the pursuer was employed as a driver and labourer for the second defender. During this period, the company was contracted to carry out window and door replacements on various council estates throughout the west and east of Scotland. The pursuer worked within a squad covering the west, including locations such as Spateston, Renfrew, Glenburn, Ayrshire, Inchinnan, and Houston.

[14] The work focused on modern, four-storey concrete tenement flats featuring open external walkways. The refurbishment involved the removal of asbestos panels located at the sides and bottoms of windows, as well as within a 300mm gap between the windows and the concrete roofline which would be the walkway for the floor above. He understood these panels served as fireproofing for the kitchens situated on that side of the buildings. Once the new windows had been fitted, these panels were replaced with PVC panelling.

[15] The work had to be done quickly so that tenants could regain access to their flats, with joiners "ripping out" old units and fitting new ones within hours. While the pursuer's primary role involved transporting materials and tidying sites, he was frequently present on the walkways while removal was in progress. He was responsible for clearing the debris left

behind by the joiners, who would pile broken asbestos panels on tarpaulin sheets or directly on the ground.

[16] The pursuer's job was to sort the asbestos waste from the general waste on site. He would pick up broken pieces of asbestos panels by hand, and place the material into large clear bags, which would then be tied and secured in a specialised, padlocked asbestos skip. A skip lorry would take the asbestos skips to Tracey's yard in Linwood. The pursuer would take turns with the other men to drive the tipper. The pursuer would use an industrial vacuum to clean the interiors of the flats. The pursuer did this sort of work every day while he was with the second defender.

[17] Despite the regular handling of known hazardous materials, the pursuer was never warned of the dangers associated with asbestos. The second defender failed to provide any specialised protective clothing, hard hats, or respiratory equipment. The pursuer and his colleagues - including Peter Wright, Hugh Wright, and Danny Lynch - were forced to purchase their own gloves and hi-vis vests. His boss was Hugh Clark, but he only ever saw him at the yard when he was loading and unloading. The site supervisor was Jimmy Burke.

[18] The pursuer left the second defender in 2003 following a back injury. He subsequently worked for Meridian Business Support and Comet Group plc until 2010. He confirmed that no further asbestos exposure occurred during his time with these later employers. He eventually left the workforce in 2010 to become a full-time carer for his partner.

[19] Mr McNaughtan cross-examined the pursuer on behalf of the first defender in relation to his employment history. In 2024 he had applied for industrial injuries disablement benefit. In the relevant application form completed on his behalf by Clydebank Asbestos Group, he had stated that he had been employed by Allied Timber from

approximately 1988 to approximately 1990/1991, and by the first defender from approximately 1993 to approximately 1995. The pursuer explained that at that time he had been trying to remember the dates "off the top of his head". He did subsequently obtain a record of his employment history from HMRC that showed he had been employed by Allied Timber Manufacturing Co Ltd and Gavin Shanks Ltd during the tax year 1993/1994. He explained that Gavin Shanks Ltd was part of Allied Timber.

[20] In September 2024 he made an application to the Department of Work and Pensions for worker's compensation. The pro forma application contained a table for the applicant to complete his employment history, and to indicate whether or not he had been exposed to asbestos. The form was completed by Clydebank Asbestos Group on his behalf. In relation to his employment at Allied Timber, he had indicated that he had been exposed to asbestos between 1988 and 1990, on the basis that he had been working in a yard with an asbestos roof. He had indicated that he had not been exposed to asbestos while working for Cruden Construction and W Harte Construction between 1991 and 1993. He had indicated that he had been exposed to asbestos while working for the first defender between 1993 and 1995, and with the second defender between 1995 and approximately 2003. Challenged about whether his work on the garage roofs might not have been undertaken at some other time than when he was working for the first defender, the pursuer retorted that there was no chance of that. This work was "100% with Ian Marshall. He instructed me".

[21] Medical correspondence dated 14 July 2024, 14 August 2024 and 18 September 2024 referred to the pursuer as having previously worked as a "joiner" and that there had been "known asbestos exposure". The pursuer did not accept that description of his work at Allied Timber. Allied Timber was a timber merchant for whom he cut bits of wood.

[22] Cross-examined on behalf of the second defender, the pursuer conceded that he had remained friends with the other driver-labourers with whom he worked, including the witnesses Hugh Wright and Peter Wright. He had continued to see the Wright brothers over the years, but he had not discussed the case with them. The pursuer acknowledged that the work was repetitive and physical. He conceded that his application for benefit referred only to asbestos in general rather than specifically to asbestos panels. Challenged over how he had come to know that the panels contained asbestos, the pursuer replied that he did not think there was anyone on site who did not know they were asbestos. The pursuer knew that the secure skips were specifically for asbestos. They were not locked simply to prevent interference with their contents, or for storing tools. Asked about whether specialist contractors would have been hired to deal with any asbestos, the pursuer replied that there was only one occasion where specialists in protective clothing came to do the same job as he was doing. These specialists had used a secure skip, and from that point on, the second defender had provided a secure skip to his team in which to empty the debris.

Hugh Wright

[23] Hugh Wright was 61 years' old. He worked for the second defender in Glasgow for 16 years. He worked alongside his brother Peter, the pursuer and another colleague. They supported joiners on large council window and door replacement contracts across Ayrshire, Port Glasgow, Greenock, East Kilbride, and Kirkintilloch.

[24] They worked on tenements, and single-story houses, sometimes doing half a street in a single day. The joiners would rip out the old frames and throw them into the back courts. Mr Wright and his colleagues were responsible for clearing up the debris. This involved manually loading a 7.5 ton truck and visiting tips three or four times a day. He also

unloaded new materials, often carrying windows up several flights of stairs and assisting joiners when units did not fit.

[25] On one occasion, he and his team refused to handle wet asbestos during a job in Port Glasgow. The second defender had to bring in specialists, who provided a sealed skip. He and his colleagues were often required to bag up suspicious materials in standard black bin bags themselves. The vacuum cleaner would frequently fail to clear dust from the carpets, in which case they had to resort to manual brushes. Hugh Wright described being exposed to "blue stuff", which he recognised as asbestos from his exposure to it in previous jobs. There was a lack of safety equipment or training.

[26] Cross-examined by Mr McNaughtan, Hugh Wright confirmed that they found blue asbestos in the panels under the windows. They would be doing this work up to 5 days a week. For years they were never provided with skips. The debris would just be thrown into vans or the back of a truck. It was dusty work, both when working in the properties, and also when sweeping out the back of the vans.

[27] Cross-examined by Mr McKenzie, Hugh Wright confirmed he and the pursuer worked as labourer-drivers. They would load the windows and doors at the second defender's factory in Chapelhall near Airdrie, then drive to the site, where they would unload the lorry. They would take the old windows and doors to the tip, then return the empty lorry to the factory for reloading. Some days, the lorry would have to be reloaded. Hugh Wright insisted, when challenged, that he had been required to handle asbestos, including blue asbestos. He alleged that "someone" from the second defender had given the local clerk of works a "brown envelope". James Burke was responsible for health and safety and had become a nervous wreck, he had not been coping.

Peter Wright

[28] Peter Wright was 58 years' old. He had worked for the second defender for over 20 years. He worked with the pursuer for the whole time that the pursuer was with the second defender. They would class themselves as driver-labourers, but they were given no job description or formal contract. They regularly transported and disposed of debris containing asbestos from sites, often using only a brush and shovel, which created dangerous, airborne dust. The joiners told them they were handling asbestos. Some of the joiners had put the asbestos in 30 years previously, and they knew what it was. Some of the joiners would take care removing it, but others did not. Using a brush and shovel, they bagged the asbestos debris and put it in locked skips. They had masks, but they were too irritable to wear all the time. They knew the material was hazardous; it was marked as such on the bags they were using. Cumbernauld and East Kilbride were the worst areas for asbestos, but they came across it all over Edinburgh and Glasgow as well. The men received no formal safety training or adequate protection.

[29] Cross-examined by Mr McNaughtan, Peter Wright confirmed that, in the new housing schemes, large square asbestos panels were used underneath living room and bathroom windows. Sometimes they were taken out whole, but mostly in bits. The stour of dust was bad, particularly in closes. They would do 10 - 15 houses a day. Sometimes the truck would run two or three times a day. They would be working for an hour or more at a time.

[30] Cross-examined by Mr McKenzie, Mr Peter Wright insisted that he had worked with asbestos panels, on many occasions all over Scotland. James Burke, the site manager, was an easy-going man; he did what he was told. He knew they were handling asbestos and would tell them to tidy up and get rid of it as quickly as possible. Both Mr Burke and

Hugh Clark told them the material was safe to work with. Peter Wright did not know anything about any brown envelopes.

Bernard Dunne

[31] The second defender led Bernard Dunne. He was aged 67 and now retired. Formerly he was the managing director of the second defender, which had been set up in 1986 to manufacture and install new pvc windows for local authorities.

[32] By the early 2000s, the second defender had evolved from being a local contractor in Monklands to operating throughout the central belt, working for 25 - 30 local authorities. The company handled contracts ranging from 28 houses to 3,000 houses. The company employed up to 100 people. Hugh Clark and Jim Burke were the site managers. He did not know if Mr Burke was still alive. The second defender would generally be working on two sites at any one time. The second defender employed an external health and safety consultant, John Sproule. He did not know if Mr Sproule was still alive. Asked if he were ever on site, Mr Dunne replied that he could have been. He would certainly have been on site to scope the extent of the works. However he did not regularly exercise a supervisory role.

[33] Mr Dunne outlined the tendering process, beginning with the local authority undertaking a site survey, then issuing an invitation to tender and bills of quantities. These would form the basis on which the second defender priced the works. Thereafter he would meet regularly with local authority officers to draw up a programme of works. Dealing with the same local authorities repeatedly, it became a "box-ticking exercise". Mr Dunne could not say whether the survey was designed to detect asbestos. But if asbestos had been

present, he expected the local authority to identify it and include it in the contract as a prime cost sum for specialist contractors.

[34] The second defender had a standard health and safety document. Mr Dunne initially suggested that there would have been "protocols" within that document that would have covered working with asbestos. However, I understood him to have retracted his evidence on that matter, on the basis that he had no reason to expect asbestos to be encountered and therefore no need for any protocol to address it. Ultimately, he conceded that back in 2000 - 2003, so far as the window replacement work was concerned, he could only recall the topic of working at heights being the subject of any sort of risk assessment. Mr Sproule would have drawn up a "programme" on de-glazing and de-sashing, how to lift and how to carry. It was not a complicated job and did not require a lot of training.

[35] Asked what would happen if asbestos that had not been picked up by the local authority were discovered on site, Mr Dunne replied that the second defender "would have got it tested, that would have been the protocol, [they] would have referred it back to the local authority". The local authority's clerk of works would have been on site two or three times a week. Mr Burke would have phoned him. Mr Burke had been an experienced joiner. He would have had the same training as any other joiner of that era. Mr Dunne imagined that Mr Burke would have drawn the matter to the local authority's attention. It was not a question of Mr Burke identifying asbestos. That was not his job. His job would have been to bring anything suspicious to the attention of the local authority. For most contracts, there would have been at most three or four house-types. All houses of a certain type would have been constructed in the same way. If there had been any asbestos cement panels under a window, for example, then there would have been up to 250 houses with similar panels. It would have been "impossible" for the local authority not to have seen that.

[36] Mr Burke was responsible for ensuring the use of personal protective equipment. Drivers and labourers delivered materials from the Chapelhall factory and removed old window units. Tenants would remove their furniture. The workers would lay down dust sheets internally, and tarpaulins externally to catch debris. Industrial hoovers were used for cleanup. While masks were provided, they were not always worn by staff.

[37] In cross-examination, Mr Dunne acknowledged that cement render, plaster, and timber dust were common during the removal of old steel and timber windows, but maintained that this did not involve the removal of asbestos. If there had been any asbestos on site he would have known about it. He disputed any evidence of specialist skips being used on sites like Port Glasgow, asserting that if Mr Burke had encountered asbestos and failed to report it, he would have been dismissed. The responsibility for identifying asbestos lay with the local authority. Any claims by labourers of encountering asbestos were likely a misidentification of standard cement panels, as no specialist asbestos removals were ever commissioned for these contracts during the 2000 - 2003 period.

Kevin Blyth

[38] Professor Kevin Blyth was a consultant respiratory physician and professor of respiratory medicine at Glasgow University. He explained that mesothelioma could be caused from exposure to low levels of asbestos, and that the risk increases in proportion to the dose of asbestos received. Successive periods of exposure each augmented the risk that mesothelioma would occur. In his opinion, the asbestos exposure described by the pursuer while working with either the first or second defender would each have been sufficient to cause mesothelioma or to have materially contributed to the risk that the pursuer would have developed mesothelioma. The materials with which he was likely to have been

working would have had a high carcinogenic potential and the period of exposure described by the pursuer was consistent with known periods of latency. There was no safe dose of asbestos.

[39] Cross-examined by Mr McNaughtan, Professor Blyth would not be drawn on the extent to which the development of mesothelioma depended on fibre size or shape, preferring to defer to occupational therapists on such matters. He accepted that the risk of developing mesothelioma from exposure to crocidolite and amosite would likely be greater than from exposure to chrysotile asbestos but would not be drawn on how estimates of risk might vary with the material under consideration.

Tina Conroy

[40] Tina Conroy was an occupational hygienist. She adopted her report dated 19 November 2025 as her evidence. She opined that both defenders should have been aware that even slight exposure to asbestos dust could have resulted in the development of fatal pulmonary disease. Both defenders should have been aware, prior to the pursuer's employment with them, that exposure to asbestos dust arising from activities such as working with asbestos panels, whether asbestos insulating board ("AIB") or asbestos cement was hazardous.

[41] Asbestos was a naturally occurring fibrous mineral which occurred in forms referred to as either amphibole (straight, stiff and needle-like fibres) or serpentine (curly, flexible fibres). The principal types of asbestos fibres used commercially in the UK were crocidolite, amosite (both amphibole types of asbestos) and chrysotile (a serpentine form of asbestos). Crocidolite was often referred to as blue asbestos, amosite as brown asbestos and chrysotile

as white asbestos. Although types of asbestos were often referred to in this way, the colour of asbestos containing materials could not be relied on to indicate the types of fibre present.

[42] Asbestos cement and AIB were historically used for, amongst other things, external window panels and asbestos cement roofs. Asbestos cement products contained about 10 - 15% asbestos fibre, predominantly chrysotile but, depending on the date of manufacture, also crocidolite or amosite. AIB differed from asbestos cement according to its fibre content and density. AIBs had a density of approximately 700 kg/m3 and contained 16-40% asbestos, generally amosite, but chrysotile and crocidolite were also used.

[43] The asbestos sheets that the pursuer described removing from the garages as part of his work for the first defender would likely have been asbestos cement sheets, as these were historically widely used for this application. The asbestos panels that the pursuer described clearing away as part of his work for the second defender may have been asbestos cement or AIB. However, on the basis of his evidence that they were used for fireproofing, she considered it more likely that they were AIB, and likely to have contained amosite or a mixture of amosite and chrysotile.

[44] Ms Conroy assessed the likely exposure to asbestos of the pursuer during his employment with the defenders. The 1984 version of Guidance Note EH 35 provided likely concentrations associated with a range of tasks, including some that were likely to be similar to those described by the pursuer. The removal of asbestos cement sheeting was associated with a concentration level of below 0.5 fibres/ml. The "rough handling" of AIB and removal of pieces was associated with a concentration level of greater than 15 fibres/ml. However, the guidance noted that these were the concentrations found when the processes were carefully carried out. Bad handling practices might result in higher concentrations. In

Ms Conroy's opinion, the work described by the pursuer for both defenders would likely be considered bad handling practice.

[45] The concentration of asbestos dust at any given time was highly variable and depended on the type of material, the activity producing the dust, the environmental conditions, and the extent of safety measures and controls in place. The absence of contemporaneous (real-time) measurements during the period of exposure, and the fluctuations in dust levels over time made historical estimates unreliable. Even where records existed, methodology and in particular the evolution of sampling standards could introduce significant uncertainties. Samples taken prior to 1970 relying on area sampling, or fixed location monitors, frequently underestimated individual exposure. Modern standards preferred personal sampling, that is, monitors worn by the individual sampler, which provided a more accurate representation of the air actually inhaled by the worker.

[46] Subject to these caveats, Ms Conroy provided the following estimates of concentrations of asbestos dust to which the pursuer would likely have been exposed as a result of the activities described by him.

Estimated concentrations of asbestos dust to which the pursuer was likely to have been exposed as a result of the activities described	
Description of process (likely fibre type)	**Estimated dust concentrations to which the Pursuer was likely to have been exposed**
Removing of asbestos cement sheets using a spanner (likely chrysotile and potentially amosite/crocidolite)	Of the order of tenths or low single figures of fibres/ml.
Removal/clearing away of asbestos panels following removal from tenement flats (likely AIB and therefore amosite or amosite and chrysotile)	More than 15 fibres/ml based on evidence of rough handling and removal of broken pieces: potentially of the order of low 10s of fibres/ml. Where exposure occurred as a result of the work of others, then it can be expected that exposure concentrations reduce by a factor

	of 10 with every 20-30 feet of distance from the activity. Lower if damped prior to sweeping depending upon the degree of damping
Sweeping dust (of a similar composition of the source material)	Of a similar order to that created by the activity creating the work, and potentially up to an order of magnitude higher.

[47] Ms Conroy estimated that the pursuer's exposure to asbestos cement would have been of the order of more than 1,000 times the concentration of asbestos dust in buildings where asbestos materials were sealed and in good condition. Where exposures resulted from working with AIB the figure would have been at least ten times higher than that, ie 10,000 times higher than the urban background level.

[48] Both defenders should have known that asbestos dust was hazardous and that they were required under the relevant legislation to control exposures to levels that were as low as reasonably practicable. She concluded that if the pursuer's account of handling broken asbestos cement sheets and AIB were to be accepted by the court, then both employers failed to reduce exposure to the required levels. They should have been aware of the significant health risks associated with even minor asbestos exposure by the late 1990s.

[49] In cross-examination, Mr McNaughtan explored Ms Conroy's estimates of the pursuer's likely exposure to asbestos fibres while carrying out the activities he described for each of the defenders. Assuming that the pursuer would be exposed to concentrations of 1 fibre/ml and 15 fibres/ml while carrying out the activities he described for the first and second defender, respectively, and making certain assumptions to be discussed later regarding the number of hours during which these activities were carried out, Ms Conroy did not demur from his calculation of the cumulative lifetime exposure to asbestos with each of the defenders.

[50] Mr McKenzie's cross-examination of Ms Conroy focussed on the information that would have been required before any conclusion could be reached regarding the materials with which the pursuer came into contact while working for the second defender. Certain products contained an inherent probability of exposure to asbestos, but she agreed that these did not include wall panels. Ms Conroy agreed that certain information that had not been provided would have been helpful, for example, the streets in which the buildings were located, plans or photographs of the buildings, the colour, shape and size of the panels, their physical qualities, and so on. However, while useful, she did not consider this information was necessary.

[51] Ms Conroy accepted that the tendering process should ordinarily define the scope of the work being carried out. That would include whether asbestos was to be removed by the contractor, but only if its presence were known. Ms Conroy insisted that the fact that there may have been a tendering process, a regime of health and safety regulations, and a clerk of works did not necessarily mean that the risks of exposure to asbestos dust would have been avoided. She had seen asbestos being removed despite these measures having been taken.

Submissions

The pursuer

[52] Mr Wilson, KC, submitted on behalf of the pursuer that the defenders did not dispute the medical diagnosis of mesothelioma, nor did they dispute the periods in which the pursuer worked in their respective employments. Crucially, the defenders admitted that they possessed the requisite knowledge regarding the dangers of asbestos at the time of employment.

[53] On the issue of causation, the pursuer relied on section 3 of the Compensation Act 2006. In mesothelioma litigation, a pursuer did not need to prove which specific asbestos fibre caused the disease; they only needed to prove that a defender's negligence materially increased the risk of contracting it. Both defenders had conceded that if the pursuer proved he was exposed to asbestos while in their employment, that exposure was negligent and satisfied the legal test for causation.

[54] The core of the case, so far as the pursuer was concerned, had been narrowed to a single factual issue: did the pursuer actually come into contact with asbestos dust and fibres while working for these specific defenders? The pursuer's testimony was clear and careful, consistent with his written affidavit and the pleadings.

The first defender

[55] Mr McNaughtan, KC, on behalf of the first defender, submitted that the pursuer had failed to prove any exposure to asbestos by either defender. Indeed, the pursuer had failed to prove any facts beyond those already established by virtue of the joint minute.
Mr McNaughtan was critical of the manner in which the pursuer's evidence was presented. There had been no agreement that the pursuer's evidence in chief should be taken to be that stated by him in his affidavit. His oral evidence in court, particularly when prompted by leading questions by the pursuer's counsel, lacked spontaneity and reliability. The effect of leading the pursuer through his affidavit and putting leading questions to him was to completely undermine the confidence that the court could place in his evidence. There were significant discrepancies between his affidavit and his testimony in court, especially regarding the duration of any alleged work on garage roofs, with the affidavit claiming one week of work, while his testimony in court indicated only one day. In addition, he

challenged the pursuer's recollection, using medical records and government benefit applications to suggest that the exposure the pursuer remembered actually occurred at a different time or with a different employer. The court could have no confidence in the credibility or reliability of the pursuer, undermining his claims to having been exposed to asbestos by the first defender. Mr McNaughtan referred me to *McKenzie* v *McKenzie* 1943 SC 108; *Gilluley* v *Greater Glasgow Health Board* 1987 SCLR 431 (Sh Ct), and Walker and Walker, *The Law of Evidence in Scotland*, 5th Edition (2020), at paragraph 5.13.1.

[56] However, if the court found there to be such exposure, Mr McNaughtan submitted that the court should apportion liability, with proposed shares of 0.055% to the first defender and 99.945% to the second defender. Section 3(4) of the Compensation Act 2006 provided a basis for apportionment according to the relative lengths of the periods of exposure for which each defender was responsible. However, the court was free to apply any other basis it considered more appropriate.

[57] The relative lengths of exposure to asbestos for which the defenders were responsible were 1.5 days and 720 days, respectively, assuming the pursuer worked for the second defender 5 days a week, 48 weeks a year, and for 3 years. On that basis their relative contributions would be 0.2% and 99.8%. Alternatively, Mr McNaughtan invited the court to adopt cumulative lifetime exposure, expressed in fibres/ml years, as a basis for apportionment. The pursuer's cumulative lifetime exposure with the first defender would then be 1.5 days x 7 hours x 1 fibre/ml = 10.5 fibres/ml hours or 0.005 fibres/ml years (dividing by 1920, or 40 hours x 48 weeks in the year). His cumulative lifetime exposure with the second defender would be 1152 hours (assuming that he was exposed to asbestos for 2 hours a day, 4 days a week, 48 weeks a year, for 3 years) x 15 fibres/ml = 17,280 fibres/ml hours or 9 fibres/ml years (again dividing by 1920). On this, Mr McNaughtan's

preferred alternative, basis the defenders' relative contributions would be 0.055% and 99.945%.

The second defender

[58] Mr McKenzie, KC, on behalf of the second defender, submitted that the pursuer had not been exposed to asbestos while employed by the second defender. The pursuer's case against the second defender required him to prove that, during his employment with the second defender, he worked with panels that contained asbestos. If the pursuer did work with window or door panels, they were likely to have been made of cement. The pursuer had not proved that the panels contained asbestos. Mr McKenzie referred to judicial opinion on the frailty of human memory and the unreliability of eyewitness testimony (*Gestmin SGPS SA* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm); [2020] 1 CLC 428, Leggatt, J at paragraphs 16 - 20; *Henderson* v *Benarty Medical Practice* [2022] CSOH 28, Lady Wise, at paragraph 49).

[59] The pursuer had proved liability against the first defender. The pursuer gave unchallenged evidence that Mr Marshall, one of the first defender's principals, instructed him to take down an asbestos garage roof. The negligent, material exposure to asbestos arising from that work had not been challenged.

[60] Regarding apportionment, the first defender's hypothesis that the pursuer had been exposed to asbestos while employed by the second defender for 2 hours a day, four times a week, 48 weeks a year, for 3 years, was not supported by credible and reliable factual evidence, or the expert evidence. Mr McKenzie submitted that if apportionment were required, the second defender's contribution should be assessed as nil. A nil contribution was competent (*CAR* v *Eljamel and NHS Tayside* [2021] CSOH 130).

Decision

Credibility and reliability

[61] I had no difficulty in accepting the evidence of Professor Blyth and Tina Conroy in its entirety. The evidence of the lay witnesses, relating as it did to events occurring many years ago, and in the absence of any documentary evidence, presented more significant difficulties. Their credibility and reliability was hotly contested.

[62] The pursuer had been invited to adopt the contents of his affidavit as forming part of his evidence in chief. If either defender had intended to challenge the pursuer's affidavit being admitted into evidence in this way, then this would have been the time to do it. Instead, the pursuer having adopted his affidavit without objection from either defender, its contents became part of his evidence. Mr McNaughtan, on behalf of the first defender, founded heavily on the case of *McKenzie* v *McKenzie* (*op cit*), in which Lord President Cooper criticised the habitual and persistent use of leading questions when examining in chief witnesses on central issues of disputed fact. The effect was said to displace entirely the confidence the court ought to place in the witnesses' evidence and render their answers to questions "worthless" (*Ibid*, p109). Ultimately, I understood Mr McNaughtan's submissions to be directed not at admissibility, but at the weight that he considered should properly be placed on the pursuer's account.

[63] In *McKenzie,* the only contributions made by some witnesses to important branches of the case were in the form of monosyllabic answers to extracts read from precognitions. The case should be distinguished from the present, in which the pursuer not only expanded meaningfully on his affidavit in chief, but was exposed to cross-examination by skilled senior counsel, in which he was required to answer any relevant question they might choose

to ask. Moreover, the reliance on the precognitions referred to in *McKenzie* would have been frowned upon by the court, since these would have been considered as documents "filtered through the mind of another" (*Kerr* v *HM Advocate* 1958 JC 14, *per* Lord Thomson, LJC at p19; see now *HM Advocate* v *McSween*, 2007 SLT 645, and *Beurskens* v *HM Advocate* [2014] HCJAC 99; 2015 JC 91). In the present case, given the stage the litigation had reached by the time it was sworn, the affidavit might be considered to have been made "on precognition", but as the signed and sworn testimony of the pursuer it cannot be assumed to have been filtered through the mind of another, and is therefore not vulnerable to the same objection as the precognitions in *McKenzie*. The pursuer was not cross-examined on the circumstances in which the affidavit was prepared, and I can find no reason to criticise it merely on the ground of any presumed lack of authenticity. Obviously I had not been afforded the opportunity to observe the demeanour of the pursuer as he provided his affidavit testimony. However, any concerns I might have had in that regard were mitigated by having witnessed him giving evidence in court.

[64] The fact that the pursuer had provided incorrect dates of employment when completing his applications for compensation may not have reflected particularly well upon him. However, the actual periods of employment with both defenders were now agreed, and for the purposes of this litigation what mattered was the nature of the work carried out, and for whom he carried it out. In that regard, the pursuer was in no doubt that the work on the garage roofs had been carried out on the instructions of the first defender. It did not seem to me likely that dismantling garage roofs would have been part of his palletry and other duties working with Allied Timber or indeed any of the pursuer's other employers. The references in recent medical notes to the pursuer as having been exposed to asbestos as a labourer and joiner were perhaps more problematic. But I accept the pursuer's

explanation that the reference by others to the word "joiner" was likely a misinterpretation of his having admittedly worked with wood in a yard containing an asbestos roof. If the pursuer had completed an apprenticeship as a joiner and acquired the relevant skills, one would have expected that to have been reflected in his employment history. Instead, he seems to have worked variously as labourer, delivery driver and in retail.

[65] Mr McKenzie, relying heavily on Lord Leggatt's well-known observations in *Gestmin,* urged me to distrust any witness's recollection of events occurring so many years ago, however vivid they may have appeared in the minds of those recalling them. I had no difficulty with the general thrust of his submissions regarding the frailty of memory, recollection always involving reconstruction, and the influence that litigation itself may have on that reconstruction (*Gestmin, op cit,* paragraphs 15 - 23). Lord Leggatt's remarks have proved highly influential in subsequent cases, not least in the context of asbestos litigation (*Prescott* v *The University of St Andrews* [2016] CSOH 3, Lord Pentland at paragraph 42; *Bannister* v *Freemans plc, op cit, per* Geoffrey Tattersall KC, sitting as a deputy judge of the High Court, at paragraphs 76 - 77). However, the insights from psychological research on which they were based explain how memory functions generally; they are not confined to the recollection or reconstruction of events occurring many years in the past. Pushed to extremes, those insights might be thought to undermine the value of oral testimony altogether, something which was clearly not Lord Leggatt's intention, as in *Gestmin* he made clear. Indeed he was careful to explain that his recommendation to judges to give greater weight to documentary evidence than to oral testimony was made specifically in the context of commercial cases, where documentary evidence of meetings and conversations might be expected to be more readily available (*Gestmin, op cit*, paragraph 22). Such an approach will be of no assistance in cases where there is no contemporary documentary evidence available

either to support or call into question the oral testimony of anyone. Such is the position here, as it is, not infrequently, in asbestos litigation (*cf Bannister, op cit*, paragraph 78).

[66] Accordingly, the reliance that ought properly to be placed by the court on oral testimony will vary from case to case. Professionals and office workers have sometimes struggled to persuade the court that activities carried out thirty to forty years ago involved secondary exposure to asbestos. In the case of *Prescott*, for example, the pursuer suffered from a rarely occurring form of mesothelioma (peritoneal), and had been unable to offer any coherent explanation why, as a psychology lecturer, he would have been on the construction site of the University's Old Library, when the asbestos was being stripped out (*Prescott*, paragraph 43). In *Bannister,* the court was not persuaded that the deceased, the manager of an accounts department, would have been exposed to dust arising from the removal of asbestos-containing office partitions, as distinct from dust generated by the installation of their asbestos-free replacements (*Bannister,* paragraphs 114 - 115). In contrast with both these cases, the pursuer and his colleagues were labourers on site carrying out or in close proximity to the very operations themselves. There was no dispute that, if the garage roofs or the window panels contained asbestos, they would have materially increased the risk of the pursuer's exposure to asbestos. The principal question for the court is whether the materials did indeed contain asbestos.

[67] Mr McKenzie challenged the pursuer's recollection of the tasks he carried out on behalf of the second defender on the basis that, because of their highly repetitive nature, they would not have been particularly memorable. I have no doubt that the pursuer would struggle to recall every last piece of asbestos he removed to skip, or every last job in which he and his colleagues had been engaged. But as Lord Leggatt observed in *Gestmin,* the value of oral testimony lies in the opportunity which cross-examination affords "to gauge the

personality, motivations *and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations or events*" (*op cit,* at paragraph 22, emphasis supplied). In my view, the pursuer provided a convincing account of his working practices and of the kinds of activities in which he was repetitively engaged. Indeed, one reason why he may have been able clearly to recall them was precisely because of their highly repetitive nature.

[68] Ultimately, I have come to the conclusion that the pursuer was a credible and reliable witness in relation to the critical issues in the case. His evidence that he had been working with asbestos while working for the second defender was consistent with that of the Wright brothers. Mr Peter Wright, in particular, was an impressive witness, whose evidence I accept in its entirety. Mr Hugh Wright perhaps had a tendency to exaggerate; his references to blue asbestos and to the handing over of brown envelopes were not explored in any detail by counsel. As such, they played no part in my assessment of his evidence, which I accept only where it was consistent with that of his brother and the pursuer. I specifically reject any suggestion that the pursuer colluded with the Wright brothers, there having been not a shred of evidence to support that proposition. So far as Mr Dunne is concerned, I accept that he appeared, on the whole, to be doing his best to assist the court. But I did not consider that, as the director of a large company serving local authorities throughout Scotland's central belt, he was a reliable witness regarding what actually took place on site. His evidence in relation to "protocols" was inconsistent, and his description of processes of regulatory compliance as a box-ticking exercise did not inspire confidence. I have accepted his evidence only where it was consistent with that of the pursuer or Peter Wright.

The first issue: exposure to asbestos

[69] The pursuer's evidence that he had been working with asbestos derived support from Tina Conroy. Her evidence was that the asbestos sheets that the pursuer described removing from the garages as part of his work for the first defender would likely have been asbestos cement sheets. She also testified that the window panels, as a result of the removal of which the pursuer was exposed to dust, were likely to have been AIBs. That was on the basis of the pursuer's evidence that they were taken from the back of tenements where the kitchens would have been located and were likely installed for fireproofing purposes. That the pursuer was exposed to asbestos can also be inferred from the introduction of secure skips, not specifically to protect their contents from interference, but after an incident in which specialist contractors had been engaged. I have taken account of what Mr McKenzie described as the improbability, in the early 2000s, of a local authority, employing a clerk of works and a tendering process, exposing council tenants to the risk of asbestos exposure. But Ms Conroy explained with the benefit of her considerable experience in this area, that she had seen asbestos being removed despite these measures having been in place.

Mr McKenzie did not expressly invoke the presumption of regularity (*omnia praesumuntur rite et solemniter esse acta*), but if that is what his submission came to, then I consider any such presumption had been rebutted by the evidence of the pursuer and his colleagues.

I therefore find that the pursuer was negligently exposed to asbestos while in the employment of each of the defenders, materially increasing the risk of his contracting mesothelioma. As a result, applying the so-called *Fairchild* exception to the "but for" test for causation, both defenders are liable jointly and severally in respect of the whole of the damage caused to the pursuer by the mesothelioma which it is admitted he has contracted (*Fairchild* v *Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* 2003 1 AC 32; *Sienkiewicz* v

Greif (UK) Ltd [2011] UKSC 10, [2011] 2 AC 229; Compensation Act 2006, section 3(2): for the avoidance of doubt, I find that the conditions set out in section 3(1) of the Compensation Act 2006 are fulfilled).

[70] The written submissions lodged on behalf of the pursuer moved the court to grant decree that the defenders were in breach, not only of their duties of care, but of various statutory duties that had been referred to on record. However, counsel did not address me further in that regard, his argument being confined to the case based on negligence. Moreover, to make any findings regarding breach of any statutory duties would be to go beyond the scope of the evidence or any admissions that the defenders were prepared to make in the joint minute. To that extent, therefore, the pursuer's motion is refused.

The second issue: apportionment

[71] In the event that they are found liable to the pursuer, each defender claims contribution from the other in terms of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which provides that they shall be liable *inter se* to contribute in such proportions as the court may deem just. The right of contribution between defenders was preserved by section 3(3) of the Compensation Act 2006. Section 3(4) of the 2006 Act sets out the basis upon which contributions shall be determined, as follows:

> "In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply–
> (a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or
> (b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case."

In order to apportion liability between the defenders according to their respective contributions, I shall make the following additional findings in fact.

[72] So far as the pursuer's exposure to asbestos with the first defender is concerned, I find that the pursuer carried out the relevant work for at most one and a half days, working 7 hours a day. It involved removing the garage roofs predominantly from within the garages, before taking the debris to skips, 15 to 20 feet away. The half day involved predominantly cleaning up. The roofs were made of asbestos cement, comprising 10 - 15% of asbestos fibres, predominantly chrysotile. Chrysotile is less likely to cause mesothelioma than amosite or crocidolite. The likely average dust concentration associated with the pursuer's activities would have been around 1 fibre/ml. The first defender provided no masks, protective clothing, or safety training regarding asbestos.

[73] So far as the pursuer's exposure to asbestos with the second defender is concerned, I find that the pursuer carried out the relevant work throughout his employment with the second defender up to 5 days a week, for 2 to 3 hours each day. His employment began in the tax year 2000/2001 and ended in the tax year 2002/2003. The pursuer's work involved tidying up dust and debris arising from the removal of AIB panels by joiners. The dust and debris would be deposited or thrown by the joiners onto tarpaulin sheets placed on the tenement walkways where they were working. While the pursuer's primary role involved transporting materials and tidying sites, he was frequently present on the walkways while removal was in progress. The AIBs were comprised of 16 - 40% asbestos fibres, either amosite or a mixture of amosite and chrysotile. The pursuer received no formal safety training or adequate protection. Masks were provided but without training as to their use. The likely average dust concentration associated with the pursuer's activities would have been around 15 fibres/ml.

[74] Mr McKenzie submitted that there was insufficient evidence to estimate the duration and frequency of the tasks carried out by the pursuer for the second defender. On that basis, he argued that a nil apportionment should be allocated to the second defender, as a result of which the first defender would be required to bear responsibility for the whole of the pursuer's loss, citing *CAR* v *Eljamel and NHS Tayside* [2021] CSOH 130 (upheld on appeal [2022] CSIH 34; 2022 SLT 881). However, in that case, a medical negligence action, Lord Uist found that the negligence for which the second defenders were responsible did not cause any significant harm to the pursuer, and that therefore the appropriate apportionment was nil. In my opinion, a nil apportionment would not be appropriate in a case such as this where *ex hypothesi* both defenders had been found to have caused or contributed to the loss. Ultimately, therefore, while in the circumstances of this case, I have found that the second defender must bear significant responsibility for the pursuer's loss, Mr McKenzie offered no realistic submissions as to how that apportionment might be carried out.

[75] In my opinion, this is one of those cases, like so many damages claims, that calls for that most trusted of judicial tools, the "conventional broad axe with a blunt blade" (*Grier* v *Lord Advocate* 2023 SC 116, at paragraph 144). I was initially attracted by the default rule in section 3(4) of the 2006 Act, providing that the defenders' contributions should be determined according to the relative lengths of the periods of exposure for which each was responsible. However, I have come to the conclusion that this would be inappropriate in the present case primarily for two reasons. Firstly, the default rule effectively assumes an equal level of concentration of exposure with each defender across quite different tasks, which would be contrary to the evidence. Secondly, the default rule does not allow the court to

avoid having to wield a broad axe, since even determining the relative lengths of the periods of exposure with each defender involves making very rough estimates.

[76] Against that background, I have adjusted the second defender's calculation of the relative cumulative lifetime exposure to asbestos for each defender. So far as the first defender is concerned, I accept that the second defender has provided a reasonable basis for assessment as follows: 1.5 days x 7 hours x 1 fibre/ml = 10.5 fibres/ml hours. Converted into fibres/ml years, I accept that it is appropriate to divide that figure by 1920, arriving at a cumulative lifetime exposure of 0.0055 fibres/ml years. So far as the second defender is concerned, I accept that it would be reasonable to estimate that the pursuer was exposed to asbestos for 2 hours, 4 days a week, 48 weeks per year, or 384 hours per year. However, I disagree with the second defender's assumption that the pursuer's employment lasted fully 3 years. It was agreed that the pursuer's employment began in the tax year 2000/2001 and ended in the tax year 2002/2003. It was not agreed, and I heard no evidence, regarding when, in each of these years, his employment began and ended. I propose to take the midpoint in each year, arriving at a total period of employment, and therefore of exposure, of 2 years. On that basis the pursuer was exposed to asbestos while employed by the second defender for 768 hours. I accept the estimated concentration levels associated with the pursuer's activities with the second defender of 15 fibres/ml. On that basis, I estimate the pursuer's exposure as being 11,520 fibres/ml hours or, dividing once again by 1920, 6 fibres/ml years.

[77] In order to apportion liability according to the defenders' relative contributions, the cumulative lifetime exposures require to be converted into percentages. Expressed to three decimal places, the first defender's contribution is 0.092% and the second defender's contribution is 99.908%.

Disposal

[78] I shall therefore pronounce decree of declarator (a) that the pursuer was negligently exposed to asbestos while in the employment of each of the defenders, materially increasing the risk of his contracting mesothelioma, (b) finding both defenders liable jointly and severally in respect of the whole of the damage caused to the pursuer by the mesothelioma which it is admitted he has contracted, and (c) determining the extent of their contributions as follows: 0.092% to the first defender and 99.908% to the second defender. I shall reserve any question of expenses meantime.