SUPREME COURT OF QUEENSLAND

CITATION:	*WorkCover Queensland v Amaca Pty Limited (No 2)* [2011] QSC 358
PARTIES:	**WORKCOVER QUEENSLAND** (Plaintiff) v **AMACA PTY LIMITED (FORMERLY James Hardie & Coy Pty Ltd under NSW administered winding up)** (Defendant)
FILE NO/S:	BS 13258 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2011
JUDGE:	Boddice J
ORDER:	**The separate question is answered "no"**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – Where the plaintiff applies for an order pursuant to r 483 *Uniform Civil Procedure Rules* 1999 (Qld) for the separate determination of questions in the proceeding – Whether the claim for damages for personal injuries is capable of assignment at law – Whether the plaintiff had a genuine substantial or commercial interest in taking the assignment *Succession Act* 1981 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld) *Workers' Compensation and Rehabilitation Act* 2003 (Qld) *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (Federal Court of Australia, 7 November 1994, unreported: BC9400129) *Beatty and Anor v Brashs Pty Ltd* [1998] 2 VR 201 *Brownton Ltd v Edward Moore Inbucon Limited* [1985] 3 All

ER 499

Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386

Chapman v Luminis Pty Ltd (No 4) (2001) 123 FCR 62

Deloitte Touche Tohmatsu and Anor v Cridlands Pty Ltd and Ors (2003) 134 FCR 474

Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd (2007) 158 FCR 417

Giles v Thompson [1994] 1 AC 142

Glegg v Bromley [1912] 3 KB 474

Monk v Australia and New Zealand Banking Group Ltd (1994) 34 NSWLR 148

National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (1995) 132 ALR 514

Park v Allied Mortgage Corporation Ltd [1993] FCA 286

Poulton v The Commonwealth (1953) 89 CLR 540

Re Timothys Pty Ltd & the Companies Act [1981] 2 NSWLR 706

Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd (2004) 220 ALR 267

Salfinger v Niugini Mining (Australia) Pty Ltd (No 3) [2007] FCA 1532

Scholle Industries Pty Ltd v AEP Industries (NZ) Ltd [2007] SASC 322

Singleton v Freehill Hollingdale & Page [2000] SASC 278

South Australian Management Corporation v Sheahan & ors (1995) 16 ACSR 45

Trendtex Trading Corporation v Credit Suisse [1982] AC 679

Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd [2002] QSC 137

WorkCover Queensland v Amaca Pty Ltd (2010) 241 CLR 420

COUNSEL: Holyoak, K for the plaintiff

Douglas, SC for the defendant

SOLICITORS: Bruce Thomas Lawyers for the plaintiff

Holman Webb Lawyers for the defendant

[1] This is an application, pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 for a determination as a separate question whether an assignment to WorkCover Queensland ("WorkCover") of a cause of action in the estate of Douglas John Rourke ("Rourke") against Amaca Pty Limited ("Amaca") is valid.

[2] The separate question is in the following terms:

> "Is the assignment pleaded in 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."

WorkCover submits the answer to this question is "yes". Amaca submits the answer is "no".

[3] The question does not relate to whether the cause of action survived by virtue of, and to the extent provided by, s 66 of the *Succession Act* 1981.[1] The issue raised for determination is whether a claim for damages for personal injuries is capable of assignment at law and, if so, whether WorkCover had a genuine substantial or commercial interest in taking that assignment.

The proceeding

[4] By claim and statement of claim filed 19 December 2008, Rourke claimed damages for personal injuries and other loss and damage allegedly occasioned by the negligence and/or breach of contract of Amaca. The damages were allegedly sustained by Rourke as a consequence of his use of asbestos sheeting whilst he was employed and self employed as a carpenter between 1967 and 1983. It was alleged that as a consequence of the use of this asbestos sheeting, Rourke developed lung cancer and asbestos related pleural disease.

[5] Rourke died as a consequence of his lung cancer on 12 January 2009. By Deed executed by his duly appointed executor on 12 June 2009, his estate assigned to WorkCover absolutely the whole of the estate's causes of action against Amaca in respect of its breach of duty and/or breach of contract which caused Rourke's personal injuries and other loss and damage.

[6] By amended claim and statement of claim filed 29 October 2009, WorkCover claimed damages for personal injuries sustained by Rourke as a consequence of the negligence and/or breach of contract of the defendant, together with interest thereon and costs. WorkCover claims the cause of action was validly assigned by Rourke's estate, and that it has a pre-existing genuine, substantial and/or commercial interest in taking that assignment, or that the assignment supports pre-existing rights of recoupment. Prior to his death, WorkCover paid to Rourke the sum of $550,351.50 by way of statutory compensation pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 ("the 2003 Act").

The assignment

[7] The Deed of Acknowledgement and Assignment ("the Deed") was executed by the executor of Rourke's estate, his employers and WorkCover. It assigns the estate's causes of action to WorkCover, including the right to pursue the proceedings commenced by Rourke in December 2008.

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1 See, generally, *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420.

[8] The recitals to the Deed provide that should the proceeding result in an award of damages in excess of the statutory compensation, WorkCover will hold the excess on trust for the benefit of Rourke's estate.

Submissions

[9] WorkCover accepts that actions claiming damages for personal injuries have traditionally been considered to be personal actions which were incapable of assignment at law or in equity. However, WorkCover submits that recent authority, both in England and Australia, supports a conclusion that there can be a valid assignment of a claim for damages for personal injuries if the assignee has a genuine and substantial interest in the success of the litigation, or a genuine commercial interest in its enforcement.

[10] In support of these contentions, WorkCover relies on the decisions of the House of Lords in *Trendtex Trading Corporation v Credit Suisse*[2] and *Giles v Thompson*,[3] a decision of the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[4] and a number of Australian decisions at first instance.[5]

[11] Amaca submits the law continues to prohibit the assignment of such causes of action. It contends that dicta of the majority in *Poulton v The Commonwealth*[6] remains good law and was not overturned or doubted in *Fostif*. Amaca further submits that the Australian decisions at first instance continue to draw a distinction between the assignment of torts of a personal nature, and that a similar distinction was drawn by the Court of Appeal in *Trendtex*.

[12] Amaca further submits that even if a claim for damages for personal injuries is capable of being assigned, WorkCover did not have the requisite genuine interest to support this assignment.

Discussion

[13] Whilst choses in action are assignable, a distinction has traditionally been drawn between the assignment of rights of action which are "personal" and rights of action which are of a proprietary nature.[7] A "bare right to litigate" was not assignable. Lloyd LJ explained that expression in *Brownton Ltd v Edward Moore Inbucon Limited*:[8]

> "What is meant by bare right to litigate? In origin it meant no more and no less than a right to claim damages divorced from any transfer of property. In *Glegg v Bromley*, Parker J said:
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> > 'The question was whether the subject-matter of the assignment was, in the view of the court, property with an incidental remedy for its recovery, or was a

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2 [1982] AC 679.
3 [1994] 1 AC 142.
4 (2006) 229 CLR 386.
5 See *Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd* [2002] QSC 137; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267; *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 FCR 417; *Salfinger v Niugini Mining (Australia) Pty Ltd (No 3)* [2007] FCA 1532.
6 (1953) 89 CLR 540.
7 See, generally, *Poulton v The Commonwealth* (1953) 89 CLR 540; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679.
8 [1985] 3 All ER 499 at 507.

> bare right to bring an action either at law or in equity.'"

[14] Claims for damages for tort have traditionally been considered to be a bare right to litigate which were incapable of assignment at law[9] or in equity.[10] Such an assignment "savoured of maintenance".[11] The incapability of assignment of causes of action in tort was recognised by the majority in *Poulton*.[12]

[15] In *Trendtex*, the House of Lords explored the prohibition on the assignment of causes of action in contract on the grounds of maintenance or champerty. Lord Roskill (with whose speech Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed) observed that courts now adopt "an infinitely more liberal attitude towards the supporting of litigation by a third party",[13] and towards the circumstances in which the validity of an assignment of a cause of action was recognised and not struck down "as one only of a bare cause of action".[14] Whilst the principle you cannot assign "a bare right to litigate" remained a fundamental principle of law, an assignee who could show that he had a genuine commercial interest in the enforcement of the claim of another could enforce an assignment of that claim unless by the terms of that assignment he fell foul of the law of champerty, a branch of the law of maintenance.[15] Lord Roskill said:

> "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."[16]

[16] In *Brownton*, Sir John Megaw (with whose reasons Donaldson MR agreed) held that the "genuine and substantial interest" or the "genuine commercial interest" referred to in *Trendtex* as sufficient to render an assignment lawful is not to be limited only to a party to the contract or the interest of a creditor.[17] Lloyd LJ held that whilst the prohibition on the assignment of a bare right to litigate remained a fundamental principle, it was confined to cases where there was no such genuine commercial interest.[18] His Lordship summarised the *Trendtex* principles:[19]

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

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9 *Poulton* at 602.
10 *Glegg v Bromley* [1912] 3 KB 474.
11 *Brownton* at 507.
12 At 602.
13 *Trendtex* at 702.
14 *Trendtex* at 703.
15 *Trendtex* at 703.
16 *Trendtex* at 703.
17 *Brownton* at 505.
18 *Brownton* at 507.
19 *Brownton* at 509

(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."

[17] Whilst the principles enunciated in *Trendtex* have been applied in Australia,[20] differing views have been expressed by Australian courts at first instance as to the applicability of those principles to assignments of actions in tort. The genesis for that difference of opinion lies in a statement by the majority in *Poulton v The Commonwealth*[21] that there could not be an assignment of the right of action for tort "because, according to well-established principle, the right was incapable of assignment either at law or in equity".

[18] A number of decisions at first instance have held that the statement of the majority, whilst dicta, was a considered statement which remains binding unless overturned by the High Court, and that, accordingly, the assignment of rights of action in tort remains invalid.[22] However, other decisions at first instance have held that the observations of the majority in *Poulton* was dicta which no longer represents the law in Australia having regard to recent developments in the law in relation to maintenance and champerty.[23]

[19] In *Monk v Australia and New Zealand Banking Group Ltd*,[24] Cohen J applied the principles in *Trendtex* to an assignment of a cause of action in tort, notwithstanding the dicta in *Poulton*. The statement in *Poulton* was one of a general principle, and had not considered any issue involving a claimed commercial interest. Cohen J found that there seemed to be no logic in making a distinction between a cause of action in tort and one in contract if the basis of the claim is a commercial claim. In such a case, the assignment is valid if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit. Cohen J did

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20 *Re Timothys Pty Ltd and the Companies Act* [1981] 2 NSWLR 706; *Monk v Australia and New Zealand Banking Group Ltd* (1994) 34 NSWLR 148; *South Australian Management Corporation v Sheahan* (1995) 16 ACSR 45; *Beatty and anor v Brashs Pty Ltd* [1998] 2 VR 201; *Singleton v Freehill Hollingdale & Page* [2000] SASC 278; *Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd* [2002] QSC 137.

21 (1953) 89 CLR 540 at 602.

22 *Park v Allied Mortgage Corporation Ltd* [1993] FCA 286; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (Federal Court of Australia, 7 November 1994, unreported: BC9400129); *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; *Deloitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 134 FCR 474.

23 For a decision, generally, see *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

24 (1994) 34 NSWLR 148.

not consider there was a need for a distinction to be drawn between property torts and personal torts. In a personal tort, there could be no genuine commercial interest such as to satisfy the test for a valid assignment.[25]

[20] The *Trendtex* principles were also applied to the assignment of a right of action in tort in *Beatty and Anor v Brashs Pty Ltd*.[26] After noting that with the development of the law of negligence it is now very common for claims in tort to be made in conjunction with contractual claims arising out of the same facts, Smith J concluded that a person will not infringe the law of maintenance or champerty in assigning a mere right of action in tort or for breach of statutory duty where it can be demonstrated that the assignee had a genuine substantial interest or genuine commercial interest in maintaining the cause of action and that interest existed prior to the assignment. In reaching that conclusion, Smith J noted that the general proposition enunciated in *Poulton* was dicta which was not inconsistent with the *Trendtex* principle. The assignee in *Poulton* did not have a pre-existing genuine substantial commercial interest in the cause of action that was being decided.[27]

[21] The applicability of the *Trendtex* principle to Queensland was expressly considered by Mullins J in *Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd*.[28] In dismissing an application for summary judgment, Mullins J stated:

> "[70] The rationale for the unassignability of a bare right of action was that it was objectionable on the grounds of maintenance: *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, 505. The authorities commencing with *Trendtex* have changed the laws relating to maintenance and champerty and provided a basis on which an assignment of a right to claim damages for breach of contract or tort which is not coupled with a right of property can be justified. In view of these developments, it is wrong to rely on the statement in *Poulton v Commonwealth* to the effect that the right of action for the tort was incapable of assignment either at law or in equity, when the assignee in that case did not have a pre-existing genuine substantial or commercial interest in the cause of action that was assigned and the case was also decided before the modern developments in the law of negligence: *Beatty v Brashs Pty Ltd* at 215. The analysis in *First City Corporation Ltd v Downsview Nominees Ltd* and *Beatty v Brashs Pty Ltd* for not drawing any distinction between rights of action in tort and contract in applying the principles of *Trendtex* is compelling."

[22] A similar conclusion was reached by McDougall J in *Rickard Constructions & Anor v Rickard Hails Moretti & Ors*.[29] After noting the various authorities which had applied *Trendtex*, and those which had declined to do so, McDougall J considered whether it was open, having regard to the *obiter* remarks in *Poulton*, to find that the

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25 At 153.
26 [1998] 2 VR 201.
27 At 215.
28 [2002] QSC 137.
29 [2004] NSWSC 1041.

test in *Trendtex* also applied to the assignment of actions in tort. His Honour concluded:

> "53 If it were necessary for me to reach a concluded view, it would be that I am at liberty to depart, and should depart, from the dicta of the High Court in *Poulton*. I have come to this view for a number of reasons:
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> (1) Their Honours were doing no more than identifying the law as it then stood. It was unnecessary for them to decide whether the principle that they identified should be applied to the facts of the case before them (because, as they said, there was in fact no assignment).
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> (2) In terms, what their Honours said applies only to an assignment of a cause of action in tort.
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> (3) Their Honours did not consider (because they did not need to consider) whether there were any exceptions to the rule. *Trendtex* does not deny the rule; it establishes that there is an exception, at least in relation to causes of action in contract, where the assignee has the requisite interest to support the assignment.
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> (4) The rule is at base a reflection of the policy of the common law against maintenance. The content of that policy, and its application, change from time to time. It is likely that a re-examination of the rule, in the light of changing social, commercial and economic conditions, will indicate exceptions that had not existed, or had not been perceived, in earlier times.
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> (5) I therefore regard it as open to me to have regard to the analysis of the policy considerations in *Trendtex* and *Giles* (and in cases in England that follow them), and to the recognition of those changed, or revealed, policy considerations in decisions in this country."

[23] McDougall J saw no reason to draw a distinction between the assignment of causes of action in contract and in tort. Applying the *Trendtex* test, McDougall J was satisfied that the plaintiff had no interest sufficient to justify the assignment. McDougall J noted that if he were wrong in thinking that *Trendtex* applied, the same result would be reached, at least in respect of the assigned claims in tort, by application of the dicta in *Poulton*.[30]

[24] Like Mullins J, I find the reasoning in *Beatty*, and the subsequent reasoning in *Rickard*, compelling. If assignments of causes of action in contract may now be validly made where the assignee has the requisite genuine interest, there is no good reason why a distinction should be drawn in respect of the assignment of actions in

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30 At [68].

tort. This is particularly so where, as here, the assignment was of causes of action for damages for personal injuries in both contract and tort, based on the same facts. There is also no reason to create a distinction between actions in tort claiming damages for personal injuries. As was observed in *Beatty*, the need for the requisite genuine interest would render the assignment of such actions invalid as an assignee of such a cause of action would be unable to establish that interest.

[25] In reaching that conclusion, I have had regard to the observations of Selway J in *Deloitte Touche Tohmatsu v Cridlands Pty Ltd*[31] that there are broader public policy issues involved in the assignment of causes of action for personal claims in tort, particularly, their tendency to impose a requirement that a party give particular and specified evidence in court. Those concerns were valid in *Deloitte* as the particular Deed under consideration was found to have a tendency to require the giving of particular and specified evidence. As such, it specifically involved unlawful maintenance and was in breach of public policy.[32]

[26] However, in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd*, when considering *Trendtex*, albeit in the context of an appeal against a finding that litigation funding arrangements in representative proceedings were against public policy,[33] Gummow, Hayne and Crennan JJ, after noting that the order for a stay in *Trendtex* was not based upon considerations of public policy concerning maintenance or champerty,[34] questioned why fears that evidence may be suppressed or witnesses suborned would not be adequately addressed by equity doctrines of abuse of process or other procedural or substantive court processes.[35]

[27] WorkCover contends that it has the requisite genuine interest in the assignment of Rourke's causes of action for damages for personal injuries. The basis for this contention is that WorkCover is granted a right of statutory indemnity by s 207B of the 2003 Act. WorkCover accepts it is unable to take advantage of that right of indemnity in the particular circumstances of this case because whilst Rourke had commenced proceedings, he did not serve those proceedings, and there had been no subsequent settlement of those proceedings. However, WorkCover submits the existence of statutory indemnities under s 207B of the 2003 Act supports its claim that it has a genuine and substantial interest in the success of Rourke's claim, or a genuine commercial interest in its reinforcement.

[28] The respondent accepts that in different circumstances WorkCover would have had a statutory right of indemnity. However, it submits that that fact does not satisfy the test as the requirements of a genuine interest must be an existing legitimate interest supporting the action, distinct from the benefit derived from the assignment.[36]

[29] The need for the genuine and substantial, or commercial, interest to be pre-existing was expressly recognised by Mullins J in *Vangale*.[37] Further, in *Scholle Industries Pty Ltd v AEP Industries (NZ) Ltd*,[38] White J said:

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31 (2003) 134 FCR 474 at 500.
32 (2003) 134 FCR 474 at 500 [110]-[111].
33 (2006) 229 CLR 386.
34 *Fostif* at 432 [81].
35 At 435 [93].
36 See *Giles v Thompson* [1994] 1 AC 142 per Lord Mustill.
37 At [70].
38 [2007] SASC 322 at 4 [17]

> "Subsequent authority has illustrated the variety of circumstances in which a genuine commercial interest may exist. A substantial creditor of the assignor, a sole shareholder who was the guarantor of the overdraft of the assignor, and a defendant who had paid money into court to satisfy a plaintiff's claim and who had taken an assignment of the plaintiff's cause of action against a co-defendant have each been held to have an interest amounting to a genuine commercial interest sufficient to sustain an assignment. But in all cases in which it has been held that the assignee had a genuine commercial interest in taking the assignment, that interest has existed independently of, and prior to, the assignment itself. That is to say, the interest of the assignee in the subject matter of the assignment was distinct from the benefit which it sought to derive from it."

[30] To be a genuine substantial or commercial interest within the principles enunciated in *Trendtex*, there must be an interest which already exists, and which receives ancillary support from the assignment.[39] The interests contended for by WorkCover do not satisfy that test. Its claim is not akin to a right of subrogation. WorkCover was given a statutory right of indemnity under the 2003 Act only in specified circumstances. Those circumstances are not satisfied in the present case. WorkCover has no pre-existing interest. It seeks to create an interest by an assignment. Such an interest does not satisfy the test of a genuine substantial or commercial interest.

[31] This conclusion renders it unnecessary to finally determine whether it is open to this Court, to depart from the dicta in *Poulton*. If it had been necessary to determine that issue, I would, for the reasons advanced by Mullins J and McDougall J, have concluded that I was at liberty to do so.

Conclusion

[32] If the principles enunciated in *Trendtex* are to be applied to assignments of causes of action for damages for personal injury, this assignment does not satisfy the prerequisite that WorkCover have a genuine substantial or commercial interest in the assignment. Accordingly, the assignment is invalid. Alternatively, if the dicta in *Poulton* continues to operate, an assignment of a cause of action in tort for personal injuries is not valid.

[33] The separate question is answered "no".

[34] I shall hear the parties as to the form of orders, and costs.

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[39] See *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Limited* (1995) 132 ALR 514 at 540.