SUPREME COURT OF QUEENSLAND

CITATION:	*Hogno & Lee v Racing Queensland Ltd & Ors* [2012] QSC 303
PARTIES:	**STEVEN HOGNO AND DEBRA LEE** (plaintiffs) **v** **RACING QUEENSLAND LIMITED (ACN 142 786 874)** (first defendant) **ALAN REARDON** (second defendant) **CHARLES CLIFFORD** (third defendant)
FILE NO/S:	BS7341 of 2000
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 October 2012
DELIVERED AT:	Brisbane
HEARING DATES:	28 to 31 May 2012 and 1 June 2012
JUDGE:	Martin J
ORDER:	**Claim dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where Hogno was disqualified from certain activities after attending a stewards inquiry – where the disqualification was found to be unlawful – where plaintiffs seek damages for loss as a result of disqualification – whether the respondents were exercising quasi-judicial functions and have immunity from suit TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where plaintiffs contend the stewards owed the plaintiffs a duty of care in making their decision to disqualify – whether a duty of care should be imposed in respect of the actions of a statutory decision maker in favour of the person who is affected by the decision made

Racing and Betting Act 1980, s 11, s 130(2), s 135

The Rules of Racing of the Queensland Principal Club (Australian Rules of Racing revised to 1 August 1997)
The Local Rules of the Queensland Principal Club

Everett v Griffiths [1921] 1 AC 631, considered
Hall v New South Wales Trotting Club [1977] 1 NSWLR 378, considered
Hunter Area Health Service v Presland (2005) 63 NSWLR 22, followed
Mann v O'Neill (1997) 191 CLR 204, considered
O'Connor v Waldron [1935] AC 76, considered
Partridge v The General Council of Medical Education and Registration of the United Kingdom (1890) 25 QBD 90, considered
R v Wadley, ex parte Burton [1976] Qd R 286, considered
Re Kooralbyn Picnic Race Day (unreported), Williams J, 11905 of 1998, 29 January 1999, considered
Tampion v Anderson [1973] VR 321, considered
Trapp v Mackie [1979] 1 WLR 377, considered
Willey & ors v Queensland Principal Club [2000] 2 Qd R 210, considered

COUNSEL: D C Kissane for the plaintiffs
B D O'Donnell QC for the defendants

SOLICITORS: Flehr Law for the plaintiffs
Thynne & Macartney for the defendants

[1] On 8 June 1998, a picnic race day was conducted at Kooralbyn. Mr Hogno trained and nominated a horse ("Rare Edition") for a race on that day. Mr Hogno was not licensed with the Queensland Principal Club ("QPC") but, in early September, he received a letter from the QPC asking him to attend a stewards' inquiry.

[2] He attended the inquiry in October 1998 and, after a hearing, was disqualified by the QPC on the basis that he was interested in a horse which had been entered and ran at an unregistered race meeting. The disqualification effectively prevented him from having almost anything to do with the racing industry.

[3] In January 1999 Mr Hogno (and others who had been disqualified for a similar reason) unsuccessfully sought orders quashing the disqualification. That refusal was overturned by the Court of Appeal[1] on 9 July 1999 and Mr Hogno's disqualification was quashed.

[4] Mr Hogno now seeks damages and pleads two causes of action: negligence in making the decision to disqualify him and negligent misstatement in given effect to the decision and publishing the decision.

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1 *Willey & ors v Queensland Principal Club* [2000] 2 Qd R 210.

[5] Mr Hogno has sued the QPC, Alan Reardon and Charles Clifford. Those two men were, at the relevant time, stewards employed by the QPC. The QPC accepts that it is legally responsible for the decision made by the stewards.

[6] After this action was commenced, the QPC's name was changed to Racing Queensland Limited. As all relevant events occurred when the first defendant was called the Queensland Principal Club, that is the name I will use in these reasons.

Regulation of racing

[7] At the relevant times, the racing industry was subject to the *Racing and Betting Act* 1980 ("the Act").[2] By s 11 it created the Queensland Principal Club and its functions included the control, supervision, regulation and promotion of racing. The rules which governed horse racing under the control of the QPC (the "rules of racing") were defined in s 5 to be an amalgamation of the Australian rules ("AR") of racing and the local rules ("LR") of the club together with any regulations.

[8] Section 11B of the Act provided:

> "**11B (1)** The Queensland Principal Club has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.
> **(2)** Without limiting subsection (1), the Queensland Principal Club has the powers conferred on it under this Act and may—
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> (a) make or amend the local rules of racing in accordance with the Australian Rules of Racing; and
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> …
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> (c) register or license, or refuse to register or license, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, bookmaker, bookmaker's clerk or another person associated with racing, or disqualify or suspend any of those persons permanently or for a specified period; and
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> (d) supervise the activities of race clubs, persons licensed by the Queensland Principal Club and all other persons engaged in or associated with racing; and
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> …
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> (k) impose a penalty on a person licensed by it, or an owner of a horse for a contravention of the rules of racing; and
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> …
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> (u) publish material, including periodical publications, to inform and keep informed the public concerning matters relating to racing, whether in Queensland or elsewhere; and
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> …
>
> (x) take such steps and do such acts and things as are incidental or conducive to the exercise of its powers and the performance of its functions."

[2] Reprint 2D. The Act was repealed and replaced by the *Racing Act* 2002.

[9] Section 130(2) of the Act provided:

> "**(2)** The rules of racing… shall apply subject to this Act and clubs shall make all necessary adaptations to those rules for the purpose of the application of this Act."

[10] Section 135 of the Act provided for the holding of a "combined sports meeting":

> "135 **(1)** For the purposes of this section and the definition "combined sports meeting"—
> **"horse race"** includes hurdle race or steeple chase but does not include flag race or jumping or a like event in which a skill other than speed alone is tested.
> **(2)** A person who desires to hold a combined sports meeting may make application as prescribed for a permit under this section.
> **(2A)** An application for a permit under this section—
> (a) shall be made to the chief executive;
> (b) shall be in writing in the form approved by the chief executive;
> (c) shall contain the prescribed particulars.
> **(2B)** The chief executive shall consider each application and may grant or, without giving a reason therefor, refuse it.
> **(2C)** Where an application is granted the chief executive shall issue in respect thereof a permit.
> **(3)** A permit under this section—
> (a) shall be in writing in the form approved by the chief executive;
> (b) shall be subject to this Act and such terms, conditions or restrictions as the chief executive either generally or in a particular case imposes, endorsed or attached to the permit;
> (c) shall authorise the holder thereof to conduct a combined sports meeting and do such other acts and things as are prescribed with respect thereto;
> (d) may be cancelled by the chief executive at any time after its issue without giving a reason therefor;
> (e) may be amended, altered, varied or otherwise modified by the chief executive during the currency thereof."

[11] Those parts of the Australian rules which are relevant to this part of these reasons are:

> **AR 6**
> (a) These Rules apply to all races held under the management or control of a Principal Club … .
> (b) If any race meeting is not held under these Rules all horses taking part shall ipso facto be disqualified, and no person taking part therein shall be competent to enter a horse for any race held under the Rules or to hold or continue to hold any licence unless the Committee shall otherwise determine.
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> **AR 181**
> A list of persons … disqualified … shall from time to time be published in the Racing Calendar … .

AR 182

(1) Except with the consent of the Committee that imposed the disqualification, a person disqualified by the stewards or Committee of a Principal Club shall not during the period of that disqualification:-
   (a) Enter upon any racecourse or training track owned, operated or controlled by a Club or any land used in connection therewith;
   (b) Enter upon any training complex or training establishment of any Club or licensed person;
   (c) Be employed or engaged in any capacity in any racing stable;
   (d) Ride any racehorse in any race, trial or test;
   (e) Enter or nominate any racehorse for any race or official barrier trial whether acting as agent or principal;
   (f) Subscribe to any sweepstakes;
   (g) Race or have trained any horse whether as owner, trainer, lessee or otherwise;
   (h) Share in the winnings of any horse.

(2) No person who in the opinion of the Committee or the Stewards is a close associate of a disqualified person shall be permitted to train or race any horse.

[12] The local rule which is relevant to this part of these reasons is:

LR 77

(1) Any person who nominates or enters owns trains or rides or undertakes the care or management or is otherwise interested in a horse entered or running at an unregistered meeting becomes *ipso facto* a person disqualified within the meaning of the Rules.

(2) A horse becomes automatically disqualified within the meaning of the Rules:
   (a) if it has been entered for or runs at any unregistered meeting;
   (b) if it is owned or trained or is under the care or management of a disqualified person.

The Kooralbyn Picnic Race Day

[13] On 8 June 1998, the Kooralbyn Hotel Resort conducted the Kooralbyn Picnic Race Day. A permit under s 135 of the Act for a combined sports meeting had been obtained.

[14] The race day included eight horse races and other activities such as tent pegging, polo games and a sheep dog trial demonstration. Mr Hogno trained and nominated Rare Edition for one of the races.

[15] At some time before the race day, the Chairman of Stewards for the QPC directed Mr Clifford to go to the race day to determine if any licensees were at the meeting or participating at the meeting. Mr Clifford identified a number of people at the meeting who held licences and a number of thoroughbred horses. He did not see or, at least, did not identify Mr Hogno at the meeting.

[16] Some time later it came to the attention of the QPC that Mr Hogno had been involved in the races on that day. On that basis, the QPC wrote to Mr Hogno and asked him to arrange a convenient time to attend a stewards' inquiry.

[17] The date of the inquiry was contentious. The transcript of proceedings records that it took place at the QPC offices on 30 September 1998. Mr Hogno says that that it is incorrect and that it took place on 9 October 1998. The weight of evidence is in favour of finding that it took place on the date contended for by Mr Hogno.

[18] At that inquiry Mr Hogno admitted that he took a horse to the Kooralbyn races and that he trained the horse.

[19] Mr Hogno did not, at the time, hold any licence issued by the QPC. He said to the stewards that they did not have jurisdiction over him because he was an unlicensed person. He did, though, own a racehorse ("Dandy Dozen") which was registered.

[20] At the conclusion of the hearing, the Chairman said:

> "We believe by your actions by nominating and training and racing a horse, namely Rare Edition, that you do fall within that category of that rule, Local Rule 77, and under that rule you become ipso facto a person disqualified within the meaning of the rules, and of course the horse becomes disqualified within the meaning of the rules."

[21] The Chairman then advised Mr Hogno that he could, if he wished, appeal against the stewards' decision or make a submission to the QPC to have the disqualification lifted.

[22] Mr Hogno neither sought to appeal nor did he apply to have his disqualification lifted by the QPC.

[23] In January 1999 Mr Hogno, together with three other people who had also been involved in the Kooralbyn Picnic Race Day, sought declarations under Order 64 rules 1B and 1BB of the former Supreme Court Rules. At first instance,[3] Williams J (as he then was) held that the applicants had participated in a race meeting which was not authorised pursuant to the Rules of Racing. As such, that was conduct which the Act and the Rules provided was a breach of the Rules of Racing and gave the QPC jurisdiction to deal with those who committed that breach. His Honour rejected the contention by each of the applicants that the QPC had acted beyond power and that the disqualifications were unlawful and, therefore, void.

[24] The unsuccessful applicants appealed that decision and in July 1999 the Court of Appeal upheld their appeal.[4] It is not necessary, for the purposes of these reasons, to explore the reasoning of the Court of Appeal so far as the interaction of s 135 of the Act and LR 77 is concerned. It is sufficient to set out the conclusion reached:[5]

> "[21] Given that, as appears from what we have said, and as indeed was common ground, the Act cannot be construed literally, this Court is then left, as was the learned primary judge, to arrive at a construction which, in its view, in the context of the Act as a whole, most accords with its evident intention. It is with some hesitation that we differ in this respect from the careful reasoned judgment of the learned

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3 *Re Kooralbyn Picnic Race Day* (unreported), Williams J, 11905 of 1998, 29 January 1999.

4 *Willey v Queensland Principal Club* [2000] 2 Qd R 210.

5 Ibid, 214.

> primary judge. However, for the reasons already given, the construction which, in our view, is more consistent with what appears to be the intention of s 135 is one which frees a permit holder under s 135, and those who participate in events for which the permit is granted, from any obligations which the Act or the rules thereunder otherwise impose on those engaged in racing or trotting or greyhound racing."

[25] Consistently with that conclusion, the Court of Appeal declared that the disqualification of Mr Hogno was unlawful and the disqualification was quashed.

[26] It follows, then, that Mr Hogno was "disqualified" for a period of 9 months from 8 October 1998 until 9 July 1999, the latter being the date of the decision of the Court of Appeal. Of the four people who had been disqualified by the stewards on the basis of their involvement at Kooralbyn, two had successfully applied to the QPC and had their disqualification lifted after four months. Mr Hogno made no such application.

The causes of action

[27] The plaintiffs abandoned a number of claims which had been made earlier and rested their case on two causes of action:

(a) negligence in making the decision to disqualify Mr Hogno; and
(b) negligent misrepresentation by the QPC by:
  (i) the stewards telling Mr Hogno what he was prevented from doing by the disqualification, and
  (ii) publishing Mr Hogno's name in the Racing Calendar as a person who was disqualified.

[28] It is alleged by the plaintiffs that the second and third defendants, on behalf of the QPC, "purported to disqualify Hogno under LR 77 of the Rules of Racing without temporal limitation". That is an incorrect characterisation of what occurred. The stewards found that Mr Hogno had, by his actions in connection with the race day, come within LR 77. Upon making that finding, LR 77 automatically effected a disqualification. The power exercised by the stewards was not one of disqualification but of fact finding.

[29] Because of the views I have formed about the issues in this trial, I will turn first to the matters raised in the defendants' defence.

The defences

[30] The defendants plead:

(a) that the defendants are entitled to immunity;
(b) if they do not have immunity, then there was no duty of care;
(c) if there was a duty of care, then there was no negligence; and
(d) if they were negligent, then they are protected from liability by the operation of AR 197 and 198.

(a) Immunity when acting judicially

[31] A tribunal which exercises quasi-judicial functions is not liable for the things which are done or said in the course of proceedings or for the decision which it makes.

That is a relatively simple statement, but it is one which conceals a number of issues which must be considered before concluding that immunity exists.

[32] An early exposition of the principle can be found in *Partridge v The General Council of Medical Education and Registration of the United Kingdom*.[6] In that case the plaintiff brought an action against the defendant for unlawfully and maliciously removing his name from the dentists register. It was held that the defendant had struck his name off without taking the proper steps, such as giving him an opportunity to be heard. It was also found that the defendant had acted without malice.

[33] Lord Esher MR said: [7]

> "The question now is whether such an action will lie? **I think the defendants were intending, in what they did, to do what they were entitled to do, viz., to perform the public duties imposed upon them by the Act for the protection of the public and also of the profession.** There are two sections, apparently, which are material to this question, the 11th and the 13th. It seems to me that the 13th was the section under which they ought to have acted, if there was any question of erasing the name of a person from the register for having acted disgracefully in a professional respect. But I think that in any case they bona fide intended to act under the Act of Parliament which gives them powers as to the register. That being so, the question is whether they were acting merely ministerially; whether they were intending to act under s. 11 only, or under s. 13 as well, if they were not so acting, it appears to me that in the absence of malice they are protected from an action. **If they were acting under s. 13, I think the functions they were so exercising were clearly judicial, and not merely ministerial, and that they would, therefore, not be liable to an action for the erroneous exercise of those functions without malice**." (emphasis added)

[34] Lord Justice Fry put the issue and the principle succinctly: [8]

> "The defendants proceeded in the matter with care and deliberation, and were anxious to ascertain all the facts of the case, and, though they made an error, they appear to have acted with perfect good faith. That being so, the inquiry arises whether the action will lie without malice. That question again depends on the inquiry whether, in what they did, the council were performing a merely ministerial duty. **I agree that, where a body like the defendants have imposed upon them a public duty, which consists in the exercise of a discretion, they are not liable to an action merely for an erroneous exercise of the discretion so vested in them.**" (emphasis added)

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6 (1890) 25 QBD 90.
7 Ibid, 95-96.
8 Ibid, 97.

[35] *Partridge* was referred to in *Everett v Griffiths*[9] where the defendant was the chairman of a Board of Guardians of the parish of St Mary, Islington and was empowered to sign orders for the reception of persons as pauper lunatics in institutions for lunatics. Everett brought an action for damages, claiming that the defendant had unlawfully certified him to be insane with the result that he was incarcerated in an asylum. The action was dismissed and, on appeal in the House of Lords the defendant's duty was described by Viscount Haldane thus: [10]

> "If he does his best to act fairly within the limits laid down for him, he has acted up to the standard prescribed and I do not think he can be made liable to an action at common law for want of care beyond this. For assuming that he has actually satisfied himself, acting honestly and bona fide in arriving at his conclusion and proceeding on it, he has done the very thing which the statute told him to do, and no further question arises."

[36] Viscount Finlay said: [11]

> "It is not necessary for the purposes of the present case to decide whether the justice of the peace, and the chairman authorized under s. 25 of the Act of 1891 to deal with cases under s. 16 of the Act of 1890, are entitled to complete judicial immunity. There is another class of cases, of which *Partridge v. General Medical Council* is an example, in which persons discharging public duties of this nature are not liable to be sued so long as they act honestly. I am clearly of opinion that a justice of the peace or chairman of guardians acting under s. 16 cannot be made liable for want of care so long as he acts honestly in the discharge of the duties imposed upon him by the statute.
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> **The section casts upon him the duty of making the order if "satisfied" of the necessary facts. This, of course, imports that he must be honestly satisfied, but if the justice of the peace or chairman is so honestly satisfied he cannot be made liable on the ground that he has been negligent in arriving at his conclusion**." (emphasis added, citation omitted)

[37] To similar effect, Viscount Cave said: [12]

> "**But where (as in this case) the order is made honestly and in good faith, the person making it cannot afterwards be made liable in damages on the ground that he exercised a wrong judgment as to the inquiries which he should make or as to the conclusion which he should draw from the facts proved.** So to hold would be to expose a justice, honestly exercising his powers under the section, to the peril of having his judgment reviewed in every case by a jury in an action for negligence. This cannot be the intention of the Act, and, in my opinion, the plaintiff's claim

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9 [1921] 1 AC 631.
10 Ibid, 660.
11 Ibid.
12 Ibid, 678

> against this defendant is bad in law and judgment was rightly given against him." (emphasis added)

[38] These authorities have been reinforced in many cases. In *Tampion v Anderson*,[13] McInerney J considered the position of a person appointed by an Order in Council to inquire into and make recommendations concerning Scientology. The plaintiff alleged that there had been misfeasance in a public office. After considering the effect of some relevant legislation on the immunity of the appointee he turned to the common law and said: [14]

> "The authorities show that the immunity of judges, counsel and witnesses has been extended (by analogy) to persons presiding at or constituting a tribunal authorized by law to conduct an inquiry proceeding judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it; and also to counsel and witnesses appearing before such a tribunal (see *Royal Aquarium, etc. Society v Parkinson*, [1892] 1 QB 431, at p. 442 per Lord Esher, MR; [1891-4] All ER Rep 429) as for instance to a military court of inquiry: see *Dawkins v Rokeby* (1873) LR 8 QB 225; (1875) LR 7 HL 744. See also *Barratt v Kearns*, [1905] 1 KB 504; *Bottomley v Brougham*, [1908] 1 KB 584; *Burr v Smith*, [1909] 2 KB 306; [1908-10] All ER Rep 443, and *Bretherton v Kaye* and *Winneke*, [1971] VR 111.
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> …
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> **These cases indicate that the circumstance that a tribunal has power to examine witnesses assists towards the conclusion that it is a body acting judicially, as does the fact that it conducts its proceedings in a manner resembling that of a court of justice, but that neither of these tests is decisive.** The fact that a tribunal has power to determine rights is a strong (though not conclusive) indication that it is a body acting judicially. On the other hand, the converse proposition is not necessarily valid." (emphasis added)

[39] The principle is not in doubt, but its application can be problematic. Whether someone or some body (other than a judge) can call upon the protection of the principle may be answered by considering the requirements which have been identified in a series of cases. Some of them have been concerned with whether a non-judicial person or body had absolute privilege against an action for defamation. The same questions arise as it always resolves into a comparison of the tasks, processes and power of a quasi-judicial body with those of a true court.

[40] In *O'Connor v Waldron*,[15] the Privy Council was concerned with whether an inquiry held under a Canadian Act was exercising judicial or administrative

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13 [1973] VR 321.

14 Ibid, 332-333. See also *Small v Buller District Council* [1998] 1 NZLR 190 and *Wentworth v Wentworth* (1999) 46 NSWLR 300, 312.

15 [1935] AC 76

functions. The difficulty in deciding this was summarised in the reasons of Lord Atkin: [16]

> "The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act? This is of necessity a differentia which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other; and the final decision must be content with determining on which side of the line the tribunal stands."

[41] As the immunity is extended to tribunals which act judicially in a manner similar to courts of justice, but not to merely administrative tribunals, it is necessary to examine the tribunal. In *Trapp v Mackie*[17] (a case involving absolute privilege against defamation) Lord Diplock said: [18]

> " …to decide whether a tribunal acts in a manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider **first**, under what authority the tribunal acts, **secondly** the nature of the question into which it is its duty to inquire; **thirdly** the procedure adopted by it in carrying out the inquiry; and **fourthly** the legal consequences of the conclusion reached by the tribunal as a result of the inquiry." (emphasis added)

[42] *Trapp v Mackie* was referred to in *Mann v O'Neill*.[19] In that case the High Court had to consider whether absolute privilege applied to letters which had been sent to the Commonwealth Attorney-General which were defamatory of a special magistrate. In their reasons, the majority[20] said:[21]

> "It is well settled that absolute privilege attaches to all statements made in the course of judicial proceedings, whether made by parties, witnesses, legal representatives, members of the jury or by the judge. It extends to oral statements and to statements in originating process, in pleadings or in other documents produced in evidence or filed in the proceedings. It is said that it extends to any document published on an 'occasion properly incidental [to judicial proceedings], and necessary for [them]'.
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> It is also settled law that absolute privilege attaches to statements made in the course of quasi-judicial proceedings, ie proceedings of tribunals recognised by law and which act 'in a manner similar to that in which a Court of justice acts'. **Various considerations are relevant to the question whether proceedings are quasi-**

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16 Ibid at 81
17 [1979] 1 WLR 377
18 Ibid at 379
19 (1997) 191 CLR 204.
20 Brennan CJ, Toohey, Dawson and Gaudron JJ.
21 (1997) 191 CLR 204, 211-212.

> **judicial. However, the overriding consideration is 'whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern'**. The privilege extends to members of tribunals and to 'advocates, litigants, and witnesses'. And its scope is no less extensive in other respects than in the case of statements made in the course of judicial proceedings." (emphasis added, citations omitted)

[43] McHugh J, after referring to the passage from Lord Diplock in *Trapp v Mackie*, said: [22]

> "The presence of a statutory scheme establishing the tribunal and regulating its procedures has been viewed as an important guide in determining whether the tribunal is 'recognised by law' for the purposes of the defence of absolute privilege. This is because the statutory detail allows the court more readily to determine whether the tribunal has the trappings of a court. Relevant matters on this issue include whether provision is made for inter-parties proceedings, for the calling of witnesses and receiving evidence on oath, for public hearings, and for legal representation. In addition, the statutory detail will often describe the tribunal's initiating mechanisms and the legal consequences of its determinations."

[44] The following matters (some of which overlap), at least, are significant for the determination of whether a person or tribunal has acted in the relevant quasi-judicial sense:

(a) the decision must have been made in the discharge of a public duty (see, for example, *Everett v Griffiths*);
(b) the decision must affect the liberty or property of a person (*Everett v Griffiths*);
(c) the person or tribunal is authorised by law to conduct an inquiry proceeding judicially, that is, in a manner as nearly as possible similar to that in which a court acts in respect of an inquiry before it (*Tampion v Anderson*; *Trapp v Mackie*);
(d) the nature of the question being considered (*Trapp v Mackie*);
(e) the procedure adopted in carrying out the inquiry – are witnesses called, how is evidence received, is there legal representation etc (*Trapp v Mackie*; *Mann v O'Neill*);
(f) the legal consequences of the tribunal's conclusion (*Trapp v Mackie*);
(g) has there emerged from the proceedings a determination the truth and justice of which are a matter of public concern? (*Mann v O'Neill*)

[45] With those matters in mind it is necessary to consider the framework provided by the Act and the Rules, and then the manner in which the inquiry was conducted.

[46] Section 11A(1)(a) of the Act provides that one of the functions of the QPC is "to control, supervise, regulate and promote racing". It was not contested, nor could it be, that a decision made in the furtherance of that function would be in the discharge of a public duty.

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22 Ibid, 225.

[47] The QPC is required by AR 8 to appoint stewards to "assist in the control of racing". Australian Rule 8 also specifies the powers which the stewards have. They include the power:

> "(d) To regulate and control, inquire into and adjudicate upon the conduct of all … persons … connected with a horse … and to punish any such person in their opinion guilty of improper conduct or unseemly behaviour.
>
> (e) To punish any person committing a breach of the Rules …"

[48] The rules provide little guidance as to the manner in which they should go about their duties or how they should determine whether someone has breached a rule. The conduct of racing, though, requires that decisions be made and be made quickly. That is evident from a number of rules in which the stewards are given very wide powers; for example, AR 8(l) allows a steward to "order down any rider without assigning any reason and if they think fit to substitute another rider."

[49] There is also a "catch all" provision in AR 10:

> "The Stewards may at any time inquire into, adjudicate upon and deal with any matter in connection with any race meeting or any matter or incident related to racing."

[50] I was not directed to any rule which required that that stewards had to proceed judicially when conducting an inquiry. Rather, the emphasis in the rules is on the power of the stewards to act in a summary way in many circumstances. Where there is a reference to the stewards inquiring into something (such as in AR 10), it is not constrained by any requirements in the rules to allow legal representation or how evidence is to be received and so on.

[51] There is no doubt that the legal consequences of a decision by the stewards can be important and that, depending upon the circumstances, can be one of substantial public concern. However, there is nothing in the rules which suggests that an inquiry leading to a decision must be carried out in a manner as nearly as possible similar to that in which a court acts in respect of an inquiry before it. Rather, the rules suggest that inquiries and decisions can be held and made without reference to the procedures found in court proceedings.

[52] In this case, there were some circumstances advanced as being indicative of a judicial proceeding. They were:

(a) Mr Hogno was informed that an inquiry was to be convened in order to investigate whether he had acted in breach of LR 77;
(b) the QPC required that Mr Hogno attend;
(c) the stewards did convene the inquiry;
(d) Mr Hogno was present; and
(e) the Rules contemplate that a record of the proceedings before the stewards will be made.

[53] Nowhere in the Act or the Rules is there any requirement that a notice of a charge be given. Nor is there any right of a person to hear the evidence against him or that

any person charged will be heard in his or own defence. I do not doubt, though, that these matters would be imposed by the requirement to observe natural justice.[23]

[54] In *Calvin v Carr*[24] the Privy Council considered an appeal which related to actions by stewards of the Australian Jockey Club. They had inquired into the running of a horse in a race. Charges were brought against one of the owners and the jockey. The stewards ruled that the jockey was guilty of an offence against a rule which required every horse to be run on its merits and that the part owner was a party to the breach of the rule. Both men were disqualified for a year. The part owner and the jockey appealed to the committee of the Club and the appeal was dismissed. An application was brought by the part owner for declarations that the disqualification was void. At trial it was held that the stewards might have failed to observe the rules of natural justice in certain identified respects, but that the proceedings later taken before the committee constituted a hearing de novo and cured any defects in the stewards' inquiry. Their Lordships on the Privy Council agreed with that decision. Of importance to this case is the statement by the Privy Council about the need to take into account the reality of circumstances in racing. They said: [25]

> "Races are run at short intervals; bets must be disposed of according to the result. Stewards are there in order to take rapid decisions as to such matters as the running of horses, being entitled to use the evidence of their eyes and their experience. As well as acting inquisitorially at the stage of deciding the result of a race, they may have to consider disciplinary action: at this point rules of natural justice become relevant. These require, at the least, that persons should be formally charged, heard in their own defence, and know the evidence against them. These essentials must always be observed but it is inevitable, and must be taken to be accepted, that there may not be time for procedural refinements. It is in order to enable decisions reached in this way to be reviewed at leisure that the appeal procedure exists. Those concerned know that they are entitled to a full hearing with opportunities to bring evidence and have it heard. But they know also that this appeal hearing is governed by the Rules of Racing, and that it remains an essentially domestic proceeding, in which experience and opinions as to what is in the interest of racing as a whole play a large part, and in which the standards are those which have come to be accepted over the history of this sporting activity. All those who partake in it have accepted the Rules of Racing, and the standards which lie behind them: they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as when the process of reaching these decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits."

[55] That decision was followed by Douglas J in *Wanless v Queensland Trotting Board*.[26]

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23 *Hall v New South Wales Trotting Club Inc* [1977] 1 NSWLR 378.

24 [1980] AC 574.

25 Ibid, 596-597.

26 unreported, 1377 of 1981, 22 May 1981.

[56] Mr O'Donnell QC also relied upon a decision of the Full Court in *R v Wadley, ex parte Burton*.[27] That case involved a charge laid by a steward against an apprentice jockey for using a battery. An inquiry was held by another steward who had not been at the race meeting where this was alleged to have occurred. He charged the apprentice jockey with having committed an offence, found him guilty and disqualified him. The committee of the Queensland Turf Club found that the steward had no jurisdiction to hold the inquiry and an appeal was allowed on that ground.

[57] The committee of the Turf Club then proceeded to charge the prosecutor with the same offence and hear the charge itself. The jockey sought an order nisi for prohibition in respect of that hearing. Wanstall SPJ (as he then was) considered the capacity of the committee of the Turf Club to hear the charge and to deal with it. He referred to the then AR 7 which in sub-rule (d) provided that the committee of a club could punish any person contravening the rules. Wanstall SPJ said: [28]

> "The power to punish implies the right, and duty, to charge, and jurisdiction to hear and to determine the charge. A.R. 196 prescribes the kinds of punishment which may be imposed. I hold that these provisions, even without the assistance of the implication arising from L.R. 11 A, would plainly confer on the Committee power to charge the prosecutor as they did, and jurisdiction to hear and determine the charge."

[58] His Honour then analysed the proper characterisation to be applied to the status of the committee: [29]

> "I turn now to the submission that the Committee put itself in the position of both prosecutor and judge when it charged the apprentice jockey and proceeded to determine the charge. It would be helpful in considering this question to classify the nature of the Committee's acts from time to time in the course of the proceedings. **In its first deliberation it sat as a quasi-judicial tribunal exercising appellate jurisdiction and decided the appeal on the threshold, on a jurisdictional point, without entering in any way into the merits and without involving itself with the question of the prosecutor's guilt. In the next step, that of charging him, it acted as an administrative body. Thereafter it sat as a quasi-judicial tribunal exercising original jurisdiction**. In every step and in each function it acted as a domestic tribunal or body closed by the Legislature with the duty of disciplining persons who are subject to the Rules of Racing." (emphasis added)

[59] He then went on to deal with the question of the committee both charging a person and deciding the issue. He said: [30]

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27 [1976] Qd R 286.
28 Ibid, 290-291.
29 Ibid at 291.
30 Ibid, 292-293.

> "It is a fundamental principal [sic] of justice that no man should be judge in his own cause (Co. Litt. 141a). Although the members of the Committee were not in the ordinary sense judges they had to decide judicially whether the pros[e]cutor was guilty of the charge they had formulated against him. As Bowen LJ said in *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366, at p 384:
>
> > '… it must be in all cases a question of substance and of fact whether one of the judges has in truth also been an accuser. The question which has to be answered … must be: Has the judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or by his agents?'
>
> …
>
> However there are important qualifications of this general rule. The scheme which charges the Committee with the general oversight of horse racing, within the context of the Rules of Racing, and imposes on it the duty, either by itself (A.R. 7 and 175, and L.R. 3), or by its stewards (A.R. 8), of disciplining and punishing persons who breach the Rules, they being contracting parties to that scheme, clearly requires and authorises the Committee to fill the dual role of judges and accusers, provided the members or any of them are not personally involved as accusers or explicitly biased [sic] in a particular instance."

[60] These reasons applied to the Committee of the Turf Club. It was, as the Appeals Committee now is under LR 31, subject to a more detailed specification of its procedures – specifications which are not present for the Stewards.

[61] When considering the actions taken by stewards, it should be borne in mind that they are able to act in a number of different capacities. This was explicitly recognised in *Hall v New South Wales Trotting Club Ltd*[31] where Mahoney JA said:[32]

> "Whether a decision of a tribunal will be vitiated because of the presence at its deliberations of a particular individual must be determined in the light of the nature of the tribunal and its functions, and the relationship of the "accused" to the person in question. The stewards of a racing club have, in general, been seen as occupying a position different in significant respects from that of, e.g. a court in the strict sense: see generally *Parr v. Winteringham*; *Russell v. Duke of Norfolk*; *Evan v. Winterbottom*; *Beale v. South Australian Trotting League Inc*.; *R. v. Brewer; Ex parte Renzella*; *Fagan v. National Coursing Association of South Australia Inc. (No. 2).*

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31 [1977] 1 NSWLR 378.

32 Ibid, 397.

> **Stewards are contemplated as acting administratively as well as in a quasi-judicial fashion; when they exercise their quasi-judicial functions, they may exercise them in the context of an 'inquiry'; and they are entitled to act upon their own observation and knowledge. In so far as they act in this way, the requirements of natural justice touching the composition of tribunals, which in courts and similar bodies, require the strictest observance, do not apply with the same rigour.** In the case of courts, a judicial officer may be disqualified if he is involved in any way in the obtaining or giving of evidence. Stewards, as in the present case, have the function of themselves obtaining or receiving information, determining administratively whether and what should be taken in relation to it and generally acting in a manner administrative rather than judicial. In a proceeding which is of the nature of an inquiry, rather than an adversary procedure, the members of the tribunal may be required more directly to intervene in the obtaining of evidence." (citations omitted, emphasis added)

[62] The functions of Stewards under the Australian and Local Rules will change according to the matter under consideration and the way in which they proceed; on some occasions they will act administratively, while on others they will act in a quasi-judicial way. Each exercise of power will need to be assessed in accordance with the principles referred to above and it will not be commonplace for each of the indicia to be present.

[63] In this case, the actions of the Stewards in:

(a) exercising their duties under the Act and the Rules;
(b) advising Mr Hogno of the charge;
(c) requiring his presence at the inquiry;
(d) seeking his submissions on the issue; and
(e) finding that he had breached the rule,

combined with that finding having the consequence that he was disqualified; mean that they were acting quasi-judicially. There is no allegation of malice or bad faith, only negligence, so the defendants are entitled to immunity resulting in them not being able to be the subject of a successful claim.

Excess of power?

[64] In response to the pleading of immunity, the plaintiffs contend that there could be no immunity because the QPC was acting in excess of its powers conferred on it under the Act and the various Rules of Racing.

[65] The QPC is a creature of statute and, as such, its powers must be found in the statute. Section 11B(1) provides that the QPC has power to do all things necessary or convenient for the functions conferred on it by section 11A(1), namely, controlling, supervising and regulating racing. An aspect of the power so conferred is the capacity to disqualify an owner or other person associated with racing.[33]

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[33] s 11B(2)(c).

[66] Mr Hogno was the owner of "Dandy Dozen" which was a horse registered for racing with the QPC and so he falls within the purview of s 11B(2)(c). It follows, then, that the QPC had power to inquire into whether Mr Hogno had breached LR 77. It must be borne in mind that the Court of Appeal did not hold that any jurisdictional fact was assumed in error by the stewards but that they erred in the interpretation of the Act and the Rules of Racing.

[67] In any event, the test to determine whether a decision maker will have immunity from suit is not whether the decision maker was acting within or in excess of his or her powers but, rather, whether the decision maker was acting in a judicial manner and in good faith.[34]

Publication of the disqualification

[68] The plaintiffs allege that the defendants, by publishing Mr Hogno's name in the Racing Calendar as a person who was disqualified, were negligent and misrepresented the fact.

[69] Australian Rules 180 and 181 require the QPC to communicate any disqualification to all other principal clubs and to publish in the Racing Calendar from time to time a list of all persons so disqualified. Thus, the QPC was merely performing its statutory duty in doing so. It must follow that if immunity applied to the finding of fact which led to the disqualification, then immunity would also apply to the publication of the disqualification. The publication should be regarded as a statement made in the course of, or for the purposes of, a quasi-judicial proceeding which is protected by the same absolute immunity.[35]

Was a duty of care owed?

[70] If I am incorrect in the decision I have come to above, then I now turn to the issue of whether or not a duty of care was owed by the defendants to the plaintiffs.

[71] The question that arises here is whether a common law duty of care should be imposed in respect of the actions of a statutory decision maker in favour of the person who is affected by the decision made.

[72] Whether a common law duty of care arises in circumstances where persons are charged with the control, supervision and regulation of a large enterprise requires a careful examination of the statutory regime which applies.[36]

[73] In *Hunter Area Health Service v Presland*[37] the New South Wales Court of Appeal considered a number of authorities relating to the issue of when a duty of care arises in the circumstances. The approach which should be taken to determine whether or not a duty of care arises is to engage in what was described as a multifactorial or "salient features" analysis.[38] In that case Spigelman CJ said that the correct

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34 See *Partridge*, 96-97; *Wentworth v Wentworth*, [35]-[42].
35 *Mann v O'Neill*, 212-213.
36 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.
37 (2005) 63 NSWLR 22.
38 Ibid, 27.

approach was exemplified in the joint judgment of Gummow J and Hayne J in *Graham Barclay Oysters Pty Ltd v Ryan* where they said:[39]

> "[146] The existence or otherwise of a common law duty of care allegedly owed by statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.
>
> [147] Where the question posed above is answered in the affirmative, the common law imposes a duty in tort which operates alongside the rights, duties and liabilities created by statute.
>
> …
>
> [149] An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute."

[74] The tests which are required to be applied were set out by Spigelman CJ as follows:[40]

> "[11] For the purpose of determining whether the relationship between a statutory decision-maker and an individual is such as to create a duty of care with respect to the exercise of the power, a court must consider a range of circumstances. As the above passage from the joint judgment of Gummow J and Hayne J indicates, four matters are of significance:
>
> - the purpose to be served by the exercise of the power;
> - the control over the relevant risk by the depository of the power;
> - the vulnerability of the persons put at risk; and
> - coherence.
>
> [12] The purpose or purposes of the exercise of the power identifies the beneficiary of its exercise. Insofar as the

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39 Ibid.

40 *Hunter Area Health Service & v Presland* (2005) 63 NSWLR 22, 27-29.

beneficiary is the public at large, or a section of the public, it is unlikely that a duty of care will attach to the exercise of the power. Where the person asserting the existence of a duty is a person whose welfare or safety is to be protected by the exercise of the power, then the court will more readily reach the conclusion that a duty of care at common law arises. The fact that a power has been conferred for the protection of a particular class of person is not determinative, but it is indicative. (See, for example, *Graham Barclay Oysters Pty Ltd* (at 574 [79]) and (at 580 [91]) per McHugh J.) In *Graham Barclay Oysters Pty Ltd* the court concluded that the powers there under consideration were conferred for the benefit of the public generally.

[13] Analysis of the statute is required in order to determine whether the person, who asserts a duty is owed to him or her, is a beneficiary of the power. What is not authoritatively established, on the authorities, is the degree to which the scope and purpose of the power defines the scope or extent of the duty. Nevertheless, where the power is conferred for the purpose of protecting, inter alia, the plaintiff, from a risk that has materialised, that is a factor entitled to considerable weight and will, in the ordinary case, be determinative on the issue of scope of duty. Where there is no coincidence between the scope and purpose of the power and the scope of duty required to determine the proceedings, the weight to be given to this consideration will be less.

[14] On the issue of control, Gummow J and Hayne J said in *Graham Barclay Oysters Pty Ltd* (at 598 [150]): "The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority". (footnotes omitted)

[15] This sentence reiterated the approach adopted in the joint judgment of Gaudron J, McHugh J and Gummow J in *Brodie* (at 559 [102]):

> "[102] ... [O]n occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance." (footnotes omitted)

[16] The significance of control has also been emphasised in a number of other authorities including *Crimmins* (at 24 [43]-[46], 42 [104], 61 [166], 82 [227], 104 [304], 116 [357]); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [19]- [21], 270 [42]-[43], 292 [110]-

[117]; *Graham Barclay Oysters* (at 558 [20], 579 [90]-[95]); see also *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* (2002) Aust Torts Reports ¶81-636 at 68,335 [64]- [69].

> [17] In the legislative scheme considered in *Crimmins*, the relevant depository of the statutory power had a power to direct where waterside workers had to work. McHugh J regarded that as a decisive consideration and said (at 42 [104]): '[104] ... It can seldom be the case that a person who controls or directs another person, does not owe that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control'.

[18] The case law applying a multifactorial analysis has also emphasised the vulnerability of the person to whom it is alleged the duty is owed. (See *Perre v Apand* (at 194 [10]-[11], 220 [104]-[105], 225 [118]-[120], 228 [125]-[126], 229 [129], 259 [216]); *Crimmins* (at 26 [51], 39 [93], 40 [100]-[104], 24 [44], 25 [46], 65 [233]); *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at 49 [29]-[43].)

[19] The concept of vulnerability in this context is a reference to the inability of a particular person to protect himself or herself from the consequences of the conduct alleged to be negligent. (See *Crimmins* (at 40 [100]) and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [23] and 548 [80].)

[20] The next issue which arises is the question of coherence between the law of tort and the statutory scheme. (See *Perre v Apand* (at 253 [197]); *Sullivan v Moody* (at 576 [42], 579 [50], 580 [53]-[55]); *Tame v New South Wales* (at 335 [28], 342 [58], 361 [123], 425 [323]); *Graham Barclay Oysters Pty Ltd* (at 574 [78]); *New South Wales v Paige* (2002) 60 NSWLR 371 at 390 [93]-[95]; *New South Wales v Godfrey* (2004) Aust Torts Reports ¶81-741 (65,654) at 65,665 [71]-[80]; *Edwards v Attorney General (NSW)* (2004) 60 NSWLR 667 at 671 [6]- [9].)

[21] The imposition of a duty of care may be inconsistent with some aspect of the scheme or, if not directly inconsistent, may be otherwise inappropriate by reason of the scope and purpose of the legislation:

- liability in tort may "distort [the] focus" of the statutory decision-making process; (*Crimmins* (at 101 [292]))
- the decision may be made in a "detrimentally defensive frame of mind"; (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63D)
- a common law duty should not be imposed if it "would ... have a tendency to discourage the due performance of ... statutory duties"; (*X (Minors) v*

Bedfordshire County Council [1995] 2 AC 633 at 739D)

- the imposition of a duty of care may "undermine the effectiveness of the duties imposed by the statute"; (*Graham Barclay Oysters Pty Ltd* (at 574 [78]))
- "a common law duty could distort the performance of the functions of the statutory body". (*Crimmins* (at 77 [216]))

[75] With those factors in mind, I turn to the circumstances which apply in this case.

[76] The imposition of a common law duty would be inconsistent with, and would have a tendency to discourage, the due performance by the QPC of its statutory duties. The functions imposed by the Act on the QPC require that it should be able to exercise its powers and make decisions without being concerned that, depending upon the outcome of the decision making process, it might be exposed to liability for damages. If it were otherwise, then a decision might be made in a "detrimentally defensive frame of mind".

[77] There is nothing in the Act or the Rules which requires that a duty of care be created vis-à-vis the QPC and the individuals involved in racing. The actions of the QPC, either through its stewards or its appeal committee, are subject to a number of legal constraints:

(a) the requirement to observe natural justice and to act impartially;
(b) the amenability to judicial review; and
(c) the amenability to appeal within the Rules and the Act.

[78] The role imposed on the QPC by the Act is a role with respect to racing and its control, supervision, regulation and promotion. It is not a role with respect to persons within racing or generally.

[79] It was put forcefully for Mr Hogno that he was "vulnerable" in circumstances where the stewards could make an error in conducting the inquiry. But the vulnerability is not a reference to anything other than a person's inability to protect himself or herself from the consequences of the conduct said to be negligent. Mr Hogno had a number of avenues available to him. He could have, as others did, sought a lifting of the disqualification from the QPC. He could have, but did not, appeal against the decision of the stewards. Finally, he had the avenue of relief by way of judicial review available to him and he did pursue that. These rights of redress enable a person who has been the subject of an incorrect decision to seek to be put in the same position as he or she would have been had there not been any error.

[80] So far as Ms Lee is concerned, no such duty could exist. There were no relevant dealings between the QPC and Ms Lee. She was not charged with any offence and, therefore, no hearing concerning her was held. When the QPC, through its stewards, was dealing with Mr Hogno, they were only concerned with his behaviour. The effect it had on her was due to the operation of the Act and the Rules.

Were the stewards negligent in arriving at their decision?

[81] If the QPC did not have immunity, and if a duty of care was owed to Mr Hogno, then the next question to be considered would be whether there was negligence on the stewards' part.

[82] The plaintiffs framed this part of their case by saying that the defendants owed both Mr Hogno and Ms Lee a duty to take reasonable care to ensure that it had jurisdiction to disqualify Mr Hogno and to take reasonable care to ensure that the limits of the stewards' powers were observed.

[83] The alleged breaches of the duty of care, as pleaded, come down to these three elements:

(a) the QPC failed to obtain legal advice as to the extent of its jurisdiction and powers before disqualifying Mr Hogno;
(b) the QPC failed to appreciate that it had no jurisdiction to disqualify Mr Hogno; and
(c) the QPC went beyond the limits of its powers with respect to Mr Hogno.

[84] Each of those alleged elements go to make up what is really the defendants' case and that is, that the interpretation used by the stewards of the relevant Rules was arrived at negligently. That is what is at the heart of the plaintiffs' allegation of negligence.

[85] The answer to that allegation can be drawn from the decision of Williams J at first instance and the subsequent Court of Appeal decision. At first instance, the construction favoured by the QPC was accepted by Williams J. On appeal, that construction was rejected in favour of the interpretation advanced by Mr Hogno and his interests. The manner in which the Court of Appeal dealt with the reasons of Williams J is set out in [24] of these reasons.

[86] The stewards proceeded on a view of their jurisdiction which coincided with that of Williams J. It will be a rare event where a party will be found to have been negligent where it has acted on the basis of a particular construction of an Act or, in this case, the rules of racing, where that construction coincides with the conclusion of a judge arrived at in a "careful reasoned judgment". The plaintiffs have not demonstrated negligence by the stewards in construing the rule in the way that they did.

[87] For the reasons I have given above with respect to the requirement to publish the fact of disqualification, there can be no negligence either with respect to that.

Australian Rules 197 and 198

[88] The last domino in the argument for the defendants is that if they fail in all the arguments already considered, then they can rely on AR 197 and 198.

[89] AR 197 provides:

> "No person shall be entitled to make any claim for damages by reason or in consequence of the imposition, annulment, removal, mitigation or

> remission of any punishment imposed or purporting to be imposed under the Rules."

[90] AR 198 provides:

> "No Club, official or member of a club shall be liable to any person for any loss or damage sustained by that person as a result of, or in any way (either directly or indirectly) arising out of the exercise of any right, privilege, power, duty or discretion conferred or imposed, or bona fide believed to have been conferred or imposed, under the Rules."

[91] The defendants submit that the circumstances of these claims fall within both of the above rules.

[92] The claim made by each of the plaintiffs is for damages in consequence of the imposition of a punishment. The punishment is the disqualification which arose following the finding of fact made by the stewards.

[93] The plaintiffs plead that neither rule applies. They allege that the claims they make are not for damages in consequence of the imposition of a penalty. That is not the point of these rules. These rules are designed to protect those who administer the rules of racing where a loss arises out of the exercise of a power under the rules. The loss alleged to have been suffered by the defendants arises, on their own case, as a result of the exercise of such a power. Of course, the plaintiffs have argued that the rule relied upon by the stewards did not apply to them and that was held to have been correct by the Court of Appeal. But AR 198 excludes liability for loss arising out of the exercise of any power bona fide believed to have been conferred or imposed under the rules. It was not seriously in issue that there was a lack of bona fides on the part of the stewards. In any case, I find that the stewards proceeded according to their understanding of the rules and acted bona fide in so doing.

[94] The Australian Rules of Racing were recognised in *R v Wadley, ex parte Burton*[41] to constitute a contract between the principal club and, in that case, Mr Burton. The court said it was a contract "… that the legislature has recognised and endorsed, thus putting the relationship between the contracting parties on a higher plain than that which would arise from a mere contract".[42] There is no difference in substance between the act considered in *Wadley* and the Act which applies in this case. Consequently, AR 197 and AR 198 operate between Mr Hogno and the QPC by virtue of their statutory force.

Ms Lee

[95] The claim for Ms Lee is consequential upon the claim made by Mr Hogno. She was both his business and domestic partner. After Mr Hogno was told of his disqualification by the stewards, Ms Lee attempted to transfer the registered ownership of "Dandy Dozen" from Mr Hogno to her. That transfer was eventually disallowed. The basis upon which the claim is made on Ms Lee's behalf is that the QPC knew or ought to have known that if Mr Hogno was disqualified then that might cause persons in business with him to suffer economic loss.

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41 [1976] Qd R 286.

42 Ibid, p 294.

[96] For the reasons I have given above, Mr Hogno has no viable claim against the defendants. It must follow that Ms Lee is in the same position.

Damages

[97] Given my findings above, the plaintiffs' action must be dismissed. Nevertheless, I will refer to the claim for damages briefly. The claim for damages was under three heads:

(a) a loss on the sale of the property owned by the plaintiffs;
(b) a loss of opportunity associated with the racehorse "Dandy Dozen"; and
(c) a loss of income associated with horse stud/spelling and sale preparation business.

Loss on sale of property

[98] In 1998 the plaintiffs purchased "Barnesmore", a property of about 100 acres at Hodgsonvale.[43]

[99] The plaintiffs allege that, as a result of the disqualification, they were forced to sell the property in January 2000. The sale price was $355,000, which was $15,000 more than the price they paid for the property in 1998. For reasons which never became clear, the plaintiffs claim damages for the "loss on sale of Hodgsonvale property" as at 13 October 2005. The valuation evidence, which I accept, was that the property at that time would have been worth $750,000. But the plaintiffs did not establish why that date was relevant, apart from it appearing to be the date on which the valuer that they engaged inspected the property.

[100] The plaintiffs made a profit when they sold the property in the year 2000. There was no evidence that, if they could have kept it, they would have kept the property until the year 2005. No loss was established under this heading.

Loss on opportunity associated with the racehorse "Dandy Dozen"

[101] This is a claim for loss of the chance of future wins from the horse "Dandy Dozen". However, the evidence which was advanced to support it was not put forward as a loss of a chance but rather a complete compensation on the basis that another horse "Lean Lad" had won a certain number of races and that "Dandy Dozen" would have won the same. This was all a fairy tale. A forensic accountant's report was tendered but it was of no assistance. The author knew nothing about the racing industry and relied entirely on what he was told by Mr Hogno, having made no substantial inquires of his own. I disregard it for that reason.

[102] Similarly, no evidence was advanced to establish that "Lean Lad" was comparable to "Dandy Dozen". To the contrary, Mr Schreck, who was called by the defendants, gave detailed evidence to say that the two horses were not comparable and that evidence was unchallenged.

[103] No damages were established under this heading.

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[43] At the time of purchase there were two other persons who were purchasers with the plaintiffs. I accept that their interest was bought out by the plaintiffs before the facts the subject of this case came into existence.

Loss of income associated with horse stud/spelling and sale preparation business.

[104] This part of the plaintiffs' claim was based upon the assumption that the plaintiffs' disqualification prevented them from doing this type of work. The defendants' answer to this head of damage was to refer to AR 182.

[105] It provides:

> "(1) Except with the consent of the Committee that imposed the disqualification, a person disqualified by the stewards or Committee of a Principal Club shall not during the period of that disqualification:-
>
> (a) Enter upon any racecourse or training track owned, operated or controlled by a Club or any land used in connection therewith;
>
> (b) Enter upon any training complex or training establishment of any Club or licensed person;
>
> (c) Be employed or engaged in any capacity in any racing stable;
>
> (d) Ride any racehorse in any race, trial or test;
>
> (e) Enter or nominate any racehorse for any race or official barrier trial whether acting as agent or principal;
>
> (f) Subscribe to any sweepstakes;
>
> (g) Race or have trained any horse whether as owner, trainer, lessee or otherwise;
>
> (h) Share in the winnings of any horse.
>
> (2) No person who in the opinion of the committee or the stewards is a close associate of a disqualified person shall be permitted to train or race any horse."

[106] The disqualification to which Mr Hogno and Ms Lee were subjected only prevented them from doing the activities listed above. It did not prevent them from doing any of the three activities under this claim head of damage. They could still have engaged in the spelling of horses, the preparation for sale of horses and stud services.

[107] The evidence given by Mr Hogno with respect to his costs of running the business as he had conducted it prior to the disqualification was generally unreliable. I would not have been prepared to have acted upon his evidence with respect to the costs he incurred.

Order

[108] The plaintiffs' claim is dismissed.