In late 2014 Roger Singh of Shine lawyers Brisbane briefed Graeme Little SC to advise whether his client suffering from asbestos caused mesothelioma resulting from an employers breach of duty at work in the Northern Territory between 1974 and 1977 had a cause of action for damages against his employer.

The advice required consideration of a Northern Territory statute "The Workers Rehabilitation and Compensation Act 2006". Section 52 of that act provided that after 1 January 1987 no action for damages should lie against an employer in respect of an injury to a worker. That barrier to a claim was however subject to section 189 which provided that where a cause of action in respect of an injury arose before the commencement of the act a claim or action at common law in respect of that injury or death may be made after the commencement of the act as if the act had never commenced.

Graeme advised that current medical and scientific opinion would establish that in a case where mesothelioma eventuated more than trivial damage had been suffered at the time of or shortly after the initial inhalation of asbestos fibres and accordingly the cause of action had arisen long before the 2006 act took effect.

The Northern Territory Supreme Court expedited the trial of the case which commenced in December 2014 and resulted in a judgment in early January 2015 dismissing the action on the ground that the mesothelioma had not been suffered prior to the coming into effect of the act and the claim was therefore barred by section 52 the trial judge holding that he should follow a decision of the Court of Appeal in New South Wales in Orica Ltd v CGU Insurance Ltd (2003) 59 NSWLR 14 which held for the purposes of an insurance indemnity policy that liability for a mesothelioma did not arise until the mesothelioma itself became manifest.

The Northern Territory Court of Appeal expedited an appeal from the decision of the Supreme Court and subsequently allowed the appeal and ordered the entry of judgment for the plaintiff for $425,000 plus costs. The holding of that court was that where mesothelioma had eventuated hindsight could be used to determine that the initial inhalation and penetration of the lungs amounted to serious and substantial damage even though the tumour itself did not become manifest for a further 30 years.

The employer sought special leave to appeal to the High Court from the decision of the Court of Appeal and that leave was granted.

The High Court dismissed the appeal holding that the fact that the severity of an injury was not discovered or was not discoverable by a certain time did not prevent the cause of action arising by that time. The court endorsed the approach taken by a first instance Judge in Queensland (Derrington J) in Martindale v Burrows [1997] 1Qd R 243 where his Honour relied in part on a judgment of the House of Lords in Cartledge v E Jopling & Sons Ltd [1963] AC 758 which held that non-discovery or non-discoverability of the severity of an injury did not prevent the cause of action from accruing.

In the course of the judgment the High Court considered Orica and said “the difficulty with that approach, however, is that neither the issue nor the evidence in Orica was precisely the same as in this case. The issue in Orica was framed as being whether, under an insurance contract, the insured was liable to an employee upon that employee inhaling asbestos fibres.…… The court appeared to assume, rather than decide, that damage at common law did not occur until the onset of mesothelioma. So far as appears, there was no evidence in Orica nor any consideration of whether the kind of initial molecular mesothelial cell changes which occurred in this case amount to compensable damage if they may be seen in hindsight to have led inexorably to mesothelioma. “ This observation may give rise to the revisiting of Orica in so far as in an insurance contract it may be arguable that the liability to indemnify arises at the time of inhalation or shortly thereafter and that is the liability to which S 151AB is directed.

The court also agreed with the Court of Appeal's distinguishing of Wardley Australia Limited v Western Australia (1992) 175 CLR 514 on the basis that in that case there needed to be some other extraneous event to trigger the potential liability into a liability in fact.

Finally the court noted that the current English decisions were not relevant to the situation in Australia because the medical evidence was different and England had adopted the Fairchild exception which had not been adopted here.