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IN THE SUPREME COURT

OF VICTORIA

1987 No. 4581

BEFORE THE FULL COURT

MELBOURNE

BEFORE THE HONOURABLE MR. JUSTICE KAYE,

THE HONOURABLE MR. JUSTICE FULLAGAR and

THE HONOURABLE MR. JUSTICE TEAGUE

B E T W E E N:

HIDALCO PTY. LTD.

Appellant
(Defendant)

and -

KLAUS RABENALT

Respondent
(Plaintiff)

J U D G M E N T

(Delivered 20 SEP 1988, 1988)

KAYE J.: This appeal is against that part of a judgment whereby exemplary damages were awarded to the respondent (plaintiff) against the appellant (defendant).

The action was tried by a judge and jury.

The plaintiff claimed that the defendant negligently exposed him to asbestos whilst in its employ whereby many years later he developed malignant mesothelioma. The jury found that there was negligence on

the part of the defendant which was a cause of the plaintiff's illness and it assessed his compensatory damages in the sum of \$426,000. The jury also found the defendant liable to pay the plaintiff exemplary damages

PLAINTIFF'S
EXHIBIT

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PLAINTIFF'S
EXHIBIT
WV-04278

JW/SC

JUDGMENT

which is fixed in the sum of \$250,000.

The plaintiff's case may be summarised as follows.

The defendant was the owner or occupier and the operator of a blue asbestos mine and mill situated at Wittenoom in the State of Western Australia. Between 18th July 1960 and 20th January 1961 the plaintiff was employed by the defendant in the mine and in the mill. Although the plaintiff worked in the mill during the first three months of his employment, it is convenient first to describe the mine and its operations.

Asbestos ore was excavated from stopes being horizontal layers of deposits rising to about 4 feet from the working floor of the mine. Access to the stope where the plaintiff worked was gained by an entrance-way or adit situated at the top of the mine, down into and along a haulage-way, and then up a man-way. The distance from the adit to the stope area was between 300 and 400 metres.

Explosives, which were plugged into the holes drilled in the stope face, blasted off ore comprising asbestos and rock. The plaintiff as a scraper man shovelled the displaced ore from the wall of the mine and from the ground onto a chute. From the chute, the ore was released onto trucks which were hauled by a loco to the mill. The height of the area in which the plaintiff worked in the stope did not exceed 4 feet. The stope was poorly ventilated, air being stale and charged with asbestos dust and dust. Visibility there was limited to 15 to 20 feet. Employees were forbidden to use water for suppression of dust.

In the mill the ore was subject to processes by which asbestos was separated from rock by crushing, then dried and reduced into fibres. From a screening machine, in which fines were finally separated, asbestos fibres were dropped about 10 feet along a wide and opened chute to the bagging area. There the plaintiff and three others manually packed 100 pounds of asbestos into each bag. To ensure the contents were tightly packed, the plaintiff forced asbestos into each bag by means of a wooden club. As he did so asbestos fibres flew back onto his face. If the contents of a bag exceeded 100 pounds, he removed by hand excess asbestos. Filled bags were sewn up by the plaintiff. The time taken to fill a bag was 10 to 15 minutes.

The mill was a large enclosed structure in which the atmosphere was impregnated with asbestos fibres and dust. The floor, and particularly in the bagging area, was constantly dirty and covered with asbestos. Notwithstanding some ventilating equipment, asbestos deposits were present on items of machinery. Holes in machinery, pipes and ducts from which asbestos fibres escaped into the air were covered by or plugged with hessian. The plaintiff was required to clear away by hand asbestos which from time to time clogged up the chute. Men working in the mill were covered with asbestos which clung to their skin, ears, mouth, nose, hair and clothing. Temperatures in the mill were of the order of 40 degrees. Masks provided for the employees' use were unsuitable because they quickly clogged with dust, restricting breathing. Men working in the mill were not directed by

the foremen or superiors to use masks, and except during inspection by health authorities did not do so.

It was the opinion of Dr. J.C. McNulty, a Chest Physician and the West Australian Mines Medical Officer, that men working in the prevailing dusty conditions, and manually handling asbestos fibres, were at significant risk of developing lung disease.

In October 1987 the plaintiff was diagnosed as suffering from mesothelioma.

Evidence of the existence since almost the turn of the century of a number of medical and scientific publications and reports concerned with the development of lung disease due to exposure to asbestos was adduced through witnesses. For present purposes it is sufficient to refer to a small selection from the literature. In 1898 the Chief Inspector of Factories and Workshops warned of the dangers of asbestos. In a report made in 1930 Dr. E.R.A. Merewether, a Medical Inspector of Factories, and Mr. C.W. Price, an Engineering Inspector of Factories, recorded their conclusion that inhalation of asbestos dust over a period of years results in development of a serious type of fibrosis of the lung, and advised that there was need to take preventative measures. In 1933 Dr. Badham, a Medical Officer of the New South Wales Department of Health, reported the first case of asbestosis in Australia. Lancet Medical Journal 1938 carried a report by Drs. Wood and Gloyne showing that of one hundred patients suffering from asbestosis twelve had died, of whom two had lung cancer. Dr. Welder in the Journal of Industrial Hygiene and Technology 1944, suggested a correlation between

asbestos and mesothelioma. In the Annual Report of the Chief Inspector for 1947, Dr. Merewether again drew attention to the incidence of cancer in patients suffering from asbestosis. In 1951 Dr. Gloyne in 'Lancet' advised that asbestosis is an important cause of lung cancer; and Sir Richard Doll in 1955 expressed the same opinion. In 1960 Dr. Wagner stated in the South African Journal of Industrial Medicine, that exposure to asbestosis could result in mesothelioma, being penetration of the pleura by asbestos fibres.

The defendant was a wholly owned subsidiary of CSR. The head office of both companies was situated in Sydney where CSR had an extensive library of medical, scientific and engineering publications, including some of those referred to in the evidence. Access to the library was available to the defendant's directors and managerial staff.

Evidence of warnings of dangers to men working in the mine and mill at Wittenoom given to the defendant's managerial staff was as follows. In 1946, and within three years of the commencement of the Wittenoom operations, the defendant was informed that Dignum, a mine employee, was suffering from asbestosis. In March 1948 Dr. E.G. Saint, who at one time was Professor of Medicine at the University of Western Australia and who at the relevant time was Medical Officer for Port Hedland, on his first visit to the mine and mill expressed to one Broadhurst, the then Manager of the mining and milling operations, his anxiety about the risks of workers developing asbestosis from exposure to asbestos for periods of six months. He warned Broadhurst

that asbestosis was lethal, and that Wittenoom would have the largest epidemic of asbestosis recorded in medical literature because of the very heavy exposure of the men to asbestos in both the mill and the mine. In 1959 Dr. McNulty, after an inspection of the mill and mine, warned Broadhurst of the dangers of exposing men to asbestos and drew attention to the existing unsatisfactory working conditions. He discussed with Broadhurst those employees of the defendant who had contracted disease. In his report for the year 1959, presented to both Houses of Parliament, under the sub-heading "Industrial Chest Disease - Wittenoom" Dr. McNulty concluded, inter alia:-

"The very high labour turn-over at Wittenoom is necessarily associated with a short average exposure per worker and many workers at risk were protected simply because their exposure time was too short. At least one of these short-term workers has been diagnosed as suffering from Asbestosis, many years after he left the industry.

The problem is essentially one of ventilation conducted with a proper appreciation of the relative importance and medical significance of the asbestos fibre as distinct from the silica particle. Despite the many marked improvements which have been effected at the Mine and Mill, I am not satisfied that the risk of industrial chest disease has been eradicated or even brought to par with the risk of Silicosis in the gold-mining industry."

Dr. K.O. Brown, who at one time was a Director of both the defendant and CSR, was aware of the contents of this report.

By a letter dated 22nd February 1960, the General Superintendent of the defendant in Perth informed the defendant's Managing Director in Sydney that at a meeting in Kalgoorlie the Health Laboratory expressed deep concern that four of the defendant's employees were inmates of the Perth

Chest clinic suffering from asbestosis. The letter continued:-

"This is taken by the Laboratory to be a condition of the industry and Mr. Brisbane has been more or less advised to begin a thorough investigation of the ventilation of the mine to determine the safety of the industry."

Mr. Brisbane, referred to in the letter, was the State Mining Engineer.

In a letter of 24th June 1960 Mr. O.A. Allan, the then Manager of the mill and mine, drew the attention of the defendant's Managing Director in Sydney to extracts from an article appearing in the British Medical Journal concerning asbestosis which he enclosed for information.

Mr. Allan made the comment that it was "quite an interesting article and reveals several facts not known to us". Under the heading "Asbestos Reviewed", statements made by Dr. Hugh Jones included the following:-

"Asbestosis is a pneumoconiosis arising from the inhalation of asbestos dust during the manufacture of asbestos goods, such as asbestos sheeting, fireproof clothing, brake-linings, lagging for boilers and pipes, etc. ...

Asbestos is very toxic and produces not only pulmonary fibrosis but reactions in the pleura and even in other organs. ... There is an interstitial fibrosis, as in the present case, gross pleural thickening and some patchy bronchiectasis. Besides these three features, which are common in asbestosis, there may be associated tuberculosis, as there was in this second case, or, even more important, associated lung cancer as in our patient. ...

Patients suffering from asbestosis may die either from the complication of tuberculosis (more common in past years), or more particularly from that of carcinoma of the lung. Those not killed by chest infection or cancer may finally get cor pulmonale. The disease usually makes its appearance rather suddenly, over the course of a few months, often long after the initial exposure to the asbestos inhalation. It has been suggested that the

asbestos lies dormant as an asbestos body, which has to "ripen" over many years before it can break down and liberate its toxic contents. ...

Carcinoma of the lung is a serious and well recognised complication in asbestosis. Its frequency in asbestosis is difficult to determine, for it is not a common condition in the general population. Another hazard is mesothelioma of the pleura. This rather rare tumour may draw attention to the fact that a patient has worked in asbestos dust. ...

Nevertheless, asbestos dust is most toxic, and the amount needed to cause asbestosis is not known, so constant vigilance and new preventive methods are needed if this disease is to be abolished.*

Mr. Allan sent a similar letter enclosing the same article to the defendant's General Superintendent in Perth. In his letter Mr. Allan stated that he had underlined several passages in the article which had been stressed by Dr. Ozer, a Medical Practitioner who was then practising in Wittenoom.

At the close of evidence, His Honour heard submissions by counsel for both parties concerning matters necessary to be established by the plaintiff for an award of exemplary damages. In the course of discussion, leading counsel for the defendant submitted that the evidence did not justify the jury making the award claimed. The learned judge ruled that there was evidence on which the jury, properly directed, could make an award of exemplary damages on the basis of recklessness.

In his charge His Honour directed the jury in relation to exemplary damages as follows:-

"You would award exemplary damages only if you were satisfied that the conduct by the defendant was of a reckless nature. It does not have to be conduct which intended to cause an injury, but reckless conduct in the sense that there was a disregard of the plaintiff's rights and the defendant's obligations.

To be reckless is to act in this way; with knowledge of the danger, simply not to care whether the injury would occur or not. That is what is meant by recklessness. In other words, you are aware of the risk and the danger of, in this case, serious injury to health, and you act not caring whether that would occur or not. Put another way, if you act with wilful blindness, wilfully turning a blind eye to the problem and doing nothing about it, once you are put on notice or on guard. That would be reckless. And if you were satisfied that the conduct of the defendant, looked at overall, was reckless in this respect, then you are entitled to award exemplary damages. You would have to consider that conduct of that kind was such as to warrant punishment of the defendant and the making of an example to other people, not just people who were involved in this particular industry, but other employers who may be minded to act recklessly in respect to their employees."

His Honour's direction was substantially in the terms which earlier leading counsel for the defendant had expressed in his submission concerning matters entitling the plaintiff in the instant case to an award of exemplary damages. Before this Court, the substance of leading counsel's submission was referred to as his concession. Later in his charge, the learned judge summarised the evidence relevant to the claim for exemplary damages, and the arguments relating to the claim which were advanced by both counsel in their final addresses to the jury.

Acceding to an exception by leading counsel for the plaintiff that he had not adequately summarised counsel's argument in support of an award of exemplary damages, His Honour redirected the jury in these terms:-

"When I was dealing with [plaintiff counsel's] submission about exemplary damages I put and summarised his submission on the basis of what he put the defendant actually knew. But I omitted to point out to you that exemplary damages are also open on the basis of deliberate ignorance. In other words, if a person with some knowledge then deliberately keeps themselves ignorant about the real situation, fails to inform itself about what the real situation is, that can be the basis

of recklessness. So recklessness can be either a deliberate act with knowledge, not caring about the consequences, or, deliberate failure to inform oneself, in other words deliberate ignorance, deliberate blindness I think it is sometimes referred to. So you may of course deal with that when you are dealing with exemplary damages."

Some three hours later, the jury sought a reminder of what in his redirection His Honour had said about exemplary damages. The learned judge then directed as follows:-

"Exemplary damages, as you will recall, are awarded if you are satisfied on the balance of probabilities that the defendant's conduct was reckless in the way that I have explained to you. I explained to you in the general part of my summing-up, when I was directing you on the law, that to show recklessness there has got to be shown conduct which with knowledge of the risks and dangers involved there is a disregard of the consequences. In other words you know that something injurious to health, something of a serious kind will happen, but you do not care whether it happens or not. That is one aspect of recklessness. The other is simply turning a blind eye to matters. When a person either is or ought to be on notice. In other words, not caring to get information which is relevant to the problem, and in that way recklessly disregarding the plaintiff's rights. And it was that part of it that I added at the end of my summing-up, because when I was putting the way [plaintiff's counsel] had put his case I referred to the first aspect of recklessness, a wilful disregard, and I did not refer to the second aspect, that is the wilful blindness aspect, so I redirected you on that."

It was this, His Honour's final redirection, which was the subject of one ground of appeal argued on behalf of the defendant by Mr. Hughes, Q.C. who did not appear at the trial, contending that the jury were thereby misdirected. Mr. Hughes acknowledged that, because of the concession made at the trial by the defendant's then leading counsel, it was not now open to him to question the correctness of the learned judge's direction that in a personal injury action exemplary damages may be awarded to a plaintiff where the

defendant is found to be negligent causing injury and to be reckless. Consequently, counsel were not heard to debate, and it is not an issue for determination in this appeal whether in an industrial accident action mere recklessness by the employer is a situation entitling the plaintiff employee to an award of exemplary damages. Moreover, it is not to be understood that it is my opinion either that the learned judge's initial direction and penultimate redirection contained a correct statement of law concerning exemplary damages, or that as a matter of law a plaintiff employee in a negligence action against his employer is entitled to an award of exemplary damages on proof of reckless conduct simpliciter by the employer. In this connection I am mindful of authoritative expressions appearing in Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118 at 122, 129-130, 143 and 153-154; X.L. Petroleum (N.S.W.) v. Caltex (Australia) Pty. Ltd. (1985) 155 C.L.R. 448 at 471; Lamb v. Cotongo [1987] 61 A.L.J.R. 549 at 553 and Cotongo v. Lamb No. 3 [1986] N.S.W.L.R. 359 at 587.

Mr. Hughes submitted that, in his final redirection, His Honour equated recklessness with ordinary negligence when he dealt with the aspect of a person who "either is or ought to be on notice" and "simply turning a blind eye to matters." From those words, it was said, the jury could have found that the defendant, without any knowledge of the risk, acted recklessly if it had deliberately not sought information of the risk of injury to which the plaintiff was exposed by conditions in the mill and mine. Underlying the submission was the unexceptionable

notion that failure to inform itself of risk of injury likely to be suffered by an employee in the course of his employment may constitute negligence on a part of the defendant employer.

There appears in the passage of the final direction complained of expressions which on examination provide support for the defendant's submission. This emerges from His Honour's elaboration of the position adopted by a person, who is or ought to be on notice, in the expression "in other words, not caring to get information which is relevant to the problem and in that way recklessly disregarding the plaintiff's rights." That adopted position His Honour finally referred to as "the wilful blindness aspect." The jury might have understood the learned judge to mean that the defendant's conduct was reckless if it, without any knowledge of risk, did not seek information about the risk. As I have already noted, a person may be guilty of actionable negligence who either does not know or has not adverted to - whether deliberately or otherwise - the risk of injury likely to be suffered by the victim of his tortious conduct.

On the other hand, conduct of turning a blind eye to a situation or wilful blindness of it involves a conscious decision upon facts known to the actor. It follows that for the defendant to have turned a blind eye to the risk of injury likely to be suffered by the plaintiff by exposing him to the effects of asbestos required at least some knowledge of the risk. And it was upon that knowledge, whatever its degree or extent, the decision - not to seek further information - was not or would not have been made.

The jury therefore might have understood that His Honour was referring to the conduct of a person who was possessed of sufficient knowledge of the risk of injury to have put it upon enquiry for the purpose of better informing himself, and that by deliberately not seeking further information he acted recklessly. If His Honour's redirection was so understood, the jury would have applied it to such evidence establishing that the defendant had some knowledge of the risk but intentionally withheld from informing itself better.

Whether the jury so understood His Honour's words is, of course, a matter of conjecture. However, the course of the evidence, the defence adopted by the defendant, counsels' final addresses, and other portions of His Honour's direction provide compelling reasons for concluding that the jury understood His Honour to be referring to the defendant having at least sufficient information to cause it to inform itself further.

Evidence to which I refer included evidence of the existence, over many years before the commencement of the plaintiff's employment, of medical and scientific literature concerning the association between asbestosis and lung cancer with asbestos exposure, reports in the defendant's possession concerning the risk of asbestosis to asbestos workers, the Age newspaper report of 13 January 1956 of the high incidence of asbestosis among workers handling asbestos, correspondence in the defendant's possession relating to its employees suffering from asbestosis, and verbal warnings of the risk to the health of workers in the mill and mine from the existing unsatisfactory conditions

given by Dr. Saint and Dr. McNulty to Mr. Broadhurst, the Mine Manager.

In his development of its defence denying negligence, the defendant's leading counsel argued that the defendant had knowledge of the fact that asbestosis and lung cancer caused by asbestos exposure but because it did not have knowledge of mesothelioma, injury to the plaintiff was not reasonably foreseeable by it. Examination of transcript of his final address in relation to the exemplary damages claim reveals that defendant's leading counsel did not urge the jury to find that the defendant was without any knowledge of the risk of injury likely to be suffered by the plaintiff. Counsel argued that measures taken by the defendant in the mill and mine, which he recounted, constituted proof that it had not acted recklessly, in the sense of not caring whether or not the plaintiff would suffer injury. He further urged the jury to conclude from evidence of those matters that the defendant took positive measures in an endeavour to minimise the risk of which the plaintiff complained. Thus it must have been clear to the jury that the reply to the plaintiff's claim for exemplary damages was based upon the premise that the defendant had at least some if not actual knowledge of the dangers to which it was exposing the plaintiff.

Argument advanced to the jury by plaintiff's leading counsel was that it was incontrovertible that the defendant knew of the risk of very serious injury - asbestosis, lung cancer and mesothelioma - to which it exposed the plaintiff; he dealt at length with evidence of the defendant's actual knowledge. Counsel also dealt with

the alternative position of the defendant having some, in contradistinction to no, knowledge of the risk and its deliberate failure to inform itself further. However, like defendant's leading counsel, plaintiff's leading counsel did not address any argument in connection with the exemplary damages claim on the basis that the defendant was without any knowledge of the risk.

In his charge the learned judge summarised arguments advanced by both counsel in relation to the exemplary damages claimed. In doing so he did not advert to a situation of the defendant being without any knowledge of risk or danger. Moreover, examination of his charge does not reveal that His Honour, in connection with the requisite conduct of recklessness, postulated a situation of the defendant having no knowledge and deliberately failing to seek knowledge. Again, in his penultimate direction, the learned judge dealt with the alternative basis of recklessness arising out of some knowledge together with a deliberate decision to remain ignorant of the real danger. In doing so he used the expressions "deliberate ignorance" and "deliberate blindness" in association with some knowledge. It was only when the learned judge gave the jury his final redirection that any suggestion of reckless conduct without any knowledge or apprehension of danger or risk of injury was introduced into the proceedings; perhaps by an oversight.

Consequently, in the total context of the evidence adduced, the conduct of the plaintiff's case and the defence, the final addresses of counsel and the learned judge's charge, including his penultimate direction, I

consider that the jury would have understood His Honour to have meant by "wilful blindness" the possible situation of the plaintiff having some knowledge of the risk. I am fortified in this conclusion by the conduct of counsel following His Honour's final redirection. After completing his final address defendant's leading counsel withdrew from the trial leaving his junior responsible for the further conduct of the defence. It appears that defendant's junior counsel was present throughout the hearing. It is clear that he, an experienced and competent counsel, was fully aware of the manner in which the issue of recklessness had been argued by both his leader and plaintiff's leading counsel. This is apparent from the terms of his reply to the plaintiff's leading counsel's two exceptions to His Honour's charge. The trial having occupied 32 sitting days, and having regard to the precarious state of the plaintiff's health, it was in the interests of both parties that the jury should not misunderstand the final direction concerning recklessness given by His Honour. However, neither counsel sought to have His Honour clarify further what was meant by the phrase "turning a blind eye to matters" and the words "the wilful blindness aspect." Their failure to do so suggests that both counsel were confident that the jury understood that in the context and implicit in both expressions was some knowledge of the risk of injury. If either counsel was not so confident, it was not explained why a further redirection was not sought to remove any real doubt.

In my view, therefore, it ought not to be assumed that the jury were misled by the language used by His Honour when finally explaining the alternative situation of limited

knowledge together with failure to seek further information entitling the plaintiff to an award of exemplary damages.

However, this conclusion per se is not sufficient to dispose of the ground of appeal. His Honour's final explanation of the alternative basis for a finding of recklessness was a direction of law. Being an incorrect statement it constituted a misdirection of law. Mr. Hughes contended that being a misdirection as to a question of law, both material and critical to the exemplary damages claim, a miscarriage of justice inevitably occurred; in such circumstances, counsel continued, the discretion provided by Order 64 Rule 16(2) of the General Procedures of Procedure 1986 ought not to be invoked to save the jury's verdict.

The rule, insofar as relevant, provides:-

"A new trial shall not be granted on the ground of misdirection ... unless in the opinion of the Full Court some substantial wrong or miscarriage has been thereby occasioned in the trial."

In Balenzuela v. De Gail [1959] 101 C.L.R. 226 at 234-236 Dixon C.J. discussed the effects of a misdirection at common law and under the English Rules 1883 Order 39 Rule 6, the provisions of which appear in the same language in Order 64.16(2) of the Victorian 1986 Rules. His Honour at p.232 stated:-

"The difference between the common law rule and the effect of that provision can easily be exaggerated by over-estimating the operation of the judicature provision in widening the discretion of the court and by under-estimating the effect of the common law rule in allowing a discretion to the court. In Holford v. Melbourne Tramway and Omnibus Co. Ltd., Cussen J. after referring to the provision said, 'I think that the rule is very little different from the view which was taken by the courts before the Judicature Act. The courts would not necessarily direct a new trial if the misdirection was on an immaterial or collateral matter, or if the trial resulted in a verdict against the person in whose

favour the misdirection operated, or if the misdirection was in respect of a pure question of fact, and the judge's attention was not called to the mistake. But it is an error to think there never can be a wrong or miscarriage unless it can be shown that the jury were in fact influenced in giving their verdict by a misdirection. There is a wrong or miscarriage occasioned by a misdirection in law, or as to the application of evidence, if, as a final result of what has been said by the judge, the jury retire to their room under a wrong impression in relation to these matters, and the result of the case is such as to show that they may have been influenced in their verdict by the misdirection. "Miscarriage" is a technical word, and includes this technical meaning. The plaintiff's counsel contended that the onus of showing the miscarriage is on the party asking for the new trial. I think this is clearly right, but I think that onus is satisfied when the facts appear to be as above set out, and that unless the party opposing the grant of the order for a new trial can point to some further fact, the conclusion that there was a miscarriage must be drawn."

After discussing authorities relating to both the common law position and the position under the rules His Honour continued at p.234-235:-

"If the question really be of any importance, resting as it does rather on processes of reasoning than upon proof of an issue of fact, the true view, it may be suggested, is that at common law it was necessary to grant a new trial unless the court felt some reasonable assurance that the error of law at the trial whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result or because, in any case, as a matter of law the same result must have ensued, while under the judicature rule the burden is the other way. The form in which the judicature rule is cast seems to indicate an intention that the court should not grant a new trial unless it reached a positive opinion, in other words unless it was persuaded that a substantial wrong or miscarriage had been occasioned by the error."

The Chief Justice at 235 made the following observations about the operation of the rule:-

"Care must be taken lest in exercising an authority to decide whether an error of law occurring at the trial is likely to have influenced the result, what is really done is to examine the evidence as

if the court were forming a conclusion of fact for itself. The basal distinction between the court's duty and the function of the jury cannot be confused in this way. The question whether an error of law made at a trial calls for a new trial depends on definite considerations involving a legal criterion. Cases may be put on one side where, although there has been some error of law committed at the trial, whether in the judge's direction to the jury or in his rulings as to the reception or rejection of evidence, the verdict may be sustainable because the successful party in any case is entitled as a matter of law to such a verdict or because had a contrary verdict been returned it must have been set aside. Apart from such cases it is enough if it appears to the court deciding an application for a new trial that an error of law has been made at the trial which may operate to do any of the following three things: - (a) improperly to limit or enlarge the evidentiary materials by which it is not an unreasonable hypothesis to suppose the judgment of the jury might be affected, even if illogically; or (b) in the case of misdirection touching standards or criteria of liability, wrongly to expose the party to a hazard that is appreciable and not illusory of a verdict for or against him that otherwise might not have been found; or (c) in matters of burden of proof, of the legal need of corroboration or of other like incidents of the jury's consideration of the case, to provide an erroneous guidance which is not unreasonable to regard as capable of contributing to the result. These categories are probably not exhaustive but it is enough if a case falls within one of them; if it does it is necessary to treat it as involving a substantial wrong or miscarriage. What has been said relates entirely to misdirection, the erroneous reception or rejection of evidence and other errors of law."

The misdirection in the present case, being an error of criteria of liability for claimed exemplary damages, fell within category (b). However, in my opinion, it is necessary to consider the circumstances giving rise to the error and the context in which it occurred.

There is no rule that a new trial will be denied to a party on the ground of an erroneous direction concerning a material question of law where counsel has not sought a redirection. In Holford v. The Melbourne Tramway and Omnibus Co. Ltd. [1909] V.L.R. 497 Cussen J. said:-

"If on a material question the judge gives a misdirection in law, or even fails to direct where it is his duty to direct, or misleads the jury as to the application and limits of the evidence, the consequences cannot be escaped by an attempt to throw the responsibility on to the shoulders of counsel."

The misdirection of law with which the Full Court was concerned in Vandeloo v. Waltons Ltd. [1976] V.R. 77 was within category (b) formulated by Dixon C.J. in Balenzuela v. De Gail. At the trial counsel for the defendant did not object to the misdirection. Gowans J., with whom Menhennitt and Dunn JJ. agreed, stated that if a redirection had been sought and acceded to, it would have required recasting of a very substantial area of the charge on a critical issue, which might not have been possible in the circumstances. His Honour considered and the Full Court held that it was not a case for refusing to set aside the judgment as a matter of discretion under the rule.

On the other hand in General Motors Holden's Pty. Ltd. v. Moularas [1964] 111 C.L.R. 234 at 242-243 Barwick C.J. stated:-

"Without attempting an exhaustive statement, it is established that, generally speaking, a criticism of the summing up which is capable of being cured at the trial must be taken at the trial and the judge asked to correct it. If this is not done in a case where it ought to be done, a new trial on the basis of that criticism of the summing up will, in general, not be ordered. Again, the matter is not the subject of any hard and fast rule, because the court retains a general discretion and is able in a proper case in the interests of justice to relax the requirement."

The Court was there concerned with the conduct of a defendant's counsel who at the conclusion of the charge brought to the trial judge's attention his omission to have directed the jury when assessing damages for personal injuries to take into account the ordinary contingencies of

life. When asked by the trial judge whether he wished the jury to be recalled, counsel declined to seek a redirection on the point. The High Court held that, although the trial judge had misdirected the jury, in the particular circumstances no substantial wrong or miscarriage had been suffered. At 243 Barwick C.J. referred to the requirement that "notwithstanding the error in the summing up, the court must be satisfied that there was a substantial wrong or miscarriage" as "the most salutary feature of the rule". Menzies J. at 256 considered the misdirection to be a misdirection of law adding "because, by reason thereof, the jury were left to assess damages without the guidance of a complete and correct statement of the way in which the law requires damages to be assessed". At p.255 His Honour said:-

"The question for the court of appeal, however, is not whether the misdirection did affect the verdict; it is, as Cussen J. said in Holford's Case, whether the jury may have been influenced in their verdict by the misdirection. If so and in the absence of anything else, the misdirection brought about a substantial miscarriage in the trial."

The answer to the question advised by Menzies J. might in an appropriate case involve consideration of matters in addition to those falling within the three categories referred to by Dixon C.J. in Balenzuela v. De Gail at p.236. The primary of those matters must be the form of the error of law and the verdict of the jury. However matters and circumstances associated with the misdirection in the present case were exceptional; because of those matters and circumstances I am not persuaded that there was a substantial wrong or miscarriage suffered by the defendant. In addition to considerations which caused me to

conclude that the jury were not likely to have been misled by the language used inadvertently by His Honour in explanation of the alternative situation of limited knowledge as the basis for reckless conduct, matters and considerations which caused me to be so unpersuaded are as follows; Balenzuela v. De Gail at p.235 per Dixon C.J.

First, unlike the circumstance existing at the close of the trial judge's charge in Vandello v. Waltons Ltd., here the error was capable of correction by a simple statement made to the jury by the learned judge. Had his omission been brought to his attention, His Honour could have overcome any risk of misunderstanding of what he had previously said. He might have done so by reminding the jury that the defendant could have turned a blind eye only if it had at least some knowledge of the risk of injury to the plaintiff by exposing him to asbestos.

Secondly, both in the course of his charge and in his penultimate redirection His Honour correctly directed the jury about the alternative basis.

Thirdly, when summarising those parts of the plaintiff's leading counsel's address to the jury relating to the issue of exemplary damages, he correctly reminded the jury that the plaintiff's case was that the defendant had actual knowledge of the risk or at least some knowledge.

~~Finally, having regard to the weight of the~~
~~uncontradicted evidence and information concerning the risks~~
~~to which the employees were exposed in the mill and mine,~~
~~the defendant's continued failure to take steps to prevent the~~
~~defendant's consideration of the case supporting a finding of~~
~~recklessness, indeed a finding of conscious and judgment~~

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Do not remove from the container or use for any other purpose.

Went out to find out if a finding contrary might have been

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direction in law is necessary, though where special questions are asked there may possibly be no direction in law to give. But, whether the case is one of a general or a special verdict, if any question of law is mixed up with the facts it is the imperative duty of the judge to give such a direction as will enable the jury to appreciate the proper effect of the evidence given, and to apply the law to the facts so that by the joint labours of both justice may be attained. A fuller direction is required if the evidence is complicated or the subject is one with which the jury cannot be expected to be familiar. It is equally the duty of the judge, where the circumstances render it necessary, to state the limits of the evidence given and its application to the issues or questions, or, at all events, it is his duty not to mislead the jury as to such limits or application. This statement may in some circumstances be very general, and the failure to make any statement may possibly not be a ground for a new trial unless attention is called to it at the time."

The foregoing citation contains an expression of Cussen J. to which Dixon, Williams, Webb, Fullagar and Kitto JJ. referred in Alford v. McGee [1952] 85 C.L.R. 437 at 456 in the following passage of their Honours joint judgment:-

"It may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility of deciding what are the real issues in the particular case, and of telling the jury, in the light of the law, what those issues are."

In the present case, the learned judge, in the course of his charge, by his summary of evidence and reminder of those parts of the addresses of both counsel, made clear to the jury how evidence of facts was applicable to the relevant law. I refer briefly to the following

matters concerned with the issue of exemplary damages appearing in the transcript of his charge.

The learned judge explained to the jury in clear terms the difference between compensatory and exemplary damages, the nature and purpose of exemplary damages, and the requirement of an award of exemplary damages for the defendant's conduct to be of a reckless nature. He then, as appears from the passage of his charge which I have set out earlier in this judgment, elaborated on what was meant by reckless. His Honour directed the jury to consider whether the defendant's conduct was such as to warrant punishment and exemplification to others. He explained that it was the conduct of those discharging managerial functions, including Messrs. Brown, Allan and Broadhurst, being supervisors, managers and directors of the defendant rather than fellow workmen and foremen which was relevant conduct. He then directed that although the standard of proof was a civil standard, the seriousness of the allegations and the consequences of an award required very special care to be taken when examining the conduct of the defendant before reaching a conclusion, if it did, that exemplary damages were appropriate.

In the course of summarising evidence presented by the parties, the learned judge recounted evidence which related to the defendant's knowledge of the unsatisfactory conditions in the mine and mill, other evidence which related to the defendant's knowledge of the risk of disease to its workmen by exposure to asbestos, and evidence of improvements made in the working conditions.

When reminding the jury of submissions made by plaintiff's counsel in his final address, His Honour drew attention to references made by counsel to evidence of conditions existing in the mill and mine, of inadequate equipment used to extract dust and asbestos dust, of the defendant's knowledge of those conditions, of the defendant's actual knowledge of the significant risk of lung cancer and asbestosis from exposure to asbestos fibre, and of the defendant's conduct while possessed of such knowledge. His Honour then summarised the manner in which plaintiff's leading counsel submitted that evidence of those and other matters related to the exemplary damages claim.

In the course of his summary of the defendant counsel's final address, the learned judge reminded the jury of counsel's enumeration of several specific innovations made, precautions taken, improvements in the working conditions introduced and capital costs expended in effecting such work. His Honour also restated defendant counsel's submission that the evidence of those matters should cause the jury to conclude that the defendant did not conduct its operations with reckless disregard for the plaintiff's safety.

From the totality of His Honour's charge it would have been abundantly clear to the jury what evidence led by both parties related to the exemplary damages issue, and how they might apply such evidence, if accepted, to the law relating to exemplary damages as explained by him. In addition, during the hearing of evidence His Honour instructed the jury what was the limited application

permissible of evidence given by particular witnesses. The jury were therefore adequately directed in those respects.

For the foregoing reasons I would dismiss the appeal with costs.

CERTIFICATE

I certify that the 26 preceding pages are a true copy of the reasons for judgment of Kaye J. of the Full Court (Kaye, Fullagar and Teague JJ.) of the Supreme Court of Victoria delivered on *20 September 1988*

DATED this *20* day of *September* 1988.

A. W. Burrows
Associate