SUPREME COURT OF QUEENSLAND

CITATION:	*Pascoe v Coolum Resort P/L* [2005] QCA 354
PARTIES:	**DIANA URSULA PASCOE** (plaintiff/respondent) **v** **COOLUM RESORT PTY LTD** ACN 010 593 638 (defendant/appellant)
FILE NO/S:	Appeal No 2760 of 2005 DC No 79 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	TORTS - NEGLIGENCE - ESSENTIALS FOR ACTION FOR NEGLIGENCE - STANDARD OF CARE - PARTICULAR PERSONS AND SITUATIONS - OTHER CASES - where the respondent sustained personal injury when she fell in the course of her employment as a housekeeper at the resort operated by appellant - where the respondent had proceeded down a path to where it intersected with a roadway - where the respondent had tripped on the edge of a sizeable depression as she crossed a garden bed adjacent to the roadway - where there was evidence that the existence of the depression had been known to other employees of the appellant and that such depressions were recognised as posing a hazard to the health and safety of persons moving around the resort - whether the learned primary judge was right to conclude that a reasonable person in the position of the appellant would have taken additional steps to reduce the risk of injury posed by the depression to persons such as the respondent

Australian Capital Territory v Badcock [2000] FCA 142; (2000) 169 ALR 585, cited
Castle v Weeks [1999] QCA 450; Appeal No 196 of 1999, 5 November 1999, distinguished
Czatyrko v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839, applied
Ghantous v Hawkesbury City Council [2001] HCA 29; (2001) 206 CLR 512, considered
Gondoline Pty Ltd v Hansford [2002] WASCA 214; FUL 115 of 2001, 14 August 2002, distinguished
McLachlan v Purchas [1998] WASCA 350; FUL 28 of 1998, 21 December 1998, distinguished
Phillis v Daly (1988) 15 NSWLR 65, distinguished
Roman Catholic Bishop of Broome v Watson [2002] WASCA 7; FUL 94 of 2001, 1 February 2002, considered

COUNSEL: S C Williams QC, with J A McDougall, for the appellant
M Grant-Taylor SC, with D W Thornburgh, for the respondent

SOLICITORS: McInnes Wilson for the appellant
Schultz Toomey O'Brien Lawyers for the respondent

[1] **JERRARD JA:** In this appeal I have read the reasons of Keane JA and the orders proposed by His Honour, and respectfully agree with those reasons and orders.

[2] **KEANE JA:** On 30 January 2002, the respondent suffered personal injuries when she fell in the course of her employment as a housekeeper by the appellant at its resort at Coolum. Her claim for damages was upheld at trial although the learned trial judge reduced her damages by 20 per cent on the basis that her failure to take reasonable care for her own safety had contributed to her injuries.[1] This appeal is concerned only with the learned trial judge's conclusion that the appellant was liable for the respondent's injuries.

The evidence and the learned trial judge's findings

[3] The learned trial judge accepted the respondent's account of the circumstances of her injury. According to the respondent, she was walking with two other employees of the appellant down the right-hand side of a paved pathway at the resort when they came to a point where the pathway met a roadway. At this corner, there was an exposed area of garden bed to the respondent's right. The respondent looked to her left to check for the possible approach of vehicular traffic. As she went to go to her right around the corner, she fell.

[4] The respondent's account of the fall was not entirely clear, and her movements may have been somewhat awkward, but her evidence was that her left foot stumbled on the edge of a hole in the garden bed. This hole in the garden bed was immediately adjacent to the cement strip of the roadway and was between the pathway and the roadway. The respondent also said in cross-examination that her leg "went into the hole". The learned trial judge found that the respondent "placed her foot on the edge of the depression or into the depression" which caused her to fall.

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1 *Pascoe v Coolum Resort Pty Ltd* [2005] QDC 039; DC No 79 of 2004, 4 March 2005.

[5] As a result of the respondent's fall, her left knee hit the cement on the other side of this hole in a manner that resulted in the respondent sustaining personal injury.

[6] The respondent gave evidence as to the existence and dimensions of the hole, which was said to be between 15 and 20 centimetres deep and 35 to 40 centimetres in diameter. This evidence was largely corroborated by her fellow employee, Ms De Roia. There was other evidence confirming the existence of the hole, but there were differences in recollection as to its dimensions.

[7] Mr Mitchell, a gardener at the resort, was called by the appellant. He gave evidence of the existence of "a depression" at the scene where the respondent fell. He described the depression as a couple of inches deep and half a metre long where rocks in the corner of the driveway had been dislodged. He said that he thought that this had occurred because of the action of tyres when vehicles passing over this spot went off the tarmac. It was part of his duties to inspect the driveway for this sort of problem. Mr Mitchell described how, despite repeatedly covering the depression with rocks, the regular dislodgment of these rocks as a result of the passage of vehicles through the area meant that the reappearance of the depression was an "ongoing problem" and had been for a considerable period of time prior to the date of the accident.

[8] Mr Dorrington, the landscape superintendent at the resort, was also called by the appellant. He said that small van type vehicles were used to service guest lounges. In the course of the use of these vehicles, their back wheel tended to drive over this area and flick stones out, thus creating the "depression". Mr Dorrington gave evidence confirming his awareness of this phenomenon. He denied that it could result in a depression of the dimensions described by the respondent. The learned trial judge expressly preferred the evidence of the respondent.

[9] The learned trial judge found that the appellant knew, or should have known, of the removal of stones over time from the corner by reason of the action of the wheels of the appellant's vehicles; and of the consequent formation of the hole described by the respondent. That finding is not attacked by the appellant.

[10] It may be noted that Mr Dorrington accepted in the course of his cross-examination that a hole of the dimensions described by the respondent at the location identified by her would have been "very dangerous", and that it would have been remiss of him not to deal with it. In the light of this evidence, and of the evidence of Mr Mitchell to which reference has been made, the learned trial judge's findings that the depression was known by the appellant to be "a risk of injury to persons such as the [respondent]" and that the appellant, by its employees, knew that an employee engaged in her work at the resort might trip and fall in the depression, were open to his Honour.

[11] Further in this regard, the learned trial judge found that the hole was of the dimensions sworn to by the respondent and that she fell because her foot either caught the edge of the hole or was placed in the hole. The appellant has not sought to attack these findings save for the finding that the respondent's left foot went into the hole as opposed to catching on its edge. The appellant contends, however, that his Honour's finding as to the dimensions of the hole is immaterial because the depth of the hole was not causally related to the respondent's fall.

[12] In this regard, the respondent accepted that she was aware of variations in ground levels on or around pathways on the resort, but said that the usual variations in height on pathways of two or three inches were not relevant here because this was a "big hole". What is not clear, and could hardly be expected to be made clear by the respondent in the circumstances of a sudden trip or fall, is the extent to which the respondent's foot actually went into the depression. It was, nevertheless, open to his Honour to conclude that the size of the depression created a real risk to pedestrians and that it was this risk which caused her to fall. In this regard, the dimensions which his Honour found the depression to have may be contrasted with the other, usual or natural, variations in ground heights with which the respondent was, or could be, expected to be familiar.

[13] Further, the extent of the depression was relevant to the extent of the risk of injury and the unreasonableness of the appellant's failure to alleviate that risk by extending the concrete driveway a little way into the garden bed at the corner to provide a surface that would not shift or otherwise degrade when driven upon over time. The point is that, to the extent that the depression was large and growing, the more compelling was the need to take measures other than relying on inspection and ad hoc repair to ensure that the respondent's workplace was reasonably safe. The learned trial judge's finding in relation to the dimensions of the hole supports his Honour's conclusion that the appellant was negligent in failing to take more effective measures to obviate the real risk which arose from the exigencies of this aspect of the operation of the appellant's business at the resort.

[14] It has been noted above that the learned trial judge found that it was reasonably foreseeable that the appellant's employees might pass over the area of the depression while rounding the corner from the pathway to the roadway, and that they might not be attentive while doing so because they were keeping an eye out for vehicular traffic or were otherwise distracted. These findings were attacked by the appellant. Having regard to the physical proximity of the hole to the corner of the roadway and the pathway, and the use of the pathway and roadway by both pedestrian and vehicular traffic, both of these findings of fact were open to his Honour.

Ghantous v Hawkesbury City Council

[15] The main issue raised by this appeal is whether or not the learned primary judge was right to conclude that a reasonable person in the position of the appellant would have taken additional steps to reduce the risk of injury posed by the depression to persons such as the respondent. The appellant relies, in particular, upon the decision of the High Court in *Ghantous v Hawkesbury City Council*[2] to submit that his Honour fell into error by reaching this conclusion.

[16] *Ghantous* was a case in which the plaintiff had sued a local authority for damages for personal injuries suffered when she fell after stepping from a concrete footpath onto an earthen verge on a street within the local government area of the local authority. The plaintiff's claim failed on the basis that it was not established that the local authority had failed to exercise reasonable care for her safety. The appellant relies in particular on the following observations of Callinan J:[3]

> "There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not

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2 [2001] HCA 29; (2001) 206 CLR 512.

3 [2001] HCA 29 at [355]; (2001) 206 CLR 512 at 639.

> unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself admitted in cross-examination that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges. There was no negligence on the part of the respondent either in the construction of the footpath or in not keeping the concrete strip and verges level."

The other members of the High Court agreed with Callinan J that no case of negligence was made out against the local authority.[4]

[17] The observations of Callinan J in *Ghantous* were concerned with the issue whether a local authority had fallen short of discharging its duty to exercise reasonable care for the safety of users of the highway. The crucial issue is the context of the obligation to exercise reasonable care, that is to say: what does the exercise of reasonable care involve? It is important to emphasize that "it is one thing to impute in general terms a duty of care and another to define its measure".[5] The High Court in *Ghantous* was concerned with the "measure of the duty of care imposed upon bodies such as the respondent Councils".[6]

[18] The appellant's submission does not recognise that what is required of a local authority in order to discharge its duty of reasonable care to users of the highway is quite different from what is required of an occupier of private land or, *a fortiori*, an employer. The position of a local authority is not analogous with that of an occupier of private land or an employer. In that regard, in *Ghantous*, Gaudron, McHugh and Gummow JJ concluded:[7]

> "The formulation of the content of the duty of care in this field should not further pursue any analogy between occupation of privately owned land and the management and control by statutory bodies of lands set aside for public use and enjoyment."

[19] Kirby J explained some of the reasons for the difference in the measure of reasonable care applicable to a local authority in terms of the extent of its ability to monitor and control the state of the highway. His Honour said:[8]

> "A body such as the Council has little effective control over the use by pedestrians of a footpath and its surrounds, once created. Such structures do not have an infinite lifespan. They are subject to deterioration by reason of the weather, of ordinary traffic use, of subterranean changes, of public utilities that lawfully disturb them and other persons who unlawfully do so. The rate of deterioration will vary. Necessarily it is unpredictable and largely out of the control of a body such as the respondent.

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4 [2001] HCA 29 at [8], [166] - [167], [244] - [248], [339]; (2001) 206 CLR 512 at 526, 582, 605 - 607, 636.

5 *Aiken v Kingborough Municipality* (1939) 62 CLR 179 at 206 - 207; *Ghantous v Hawkesbury City Council* [2001] HCA 29 at [145]; (2001) 206 CLR 512 at 575.

6 [2001] HCA 29 at [146]; (2001) 206 CLR 512 at 576.

7 [2001] HCA 29 at [148]; (2001) 206 CLR 512 at 577.

8 [2001] HCA 29 at [245] - [247]; (2001) 206 CLR 512 at 605 - 606 (citations omitted).

> Whereas Mrs Ghantous alleged that the area beside the footpath was rendered 'hazardous' by a combination of erosion and increased foot traffic, something more than the fact that she fell would be necessary to convert the powers which the respondent Council enjoyed into a duty to safeguard a pedestrian such as Mrs Ghantous, rendering the Council liable to her because she momentarily took a false step. That 'something' might be evidence of poor original design, a history of previous accidents or complaints or deterioration that was judged manifestly dangerous. None of these elements was established in Mrs Ghantous's case. Nor did the primary judge's remark that '[i]t is regrettable that the Council's program of maintenance did not operate to keep the footpath in less hazardous condition' represent a finding of negligence by the Council. It was no more than a comment that, in retrospect and with the wisdom of hindsight, it was a pity that the subsidence next to the path had not been noticed and cured before Mrs Ghantous took the step that led to her fall.
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> It could not reasonably be expected in these circumstances that a local government authority in the position of the Hawkesbury City Council, exercising its powers reasonably, would be aware of particular dangers inherent in the verge to the footpath off which Mrs Ghantous momentarily stepped before she fell. I would not rest my conclusion in her case upon any enlarged assumptions about a pedestrian's need for vigilance for his or her own safety. I do not agree in the latter-day enthusiasm for the notion of contributory negligence that is abroad. It goes against the steady trend of common law authority in this Court and indeed in Australian courts back to colonial days to exaggerate the expectations that manifest themselves in various forms of disqualification for suggested contributory negligence. Pedestrians and other highway users exist in every variety of physical and mental ability and acuity. Roadways and footpaths are used in every condition of light and all circumstances of weather. The reason Mrs Ghantous fails, in my view, is not any lack of attention on her own part. I respectfully regard that explanation as unconvincing and unreasonable. The real reason she fails is that no breach of duty is shown on the part of the local authority which she sued."

[20] In my respectful opinion, the appellant's contention that this case should be resolved by analogy with the decision of the High Court in *Ghantous* must be rejected. The position of the appellant vis-à-vis the respondent in the present case is quite different from that of a local authority vis-à-vis the user of a highway in terms of the appellant's ability to monitor the state of the walkways around its resort and to control the extent to which they are kept in proper repair for the safety of its employees and guests in the course of the conduct of the appellant's business. The degree of care necessary to discharge its obligation to take reasonable care for the respondent is, accordingly, of a higher order. In this regard, it is well established that, in the context of the employer's duty to its employees, the exercise of reasonable care for the employee's safety in the environment created for, and in the

course of, the conduct of appellant's business operations includes recognition of the possibility of inadvertence or even careless lack of attention by its employees.[9]

[21] In the present case, the respondent was the appellant's employee. She was going about her employer's business on her employer's premises. The state of the premises was directly affected by the acts and omissions of other employees of the appellant. Unlike *Ghantous*, this case does not raise the issue whether or not the appellant should have known of the existence of the relevant risk. The appellant was actually aware of the creation of a risky situation through the knowledge of its employees in charge of that situation. The appellant also sought to exercise control over the situation, but that control was not sufficient to obviate the risk which arose from the appellant's own operations. The exercise of effective control over the workplace to remove the risk would have been inexpensive. That expense would have been an ordinary incident of the conduct of the appellant's business to extend the existing pathway a short distance into the garden bed. Where it is reasonably foreseeable that employees may cut the corner of pathways and roadways over garden beds of varying depths thus exposing themselves to hazards that are known to the employer, such as the depression, the requirements of reasonable care for the employee extend to the removal of that risk by the simple expedient of extending the paved surface to cover the area of the depression. Especially is this so where the employer knows or ought to know that the hazard is an unusual one and that the attention of employees is likely to be diverted by concern for the possible approach of vehicles.

Other authorities

[22] The appellant relied upon a number of other authorities to which reference should be made.

[23] In *Castle v Weeks*,[10] the plaintiff, who worked for the defendants as a live-in housekeeper for their elderly mother at her home, fell while attempting to deposit some household rubbish into a wheelie bin in the front yard. The plaintiff's claim was dismissed by the learned trial judge whose decision was upheld on appeal. The plaintiff was unable to provide a satisfactory explanation of what caused her fall. The plaintiff did not suggest that there was any unusual feature in the terrain she was required to walk across. It was held that the only risk was that "posed by crossing a gently sloping grass bank for a distance of just over 1 metre".[11] The present case is readily distinguishable in light of the findings of fact made by the learned trial judge that the hole which caused the respondent to fall was an unusual man made feature which the appellant's other employees acknowledged was a cause for concern.

[24] The appellant also relied on the decision of the Full Court of the Supreme Court of Western Australia in *McLachlan v Purchas*.[12] In that case, an employee suffered a fall while alighting from a vehicle when she slipped on wet grass. The plaintiff's evidence that the wet grass was dangerous because it was long and the surface of the ground uneven was rejected by the trial judge. As a result, the plaintiff's claim

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9 *Smith v Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342 - 343; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 218; *Czatyrko v Edith Cowan University* [2005] HCA 14 at [12] - [14]; (2005) 79 ALJR 839 at 842 - 843 at [12] - [14].

10 [1999] QCA 450; Appeal No 196 of 1999, 5 November 1999.

11 *Castle v Weeks* [1999] QCA 450; Appeal No 196 of 1999, 5 November 1999 at [21].

12 [1998] WASCA 350; FUL 28 of 1998, 21 December 1998.

failed, both at trial and on appeal, because wet slippery grass cannot, of itself, be regarded as an unusual risk. Once again, the distinction between that case and this is obvious, having regard to the findings of fact made by the learned trial judge.

[25] It is significant that the Full Court of the Supreme Court of Western Australia decided to distinguish *McLachlan* on similar grounds in *Roman Catholic Bishop of Broome v Watson*.[13] That case concerned a teacher who suffered personal injury as a result of a trip and fall that occurred while she was walking along a pathway between two buildings at the school at which she was employed. The cause of the fall was identified as being a rock that protruded an inch and a half above the surface of the pathway after having been exposed by recent rain. A finding of negligence against the school was upheld on appeal. The decision in *McLachlan* was distinguished on the basis that the protruding rock "was a significant hazard which was not an ordinary everyday risk which the respondent could have been expected to guard against".[14] It may also be noted that the Court in that case considered that the construction of a proper concrete path between the two buildings would have provided a simple and inexpensive solution to the problem posed by the pathway's current condition.[15]

[26] Next, the appellant relied on the decision of the New South Wales Court of Appeal in *Phillis v Daly*.[16] In that case, the plaintiff fell when she attempted to step over a log in a hotel car park while she was on her way into the hotel. There were flat pathways which the plaintiff could have taken into the hotel rather than stepping over the log. As Mahoney JA said:[17]

> "… in so far as there was a risk from the log or the protuberance on it, it was obvious to the plaintiff. There was nothing hidden or unusual about it."

Once again, this feature distinguishes that case from the present.

[27] Finally, the appellant referred to the decision of the Full Court of the Supreme Court of Western Australia in *Gondoline Pty Ltd v Hansford.*[18] In that case, the plaintiff suffered a fall on a pathway leading from a shop to a car park on the defendant's rural property. The path was a gently sloping paved walkway. The plaintiff tripped when her foot caught the edge of a paver where one paver had sunk about half an inch or an inch. The trial judge found that the defendant had been negligent in failing to make adequate inspections of the pathway.[19] On appeal, it was held that unevenness in a footpath in a rural location is not in the nature of a "hazard or a trap" which a pedestrian would not expect to encounter.[20] It was on this basis that the facts in that case were distinguished from the decision in *Australian Capital Territory v Badcock*[21] where the Territory was found to have been negligent in

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13 [2002] WASCA 7; FUL 94 of 2001, 1 February 2002.

14 *Roman Catholic Bishop of Broome v Watson* [2002] WASCA 7; FUL 94 of 2001, 1 February 2002 at [36].

15 *Roman Catholic Bishop of Broome v Watson* [2002] WASCA 7; FUL 94 of 2001, 1 February 2002 at [37].

16 (1988) 15 NSWLR 65.

17 (1988) 15 NSWLR 65 at 72.

18 [2002] WASCA 214; FUL 115 of 2001, 14 August 2002.

19 *Gondoline Pty Ltd v Hansford* [2002] WASCA 214 ; FUL 115 of 2001, 14 August 2002 at [42] - [43].

20 *Gondoline Pty Ltd v Hansford* [2002] WASCA 214; FUL 115 of 2001, 14 August 2002 at [54] - [60].

21 [2000] FCA 142; (2000) 169 ALR 585.

failing to remedy a known risk posed by raised pavers in a car park. The decision in *Gondoline* is thus also distinguishable from the present case which, in light of the findings of fact made by the learned trial judge, is much closer to the facts of *Badcock*.

[28] The appellant's principal reliance on the decision in *Gondoline* was as an example of the application of the approach in *Ghantous* to a case where the defendant was not a local authority but an occupier of private land. In this regard, as I have said, the present case is distinguishable on the facts from *Gondoline*. It may also be noted, however, that the reasons of the court in *Gondoline* do not advert to the warning in *Ghantous*, referred to above, against using decisions concerned with the management and control by local authorities of public roads as a guide to the formulation of the context of the duty of care in the case of an occupier of private land. In any event, the formulation of the content of reasonable care in an employer-employee situation is not determined by analogy with that applicable to occupiers of land. The unanimous view of the High Court in *Czatyrko v Edith Cowan University*[22] was that:

> "[c]ompliance by … an employer, with its duty of care to an employee was not to be measured by reference to the reasonableness of imposing on an occupier of land an obligation to warn members of the public about the obvious risks on the land".[23]

Conclusion and orders

[29] In my respectful opinion, the findings of fact made by the learned trial judge were open to him on the evidence. In the light of those findings, the decision of the learned trial judge was correct. This conclusion makes it unnecessary to consider the issues raised by the respondent's notice of contention.

[30] The appeal should be dismissed. The appellant should be ordered to pay the respondent's costs of the appeal to be assessed on the standard basis.

[31] **CULLINANE J:** I have read the reasons for judgment of Keane JA in this matter. I agree with those reasons and the orders he proposes.

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22 [2005] HCA 14 at [14]; (2005) 79 ALJR 839 at 843.

23 See also H H Glass, M H McHugh and F M Douglas, *The Liability of Employers in Damages for Personal Injury* (2nd ed, 1979) at 53.