

SUPREME COURT OF QUEENSLAND

CITATION: *Hall v WorkCover Queensland* [2014] QCA 135

PARTIES: **KAREN LESLEY HALL**
(appellant)
v
WORKCOVER QUEENSLAND
(respondent)

FILE NO/S: Appeal No 12304 of 2013
SC No 5919 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2014

JUDGES: Margaret McMurdo P and Muir JA and Atkinson J
Separate reasons for judgment of each member of the Court,
Margaret McMurdo P and Atkinson J concurring as to the
orders made

ORDERS: **Allow the appeal, set aside the first of the orders made by the primary judge on 6 December 2013 and instead order that the question "Is the appellant's claim for damages as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim barred by reason of s 11(1) of the *Limitation of Actions Act 1974 (Qld)*?" be answered "No". The respondent should pay the appellant's costs of the appeal and of the hearing below.**

CATCHWORDS: LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS, QUASI-CONTRACTS AND TORTS – TORT ACTIONS INVOLVING PERSONAL INJURIES – where the appellant is the widow of the deceased – where the deceased had been employed by the respondents – where the deceased was exposed to asbestos dust during his employment – where the deceased died of mesothelioma – where at the date of the deceased's death the three year limitation period for the commencement of actions for damages for negligence or breach of duty prescribed by s 11 of the *Limitation of Actions Act 1974 (Qld)* had expired – whether the primary judge erred in finding that the appellant's claim for damages was statute barred

Acts Interpretation Act 1954 (Qld), s 14A, s 14B, s 32C
Civil Liability Act 2003 (Qld), Sch 2
Civil Liability and Other Legislation Amendment Act 2010 (Qld),
s 25, s 30
Civil Proceedings Act 2011 (Qld), s 64
Common Law Practice Act 1867 (Qld), s 12, s 13, s 14
*Common Law Practice and Limitation of Actions Acts
Amendment Act 1981 (Qld)*, s 9
Limitation of Actions Act 1974 (Qld), s 5, s 11, s 29, s 31, s 47
Succession Act 1981 (Qld), s 66
Supreme Court Act 1995 (Qld), s 17

Austral Pacific Group Ltd (In liq) v Aircservices Australia
(2000) 203 CLR 136; [2000] HCA 36, considered
*Australian Competition and Consumer Commission v
Maritime Union of Australia* (2001) 114 FCR 472; [2001]
FCA 1549, considered
Australian Iron & Steel Ltd v Hoogland (1962) 108 CLR 471;
[1962] HCA 13, considered
Barclay v Penberthy (2012) 246 CLR 258; [2012] HCA 40,
considered
Bonser v Melnacic [2002] 1 Qd R 1; [\[2000\] QCA 13](#),
considered
British Electric Railway Company Ltd v Gentile [1914] AC 1034,
considered
Burns v Minister for Health (2012) 45 WAR 276; [2012]
WASCA 267, applied
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378;
[2012] HCA 56, followed
Commissioners of Inland Revenue v Maple & Co (Paris) Ltd
[1908] AC 22, considered
*Cooper Brookes (Wollongong) Pty Ltd v Federal
Commissioner of Taxation* (1981) 147 CLR 297; [1981]
HCA 26, considered
Crawford v Hydro-Electric Commission [1963] Tas SR 83;
[1963] TASStRp 10, considered
Ex parte Revis [1981] Qd R 10, followed
Hall v Don Faulkner Motors Pty Ltd & Ors [2013] QSC 331,
considered
Harding v Lithgow Corporation (1937) 57 CLR 186; [1937]
HCA 46, followed
Hawthorne v Thiess Contractors Pty Ltd [2002] 2 Qd R 157;
[\[2001\] QCA 223](#), considered
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503;
[2000] HCA 36, considered
Johnson v Hill & Ors [2002] 2 Qd R 486; [\[2002\] QCA 52](#),
followed
Kupke v The Corporation of the Sisters of Mercy [1996]
1 Qd R 300, considered
Leggott v Great Northern Railway Co (1876) 1 QBD 599,
considered
Maxwell v Murphy (1957) 96 CLR 261; [1957] HCA 7,

considered

Miller v Nominal Defendant [2005] 1 Qd R 135; [\[2003\] QCA 558](#), considered

Multiplex Constructions Pty Ltd v Irving [2004] NSWCA 346, applied

Newcastle City Council v GIO General Ltd (1997)

191 CLR 85; [1997] HCA 53, considered

Nolan v Clifford (1904) 1 CLR 429; [1904] HCA 15, considered

Nunan v Southern Railway Co [1924] 1 KB 223, considered

Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, considered

Pumpa v Goulburn-Murray Rural Water Corporation (2010) 27 VR 577; [2010] VSC 169, applied

Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12, followed

Smith v Federal Commissioner of Taxation (1987) 164 CLR 513; [1987] HCA 48, considered

Taylor v Owners – Strata Plan No 11564 (2013) 83 NSWLR 1; [2013] NSWCA 55, considered

Taylor v The Owners – Strata Plan No 11564 (2014) 88 ALJR 473; [2014] HCA 9, considered

Thaina Town (On Goulburn) Pty Ltd v Sydney City Council (2007) 71 NSWLR 230; [2007] NSWCA 300, applied

WorkCover Queensland v Amaca Pty Ltd (2010) 241 CLR 420; [2010] HCA 34, applied

Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553, considered

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W Sofronoff QC, with K Holyoak, for the respondent

SOLICITORS: Turner Freeman Lawyers for the appellant
BT Lawyers for the respondent

- [1] **MARGARET McMURDO P:** I agree with Muir JA that the appeal must be allowed. The primary judge erred in answering the separate question, "Is the appellant's claim for damages as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim barred by reason of s 11(1) of the *Limitation of Actions Act 1974?*", "Yes." The question should have been answered, "No".

- [2] I agree with Muir JA's reasons on both aspects of ground 1 and add the following observations. The terms of s 11 are set out in Muir JA's reasons at [12]. The following relevant definitions are contained in s 5 *Limitation of Actions Act*:

"(1) In this Act –

action includes any proceeding in a court of law.

...

damage includes loss of life and personal injury.

...

personal injury includes a disease and an impairment of a person's physical or mental condition."

- [3] The definition of "damage" includes loss of life. Under s 32C(a) *Acts Interpretation Act* 1954 (Qld) words in the singular include the plural. The definition of "damage" in s 5 supports the conclusion of the primary judge and Muir JA that s 11(1) extends to claims for damages for loss of life, that is, dependency claims brought under s 17 *Supreme Court Act* 1995 (Qld). I consider it also supports Muir JA's conclusion that s 11(2) similarly extends to dependency claims. The reference in s 11(2) to "a right of action" can only mean a right of action for damages of the kind discussed in s 11(1) and therefore include actions for damages for loss of life, that is, dependency claims.
- [4] In light of the text of s 11 and Muir JA's discussion of its context within the *Limitation of Actions Act* and its legislative history and purpose, this construction sits comfortably with the approach to statutory interpretation recently taken by French CJ, Crennan and Bell JJ in *Taylor v The Owners-Strata Plan No 11564*.¹
- [5] The appellant's counsel made clear in oral submissions that grounds 2 and 3 were alternative arguments in case this Court did not uphold the contention that s 11(2) applied to the dependency claims. As the appellant has been successful in that contention, I consider it unnecessary to determine grounds 2 and 3.
- [6] I would allow the appeal, set aside the first of the orders made by the primary judge on 6 December 2013 and instead order that the question "Is the appellant's claim for damages as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim barred by reason of s 11(1) of the *Limitation of Actions Act* 1974?" be answered "No". The respondent should pay the appellant's costs of the appeal and of the hearing below.
- [7] **MUIR JA: Introduction** The appellant is the widow of the late Gregory Hall who was diagnosed with mesothelioma on 9 August 1994. He died of that condition on 28 May 1995 without having commenced proceedings against the first or second respondents. He had been employed by the first respondent and the second respondent at different times between 1966 and about 1978 and had been exposed to asbestos dust during his employment. At the date of his death, the three year limitation period for the commencement of actions for damages for negligence or breach of duty prescribed by s 11 of the *Limitation of Actions Act* 1974 (Qld) (the 1974 Act) had expired.
- [8] On 7 July 2011, the appellant commenced these proceedings on behalf of the deceased's estate (the estate claim) and also for the benefit of the deceased's dependents (the dependency claim).
- [9] The question, "Is the plaintiff's claim for damages as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim barred by reason of s11(1) of the *Limitations of Actions Act* 1974?", was tried as a separate issue and answered in the affirmative by the primary judge on 6 December 2013. The appellant appeals against that decision. The third respondent was the other party to the appeal.
- [10] It is convenient to consider the grounds of appeal in the order in which they were argued by the parties.

¹ (2014) 88 ALJR 473 at 482-383.

Ground 1 – s 11(1) of the 1974 Act does not apply to the dependency claim

- [11] In his second reading speech when introducing the Bill for the 1981 Act into the House of Representatives, the then Minister for Justice and Attorney-General explained:²

“It is also proposed in this Bill to introduce reforms in respect of periods of limitation applicable to actions brought by dependants of a deceased bread-winner pursuant to the provisions of the Common Law Practice Act.

Under the Common Law Practice Act the spouse, parents or children of a deceased bread-winner may maintain an action for damages for their loss of dependency resulting from the death of the bread-winner. A dependency action under the Common Law Practice Act must be commenced within three years after the death of the deceased person, and there is no provision in that Act for an extension of the period of limitation. Infants who seek to claim for their loss of dependency must bring the action within three years of the death of the bread-winner. Such a limitation in respect of children can have grave consequences for their future welfare.

The Queensland Bar Association has submitted that section 29 of the Limitation of Actions Act should have application to a dependency action. Under that provision the limitation period during which an infant may bring an action in respect of personal injury is postponed until three years after the cessation of his infancy. It is considered that the limitation period should be similarly postponed in the case of a dependency action brought by an infant or by a person under some other disability.

My attention has been drawn to a recent Supreme Court decision³ in which it was held that a dependency action under the Common Law Practice Act is not an action in respect of which the limitation period may be extended under the provisions of section 31 of the Limitation of Actions Act.

Section 31 of the Limitation of Actions Act enables the court in an appropriate case to extend a period of limitation where a plaintiff has become aware of relevant evidence which would enable him to maintain an action. The fact that section 31 of the Limitation of Actions Act does not apply to a dependency action can have serious consequences, particularly in a case where a widow cannot locate all relevant witnesses within the limitation period. There may be a case in which a widow cannot ascertain the identity of the person whose negligence caused the death of her husband until after the limitation period has expired.

This Bill provides that sections 29 and 31 of the Limitation of Actions Act apply to a dependency action. The Queensland Bar

² *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [29].

³ *Ex parte Revis* [1981] Qd R 10.

Association and the Queensland Law Society support the application of those provisions to a dependency action. This Bill would ensure that widows and children of a deceased bread-winner would have more adequate means to pursue their claims for compensation.” (citation added)

[12] The 1974 Act relevantly provides:

“11 Actions in respect of personal injury

- (1) Notwithstanding any other Act or law or rule of law, an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) in which damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person **or damages in respect of injury resulting from the death of any person** shall not be brought after the expiration of 3 years from the date on which the cause of action arose.
- (2) However, a right of action relating to personal injury resulting from a dust-related condition is not subject to a limitation period under an Act or law or rule of law.” (emphasis added)

[13] The emphasised words were inserted in s 11(1) by s 9 of the *Common Law Practice and Limitation of Actions Acts Amendment Act 1981* (Qld) (the 1981 Act). The 1981 Act amended s 29 and s 31 of the 1974 Act to include a three year limitation period for a dependency claim and to make the facility to extend the limitation period in prescribed circumstances afforded by s 31 of the 1981 Act applicable to dependency claims.

[14] The 1981 Act also omitted from s 14 of the *Common Law Practice Act 1867* (Qld) (the 1867 Act) that part of s 14 that provided for a limitation period of three years for dependency claims.

[15] Dependency claims were originally provided for in Queensland by s 12 of the 1867 Act which provided:⁴

“12. Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.”

[16] By the *Statute Law Revision Act (No 2) 1995* (Qld), s 12 was relocated to the *Supreme Court Act 1995* (Qld), becoming s 17. That provision, with slight modifications, became s 64 of the *Civil Proceedings Act 2011* (Qld). It provides:

⁴ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [12].

“64 Liability for a death

- (1) This section applies if—
 - (a) a death is caused by a wrongful act or omission, whether or not an offence; and
 - (b) the act or omission would, if death had not resulted, have entitled the deceased person to recover damages in a proceeding for personal injury.
- (2) The person who would have been liable if the death had not resulted is liable for damages despite the death and whether or not the death was caused by circumstances that were an offence.
- (3) In a proceeding under this part, a court may award to the members of the deceased person’s family the damages it considers to be proportional to the damage to them resulting from the death.”

[17] The primary judge held that s 11 of the 1974 Act applied to the dependency claim, explaining:⁵

“It is apparent from the terms of the 1981 Act that the intention of the legislature was to preserve the limitation period of three years for a dependency claim, but to relocate it to the [1974 Act] where the extension of limitation provisions could also be made to apply to a dependency claim. The amendment of the [1974 Act] by the 1981 Act was sufficient to impose a limitation period of three years on a dependency claim and to make the extension provisions in s 29 and s 31 of the Act applicable to a dependency claim. That means that s 11(1) of the Act applies to a dependency claim.”

Ground 1 – application of s 11(1) to the dependency claim - the appellant’s contentions

- [18] The appellant’s contentions were to the following effect. The introductory words of s 11(1) of the 1974 Act, which are clear in meaning and unambiguous, do not refer to a dependency claim created by statute. That position pertained prior to and after the 1981 Act amendments. The primary judge erred in construing s 11(1) in that, contrary to principle, she caused the Minister’s statement of intention in his second reading speech to prevail over the words of the statute.⁶ The primary judge also erred in concluding that the words inserted in s 11(1) by the 1981 Act are “consistent only with the opening words of the provision extending to a dependency claim”.⁷ Those words capture claims brought by the estates of deceased persons (surviving pursuant to s 66 of the *Succession Act* 1981 (Qld)) based on causes of action in “negligence, trespass, nuisance or breach of duty”.
- [19] The appellant’s final contention in this regard was that the added words did not alter or operate in any way upon the fundamental focus of the section, namely, “an action for damages for negligence, trespass, nuisance or breach of duty”.

⁵ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [33].

⁶ *Nolan v Clifford* (1904) 1 CLR 429 at 449; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 499 [55].

⁷ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [32].

Ground 1 - application of s 11(1) to the dependency claim - consideration

- [20] Literally construed, the words of s 11(1) support the appellant's arguments. The introductory words "an action for damages for negligence, trespass, nuisance or breach of duty" are not apt to include a dependency claim. Nor are the words "in which damages claimed by the plaintiff consist of or include damages in respect of injury resulting from the death of any person", literally construed with the preceding words of s 11(1), apt to expand the scope of the introductory words. On a literal reading, the added words refer back to "an action for damages for negligence ... or breach of duty".
- [21] In considering the meaning of s 11(1), regard must be had to other provisions of the Act and, in particular, the amendments to ss 29 and 31. Those amendments, the words of which are identical to the words inserted in s 11(1), make ss 29 and 31 applicable to dependency claims. Section 14 of the 1867 Act was amended by the 1981 Act to excise from that section and thus from the 1867 Act the limitation period for dependency claims. It is apparent, even without recourse to extrinsic materials, that the legislature intended the role played by s 14 of the 1867 Act prior to its amendment by the 1981 Act to be fulfilled by a limitation provision of the 1974 Act as amended by the 1981 Act. Section 11(1) is the only provision of the 1974 Act which, in consequence of its amendment by the 1981 Act, is arguably capable of achieving the legislature's intention. As was pointed out by the respondent on the hearing of the appeal, the words "damages in respect of injury resulting from the death of any person" substantially mirror the language of s 13 of the *Common Law Practice Act 1867* and s 17 of the *Supreme Court Act 1995* (Qld).
- [22] As the respondents submitted, a cause of action by a deceased's estate for damages for personal injuries is not a fresh cause of action by the estate. The cause of action of the deceased and that pursued under s 66 of the *Succession Act 1981* (Qld) are one and the same.⁸ That being so, if the appellant's contention is correct, the intention stated in the second reading speech would not have been fulfilled by the amendment and the words inserted in s 11(1) would have no operative effect.
- [23] There is plainly merit in the respondent's contention that in the above circumstances the construction advocated by the appellant is so capricious or absurd that it can scarcely have been intended by the legislature.⁹
- [24] The 1981 amendments created an ambiguity in the words of s 11(1) which permits recourse to extrinsic materials to resolve the ambiguity.¹⁰ Section 14A of the *Acts Interpretation Act 1954* (Qld) requires that the interpretation that will best achieve the purpose of the Act be preferred. The primary judge was right to conclude that, despite the awkwardness of the choice of language, what I have referred to as the introductory words must be construed so as to accommodate "damages in respect of injury resulting from the death of any person": a process assisted by "loss of life" being included in the meaning of "damage" by s 5 of the 1974 Act.
- [25] The following passage from *Newcastle City Council v GIO General Ltd*,¹¹ quoted with approval by Gageler and Keane JJ in *Taylor v The Owners – Strata Plan No 11564*,¹² has particular relevance for present purposes:¹³

⁸ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [38].

⁹ *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157 at [37], [40] applying *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

¹⁰ *Acts Interpretation Act 1954* (Qld), s 14B.

¹¹ (1997) 191 CLR 85.

¹² (2014) 88 ALJR 473 at [60].

¹³ *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113.

“If the target of a legislative provision is clear, the court’s duty is to ensure that it is hit rather than to record that it has been missed.”

Ground 1 – s 11(2) of the 1974 Act applies to the dependency claim

- [26] Section 11(2) was inserted in the 1974 Act by s 25 of the *Civil Liability and Other Legislation Amendment Act 2010* (Qld). It is common ground that the deceased died from a “dust related condition”. The primary judge held:¹⁴

“In the light of the purpose of the enactment of s 11(2) of the [1974 Act] to make it easier for a person suffering from the dust-related condition to pursue an action for personal injuries, but that a dependency claim accrues on the death of the relevant person, s 11(2) of the Act should be construed as applying to the first proceeding referred in s 11(1) of the [1974 Act] and not the second proceeding. Section 11(2) of the Act therefore does not apply to a dependency claim.”

- [27] The primary judge observed that s 11(1) “draws the distinction between ... two types of proceedings – one that includes damages in respect of personal injury and one that includes damages in respect of injury resulting from the death of any person”. That, in her Honour’s view, gave “significance to the lack of reference to ‘death’ in s 11(2)”.¹⁵ Principally because of those matters and the absence of “death” from the definition of damage in s 5 of the 1974 Act, her Honour concluded that the considerations favouring the appellant’s construction were overwhelmed by those against it.

Ground 1 – s 11(2) the appellant’s contentions

- [28] The appellant’s arguments were to the following effect. The primary judge erred in attaching significance to the absence of reference to “death” in a definition of “personal injury” which did not purport to be exhaustive. In the context of dust related diseases, death is inextricably linked with and is the inevitable consequence of the injury. The ordinary meaning of the words “personal injury” in s 11(2) is sufficiently wide to encompass death. Schedule 2 to the *Civil Liability Act 2003* (Qld) defines “personal injury” as including “(a) fatal injury”. It defines “personal injury damages” as “damages that relate to the death of or injury to a person”.
- [29] There is no proper basis for limiting the scope of subsection (2) by reference to the terms of subsection (1). The wording and the scope of the provisions are quite different. It should be assumed that Parliament was aware of the undoubted width of “relating to”. Lord Macnaghten in *Commissioners of Inland Revenue v Maple & Co (Paris) Ltd*,¹⁶ said of it, “there is no expression more general or far-reaching”.
- [30] Contrary to the primary judge’s findings,¹⁷ the hardship to which s 11(2) was directed is not limited to persons afflicted with asbestos related diseases. The second reading speech supports this conclusion. The Minister’s reference to the “harmful effects” on “individuals, families and society” recognises that the deadly effects of asbestosis and its consequences reach beyond individuals suffering from the illness.

¹⁴ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [45].

¹⁵ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [42].

¹⁶ [1908] AC 22 at 26.

¹⁷ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [44]–[45].

- [31] Section 64 of the *Civil Proceedings Act* 2011 makes it clear that the statutory prerequisites for a dependency claim are:
- (a) that the death was caused by wrongful act or omission; and
 - (b) “the act or omission would, if death had not resulted, have entitled the deceased person to recover damages in a proceeding for personal injury”.
- [32] If by reason of the effluxion of time a deceased person at the date of his or her death was barred from bringing an action for damages, it follows that the deceased’s dependent would not have a cause of action under s 64. The limitation hardship borne by asbestosis sufferers would also be experienced by their dependents.

Ground 1 – s 11(2) the respondent’s contentions

- [33] The respondent’s arguments were to the following effect. The absence of “death” in the definition of “personal injury” is significant as the words “personal injury” do not normally encompass death. At common law, the death of a person could not be complained of as an injury.¹⁸ The absence of the inclusion of “death” in s 5 may be contrasted with the express reference to it in s 11(1) and in the statutory provisions referred to in paragraph [12] above. Where the legislature intends to expand the meaning of “injury” to include death, it can and does so.
- [34] The primary judge was correct to identify that s 11(1) referred to two types of proceedings, one of which is dependency claims.
- [35] The estate claim and the dependency claim are for separate causes of action.¹⁹ The dependency action depends on there being rights of action vested in the deceased immediately before his or her death.²⁰
- [36] Subsection (2) of s 11, which commences with “However”, is a qualification of subsection (1). The operation of s 11(1) is therefore confined to the extent of s 11(2). So construed, the reference to a “right of action” in s 11(2) is to the rights of action in s 11(1).
- [37] The absence in s 11(2) of any reference to “death”:
- (a) creates an ambiguity or obscurity; and
 - (b) ought to be construed as a deliberate choice given the change of language from the subparagraph that immediately precedes it which connotes a change in meaning.²¹
- [38] Although the expression “relating to” is wide, the sufficiency of the connection or association will be a matter for judgment that will depend, among other things, upon the subject matter of the inquiry, the legislative history and the facts of the case.²²

¹⁸ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [34]; *Barclay v Penberthy* (2012) 246 CLR 258 at [1], [26], [27].

¹⁹ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [34] and [38]; *Kupke v The Corporation of the Sisters of Mercy* [1996] 1 Qd R 300 at 307–308, citing and applying *Leggott v Great Northern Railway Co* (1876) 1 QBD 599 at 606.

²⁰ *Taylor v Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at [20].

²¹ *Multiplex Constructions Pty Ltd v Irving* [2004] NSWCA 346 at [10]; *Pumpa v Goulburn-Murray Rural Water Corporation* (2010) 27 VR 577 at [24].

²² *Taylor v Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at [15] and [20].

Like “in respect” and “related to”, the phrase “in respect of” is capable of a wide meaning but ultimately the meaning depends on context.²³

- [39] The s 11 context confines the operation of the phrase “relating to” by the absence of any reference to death in s 11(2). This deliberate choice signifies an intention not to extend s 11(2) to an action for damages in respect of injury resulting from death. This is confirmed by reference to the extrinsic evidence to which the primary judge had regard in undertaking a purposive construction and the legislative history of the immediately preceding amendment dealing with similar subject matter.
- [40] The second reading speech of the Minister referred to the beneficiaries of the removal of the statutory limitation period as being persons suffering from a dust related condition. Dependents do not fall within that description and no mention is made of claims relating to death or dependency in the Minister’s speech which introduced the amendments. The explanatory memorandum justified retrospectivity on the basis *inter alia* that dust related conditions were often characterised by a rapid onset of symptoms with death sometimes occurring within a very short time from diagnosis. That justification has no application to dependents.
- [41] The focus of the second statutory prerequisite for the dependency action in s 64 of the *Civil Proceedings Act* is the entitlement to recover, not the recovery of, damages in a proceeding for personal injury. The barring of a deceased’s claim procedurally at the time of death is not a bar to a dependency claim. Section 64 of the *Civil Proceedings Act* “is concerned with the existence of the liability of the wrongdoer to the deceased at the moment of the death of the deceased and not with the process by which such liability could have been enforced”.²⁴
- [42] Section 11 provides a procedural defence and does not destroy or extinguish the right of action, especially when, after its expiry, the limitation period may be extended. This is to be contrasted with time limitations which are annexed to the right or form part of the right.²⁵ The “entitlement” of the deceased person to recover damages is not affected by s 11(1) of the 1974 Act.²⁶
- [43] Consequently, the “entitlement” of the deceased to recover damages remained intact at death even if the limitation period under s 11(1) had expired. Alternatively, when the deceased died, if the limitation period had expired, he may have had an entitlement to invoke the judicial discretion in s 31 of the 1974 Act to extend the time for instituting proceedings and, consequently, it cannot be said that the deceased had “no entitlement”²⁷ to recover damages”.
- [44] The retrospective declaration of, *inter alia*, s 11 of the 1974 Act as part of the substantive law of Queensland does not result in s 11 being construed to distinguish or destroy the right of action as opposed to being about a remedy.²⁸ Limitation

²³ *Taylor v Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at [16].

²⁴ *Crawford v Hydro-Electric Commission* [1963] Tas SR 83 at 88.

²⁵ *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488–489; *Miller v Nominal Defendant* [2005] 1 Qd R 135; *Maxwell v Murphy* (1957) 96 CLR 261; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [30]–[31].

²⁶ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [30]; *Johnson v Hill & Ors* [2002] 2 Qd R 486; *Bonser v Melnacic* [2002] 1 Qd R 1; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136.

²⁷ *Crawford v Hydro-Electric Commission* [1963] Tas SR 83 at 88–89.

²⁸ For example, in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

periods, even of the “procedural” type found in s 11(1) of the 1974 Act, were held to be treated as “substantive” for the purposes of choice of law but, nonetheless, in *WorkCover Queensland v Amaca Pty Ltd*,²⁹ s 11 of the 1974 Act was considered “procedural” in actual operation. The meaning and effect of a provision being “substantive” may differ depending on the reason the issue is relevant. What is actually involved is a process of statutory interpretation and the issue is what the legislature intended to be the effect of the provision upon the matter that has arisen. Therefore, if the s 11 limitation period for an action by the deceased had expired at the time of death, it was of no relevance to the accrual of the cause of action in favour of the dependents on death.

Ground 1 – s 11(2) consideration

[45] The resolution of the issue now under consideration is dependent on the meaning of the words “a right of action relating to personal injury”.

[46] The words “in relation to” are words of wide meaning.³⁰ In *Australian Competition and Consumer Commission v Maritime Union of Australia*,³¹ Hill J observed of “in relation to”:

“But the phrase is both ‘vague and indefinite’: see per Taylor J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620. Like the phrase ‘in respect of’, the phrase ‘in relation to’ will not, at least normally, apply to any connection or relationship no matter how remote: see *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 51 per Dawson J. The extent of the relationship required will depend upon the context in which the words are used.

As Beaumont and Lehane JJ said in *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 in discussing a number of the cases dealing with ‘relates to’:

‘... it will depend upon context whether it is necessary that the relationship be direct or substantial, or whether an indirect or less than substantial connection will suffice.’
(References omitted.)”

[47] Section 11(2), as the respondent submitted, qualifies s 11(1). However, it does more than that. It is an emphatic statement by the legislature that any qualifying right of action is not subject to any limitation period howsoever or whatsoever. It would thus be wrong to approach its construction on the basis that its role was merely to qualify s 11(1).

[48] The primary judge arrived at her construction of s 11(2) by reference to, *inter alia*, the drawing of a distinction by s 11(1) “between the two types of proceedings – one that includes damages in respect of personal injury and one that includes damages in respect of injury resulting from the death of any person”. That consideration loses much of its validity once it is appreciated that s 11(2) bears the character mentioned

²⁹ (2010) 241 CLR 420 at [30].

³⁰ *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513 at 533.

³¹ (2001) 114 FCR 472 at 487–488.

above. It also tends to attribute to s 11(1) a precision in choice of language which, as discussion in relation to ground 1 shows, is lacking.

- [49] If it was intended that the role of s 11(2) be confined to excluding from the scope of s 11(1) rights of action:

“... for damages for negligence, ... or breach of duty in which damages [were claimed] in respect of personal injury ... resulting from a dust-related condition”,

it would have been simple enough to say so.

- [50] The course the legislature has chosen to follow is to provide for a blanket exemption from all limitation provisions for any right of action “relating to” personal injury resulting from a dust related condition. As the appellant contended, the words “relating to” are of wide import. The language of s 11(2) comfortably accommodates dependency claims.

- [51] It does not seem to me that any assistance in construing s 11(2) can be derived from the absence of an explicit reference to “death” in that provision. The definition of “personal injury” in s 5 of the 1974 Act is inclusive in nature. The respondent’s proposition that the ordinary meaning of “personal injury” does not encompass death is of dubious validity. The common law principle that the death of a person could not be complained of as an injury was overridden in the 19th century, in part, by the Lord Campbell Act provisions. More significantly, s 11(2) is not expressed to apply to a right of action “for damages for negligence ... or breach of duty ... in which damages claimed ... consist of or include damages in respect of personal injury” but to a “right of action relating to personal injury”, a quite different concept. Under s 11(1), the subject relationship is between the “damages claimed” and “the personal injury” or “injury resulting from the death of any person”. Under s 11(2), the relevant relationship is that between a right of action and “personal injury”.

- [52] The primary judge’s construction derives a degree of support from the Minister’s second reading speech. However, as the appellant’s argument shows, it does not plainly emerge from the speech that there was an intention to exclude dependency claims resulting from deaths arising from dust related conditions. In any event, the primary focus in construing s 11(2) must be on its words.³² For the above reasons, I find that s 11(2) applies to dependency claims.

Grounds 2 and 3 – accrual of the dependents’ cause of action – is the dependency claim otherwise statute barred?

- [53] The primary judge rejected the appellant’s argument that as the deceased had not obtained an extension of the limitation period at the time of this death, he did not have an entitlement to recover damages in respect of the negligent act or omission that caused his mesothelioma and that any prohibition upon his commencing proceedings was not lifted until the commencement of the retrospective operation of s 11(2) of the Act on 1 July 2010. It was that which, according to the argument, enlivened the deceased’s claim for damages for personal injuries.³³ The primary

³² *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at [4]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [23]–[25].

³³ *Hall v Don Faulkner Motors Pty Ltd & Ors* [2013] QSC 331 at [47].

judge held that the appellant's argument ignored the fact that the limitation period for the appellant's dependency claim expired in May 1998, as the dependency claim accrued on the death of the deceased.

Grounds 2 and 3 – the appellant's contentions

[54] The appellant's argument was to the following effect. The primary judge erred in concluding that the dependency claim "accrued at the death of [the deceased]" and that, for this reason, "the limitation period for the [appellant's] dependency claim expired in May 1998". The deceased's claim for damages for personal injury was statute barred at the date of his death. Consequently, the second of the two requirements imposed by s 64(1)(b) of the *Civil Procedure Act 2011* (Qld) for the accrual of the dependency claim had not been satisfied: "the act or omission would, if death had not resulted, have entitled the deceased person to recover damages in a proceeding for personal injury".

[55] In *Harding v Lithgow Corporation*,³⁴ Dixon J, referring to the point in time at which a cause of action accrues under the New South Wales Lord Campbell's Act legislation, said:³⁵

"It is well settled that at the moment of death the cause of action must subsist and that the deceased's remedy must not be barred so as to relieve the defendant of liability to him."³⁶

[56] The effect of the prohibition against the deceased's commencing proceedings and recovering damages in respect of his condition was that, until that prohibition was lifted by the commencement of the retrospective operation of s 11(2) of the 1974 Act (pursuant to s 25 and s 30 of the *Civil Liability and Other Legislation Amendment Act 2010* (Qld)), the appellant's cause of action in respect of the dependency claim had not accrued.

Grounds 2 and 3 – the respondent's contentions

[57] The respondent submitted that the appellant drew the wrong conclusion from *Harding* through referring to only part of the relevant passage. The passage referred to by the respondent was:

"It is well settled that at the moment of death the cause of action must subsist and that the deceased's remedy must not be barred so as to relieve the defendant of liability to him. But I do not think that this means that before his death the deceased must have taken every step which would enable him then to sue out process. The expression 'as would have entitled the party injured to maintain an action' descriptive and, of course, the description is hypothetical ; the thesis being the survival of the deceased. **The description connotes the existence at death of a title in the deceased to enforce a liability.** But the imposition in favour of a particular defendant of a condition of suit, such as giving notice, is a procedural matter **not going to the validity of the title to enforce the liability**, but only to the mode of enforcing it, or the fulfilment of a preliminary procedural condition." (citation omitted; emphasis added)

³⁴ (1937) 57 CLR 186.

³⁵ *Harding v Lithgow Corporation* (1937) 57 CLR 186 at 194.

³⁶ See *Nunan v Southern Railway Co* [1924] 1 KB 223 at 227 per Scrutton LJ.

- [58] The retrospective operation of s 11(2) of the 1974 Act ought not to be construed as having the effect for which the appellant contended. Normal rules of statutory interpretation apply when deciding how an amending Act operates on past events. Even an Act which clearly is intended to operate retrospectively may only be given such operation to the extent necessitated by text, context and purpose.³⁷ Section 11(2) does not remove, retrospectively or at all, the limitation period applicable to dependency actions. Consequently, its operation should not be construed to have the effect of postponing the accrual of a cause of action for dependency for all deaths more than three years before the commencement of the amending Act. The contrary conclusion would lead to substantial injustice.³⁸

Grounds 2 and 3 – consideration

- [59] It is unnecessary to address most of the parties' interesting and learned arguments. The *Civil Liability and Other Legislation Amendment Act 2010* amended the 1974 Act by inserting the following section:

“47 Transitional provision for Civil Liability and Other Legislation Amendment Act 2010

- (1) Section 11(2) applies to a right of action relating to personal injury resulting from a dust-related condition whether the right of action accrued before or after the commencement of this section.
- (2) However, subsection (1) does not apply if—
 - (a) judgment has been given in the action; or
 - (b) the action has been settled or discontinued; or
 - (c) an application before the commencement of this section to extend the period of limitation applying to the action before the commencement was refused by a court.
- (3) In this section—

court includes—

 - (a) a court in a place outside Queensland, including outside Australia; and
 - (b) the Dust Diseases Tribunal of New South Wales established under the *Dust Diseases Tribunal Act 1989* (NSW).”

- [60] For the reasons given earlier, the appellant has a “right of action relating to personal injury resulting from a dust-related condition”. Section 11(2) applies to dependency claims. None of the exceptions in subsection (2) of s 47 applies. As the respondents

³⁷ *Burns v Minister for Health* (2012) 45 WAR 276 at [16]; *Thaina Town (On Goulburn) Pty Ltd v Sydney City Council* (2007) 71 NSWLR 230 at [127].

³⁸ *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 556; *Burns v Minister for Health* (2012) 45 WAR 276 at [18]–[21], especially at [21].

contended, the fact that the limitation period in respect of the deceased's personal injuries claim had expired before the death of the deceased did not mean that he did not have at the date of his death an entitlement to recover damages within the meaning of s 64(1) of the *Civil Proceedings Act 2011*.³⁹

- [61] It is also relevant that any causes of action the deceased may have had at the date of his death survived for the benefit of his estate.⁴⁰ As stated earlier, the cause of action of the deceased and that pursued by the estate under s 66 are one and the same.⁴¹

Conclusion

- [62] For the above reasons the primary judge erred in finding that the appellant's claim for damages, as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim, was statute barred by reason of s 11(1) of the 1974 Act.

- [63] I would order that:

1. The appeal be allowed.
2. The first of the orders made by the primary judge on 6 December 2013 be set aside.
3. The respondent pay the appellant's costs of the appeal and of the trial of the separate issue at first instance.

- [64] **ATKINSON J:** I agree with the orders proposed by the President and with the reasons given by the President and Muir JA.

³⁹ *British Electric Railway Company Ltd v Gentile* [1914] AC 1034; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [29]–[31]; *Crawford v Hydro-Electric Commission* [1963] Tas SR 83 and see paras [36]–[38] above.

⁴⁰ *Succession Act 1981*, s 66.

⁴¹ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at [38].