JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	PARKIN -v- AMACA PTY LTD (FORMERLY JAMES HARDIE & COY PTY LTD) [2020] WASC 306
CORAM	**:**	LE MIERE J
HEARD	**:**	15-17, 21, 22 JULY 2020
DELIVERED	**:**	27 AUGUST 2020
FILE NO/S	**:**	CIV 3061 of 2019
BETWEEN	**:**	CHRISTINE PARKIN Plaintiff AND AMACA PTY LTD (FORMERLY JAMES HARDIE & COY PTY LTD) Defendant

Catchwords:

Negligence - Assessment of plaintiff's damages - Mesothelioma - Medical and treatment expenses - Whether the treatment of combined chemotherapy and immunotherapy is objectively reasonably required - Additional cost of treatment is not disproportionate to its benefits

Negligence - Damages for gratuitous services - Gratuitous services provided by the plaintiff's sister - Supervision and protective attention provided by the plaintiff's sister is a compensable gratuitous service - The market cost or value of services rendered gratuitously is the fair and reasonable value of such services

Negligence - Mesothelioma - General damages - Damages for non-pecuniary loss - *Civil Liability Act 2002* (WA) - Section 10A - Reference may be had to earlier cases for the purpose of establishing the appropriate award for non-pecuniary loss - The court must have regard to the particular circumstances of the plaintiff - Impact of mesothelioma on plaintiff has been enormous - Appropriate award of general damages is $360,000

Legislation:

Civil Liability Act 2002 (WA)

Result:

Plaintiff's damages are assessed in the sum of $1,041,480

Representation:

Counsel:

Plaintiff	:	Mr J T Rush QC & Mr T J Hammond
Defendant	:	Mr D Priestley SC

Solicitors:

Plaintiff	:	Segelov Taylor Lawyers
Defendant	:	Mills Oakley

Case(s) referred to in decision(s):

Amaca Pty Ltd v King (2011) 35 VR 280
Bowen v Tutte (1990) Aust Torts Reports 81-043
CSR Ltd v Eddy (2005) 226 CLR 1
Griffiths v Kerkemeyer (1977) 139 CLR 161
Kars v Kars (1996) 187 CLR 354
Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd [2020] NSWDDT 7
Lawrence v Province Leader of the Oceania Province of the Congregation of Christian Brothers [2020] WADC 27
Lowes v Amaca Pty Ltd [2011] WASC 287
MC v Morris [2019] NSWSC 1326

MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110
Neal v CSR Ltd (1990) Aust Torts Reports 81-052
Nicholson v Nicholson (1994) 35 NSWLR 308
Sharman v Evans (1977) 138 CLR 563
Simon Engineering (Aust) Pty Ltd v Brieger (Unreported, NSWCA, 6 September 1990)
Van Gervan v Fenton (1992) 175 CLR 327
Waller v Suncorp Metway Insurance Ltd [2010] 2 QdR 560
Wormleaton v Thomas & Coffey Ltd (No 4) [2015] NSWSC 260

LE MIERE J:

Summary

1 The plaintiff suffers from mesothelioma caused by exposure to asbestos-containing products manufactured by James Hardie Industries, the relevant liabilities of which have been inherited by the defendant. The plaintiff was exposed to asbestos whilst working with her father, constructing an extension to their home using asbestos cement sheets in the 1970s and again in the 1980s. The defendant admits liability for the damage suffered by the plaintiff as a result of contracting mesothelioma.

2 For the reasons which follow I assess the plaintiff's damages in the sum of $1,041,480.

The plaintiff

3 The plaintiff, Ms Parkin, was born in the United Kingdom on 10 April 1957. She was 63 years of age at the time of trial.

4 Ms Parkin came to Australia in 1966 and settled in Whyalla with her parents, her brother and her sister, Margaret. Ms Parkin relocated to Perth with her family in 1967. Ms Parkin left school aged 18 and continued living at home until she was 26 years old.

5 Ms Parkin commenced employment with the Commonwealth Bank as a teller in 1976 and worked for the bank until 1980 when she began work at Alcoa as a fixed asset clerk. In 1987 or 1988 she started a retail clothes business with her sister Margaret. They had a shop at Melville Plaza. In 2000 Ms Parkin started working at Perth Zoo as a customer service officer. She was employed on a permanent part time basis working three days a week. Margaret worked alongside her as a customer service officer. Ms Parkin and Margaret live together in a two level, four bedroom house near the river in Mosman Park. Neither of them are married or have any children.

6 In the 1970s and 1980s the plaintiff assisted her father with renovation work, sanding and painting at the family home. In the course of those activities, Ms Parkin was exposed to asbestos dust and fibres derived from products manufactured by James Hardie Industries.

7 Prior to late 2018 the plaintiff was very fit and healthy. She exercised an hour a day in her home gym, did yoga DVDs and walked around the river. In late 2018 Ms Parkin became breathless while

walking up a hill. In December 2018 she developed a bad cold. The cold did not go away. On the referral of her GP, Ms Parkin underwent a chest x-ray which showed fluid on her right lung. She was diagnosed with pneumonia and prescribed antibiotics. Ms Parkin recovered quite quickly. Over the next seven months she was well but suffered from some fatigue.

8 In August 2019 Ms Parkin was walking with Margaret when she found she was getting short of breath much quicker than she previously had. She was becoming increasingly fatigued and falling asleep while watching television. A little while later she experienced a pain in her chest. She became concerned and went to see her general practitioner on 14 September 2019. She had a CT scan. The scan showed fluid on her right lung. Ms Parkin was referred to Dr Keihani, a respiratory physician. Dr Keihani arranged a biopsy. On 15 October 2019 Dr Keihani advised Ms Parkin that he thought she was suffering from mesothelioma.

9 On 23 October 2019 Ms Parkin underwent a PET scan which confirmed she was suffering from pleural mesothelioma. The scan also showed a cystic structure or mass in the pelvis area. Ms Parkin consulted Dr Feeney, an oncologist. Dr Feeney recommended chemotherapy.

10 In October 2019 the plaintiff took long service leave as she planned to travel to the UK with Margaret and her brother for a family reunion over Christmas. Ms Parkin was due to return to work on 3 February 2020. On 27 November 2019, whilst Ms Parkin and Margaret were on leave, the Perth Zoo invited them to apply for the shared positions of shift assistant supervisor. On 29 November, Margaret, on behalf of herself and Ms Parkin, informed the zoo that they would be happy to be in the shift assistant supervisor pool on any days when they are working at the zoo.

11 On 4 November 2019 Ms Parkin underwent her first round of chemotherapy at Fiona Stanley Hospital. Following the treatment the plaintiff developed stomach cramps, nausea and fatigue. Since Ms Parkin commenced the chemotherapy, Margaret has undertaken all the domestic duties for herself and Ms Parkin because Ms Parkin has not been able to do so. Margaret has assisted Ms Parkin with daily living tasks as well as driving her to appointments.

12 Ms Parkin was referred to Dr Wei-Sen Lam. Dr Lam saw Ms Parkin on 20 November 2019 and has been her treating oncologist since then.

13 Examination of Ms Parkin on 12 December 2019 showed a worsening large volume of ascites, that is the accumulation of fluid in the peritoneal cavity causing abdominal swelling. On 16 December Ms Parkin presented to the Fiona Stanley Hospital emergency department with shortness of breath and increasing abdominal distension. She was admitted to hospital. The fluid was drained from her abdomen. Ms Parkin was discharged on 17 December.

14 On 24 December Ms Parkin resigned from the Perth Zoo because of her deteriorating health.

15 On 2 January 2020 Ms Parkin presented to Fiona Stanley Hospital with increasing abdominal distension and decreased oral intake. The principal diagnosis was malignant ascites. She was admitted under medical oncology for the insertion of a drain or stent so that fluid could be drained at home. Ms Parkin was discharged on 9 January.

16 On 12 January 2020, while she was undergoing chemotherapy, Ms Parkin raised with Dr Lam the prospect of receiving immunotherapy. Dr Lam recommended that Ms Parkin receive immunotherapy in the form of Keytruda together with chemotherapy. Keytruda is the brand name of Pembrolizumab, a drug used in cancer immunotherapy.

17 On 21 January 2020 the plaintiff underwent surgery to adjust the abdominal drain which was blocked.

18 On 24 February 2020 Ms Parkin completed six treatments of combined chemotherapy and immune therapy using Keytruda. Ms Parkin suffered from side effects throughout the treatment, rendering her unable to participate in many aspects of life. Throughout chemotherapy and for two months after Ms Parkin experienced dizziness. She could not bend forward while standing and needed to sit to dress. On 24 March 2020 Ms Parkin suffered a fall at home causing bruising to her face.

19 On 6 April 2020 Ms Parkin was admitted overnight at St John of God Hospital where fluid was drained.

20 By mid-April 2020 the build-up of fluid in Ms Parkin's abdomen slowed and eventually stopped. On 28 May 2020 the drain was removed.

Expert evidence

21 The plaintiff and the defendant adduced evidence from forensic accountants - Mr Thompson and Ms Lindsay respectively.

22 The plaintiff and the defendant adduced evidence from occupational therapists - Ms Cogger and Ms Cunningham respectively.

23 The plaintiff adduced evidence from her treating oncologist, Dr Lam. Dr Lam is the head of the Medical Oncology Department at Fiona Stanley Hospital and director of Medical Oncology WA Country Health Service. He treats cancer patients including mesothelioma patients. He is a principal investigator in immunotherapy trials.

24 The defendant adduced evidence from three medical experts - Professor Fox, Dr Mohan and Professor Cohen. Professor Fox is an eminent oncologist. He ceased active clinical practice in 2006. He was involved as a director of clinical research at St Vincent's Hospital from 2007 to 2013. Since then he has been involved in medico legal work in the course of which he has seen many patients with mesothelioma. He has not treated or examined the plaintiff.

25 Dr Raj Mohan is a consultant gynaecologic oncologist at King Edward Memorial Hospital. Dr Mohan was one of the medical team who considered and discussed Ms Parkin's scans at the Western Australian Gynaecological Oncology Multidisciplinary Tumour Conference on 10 October 2019.

26 Professor Cohen is an obstetrician and gynaecologist who was also part of the team who discussed Ms Parkin's scans at the Western Australia Gynaecological Oncology Multidisciplinary Tumour Conference on 10 October 2019. Professor Cohen carried out a physical examination of Ms Parkin prior to the conference.

27 Ms Parkin was reviewed at King Edward Memorial Hospital Gynaecological Clinic on 21 November 2019 by the registrar who discussed Ms Parkin's case with Dr Mohan.

28 Ms Parkin's case was again discussed at the Western Australia Gynaecological Oncology Multidisciplinary Tumour Conference on 27 February 2020, at which Dr Mohan and Professor Cohen

participated. A CT scan of Ms Parkin's chest, abdomen and pelvis performed on 23 January 2020 was reviewed.

29 Professor Cohen reviewed Ms Parkin in the King Edward Memorial Hospital Gynaecological Oncology Clinic on 12 March 2020. It was decided not to proceed with surgical management for Ms Parkin's pelvic mass because of her advanced stage of malignant mesothelioma and poor prognosis.

The pelvic mass

30 There is an issue as to the plaintiff's life expectancy arising from the possibility that the mass in Ms Parkin's pelvic area is malignant and may have led to her early death in any event.[1] The defendant submits there is a substantial chance that the plaintiff would have been affected by such a pre-existing condition.

31 Dr Mohan's opinion is that the mass is either benign or related to mesothelioma but in the absence of a biopsy he cannot be sure which it is. In his opinion, if it is malignant then it is related to the mesothelioma. His opinion is based on cytology, that is the study of the cells, and the CT scans. At the time of the February conference Ms Parkin had fluid collection in her abdomen that was drained and the cytology was reported as malignant mesothelioma. The CT scan showed that the mass had grown slightly, within 2 cm, which is 'very insignificant'.

32 Dr Cohen's opinion is that without a tissue diagnosis it is not possible to say whether the mass is benign or malignant but if it is malignant then on the balance of probabilities it would be likely related to the mesothelioma and not a separate ovarian malignancy. Professor Cohen said that if the surgery had proceeded then in the case of a woman otherwise in good health at 62 years of age he would expect that she would be off work somewhere between two to six weeks.

33 Professor Fox and Dr Lam conferred in a court directed expert conclave before they gave their evidence. They produced a joint expert report in which they addressed the question: 'Is the uterine mass, on the balance of probabilities, malignant?' Dr Lam answered: 'Given the progressive nature of the uterine mass, it is likely malignant'. Professor Fox agreed.

[1] This mass is sometimes referred to in the medical records and reports and by the medical witnesses as the abdominal or uterine mass.

34 In their joint expert report Dr Lam and Professor Fox addressed the question: 'What is the likelihood that the uterine mass is related to the plaintiff's mesothelioma?' Dr Lam opined:

> Given that the cytology of the ascitic fluid on 17 December 2019 confirmed mesothelioma, it is likely that an abdominal pathology is causing ascitic fluid. Given that there is no other abdominal disease apart from a pelvic mass, it is likely that the pelvic mass is related to the mesothelioma.

35 In his oral evidence Professor Fox agreed that he has often seen patients with ascites with mesothelioma, and their only disease is in the chest, and it appears that the fluid can then accumulate in that situation. However, Professor Fox considers this mass to be a very big mass which is unusual to be a solitary metastasis from a mesothelioma without the appearance of multiple peritoneal nodules or an omental volume and it has grown through the various treatments that Ms Parkin had undergone. Dr Lam agreed that the mass is unusual and uncommon but the cytology results in December 2019 confirmed that there was mesothelioma in the abdomen.

36 I find it is more likely than not that the pelvic mass is malignant and is causally related to the mesothelioma. Professor Fox's opinion is based on the mass having grown in size while Ms Parkin was undergoing chemotherapy. However, Professor Fox agrees that it is possible to have progression in one site and control in another site related to mesothelioma. Professor Cohen said that metastasis from mesothelioma in the pelvic region had been reported. He said that any malignancy in the body can metastasise to the ovary. He has personally seen that in another patient and there are reports in the literature of mesothelioma metastasising to the ovary.

37 Dr Mohan, Professor Cohen, who had conducted an internal examination and examined the mass, and Dr Lam all rejected Professor Fox's opinion that the mass was gigantic and had doubled or more in size. The last CT scan, performed on 30 April 2020, according to the radiologist showed that the mass was stable. Professor Fox had not seen that scan. Dr Lam said that if the mass was doubling or tripling in size there would be clinical evidence and there would be abdominal distension. So on the basis of the CT scan in April 2020, with the radiologist report saying that it was stable, and his clinical observations, Dr Lam considered that the mass was not doubling or tripling in size.

38 Dr Lam says that the ascitic fluid must have developed from an abdominal pathology and there are no other abdominal masses seen on the CT scan other than the mass in question. The ascitic fluid has been shown to be mesothelioma. Therefore, Dr Lam opines that the pelvic mass is mesothelioma. I find that reasoning persuasive. It is consistent with the opinions of Dr Mohan and Professor Cohen.

39 I find that on the balance of probabilities the pelvic mass is malignant and is causally related to the mesothelioma. Alternatively, if it is benign then it would have been dealt with by a surgical procedure which would have required the plaintiff to be off work for between two to six weeks. That procedure could have been carried out whilst Ms Parkin was on long service leave and would not have resulted in any loss of income.

40 My finding that the pelvic mass is causally related to the mesothelioma means that the pelvic mass does not need to be taken into account in considering the plaintiff's life expectancy and future loss.

Life expectancy

41 In his report of 28 May 2020 Dr Lam said that prognosis is poor with mesothelioma with an average prognosis of 12 to 18 months from diagnosis. Given that Ms Parkin was diagnosed in October 2019, Dr Lam wrote that she may potentially die within the next six months. In his oral evidence Dr Lam said that Ms Parkin has had a clinical response to treatment and it is possible that she can do better than the average prognosis but it is uncertain and unpredictable. The parties have agreed that for the purposes of assessing damages the parties accept Dr Lam's estimate of life expectancy.

42 The forensic accountants have assumed a life expectancy to 31 December 2020. The parties agree that assessment of past economic loss, future economic loss, and loss of superannuation should be based upon an assumed life expectancy to 31 December 2020.

43 The occupational therapists have assumed a life expectancy to 28 November 2020. The parties have agreed that damages for gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance, described by the plaintiff as ***Griffiths v Kerkemeyer***[2] damages and by the defendant as domestic assistance

[2] See ***Griffiths v Kerkemeyer*** (1977) 139 CLR 161.

damages, are to be calculated on the assumption of a life expectancy to 28 November 2020.

Past expenses

44 The defendant admits the following expenses have been incurred by the plaintiff and are properly to be allowed as damages:

Past medical and treatment expenses		
i.	Medical expenses (excluding Keytruda)	$3,736.35
ii.	Reimbursement to Medibank Private	$11,131.95
Past aids and appliances		
i.	Equipment costs - purchasing adjustable bed	$5,135.00
Past special damages		
i.	Medication	$948.99
ii.	Parking	$504.20
iii.	Mileage - 1,922km @ 0.68/km (exhibit 68)	$1,306.96
Total		$22,763.45

Keytruda treatment

45 The plaintiff also claims $53,755.38 for nine treatments of Keytruda at $5,972.82 per treatment.

46 Keytruda is a brand name for Pembrolizumab. Keytruda is not a chemotherapy or radiotherapy drug - it is a checkpoint inhibitor, a type of immunotherapy. It blocks proteins that stop the immune system from attacking the cancer cells.

47 Ms Parkin learned about Keytruda from Professor McCaughan's former theatre nurse, Jocelyn. Ms Parkin telephoned Professor McCaughan inquiring about radical surgery to remove her lung. Professor McCaughan said that Ms Parkin's pleura was too thick. He referred her to Jocelyn, who was his theatre nurse for 20 years, but is now in a support role for mesothelioma sufferers. Jocelyn told Ms Parkin that Professor McCaughan's patients were all on Keytruda and they get a lot of benefit and wellness from it.

48 When Ms Parkin transferred her treatment to Dr Lam, she raised the question about immunotherapy, and asked whether he would be willing to offer the treatment. Dr Lam advised Ms Parkin that he would absolutely support her in offering the treatment of chemotherapy and immunotherapy for a number of reasons. First, Dr Lam's work with Professor Nowak, a world leading researcher in mesothelioma. Secondly, Dr Lam's involvement in the DREAM study, a national trial of Durvalumab with first line chemotherapy in mesothelioma. Thirdly, Dr Lam seeing the benefits of chemotherapy and immunotherapy.

49 In cross-examination, Dr Lam rejected the proposition that he offered the treatment but did not recommend it. Dr Lam said, 'I offered and recommended combination chemotherapy and immunotherapy'.

50 Ms Parkin subsequently underwent the combined treatment of chemotherapy and immunotherapy in the form of Keytruda. Ms Parkin gave evidence that the treatment benefitted her and improved her wellbeing.

51 In March 2020, Dr Lam reviewed the treatment by way of chemotherapy and Keytruda. He decided to continue the treatment on the basis that Ms Parkin was getting clinical benefit and a CT scan showed stable pleural disease. At that time there was slight progression of pleural effusion and progressive ascites. Subsequently in April 2020, Dr Lam caused a further CT scan which showed that the pleural disease was stable and the pleural effusion was subsiding. He decided to continue the treatment on the basis that the scan showed stability of the disease.

52 The defendant submits that the plaintiff's claim to be compensated for the cost of the immunotherapy treatment is not supported by the evidence. The defendant submits that it is for the plaintiff to establish some therapeutic or medical benefit for the treatment and the touchstone is reasonableness.

53 The defendant referred to the decision of the High Court in ***Sharman v Evans***[3] where the High Court considered an award of compensation to provide for future costs of nursing and medical care. The plaintiff suffered from quadriplegia. The trial judge awarded damages in respect of future nursing and medical attention assuming that the plaintiff would not spend all of the rest of her life in hospital, but would instead be able to spend periods being cared for at home.

[3] ***Sharman v Evans*** (1977) 138 CLR 563, 573.

The High Court held that the costs of being cared for at home rather than in hospital should not have been allowed. Barwick CJ said:

> The first ground of error, in my opinion, was that his Honour allowed the cost of providing premises at the respondent's mother's house and of nursing attention during those periods in which the respondent might choose to sojourn in that house as part of the award. It seems to me that it was not reasonable to make the appellant pay for these costs. They were not reasonably necessary in any real sense for the treatment and care of the respondent. True it may be that the transfer of the respondent to her mother's house from time to time would give the respondent personal satisfaction and may have some psychological effect on her outlook of life. I can well understand the desirability from the respondent's personal point of view of being able from time to time to change from her hospital to her mother's house. But the expense of that course would be, to my mind, quite disproportionate to any causal connexion which might possibly be found between that transfer and the appellant's negligence [566].

54 In an oft-cited passage, Gibbs and Stephen JJ said:

> The appropriate criterion must be that such expenses as the plaintiff may reasonably incur should be recoverable from the defendant; as Barwick CJ put it in ***Arthur Robinson (Grafton) Pty Ltd v Carter*** [1968] HCA 9; (1968) 122 CLR 649, at p 661 'The question here is not what are the ideal requirements but what are the reasonable requirements of the respondent', and see ***Chulcough v Holley***, per Windeyer J (1968) 41 ALJR 336, at p 338. The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative health benefits to the plaintiff, becomes manifest [573].

55 The defendant submitted that this case is very similar to the case of ***Neal v CSR Ltd***.[4] In my opinion, that case is very different from the present one. In ***Neal v CSR Ltd***, the trial judge awarded damages to the appellant who had contracted mesothelioma as a result of exposure to and inhalation of dust containing blue asbestos in the course of his employment. The trial judge found that it would be unreasonable to allow the cost of treatment by the drug Alpha Interferon. A research

[4] ***Neal v CSR Ltd*** (1990) Aust Torts Reports 81-052.

team at Sir Charles Gairdner Hospital had been investigating the use of the drug Alpha Interferon. They were conducting a trial with 25 mesothelioma sufferers. The places in the trial were filled. The plaintiff wished to be included in the trial but funding was not available. The Alpha Interferon could be purchased commercially. The trial was at too early a stage to analyse the data so as to be able to draw any reliable conclusions. The plaintiff's treating physician had not prescribed the Alpha Interferon for the plaintiff. When asked why he had not done so, he said he did not think the evidence for it was sufficiently strong for it to be used as a conventional treatment for the disease. When Dr Musk was asked whether he suggested that the plaintiff undergo a trial with the drug because he was an appropriate person to further the trial process or because he thought that the plaintiff should take the drug for his health, he replied he thought it was a bit of both.

56 The defendant relies upon the opinion of Professor Fox that treatment with Keytruda for mesothelioma generally, that is, first or second line treatment, with or without chemotherapy, is not adequately supported by current medical knowledge.

57 Dr Lam was a co-investigator in a Phase 2 clinical trial - the DREAM study - which looked at how effective it was to combine standard treatment involving chemotherapy with a new immunotherapy treatment called Durvalumab in mesothelioma patients. Durvalumab and Pembrolizumab (Keytruda) are both checkpoint inhibitors in immunotherapy. The clinical trials showed positive responses, the cancer was shrinking more rapidly and more significantly than chemotherapy treatment alone. That was an observation that Dr Lam made together with Professor Nowak, the trial leader. The DREAM trial met its primary endpoints which warrants a Phase 3 trial to be conducted later this year.

58 In his medico-legal report, Professor Fox addressed the question of whether it was reasonable for Dr Lam to recommend immunotherapy to treat mesothelioma. Professor Fox referred to Dr Lam having discussed the DREAM trial and commented that Dr Lam 'appeared to be unaware that Keytruda in a randomised trial was reported to be no more effective than chemotherapy'. Professor Fox was referring to the results of a large-scale randomised trial presented in Barcelona at the European Society of Medical Oncology Conference on 30 September 2019 (the PROMISE-meso trial). Keytruda did not show an improvement in

progression-free survival compared with chemotherapy in patients with malignant pleural mesothelioma. Professor Fox concluded:

> I think Dr Lam took this issue very lightly and really left the decision to Ms Parkin, which is somewhat irresponsible, given cost issues as well as potential severe toxicity, and lack of evidence of effectiveness. He did not make a definite recommendation.

59 Professor Fox was wrong in believing that Dr Lam was not aware of the results of the PROMISE-meso trial. Dr Lam attended the Barcelona conference at which the results were presented. Having reviewed the medical reports and Dr Lam's testimony, I reject any suggestion that Dr Lam took this issue very lightly. He considered Ms Parkin's clinical condition and the potential benefit of combined chemotherapy and immunotherapy and advised Ms Parkin appropriately. Dr Lam did make a 'definite recommendation'. Dr Lam acknowledged that Ms Parkin first raised the question of immunotherapy. In his report of 28 May 2020, Dr Lam said, '[a]s a clinician who had first-hand experience in treating mesothelioma with chemotherapy and immunotherapy, I recommended to [Ms Parkin] to undertake combination chemotherapy/immunotherapy'. In his oral evidence, Dr Lam said he told Ms Parkin he would 'absolutely support her in offering the treatment of chemotherapy and immunotherapy'.

60 In the DREAM trial, the immunotherapy drug used was Durvalumab, not Keytruda. Dr Lam explained that the choice of Keytruda was purely based on cost and on the clinical decision that they are both checkpoint inhibitors and would be equally efficacious. Dr Lam noted that Keytruda is commonly used in other thoracic cancers in combination with chemotherapy. Professor Fox said that the two drugs are supposed to act at the same point but they are different and they may actually act somewhat differently, however there are a lot of similarities. Professor Lam said we will never know whether Keytruda is superior to Durvalumab or vice versa but they are both checkpoint inhibitors and they act on the same molecule. In my opinion, the support for the Keytruda treatment offered by the DREAM trial is not lessened by the fact that the DREAM trial used the drug Durvalumab, not Keytruda.

61 It is difficult to be definitive as to the potential benefit of Keytruda in combination with chemotherapy because of the lack of advanced medical trials comparing treatment with a combination of Keytruda and chemotherapy on the one hand, and treatment with chemotherapy alone

on the other. However, there is evidence supporting that it can extend life.

62 A Phase 2 trial, like the DREAM study, may demonstrate clinical efficacy. A Phase 3 trial, like the PROMISE-meso trial, usually involves a larger group of patients and determines the therapeutic effect for which the drug is intended and may lead to registration.

63 In my opinion, the results of the PROMISE-meso trial do not undermine the opinion of Dr Lam based upon the DREAM trial. The PROMISE-meso trial demonstrated that Durvalumab (like Pembrolizumab) was not more effective as a single agent treatment than conventional chemotherapy. However, the treatment prescribed by Dr Lam is not Pembrolizumab as a single agent; it is treatment by a combination of Pembrolizumab and conventional chemotherapy. Furthermore, the PROMISE-meso trial was a trial of Durvalumab as a second line of treatment. The treatment given by Dr Lam is combined immunotherapy and chemotherapy as a first line treatment.

64 The proposed treatment of combination chemotherapy and Keytruda immunotherapy does not have the support of a Phase 3 clinical research trial, but the DREAM Phase 2 study shows potential benefit to mesothelioma sufferers. Treatment with Keytruda is supported by medical evidence.

65 The plaintiff appears to have done well from the treatment to date. That is some evidence to justify the combined immunotherapy and to justify Ms Parkin continuing with the treatment.

66 Dr Lam provides a rational basis for adopting the treatment as a first line treatment. The treatment carries a risk of toxicity but it is not inadvisable for that reason. Conventional chemotherapy carries the risk of toxicity and adverse side effects.

67 Dr Lam is an oncologist with expertise and experience in the treatment of mesothelioma and an investigator in a Phase 2 trial of a similar immunotherapy drug combined with chemotherapy. The trial is a national trial, done by large cancer centres throughout Australia which has passed through research and ethics bodies, and been awarded a Medical Research Council grant.

68 The decision in this case is not a binary choice as to preference between two experts called at trial. It is a decision as to whether the treatment recommended by the relevant medical practitioner, Dr Lam,

is objectively reasonably required, even if it falls within a range of opinion.

69 I find that the Keytruda treatment was reasonably required by Ms Parkin in consequence of the mesothelioma caused by the defendant's tort. The treatment is appropriate in the sense that it serves a purpose. There is currently no cure for mesothelioma. Standard treatment includes chemotherapy. Immunotherapy is not yet a standard first line treatment for the cancer but medical research, in particular the DREAM study, has shown that the treatment has a greater capacity to reduce the progression of the disease than alternative treatment by conventional chemotherapy alone. The cost is substantially greater than the cost of treatment by chemotherapy alone. However, the additional cost of the treatment is not disproportionate to its benefits when regard is had to the devastating nature and effect of mesothelioma and the capacity of the treatment to reduce the progression of the disease and improve wellbeing.

70 I will allow the plaintiff's claim of $53,755.38 for past immunotherapy treatment with Keytruda.

71 I assess damages for past expenses, including Keytruda treatments, in the sum of $76,518 ($22,763 + $53,755).

Interest on past expenses

72 The plaintiff claims and I allow $1,949 for interest on past expenses.

Future medical and treatment expenses

73 The plaintiff claims the following expenses for future medical and other treatment:

i.	Visits to specialists, every three weeks @ $60.00 - $200.00 per visit (6 visits) = 6 x $130.00	$780.00
ii.	X-rays and scans - every 6 weeks to 3 months (3 scans) - $300.00 - $500.00 - 3 x 400	$1,200.00
iii.	Medications including analgesia - $400.00 - $100.00 per month - $70.00 x 4 months	$280.00

iv.	Chemotherapy - $1,800.00 - $3,000.00 per treatment (every 3 weeks) - $2,400.00 x 6	$14,400.00
v.	Immunotherapy (Keytruda) (capped at $60,000.00)	$6,224.62
vi.	Radiotherapy	$3,000.00
vii.	Hospitalisation - $2,000.00 - $3,000.00 per day x 10 days	$25,000.00
Total		$50,884.62

74 The plaintiff claims the following future special damages:

i.	Occupational therapy - (exhibit 57 TB 290)	$3,600.00
ii.	Palliative Care planning - (exhibit 57 TB 290)	$6,000.00
Total		$9,600.00

75 The defendant admits that those expenses should be allowed as damages except for visits to specialists, and immunotherapy. The defendant admits that damages should be allowed for chemotherapy but only in the sum of $4,800, and hospitalisation but only in the sum of $12,500.

76 I will allow the costs for immunotherapy for the reasons I have already given. I will allow the expenses claimed for future immunotherapy in the sum of $6,224.62.

77 The defendant says that Dr Lam's evidence was that the plaintiff made specialist visits to him at Fiona Stanley Hospital without cost. Dr Lam's evidence is that the plaintiff's care was initially at his public practice but her self-funded immunotherapy treatments were as a private patient and her ongoing treatments are done privately. The plaintiff's claim for specialist visits is based upon the evidence of Dr Lam in his report of 6 January 2020. I will allow the expenses for specialist visits in the sum of $780 as claimed by the plaintiff.

78 The defendant says that the plaintiff has received chemotherapy at Fiona Stanley Hospital and the costs of that are reflected in the documents supporting the claim for private health coverage costs and out of pocket expenses. The defendant's analysis of those documents

suggest a cost of approximately $800 per treatment which sets the reasonable and likely cost for such future expense.

79 In the joint expert report, Dr Lam said he had obtained a quote of $1,800 to $3,000 per treatment. Dr Lam's evidence is that the plaintiff's care was transferred from public to private because the hospital does not accept self-funded treatment. The chemotherapy treatment is given in conjunction with immunotherapy and as the treatment is self-funded, the plaintiff cannot receive the treatment in a public hospital. I will allow the future expense for chemotherapy in the sum of $14,400 as claimed by the plaintiff.

80 The hospitalisation costs claimed by the plaintiff are not for admissions for chemotherapy or immunotherapy treatment but for other reasons. The plaintiff has been admitted to Fiona Stanley Hospital for treatment unrelated to chemotherapy and immunotherapy as follows:

(a) 16 - 17 December 2019 - fluid drained from abdomen

(b) 2 - 9 January 2020 - fluid in abdomen and drain inserted

(c) 4 January 2020 - day surgery to adjust drain

The plaintiff was also admitted to St John of God Hospital from 7 - 8 April 2020 for fluid drain from her left lung.

81 The defendant submits that the evidence does not establish any particular number of days that Ms Parkin will stay in hospital in the future. The defendant concedes that there may be some and allows five days at the daily rate of $2,500 as suggested by Dr Lam in his report. I will allow the expenses claimed for hospitalisation in the sum of $12,500 as submitted by the defendant.

82 I will allow $47,984 for future medical and treatment expenses and future special damages.

Past economic loss and past loss of superannuation

83 The parties have agreed that the plaintiff is entitled to an award of $18,426 for past economic loss and $1,769 for past superannuation loss.

Future economic loss

84 The primary calculation of the economic loss to the plaintiff must have regard to the total period during which the plaintiff could have been expected to earn if her lifespan had not been curtailed by

contracting mesothelioma. However, there must be offset against that primary figure, the saving of expenditure on the plaintiff's maintenance during the lost years.

85 The starting point of the calculation is what the plaintiff would have been earning at the date of the assessment if she had not contracted mesothelioma. The parties agree that the plaintiff would have earned $763 after tax per week.

86 The amount which the plaintiff should be awarded for future loss of earning capacity depends upon the following variables. First, the age at which the plaintiff would have retired from employment if she had not contracted mesothelioma. Secondly, the amount of the plaintiff's living expenses or maintenance to be deducted in calculating future economic loss in respect of the lost years. Thirdly, the amount to be deducted for the vicissitudes of life when assessing damages for future economic loss.

87 The plaintiff submits there is compelling evidence to support a finding that the plaintiff would have worked until aged 75. The defendant submits that the evidence to support a finding that the plaintiff would have worked until 75 is not compelling. The defendant says that, even accepting that the plaintiff had no specific plans about retirement, there is little reason to think she would have worked much longer than the statistical average.

88 The forensic accountant called by the defendant, Ms Lindsay, stated in her report of 8 July 2020:

> Based on statistical data on retirement intentions and actual retirement ages, generally speaking, people in fact retire prior to when they say they intended to retire (see the publication of the Australian Bureau of Statistics Intentions, Australia 2018 - 19 Catalogue No 6238.0 - available from www.abs.gov.au). The report indicates that the average age of retirement in Australia was 55.4 years, and for people who were intending to retire, the average age they plan to retire was 65.5.
>
> Also, I have attached at Annexure B hereto a Job Markets Australia Report for Sales Assistants which indicates that the average retirement age for that occupation is 61.3 years, which is reasonably similar to the plaintiff's current age.

89 The plaintiff loved her work at the Perth Zoo and had no plans to retire. The email from Ms Parkin's supervisor at the zoo asking her and her sister to consider applying to be part of the staff supervision pool

and the response of Margaret on behalf of herself and Ms Parkin evidences the plaintiff's strong work ethic and her employer's confidence in her future employment.

90 Prior to her diagnosis of mesothelioma, Ms Parkin was in good health. She continued working notwithstanding she had no financial need to do so. It is likely she would have continued working for some years. Her future economic loss should be calculated on the basis that, but for contracting mesothelioma, she would have worked to 70 years of age. That is a further eight years from when she took long service leave, is beyond the statutory pension age and is well beyond the statistical average retirement age for persons in comparable occupations.

91 Precisely what is encompassed in the concept of 'living expenses' is uncertain. In my opinion for the purposes of calculating economic loss for the lost years, living expenses are expenditures necessary for basic daily living and maintaining good health. They include expenditure on housing, food, clothing, healthcare and transportation. While there are likely other recurring costs in life, they might not be considered as a living expense. For example, recreational activities and entertainment are not living expenses.

92 Ms Lindsay estimated the plaintiff's living expenses to be $265 per week. Ms Lindsay's calculation is based on the Household Expenditure Survey 2015/16 data published by the Australian Bureau of Statistics. Ms Lindsay used the average expenditure in relation to a number of categories of households she considered most relevant to the plaintiff.

93 Ms Parkin estimated her share of the weekly expenses is $186.25 based on an analysis of bills and bank statements over the last 12 months. Ms Parkin said that she and her sister analysed their bank cards, calculated their total household expenditure during the 12 months and divided by two to arrive at Ms Parkin's 'share'.

94 The relevant weekly expenses are those of Ms Parkin, not those of an average household with characteristics similar to Ms Parkin. The data extracted by Ms Lindsay is some evidence of Ms Parkin's likely expenses but Ms Parkin's evidence is a better guide to her weekly living expenses.

95 By the method I have described, Ms Parkin calculated her expenses to be:

a. Synergy (gas) - $9.21
b. Alinta Energy - $3.56
c. Water - $20.64
d. Council rates - $44.06
e. Vehicle licence - $7.38
f. Car Service and Petrol - $25.71
g. Phone - $2.30
h. Work shoes (uniform supplied) - $4.23
i. Food and groceries - $69.16

96 There are basic expenses that Ms Parkin would be likely to incur which she has not taken into account. Ms Parkin's analysis makes no allowance for healthcare. In cross-examination she said that she spends $238 per month ($54 per week) on health insurance. If health insurance was not taken into account, some allowance should be made for likely medical and pharmacy costs.

97 There are other expenses Ms Parkin would be likely to incur. For example, Ms Parkin has made no allowance for housing costs. She and her sister own their house. It is mortgage free. However, from time to time she would be likely to incur some expense on repairs and maintenance. Ms Parkin's analysis includes no allowance for clothing other than work shoes. Ms Parkin explained that she has retained clothes from the clothing shop she and her sister previously operated. They closed the shop 20 years ago. It is likely that Ms Parkin would in the future incur some expense on clothing. Ms Parkin makes a modest allowance for phone costs but allows nothing for internet service notwithstanding that Ms Parkin gave her evidence by internet connection from her house.

98 In my opinion, Ms Parkin's weekly expenses should be estimated in the sum of $240.

99 In his opening submissions, senior counsel for the plaintiff, Mr Rush QC, submitted, in reliance upon ***Bowen v Tutte***:[5]

> Contingencies for loss of earning capacity will generally be deducted at the rate of 2% to 6%.

100 In his opening submissions, senior counsel for the defendant, Mr Priestley SC, submitted that the appropriate deduction for vicissitudes depends to some extent on the remaining period in the workforce that is adopted - the longer the time, and the older the plaintiff would have become, the higher the chances of some

[5] ***Bowen v Tutte*** (1990) Aust Torts Reports 81-043 (Malcolm CJ) 68,083, (Wallace J) 68,807.

circumstance intervening to interfere with her earning capacity. The defendant submitted that the starting point for a retirement age of 65 years would be 10% going up to 25% for 75 years.[6]

101 I have adopted a retirement age of 70 years which is beyond the statistical average for a person following an occupation similar to that of a customer service officer. Having regard to that fact together with the plaintiff's work and health history the appropriate deduction for the vicissitudes of life, having regard to Ms Parkin's circumstances, is 5%.

102 In their joint expert report, the forensic accountants provided tables of future economic loss applying each of the variables to which I have referred. Some modification is required to the table showing a retirement age of 70 years and vicissitudes of 5%, to allow for weekly expenses of $240. Applying those variables I assess the plaintiff's future economic loss to be $132,594.

Future loss of superannuation

103 I will allow $20,217 for future loss of superannuation in accordance with the calculation of the forensic accountants.

Damages for gratuitous services - past care assistance

104 Prior to the onset of symptoms, Ms Parkin lived with Margaret in their own home. Ms Parkin was independent in personal and domestic activities of daily living. Since the onset of symptoms, she has relied on her sister for assistance with domestic tasks. She now spends most of her time resting at home.

105 Ms Cogger, an occupational therapist, was instructed by the plaintiff's solicitor to assess Ms Parkin's past, present and future needs as a result of mesothelioma. Ms Cogger interviewed Ms Parkin and her sister and inspected their home on 2 February 2020. Ms Cogger again interviewed and assessed Ms Parkin by Zoom on 11 June 2020.

106 On 4 March 2020 Ms Cogger reported that Ms Parkin had informed her that she has constant pain at her right scapula. Ms Parkin became breathless with minimal exertion including transfers, lower body dressing and walking. She required standing and seated rests

[6] In his closing submissions, Mr Priestley SC submitted that in light of the prospect that the plaintiff's undiagnosed pelvic mass may have significantly shortened her working life, a starting point for a retirement age of 65 years would be 20%, and increasing if and as the chosen retirement age increases. It is not necessary to have regard to the pelvic mass because I have found on the balance of probabilities it is causally related to the mesothelioma.

throughout the assessment to regain her breath. Her performance in the functional component of the assessment was limited by fatigue, shortness of breath and dizziness that she experienced.

107 Ms Cogger determined that Ms Parkin then required constant support and supervision; she required standby supervision when walking and undertaking personal care tasks. Due to her fatigue and dizziness, Ms Parkin was at risk of falling. Ms Parkin found it distressing when left on her own and support from her sister has helped relieve some of that. Margaret also prepared all of Ms Parkin's meals.

108 Following her assessment on 11 June 2020 Ms Cogger assessed that Ms Parkin's functional capacity had remained unchanged. Ms Parkin informed Ms Cogger that since her original assessment Ms Parkin had developed pain across her right breast/chest. Ms Parkin became breathless with minimal exertion including transfers, lower body dressing and walking. She required standing and seated rests throughout the assessment to regain her breath. She informed Ms Cogger that she is always fatigued in the range of 6 to 8/10 daily.

109 Ms Cogger's report of Ms Parkin's physical, psychological and functional limitations is consistent with the evidence of Ms Parkin and Margaret.

110 Ms Cunningham, an occupational therapist, was instructed by the defendant to assess Ms Parkin's reasonable needs. Ms Cunningham conducted a Zoom video conference with Ms Parkin on 4 June 2020 and subsequently produced a report dated 10 June 2020. Ms Cunningham noted that after Ms Parkin had the drain removed from her abdomen she began to take pain medication as prescribed and became a lot more functional, requiring less assistance from Margaret. This also coincided with the purchase of an electronically profiling bed which made a significant change to Ms Parkin's independence.

111 Ms Cunningham observed that Ms Parkin and her sister have a very special bond, having done most things together for years prior to Ms Parkin's diagnosis. Ms Cunningham reported that Ms Parkin and her sister are somewhat enmeshed in each other's lives and as a result, Margaret has provided more care and assistance than Ms Cunningham has seen comparatively with other cases of a similar nature.

112 Ms Cogger and Ms Cunningham produced a joint expert report after conferring to discuss three questions. The first question is: What personal care and domestic assistance has the plaintiff needed to date,

currently needs and is likely to need in the future as a result of her condition of mesothelioma? The experts agreed that Ms Parkin's past care needs should be considered in eight stages as follows:

Stage 1: 1 September 2019 to 3 November 2019. That is from the date of presentation of symptoms up to the date on which Ms Parkin commenced chemotherapy.

Stage 2: 4 November 2019 to 15 December 2019. That is from when Ms Parkin commenced chemotherapy to when she was admitted to hospital.

Stage 3: 15 December 2019 to 17 December 2019. During that time Ms Parkin was in hospital.

Stage 4: 18 December 2019 to 1 January 2020. During this period Ms Parkin was continuing with chemotherapy treatment.

Stage 5: 2 January 2020 to 9 January 2020. During this period Ms Parkin was again in hospital.

Stage 6: 10 January 2020 to 15 April 2020: During this period Ms Parkin was experiencing significant side effects of the chemotherapy, including night sweats, dizziness, nausea, and vomiting.

Stage 7: 15 April 2020 to 23 June 2020. Mid-April is when Ms Parkin had the drain removed, she had stopped chemotherapy and was undergoing immunotherapy. She noticed some improvements and there was an improvement in her capacity from mid-April. The end of the period, 23 June 2020, is when Ms Cogger had a telephone conversation with Margaret. Margaret informed Ms Cogger that Ms Parkin had been put on Lyrica to manage her pain and was suffering the same sort of side effects as referred to in stage 6.

Stage 8: 24 June 2020 to 2 July 2020. That is from the time of the phone call to the date on which the experts completed their report.

113 The experts agree that during stage 1 Ms Parkin needed three hours of community assistance per week. Community assistance is to drive Ms Parkin to medical appointments, investigations and tests and to attend these appointments with her. Ms Cogger considers that Ms Parkin needed 7.75 hours domestic assistance per week whereas Ms Cunningham considered that Ms Parkin needed 6.5 hours per week. I am persuaded by Ms Cogger's exposition of Ms Parkin's needs,

together with the evidence of Ms Parkin and Margaret, that Ms Parkin reasonably needed 7.75 hours domestic assistance per week during that period.

114 During stage 2 Ms Parkin was undergoing chemotherapy and had significant side effects including nausea, fatigue and pain. Ms Cogger assessed that Ms Parkin needed 26.25 hours domestic assistance, 0.5 hours gardening help and 6 hours community assistance. Ms Cunningham agreed that Ms Parkin reasonably needed 6 hours per week community assistance but considered that 17 hours per week domestic and gardening assistance was sufficient. The main difference between Ms Cogger and Ms Cunningham was the time needed for meal preparation and cleaning. I accept Ms Cogger's assessment.

115 During stage 3 Ms Parkin was in hospital. Ms Cogger allowed 16 hours for this two day period on the basis that Margaret visited Ms Parkin for at least eight hours a day and provided her with assistance. Ms Cunningham asserts that there are nursing staff paid to take care of Ms Parkin's needs and the only requirement for additional care was to support Ms Parkin when the doctors do their round.

116 In ***Nicholson v Nicholson***,[7] the New South Wales Court of Appeal held that minor activities which helped to improve a plaintiff's level of comfort, engaged in by a relative while the plaintiff is subject to full time hospitalization, do not fulfil a relevant need within the ***Griffiths v Kerkemeyer*** principle. That approach has been followed by Australian courts.[8] However, the court must have regard to the facts of each case. It should not be assumed that the nursing staff in hospitals can provide all necessary services.

117 Ms Cogger based her assessment on Margaret visiting Ms Parkin for at least 8 hours a day. Margaret provided Ms Parkin with some services during that time, for example, providing her with snacks, but she was not providing services for the whole of her visit. I will allow 4 hours per day during Ms Parkin's hospitalization.

118 The experts are agreed that during stage 4 Ms Parkin's needs were the same as during stage 2. I will make the same allowances for that period.

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[7] ***Nicholson v Nicholson*** (1994) 35 NSWLR 308, 323 - 334.

[8] See eg ***Waller v Suncorp Metway Insurance Ltd*** [2010] 2 QdR 560 [10] - [11]; ***Wormleaton v Thomas & Coffey Ltd (No 4)*** [2015] NSWSC 260.

119 During stage 5 Ms Parkin was in hospital. For the same reasons as in relation to stage 3 I will allow for 4 hours assistance per day, a total of 28 hours for the period.

120 Stage 6 is after Ms Parkin was discharged home. During this period Margaret provided 16 hours per day assistance. Ms Cogger assessed Ms Parkin's needs for assistance to be 16 hours per day. This was on the basis that the chemotherapy had a cumulative effect at this point. The side effects affected Ms Parkin to the point she experienced constant dizziness; she was unsteady and at risk of falling. Ms Cogger assessed that Ms Parkin would benefit from using a walking aid as she needed supervision. Ms Cunningham agreed that Ms Parkin needed additional assistance during this period. She assessed Ms Parkin's reasonable needs to be 6 hours per day.

121 In her report Ms Cogger assessed Ms Parkin's needs to be 86.25 hours per week personal care, 26.75 hours per week domestic assistance and 6 hours per week transport assistance, that is, a total of 119 hours per week (17 hours per day). In the joint expert report Ms Cogger recommended supervision and assistance for 16 hours per day, which is a total of 112 hours per week.

122 I consider that Ms Cogger's assessment of Ms Parkin's needs for domestic assistance and transport are reasonable and supported by the evidence.

123 In relation to personal care, Ms Cogger says that Ms Parkin requires assistance and supervision with showering and dressing of 1.5 hours per day. Overnight Ms Parkin requires 1 hour support to help with night toileting and then to help Ms Parkin to settle back to sleep. Margaret manages Ms Parkin's diary and following up with medical staff where needed on her behalf, taking 2 hours per week. Ms Cogger says that all the remaining time that Margaret is supervising Ms Parkin she is on call and will provide her sister with assistance should she want to go to the toilet or go downstairs to rest. Ms Cogger explained that Margaret's constant supervision provides emotional support for Ms Parkin.

124 Ms Cunningham assessed the plaintiff's need for personal care to be eight hours per day.

125 In ***Wormleaton v Thomas & Coffey Ltd (No 4)***,[9] Campbell J rejected a claim of seven hours per week for emotional support, provided by the plaintiff's wife, directed to maintenance of the plaintiff's psychological state as a result of serious injury. Campbell J referred to ***CSR Ltd v Eddy***[10] where the majority said:

> … ***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 [21].

126 In ***Wormleaton***, Campbell J accepted that emotional support is not a service that one is capable of rendering to oneself. His Honour said:

> People are social beings and most of us appreciate the company of family, friends and colleagues. But the benefits we derive from that society is not a service provided by those others to us. Nor can we, as I have said, provide that support to ourselves [134].

Campbell J noted that in that case there was no diagnosis of any psychiatric or psychological injury.

127 The defendant accepts that emotional or psychological support may be of comfort to the plaintiff but submits that there is no appropriate expert evidence that Ms Parkin has a need for such supervision and care.

128 Ms Parkin's need for emotional support is intertwined with her need for assistance in carrying out daily tasks. Ms Cogger considered that Ms Parkin has a need for constant supervision and care from her sister.

129 In ***Van Gervan v Fenton***,[11] the High Court considered gratuitous services provided to a plaintiff by a person with whom she is in a marital or other personal and permanent relationship including protective attention. Deane and Dawson JJ said:

> 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. It may be that, if the appellant had not been married, it would have been reasonable, for the purposes of assessing damages, for

[9] See ***Wormleaton v Thomas & Coffey Ltd (No 4)*** [2015] NSWSC 260.
[10] ***CSR Ltd v Eddy*** (2005) 226 CLR 1.
[11] ***Van Gervan v Fenton*** (1992) 175 CLR 327.

> him to have continued to live at home and to have employed the services of a seven-day-a-week live-in housekeeper to attend to his accident-caused needs during the period of 7 years following the trial. The facts of the matter were, however, that the appellant was and was likely to remain a party to a stable marital relationship and that 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, 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. To that extent, the continuing gratuitous services provided by the spouse assume a different character and should be treated as additional services which have been or will be provided by that spouse to look after the accident-caused needs of the injured plaintiff.
>
> …
>
> [Those services] involve both active care and protective attention to an extent that represents an oppressive restraint upon the wife's freedom of activity. It was clearly reasonable that the appellant's damages for loss of capacity include a substantial amount calculated by reference to the value of those additional services and that, in ascertaining the extent of the wife's additional services, account be taken of the drastic curtailment of the appellant's ability to do things for his wife (and himself) in return. Nonetheless, it would be illegitimate to treat the burden of additional care which the wife has assumed in the context of a devoted marriage and in the environment of her own home as converting her into the equivalent of a full-time live-in housekeeper to be remunerated not only for the active services which she renders to her husband but on the basis that time spent with her husband in her own home is to be treated as if it were services rendered to a stranger in a strange environment (343 - 344).

130 Their Honours considered 'protective attention' was a service. Furthermore, if a fulltime live-in housekeeper were required, the time spent by the housekeeper by being on hand to deal with any calls that might be required of her would amount to the rendering of a service. Mason CJ, Toohey and McHugh JJ,[12] Brennan J[13] and Gaudron J[14] also characterised the constant care and attention provided by the injured plaintiff's wife as the provision of services.

131 The supervision or protective attention provided by Margaret is a compensable gratuitous service.

132 I assess Ms Parkin's reasonable need for supervision and assistance during stage 6 at 12 hours per day or 84 hours per week, that is 26.25 hours domestic assistance, 0.5 hours gardening, 6 hours community and 51.25 hours personal care.

133 The experts are agreed that during stage 7 Ms Parkin improved in her mobility and would have required the same level of assistance as in stage 2. I will make the same allowance for assistance in stage 7 as in stage 2.

134 The experts are agreed that during stage 8 Ms Parkin reasonably needed the same level of assistance as in stage 6. I will make the same allowance for assistance.

135 The experts adopted different hourly rates for calculating the cost of care needed by Ms Parkin.

136 As a general rule, the market cost or value of services rendered gratuitously to the plaintiff is the fair and reasonable value of such services.[15]

137 Ms Cunningham used the NDIS rate for valuing the services provided to Ms Parkin. The NDIS rate is a rate set by the government. Ms Cunningham said that many commercial care providers in Perth use these rates for servicing both private and NDIS clients. Ms Cogger used rates charged by Silver Chain. Silver Chain is a well-known, reputable provider of services. Silver Chain has previously provided services to Ms Parkin. The evidence does not establish that the plaintiff would be able to obtain any level of care at an NDIS rate. For all stages

[12] At 338 - 340.
[13] At 340 - 341.
[14] At 346 - 347.
[15] ***Van Gervan v Fenton*** (1992) 175 CLR 327; ***Kars v Kars*** (1996) 187 CLR 354.

except stages 6 and 8 Ms Cogger adopts hourly rates of $71 for personal care and community care and $65 for domestic assistance. I adopt those rates.

138 For stages 6 and 8 Ms Cogger adopts an hourly rate of $65 for gardening and domestic assistance and $71 for community care. For personal care Ms Cogger adopts an hourly rate of $71 for Monday to Friday, an after hour's rate of $84, a Saturday rate of $103 and a Sunday rate of $118. For simplicity, I have adopted an hourly rate of $82 for personal care which is an approximate time weighted average of the Monday to Friday (ordinary hours) and Saturday and Sunday rates adopted by Ms Cogger.[16]

139 For the reasons set out above I assess damages for past assistance as follows:

Stage	**Start Date**	**End Date**	**Weeks**	**Hours Per Week**		**Hourly Rate**	**Weekly Cost**	**Total Cost**
1	1/09/2019	3/11/2019	9.14	Personal Care	0	$71.00	$0.00	$0.00
				Domestic	7.75	$65.00	$503.75	$4,604.28
				Community	3	$71.00	$213.00	$1,946.82
Total					**10.75**			**$6,551.10**

Stage	**Start Date**	**End Date**	**Weeks**	**Hours Per Week**		**Hourly Rate**	**Weekly Cost**	**Total Cost**
2	4/11/2019	15/12/2019	6.00	Personal Care	0	$71.00	$0.00	$0.00
				Domestic	26.25	$65.00	$1,706.25	$10,237.50
				Gardening	0.5	$65.00	$32.50	$195.00
				Community	6	$71.00	$426.00	$2,556.00
Total					**32.75**			**$12,988.50**

Stage	**Start Date**	**End Date**	**Weeks**	**Hours Per Week**		**Hourly Rate**	**Weekly Cost**	**Total Cost**
3	16/12/2019	17/12/2019	0.29	Personal Care	8	$71.00	$568.00	$164.72
Total					**8**			**$164.72**

[16] ie (71 x 5) + 103 + 118 ÷ 7.

Stage	Start Date	End Date	Weeks	Hours Per Week		Hourly Rate	Weekly Cost	Total Cost
4	18/12/2019	1/01/2020	2.14	Personal Care	0	$71.00	$0.00	$0.00
				Domestic	26.25	$65.00	$1,706.25	$3,651.38
				Gardening	0.5	$65.00	$32.50	$69.55
				Community	6	$71.00	$426.00	$911.64
Total					**32.75**			**$4,632.57**

Stage	Start Date	End Date	Weeks	Hours Per Week		Hourly Rate	Weekly Cost	Total Cost
5	2/01/2019	9/01/2019	1.14	Personal Care	8	$71.00	$568.00	$647.52
Total					**8**			**$647.52**

Stage	Start Date	End Date	Weeks	Hours Per Week		Hourly Rate	Weekly Cost	Total Cost
6	10/01/2020	15/04/2020	13.57	Personal	51.25	$82.00	$4,202.50	$57,027.93
				Domestic	26.25	$65.00	$1,706.25	$23,153.81
				Gardening	0.5	$65.00	$32.50	$441.02
				Community	6	$71.00	$426.00	$5,780.82
Total					**84**			**$86,403.58**

Stage	Start Date	End Date	Weeks	Hours Per Week		Hourly Rate	Weekly Cost	Total Cost
7	16/04/2020	25/06/2020	10	Personal Care	0	0	0	0
				Domestic	26.25	$65.00	$1,706.25	$17,062.50
				Gardening	0.5	$65.00	$32.50	$325.00
				Community	6	$71.00	$426.00	$4,260.00
Total					**32.75**			**$21,647.50**

Stage	Start Date	End Date	Weeks	Hours Per Week		Hourly Rate	Weekly Cost	Total Cost
8	26/06/2020	02/07/2020	1	Personal	51.25	$82.00	$4,202.50	$4,202.50
				Domestic	26.25	$65.00	$1,706.25	$1,706.25
				Gardening	0.5	$65.00	$32.50	$32.50
				Community	6	$71.00	$426.00	$426.00
Total					**84**			**$6,367.25**

Total: $139,402.74.

140 Accordingly, I assess damages for past gratuitous services in the sum of $139,402.74.

Interest on past care assistance

141 I allow interest on past care assistance, that is on $139,402.74 at 3% from 1 September 2019 to 2 July 2020 (305 days) - $3,475.00.

Damages for gratuitous services - future care assistance

142 Ms Cogger and Ms Cunningham divided their assessment in relation to future care into two periods. The first period is from 3 July 2020 to 22 October 2020 during which the experts considered that Ms Parkin would require high care. That period is from the date of their joint report to a date five weeks prior to her final five weeks. The experts considered that from 23 October 2020 to 28 November 2020, that is the end of Ms Parkin's assumed life expectancy, Ms Parkin would require complete care.

143 The experts agree that in the period from 3 July 2020 to 22 October 2020 Ms Parkin requires the same level of support as in stages 6 and 8. I will allow for assistance at the same level.

144 The final stage of support is from 23 October 2020 to 28 November 2020 during which the experts agree that Ms Parkin will need 24 hour care. Ms Cunningham considers this should be with an inactive overnight support. Ms Cogger considers it should be an active 24 hour support. Having regard to the evidence, I accept Ms Cogger's approach.

145 I accept and adopt Ms Cogger's assessment of Ms Parkin's future need for care and assistance with the qualification in relation to the

number of hours of personal care in the high care stage and I accept her calculation of a fair and reasonable cost of those services with the qualification of the hourly rate for personal assistance.

146 I assess future care and assistance as follows:

Stage	**Start Date**	**End Date**	**Weeks**	**Hours Per Week**		**Hourly Rate**	**Weekly Cost**	**Total Cost**
High Care	26/06/2020	22/10/2020	17.00	Personal	51.25	$82.00	$4,202.50	$71,552.50
				Domestic	26.25	$65.00	$1,706.25	$29,006.25
				Gardening	0.5	$65.00	$32.50	$552.50
				Community	6	$71.00	$426.00	$7,242.00
Total					**84**		**$9,826.50**	**$108,243.75**

Stage	**Start Date**	**End Date**	**Weeks**	**Hours Per Week**		**Hourly Rate**	**Weekly Cost**	**Total Cost**
Com-plete Care	23/10/2020	28/11/2020	5.29	Personal (Mon-Fri)	70	$71.00	$4,970.00	$26,291.30
				Personal (After Hours)	65	$84.00	$5,460.00	$28,883.40
				Personal (Saturday)	27	$103.00	$2,781.00	$14,711.49
				Personal (Sunday)	27	$118.00	$3,186.00	$16,853.94
				Domestic	4	$65.00	$260.00	$1,375.40
				Gardening	0.5	$65.00	$32.50	$171.93
Total					**193.5**			**$88,287.46**

Total $196,530.71.

147 Accordingly, I assess damages for future care assistance in the sum of $196,530.71.

Future aids, appliances and equipment

148 The parties are agreed that damages should be allowed in the sum of $11,747 for future aids, appliances and equipment.

149 The plaintiff also claims $15,868 for the cost of installing a stair lift. Ms Parkin and her sister informed Ms Cogger that Ms Parkin sits in the sun on the upstairs balcony and when her nieces and brother visit she uses the upstairs area. In Ms Cogger's opinion, Ms Parkin will not be able to manage the stairs in the near future. If the stair lift is not installed Ms Parkin would be restricted to only being able to access her bedroom and bathroom with no living spaces for her to utilise.

150 Ms Cunningham acknowledged that Ms Parkin was very breathless after ascending the stairs and she does miss going upstairs but does not consider that the stair lift is reasonably necessary.

151 Having regard to Ms Cogger's assessment, I find that a stair lift is reasonably necessary. Without it Ms Parkin will not be able to access the upper floor and will be restricted to her bedroom and bathroom. I will allow the sum of $15,868 for the installing of a stair lift.

152 Accordingly, I allow the sum of $27,615 for past and future aids, appliances and equipment, including the installation of a stair lift.

Loss of expectation of life

153 Damages for loss of expectation of life is an objectively determined amount in addition to that awarded for pain and suffering and loss of enjoyment and amenities of life. In Western Australia a conventional award of $15,000 is usual.[17] I will allow the sum of $15,000 as damages for loss of expectation of life.

General damages

154 The defendant notes that the plaintiff has suffered pain and discomfit and invasive forms of treatment for a period of at least some nine months now. She has an estimated life expectancy of six months. The defendant also notes that since her diagnosis the plaintiff has been suffering from a particular condition known as ascites, a collection of fluid in the abdomen which has required separate treatment. There is no doubt that mesothelioma is a condition which causes great pain and distress.

155 Both parties referred the court to awards for damages for non-pecuniary loss in earlier decisions. The court may have regard to

[17] ***Lowes v Amaca Pty Ltd*** [2011] WASC 287.

such decisions for the purpose of establishing the appropriate award from non-pecuniary loss.[18]

156 The plaintiff referred to a number of cases concerning awards of general damages in the Dust Diseases Tribunal of New South Wales. The awards in the Dust Diseases Tribunal generally range from $350,000 to $400,000 for pain and suffering damages.

157 In their written submissions counsel for the plaintiff referred to two non-mesothelioma cases which they submitted are relevant in relation to the consideration by the court of an appropriate award of general damages. In ***MC v Morris***,[19] a plaintiff was sexually assaulted between the ages of 13 and 15 and suffered acts of sexual trauma described by the trial judge as gravely humiliating. General damages were assessed at $400,000. In ***Lawrence v Province Leader of the Oceania Province of the Congregation of Christian Brothers***,[20] a 75-year-old plaintiff was sexually abused whilst in the care of the Christian Brothers from the age of 8 to 12. The plaintiff suffered lifelong PTSD and associated psychiatric harm. The District Court of Western Australia awarded general damages of $400,000.

158 The defendant referred to ***MR & RC Smith Pty Ltd v Wyatt [No 2]***[21] and ***Lowes v Amaca Pty Ltd***.[22] In ***MR & RC Smith Pty Ltd v Wyatt [No 2]*** Pullin JA, with whom Newnes and Murphy JJA agreed, said:

> In the cases cited by the appellant, the awards of general damages ranged from $7,500 to $75,000. In the cases cited by the respondent, the general damages awards ranged from $120,000 to $225,000. The mere recital of these figures suggests that not all of the cases were comparable with this case. In fact, many of the cases cited by the parties provided little guidance. First, some cases cited were over 10 years old, one dated back more than 20 years. This diminished their utility, given the fluctuations in the value of money. Secondly, the facts of many of the cases were not, in any respect, comparable to the facts of the present case. Finally, the majority of the respondent's cases were cases decided in other jurisdictions. While cases from outside of Western Australia are relevant, attention should first be paid to recent comparable decisions in courts in this jurisdiction: ***Lowes v Amaca Pty Ltd*** [2011] WASC 287 [821]. If a party contends that awards in this State are out of step with awards in other jurisdictions, the point should

[18] *Civil Liability Act 2002* (WA) s 10A.
[19] ***MC v Morris*** [2019] NSWSC 1326.
[20] ***Lawrence v Province Leader of the Oceania Province of the Congregation of Christian Brothers*** [2020] WADC 27.
[21] ***MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2]*** [2012] WASCA 110.
[22] ***Lowes v Amaca Pty Ltd*** [2011] WASC 287.

> be expressly raised and argued. In this case, the parties were reluctant to refer to cases at all, and the respondent did not contend that awards in this State should not provide a guide to the appropriate award of damages [130].

159 In ***Lowes v Amaca Pty Ltd***,Corboy J undertook a survey of damages for pain and suffering and loss of enjoyment of life awarded in the Western Australia Supreme and District Courts and in the New South Wales Dust Diseases Tribunal and determined that an appropriate award in that case was $250,000.

160 ***Lowes v Amaca Pty Ltd*** was decided almost 10 years ago and awards of damages have increased significantly during that period.

161 In ***Amaca Pty Ltd v King***,[23] a jury had awarded the plaintiff who suffered mesothelioma $730,000 damages for pain and suffering and loss of enjoyment of life. The Victorian Court of Appeal dismissed an appeal on the ground that the award was so high that no reasonable jury properly instructed and with all due attention to the evidence could arrive at it. The Court of Appeal referred to the decision of the New South Wales Court of Appeal in ***Simon Engineering (Aust) Pty Ltd v Brieger***[24] and the decision of Corboy J in ***Lowes v Amaca Pty Ltd***. The Court of Appeal said:

> For present purposes, we do not find either case to be particularly persuasive. The problem with ***Brieger*** is that it is now over 20 years old. In that time, a lot has changed. Apart from anything else, the minimum wage, average weekly earnings and average annual earnings have almost tripled and the remuneration paid to some members of society, such as, for example, chief executive officers of publicly listed corporations, has increased from a couple of hundred thousand dollars per annum to millions of dollars per annum with added bonuses and incentives of more millions of dollars. Of course, an award of damages for loss of enjoyment of life and pain and suffering is not to compensate for loss of earnings or earning capacity. We do not suggest that there is any necessary relationship between earnings and the measure of compensation appropriate for pain and suffering. But inasmuch as contemporary society pays and receives vastly greater amounts of remuneration than that of a generation ago (even allowing for inflation) and, at the same time as it seems to us, writes and speaks of the importance of the quality of life to an extent not before contemplated, who doubts that modern society may place a higher value on the loss of enjoyment of life and the compensation of pain and suffering than was the case in the past? [177]

[23] ***Amaca Pty Ltd v King*** (2011) 35 VR 280 [177].
[24] ***Simon Engineering (Aust) Pty Ltd v Brieger*** (Unreported, NSWCA, 6 September 1990).

…

> Moreover, over the last 10-20 years, awards of damages have increased significantly; not just in personal injuries cases, but also in other areas of litigation. For example, last year a jury in this State awarded a barrister more than $600,000 in damages for defamation and that amount seems not to have been regarded as unreasonable [180].

162 Senior counsel for the defendant submitted that the difference in the award in ***Lowes v Amaca Pty Ltd*** and awards by the Dust Diseases Tribunal of New South Wales is explicable, at least in part, by different statutory regimes.

163 The defendant subsequently referred the court to the decision of the New South Wales Dust Diseases Tribunal in ***Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd***[25] in which reasons for judgment were delivered after the trial in this case.

164 In ***Kennedy v CIMIC***, Scotting J assessed damages against the first defendant in accordance with the substantive law of New South Wales and damages against the second defendant in accordance with the substantive law of Western Australia because the tortious conduct of the first and second defendants took place in New South Wales and Western Australia respectively. Scotting J said:

> In my view there should be general consistency between the awards of general damages between the defendants because they have resulted in the same indivisible damage. In assessing the appropriate award of general damages I am applying the common law of Australia, as modified by s 10A. Taking into account all of the judgments that I have been referred to, I am persuaded that the starting point for the appropriate award of general damages is $350,000. This finding is supported by reference to the awards in the majority of cases I have been referred to. Further, the decision of ***Hannell*** is [not] of much value because it was decided more than 10 years ago. Similarly the decision in ***Lowes*** was decided about eight years ago and lacks contemporaneity. I note that the assessment of general damages in ***Lowes*** is comparable to similar verdicts in the New South Wales Dust Diseases Tribunal at about the same time but the facts were not truly comparable. It is apparent from the list of cases that I have been referred to that awards of general damages have increased and this is consistent with the dicta of the Victorian Court of Appeal [177].

165 In determining an award for general damages the court must have regard to the particular circumstances of the plaintiff. The evidence

[25] ***Kennedy v CIMIC Group Limited and CPB Contractors Pty Ltd*** [2020] NSWDDT 7.

discloses that the impact on the plaintiff of mesothelioma has been enormous. In opening, senior counsel for the plaintiff, Mr Rush QC, described Ms Parkin as:

> a lovely woman who led a happy, healthy life, who was careful in her approach to life, has an inner kindness in relation to her character. She led a full life in every respect. She loved her work at the zoo. She is enormously close to her family, her sister and her brother and her nieces … she used to exercise every day in the home gym.

That submission is supported by the evidence.

166 The mesothelioma has shattered that life. As a result of her mesothelioma and her treatment, the plaintiff regularly experiences cramps, stomach pains and intermittent pain in her abdomen as well as reflux. She takes pain medication and uses heat packs on her right side, back and stomach to ease the pain. The pain continues despite the medication. Ms Parkin has become increasingly fatigued. She finds it difficult to sleep and has been prescribed medication for that. When she does fall asleep, Ms Parkin wakes to pain or needing to go to the bathroom. Margaret gives Ms Parkin her medication and reapplies heat packs under her back, the right side of her chest and stomach and helps her out of bed when she needs to go to the toilet. Ms Parkin is very unsteady on her feet and needs Margaret's assistance. Ms Parkin finds it hard to get back to sleep as she lies awake thinking about what is happening to her.

167 The plaintiff's mental and emotional responses and her sense of loss is difficult to describe. Ms Parkin has lost her life as it was. She was fit and healthy, worked, socialised and travelled. Now she is in constant pain and fatigued. She spends most of her time resting at home and rarely leaves the house. All she can do is sit and watch TV and look at the view. Even watching TV is difficult because she cannot concentrate and becomes distracted thinking and worrying about her future.

168 The appropriate award for general damages is $360,000.

Conclusion

169 I assess damages as follows:

Past expenses	$76,518.00
Interest on past expenses	$1,949.00

Future medical and treatment expenses (including Keytruda)	$47,984.00
Past economic loss	$18,426.00
Past superannuation loss	$1,769.00
Future economic loss	$132,594.00
Future loss of superannuation	$20,217.00
Past care assistance	$139,402.74
Interest on past care assistance	$3,475.00
Future care assistance	$196,530.71
Future aids, appliances and equipment	$27,615.00
Loss of expectation of life	$15,000.00
General damages	$360,000.00
Total	$1,041,480

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

GG
Associate to the Honourable Justice Le Miere

27 AUGUST 2020