SUPREME COURT OF QUEENSLAND

CITATION:	*Miller v Livingstone Shire Council & Anor* [2002] QSC 180
PARTIES:	**BENJAMIN KEITH MILLER** (Plaintiff) v **COUNCIL OF THE SHIRE OF LIVINGSTONE** (First Defendants) and **STATE OF QUEENSLAND** (Second Defendant)
FILE NO:	S112 of 1998
DIVISION:	Trial Division
DELIVERED ON:	21st June 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	7th, 8th and 9th May 2002
JUDGE:	Dutney J
ORDERS:	**The plaintiff's claim is dismissed.**
CATCHWORDS:	NEGLIGENCE – PERSONAL INJURIES – LIABILITY – Pl has no recollection of events but alleges that he fell over a fence that was too low to prevent injury into a culvert – No direct evidence of how the accident occurred – whether the plaintiff's hypothesis is the only plausible explanation – Whether Pl has discharged onus of proof. *Borland v Makauskas* [2000] QCA 521 – FAA *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 75 ALJR 992 - FAA *Muller v Cherrie* [2000] QSC 330 – FAA. *Girlock Sales Pty Ltd v Hurrell* (1982) 149 CLR 155 – FAA.
COUNSEL:	J F Curran for the Plaintiff. R J Douglas SC for the first Defendant. R C Morton for the second Defendant.

SOLICITORS: Robert Harris & Co for the Plaintiff.
Barry & Nilsson for the first Defendants.
Crown Solicitor for the second Defendant.

[1] **Dutney J** Benjamin Keith Miller ("the plaintiff") suffered severe injuries as the result of falling onto the concrete base of a culvert over Fig tree Creek on Appleton Drive at Yeppoon on Friday 30 May 1997 at around midnight.

[2] Quantum has been agreed between the plaintiff and the defendants at $1,600,000.00. The trial was concerned only with liability.

[3] The culvert appears to have been constructed in about 1982 by the second defendant, the Main Roads department of the Queensland Government ("the Main Roads Department"). Included in the design plans[1] was a fence to a height of 0.9m above the top of the concrete headwall of the culvert. Australian Standard AS1657-1992 relating to fixed platforms, stairways and ladders requires a guardrail to be of between 900mm and 1100mm above platform level. There was a great deal of debate between the parties as to whether this standard should be applied to a fence on top of a culvert but no other standard that might have been applicable was identified. In the absence of any other applicable standard I accept the evidence of Mr Smolakovs, an engineer, that regard would be likely to be had to AS1657 by an engineer designing a fence such as the one on Appleton Road. The design height of this fence would have complied with AS1657. This, however, does not take into account a fall on the area from the sealed portion of the road to the culvert ("the footpath"). Depending on how far from the fence a person walked the effective height of the fence would in all probability have been lower than the design height.

[4] At the time the culvert was constructed the footpath between the sealed section of the roadway and the headwall of the culvert was unsealed. Nonetheless it was a popular thoroughfare for bicycles and walkers such that an even gravel

[1] Exhibit 16

path was created, probably by usage. In 1995 the footpath adjacent to the culvert was changed by the addition of a concrete pathway ("the pathway"). The effect of the pathway appears to have been to raise the level of that part of the footpath on which pedestrians walked relative to the concrete top of the headwall and thus reduce the effective height of the fence. At the time of his inspection in September, 1997, Mr. Smolakovs measured the height of the seven uprights of the fence from left to right as increasing in height fairly uniformly from 700mm to 860mm above the surface of the pathway.

[5] There was debate between the defendants as to the extent to which this reduction in the height of the fence was attributable to the pathway and how much was attributable to the original shaping of the footpath adjacent to the top of the headwall. The contractor who was responsible for the pathway, a Mr. Fuller, was called, as was his formsetter, a Mr. Schultz. Their evidence seemed to be to the effect that the pathway had a fall of 38mm or thereabouts across its 1.5m width and was 100mm thick. Because of the existence of the flat gravel path on the footpath little excavation was required to make the pathway which was to a large extent laid on top of the existing footpath. Allowing for some slight excavation to level the ground for the formwork the overall effect was to reduce the effective height of the fence by something less than 100mm. Between commencement of the construction of the culvert in 1982 and construction of the pathway in 1995 the footpath had been built up somewhat with gravel fill being placed on it near the culvert and a batter constructed down to the headwall. This is quite likely to have happened at the time of the initial construction of the culvert. There is no evidence on this point. Whatever works had been done on the footpath the end result was that the fence was below the height of a guard rail specified in AS1657 by the time the plaintiff fell. Just who was responsible for this is in issue. The pathway was constructed by the first defendant ("the council") without reference to the Main Roads Department but the Main RoadDepartment was responsible for the roadway itself. There was no evidence as to whether the fill which was there before the pathway was constructed in 1995 had been placed there by the council or by the Main Roads Department. Mr Smolokovs, somewhat tongue in cheek I thought, suggested the fence needed to be 1.5m high to provide a

safe barrier. The rationale for this was that test results with which Mr. Smolokovs was concerned suggest that a person's center of gravity is at 58% of their body height. A fall against a fence less than that percentage of the person's body height might result in the body rotating over the fence rather than being stopped by it. Above 58% of body height a person cannot without more fall over the barrier. At 1.5m the fence would have been designed as an effective barrier for a person of 2.6m or nearly eight and a half feet. I reject 1.5m as an appropriate or reasonable height. The plaintiff was 1.88m tall. To provide an effective barrier for a person of this height the fence would need to be above 1.09m high. This would still be within AS1657.

[6] I accept that in the absence of a directly relevant standard a reasonable guide to a proper fence height is provided by AS1657. The fence as designed was within this standard but because of the build up of the footpath over the years by placing fill and adding a concrete pathway the fence was inadequate by 1997 to provide a reasonable barrier to protect persons from falling from the pathway into the culvert. With an effective height of only 700mm at the northern end the fence would have only been of mid thigh height for a person as tall as the plaintiff.

[7] The other feature of the pathway and culvert to which my attention was drawn by the plaintiff's counsel was the existence of a gap between the edge of the concrete pathway nearest the culvert and the line of fence posts on top of the headwall which varied from 410mm at the northern end where the fence was angled away from the pathway slightly to correspond with the edge of the culvert to 70mm at the second post and between 210mm and 240mm from post three to post five. The fence comprised seven posts and the seventh, like the first was offset to provide shaping around the culvert. As measured by Mr. Smolokovs, there was a drop off of 100mm to 150mm between the edge of the concrete pathway and the top of the concrete headwall. The existence of the drop off was obscured by weed growth from the edge of the pathway to the headwall.

[8] The pathway as it passes the culvert is well lit with an extensive system of overhead lighting. An indication of the lighting is given by the photos in exhibit 9 although they were taken after the fence was replaced and rebuilt in 1999. At the invitation of the parties I attended at the scene at night. During the period I was in attendance it was both cloudless and raining at different times. The lighting observed by me was not as bright as might be thought from the photographs but was nonetheless sufficient to clearly show the pathway. This is consistent with the evidence of the photographer Mr Lavin. He took the photographs with an automatic exposure with the result that brighter parts of each scene are slightly overexposed making them appear brighter than they in fact are and resulting in the darker parts correspondingly being underexposed. My observations were also consistent with the evidence of Ms Chadjinicolis who was the first person on the scene after the accident apart from the plaintiff's brother. She saw the plaintiff's brother standing in the road at the corner just before the culvert as soon as she turned the corner into Appleton Road around the sailing club.[2] When Ms Chadjinicolis arrived at the culvert it was dark enough to require a torch and the car headlights.[3] According to Ms Chadjinicolis it was dark both in the area around the top of the culvert as well as in the base. I accept her evidence on this point. The culvert itself and the area to either side of it is in the shadow of the overhead lights and thus much darker than the pathway or the roadway..

[9] I accept the evidence of Mr Hamilton, a scheduler with Ergon Energy that there has been no change in the lights or lighting in the area around the culvert since the time of the plaintiff's accident.

[10] The pathway past the culvert was a popular thoroughfare and the main access from the Yeppoon central business district to the southern residential beach areas. From the Yeppoon central business district to the southern residential beaches was only about a 20 minute walk. I accept that the taxi service in Yeppoon is unreliable late at night. I accept that there is reasonable likelihood

[2] Transcript page 124, lines 1-15
[3] Transcript page 126

that persons walking on the pathway late at night had been drinking in one of the Yeppoon hotels.

[11] The plaintiff has no recollection of the accident or of the night. He was familiar with the area. He had never had difficulty with the culvert. He had walked the footpath at night on many occasions. There was no known witness to the plaintiff's fall.

[12] The fullest account of the plaintiff's activities on the evening leading up to the accident was given by his brother, Mark Miller. Mr Miller gave evidence that the plaintiff had turned up at his residence at Casuarina Avenue, Taranganba at about 5:30pm after work. The plaintiff had a cold. At about 6:30pm the two brothers went to the Railway Hotel in Yeppoon by cab. They stayed at the Railway Hotel until about 9:30. During that time Mark Miller estimates he had about six 303 stubbies and the plaintiff about three 303 stubbies.[4] After leaving the Railway Hotel the brothers went to the Marsden Tavern to play pool. They remained at the Marsden until about 11:00pm drinking approximately six half rum and cokes each. At about 11:00pm the brothers went to the Bonker's nightclub where they had another half rum and coke before returning to the Marsden. At the Marsden the brothers had another couple of half rum and cokes before deciding to go home at about midnight.

[13] Mark and Ben Miller were apparently fairly fit. It was their practice on occasions such as this to jog at least part of the way home. The brothers jogged to Appleton Road[5]. The route the brothers took was along Barry Street. Barry Street does not connect with Appleton Road but there is a walkway through a log fence which allows access to Appleton Road at the southern end of Appleton Park near a wooden footbridge.[6] When the brothers

[4] 303 is a brand name for a mid-strength alcohol beer.
[5] In the evidence Appleton road is often referred to as the Yeppoon-Emu Park Rd or Scenic Drive. Appleton Road becomes the Yeppoon –Emu Park Road or Scenic Drive at the roundabout a few hundred metres past the culvert and the names are interchangeable.
[6] In giving evidence of the lighting at least one of the lay witnesses, a Mr Corbett, was confusing the culvert where the accident happened with the wooden footbridge a hundred metres or so further north: see transcript page 185

reached Appleton Road the plaintiff was in front. They both slowed to a walk and crossed the road to the concrete pathway. Mark Miller walked over the footbridge behind Ben who started jogging again on the other side. After about 10 to 15 meters jogging Ben stopped and returned to walking. At that stage Ben was about 20m ahead of Mark. The pathway veers to the left around a corner just before the culvert. The corner is blind because of the mangroves on the edge of Fig Tree Creek. Ben went out of Mark's view around the corner. After 10 or 15 seconds Mark heard a thud. Mark rounded the bend but saw no sign of Ben. Mark looked over the side of the culvert and saw a shape. The shape was not immediately recognizable as that of a person because of the darkness in the culvert. Mark initially thought Ben was playing a practical joke and called out to him to "stop mucking around". Moments later he realized that Ben was lying in the culvert and had been seriously injured.

[14] Mark Miller described the plaintiff before the accident as having a good tolerance to alcohol. The amounts Mark recalls the plaintiff drinking on the night of the accident were not such as Mark would describe as a lot for Ben. Rhonda Miller who was with Mark and Ben for part of the evening saw the brothers shortly before they left the Marsden Tavern and formed the view that they were not drunk.

[15] A sketch plan of the culvert showing the position of the plaintiff's body after the fall is exhibit 8. It shows the plaintiff lying at a right angle to the pathway with his feet nearest the pathway and his head further away from the pathway.

[16] The plaintiff's case as particularized in paragraph 6 of the Further Amended Statement of Claim may be paraphrased as being that the fence was too low to prevent injury; no warning of the inadequacy of the fence was given; the gap between the fence and the nearest edge of the concrete path was uneven and constituted a risk and the area was ill lit. I am satisfied that the area was adequately lit at all relevant times. I am also satisfied that the fence was too

low to provide an effective barrier relative to the path. I am not satisfied that the area between the edge of the path and the fence was such as to constitute any danger to a person taking reasonable care for his or her own safety[7]. I am satisfied that the pathway was a popular route for walkers and that many of them, especially at night, might reasonably be expected to be affected by alcohol. It is noteworthy that the council's records do not disclose any complaint regarding this section of footpath notwithstanding the keeping of detailed records since 1992. The only respect to which the plaintiff can point in which either defendant has failed to act reasonably in relation to this section of footpath is in not ensuring that the fence in fact erected was of an effective height commensurate with the design height. Reference to the photos attached to Mr Smolokov's report as Plate V show that the fence is not likely to afford an effective barrier if regard is had to the fact that it comes to below the waist of the person in the photograph, Mr Shroder, the plaintiff's solicitor. Mr Shroder is a much shorter man than the plaintiff. It is reasonably foreseeable that if a vertical drop to a concrete culvert is created on a busy walkway someone might fall over it and injure themselves unless an adequate fence is constructed. Such a danger is obvious and the fact of a fence being constructed evidences a recognition of it.[8] The fact that there is a fence suggests that the erection of a fence is a reasonable response to the perceived risk. If it is reasonable to construct a fence it seems to me to be reasonable to construct an adequate one. A proper fence was in fact constructed in 1999 after commencement of these proceedings. If I were satisfied that the plaintiff had discharged the onus of showing that the inadequacy of the fence was causative of his injuries I would find either or both of the defendants liable

[17] The difficulty for the plaintiff arises because of his inability to lead evidence as to what actually happened between the time he passed out of his brother's sight and when he fell into the culvert. The plaintiff's counsel submits that the plaintiff probably put his foot into the gap between the concrete path and the fence, stumbled against the fence and because of its height simply fell over it.

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[7] *Borland v Makauskas* [2000] QCA 521 at [16]; *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 75 ALJR 992 at [6] – [8], [163], [339], [355].

[8] See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 – 48.

While the scenario relied on by the plaintiff is a plausible one, there is no evidence that this is what in fact happened and there are a number of reasons for not accepting it as the only plausible explanation.

[18] If the accident occurred as the plaintiff submits it is curious that he landed with his head away from the footpath. If he had rotated over the fence it is not unlikely that he would have continued to rotate and landed with his head nearer the pathway.[9] The position the plaintiff fell as shown in the sketch prepared by Mark Miller suggests a fall near post two.[10] At that point the gap between the fence posts and the concrete path is only 70mm or less than 3 inches with the fence on one side. It is difficult to see how the plaintiff could have got close enough to the fence or put sufficient of his foot into such a gap to stumble. These difficulties do not mean that the plaintiff's hypothesis is not correct. They do give one some cause for pause before determining that there is no other plausible hypothesis. Two other hypotheses come readily to mind. The plaintiff had been drinking. He may well have felt a need to urinate, especially having jogged some distance from the tavern. The area to the side of the culvert is dark. He might have moved deliberately around the end of the fence and off the path into the darkened area beside the wing wall of the culvert to urinate and slipped and fallen. Going around the end of the fence to the wing wall would allow some privacy because there is space to move outside the lit area into the shadow. Another possibility is that he may have been intending to conceal himself in the darkened area beside the culvert to surprise his brother as a joke when he came around the corner. His brother did, after all, think at first he was joking when he lay in the culvert. These are, of course, just conjectures. They are, however, plausible scenarios in which the height of the fence plays no part in the fall because each involves a deliberate skirting around the end of the fence. I respectfully adopt the law as

[9] see Smolokovs – transcript page 161-162

[10] Despite there being 8 posts shown on the sketch plan (exhibit 8) the photographs taken by Mr Smolokovs in 1997 and attached to his report clearly show that there were only 7 posts and the entrance to the culvert commences at about post 2. These photographs were taken before the headwall and fence were changed in 1999.

correctly summarized by Atkinson J in *Muller v Cherrie*[11] at [14] – [15] where her Honour said:

> **"[14]** As the High Court held in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66, the court may only draw proper inferences and not engage in conjecture. Their Honours referred to a judgement of Dixon CJ in *Jones v Dunkel* (1959) 101 CLR 298 at 304-305:
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> > 'In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one wich they establish to the reasonable satisfaction of a judicial mind … the law … does not authorize a Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts must form a reasonable basis for a definite conclusion affirmatively drawn from the truth of which the Tribunal of fact may reasonably be satisfied.'
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> **[15]** In *West v Government Insurance Office of NSW* the plaintiff, who was involved in a motor vehicle collision at an intersection, claimed to suffer from retrograde amnesia about the circumstances. There was no expert evidence about skid marks or the like. No witnesses were called who observed the collision or the situation which led to it. There was no defence evidence about liability. The High Court held at 65 that the dearth of evidence was such as to prevent any inference being drawn as to the conduct of either driver at the time of or immediately prior to the collision. Although it might be reasonable to infer that one or another of the drivers was negligent, there was no evidence sufficient to establish that it was the defendant. The outcome therefore was that the plaintiff failed to establish negligence on the part of the defendant."

[19] A similar conclusion was by Stephen J in *Girlock Sales Pty Ltd v Hurrell* [12] where he set out a passage from an earlier decision of the High Court in *Bradshaw v McEwans Pty Ltd* [13] as follows:

> "You need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture … All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

[11] [2000] QSC 330
[12] (1982) 149 CLR 155 at 161 - 162
[13] (Unreported: High Court; 27 April 1951)

[20] Here the evidence does establish that the footpath itself was safe. It had been in use for some years without complaint to the council. It was flat, well lit and its limits clearly defined. Whatever may have been the state of the fence there is no basis for concluding that it was causative of the injury unless there is evidence to establish if and how the plaintiff came to fall over it. If he was so close to the fence that he tripped off the edge of the concrete path and then over the fence it seems to me that involves a level of carelessness for his own safety for which he must bear some responsibility himself. If he was going around the fence to the darkened area out of the reach of the streetlights for a reason such as that I postulated earlier then the fence does not seem to me to have played any part at all in the accident.

[21] In all the circumstances I am not satisfied that the plaintiff has discharged the onus of establishing that the hypothesis relied on by him either occurred or is more probable than any other inference that may be drawn from the evidence. It is not inevitable that the fence which I have found by the time of the accident to be inadequate and substantially below both the design height and the height specified by the only objective standard available was causative of the injury.

[22] It follows that the plaintiff's claim must be dismissed.

[23] Because of the conclusion to which I have come it is not necessary to consider the position of the defendants inter se. Nonetheless, in case it should be necessary later I should add some findings in relation to the this issue.

[24] If his hypothesis is correct, at the place where the plaintiff fell the fence as constructed was probably about the design height of 900mm. This is the post height above the pathway measured by Mr Smolokovs plus the drop off to the concrete headwall of 100 – 150mm which Mr Smolokovs notes at page 3 of exhibit 2 and assumes the biggest drop off occurs when the effective height of the posts is lower. Because it is not known when the fill up to the walking part of the footpath was placed it is impossible to say whether the fence was an adequate height when constructed. The addition of the pathway certainly

made it inadequate. In any event the inadequacy of the fence was apparent to visual inspection after the pathway was laid. The pathway was laid by the council without reference to the Main Roads Department. The Main Roads Department had no formal method of inspection of its infrustructure and relied on casual observation by officers of the department while driving about or reports from the council. The Main Roads Department alleges that Road Maintenance Performance Contracts (exhibit 18) which the council entered into with the Main Roads Department in each financial year and provided for the council to maintain road systems within their area of authority at the expense of the department. I am not persuaded that these contracts are such as to impose an obligation on the council to rebuild fences which are inadequate but still in their "as constructed" form but rather, relate to repair of damage such as pot holes.

[25] On balance, as between themselves, and ignoring any contributory negligence, I consider that the council, having laid the pathway and thereby increased the risk to an obvious level without referring the issue of the fence back to the Main Roads Department should bear the greater portion of the responsibility for an accident causally connected to the height of the fence. The department should accept some of the responsibility for failing to have in place any organized system of periodic inspection of infrastructure to consider its continued acceptability where the unacceptable features fall outside the category of repair.

[26] For the reasons I have already given, however, I am not satisfied that either defendant is liable in this instance.