IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 37 of 1995

Brisbane

[Jaenke v. Hinton]

BETWEEN:

KEVIN GEORGE JAENKE

and

SANDRA ELIZABETH JAENKE
(Defendants) Appellants

AND:

TONI HINTON
(Plaintiff) Respondent

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Pincus JA
Thomas J
Williams J

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Judgment delivered 03/11/1995

Separate reasons for judgment. All concurring as to the orders made.

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**APPEAL ALLOWED. THE APPELLANTS SHOULD HAVE THE TAXED COSTS OF THE APPEAL AND OF AND INCIDENTAL TO THE ACTION.**

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**CATCHWORDS:** **NEGLIGENCE - garden hose left across mown lawn overnight - milk vendor stepped on hose and injured ankle - held home owner not negligent - Wyong Shire Council v. Shirt (1980) 146 CLR 40 and Bolton v. Stone (1951) A.C. 850 considered.**

Counsel: Mr W Sofronoff QC and Mr S Doyle for appellants.
Mr M Grant-Taylor for the respondent.

Solicitors: Phillips Fox for appellants.
McLaughlin Ivey Woodman for respondent.

Hearing date: 11 September 1995

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BeforePincus J.A.
Thomas J.
Williams J.

[Jaenke v. Hinton]

BETWEEN:

KEVIN GEORGE JAENKE and
SANDRA ELIZABETH JAENKE

Appellants

AND:

TONI HINTON

Respondent

**REASONS FOR JUDGMENT - PINCUS J.A.**

**Judgment delivered 03/11/1995**

I have read the reasons of G N Williams J and agree with his Honour's view that no breach of the appellant's duty of care was shown and that the orders his Honour proposes should be made. I do so for the reasons given by G N Williams J, to which I wish to add little.

In Inverell Municipal Council v. Pennington [1993] Aust. Torts Reports 81-234, Meagher JA, in discussing an appeal against a judgment in a negligence case, suggested that if the primary judge's view that negligence was proved was correct -

> " . . . the legal result would be surprising to a degree, for it would indicate that the law of negligence has travelled such a long way that it has imposed the duties of an insurer on persons in the position of the appellants . . . " (62,410)

His Honour also remarked:

> " So long as a duty arises whenever the occurrence of the risk is not fanciful, a duty will arise in every single case. It does not follow that the defendant will be liable in every single case, but it does follow that he will be unless it can be proved that to avoid the risk will be wholly unreasonable ". (62,410)

In the same case Mahoney JA, referring to the reasons given by Mason J in The Council of the Shire of Wyong v. Shirt (1980) 146 C.L.R. 40, expressed the view, in effect, that before that judgment it had been -

> " **. . .** believed by some that once a risk of injury was relevantly foreseeable and if that risk was not so far fetched or remote that it could properly be put aside, then there was a duty upon the defendant to remove or neutralise that risk ". (62,401)

Mahoney JA, after some further discussion, remarked:

> " In my opinion, the judgment of Mason J establishes that the law does not in every case require a defendant to go so far. It measures what the defendant is to do by the response of a reasonable person ".

In my respectful opinion, the views of Mahoney JA more accurately represent what the law requires of a person having a duty of care than those of Meagher JA. It is true that there are some (myself among them) who find difficulty in grasping how it can be said that persons such as the defendants in The Council of the Shire of Wyong v. Shirt (above) and Nagle v. Rottnest Island Authority (1993) 177 C.L.R. 423 failed to do "what a reasonable man would do by way of response to the risk". But it seems wrong to reason from the actual results of these cases to the conclusion that the legal rule now is of the kind suggested by Meagher JA; the law is not that the reasonable person, for the purposes of the relevant test, is one who is most unusually, or obsessively, apprehensive of harm to others. To apply this to the present case, it could not be denied that some householders might, to avoid the possibility of someone such as the respondent being injured by a hose lying across the lawn, move it out of the way

at night; but it seems to me impossible sensibly to conclude that, to adapt the language of Mahoney JA, a reasonable person, as opposed to a remarkably cautious one, would not accept the continuance of the risk involved in the hose being left lying across the lawn.

I agree that the appeal must be allowed.

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(Plaintiff) Respondent

REASONS FOR JUDGMENT - THOMAS J

Judgment delivered 3/11/1995

I record my agreement with the reasons about to be published by Williams J.

The appellants are householders in a Brisbane suburb. The learned Trial Judge found that they owed a duty of care to the respondent (a milk-delivery person) to remove a garden hose from the lawn surface. His Honour also found that "the notional reasonable person in the (appellants') position and circumstances would have foreseen that the person to deliver bottled milk on the night of 19-20 February 1989 may have sustained injury caused by the hose lying on the lawn at or near the place of the plaintiff's injury". His Honour further concluded that the appellants failed to discharge the duty which they owed, found them guilty of negligence causing the injuries sustained by the respondent when she slipped on the hose, and ordered them to pay damages.

In addressing the question whether a given situation creates a foreseeable risk of injury, it

is not legitimate to use hindsight. Unfortunately the fact that an injury has in fact resulted tends to compromise the exercise, as hindsight of an actual mishap makes it difficult to address the question objectively and realistically. Knowledge of the fact that an injury has occurred commonly makes it difficult for a tribunal to hold that the risk of injury was not foreseeable, or to use the terms of Mason JA in Wyong Shire Council v. Shirt (1980) 146 C.L.R. 40, 47-48, to hold that such a risk was "far-fetched" or "fanciful".

In the present case, however the matter is looked at, I have no real doubt that reasonable householders in the position of the appellants would not and should not be expected to foresee that their conduct in leaving a domestic hose lying on the lawn overnight involved a risk of injury to a milk-delivery person, or indeed to anyone. The respondent's case does not in my view surmount the first test of foreseeability described by Mason J in the passage to which reference has been made.

In the present case if the appellants had adverted to all the relevant facts, including the respondent's habits, movements, footwear, and use of a torch, they would not have foreseen the existence of other than a fanciful risk that she would be injured by slipping on the hose.

If such a duty exists, as Williams J has pointed out, a householder would be potentially liable whenever a hose was not folded away after use, and indeed even when it was in use. I do not consider that a householder is generally at legal risk for mishaps that might arise from persons coming into contact with a garden-hose any more than he or she is liable for mishaps to persons coming into contact with a kitchen table (Phyllis v. Daly (1988) 15 N.S.W.L.R. 65, 74), with a pot-plant in a special place, or a car parked in a garage. Nor do I think that a householder is at risk with respect to a plastic-wrapped newspaper until such time as he or she removes it from the lawn. In the examples which I have given, the magnitude of the risk and the probability of its occurrence are in the absence of special circumstances too small to be regarded as foreseeable risks giving rise to a duty of care. I do not say that it would always be impossible for

objects of these kinds, in the circumstances of a particular case, to be held to be the subject of a breach of a duty of care. But I am of the view that in the context of ordinary suburban living in 1995, such objects do not in general give rise to a duty of care to prevent persons from suffering mishap from coming into contact with them.

The words of Mason J at pp.47-48 in Wyong have had a considerable impact upon the practice of the law concerning occupiers' liability. The limiting of events that are not reasonably foreseeable to those that can be described as "fanciful" or "far-fetched" is a gloss on what is and what is not reasonably foreseeable in the circumstances. There is neither need nor authority for this Court to go beyond Mason J's stated test for the purpose of dealing with the present case, but I fear that a slavish adherence to these words may sometimes lead to unrealistic results, as it is particularly difficult for a Judge to hold a prospect to have been "fanciful" or "far-fetched" when he or she knows that it in fact resulted. Concerns in relation to the present trend were expressed by the members of the Court of Appeal in Inverell Municipal Council v. Paddington (1993) A.T.R. 62,397, 62,401-402, 62404, 62,409-62,410, where part of the test suggested by Walsh J in Miller Steamship Pty Co Ltd v. Overseas Tankship (UK) Ltd (1963) 63 S.R.N.S.W. 948, 959, was favoured. The reformulation of the text however cannot be done by an intermediate appellate court.

In my view the finding of negligence in the present case was quite contrary to contemporary expectations and standards. If the law pretends to impose standards to which reasonable members of the community cannot relate, the law will fall into disrepute. In fact it is the standard of the reasonable person that courts attempt to uphold. The finding of negligence against the appellants in this case assumed an unreasonably high standard of care to protect other persons from danger, and an unrealistic level of foreseeability. The alleged danger was from a common garden hose, the presence of which presented too small a risk to create a duty to remove it.

The appeal should be allowed. I agree with the orders proposed by Williams J.

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REASONS FOR JUDGMENT - GN WILLIAMS J

Judgment delivered 03/11/1995

This is an appeal by defendants against a finding that negligence on their part was a cause of the respondent (plaintiff) sustaining personal injury. The learned trial Judge in the District Court apportioned liability equally between the appellants and the respondent, and it is the alternative contention of the appellants that the apportionment in fact made was far too favourable to the respondent. There is no appeal against the quantum of damages assessed.

The incident in question occurred at about 1.45am on 20 February 1989 when the respondent, a milk vendor, was traversing the front yard of the residence of the appellants at

126 Fegan Drive, Moorooka. A sloping cement driveway provides vehicular and pedestrian access from the roadway to the front of the residence occupied by the appellants. The respondent entered the yard of the appellants by that route, deposited milk near the front door, and then proceeded to cross the grassed area of the front yard of the appellants in order to gain access to the residence at 128 Fegan Drive. In the course of so doing (in accordance with the findings) she stood on a garden hose, lost control of her balance, fell, and badly fractured her left ankle. There is no suggestion in the evidence or the findings that she tripped on the hose.

The hose in question was an ordinary green garden hose. There was also a finding that the lawn in the vicinity was neatly mown. The evidence of the respondent was that she had delivered milk to the premises in question hundreds of times and had usually followed the same course. There is ample evidence (unchallenged and accepted by the learned trial Judge) that the hose had often been there before; the respondent had seen it from time to time. She also agreed in evidence that it was common to find hoses and sprinklers in the yards of residences to which she delivered milk. Indeed in the course of her evidence the respondent conceded that she frequently had to negotiate obstacles such as long grass, children's toys, rubbish bins and the like.

On this occasion the respondent would also have had to negotiate some stone steps which formed part of the landscaping

on the boundary between the residences at 126 and 128 Fegan Drive. Those stone steps were regularly used by the appellants and their neighbour at 128 in gaining access to each other's yard. There was nothing in the evidence suggesting that the appellants knew the respondent followed that route when delivering milk, but it was the logical way to take. The grassed area and hose would have been avoided if the respondent had returned to the road by way of the cement path and then entered 128 through the front gate.

On the night in question (though there had been a drizzle of rain earlier which had wet the ground) there was a full moon, and there was also some light thrown onto the area in question from a nearby street light. In addition the respondent was carrying a torch which she was shining onto the ground. She claimed that she was neither jogging or running. She did not see the hose before stepping on it. It was the respondent's failure to keep a proper look out (found to be more than mere inadvertence) which resulted in a finding of contributory negligence against her.

There was no finding by the learned trial Judge that for some reason the hose constituted a particular problem or danger on the night in question; nothing was advanced on the hearing of the appeal by counsel for the respondent which would suggest that any such finding was open on the evidence.

The learned trial Judge recognised that the relevant duty on the appellants as the occupiers of land was to take reasonable

care to avoid foreseeable risk of injury to the respondent (Australian Safeway Stores Pty Ltd v. Zaluzna (1987) 162 C.L.R. 479 at 488). It was also conceded by senior counsel for the appellants that the learned trial Judge correctly formulated the test with respect to the relevant duty of care; the relevant passages in his reasons appear to be based on what was said by the High Court in Australian Safeway Stores Pty Ltd v. Zaluzna and Nagle v. Rottnest Island Authority (1993) 177 C.L.R. 423. Counsel for the appellants submitted that the learned trial Judge erred in concluding that the risk of injury from the hose was sufficient to give rise to a duty of care in the appellants to protect the respondent from that potential danger. It is true as counsel pointed out in argument that this was not a case of the entrant being unfamiliar with the lie of the land and encountering an unexpected obstacle in a dark area. As noted above the respondent was well familiar with the features of the yard in question, and was also aware of the type of obstacles that she was likely to encounter in the course of traversing the yard.

An ordinary garden hose is a common feature found in most suburban yards in Brisbane. So much was virtually conceded by the respondent in her evidence. The presence of a hose running across a mown lawn is not ordinarily considered to constitute a danger to persons walking across the yard either in day time or at night time. If a hose running across the lawn constitutes a danger to a person traversing the yard at night time with the aid

of a torch, and knowing of the likelihood of a hose being there, it is logically difficult to conclude that it does not constitute a similar danger during daylight hours. Further the risk of injury to a person from merely stepping on a hose in those circumstances is very slight; indeed it is so slight that it would not ordinarily be regarded as foreseeable.

I have real difficulty in satisfying myself that the potential risk from the mere presence of the hose on the lawn was such as to give rise to a duty of care to protect the respondent from it. But in the circumstances it is not necessary to decide the appeal on that point.

The next issue to consider, and it is most critical, is whether or not the appellants breached the duty imposed on them; this involves an assumption that there was a foreseeable risk of injury to the respondent from the hose.

Again the learned trial Judge stated the appropriate test in unexceptional terms. Clearly the test that he applied was based on the formulation of principle by Mason J in Wyong Shire Council v. Shirt (1980) 146 C.L.R. 40; in the circumstances it is desirable to quote from the judgment at 47-8:

> "A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v. Stone, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far fetched or fanciful. Although it is true to say that in many instances the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it

> certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviated action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

The High Court recently applied that test in Miletic v. Territory Health Commission (1995) 69 ALJR 675. There they referred to the exercise as one of "balancing" the factors referred to in that passage.

The references by Mason J to Bolton v. Stone (1951) A.C. 850 in Shirt are, in my view, of importance for present purposes. His Honour at 45 stated the ratio of that House of Lords decision to be that there was no breach of duty, not because the risk of injury was not foreseeable, but because the risk, though

foreseeable, was so small that a reasonable man would have been justified in disregarding it and taking no steps to eliminate it. That then led him to cite with approval the passage from the judgment of the Privy Council in Overseas Tankship (UK) Ltd v. The Miller Steamship Co Pty (1967) A.C. 617 at 642-3, where Lord Reid was referring to the decision in Bolton v. Stone:

> "What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

Nothing in the other judgments in Shirt, nor in the judgments in Nagel v. Rottnest Island Authority, nor in any other authoritative decision I have been able to find questions the validity of all those observations. One finds further support for that approach in the reasoning of the majority in Phyllis v. Daly (1988) 15 NSWLR 65. Samuels JA concluded that on the facts of that case "the chance of a visitor to the premises coming to grief in stepping on and over the logs was so slight as to require no precaution omitted by the occupiers." (69) Mahoney JA made observations which are relevant for present purposes at 74:

> "There are dangers on any premises. The room may have a desk or a table. There is a danger that, if I fall, I will hit my head on it and my skull will be fractured. If the desk or table were not there, I would suffer little or no harm. And the danger is obvious: people do slip and fall. And the injury may be serious. The obvious foreseeability of such and injury and its seriousness does not involve that, if a person falls and hits his head on a table, there must have been a breach of duty by the occupier of the

> room. And this notwithstanding that people may live without tables and that tables may be easily removed."

In his reasons he referred to the danger or risk in that case as being "ordinary".

There are also pertinent observations made by White J in Bartlett v. Robinson (1981) 27 SASR 342, another milk vendor case. There the milkman tripped on the raised portion of a concrete slab whilst delivering milk at night to a dwelling house. The case was decided on the old law relating to invitees, but many of the observations in the judgment are pertinent for present purposes. The Full Court held that the unevenness between the slabs did not constitute an unusual danger. White J at 346-7 said:

> "Ultimately, the law of negligence is based upon a decent commonsense regard and care for our neighbour applying contemporary standards. We interact with, and sometimes cause harm to, our neighbour in an almost limitless combination and permutation of circumstances. In my view, the decision appealed from correctly and fairly applied the sensible standards of the law of negligence in determining that this unfortunate accident was not caused by some unusual danger on the respondent's domestic premises.
> ...
> The law of negligence is concerned with reasonable standards of conduct - reasonable care for the safety of others, showing reasonable foresight in the circumstances. What is reasonable varies not only with the particular circumstances or relationship, but with community standards from place to place and decade to decade."

It is in the light of the passages that I have quoted that the facts of the instant case must be considered in determining whether there was a breach of the duty owed by the appellants. The learned trial judge did not clearly articulate what he found

constituted the breach of duty. All he said was: "The storing of the hose after use would not have been a complicated undertaking." That was also the only particular given by counsel for the respondent of the breach of duty.

But it must be reconsidered that hoses are often used for hours at a time, both during the day and at night. Further, even when the hose is in use there could be a considerable length of it on the ground between the tap and the watering point. If the breach be in not rolling up the hose after use, it must follow that the mere presence of an ordinary garden hose running across mown lawn whilst the hose was in use constituted a danger which a reasonable householder failed to remove at his peril.

As I have already noted, it is not uncommon for Brisbane householders, who would ordinarily be regarded as people taking all reasonable care to avoid creating risk of injury to persons using their yards, to leave an ordinary garden hose lying across the lawn. Further, as already noted, this particular respondent had regularly encountered hoses in such a position whilst she was delivering milk. When the balancing test favoured by the High Court is applied to the facts of this case there can, in my view, be no doubt but that the appellants were not guilty of negligence in leaving their hose across the lawn as they did. That is not to say that a garden hose may never ever constitute such a potential danger to an entrant upon land as would provide a basis for a finding of negligence. It is sufficient for present purposes to say that more would be required than was established

here by the evidence before a garden hose lying across lawn could constitute such a danger as to make the landowner liable in negligence for a person injured as a result of stepping on it.

It follows that the appeal should be allowed; the appellants should have the taxed costs of the appeal and of and incidental to the action.