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Supreme Ct
1985 UR #156A

IN THE SUPREME COURT

OF VICTORIA

BEFORE THE FULL COURT

MELBOURNE

BEFORE THE HONOURABLE MR. JUSTICE KAYE,

THE HONOURABLE MR. JUSTICE MARKS and

THE HONOURABLE MR. JUSTICE GRAY

B E T W E E N:

MCPHERSON'S LIMITED

Appellant
(Defendant)

- and -

HAROLD SIMPSON PILMER

Respondent
(Plaintiff)

J U D G M E N T

(Delivered 26th November 1985)

KAYE, J.:

This is a defendant's appeal against a jury's verdict and judgment ordered by Gobbo, J. in accordance with the verdict for the plaintiff for the sum of \$222,500 damages and \$8,900 by way of agreed damages in the nature of interest.

The plaintiff claimed that as a result of the defendant's negligent exposure of him in the course of his employment to asbestos and asbestos dust in fibre he suffered injury in the form of mesothelioma and loss.

By its defence the defendant denied negligence, although at the trial of the action it did not call evidence.



Notice of appeal given by the defendant was based on four grounds. However, argument in support of the third ground only was advanced to the Court. That ground reads:

"That insofar as the said verdict and judgment relate to damages the said award of damages was unreasonably excessive."

For the purposes of determining whether the award of damages was unreasonably excessive the Court is required to assume that the jury accepted and acted upon a view of the evidence most favourable to the plaintiff. That evidence may be summarised as follows.

At the time of the trial the plaintiff was 65 years of age, having been born on 27th June, 1920. Throughout his working life, except for a period of war service between 1940 and 1945, the plaintiff was employed by the defendant in several capacities. The defendant's business included importing and sales of asbestos products. After his discharge from the army the plaintiff worked for five years in the General Department of the defendant's premises in Collins Street. That department was situated on the lower ground floor, ground floor and basement. The plaintiff worked in the lower ground floor and basement handling asbestos products. In doing so he was exposed to asbestos dust and asbestos fibre. No plant or equipment for extraction of dust was provided and ventilation in those two areas was poor. During 1945 to 1950 the plaintiff handled asbestos products four or five times a day. Between 1951 and 1956 he was free from exposure to asbestos, having been appointed a sales representative. In 1953 he became the assistant manager of the Tool Department and continued in that capacity until 1955. Between 1956 and 1962 the plaintiff returned to the General Department as the assistant manager.

In that capacity he handled asbestos products. The situation in that department, however, was unchanged, there being no extractive equipment; masks and respirators were not provided for him or others employed in the department. Returning to 1957 when as manager of the General Department, he spent part of the time on the ground floor and lower ground floor and the basement checking stocks, including asbestos products. In 1973 the company moved to Mulgrave.

The plaintiff retired at the age of 56 in 1976. He then felt generally unwell, lacked energy and enthusiasm, and felt some debility. Had he enjoyed good health, he intended to continue to work until the age of 62 or 63. With the approval of the Board of the Defendant Company he was paid as lump sum superannuation an amount of \$91,000.

In 1979 he experienced intense pain in the area of his lungs, behind his right shoulder blade, and across his right side. His appetite became poor and he lost weight. His condition was then explored clinically by Mr. Simpson, a thoracic surgeon, who found that fluid taken from his chest was benign.

Between 1980 and 1983 he had a constant feeling of being unwell and increasing pain. He experienced extreme breathing difficulties and broken sleep. While in the United Kingdom his condition deteriorated. Pain and symptoms in his chest became worse and he had pain in his right shoulder blade. His son, who is a surgeon, suggested that he should return to Melbourne for further investigations.

In August of 1983 Mr. Simpson, after tests, diagnosed the plaintiff's condition as mesothelioma, a rare type of cancer of the fluid cavity generally associated with exposure

to asbestos. The disease had been slowly developing and insidious. Mr. Simpson then considered that the plaintiff's life expectancy was limited to a matter of months.

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At the trial of the action Dr. Minty, who practises at the Peter MacCallum Institute, expressed the opinion that the plaintiff was unlikely to survive beyond three years.

The plaintiff described his present condition as follows: he feels depressed and fatigued on getting out of bed, showering, shaving and dressing; indeed, he is easily fatigued. He has disturbed sleep unless he takes a drug Dolobid. He takes that drug twice a day. For a period of some eight hours after taking the drug he is relieved of pain.

The plaintiff has shown considerable fortitude during his illness and the manner in which he has coped with his disability. It seems that he has been engaged during two days a week for some five hours in assisting at the Retired Persons Association. This, he regarded, as a form of social service towards others.

Mr. Winneke, senior counsel for the defendant, has contended before us that the jury's award, when analysed, was found to be unreasonably high. It is accepted that the economic loss, for which the jury was entitled to award the plaintiff damages for past medical expenses was \$3,000.

The amount for past loss of earning capacity was put to the jury as the sum of \$136,000. Mr. Winneke has pointed out that the sum was the amount which the defendant's counsel at the trial agreed would have been the amount which the plaintiff would have earned between December 1976 and, until the age of 65 if he had worked during that period.

Clearly, therefore, the sum of \$136,000 was, as Mr. Winneke contended, only a guide to the amount which the jury might have awarded the plaintiff under that heading.

It required some reduction because the plaintiff swore that, in any event, he intended to retire at the age of 62 or 63. The jury therefore were entitled, taking the evidence at its best for the plaintiff, to have compensated him for loss of earnings until the age of 63. That would have necessitated a reduction of the total amount of \$136,000 by such amount as the jury considered appropriate.

Now, in addition to that, it is said that the plaintiff was in fact debilitated during that period. But, in my view, the only reduction that the jury was required to make was the one to which I have referred. A discount for that lesser period would have reduced the sum to something like \$100,000 or \$90,000.

Mr. Winneke, however, in the same connection, pointed out that the plaintiff did not retire because of indifferent health; the plaintiff, he indicated, swore that at the time when he retired, and for a few years thereafter, he was in very good health. On the other hand, the jury was entitled to accept the evidence of the plaintiff's wife, who indicated that the plaintiff was not well in that period. She said that he became distressed by shortness of breath, when coming up a hill and approaching their home.

Furthermore, the plaintiff also swore at the trial, as I have already indicated, that when he did retire he was not feeling well. He lacked enthusiasm and felt depressed. In short, he suffered a form of malaise. The disease being an insidious one it was reasonable for the jury to infer from the medical evidence that it was its onset which caused the plaintiff to retire when he did at the age of 56 and that therefore, he retired at an age earlier than when he otherwise might have done.

In my view, it would have been permissible for the jury to have awarded the plaintiff, under the head of damages for reduced earning capacity the sum of \$100,000.

As to the sum of \$57,000, which was put by the plaintiff's counsel to the jury as the amount to be awarded for future medical expenses, Mr. Winneke again contended that this sum ought to have been used by the jury merely as a guide. For my part, I would accept that that is the proper way in which the jury ought to have approached the sum. It was the amount which Dr. Minty had said the plaintiff might incur in the event of him requiring what might be described as the most intensive form of treatment up till the time of his death.

Mr. Winneke has pointed out that there is a less intensive form of treatment which the plaintiff might choose to have, and that treatment would not expose the plaintiff to expenses of \$57,000.

This, however, in my view, was a question for the jury. It was for the jury from its view of the evidence to decide for itself what sort of treatment the plaintiff is likely to choose to have. In doing so, they might have concluded from the manner in which he has conducted himself over the past that there is the probability, and at least a possibility, that the plaintiff will make a fight for it, as he has already done. He might continue to grasp what threads there are of life as long as he possibly can. In that event, the amount which the jury could have awarded the plaintiff would have been \$57,000 or thereabouts. However, the amount of \$57,000 is not the sum which the plaintiff will inevitably incur and therefore some reduction would have been appropriate or proper to have been made from it.

In this connection it is also proper to take into account that, even if the contention is correct and the plaintiff would choose to have a less intensive form of treatment, it would, on the evidence of Dr. Minty, have necessitated some period of hospitalisation, and that is at least a certainty.

I would take the view that the jury could have properly awarded the plaintiff the sum of \$57,000 for future medical expenses. Of course, that makes a total sum of \$153,000 which is an amount which, in my view, it would have been permissible for the jury to have awarded the plaintiff for what I might term economic loss past and future.

I now turn to the head of damages for pain and suffering and loss of amenity.

After a careful analysis of the evidence Mr. Winneke, when invited to do so, offered the view that \$50,000 was the maximum amount which the jury acting in accordance with the trial Judge's directions might have awarded the plaintiff.

In assessing damages for pain and suffering the jury ought to have taken into account that there was a period of some three years from the date of the plaintiff's retirement until his illness became more manifest when he suffered discomfort, debility and malaise. Of course that period was nothing like as difficult as what he experienced in the years thereafter. Between 1980 and 1985, as I have already indicated, he suffered severe and increasing pain, distress and disability. During that period he underwent a number of clinical and surgical investigations. Those experiences in themselves must have subjected him to discomfort and pain. He has undergone chemotherapy treatments; and he has been taking drug therapy almost continuously twice a day for some considerable time.

Perhaps the future condition of the plaintiff was best summarised by Dr. Simpson and by Dr. Minty. Dr. Simpson said that the plaintiff would die of progressive mesothelioma, in which case he may live two to four years but the likelihood is that he will earlier develop complications. He will certainly suffer increased shortness of breath, increased pain and increased lethargy and lassitude. Mr. Simpson said that it is possible that the disease could affect the blood vessels in his head and neck, and extend around his heart. It could cause heart failure spreading into his abdomen and thereby causing pneumonia. Dr. Simpson said that the plaintiff will require medical treatment as it progresses. He could probably be treated at

home with oxygen and painkillers, but if he develops complications he will have to go to hospital.

The description of the prognosis of the plaintiff given by Dr. Minty was in these words:

"I believe it is unlikely that he will survive beyond three years. He at present has constant pain from the involvement of the nerves in the chest wall, for which he takes regularly analgesic drugs. I believe this pain will increase and eventually he will require narcotic drugs to relieve his pain. As the disease progresses, it will progressively impair his breathing, so that he will become breathless even at rest. He may gain some benefit in the terminal stages from continuous oxygen. The use of narcotic drugs will further impede his breathing, and this will produce disturbed nights, nightmares, and some mental confusion. I have seen several patients die from malignant mesothelioma and it is a very painful and distressing death."

Dr. Minty said that, as he becomes weaker and in need of injections of narcotics, the plaintiff will almost certainly need to be admitted to hospital.

From those descriptions it is clear that the plaintiff's prospects for the future are indeed awesome. Moreover, the plaintiff is aware of his reduced and very limited life expectancy and the pain and suffering to which he will inevitably be subjected before he succumbs to the disease. With this knowledge the jury was entitled to award, in my view, by way of damages for pain and suffering, a substantial sum.

Upon comparison with awards of general damages for far less severe injuries, including those with a psychological or psychiatric basis, given by juries in these courts, \$50,000 in my view is not the maximum amount which the jury could have reasonably awarded the plaintiff for his pain and suffering, both for what he has already experienced and which he will experience in the future. It is not necessary for me now to say any more than in my view the amount of \$222,500 was not in excess of

what the jury might reasonably have awarded the plaintiff having regard to his past, present and future pain and suffering and past and future economic loss.

For those reasons, I would dismiss the appeal.

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MARKS, J.: I agree that the appeal be dismissed and substantially for the reasons given by the learned presiding judge.

For my part, I prefer not to be taken as expressing a view as to the upper limit of the amounts the jury were entitled to assign to the various heads of damages. I am satisfied that the jury could have, in the proper exercise of their function, reached the verdict they did. They could have done so by a number of different combinations of figures which they appropriately took into account the various heads of damages they were obliged to consider. That combination depended on the view of the evidence which they took, and which was relevant to the various heads. In particular, I would not like to be taken as assuming that \$100,000 was necessarily the upper limit of the compensation the jury could reasonably have awarded for loss of earning capacity. The reason is that under that head they were not bound to consider only the period between the date of retirement and the date of intended retirement. The jury was entitled to consider what sum they could reasonably award the plaintiff as compensation for loss of earning capacity by reference to his permanent loss of capacity to use his income earning talents.

I agree with the view expressed by the learned presiding judge as to the amount which the jury could reasonably consider for loss of enjoyment of life and loss of amenities and otherwise under the head of general damages.

I have nothing further to add.

GRAY, J.: I agree that the jury's assessment of damages has not been shown to be excessive, and that the appeal should be dismissed.

KAYE, J.: The order of the court is the appeal be dismissed with costs.

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CERTIFICATE

I certify that this and the 12 preceding pages are a true copy of the reasons for judgment of the Full Court (Kaye, Marks and Gray, JJ.) of the Supreme Court of Victoria delivered on 26th November, 1985.

DATED this 5th day of December 1985.

D. McEwan.
Associate