CITATION: *Moore v Pine Creek Community Council* ***[2003] NTMC 008***

PARTIES:	Jeffrey David Moore
	v
	Pine Creek Community Council
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	LOCAL COURT ACT
FILE NO(s):	20118064
DELIVERED ON:	11 March 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	11 February 2003
DECISION OF:	Mr V M Luppino SM

CATCHWORDS:

Negligence - Public authority - Duty of care – Breach of duty - Person walking over an embankment on the edge of road at night – Road within the area of a recreational reserve controlled by the public authority - Edge of road unfenced – Whether defendant in breach of duty of care.

Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431; *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

REPRESENTATION:

Counsel:

Plaintiff:	Mr McMahon
Defendant:	Mr Bruxner

Solicitors:

Plaintiff:	David Francis and Associates
Defendant:	Morgan Buckley

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 008
Number of paragraphs:	28

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20118064

BETWEEN:

JEFFREY DAVID MOORE
Plaintiff

AND:

PINE CREEK COMMUNITY COUNCIL
Defendant

REASONS FOR DECISION

(Delivered 11 March 2003)

Mr V M LUPPINO SM:

1. This is a claim for damages alleging injuries arising in consequence of a breach of duty claimed to be owed by the defendant to the plaintiff.

2. Relevant background facts as I find them are as follows:-

    1. The defendant is a public authority namely, a local government authority centred on the town of Pine Creek situate approximately 200 kilometres south of Darwin;

    2. The defendant is the leaseholder of a certain lands used as a recreational reserve known as Lake Copperfield Reserve ("the Reserve") and has the ongoing care control and management of the Reserve;

    3. The Reserve is located approximately eight kilometres by dirt road from the Pine Creek township;

4. The plaintiff lived in a caravan on the Reserve in a fenced accommodation site specifically designated as the caretaker's compound; this was provided to the plaintiff by the defendant free of charge and in return the plaintiff performed some supervision or caretaker type duties at the Reserve;

5. The incident the subject of the claim occurred on the 23rd July 2001 and at that time the plaintiff had lived on the Reserve as caretaker for some four months;

6. The incident occurred when the plaintiff fell over the edge of the road into a natural drain; the edge was effectively created during the formation of the road which involved filling in part of that natural drain; the length of this edge is something of the order of twenty metres and the distance he fell was approximately one metre;

7. The road from the Pine Creek township to the Reserve, at the entrance to the Reserve has a fork ("the Fork") and the branch to the right leads into the Reserve; straight ahead from the Fork is a road ("the Gun Club Road"), which is a continuation of the road from the town and is one of the two alternative roads leading to a certain mineral lease on which a Mr John Oates resides;

8. The road branching to the right from the Fork leads in turn to the caretaker's compound, to a picnic area, to a loop road and to a go-kart track; the loop road forms the border of the camping area within the Reserve; the picnic area has a car park which abuts a lake which is the main feature of the Reserve; the road passing the caretaker's compound then leads to the alternative road leading to Mr Oates' residence;

9. A very short distance along the Gun Club Road after the Fork is a road to the left leading to the premises of the Pine Creek Gun Club;

those premises essentially comprise a shooting range and a demountable building that is very near to that road;

10. All of the roads referred to are unsealed dirt roads;

11. The distance from the Fork to the caretaker's compound is approximately 80 metres and the Fork is approximately equidistant to Mr Oates' residence by either of the two alternative routes referred to;

12. The camping area features eight camp sites, an ablution block and a water tank; it is adjacent to the caretakers compound;

13. Within the area approximately bordered by the two alternative roads leading to Mr Oates' residence is an area of scrub; that scrub comprised low stubble but it was a hazardous area for persons traversing it on foot, particularly in the dark, as it contained a large number of rocks;

14. There is no power to the Reserve; in all there are three solar powered lights in the Reserve; one light, the closest to the site of the plaintiff's fall, was situated next to the toilet block and was not operational on the relevant date; the other two were in close proximity to each other and were placed between the car park and the lawned area abutting the lake;

15. The light closest to the site of the plaintiff's fall was approximately 70 metres from the other two lights but in a direction away from the site of the plaintiff's fall; consequently those two lights were at a greater distance than 70 metres from the site of the plaintiff's fall;

16. Assuming the light next to the toilet block had been operational on the night in question, neither that light nor the other two lights would have illuminated the site of the plaintiff's fall; Ex P2 which was

placed in evidence by the plaintiff depicted the three solar lights as having a 12 metre foot print.

3. The plaintiff's evidence was that on the day in question he had been requested by Mr Oates to travel with him and with another person (Ms Cleary) to Darwin. Mr Oates had cataracts and as a result had very impaired vision at nighttime. The plaintiff said that he had been specifically asked by Mr Oates to go with him so that he could drive back as it was contemplated that the return trip would be at night. Why Ms Cleary could not have driven was not explained nor may it be relevant. Later in his evidence the plaintiff contradicted his claim that it was contemplated that they would return at night. As it turned out they returned to the Reserve area approximately 8.45 pm when it was fully dark.

4. The plaintiff says that he drove all the way from Darwin and there had been one stop along the way at Acacia Roadhouse. He says that when he reached the Reserve he pulled up on the Gun Club Road just past the Fork. He said that he alighted from the vehicle at that point intending to walk from there to the caretaker's compound. The plaintiff conceded that he could just as easily have driven right up to the caretaker's compound and alighted there from the vehicle. He offered two reasons for not doing so.

5. The first was that if he had driven into the caretaker's compound Mr Oates would then have had to reverse partly to get back onto the road to then proceed along the alternative road to his residence. Why any reversing was necessary was not satisfactorily explained in my view. The caretaker's compound being fenced, the plaintiff would presumably have had to stop and get out in any event to open the gate before being able to drive into the compound. Why Mr Oates could not have driven off from there was not addressed. Similarly, why the plaintiff couldn't simply have reversed the vehicle for Mr Oates before he alighted was not explained. Leaving this aside for the present, the need to reverse at all would have been very simply

avoided in any event by the plaintiff simply stopping on the road in the vicinity of the entrance to the caretaker's compound. The plaintiff could not have had any concerns about stopping on the road given that he did precisely that where he actually stopped. Mr Oates could then have driven off directly along the alternative route without reversing at all. That the plaintiff did not drive nearer to the caretaker's compound was all the more surprising given the plaintiff's agreement that from the Fork, the distance Mr Oates would have had to drive to his residence by either of two alternative routes was almost precisely the same. It was something of the order of three hundred metres and would have involved driving for approximately one minute. Therefore there were objective problems with the plaintiff's evidence on this point.

6. The second reason given by the plaintiff was that the Gun Club Road had a better surface. That evidence was contradicted by Mr Woolridge who gave evidence on behalf of the defendant including evidence specifically on this issue. He is the current president of the defendant and in total has served on the council of the defendant for approximately six years. He is very familiar with the area of the defendant having had an association with the area since 1985. He has lived in the area since 1991. He is also familiar with road maintenance and road works conducted by the defendant as part of his official duties. I was very impressed with his evidence overall. He impressed me as an honest witness and I thought he was objective. I thought Mr Woolridge's evidence on this point was quite consistent with the various photos and videos that were put in evidence. This comprised Ex P3 tendered as part of the plaintiff's case, and Ex D2 and Ex D3 tendered by the defendant. These show the condition of the road. The plaintiff's exhibit is more contemporaneous with the relevant events but has the more restricted view of the actual road surface. Notwithstanding that, those exhibits I think support the evidence of Mr Woolridge which was to the effect that all of the relevant roads were all in approximately the same condition.

7. It was put to Mr Woolridge in cross-examination, with which he agreed, that the entire road from Pine Creek to the car park servicing the picnic area, (which also forms part of the road to the caretaker's compound), was graded before the relevant date for the purposes of a festival. Accordingly, on this evidence, part of the road along which the plaintiff would have driven had he chosen to alight from the vehicle at the caretaker's compound, was in better condition than the Gun Club Road. This partly refuted the plaintiff's evidence on this point.

8. Overall I prefer the evidence of Mr Woolridge to that of the plaintiff and particularly on this issue. I therefore find that whatever difference there was in the standard of the two roads was not significant and I reject the plaintiff's evidence in that regard. Even if there was a significant difference, this would not be a satisfactory reason for the plaintiff alighting where he did in the circumstances given the very short distance required to travel from the Fork to Mr Oates' residence ie., approximately 300 metres. In any event I really cannot see why Mr Oates could not have backtracked to the Fork and proceeded home from there. After all, the distance back to the Fork was only approximately 80 metres and he would then still only have had another 300 metres to travel from there to his home.

9. Other evidence given by the plaintiff suggested that he was alert to the hazards of walking across the area of scrub and that as a result he was watching where he was walking. It appears to me to be a major contradiction that, on the one hand the plaintiff can claim to be alert to risks and was being careful, yet he chose to alight from the vehicle at a point which involved more risk than the safer option then available to him. It also appears to me to be a significant contradiction in the plaintiff's evidence to suggest that he was taking so much care yet he managed to fall over the edge of a road only a short distance from where he alighted from the vehicle. He said he was familiar with the area having travelled along the road a number of times. I would have expected this to be the case. In cross-examination he

said that he was aware of the existence of the embankment but did not see it on the night. In re-examination he was asked about the extent of his awareness of the existence of the embankment and he gave what I thought was a rather curious answer. He said that although aware of the embankment, it did not occur to him to think of it at the time. I find this rather surprising given his knowledge of its existence and given also that he chose to stop in the vicinity. Likewise his decision to stop on the Gun Club Road just past the Fork and not just before (in which case the spillage of headlights would have al least partly illuminated the edge of the road) again is highly indicative of poor attention to one's own safety. He also said in his evidence in chief that he would have chosen to drive up to the caretaker's compound in lieu of stopping where he did, had he had something of his in the car which had to be removed. Other than that he said that it didn't occur to him to drive up to the caretaker's compound. As far as I am concerned this very much cuts across his claim that it was the quality of the road and the likely need for Mr Oates to have to reverse the vehicle which made him stop and alight where he did. This evidence is also inconsistent. I formed the view that the plaintiff was fashioning his evidence to put his case in the best possible light. I am very unimpressed by this given that, as will be seen in the discussion of the applicable law, this is relevant to the issue of determining whether there has been a breach of duty, which is a key issue in this case.

10. This fashioning of the evidence by the plaintiff was also made apparent by another aspect of his evidence, again on a key issue. In his evidence in chief he said that he was specifically asked to go along with Mr Oates and Ms Cleary because of the prospect of having to return at night. He contradicted himself in cross-examination when he said that it had not been anticipated that they would be driving in the dark. Even later in cross-examination, and I believe when he realised that his earlier answer had been contradictory, he added that another reason that he was asked to drive was because of the long

distance to be driven. Why this should be the case is not known. Despite that, he drove the whole distance. I think it is also material that he did not mention that at all in his evidence in chief. I formed the view that having realised the inconsistencies in his evidence, that he was attempting to retrieve the situation. That reinforced the impression I formed that the plaintiff was attempting to put his evidence in the best light rather than being entirely truthful.

11. On the other hand I thought Mr Woolridge was objective. There were no apparent or obvious inconsistencies in his evidence such as those described above in relation to the plaintiff. In consequence of the foregoing I have no hesitation in preferring his evidence to that of the plaintiff wherever their evidence conflicts and in particular in relation to the standard of the various roads.

12. Having said that, much of the relevant evidence on both sides was not in dispute. Having regard to my assessment of the witnesses, in summary form, the findings I make relevant to the question of whether a breach of duty has occurred are as follows:

    1. The defendant is a rural council, small in size (approximately 40 square kilometres) and population (approximately 600); it has a total road network of approximately 60 kilometres, 20 of which is sealed roads; the defendant's total budget is approximately one million dollars;

    2. The defendant's revenue is mostly in the form of grants and subsidies and a relatively small amount comprises rate revenue;

    3. The defendant relies heavily on volunteer labour from its residents for its works program;

    4. Part of the grants forming the revenue of the defendant comprise approximately $100,000.00 per annum in the form of road grants which are given upon condition of being used only for the purposes of roads;

5. The defendant does have the power to borrow and does have some borrowings but is limited in that extent by its small revenue base which restricts its ability to service loans;

6. There are four recreational areas in the defendant's area; the Reserve is one of these and is the only one located out of the actual township;

7. Of the four recreational areas the Reserve is the second most frequently used;

8. The Reserve contains a camping area which is limited to eight camping sites at any one time; the eight sites are available free of charge on a first in basis and for a maximum of three nights;

9. A ramp used for the purposes of loading machines onto vehicles has been constructed next to the camp area by excavating into a natural slope; this is in the camping area and adjacent to the car park area; the resultant drop is greater than the drop where the plaintiff fell;

10. There is also a long embankment near the go-kart track;

11. The Reserve is intended to provide a bush experience; as such it is kept as natural as possible and facilities are at a minimum; in particular there is no power to the Reserve area;

12. The defendant does not actively promote the Reserve but it is depicted on information bays and, with the knowledge of the defendant, is promoted as a feature of the area in brochures published by the local tourist association; that association is independent of the defendant;

13. The picnic area within the Reserve, which abuts the lake, is a lawned and landscaped area with some shelters and seating designed largely for day use; there is a significant embankment between the car park and the picnic area;

14. The picnic area is well frequented by townspeople;

15. There are no natural scenic features in the Reserve or in the vicinity of the site of the plaintiff's fall, other than the natural bush setting itself;

16. The road maintenance program of the defendant exhausts the defendant's road budget; road maintenance is largely performed on a need basis with allowance for emergency repairs such as washaways and the like;

17. There have been no other injuries or reports of injuries on the Reserve and particularly at the site where the plaintiff fell; particularly there have been no injuries or reports of injuries from patrons of the gun club and the members of that club use that particular area and section of road regularly;

18. There are numerous areas in the Reserve which carry a risk to persons walking at night;

19. There are many areas in the defendant's council area which are hazardous or involve some risk to users; these are largely in the form of embankments and open drains; there are many in the town itself and then in recreational areas;

20. In the defendant's council area, there are approximately 20 sections of road with the same extent of drop off as the road edge where the plaintiff fell;

21. The funding limitations of the defendant limits the extent to which the various risk areas can be addressed; to date the defendant has erected only one fence along an embankment; that embankment is in the most heavily trafficked pedestrian area within the defendant's council area and is in one of the recreational areas in the town itself;

22. The Reserve itself is a low traffic or risk area by comparison and if funding were to be available, the defendant's priority would be to fence other hazardous areas in the town, particularly the open drains and embankments as these are in more heavily trafficked areas;

23. If the area of the Reserve were to be taken in isolation, the actual site where the plaintiff fell is a low priority for the defendant in terms of comparative hazards or risk areas within the Reserve; if funding were to become available for fencing, the highest priority would be given to fencing the embankment located in the picnic area as that area has the greatest pedestrian traffic;

24. There has been no change in the defendant's priorities since the date of the plaintiff's accident.

13. I now proceed to apply these findings to the law. A successful outcome for the plaintiff in this case depends upon it being established that:-

1. The defendant owed him a duty of care;

2. There was a foreseeable risk of injury;

3. The defendant breached the duty;

4. The plaintiff's loss arises from the breach.

5. The plaintiff was not guilty of contributory negligence.

14. The existence of the breach of duty and that the risk was foreseeable was conceded by the defendant and quite rightly so in my view. The existence of the breach of duty is clearly so given the decision of the High Court in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 ("Romeo"). The existence of the duty largely requires only determination of whether the possibility of harm was reasonably foreseeable and an appropriate relationship of proximity exists between the plaintiff and

the defendant. I think both were readily satisfied on the applicable law and on the evidence I heard.

15. Similarly, per the High Court in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 ("Wyong"), an event is said to be foreseeable if it is not far-fetched or fanciful. In light of this latter authority, it is almost impossible to see how an event that actually occurs is not found to be foreseeable given that test.

16. The question of whether the duty has been breached is the critical question in this case. I think that it is clear from the authorities that the duty is not to avoid all risks. It is a duty to take reasonable care to avoid a foreseeable risk of injury, not a duty to prevent any and all reasonably foreseeable injuries. In Romeo, Hayne J said at p 488:-

> "In this case the Commission owed visitors who lawfully entered land which it managed, a duty to take reasonable care to avoid foreseeable risks of injury to them. But the bare fact that the risk of the injury which in fact occurred was reasonably foreseeable (in the sense of not far-fetched or fanciful) does not conclude the inquiry about the scope of the Commission's duty. The duty is a duty to take *reasonable care* not a duty to prevent any and all reasonable foreseeable injuries...That is why it is of the first importance to bear steadily in mind that the duty is not that of an insurer but a duty to act reasonably".

Kirby J appears to concur given his comments at p 478.

17. What is reasonable depends on the particular circumstances of each case (Romeo, per Kirby J at p 479 and Hayne J at p 488).

18. The approach to be taken by courts to determine whether there has been a breach of duty was expressed by Mason J in Wyong. Kirby J in Romeo at p 479 adopted this. That approach is to first determine whether a reasonable person in the defendant's position would have foreseen that the conduct or omission complained of involved a risk of injury to the plaintiff. Once that

is determined in the affirmative, the approach, as Mason J in Wyong said at pp 47-48 is 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 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."

19. In Romeo, Hayne J at p 488 provided some very useful elaboration when he said:-

> "What is reasonable must be judged in the light of *all* the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may; it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonable foreseeable. Similarly it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which *may* go towards judging what reasonable care on the part of the particular defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all the circumstances of the case."

20. Mr McMahon for the plaintiff submitted that the injury to the plaintiff could have easily and cheaply been avoided by the erection of a barrier on the edge of the road where the plaintiff fell. His submission related to a wire

fence type barrier. The only evidence of the cost of taking alleviating action however was from cross-examination of Mr Woolridge. He was asked and conceded that the cost of materials to build a basic barrier to prevent accidental falls over the subject road edge would be of the order of $250.00. Although of some relevance, having regard to the authorities, I felt this missed the point. I therefore asked Mr Woolridge how many other such edges or embankments there are along the roads within the defendant's area. His estimate was that there were of the order of twenty. This, together with the rest of the evidence of other risk areas in the defendant's council area which also have not been addressed, puts the relevant issue in the proper context having regard to Romeo where Kirby J, at p 481 said:-

> "As to the expense of taking alleviating action, it is increasingly recognised that courts must "bear in mind as one factor that resources available for the public service are limited and that the allocation of resources is a matter for" bodies accorded that function by law. Demanding the expenditure of resources in one area (such as fencing of promontories in natural reserves) necessarily diverts resources from other areas of equal or possibly greater priority. Whilst this consideration does not expel the courts from the evaluation of what reasonableness requires in a particular case, it is undoubtedly a factor to be taken into account in making judgments which affect the operational priorities of a public authority and justify a finding that their priorities were wrong. I leave aside, but shall return to, the extent to which "true policy" decisions of a public authority are justiciable. But even in so-called operational decisions, which are subject to court assessment, it is necessary to evaluate more than simply the cost of preventing the particular accident. Inherent in the suggestion of the obligation of prevention is the cost that would be incurred in the measures necessary to prevent all equivalent accidents of a like kind and risk." (Emphasis added).

21. This is particularly relevant on the facts of this case given the very limited resources available to the defendant and the many demands for works that the defendant has to meet.

22. On the evidence before me I have no doubt that had there been even the simplest of barriers in place then the plaintiff would have realised that he was about to step over an edge and would have stopped. I think it is clear

that the existence of a simple barrier would have prevented the injury. This satisfies the causation issue. However, when considered in this restricted form it does not precisely identify the risk that the defendant had to address. If it was simply a matter of looking in isolation at the particular site where the fall occurred and without regard to all of the other land in the charge of the defendant, then the defendant may have been in breach of its duty. However, according to Romeo, that does not correctly identify the risk. The risk that the defendant has to identify and address is not simply the risk of injury at that point. It is the risk of injury on all of the defendant's property, or at the very least the risk at all other sites within the Reserve, which must be addressed. In Romeo, at pp 478–479, Kirby J said:-

> "In considering whether the scope of the duty extends, in a case such as the present, to the provision of fencing or a wire barrier, it is not sufficient to evaluate that claim by reference only to the area of the Dripstone Cliffs. An accident of the kind that occurred to the appellant might have occurred at any other elevated promontory in every similar reserve under the control of the Commission to which members of the public had access. The projected scope of the duty must therefore be tested, not solely with the hindsight gained from the happening of the accident to the particular plaintiff but by reference to what it was reasonable to have expected the Commission to have done to respond to foreseeable risks of injury to members of the public generally coming upon any part of the lands under its control which presented similar risks arising out of the equivalent conduct."

23. Hayne J agrees, where at p 491, he says:-

> "...it is to attribute a false degree of precision to the identification of the foreseeable risk to say that it was *this* area (and only this area) which needed fencing against the possibility that a person affected by alcohol would be deceived in a way that a sober and alert person would not. To say that only this area needed fencing assumes (wrongly) that it is only at this point on the cliffs that a mistake of the tragic kind made by the plaintiff on this night might be made.
>
> Further, to say that it was reasonable to fence this area (or some other areas as well) assumes that a reasonable person would think that the possibility of such an unusual combination of circumstances

> as led to this accident was sufficient to warrant taking the step of installing fences."

24. Another relevant factor in the determination of the scope of the duty and therefore of the question of whether the duty has been breached is the extent to which the plaintiff has taken reasonable care for his own safety. The matters I discuss at paragraphs 3 to 9 (inclusive) are relevant to this question. Mr McMahon submitted that the plaintiff's actions on the night in question did not go beyond the type of inadvertence referred to by Kirby J in Romeo where at p 478, in discussing the factors relevant to determining the scope of a duty his Honour said:-

> "While account must be taken of the possibility of inadvertence or negligent conduct on the part of entrants, the occupier is generally entitled to assume that most entrants will take reasonable care for their own safety."

This is expressed to be a factor to be taken into account. It is not meant to be taken in isolation. Mr McMahon's submission looks too narrowly at his client's conduct. If the issue were only to be the plaintiff's conduct at the site of the fall, then perhaps it could be said to be simple inadvertence on his part. The plaintiff however must take reasonable care for his own safety. By alighting from the vehicle where he did, and in the circumstances of having reasonably available safer alternatives, he has seriously failed to do so. I view his conduct so poorly that if a breach of duty had been proved, there would have been a very significant deduction on account of contributory negligence.

25. Applying this legal framework to the findings I make, then it is clear that the plaintiff's claim must fail. Notwithstanding that the defendant owed the plaintiff a duty, the simple fact remains that having regard to the appropriate scope of the duty the defendant cannot be said to in breach of that duty.

26. I have come to this conclusion as I find:-

1. The defendant has the responsibility for many other areas other than the Reserve and the particular site where the accident occurred;

2. The defendant does not have resources to address all sites where there is a risk of injury to persons entering on lands under the control of the defendant;

3. The Reserve is in a remote area and it provides minimal facilities with the emphasis on the natural bush experience;

4. Although the defendant is aware that the Reserve is promoted as a feature of the area, and the Reserve is well utilised by residents of the township, it does not actively encourage entrants; it exercises little control over who enters (as opposed to indirectly restricting the number in the Reserve at any one time) and does not charge a fee for entry nor does it make any charge for the use of the facilities;

5. Within the Reserve there are a number of areas where risk to users of that land is involved which would ordinarily have a greater priority for preventative works than the site where the plaintiff's accident occurred;

6. There have been no other such incidents at that site or similar sites within the defendant's area, nor any other reports of any incidents; accordingly the risk of a mishap such as that which occurred at that site was sufficiently remote to warrant, in all of the circumstances, the risk being disregarded;

7. The plaintiff has had little regard for his own safety;

8. The gravity of the injury which might be sustained at the site was, I thought, relatively slight given that at worst the fall would have been of approximately one metre; indicative of this is that the injuries the plaintiff actually sustained were relatively slight, certainly so

compared, for example, to the horrific injuries involved in the fall in Romeo.

9. Although the individual cost involved in erecting a log barrier (which I consider would have been sufficient to prevent the plaintiff's fall) at the actual site would, in isolation, likely be manageable by the defendant, I cannot fault the operational priorities of the defendant having regard to the available resources; nor is there any evidence that could base a finding that those priorities were wrong in any way; Mr Woolridge was not seriously challenged on this issue and to the extent that he was challenged, he was unshaken and, I thought, convincing.

27. In summary having regard to the foregoing it is my conclusion that a breach of the duty owed by the defendant to the plaintiff was not established in that the defendant's failure to take precautions was not unreasonable. The plaintiffs claim is therefore dismissed.

28. I will hear the paries as to costs.

Dated this 11th day of March 2003.

_____

V M LUPPINO
STIPENDIARY MAGISTRATE