SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v Gold Coast CC* [2008] QCA 353
PARTIES:	**NOELA ANDERSON** (plaintiff/applicant) **v** **GOLD COAST CITY COUNCIL** (defendant/respondent)
FILE NO/S:	Appeal No 6613 of 2008 DC No 61 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	5 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2008
JUDGES:	Keane and Holmes JJA and White AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal refused** **2. Applicant to pay the respondent's costs of the application on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant commenced proceedings against the respondent claiming damages for injuries sustained as a result of her tripping on a service pit cover exposed on an unpaved footpath located within the local government area of the respondent – where the learned Magistrate found that in the circumstances the respondent owed the applicant no duty to protect her from the risk posed by the service pit cover and that, even if a duty were owed, there was no breach – where the decision of the learned Magistrate was affirmed on appeal to the District Court – where the applicant now seeks to challenge findings of the learned Magistrate which were not challenged in the District Court below – whether in the circumstances leave to appeal should be granted *District Court of Queensland Act* 1967 (Qld), s 118(3) *Anderson v Gold Coast City Council* [2008] QDC 126, affirmed

Brodie v Singleton SC (2001) 206 CLR 512; [2001] HCA 29, applied
Pickering v McArthur [2005] QCA 294, cited
Richmond Valley Council v Standing (2002) 127 LGERA 237; [2002] NSWCA 359, cited
Rodgers v Smith [2006] QCA 353, cited

COUNSEL: J S Miles for the applicant
M T O'Sullivan for the respondent

SOLICITORS: Parker Simmonds for the applicant
O'Keefe Mahoney Bennett for the respondent

[1] **KEANE JA:** On 14 October 2000, at about 4.15 in the afternoon, the applicant tripped on the edge of a service pit cover set in an unpaved area of footpath near the concrete pavement on the south-western corner of the intersection of Old Burleigh Road and Charles Avenue at Broadbeach. The applicant brought an action against the respondent, the local authority for the area, for damages for personal injury allegedly suffered in her fall consequent upon tripping on the service pit cover.

[2] At the trial of the action in the Magistrates Court, it was found that the service pit cover protruded about one inch above the ground in which it was set. It was also found that this protrusion was the sole cause of the applicant's fall. Nevertheless, the applicant's claim was dismissed on the bases that the respondent owed the applicant no duty to protect her from the risk posed by the protrusion, and that, even if a duty of care were owed, the respondent had not breached that duty by failing to ensure that the service pit cover was flush with the surrounding ground.

[3] The applicant appealed to the District Court against the decision of the learned Magistrate. The District Court affirmed the decision dismissing the applicant's claim. The reasons for decision of the learned District Court judge were clear, comprehensive and compelling.[1]

[4] Even though the applicant's case has been fully considered by two courts, and even though the quantum of any damages recoverable by the applicant would be likely to be quite modest, the applicant now seeks leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). It is well-settled that leave to appeal to this Court will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[2]

[5] In this case it is convenient to move immediately to a consideration of the merits of the applicant's argument that there is an error to be corrected in the decision of the District Court.

The merits of the applicant's claim

[6] The applicant argues that the hazard posed by the protrusion was not obvious to users of the footpath but was apt to create a reasonably foreseeable risk of injury which the respondent acting reasonably would have removed. The applicant argues

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1 See *Anderson v Gold Coast City Council* [2008] QDC 126.

2 *Pickering v McArthur* [2005] QCA 294 at [3]; *Rodgers v Smith* [2006] QCA 353 at [4].

that although the protruding service pit cover was located in the unsealed part of the footpath, it was located in a part of the footpath "well traversed" by pedestrians taking a shortcut. The argument advanced on the applicant's behalf does not show any error in the judgment of the District Court.

[7] There are concurrent findings in each of the courts below that the uneven surface of the ground posed no real risk of injury to pedestrians using the footpath with ordinary care. Such users could reasonably be expected to be aware of the obvious fact that the ground was uneven and proceed accordingly: the unevenness created by the protrusion was one aspect of the general unevenness of the unsealed part of the footpath. It is well-established by decisions of the highest authority that a local authority is not duty-bound to eradicate mundane risks which persons exercising ordinary care can be expected to observe and avoid.[3]

[8] The applicant sought to meet this difficulty in her case by asserting in the written submissions delivered on her behalf that the use of the path by other pedestrians had resulted in the hazard being obscured or concealed. There is simply no evidentiary basis for this assertion. It does not appear that any finding to this effect was sought from either of the courts below. In oral argument it was contended on the applicant's behalf that the hazard was obscured from the applicant's view because she was walking in the midst of a number of other people. The learned Magistrate was not disposed to accept the applicant's evidence on this point. His scepticism was understandable having regard to the vague and argumentative evidence of the applicant. More importantly for present purposes however, there was no challenge to the Magistrate's scepticism in the course of the applicant's appeal to the District Court. Accordingly, no criticism can be made of the decision of the District Court on the basis that his Honour should have come to a different view on this point from that taken by the Magistrate.

[9] As to the issue of breach of duty, both the courts below held that there was nothing unreasonable in the absence of action by the Council to ensure that the part of the footpath in question was perfectly smooth. There is no basis on which this Court could be persuaded to come to a contrary view, bearing in mind that the existence of a problem for pedestrians in terms of the uneven condition of the unsealed part of the footpath had not been drawn to the respondent's attention, whether as a result of complaint or otherwise, in sufficient time for the Council to remove the hazard.

[10] Neither at first instance nor on the appeal to the District Court was the applicant able to advance a coherent case as to the level of inspection reasonably necessary to ensure that this hazard was identified in time for it to have been removed before the applicant suffered her injury. The applicant's argument failed to address the concern that the level of care necessary to obviate the risk of concern to the applicant in this case would require that local authorities find and fix every example of unevenness in every footpath or walkway in their local authority areas within a very rigorous timeframe. The applicant failed to show even an arguable case that an insistence by the courts that local authorities must pursue such a course would be reasonable, either in terms of the cost to ratepayers or the impact upon local authorities' priorities for the expenditure of public moneys.

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[3] *Brodie v Singleton SC* (2001) 206 CLR 512 at [6] – [9], [163]; *Richmond Valley Council v Standing* [2002] NSWCA 359 at [29], [54] – [55].

Conclusion and orders

[11] In these circumstances, there is no basis upon which the decision of the District Court can be said to be in error.

[12] The application for leave to appeal should be refused.

[13] The applicant should pay the respondent's costs of the application on the standard basis.

[14] **HOLMES JA:** I agree with the reasons of Keane JA and the orders he proposes.

[15] **WHITE AJA:** I have read the reasons of Keane JA and I agree with those reasons and the orders proposed by his Honour.