

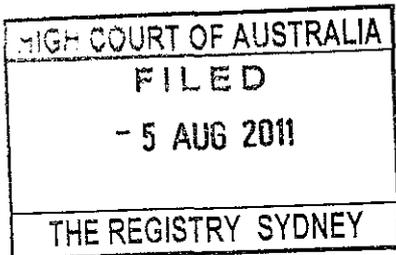
BETWEEN

AMABA PTY LIMITED
(ACN 000 387 342)
(UNDER NSW ADMINISTERED WINDING UP)
Appellant

AND

JOHN WILLIAM BOOTH
First respondent

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AMACA PTY LIMITED
(ACN 000 035 521)
(UNDER NSW ADMINISTERED WINDING UP)
Second respondent

APPELLANT'S SUBMISSIONS IN REPLY

Internet publication

- 20 1. These submissions in reply are in a form suitable for publication on the internet.

The special leave questions and the scope of Amaba's submissions

2. The terms of the grant of special leave accommodate the scope of Amaba's submissions. The grant recognises two separate issues: finding causation by reference to risk; and finding causation where there was "*reliance upon insufficient expert opinion evidence*". The second issue requires an examination of the basis of the expert opinions admitted into evidence.

Factual contentions

- 30 3. Amaca does not accept the first respondent's additions to its statement of the material facts. Most are references to evidence, not to findings – and as such appear to be more in the nature of submissions. And at least five matters are contentious or wrong.

- (a) The first respondent (repeatedly) says that it was agreed that his mesothelioma was caused by inhaling asbestos¹. That is not right. Statistically speaking asbestos probably caused the mesothelioma, but ultimately this is unknowable. The primary judge seemed to think that this was a concession, but neither Amaca nor Amaba made (nor could anyone make) such a concession;

¹ In the first respondent's submissions ("*RS*") at [5], [30], [53], [57]

- (b) The references by the first respondent to dust created by his work as a motor mechanic, or comparisons with dust created by other processes², cannot impact upon the actual findings of the primary judge, who – taking those very facts into account – concluded that the background risk was much greater than the risk from any dust created by the first respondent’s brake work;
- (c) If it is not common ground that the background risk was much greater than the risk created by the work as a motor mechanic³, then it should be. The issue was settled by the findings of the primary judge. The primary judge found that the work with Amaba’s products (at its highest) was only 20% of the risk from the background;
- 10 (d) The (repeated) assertion by the first respondent that the cumulative effect theory is “almost universally accepted”⁴ is tendentious. For reasons given in Amaba’s principal submissions the evidence does not support that proposition. Dr Leigh could not identify literature which supported it⁵. The theory is not accepted by the leading researchers in the UK or in America⁶. Closer to home, the same evidence of Professor Henderson and Dr Leigh in Western Australian proceedings⁷ was not found sufficient to support the cumulative effect theory⁸;
- (e) Neither Amaca nor Amaba proposed or relied upon a “single fibre theory” or a “threshold theory”⁹ – this was said by the primary judge, but we do not know why. Amaca¹⁰ did make a written submission that Dr Leigh and Dr Heiner appeared to accept the discredited “single fibre theory” – a submission supported by the evidence¹¹.
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The primary judge *did* base his finding upon an increase in risk

4. Although the first respondent says that the primary judge did not make his causation finding by a reference to an increase in risk¹², this overlooks the fact that the primary judge devoted a specific section of his judgment to “*Conclusions on Causation*”, and divided this into two sections – “*Generally*” and “*Specifically*”¹³. In the “*Conclusions on Causation*” the primary judge made no reference to the cumulative effect theory, or to any biological theory at all – he only referred to matters bearing upon risk.

² RS [8(a)]

³ RS [8(b)]

⁴ RS [9], [37]

⁵ Joint Appeal Book (“JAB”) at 337.15-339.45

⁶ As shown by the various UK decisions in *Fairchild* etc, and the result of the close examination of the American cases by Professor Stapleton in “*The Two Explosive Proof of Causation Doctrines Central to Asbestos Claim*” (2008) 74 Brook L Rev 1011

⁷ See Henderson JAB 592.40-595.15; Leigh JAB 545.20-546.45, 549.45-550.25

⁸ See *Amaca Pty Ltd v Moss* [2007] WASCA 162. Professor Stapleton identified this anomaly in “*Factual Causation and Asbestos Cancers*” (2010) 126 LQR 351. Professor Musk also gave evidence in *Amaca v Moss*

⁹ RS [9], [30]

¹⁰ Amaba adopted the submission

¹¹ See Leigh JAB 262.30, 263.25; Heiner JAB 311.35-311.40

¹² RS [13] – [14]

¹³ JAB 1142.30-1145.85; DDT [161]-[172]. The first respondent has not addressed paragraph 19 of Amaba’s principal submission.

The application of the “*but for*” test

5. It was Amaba’s case at trial and on appeal that the first respondent had to pass the “*but for*” test, and that only this Court may say otherwise. In *Sienkiewicz*¹⁴ it was observed that the essential element of the creation of the *Fairchild* exception was the relaxation of the “*but for*” test.
6. The primary judge failed to address the “*but for*” issue. The Court of Appeal appears to have acknowledged the omission, but it remains unclear as to whether the Court of Appeal itself applied the “*but for*” test.
- 10 7. It is not clear what the first respondent ends up saying about the “*but for*” test. He seems to make three points: First, he appears to submit that the Court of Appeal did resolve the issue¹⁵, but when the points of reference in the Court of Appeal’s judgment¹⁶ are examined, that is plainly not so; one cannot discern whether the Court of Appeal was saying the “*but for*” test did or did not apply. Secondly, the first respondent appears to submit that the primary judge made an “*implicit*” finding¹⁷ – but that seems neither likely nor satisfactory: to justify the finding the primary judge would have needed to explain why he rejected the expert evidence directly on point. Thirdly, it seems that the first respondent submits that the “*but for*” test does not or should not apply because the whole issue can be resolved by “*the application of common sense to the facts*”¹⁸.
- 20 8. Each of those three propositions should be rejected – the first and second because they are wrong; the third because it would constitute an unwarranted departure from principle, contrary to recent authority doubting the utility of common sense as a general test for causation¹⁹.
9. The practical consequence here is that the first respondent was unable to prove that he would not have contracted mesothelioma except for his work on Amaba’s brake products. Such an outcome is hardly surprising in circumstances where the work on Amaca’s brakes only created a small increase in the risk of mesothelioma. An inference of causation is unavailable.

Were the medical experts speaking of risk or cause?

- 30 10. The first respondent’s submission is that when the experts (repeatedly) referred to “*risk*” they really meant “*cause*”. It would be unproductive to repeat Amaba’s principal submission. It is better to direct attention to the real question – The “*cumulative effect theory*” is predicated upon every asbestos fibre being *necessary* to the outcome: Did the evidence prove the theory?

¹⁴ *Sienkiewicz v Greif (UK) Ltd* [2011] 2 WLR 523, see, for eg, Lord Brown at 578-9 [174]-[176]

¹⁵ RS [18] referring to the Court of Appeal judgment at [93] – [114], and esp [111] and [114]

¹⁶ RS [18]

¹⁷ RS [18]

¹⁸ RS [19]

¹⁹ See, for example, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-7 [96]-[97], per Gummow, Hayne and Heydon JJ

11. For reasons submitted in its principal submissions, Amaba says that the expert evidence contradicted the idea that every asbestos fibre was necessary to produce the outcome; each of the experts repeatedly acknowledged that this was so.
12. The passage relied upon by the Court of Appeal to support the primary judgment discloses the deficiencies in the evidence. The Court of Appeal set out only one question and answer from the evidence of Professor Henderson, as though this alone was sufficient to support the primary judgment²⁰, but it does not:

Q. In the case of Mr Booth, are you able to say whether or not that particular risk of that last exposure came home?

10 *A. No. I'd say particularly the risk from all of his exposures came home because the model which I adopt is that of a cumulative exposure dose response, so I think that all of the asbestos fibres that he's inhaled, or at least a proportion of them, will contribute to the risk and to the ultimate development of the mesothelioma.*

13. Professor Henderson *denied* that every fibre was necessary; he referred specifically to *risk*; he did not refer to a biological explanation, but rather to a *model*; and he acknowledged that it may have been only *a proportion* of the fibres which were involved.
14. Finally, the first respondent has enlisted Professor Berry as supporting his “*cumulative effect*” theory contention²¹. With respect, the first respondent is wrong to do so, and the evidence cited does not support the submission; Professor Berry said that in determining cause, the
20 relativities of different exposures were essential²².

The value of the epidemiological studies

15. The significance of the 22 epidemiological studies – none of which could demonstrate that a motor mechanic is at an increased risk of contracting mesothelioma – is that epidemiology is one of the factors to be taken into account in determining the sufficiency of the expert evidence. As explained in the principal submissions, the primary judge erred when dealing with the epidemiology, and the Court of Appeal declined to intervene. It seems appropriate that this Court consider all of the evidence – which includes all of the science – in arriving at a conclusion as to the sufficiency of evidence on an issue, which since *Fairchild*, is clearly an
30 internationally contentious issue.
16. The epidemiology is important. It was either misunderstood or mistreated by the primary judge. Its significance in these proceedings is underlined by the fact that the best submission that the first respondent can muster is that Professor Henderson said the epidemiological studies “*did not negate conclusively a small increase in risk*”²³

²⁰ JAB 1251.25-1252.40; CA [118]

²¹ RS [25] – Professor Berry did not *agree*, he *disagreed* with the cross-examiner’s proposition, see JAB 371.40-372.13

²² JAB 609.32-609.35

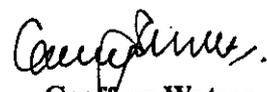
²³ See submission at RS [28]

17. Incidentally, the first respondent's submissions on Professor Berry's opinions on the epidemiology are quite wrong. The first respondent said²⁴ that Professor Berry "*testified that Mr Booth was undoubtedly at increased risk of contracting mesothelioma from brake work*". That is not true: when one examines the evidence cited²⁵ he actually said "*I certainly wouldn't wish to argue that brake workers were at a lower risk than the general population*". And Professor Berry gave evidence of the general value of the epidemiology, and that in particular, the meta-analyses by Wong and Goodman *et al* were "*competent*", "*accurate*" and "*sound*"²⁶.
18. The epidemiology is a powerful part of the evidence on causation.

10 Dr Leigh's evidence

19. As demonstrated in Amaba's principal submissions, Dr Leigh could not identify literature which supported the cumulative effect theory. The first respondent has not answered that submission – except by one remarkable reference²⁷ to Dodson and Hammar's text book. The first respondent purports to "*quote*" from the text book – but an examination of the portion "*quoted*" shows the following: three words are taken from the commencement of one paragraph, then an ellipsis covers 300 omitted words. The omitted words extend over three paragraphs of text. The first respondent then inserts a critical word ("*cause*") into the text where it does not fit – supposedly linking two completely unrelated subjects. That is not all: the "*quote*" also omits multiple qualifications and references to contrary arguments.
20. Dr Leigh's opinion remains unsupported by the international or Australian medical and scientific literature.

Dated: 5 August 2011



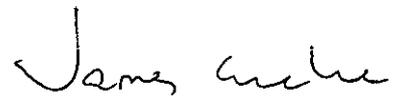
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²⁴ RS [28]

²⁵ JAB 363.37

²⁶ JAB 361.35-361.45, 364.15-364.28

²⁷ RS [48]