SUPREME COURT OF QUEENSLAND

CITATION:	*Hosking v Pacific Partner P/L* [1999] QCA 484
PARTIES:	**JARROD BENJAMIN HOSKING** (Plaintiff/Respondent) v **PACIFIC PARTNER PTY LTD** ACN 052 887 699 (Defendant/Appellant)
FILE NO/S:	Appeal No 1939 of 1999 DC No 535 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 1999
JUDGES:	de Jersey CJ, Davies JA and Jones J
ORDER:	**Appeal allowed with costs. Judgment below set aside, in its place judgment for the defendant with costs.**
CATCHWORDS:	NEGLIGENCE – BREACH OF STATUTORY DUTY – REASONABLE FORESEEABILITY OF INJURY – SAFE SYSTEM OF WORK – respondent was employed by appellant's tree-lopping and removal business – respondent during course of employment suffered a spontaneous idiopathic pneumothorax – presence of dust caused the respondent to sneeze – whether there existed a foreseeable risk of injury – insufficient evidence adduced – no suggestion that appellant was, or ought to have been, aware of respondent's condition – may not be inferred as a matter of common sense – whether practicable to ensure the employee's health and safety at work – no proven breach of statutory duty *Workplace Health and Safety Act* 1989 (Qld) , s 6(1), s 9(1) *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339, considered *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29, considered *Mount Isa Mines v Pusey* (1970) 125 CLR 383, considered *Negric v Albion Scrap Steel Pty Ltd* [1978] Qd R 362, applied

Neill v NSW Fresh Food and Ice Pty Ltd (1962-3) 108 CLR 362, considered
St Vincent's Hospital Toowoomba Ltd v Hardy [1998] QCA 86; Appeal No 7477 of 1997, 6 May 1998, considered
Vozza v Tooth & Co Ltd (1964) 112 CLR 316, considered
Wyong Shire Council v Shirt (1979–80) 146 CLR 40, considered

COUNSEL: Mr D O North SC, with him Mr M T O'Sullivan, for appellant
Mr A J Bellanto QC, with him Mr P J Woods for respondent

SOLICITORS: Gall Standfield & Smith for appellant
Hamilton Quinlan Fenwick for respondent

[1] **de JERSEY CJ**: I agree with Jones J that judgment should at the trial have been entered for the appellant defendant. I agree with the orders His Honour proposes.

[2] As to the first point arising on the appeal, the respondent failed to establish the existence of a foreseeable risk of injury, a risk which was "real" in the sense of not being "far fetched or fanciful" (*Wyong Shire Council v Shirt* (1979-80) 146 CLR 40, 48). As Jones J has explained, the respondent adduced no sufficient evidence to establish that the inhalation of substantial amounts of woodchip dust created a real risk of the respondent's suffering injury of this general category, that is, lung damage. Faced with the substantial limitations on Dr Hart's evidence, the only evidence touching upon even the periphery of the point, Mr Bellanto QC, who appeared for the respondent, submitted that medical or other expert evidence was not necessary to establish the existence of the risk: its existence might be inferred as a matter of mere commonsense. For the reasons given by Jones J, I also reject that submission.

[3] While commonsense, or common knowledge, would certainly support a conclusion that the inhalation of substantial amounts of this dust could occasion personal discomfort, it could not warrant the conclusion that lung damage might result. *Neill v NSW Fresh Food and Ice Pty Ltd* (1962-3) 108 CLR 362, 369-70 affirms what is obvious, that evidence must in these cases be adduced to establish matters not within the realms of common knowledge. See also *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316, 321-2 and *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339, 348. While by way of contrast, in the motor car cases which frequently come before courts, it is at once accepted that negligent driving creates a real risk of physical injury to other road users, so that evidence to establish that need not be led, in other cases the risk may not, without more, be apparent. This is such a case.

[4] The second point arising on the appeal concerns the sustainability of the learned trial judge's finding of breach of the appellant's duty under s 9(1), as then applicable, of the *Workplace Health and Safety Act* 1989. The appellant submitted that two decisions in relation to that provision, *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29 and *St Vincent's Hospital Toowoomba Ltd v Hardy* [1998] QCA 86; Appeal No 7477 of 1997, 6 May 1998, may be in conflict. There is no need to address that issue here.

[5] As Jones J has pointed out, s 9(1) excused an employer from liability to ensure an employee's "health and safety at work" where it was not "practicable" to do so. In determining practicability, s 6(1) directed attention, among other things, to "the degree of risk that exists in relation (to any potential injury)" (para (b)), and "the state of knowledge about … the risk of that injury … occurring" (para (c)). For the reasons earlier expressed, no relevant risk was by necessary evidence established in this case. The conclusion follows that, on this state of evidence, it was "not practicable", in terms of s 9(1), for the appellant employer to have ensured that the respondent's health and safety were not in this way prejudiced. As put by Jones J, "it was not practicable for the employer to have done things, the need for which was not known or required to be known by it". The finding of breach of statutory duty is therefore not sustainable.

[6] In the result, the appellant (defendant) should have succeeded at the trial, and the appeal must be allowed.

[7] **DAVIES JA:** I have read the reasons of the Chief Justice and of Jones J and agree with them that the appeal must be allowed. I agree with both of them, for the reasons which they give, that the respondent failed to establish a foreseeable risk of injury of the relevant kind. I also agree, for the reasons which both of them give, that it was not practicable for the appellant to ensure the health and safety of the respondent in the way alleged by him.

[8] For that reason it is unnecessary to consider whether s 9(1) of the *Workplace Health and Safety Act* 1989 conferred a civil cause of action[1] or whether, if it did, it imported a notion of foreseeability.[2]

[9] **JONES J:** The appellant (defendant) carries on the business of tree lopping and removal and was, at all material times, the employer of the respondent.

[10] The respondent during the course of his employment on 31 October 1992 suffered a spontaneous pneumothorax. He sued the appellant for damages for negligence and breach of statutory duty in respect of his injury and was awarded $84,022.95 by the District Court at Southport.

[11] That sum was the total assessment of the respondent's damages from which a refund of workers' compensation payments must be made. For the reasons explained in *Negric v Albion Scrap Steel Pty Ltd*[3] the amount expressed to be the judgment sum ought to have reflected the fact that such a refund had been made. The proper amount of the judgment therefore ought to have been expressed as

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1 This question was left open by this Court in *Finn v Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 QdR 29 at 40 but the proposition that it did was assumed to be correct in *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212 at 217, 222, *Hardy v St Vincent's Hospital Toowoomba Ltd* [2000] 2 Qd R 000 and *Peachey v Mount Isa Mines Ltd* [1998] QCA 400; Appeal No 3072 of 1998, 1 December 1998. See however *Heil v Suncoast Fitness* [2000] 2 Qd R 000 at [9] to [17].

2 Different views have been expressed on this in *Finn* at 42, *St Vincent's Hospital* at 000 and *Mount Isa Mines Ltd*.

3 [1978] Qd R 362.

$55,173.29. No serious argument was raised by senior counsel for the respondent in respect of this issue on appeal.

[12] The appellant appeals against the finding of liability made against it, particularly the finding that the risk of injury was foreseeable.

The Facts

[13] On the day in question, the respondent in the company of a co-worker, Mr Kafoa, was lopping tree branches to clear them from electricity power lines. The system of work was for Mr Kafoa to use a cherry picker to actually cut the branches away from the tree and for the plaintiff to collect the branches and where necessary reduce them in size before feeding them through a "Vermeer 620" brush chipper. Photos of the brush chipper, which is also called a mulcher, were exhibited at the hearing and appear at p 208 – p 210 of the record. The branches after passing through the cutters in the machine, which turns them into woodchips, were thrust through a chute which delivered the timber in chip-form to the back of a truck. There was some dispute as to whether the truck had a canopy which fully enclosed its tray or whether the sides were made of open square mesh.

[14] This dispute was not resolved in the learned trial Judge's reasons but it seems clear enough that he accepted that woodchip dust was created by the process and he found that "probably as a result of a gust of wind blowing towards the plaintiff from the direction of the chute of the mulcher, the plaintiff did inhale woodchip dust".[4]

[15] The presence of the dust caused the plaintiff to sneeze which, in the opinion of the medical expert, caused an increase in the internal pressure in his lungs which led to a spontaneous idiopathic pneumothorax. The condition is not a common one. In the opinion of Dr Phillips, who was called as a witness by the respondent, one would expect to see only about 12 such cases in a year at a major hospital.[5] The condition arises suddenly. The anatomical basis for the rupture is usually a cyst or a bleb on the surface of the lung.[6]

[16] The respondent was congenitally predisposed to this condition and could have suffered the consequential pneumothorax at any time, even in his sleep.[7] At the same time he may have gone through life without ever suffering this consequence. Prior to the incident he was not aware of this predisposition.

[17] There is no suggestion that the appellant was, or ought to have been, aware of this condition in the respondent. The respondent does not assert that he was owed any special duty by reason of his particular vulnerability to suffer a spontaneous pneumothorax.

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4 [Record 261].

5 [Record 92/40].

6 [Record 64/1].

7 [Record 66/35].

[18] The respondent's case at trial was founded upon the failure by the applicant to provide him with a face mask in circumstances where -

(a) there was a risk of the inhalation of woodchip dust;
(b) that such inhalation gave rise to a risk of injury.

[19] The relevant findings of the learned trial Judge were expressed as follows:-

> "*I am satisfied on the evidence that the following facts have been established. Firstly the process which involved mulching of branches after they had been fed into the mulcher did generate a significant quantity of woodchip dust. Secondly at the time of the incident, probably as a result of a gust of wind blowing towards the plaintiff from the direction of the chute of the mulcher, the plaintiff did inhale woodchip dust. Thirdly the spontaneous pneumothorax sustained by the plaintiff was caused as a result of his sneezing after or while inhaling woodchip dust and in the course of lifting a moderately heavy log to feed into the mulcher.*
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> *No dust mask was provided to the plaintiff and he was not wearing one at the time. I accept that he was given no instructions about wearing one. Despite a quantity of evidence that it was not common practice for those operating mulchers to be provided with or to wear dust masks I am satisfied that any reasonable employer would have foreseen that there was a very real possibility that woodchip dust would be inhaled by those using a mulcher and that such inhalation constituted a foreseeable risk of harm involving some form of lung injury. The particular form of injury does not have to be foreseen, only the fact that some injury may result."* [8]

Foreseeability of Injury

[20] This appeal turns on the relatively narrow point of whether the inhalation of woodchip dust constituted a foreseeable risk of injury.

[21] For the appellant it was submitted there was no evidence to establish that there was any such foreseeable risk to a normal person in the position of the plaintiff and consequently there was no basis for His Honour's finding.

[22] The only direct evidence on this topic appears in the cross-examination of Dr Hart by counsel for the respondent which is in the following terms:-

> "Q. Doctor, with the inhalation of dust at a workplace, in your experience could that cause a worker any lung problems?—
> A. I guess it depends on the dust and over how long a period.
> Q. And in you experience, what type of problems could be caused?—
> A. I've seen it – well, I guess in the worst case scenario it can go on to cause asbestosis. It can cause allergies. It can exacerbate asthma."[9]

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8 [Record 261].

9 [Record 143/49-60].

[23] It is noted at once that this evidence is of a very general nature and is highly qualified. Plainly by reason of his reference to asbestosis, Dr Hart was not expressing any opinion about woodchip dust. Rather he was making reference to some problems that might arise as a consequence of inhalation of dust of an unspecified kind and of an unstated concentration.

[24] The likelihood of harm resulting from the inhalation of woodchip dust in the concentrations and in the circumstances referred to in the plaintiff's case was not dealt with in any of the medical reports tendered nor in the oral evidence given by other medical witnesses. Dr Phillips and Dr Stevenson agree that the anatomical cause of the pneumothorax was the presence of a bleb or a minor cyst on the surface of the lung.[10]

[25] The medical practitioners all agree that it was the inhalation of dust which caused the sneeze which, in turn, caused the pneumothorax[11] but neither of them makes any reference to any risk of injury from the inhalation of woodchip dust per se.

[26] Counsel for the respondent argued that it was a "matter of commonsense" that the inhalation of dust gives rise to a foreseeable risk of injury to the lungs. No injuries were particularly identified as being ones that commonsense would associate with the inhalation of woodchip dust in the circumstances of the respondent's workplace.

[27] No doubt inhalation of dust of any kind or quantity might provoke a person to sneeze [12] but that is somewhat removed from establishing a reasonably foreseeable risk of injury. The employer's duty does not extend to reducing the risk of a non-injurious response, such as a sneeze, when irritated by dust in the workplace. Further, apart from the pneumothorax there was no sign of other damage to the respondent's lung associated with his having spent 18 months in this workplace.

[28] Dust is a common irritant in many a workplace and in areas through which an employee may have to pass in the course of his/her employment. Dust can arise from many sources, some outside the control of the employer. In the instant case there was some divergence in the evidence as to the concentration of the woodchip dust. The learned trial Judge did not feel the need to resolve this divergence but found simply that "the mulcher did generate a significant quantity of woodchip dust"[13] but this finding and the further finding that "the plaintiff did inhale woodchip dust" do not lead necessarily, or even probably, to a finding that it constituted a foreseeable risk of harm involving "some form of lung injury".[14]

[29] In *Neill v NSW Fresh Food and Ice Pty Ltd*[15] the following appears from the joint judgment of Taylor and Owen JJ –

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10 [Record 193] Dr Stevenson; [Record 89] Dr Phillips.

11 [Record 196] Dr Phillips.

12 [Record 91/45].

13 [Record 261].

14 [Record 262].

15 (1963) 108 CLR 362 at 369 - 370.

> "These observations, however, involve no departure from the proposition that in order to enable an injured workman to recover damages from his employer the evidence must be such as to justify a finding of negligence on the part of the employer and, if the negligence alleged is in relation to a system of work employed, **the evidentiary material must be such as to enable the jury to find that the system unreasonably exposed the workman to the risk of injury** … Whether or not there has been such a failure on the part of the employer may, in some cases be resolved by the application of common knowledge; in others it may be necessary to show a departure from long established practice in the type of work under consideration or by showing that an appropriate method which would eliminate or minimize the risk was reasonably available. Additionally, of course, it must appear that the plaintiff's injuries would have been prevented if the standard practice or the alternative method had been employed. No doubt also the answer to this question may, in many cases, follow almost as a matter of course, but the recent case of *McWilliams v Sir William Arrol & Co Ltd* serves as a reminder that the onus of establishing this proposition is always on the plaintiff" (my emphasis).

[30] In some circumstances, direct evidence may be unnecessary. Such was the case in *Mount Isa Mines v Pusey*[16] where the plaintiff suffered nervous shock on seeing workmates badly injured from an electrical incident. Barwick CJ said:

> "I think it could be held that such an employer could and ought to foresee that the sight of a burning or recently burnt human might mentally disturb an employee whose proximity to the injured fellow employee ought to be foreseen. So much I think is within the ordinary experience of people who work with electric current, particularly electric current at a high voltage. No special medical or psychiatric knowledge is required in my opinion to foresee the possibility of injury by way of mental disturbance in such circumstances."[17]

In the same case, Windeyer J said:-

> "Foreseeability does not mean foresight of the particular course of events causing the harm. Nor does it suppose foresight of the particular harm which occurred, but only of some harm of a like kind. That is well established by many cases, including *Chapman v Hearse*[18], and *Hughes v Lord Advocate*[19] … In what way does one test whether a particular harm is of the genus that was foreseeable? … Liability for nervous shock depends on foreseeability of nervous shock. That, not some other form of harm, must have been a foreseeable result of the conduct complained of. The particular

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16 (1970) 125 CLR 383.

17 At 389 - 390.

18 1961) 106 CLR 112

19 [1963] AC 837.

> pathological condition which the shock produced need not have been foreseeable. It is enough that it is a 'recognizable psychiatric illness'."[20]

[31] To my mind, it is not a matter of common knowledge that exposure to woodchip dust even in a 'significant quantity' would give rise to a foreseeable risk of injury. Whilst such an environment might give rise to a likelihood of a person sneezing that does not seem to me a circumstance which an employer was required to guard against unless, additionally, that consequence imposed a risk to health. This latter proposition has not been established by the evidence.

[32] At trial, the appellant led a body of evidence to show that it was not the practice for a worker engaged in the use of a mulcher to wear a face mask. The witnesses who gave this evidence were not aware of any risks of injury to the workers so engaged by reason of inhalation of dust. Other safety equipment such as a helmet, ear muffs and safety goggles were common and were in fact used by the respondent. Had it been established that there was a risk of injury from the inhalation of woodchip dust, there would be little difficulty in accepting that by the use of face masks, the means were readily at hand to obviate the risk. No argument was raised by the appellant on that account. The issue was simply foreseeability of harm.

[33] In my view the plaintiff has failed to establish that there was a foreseeable risk of injury by reason of the environment in which he was required to work and he has thereby failed to make out his claim in negligence.

Breach of Statutory Duty

[34] The appellant also challenged the learned trial Judge's finding that it was guilty of a breach of statutory duty by s 9(1) of the *Workplace Health and Safety Act* 1989 ("the Act") which is now repealed. The subsection is in the following terms:

> "**9.(1)** An employer who fails to ensure the health and safety at work of all the employer's employees, except where it is not practicable for the employer to do so, commits an offence against this Act."

[35] His Honour's finding on this point was that:

> *"[The appellant] failed to provide and maintain plant and systems of work that are, so far as practicable, safe and without risk to the health and safety of any person, and that it failed to provide as far as practicable, adequate facilities for the health and safety of employees."*

The reasons for judgment did not identify the plant and systems nor the facilities which the appellant failed to provide, but since the case was fought only on the issue of whether face masks ought to have been provided the finding should be interpreted against that background.

[36] The appellant argued that the finding did nothing to strengthen the case for the respondent because there remained a need on the part of a claimant alleging breach of a statutory duty to demonstrate a causal link between his/her condition and the deficiency in the workplace. Reference was made to two decisions of this Court:

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20 At 402.

Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville[21], decided in October 1995, and *Hardy v St Vincent's Hospital Toowoomba Ltd*[22], decided in May 1998. It was suggested that these decisions were in conflict.

[37] In *Finn*, Thomas J spoke of there needing to be "a general awareness of the problem to activate a duty in an employer to introduce special protective measures. If this is correct, it cannot be said that it was practicable for the employer to have done things the need for which was not known or required to be known".[23] Williams J spoke of the employer not to be required "to take precautions against a risk which was wholly foreseeable".[24] These obiter statements were not cited to the Court of Appeal in the later case.

[38] In *St Vincent's Hospital*, the Court of Appeal (Pincus, Davies JJA and Ambrose J) considered the construction of s 9(1) of the Act, particularly having regard to the extended meaning given to the word "practicable" in the exception to liability under the statute.

[39] By s 6(1), "practicable" means practicable having regard to:

(a) the nature of the employment or, as the case may be, the particular aspect of the employment concerned;
(b) the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation thereto;
(c) the state of knowledge about the injury or harm to health or safety that may be involved, about the risk of that injury or harm to health or safety occurring and about any ways of preventing, removing or mitigating that injury, harm or risk;
(d) the availability and suitability of ways to prevent, remove or mitigate that injury or harm to health or safety or risk; and
(e) whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances.

[40] Noting particularly that paragraphs (b) and (c) above import notions of "potential injury or harm" and "degree of risk", the Court in *St Vincent's Hospital* said:-

> "We find it unnecessary to consider to what extent a fall was foreseeable, for we are of the view that the provisions of s 9(1) should not be read as if foreseeability was a requirement. The sorts of considerations a court would have regard to in dealing with an issue of foreseeability are, to some extent, made relevant by the definition of the word "practicable"; we refer to paras (b) and (c) of the definition."[25]

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21 [1997] 1 Qd R 29.

22 [2000] 2 Qd R 000.

23 At 40.

24 At 42.

25 At 000.

[41] Other points emerge from the decision of the Court in *St Vincent's Hospital*. Firstly, the onus of proving the statutory exception of practicability in the defined sense falls on the employer.[26] Secondly, in the context of s 9(1) of the Act, the word "ensure" means "make certain" or "make sure".[27]

[42] Taking these matters into account, the exception which the appellant sought to establish was that it was not practicable, in the defined sense, to avoid the harm suffered by the respondent. The employer could have no knowledge of the potential injury in the form of spontaneous pneumothorax. Nor could it be said, on the evidence, that there was any risk of a more general harm to lungs by reason of the inhalation of woodchip dust. In other words it was not practicable for the employer to have done things, the need for which was not known or required to be known by it.

[43] One arrives at this position by applying the approach suggested in the *St Vincent's Hospital* case. But it is worth noting that in so doing, I have adopted the terms used by Thomas J (with whom McPherson JA agreed) in *Finn*'s case. In short, I do not see that the two decisions of this Court are in conflict.

[44] The findings of the learned trial Judge do not bear upon the question of whether the exception of practicability was made out having regard to paragraphs (b) and (c) of s 6(1) of the Act. However it is clear enough that on the whole of the evidence there is not shown the presence of any danger to health by the inhalation of woodchip dust. A finding to this effect is unassailable once one rejects, as I do, the suggestion that common sense identifies the presence of such danger. That being so, I come to the view that there is no proven breach of the statutory duty arising pursuant to s 9(1) of the Act.

[45] I would therefore allow the appeal with costs. The judgment below should be set aside and in its place there should be judgment for the defendant with costs.

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26 At 000.

27 At 000.