*process of process form. The question arises, therefore, as to what the contents of that duty was. In our opinion, it was not a duty to withdraw the asbestos from the market. Although the product was known to be dangerous, the received learning at the time was that it was only at the time was that it was only dangerous at certain levels. However, there was a duty to warn... Given the nature of the risk, ABA was under a duty to warn that care should be taken so as to minimise the liberation of asbestos dust into the atmosphere in the proximity of persons who would be liable to inhale the dust. The warning had to be given in a way which would come to the attention of AP's management, employees of CSR, and it was these officers who were responsible for the conditions under which the asbestos was handled and used in the factory. A warning on the h[illegible]n bags in which the asbestos was delivered would not necessarily have come to management's attention, and therefore, would have been insufficient. However, there were other reasonably practicable ways for ABA to give a direct warning to management staff. For example, a warning could have included on the invoices or statements forwarded by APA to AP in respect of AP's purchase of ABA's asbestos. A warning could have been given on the delivery dockets. A warning letter could have been forwarded at regular intervals. A need for regular warning, by what ever means it was given, arises from the possibility of change of staff or from corporate amnesia."*

Further, the Court held that the fact that AP and CSR's knowledge of the dangers of asbestos was co-extensive with that of ABA did not prevent ABA's duty of care from arising. The Court then turned their attention to the question of causation. They found that ABA's breach of duty was the cause of the plaintiff's injury. The Court held that *"although there was no evidence that management would have acted upon any warning, it is open to the Court to infer or warn, or at least that its failure to warn contributed to the risk of injury to which Mr Wren was exposed."*

**Damages**

The trial judge awarded general damages in the sum of $125,000. Mr Wren was aged seventy-two at the time of trial. The Court of Appeal stated that: *"We do not consider, however, that the award of general damages in total was outside the bounds of a sound discretionary judgment."*

The trial judge apportioned $100,000 to the past. On appeal this apportionment was overturned and an award for past general damages of $50,000 was substituted.

CSR Ltd and Midalco Pty Ltd have subsequently settled a number of other cases involving employees of Asbestos Products. ■

If you would like any further details in relation to the contents of this article please contact **Tanya Segelov** at Turner Freeman Solicitors. **Phone** 02 9633 5133, **email** ts@turnerfreeman.com.au

# Scrutiny of judicial questions to juries

***Wynbergen v The Hoyts Corporation Pty Ltd (High Court of Australia, 11 November 1997, unreported)***

**Simon McGregor, APLA Policy Officer**

As is a common practice in many personal injuries claims, a jury was given a series of questions to answer to provide them with a logical framework in which to return their verdict. The jury returned a verdict of 100% contributory negligence against the plaintiff, but answered a further question in a manner which implied some minor fault on behalf of the defendant.

The case involved a slip and fall in the work place. The jury were asked:

...

2. *"Was the plaintiff negligent by failing to take care of his own safety?"*

*-Yes, 100%*

3. *"What is the assessment of damages arising out of the defendant's negligence?"*

*-$38.*

Hayne J (with whom Gaudron, MgHugh, Gummow and Kirby JJ concurred) held:

*The jury's answer to the third question assessed the damages "arising out of the defendant's negligence".* (Its seems that the figure of $38 was arrived at in response to an invitation by counsel for Hoyts to allow the appellant no more than the cost of his visit to his local doctor on the day that he said he slipped at work if, contrary to the principal submission advanced on behalf to Hoyts at trial, the jury found that Hoyts was "in some way negligent and there was a fall".) *Plainly, the jury's answer to this question amounted to a finding that the negligence of the defendant was a cause of the plaintiff's loss. But if the jury found, as the answer which was given to the third question indicated, that the defendant's negligence was a cause of the plaintiff's loss, it was not open to the jury to find that the plaintiff had been contributorily negligent to the extent of 100%.*

Having ruled that the jury's answers to questions 2 and 3 were inconsistent, his Honour held the judgement in favour of the defendant at trial in effect ignored the answer to the third question. On this ground the appeal should be allowed. Further, because the answers are inconsistent and the jury had not been asked a sufficiently general question to authorise their verdict, a new trial was the only appropriate remedy. The appeal was allowed with costs, and costs of the first trial were to be awarded at the discretion of the retrial judge. ■

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