SUPREME COURT OF QUEENSLAND

CITATION:	*McKenzie v. Honnery & Ors* [2002] QSC 303
PARTIES:	**PAUL McKENZIE** (respondent/plaintiff) **v** **GLENVILLE COLIN HONNERY AND ELIZABETH ELLEN HONNERY** (first defendant) **COUNCIL OF THE SHIRE OF FLINDERS** (applicant/second defendant) **PRIMARY INDUSTRIES CORPORATION AND/OR DEPARTMENT IF IRRIGATION AND WATER SUPPLY AND/OR STATE OF QUEENSLAND** (third defendant)
FILE NO/S:	S 66 of 1995
DIVISION:	Trial
PROCEEDING:	Application for Leave to Enter Judgment
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	1 October 2002
DELIVERED AT:	Townsville
HEARING DATE:	25 September
JUDGES:	Cullinane J
ORDER:	**1. Judgment in the action for the applicant/ defendant against the respondent/plaintiff** **2. Costs of the action to be assessed.** **3. Respondent to pay the applicant's costs of the application to be assessed.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – where applicant/defendant seeks order against respondent/plaintiff under Rule 293 of the *Uniform Civil Procedure Rules* – where order sought by applicant/defendant to stay the action or strike it out and have Judgment entered in it's favour on grounds of delay and failure to take steps – whether judgment can be entered if it is clear that claim must fail or has no real prospect of success

TORTS – NEGLIGENCE – DANGEROUS PREMISES - where plaintiff suffered grievous injury in an accident at Farleigh Waterhole – where applicant is local authority for the relevant area – whether duty of care can be imposed on basis of occasional work carried out on the premises by the applicant – where liability on condition of a premises to be based upon occupation or some degree of use or control related to the creation or existence or continuance of the risk or danger

Uniform Civil Procedure Rules 1999 (Qld) Rules 293 and 292

CSR Ltd v Casaron Pty & Ors (2002) QSC 21 (15 February 2002
McPhee v Zarb & Ors [2002] QSC 4 (8 January 2002)
Prast v Town of Cottesloe (2000) 22 WAR 474
Romeo v Conservation Commission (NT) (1988) 192 CLR 431
Wheat v E. Lacon & Co. Ltd (1966) AC 552

COUNSEL: P Hastie for the applicant/second defendant
J Webb for the respondent/plaintiff

SOLICITORS: Sparke Helmore for the applicant/second defendant
Barrett Wherry, Solicitors and Attorneys for the respondent/plaintiff

[1] The applicant/defendant seeks an order that judgment be entered for it against the respondent/plaintiff under Rule 293 of the Uniform Civil Procedure Rules (the Rules). In addition an order is sought staying the action or striking it out and entering judgment in the applicant's favour under the inherent jurisdiction of the court on the grounds of delay and failure to take steps in accordance with the Rules although it is now acknowledged that at present the respondent is not in default under any Rule.

[2] The case has had a long and somewhat tortuous history.

[3] The plaintiff suffered grievous injury in an accident at Fairleigh Waterhole near Hughenden on 11th April 1992. The applicant is the local authority for the relevant area.

[4] The Writ of Summons was filed on 10th April 1995. The respondent also sued the purported owners of the property on which the waterhole is located. Subsequently others were substituted for these defendants. This occurred on 9th December 1996 and an appeal against the order substituting defendants was dismissed by the Court of Appeal on 16th December 1997.

[5] The action was struck out against the first defendants (the owners) on 6th October 2000. The respondent had also sued a third defendant, the State of Queensland (or in the alternative certain Government instrumentalities). The action against this defendant was struck out on 17th December 2001.

[6] In 2001 the applicant sought to have the respondent's claim dismissed for want of prosecution and the respondent sought leave to proceed, notwithstanding that he had not taken any step in the action for more than two years. The respondent had purported to take some steps without adverting to the fact that leave was needed.

[7] On 5th June 2001 the applicant's application to dismiss was struck out and leave was granted to the respondent to proceed.

[8] On 5th March 2002 the applicant delivered a list of documents and a statement of expert and economic evidence.

[9] On 24th September 2002 (that is, the day before this application came before the court) an amended statement of loss and damage and documents associated therewith were forwarded to the solicitors for the applicant. No other step has been

taken in the proceedings by the respondent since the order dismissing the applicant's application in June of last year.

[10] The respondent has since that time undergone surgery involving the removal of a hip.

[11] The extremely serious nature of the respondent's condition and the substantial difficulties associated with giving appropriate instructions and obtaining the necessary documentation which arises from his relatively isolated position in Hughenden (where he lives with a permanent carer) and the fact that his solicitor is in Charters Towers weighed heavily in the decision to grant the respondent leave to proceed and to refuse the application to strike the matter out. It must necessarily continue to be a relevant factor although more than a year has passed with relatively little progress and such progress as has occurred, occurred only very late.

[12] Rule 293 of the UCPR provides as follows:

> ***"[r 293] Summary judgment for defendant***
>
> ***293*** *(1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.*
> *(2) If the court is satisfied –*
> *(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and*
> *(b) there is no need for a trial of the claim or the part of the claim;*
> *the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."*

[13] This rule which had no counterpart in the superseded rules empowers the court to give judgment for a defendant if it is satisfied the plaintiff has no real prospect of succeeding and there is no need for a trial of the claim. This is also the language used in Rule 292 providing for summary judgment for a plaintiff. This, as has been pointed out in some judgments, is not to be regarded as simply a restatement of the

position as it previously stood. It permits a more robust approach by the court in conformity with the aim of facilitating the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. This is the stated purpose of the UCPR. See *McPhee v Zarb & Ors* [2002] QSC 4 (8 January 2002) and *CSR Ltd v Casaron Pty Ltd & Ors* (2002) QSC 21 (15 February 2002).

[14] Nonetheless a judgment can in my view be entered only if it is clear that the claim must fail or has no realistic prospects of success.

[15] Much of the factual matter is common. There is however a substantial dispute as to the role of the applicant in relation to a road or track which will be referred to shortly. It is common ground that I assume that view of the facts most favourable to the respondent on this issue for the purposes of this application.

[16] According to the statement of claim the respondent was present at a picnic spot at Fairleigh Waterhole on 11th April 1992. As has already been mentioned the waterhole is situated on private property. There was a rope attached to a tree on the bank. The rope which is alleged to have been approximately 7 metres in length hung over the waterhole. After swimming in the waterhole the respondent climbed onto the rope and started to swing on it. The rope was wet and muddy and the plaintiff lost his grip whilst swinging in an arc and his head was propelled into a steep bank of the creek. The bank of the creek was several metres in height above the water line and was steep and approximately vertical to the water line.

[17] There are photographs of the waterhole in evidence.

[18] The allegations against the applicant are found in paragraph 9 of the statement of claim**;**

" the Second Defendant:-

I. *failed to maintain a safe picnic area.*

II. *failed to erect a warning sign, warning of the danger of using the rope and in particular its capacity to become wet, muddy and slippery.*

III. *permitted the rope to remain in place when it knew or ought to have known of the danger to users.*

IV. *failed to inspect or adequately inspect the safety of the waterhole and to require the removal or remove the rope.*

V. *permitting persons to swing on the rope in close proximity to the steep bank."*

[19] Although the applicant has placed a body of evidence before the court to the effect that it played no role in the provision of access to the waterhole it is accepted that for the purposes of this application I should proceed upon the basis of the respondent's material. This suggests that the access road to the waterhole leads from a council road (the Torver Valley-Spring Valley Road) and that the tree on which the rope hung is some 269.1 metres from the closest boundary of the Torver Valley-Spring Valley Road. It also suggests that the applicant from time to time graded the access road from the Torver Valley-Spring Valley Road to the waterhole and associated with that cleared rubbish away from the area of the waterhole. It can be assumed that the applicant was at all times aware that people used the waterhole and of the circumstances of the waterhole generally.

[20] The applicant did not purport to exercise any control over or in relation to the waterhole beyond the activities which I have just described.

[21] It was submitted on behalf of the applicant that there is no conceivable basis upon which the respondent can succeed in his action against the applicant. For the respondent it was contended that it would be open to a court to make a finding favourable to the respondent upon the basis that the applicant by maintaining the road to the waterhole, and associated with that, keeping it tidy invited persons to

use the waterhole or facilitated the use of it. It was argued that the use of the rope involved a foreseeable risk of injury having regard to the steep nature of the banks on either side of the waterhole and that the applicant, given its role in the provision of access to the waterhole and the associated tidying of the area, ought to have warned those coming to the waterhole of this risk. No authority was cited in support of this argument. It was accepted, as is clearly the case, that no allegation based upon a failure to do anything on the land could succeed.

[22] The salient features then of the undisputed facts or the facts to be assumed for the purpose of the application are as follows:-

a) The work occasionally carried out by the applicant can be taken to have been carried out with either the express or implied consent of the owners.

b) A similar consent must have extended to members of the public who used the waterhole.

c) Since the land on which the waterhole is situated is private property, the applicant had no power either to invite persons to or exclude persons from the waterhole.

d) Nothing done by the applicant created or increased or affected in any way the risk of injury which it is alleged existed.

e) The applicant's actions facilitated access to the waterhole although it is not suggested that the hole would have been otherwise inaccessible.

[23] It is difficult to see on what basis a duty of care of the kind contended for can be imposed upon the applicant simply upon the basis of its action in grading from time to time an access to the waterhole or removing rubbish from the site coupled with a knowledge (to be assumed for the purpose of this application) that the use of the rope at the waterhole might involve a risk of injury to persons using it.

[24] Liability in respect of the condition of premises or activities on premises must be based upon occupation or some degree of use or control which is related to the creation or existence or continuance of the risk or danger.

[25] In *Wheat v E. Lacon & Co. Ltd (1966) AC 552* Lord Denning after observing that the duty of a person in relation to premises is an illustration of the general duty of care went on to say at page 578:

> *"Translating this general principle into its particular application to dangerous premises, it becomes simply this: wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in an injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is 'his visitor'; and the 'occupier' is under a duty to 'his visitor' to use reasonable care. In order to be 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers' and whenever this happens, each is under a duty to use care to persons coming lawfully onto the premises, dependent on his degree of control."*

[26] There is in my view no basis upon which either knowledge or imputed knowledge of a risk or danger can alone be sufficient to give rise to a duty of care in the absence of some responsibility for its creation or existence or continuance or some degree of control over the premises giving rise to a duty to take some step in relation to the risk, such as by its removal or by the provision of some warning of it.

[27] As the respondent in this case can point only to the occasional grading of the access road to the waterhole and the clearing of rubbish, combined with such knowledge I

am of the view that this is insufficient to enable the respondent to succeed and that he should be regarded as having no realistic prospects of success.

[28] I should add that if a duty of some kind were held to arise it would seem that the risk of losing one's grip and coming into contact with the bank or some other object is so obvious that the plaintiff would be unable to establish that a failure to warn of such risk constituted a breach of such duty. See cases such as *Romeo v Conservation Commission (NT)* (1988) 192 CLR 431 and *Prast v Town of Cottesloe* (2000) 22 WAR 474.

[29] The further litigation of the matter including this trial would undoubtedly have been an expensive exercise for all concerned. The clear view I have formed is that the respondent cannot hope to succeed and this being so it is in everybody's interests that further costs of the litigation be avoided. I am conscious of the gravity of the respondent's condition and the fact that the action has proceeded to this point which has entailed medical examinations and a good deal of preparatory work. Nonetheless as the requirements of Rule 293 have been satisfied the appropriate course is to order that judgment be entered for the applicant/defendant.

[30] It is unnecessary for me to deal with the second basis of the applicant. However I indicate that whilst I think that if the considerations personal to the respondent to which I have already referred were put to one side this would clearly be a case in which the court would be inclined to exercise its inherent jurisdiction to stay the proceedings. Those considerations, however, in my view weigh heavily in the respondent's favour on this application also. No specific prejudice is alleged by the applicant and it is conceded that the respondent is not presently in default under any of the rules. Had I found against the applicant on the first issue I would refuse the

order staying or dismissing the action in the exercise of the court's inherent jurisdiction.

[31] Some particular complaints were at one time advanced by the applicant in respect of the respondent's provision of a statement of loss and damage but ultimately it was accepted that there is no present default by the respondent.

[32] I give judgment in the action for the applicant/defendant against the respondent/plaintiff with costs of the action to be assessed. I order the respondent to pay the applicant's cost of the application to be assessed.