SUPREME COURT OF QUEENSLAND

CITATION:	*Spencer v The Council of the City of Maryborough* [2002] QCA 250
PARTIES:	**EVELYN SPENCER** (plaintiff/respondent) **v** **THE COUNCIL OF THE CITY OF MARYBOROUGH** (defendant/appellant)
FILE NO/S:	Appeal No 9248 of 2001 DC No 105 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	26 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2002
JUDGES:	McMurdo P, Jerrard JA and Holmes J Separate reasons for judgment of each member of the Court; McMurdo P and Holmes J concurring as to the orders made, Jerrard JA dissenting
ORDERS:	**1. Appeal allowed** **2. Judgment entered for the appellant** **3. Respondent to pay the appellant's costs of the appeal to be assessed**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF AN ACTION FOR NEGLIGENCE – DUTY OF CARE – where respondent tripped over uneven pavement owned by appellant, sustaining injury – where duty of care owed by appellant to pedestrians such as the respondent – whether content of duty established – whether conclusion as to breach of duty can reasonably be reached where content of duty not specified TORTS – NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – GENERALLY – whether Council failed to implement a system of inspection for detecting faults in pavement – whether failure to implement system amounted to breach of duty of care – whether necessary to establish the content and form of the inspection system in order to determine whether the respondent's injuries would have been prevented had the

system been in place

TORTS – NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – GENERALLY – where Council reduced risk to pedestrians by "mowing" footpath once the defect became known to it via the respondent's fall – whether the appellant had taken reasonable steps before the respondent's fall to ascertain the existence of that risk

Local Government Act 1993 (Qld), s 901

Brodie v Singleton Shire Council (2001) 180 ALR 145, followed
Buckle v Bayswater Road Board (1936) 57 CLR 259, followed
Littler v Liverpool Corporation [1968] 2 All ER 343, considered
Nelson v John Lysaght (1975) 5 ALR 289, considered
Romeo v Conservation Commission (1998) 192 CLR 438, considered
Webb v South Australia (1982) 43 ALR 465, considered

COUNSEL: S C Williams QC for the appellant
P J Favell for the respondent

SOLICITORS: Barry & Nilsson Solicitors for the appellant
Morton & Morton Solicitors for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[2] **JERRARD JA:** On her seventy-third birthday on 13 March 2000, Evelyn Spencer was walking along the pavement on the eastern side of Bazaar Street in Maryborough, when she tripped and fell, fracturing her right hip. She was wearing reasonably flat heeled shoes, had not been in a hurry, had been walking at her usual pace and was watching where she was going. She had walked along that pavement many times in the preceding six months in which she had lived in that immediate area, and had previously noticed unevenness in the cement pavement on that road. She sued the appellant Council of the City of Maryborough, and obtained a judgment in her favour for $50,323.45 on 18 September 2001. The learned trial judge found that at the spot where she tripped and fell there was a slight difference in height or "lip" between two adjacent concrete slabs of the pavement of between 9 to 10 mm, and that trips and falls are these days regarded as a major health issue, particularly for the young and elderly. The judge held it was clearly foreseeable that a person walking on that footpath might catch her or his toe on such a lip, stumble and fall, and that had the defendant had an effective and appropriate risk assessment program in place, the Council must have known of the dangers created by the elevated part of the slab.

[3] The trial judge found that once the defendant Council had been made aware of that danger (when it learnt of her fall) the Council quickly responded by grinding down the respective slab surfaces of the adjoining slabs by a procedure known as

"concrete mowing". This procedure was inexpensive, efficacious and carried out very, very soon after 13 March 2000. The learned judge also found that with the elderly there is a heightened risk of very serious consequences from a trip, and that the defendant Council was obliged to take reasonable steps to ascertain the existence of latent dangers which might be reasonably expected to exist, and to take reasonable care that its exercise or failure to exercise its powers to construct and repair footpaths should not create a foreseeable risk of harm. The judge concluded that the Council's failure to identify and remedy the danger the learned judge found to exist demonstrated negligence on the Council's part, namely a failure to take reasonable care for the safety of the plaintiff in all the circumstances, and further that he was not satisfied that any contributory negligence had been proved. The last conclusion particularly depended upon a finding that there was no change in colour or density of adjoining slabs or anything else which might in any way help "flag" the existence of the danger posed to the plaintiff by the ten millimetre height difference in the slabs.

[4] The Council appealed that judgment. I think the issues thrown up for consideration include:

- whether the learned judge's findings of fact are ones which could reasonably be made on the evidence;

- whether the learned judge was in error in determining that those findings of fact describe a breach of a duty of care owed by the appellant Council to the elderly respondent.

[5] The Council had carried out a footpath inspection on that portion of Bazaar Street on 22 November 1996. It was described in submissions at the trial as an "inner city path" and the photographic exhibits support that description. The report of the Council's inspector at the time, a Mr McNab, was put in evidence, and Mr McNab's goal was to report on all matters which had the potential to create a hazard or risk. He said (in evidence) "You're only allowed to have about 5 or 6 mm rise in a slab before it's dangerous". He considered his inspection had been quite thorough, and agreed that he had done a "pretty picky job". His report shows that on his inspection of a 50 metre stretch of that footpath, which included the spot at which the respondent tripped, he had reported 20 matters which were potential risks. These were mostly described as a "raised joint on footpath", or as "eroded" joints or cracks; or as "hole in footpath". Nothing adverse was reported for the particular point where the respondent tripped. There was no evidence led of any steps taken by the Council in respect of the matters identified by Mr McNab.

[6] A "risk assessment" was carried out in December 1997 by a works overseer and two senior foremen of the Council, and undertaken for the purposes of generating "our forthcoming budget", but no outcome of that assessment was put in evidence. The Council has maintained a computerised maintenance request system since about September/October of 1999, recording requests received for maintenance of footpaths. Those requests are primarily received a complaints. There were no complaints recorded for the spot where the respondent tripped between September 1999 and 13 March 2000. Whether or not there is one now, there was no system then in operation for regularly carrying out examinations of the city footpaths. A record is maintained of the construction and resealing date of the concrete pavement.

[7] A Mr Waites, the then Maryborough City Council works engineer, attended the scene of the incident "definitely within a week" of its occurrence. On an inspection he then carried out it "wasn't really clear to me where anyone could have fallen down and there really didn't seem to be any significant steps that people could have tripped on". A report he wrote on 12 April 2000 recorded that there were no "significant (in excess of 10 mm) tripping hazards evident" and that "the small 'steps' between adjacent sections of path were in the order of 5 mm and were smoothed with Council's concrete mower within one week of (the respondent's) fall". He calculated those "steps" by putting his finger next to each slab and "it didn't even come up halfway up my fingernail"; and he accordingly determined that "they were somewhere around 5 mm, somewhere in that vicinity". He took photographs before any remedial work was done (exhibit 8), which depict a concrete slab footpath with no obvious major defects.

[8] Nevertheless, the Council's "concrete mower" was despatched to the scene, possibly as quickly as on 14 March 2000 and within a week anyway. The fact, and the apparent results, of mowing are demonstrated by the photographs which are exhibit 6, and the photographs (record 159-160) which are within exhibit 1. That "mower" grinds the concrete surface and can thus reduce the height difference between one concrete slab and another. Approximately 10 linear metres can be ground in about one hour.

[9] The respondent led evidence from a Mr McDougall, a consulting engineer, who attempted in June 2001 to calculate the difference in height or "lip" which would have existed on 13 March 2000 between the two concrete slabs at the point at which the respondent said she tripped. Photograph 3 at record 160 shows how he did this. He placed a level measure upon the **unground** portion of the apparently higher block, such that its edge then lay over both the now ground down surface of that same block and over the unground surface of the (presumably) always lower lying block. The difference in height at that point between the lower lying (and southern) slab, and the unground height of the northern slab, was in the order of 9 to 10 mm. The height difference was not uniform along the length of the join between the two slabs.

[10] As Mr Waites agreed and as His Honour found, that appeared an appropriate way of endeavouring to measure the height differential existing at the relevant time. Mr McDougall also gave evidence without objection in a report exhibited to His Honour that:

- during normal walking of adult males, the minimum ground clearance of the toe when the foot is swung forward averaged 14 mm and ranged between 10-38 mm;

- the home safety guides for architects and builders suggests that a lip as low as 5 mm at the edge of carpets or a poor seam in the carpet may interfere with foot movement and result in trips and falls;

- the Austroads Guide to Traffic Engineering Practice – Part 13 Pedestrians contains the following quote in chapter 2: "It is important for many people that surfaces be flat. This is particularly so for people in wheelchairs, on crutches, or who are unsteady on their feet, as small ridges and protrusions as low as 6 mm can cause these people to stumble and fall. Surfaces should not deviate

more than 5 mm from a 500 mm long straight ledge laid anywhere on the surface";

- the Guidelines for Footpath Design as prepared by the Brisbane City Council requires that full width concrete paths have, amongst other things, a finished surface tolerance to a maximum of 6 mm over a 3 metre distance".

[11] On that evidence the learned judge made the findings I have described. I think that they were all reasonably open. The judge was entitled to accept the plaintiff's evidence that she tripped, and Mr McDougall's evidence that the height difference at the time between the two concrete slabs at that point was in the order of 9 to 10 mm at the place where the respondent fell. The judge was entitled to find that the measuring system used by Mr Waites was a somewhat inexact one. The judge was entitled to find, both by reference to the report of Mr McDougall and as a matter of notoriety, that with the elderly there is a heightened risk of very serious consequence from a fall, and that trips are major health hazards for the elderly. The judge was entitled to find that it was foreseeable that a person walking on that footpath, in the northerly direction the respondent had walked, might catch a toe upon this lip, stumble forwards and fall.

[12] The argument for Senior Counsel for the appellant really accepted all of that. His argument was that even so, the obligations placed on the appellant by reason of s 901 of the *Local Government Act* 1993 (Qld) was an obligation to take no more than what was reasonable care in the circumstances to avoid a foreseeable risk. The appellant's submission was that, given **all** the facts found by the learned judge, the finding that it had breached its duty of care to the respondent placed more than a reasonable burden of care upon it. It was submitted that the finding there was a breach of a duty owed to the respondent produced the result that councils such as the appellant became the insurer of anyone walking along footpaths who fell over as a result of minor imperfections in the footpath surfaces, and that the appellant could not be required to "ensure that its footpaths are like a bowling green".

[13] There is not dispute about the relevant law to apply. It was authoritatively stated by the High Court in the relatively recent decision of *Ghantous v Hawkesbury City Council*, reported as *Brodie v Singleton Shire Council*[1]. In that case a majority of the High Court held that the liability of defendant councils in matters such as these does not turn upon the application of any "immunity" provided by the "highway rule" described in earlier common law decisions. The joint judgment of Gaudron McHugh and Gummow JJ, and the separate judgment of Kirby J, formed the majority. That joint judgment held that the common law duty to maintain the highways in the parish was based in nuisance, and not negligence. However, in the year 2001, the time had come to treat public nuisance in its application to the highway cases "as absorbed by the principles of ordinary negligence". It held it was satisfied that the abolition of the previously described "immunity" of highway authorities from action in respect of "mere non-feasance" (the rule was said to be that a road authority incurs no civil liability by reason of any neglect on its part to construct, repair, or maintain a road or other highway)[2] would not move the law from the extreme of non-liability to the other extreme of liability in all cases. This was because there would not be imposed a duty which could be discharged only by

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1 (2001) 180 ALR 145.

2 *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 281.

repairing roads to bring them to a perfect state of repair. Rather, the following propositions were declared.

[14] Authorities having statutory power to carry out works or repairs upon roads and footpaths are obliged to take reasonable care that their exercise of, or failure to exercise, those powers do not create a foreseeable risk of harm to road users. (Here, the council by virtue of s 901(1) of the *Local Government Act* 1993 (Qld) had control of all roads in its area, which control included the capacity to take all necessary steps for maintaining and improving those roads. The statutory definition of a road includes a pedestrian or bicycle path.) Where the state of a roadway did pose a risk to road users, then to discharge its duty of care an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. Where that risk is unknown to the authority, or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist.[3]

[15] The joint judgment helps to define what **will** constitute reasonable steps and reasonable care by posing the question "what is the response which the reasonable person, foreseeing the risk, would make to it? Is the risk so small that a reasonable person would think it right to neglect it?"[4] The joint judgment also posed the question in another way, namely, in exercising or failing to exercise those powers, was the authority in breach of a duty of care owed to a class of persons which included the plaintiff?.[5]

[16] A means of answering those questions was provided in that joint judgment, which is that the perception of the response by the authority calls for a consideration of various matters, including the magnitude of the risk and the degree of probability that it would occur; the expense, difficulty, and inconvenience to the authority in taking steps to alleviate the danger; and any other competing or conflicting responsibilities or commitments of the relevant authority. It was expressly remarked that the duty did not extend to ensuring the safety of road users in all circumstances.[6]

[17] The joint judgment also described what would **discharge** a duty owed. This would involve the taking by the authority of reasonable steps to prevent there remaining a source of risk which gave rise to a foreseeable risk of harm. Such a risk of harm might arise from a failure to repair a road or its surface; but a proper starting point "may be the proposition" that the persons using the road will themselves take ordinary care.[7]

[18] As to that last point, the judgment went on to observe that pedestrians in general are more able to see and avoid imperfections in a road surface than other road users. "It is in the nature of walking in the outdoors that the ground may not be as even flat or smooth as other surfaces", and "persons ordinarily will be expected to exercise

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3 *Brodie v Singleton Shire Council* at paragraph 150 of the joint judgment.

4 See *Webb v South Australia* (1982) 43 ALR 465 at 467-8 in the judgment of Mason Brennan and Deane JJ, cited at paragraph 54 of the joint judgment in *Brodie v Singleton*.

5 Joint judgment at paragraph 56

6 Joint judgment at paragraph 151.

7 Joint judgment at paras 159 and 160.

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".[8]

[19] Those last observations themselves adopted and essentially repeated the remarks made by Callinan J at paragraph 355 of the judgment. His Honour had said that "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". Those remarks are akin to observations by Cumming-Bruce J in *Littler v Liverpool Corporation*[9] to the effect that:

"Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green".

[20] The respondent argues that the similar colouring of each concrete slab would have made it difficult to notice the height difference between the two slabs. Further, the higher slab lay in the direction she was walking. The difference in heights **was** of the order for which Mr McNab had searched, and on the verge of what Mr Waites' memo identified as a "significant" tripping hazard. It exceeded the finished surface tolerance advised or suggested in the guidelines referred to in the report by Mr McDougall. On the evidence accepted by the learned judge, the respondent did fall over at that point and for that reason.

[21] Senior Counsel for the appellant submitted that the fact that the plaintiff had herself noticed unevenness in the paving along that footpath meant that she was confronting known and not hidden defects, and that that matter absolutely defeated her claim. It was submitted that the obligation of the court was to assess the duty owed by the Council to person who, like the plaintiff, knew what they were confronting and who were expected to take reasonable care for their own safety.

[22] I respectfully observe that those submissions were put forcefully and well. So was the submission that 10 mm is a very small actual difference in height between paving stones. However, the evidence shows that following an inspection made within the week of 13 March 2000, the appellant Council did cause the reduction of the height differential between a number of the cement paving blocks along the footpath, on the section of the path where the respondent tripped and fell. This included reducing the height differential at the point where she tripped. That fact is well documented in photo number 11 of exhibit number 6. It appears that the Council, by its conduct, accepted that it was reasonable for it to use its concrete "mower" to reduce the height differential between all, or almost all, of the adjoining paving blocks shown in the perhaps 30 metres of footpath showing in that photo. I think it follows that the Council by its conduct did accept it was reasonable for it to reduce the existing risk to pedestrians on that portion of the footway once that risk had been identified by it.

[23] It was identified to the Council by knowledge of the respondent's fall and by her own subsequent complaint made soon after to the Council. The receipt of such complaints was its only method of ascertaining the existence of risks to pedestrians

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8 Paragraph 163 of the joint judgment.

9 [1968] 2 All ER 343 at 345

on footpaths under its control. Once one accepts that the appellant's response to the risk when made aware of it was to reduce it by using the mower as described, then the present respondent begins to approach the position of the appellant in *Nelson v John Lysaght*.[10] The issue becomes whether the respondent established that the appellant had not taken reasonable steps before her fall to ascertain the existence of that risk. As to that, the appellant led no evidence of the actual cost to it caused by the "mowing" done so soon after the respondent fell over, nor was there any evidence from the appellant of the likely cost to it of a system of regular inspection and repair by "mowing" of its inner city concrete footpaths, where these had height differentials in the order of 9 to 10 mm. There was no evidence of the comparative cost to the Council, or benefit to road users, of such a system of inspection and repair, when compared to its present system.

[24] The trial judge made an unchallenged finding that the respondent, albeit she knew from prior usage that the paving was uneven, **was** watching where she was going. On that finding she was taking appropriate care for her own safety. Nevertheless, she tripped and fell. The Council's conduct in response, namely "mowing" the borders of the paving blocks for some distance along that section of pavement, was a response which reduced the identified and foreseeable risk to pedestrians who, like the respondent, took appropriate care for their own safety.

[25] In those circumstances, I think the learned trial judge was entitled to find that the appellant lacked an effective and appropriate risk assessment program; and to make the further finding that an adequate inspection system would have readily discovered the risk to pedestrians which the appellant so promptly reduced in the week following the respondent's fall. It follows that I am satisfied that not only were all findings made by the learned trial judge reasonably available to be made, but that those findings did describe a breach of duty of care owed to the respondent. I would dismiss the appeal.

[26] **HOLMES J:** I have had the very considerable advantage of reading the reasons of his Honour Jerrard JA on this appeal, and I adopt his Honour's summary of the evidence in the case. The appellant had sought to appeal against the findings of the learned trial judge that the height differential between the adjoining sections of pavement was nine to ten millimetres and that it was the cause of the respondent's fall. I agree with Jerrard JA that both of those findings were reasonably open on the evidence; and I agree also that the trial judge was entitled to find that it was foreseeable that a pedestrian on the footpath might be caused to fall by the protrusion of one concrete slab above the other. And there is no doubt that, for the reasons given by Jerrard JA, the appellant, having control of the footpath, owed a duty of care to pedestrians such as the respondent. It is as to the content of that duty of care that I am unable to agree with his Honour.

[27] It is as well to commence consideration of what was entailed in the duty of care owed by the Council with the observation of Hayne J in *Romeo v Conservation Commission*[11]:

> "The duty is a duty to take "reasonable care", not a duty to prevent any and all reasonably foreseeable injuries."

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10 (1975) 5 ALR 289 at 302.

11 (1998) 192 CLR 438 at 488.

In the present case the defect in the footpath had not previously been the subject of complaint and was not known to the Council. The Council's obligation, in order to discharge its duty of care, was "to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist"[12].

[28] The learned trial judge adopted the latter statement of the defendant's obligation. Unfortunately he did not consider in any detail what those reasonable steps might entail, perhaps because neither the evidence nor the submissions gave great assistance in this regard. At any rate, his Honour's findings as to what was required of the Council are limited to the following:

> "In my view had the defendant had an effective and appropriate risk assessment program in place it must have known of the dangers created by the elevated part of the slab that I have described"….

(After reference to the defendant's ability to undertake "concrete mowing" to correct defects in the pavement)

> "So here we have a danger which was created, which was readily discoverable by the defendant, if it had an adequate inspection system in force, which could be cheaply and quickly remedied where the probability of someone tripping must be regarded as being, if not high, at least, significant and where the consequence as to someone tripping could be very serious.
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> In my view, the defendant's failure to identify and remedy the danger demonstrates negligence on the defendant's part."

[29] The difficulty with this passage, as it seems to me, is that references to an "effective" "appropriate" and "adequate" program amount to little more than saying that the Council's duty to take reasonable care would have been met by the Council's taking reasonable care. The real question is not addressed: what was it that actually was required of the Council? Until that question was answered it was not possible to say that there had been a breach, nor that any breach was the cause of the plaintiff's injury.

[30] It can be seen that the learned trial judge did refer, in the passage set out, to the proportions of the risk involved; a necessary consideration, of course, in arriving at a view on what was reasonable. To reach his conclusions, his Honour acted on the evidence of Mr McDougall. On the information in Mr McDougall's report, the average adult male pedestrian was not at risk of catching his toe, since the normal ground clearance of his foot would exceed the height of the lip created by the protruding portion of pavement. (No equivalent information was supplied for women.) On the other hand, the Guide to Traffic Engineering Practice referred to by him would suggest that pedestrians who were unsteady on their feet through age or disability might be at risk. That risk may have been exacerbated by the fact that the height discrepancy was not obvious by reason of the similarity in colour between the two paving stones; although the fact that there was a join would have been. The inference from all the evidence is that a defect of the proportions of this one presented no hazard to pedestrians at large, but could be considered to pose some risk to the elderly and disabled. Hence, no doubt, his Honour's reference to the probability of someone tripping as "if not high, at least significant."

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12 *Brodie v Singleton Shire Council* (2001) 180 ALR 145 at 189.

[31] As to the magnitude of the risk posed should such a trip occur, while Mr McDougall's report was replete with diagrams and tables setting out proportions of injuries in the workplace due to fall and the consequence to cadavers of being dropped from various heights, it did not give any indication of the consequences likely from a trip over a nine to ten millimetre protrusion. It could not be expected to; one would, as a matter of everyday experience, expect that most such stumbles would have no consequence warranting report. The hip fracture experienced by the respondent, while more likely in an elderly person, was not a usual and predictable consequence of a pavement stumble. As the learned trial judge observed, "the consequence to someone tripping could be very serious". But in the ordinary course, one would not expect serious injury to result.

[32] The Council was, of course, entitled to assume in considering any question of risk that pedestrians using its footpaths would themselves take ordinary care[13]. On the whole, then, while a defect such as this might present a foreseeable risk, it was not one of grave or numerically significant proportions. Against that risk must be set the relative ease or difficulty of endeavouring to identify it in order to obviate it. That question is not to be confused with the ease of eradicating the defect once detected, in this case by the concrete shaving process described in the judgment of Jerrard JA.

[33] Nor is it to be approached on the basis that the Council had merely to detect this particular fault. There was no previous complaint to alert the Council to its existence. Nothing about this footpath distinguished it from any of the other urban footpaths under the Council's control. In order to ensure the detection and eradication of this particular gap, it would have been necessary for the Council to have in place a system of close inspection which would detect and enable eradication of ten millimetre height differentials anywhere in its pavements, of which there were in the city of Maryborough some 26 kilometres.

[34] The learned trial judge referred to the statement in Mr McDougall's report as to the development of "such hazards" (formation of lips forming at joints in concrete footpaths) occurring "over a long period of time". Just what Mr McDougall meant by "a long period" was unfortunately, not defined. There was, his Honour said also, "opportunity to identify the existence of the hazard had an appropriate inspection and maintenance programme been in place by the council." But the evidence assists neither as to how long the fault in this case might have existed before the applicant stumbled on it, nor the frequency or closeness of inspection required to find it.

[35] And what is, with respect, lacking in the learned trial judge's reasons, is any detail of what the system of inspection required of the Council to meet its duty of care was. It is one thing to assert that the defendant ought to have had an "effective and appropriate risk assessment program" in place. It is quite another to identify what form such a program should have taken; and more, what form it would have had to take in order to prevent the respondent's injury. Without such identification, it was impossible to say that the failure to implement it was causative of the plaintiff's injury. One might say that by failing to have a regular system of inspection – for example, annually – as opposed to reliance on a system of response to complaints, the Council was in breach of its duty of care to pedestrians using its footpaths. But it does not follow, and the evidence is not sufficient to support a conclusion, that such a system of inspection would have prevented existence of the defect in this case.

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13 *Brodie v Singleton Shire Council* (2001) 180 ALR 145 at 191.

[36] On the other hand, to say that the Council should have committed itself to such close and constant inspection of its footpaths as to ensure that any defect was eradicated before reaching dimensions of nine to ten millimetres, dictates, in my view, a use of resources which is not rational in relation to the risk posed. The evidence did not, in my respectful opinion, support a conclusion that the Council owed a duty of care to ensure that it discovered any footpath gap in the city area of those dimensions. It was only a duty of care of such proportions which could have protected the applicant here against injury. Since I do not consider such a duty of care to have existed in this case I consider his Honour's finding of negligence to have been wrongly made. I would allow the appeal, give judgment for the appellant, and order that the respondent pay the appellant's costs of the appeal to be assessed.