SUPREME COURT OF QUEENSLAND

CITATION:	*Aquilina v Beenleigh Greyhound Race Club Inc & Anor* [2003] QCA 270
PARTIES:	**JOHN GEORGE AQUILINA** (plaintiff/respondent) **v** **BEENLEIGH GREYHOUND RACE CLUB INCORPORATED** (first defendant/first appellant) **BEENLEIGH SHOW SOCIETY** (second defendant/second appellant)
FILE NO/S:	Appeal No 8489 of 2002 DC No 60 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	4 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2003
JUDGES:	McPherson and Jerrard JJA and Atkinson J Separate reasons for judgment for each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACTS – where trial judge found defendants negligent – contribution by plaintiff – awarded damages for loss of earning capacity – whether findings were open on evidence at trial *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, distinguished *Hackshaw v Shaw* (1984) 155 CLR 614, applied *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, distinguished *Seiko Australia Pty Ltd v Da Rin* [2001] NSWCA 84; CA No 41033 of 1999, 10 April 2001, referred to
COUNSEL:	RJ Douglas SC for the appellants JF Curran for the respondent

SOLICITORS: McInnes Wilson for the appellants
M P Sweeney & Co for the respondent

[1] **McPHERSON JA:** I have read the reasons for judgment of Atkinson J and agree that the appeal should be dismissed with costs.

[2] **JERRARD JA:** I have had the advantage of reading the reasons for judgment of Atkinson J and her Honour's proposed orders. I agree with those and add the following comments.

[3] The respondent/plaintiff established that he slipped and fell on a wet, grassy, and sloping surface, made wet because of spray and run off water resulting from the first defendant's irrigating the track the greyhound dogs raced upon. The appellants' case at the appeal was that this wetted area was so obvious, and so obviously muddy and slippery, that the appellants owed no duty of care to the respondent to warn him of it, or protect him from it in any other way.

[4] As was conceded in argument during the appeal by senior counsel for the appellants, who was not their counsel at trial, that argument necessarily conceded that the appellants either knew or should have known themselves of that wetted area, created as a result of run off water from their activities. There was no appeal against the finding that it was the first defendant's management of the track which caused that patch outside that track to become water logged, and nor did the appellants dispute or contest in any way the fact of orders being made against both appellants.

[5] The first defendant's further amended defence pleaded that if the ground upon which the plaintiff allegedly fell was wet, then it was only so because of morning dew. This was the case advanced in cross examination to the respondent plaintiff, the first witness in his case. His evidence in chief had been that the grass upon which he slipped looked "very safe to walk on, like walking on a golf course" (AR 19); and the positive proposition was put in cross-examination to him that:

> "But that looked the same, it didn't look any different to any of the other grassed area you walked along?"
>
> Answer: "Not Really". (At AR 64).

That proposition was put in different ways in that passage of cross-examination, which cross-examination emphasised the point that nothing in the appearance of the grass upon which the plaintiff slipped appeared different from the rest of the area, or suggested a danger. The proposition put was that the ground was not as wet as the plaintiff made out and that while there might have been dew on it, it was not soaked with water (At AR 71).

[6] The respondent/plaintiff disagreed with those suggestions, and continued to assert, as he had in his evidence in chief, that having slipped he then discovered that water and mud had underlain an apparently grassy surface. Witnesses he called thereafter in his case stressed both in their evidence in chief, and when cross examined on behalf of the appellants that that particular spot within the grassed area was both wet, and also muddy and slippery.

[7] It is those witnesses whom the appellants now rely in urging this court to find that the trial judge should have found that the plaintiff, exercising reasonable care, would have been alerted to so obvious a danger as he in fact came upon. The appellants themselves called no evidence at all. The plaintiff's witnesses said both that that particular spot was "mainly mud and water" (as for example did Mr Keep at AR 108); that it was "very very slippery" (Mr Keep at AR 107); that it was "obviously" muddy (Mr Keep at AR 132), and that it was a green turfed area (Mr Keep, also at AR 132). Likewise a Mr Moawad said both that the spot had "always been muddy and slippery"; and that "it's grass, and you don't see it's mud under the grass until you actually walk on it".

[8] That was the evidence presented to the trial judge. The appellant's case presented in its final submissions to the trial judge and on appeal, namely that the area was so muddy and wet as to be obvious, was perhaps forced on it by the evidence from the plaintiff's witnesses rebutting the defendants' pleading. That pleaded case resulted in it not once being suggested to the respondent/plaintiff that he could, or ought to, have seen that the grass upon which he was about to walk was wet, probably muddy, and probably slippery. The appellant did not later seek to have him recalled to put that to him. Instead, as described, only the opposite case to what it finally argued was put.

[9] In those circumstances the learned trial judge was entitled to describe the evidence solely by the laconic conclusion that:

> "The oral evidence as to whether the patch was obvious to the eye was somewhat inconclusive".

His Honour went on to record that the plaintiff had not noticed any difference in the grass, the photographs simply showed longish grass, and he accepted the plaintiff's evidence; and also that the plaintiff was exercising reasonable care. Those findings were open.

[10] **ATKINSON J:** On Saturday, 7 August 1999, Mr Aquilina, the respondent, who is a butcher by trade and a part-time greyhound dog trainer, took his young dog, Mindy Moss, to the greyhound track occupied by the appellants. He proposed to trial his dog over 340 metres. On the way to the track he picked up his old friend, Barry O'Sullivan, and his dog. When they arrived at the track at about 6.30 in the morning, they took the dogs for a walk and then put them in the kennels at the greyhound track. The dogs were too young and inexperienced to race and, as a result, they were each to be trialled alone over the given distance chasing the lure.

[11] After Mr Aquilina paid the fee for entry of his dog into the trial, he went to the kennel and collected his dog to take it to the starting box. As his friend Mr O'Sullivan was suffering from lung cancer, Mr Aquilina walked both dogs from the kennels to the starting boxes for the 340 metre trial. The direct route was across grass outside the racing area. The racing area itself had a sand surface.

[12] The learned trial judge found that the area in which Mr Aquilina was walking was grassed and angled down from the outer edge of the track. While walking in this area, Mr Aquilina slipped in a band or patch of extremely slippery grass and mud. He fell heavily suffering a break to his left ankle. His Honour found that Mr Aquilina had not walked in the area before and was unaware of the patch or band of moisture.

[13] It must be accepted that an occupier of premises has a duty of care to an invitee such as Mr Aquilina. This is no more or no less than the ordinary duty of reasonable care.[1] As the learned trial judge found, the requirement that the occupier in this case exercise reasonable care to ensure the track is safe for use by members of the public did not require every foreseeable risk to be countered. In the case of grassy slopes, members of the public can be expected to take reasonable care for their own safety when walking[2]. His Honour also correctly held that in considering the content of the duty of care that the racing club was entitled to act on the expectation that the respondent would exercise reasonable care for his own safety when walking[3]. No error of law has been demonstrated in his Honour's reasoning.

[14] The appellants however say that his Honour erred in what were essentially findings of fact made by him. His Honour found that the patch of grass where the respondent fell was very slippery. He also found that it was slippery because the racing club's management of the track caused the patch to become water logged and that the racing club must have known of the condition of that area. His Honour also found that those familiar with the track avoided walking on the particular area because of the risk of falling. So much was accepted by the appellants on appeal.

[15] His Honour also found that it was reasonably foreseeable that a dog handler would walk to the 340 metre starting boxes by the route taken by the respondent as it lay directly across the reasonably direct route from the kennels to the starting boxes. Importantly, his Honour found that it was reasonably foreseeable that a dog handler walking a dog to the 340 metre boxes by the route taken by the respondent may not notice the patch of water logged grass and walk on it. This finding of fact was disputed on appeal. His Honour referred to the evidence given by those who were more familiar with the track than the respondent. His Honour did not set out the reasons for his findings in great detail but, when examined, as his Honour said, their evidence as to the obviousness of the danger was inconclusive. His Honour also referred to the number of distractions to which a dog owner is subject. He accepted the plaintiff's evidence that he did not notice any difference in the grass and found that he was exercising reasonable care while walking the dogs.

[16] These findings of fact were within the province of the trial judge and there is no justification for this court to reject them. Those findings of fact take it outside cases such as *Romeo v Conservation Commission of Northern Territory* and *Ghantous v Hawkesbury City Council* where the danger was obvious to a reasonable person. In these circumstances, the trial judge was satisfied that the first appellant's management of the track had created a potentially hazardous situation and there was a significant risk a reasonably careful dog handler might not notice the change from a dry and solid surface to a wet and slippery one and it was reasonably foreseeable that someone handling a dog might walk into the slippery patch and water logged grass and fall as the respondent did.

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1 *Hackshaw v Shaw* (1984) 155 CLR 614; *Papantonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 32; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at [12], [19].

2 *Seiko Australia Pty Ltd v Da Rin* [2001] NSWCA 84, CA No 41033 of 1999, 10 April 2001, at [21]; *McLachlan v Purchas* [1998] WASCA 350, CA No 28 of 1998, 21 December 1998; *Buttita v Strathfield Municipal Council* [2001] NSWCA 365, CA No 41039 of 2000, 8 October 2001 at [6]; *Percy v Noosa Shire Council* [2002] QCA 245, CA No 9843 of 2001, 19 July 2002.

3 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at [123]; *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 at [163].

[17] The appellants failed to satisfy the trial judge that the respondent contributed to his injury by failing to take reasonable care for his own safety. In those circumstances, the appellants have not succeeded in showing that his Honour erred in finding for the respondent, or in failing to find contributory negligence on the part of the respondent.

Future Earning Capacity

[18] The appellants have alleged that the trial judge erred in awarding $50,000.00 for the respondent's loss of income earning capacity. To succeed, the appellants must, once again, persuade this court to overturn findings of fact reasonably open to the learned trial judge.

[19] The respondent was 55 years of age when he was injured and was 58 by the time judgment was given. He has been left with a permanent disability to his left ankle which gives him pain and stiffness and limits his mobility. He returned to very limited part-time work as a butcher for three months in late 1999 but found the pain unbearable. At the trial, which was heard on 26 to 28 November 2001, the respondent believed that he could work as a butcher for 2 to 3 hours a day, six days a week.

[20] At the time he was injured, the respondent was caring for his seriously ill wife on a full-time basis. He had sold his successful butcher's shop at Eagle Junction to do so in July 1998. Thereafter he worked part-time but says he would have stopped all work to take care of his wife after she suffered a serious relapse in March 2000.

[21] On 22 December 2001, which was after the trial but before judgment was given, the respondent's wife died. The learned trial judge was therefore able to take account of that in assessing the quantum of damages. It was, as his Honour observed, material to the assessment of future economic loss.

[22] His Honour found that the respondent was a reasonably fit man and a capable butcher. Prior to his wife's death, his obligation to look after his very ill wife prevented his working. After her death, there was not the same constraint on his capacity to work. Nevertheless, the trial judge found there was still some uncertainty about the period of time for which the respondent would have returned to the full-time workforce had he been fully fit. In the circumstances, his Honour made a global assessment of $50,000.00. He was entitled to adopt this approach rather than a more mathematically precise prediction.

[23] However, a comparison with a more mathematical approach demonstrates that the amount allowed was not excessive. Had he worked full-time for only three more years, based on a minimum rate of $15.50 per hour for a 40 to 55 hour week, he would have earned between $32,240 and $44,330 per annum. In addition, he would have been entitled to superannuation, valued over three years, at between $8,706 to $11,970.

[24] His residual earning capacity was 2 to 3 hours a day up to six days a week, which was worth between $186.00 and $279.00 a week (or $9,672 - $14,508 per annum). His earning capacity if uninjured over three years was between $105,426 and $144,960. His residual earning capacity was between $29,016 and $43,524 for the three years. Even allowing for the usual discounts, taxation and contingencies, it

can be seen that the global assessment of $50,000 was by no means excessive and this ground of appeal must also fail.

[25] I would dismiss the appeal with costs.