



## SUPREME COURT OF WESTERN AUSTRALIA

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*This statement is not intended to be a substitute for the reasons of the Court of Appeal or to be used in any later consideration of the Court's reasons.*

### **SUMMARY:**

**AMACA PTY LTD v HANNELL - CACV 15 of 2007;**

**AMACA PTY LTD v MOSS - CACV 5 of 2007**

In a decision published today, the Court of Appeal has upheld appeals by Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) from decisions of Justice Le Miere of the Supreme Court of Western Australia, in which he awarded damages to Mr David Hannell and Mr Dennis Moss. Those awards of damages have been set aside, and instead the claims made by Mr Hannell and Mr Moss against Amaca have been dismissed. The question of the costs of the trials and the appeals will be dealt with at a later date.

### **Summary of the Facts**

Each of Mr Hannell and Mr Moss suffer from mesothelioma. Each was exposed to respirable asbestos fibre released as a result of work they had carried out involving asbestos cement products (fences and eaves) which had been installed in houses they purchased in the northern suburbs of Perth. In addition, Mr Moss claimed exposure as a consequence of standing by while work was done by his neighbour on their dividing fence, which was made from asbestos cement. Mr Hannell's exposure to respirable asbestos fibre in the course of these incidents occurred in 1983, 1985 and 1990, whereas Mr Moss' exposures occurred between 1989 and 1991.

Each claimed that those exposures to asbestos fibre caused or materially contributed to their mesothelioma. The asbestos cement products involved had been manufactured by Amaca. They claimed that Amaca was in breach of a duty of care which it owed to them, as prospective users of those products, to warn them not to undertake work which involved a risk of the inhalation of respirable fibre. They claimed that Amaca should have discharged that duty by placing warning labels on the products at the time of sale, and by undertaking an advertising campaign thereafter, to warn persons who might come into contact with those products, as to the

risks involved. Justice Le Miere upheld those claims and awarded damages to Mr Hannell of \$537,032.99, and to Mr Moss of \$225,000.

Asbestos cement is a product comprised mostly of cement but which includes between 8% and 15% asbestos, bound in with the cement. In these cases, the asbestos included within the cement products was mostly chrysotile, with a small portion (about 1% of the product) being amosite. The products did not contain any crocidolite, which is the most dangerous form of asbestos, being that which was mined at Wittenoom. Asbestos cement was widely used for the manufacture of sheeting and other building materials, including fencing panels. Amaca discontinued the manufacture of asbestos cement products in the mid-1980s.

### **The Issues in the Case**

These cases differ from many of the cases previously heard and determined by the courts because the levels of exposure to asbestos fibre experienced by Mr Hannell and Mr Moss in their domestic situations were much lower than the levels experienced by workers involved in mining asbestos or processing or regularly working with asbestos products, or those who had lived at Wittenoom. The issues in each case concerned:

- (a) whether Amaca knew or ought to have known that the levels of risk associated with relatively low levels of exposure to asbestos fibre in a domestic or non-occupational environment were such as to impose upon it a duty of care;
- (b) if so, did that duty of care extend to the application of warning labels and the conduct of a substantial advertising campaign directed to all potential users of their asbestos cement products;
- (c) did the exposure to asbestos fibre which had been specifically identified by each of Mr Hannell and Mr Moss cause or materially contribute to their mesothelioma;
- (d) would the application of warning labels by Amaca or the conduct of an extensive advertising campaign directed to users of those products have had the effect that Mr Hannell and Mr Moss would not have contracted mesothelioma.

### **The Decision**

All members of the Court of Appeal were of the opinion that the appeals should be upheld, the damages awarded by Justice Le Miere set aside, and instead, the claims made by Mr Hannell and Mr Moss dismissed, although for different reasons.

President Steytler and Justice McLure have published joint reasons for decision. In their view, Amaca owed a duty of care to Mr Hannell and Mr Moss but did not breach the duty.

Chief Justice Martin came to the conclusion that the evidence did not establish that it was foreseeable, at the relevant times, that occasional and intermittent exposure to low levels of respirable asbestos fibre as a result of working on asbestos cement products created a sufficient risk as to impose upon Amaca a duty of care in relation to the occasional users of those products. It followed that, in his view, Amaca was under no legal duty to affix labels or undertake an extensive advertising campaign. In his view, the evidence did not establish that the specific exposures to respirable asbestos fibre identified by either Mr Hannell or Mr Moss could be said to have caused or materially contributed to their mesothelioma on the balance of probabilities. In his view, the evidence established that it was much more likely that their mesothelioma was the result of what is known as "background risk" - that is, the risk occasioned by breathing asbestos which is to be found in the ambient environment, or as a result of specific exposures of which the person was unaware or had forgotten. Further, in the view of the Chief Justice, the evidence did not establish that the application of warning labels, or the conduct of an extensive advertising campaign, would have made by difference to either Mr Hannell or Mr Moss, who would, on the balance of probabilities, have nevertheless carried out the work which they did carry out in relation to the asbestos cement products concerned.

For the full judgment of the Court of Appeal on this matter, please go to: AMACA PTY LTD (Formerly James Hardie & Co Pty Ltd) -v- HANNELL [2007] WASCA 158; and AMACA PTY LTD (Formerly James Hardie & Co Pty Ltd) -v- MOSS [2007] WASCA [162]