VICTORIA follows the path on TRIPPING

***Greater Shepparton City Council v Davis* [2004] VSCA 140**
***Boroondara City Council v Cattanach* [2004] VSCA 139**

By Michael Lombard

The Victorian Court of Appeal, three years after the High Court abolished the Highway Rule, has given its first judgments applying the principles of negligence against two councils. The results will severely curtail an already restricted area of litigation in Victoria.

BACKGROUND

Prior to the decisions in 2001 in *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*[1] the Highway Rule gave immunity to public authorities responsible for highways for negligent acts of nonfeasance. This was felt to be

unfair, and resulted in many exceptions and qualifications being found to try and overcome its effect.

In these cases, the High Court held that general principles of negligence were to be applied to public authorities and abolished the Highway Rule. But its judgment contained indications that this decision wasn't going to herald 'open slather' for plaintiffs.

In fact, Catherine Ghantous, who had injured her ankle when stepping from a concrete footpath onto an uneven unpaved strip on the side of the road, found that all seven judges dismissed her appeal. Callinan J who wrote the leading judgment, observed that there was no concealment in the difference in height, and produced a memorable direction:

> 'The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along.'[2]

In *Brodie*, the High Court found that the Council had breached its duty by not properly maintaining a bridge, which collapsed when Mr Brodie drove his truck over it.

REACTION TO DECISION

It was thought that the High Court's decision had greatly changed the landscape for injured plaintiffs. The Victorian Government was certainly concerned about the exposure that councils may be subject to and, in November 2002, introduced the *Transport (Highway) Act* 2002. The purpose of that Act was to reverse the effect of the ruling in the High Court and allow time for the Government to review all road management legislation in the state.

The reversal of the abolition of the Highway Immunity Rule will cease on 1 January 2005, when the new *Road Management Act* 2004 will take over.

The reversal of the decision of the High Court didn't take effect until 18 months later. This left a window of opportunity, and the two Victorian Court of Appeal cases of *Davis* and *Cattanach*[3] were required to be decided in accordance with the law prior to the enactment of the *Transport (Highway) Act* 2002.

OTHER STATE DECISIONS

Other jurisdictions seemed to gain a head start on Victoria in interpreting *Ghantous* and *Brodie*, and the caution in extending an obligation on the authority has been taken up by all interstate Courts of Appeal. Interstate courts have found that the defects in road surfaces were either so small as to be coped with easily by any pedestrian, or so obvious as to be easily avoided by a pedestrian exercising proper care for his or her own safety.

What follows is an Australia-wide summary of some of these post-*Brodie* and *Ghantous* decisions:

Queensland

- *Percy v Noosa Shire Council* [2002] QCA 245
  Mr Percy was jogging along a grassed area next to the road. He put his foot in a tuft of grass that contained a tree root and sustained injury to his leg and ankle. The Court of Appeal found the council was under no obligation to remove all trees whose roots might present a danger, particularly to 'one who does not see the obvious'.
- *Spencer v Council of the City of Maryborough* [2202] QCA 250
  A 10mm difference between two concrete slabs in the footpath was not one of 'grave or numerically significant proportions' for pedestrians taking ordinary care.

ACT

- *Garvan v ACT* [2202] ACTSC 70
  A 20mm difference between pavers on a patch was an irregularity that the ACT did not have to be aware of, in the absence of any earlier complaint.

Western Australia

- *Gondoline v Hansford* [2002] WASCA 214
  A paver was12.5mm to 25mm above the surrounding path. This was found to be a 'relatively insignificant difference'. It was an ordinary everyday risk that a pedestrian ought to envisage.

New South Wales

- *Lombardi v Holroyd City Council* [2002] NSWCA 25
  A 25mm difference between two slabs of concrete on a footpath was found to be plainly visible and couldn't be regarded as a high or unacceptable risk. Therefore, failure >>

by the Council to detect and fix it wasn't negligent.

- *Roads & Traffic Authority of NSW v McGuinness* [2002] NSWCA 210
  A raised corner of a manhole, 13mm above the footpath surface, was found to be obvious and the height difference did not make the footpath unsafe for people taking ordinary care.
- *Burwood Council v Byrnes* [2002] NSWCA 343
  A 20mm difference between pavers in a footpath was found not to be an unexpected or unusual danger to a pedestrian in the Sydney metropolitan area who was taking reasonable care and keeping a proper lookout.
- *Richmond Valley Council v Standing* [2002] NSWCA 359
  A 15mm gap in a cracked footpath was found to be obvious and called for no special vigilance. The Court of Appeal found that, so far as there was any hazard, it was both not only obvious but insignificant and common.
- *Temora Shire Council v Stein* [2004] NSWCA 236
  Mrs Stein tripped on a raised driveway which was 30 to 40mm above the footpath at 11pm. The court found the hazard was obvious and readily visible in daylight and there was insufficient evidence of what it was like at night.
- *Newcastle City Council v Lindsay* [2004] NSWCA 198
  Two days before Mrs Lindsay tripped over a 75mm raised footpath slab, the council had identified it as a hazard and instructed its employees to immediately effect repairs by replacing 15 square metres of footpath. The workers attended with red and white water-filled barriers that they were going to use to block the footpath while effecting repairs. Due to problems with the possible utilities below the footpath, they were unable to work that day. They left the barriers on the side of the footpath with no warning of the danger to pedestrians.

  The Court of Appeal found that any duty of the Council arose only when a defect was not obvious. It was found that this hazard was in full view of any pedestrian keeping a reasonable lookout as they went about their business. Therefore the Council did not have to put barriers around it, despite considering it sufficiently hazardous to justify prompt repair.
- *Parsons v Randwick Municipal Council* [2003] NSWCA 171
  At 1am, while intoxicated, Mr Parsons fell because of a large hole in the footpath. The court found the hole would have been obvious to any reasonable user of the footpath in daylight. If a person using the footpath and exercising due care could not have seen the fault and recognised its nature due to poor lighting, it could have become a concealed trap. However, there was not enough evidence about the lighting to enable that conclusion to be reached.

THE TWO VICTORIAN DECISIONS

The *Davis* and *Cattanach* appeals were heard together in March 2004 by a Court of Appeal consisting of Winneke P, Chernov JA, and Bongiorno AJA. The judgments were delivered on 20 August 2004.

Boroondara City Council v Cattanach

Ellen Cattanach, 26, went for a run near her home with her parents' two dogs on double lead. She ran a familiar route on a clear sunny morning.

The plaintiff tripped on a 20mm ridge in the footpath, caused by a cracked paving slab. She fell, fracturing her femur and dislocating her hip.

The trial judge held that the defect was a real and significant danger, the true level of which would not have been necessarily apparent to a 'jogger approaching in the plaintiff's circumstances'. The trial judge also found that the Council knew, or ought to have known, of the damage to the footpath and that repairs were feasible and not costly.

The appeal was based on the grounds that the trial judge had applied the wrong test in considering whether the defect in the footpath would have been obvious to a person jogging with two dogs on a lead, who obscured her vision of the footpath – that is, to someone in the plaintiff's circumstances.

The Victorian Court of Appeal held that whether a defect in the path gives rise to a reasonable foreseeability of harm, including whether the hazard is obvious, should be resolved by reference to the ordinary reasonable pedestrian keeping a proper lookout and not by reference to a particular user of the footpath.

Chernov JA said:

> 'The reference by their honours in *Brodie* to 'pedestrian' was intended to be a reference to a person who walks and does not include one who jogs or runs on it or on which he or she uses a skateboard or a scooter.'[4]

Chernov JA found that the trial judge ought to have concluded on the evidence that the defect in the footpath was a hazard and would have been obvious to an ordinary, reasonable pedestrian exercising a proper lookout. He noted that the plaintiff chose to jog along the footpath while holding a lead at the end of which were two dogs that ran in front of her, thereby obscuring the area immediately at her feet. He said:

> 'These circumstances, I consider, obliged her to pay greater attention to any possible defects in the path along which she proceeded, and the fact that she did not see the faults in the pavement, and that she could not say what made her trip, led to the irresistible inference that she did not keep a sufficient lookout, and thus, in the circumstances, did not take reasonable care for her safety.'[5]

In regard to the Council's obligation, Chernov JA also found that even if it owed a relevant duty, it was not open to the judge to find on the evidence that it had been breached.

Davis v Greater Shepparton Council

Ms Tammy Davis was 25 and pregnant with her second child when she tripped over a defect in the footpath and fell outside her aunt's home in Mooroopna. The weather was fine.

She had visited her aunt previously but had always parked in the driveway. On this occasion, she parked in the street. When leaving her aunt's, she stepped into a hole in the footpath and fell, damaging three discs in her lumbar/sacral spine. She had not observed the hole upon her arrival as she had her young son with her and was carrying several bags. Nor had she noticed the hole immediately prior to falling, as she was looking towards her aunt. The hole was part of a

damaged area of pavement about one foot in length.

The trial judge found that the Council was negligent and ordered compensation to the plaintiff.

The Court of Appeal found that the trial judge had erred by looking at the subjective circumstances confronted by the plaintiff, as distinct from what would be expected of the ordinary, prudent pedestrian.

Winneke P said:

> 'In my view, when the authorities speak about a defect which the ordinary pedestrian should be able to perceive and avoid, they are talking about a defect which is there to be seen whether the pedestrian is emerging onto the footpath from adjoining premises or walking along the footpath. Such pedestrians cannot expect the pavement to be smooth and the ordinary pedestrian is expected to watch where he or she is going or whatever use is being made by him or her of the footpath.'[6]

Winneke P went on, *in obiter*, to look at whether the Council could be in breach of its duty and found that, if the defect in the footpath could be regarded as a 'trap' (in this case it was not), then the Council had breached its duty in allowing it to remain there for such a long time. The evidence at the trial was that the defect was identified in an inspection in approximately 1998, and in the year 2000 it had been accorded a rating 1 classification, which was the highest priority.

Winneke P found that the system was deficient and it could scarcely be contended that it was not in breach of its duty in failing to repair it.

Conclusions of the Victorian Court of Appeal

The Court of Appeal confirmed the High Court view that there cannot be negligence if the defect would have been seen by an ordinary pedestrian keeping a reasonable lookout.

It was only where the defect is in the nature of a 'trap' that the court moves on to investigate whether the system of the council or road authority was deficient, and whether reasonable action was or was not taken.

The court also gave guidance in regard to the streets of Melbourne as follows:

> '...It is notorious that footpaths in Melbourne have areas of deterioration, such as cracking and undulation, caused by wear and tear, the weather, the movement of tree roots underneath them and other causes not relevantly connected with their construction and maintenance. Thus, the ordinary, reasonable user of the footpath would expect to come across such imperfections.'[7]

THE FUTURE

As from 1 January 2005, Victorian law has been overlayed with a further set of requirements contained in the *Road Management Act* 2004. This Act is an attempt to codify rights, obligations, responsibilities and all matters pertaining to highways and highway authorities within Victoria.

The new Act gives highway authorities and local municipalities the opportunity to develop policies or a road management plan. The Act includes a 'policy defence', which provides that an act or omission would not be wrongful if the road authority's actions were consistent with its policies in relation to the performance of its road management function. The defence does not apply, however, if the policy is so unreasonable that no reasonable authority would have adopted it.

Also, an interesting s115 requires a person who proposes to commence a proceeding in a court to give written notice of the incident to the authority within 30 days, to enable the authority to prepare a report into the incident. Failure to do so requires the court to take the delay into account.

It remains to be seen how this new Act will further impact upon those injured on the road or footpath. ■

Notes: **1** 206 CLR 512. **2** At para 355. **3** *Greater Shepparton City Council v Davis* [2004] VSCA 140 and *Boroondara City Council v Cattanach* [2004] VSC 139. **4** At para 12. **5** At para 17. **6** At para 30. **7** Chernov JA at para 21.

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