# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Percy v Noosa Shire Council* [2002] QCA 245 |
| PARTIES: | **JOHN DAVID PERCY**<br>(plaintiff/appellant)<br>**v**<br>**NOOSA SHIRE COUNCIL**<br>(defendant/respondent) |
| FILE NO/S: | Appeal No 9843 of 2001<br>DC No 185 of 1999 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Maroochydore |
| DELIVERED ON: | 19 July 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14 June 2002 |
| JUDGES: | Williams JA, White and Wilson JJ |
| ORDER: | **1. Dismiss the appeal.**<br>**2. The appellant pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.** |
| CATCHWORDS: | TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – LOCAL AUTHORITIES – content of the duty owed by local authorities – consideration of competing responsibilities and availability of resources<br><br>TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – GENERALLY – whether maintenance system of local authority sufficient – whether plaintiff was alerted to the risk and requirement to take care<br><br>*Brodie v Singleton Shire Council; Ghantous v Hawksbury Shire Council* (2001) 75 ALJR 992, followed<br>*Wyong Shire Council v Shirt* (1980) 146 CLR 40, followed<br>*Webb v South Australia* (1982) 56 ALJR 912, followed<br>*Lanyon v Noosa District Junior Rugby League Football Club Inc. & Ors* [2002] QCA 163, CA No 11149 of 2001, 5 April 2002, followed |

COUNSEL: T Matthews, with P B de Plater, for the appellant
G Gibson QC, with C K Copley, for the respondent

SOLICITORS: Boyce Garrick, for the appellant
King & Company, for the respondent

[1] **WILLIAMS JA:** The relevant facts are fully set out in the reasons for judgment of White J with which I agree.

[2] The respondent local authority provided a well kept asphalt walkway for those persons who were not prepared to take the ordinary risks associated with walking on natural ground. The appellant freely elected to leave that walkway and traverse the natural ground between it and the roadway. In so doing he accepted the ordinary risks which a person in every day life takes when traversing natural ground. Unfortunately nature does not provide totally risk free surfaces on which a person may walk. Natural ground is notoriously uneven and frequently a person traversing it will come across clumps of grass or other vegetation, or roots of trees or other vegetation, which present a minor obstacle. Because of that a reasonable person crossing such country would keep an eye open for such potential obstacles.

[3] Whilst a local authority is undoubtedly under a duty to keep a prepared walkway free from unusual or unexpected dangers, its duty with respect to the maintenance of natural ground is not as onerous. If it was aware of an unusual danger posed to known users of natural ground under its control, it would be under a duty to minimise that risk either by removing the danger or warning of it. But the tree root in this case was not of such a nature. It was the sort of thing which one ordinarily expects to encounter when walking or jogging across natural ground of the type in question here.

[4] Given the size and location of this particular tree root the respondent local authority was not negligent in failing to remove it prior to the date on which the appellant was injured. Trees are a natural part of the environment and a local authority is under no obligation to remove all trees whose roots might present a danger to a passer-by, particularly one who does not see the obvious.

[5] The appeal should be dismissed with costs.

[6] **WHITE J:** The appellant appeals against the dismissal of his claim in the District Court for damages for personal injuries suffered by him when he stepped on a portion of a protruding tree root while jogging along Solway Drive at Noosa on 28 January 1999.

[7] The appeal is of narrow compass. The appellant accepts the learned trial judge's findings of fact. He does not challenge his enunciation of the relevant legal principles. It was uncontroverted that the respondent was the occupier of the place where the appellant sustained his injury and owed him a duty of care. The challenge is to the application of the principles to the facts as found.

[8] Quantum was agreed at the commencement of the trial in the sum of $80,000. The appellant was the only witness in his case and the respondent's witnesses who gave evidence about the system of maintenance were largely unchallenged.

[9] The appellant is a 54 year old man living at Sunshine Beach. He was in the habit of jogging each day. On 28 January 1999 at about 5.15 p.m. he was returning home in good light after an approximately eight kilometre jog in the National Park and surrounds via Solway Drive. That road enters David Low Way near the Sunshine Beach Primary School which is on David Low Way.

[10] The appellant jogged along the northern footpath of Solway Drive. It consisted of an asphalt shared walkway and bikeway edged on the roadside with a Koppers log fence made of a single row of horizontal round logs about 60 to 70 centimetres above ground level supported on vertical posts. Next to the fence was a grassed area approximately one or two metres in width bounded by cement kerbing which edged the bitumen road. There was a gap in the log fence near the place where the appellant sustained his injury marked by tubular steel railings painted red and white on both sides of Solway Drive which indicated a pedestrian crossing. There was another break in the log fence a short distance around the corner into David Low Way giving access to a pedestrian crossing on David Low Way north of its intersection with Solway Drive.

[11] The appellant left the asphalt path, went through the gap in the fence marked by the red and white railings and jogged slowly on the same side of Solway Drive on the grassed area next to the road towards David Low Way preparatory to crossing that highway. He put his foot on what he thought was a tuft of grass. A tree root was concealed within it and as the appellant's foot struck the root his foot rolled to the left, his ankle cracked and he fell down sustaining serious injury to his ankle and leg.

[12] His Honour described the grassed area as follows:

> "… the footpath consists of a mown, but sparsely grassed, area of ground … [t]he grassed area appears to have consisted of a somewhat stony level surface perhaps rising slightly from the gutter to the walkway with areas bare of grass … The photographs which the plaintiff tendered which he took of the area a couple of weeks later show bare earth and stones about the area where the tree root is. The tree root, which does not appear to be of recent origin, evidently belonged to a tree growing in bushland on the other side of the walkway which had found its way under the walkway emerging some centimetres above the ground's surface on the road side of the walkway. It does not appear to go right to the gutter but to emerge next to the walkway and to occupy about a quarter of the distance from the edge of the walkway to the gutter." [5] and [9].

[13] The appellant subsequently measured the root at about five to seven centimetres above the ground. He said that the tuft of grass which obscured the part of the root on which he placed his foot was about ten centimetres above the ground. The root itself was about 15 centimetres long, not all of which was obscured by the tuft of grass. The appellant noted that the area around was fairly clear of grass. The uncontested evidence was that it had been mowed eight days previously.

[14] The respondent called extensive evidence about its system of maintenance. His Honour found:

> "… that the defendant appears to have had in place a responsible and reasonable system of maintenance to identify and respond reasonably

> to hazards in its authority area. What emerged was that maintenance inspections of the area where the plaintiff fell occurred from time to time: see Exhibit 13. The grass area between the walkway and the gutter was regularly mown and trimmed by a contractor, the last occasion prior to the plaintiff's injury on 20 January 1999. The quality of the contractor's work was checked intermittently by a responsible employee of the defendant. The walkway was mechanically swept from time to time. The defendant had a risk assessment system so that if a potential hazard was noticed by an employee or reported by a member of the public a decision may be made whether, and if so how urgently, the defendant's resources would deal with it." [11].

[15] The appellant does not dispute that there was such a system in place and that it was adequate. Rather he submits that because this root was overlooked or was not removed by virtue of the system in place that some employee of the respondent or of one of its mowing contractors must have negligently omitted to deal with it. In effect, the appellant's contention is that in order to acquit its duty to take reasonable care, the respondent was required to remove every tree root which intruded onto a portion of a road reserve. Mr T Matthews, who appeared for the appellant, submitted that this was not the appellant's case, it was merely that this particular root should have been removed. But there was nothing special about this tree root which would call for its removal above any other tree root which similarly penetrated into an area adjacent to a formed walkway. The respondent was not aware of the presence of the root upon which the appellant stood until after he wrote a letter of complaint. By 19 April 1999 it had been removed.

[16] The evidence showed that there were about 1,000 kilometres of roads in the respondent shire, 300 kilometres of which were in an urban area. Approximately seventy-five percent of roads in the urban area had at least one footpath. His Honour accepted the evidence that there was a necessity to prioritise the use of resources and that this was weighted to the heavier use areas.

[17] The evidence was not challenged that the cost of removing all tree roots in the respondent shire which were above ground level and adjacent to footpaths would be, in the words of Mr M R Preston, technical officer of works with the respondent, "astronomical and it would be an impossibility to cost it". In order to respond to potential hazards from tree roots the respondent had in place a risk assessment management program. The maintenance team foreman was required systematically to inspect each area of responsibility every three months. In addition the respondent reacted to information from the public and business houses in its area. A document issued by the respondent to each works foreman required the team to check, *inter alia,* footpaths, bikeways, boardwalks and beach access paths for hazards. One of the items to look out for was root intrusion. The evidence showed that these inspections had been carried out in the area in September, October, November and December of the previous year. The footpath had last been mown on 20 January 1999.

[18] The learned trial judge made extensive reference to the joint judgment of Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council* and *Ghantous v Hawksbury Shire Council* (2001) 75 ALJR 992. Those appeals were concerned to

consider whether the common law rule of immunity from liability in negligence and nuisance for non-feasance of highway authorities should continue to be followed.

[19] By a majority the Court concluded that the liability of highway authorities should be governed by ordinary principles of negligence applicable to other statutory bodies. Their Honours concluded that the content of the duty of care for highway authorities should reflect what was said by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8 and referred to in *Webb v South Australia* (1982) 56 ALJR 912 where Mason, Brennan and Deane JJ said at 913:

> "The question then is: What is the response which the reasonable man, foreseeing the risk, would make to it? Is the risk so small that a reasonable man would think it right to neglect it? In *Wyong* Mason J said:
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> > "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.""

In formulating the duty of care the majority held that consideration must be given to the authority's competing or conflicting responsibilities and the resources available to it. When considering pedestrians, their Honours commented at [163]:

> "In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in *Ghantous*, persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence."

[20] The learned trial judge concluded that grass growing over the root sufficiently to conceal it in an area of mown grass and bare earth on the other side of the log barrier from the asphalt pathway should have alerted a pedestrian who chose to pass over that surface of the need to take care where he placed his feet.

[21] Reference was made before us to a recent decision of this court in *Lanyon v Noosa District Junior Rugby League Football Club Inc. & Ors* [2002] QCA 163, CA No 11149 of 2001, unreported 5 April 2002. The appellant, a 48 year old man, was coaching an under 14 football team in a training session. As he was running across the ground his foot went into a depression and he sustained personal injury. The court quoted with evident approval the observation of the trial judge that "the fact that the hole escaped attention does not of itself mean that the system in place was not followed or was deficient."

[22] Kirby J, who agreed with the majority in *Brodie*, noted at [248]:

> "Local authorities are not insurers for the absolute safety of pedestrians or other users of roads or footpaths. To recover, a person in the position of Mrs Ghantous must establish a want of reasonable care causing his or her injury. Her mishap was simply an accident.

> Her damage was not shown to be the result of negligence on the part of the respondent."

[23] There is nothing to suggest that the learned trial judge was wrong in the conclusion which he drew from essentially uncontested facts that the appellant was not shown to have failed in its duty of care as pleaded.

[24] I would dismiss the appeal and order that the appellant pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.

[25] **WILSON J:** I agree with Williams JA and White J that the appeal should be dismissed with costs, for the reasons given by their Honours.