SUPREME COURT OF QUEENSLAND

CITATION:	*WorkCover Queensland v AMACA Pty Limited* [2012] QCA 240
PARTIES:	**WORKCOVER QUEENSLAND** (appellant) **v** **AMACA PTY LIMITED (formerly James Hardie & Coy Pty Ltd under NSW administered winding up)** (first respondent)
FILE NO/S:	Appeal No 11786 of 2011 SC No 13258 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2012
JUDGES:	Margaret McMurdo P, Gotterson JA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The orders made in the application on 9 December 2011 are set aside.** **3. The separate question "Is the assignment pleaded in paragraphs 8A, 8B, 8C of the amended statement of claim valid at law to assign to the plaintiff the benefit of the cause of action of the estate of Douglas John Rourke against the defendant", be answered, "Yes".** **4. The respondent pay the appellant's costs of and incidental to the application and to the appeal to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER – where a worker died of workplace related mesothelioma – where prior to his death he had applied to the appellant for statutory compensation pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where the worker also commenced proceedings for damages for personal injuries against the respondent – where the appellant paid statutory compensation – where the worker's personal representative assigned the whole of the

worker's causes of action to the appellant – where the appellant was not to profit from the assignment so that any recovered damages exceeding the compensation paid to the worker, together with costs and outlays, were to be held on trust for the worker's estate – whether the assignment is lawful – whether the appellant had a genuine commercial interest in the assigned causes of action

Property Law Act 1974 (Qld), s 199
Succession Act 1981 (Qld), s 66
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 207B

Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All ER 499, cited
Castellain v Preston (1883) 11 QBD 380, cited
Dawson v Great Northern and City Railway Co [1905] 1 KB 260, cited
Elfic Ltd v Macks [2003] 2 Qd R 125; (2001) 181 ALR 1; [2001] QCA 219, cited
Ellis v Torrington [1920] 1 KB 399, cited
Equuscorp Pty Ltd v Haxton (2012) 86 ALJR 296; [2012] HCA 7, cited
Fredrickson v Insurance Corporation of British Columbia (1986) 28 DLR (4th) 414, considered
Giles v Thompson [1994] 1 AC 142; [1993] UKHL 2, cited
Glegg v Bromley [1912] 3 KB 474, cited
King v Victoria Insurance Co Ltd [1896] AC 250, cited
Meacock v Bryant & Co [1942] 2 All ER 661, cited
Poulton v The Commonwealth (1952) 89 CLR 540; [1953] HCA 101, cited
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd (2004) 220 ALR 267; [2004] NSWSC 1041, cited
Roux v Australian Broadcasting Commission [1992] 2 VR 577; [1992] VicRp 87, cited
State Government Insurance Office (Q) v Brisbane Stevedoring Pty Ltd (1969) 123 CLR 228; [1969] HCA 59, cited
Trendtex Trading Corporation v Credit Suisse [1982] AC 679, cited
Victoria Insurance Co Ltd v King (1895) 4 QLJ 202, cited
Williams v Protheroe (1829) 5 Bing 309; [1829] EngR 318, cited
WorkCover Qld v Amaca Pty Ltd (2010) 241 CLR 420; [2010] HCA 34, related
WorkCover Queensland v Amaca Pty Ltd (No 2) [2011] QSC 358, related

COUNSEL: W Sofronoff QC SG, with K Holyoak, for the appellant
R Douglas SC, with J Sorbello, for the respondent

SOLICITORS: Bruce Thomas Lawyers for the appellant
Holman Webb Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA that the appeal should be allowed, the orders of 9 December 2011 set aside, and instead the question, "Is the assignment pleaded in paragraphs 8A, 8B, 8C of the amended statement of claim valid at law to assign to the plaintiff the benefit of the cause of action of the estate of Douglas John Rourke against the defendant" should be answered "yes".

[2] Mr Rourke was, at various times between 1967 and 1983, an employed and self-employed Queensland carpenter. He claimed that in the course of his work he handled asbestos cement fibro sheeting manufactured by the respondent, Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd under New South Wales administered winding up). He developed lung cancer and asbestos-related pleural disease which he claimed was caused by exposure to Amaca Pty Ltd's asbestos. He applied for compensation under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the Act") and the appellant, WorkCover Queensland, paid him compensation of $550,351.50. On 29 October 2009, he filed a claim against Amaca Pty Ltd in the Supreme Court at Brisbane for damages of $620,000 for personal injuries "caused by the negligence and/or breach of contract" of Amaca Pty Ltd, together with interest and costs. He filed a statement of claim on 19 December 2008 which pleaded facts and particulars only in relation to a claim based on negligence, not contract.

[3] On about 7 January 2009, five days before Mr Rourke's death on 12 January 2009, WorkCover accepted Mr Rourke's application. On 12 June 2009, his personal representative, WorkCover and various employers (none of which was Amaca Pty Ltd) executed a deed under which Mr Rourke's estate assigned to WorkCover the whole of his causes of action which caused or contributed to his injury. Under the deed, WorkCover was not to profit from the assignment;[1] if it recovered damages exceeding the compensation it paid to Mr Rourke, it would hold the excess on trust for his estate,[2] after taking out costs and outlays.[3]

[4] WorkCover was substituted as plaintiff in Mr Rourke's proceedings against Amaca Pty Ltd and the statement of claim was amended to reflect the assignment. The amendments included the allegation in para 8B that Mr Rourke's estate had assigned to WorkCover "absolutely the whole of and all of the estate's causes of actions against [Amaca Pty Ltd] in respect of [Amaca Pty Ltd's] breach of duty and or breach of contract which caused personal injury and loss and damage to [Mr] Rourke".[4] Despite para 8B and although the claim referred to personal injuries caused by both negligence and breach of contract, the statement of claim did not plead any facts establishing a contractual relationship between Mr Rourke and Amaca Pty Ltd, whether in its original or amended form. It is, however, unnecessary for the purposes of this appeal to determine whether there was any such contractual relationship.

[5] The question for this Court is whether Mr Rourke's cause of action for damages for personal injuries allegedly caused by Amaca Pty Ltd's negligence was lawfully assigned to WorkCover.

[6] In answering that question, I note that in the appeal and at first instance, both parties made their submissions on the basis that s 207B(7) of the Act, contained in Ch 3A (Compensation claim costs), did not give WorkCover a statutory right of

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1 The Deed, 2.6.

2 The Deed, recital F.

3 The Deed, 2.7 and 3.1

4 Amended Statement of claim, para 8B.

subrogation in respect of Mr Rourke's claim. The parties contended that s 207B(7) could only apply if Mr Rourke had neither recovered nor taken proceedings to recover damages from Amaca Pty Ltd. As he had commenced proceedings against Amaca Pty Ltd prior to his death, s 207B had no application. There was no argument as to a contrary construction of s 207B and accordingly this appeal has been determined on that basis.

[7] The common law has long held that assignments of rights of action turning solely on personal rights (bare causes of action) cannot be assigned, either in law or in equity. This was because to do so would amount to the common law offence and tort of maintenance, that is, where a person unlawfully assisted a party in litigation, usually by providing financial assistance in exchange for a purported assignment of the cause of action. Sometimes this might amount to the common law offence and tort of champerty, an aggravated form of maintenance by which the consideration for the purported assignment was part of the gains of the litigation or some other profit.[5] The historical reasons for the development of these crimes and torts in medieval times have little present relevance but the courts must remain vigilant for sound public policy reasons to stop litigation trafficking or speculating in compensation for improper gain: *Elfic Ltd v Macks* (2001) 181 ALR 1, 12 [65]; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 606. Amaca Pty Ltd contends the present assignment is unlawful as it offends against that common law rule.

[8] Amaca Pty Ltd has placed considerable emphasis in this appeal on the comments of Williams, Webb and Kitto JJ in *Poulton v The Commonwealth*[6] where their Honours referred to the "well-established principle" that a tortious right of action (in that case, for conversion) "was incapable of assignment either at law or in equity".

[9] But that common law rule has been incrementally refined and confined by the recognition of exceptions, some of which preceded *Poulton*. Since at least the late 19th century, assignments to insurers of causes of action in tort or contract concerning property damage were found to be lawful. See, for example, *Victoria Insurance Co Ltd v King*;[7] *King v Victoria Insurance Co Ltd*.[8]

[10] Most significantly, in 1982 in *Trendtex Trading Corporation v Credit Suisse*[9] Lord Roskill, with whom Lords Edmund-Davies, Fraser of Tullybelton and Keith of Kinkel agreed, stated in respect of an assignment of a cause of action in contract:

> "[A]n assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance."[10]

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5 Other Australian jurisdictions have now statutorily abolished champerty and maintenance as crimes and/or common law causes of action. See, for example, *Wrongs Act* 1958 (Vic) s 32; *Criminal Law Consolidation Act* 1935 (SA), sch 11; *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) and *Crimes Act* 1900 (NSW), sch 3. The *Criminal Code* 1899 (Qld) makes no reference to the offences of maintenance or champerty but they remain torts in Queensland.

6 (1952) 89 CLR 540, 602.

7 (1895) 4 QLJ 202.

8 [1986] AC 250.

9 [1982] AC 679.

10 Above, 703.

[11] Three years later, Lloyd LJ, with whom Sir John Donaldson MR agreed, took a similar view in *Brownton Ltd v Edward Moore Inbucon Ltd*.[11] Their lordships affirmed that an assignment of a cause of action for damages for non-personal injuries in contract and negligence was lawful where the assignee had a genuine commercial interest in enforcing the claim. Their lordships also noted that the rule against assigning a bare right to litigate was much narrower than it once was.[12]

[12] The following year, the British Columbia Court of Appeal in *Fredrickson v Insurance Corporation of British Columbia*,[13] a case which was in some ways the mirror opposite of the present, considered whether an established tortfeasor could assign to the injured person the tortfeasor's cause of action against the insurer for failing properly to defend the injured person's action against the tortfeasor. McLachlin JA (as her Honour then was) in delivering the judgment of the court noted that, as a general rule, causes of action in tort are not assignable but that rule was subject to exceptions the categories of which were not closed. In each case, the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason.[14] One exception to the rule was where the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim. It is true, however, as Amaca Pty Ltd emphasised, her Honour qualified that exception with the proviso that "the action in tort [sought to be assigned] is not based on a personal wrong, such as assault, libel or personal injury",[15] noting that in such cases the assignee can have no legitimate property or commercial interest in recovery. Her Honour, citing *Trendtex*, considered that in respect of actions for non-personal torts:

> "A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term 'commercial interest' is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense."[16]

[13] Most recently and since the primary judge delivered his reasons, the High Court of Australia in *Equuscorp Pty Ltd v Haxton*[17] has considered the question of assignments of causes of action. Although the assignment there (a restitutionary claim for money had and received under an enforceable loan agreement) was of a cause of action quite different to that concerning this Court, the focus remained on whether the assignment had a legitimate commercial interest in acquiring the assigned rights. The plurality (French CJ, Crennan and Kiefel JJ,[18] Gummow and Bell JJ agreeing[19]) found that the assignment was closely linked to the performance of that agreement and if assigned along with contractual rights, was not assigned as a "bare cause of action". The assignment of the contractual rights for value indicated a legitimate commercial interest on the part of the assignee in acquiring the restitutionary rights should the contract be found to be unenforceable.

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11 [1985] 3 All ER 499.
12 Above, 507.
13 28 DLR (4th) 414.
14 Above, 420.
15 Above, 421.
16 Above, 424.
17 (2012) 86 ALJR 296.
18 Above, 312–313 [46]–[53], esp 313 [52] and [53].
19 Above, 317– 318 [79].

Gummow and Bell JJ noted that the statements of principle in *Poulton* were subject to the exception where the assignee had an interest in the suit (*Ellis v Torrington*[20]) and a genuine and substantial commercial interest was now sufficient. Heydon J also noted that *Poulton* predated *Trendtex*; in *Poulton* there was no argument that there was any genuine commercial interest associated with the purported assignment.[21]

[14] What distinguishes the present case from those I have discussed is that the cause of action purported to be assigned here is for damages for personal injury.

[15] This appeal has been conducted on the basis that WorkCover did not have a statutory or common law right of subrogation flowing from the compensation it paid to Mr Rourke. But an insurer which has fully indemnified its insured would ordinarily be entitled to have the rights of the insured substituted to the insurer so that the insurer can exercise those rights against third parties in relation to a claim. See *Castellain v Preston*;[22] *Meacock v Bryant & Co*;[23] and *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd*.[24]

[16] The cases pertaining to assignments of causes of action which I have discussed do not suggest that the concept "legitimate (or genuine) commercial interest", which brought them within the exceptions to the rule, requires an enforceable legal or equitable right. WorkCover, as an insurer which fully indemnified its insured, Mr Rourke, clearly had a close relationship with him and, after his death, his estate. True it is that the assigned cause of action was for damages for personal injury. But it is not offensive to the interests of justice or intermeddling for some collateral reason for WorkCover to seek to recover the amount it has expended, together with costs and outlays, through pursuing the assigned cause of action against Amaca Pty Ltd. Indeed, this is entirely consistent with the interests of justice. WorkCover's interest in the assigned cause of action here, which predated the assignment, was a legitimate or genuine commercial interest, akin to an insurer's right of subrogation. There is nothing to taint the present assignment with the common law offences and torts of maintenance or champerty. For these reasons, I consider the primary judge erred in finding that WorkCover's interest in this case was not akin to a right of subrogation and did not amount to a legitimate or genuine commercial interest sufficient to support the assignment.[25]

[17] The common law rule remains that ordinarily causes of action in tort based on a personal wrong such as personal injury are not assignable. There are still sound policy considerations for this general rule. But as this case demonstrates, even causes of action for personal injury may be assigned in unusual cases like the present where the assignee has a pre-existing legitimate commercial interest in the enforcement of the claim so that the assignee is not acting against the interests of justice as an officious intermeddler guilty of maintenance or champerty.

[18] Subject to these observations, I agree with the reasons of Gotterson JA. I also agree with the orders proposed by Gotterson JA.

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20 [1920] 1 KB 399, 406.
21 (2012) 86 ALJR 296, 333 [156].
22 [1883] QBD 380, 386 (Brett LJ), 393–4 (Cotton LJ).
23 [1942] 2 All ER 661, 663–4.
24 (1969) 123 CLR 228, 240–241 (Barwick CJ).
25 *WorkCover Queensland v Amaca Pty Limited (No 2)* [2011] QSC 358, [30].

[19] **GOTTERSON JA: Introduction** Douglas John Rourke died from mesothelioma of the lung on 12 January 2009. Prior to his death, he had applied to the appellant WorkCover Qld for statutory compensation pursuant to the provisions of the *Workers' Compensation and Rehabilitation* Act 2003 ("WCR Act"). The application was made on the footing that his lung disease had been caused by exposure to asbestos dust and fibre during the course of his employment as a carpenter in Queensland.

[20] WorkCover accepted the application and paid statutory compensation of $550,351.50 to Rourke on or about 7 January 2009.

[21] On 19 December 2008, and several weeks before payment of the compensation, Rourke commenced proceedings for damages for personal injuries against the respondent, Amaca Pty Ltd (formerly James Hardie and Coy Pty Ltd under NSW administered winding up) ("Amaca"), as manufacturer of asbestos products. He claimed that he had handled those products over a number of years during his employment by parties unrelated to Amaca. The claim was based on alleged negligence in manufacture and failure to warn of risk on the part of Amaca.

[22] A claim and statement of claim were filed in the Supreme Court of Queensland. However, those proceedings were neither served nor otherwise continued after payment of the statutory compensation. In all probability that is because Rourke, on advice, believed that after allowing for a refund of the statutory compensation, what would in all likelihood have been recovered by way of damages in the proceedings would not have justified the expense or delay in continuing them.

[23] Some six months later, on 12 June 2009, Rourke's personal representative executed a Deed of Acknowledgement and Assignment by which she as "the Estate", assigned "the causes of action" to WorkCover. The expression "the causes of action" is defined in Recital D to the Deed to mean:

> "…the whole of, and all of, the Estate's and the Worker's causes of action capable of being assigned of whatsoever nature or description against any person or entity, other than the Employer, whose negligence, other breach of duty conduct, act or omission actionable at law, in equity or by statute whatsoever, caused or contributed to the worker suffering his or her injury."

[24] The Recitals identified Rourke as "the Worker". The other parties to the Deed are WorkCover which executed it on 30 July 2009, and certain entities identified collectively as "the Employers". Amaca is not one of the Employer entities.

[25] Plainly the causes of action for which the proceedings had been commenced were causes of action within the scope of the definition at the dates of execution in December 2008 of the Deed. They had survived Rourke's death for the benefit of his estate pursuant, and subject, to the limitations upon recoverable losses within s 66 of the *Succession Act* 1981.

[26] Clause 2 of the Deed effects the assignment upon the following terms:

> "**2 Assignment of Existing Proceedings**
>
> 2.1 The parties acknowledge that the Worker commenced proceedings against Amaca Pty Ltd in the Brisbane Registry of the Supreme Court of Queensland being case

number 13258 of 2008 claiming damages for the Injuries (*"the Proceedings"*).

2.2 The Estate hereby assigns to WorkCover absolutely the whole of, and all of, the Causes of Action, including:

(a) The right to commence proceedings to recover damages, and to recover such damages, for personal injuries upon the causes of action; and

(b) The right to pursue The Proceedings through to judgment and enforcement of any such judgment.

2.3 The Estate permits and authorises WorkCover to use and apply the Worker's name and the Estate's name in [pursuing] any proceedings or appeal in relation to the causes of action.

2.4 The Estate expressly authorises WorkCover to:

(a) Assume conduct of The Proceedings;

(b) Appoint its own solicitors to assume further conduct of The Proceedings;

(c) Instruct its own solicitors to file a Notice of Change of Solicitors to further conduct The Proceedings in the Worker's name.

2.5 The Estate agrees to execute any documentation WorkCover reasonably requires to give further effect of this assignment or WorkCover's pursuit of causes of action.

2.6 If the total sum that WorkCover recovers pursuant to the assignment of the Worker's causes of action exceeds the Lump Sum, WorkCover:

(a) shall hold so much of the sum recovered by WorkCover in excess of the Lump Sum in trust for the Estate;

(b) shall pay such excess to the Estate in accordance with the written direction of the worker or the duly appointed executors or administrators of the Estate.

2.7 The parties agree that in calculating whether the sum WorkCover recovers exceeds the Lump Sum, WorkCover shall first deduct its legal costs and outlays incurred in pursuing the assigned causes of action, whether such costs are incurred in respect of commencing or pursuing Court Proceedings or informal negotiations."

[27] Later, in accordance with orders of the court made on 30 September 2009, WorkCover was substituted as plaintiff in the proceedings and the statement of claim was amended in a number of respects. Significantly, for present purposes, the following paragraphs were added to the pleading:-

> "8A. Jane Olive Rourke is and was at all material times the duly appointed executor of Rourke's estate.
>
> 8B. By Deed executed by Jane Olive Rourke on 12 June 2009 and by the Plaintiff on 30 July 2009 the Rourke's estate assigned to the Plaintiff absolutely the whole of and all of the estate's causes of action against the Defendant in respect of the Defendant's breach of duty and or breach of contract which caused personal injury and loss and damage to Rourke.
>
> 8C. By letters dated 10 September and 23 September 2009 the Plaintiff gave notice to the Defendant pursuant to Section 1999 (sic) of the *Property Law Act* of the assignment alleged in paragraph 8B."

[28] The proceedings were served and a defence was filed by Amaca on 22 December 2009. With respect to those added paragraphs, Amaca admitted paragraph 8A but as to the others, raised the following specific defence:-

> "1. The Defendant denies the estate of Rourke assigned, absolutely or otherwise, to the Plaintiff all of the estate's causes of action against the Defendant:-
>
> **Particulars**
>
> (a) The purported assignment by the estate of Rourke to the Plaintiff is invalid as the cause of action is not capable of assignment.
>
> (b) By virtue of paragraph 1, the Defendant says the Plaintiff is unable to maintain the claim as alleged or at all."

[29] The defence did not, however, put in issue the factual matters pleaded in paragraphs 8B and 8C, namely, that the Deed had been so executed; that the Estate's causes of action against Amaca in respect of breach of duty causing personal injury had been assigned to WorkCover; and that the requisite notice under the *Property Law Act* had been given. Nor did it raise any other specific defence in relation to them. I pause to note two matters: the first is that the section which paragraph 8C addresses is obviously intended to be s 199. The second is that paragraph 8B refers to causes of action for breach of contract as also having been assigned. I return to this reference later in these reasons.

Separate question for determination

[30] On 15 September 2011 WorkCover applied pursuant to *UCPR* r 483 for determination of the following as a separate question:-

> "Is the assignment pleaded at paragraphs 8A, 8B and 8C of the Amended Statement of Claim valid at law to assign to the Plaintiff the benefit of the cause of action of the estate of Douglas John Rourke against the Defendant."

[31] The application was heard on 19 October 2011. On the 29th of November orders were made. The orders included the following paragraphs:-

- That the separate question be answered "no": (paragraph 1);

- That WorkCover pay Amaca's costs of and incidental to the application to be assessed on the standard basis (paragraph 3).

The Appeal

[32] On 19 December 2011, WorkCover appealed against paragraphs 1 and 3 of the orders. It relies on two grounds of appeal, namely:-

> "(a) In deciding that the assignment pleaded in paragraphs 8A, 8B, 8C of the amended statement of claim is not valid at law to assign to the Plaintiff the benefit of the cause of action of the estate of Douglas John Rourke against the Defendant, the learned primary Judge erred in law.
>
> (b) In finding that the Plaintiff did not have a genuine, substantial or commercial interest in the cause of action purported to be so assigned to the Plaintiff by the estate of Rourke, the learned primary Judge erred in law."

[33] Amaca filed a notice of contention on 19 March 2012. The grounds on which it proposed that the decision be affirmed were stated in the notice to be the following:-

> "2. A personal claim for unliquidated damages for personal injury, upon a cause of action in the tort of negligence, is incapable of assignment. Such assignment is void as a matter of public policy, as savouring of maintenance. The same does not enjoy any commercial character.
>
> 3. Further, his Honour erred in proceeding on the express footing that the causes of action assigned included causes for personal injuries in both contract and tort. The sole subject matter of the purported assignment consisted of a cause of action in tort."

[34] The parties' submissions, both oral and written, have concentrated upon paragraph 1 of the orders. The ultimate issue for this appeal is whether the answer given to the separate question in that paragraph is correct or not.

[35] The grounds of appeal and contention 2 focus upon the assignability of the causes of action in tort that were assigned. No causes of action in contract were assigned. There was no relevant contractual relationship between Rourke and Amaca from which a cause of action in contract could have arisen.

[36] With respect to contention 3, the learned judged did describe the assignment as being of causes of action in both contract and tort.[26] That description may have been attributable to the pleading in paragraph 8B in the statement of claim and also to the reference to breach of contract in the claim. As noted, Rourke had no cause of action in contract against Amaca which the Estate could have assigned to WorkCover. However, in so far as contention 3 implies that this misdescription was influential in his Honour's reasoning to a conclusion, it is inaccurate. He did not place any reliance upon, or draw any distinctions referable to, any particular characteristic of a cause of action in contract in the reasons. In these circumstances, this contention cannot be regarded as constituting a separate ground for affirming the decision under appeal.

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[26] Reasons [24].

Section 207B WCR Act

[37] Why it is that, in the proceedings, WorkCover seeks to rely on the assignment in the Deed is explained by the provisions of s 207B of the WCR Act. That section is within Chapter 3A of the Act. References to a "worker" in that Chapter include a person to whom compensation is payable under that Act for injury.

[38] Section 207B applies where a worker sustains an injury in circumstances creating both an entitlement to statutory compensation under the WCR Act and a legal liability to pay damages independently of the Act on the part of the worker's employer or other person and where those damages are not indemnified against under the Act: subsection (1). The section confers upon worker's compensation insurers rights of recoupment for the compensation paid in certain specified events. Those events and the respective modes of recoupment applicable to them are the subject of the remaining provisions in the section.

[39] Subject to determination of legal liability, the circumstances described generally in s 207B(1) are apt to apply to the particular circumstances here. Rourke was injured in circumstances in which there was an entitlement to compensation and also, if so determined, a legal liability on the part of Amaca to pay damages which are not indemnified against under the WCR Act. WorkCover has paid statutory compensation. Whether it would have any right of recoupment under s 207B depends upon whether any of the events in which such a right is conferred by the section has occurred.

[40] Subsections 2 to 6 apply to events when damages are recovered by judgment in, or settlement of, proceedings taken to enforce the legal liability of the worker's employer or other person to pay them. A first charge is imposed upon the amount of damages recovered. Neither event of judgment or settlement has occurred in the present case. No damages have been recovered over which WorkCover might have a first charge pursuant to these subsections.

[41] Subsections 7 and 8 address circumstances where there is legal liability to pay damages on the part of a person other than the worker's employer. They apply in the event that the recipient of compensation "has not recovered, or taken proceedings to recover, damages for the injury". Subsection 7 confers a statutory right on the insurer to be indemnified by the other person to the extent of the amount to which their liability for damages extends, and subrogates the insurer to the rights of the recipient. The nature of this right as one independent of the recipient's right to damages was confirmed by the High Court in *WorkCover Qld v Amaca Pty Ltd*.[27]

[42] Notwithstanding scope for argument with respect to the full extent of the event in which ss 7 and 8 apply, WorkCover acted on the footing that s 7 had not operated to confer a right of indemnity on it or to effectuate subrogation in its favour. The fact that Rourke had commenced the proceedings was seen as having put Rourke's circumstances beyond the described event.

[43] It need be noted that this appeal was conducted on the agreed basis that ss 7 and 8 had not been engaged.

[44] Thus, although Rourke's circumstances were within those described in s 207B(1), WorkCover considered that no rights of recoupment had been conferred upon it by

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27 [2010] HCA 34; (2010) 241 CLR 420.

s 207B for the compensation it had paid to him. It was in that state of affairs that some six months after payment of the compensation, the causes of action, as defined, were assigned to WorkCover by the Estate.

[45] In the course of argument of the appeal, a submission was made on behalf of Amaca to the effect that an assignment of the causes of action against it to WorkCover was precluded by the operation of s 207B. At the heart of this submission lay the propositions that that provision operated as a code having the effect of prescribing the sole modes of recoupment that an insurer who has paid compensation may have in the circumstances described in s 207B(1) and that, by implication, it rendered void or otherwise legally unenforceable, any other mode of recoupment.

[46] That submission must be rejected. The section does not contain express provision to that effect. Nor does such an effect arise by necessary implication. Amaca has not identified any textual aspects to the section or contextual features elsewhere in the WCR Act which are said to give rise to such an implication. To interpret WorkCover's power to contract as a natural person in the course of performing its statutory function as an insurer[28] as a power that is circumscribed by implication in that way, would require convincing justification. To my mind, no such justification is found here.

Assignability of a right to claim damages in negligence for personal injury

[47] As paragraph 2 of its Notice of Contention foreshadowed, Amaca contends that, as a matter of law, a right to claim damages for negligence for personal injury is incapable of assignment. Underpinning this contention are the dual propositions that a purported assignment of such a right is always void and that it is always void because it savours of maintenance.

[48] If that contention is sound, then the assignment by the Estate to WorkCover of its causes of action against Amaca for personal injuries has had no operative effect in law with the consequence that WorkCover does not have standing to pursue them in the current proceedings. The outcome of this appeal therefore depends significantly upon whether this contention is now correct in law. I now turn to consider that issue.

[49] Historically, claims for damages for personal injury were not assignable at common law or in equity. However, at a level of principle, the justifications for non-assignability appear to have altered over time, or altered in emphasis at least. That course of development gives cause for enquiry whether under current law such claims are absolutely unassignable or not and whether, if they are assignable, they may be assigned in specific circumstances only.

[50] Holdsworth records[29] that, in the eyes of the common law, assignment of a right of action based on contractual or delictual obligation was not allowed. That, it seems, "…was a necessary and a logical deduction from the nature of such a cause of action. They were essentially personal rights – personal to the parties bound by the obligation".[30] This was the principle from which the common law started.

[51] By degrees, inroads were made upon that principle. Equity's recognition of assignment of debts and some other choses in action resulted in a relaxation of the strictures of the common law rule in the field of rights of action of a contractual kind. As well, causes of action in tort of a proprietary nature such as detinue and

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28 WCR Act s 383, s 388(1)(a); (g).

29 Sir William Earle Holdsworth: *A History of English Law Vol VII*, Methuen, London, 1924 p 526.

30 Id at p 532.

trover were regarded as assignable. In this way every right of action based on contractual or delictual obligation ceased to be characterised as unassignable merely because of the personal attribute of the right.

[52] Writing in 1924, Holdsworth observed that "... no relaxation has ever been suggested in the rule that a right of action for unliquidated damages for a tort to property or to the person is unassignable".[31] However, he noted the emergence of exceptions, short of relaxation of the rule in the following comment:-

> "… As the result of the modern discussions on the limitations of the right to assign, it would seem that, subject to exceptions which modern causes appear to have allowed, either, if the assignment of certain of these rights of action in tort is merely incidental to an assignment of property,[32] or if such assignment comes within the scope of the application of the doctrine of subrogation to the rights of insurers,[33] the modern law refuses to allow the assignment of a right to sue in tort for a merely personal wrong, and for damages of uncertain amount."[34]

With some foresight, he added: "But the law is not as yet finally settled…".[35]

[53] It is with respect to bare rights of action that resistance to assignability has been most enduring. As recently as 1953, in a judgment of the High Court in *Poulton v The Commonwealth*,[36] there is dicta to the effect that "…according to well-established principle", a right of action for tort is "…incapable of assignment either at law or in equity"…[37].

[54] In conventional legal taxonomy, a right to claim damages in negligence for personal injury has customarily been classified as a bare right of action, or, as it is sometimes described, a bare right to litigate, and customarily a bare right of action has been regarded as unassignable. This classification conceives of such a right as one that stands alone, bare of any association with property or with another interest that would be advanced by its enforcement. In accordance with the dicta in *Poulton*, the right would be unassignable at common law or in equity.

[55] However, progressive expansion of the nature of interests with which a right of action may be associated in order for an assignment of it to be valid, calls into question the classification of all rights to claim damages in negligence for personal injury as bare rights of action which are unassignable.

[56] In the course of explaining the rationale for the resistance to assignment in this context, French CJ, Crennan and Kiefel JJ in *Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton*[38] recently observed:-[39]

> "In *Ellis v Torrington*,[40] Scrutton LJ referred to the common position of Courts of Law and Equity in opposition to the assignment of

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31 Id at p 537.
32 *Williams v Protheroe* (1829) 5 Bing 309; *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 at p 271.
33 *King v Victoria Insurance Co Ltd* [1896] AC 250.
34 Id at p 538.
35 Ob cit
36 [1953] HCA 101; (1953) 89 CLR 540.
37 Per Williams, Webb and Kitto JJ at p 602.
38 [2012] HCA 7.
39 At [50].
40 [1920] 1 KB 399.

> "a bare right of action, a bare power to bring an action".[41] Such an assignment was seen "as offending against the law of maintenance or champerty or both."[42] That opposition was qualified however:[43]
>
> > '[E]arly in the development of the law the Courts of equity and perhaps the Courts of common law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance.'
>
> The attenuated role of maintenance and champerty in relation to assignability was acknowledged by Lord Mustill in *Giles v Thompson*[44] who spoke of them as maintaining a living presence in only two respects, first as the source of the rule against contingency fees and, second, as the ground for denying recognition to the assignment of a "bare right of action". Of the latter, Lord Mustill said it was, in his opinion, "best treated as having achieved an independent life of its own."[45]

[57] In the paragraph that follows, their Honours noted the impact of the decision of the House of Lords in *Trendtex Trading Corporation v Credit Suisse.*[46] They said:[47]

> "The criteria for assignability of causes of action were widened by the decision of the House of Lords in [*Trendtex*]. The non-assignability of a bare right to litigate was still treated as a fundamental principle. Nevertheless, Lord Roskill said:[48]
>
> > 'But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.'

[58] Although their Honours did not refer specifically to *Poulton*, other members of the Court did. Gummow and Bell JJ observed:[49]

> "Finally, the Assignment was not open to the objection that it dealt with no more than "bare" rights of action and so attracted the statements of principle in [*Poulton*]. It has long been held that an exception exists where the assignee has an interest in the suit,[50] and a genuine and substantial commercial interest is now regarded as sufficient."[51]

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41 [1920] 1 KB 399 at 411.
42 [1920] 1 KB 399 at 411.
43 [1920] 1 KB 399 at 411.
44 [1994] 1 AC 142.
45 [1994] 1 AC 142 at 153.
46 [1982] AC 679.
47 At [51].
48 At [703].
49 At [79].
50 *Ellis v Torrington* [1920] 1 KB 399 at 406.
51 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267 at 280-285 [42]-[61].

[59] The other member of the Court in *Equuscorp*, Heydon J commented that *Poulton* predated *Trendtex*, quoted the same passage from the speech of Lord Roskill as the Chief Justice and Crennan and Kiefel JJ had quoted, and then noted:[52]

> "…In *Poulton's* case no argument was presented that there was any *"genuine commercial interest" associated with the supposed* assignment. …". (emphasis added)

[60] Whilst it is true that *Equuscorp* did not involve the assignment of causes of action for damages for personal injury, the observations to which I have referred do not suggest an exception for such causes of action. There is no reason to think that the observations made were not intended to refer to them as well. There is no inherent characteristic of an action for damages for personal injury which would make the observations inapplicable to them.

[61] In *Trendtex*, Lord Roskill[53] explained the objection to assignablility of bare causes of action in terms of maintenance. His Lordship said:[54]

> "My Lords, one of the reasons why equity would not permit the assignment of what became known as a bare cause of action, whether legal or equitable, was because it savoured of maintenance. If one reads the well know judgment of Parker J. in *Glegg v. Bromley* [1912] 3 K.B. 474, 490, one can see how the relevant law has developed. Though in general choses in action were assignable, yet causes of action which were essentially personal in their character, such as claims for defamation or personal injury, were incapable of assignment for the reason already given. …"

A little later, his Lordship observed:[55]

> "… The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."

[62] I understand his Lordship to say that where an assignee of a cause of action, including a cause of action based on a claim for damages in tort for personal injury, has a genuine commercial interest in taking the assignment and enforcing it for its own benefit, then the assignment should not be struck down as savouring of maintenance. Put another way, the existence of a concurrent genuine commercial interest removes the cause of action from the category of unassignable bare causes of action.

[63] A similar theme is expressed in the summary of the principles established by *Trendtex* undertaken by Lloyd LJ in *Brownton Ltd v Edward Moore Inbucon Ltd*:[56]

> "… (i) Maintenance is justified, inter alia, if the maintainer has a genuine commercial interest in the result of the litigation. (ii) There

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52 At [156].

53 With whom Lords Edmund-Davies, Fraser of Tullybelton and Keith of Kinkel concurred.

54 At 702F, G.

55 At 703 FG.

56 [1985] 3 All ER 499 at 509 c-e.

> is no difference between the interest required to justify maintenance of an action and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out-and-out assignment. (iii) **A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest.** (iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) to (iii) above, you must look at the transaction as a whole. (v) If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment. (vi) It is an open question whether, if the assignee does make such a profit, he is answerable to the assignor for the difference." (emphasis added)

Significantly, in (iii), his Lordship described the bare right to litigate which the law now regards as unassignable, as being a cause of action in which the assignee has no genuine commercial interest.

[64] Drawing upon the authorities to which I have referred, I understand the law now to be that a right to claim damages in negligence may be validly assigned where the assignee has a genuine commercial interest in the assignment.

Genuine commercial interest

[65] From the discussion in the cases, several characteristics for sufficiency as a genuine commercial interest in this context can be discerned. In the first place, where the assignee relies on a genuine commercial interest to sustain an assignment, that interest must be one that has come into existence prior to the assignment. Plainly, a commercial interest in exploiting an assigned right, even if to recoup an amount paid in exchange for the assignment, would not, of itself, suffice. A commercial interest merely of that kind would tend to taint the assignment as savouring of maintenance or as champertous. It was on that basis that the assignment in *Trendtex* failed. The anonymous third party assignee had had no prior dealings with the parties to the assigned causes of action from which a genuine commercial interest might have arisen prior to the assignment.[57]

[66] Secondly, the pre-existing commercial interest need not be an interest which, itself, is enforceable at law or in equity. In *Brownton*, for example, the commercial interest that a defendant who had settled with the plaintiff had in recouping, if only partially, against another defendant who had refused to settle, was held sufficient to sustain an assignment of the plaintiff's rights against that defendant to the other defendant who had settled. The assignee's interest in recoupment was not a legally enforceable interest; yet, clearly, it was a genuine commercial interest which was in existence at the time of the assignment. Another example is found in *Victoria Insurance Co v King*[58] which concerned an assignment by an insured to an underwriter of causes of action against a tortfeasor in circumstances where the insured did not have a right of subrogation. The underwriter clearly had a commercial interest in recouping payment made under the policy. Griffith CJ (with

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57 At 704B.

58 (1895) 6 QLJ 202.

whom Chubb and Real JJ concurred) was in no doubt that the assignment was valid.[59]

[67] The learned Judge who determined the separate question here was of the view that the interest which pre-exists must be one "…which receives ancillary support from the assignment".[60] The discussion by his Honour suggests that he had in mind an interest in the nature of a right enforceable at law or in equity for which ancillary support was given by the assignment. Quite possibly his Honour was influenced in his approach by an argument advanced before him that upon payment of the lump sum compensation, WorkCover acquired what might be described as an inchoate right to indemnity by Amaca under s 207B(7) of the WCR Act. That, it seems, was the sole pre-existing interest upon which reliance was placed at the hearing of the application. On the view of the extent of that subsection taken by the parties, WorkCover had no such right to indemnity, and reliance upon such a right was misplaced. Recognition that a genuine interest, commercial in nature and not necessarily legally enforceable, might support an assignment would have been appropriate, but apparently was overlooked.

Validity of this assignment

[68] At the dates when the parties respectively executed the Deed, WorkCover had an interest in an assignment to it by the Estate of the causes of action. The interest it had was in recoupment, fully or partially, of the amount that it had paid out to Rourke by way of statutory compensation. That interest was not a legal one; but it was a genuine commercial interest. Moreover, it was an interest which arose upon payment of the compensation and well before execution of the Deed.

[69] The Deed itself does not suggest, nor was there extrinsic evidence to the effect, that the payment of compensation was conditioned upon subsequent execution of the Deed or upon subsequent assignment by Rourke or the Estate of the causes of action. In every sense, WorkCover's commercial interest pre-existed the assignment.

[70] In my view, WorkCover did have a genuine commercial interest in the assignment at the time it occurred. That interest validates the assignment. It also precludes argument that the assignment was champertous or savoured of maintenance.

[71] As well, it is worth noting that, under the terms of the Deed, there is no scope for WorkCover to profit by the assignment. Under Clause 2.6, if the total sum Workcover recovers pursuant to the assignment exceeds the lump sum statutory compensation it paid to Rourke, it is to hold the excess in trust for the Estate and then to pay it to the Estate as directed by the personal representative. Whilst, as Lloyd LJ summarised in *Brownton*, the making of a profit by an assignee from an assignment is not fatal to it, no element of potential issue of profit making by WorkCover is present here.

Disposition

[72] For these reasons, I consider that the correct answer to the separate question is in the affirmative.

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59 At 204.

60 Reasons at [30].

Orders

[73] I would order as follows:-

(a) That the appeal be allowed;

(b) That the orders made in the application on 9 December 2011 be set aside;

(c) That the separate question "Is the assignment pleaded in paragraphs 8A, 8B, 8C of the amended statement of claim valid at law to assign to the plaintiff the benefit of the cause of action of the estate of Douglas John Rourke against the defendant", be answered, "Yes"; and

(d) That the respondent pay the appellant's costs of and incidental to the application and to the appeal to be assessed on the standard basis.

[74] **MARTIN J:** I agree with the reasons given by Gotterson JA, and with the orders he proposes.