

***Amaca Pty Ltd v Ellis; The State of South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis***  
**[2010] HCA 5 (3 March 2010)**

**KEY CAUSATION CASE**

This appeal to the High Court of Australia (HCA) flowed from an action brought by Teresa Ellis as the Executor of the Estate of Paul Cotton, who died of lung cancer. The plaintiff had the unenviable task of bringing an action against three defendants whom she alleged had caused the lung cancer by exposing Paul Cotton to respirable asbestos – Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd ('Amaca'), Millennium Inorganic Chemical Ltd ('Millenium'), and The State of South Australia (the 'Department'). The complicating factor was that Paul cotton had been a smoker, having smoked around fifteen to twenty cigarettes per day for over twenty-six years. Both smoking and breathing asbestos fibres have been established as causes of lung cancer. The issue on appeal to the HCA was whether the plaintiff had established at trial that exposure to respirable asbestos fibres was more probably than not a cause of the deceased's cancer. The type of cancer was not one that is peculiarly associated with asbestos exposure.

The case, in the lower courts and the HCA, turned on causation. The plaintiff / appellant argued that Paul Cotton's exposure to asbestos had caused or contributed to (in the sense of being a necessary condition for) his developing lung cancer. The HCA acknowledged that the law does not require medical certainty to prove causation, but rather it asks whether the evidence of the plaintiff proves that it was more probable than not that the asbestos exposure was a cause of the cancer. However, the HCA found that the plaintiff had not established this on the evidence.

**The trial: Supreme Court of Western Australia**

The plaintiff asked the court to find that the inference, drawn from epidemiological studies, should be accepted that smoking and asbestos exposure were causally linked to lung cancer. There was no expert evidence before the court that gave a definite cause of Paul Cotton's cancer. The expert epidemiological evidence could not determine that exposure to asbestos created any more than a 23 per cent chance of causing lung cancer, while the probability of smoking causing the cancer was around 67 per cent. However, the trial judge refused the argument that these statistics should be tested causally in isolation, preferring the argument that smoking and asbestos exposure had a "synergistic effect", acting interdependently and cumulatively to cause lung cancer. It was by this route that the trial judge held that asbestos exposure had materially contributed to the lung cancer.

### **The Court of Appeal decision:**

The majority upheld the trial judge's decision. The minority position was that if it could be established that Mr Cotton's smoking would have caused him to contract cancer anyway, then the breaches of the defendants could not be said to materially contribute to the injury.

### **The HCA decision:**

The decision of the court was unanimous and delivered in a joint judgment of the Full Court. It was held that the plaintiff's evidence had not established that the defendant's breaches of duty had more probably than not caused the cancer. The HCA denied the finding of the state courts that the medical evidence had established that smoking and asbestos exposure operate together to cause cancer or that this had indeed occurred in the present case. The balance of the epidemiological evidence was that smoking was more probably a cause of lung cancer than exposure to respirable asbestos. Further, the case for the plaintiff / appellant had not established evidence to relate the results of the epidemiological evidence directly to the case at hand. The court pointed out that it was necessary for a plaintiff in such a case, when adducing evidence that there are a small percentage of cases where asbestos exposure has caused cancer, to offer further evidence to support an inference that exposure has more probably than not caused cancer in the case at hand.

In short, it was insufficient to demonstrate that exposure to asbestos increased the risk of cancer, or may have caused cancer. The requirement was to prove that it was an actual cause of the disease in the plaintiff. This must be proved on the balance of probabilities. The HCA clarified the position with respect to 'material contribution', stating that it was only relevant *after* proof of causation.

### **What does this case mean for plaintiffs?**

The decision is not really unexpected, being consistent with the reasoning in of the NSW Court of Appeal in *Seltsam Pty Ltd v McGuinness*<sup>1</sup>. The Amaca case highlights the difficulties in the evidentiary hurdles that must be overcome to bring a successful negligence action in asbestos-related cancer cases, particularly where smoking is part of the plaintiff / deceased's history. The evidentiary barrier has been set quite high and it is considered that, unless medical evidence progresses to offer more certain links between asbestos exposure and lung cancer, plaintiffs in such cases may encounter difficulty in meeting the causation requirements.

***Epidemiological evidence alone is not likely to be sufficient. Such evidence needs to be strong and related to the plaintiff's individual circumstances. It will be necessary to adduce additional expert medical and scientific evidence to support the connection.***

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<sup>1</sup> (2000) 49 NSWLR 262; [2000] NSWCA 29

The case may be relevant to any cases where the cause of the injury or disease cannot be scientifically proven on the balance of probabilities, or where there are possible multiple causes for the harm. Epidemiological evidence will need to be strong, and the plaintiff will need to establish that it is not only applicable to the general population, but to their particular case. The manner in which the plaintiff argued her case means that there remains a degree of uncertainty about the decision. The plaintiff denied any argument that demonstrating alone that exposure to asbestos *increased* the risk of cancer would be sufficient to establish causation. Rather, the plaintiff's argument was that she could succeed only if she showed that Paul Cotton's exposure to asbestos had *caused or contributed to* (in the sense of being a necessary condition for) his developing lung cancer. For this reason the HCA considered it unnecessary and inappropriate to consider UK and Canadian, including those where decisions where a policy-based less rigorous test has been applied in mesothelioma cases.<sup>2</sup>



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<sup>2</sup> *Fairchild v. Glenhaven Funeral Services Ltd* [2003] 1 AC 32; *Barkerv. Corus UK Ltd* [2006] 2 AC 572; *Karen Sienkowitz (Administratrix of the Estate of Enid Costello Deceased) v. Grief (UK) Limited* [2009] EWCA CIV 1159