(1993) 79 LGERA 392, 1993 WL 1406309

SC Not Available, 17 February 1993
Supreme Court of Tasmania

Stone v **Clarence** Municipality

Wright J

Digest (5)

[1] **Energy and resources** In respect of what acts or omissions

Abandoned quarries — Statutory duties — Failure to fence — Abandonment prior to statute — Child injured climbing quarry face — Owned and occupied by local authority

The plaintiff, when aged 11, went to an abandoned quarry and while climbing the quarry face was injured. The municipal council was the owner and occupier of the land upon which the quarry was located. The plaintiff sued the council for breach of its statutory duty under the Mines Inspection Act 1968 (Tas), s 41. **Held**:

(1) The Mines Inspection Act applies to mines (the quarry being one) whether abandoned before or after the commencement of the Act.
(2) While s 41 of the Act does not cast a specific duty upon any mine owner to have the mine inspected before it is abandoned, it is clearly framed in such terms that unless such an inspection is undertaken, the defendant will be at substantial risk in the event of an accident arising from the condition of the mine.
(3) The quarry was likely to be dangerous unless safely and securely fenced and in this condition was causative of the plaintiff's injuries so that the defendant was in breach of a statutory duty under s 41(1).
(4) The plaintiff should have been aware that climbing the quarry face constituted a substantial element of risk so that it was appropriate to reduce his damages by one-third on account of his contributory negligence.

[2] **Local government** As occupier

Owner-occupier of abandoned quarry — Failure to minimize risk — Injury to child climbing quarry face

The plaintiff, when aged 11, went to an abandoned quarry and whilst climbing the quarry face was injured. The Municipal Council was the owner and occupier of the land upon which the quarry was located. The plaintiff sued the Council for negligence. **Held**:

(1) It should have been foreseen by the Council's officers that children gaining access to the quarry might seek to climb the quarry face. Whilst it was not a matter of great likelihood, due to the remote area in which it was situated, it was a foreseeable risk which could not be characterized as far fetched or fanciful. The defendant, by leaving the quarry unfenced, unraked and unterraced, failed to take steps to avoid a foreseeable danger.
(2) The quarry was abandoned without any steps having been taken to minimize by fencing any danger arising from the condition in which it was left so that the defendant was in breach of a duty of care which it owed to a class of people, namely children, of whom the plaintiff was one.
(3) The plaintiff should have been aware that climbing the quarry face constituted a substantial element of risk so that it was appropriate to reduce his damages by one third on account of his contributory negligence.

[3] **Statutes** Safety regulations

Statutory regulation of conduct of mining operations

The plaintiff, when aged 11, went to an abandoned quarry and while climbing the quarry face was injured. The municipal council was the owner and occupier of the land upon which the quarry was located. The plaintiff sued the council for breach of its statutory duty under the Mines Inspection Act 1968 (Tas), s 41. **Held**:

(1) The Mines Inspection Act applies to mines (the quarry being one) whether abandoned before or after the commencement of the Act.
(2) While s 41 does not cast a specific duty upon any mine owner to have the mine inspected before it is abandoned, it is clearly framed in such terms that, unless such an inspection is undertaken, the defendant will be at substantial risk in the event of an accident arising from the condition of the mine.
(3) The quarry was likely to be dangerous unless safely and securely fenced and in this condition was causative of the plaintiff's injuries so that the defendant was in breach of a statutory duty under s 41(1).
(4) The plaintiff should have been aware that climbing the quarry face constituted a substantial element of risk so that it was appropriate to reduce his damages by one third on account of his contributory negligence.

[4] **Torts** Particular cases of negligence involving minor

Child injured climbing quarry face

The plaintiff, when aged 11, went to an abandoned quarry and while climbing the quarry face was injured. The municipal council was the owner and occupier of the land upon which the quarry was located. The plaintiff sued the council for negligence. **Held**:

(1) It should have been foreseen by the council's officers that children gaining access to the quarry might seek to climb the quarry face. While it was not a matter of great likelihood, due to the remote area in which it was situated, it was a foreseeable risk which could not be characterised as far fetched or fanciful. The defendant, by leaving the quarry unfenced, unraked and unterraced, failed to take steps to avoid a foreseeable danger.
(2) The quarry was abandoned without any steps having been taken to minimise by fencing any danger arising from the condition in which it was left so that the defendant was in breach of a duty of care which it owed to a class of people, namely children, of whom the plaintiff was one.
(3) The plaintiff should have been aware that climbing the quarry face constituted a substantial element of risk so that it was appropriate to reduce his damages by one third on account of his contributory negligence.

[5] **Torts** Materiality of claimant's age, physical or mental ability

Age — Injury to child — Awareness of substantial element of risk — Abandoned quarry — Child climbing quarry face

The plaintiff, when aged 11, went to an abandoned quarry and while climbing the quarry face was injured. The municipal council was the owner and occupier of the land on which the quarry was located. The plaintiff sued the council for negligence. **Held**: The plaintiff should have been aware that climbing the quarry face constituted a

substantial element of risk so that it was appropriate to reduce his damages by one-third on account of his contributory negligence.

Legislation Considered
Mines Inspection Act 1968 (TAS)
Mines Inspection Act 1968 (TAS) s 41
Mines Inspection Act 1968 (TAS) s 41(1)
Mines Inspection Act 1968 (TAS) s 41
Mines Inspection Act 1968 (TAS) s 41(1)

Legal Representatives
W A Ayliffe, for the plaintiff.; *A G Melick*, for the defendant.

Judgment

Judgment reserved

17 February 1993

Wright J.

At about 9 am on 1 December 1979 the plaintiff, Scott Bradley **Stone**, then aged eleven years, and a young companion went to a disused quarry adjacent to the Flagstaff Gully Road reservoir. They decided to climb the rock face of the quarry which is approximately 20 metres at its highest point. When it was operational in the early 1960's the quarry had been used as a source of **stone** fill for the Flagstaff Gully reservoir. The quarry face is uneven and apparently it has been neither raked nor benched since falling into disuse. Its face forms an angle varying from 39 degrees to 79 degrees from the horizontal.

The two boys negotiated the rock face nearly to the top. There is a conflict in the evidence as to whether or not they were competing against each other and whether or not the plaintiff was ahead of his companion. At all events, during the course of the climb the plaintiff attempted to pull himself up by holding on to a large rock. The evidence is unclear as to the size of the rock, its general shape or condition. As the plaintiff placed his weight upon it it yielded to the pressure exerted and the plaintiff tumbled back to the quarry floor. The dislodged rock landed upon his left hand causing a severe crush and degloving injury. It is alleged that this injury has left the plaintiff severely incapacitated. By his mother acting as his next friend he instituted proceedings against the **Clarence** Municipality in September 1982. The **Clarence** Municipality was the owner and occupier of the land upon which the quarry was situated at all relevant times, although the evidence suggests that the actual quarrying operations at the relevant site were carried out by the Metropolitan Water Board.

The quarry is located on the western side of the Flagstaff Gully Road. The reservoir is between the quarry and the road. On the southern side of the reservoir there is a Council reserve and south of that again is a farming property formerly owned by Mr Turner. The **Stones**' residence is located on the eastern side of Flagstaff Gully Road opposite Mr Turner's property. The **Stone** family, and in particular the plaintiff, were on friendly terms with Mr Turner at all relevant times and the plaintiff was in the habit of visiting Mr Turner's property on a regular basis prior to his accident. To the north of the Flagstaff Gully reservoir there is a currently operational quarry occupied by Pioneer Concrete. The quarry in which the plaintiff was injured is not fenced around its perimeter. There is no fence around the top edge or lip so as to prevent unsuspecting bush walkers or the like from tumbling down the quarry face. There is no fence across the entrance to the quarry of such a kind as to exclude trespassers. There are no warning signs at or adjacent to the quarry warning visitors of its existence or condition. There are few houses in the immediate vicinity of the quarry. There is no reason to think that it is or was habitually frequented by children other than the plaintiff or adults other than Council workmen. At all relevant times it appears to have been used by the **Clarence** Municipality as a place for the storage of disused pieces of equipment such as a footbridge, metal piping and other sundry objects.

The plaintiff claims that by reason of this usage, the quarry constituted something of an allurement to him and there is little reason to doubt his evidence that he went there frequently and used the quarry as a play area from time to time. I accept his evidence that he built two cubby houses there and that sometimes he saw Council workmen visiting the quarry in Council vehicles. Whilst they did not object to his presence, it is not claimed that they gave him permission to play in the quarry. There was no evidence to suggest that senior officers in the Council hierarchy were aware that the plaintiff used the quarry as a playground. There was no evidence to suggest that Council officers ought to have been aware that the quarry was used for this purpose by the plaintiff.

There were four alternative routes that the plaintiff could use to get to the quarry. He claimed that on occasions he had used all of them. I have some hesitation in accepting this. It is plain however that there was a simple bush gate separating Mr Turner's property from the land upon which the quarry is situated. It would be an easy matter for the plaintiff to pass through that gate from Mr Turner's property to the quarry area. I am in no doubt that he had Mr Turner's authority to pass across his land whenever he wished. There was no evidence to suggest that access from Mr Turner's property was in any way impeded or forbidden by the **Clarence** Council, its servants or agents. The Flagstaff Gully reservoir is fully fenced with approximately 8 foot high cyclone wire fencing. From the history given by Mr Turner, it is plain that this fencing was put in place to prevent trespassers from swimming in the reservoir. In front of the reservoir itself there is an area, possibly a hectare in size, which was and still is set aside as a public recreation area. This area was separately fenced in a similar manner but at its boundary with Mr Turner's property on the southern side, there was, and still is, a simple wire strand fence in lieu of the cyclone wire type of fence previously described. Furthermore, at the relevant time there was unimpeded pedestrian access from Flagstaff Gully Road to the reserve although there was a gate preventing vehicular access. A gravel road runs through the centre of the reserve from the Flagstaff Gully Road entrance to the quarry in which the plaintiff was injured. Vehicular access to the quarry is prevented not only by the gate which I have already mentioned, but also by a second double gate on the eastern boundary between the quarry area and the reservoir.

The plaintiff said that both sets of vehicular gates were unlocked from time to time but evidence from Council officers suggested that they were locked when not in use for the purpose of admitting Council vehicles to the quarry site. Whilst that may have been the desired practice, I have no reason to doubt the plaintiff on this point. When the gates on the eastern boundary were unlocked as I find they were on some occasions, this was a second route available for the plaintiff to gain access to the quarry area. Running under the fence on the eastern boundary that I have described there was, and still is, a deep gutter or ditch designed apparently to divert stormwater run-off from the eastern side of the gully from entering the reservoir itself. There was, and still is, a cyclone wire apron suspended from the bottom of the fence into this gully or ditch area. The Council contended that this was an effective means of preventing all but the most determined trespasser from gaining access from the reserve area to the land upon which the quarry is situated. However, the preponderance of evidence from the plaintiff and his witnesses satisfies me that at the relevant time this apron of wire had been displaced to such an extent that it was a simple matter for a child to step into the gutter and walk under the cyclone wire fence. Indeed the plaintiff and several guests of a similar age who had attended his belated birthday party the day before his accident had used this route to go from his home to the quarry area during the course of the birthday party festivities. This, then, was the third route by which the plaintiff could travel from his home to the quarry area and I think it was probably the route most frequently used by him.

A fourth route was available by travelling to the northern end of the reservoir and passing through a pedestrian access way onto a fire trail or track which proceeds from this point down the eastern side of the reservoir outside the cyclone wire fence. I attended a view with counsel at the commencement of the trial and we walked to the quarry along this route. I would estimate that it is about half a kilometre long; it is a level track which, although rough, is easily negotiated by a pedestrian and could equally easily be negotiated by a four wheel drive vehicle if vehicular access was available from Flagstaff Gully Road. For pedestrian access there is no impediment between Flagstaff Gully Road and the quarry in question. Whether or not the plaintiff ever used this route, I am unable to say. I think it unlikely that he did, involving as it does a considerably longer walk than was necessary if he went through Mr Turner's property or by his more usual route through the reserve and under the wire fence.

It was contended by the defence that the plaintiff was a trespasser in the quarry but to describe him in these pejorative terms does little to advance an understanding of the legal issues arising in this case: see Australian Safeway Stores Pty Ltd v Zaluzna

(1987) 162 CLR 479. The defendants however say that whether or not their duty of care is stated in the classic terms applicable to a trespasser or according to the more general duty adumbrated in Hackshaw v Shaw (1984) 155 CLR 614 and *Zaluzna's case*, the Council owed no duty of care to the plaintiff in the circumstances of the case.

The plaintiff's allegations of negligence against the Council were particularised in the following terms:

"5. The said injuries were caused by the negligence and breach of duty of the Defendant.

Particulars of Negligence

(a) Failing to prevent access particularly by children to the site;
(b) Failing to display signs particularly along Flagstaff Gully Road, forbidding entry to the site and warning of the dangers involved in being on site and in climbing the quarry face;
(c) Failing to make regular inspections of the site to ensure the fencing had not deteriorated;
(d) Failing to block gaps under the fencing which allowed access to the site;
(e) Failing to make regular inspections of the quarry face to check on its deterioration; and guard against increasing danger from any such deterioration;
(f) Permitting the quarry face to remain in a condition which was dangerous in that there were loose rocks in or on its surface;
(g) When it knew or ought to have known of the practice of the infant Plaintiff and other children of going onto the site, failing to erect fencing around the quarry site;
(h) When it knew or ought to have known of the practice of the infant Plaintiff and other children of going onto the site, failing to erect warning signs at or near the quarry site warning of the dangers of climbing the quarry face;
(i) Failing to keep the quarry site filled in and/or backfilled and/or covered over."

Additionally the plaintiff alleges that the quarry site constituted a mine within the meaning of the Mines Inspection Act 1968 (Tas) in that the quarry face and floor constituted an excavation in or about a mine within the meaning of s 41 of that Act and, as mining operations had ceased and the mine was left in a dangerous condition, it was the defendant's statutory duty to take steps to ensure that it was rendered safe. Paragraph 9 of the amended statement of claim reads as follows:

"9. At all material times since 1963 and in particular on the 1st December 1979 the said excavation is and was likely to be dangerous.

Particulars of the likely Danger

(i) The quarry face dips at 45 degrees with a vertical height of 17 m and is easily accessible at both ends;
(ii) the lip is and was undermined in places;
(iii) the quarry face is and was generally unstable with many large rocks being loose;
(iv) there is and was a possibility of both small and large rocks dislodging at any time;
(v) on the floor of the quarry many rocks have fallen and mixed together."

The plaintiff alleges that in breach of s 41 of the Act and at all material times the defendant failed:

1. To keep the excavation safely and securely fenced.
2. To keep the said excavation filled in and/or back filled and/or covered over.
3. To provide and maintain a sufficient sign warning children and other persons to keep off the excavation.

The defendant Council denies negligence and alleges contributory negligence against the plaintiff. The particulars of contributory negligence are as follows:

> "The plaintiff was negligent in that he:
>
> (a) failed to keep any or any proper, sufficient or adequate lookout;
> (b) entered onto the quarry site when he knew that he was forbidden to enter upon it;
> (c) entered upon the quarry face when he knew or ought to have known that it was dangerous;
> (d) attempted to descend the quarry face when he knew or ought to have known that it was dangerous;
> (e) failed to have proper regard for his own safety."

The plaintiff and his mother both gave evidence during the course of the trial to the effect that she was unaware of his habit of visiting the quarry. Apart from any other consideration, it seems inherently unlikely that she would have been unaware of this practice, particularly as he took a number of his young friends there on the day of the birthday party and played in that area with them for an appreciable period of time. There was some dispute as to the extent to which the quarry was actually visible from the **Stone** home, but on the whole of the evidence I am left in little doubt that Mrs **Stone** was aware that her son visited the quarry and also that she considered it an unsuitable place for him to play and advised him of this. The extent to which she actually forbade him to visit the quarry is more difficult to assess. It may well be that she advised him of her misgivings about the quarry but failed to enforce her wishes in the face of his continual disobedience. She was a sole parent at the time, but judging from her resolute performance in the witness box, she was and is obviously a woman of strong character.

Determination of the issue of liability in this case has been far from easy. The case came to trial nearly thirteen years after the relevant accident. It is not surprising that memories have been affected as a consequence. Nonetheless, I found Dale Triffett, the plaintiff's companion in the cliff climbing escapade, an impressive and reliable witness. Mr Triffett, now aged twenty-three, had been a party guest on 30 November 1979. In company with most of the other children at the party he had gone to the quarry with the plaintiff during the afternoon. He had stayed at the plaintiff's house overnight and again went to the quarry with him early on 1 December. He said that he and the plaintiff were not racing "it was just a mutual agreement we decided to climb to the top and that's what it was". He said he was on the plaintiff's right hand side and they were near the centre of the quarry face. He climbed the face by pulling his weight from rock to rock and when he was about three quarters of the way up and the plaintiff about two-thirds of the way up, he paused and watched the plaintiff pull himself onto a rock. He said:

> "I was watching Scott he pulled himself onto a fairly big rock, a boulder you'd probably call it, pulled himself up onto the rock. The rock gave way, the earth gave way and he rolled down with the rock. It was quite horrific. I, like I was virtually at the top, I climbed to the top of the cliff and I walked back down and I found Scott. He was unconscious."

When he reached the base of the quarry he found that his friend had been injured and he appeared to be unconscious. He said: "I had to virtually carry him back home. He was unconscious all the way."

In so far as Mr Triffett's evidence differs from the plaintiff's, I prefer the evidence of Mr Triffett except that I believe each boy was attempting to reach the top of the quarry face ahead of the other and that in this sense they were racing at the relevant time. Mr Triffett said that access to the quarry area was gained by passing under the cyclone wire fence and through the ditch, both on the day of the party and the following morning.

I think a starting point for considering the question of the Council's liability is to pose the question, "What sort of dangers should an occupier of land have anticipated as arising from the state in which the quarry was left after it ceased to be operational?"

Evidence called by the defendant established that in the Hobart area in places under the jurisdiction of the Hobart City Council, a large number of disused quarries have been fenced both around the upper rim and across the floor of the quarry in such a way as to deter trespassers. It could not be said that the fencing carried out is such as to absolutely prevent any determined person seeking entry to the quarry area. Nonetheless, generally speaking, fences around the upper lip of the quarry appear to have been designed for the purpose of preventing unwary pedestrians from coming unexpectedly upon the quarry face and falling down. The fences used for this purpose are, generally speaking, substantial wire structures and in addition, in many instances, substantial notices warning of the danger have been affixed to the fence. In many instances such as Cleary's Gates and the quarry at the southern end of the Brooker Highway, Hobart City Council equipment is stored in the quarry and the fencing provided has been of a particularly sturdy kind to ensure security against would-be thieves. In other more remote areas, such as Proctor's Road, the fencing is apparently primarily designed to keep out casual trespassers.

The plaintiff in the present case claimed that if the quarry at Flagstaff Gully Road had been similarly fenced and, particularly, if warning signs of a similar kind had been erected adjacent to the quarry, he would not have trespassed in the quarry. It is always difficult to know whether ex post facto rationalisation of this kind has any real substance in fact.

A point of interest which emerged from the defence evidence was that comparable quarries in the Hobart area have vertical or near vertical faces. This, to me, is a matter of some significance in the context of the present case. One can see a good deal of substance in the argument that the **Clarence** Council should have fenced the Flagstaff Gully quarry at in such a way as to prevent unsuspecting pedestrians from falling over the lip and also from entering the quarry at floor level so as to be at risk from falling rocks and debris detaching from the face of the quarry and falling to the floor. As the face of the quarry had been neither scraped nor benched, it is easy to see that if the plaintiff had been injured by a falling rock whilst he was playing near the base of the quarry face, he would have a strong argument that this was a foreseeable danger against which the Council should have guarded.

In the case of the Hobart quarries with which comparison was invited, the quarry faces are, as I say, nearly all vertical. It therefore seems to me that it would be very difficult to maintain an argument that in any of these quarries it should have been reasonably foreseeable by the occupier that any person would seriously attempt to climb the quarry face unless equipped with suitable rock climbing or mountaineering equipment. As the plaintiff was not injured by falling over the lip of the quarry and was not struck by a falling rock whilst playing on the floor of the quarry, it seems to me that in order to succeed he must be able to establish that the Council ought to have foreseen that children may attempt to scale the quarry face as did the plaintiff and his companion Mr Triffett. If the quarry face had been vertical or nearly vertical, such a proposition could obviously not succeed. It could not be anticipated that any reasonable person, even a child, would attempt to scale such a formidable obstacle unaided, and even if he did he would be unlikely to get more than a foot or two above the quarry floor level before being obliged to desist by the impossibility of the task.

It should be noted however, that the photographs tendered in evidence do not do justice to the nature of the quarry face. When I attended on the view with counsel, I was asked to note “the quarry face including the nature and substances, rocks and boulders comprising the quarry face”. I noted on my document in which the points of view were enumerated, “much steeper than it appears in photos” and after revisiting the scene with the consent of counsel, I confirm this initial impression. Much of the quarry face is so nearly vertical or bestrewn with such large obviously unstable pieces of rock, that I doubt whether anyone would anticipate that these sections would be climbed by even the most adventurous eleven year old boy. On the other hand, near the centre of the quarry above and to the right of the words “Kiwi Korner” which have been daubed in white paint upon a rock near the foot of the quarry, the slope of the face is less pronounced, the rock seems far more solid and there is a fairly obvious dog leg track which can be taken to the quarry lip. In the upper section of this apparent track loose rock can be seen, but from the quarry floor it does not appear to present too difficult a task for an active lad to climb the quarry face at this point. It is in this general area that the evidence suggests the plaintiff and his companion scaled the rock face and I can well imagine that two normal eleven year olds may readily undertake this venture without being alive to the potential danger from loose rock at the top end of their route.

It was important for me to re-attend the scene of the plaintiff's accident after having heard the evidence, particularly the evidence as to the way in which disused quarries in other municipalities have been secured, because it seemed to me that, apart from the provisions of the Mines Inspection Act 1968, which I will consider separately, it may not be entirely reasonable to expect conscientious council officers to foresee the possibility of children climbing or attempting to climb a near vertical rock face or one heavily strewn with very large unstable boulders. The doubts engendered by these considerations were soon dispelled when I re-inspected the quarry. I think a reasonably careful council officer, looking at the quarry face in question, should have foreseen a distinct possibility that it would present an attractive climbing challenge to normally active and adventurous children. In conjunction with this, of course, one must consider the nature of the material stored at the quarry at the relevant time. It was then much more abundant than it is now. Having regard to the description given by the plaintiff of the type of material there, it is not difficult to see that it would be an attraction to children. I am conscious of course that it was not the attractive material itself which caused the plaintiff's injury but it was the nature and quality of this material which caused him to visit the quarry on numerous occasions and regard it as something of an adventure playground. This is a factor to be borne in mind in assessing the Council's responsibility for the accident which in fact occurred.

As pointed out on many occasions by this Court, for example, Cadbury Schweppes v Belbin (Supreme Court of Tasmania, 25/198, unreported), it is not necessary that the actual mechanism causing an injury should be foreseen by an alleged tortfeasor before he can be held responsible. Furthermore, in the now classic words of Mason J, as he then was, in Wyong Shire Council v Shirt (1980) 146 CLR 40 at 48:

> " … 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."

In my opinion, it should have been foreseen by Council officers that children gaining access to the quarry may seek to climb the quarry face at or about the point I have described. Whilst it was not a matter of great likelihood that this would occur due to the comparatively remote area in which the quarry is situated, it was nonetheless a risk which should have been foreseen. It is certainly not a risk which could be characterised as far-fetched or fanciful. Accordingly, for the Council to leave the quarry unfenced, unraked and unterraced, involved a failure to take steps to avoid a foreseeable danger. The argument advanced that the quarry was effectively fenced from all but the most determined intruders does not impress me. As I have already pointed out, there was unrestricted pedestrian access from the northern end of the dam. The gates restricting vehicular traffic proceeding from Flagstaff Gully Road to the quarry appear to me to be designed not so much to keep people out of the quarry, as to restrict access to the recreation area in front of the dam. I can see no basis upon which the Council could or should have regarded the quarry as effectively and securely fenced off from any member of the public, let alone an inquisitive small boy, as a result of the fencing which existed in the area.

This of course is not an end of the problem. As also pointed out by Mason J in Wyong Shire Council v Shirt (at 47):

> "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 alleviating 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

> 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."

In considering these questions the evidence of Mr Kremmer is of particular significance. Mr Kremmer gained a degree of Bachelor of Science and Technology in Mining Engineering in 1969. He then spent twenty-one years at Broken Hill employed by Broken Hill South Ltd working in underground mines. In three of these he was the production engineer. He then moved to Rosebery in Tasmania for a period of thirteen years and during the last four years he was manager of operations. From Rosebery he moved to Hobart and set up a consultancy business in mineral engineering for a period of four years and he then returned to the mainland and now lives at Armidale where he is senior inspector of mines, a post which he has held for the last four years working for the New South Wales Department of Mineral Resources. In about November 1987 he was engaged by the plaintiff's solicitors to report upon the quarry. He said that in his opinion there were three dangerous areas in the quarry:

> "The first one was the top of the quarry which is commonly called the lip or the edge and there was a drop from there. There was a lot of vegetation growing up to the edge of the quarry which tended to hide the edge and so anybody wandering around the area could easily stumble over the edge and fall below. The second area was the junction between the quarry face and the floor of the quarry. Now that was dangerous from the point of view of rocks without any warning whatsoever could roll down the face of the quarry or down the rill and clobber anybody who was standing down the bottom. The third area was the rill cum face of the quarry … if anybody started climbing up the face or the rill then they had the possibility of dislodging **stones** and rocks, you know that could fall down and clobber them and if there were two people involved then the **stones** could easily have been dislodged and fallen down and hit the other person that was following behind. There was also the danger that just moving on the face of the quarry could dislodge large slabs which could fall down and hurt somebody."

He said that on the face of the quarry there were:

> "Lots of loose rocks and there was also large rocks which were almost ready to come down. Given a bit of time that would occur … the rill is made up of rocks and dirt stuff that's fallen in the past and built itself up. A lot of the rocks of course were within this sort of matrix if you like of dirt and other rocks and obviously the rocks themselves were quite loose. Most of them, well a lot of them were. Obviously there'd be a lot that's tight too but a lot of them were quite loose but as I say given time given rain etc this would erode the fine material that's cementing the rocks together and loosen up even more rocks."

Mr Ayliffe, counsel for the plaintiff, then asked him: "Q. And what particular danger did the condition of the rocks on the rill and face pose to persons minded to climb the face of the quarry."

Mr Kremmer's reply was:

> "Well it was obviously a dangerous situation. Anybody, as I said before, I think, anybody climbing this face was subject you know to the problems of falling rock whether they actually dislodged the rocks themselves by moving up the quarry or the possibility of larger rocks being from above loosening up and coming down and clobbering them. … If somebody was hauling themselves up the quarry by the rocks well then obviously they'd be easily loosened up and be able to be pulled down."

Mr Kremmer also said that his opinion applied to the totality of the rill and face as portrayed in the exhibit photographs and to the area where the plaintiff had indicated from those photographs that he had climbed the face of the quarry.

He also pointed out that the "bedding plane" of the rock was not horizontal and was indeed at a substantial angle in the vicinity of 45 degrees to the surface of the floor of the quarry. Mr Kremmer said:

> "The structure of the ground is such that for a rock to fall out it needs to be loose on four sides. Here we've got something at 45 degrees and on top of that we have vertical jointing in the rock so that each slab can just sort of tip over and fall out on itself and that's why you tend to get — it finishes up a domino effect to some extent and each — oh you can see the effect of that happening in some of the areas in this face where you get negative angles where you've actually had the slab fallen out and so you have an undercut section. So you get negative angles of the face and that's one of the reasons why I found it difficult to put a face angle on it."

In cross-examination by Mr Melick, Mr Kremmer agreed that it would be unwise for anyone to attempt to climb a disused quarry face because the nature of quarrying is such that by blasting and drilling it fractures the rock, not just the surface of the rock but also rock behind that. Mr Melick then asked: "And no matter how careful you are and how well you clean up the quarry face there is little you can do to completely eradicate that inherent danger of loose rocks etc." To this Mr Kremmer replied: "Well there's plenty you can do if you want to go to the expense and the trouble."

He then went on to state a number of measures that could be taken depending upon a willingness on the part of the person responsible to incur the cost. He agreed that the quarry face in question would cost a lot of money to restabilise. He then said:

> "To stabilise that quarry you'd need to come in with a backhoe type piece of gear and scrape down the loose rock that's available and then you would have to came in and re-blast and move the top or the top half of the quarry back probably 5 metres and establish a bench half way along, half way up the face of the quarry. While I'm talking to you I'm just thinking of some figures in my mind. You might get away with $25,000 or $30,000. … You can go further than what I have just said and make it absolutely safe. That would cost you more money. I mean if you wanted to then put wire mesh over each of those faces which could stop rocks falling down that would cost extra dough so if you went to that extent you'd probably be looking at another $14,000 to $20,000 perhaps."

This concluded Mr Melick's cross-examination of the witness.

I then asked Mr Kremmer whether it was usual practice to clean up quarry faces when they are abandoned and he informed me that as a matter of practice an inspector of mines views the quarry on abandonment and "passes judgment on the safety of the quarry to be left and issues any instructions as to what might be needed to make it so". As this seemed to me to be an important issue I asked further questions of Mr Kremmer. I said:

> "Looking at that quarry in the condition as you saw it, how, if at all, did it fall below a standard which you would have found acceptable for an abandoned quarry, that is, you in your capacity as an inspector of mines, what would you have required the owner to do had you come upon that quarry at the point where it was to be abandoned to get it into a state where you would regard it as satisfactory."

Mr Kremmer then said: "I would have required one of two things. I would have required the area to be stabilised spending the money that I have already indicated. … " I then interrupted and said: "That is raking down the face and cutting a bench half way up."

The witness then said:

> "Put a bench through and then looking at it from a stability point of view after that and see whether you need to put mesh or gunnite over the faces to actually keep the rocks in place, now that's one way. The other way would be to fence the area securely and I think my normal practice would be to discuss with the client which may be the best for him and we'd work something out between us but one of those two things would be done and when I say client I'm talking about the quarry operator."

I then gave Mr Melick permission to ask further questions of the witness and he then expressed the view that to fence the quarry would cost about $15,000 to $20,000 and he agreed that unless the fence were "spiked down" its effectiveness may be decreased by subsequent erosion underneath it. He expressed the view that a fence of the kind now surrounding the reservoir would be quite satisfactory for the purposes that he had in mind. He expressed the view, when shown a photograph P8 by Mr Melick, that the section of rock face shown being the section upon which the plaintiff was climbing when he fell, was not "too bad". Mr Melick placed considerable reliance upon this opinion in his final address to me but I do not in any way interpret Mr Kremmer's opinion as suggesting that the section of face upon which the plaintiff was climbing when he was injured should not have been scraped or benched in the manner which he had earlier suggested.

The cost involved in taking the safety measures suggested by Mr Kremmer must be evaluated in light of all of the known circumstances. He said, without objection, that according to his inquiries, approximately 10,000 tons of rock had been taken from the quarry. It also clearly had a certain value as a storage area for the **Clarence** Council. A considerable amount of expense had been incurred by the Council in fencing the Flagstaff Gully reservoir to prevent people swimming in that body of water. With a reasonable degree of pre-planning I am confident that the quarry could have been fenced at or about the same time by the same contractor and it may have been possible to do this in such a way that some part of the estimated cost would have been saved. There is however no other evidence as to the comparative cost of carrying out the safety measures suggested. This is perhaps surprising having regard to the length of the trial and the detailed examination of many other issues bearing upon both liability and damages. However, I would not regard the costs mentioned by Mr Kremmer as unreasonable costs to be incurred by a municipal council in all the circumstances of the case. It is not entirely without significance that the Mines Inspection Act 1968 contemplates that people who undertake "mining operations" (and quarrying is clearly such an operation) must take all reasonable measures to prevent danger arising from the condition in which the mine is left. There is of course no suggestion that there is, or was, any direct statutory responsibility upon the **Clarence** Council to have the quarry inspected prior to its abandonment but I think such a course should have been taken as a matter of reasonable prudence in any event. The tenor of the whole of the evidence satisfies me that the quarry was abandoned without any steps having been taken to minimise any danger arising from the condition in which it was left.

Accordingly, applying the test propounded by Mason J in *Wyong's case*, I have come to the conclusion that the Council was in breach of a duty of care which it owed to a class of people, namely children, of whom the plaintiff was one.

As well as common law negligence, the plaintiff alleges breach of statutory duty by the **Clarence** Municipality. The Mines Inspection Act 1968, s 41, provides as follows:

> "(1) Where any excavation in or about a mine ceases to be used for mining operations —

(a) that excavation shall be kept safely and securely fenced, covered over, or filled in; and

(b) there shall be provided and maintained on the surface of the ground such indication of its existence (whether by a post with a notice affixed thereto, a cairn of **stones**, or otherwise) as an inspector may consider sufficient.

(2) Subsection (1) of this section does not apply to any excavation (other than a shaft) unless the excavation is likely be dangerous unless it is safely and securely fenced, covered over, or filled in.

(3) Where there is no owner (other than the Crown) of the mine in or about which there is an excavation to which this section applies the person who was the last owner of that mine shall for the purposes of this section be deemed to continue to be the owner of that mine until an inspector grants a certificate stating that the works required by this section have properly been carried out."

The statement of claim alleges that the quarry ceased to be used for mining operations in about 1963 and this allegation was substantially borne out by the evidence of Mr Turner. By interlocutory application which came before Green CJ in December 1991, the defendant applied for an order that the paragraphs of the statement of claim alleging breach of statutory duty founded upon alleged non-compliance with s 41 should be struck out on the ground that they disclosed no reasonable cause of action. The Chief Justice considered this matter and gave written reasons for rejecting the defence application on 19 December 1991: see 111/1991. The arguments which were raised in the application before the Chief Justice were raised again before me at the trial. Essentially, the defendant claimed that s 41 did not apply to the quarry, the subject matter of this action. It was submitted that to so interpret the statute would create a retrospective liability upon the defendant where none had previously existed at the time the quarry had ceased operation. It was also argued that if the Mines Inspection Act had been intended to apply to quarries as distinct from mines, a specific provision to this effect would have been included in the Act, particularly as the Mines and Works Regulation Act 1915 (Tas), which was superseded and repealed by the Mines Inspection Act 1968, had dealt separately with quarries and mines.

I do not find this argument persuasive however as it is quite plain that within the definitions contained in s 3 of the 1968 Act, a quarry of the type now in question should, for the purposes of that Act, be regarded as a "mine".

Whether the relevant statutory provisions should be so interpreted as to give effect to the presumption against retrospective operation of a statute is seldom straightforward. I had occasion to discuss some of the problems involved in a recent judgment of mine, Carrick v J [1989] Tas R 24. In dismissing the defendants' application on 19 December 1991, the Chief Justice only needed to consider whether or not the pleadings by the plaintiff disclosed a reasonable cause of action. However, in his reasons his Honour expressed the strong view that the Mines Inspection Act, s 41 applied to mines, whether abandoned before or after the commencement of that Act. I entirely agree with the Chief Justice's views in this respect and I cannot usefully add to what he has said. He left open the question of whether or not the defendant owed the plaintiff any, and if so what, duty of care pursuant to s 41. 1 am quite satisfied that s 41 casts a statutory duty upon the defendant upon proof of the breach of which a civil action is maintainable for damage suffered. I had occasion to consider a similar question in the recent case of Telha v University of Tasmania (Supreme Court of Tasmania, Wright J, 72/1992, unreported) and I adhere to the views which I then expressed. As I have already mentioned, whilst the Mines Inspection Act 1968 does not cast a specific duty upon any mine owner to have the mine inspected before it is abandoned, s 41 is clearly framed in such terms that unless such an inspection is undertaken, the defendant will be at substantial risk in the event of an accident arising from the condition of the mine. In my opinion, the "excavation" in this case was "likely to be dangerous unless … safely and securely fenced, covered over, or filled in". It was certainly not safely and securely fenced and if it had been, the infant plaintiff may well not have entered the quarry site. Only by doing that was he able to scale the quarry face. Clearly therefore, the absence of safe and secure fencing was a causative factor in the accident which occurred. The meaning of "covered over" in the section is not entirely clear. Mr Kremmer suggested one way in which the face could be covered over by netting but I think it would be stretching the language of the statute unduly to construe "covered over" as casting an obligation to rake down the face and bench it. Finally, whilst it may be practicable to "fill in" some excavations, it would be totally impracticable and therefore unreasonable to require the subject quarry to in any way be filled in. I find that the excavation, that is, the quarry, was likely to be dangerous unless safely and securely fenced. I

find that it was not safely and securely fenced and I find that this condition was causative, in the way that I have explained, in producing the plaintiff's injuries. Consequently it seems to me that quite apart from breach of the common law duty of care, the defendant was in breach of a statutory duty and that upon proof of that breach the plaintiff is entitled to recover.

The question of the plaintiff's contributory negligence can be dealt with shortly. As a general proposition children who are unaware that their behaviour resulting in injury is forbidden or dangerous will normally not be held to have been guilty of contributory negligence. Such was not the situation here however. The plaintiff was an intelligent eleven year old boy. Whilst a regular visitor to the quarry, he had not previously attempted to climb its face. Had he stopped to think I am sure he would have realised that there was danger in climbing the quarry face. He may well have undertaken such an enterprise although obviously risky to him, because of the presence of his companion. It is not possible on the evidence to say whether the plaintiff or Mr Triffett initiated the climb. It is not difficult however to infer that there was an element of challenge and competition between them in undertaking this adventure. I have already mentioned the dispute in the evidence as to whether or not the plaintiff's mother had warned him not to go to the quarry. In my opinion, the proper finding in the circumstances is that she had done so on many prior occasions. Whether she had warned him of any specific danger I am unable to say. However, at the time of his accident he was acting in breach of her injunction and was taking an obvious risk — a risk not so much of dislodging a rock in the way that he did, but rather of slipping or falling from the quarry face as he scrambled up. He should also have had a general appreciation of the potential risk of instability on the quarry face.

The standard of care which a child may be expected to exercise for his own safety is that which may reasonably be expected of a child of similar age, intelligence and experience: see McHale v Watson (1966) 115 CLR 199; see also Walters v Glasser (Supreme Court of Tasmania, 34/1962, unreported) and Bullock v Miller (Supreme Court of Tasmania, 13/1987, unreported) in which Underwood J undertakes a useful review of cases in which the contributory negligence of children has been discussed.

Whether judged subjectively or objectively, I am quite satisfied that the plaintiff should have been aware that climbing the quarry face as and when he did was an escapade involving a substantial element of risk and in my opinion it is appropriate to reduce his damages by one third having regard to his share of responsibility for the injury which occurred.

[His Honour then considered the question of damages in a manner not calling for report and concluded.]

There will be judgment for the plaintiff in the sum of $153,667.

Judgment for plaintiff

Reported by BAG

All Citations

SC Not Available, 17 February 1993, (1993) 79 LGERA 392, 1993 WL 1406309

End of Document

© 2025 Thomson Reuters.