

AUSTRALIA / JUDGMENT

## Amaca Pty Ltd v Tullipan [2014] NSWCA 269

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Amaca Pty Ltd v Tullipan [2014] NSWCA 269

Hearing dates: 6 August 2014

Decision date: 15 August 2014

Before: Basten JA at [1];

Gleeson JA at [48];

Leeming JA at [49]

Decision: Orders made 6 August 2014:

In matter 2014/197925:

Dismiss the summons filed by Amaca Pty Ltd on 4 July 2014 with costs to be costs in the appeal.

In matter 2014/179948:

- (1) With respect to the motion to amend the notice of appeal:
  - (a) grant Amaca Pty Ltd leave to file an amended notice of appeal as contained in the Orange Appeal Book at pp 34-39;
  - (b) dispense with the requirements for service of the amended notice of appeal as filed;
  - (c) order that costs of the motion be costs in the appeal.
- (2) Dismiss the respondent's motion to strike out the notice of appeal as incompetent, with costs of the motion to be costs in the appeal.
- (3) Dismiss the appeal.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: APPEAL AND NEW TRIAL - nature of appeal - appeal from decision in "point of law" - plaintiff suffered from terminal lung condition - plaintiff claimed damages against appellant on the basis that lung condition was asbestosis - appellant argued the lung condition was idiopathic pulmonary fibrosis - trial judge held that the appellant's expert witnesses had conceded that the longevity of the disease established that it was probably asbestosis - whether there was an error in point of law in finding that the appellant's expert had made such a concession - whether any error by the trial judge amounted to an error in point of law - Dust Diseases Tribunal Act 1989 (NSW), s 32

DAMAGES - general damages - whether award of general damages disproportionate or excessive - principles on appeal of award of damages - no norm or standard should be derived from other decisions to determine whether award disproportionate - appeal limited to errors of law requires award to be so disproportionate it cannot be assumed the judge operated within the law

TORT - negligence - causation - plaintiff had been exposed to asbestos by appellant - plaintiff claimed inhalation of asbestos had caused asbestosis - asbestosis and idiopathic pulmonary fibrosis share similar clinical symptoms - whether medical evidence established that the plaintiff was suffering from asbestosis

Legislation Cited: Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 2

District Court Act 1973 (NSW), ss 127, 176

Civil Liability Act 2002 (NSW), s 16

Dust Diseases Tribunal Act 1989 (NSW), ss 4, 12B, 13, 19, 25, 25B, 32

Supreme Court Act 1970 (NSW), ss 48, 75A

Cases Cited: Amaca Pty Ltd v Booth [2011] HCA 53; 246 CLR 36

Amaca Pty Ltd v Ellis [2010] HCA 5; 240 CLR 111

Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26; 78 CLR 353

Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139

Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601

Goodwin v Commissioner of Police [2012] NSWCA 379

Miller v Jennings [1954] HCA 65; 92 CLR 190

Planet Fisheries Pty Ltd v La Rosa [1968] HCA 62; 119 CLR 118

Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33

Seltsam Pty Ltd v McGuiness [2000] NSWCA 29; 49 NSWLR 262

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247

State Super SAS Trustee Corporation v Cornes [2013] NSWCA 257

Wainohu v New South Wales [2011] HCA 24; 243 CLR 181

Waterways Authority v Fitzgibbon [2005] HCA 57; 79 ALJR 1816

Whisprun Pty Ltd v Dixon [2003] HCA 48; 200 ALR 447

Category: Principal judgment

Parties: Matter No 2014/179948

Amaca Pty Ltd (Under NSW Administered Winding Up) (Appellant)

David Tullipan (Respondent)

Matter No 2014/197925

Amaca Pty Ltd (Under NSW Administered Winding Up) (Applicant)

Dust Diseases Tribunal of NSW (First Respondent)

David Tullipan (Second Respondent)

Representation: Counsel:

Mr D J Russell/Mr J C Sheller (Appellant/Applicant)

Mr PCB Semmler QC/Mr S Tzaouganatos (Respondent/Second Respondent)

Submitting appearance (First Respondent in CA 2014/197925)

Solicitors:

DLA Piper Australia (Appellant/Applicant)

Turner Freeman Lawyers (Respondent/Second Respondent)

I V Knight (First Respondent in CA 2014/197925)

File Number(s): CA 2014/179948; CA 2014/197925

Decision under appeal Jurisdiction: 9115

Date of Decision: 2014-06-04 00:00:00

Before: Finnane DCJ

File Number(s): DDT 420/2013

## HEADNOTE

[This headnote is not to be read as part of the judgment]

The respondent, David Tullipan, suffers from a terminal lung condition. He brought proceedings in the Dust Diseases Tribunal alleging the condition was asbestosis brought on by inhaling asbestos dust from building material manufactured by the appellant, Amaca Pty Ltd. The appellant denied liability and argued the lung condition was idiopathic pulmonary fibrosis (IPF). It was held by the trial judge that the lung condition had manifested itself as long ago as 2000 and that such longevity was more consistent with a diagnosis of asbestosis than IPF. In reaching this finding, the trial judge observed that the appellant's expert witnesses had conceded that the lung condition "could not be anything but asbestosis" if it had manifested in 2000, as the respondent would have already died if it were IPF. Damages were assessed at \$1,464,282, with \$350,000 of that amount reflecting general damages for pain and suffering.

Section 32 of the Dust Diseases Tribunal Act 1989 (NSW) provides a dissatisfied party with a right of appeal against a decision in point of law. The appellant alleged various errors of law, including in finding that there had been a concession by Amaca's medical experts and in the amount awarded for general damages.

The Court (Basten JA, Gleeson JA and Leeming JA) held, dismissing the appeal:

1. No error in point of law was established in respect of the concession. The trial judge was entitled to find that the evidence of the appellant's expert witnesses supported the conclusion that longevity likely established asbestosis. It was incorrect to say that there was a concession that such longevity could only mean the condition was asbestosis, but the error was immaterial. Furthermore, there was evidence to support the finding that the lung condition had commenced as long ago as 2000: [31]-[37], [60]
2. Counsel for Amaca accepted that if the challenge with respect to the alleged concessions failed, the appeal failed. It was therefore not necessary to address other grounds relating to liability: [22], [37]
3. A challenge to an award of damages where the appeal is limited to an error of law needs to demonstrate that the amount is so disproportionate to the harm that it cannot be assumed the judge operated correctly in accordance with the limits of his or her function under the law. The appellant failed to demonstrate this: [43]-[44]

Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601; Miller v Jennings [1954] HCA 65; 92 CLR 190; Planet Fisheries Pty Ltd v La Rosa [1968] HCA 62; 119 CLR 118 applied.

Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 28; 78 CLR 353 considered

## Judgment

1BASTEN JA: The respondent, David Tullipan, suffers from a terminal lung condition. If it were found, as a probability, to have been caused by inhalation of asbestos dust, the condition would be described as asbestosis and Mr Tullipan would be entitled to recover damages from the appellant, Amaca Pty Ltd. If the causal link with asbestos were not demonstrated, the condition would be described as idiopathic pulmonary fibrosis ("IPF"), indicating that it was not caused by a known exogenous pathogen. In that case, Amaca would not be liable. In proceedings commenced by Mr Tullipan against Amaca, the Dust Diseases Tribunal (Finnane DCJ) was satisfied that the condition was caused by asbestos fibres and therefore found Amaca liable. Amaca sought to challenge that finding in this Court on the basis that it was erroneous in point of law.

2The Tribunal awarded Mr Tullipan damages assessed at \$1,464,282. The largest proportion of that amount was for future economic loss. If Mr Tullipan had not survived until judgment, he would not have been entitled to an award on that basis: Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 2(2)(a)(ii). Mr Tullipan is still alive, though his prognosis is not good. There is no challenge to the assessment of future economic loss.

3The other significant element of the damages was an amount of \$350,000 allowed on account of general damages for pain and suffering. His entitlement to such damages did not depend on him surviving until judgment: Dust Diseases Tribunal Act 1989 (NSW) ("the Tribunal Act"), s 12B(2). Amaca sought to challenge that assessment as erroneous in point of law.

4The decision of the Tribunal was delivered on 4 June 2014. On 4 July 2014 Amaca filed both a notice of appeal and a summons seeking relief in the supervisory jurisdiction of the Court. Both proceedings were listed for hearing on 6 August 2014. At the conclusion of the hearing the Court made orders dismissing both the appeal and the proceedings for judicial review. This judgment sets out my reasons for making those orders.

## Nature of proceedings in this Court

5Pursuant to the Tribunal Act, there is an appeal from a decision of the Tribunal in point of law: s 32. The finding that Mr Tullipan suffered from asbestosis was a finding of fact, based upon the medical evidence. As will be explained below, Amaca struggled to identify a relevant decision of the Tribunal in point of law, let alone one which was erroneous. A similar difficulty arose with respect to the challenge to the award of general damages, that being an evaluative judgment of a peculiarly indeterminate nature.

6On one view, a provision in the form of s 32(1) identifies as the subject matter of the appeal "a decision of the Tribunal in point of law". While it is well established that there need not be an express decision, so long as a decision may be identified which is implicit within the Tribunal's reasons, there is doubt as to whether all forms of legal error fall within such an appeal. It was perhaps for that reason that Amaca, as well as appealing, commenced proceedings by way of summons seeking judicial review of the decision of the Tribunal. (As a matter of drafting, the

summons inappropriately adopted the language of s 32, namely seeking to identify errors in point of law: it should have sought to identify error of law on the face of the record - as a ground for a quashing order - or jurisdictional error.)

7Whether review is available for error of law on the face of the record is not beyond doubt. Section 13(5) of the Tribunal Act contains a form of privative clause, stating that a decision of the Tribunal is not liable to be "questioned or appealed against in any court", except as provided by s 32 of the Tribunal Act "or s 48 of the Supreme Court Act 1970." (The reference to s 48 of the Supreme Court Act appears to be inapt, as that provision allocates certain proceedings to this Court, but does not constitute a source of jurisdiction.) Section 13(5) might have the effect of limiting judicial review to jurisdictional errors, in keeping with the approach adopted to s 176 of the District Court Act 1973 (NSW). In any event, it is not necessary to pursue these issues further as no attempt was made to identify any error which might attract relief under s 69 of the Supreme Court Act which did not constitute error for the purposes of s 32 of the Tribunal Act. The summons was therefore dismissed on the formal ground that it was otiose.

8The greater part of this Court's jurisdiction, other than appeals from a Division and civil appeals from the District Court, are expressed in some form as limited to questions of law. As a result, the Court has considered on numerous occasions the limitations imposed by such language, in comparison with the scope of an appeal by way of rehearing under s 75A of the Supreme Court Act or s 127 of the District Court Act.

9It is generally accepted that such statutory provisions reflect an implicit distinction between errors of law and errors of fact. However, although the distinction is legitimate, the boundary between the categories is porous. Furthermore, different issues arise in different circumstances. One critical aspect in considering the scope of appeals limited to questions of law is whether the appellant was the party bearing the onus of proof in the court below. That party will face difficulties in identifying legal error on which to challenge an erroneous finding of fact of the kind identified by Glass JA in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156-157. However, Amaca was not an unsuccessful applicant: it was an unsuccessful respondent.

10The difficulty in drawing a bright line boundary between errors of law and errors of fact is illustrated by the present case. One aspect of Amaca's challenge was that the trial judge had "ignored critical evidence", being evidence tendered on behalf of Amaca. That was described in various ways, including "failing to afford procedural fairness to [Amaca]" and as "failing to exercise jurisdiction": amended ground 7. The scope for challenging findings of fact on such bases was noted in *Goodwin v Commissioner of Police* [2012] NSWCA 379 at [18]-[25]. The issue was also considered in *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257, where the Court said:

"[11] Goodwin considered whether the rejection by the trial judge of a recusal application, based on a reasonable apprehension of bias, could give rise to a grievance with respect to a decision 'in point of law'. However, the Court also identified the possibility that a mistake in understanding the facts, applying the law and reasoning to a conclusion could amount to a constructive failure

to exercise jurisdiction if it revealed 'a basic misunderstanding of the case brought by an applicant, [so that] the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way': *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [88] (Kirby J), referred to in *Goodwin* at [20]. The reasoning also accepted the proposition that a failure by a tribunal to bring its own mind to bear on the issues before it was a constructive failure to exercise its jurisdiction: *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90; 203 FCR 166 (North, Logan and Robertson JJ) at [5], reasoning adopted in *Secretary for Justice v Simes* [2012] NZCA 459 (Randerson J, writing for himself, Stevens and French JJ) at [58]-[59], and *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, in relation to an administrative tribunal, particularly at [2]-[5] (Allsop CJ).

[12] Broad statements in *Azzopardi v Tasman UEB Industries* ... to the effect that a finding of fact which could be characterised as 'perverse' or 'illogical' does not raise a point of law should be understood as qualified in this way. It is not in doubt that merely to identify a finding of fact as in some way erroneous does not raise a question of law. However, if the finding has resulted from an error of the kind identified above, it may reveal a constructive failure to exercise jurisdiction and thus an error of law. The fact that the finding could also be fairly characterised as 'perverse', or the process of reasoning by which it was reached 'illogical', does not diminish the legal error so identified. The language of perversity or illogicality is neither sufficient nor necessarily inadequate to identify a point of law: some greater level of precision may be necessary."

11These issues can be articulated further by reference to the specific complaints made by Amaca with respect to the decision of the Tribunal. There was, however, an entirely separate basis on which Amaca challenged the decision of the Tribunal, namely that its reasons were inadequate to comply with the legal obligation of the Tribunal to expose its reasoning. This was treated as a ground separate from the complaint that particular evidence had not been properly addressed. There was no specific complaint that the Tribunal had failed to make findings which were necessary for its ultimate conclusion: cf *Waterways Authority v Fitzgibbon* [2005] HCA 57; 79 ALJR 1816 at [129]-[130] (Hayne J). As explained in *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 the content of the duty to give reasons will vary "according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision", referring to *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181 at [56] (French CJ and Kiefel J).

12Although its name identifies the Dust Diseases Tribunal as a tribunal, its status by statute is "a court of record": Tribunal Act, s 4(2). Whilst it enjoys some procedural flexibility, designed to allow for the efficient exercise of its highly specialist jurisdiction and to address cases expeditiously where a claimant may be dying, it generally bears the hallmark of a court. Thus proceedings are generally in open court (s 13(1)), parties have a right to legal representation (s 19) and the rules of evidence generally apply (s 25(1) and (2)). The statute allows for some variation with respect to evidential material. Thus, "[h]istorical evidence and general medical evidence

concerning dust exposure and dust diseases which had been admitted in any proceedings before the Tribunal may with leave of the Tribunal be received as evidence in any other proceedings": s 25(3). Further, there is scope for an "issue of a general nature" to be determined in one set of proceedings so that the finding may be available in later proceedings without being relitigated: s 25B.

13The parties accepted that the dictates of justice in the present case warranted a significant level of expedition. There was a debate as to whether it was proper to characterise the reasons of the Tribunal as having been given "ex tempore". There is no reason to decide whether that label is apt or inapt: the fact is that, after a six day hearing concluding on 2 June 2014, reasons were given on 4 June 2014. In those circumstances, the appropriate level of scrutiny of the tribunal's reasons is one which does not focus on infelicities of expression or possible ambiguities. Further, to the extent that Amaca asserted that it was aggrieved because it did not know why it had lost, it is open to this Court to take into account the course of the proceedings in the Tribunal which had been completed only two days earlier. Further, to the extent that Amaca alleged that the trial judge had failed to consider particular evidence, it is open to this Court to take account of discussion in the course of the hearing which demonstrated familiarity of the trial judge with respect to that evidence. Given the brief period within which the proceedings were determined, it is implausible that matters discussed in open court on Monday had been forgotten by Wednesday of the same week.

14It is not necessary to set out the general principles regarding review for inadequacy of reasoning, which were summarised in *Resource Pacific* at [42]-[57]. As noted by Mahoney JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, "it will ordinarily be sufficient if ... by his reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he has acted." As counsel for the respondent noted, adopting the language of McHugh JA in *Soulemezis* at 281, "great care needs to be taken that dissatisfaction with the finding of fact does not mislead the Court into holding that the learned judge has failed to give his reasons for his finding." Finally, in *Soulemezis* at 282, McHugh JA stated:

"What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in support of, his finding of fact. But that is enough where no appeal lies against the finding of fact. Accordingly there was no failure to give reasons sufficient to constitute an error of law."

15As will become apparent in considering the issues raised by the appellant, the attack on the reasons was an artefact: if the judge was entitled to decide the case on the basis which he in fact articulated, the failure to deal with other issues and other evidence was both justifiable and immaterial.

## Issues

16The nature of Mr Tullipan's condition depended entirely upon the medical evidence. This evidence fell into two broad categories. First, there was the historical evidence which included radiology (X-ray reports and high resolution CT scans), together with reports of treating doctors over a two year period from May 2007 until May 2009; none of these doctors gave oral evidence. Secondly, there were experts for each party, who did give oral evidence. The first complaint of the appellant is that the trial judge erred in "failing to consider" by failing "to properly understand" the historical evidence: ground 1(c), (d). (There was also a complaint that the judge failed to "make findings about such opinions".) Further, the judge was said to have failed to give reasons for not accepting those opinions: ground 2(c).

17The second category of evidence covered the conflicting opinions of the principal experts called for the plaintiff and for Amaca. The grounds of appeal identified the position adopted by the trial judge as preferring opinions of Professors Bryant and Breslin (called for the plaintiff) to the opinions of Professor McKenzie and Dr Jones (called by Amaca). Again there were complaints of "failing to consider" by failing "to properly understand" the opinions of Professor McKenzie and Dr Jones and failing to make findings about those opinions (grounds 1(a), (b)), failing to "properly understand" the articles tendered as the basis for their opinions and make findings "about" such articles (ground 1(e)); failing to give adequate reasons for not accepting the opinions of Professor McKenzie and Dr Jones; and preferring the opinions of Professors Bryant and Breslin (grounds 2(a), (b), (d)) and "preferring the opinions of Professors Bryant and Breslin to the opinions of Professor McKenzie and Dr Jones, based upon their supposed eminence and greater experience, when there was no evidence of these matters, and in any event such matters are not an appropriate substitute for recording and weighing the opinion evidence, and giving reasons for preferring one opinion over another": ground 6. There was a degree of tension between grounds 2 and 6.

18There were two more focused complaints. One was an alleged error in finding that Professor Bryant had said that the plaintiff "had had asbestosis since the year 2000", there being no evidence to support such a finding: ground 3. The second specific complaint alleged an erroneous finding that "all the medical evidence" supported the view that the plaintiff must have had asbestosis, "otherwise he would be dead years ago", when the opinions of Professor McKenzie and Dr Jones were to the contrary: ground 5.

19It remains to note the terms of ground 4, which was closely related to ground 5. Ground 4 was of central importance in the way in which Amaca presented its case on appeal. Counsel for Amaca accepted that if ground 4 were not upheld, the appeal on liability must fail: CA Tcpt, 06/08/14, pp 26(7)-(10), 28(10)-(12). Accordingly, it is convenient to set out ground 4 in full:

"The trial judge erred in point of law in finding that both Dr Jones and Professor McKenzie conceded that if [the plaintiff] had his disease as long ago as 2000, it could not be anything but asbestosis, when there were no such concessions made."

20Ground 7 alleged, in generic terms, that the trial judge "ignored critical evidence in the case and failed to give adequate reasons for his decision on the issue of diagnosis". These factors, which had been particularised in the earlier grounds, were said to promote a sense of grievance, and to constitute procedural unfairness and a failure to exercise jurisdiction. It is sufficient to note that the particular grounds must be established at a sufficiently serious level to warrant such descriptions.

21Ground 8 was a challenge to general damages as being outside a sound discretionary range. No specific error was identified in the reasons: the award itself was said to "demonstrate appealable error of law."

22Because counsel for Amaca accepted the central importance of the alleged concessions, it is convenient to start by addressing that issue.

### Challenge to concessions

23The experts were agreed on three propositions central to the determination of an appropriate diagnosis. First, the plaintiff's condition was consistent only with asbestosis or IPF: there was no plausible third option. Secondly, a precondition to a diagnosis of asbestosis was a history of sufficient exposure to airborne asbestos dust. The level of exposure was, to some extent, controversial but Amaca conceded, at least in this Court, that there had been sufficient exposure to satisfy that precondition.

24Beyond these propositions, there were particular diagnostic criteria which were associated with one disease rather than the other. However, absent a biopsy, which was not practicable in relation to the plaintiff, each criterion which might inform a differential diagnosis was indecisive. For example, there was a question as to the likelihood of there being asbestosis, absent pleural plaques. Not only was there debate as to the relative significance of the absence of pleural plaques, but there was disagreement as to whether the plaintiff exhibited that symptom. The criterion which had the greatest potential to permit a diagnosis of asbestosis in the present case was the longevity of the disease. Thus, asbestosis was a condition which progressed slowly (some patients might die with, rather than from, asbestosis), whereas IPF generally progressed much faster. The plaintiff's case was that he had had the disease for at least 12 years and that the probability of a person with IPF surviving more than four or five years was remote: accordingly the correct diagnosis on the probabilities was asbestosis.

25The judge discussed in some detail the history of the plaintiff's medical examinations from May 2007 when he was experiencing symptoms including a cough, a hoarse voice and occasional breathlessness. X-rays were taken at that time, as was a high resolution CT scan. However, it was later discovered that an X-ray had been taken in 2005. That X-ray was shown to Dr Bryant shortly before the hearing. The judge stated (reasons, p 9):

"With that X-ray, Dr Bryant, who did not have it initially when he did his reports, was able to come to the opinion that this man had this disease, asbestosis, as long ago as 2000. That is, it was manifesting itself in 2000. And in his opinion, it could not be idiopathic pulmonary fibrosis because that disease is one of rapid progression and if he had had that in 2000 he would have been dead years ago. It was just not possible for him still to be alive.

Ultimately, Dr Jones, who certainly is an expert radiologist, and Dr McKenzie conceded that if he had this disease as long ago as 2000, it could not be anything but asbestosis."

26In a later passage (reasons, p 10) the judge explained that, given Dr Bryant's very extensive experience and expertise, the fact that he was a treating doctor and that his opinion was backed by Professor Breslin, an eminent authority in the area, he preferred Professor Bryant's opinion to that of Drs McKenzie and Jones. The judge continued:

"To some extent they differ, but they do not differ on the essential matter that this man should have been dead years ago if he had idiopathic pulmonary disease. I therefore have come to the conclusion that he did have asbestosis, he has got asbestosis."

27These statements should be read together: that is the final statement suggesting that Dr McKenzie and Dr Jones accepted that the plaintiff "should have been dead years ago" depended on an assumption as to the point at which he first manifested the disease. Amaca's challenge to these passages was twofold. First, it challenged the characterisation of the evidence of its witnesses as a "concession" in the terms identified by the trial judge. Secondly, it challenged the finding purportedly based on Dr Bryant's opinion that the plaintiff had in fact had the disease "as long ago as 2000."

28It is convenient to refer first to the evidence of Dr McKenzie. He was taken in cross-examination to the X-ray report from 2005 which showed the existence of fibrotic changes: Tcpt, p 202(37). He accepted that the radiologist "described what he saw as coarse increased interstitial markings" and that they "may represent long standing pulmonary fibrosis": p 202(43)-(46). He further agreed that the report was consistent with "the existence as early as 2005 of interstitial disease that was clearly found to be present in 2007." He also agreed that if there had in fact been interstitial disease seen by the radiologist in 2005 "it would have been developing for some years prior to 2005": p 202(50). The cross-examination and answers continued:

"Q. If we make that assumption that the interstitial process had been progressing for some time before 2005 and had progressed to the stage of honeycombing in 2007, which the CT scans demonstrate, it is highly probable is it not that if what Mr Tullipan had was IPF, he would be dead by now. A - Yes, more probable than not, so -

Q. And for that reason it is more likely, is it not, that his fibrosis is a result of asbestosis and not idiopathic pulmonary fibrosis. A - I don't agree that follows.

Q. Well the length of time, if one assumes the fibrosis occurred before 2005 to the present, would make it much more likely, would it not, that what Mr Tullipan is suffering from is asbestosis rather than idiopathic pulmonary fibrosis. A - I disagree with that. I would say if someone had

asbestosis in 2005 with normal lung function in 2005 the chance of that person being dead from asbestosis in 2014 I would say is well less than 10%. I would say that it is very, very unlikely. Whereas I think there is probably a 20 to 30% chance that someone could have idiopathic pulmonary fibrosis for that long."

29The denial with which the last answer commenced was contradicted by the explanation. Treating the survival rate as the obverse of the mortality rate, the survival rate for a person with asbestosis was 90%. The highest survival rate proffered for a person with IPF was 30%. That is, a person having pulmonary fibrosis in 2005 and surviving to 2014 was at least three times as likely to be suffering from asbestosis as IPF. Those figures more than satisfy a standard applying the balance of probabilities. That constituted a sufficient concession to warrant the remark by the trial judge. Nevertheless, the cross-examiner returned to the fray shortly thereafter eliciting the following answers (p 204):

"Q. Professor, if the plaintiff had fibrosis as early as about 2003, and if he was suffering from idiopathic pulmonary fibrosis as you have said, if he is still alive now, that would be an unusually long survival time for the condition. A - Yes it would.

Q. Most would be dead years ago. A - Yes. ...

Q. Mr Tullipan's survival from an apparent onset of fibrosis in 2003 to the present is more consistent with asbestosis than with idiopathic pulmonary fibrosis, do you agree with that proposition. A - Yes, I think I will agree with that."

30The cross-examiner undertook a similar line of questioning with Dr Jones, ending with the following exchange (p 144):

"Q. If Mr Tullipan had fibrosis as early as 2003 and if he in fact was suffering from idiopathic pulmonary fibrosis, that would be an unusually long survival time would it not. A. - Yes it would.

Q. And that survival time and that circumstance would be more consistent I would suggest with asbestosis than with idiopathic pulmonary fibrosis. A. - Yes it would.

31Dr McKenzie, dealing with the passage of eight or nine years, treated the survival rate in IPF sufferers as no greater than 30%. Dr Jones gave evidence that the mortality rate from IPF at five years was 70% and the survival rate 30%: Tcpt, p 143(14). The finding by the trial judge as to agreement that the plaintiff "should have been dead years ago" if he had IPF was imprecise and involved an unnecessary element of hyperbole. It did not, however, involve any material error. It is correct to say that neither Dr Jones nor Dr McKenzie conceded that "if he had this disease as long ago as 2000, it could not be anything but asbestosis." This statement involved two errors, but neither of them assists Amaca. First, Dr McKenzie used a period from the date of the first X-ray in 2005. (Counsel may have been confused by the figures cited and not realised it was a powerful concession.) In the second passage, Dr McKenzie accepted the probability when the disease was measured from 2003. Counsel used the same year, 2003, in obtaining the final concession from Dr Jones. He may also have failed to appreciate that Dr Jones gave a survival rate of 30% at five years, which would have been satisfied by going back no further than 2007. Thus, it would have been

sufficient for Mr Tullipan's purposes if the concessions had been identified by reference to a disease commencing in 2003: however, the concession would have strengthened rather than diminished by going back to 2000. More importantly, with respect to Dr McKenzie, reliance on 2005 would have been sufficient because he accepted that the disease in fact would have developed some years prior to 2005. The error was therefore harmless.

32This analysis assumes that the relative frequencies of asbestosis and IPF were comparable, an assumption consistent with the concessions. It should also be noted that the analysis relevant to competing causes for a known disease may be quite different from that applicable to the differential diagnosis of an unknown disease, where there are only two competing candidates: cf *Amaca Pty Ltd v Ellis* [2010] HCA 5; 240 CLR 111 at [56], [64] and [70].

33The second error was a case of hyperbole. Neither witness said "it could not be anything but asbestosis." In fact, both witnesses adhered to the view that it could be IPF. Each did so on the apparent basis that if some might live longer than five years with IPF, that possibility remained open. Dr Jones said "the time scale [for IPF] is something like 12 years": p 143. By "time scale" he appears to have meant something like the longest possible period of survival absent exceptional circumstances. The plaintiff's case, however, had to be determined on the balance of probabilities and not by the exclusion of mere possibilities.

34The final step in the reasoning required that there be evidence to support the finding that formed the basis of the concessions, namely that Mr Tullipan had fibrosis "as early as 2003". Amaca challenged the finding, supposedly based on Dr Bryant, that the disease had arisen "as long as 2000." Dr Bryant did not give such evidence, according to the appellant. Amaca submitted that the finding by the trial judge was based on a misreading of the following evidence (Tcpt, p 30), where Dr Bryant had stated:

"My opinion was that ... because the honeycombing was detected in 2007, that it's likely that this condition has been going for at least some years irrespective of the 2007 chest X-ray which I've only just become aware of. So I felt that this suggested that the condition that we're observing now had its genesis back sometime in the period in the early years of 2000." (Emphasis added.)

35Amaca's point was that "the early years of 2000" meant somewhere between 2001 and 2004, perhaps, but not "as long ago as 2000". If this were a factual error, it would have been immaterial because this evidence was at least consistent with a disease dating from 2003, which was the basis of the relevant concessions. However, there was no factual error. One point that Dr Bryant appeared to be making was that he had reached that conclusion as to the genesis of the disease without having access to the 2005 X-ray. He gave further evidence in cross-examination (Tcpt, p 176) in the following terms:

"... if he had a highly abnormal chest X-ray and CT scan back in 2005 or 2007 but normal lung function, and if the disease has been progressing since that time at the same rate that it was beforehand and there is no reason to assume that it is an incorrect proposition, then it has taken him nine years to go from having few, if any symptoms to being at death's door. Presumably that means that the condition was present for five or ten years beforehand, so we're talking about a

disease which is progressing actually very slowly, it's taken nearly 20 years from the probable time of onset of his disease for him to die. Now I have never seen a patient with IPF do that."

36 Shortly thereafter, adhering to that reasoning, he suggested that the disease had actually been present "for a substantially longer period than [from] 2005" but said, "I can't tell you [how] long." This evidence supported the finding that Professor Bryant held the opinion that the disease had commenced "as long ago as 2000". The evidence of Professor Breslin, set out by Leeming JA, was to similar effect: Tcpt, p 88(27).

37 The trial judge decided the case on the basis of the three factors referred to above. The first two (sufficient exposure to asbestos and the absence of any third possibility) were not in dispute. The third factor was longevity. The principal witnesses for Amaca accepted, on the balance of probabilities, based on the known mortality and survival rates for the two conditions, that longevity demonstrated that the disease was more likely to be asbestosis. The trial judge was entitled to accept that evidence and determine the case on that basis. To do so demonstrated no error in point of law (or fact). Accordingly, as counsel for Amaca conceded, if it failed on that challenge (which it does) the appeal with respect to liability must be dismissed (as it was). The other issues do not arise.

38 I agree with the further reasons of Leeming JA on this matter.

### Challenge to general damages

39 The challenge to the award of general damages in the sum of \$350,000 eschewed any reference to the reasoning of the trial judge. That was, no doubt, because the judge ignored nothing that he was required to take into account and did not rely upon factors which he was prohibited by law from taking into account. So much may be accepted: however, the fact that he gave careful attention to the suffering of the plaintiff, the periods over which that suffering had continued and its effect on his life, together with reference to the periods of hospitalisation demonstrate that the assessment was made by reference to relevant considerations and was neither arbitrary nor capricious. To say that the award falls outside "a sound discretionary range" requires some indication as to the limits of that range and how far outside this figure is said to fall.

40 Counsel for the plaintiff noted that neither the trial judge nor this Court should "seek out a norm or standard" in the decision of either appellate or trial courts for the purpose of determining, by way of comparison, whether the award in question was "disproportionate": Planet Fisheries Pty Ltd v La Rosa [1968] HCA 62; 119 CLR 118 at 124 (Barwick CJ, Kitto and Menzies JJ). That warning is to be accepted. The correct approach in assessing what is fair and reasonable compensation for the injuries received and the disabilities caused was described in Planet Fisheries in the following terms at 125:

"It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. The awareness must be a product of general experience and not formed ad hoc by a process of considering particular cases and endeavouring, necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand."

41The rejection of a "norm or standard" was unexceptional: as was the statement that the judge will make an assessment which is not arbitrary or capricious, but based upon "general awareness", as a product of general experience. Such reasoning is consistent with the approach required of an appellate court in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616-617, where Lord Wright stated:

"An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law .... At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely [a] matter of impression and of common sense, and are only subject to review in very special cases. ... In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere whether on the ground of excess or insufficiency."

42This passage was cited with approval and applied by Dixon CJ and Kitto J in *Miller v Jennings* [1954] HCA 65; 92 CLR 190 at 195-196.

43These statements were made in the context of appeals not restricted to questions of law. It is arguable that the test to be applied on an appeal limited to errors of law is yet more constrained, although the practical result may not be different in most cases. In a case limited to review for error of law, especially where reasons are given which demonstrate no error of law, the amount of the award must be so disproportionate to the harm done that the assumption that the judge had operated correctly in accordance with the limits of his or her function under the law, must be false: cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353 at 360 (Dixon J). Given the imprecision necessarily attendant upon an assessment of general damages, an appellant challenging an award for error of law will, in most cases, bear a heavy burden.

44There are of course principles of certainty and transparency which militate in favour of appellate intervention where what might be normally accepted as a proper range for an award of general damages appears to have been contravened. However, such considerations have more

traction in relation to an appeal by way of rehearing than one limited to the correction of decisions in point of law. One way of demonstrating that the appellant did not satisfy this burden is by reference to the schedule of non-economic loss promulgated under the Civil Liability Act 2002 (NSW). The maximum amount of damages now payable for a most extreme case, pursuant to s 16 of that Act, is \$551,500. The trial judge did not approach the assessment before him by reference to that figure (which was not legally applicable) and was correct in that regard. Nevertheless, the fact that the award in this case was less than two-thirds of the statutory figure under the Civil Liability Act supports the view that, given the plaintiff's circumstances, the appellant has failed to demonstrate that the award was outside a sound discretionary range.

45For these reasons, the challenge to the quantum of the award for general damages was rejected.

## Conclusions

46In making orders on 6 August, the Court reserved the question of costs. The parties were given leave to file submissions in respect of this issue, if agreement were not reached. The Court has since been informed that agreement has been reached.

47For convenience, the substantive orders made by the Court on 6 August 2014 may be recorded - they were as follows:

In matter 2014/197925:

Dismiss the summons filed by Amaca Pty Ltd on 4 July 2014 with costs to be costs in the appeal.

In matter 2014/179948:

- (1) With respect to the motion to amend the notice of appeal:
  - (a) grant Amaca Pty Ltd leave to file an amended notice of appeal as contained in the Orange Appeal Book at pp 34-39;
  - (b) dispense with the requirements for service of the amended notice of appeal as filed;
  - (c) order that costs of the motion be costs in the appeal.
- (2) Dismiss the respondent's motion to strike out the notice of appeal as incompetent, with costs of the motion to be costs in the appeal.
- (3) Dismiss the appeal.

48GLEESON JA: I agree with Basten JA and with the additional reasons of Leeming JA.

49LEEMING JA: I agree with the reasons of Basten JA. It follows in particular that I agree with what his Honour has written about (a) the nature of the appeal, (b) the failure of Amaca's challenge to the finding of general damages, and (c) it being appropriate, in resolving Amaca's urgently expedited appeal, to deal only with the central and dispositive issue. When the appeal was heard, senior counsel for the appellant acknowledged that had there been evidence from the

doctors called by Amaca conceding that, if Mr Tullipan had a disease as long ago as 2000, it could not be anything but asbestosis, then the appeal as to liability had to be dismissed. The other alleged errors going to liability are not material, and should not delay the delivery of this Court's reasons for the orders made at the conclusion of the hearing.

50I also agree with his Honour's analysis of the evidence so as to support the finding of liability, but wish to elaborate on some aspects of the reasoning and evidence. For the litigation proceeded on a basis, perhaps unusual, which made the opinions of statistical likelihood more probative than may often be the case.

51First, the parties proceeded on the basis that Mr Tullipan's disease was one or other of asbestosis or idiopathic pulmonary fibrosis. When dealing with statistics drawn from a population, an assessment of relative risk requires a consideration of all the possibilities: *Amaca Pty Ltd v Ellis* [2010] HCA 5; 240 CLR 111 at [56]. That requirement was satisfied.

52Secondly, it is known that exposure to asbestos fibres can cause asbestosis (although most people who are exposed do not develop the disease), and it was accepted that Mr Tullipan had sufficient exposure to asbestos to develop asbestosis. However, it is not known what causes idiopathic pulmonary fibrosis (hence its description as "idiopathic").

53Thirdly, it was not possible to establish directly whether indeed Mr Tullipan suffers from asbestosis or idiopathic pulmonary fibrosis (which are two distinct diseases but with similar clinical symptoms, both manifesting as pulmonary fibrosis). In particular, it was common ground that it was not possible to obtain a biopsy so as to test for the presence of a larger than normal number of asbestos bodies in Mr Tullipan's lungs (there was apparently uncontroversial evidence in the academic literature that "the presence of diffuse fibrosis and asbestos bodies in tissue sections are sensitive and specific criteria for diagnosis of asbestosis": Blue 128). Hence the focus on evidence which indirectly supported a particular diagnosis.

54Fourthly, Amaca accepted that it was open for the primary judge to accept evidence that there was pulmonary fibrosis not merely in 2005 but some years earlier "in the early years of 2000".

55Fifthly, there was unequivocal evidence that most sufferers from idiopathic pulmonary fibrosis die within ten years of diagnosis of pulmonary fibrosis. (There was evidence from the experts called by Mr Tullipan that the mean survival period was around three years, and that "the great majority of patients are dead within 5 years of diagnosis", although Amaca's experts considered that the position was not so bleak.). On the other hand, most sufferers from asbestosis survive for ten years after diagnosis.

56The differential survival rates (or mortality rates) are not by themselves sufficient to establish causation. It is necessary also to have regard to the relative frequency of the two diseases. Let it be assumed that disease A is highly likely to kill within 10 years, and disease B is highly unlikely to kill within 10 years. If disease A is extremely common throughout the population, and disease B is extremely rare, it would be unsafe to conclude from the different survival rates per se that a person suffering from one of those diseases who has survived for 10 years is suffering from

disease B.

57Although this appears not to have been addressed explicitly by the experts, all experts agreed that "the main differential diagnosis [of asbestosis] is with idiopathic pulmonary fibrosis" (as one of them, Professor Breslin, put it). That would not be so if, for people who have been exposed to asbestos presenting with pulmonary fibrosis, one of the diseases was extremely common and the other extremely rare. Further, there is a body of scientific literature (which was in evidence) directed to distinguishing asbestosis from idiopathic pulmonary fibrosis. Accordingly, it is safe to proceed on the basis that the relative frequencies of asbestosis and idiopathic pulmonary fibrosis in 2013 were not so disproportionate as to detract from the significance of the different mortality rates. (Whether this will continue to be true into the future is an open question; the literature suggested that the incidence of asbestosis was declining and likely to continue to do so, while the incidence of idiopathic pulmonary fibrosis was increasing.)

58Sixthly, evidence as to the relative likelihood that a person who has been exposed to asbestos and who has pulmonary fibrosis diagnosed a decade ago is suffering from asbestosis as opposed to idiopathic pulmonary fibrosis was directly relevant to the question of discharging Mr Tullipan's burden of proof. If the relative risk is sufficiently high, that may of itself support an inference of causal connection: *Amaca Pty Ltd v Booth* [2011] HCA 53; 246 CLR 36 at [43] and [88].

59It follows that the relative likelihood that Mr Tullipan was suffering from asbestosis, as opposed to idiopathic pulmonary fibrosis, was very high. It was capable of discharging the civil onus he bore, accepting (as I do) that the court is required to reach a level of actual persuasion: see *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262 at [136]. Illustrative of this was the evidence of Professor Breslin:

"for somebody with IPF to have virtually no symptoms in 2005, minimal symptoms in 2007, honeycombing in 2007, normal lung function in 2007 and to have survived what is at least, at least ten years, because his disease radiologically was present in 2005, probably started at least two to three years before that, so he's survived more than ten years in the presence of honeycombing, I think it's nigh upon fanciful to call that idiopathic pulmonary fibrosis."

60In light of that background, one turns to the "concessions" relied on by the primary judge said to have been made by the expert witnesses called by Amaca, Dr McKenzie and Dr Jones. Their evidence has been reproduced by Basten JA. Although there is a factual error in the reasons of the primary judge (who referred to 10 years as the likely maximum survival period for idiopathic pulmonary fibrosis, rather than 12 years) nothing turns on that. It is also true that the evidence fell short of the "certainty" to which the primary judge referred, but again, nothing turns on that. The evidence of Amaca's experts supported the conclusion that the most likely diagnosis, by a considerable margin, was asbestosis. Indeed, it does not by much exaggerate Dr Jones' evidence in cross-examination that the combination of pulmonary fibrosis shortly after 2000 coupled with Mr Tullipan being alive in 2014, around 12 years later, meant that his disease could not be idiopathic pulmonary fibrosis. Dr Jones knew no one who had survived more than 12 years with idiopathic pulmonary fibrosis.

61In consequence, there was no error in point of law (or fact) in the primary judge not addressing the other complexities in Amaca's case (such as the absence of pleural plaques or other pleural disease, the negative diagnoses by the doctors who first saw Mr Tullipan, and the conflicting evidence about the variability of the progress of the diseases). "A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue": *Whisprun Pty Ltd v Dixon* [2003] HCA 48; 200 ALR 447 at [62].

62For those reasons, which are wholly consistent with those of Basten JA, I joined in the Court's orders on 6 August 2014.

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