

# Increase in general damages continues for NSW asbestos disease claims upheld by NSW Court of Appeal



Thady Blundell

**James Hardie & Coy Pty Ltd v Arthur Newton**  
Thady Blundell, Parramatta

On 22 December 1997, the NSW Court of Appeal handed down its decision in *James Hardie & Coy Pty Ltd v Arthur Austin Newton*, an appeal from the Dust Diseases Tribunal of NSW. Mr Newton, who was aged seventy-one years at trial and who had died prior to the decision of the Court of Appeal, had sued James Hardie and the State Rail Authority of NSW for damages for his condition of mesothelioma, a painful and incurable asbestos-induced cancer. The appeal involved a number of issues but of particular relevance to asbestos claims and personal injury claims generally, an award of damages for pain and suffering in the sum of \$130,000 was upheld. At issue was whether awards of general damages in mesothelioma claims should vary with age. The appeal was also an attempt to reverse the recent upward trend in general damages awarded at trial in NSW mesothelioma claims.

The NSW Court of Appeal had as recently as 1990 reduced from \$85,000 to \$60,000 an award of general damages to a sixty-two year old man with mesothelioma who it was found would suffer symptoms of mesothelioma for 18 months: *Simon Engineering v Brieger* (6 September 1990, unreported). The award of general damages was reduced in Brieger's case because of what Clarke JA, who delivered the leading judgment, felt to be the shortness of the duration of what was accepted by him to be extreme suffering.

In spite of Brieger's case, since 1990, the judges of the Dust Diseases Tribunal, whose case load is 90% asbestos disease

common law claims, have steadily increased awards of general damages for mesothelioma to a range of \$110,000 to \$150,000. Although it varies somewhat among judges, the upper end of the range has generally been reserved for younger plaintiffs, who, for mesothelioma (with its long latency period from first exposure to asbestos), are persons in their forties and fifties. Plaintiffs in their seventies, like Mr Newton, have been at the lower end of the range. The \$130,000 awarded to Mr Newton is an increase in the range. Taking into account CPI, increases the \$60,000 award substituted in Brieger's case equates to a \$70,000 award today.

The steady increase in general damages is not surprising given that mesothelioma is an incurable cancer of the lining of the lung, the only known cause of which is asbestos exposure. Much evidence has been given in the Dust Diseases Tribunal and in other courts around Australia about the excruciating pain that is suffered by those with mesothelioma. Morphine is often required in large doses, as is oxygen in the later stages of the disease. Survival from diagnosis is in the order of twelve to eighteen months.

At trial, liability was not seriously disputed, but quantum of damages was. Mr Newton was awarded \$167,762.30 in damages, of which \$130,000 was awarded for general damages and \$12,500 for loss of expectation of life. The balance of the award comprised damages awarded under the principle *Griffith v Kerkemeyer* and for out-of-pocket expenses.

In addition to the appeal against the

quantum of general damages, the defendants appealed against the award of *Griffith v Kerkemeyer* damages, the deductibility of certain collateral benefits received by the plaintiff and against the quantum damages for loss of expectation of life. The latter appeal was not pursued.

The appellants contended that the award of \$130,000 was excessive due to the age of Mr Newton and the fact that he lived with mesothelioma from first symptoms for only nine months which is shorter than the average period of suffering for those with mesothelioma. The appellants sought to rely upon Brieger's case and James Hardie sought to compare and substitute an award of \$70,000 being the Brieger award with a CPI increase. Such a comparison is against the High Court decision in *Planet Fisheries Pty Ltd v La Rocca* (1968) 119 CLR 118 that awards of general damages for personal injuries should not be compared. That decision has been criticised as being unrealistic particularly for mesothelioma claims: *CSR v Bouwhuis* (1991) 7 NSWCCR 223.

Counsel for Mr Newton submitted that awards of general damages in mesothelioma claims should not vary with age as length of suffering does not vary greatly with age in mesothelioma cases. This can be contrasted with the varying periods of suffering on average of persons aged thirty years and seventy years with quadriplegia.

A majority of the Court of Appeal upheld the award of \$130,000 in general damages. Stein JA, with whom Cole JA agreed, relied upon *Planet Fisheries* and

declined to have regard to the award made in *Brieger* in 1990. His Honour noted that "there is no market price for pain" and found that even allowing for the relatively short period of acute suffering and the plaintiff's age, refused to interfere with the award of \$130,000.

**The majority appeared to accept the submission that general damages awards in mesothelioma claims should not vary greatly with age.**

Handley JA felt the award was excessive given the age of the plaintiff, and the short period during which the plaintiff would experience the disease and the relatively short period during which he would suffer acute pain. Handley JA favoured an award of \$110,000 and but for the concession at trial by counsel for the State Rail Authority that \$110,000 was the appropriate award, would have reduced the award

even further. Handley JA was critical of the decision in *Planet Fisheries* and noted that defamation awards can be compared with awards for general damages in personal injury cases (*Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44) and sentences of co-offenders must be compared (*Lowe v The Queen* (1984) 154 CLR 606; *Jones v The Queen* (1993) 67 ALJR 376).

In his reasons, Handley JA queried what award would be made to a person aged forty-five or fifty years who might suffer acute pain for a longer period than Mr Newton. However, the majority appeared to accept the submission that general damages awards in mesothelioma claims should not vary greatly with age. On this approach the award of general damages to a forty-five or fifty year old suffering mesothelioma would not be excessively increased from \$130,000 as Handley JA appeared to fear.

This decision should facilitate settlement of mesothelioma claims in the Dust Diseases Tribunal, and perhaps such claims in other jurisdictions. General damages in mesothelioma claims constitute the bulk of damages awarded where no claim is made for past loss of earnings or loss of future earning capacity. The quantum of general damages favoured by Handley JA

could have lead to an enormous range of general damages in mesothelioma claims. For a disease with symptoms that do not vary greatly between sufferers, significant compromise by one or both sides would be required to achieve settlement. The approach of the majority should lead to a confined range of general damages for mesothelioma claims. The decision in Newton was quickly followed by an award of \$130,000 in general damages to a plaintiff aged eighty-two years suffering mesothelioma: *Pyne v The Commonwealth of Australia* (Dust Diseases Tribunal, 23 December 1997, unreported).

The apparent acceptance by the majority that general damages in mesothelioma claims should not vary greatly with age may be relevant to other personal injury claims involving injuries and diseases for which the duration and intensity of symptoms are similar no matter what age the sufferer. With an ageing population, plaintiff lawyers may find this a theme worth developing. ■

**Thady Blundell** is a solicitor with Turner Freeman at Parramatta, NSW and is author of the Mills Workers Compensation NSW Practice. Thady can be contacted on **phone** 02 9633 5133, **fax** 02 9891 4343 or **email** tab@turnerfreeman.com.au

**Tanya Simpson to leave APLA**

It is with regret that I announce that APLA's Member Services Officer, Tanya Simpson, will be leaving APLA on Friday 13 March 1998. Tanya and her husband Justin will be travelling to Europe via Africa for a working holiday.

Tanya joined the APLA secretariat in September 1996 as our first Member Services Officer. Tanya has developed this role far beyond our expectations when she was appointed. She has been the first point of contact for members as they seek experts from the expert database and submit articles for *Plaintiff*. Potential members have no doubt been impressed by Tanya's efficient and helpful demeanour as our membership has more than doubled in this period.

Special mention must be made of the contribution Tanya made to APLA's journal, *Plaintiff*, during 1997. Working with Managing Editors Roland Everingham and now

Bill Madden, Tanya has played a crucial role in the transformation in the quality of *Plaintiff*.

I am sure all APLA members and the secretariat will join me in wishing Tanya well in her travels. Thank you, Tanya, for all your efforts on behalf of APLA for eighteen months. We will all miss your professionalism and friendship.

John Peacock  
Executive Director



PS: I would be pleased to receive inquiries about the forthcoming vacancy in the position of APLA Member Services Officer on (02) 9415 4233 or [jpeacock@apla.com](mailto:jpeacock@apla.com). A detailed job description of responsibilities is available.