**OUTER HOUSE, COURT OF SESSION**

**[2021] CSOH 131**

**PD125/20**

OPINION OF LADY WISE

In the cause

JOHN KELMAN

Pursuer

against

MORAY COUNCIL

Defenders

**Pursuer: Stewart QC, Thompsons**
**Defenders: Springham QC, Harper MacLeod LLP**

24 December 2021

**Introduction**

[1] John Kelman was employed as a maintenance electrician by Moray Council between 1980 and 1984. On about 18 March 1999 he was diagnosed with pleural plaques and attributed that to his exposure to asbestos during work he had carried out with Moray Council's predecessor's council. He remained well until early 2019 when he started suffering from breathlessness. A diagnosis of mesothelioma was made on 8 March 2019. Mr Kelman is now aware that his diagnosis is of a terminal illness. It is accepted on his behalf that more than 3 years passed from the date on which the injuries were sustained and the raising of this action and so the starting point would be that the case is time barred

under section 17(2)(a) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). Mr Kelman contends, however, that he was not aware that any injuries were sufficiently serious to justify his bringing an action of damages until his diagnosis of mesothelioma in 2019 and he seeks to rely on section 17(2)(b)(i) of the 1973 Act to enable this action to proceed. His fall-back position is that even if the action is time barred the court should exercise its discretion in terms of section 19(A) of the 1973 Act and allow the claim to progress. I heard a preliminary proof on these matters and have decided to allow the case to proceed for the reasons given later in this opinion.

[2] It is agreed that if the averments of fault and causation set out on record and the opinion evidence of the pursuer's expert witnesses Mr Dave Maddison (report at number 6/13 of process), Dr Todd (report at number 6/9 of process), Dr Burnett (report at number 6/3 of process) and Dr Sproule (report at number 6/2 of process) were accepted, then the pursuer would succeed in establishing a prima facie case against the defenders. The defenders have conducted only limited investigations into the circumstances of Mr Kelman's case for the reasons that will become apparent in the discussion of the evidence. They accept, however, that at this stage they are not in a position to assert a defence to the claims made and cannot say that the claim is without merit.

**Evidence at the preliminary proof**

***(1) John Kelman***

[3] Mr Kelman gave evidence from his home and adopted his affidavit number 6/21 of process. He did so with the assistance of having seen various entries in his medical records. His evidence was that he had attended his general practitioner complaining of a cough on 18 March 1999 and had discussed working with very large storage heaters in houses in the

early 1980s. He thought he could have been exposed to asbestos without the provision of a mask. He had been referred at that time to the local hospital and attended the chest clinic there. He said he was advised "… that I only had pleural plaques due to my previous asbestos exposure and they would contact me in a year for a check-up". When he had attended the chest clinic for a check-up the following year in September 2000 it was confirmed to him that there was no change to the pleural plaques and he received similar confirmation in September 2001 after which he was discharged from the clinic. As he was asymptomatic he said he was reassured about the pleural plaques and told that he did not have to come for another review. His evidence was that when he was discharged he did not think he had a medical problem. He was not aware in 1999 that he could have pursued a claim for his diagnosis of pleural plaques. He had never heard of anyone pursuing claims for an asbestos related condition. He had then changed jobs and the issue with working with asbestos never arose again. He was never involved in any conversations at work or socially about the possibility of making a claim. He did not think there was anything wrong with him to make a claim about. His position was that if he had known that he could have made a claim he would have probably investigated doing so at the time. He had no knowledge that he could pursue a claim for his asbestos condition until after he was diagnosed with mesothelioma in March 2019. At that time he was given an information booklet and advised to contact Clydeside Action on Asbestos. That organisation then assisted him with claiming benefits and advised him to contact solicitors.

[4] Mr Kelman explained that he had first gone to the GP in 1999 because his wife used to say to him about his cough "I can hear you before I can see you". It had gone on for a few weeks but had cleared up and he had no symptoms thereafter. He remembered going to get the results of his scan at the chest clinic and having a discussion with the doctor but could

not remember the specific details until he saw the records which had jogged his memory. What he recalled clearly was the doctor saying in 2001 that he did not need to come back at all unless there was any significant change to his condition. He remembered being reassured. He had assumed there was nothing seriously wrong with him because he did not have to go back to the clinic. His reassurance was because of what the doctor had told him and he was feeling okay. The doctors told him that his condition had stabilised. Mr Kelman said that if somebody had said to him in 1999 that further down the line he could be worse and that in 20 years' time that he would be breathless and not be able to do very much he would have taken action and done something about it but he had no reason to think that he would get worse in future.

[5] Under cross-examination Mr Kelman was taken to a number of entries in his medical records. It was put to him that he had understood that in 1999 when he saw a Dr Legge at Aberdeen that his chest x-ray was not normal. Mr Kelman said that he had no recollection of being told that it wasn't normal. He recalled the hospital doctor saying he would send a report to the GP who would then tell Mr Kelman what was happening. It was difficult for him to recall specifically going for the CT scan because he had had so many recently since his diagnosis of mesothelioma. Under reference to a letter sent by a registrar to his GP on 1 September 1999 (number 6/15 of process at page 89) Mr Kelman agreed that he must have known that his lungs weren't normal in the sense that he had been diagnosed with pleural plaques but the letter stated that there was no evidence of any lung disease secondary to asbestos and the condition was not giving him any problems because his coughing had disappeared. He was asked to go for check-ups the following 2 years but he was not having any symptoms. He agreed that the letter from Dr Legge to his general practitioner in September 2000 (number 6/15 of process at page 88) confirmed that he had been

asymptomatic and there was nothing of concern on examination. Then when he went for the final check-up on 5 September 2001 he saw a different consultant. He could not specifically remember the detail of that but he confirmed that he had been asked on several occasions whether he had been in contact with asbestos at work because of the diagnosis of pleural plaques. Mr Kelman did not recall Dr Devereaux, the consultant in 2001, saying to him that he was at slightly increased risk of asbestos related disease and had no specific recollection of Dr Devereaux at all. He agreed that on the face of the letter Dr Devereaux had written to his GP that must have been what he was meaning. All Mr Kelman recalled was that he left thinking there would not be any problems further down the line. There was no arrangement for any future appointment after the 2001 hospital visit.

[6] In relation to what he told his wife at the time in 1999-2001, Mr Kelman stated that there was nothing hidden between him and his wife. He will have told her at the time what he understood to be the position. He could not now remember what exactly he had said to her in 1999-2001 but he knew he would not have held anything back. He would have told his wife exactly what he thought had happened each time he went to the doctor or hospital. While he could not remember now exactly what the doctors had said he was clear that he would have told his wife everything at the time. Mr Kelman had confirmed that he had not been a member of a trade union during the early 1980s when he worked with Moray District Council as it then was. He had been a member in the early 1960s and re-joined when he went to work with Scottish Hydro Electric in the mid-1980s and remained in the union until 2000 when he became semi-retired. It was suggested to him that he could have gone to his trade union during the period 1984-2000 and asked what the diagnosis of pleural plaques meant. He responded:

> "I didn't think there was anything seriously wrong. I was playing golf three times a week. I had no reason to think I would be suffering the way I am now – I just didn't think there was anything seriously wrong with me".

He confirmed that he had no recollection of seeing any publicity over the years about asbestos related disease and if he had seen it, it did not register with him. The pursuer confirmed that he and his wife have two children and four grandchildren and that he has a sister still living. In re- examination Mr Kelman did not recall ever being shown the letter Dr Legge had sent to his general practitioner, just that the doctor had conveyed to him that "everything's hunky dory".

***(2) Linda Kelman***

[7] Mrs Linda Kelman gave evidence and adopted her signed statement number 6/23 of process. She recalled her husband having a bad cough in 1999 and she had told him that he should go to the doctors. She could not recall whether he had gone more than once and she had not attended with him. Mrs Kelman recalled being shocked when she heard about the diagnosis of pleural plaques but subsequently had then been under the impression that everything had been sorted out and that there was nothing to worry about. They were certainly not alarmed by anything that occurred at that time. Although she had no specific recollection of her husband saying he had been asked about asbestos exposure she would certainly have expected him to tell her everything that had been said at those appointments. She had no specific memory of there being anything to worry about at any time in 1999. When her husband had attended the clinic for check-ups in 2000 and 2001 he would normally go straight from work. From what Mrs Kelman recalled her husband had just been told that things were fine and that there was no cause for concern. It was all put to the back of their respective minds until 2019.

[8] Under cross-examination Mrs Kelman agreed that it might be fair to say that her recollection of what was happening in 1999 was not very clear. However she remembered her husband's cough at that time. She thought it possible that her husband had told her that they had been asking him about asbestos exposure but she did not remember that. She disagreed that her husband would have kept the information from her to avoid worrying her as they usually discussed everything. She could not remember all of the details 20 years after the event. What she recalled clearly was the cough that had resulted in a visit to the GP who had then sent her husband to hospital. She recalled that after an x-ray or scan had been carried out he was told that there was no treatment needed and he just had to go back the following year for a check-up. When he went back a second time they discharged him for good. Because the cough had stopped as far as she and her husband were concerned there was nothing wrong with him, but understood that until 2001 they were keeping an eye on it. In re-examination Mrs Kelman confirmed that if her husband had reported something of concern to her about his health in 1999 she certainly thought she would have recalled it. She and her husband had married in 1964 and are a very close couple.

***(3) Dr Geoffrey Todd***

[9] Dr Todd gave evidence on commission on 1 October 2021, prior to the preliminary proof. I acted as commissioner and the full report of Dr Todd's evidence is lodged as number 116 of process. I will summarise only parts of that evidence. Dr Todd is a physician of very considerable experience having been a consultant since 1982. His employment in Northern Ireland included dealing with many workers who had been employed by the shipbuilders Harland & Wolff and so he has had significant involvement with those suffering from lung conditions caused by asbestos exposure. Dr Todd had been instructed

to consider the medical records relating to Mr Kelman's initial diagnosis of pleural plaques in 1999 and what had been recorded at that time. He had dealt with these aspects in a supplementary medical report number 6/12 of process. There he had sought to highlight the difference between telling a patient their diagnosis and informing the patient about that diagnosis. A patient told of the diagnosis of pleural plaques might not be properly informed unless he is given other details. This applied to other medical conditions too. By analogy, when seeking consent from a patient for a procedure good practice was laid down in a document from the General Medical Council. The 1998 version sets out what would be good practice around that time. In Dr Todd's opinion a doctor giving a patient a diagnosis of pleural plaques should explain to the patient what pleural plaques are, their significance and risk of complications. The patient should also be advised that pleural plaques may be compensateable and that this has to be acted on within 3 years of knowledge. Further Dr Todd indicated that the patient should be given appropriate leaflets explaining what they were being told and/or advised to seek advice from an appropriate patient support group. Dr Todd had reviewed countless records over the years both for medical legal and clinical purposes and had found that invariably a doctor giving a patient a diagnosis of pleural plaques will include all of those points. The information given to the patient should then be recorded in the notes and ideally a follow-up letter sent to the patient given that research indicated that patients only retain about 30% of what they are told at clinics. It was regarded as a truism in medicine that if a doctor did not record something in the notes one had to assume on reading them it was not actually done.

[10] Dr Todd was clear that it was insufficient to inform a patient of their diagnosis without follow up information. This could be done by writing a letter after the clinic or having a relative or the patient's spouse along with them so that someone else is there.

Some doctors now record complete consultations and send the patients a recording. All are designed to help patients understand and retain the information given to them. It was clear from the records in Mr Kelman's case that a doctor discussed his asbestos exposure with him on 30 June 1999. The extent of the pleural plaques was clarified by CT scan on 4 August 1999. Following the June 1999 attendance at the chest clinic, the letter of 30 June from Aberdeen Royal Infirmary recorded:

> "I found no abnormality on examination. His spirometry is normal and his chest x-ray shows various pleural plaques, some of which are calcified. I have reassured him about that. What he should have is a CT scan to establish that there are no intrapulmonary lesions and I have arranged that".

The last relevant letter to the GP on 7 September 2001 following the second of the two follow up appointments recorded:

> "Mr Kelman remains well, his spirometry remains within normal limits FEB13.8, FVC4.5. There are no symptoms attributable to his chest, his cough is much improved. A chest radiograph today was unchanged with bilateral pleural plaques. I have explained that the pleural plaques indicate asbestos exposure and do suggest that he is at slightly increased risk of asbestos related disease. However the plaques do not have any prognostic significance. As he is well, I have not arranged to review him in the future, but would be more than happy to do so if there are any further problems".

[11] Dr Todd's interpretation of what had happened was that while Mr Kelman had been told he had pleural plaques he had been reassured and ultimately discharged from the clinic which he thought would also be very reassuring to the patient. There was no mention of medico legal consequences of the diagnosis. There was no mention of the risks of the asbestos exposure which caused the plaques, the main risks being mesothelioma and lung cancer. In a strictly medical sense, an esoteric sense, plaques in themselves are not a serious problem at all. They do not turn into cancer. However the cumulative asbestos exposure that has caused the plaques does have a prognostic significance. It means that the patient is at increased risk of developing an extremely nasty tumour, mesothelioma, and a nasty

tumour, lung cancer. So, Dr Todd stated, there is a subtle difference which doctors would appreciate between the prognostic significance of pleural plaques on their own and on the other hand the complications that arise from the asbestos exposure that caused the pleural plaques. Conveying to Mr Kelman that the plaques did not have any diagnostic significance may have been confusing for him.

[12] Dr Todd had noted from the medical records that even in 2019 when Mr Kelman had presented with mesothelioma, when he was asked whether he had any problems he said he did not have any and did not tell the doctors that he had pleural plaques. The records from that time had recorded that Mr Kelman had previously been playing three rounds of gold per week and that he had reported no CVS/respiratory issues before early 2019. He had specifically answered in the negative when asked if he had any problems with his lungs, asthma or conditions like that.

[13] Under cross-examination it was put to Dr Todd that there was a discrepancy between the version of the General Medical Council guidance that he had referred to in his report and that in place in 1998. Dr Todd accepted that there had been a number of versions of the document since 1998 and that later versions expanded on the initial principles set down at that time. He accepted that the particular version quoted in his report was a later version, probably the one that came into effect in November 2020. He agreed that the 1998 version will have advised doctors to ask patients whether they have understood the information given and whether they would like more before making a decision. Doctors were advised to be sure that the patient understood that clear explanations were being given and that the patients had time to ask questions. Dr Todd explained that he had not suggested that the guidelines on informed consent were directly applicable to Mr Kelman's situation, he had used them to illustrate the difference between informing a patient and

telling a patient something. He agreed that the doctors at the chest clinic in 1999 would have been aware of guidance that required them to give clear explanations and make sure a patient had understood the information they had been given.

[14] The referral from Mr Kelman's GP in 1999 was put to Dr Todd who agreed that the question of exposure to asbestos had been raised by the GP. The letter indicated that Mr Kelman had been able to give the GP some information about his exposure to asbestos at that time. Dr Todd agreed also that the letter from Dr Legge's Elgin outpatient clinic dated 30 June 1999 appeared to show that the consultant had discussed with Mr Kelman times when he may have been exposed to asbestos in taking an occupational history. It was not clear from the letter exactly what had been discussed in relation to pleural plaques and Dr Todd highlighted the sentence where Mr Legge recorded "I have reassured him about that". Only Mr Kelman and Dr Legge would know what exactly was discussed on that date. The subsequent letter from Dr Legge's outpatient clinic dated 1 September 1999 (number 6/15 of process, page 89) was put to the witness. This letter had been written by a Miss W Anderson, a career registrar who had seen Mr Kelman on that date. It was she who had noted that there was no evidence of any lung disease secondary to asbestos (wrongly recorded as asbestosis in the letter). Again Dr Todd could not know the nature of the discussion between Mr Kelman and Miss Anderson. On 6 September 2000, a subsequent letter from Dr Legge himself (number 16 of process at page 88) confirmed that Mr Kelman remained asymptomatic and that there was nothing to find on examination and the plaques looked unchanged. When asked why Mr Kelman would have been kept under review and asked to return in September 2001, Dr Todd explained that from a medical point of view there was little point in yearly reviews in patients with pleural plaques because there was no evidence that surveillance of those patients made any difference to the outcome. The worst

thing that can happen is malignancy of the type from which Mr Kelman now suffers but by the time that appears it is too late. There was little point in reviewing patients like Mr Kelman annually when they had no symptoms.

[15] The last follow-up for Mr Kelman was by Dr Devereux a consultant in thoracic medicine not known to Dr Todd. His letter (number 6/15 of process, page 87) stated that Mr Kelman remained well and that his spirometry remained within normal limits. Spirometry is a basic lung function test performed routinely at chest clinics and Mr Kelman's lung function tests had been normal. In relation to Dr Devereux's statement in the letter that he had explained to Mr Kelman that the pleural plaques indicated asbestos exposure and suggested that he was at slightly increased risk of asbestos related disease, Dr Todd agreed that doctors would certainly have understood by 2001 that a patient like Mr Kelman was at risk of asbestosis, asbestos related lung cancer and mesothelioma but a lay person would not know that. He agreed that the subsequent sentence "however the plaques do not have any prognostic significance" would not be obvious in terms of understanding to someone who is not medically qualified. He agreed that different language might have been used to Mr Kelman than "prognostic significance" but only Mr Devereux and Mr Kelman would know what had been said.

[16] When it was suggested to Dr Todd that if Mr Kelman had not understood what pleural plaques were or their significance, he had had an opportunity to ask three different professionals about that, Dr Todd indicated that the key clinic appointment was the first one. Seeing a patient for the first time took up a lot of time and that would normally be when diagnosis or investigations were explained in detail. On a review patients are typically only given five or six minutes and a patient attending for a third time with pleural plaques would probably not have the whole detail discussed with so the key time for

imparting information would have been the first attendance when the diagnosis was made. If Mr Kelman had misunderstood what he was being told at the first clinic interview he may not have been aware that he misunderstood. He may have been happy. Most patients are happy when they are reassured and most patients do not want to find out anything to the contrary. Dr Todd was not prepared to assume that Mr Kelman would have been motivated to ask any more questions although he would have to rely on whatever Mr Kelman had said about that. While he could not be sure that Mr Kelman was not told that pleural plaques were compensateable or advised there was a time period within which he had to make it plain he was working on the basis that it had not been written down and so he could assume that this had not been said. He was working on the basis of seeing hundreds and hundreds of medical records and it would be noted in the vast majority of cases. Of course he could not rule out that there was any such discussion.

[17] When asked about possible discrepancy between his report in which he said that at least over the last 10 years nearly every patient would be fully and properly informed about pleural plaques as compared with his evidence when he had said the practice of fully informing patients had been in existence for a very long time, Dr Todd explained that the reference to the 1980s was a time when he had been trained in respiratory medicine and observed what his consultants at the time had done. He could not say whether in the 1980s it was universal practice. He agreed that a consultant in thoracic medicine should have been aware of the need to inform patients in the way Dr Todd described in his report from at least 2010. Had Dr Todd seen Mr Kelman (in 1999) he would have checked to see whether the patient was fully informed of his diagnosis and might well have asked him about compensation. He could not comment on whether Mr Kelman was a curious person but he had noted that the pursuer had left school at the age of 15.

[18] Dr Todd agreed that there was nothing in his report about a period in 2019 when there was apparently nothing in the medical records to show that Mr Kelman had mentioned pleural plaques. His oral evidence on that was on the basis of a review of the records he had examined. In re-examination Dr Todd agreed that the issue of there being no mention of pleural plaques when Mr Kelman was examined in Aberdeen Royal Infirmary in March 2019 was something that he had brought to the attention of Mr Kelman's legal advisers at a consultation relatively recently. The medical history taken in Aberdeen Royal Infirmary that time had no note of Mr Kelman referring to pleural plaques. In relation to his own career, Dr Todd confirmed that because he had been located in a hospital near the shipyards of Harland & Wolff all of his chest clinics would have had a significant percentage of patients with asbestos related lung disease. Dr Todd also clarified that he was not suggesting that the GMC document on informed consent was a guide to what doctors should do in chest clinics. It was at paragraph 1.3 of his report that he focused more narrowly on what should have been explained to Mr Kelman at the chest clinic.

***(4) Michael Rollo***

[19] The first witness in the defenders' case was Michael George Rollo a 52 year old building services manager with Moray Council. Mr Rollo has been employed in that role since November 2004. His work involves overseeing building and maintenance work for council properties. As the council has about 6,000 council houses he is assisted by a large staff. He had become aware of a claim being made by Mr Kelman against the council by his line manager. Mr Rollo was able to establish the dates of Mr Kelman's employment with Moray District Council as it then was and an employee still working for the council had remembered him. The change from Moray District Council to Moray Council had taken

place in 1996 after local government reorganisation. One of the council employees who had been working for either the predecessor council or the current council for a total of 37 years had retained a black book with information about employees from the 1980s. However other information and records from that period were not available. In about 2003/2004 the Building Services Department had moved to a village seven miles from Elgin and the long serving clerk had recalled that files were "disregarded" when the council had moved to a multiservice depot. Mr Rollo was not sure whether timesheets showing work done by employees such as Mr Kelman would have been kept in the 1980s but the staff he had spoken to said that there had been documentation. He would have thought the timesheets, incident or accident reports, the provision of PPE and training records would have been kept. He had not been able to find any of that from the period 1980-1984.

[20] Mr Rollo had not been employed with the council prior to 2004 but his predecessor, Stuart Wilson would have been able to provide records of the sort he had described if somebody had asked for them in 2002. He thought that a Jill Stewart would have been the line manager of Mr Wilson at that time. Before that, there had been an employee called Bruce McKenzie within building services who was still alive and lived in Elgin. Mr Rollo knew Mr McKenzie personally. Mr McKenzie would have had access to timesheets, ill-health records and health and safety information. There was also a Mr Thomson who lived locally but Mr Rollo did not know him or whether he was still alive. Mr Rollo thought there were no claims by other former electricians employed by the council in relation to asbestos claims. In terms of identifying individuals who might have worked with Mr Kelman, Mr Rollo said that in addition to the managers he had mentioned, there was a tradesman from that era who was now in his 80s.

[21] Under cross-examination Mr Rollo confirmed that the former electrician he had mentioned who had been employed by the council in the 1980s had been contacted for a statement but he had not been willing to speak with the council. He confirmed in re-examination that the former employee concerned would have been the electrical foreman in the early 1980s and that he lives locally in Elgin

*(5) Daniel Littlewood*

[22] Daniel Littlewood is a 42 year old assistant Financial Management Systems (FMS) and banking manager with Moray Council. He gave evidence that he had been in post since January 2019 but had been employed by Moray Council from 1999 and had worked there in various different roles. One of his current duties is as the insurance officer for the council. There are two full-time staff who deal with insurance claims and report and correspond with the insurance companies. The sort of routine work that his team might progress would include claims against the council where vehicles had suffered damage through driving into potholes on council roads. Mr Littlewood had first become aware of a claim being made by Mr Kelman when he received a letter from the pursuer's solicitors in September 2019. Because of the historic nature of the claim this would normally be passed to Municipal Mutual Insurance (MMI) who handle all the council's historic claims. The insurance records for the period 1980/1984 would be paper records. At that time the council had been part of Grampian Regional Council and for these Moray Council now holds a data-sharing agreement with Aberdeen City Council who hold all the relevant documentation. MMI (now Zurich) had entered into an agreement in terms of which they would deal with the historic claims. The witness was aware of a scheme of arrangement with Zurich in terms of how such historic claims would be handled. His understanding was that Zurich would

handle the claim but depending on the timescale the cost would be apportioned between Zurich and MMI. Email correspondence had been produced (number 7/1 of process) illustrating the email chain between Zurich Insurance and the council from 18 September 2019 to 19 November 2019 illustrating the difficulty that had arisen when Zurich asked for evidence of the council's insurance cover for the period 1980 to 1986. MMI had confirmed cover from 1 April 1986 but Mr Kelman's alleged exposure was earlier than that. Mr Rollo had then looked at all of the paperwork in the office and found that a claim had been dealt with under the MMI scheme in which the paperwork included an email from a Mr Garner at Zurich who indicated that MMI had held cover between 1977 and 1993. The response to that from Zurich was that Mr Garner's information had been wrong and that they would require documents that would confirm earlier cover. Mr Littlewood admitted that he had panicked a little because he knew that the council should have had cover but he could not find the evidence to prove that they did. He wanted to try to find anything he could. He checked the files in the office and in the basement where they stored documents for all the years of the council. He literally pulled out every piece of paper he could and could not find anything. He had found some policy numbers that he thought might be of use and he sent those to Zurich in an email of 19 November 2019. He found an employer's liability policy for Moray District Council and one for Grampian Regional Council. He thought those two policies were linked in some way although it turned out they were not. Mr Littlewood had also instructed employer's liability tracing through the employer's liability tracing office which traces historical liability policies but nothing was found. He spoke also to colleagues in the council who were around at the time of the organisation in 1996. They thought that the insurance work sat in a different part of the council before that. Mr Littlewood's predecessor was not sure of the position.

[23] The witness confirmed that he had also spoken with someone at Renfrewshire Council who advised him that they had used a firm to investigate old insurance policies. Mr Littlewood's manager suggested that might be a good idea but Renfrewshire had employed someone to go through every box of paper in their office. That had ultimately been successful. Moray had stopped short of going through every piece of paper but Mr Littlewood felt he had done all he could. There had been flooding and a fire in some of the offices in question and most services were now centrally based but in earlier times there was no headquarters and each office kept its own paperwork. Although Moray Council has insurance brokers they did not cover the employer's liability or public liability insurance which has always been with Zurich (previously MMI). Had it been known prior to 2019 that there was a claim there would have been staff in the council who could have held the paperwork. Accordingly if a claim had been intimated in about 2002-2004 it would have been easier for the council to investigate.

[24] Under cross-examination Mr Littlewood agreed that the reason for his panic was that he realised that he needed a policy number in order to show that the council had cover for claims such as Mr Kelman's. If he had been able to retrieve that policy number he would have been able to pass it on to Zurich and that would have been an end of his difficulties.

***(6) Lorraine Paisley***

[25] The final witness for the defenders' was Lorraine Paisley, a 59 year old chartered accountant and chief financial officer with Moray Council. Ms Paisley has worked for the council since 1996 and was promoted to her present post in 2017. She explained that the bulk of the council's income comes from Scottish government whether by direct grant or otherwise. Council tax is also a source of income (about 17%) although at the time of her

evidence there was doubt about whether the council would be able to increase the level of council tax for the forthcoming year. A small amount of income was also obtained from leisure centres and other council services. There are legislative constraints and conditions imposed by Scottish government in relation to how the council can spend its money although there is an element of discretion. Necessary social care, education and road maintenance provision would fall into the category where there was effectively no discretion.

[26] Under reference to the financial overview for 2018/19 of local government in Scotland prepared by the Accounts Commission and Audit Scotland (number 7/4 of process) the witness explained that this document comprised an overview of the positions of various councils after their accounts had been audited. The document records that since 2013/14 Scottish government funding to councils has reduced by 7.6% in real terms. As a result Moray Council had made savings by ceasing some discretionary services and reducing the number of staff employed. There was, however a shortfall remaining between the funding the council receives and the previous year's spending. There are reserves so that the council can meet unanticipated expenditures. Some of those reserves have been used over the last few years to fill the funding gap as a temporary expedient. During the most recent financial year the council has received less income from services which could not operate due to COVID-19 restrictions and the level of council tax collection has been lower. While additional sums may be received in the next settlement any increase would be swallowed up by increased costs. The overall annual budget of the council is about £200 million and in order to make the books balance it is anticipated that at least £5 million from the council's reserves will be used so that they do not have to cut further services.

[27] In relation to Mr Kelman's claim a note had been inserted in the council's accounts in relation to contingent liabilities including asbestos related illness. Ms Paisley pointed out that the council is obliged to disclose contingent liabilities if they have knowledge of an event that may crystallise into a liability for the council. The disclosure requirement is absolute regardless of the value of the claim. It was pointed out that the note in the accounts refers to two claims and Ms Paisley thought that there must be another claim against the council at the time the accounts were prepared. When asked specifically how the council would fund payments of the pursuer's claim which is said by his advisors to be worth about £207,000, Ms Paisley said that this would be funded from reserves and not from the budget. Similarly, if the claim proceeded, in the event that Mr Kelman had then died, the council would also fund that from reserves. It was more complicated than simply finding a few hundred thousand pounds as the council requires to pay teachers' salaries, social workers salaries and so on and if an unexpected incident happens the council can of course pay from reserves but that is not sustainable in the long term as the pot is finite.

[28] Under cross-examination Ms Paisley confirmed that in the current financial year Moray Council has managed to balance its budget. All unforeseen expenditure would have to come from reserves, not just the cost of settling a claim such as that of Mr Kelman's. In general terms what the council does is assess the risk that there will be an unanticipated expenditure and attempt to keep the reserves at a sufficient level to meet at least a proportion of that. Of course it is not possible to keep enough in reserves to cover every contingency but at least there is £5 million as a "buffer" available.

[29] The witness agreed that it was reasonably foreseeable that employees might get injured at work and make a claim against the council. Normally this would be covered by insurance and so there were two ways in which the council could act financially to protect

itself, namely by holding monies in reserve and also by paying insurance premiums. For most claims the council relied on insurance but other things could sometimes be done. For example when there had been flooding the council took a decision to spend money on flood alleviation schemes. Ms Paisley agreed that if a situation arises where for whatever reason an insurance policy would not cover the contingency noted in the accounts, the council would fall back on its reserves. She did not know what the level of excess was on any insurance policy of the council in relation to claims made by employees. There were a number of different policies held and something like 36 different strands or types in relation to the level of excess.

[30] In re-examination Ms Paisley agreed that it was at least good practice for there to be insurance held by the council in relation to claims by employees and she thought there was a requirement to do so. For a current employee everything was in place insurance wise and it would be standard for the insurance company to deal with the claim. For past years going back to the 1980s some of the records had been destroyed in floods, some were difficult to access and some have disappeared. It was more difficult to deal with a situation when records of a council of which Moray Council is the successor were required. Any individual claim is unexpected until it is made. Now that Mr Kelman's claim has been made the council was aware of it but even where claims are not expected some provision has to be made in reserves for that. The general fall-back position is to rely on those reserves as it has been in the present case. In relation to the level of excess on any insurance policy, the witness was unable to say what it was for each type of claim as that sort of information would be accessed by her staff.

**Applicable law**

[31] The Prescription and Limited (Scotland) Act 1973, section 17, applies to actions in respect of personal injuries not resulting in death. It provides insofar as relevant to the present case:

> "(1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action… brought by the person who sustained the injuries or any other person.
>
> …
>
> (2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –
>
> > (a) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later;
> >
> > (b) the date (if later than any date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonable practicable for him in all the circumstances to become, aware of all the following facts-
> >
> > > (i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
> > >
> > > (ii) that the injuries were attributable in whole or in part to an act or omission;
> > >
> > > (iii) that the defender was a person to who's act or omission the injuries were attributable in whole or in part or the employer or principal of such a person …"

[32] Section 19A confers a power on the court to override the time limits imposed by the legislation including by section 17. Section 19A provides:

> "(1) Where a person would be entitled, but for any of the provisions of [section 17, 18, 18A or 18B) of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him bring the action notwithstanding that provision …"

[33] These provisions have been analysed by the court on a number of occasions. In *Agnew* v *Scott Lithgow Ltd* (No 2) 2003 SC 448 an Extra Division of the Inner House confirmed that the test set out in section 17(2)(b)(ii) of the 1973 Act was partly a subjective test and partly an objective one. The question for the court where it applies was whether taking the pursuer and his particular circumstances, on an objective basis it would have been reasonably practicable for him to become aware of the relevant fact before the date in question. In that case the pursuer had been "put on notice" that he should do something about his occupational injury at a point, some time after he stopped working, when he heard talk from his former colleagues about making claims arising out of the same occupational condition. As soon as someone is put on notice in that way, it is incumbent upon him in terms of the test in the legislation to take all reasonably practicable steps to inform himself of the material facts. In *Little* v *East Ayrshire Council* 1998 SCLR 520, a pursuer who had accepted that he could have asked the vital question of his consultant about his hearing loss was held not to have taken all reasonably practicable steps for the purposes of section 17(2)(b). Importantly, in *AS* v *Poor Sisters of Nazareth* 2017 SC 688 the First Division confirmed that section 17(2)(b)(i) requires one to assume that liability for the claim is not disputed and that the defender is able to meet the claim. Accordingly, both liability and solvency on the part of the defenders' are assumed and the relevant sub-paragraph of section 17 is concerned only with the extent of the injury in terms of quantum of damages. The actual or constructive awareness is in this context awareness that injury has been suffered:

> "… which is sufficiently serious to be above a minimum threshold in terms of quantum of damages. Time does not run against a claimant who lacks actual or constructive awareness that he has suffered injury or that the gravity of his injury is

> sufficient to bring it up above the minimum – and quite low – threshold of justifying proceedings on the assumptions of admitted liability and a solvent defender."

The single important fact in this category is the severity of the injuries so far as the pursuer was aware of it or could reasonably practicably have become aware of it. Further, in *CG* v *Glasgow City Council* 2011 SC 1 an Extra Division reiterated that the proper interpretation of section 17(2)(b)(i) had been settled in the decision of the First Division in *AS* v *Poor Sisters of Nazareth*. In that particular case the pursuer's averments did not disclose a relevant basis on which it could be proved that her awareness of the relevant facts in section 17(2)(b) had been postponed until a date within the three years preceding the raising of the action. The difficulties of identifying the starting point for the limitation period where someone suffers from injury that emerges a long time after the event were discussed in *Aitchison* v *Glasgow City Council* [2010] CSIH 9. While sometimes section 19A requires to be utilised to cater for those cases, much depends on the circumstances.

[34] There are a number of authorities concerning the correct approach to section 19A. In *B* v *Murray* (2) 2005 SLT 892 Lord Drummond Young reviewed some of the earlier authorities and discussed (at paragraph 21) the policy underlying limitation statutes. The factors that may be relevant to the exercise of the equitable power in section 19A are then discussed at paragraphs 29-42 inclusive. These include that ignorance of a legal right is a material circumstance in the exercise that the court must perform, ignorance of facts being dealt with separately by section 17. Reference was made by Lord Drummond Young to the decision in *Kane* v *Argyll and Clyde Health Board* 1999 SLT 823 where the Inner House had placed significant reliance on material prejudice to a defender in having to go to proof, commenting that it was difficult to see how, in those circumstances, even if there was a reasonable explanation for the delay, the action could reasonably be allowed to proceed. It

appeared that a loss of material evidence might be sufficient to tip the balance and the defenders' did not have to show a total loss of evidence was required. In summary, the court has a general discretion under section 19A and must pose to itself the question "where do the equities lie". The onus is squarely on the pursuer and the conduct of the solicitor acting for the pursuer might be relevant. The conduct of the pursuer up to the point of raising the action is clearly relevant and both the prejudice to the pursuer if the application to be proceed is refused and the prejudice to the defender if it is granted must be weighed in the balance. Self-evidently each case turns on its own facts and circumstances.

[35] The most recent decision of interest, from the First Division of the Inner House is that of *Jacobsen* v *Chateurvedi* [2017] CSIH 8. The pursuer there made a claim arising from alleged medical negligence in relation to treatment for a malignant tumour. It was ultimately accepted that the action had been raised outside the triennium and the pursuer contended that it was equitable nonetheless that her actions should proceed in terms of section 19A. The Lord Ordinary had decided that there were insufficient relevant averments to allow that. In delivering the opinion of the court, the Lord President pointed out that to succeed in a section 19A application, a pursuer required more than an assertion that the action should be allowed to progress on the basis that otherwise he cannot succeed, stating:

> "there require to be additional circumstances justifying a revival of the right. It is not possible to circumscribe what these circumstances might be, but they do have to be sufficiently cogent to merit depriving a defender of what will have become a complete defence to the cause. The interests of both parties and all the relevant circumstances must be considered."

Further, there are a number of authorities referred to in *Jacobsen* v *Chateurvedi* supporting that, where a pursuer has a strong case of professional negligence against his solicitors, the more likely it is that the court will refuse the application. Nothing of that sort arises in the present case.

[36] A recent example of a decision on whether a claim should be permitted to proceed under section 19A in a mesothelioma case can be found in the decision of Lady Carmichael in the case of *Quinn* v *Wright's Insulations Ltd* 2020 SCLR 731. That case also involved the diagnosis of plural plaques with the deceased (his family then sought to pursue the claim) then developing mesothelioma some 20 years or more later. In that particular case the entries from the deceased's medical records were sufficiently clear to indicate that he must have had the relevant constructive knowledge in terms of section 17 such that the claim could not proceed but for section 19A. Following a preliminary proof on section 19A the Lord Ordinary reviewed the various authorities including those referred to above. In the particular circumstances of that case, the Lord Ordinary was not satisfied that she should exercise her discretion in favour of the pursuers and dismissed the action. While the pursuers had lost a potentially high value claim in respect of a death from a serious condition, the defenders would lose a complete defence to a potentially high value claim. The prejudice to the defenders was that they lost the chance to try and settle a lower value claim on a "once and for all basis" because there was no time as claimed for the less serious condition.

**Decision**

***Credibility and reliability***

[37] There was no attack on the credibility of any of the witnesses in this case. So far as Mr Kelman is concerned, it was suggested on behalf of the defenders that, while his honesty was not in doubt, his reliability as a witness must be questioned. He is an elderly gentleman with a life limiting illness and it was contended that his recollection of the events of over 20 years ago was poor. I reject that contention on the basis that it seemed to me to confuse

recollection of detail with reliability on the central issues. I found Mr Kelman to be a straightforward witness who was very clear about the matters of detail that he could no longer recollect as distinct from the clear message he considered he had received from the doctors at the chest clinic in 1999, 2000 and 2001. He was able to convey what he understood the doctors were telling him at the time and I accept his evidence on that. Neither do I have any hesitation in accepting the evidence of Mrs Kelman as credible and reliable. It was clear that she and her husband had always enjoyed a relationship of close confidence and again she distinguished between the details she could not recall in specifics and what she had understood to be the outcome of her husband's medical appointments. I accept the evidence she gave on the central issue of whether she and her husband considered there was anything to be concerned about when he was diagnosed with pleural plaques in 1999 and reviewed in 2000 and 2001.

[38] An issue arose in relation to Dr Todd's evidence which, the defenders submitted, did not represent a truly independent medical view. It was suggested that he tried to put a particular interpretation on the available evidence and one based on his own practice. I consider that Dr Todd, who is an extremely experienced consultant chest physician, was well able to speak to practice in relation to dealing with patients with pleural plaques. Overall, I accept both that Dr Todd is a skilled witness and that he was expressing views not as advocate for the pursuer's case but based on his qualifications and experience in order to assist the court. There were however, two aspects of his report and in his evidence where he appeared to trespass into an issue for the court's determination. First, he went so far as to express a view that the pursuer was "completely unaware of the possibility of compensation and the time limitation rules for same". Secondly, his conclusion having regard to the medical records that the pursuer had not been fully or properly informed about his pleural

plaques until he later presented with mesothelioma was also not something that was properly the subject of skilled evidence. It is for the court and not Dr Todd to draw inferences on these matters from the whole evidence led. To that extent I accept that the objections on behalf of the defenders to those aspects of Dr Todd's evidence were sound. The conclusions that I have reached are based on the agreed records and the evidence led. No particular credibility and reliability issues arose with any of the defenders' witnesses.

***Section 17(2)***

[39] The first important issue for determination is whether the pursuer was aware, or it would have been reasonably practicable for him to become aware, that his injuries were "sufficiently serious to justify his bringing an action of damages" such that an action ought to have been raised within 3 years of that actual or constructive knowledge. It is agreed that the action is time barred in terms of section 17(2)(a) of the 1973 Act and so the action can proceed under section 17 only if the pursuer can bring himself within section 17(2)(b)(i) of that Act. In this context, what is relevant is not whether Mr Kelman had knowledge that any claim was actionable as a matter of law, rather it is whether he had actual or constructive knowledge that his injuries were sufficiently serious to justify raising proceedings. The stark issue between the parties in this case is whether Mr Kelman left his medical appointments at the material time between 1999 and 2001 with any sense that he had such sufficiently serious injuries. The assumption made in considering this aspect of the case is that liability would be undisputed and the defender would be solvent.

[40] The evidence led at proof clearly illustrated that Mr Kelman did not have actual knowledge that the injuries he had sustained were sufficiently serious to justify bringing an action of damages until he was diagnosed with mesothelioma in early 2019. The essential

question is whether he had been put on notice by the physicians of relevant facts, such that it would have been reasonably practicable for him then to make further inquiries. What was put to Mr Kelman in evidence was that he must have understood that his chest x-rays were "not normal". Mr Kelman disputed that to the extent that while he had been made aware that he had pleural plaques he had been reassured by the doctors and did not think he had a medical problem. The correspondence to his GP had used the expression "no abnormality on examination". While he understand that there was something to see on a scan of his lungs, he clearly regarded it as an almost inconsequential matter. This was in large part because of the reassurance given to him. His position was largely supported by the medical records. For example, on 30 June 1999 Dr Legge had written to Mr Kelman's GP stating that there was no abnormality on examination and that he had reassured the pursuer. On 1 September 1999 Miss Anderson had written to Mr Kelman's GP that his CT scan "showed no evidence of lung disease secondary to asbestos (*sic*)". It was accepted that the reference should have been to asbestosis and not asbestos.

[41] An important fact in this case is that Mr Kelman remained asymptomatic throughout. The initial cough about which he had attended the doctor in 1999 cleared up quite quickly and he remained asymptomatic thereafter. He understood that the follow-up appointments were routine and he stated in terms that he thought things were "hunky dory", or absolutely fine. There was considerable focus in the evidence on the final letter to the GP (number 6/15 of process at p 87) following Mr Kelman's appointment with a Dr Devereaux in Aberdeen in September 2001. On the face of that letter, dated 7 September 2001, Mr Kelman was told that he was at slightly increased risk of asbestos related disease. However he was also advised, albeit no doubt in layman's terms, that the "pleural plaques do not have any prognostic significance". On being advised of those matters Mr Kelman

was duly discharged from the clinic. There is nothing in the medical records available to indicate that he was advised of the risk of mesothelioma and lung cancer, other than so obliquely that it meant nothing to him. It was clear from his evidence that nothing said to Mr Kelman raised any concern on his part about his having sufficiently serious injuries of a type that would prompt him to make further inquiry. Dr Todd explained that, while medical personnel would of course understand that the cumulative asbestos exposure that caused the plaques had prognostic significance, there is no evidence to support a finding that this was explained to Mr Kelman. Of those present at the medical appointments between 1999 and 2001 only Mr Kelman gave evidence and he was clear about the impression he had been given at the time.

[42] The evidence of Mrs Kelman supports a conclusion that Mr Kelman had not been advised of the potential seriousness of his diagnosis. First, despite being a very close couple, she had not taken time off work or attended any of the medical appointments with her husband. She had initially been concerned to make sure that her husband attended about his cough but because it had been resolved and he had never had any treatment she had no concerns. When asked whether, if her husband had reported something concerning about his health she would have remembered, she responded, according to my notes, "I certainly think so yes". At another point in her evidence she said that she expected that her husband would tell her more or less everything that was said by any doctor he had seen. She did not even recall him using the expression pleural plaques but indicated it was not the sort of term her husband would use. The value of Dr Todd's evidence is his explanation, as a skilled witness, to explain the fundamental difference between telling a patient a particular fact or diagnosis and properly informing them. I accept his evidence in relation to that issue. Further I accept his evidence that, as a generality, if a doctor does not record something in

the notes one can only assume on reading those notes subsequently that the matter not recorded was not said or done. Dr Todd had noted from the records that in 2019 when a history was being taken following Mr Kelman presenting with mesothelioma, the record noted that Mr Kelman had reported "no CVS/REST issues before this". On the face of it Mr Kelman had made no mention of pleural plaques or of any respiratory or lung function issues before 2019. Taking all of the evidence into account including the medical records, the terms of which are accepted but not spoken to or elaborated on by any medical witness, I have concluded that the pursuer has established that he did not become aware that he had an injury sufficiently serious to trigger making a claim until he was diagnosed with mesothelioma in 2019. Before that, he was unconcerned about his health because the way in which his diagnosis of pleural plaques was explained to him was reassuring rather than alarming.

[43] Mr Kelman presented as a hard working individual who had left school at the age of 15 and had been in regular employment from then until retirement. He was taken through the detail of his work history when cross examined and was able to recollect for whom he had worked and when he had re-joined the trade union after leaving Moray (District) Council to work with Scottish Hydro Electric. It was clear that he had taken no notice of any publicity about asbestos related disease because he didn't think it concerned him; "it never registered with me". His statement that he had no reason (between 2001 and 2019) to think he would be suffering as he is now was clear and convincing. Mr Kelman seemed to be straightforward and unlikely to have regarded something that never prevented him from going to work as serious. He simply had not thought there was anything wrong with him. The subtleties of his diagnosis were lost on him because the real

risk, of developing the condition he now has, was either not explained, or not explained in a way he would have understood.

[44] The defenders' position in this case is that it was well known that pleural plaques are compensatable and that money will be paid or awarded for that. It was not until 2007 that the House of Lords stated that pleural plaques alone could not give rise to a claim for damages (*Rothwell* v *Chemical and Insulating Co Limited and Another* 2008 1 AC 281), the matter having then been resolved by legislation to the contrary. I am not convinced that the legal history of how it came about that pleural plaques were, then were not, and now are compensateable assists the defenders' case. It emphasises the difficulties that arose when a worker had asymptomatic pleural plaques that were caused by asbestos exposure but which did not in themselves increase susceptibility to other asbestos related diseases or shorten life expectancy. If anything it tends to support a conclusion that when a patient such as Mr Kelman was told, albeit in layman's terms, that his pleural plaques did not have any prognostic significance, he was reassured that there was nothing to worry about in terms of future illness. Dr Todd explained the way in which the lack of prognostic significance can easily be misunderstood by lay people.

[45] In these circumstances, no real issue of the reasonable practicability of the steps Mr Kelman could have taken arises. Senior counsel for the pursuer emphasised the disjunctive nature of the test in section 17(2)(b) in this respect and I accept that a lack of awareness that the injury was sufficiently serious to justify proceedings renders consideration of reasonably practicable steps unnecessary (see *AS* v *Sisters of Nazareth* at para 25). In any event, as indicated, the evidence illustrated that Mr Kelman was not a member of a trade union at the time of his diagnosis with pleural plaques. I have accepted his evidence that he had no reason to think that his health was to get worse in future. He

had been given no reason by the physicians to think that his health would deteriorate and nothing said to him had alerted him to that possibility. He was unaware of anyone making claims in respect of asbestos related lung conditions. He was playing golf three times a week and simply had no reason to ask further questions or make further enquiries. He knew that the pleural plaques might be attributable to asbestos exposure but he was unconcerned about any consequences of that because he did not make the link between that exposure and any risk to his future health. In this respect, his situation differs from that of the pursuer in *Little* v *East Ayrshire Council* who ought to have asked his consultant for a view on what had caused his hearing loss. The issue for Mr Kelman was not what might have caused his pleural plaques but whether there was anything wrong with him. It was suggested to him in evidence that he could have asked Dr Devereux to explain anything he did not understand about the "slightly increased risk" of related diseases, but Mr Kelman had no recollection of there being any risk of the development of any future condition. His understanding was that he had a current condition that was not serious. In these circumstances I do not consider that Mr Kelman can be criticised for not taking any steps to inform himself about whether he could raise proceedings earlier, as he had no reason, so far as he was concerned, to make any such enquiries. Even on the low threshold referred to in *AS* v *Poor Sisters of Nazareth* the "injury" Mr Kelman considered he had suffered was so minimal that it did not merit investigation. In the absence of a clear statement from the physicians that he was at risk of developing a life limiting serious consideration in future, Mr Kelman did not have the requisite constructive awareness. My conclusion that the pursuer did not know that his condition was sufficiently serious to justify exploring the raising of proceedings is sufficient to allow his action to proceed. However, lest I be wrong

in my conclusion, I will turn to consider whether it would nonetheless be equitable for the action to proceed.

***Section 19****A*

[46] As indicated, the considerations under section 19A are somewhat different. A wide range of factors require to be taken into account and a balancing exercise conducted. Indisputably, if the action is not allowed to proceed Mr Kelman will lose the ability to pursue a claim, the value of which has been estimated as being in the region of £150,000-£200,000. The evidence that he was not aware that he had a right to claim compensation for having been exposed to asbestos until his diagnosis with mesothelioma in 2019 is a relevant factor. It is accepted (and relevant in general terms under section 19A) that the pleadings disclosed a relevant prima facie case. While the prospects of success of the case are relevant only in a general sense when considering section 19A, to the extent that they are brought into the balance they tend to favour the pursuer in this case. The exposure to asbestos that he seeks to prove took place in the 1980s and so well after the time when employers ought to have been aware of the serious danger to which they would be submitting their employees - see *Thacker* v *North British Steel Plc* [2018] CSOH 73 at paragraph 51. It was not disputed that the foundations of a case against the defenders are present. Mr Kelman was employed by them at the material time and the basic facts of the work he did are known.

[47] There is little doubt that Mr Kelman and his wife were shocked by the diagnosis of mesothelioma in 2019 and that Mr Kelman acted promptly in raising proceedings thereafter. This is not a case where the pursuer has delayed in raising proceedings or has been failed by legal advisers. As soon as he was diagnosed with mesothelioma Mr Kelman sought

appropriate advice. His previous ignorance of his legal right to claim for an extremely debilitating and life shortening condition is a relevant factor for consideration. His response on discovering that he could pursue a remedy cannot be faulted. While each case turns on its own facts, I note that a difference between this case and that of *Quinn* is that there is here a very clear, reasonable and convincing explanation for the failure to raise proceedings timeously.

[48] As against that, the defenders would of course suffer prejudice in that they would be required to meet the claim if successful, as with any case of this sort. However, it was submitted that the prejudice to the defenders goes further than that in this case. Reliance was placed on what was said to be a loss of evidence because of the lack of records, the defenders' inability to trace insurers and consequent likelihood that any award of damages would be met from a stretched budget. If the pursuer died before the action was resolved, his relatives would have relatively significant claims as he has a wife, two sons, a sibling and grandchildren. I will deal with each of these in turn.

[49] So far as the loss of evidence is concerned, Mr Rollo disclosed that this is likely to be far less of an impediment than the defenders suggest. Mr Kelman's employment with the predecessor council Moray District Council has been established by the defenders through available records. The documents said in evidence to be lost included timesheets, incident accident reports, PPE and training records. These would be of limited value, as compared with witnesses who were working for the council at the time and are apparently still living in Elgin or the surrounding area. For example, Mr McKenzie the manager of building services some years ago is said to live locally. The council had also identified a tradesman from the early 1980s, a former electrician who would have been the foreman of Mr Kelman's department who also lives in the Elgin area. While he might not have been willing to speak

to the defenders at the time of an initial enquiry, this is something that could be pursued if the action proceeded. I do not consider that the defenders will face any greater challenge in defending this case as a result of the loss of evidence than any other litigation where evidence from some decades ago requires to be led. Of course it is not sufficient to record that relevant witnesses would appear to remain alive and can be questioned and the quality of the evidence in historic cases of any kind is a factor. However, the present case differs from the situation in *M* v *O'Neill* 2006 SLT 823, where issues of credibility in relation to allegations made by the pursuer from her time in a children's home decades earlier were critical, and so a factor in the section 19A determination. In the present case it was conceded that Mr Kelman's case is not without merit and there will be few if any stark issues of credibility. His case is that he serviced heaters that contained asbestos and so was exposed to asbestos when employed by the defenders' predecessor council. It was not suggested that those facts would be the subject of a credibility challenge and the remainder of the evidence will likely be given by skilled witnesses.

[50] On the defender's inability to trace their insurers, there was no suggestion that Moray District Council had failed to have in place the necessary policy of insurance; it is simply that searches to date have not succeeded in uncovering the relevant document. Interestingly, unlike Renfrewshire Council who had, we heard in evidence, been in a similar situation, the defenders have not employed someone to go through every document held. When Renfrewshire Council did so, ultimately the relevant old insurance policy was found. The defenders have not quite gone to that extent, although I accept that a number of efforts to locate the policy document have been made. The defenders inability to find the relevant documentation is a factor that I must weigh in the balance, although the situation is not one of an uninsured defender, but of a defender who knows he is insured but cannot prove it to

the satisfaction of the insurance company. The important related matter is how the defenders would fund the claim. Ms Paisley was very clear that the council held reserves of about £5 million against a backdrop of an annual budget of around £200 million. The contingent liability of Mr Kelman's claim is currently included in the council's accounts. While in general terms the council has faced funding challenges and has required to use reserves over the last few years because of the shortfall between the funding they receive and the previous year's spending, their current position is one of break even. If the pursuer succeeds in a claim of about £200,000 the council would fund that from reserves. There was no specific evidence of what impact if any that would have on the provision of any other services. It is an unusual feature of this case that it seems likely that the claim would be met from reserves rather than it being met by the insurance company and I have already indicated that I take that into account. That said, the pursuer would always have had his claim met, either by insurance or through reserves and it would be inequitable in my view to refuse to allow an action to proceed simply because the defenders had to date been unable to find the relevant insurance documents.

[51] Balancing the various factors in this particular case as best as I can, I consider that the prejudice to the defenders if the claim proceeds and they have to meet any damages from their reserves is less substantial than the loss to the pursuer should I refuse to allow it to proceed. Mr Kelman conducted his life in complete ignorance of the implications of a diagnosis of pleural plaques. As soon as the link between the mesothelioma from which he now suffers and that asymptomatic condition was pointed out, he took immediate action. He has acted reasonably and appropriately at all times and is not responsible in any meaningful way for the delay in proceedings being raised. I consider that the equities in this particular case lie in favour of allowing the action to proceed. Accordingly, even had I

considered that the action was time barred under section 17(2)(b), I would have allowed it to proceed on the basis that it is equitable to do so in terms of section 19(A).

[52] I will accordingly pronounce an interlocutor allowing this action to proceed, reserving meantime all questions of expenses.