SUPREME COURT OF QUEENSLAND

CITATION:	*Schultz v Allen & Ors* [2003] QCA 273
PARTIES:	**MARGARET ROSE SCHULTZ** (plaintiff/respondent) **v** **WILLIAM STEPHEN ALLEN** (defendant/appellant) **ALFRED KENNAUGH** (defendant/appellant) **ZUILL WREN (NOW PRENTIS)** (defendant/appellant) **OWEN PRENTIS** (defendant/appellant) **GORDON KENNETH MALCOLM** (defendant/appellant) **JOHN HARDY** (defendant/appellant) **BERNARD KIOTKA** (defendant/appellant) **ROBERT BOLAND** (defendant/appellant) **DENNIS MUNT** (defendant/appellant) **RETURNED SERVICE LEAGUE OF AUSTRALIA (QUEENSLAND BRANCH) ATHERTON SUB-BRANCH** (defendant/appellant)
FILE NO/S:	Appeal No 2124 of 2002 SC No 84 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability and Quantum
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	4 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2003
JUDGES:	McMurdo P, Davies JA and Cullinane J

Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **Allow the appeal, set aside the judgment sum of $1,087,856.85 and substitute the judgment sum of $1,041,731.85. The appellants pay 50 per cent of the respondent's costs of the appeal to be assessed.**

CATCHWORDS: TORTS – NEGLIGENCE – DUTY OF CARE - where respondent slipped and injured her knee and back – where learned primary judge found that the appellants breached their duty to the respondent – whether the defence of *violenti non-fit injuria* defeated the respondent's claim – whether respondent was guilty of contributory negligence

LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY – where appellants contend injury occurred prior to the date alleged by respondent – whether learned primary judge could be satisfied on the balance of probabilities that the incident occurred – whether personal injury claim was statute-barred

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – where learned trial judge awarded respondent damages – whether assessment of damages was flawed

Elford v FAI General Insurance Company Limited [1994] 1 QdR 258, applied
Malec v J C Hutton P/L (1990) 169 CLR 638, considered
Schultz v William Allen & Ors [2003] QSC 058; Appeal No 84 of 1996, 12 February 2003, applied
Van Gervan v Fenton (1992) 175 CLR 327, applied

Limitations of Action Act 1994 (Qld)

COUNSEL: J R Baulch SC, with G J Houston, for the plaintiff/respondent
S C Williams QC, with C Reid, for the defendants/appellants

SOLICITORS: Lilley Grose & Long (Atherton) for the plaintiff/respondent
Pinder Gandini (Cairns) for the defendants/appellants

[1] **McMURDO P:** Ms Schultz, the respondent, injured her knee and back in the kitchen-pantry area of the RSL, Atherton sub-branch, when she was making snacks to be served in the bar; she was President of the sub-branch's Women's Auxiliary. The appellants were the members of the sub-branch's executive committee at the relevant time. Thirteen operations to her back followed the initial injury and she has been left seriously and permanently incapacitated. She is addicted to pain killers and spends most of her time either in bed or in a wheelchair, with her spine fixed almost at right angles to her hips.

[2] The learned primary judge found that the respondent slipped on 25 May 1991 and that the appellants breached their duty to her in failing to provide safe premises and safe plant; in failing to provide non-slip matting and in failing to warn her of the

dangers and that the appellants' negligence caused her fall and injury.[1] His Honour awarded damages of $1,087,856.85.

[3] The appellants contend that the learned primary judge could not be satisfied on the balance of probabilities that the incident occurred; that if the incident did occur it occurred prior to 16 May 1991 and a *Limitation of Actions Act* 1994 (Qld) defence defeated the claim; that the appellants did not breach their duty to the respondent; in any event the defence of *volenti non-fit injuria* defeated the respondent's claim or, alternatively, the respondent was guilty of contributory negligence. The appellants also contend that the assessment of damages was flawed.

Was the action statute-barred?

[4] The respondent commenced this action on 16 May 1994. The appellants contend that the fall resulting in her injuries occurred before 16 May 1991 and her action was statute-barred. The respondent's evidence was that she thought the accident occurred on 25 May 1991, within the limitation period.

[5] His Honour did not accept the respondent as a witness of truth because he found her dishonest about her economic earnings claims; his Honour sought independent confirmatory evidence on issues about which the success of her claim depended. His Honour determined that the respondent was injured on a Saturday because the duties which she was undertaking in the kitchen were those ordinarily performed on a Saturday, namely preparing for the Goose Club. Accepting the evidence of Mrs Shanahan, another member of the Women's Auxiliary who regularly worked at the RSL with the respondent, and Dr Thurling, the respondent's general practitioner, his Honour determined the injury occurred on 25 May 1991 and the limitations defence was not made out.[2]

[6] The respondent gave evidence that she was unsure of the exact date of the fall causing her injury but thought it was Saturday, 25 May 1991 because there was a Goose Club at the premises and these always took place on Saturday morning. At the time of the fall, she was working with Mrs Shanahan. She thought she saw Dr Thurling to treat her resulting swollen knee; she visited him on 4 June for a narcotic injection to ease the pain. Shortly afterwards, Dr Thurling referred her to orthopaedic surgeon, Dr W L Thomas. She agreed she had fallen at the RSL on another occasion.

[7] Dr Thurling noted in his report of 9 December 1994 that he saw the respondent after she had fallen at work; she complained of severe low back pain and a knee injury. In cross-examination he said that he did not think she consulted him until 4 June 1991. His notes indicate that he saw her on 4 June 1991 and that she reported having a fall in the preceding week; her primary complaint was about her knee but her back was troubling her by 12 June; at some point before June 1993 he recorded that the date of the accident was 25 May 1991 on information supplied by the respondent. Dr Thurling's notes do not indicate the premises at which the fall occurred.

[8] Dr Thurling's evidence strongly supported the respondent's claim that the fall occurred on 25 May 1991. It is significant that before June 1993, by which time the respondent had reported the date of the accident to Dr Thurling as 25 May 1991,

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1 Reasons, [33].

2 Reasons, [14] and [15].

the limitation period for any resulting cause of action was not a matter of concern and she had no reason to mislead as to the date of the fall.

[9] Mrs Shanahan gave evidence that she was present when the respondent fell in the kitchen at the RSL in late May 1991 and injured her back. She was certain the fall was in 1991 rather than 1990 because she had found her 1990 diary, which recorded that the respondent and she had undertaken physically strenuous activities such as major grocery shopping expeditions; the respondent was incapable of this after her injury. Mrs Shanahan also recalled that the respondent's fall was a short time before the crystal party, recorded in the appellants' diary of events as occurring on 4 June 1991 and shortly before Mrs Shanahan's trip to England in mid-1991.

[10] In support of their contention, the appellants emphasise the evidence of Mrs Kennaugh that the respondent complained of a fall in the kitchen before Mrs Kennaugh's resignation from the RSL Women's Auxiliary in February 1991. Despite this testimony, there was ample evidence from Dr Thurling, Mrs Shanahan and the respondent to support his Honour's conclusion that the accident occurred on 25 May 1991, within the limitation period. The contention that the action was statute-barred is without substance.

Liability

[11] The appellants contend in their written submissions, which were not advanced further in oral argument, that the primary judge was not entitled to conclude the respondent's fall resulted in severe knee and low back symptoms, nor that the fall occurred on wet linoleum.

[12] As to the latter point, Mrs Shanahan, whose evidence the judge seems to have accepted, was present at the time of the fall and supported the respondent's evidence as to the circumstances of the fall; there was ample evidence from many witnesses of frequent slips on the wet RSL kitchen-pantry floor. As to the former contention, the respondent's evidence to this effect was also supported by that of her husband and, more importantly, the evidence of Dr Thurling. These findings were open on the evidence and neither contention is substantiated.

Volenti Non-Fit Injuria

[13] The appellants contend in their written submissions that the respondent knew the floor was often wet and slippery; her participation in the Club kitchen was voluntary; she fully appreciated the risks inherent in her work there and repeatedly complained of them; in those circumstances a slip and fall was inevitable and the appellants should not be held liable. Although this contention was not abandoned, the appellants chose not to advance it in their oral submissions.

[14] The learned primary judge understandably concluded that, in continuing to work for the appellants on a voluntary basis when she knew the floor was often wet and had slipped on it before, the respondent was not fully comprehending the nature and extent of and accepting the whole risk involved in working in such conditions. His Honour observed that when the kitchen-pantry floor was obviously wet, the volunteer workers would mop the floor and they made regular complaints to those responsible about the moisture on, and safety of, the floor covering in the kitchen-pantry; the appellants did not remedy this dangerous situation.[3] On those facts,

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[3] Reasons, [35].

which were open on the evidence, the learned primary judge was plainly right in concluding that the defence of voluntary assumption of risk was not made out.

Contributory negligence

[15] The appellants also claimed in their written submissions that the respondent was contributorily negligent in her choice of shoes, her method of defrosting refrigerators, in failing to mop up the water adequately and in failing to walk carefully in an area which might be wet. Once more, these contentions were not advanced in oral submissions.

[16] His Honour accepted the report of Mr Gareth Shepherd, a chartered professional engineer working with Intersafe Group Pty Ltd.[4] Mr Shepherd found that the floor at the time of his inspection, which was certainly no safer than the floor at the time of the accident, would fail the minimum Australian standard in wet conditions; risks of falls are increased during manual exertion and where there is a loss of stability such as when carrying loads, loss of vision underfoot and the elimination of the use of arms to reduce body sway forces (such as when carrying trays); changes in friction levels (such as moving from a dry to a wet floor) can significantly increase the risk of falling. In his opinion, these risks could have easily been overcome by identifying and removing the hazards; a slip resistant material could have been used in the kitchen-pantry floor area; efforts should have been made to prevent the floor from becoming wet; non-slip mats could have easily been used in kitchen areas; and specialised non-slip footwear could have been provided. A slip and fall was a highly predictable outcome of the conditions described by the respondent.

[17] The learned primary judge concluded that in circumstances where the respondent was focussed on carrying out her tasks in an unsafe workplace, she was not guilty of contributory negligence.[5]

[18] His Honour's findings of an unsafe workplace, about which the respondent and others had complained to those in a position to change it, were open on the evidence. On those facts, his Honour was entitled to conclude that there was no contributory negligence on the part of the respondent. This contention also fails.

(a) Economic loss

[19] The appellants contend that the primary judge's allowance of $20,000 for future economic loss is unsupportable because there was no real possibility on the evidence that, but for the accident, the respondent would ever again have been in the paid workforce: *Malec v Hutton*.[6]

[20] The respondent had not worked for remuneration for at least three years and was not in robust health before the accident. She had, however, worked in semi-skilled jobs such as shop assistant, student nurse, sales representative, bar attendant, kitchen hand and car dealer. His Honour found that her voluntary work at the RSL Club consumed her; but for the accident she was likely to continue in that work and not return to the paid workforce; she was the primary carer for her husband who had a significant disability for which he received a service pension and which also entitled her to a service pension.[7]

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4 Reasons, [36].
5 Ibid.
6 (1990) 169 CLR 638, 643.
7 Reasons, [67].

[21] These considerations certainly reduced the likelihood of her obtaining paid work. On the other hand, she was only 40 years old when injured; she worked hard in her voluntary work with the RSL; and she had received part-time remuneration from the RSL on occasions. It remained probable that, but for her debilitating injuries, she would have performed some part-time paid work over the next 20 years. In those circumstances, his Honour's assessment of the modest sum of $20,000 for past and future economic loss, which included interest and loss of superannuation benefit, was reasonable; although a modest sum, it was not so insignificant as to be speculative within the principles explained in *Malec v Hutton*.[8]

(b) Damages for past care

[22] The appellants contend the assessment of damages for past and future care was not within a sound discretionary judgment and that no allowance should have been made for comfort and companionship.

[23] The learned primary judge found that the respondent cannot now live independently and accepted generally the evidence of occupational therapist, Mrs Coles, and of the proprietor of Home Help Service, Townsville, Mrs Glen.[9] His Honour specifically accepted Mrs Coles' evidence as to the high degree of assistance required, including therapeutic companionship. In her report of 7 February 2001, Mrs Coles assessed the respondent's needs on that date as a minimum of 7 to 14 hours per week for personal care; a minimum of 8 to 10 hours per week domestic assistance; a minimum of 1 hour per week for house, yard and garden maintenance; a minimum of 1 hour per week for accompaniment at appointments; 3 to 4 hours per week plus travel for nursing care/injections and 10½ to 14 hours per week for comfort and companionship; in total Mrs Coles' evidence was of a minimum need for gratuitous care from 30½ to 44 hours per week and, excluding the controversial 10½ to 14 hours per week for comfort and companionship, 20-30 hours per week. His Honour determined that the respondent needed 30 hours per week of care, comprising 18 hours per week personal care (including nursing and companionship); domestic assistance of 10 hours; 1 hour of gardening and 1 hour of accompaniment at appointments.[10] His Honour recognised that, at least in the early periods after the accident, she did not require such extensive care but during post-operative periods at home she required even more extensive care.[11] The rate for past care was agreed at $10 per hour. The period from the accident until delivery of judgment was about 610 weeks. His Honour assessed damages for past gratuitous care as 500 weeks at $300 per week ($150,000), together with interest at 5 per cent for ten years ($75,000).[12]

[24] The appellants contend that, on the evidence, the respondent's partner would provide companionship regardless of her injuries and, in any case, the need for therapeutic companionship is not compensible.

[25] It seems reasonable and probable that this unfortunate, largely housebound, severely incapacitated respondent would have a much greater need for positive reassurance, companionship and general "cheering up" than before the injury resulting from the appellants' wrong and that this may well be compensable within the principles

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8 Ibid.
9 Reasons, [72].
10 Reasons, [73].
11 Reasons, [74].
12 Reasons, [75].

discussed in *Van Gervan v Fenton*.[13] It is not, however, necessary to determine whether the evidence supported a claim for therapeutic companionship because of the sensible way in which his Honour dealt with this part of the claim. In accepting Mrs Coles' assessment of the respondent's current needs, his Honour absorbed any award for therapeutic companionship into the combined hours of assistance allowed under the headings "personal care" and "nursing care – injections". His Honour determined that any required comfort and companionship was and could be provided during the substantial periods (18 hours each week) spent in administering personal and nursing care; I am not persuaded his Honour made any additional allowance for therapeutic companionship. It follows that this contention fails.

[26] The appellants also contend that the award reflects the respondent's current needs and does not recognise that, for some periods in the past, she has not needed such a high level of care; damages should be calculated as follows. Thirteen hours per week at $10 per hour should be allowed for the period from the accident until 27 August 1996 (273 weeks), when she became more disabled; 50 weeks should be deducted for periods of hospitalisation (223 weeks); the total award for this period should be $28,990.00. Twenty hours per week at $10 per hour should be allowed for the period from 27 August 1996 until the end of the trial in February 2003 (336 weeks); 50 weeks should be deducted for periods of hospitalisation (286 weeks); the total award for this period should be $57,200.

[27] This submission does not take into account that Mrs Coles' assessment of current needs was made in February 2001 so that, at least from that time, a finding of $300 per week for past care was open on the evidence. That finding was also open from 1996 when the respondent's incapacity worsened. Mrs Glen's evidence supports his Honour's assessment for some periods prior to 1996. Mrs Glen assessed past gratuitous care required by the respondent from the accident until 7 February 1995 as $54,242.25 with a weekly cost of care varying from $167 to $332, calculated, however, on a higher rate than that allowed by the primary judge. At 7 February 1995, Mrs Glen assessed future care needs at $136 per week but the respondent's health deteriorated significantly in 1996. Nor does the appellants' contention take account of the periods when the respondent was at home recovering from surgery, in need of even greater assistance.

[28] In settling on the period of 500 weeks, his Honour has recognised the periods when the respondent was cared for in hospital. Nevertheless, his Honour's assessment of past gratuitous care for the earlier period appears overly generous and not fully supported by the evidence, even adopting his averaging approach to take into account the intensive post-operative care at home. Additionally, the respondent's pre-accident medical history and low pain tolerance strongly suggests that she would have needed some lesser degree of assistance during this period, even had the accident not occurred. An appropriate award for past care supported by the evidence is 223 weeks of 15 hours per week at $10 per hour ($33,450) and 286 weeks of 30 hours per week at $10 per hour ($85,800), making a total of $119,250. Interest over 10 years at 5 per cent is $59,625. It follows that the award of damages should be reduced by $46,125, a figure just significant enough when viewed against the total award to warrant this Court's intervention: *Elford v FAI General Insurance Company Limited*.[14]

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13 (1992) 175 CLR 327, 331-338.

14 [1994] 1 QdR 258, 265.

[29] As to future gratuitous care, his Honour determined that the level of care will increase as the respondent finds it more difficult to transfer to and from her wheel chair and in time she may require a live-in carer or even institutionalisation. His Honour did not accept the respondent's contention that future gratuitous care would cost $900 per week. His Honour noted that, even without the injury, the respondent was facing a future with some physical and social limitations because of the progressive degenerative changes to her back and her other debilitating conditions, but rejected the contention that the respondent would have come to her present high level of disability in time, even without the fall. His Honour determined that a reasonable allowance was 40 hours of care per week for the first 10 years, resulting in a discounted sum of $198,240; and 65 hours per week for the remaining 10 years, at the agreed rate of $12 per hour, (below the market rate), making a discounted sum of $197,340, the two amounts rounded off to $400,000.[15] The appellants claim this award was manifestly excessive on the evidence.

[30] Physician rheumatologist Dr Keary described the respondent as totally disabled with no prospect of improvement and at best her condition was stable; she requires full-time care; she is addicted to painkilling medication and has a reduced life expectancy. The orthopaedic evidence was also that her condition was at best stable. Although there does not appear to be any direct evidence that her condition will deteriorate, her disabilities are so severe that his Honour was entitled to infer that the respondent's need for care may well increase over time as she ages and finds it increasingly difficult to transfer to and from her wheel chair. If her family becomes unable or unwilling to care for her, she may need live-in, full-time help which, on the evidence, will have a greater commercial cost than her present care.

[31] The learned primary judge had to do his best to assess uncertainties. His Honour recognised the likelihood of the respondent needing some future care regardless of the accident in limiting the care to 20 years (when there is a real prospect she may live well beyond that time) and in allowing the agreed rate of $12 per hour, which is less than the current market rate. Both parties agree that, because the future care is likely to be supplied gratuitously by the respondent's partner, the three per cent discount tables, rather than the five per cent tables used by his Honour, were in fact apposite, so that this error, which is not the subject of a notice of contention, has the effect of further moderating the award for future care.

[32] The appellants have failed to demonstrate that, on the evidence, his Honour's assessment of that part of the claim was excessive. This ground of appeal fails.

[33] I would allow the appeal, set aside the judgment sum of $1,087,856.85 and substitute the judgment sum of $1,041,731.85. The appellants have had only limited success on the many grounds of appeal raised, many of which were not pursued in oral submissions. In the circumstances, the appellants should pay 50 per cent of the respondent's costs of the appeal to be assessed.

[34] **DAVIES JA:** I agree with the reasons for judgment of McMurdo P and with the orders she proposes.

[35] **CULLINANE J:** I have read the reasons of McMurdo P in this matter and agree with them and the orders she proposes.

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15 Reasons, [81].