HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, CALLINAN AND HEYDON JJ

ROBYN VANESSA LAYBUTT APPELLANT

AND

GLOVER GIBBS PTY LIMITED
T/AS BALFOURS NSW PTY LIMITED RESPONDENT

Laybutt v Glover Gibbs Pty Ltd t/as Balfours NSW Pty Ltd
[2005] HCA 56
29 September 2005
S47/2005

ORDER

1. *Appeal allowed.*
2. *Set aside the judgment and orders of the Court of Appeal of the Supreme Court of New South Wales dated 3 March 2004 and in place thereof order that the appeal to that Court be dismissed.*
3. *The respondents to pay the costs of the appeal to the Court of Appeal of the Supreme Court of New South Wales and of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

M J Neil QC with R I Goodridge for the appellant (instructed by Firths –The Compensation Lawyers)

B W Walker SC with R C Beasley for the respondent (instructed by Leigh Virtue & Associates)

CATCHWORDS

Laybutt v Glover Gibbs Pty Limited t/as Balfours NSW Pty Limited

Negligence – Duty of care – Employer and employee – Breach – Where employee requests instructions – Employer's duty to provide instructions.

Practice and procedure – Civil trial by jury – Whether trial judge should have entered a directed verdict – Sufficiency of evidence to sustain verdict – Application of common knowledge and experience by jury to question of negligence – Circumstances justifying reversal of a jury's verdict by appellate court.

1 GLEESON CJ. I agree that the appeal should be allowed for the reasons given by Gummow, Callinan and Heydon JJ, and that consequential orders should be made as they propose.

2 A question for judgment at the trial was the reasonableness of the response, by the representative of her employer, to the appellant's requests for information as to how to carry out a particular procedure. The response was, in effect, that she should work it out for herself. She suffered an injury in the process of trying. There might be some workplace procedures for which that could be an adequate response. There are others for which it clearly would not. In the present case, the jury heard evidence of the nature of the task, which involved assembling an item of equipment. Having been told what the task was, the jury were well able to decide whether it was reasonable of an employer to leave an employee to work out for herself how to perform it. That is what juries are for.

3 McHUGH J. The only issue in this appeal is whether there was evidence upon which a jury could reasonably find that the appellant suffered injury as the result of the respondent's negligence.

4 The respondent had employed the appellant as a pastry cook for about six weeks when her "team leader" told her to reassemble a machine used to make doughnuts. Some parts of the machine had just been washed. The machine was several feet high and had five cylinders in a line. Inside each of these cylinders was a smaller cylinder. Behind the top of each inner cylinder were two lugs. When fitted into grooves on the outer cylinder, the lugs joined the inner and outer cylinders together. The outer cylinder had sharp edges and, as a result of washing, was slippery.

5 The appellant told the team leader that she did not know how to reassemble the machine. The team leader replied: "Just give it a go." The appellant received no further help from the team leader or any other employee of the respondent. She received no oral instructions, no instruction manual and no demonstration as to how to perform the task. The production manager of the respondent testified that the response of the team leader was not a "proper or appropriate induction[1] – proper appropriate task specific training".

6 After the team leader's direction, the appellant commenced to reassemble the machine. In the course of doing so, she suffered injury to her finger and arm when an outer cylinder slipped and fell on her right hand.

7 In the District Court of New South Wales, a jury found that the appellant had been injured as the result of the negligence of the respondent. The jury assessed her damages at $471,201 plus costs. However, the Court of Appeal of the Supreme Court of New South Wales set aside the appellant's verdict and entered a verdict for the respondent. The Court of Appeal held that there was no evidence of negligence upon which a jury could reasonably find for the appellant. The Court of Appeal held that there was no evidence that the respondent should have given the appellant instructions or what they should have been or whether, if given, the appellant would have followed them and, if she had followed them, whether they would have avoided her injury.

8 In my opinion, it was open for the jury, acting reasonably, to find that the appellant sustained injury as a result of the respondent's negligence. With great respect to the learned judges of the Court of Appeal, the jury's verdict for the appellant was hardly surprising. Indeed, special leave to appeal was granted – although the case turned on its own facts – because it was strongly arguable that

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1 In the context, "induction" may mean "instruction".

the setting aside of the appellant's verdict constituted a miscarriage of justice in the particular circumstances of the case.

9 A reasonable jury could find that the size of the machine, the sharp edges and slipperiness of the outer cylinders, the appellant's inexperience, and her request for guidance convincingly established that the injury she suffered was reasonably foreseeable. Nearly 50 years ago, this Court pointed out that, in a negligence action, a jury does not have to determine whether the defendant should reasonably have foreseen "the precise manner" in which an injury occurred. The jury "ha[s] to consider only whether it was reasonable to foresee in a general way the kind of thing that occurred"[2].

10 However, as I pointed out in *Swain v Waverley Council*[3], to succeed in a negligence action, the plaintiff must do more than prove a reasonably foreseeable risk of injury. To succeed, the plaintiff must also show that the exercise of reasonable care by the defendant would have avoided, or reduced the extent of, the injury. In cases concerned with operations, processes, systems and machinery that are complex, the jury will seldom be able to find for the plaintiff unless the plaintiff tenders evidence as to the precautions that were reasonably available to the defendant and which would have avoided the plaintiff's injury. As Barwick CJ pointed out in *Maloney v Commissioner for Railways (NSW)*[4], evidence of the practicability of a proposed alternative course or safeguard "is essential except to the extent that [it is] within the common knowledge of the ordinary man."

11 The slipperiness and sharp edges of the outer cylinder made it a potential source of danger unless the assembler knew of the danger and acted carefully in assembling the machine. But, despite the danger, reassembling the machine was not a complex process or operation. It could be done safely if the assembler, being conscious of the risk, held the cylinders firmly enough to prevent them slipping. So much was implicitly conceded by the respondent's cross-examination of the appellant. It was put to her that "it was just simply a situation where you just didn't hold [the cylinder] tight enough"? If the team leader had pointed out the danger and told her to hold the cylinders firmly or given her a demonstration as to the correct way of doing it, it seems unlikely that her injury would have occurred. At all events, a reasonable jury, using its experience and knowledge of the world, could find that a reasonable employer

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2 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 222.

3 (2005) 79 ALJR 565; 213 ALR 249.

4 (1978) 52 ALJR 292 at 293; 18 ALR 147 at 148.

would have given such instructions and, if they had been given, the injury would not have occurred.

12 The production manager had no doubt that the team leader's response was plainly inadequate. The jury could reasonably interpret his evidence as implying that instructions must be given to one of the respondent's workers who tells a supervisor that she does not know how to assemble this particular machine. His evidence denies any suggestion that the task was so simple that even an inexperienced worker needed no instruction. Hence the present case cannot be equated with *Electric Power Transmission Pty Ltd v Cuiuli*[5], where this Court held that an employer was not negligent in failing to instruct the caretaker of a construction camp how to use a tomahawk to cut up pieces of light bush timber for use in a fuel stove.

13 The failure of the appellant to tender evidence of the precautions that, if taken, would probably have avoided her injury was a surprising and, by any standard, a risky course of forensic conduct. But despite that failure, it was open to the jury, exercising its commonsense and knowledge of the world, to find that the respondent was guilty of negligence in failing to give the appellant instructions or a demonstration concerning the reassembly of the machine.

Order

14 The appeal should be allowed. The judgment and orders of the Court of Appeal should be set aside. In their place should be an order that the appeal to that Court be dismissed. The respondent should pay the appellant's costs in this Court and in the Court of Appeal.

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5 (1961) 104 CLR 177.

GUMMOW, CALLINAN AND HEYDON JJ.

Issue

15 The question that this appeal raises is whether, in circumstances in which an employee vainly sought instructions from her employer how to perform an apparently simple task, there was sufficient evidence to sustain a verdict by a jury of negligence against the employer.

The facts

16 The appellant is a pastry cook. She was 30 years of age in September 1999 when she was employed by the respondent at its factory in Sydney. She had been employed there for about six weeks. On 12 September 1999 she was required, for the first time, to reassemble a machine used to make doughnuts after some parts of it had been washed. She had seen other employees doing this but there had been no occasion for her to note how the work should be done. She told the "team leader" who asked her to undertake the reassembly that she did not know how it was to be done. His response was: "Just give it a go". She was provided with neither supervision, gloves, a manufacturer's manual of instructions for the reassembly of the machine, nor, as might perhaps have sufficed, a practical demonstration of a safe way of carrying out the work.

17 It is unnecessary to describe the machine in any greater detail than this. Part of it consisted of a line of five cylinders. There was a smaller cylinder inside each of these. There was a "U" piece behind the top of each inner piece which had two bolts or lugs protruding from it. These lugs had to be manoeuvred into grooves on the outer cylinder in order to join the two cylinders together. The larger, outer one had sharp edges. Because they had recently been washed the cylinders were slippery.

18 As the appellant was attempting to set up one of the sets of two cylinders, the large, outer one slipped and fell upon the small finger of her right hand. It is at least possible that she had already safely set-up one or more of the sets on the machine safely immediately before this happened. She suffered injury affecting not only her finger but also her arm. On subsequent occasions she was able to reassemble the machine without mishap.

The trial

19 The appellant sued the respondent in negligence in the District Court of New South Wales. She alleged that the respondent was negligent, in failing: to advise, adopt, implement and enforce a safe system of work; to provide adequate instructions and training; properly to supervise the appellant in the performance

of her work; properly to clean and dry the parts to be reassembled; to heed the appellant's warnings that she was unskilled in the task required of her; to provide manufacturer's instructions for the safe cleaning and reassembly of the machine; and, to provide protective gloves so as to reduce the risk of injury.

20 It was implicit in the respondent's pleading of contributory negligence that instructions, and possibly the provision of gloves were called for:

"The [appellant] was negligent in that she:

(i) failed to carry out her duties in accordance with instructions;

(ii) failed to carry out her duties in a safe manner;

(iii) failed to have any or any proper regard for her own safety;

(iv) failed to wear gloves in accordance with instructions."

21 The action came on for hearing before Phegan DCJ and a jury. The appellant's account of the events leading up to the suffering of injury was substantially unchallenged. Indeed it is not entirely clear what the respondent's defence, other than to deny any need for instructions, was, particularly as it chose, or was unable to call little relevant evidence on this issue.

22 One witness whom it did call however was its production manager who gave these answers in cross-examination:

"Q. On no occasion prior to this accident did you personally direct the [appellant] in using any sort of gloves one way or the other, when assembling or disassembling machinery, did you?

A. No.

Q. Mrs Brown, I'm sorry to interrupt again, but I just want to be sure I understand, you did instruct Mrs Laybutt to wear gloves after this happened?

A. Yes, I spoke, yes.

Q. But you have now explained that the main purpose of the gloves that you had available were for personal hygiene; is that right?

A. Yes.

Q. I don't quite understand the connection between having to wear gloves after the accident and the gloves having their main purpose as hygiene, what was the connection?

A. For probably to have that little bit of protection.

Q. If you assume that when Mrs Laybutt said to the supervisor 'I don't know how to assemble the doughnut machine', the response was words 'just try and work it out for yourself', you wouldn't consider that as proper or appropriate induction – proper appropriate task specific training, would you?

A. Definitely not."

23 At its highest the respondent's case at the trial on contributory negligence seems to have been that the appellant was maladroit in carrying out the task; as it was put in cross-examination, that "... it was just simply a situation where you just didn't hold [the cylinder] tight enough ...?"

The application for a directed verdict

24 The respondent applied for a verdict by direction at the close of the evidence. The trial judge summarized the respondent's submission on that application as follows:

> "The basis of this application is that, as [Counsel for the respondent] submitted, there is no evidence forthcoming from either the [appellant] herself or from any other independent source as to what the instructions should have been in terms of what the [appellant] should have been warned against. That, along with other matters, [Counsel for the respondent] submitted, was a serious and indeed fatal flaw in the [appellant's] case.
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> Further, it was submitted, equally fatal was the absence of any evidence as to whether the instructions, whatever they may have been, would have made any difference. In this regard [Counsel for the respondent] referred in particular to the evidence from the [appellant] herself that she was able to return to work shortly after the injury, and continue to carry out this particular job, including the reassembly of the doughnut machine, without any further adverse incident. In those circumstances it was submitted there was proof from the [appellant's] own actions that no instructions of any particular kind were necessary in order to establish a safe system of work in the required sense."

25 His Honour correctly directed himself as to the way in which he was bound to deal with the application:

> "There is no doubt whatsoever that the [appellant's] case would have been greatly assisted and indeed strengthened by evidence of the sort to which [Counsel for the respondent] referred, for example, evidence that such incidents had occurred on earlier occasions and the [respondent] had done nothing to appropriately respond to them; evidence that others who assembled the machine, were aware of the dangers of doing it in the manner in which the [appellant] appears to have done it, and I underline the word 'appears', because that is another aspect of the [appellant's] evidence which is far from clear. Evidence of that kind would, without any doubt, have added greatly to the [appellant's] case and indeed I have no doubt if there had been evidence of that kind, this application would not have been made."

26 In rejecting the application his Honour said this:

> "What the jury are entitled also to infer and this, in my view, does not take them into the realm of conjecture in any sense of that term, is that if the [appellant's] evidence is accepted, and I am entitled to assume that for the purpose of this application, certainly insofar as it does not conflict with any evidence from the [respondent], that this machinery had been in place for a number of years, that it had been used extensively by other employees, and indeed Mr Spackman [the "team leader"] in particular was very familiar with the way in which this machinery worked and with its process of assembly and disassembly.
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> In other words, the [respondent] certainly was in a position to know at least as much about this equipment as the jury know. And they, therefore, have at their disposal a level of knowledge which enables them to make a judgment about what the defendant might have properly done by way of instructions given the sharp edge of the bottom of the outer cylinder and the fact that the assembly did involve the use of both hands at the same time, one holding one part, one holding the other. There is a basis on which it might reasonably be inferred that a person, either inexperienced or inadequately instructed in the process of assembly, might lose hold of one or other of the parts and that the consequence of that was a foreseeable risk that the hand of the person attempting to assemble the equipment, might be caught in the very place it was caught."

27 The questions left to, and the answers relevantly given by, the jury were as follows:

> "1. In respect of liability how do you find, for the [appellant] or for the [respondent]? For the [appellant].
>
> 2. Did the [appellant] cause or contribute to her injury through her failure to take reasonable care for her own safety? No."

28 Subject to some statutory adjustments his Honour pronounced judgment for the appellant in accordance with the jury's verdict and assessment of damages, in the sum of $471,201.00 plus costs.

The appeal to the Court of Appeal

29 The respondent successfully appealed to the Court of Appeal of New South Wales (Meagher and Ipp JJA and Palmer J). The principal judgment was given by Meagher JA with whom the other members of the Court substantially agreed. His Honour said that the central difficulty for the appellant was her inability to prove the instructions that she claimed should have been given. Meagher JA said this[6]:

> "In other words, at the end of the day, his Honour left to the jury to decide:
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> *(a) whether the [respondent] should have given the [appellant] instructions,*
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> *(b) if so, what those instructions should have been,*
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> *(c) whether those instructions, if given, have been followed, and*
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> *(d) whether those instructions, if given and followed, would have averted an unexplained event.*
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> Not one word of evidence was given on any of these questions.
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> No doubt, there are cases in which it is clear that some industrial malfunction has occurred, although the [appellant] cannot state precisely what it was. But the law has not, in any opinion, yet descended to the

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6 *Glover Gibbs Pty Ltd t/as Balfours NSW Pty Ltd v Laybutt* [2004] NSWCA 45 at [10]-[12].

state where a judge may legitimately leave it to the jury to guess what the [appellant's] case should be.

In my view the application for a verdict by direction should have been given." (Emphasis in original)

The appeal to this Court

30 Some observations of Gleeson CJ in the most recent civil jury case in this Court, *Swain v Waverley Municipal Council*[7] are relevant to this appeal:

"The resolution of disputed issues of fact, including issues as to whether a defendant's conduct conforms to a requirement of reasonable care, by the verdict of a jury involves committing a decision to the collective and inscrutable judgment of a group of citizens, chosen randomly. The alternative is to commit the decision to a professional judge, who is obliged to give reasons for the decision. In one process the acceptability of the decision is based on the assumed collective wisdom of a number of representatives of the community, properly instructed as to their duties, deciding the facts, on the evidence, as a group. In the other process, the acceptability of the decision is based on the assumed professional knowledge and experience of the judge, and the cogency of the reasons given. In the administration of criminal justice in Australia, the former process is normal, at least in the case of serious offences. In the administration of civil justice, in New South Wales and some other jurisdictions, in recent years there has been a strong trend towards the latter process. Originally, there were no procedures for appealing against the verdict of a jury, reflecting what Barwick CJ described as 'the basic inclination of the law towards early finality in litigation'[8]. He referred, in another case, to the move towards trial by judge alone in civil cases as an abandonment of 'the singular advantage of the complete finality of the verdict of a properly instructed jury'[9]. In many areas, the law seeks to strike a balance between the interest of finality and the interest of exposing and correcting error. In a rights-conscious and litigious society, in which people are apt to demand reasons for any decision by which their rights are affected, the trend away from jury trial may be consistent with

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7 (2005) 79 ALJR 565 at 567 [7]; 213 ALR 249 at 251.

8 *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 8.

9 *Edwards v Noble* (1971) 125 CLR 296 at 302.

> public sentiment. Even so, decision-making by the collective verdict of a group of citizens, rather than by the reasoned judgment of a professional judge, is a time-honoured and important part of our justice system. It also has the important collateral advantages of involving the public in the administration of justice, and of keeping the law in touch with community standards."

31 Nothing that his Honour said would justify a verdict unsupported by relevant evidence, or a perverse one, but his words do serve to emphasize that the system of trial by jury contemplates the use by its members of their knowledge and experience, including their knowledge of the workplace and what might reasonably be expected of employers and employees in it.

32 The appellant's submissions in this Court may be shortly stated: that this was a case in which, as the trial judge held, there was sufficient evidence to go to the jury of a failure to give appropriate instructions.

33 We would accept that submission. The evidence in question included that the appellant, a novice in the assembly of the machine, having asked how to do the work, was given neither instructions nor a demonstration of how it should be done but was simply told to "give it a go". The evidence also consisted of the production supervisor's emphatic opinion that the team leader's instruction to "give it a go" was inappropriate. Having regard to the slipperiness and sharp edges of the cylinders and the appellant's ignorance of how to do the work, the jury were entitled to find on that evidence that instructions should, in the circumstances have been given. It is unnecessary for this Court to identify any particular instructions that should have been given but it is likely that a demonstration, or an instruction to ensure that each cylinder was tightly gripped as it was moved into position would significantly have reduced the risk that was realized.

34 Meagher JA in the Court of Appeal criticized an absence of evidence on the issue whether the respondent should have given the appellant instructions. The evidence of a vain request for them and the appellant's unfamiliarity with the task meet that criticism. They also meet the criticism that there was no evidence that instructions would, if given, have been followed. That a person expressly sought instructions is indicative of a real disposition to follow them if they were given. Such a request will often be more persuasive than an assertion, after the event, that the plaintiff would or would not have taken a particular course if he or she had known a certain fact or facts[10]. Furthermore, the event, the cutting of the

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10 See *Rosenberg v Percival* (2001) 205 CLR 434 at 501-502 [214].

appellant's finger, was not an unexplained event. We are unable to accept that, armed with the instructions that she sought, the risk of injury to the appellant would not have been reduced.

35 It may have been better for the appellant, but it was not necessary in this case, to formulate a precise form of instructions. As the trial judge said, it was the respondent who possessed the knowledge necessary for the safe assembly of the machine. Based on that it was for it to devise an appropriate form of instructions for an inexperienced employee explicitly asking for them. It could not satisfy that obligation by directing the appellant simply to "give it a go". These are the sorts of matters that are within the common knowledge and experience of jurors[11]. Jurors may not speculate. They may act only on evidence. But as members of the public, bringing with them a special awareness of such matters as the exigencies and demands of the workplace, their verdict may on occasions, be reached and justified on less evidence than might persuade a judge to reach the same conclusion.

36 The respondent argued that the fact that the appellant had probably set up one or more of the cylinders immediately before she was injured, and had reassembled the machine on subsequent occasions without mishap proved that instructions were unnecessary. That was an argument that could be, and no doubt was forcefully put to the jury, but it is no more than an argument. That this may have happened did not necessarily mean that instructions could be dispensed with, particularly when, as here, the appellant had actually sought them. The repetition of the particular task, of putting two cylinders together, which the appellant may have done once or more, immediately before she was injured, is a factor capable of weighing as much in her favour as against it. The jury is likely to have treated it as the former. The subsequent safe performance of the work is of even less significance. Having injured herself once in doing the work, the appellant had had an opportunity to identify fully its complexities and risks and to be wary of them. It could not be suggested that she could only succeed if subsequently she suffered another similar injury in carrying out the work.

37 It is true, as the respondent submits, that the onus lay upon the appellant throughout the trial. That does not mean however that the jury could not take into account in assessing the evidence upon which they were to reach their verdict, the sources from which each piece of it came and the capacity of those to adduce it, and further evidence[12]. The relevant knowledge, of the machine, and

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11 See, for example, *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 and *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201.

12 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36].

the safe way to reassemble it before the appellant was injured, was entirely the knowledge of the respondent. One of its own witnesses, the production manager was critical of the response given on behalf of the respondent by the team leader to the appellant's request for instructions. Even if the case were equally balanced, or tilted in favour of the respondent until that point, that evidence, particularly in the absence of other evidence that instructions would have made no difference, or that this was a commonplace machine which anyone could reasonably assemble without instructions, taken with the appellant's evidence and the photographs of the machine and its parts, constituted a case sufficient to go to the jury.

38 Indeed, on one view of the evidence, this was not a case of an absence of instruction accompanied by an appropriate warning by the "team leader", but rather a case of an instruction to the appellant to learn the new task by trial and error. Viewed in that way, the instruction to "give it a go" was negligent.

39 This case can be compared with one in which a worker has complained of an unsafe system of work and suffered injury as a result of it. Such a complaint may be a decisive matter in a negligence case, whether heard by a judge alone or, as in this case, a judge and jury[13]. The denial of instructions specifically sought may constitute no less a failure on the part of an employer whose duty it is to provide a safe system of work than a failure to act on a complaint about a defective system by an employee.

40 We would allow the appeal. The orders of the Court should be:

1. Appeal allowed.

2. Set aside the judgment and orders of the Court of Appeal of New South Wales dated 3 March 2004 and in place thereof order that the appeal to that Court be dismissed.

3. The respondent to pay the costs of the appeal to the Court of Appeal of New South Wales and the appeal to this Court.

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13 See the discussion of the relevance of complaints by employees in negligence claims in Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979) at 31.