wotton kearney

insurance lawyers

April 2012

insurance specialists

# THE DOLLARS DON'T MAKE SENSE

## A comparison of pain & suffering damages awarded in asbestos litigation across four states

Written by Andrew Seiter, Partner and Natasha Sung, Solicitor

**Wotton + Kearney**
**Insurance Lawyers**

**Sydney**

**Level 5, Aurora Place,**
**88 Phillip Street, Sydney**
**Telephone +61 2 8273 9900**

**Melbourne**

**Level 6**
**550 Bourke Street, Melbourne**
**Telephone +61 3 9604 7900**

**www.wottonkearney.com.au**

## Introduction

In Australia, the price of a Big Mac is about the same wherever you go; the same applies to an iPod nano. This consistency has become so well-recognised that economists have used the prices of these commodities to develop an index to compare international currency movements.

Hamburgers, music devices and the law do not usually intertwine. But if a consumer can expect to pay the same price for a Big Mac throughout Australia, or an iPod nano, why then does the "economic" value that the courts place on a person's pain and suffering differ so greatly between each state?

This paper considers four recent and significant cases, one each from Western Australia, New South Wales, Victoria and South Australia, which were brought by claimants who contracted mesothelioma from alleged exposure to asbestos.

Mesothelioma is a rare form of cancer principally caused by exposure to respirable asbestos dust or fibres. The latency period from the time of exposure can be as long as 40 years. Usually, by the time a person is diagnosed with mesothelioma, it is incurable. It is almost always fatal. A person's life expectancy from diagnosis is rarely more than 12 months.

This paper discusses the clear and significant disparity in the courts' assessments of pain and suffering damages for the four claimants who brought these proceedings. We refer to this head of damage in this paper as general damages.

The conclusions that we draw are not only confined to asbestos litigation – they are of general relevance to other areas of personal injury litigation. Asbestos litigation is a barometer that can be used to assess, and then compare, current social and judicial mores and attitudes. Unlike most other areas of personal injury litigation, asbestos litigation has been relatively unaffected by the tort law reform of the last decade.

## Western Australia

Our analysis begins with the Western Australian decision of ***Lowes v Amaca Pty Ltd***, handed down on 26 October 2011.[1]

Simon Lowes was 40 years of age when he was diagnosed with mesothelioma. He alleged it was caused by exposure to asbestos dust during childhood visits to a miniature railway at the Castledare Boys Home in Perth. The asbestos dust came from waste material dumped by Amaca Pty Ltd (**Amaca**), then known as James Hardie & Co Pty Ltd.

Some evidence was admitted with respect to other background and occupational exposure to asbestos. However, proceedings were brought against only Amaca.

Justice Corboy accepted that Mr Lowes did play in piles of waste material containing asbestos and that this exposed him to respirable asbestos dust and fibres that caused, or at least materially contributed, to the development of his mesothelioma over 30 years later.

The 368 page decision includes an important discussion of causation issues as liability was established notwithstanding Mr Lowes' relatively low levels of exposure to asbestos during his visits to Castledare. Indeed, Mr Lowes' mother gave evidence that Mr Lowes had visited Castledare on only 4–6 occasions between 1972 and 1975 and on each occasion, he only stayed for 2–3 hours.

1. [2011] WASC 287 (26 October 2011).

*Continued over page*

In Western Australia, section 10A(1) of the **Civil Liability Act 2002 (WA)** applies to the assessment of damages for personal injury, including personal injury caused by asbestos inhalation. It provides that a court may take into account earlier decisions of that or other courts when assessing general damages.

Amaca suggested that an appropriate award of general damages would be between $150,000 and $200,000. In coming to this assessment, it considered a number of recent decisions in which the awards of general damages ranged from $130,000[2] (in 2001) to $180,000[3] (in 2006). Mr Lowes, on the other hand, submitted that an "*appropriate and fair*" amount of general damages was $500,000, being an amount substantially higher than any previous award of general damages in Western Australia.

Mr Lowes was awarded general damages of $250,000.

## New South Wales

We now turn to New South Wales and the claim brought by John William Booth.

Mr Booth, a motor and brake mechanic, contracted mesothelioma which he alleged was caused by exposure to asbestos contained in brake linings between 1953–83.

Mr Booth commenced proceedings in the Dust Diseases Tribunal against Amaca and Amaba Pty Ltd (**Amaba**), the two companies which manufactured most of the brake linings on which he worked.[4]

In addition to this specific period of exposure, Mr Booth also recalled three brief occasions of exposure during his childhood and youth. However, these specific occasions were "dwarfed" by his exposure to asbestos in brake linings during his career as a brake mechanic. The drilling and grinding work that he performed generated asbestos dust which settled on the floor of the workshop, before being re-agitated by brooms, human traffic and compressed air, which was used to clean the work area.

The trial judge found that exposure to asbestos dust from brake linings manufactured by Amaca and Amaba "materially contributed" to Mr Booth's contracting mesothelioma. Having regard to Mr Booth's early exposure to asbestos and his work, the trial judge held that the effect of asbestos exposure on the development of mesothelioma was cumulative.

In the Court of Appeal, Amaca and Amaba argued that the trial judge's conclusion that all exposure to chrysotile asbestos that occurred in the latency period, other than trivial or *de minimis* exposure, materially contributed to his contracting mesothelioma was not correct.[5] Their appeal on causation was dismissed.

Amaca and Amaba then appealed to the High Court. However, the majority of the High Court agreed that the trial judge's findings were open on the epidemiological evidence.[6] The appeal was dismissed.

---

2. ***Easther v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd)*** [2001] WASC 328 (30 November 2001).
3. ***Hannell v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd)*** [2006] WASC 310 (22 December 2006), noting that on appeal, the plaintiff was unable to prove causation.
4. [2010] NSWDDT 8 (10 May 2010).
5. ***Amaba Pty Ltd (under NSW administered winding up) v John William Booth; Amaba Pty Ltd (under NSW administered winding up) v John William Booth*** [2010] NSWCA 344 (10 December 2010).
6. ***Amaba Pty Ltd (under NSW administered winding up) v John William Booth; Amaba Pty Ltd (under NSW administered winding up) v John William Booth*** [2011] HCA 53 (14 December 2011).

The trial judge awarded general damages of $250,000, which was not disturbed at appellate level.

## Victoria

In recent years, there has been a significant inflation of general damages awards in public liability litigation in Victoria. In 2003, tort law reform introduced a cap on general damages, but there is no graduated "percentage of a worst case" scale, as there is in many states.[7] In any event, this cap, as with almost all other tort law provisions, does not apply to asbestos litigation.

Perhaps unsurprisingly then, the highest award of general damages to date for a mesothelioma claim has been in Victoria.

In the recent Victorian Supreme Court of Appeal decision of ***Amaca Pty Ltd (under NSW administered winding up) v King***,[8] the Court of Appeal upheld a "record" jury award of general damages of $730,000. This has significantly changed damages expectations in Victoria. Prior to this decision, the "tariff" for settlement discussions was usually between $200,000 and $300,000.

Eric King, a fitter and machinist, was exposed to asbestos for a total of only six hours when he visited Amaca's factory in Perth to repair a machine over the course of three days in 1972 (**factory exposure**). As is common, due to the long latency periods associated with asbestos related diseases, Mr King was diagnosed with mesothelioma 30 years later.

At trial, the jury heard evidence that:

+ discrete episodes of exposure to, and inhalation of, asbestos dust over and above any background exposure, contribute to the risk of developing mesothelioma;

+ all exposure more than 10-15 years before the occurrence of mesothelioma can contribute to mesothelioma development;

+ mesothelioma from background exposure to asbestos is uncommon;

+ on the balance of probabilities, Mr King's factory exposure contributed to his contracting mesothelioma;

+ adding Mr King's background exposure to asbestos to the factory exposure, whatever that level of exposure was, increased the risk of contracting mesothelioma because any exposure increases the risk of contracting mesothelioma; and

+ in Mr King's case, the risk had been realised because he contracted mesothelioma. Therefore, one could not avoid the conclusion that the factor exposure at whatever level was a cause of the mesothelioma. As both the background exposure and the factory exposure posed a risk, they both contributed to the development of the plaintiff's mesothelioma.

Amaca called evidence to say that the factory exposure was an unlikely cause and was only a *de minimis* exposure. That is to say, it was not sufficient to be a cause of Mr King's injuries.

However, the jury found Amaca liable.

7. Victoria's general damages cap is indexed annually and is currently just over $500,000.
8. [2011] VSCA 447 (22 December 2011).

Amaca's application to the trial judge to set aside the verdict was dismissed. The trial judge accepted there was sufficient evidence on which the jury could find in Mr King's favour.[9] Justice Kyrou also dismissed Amaca's earlier application for the trial to proceed without a jury.[10]

Amaca appealed to the Court of Appeal.

On 22 December 2011, the Court of Appeal upheld the jury's general damages verdict of $730,000.[11]

In its discussion on general damages, the Court of Appeal considered that modern society now places a higher value on the quality of life than was the case in the past. It acknowledged that, in Victoria, there had not previously been an award of general damages as high as $730,000 in a mesothelioma case.

However, the Court of Appeal said that over the last 10–20 years, awards of damages have increased significantly, not only in personal injuries cases, but also in other areas of litigation. It took the view that, proportionately, the amount awarded to Mr King appeared to correlate with jury verdicts in previous cases. A comparison, for instance, was drawn to a relatively recent jury verdict which saw a barrister awarded more than $600,000 in damages for defamation.

Accordingly, while the Court of Appeal acknowledged that there was a "significant gap" between awards of general damages in other states as compared with the sum awarded by the jury to Mr King, it concluded that the $730,000 awarded to him was not beyond what a reasonable jury could arrive at.

It is of note that the provisions in Victoria that permit a court to refer or be referred to other previous quantum decisions to assist in determining damages for non-economic loss do not apply to claims for asbestos related diseases.[12] Accordingly, on one view, the jury's verdict in Mr King's proceeding will not force or directly influence the hand of a jury in another similar case. However, this decision, and the Court of Appeal's refusal to interfere with the decision, will have forever raised plaintiff's expectations.

## South Australia

Our analysis ends with the most recent of the four decisions, the South Australian decision of ***Hamilton v BHP Billiton Ltd***.[13]

Raymond Hamilton was employed by BHP for 10 months in 1964–65 as an electrician at Whyalla where he installed cables in the engine room of a ship. Between 1961–64, he worked as an electrician in shipbuilding in Scotland. Mr Hamilton was diagnosed with mesothelioma in February 2007 and died six months later. His wife brought proceedings in the District Court of South Australia.

Mr Hamilton gave evidence of asbestos exposure during his employment in both Scotland and Whyalla. He described working in close proximity to laggers in Scotland, who covered pipes in the engine rooms with asbestos. He also described working in workshops or areas of the ship which were not in proximity to asbestos. In Whyalla, he

9. ***King v Amaca Pty Ltd*** [2011] VSC 422 (31 August 2011).
10. ***King v Amaca Pty Ltd*** [2011] VSC 433 (5 September 2011).
11. ***Amaca Pty Ltd (under NSW Administered Winding Up) v King*** [2011] VSCA 447 (22 December 2011).
12. In Victoria, section 28HA of the **Wrongs Act 1958 (Vic)** enables a court to refer to other decisions when determining damages for non-economic loss.
13. [2012] SADC 25 (29 February 2012).

recalled working alongside laggers in the engine room of the ship. The laggers would cover pipes with asbestos lagging and apply "slurry", a wet paste comprising asbestos and water. He recalled that he would be covered in dust and that the asbestos stuck to him in the hot weather.

On the issue of causation, Judge McCusker adopted the High Court's analysis in ***Amaca Pty Ltd v Booth***. He accepted the evidence of "cumulative effect", concluding that the exposure at Whyalla made a "material contribution" to Mr Hamilton's mesothelioma and that this contribution was a significant one.

As to the assessment of general damages, Judge McCusker acknowledged that this requires an assessment of subjective experience, and that, while Mr Hamilton appeared to have faced his diagnosis with stoicism and courage, these characteristics should not downplay his experience as his condition deteriorated.

Judge McCusker awarded general damages of $115,000.

## Implications

While it is difficult to justify the significant disparity in the awards of general damages as demonstrated by the four cases considered above, the disparity can be in part attributed to:

+ differences in the levels of judicial conservatism within each state, something which is deeply engrained in legal and judicial culture;

+ recent trends in the assessment of general damages, which are reflective of judicial trends more broadly;

+ the statutory intervention and tort law reform in some states, which has placed some restrictions on general damages awards or at least modified expectations; and

+ whether the case has been heard by a jury.[14]

These issues, however, are not confined to asbestos litigation. The manner in which general damages are assessed in the four states, coupled with judicial trends regarding the assessment of general damages more broadly, has implications for all personal injury litigation.

These cases raise legitimate concerns about the possibilities of "forum shopping". Where possible, plaintiffs may be inclined to issue proceedings in jurisdictions that are perceived to be more sympathetic to their own interests. Underwriters and claims managers must therefore ensure proceedings have been issued in the appropriate jurisdiction, which, as we have seen, can significantly impact the value of a claim.

Underwriters and claims managers must also be alert to the possibility of large general damages awards, including awards in the realm of $730,000 for asbestos related injuries. As we have seen from our discussion of the cases, there can be great unpredictability, particularly where juries are involved.

---

14. It is important to note that of the jurisdictions considered above, only the Victorian case involved a jury verdict. In Western Australia and New South Wales, most civil trials are heard without a jury. In South Australia, juries do not hear civil matters. Juries are not bound by the same considerations as judges in assessing general damages.

The High Court was recently presented with the opportunity to consider why there is, and whether there should be, such disparity between general damages awards throughout Australia. After the Victorian Court of Appeal upheld Mr King's award of $730,000, Amaca sought special leave to appeal on the sole issue of quantum. However, Amaca discontinued its application just hours before the High Court was to hand down its determination "on the papers" as to whether it would hear the application.

We are therefore left with the vexed question: why is the pain and suffering of a person dying of mesothelioma in South Australia valued at $115,000, yet in Victoria, their pain and suffering is valued at $730,000?

The dollars simply do not make sense.

For further information, please contact:

Andrew Seiter, Partner
**Tel** 03 9604 7906
**Email** andrew.seiter@wottonkearney.com.au

Natasha Sung, Solicitor
**Tel** 03 9604 7904
**Email** natasha.sung@wottonkearney.com.au