

# Insurance Law Case Note

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## A plaintiff's problem of proof: a look at the High Court's decision in *Amaca –v– Ellis*

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### How is *Amaca Pty Ltd –v– Ellis* relevant to you?

- The decision assists defendants who are involved in cases dealing with the development of diseases and questions of causation.
- The legal test for causation has not changed. Plaintiffs must show that it was **more probable than not** that the defendant's actions or omissions caused the injury, not that the defendant merely increased the risk or *may* have caused the injury in the individual bringing the claim.
- Where medical and scientific evidence is inconclusive, a plaintiff will have significant difficulty in establishing causation and an entitlement to damages.

### Facts

Paul Cotton died of lung cancer. He was a smoker and smoked between 15 and 20 cigarettes a day for 26 years. He had also had light exposure to respirable asbestos fibres over 15 years in the course of his employment. After Mr Cotton died, the executor of his estate sought compensation on the basis of his exposure to asbestos in the workplace.

### Trial Decision

The trial judge said that the plaintiff would succeed if the evidence supports the conclusion that, on the probabilities, his cancer was caused by the combined effects of asbestos exposure with the effects of his chronic smoking.

The plaintiff relied on epidemiological evidence (the study of large populations) to prove her case. She argued that:

- Smoking and asbestos work together, because more people who are exposed to both carcinogens contract lung cancer than would be expected from exposure to 1 carcinogen;
- the only 2 explanations of Mr Cotton's lung cancer that need to be considered are smoking as the sole cause, and the combined effect of smoking and asbestos; and
- the epidemiological evidence shows that both exposure to tobacco smoke and asbestos is more dangerous than exposure to one or the other, and accordingly, exposure to both carcinogens was probably the cause of Mr Cotton's cancer.

None of the expert medical witnesses could definitively attribute

Mr Cotton's cancer to the smoking or the asbestos or both carcinogens. Further, none of the witnesses assigned a greater than 23% to the chance that Mr Cotton's cancer was caused by his exposure to asbestos, but assigned a much high probability of no less than 67% to the cancer being caused by smoking alone.

The trial judge however rejected the approach which looked at the probabilities of each individual cause of lung cancer, because of medical evidence which suggested that smoking and asbestos exposure has a cumulative effect. Based on that evidence, the trial judge decided that the relevant causal connection existed between the defendant's negligence and the damage suffered.

The defendants appealed the decision.

### Court of Appeal

The Western Australian Court of Appeal upheld the trial judge's determination.

### High Court Decision

The High Court disagreed with the approach taking by the trial judge and the Court of Appeal.

In short, the High Court said that Mr Cotton's lung cancer could not be attributed to asbestos exposure.

The High Court did not accept the plaintiff's proposition that because exposure to both carcinogens is more dangerous than exposure to one, smoking and asbestos must work together and they must have worked together in this case. The court held that the epidemiological evidence did not establish this. The evidence showed that it was more likely that Mr Cotton's lung cancer was caused by smoking, and the expert witnesses unanimously agreed that the risk of contracting lung cancer from smoking was significantly greater.

They said:

*"no scientific or medical examination can now say, with certainty, what caused Mr Cotton's cancer or lung cancer." "...despite this uncertainty, the courts must, and do, "reduce to legal certainty [a question] to which no other conclusive answer can be given". The courts do that by asking whether it is more probably than not that X was the cause of Y. Saying only that exposure to asbestos may have been a cause of Mr Cotton's cancer is not a sufficient*

*basis for attributing legal responsibility. Observing that a small percentage of cases of cancer were probably caused by exposure to asbestos does not identify whether an individual is one of that group."*

As such, the plaintiff had not satisfied the court that it was more probable than not that asbestos **was** the causative effect of Mr Cotton's cancer, but merely demonstrated that the inhalation of asbestos fibres increased the risk or **may be a** cause of Mr Cotton's cancer, which was insufficient to attribute legal responsibility to the defendants.

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