SUPREME COURT OF QUEENSLAND

CITATION:	*Lynch v Kinney Shoes (Australia) Ltd & Ors* [2005] QCA 326
PARTIES:	**ALLOUISE JOAN LYNCH** (plaintiff/appellant) **v** **KINNEY SHOES (AUSTRALIA) LIMITED** ACN 004 327 566 (first defendant/first respondent) **VENATOR GROUP AUSTRALIA LIMITED** ACN 004 327 566 (second defendant/second respondent) **COLORADO GROUP LIMITED** ACN 004 327 566 (third defendant/third respondent)
FILE NO/S:	Appeal No 10395 of 2004 SC No183 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury (Liability and Quantum)
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	2 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2005
JUDGES:	McMurdo P, Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, McMurdo P and Mullins J concurring as to the order made, Atkinson J dissenting
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE - SPECIAL RELATIONSHIPS AND DUTIES – OCCUPIERS – where appellant entered a shop and tripped over a display platform – whether the respondent failed to do what a reasonable person would in the circumstances do by way of response to that foreseeable risk – whether the display platform should have been obvious to a person exercising ordinary perception, intelligence and judgment TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – GENERALLY –

where the trial judge assessed apportionment for the appellant's contributory negligence at 50 per cent – whether this should be disturbed on appeal

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479, considered
Dailly v Spot-on Investments Pty Ltd (1995) Aust Torts Reports 81-363, considered
Pennington v Norris (1956) 96 CLR 10, considered
Phillis v Daly (1988) 15 NSWLR 65, considered
Thompson v Woolworths (Qld) Pty Ltd (2005) 214 ALR 452; (2005) 79 ALJR 904; [2005] HCA 19, considered
Warren v Coombes (1979) 142 CLR 531, considered
Webb v The State of South Australia (1982) 43 ALR 465; (1982) 56 ALJR 912, considered
Wyong Shire Council v Shirt (1980) 146 CLR 40, considered

COUNSEL: D O J North SC, with M A Drew for the appellant
R C Morton for the respondents

SOLICITORS: Bennett & Philp as town agents for Roati & Firth for the appellant
McInnes Wilson for the respondents

[1] **McMURDO P:** The issues and facts are comprehensively set out in the reasons for judgment of Atkinson J. I need only repeat, vary or add to these to explain my reasons for reaching a different conclusion: I would dismiss the appeal. I agree, however, with Atkinson J's reasons for rejecting the appellant's contention that the learned primary judge erred in assessing damages.

[2] The primary ground of appeal is whether the learned primary judge was entitled to conclude that the respondent shoe store breached its duty to the appellant, Ms Lynch, when she was shopping in the store on 15 March 1999. The appellant seeks to establish that breach by reliance on the evidence of Mr Roger Kahler, a mechanical engineer and director of the InterSafe Group Pty Ltd a company specialising in accident analysis, hazard studies, the implementation of occupational health and safety systems, industry training and advice to the legal profession. That evidence is relevantly set out by Atkinson J.

The learned primary judge's reasons

[3] The learned primary judge correctly stated the relevant legal principles.[1] His Honour found that there was no doubt the respondent owed the appellant a duty of care as an occupier entering its premises and identified the issues for determination as whether there was a foreseeable risk of injury to the appellant, whether the respondent failed to do what a reasonable person would in the circumstances do by way of response to that foreseeable risk and whether there was any causal relationship between any failure to act reasonably by way of such response and the appellant's injuries.[2]

[4] His Honour found that the platform on which the appellant tripped extended beyond the shoe stands on it; it was covered by a carpet of similar colour to that of the

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1 *Lynch v Kinney Shoes & Ors* [2004] QSC 370; SC No 183 of 2002, 29 October 2004, [32].
2 Above, [34].

surrounding floor; this could give rise to a foreseeable risk that a person might trip or fall on the platform.[3] His Honour then considered whether the respondent ought to have reasonably taken steps to remove such a risk and that this question had to be answered by considering matters beyond the risk itself.[4] His Honour considered that the respondent was entitled to assume that those entering its store would take notice of the obvious.[5] The platform had been in the shop for at least eight years before the accident and nobody had previously tripped on it. It was an item which could be expected in a shoe shop. Although a different coloured base may have made the platform more readily apparent, as it was it ought to have been seen by those who were looking where they were going. It was not a hidden danger or trap and nor could it be equated to a supermarket where shoppers walk along aisles with their attention focussed on the contents of shelves.[6] Had the platform been confined to the width of the shoe stands on it, customers would be more likely to make contact with the stands and knock the merchandise from them.[7]

[5] His Honour considered the matter bore a close resemblance to *Dailly v Spot-On Investments Pty Ltd*.[8]

[6] His Honour was not persuaded that a failure to adopt Mr Kahler's suggested responses to the risk, by either covering the base of the platform in a contrasting colour or limiting the platform's width to the width of the stands upon it, amounted to a breach of the respondent's duty of care to the appellant.[9]

[7] Even if the respondent breached its duty to the appellant in this way, his Honour was not satisfied that the taking of either of those steps would have avoided the incident.[10] The cause of the fall was the appellant's failure to look where she was going because she had her eyes focussed on the shoes on the back wall of the shop so that she was at risk from any item at a level below her eye level. His Honour was not persuaded that different coloured carpet on the platform would probably have attracted her attention and prevented her fall. Because she was not looking where she was going, she was likely to have fallen over the platform even if it had been no wider than the stands on it.[11]

[8] His Honour concluded that if the appellant had succeeded in her claim, she must bear a substantial portion of the blame for her failure to look where she was going so that he would have reduced her damages award by 50 per cent.[12]

Did the respondent breach its duty of care?

[9] The measure of the discharge of the respondent's duty of care to the appellant is what a reasonable person would in all the circumstances do by way of response to the foreseeable risk: *Australian Safeway Stores Pty Ltd v Zaluzna*.[13] The question of what is a reasonable response to a foreseeable risk involves a consideration of the

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3 Above, [35].
4 Above, [36].
5 Above, [37].
6 Above, [38].
7 Above, [39].
8 (1995) Aust Torts Rep 81-363; above, [41].
9 *Lynch v Kinney Shoes & Ors* [2004] QSC 370; SC No 183 of 2002, 29 October 2004, [40].
10 Above, [42].
11 Above, [43] - [44].
12 Above, [46].
13 (1987) 162 CLR 479, Mason (as he then was), Wilson, Deane, Dawson JJ, 488, approving Deane J's comments in *Hackshaw v Shaw* (1984) 155 CLR 614, 662 - 663.

magnitude of the risk, the degree of probability of its occurrence and the expense, difficulty and inconvenience of minimising or alleviating the risk and any other conflicting responsibilities which a defendant may have: *Wyong Shire Council v Shirt*.[14]

[10] More recently in *Thompson v Woolworths (Qld) Pty Ltd*,[15] a case which has absolutely no factual resemblance to this, the High Court in a unanimous joint judgment noted:

> "[35] When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case.
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> …
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> [36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises …
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> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

[11] The duty of care owed by a shopkeeper to a customer it is not a general duty to protect careless people from the consequences of their carelessness nor is it a question of whether the safety of the shop could be improved: *Rasic v Cruz*,[16] approved in *David Jones Ltd v Bates*.[17]

[12] His Honour was not obliged to accept the evidence of Mr Kahler even though it was not disputed by other expert evidence. Although Mr Kahler's report was tendered without objection, the experience of a customer walking into a shop like the respondent's is a common one within ordinary experience. His Honour accepted that the appellant's attention when she entered the shop was drawn to a pair of shoes situated upon a stand against the back wall of the shop and she focussed her attention on those shoes and commenced to walk towards them; the next thing she knew, she was on the floor.

[13] The evidence disclosed that the shoe store, like many comparable shops, was stocked with a generous assortment of racks and trays of merchandise for customers

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14 (1980) 146 CLR 40, 47 - 48.
15 [2005] HCA 19; (2005) 79 ALJR 904.
16 [2000] NSWCA 66; CA 40134 of 1998, 19 April 2000, Fitzgerald JA, [42].
17 [2001] NSWCA 233; CA 40659 of 2000, 20 July 2001, [17] - [21].

to walk around and inspect. The platform on which the appellant tripped was obvious, as it was no doubt meant to be, because it displayed stock. It did not present a trap or hazard like an unexpected step or an uneven or slippery floor: cf *Webb v South Australia*[18] and *Brodie v Singleton Shire Council*.[19] The platform did not present an inherent danger which could not be removed by a reasonable person exercising due care: cf *Wyong Shire Council v Vairy*; *Mulligan v Coffs Harbour City Council*.[20]

[14] Whilst a reasonable shopkeeper should be aware that a shopper might be distracted by the display of goods in the shop,[21] a shoe shop like the respondent's is distinguishable from a supermarket with aisle shopping. It should have been obvious to shoppers in the shoe store that they must negotiate their way around stands and trays of stock to reach other stock. It ought also have been obvious to customers that if they looked only at displays of shoes and not where they were walking they might walk into or trip over platforms displaying other shoes and injure themselves. This should have been apparent to a reasonable person in the appellant's position exercising ordinary perception, intelligence and judgment. It follows that the risk of injury from the display platform was obvious but unlikely. This conclusion is supported by the evidence that no-one else fell over the platform in at least the previous eight years. The risk identified by Mr Kahler did not require a response from the respondent. People who do not look where they are going can inadvertently fall over obvious items anywhere; living is not risk free and the community does not want nor expect courts to attempt to make it so by imposing unreasonable and unrealistic standards.

[15] I agree with the primary judge that, on the facts found by him, which were well open on the evidence, a reasonable person in the respondent's circumstances was not required to act as Mr Kahler suggested to remove the risk that a customer would be so busy looking at shoes that the customer would trip over a large and obvious platform containing displays of other shoes and injure themselves.

[16] His Honour was right in concluding that the case of *Dailly v Spot-On Investments Pty Ltd*[22] resembled this case. That case, in which the New South Wales Court of Appeal unanimously upheld the trial judge's finding that the shopkeeper had not breached its duty of care to Ms Dailly, was probably a stronger plaintiff's case than this. Ms Dailly fell on some picture frames stacked on the floor to a height of about three feet and to a distance of at least three feet out from the counter, a much less obvious obstacle than the display platform here.

[17] His Honour was also entitled to conclude from the facts he found which were supported by the evidence that the appellant was not looking where she was going and that she would probably have fallen over even if the platform was coloured differently from the floor or was no wider than the stands upon it so that any breach of the respondent's duty was not the cause of the appellant's injuries.

[18] The appeal against the finding of liability fails.

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18 (1982) 56 ALJR 912.
19 (2001) 206 CLR 512, 581, [163].
20 [2004] NSWCA 247; CA 40083 of 2003, CA 40292 of 2003, 27 July 2004, [161] - [168].
21 See *Junkovic v Neindorf* (2004) 89 SASR 572, 598.
22 (1995) Aust Torts Rep 81 - 363.

Contributory negligence

[19] If, however, the appellant is successful on her appeal as to liability the next issue to consider is the learned primary judge's apportionment of her contributory negligence at 50 per cent.

[20] Appellate courts are reluctant to interfere with a judge's apportionment of contributory negligence which involves the exercise of a broad discretion. In *A V Jennings Construction Pty Ltd v Maumill*[23] the High Court noted that a finding on the question of apportionment "… is not lightly reviewed by a court of appeal. As Lord Wright observed in *British Fame (Owners) v Macgregor (Owners)* ([1943] AC 197, at p 201) it is a finding upon a question 'not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion as to which there may well be differences of opinion by different minds'. Accordingly re-consideration of the question in the exercise of an appellate jurisdiction is subject to the limitations imposed by the principles which govern all appeals against judgments given in the exercise of discretions, principles which this Court has stated repeatedly in recent cases. Consequently, as Lord Simon remarked in the case just cited at pp 198 - 199, 'the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, nonetheless has sufficient reason to alter the allocation of blame made by the trial judge'."

[21] The High Court again in *Pennington v Norris*[24] noted that apportionment legislation "… intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment at what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged."

[22] Those principles continue to be applied by this Court which consistently recognises that an appellant carries a substantial burden in seeking to alter an apportionment: *McPherson v Whitfield*;[25] *Owbridge v Murphy & Anor*.[26]

[23] I am unpersuaded that the apportionment of liability determined by the learned primary judge was so outside a sound exercise of discretion as to justify this Court's interference.

[24] In my view this ground of appeal also fails.

[25] It follows that I would dismiss the appeal with costs to be assessed.

[26] **ATKINSON J**: The plaintiff, Allouise Lynch, lived in Ingham where she worked as a hairdresser in a business in which she was one of the partners. Her brother-in-law was soon to be married, so she and her mother-in-law travelled from Ingham to Townsville to buy a pair of shoes and a hand bag for Mrs Lynch's mother-in-law to wear to her son's wedding.

[27] They went to a number of shops and by mid afternoon, found themselves outside the Mathers For Shoes store in the Stockland Plaza shopping centre in Townsville.

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23 (1956) 30 ALJR 100.
24 (1956) 96 CLR 10, 15-16
25 [1996] 1 Qd R 474.
26 [2002] QCA 197; Appeal No 8821 of 2001, 6 June 2002, [11].

Mrs Lynch noticed a pair of shoes which might be suitable on a stand against the back wall of the shop. The shoes were at about eye level and, having focussed her attention on them, she commenced to walk towards them, a distance of about eight metres. She did not notice the corner of a platform or plinth which was protruding from underneath a shoe stand not far inside the store. She tripped on it and fell to the ground. She landed on her right side and sustained long term injuries to her elbow and shoulder. The learned trial judge assessed her damages as at $212,255.05 but entered judgment for the defendants because he found that the cause of the accident was Mrs Lynch's failure to look where she was going, rather than a breach of any duty of care owed by the defendants to the plaintiff.

[28] The plaintiff appealed, setting out 12 grounds of appeal. They were as follows:

1. His Honour was wrong in finding that the defendant did not breach its duty of care.

2. His Honour failed to give adequate weight to the evidence of Mr Roger Kahler as to the steps the defendant might have taken to draw to the plaintiff's attention the presence of the projecting platform in the pathway of the plaintiff in the store.

3. His Honour failed to take proper account of the position of the platform relative to the store entrance and the opportunity the plaintiff had to see the platform and the risk it posed to her, prior to her tripping on the platform.

4. His Honour failed to take proper account of the evidence of Mr Kahler relating to the functioning of the human eye and the effect of the display of goods (shoes) in the store on the attention of customers and the plaintiff in particular, and the role of that factor in the failure of the plaintiff to see the platform over which she tripped in the context of its position close to the entrance of the store.

5. His Honour erred in relying on the decision in *Dailly v Spot-on Investments Pty Ltd* (1995) Aust Torts Reports 81-363 as bearing a close resemblance to the plaintiff's case.

6. His Honour was wrong in finding that the platform could not be described as being in the nature of a hidden danger or trap and, further, in this regard his Honour did not give proper weight to the evidence of Mr Kahler as to the camouflage effect of the colouring of the floor carpet and the carpet covering the platform from the perspective of the plaintiff, particularly in the context of the position of the platform near the entrance of the store (two inches to one metre).

7. His Honour was wrong in finding that the platform ought to have been seen by persons who were looking where they were going and was wrong in distinguishing the plaintiff's situation from a supermarket customer walking along aisles with their attention focused on the content of shelves.

8. His Honour erred in finding that the colour of the platform and the floor was not a critical issue and failed to give proper consideration to the evidence of Johnson, which was to the effect that the colour of the platform carpet was slightly lighter than the colour of the floor carpet.

9. His Honour failed to give any or any proper consideration to the fact that the platform was capable of being moved, thus reducing the risk of a tripping hazard to persons entering the store by the entrance used by the plaintiff.

10. His Honour erred in finding that the entire cause of the incident was the plaintiff's failure to look where she was going because she had her eyes focussed on the shoes on the back wall. In so finding, his Honour failed to give proper consideration to the evidence of the opportunity the plaintiff had to see the platform, the position of the platform relative to the entrance and the fact that the platform presence was not highlighted but rendered hard to see by the colouring of the platform carpet and the pathway carpet.

11. His Honour erred in his assessment of contributory negligence.

12. His Honour erred in assessing the plaintiff's general damages at only $37,500, in that he failed to take proper account of the pain and suffering of the plaintiff following the accident and her past and future pain and suffering and loss of amenities.

[29] The first ten grounds of appeal essentially concern an appeal from the finding by the trial judge that there was no breach of duty which caused the plaintiff's injury. In prosecuting that appeal, the appellant relied heavily on the expert evidence of Roger Kahler. It is not necessary therefore, to consider each of those grounds separately. The grounds of appeal which raise distinct issues, which need to be dealt with separately, are the last and second last, concerning contributory negligence and the quantum of general damages.

[30] No issue of credibility arose on this appeal with regard to the plaintiff's evidence. Nor was there any contest that there was a platform or plinth approximately 15 cm in height which extended about 30 cm beyond the shoe stand which was on it. The shoe stand consisted of three glass shelves in a tier. The plinth was covered by a carpet of a similar colour to that on the surrounding floor. The learned trial judge found that it could be regarded as giving rise to a foreseeable risk that a person might trip or fall on it. The appeal concerns what a reasonable person would have done in response to that risk. This court is not disadvantaged in answering that question by the principle of restraint properly exercised by an appellate court limiting reversal of a trial judge's conclusions based on an assessment of the credibility or demeanour of a witness.[27]

[31] The obligations cast upon an appellate court were set out by the High Court in *Warren v Coombes*:[28]

> "Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles,

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27 *Fox v Percy* (2003) 214 CLR 118 at 123-124, 138-139; *Whisprun v Dixon* (2003) 200 ALR 447 at 470-472, [90]-[96]; *Hoyts Pty Ltd v Burns* (2003) 201 ALR 470; ALJR 1934; [2003] HCA 61 at [52].

28 (1979) 142 CLR 531 at 551-553.

we venture to think, are not only sound in law, but beneficial in their operation.

With the very greatest respect for the opinion of Windeyer J, we can see no reason to favour the suggestion, which he himself recognizes as heretical, that in a case of negligence, where the primary facts are not in question, the decision of the trial judge should be treated as the equivalent of the verdict of a jury. That suggestion has not found favour with any other member of this Court and we need say no more about it than that the traditional and practical reasons for the reluctance of an appellate court to interfere with the verdict of a jury do not exist where the judgment is that of a judge sitting alone; for one thing, the judge gives reasons, whereas the verdict of the jury is, as Lord Denning M.R. has said, 'as inscrutable as the sphinx' (*Ward v James* [1966] 1 QB 273, at p 301). Again with the greatest respect, we can see no justification for holding that an appellate court, which, after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process. The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment. Further there is, in our opinion, no reason in logic or policy to regard the question whether the facts found do or do not give rise to the inference that a party was negligent as one which should be treated as peculiarly within the province of the trial judge. On the contrary we should have thought that the trial judge can enjoy no significant advantage in deciding such a question. The only arguments that can be advanced in favour of the view that an appellate court should defer to the decision of the trial judge on such a question are that opinions on these matters very frequently differ, and that it is in the public interest that there should be finality in litigation. The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be taken of the appellate function. The resolution of these questions by courts of appeal should lead ultimately not to uncertainty but to consistency and predictability, besides being more likely to result in the attainment of justice in individual cases. The interest of the community in the speedy termination of litigation might, no doubt, be an argument in favour of the complete abolition of appeals, although that would be far too high a price to pay merely for finality. However, if the law confers a right of appeal, the appeal should be a reality, not an illusion; if the judges of an appellate court hold the decision of the trial judge to be wrong, they should correct it."

Liability in Negligence

[32] The test of liability in negligence was explained by Mason J in *Wyong Shire Council v Shirt*:[29]

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then 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 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. 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."

In this case, the learned trial judge answered the question whether a reasonable person in the defendants' position would have foreseen that their conduct involved a risk of injury to a class of persons including the plaintiff in the affirmative. The focus of this appeal is therefore on what a reasonable person would do by way of response to that risk.

[33] This case concerns the duty of an occupier of a shop to a lawful entrant. Although the common law no longer measures the duty owed according to the category of entrant,[30] the measure of control of the occupier of the premises is one aspect of the relationship that gives rise to a duty of care.[31] It is quite unlike the cases which deal with the question of whether a public authority should be held liable in negligence for failure to warn of conditions brought about by natural phenomena.[32] The duty owed to customers by the occupier of a commercial premises must take into account the risks the commercial environment creates. The test is no longer that found in *Indermaur v Dames*[33] that the occupier's obligation is only to take reasonable care to prevent damage from "unusual danger" of which it knew or ought to have known.[34] The retailer's duty in tort is more akin to, although it has not yet been held to be coincident with, the implied warranty in contract, "that the premises are as safe for the purpose as the exercise of reasonable skill and care can make them."[35]

[34] The only expert witness about the mechanism of injury was Roger Kahler, a specialist in workplace health and safety matters. Mr Kahler's report was based upon an interview with the appellant and an inspection of the site completed on 24 October, 2003. The description of what occurred given by Ms Lynch to Mr Kahler

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29 (1980) 146 CLR 40 at 47-48.

30 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

31 *Thompson v Woolworths (Qld) Pty Ltd* (2005) 214 ALR 452; 79 ALJR 904; [2005] HCA 19 at [24].

32 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247; CA 40083 of 2003, CA 40292 of 2003, 27 July 2004 [12].

33 (1866) LR 1 CP 274 at 288.

34 *Phillis v Daly* (1988) 15 NSWLR 65 at 68.

35 *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38.

was consistent with the findings made by the learned trial judge. The shop has been heavily modified since the accident, which meant that observation of the stand and shop as it was at the time was not possible. Mr Kahler gave evidence that when he visited the store, there were no longer any tripping hazards there.

[35] Mr Kahler observed that when allocating resources to safety initiatives it is desirable to direct attention to where major areas of personal injury risk exist. The largest area of risk, based on information available about injuries, is injury from slips, trips and falls. Mr Kahler suggested that, given the magnitude and severity of the problem, reduction of falls by people should form a prime consideration of those who design and maintain pedestrian surfaces. His report gave figures on hospital statistics, mechanisms of injury and accident types. The detailed statistics showed that when making a safety assessment of any facility, the prevention of falls must be a prime consideration and that specific attention needs to be directed towards the adequacy of access systems and underfoot surfaces and tripping hazards.

[36] In a shop there will be displays which are close together where people browse and move around. There are various guidelines as to how much space is sufficient for the movement of one or two people down passageways. The width of the passage way which the appellant and her mother-in-law walked down side by side was not known. As it is predictable that clear dimensions of the recommended width will not always be achieved, it is necessary, as Mr Kahler said, to ensure that objects at foot level do not present tripping hazards. Mr Kahler observed that it must be recognised that people within stores will move in areas of less than preferred widths and so the characteristics of the furniture become an essential factor in preventing trips and falls.

[37] In Mr Kahler's opinion, to minimise the likelihood of injury, there are a number of characteristics of furniture that should be in place.

1. An absence of sharp corners (a majority of furniture/display stands in Mathers contained sharp edges which were hard and could predictably result in localised bruising); and

2. the base of the display's dimensions should be equal to or less than the upper levels of the display (say, at waist height). This is based on an understanding of visual information processing issues.

[38] This appeal concerns the second of these matters which is relevant to whether a shop fitting will create a tripping hazard. If an underfoot hazard is to be avoided, its presence must first be detected by the customer. This detection will primarily be a function of visual perception and expectancy factors.

[39] The report referred to a number of papers about this subject. They demonstrate that not all information available within a person's visual field will be recognised and processed, as only a small amount can be attended to at one time. The eye moves rapidly and fixates from point to point (approx two to three times per second), transmitting vast amounts of visual information to the brain. Once the information is received, the higher brain can subconsciously select and organise material perceived as relevant.

[40] Mr Kahler's report referred to a paper by Zohar, which discussed experiments identifying that hazards at foot level are much less likely to be avoided than objects at waist level or above. When a person approaches objects which are at or near foot

level, the person is likely to miss the object if its characteristics are camouflaged and there are significant distractions present within the visual field e.g. shoes attractively displayed on a stand. It is, as Mr Kahler said in his evidence, a characteristic of retailing that goods are displayed so that the customer will have his or her attention attracted to them.

[41] In his report, Mr Kahler observed that "the likelihood of a hazard at foot level being noticed is influenced by the quality and quantity of visual information available. The quality of visual information is dependent on contrast between the hazard and its background (signal-to-noise ratio) and on illumination and available depth clues. The use of colour and pattern contrast (e.g. black and yellow diagonal stripes) is often used to delineate such hazards". The quantity of visual information relates to the size of the particular hazard and the time it is in the visual field. As such, a moving observer must process information more quickly than a stationary observer.

[42] Mr Kahler concluded that Ms Lynch's failure to detect the stand arose from the following interaction of factors:

1. lack of colour pattern or illuminance contrast between the hazard and background surfaces i.e. a poor signal to noise ratio;

2. the location of the plinth adjacent to a passageway;

3. a hazard which was not expected by the pedestrian;

4. the undertaking of another task i.e. a strong focus upon a display stand containing product to be inspected; and

5. the design of the facility which strongly encouraged people's visual attention to be drawn to the product for sale rather than on critical information at floor level.

[43] The store was an environment which contained rich visual information to a person entering the store, which made strong demands on the person's perceptual processes, resulting in camouflaged vertical changes in transition remaining undetected.

[44] In the case of Ms Lynch, unless there were characteristics of the plinth which caused the eye to be drawn towards it, the characteristic of the edge could go unnoticed if there came a time in the movement path of a person that the edge was simply not within the field of view. Mr Kahler's evidence was that this was a function of the walking speed of the person, the angle of the head and the orientation and fixation of the eye. Objects at foot level are not necessarily within the person's peripheral field of view as they get close to the object. Therefore, unless there are characteristics of the object which cause the eye to process information about that object, it can go unnoticed, resulting in the person tripping.

[45] In Mr Kahler's opinion, the most effective response would be to construct a stand which has base dimensions of either the same size or smaller than those parts of the stand at waist height or higher. This would involve constructing a plinth with smaller base dimensions. Another alternative, retaining the original plinth, would be to ensure that the plinth colour contrasted with its background by using a covering material which guarantees that a colour contrast is obtained. This is a less effective control than reducing the base dimensions of the plinth.

[46] Mr Kahler observed that the ease and low cost of rectification which was required in order to avoid a very serious accident was relatively simple.

[47] The report described in detail why an object at foot level may go unnoticed. It is predictable that a person could trip on the plinth and be seriously injured. The nature and size of the problem of personal injury as demonstrated in the report is such that paying close attention to underfoot conditions and the potential for slipping and tripping is a key part of the risk management process. A key recommendation was to provide stands with base dimensions less than or equal to the dimensions of the stand at waist height as one design criterion. Such stands were depicted in the photograph of the shop as it was by the time of trial.

[48] The learned trial judge recorded that he asked Mr Kahler how one could prevent a person from coming to grief on an object situated at a level below eye level when that person's attention was focussed there, Mr Kahler said:

> "Yes, your Honour, and all – all I can say to that is that in the process of moving towards that object it – it then becomes necessary to recognise in that the way people interact visually with their environment is to then say, well, it may shift from this object and it may shift to some other object in the visual environment but are we ensuring that the objects at foot level, if they are in the movement path – there are several options; remove them, give them some visual characteristics so that at least they have a chance of competing with the other visual information that is competing for the person's attention. Because it can be more than objects …"

[49] The effect of Mr Kahler's oral evidence was that it was not sufficient to say that people should watch where they are walking, but rather that the environment should be modified to decrease rather than increase the risk of tripping and falling amongst unsuspecting members of the public.

[50] When asked at the end of his cross-examination about the problem of inattention or carelessness, Mr Kahler said that:

> "… the idea particularly of inattention or not looking where one's walking is only more a statement that isn't reflecting that probably the person looking at the accident doesn't really understand how people interact with their – with task and – and fail to observe information for various reasons."

[51] Mr Kahler's evidence was only admissible in accordance with the common law test for admissibility: [36]

> "… if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable 'to form a sound judgment … without the assistance of [those] possessing special knowledge or experience … which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience'.[37]"

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[36] *HG v The Queen* [1999] HCA 2 (9 February 1999) per Gaudron J at [58].

[37] *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J; *Farrell v The Queen* (1998) 194 CLR 286 at 292; 155 ALR 652 at 655 per Gaudron J; *Osland v The Queen* (1998) 197 CLR 316 at 335-336; 159 ALR 170 at 184 per Gaudron and Gummow JJ.

There was no contest at the trial that Mr Kahler's evidence was admissible. He was able to express an opinion which an ordinary person would not be able to form without the special knowledge or experience of his expertise. Despite no objection having been taken at the trial, it was argued in the respondent's written submissions on appeal that expert evidence was not necessary for the trial judge to reach the findings he did, as such matters are capable of being determined without the assistance of an expert. This is not correct. In fact, as Mr Kahler's evidence showed, a person without the relevant expertise was likely to misunderstand the mechanism of injury in such a case.

[52] The risk of injury in this case was created by the retail activity in which the defendants were engaged. The risk of tripping was created by the type of furniture and fittings installed by the defendants in the shoe shop in which they conducted that retail activity.

[53] The evidence that no-one had previously tripped on the stand may be relevant but is far from decisive. As the High Court held in *Webb v The State of South Australia*:[38]

> "The primary judge found that the false kerb and the intervening space was 'a very obvious feature'. And so it was. The primary judge also found that the false kerb was not dangerous. This finding seems to have been based on its obviousness and on the circumstance that in the seven years that elapsed since its construction there was no record of any previous accident. But obviousness and the absence of accident over this period does not mean that the construction presented no risk of injury. As the false kerb was adjacent to a bus stop there existed the distinct possibility that a pedestrian, because he was in a hurry to catch a bus or was intent on observing an approaching bus or because his attention was distracted for some other reason, would fail to take sufficient care to avoid injury to himself. The happening of the accident demonstrated, if demonstration be needed, that the construction had the potential to cause injury.
>
> Of course a pedestrian could avoid the possibility of injury by taking due care. However, the reasonable man does not assume that others will always take due care; he must recognize that there will be occasions when others are distracted by emergency or some other cause from giving sufficient attention to their own safety. It seems to us that the courts below gave undue emphasis to the circumstance that injury could be avoided by a pedestrian who took reasonable care for his own safety.
>
> 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?"

The High Court held that, in such circumstances, where the risk could have been eliminated without undue difficulty or expense, the reasonable person's response would have been to eliminate it.

[54] The plaintiff was attracted by shoes which were on a display rack on the back wall. The retailer must be taken to foresee that its display racks, which are after all

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38 (1982) 43 ALR 465 at 466-7; 56 ALJR 912 at 913.

designed to attract attention, will divert a customer's attention from hazards at floor level. This distinguishes this case from cases involving the liability of a local authority to pedestrians on public footpaths[39] as "the customer in a shop is, as intended by the shopkeeper, focussing on the goods rather than the floor".[40] The retailer must take whatever reasonable steps available to remove those risks and so avoid foreseeable risk of injury to its customers.

[55] The learned trial judge in determining that there had been no breach of duty by the defendant relied on the obviousness of the risk and the failure of the plaintiff to look where she was going because she had her eyes focussed on the shoes on the back wall. His Honour referred in support of his view to the judgment of Mahoney JA in *Phillis v Daly*[41] and to *Dailly v Spot-on Investments Pty Ltd.*[42]

[56] In *Phillis v Daly*, Mahoney JA held that[43] "the defendants were entitled to expect that, with such allowances, persons coming upon their premises would pay heed to the obvious and act accordingly". The allowances referred to are "due allowance for human nature". The allowance to be made for human nature in this case involved an understanding of the evidence of Mr Kahler of the factors which would mean that the plaintiff could fail to notice the edge of the plinth as she moved through the store. That is quite unlike the situation in *Phillis v Daly* where the plaintiff deliberately stepped on uneven logs delineating the edge of a hotel car park thereby exposing herself to the risk of falling and injuring herself. The risk in that case was obvious and she took the risk.

[57] The learned trial judge held that "the matter bears a close resemblance to the case of *Dailly v Spot-on Investments Pty Ltd* (1995) Aust Tort Reports 81-363". And so it does. But the differences are instructive. In *Dailly*, the plaintiff, a 79 year old widow, went into a shop and walked to a display cabinet on the right hand side where she picked out an item she wished to purchase. She turned and started to walk to the service counter which was about one and a half metres to her left, when she fell over a rack of picture frames which stood on the floor against the counter. Although it was below eye level, it was a large rack containing some 14 frames with the tallest frame being almost a metre high and the smallest about 30 cm. The rack protruded almost a metre from the counter. The trial judge found that the rack "was so large as to be obvious to anyone walking in the shop in the direction of the counter". The same could be said in this case of the rack on which the shoes were displayed but not the plinth at its base.

[58] The risk may have been obvious to someone who noticed the plinth but there were a number of factors in this case which were created by the defendants which made it less likely that someone in the plaintiff's position would notice the plinth.[44] These were the factors listed by Mr Kahler in his report. The finding by the trial judge that the plaintiff failed to look where she was going should be reflected in a finding of contributory negligence rather than denial of any liability. As the High Court observed in *Thompson v Woolworths (Qld) Pty Ltd*:[45]

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39 *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 59, *Webb v The State of South Australia* (1982) 43 ALR 465; 56 ALJR 912.

40 *David Jones Ltd v Bates* [2001] NSWCA 233 (20 July 2001) at [61]; cf *Webb v The State of South Australia* (1982) 43 ALR 465; 56 ALJR 912 at 913.

41 (1988) 15 NSWLR 65.

42 (1995) Aust Torts Reports 81-363.

43 (supra) at 75.

44 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

45 (supra) at [37].

> "If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence."

[59] The only evidence as to what could be done to alleviate the risk of injury to persons such as the plaintiff was that given by Mr Kahler. His recommendations would not have involved significant expense and given the risk of serious injury to a customer in the appellant's position, the reasonable response would have been to take steps to alleviate the risk.[46] Had those steps been taken, there is no doubt that as the risk would have been alleviated or eliminated, then the prospects of the injury occurring would have been substantially lessened or eliminated. In that case, it is more probable than not that the injury would not have occurred. The negligent omission can therefore be said to have caused the injury in that it materially increased the risk of injury.[47]

[60] The learned trial judge's finding that the failure of the plaintiff to observe the plinth was a breach by the plaintiff to exercise reasonable care should have been reflected in a finding of contributory negligence. The precautionary finding by the learned trial judge of 50 per cent contributory negligence is, however, in all of the circumstances excessive. As the High Court held in *Pennington v Norris*:[48]

> "What has to be done is to arrive at a 'just and equitable' apportionment as between the plaintiff and the defendant of the 'responsibility' for the damage. It seems clear that this must of necessity involve a comparison of culpability. By 'culpability' we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man."

[61] In that case, the High Court was of the view that apportioning liability equally to the plaintiff and the defendant did not reflect their respective culpability. As their Honours said, in a passage that could apply equally to this case:

> "The plaintiff's conduct was *ex hypothesi* careless and unreasonable but, after all, it was the sort of thing that is very commonly done: he simply did not look when a reasonably careful man would have looked. We think too that in this case the very fact that his conduct did not endanger the defendant or anyone else is a material consideration." [49]

In this case the plaintiff's failure to watch where she was going contributed to the risk that she would trip but the obstacle which created the foreseeable risk that someone in the position of the plaintiff would trip, fall and injure herself was created by the defendants. The defendants' culpability was considerably more than that of the plaintiff. A finding of 30 per cent contribution is more consistent with the findings of fact and the undisputed evidence of Mr Kahler.

[62] The plaintiff has also appealed against the quantum of damages awarded for pain, suffering and loss of amenities. While it was at the lower end of the appropriate range, it was, in my view, within the range and so should not be disturbed on appeal.

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46 cf *Woods v Multi-Sport Holdings Pty Ltd* (supra) per Gleeson J at 472-473.

47 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 278-279.

48 (1956) 96 CLR 10 at 16.

49 (supra) at 16.

Conclusions

[63] The appeal should be allowed. The plaintiff should be awarded damages against the defendants in the sum of $148,578.53, being $212,255.05 (as assessed by the learned trial judge) less 30 per cent contributory negligence. The defendants should pay the appellant's costs of the trial and the appeal.

[64] **MULLINS J:** I agree with McMurdo P that the appeal should be dismissed with costs for the reasons given by her Honour.