SUPREME COURT OF QUEENSLAND

CITATION:	*Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074
PARTIES:	**JOHN ELLIS** (plaintiff) v **UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q)** (defendant)
FILE NO/S:	7650/06
DIVISION:	Trial Division
PROCEEDING:	Action for damages
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	17 April 2008
DELIVERED AT:	Brisbane
HEARING DATE:	12, 13, 14 March 2008; 9 April 2008
JUDGE:	Skoien AJ
ORDER:	**Judgment for defendant**
CATCHWORDS:	TORTS – NEGLIGENCE – PERSONAL INJURIES – Trip and fall – protruding paver on driveway across public footpath on which plaintiff walking – contemporaneous statement identifying place of fall – paver a risk but a slight and obvious one – plaintiff's trip not because of breach of defendant's duty. *Neindorf v Junkovic* (2005) 222 ALR 631 *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 *Civil Liability Act 2003* (Qld), s13, s23, s61, s62 *Civil Liability Regulation 2003* (Qld)
COUNSEL:	Mr D Kelly for plaintiff Mr R Morgan for defendant
SOLICITORS:	Parker Simmonds, Solicitors for plaintiff HBM Lawyers for defendant

[1] **SKOIEN AJ:** This is an action for damages for negligence causing personal injury. Both liability and the quantum of damages are in issue.

Background

[2] Mr Ellis was born on 22 October 1957 so on the relevant date, 27 September 2003, he was aged 45 and is now aged 50.

[3] In cross-examination Mr Ellis agreed that he had been twice admitted to hospital (in the 1990's) for a heart condition. He was put on, and remains on, medication to manage hypertension and an elevated cholesterol level. He believes, and there is no evidence to the contrary, that these conditions are successfully controlled. At one stage he had some type of abdominal discomfort and was affected to some extent by dizziness. However there is no reason for me to conclude that his general health is poor, that it materially affected the events the subject of the proceeding, or that it would in the future impair his working capacity or reduce his life expectancy to any material extent.

[4] The Uniting Church operates the charitable institution called Lifeline to give assistance to people who are depressed to the point of possible suicide. Among the many Lifeline properties is a building at 2471 Gold Coast Highway, Broadbeach.

[5] The highway runs north/south in the relevant area. On its eastern side is a commercial area in which is situated the Aces Workers Club premises. A pedestrian proceeding north from Aces on the eastern footpath would cross Queensland Avenue, then Australia Avenue to reach Britannia Avenue in which Mr Ellis then lived in an apartment building to the east.

[6] The Lifeline premises are also on the eastern side of the highway, about 100 metres to the south of Australia Avenue and separated from that avenue by a McDonald's takeaway shop and a Caltex Service Station. Taking up most of the next block, between Australia Avenue and Brittannia Avenue, are the "Mardi Gras" residential units.

[7] The highway is a busy four lane road. One would expect the presence of traffic there even in the small hours of the morning. Along its eastern footpath in the relevant area it has a system of street lighting.

[8] At the relevant time the Lifeline building had a vehicular driveway to the highway which was paved with bricks of the standard dimensions. Although the footpath beside the highway was generally made up of a strip of concrete, at Lifeline the brick paved driveway ran unbroken from the property line to the gutter. Thus a pedestrian on the eastern footpath would necessarily walk on these brick pavers in order to cross the driveway. Subsequently to the date in question the pavers have been entirely replaced with a pebblecrete surface.

The fall – plaintiff's evidence

[9] Mr Ellis and his wife dined together on the evening of Friday 26 September 2003 during which neither drank alcohol. At about 8p.m. they went to Aces, a venue they regularly attended. Mrs Ellis was tired and walked home alone to their unit in Brittannia Avenue at about 10.30p.m., where she went to bed and to sleep.

[10] Mr Ellis remained at Aces, paying snooker, until about 12.30a.m. on 27 September. During his stay at Aces he said he drank about four to six stubbies of Hahn Ice beer. He said they contained about 4.2 percent alcohol. The hospital records have a note by the admitting doctor that at about 6.00a.m. he was smelling strongly of alcohol. It is a notorious fact that consumption of beer in quantities such as that produces an odour which can persist for hours but which, by itself, does not establish that the drinker was particularly affected by the drinking. In cross-examination he insisted that his intake of alcohol did not impair his ability to walk safely. While I doubt that his intake would have allowed him legally to drive at 12.30a.m., I am not prepared to conclude that he would have been materially impaired in his ability to keep a proper lookout or to walk with reasonable skill and agility. He set out to walk home, using the eastern footpath of the highway to proceed north, a route which would require him to cross the Lifeline driveway.

[11] The description given by Mr Ellis in evidence-in-chief of his fall was, to say the least, perfunctory. Indeed he did not actually say that he tripped as he was walking. Looking at photographs (exhibit 7F, particularly) he simply identified the position where he fell and where he "tripped on the brick paver". Looking at photographs (exhibit 9) he identified the brick paver "that was protruding" and "where I tripped over". He said the paver was protruding about an inch vertically.

[12] Thus, in chief, he did not initially give sequential evidence of where he had been walking on the footpath, what the state of the light or the weather was, where he was looking as he approached the Lifeline driveway, whether he saw a protruding paver as he approached, whether he was aware from previous occasions of the presence of a protruding paver, the mechanism of the trip, that is, what part of his footwear came into contact with the protruding paver, what that did to his balance, how he fell. It was not until he was cross-examined that details of his account of his fall emerged.

[13] In defence of Mr Ellis, I must say that he was not asked by his counsel to go through such a sequence in any logical or chronological way. It would have been very difficult for him to have achieved that without assistance. After the evidence I have summarised in para [11] he was taken immediately to photographs of the driveway in its current state, then to the condition of his left ankle immediately after the fall and what he then did. It was not until the end of his examination in chief that his mind was redirected to the fall. He was asked about the state of the lighting and he said that the closest street light to the driveway was not working. At T.46:-

> "And have you ever had any problems with this paver before?-- Oh, I've avoided it because when you're walking down the highway during the day time, you can see it, during the day time and there's a few people tripped over it as well. There was a few pavers protruding on that area of the driveway.
>
> HIS HONOUR: Have you seen people trip or had you read about people tripping?-- Just hearsay."

[14] Because the details of a trip and fall are so often, as here, limited to the evidence of the plaintiff solely, attention to those details in the plaintiff's evidence is important. In this case it was especially important because it has always been the defence case that if the plaintiff tripped and fell he did not do so on the Lifeline driveway but

some considerable distance (well over 100 metres) to the north of there, in the vicinity of the Mardi Gras building.

[15] In cross-examination Mr Ellis was asked whether a doctor at the Gold Coast Hospital had asked him how he fell. He agreed with the proposition that he told the doctor that he was walking home after a night out and tripped over a loose brick. He agreed that he told the doctor that he had seen the brick protruding on other "occasion" (*sic*) but denied that he told the doctor that he had tripped on it on several prior occasions.

[16] Mr Ellis was cross examined about the contents of his Reply as follows (T. 66):-

> "In paragraph 3.3 of a Court document filed on your behalf by your solicitors, it said: 'The plaintiff'– that's you – 'denies any awareness of the existence of the raised paver.' Is that right?-- Could you repeat that, sorry?
>
> Yes. 'The plaintiff', and that's you-----?-- Yeah, that's me, yes, I understand that.
>
> -----John Ellis, 'denies any awareness of the existence of the raised paver.' This is prior to the accident?-- I can't recall that, no.
>
> Yes. You've said that you noticed it?-- Yeah, I've noticed it before, yeah, and there's several pavers on that area being raised pavers.
>
> And paragraph 3.4 of this Court document filed on your behalf says: 'The plaintiff did not observe the raised paver because its existence wasn't obvious given its placement and position among identical pavers on the driveway.'?-- Well, I didn't take no notice of that where it was that night, anyway, because it was raining, I just wanted to get home.
>
> But beforehand-----?-- Yeah.
>
> Was it obvious to you beforehand?-- During the day time, yes, it was, when I walked down during the day time to the street.
>
> Did you think it was a risk?-- Yes, I did.
>
> How many times do you think you'd seen it before you had your accident?-- Oh, I don't know, probably half a dozen times. Six times, five times, I don't know."

and (T.67):

> "This paver that you say you've seen before, was it in a raised condition when you'd seen it?-- Correct.
>
> Was it obvious to you?-- Yes.
>
> Did it appear like a obvious risk?-- Yes.

> Did you think to do anything about it, like report it to the Lifeline premises?-- No, I didn't, no."

[17] It seems to me that these passages point to a lack of guile on the part of Mr Ellis. He was clearly a man of some intelligence. It must have been obvious to him that it would assist his case to establish that he tripped over a raised paver of which he was unaware. Instead he dismissed that proposition and said he was well aware of its existence.

[18] He was cross-examined on the fact that, in an interview with a loss assessor on 5 May 2004 he said (at pages 3-4 of exhibit 14):

> K:Right ok. So if I wanted to go there is it ground floor?
> J:Yes, it's just on the footpath, where the foot path sort of runs, the councils footpath and Lifeline sort of comes out of there and they have all brick pavers and all the driveways are brick pavers and it sort of goes right down to the road and it's all brick pavers. And that area I slipped, I tripped on like you know. Should have been a proper foot path, but it's all brick pavers.
>
> K:In particular, it's where it goes down?
> J:I can show you any way if you want me to take you down and show you. They have got a bit of a concrete strip, I think that is new anyway. I can see a brick paver like and it is raised up. When I tripped over it it was round about an inch high. When the wife went down to take some photos, she said it had been replaced.
>
> K:You have, as you walked you obviously didn't see it before hand.
> J:I have seen it before hand, when we walk down the street even with a couple of friends and I watch out for that brick paver, you know. I told my solicitor when you are walking home, you not sort of even think about it, late at night.
> K:So do you go to Aces a bit? Travel that path once a week or?
> J:Probably once a week, something like that yeah.
> K:So at the time, on the evening when you tripped, you believe it was probably about an inch?
> J:About an inch high yeah.

[19] Further in cross-examination he said (T.70 and 71):

> "And you started to jog?-- No I did not.
>
> Did you start to walk briskly?-- A little bit, yeah.
>
> So you did pick up your speed?-- Yeah. Not too much, yeah.
>
> You picked up your speed because it was raining and you wanted to get home?-- Yeah.
>
> And isn't that why you said as the top of page 4 that you slipped and then added "tripped"?-- No, I know I tripped I didn't slip because if I'd slipped I would have slipped further – straight in front of me, which I didn't. My foot went over to the left-hand side."

[20] Counsel for the defence taxed him at some length on the fact that he said he "slipped", rather than "tripped". I think it is too nice a point to place any particular significance on the use of that word. It is more likely to be a careless description in what was quite a lengthy interview (the transcribed record (exhibit 14) is 7 pages). Nor do I place any weight on the fact that on an occasion during cross-examination (T.69) he referred to the paver as "loose" rather than "raised".

[21] Then, under cross-examination (T.73, 74) he described the way he lost his balance in terms of his left ankle rolling to the left when his left foot stood on the raised paver. While he continued to call it a "trip", and while his descriptive powers failed him in the details, what he demonstrated by gestures (as well as the gist of what he said) satisfied me that he rolled his ankle to the left and that caused him to fall. I observe that the Shorter Oxford English Dictionary gives a large number of descriptions of the meaning of the noun "trip", for example "a stumble or miss-step causing one to lose ones equilibrium". The dictionary's definition of the verb "to trip" in its intransitive form includes "to strike the foot against something so as to hop, stagger, or fall; to stumble over an obstacle, to make a false step". I would be reluctant to regard the use made the plaintiff of that word as critical in the midst of so many accepted variations in its meaning.

[22] There was a great deal more cross-examination on the prior knowledge of Mr Ellis of the raised paver (indeed more than one raised paver (T.88 and T.92), the position of the offending paver "next to the grass" (T.89 and T.97), the mechanism of the fall (T.90) and the path he was taking as he walked (T.98). Finally, I was left with a reasonably clear idea of his evidence. He was walking north on the concrete path on the eastern footpath and close to its left hand edge. He traversed the Lifeline paved drive heading for the continuation of the concrete path, again intending to walk close to its left hand edge. That brought his foot into contact with a raised paver which was close to the grassed part of the footpath (marked in the photograph exhibit 7F, and indicated on the photograph exhibit 26). He was hurrying to get home, out of the increasingly heavy rain. The nearby street light was not illuminated. He had seen the raised paver several times (perhaps five or six) in the past and considered it to be an obvious risk. However he did not consciously see it on this occasion or turn his mind to it. His left foot stood on the raised brick's left hand edge which turned his ankle to the left and he fell. I can see nothing particularly remarkable, and certainly nothing unbelievable, in that account. The mechanism of his loss of balance as he described it was accepted by the orthopaedic specialist, Dr Curtis (who described it as an "inversion injury") as the most likely cause of his injured ankle.

The fall – defence case

[23] The defence led no direct evidence that Mr Ellis did not fall as he alleged. Its evidential case on liability fell into two categories. First it argued that if he fell and injured himself on 27 September 2003, he did not do so on the Lifeline paved drive but elsewhere, and second that there was no feature of the drive on 27 September 2003 which would cause injury to a pedestrian using reasonable care for his own safety. Thus the defence raised the issue of the place of the fall and the issue of the actual state of the driveway.

Place of the fall

[24] This dispute turned mainly on the place at which Mr Ellis was located in his injured condition. His evidence was that his left foot could not be walked on, that it was in flail and any attempt to bear weight on it was excruciatingly painful. That seems to be borne out by all of the available evidence, medical and lay (Mrs Ellis and Mr Burns). Mr Ellis said that all he was able to do was to clamber upright, using the nearby lamp-post. Because it was not illuminated, he then crawled along the ground to the next lamp-post, which was illuminated, where he unsuccessfully tried to flag down passing cars. Then he crawled to the shelter of a nearby small tree to try to escape the increasingly heavy rain. No aid came until about 5.30 am (that is some 4 to 5 hours after his injury) when by coincidence, his boarder Mr Burns walked by on his way to work at Aces and discovered him. Mr Burns hurried home to rouse Mrs Ellis who drove to the scene and ferried Mr Ellis to the Gold Coast Hospital.

[25] Mrs Ellis gave evidence by telephone from Phuket which confirmed her being awakened by Mr Burns at about 5.30a.m. on 27 September, finding Mr Ellis outside the Lifeline building and taking him to hospital.

[26] Mr Burns was called by the defence. His evidence was that he left the apartment in Britannia Avenue where he boarded with Mr and Mrs Ellis at about 4.40a.m. on 27 September, walked to the highway and turned left to walk south to Aces. It was cold, wet and dark. He walked along the front of the Mardi Gras building and at a point outside its far end, its southern end, he came across Mr Ellis clinging to a post. Mr Burns identified himself as the person shown in two photographs, exhibits 23 and 24, indicating the post. This post is not adjacent to the Lifeline driveway but some couple of hundred metres to the north on the same (eastern) side of the highway and outside Mardi Gras. He said Mr Ellis was soaking wet and dishevelled and told him that he had tripped on a brick outside Lifeline.

[27] In two statements, exhibit 27 (unsigned and undated) and exhibit 28 (signed and dated 24 January 2004) he said that he found Mr Ellis "on the grass verge north of the Caltex Service Station a few hundred metres north of the Lifeline driveway". That description, while it does not specifically identify a point outside the Mardi Gras building, is broadly consistent with being outside that building. In a later statement, signed and dated 16 August 2004, he corrects the position to "a small tree or a signpost both of which are on the western footpath of the Gold Coast Highway immediately opposite the Mardi Gras units on the north side of the intersection of Australia Street (*sic)* and the Gold Coast Highway". The reference to the western side of the highway is quite at odds with all of the other evidence and I feel safe in assuming that either he or the assessor who took the statement confused the points of the compass.

[28] The defence relies on the evidence of Mr Burns as establishing that Mr Ellis did not suffer injury at the Lifeline driveway at all, but well to the north of it. However a careful review of the evidence does not lead me to that conclusion.

[29] I regarded Mr Ellis as a truthful man. I accept that he left Aces when he said, about 12.30am. In his report, exhibit 3, Dr Curtis has recorded Mr Ellis telling him that he fell at "11.30 on 27 September 2003" which is obviously not correct. He was not questioned on the accuracy of the "11.30". Perhaps he mis-heard or mis-recorded

the time. Perhaps the typist misread "1.30". Errors of this type are not rare in medical reports. Anyway, I accept that the correct time was more like 12.30 or 1.00 am. There is no evidence that Mr Ellis then went to some other premises or took up with another person, or persons. There is no evidence of any dangerous object on his obvious path home (other than the Lifeline paver), although obviously an inversion of the ankle could occur because of a mis-step on many ordinary objects, for example a footpath or gutter. The evidence is that to the first person he had contact with, Mr Burns (called by the defendant), he said he had injured himself on a paver at the Lifeline drive. The Gold Coast Hospital report, exhibit 6, in the Triage Notes (apparently made at 6.35am) records the presenting problem as "fall on irregular footpath". These contemporaneous statements made to Mr Burns and to the doctor, if not true, could only have been made by a devious, fraudulent man (a perjurer ultimately) who was capable of being devious and fraudulent when in severe pain, when cold and wet after a traumatic experience (and I do not regard Mr Ellis as such a man), or a man who is now simply guessing or reconstructing because he cannot remember. I have rejected a finding that he was materially adversely affected by alcohol (he would have had to be grossly affected to have no memory) and there is no reason to suspect some other cause. Finally, there is actual evidence that the Lifeline driveway had a protruding paver that night, a matter to which I will return.

Between fall and discovery

[30] It is curious but not unbelievable that Mr Ellis was apparently not discovered in his injured state for some four hours. On the ground, sheltering under a bush, he would not be easily visible to occupants of passing cars, especially in dark, rainy conditions. If a pedestrian came along might not that person hurry past an apparent drunk or derelict? I doubt that there would have been many pedestrians (perhaps none) on that footpath at the time I am considering. I reject as most unlikely that he crawled some hundreds of metres to Mardi Gras. If he had done that, why would he not say so? It would simply demonstrate extraordinary fortitude on his part. Dr Curtis said he could not have walked.

[31] Mrs Ellis identified the spot at which she located her husband as being outside Lifeline. I expect the event was one she would remember. If she had found him hundreds of metres from where, presumably, he told her he had injured himself, she would surely remember that.

[32] What of the evidence of Mr Burns as to the place of discovery? I found him to be an engaging witness who had no demonstrated reason to lie. I think he has simply fallen into honest error. Other evidence given by him actually fitted in with evidence given by others, for example, evidence by Mr and Mrs Ellis of the actual presence of a raised paver and defence evidence of the possibility of the presence of raised pavers at Lifeline.

The paver – evidence of Mr Ellis, Mrs Ellis, Mr Burns

[33] As I have set out in paragraphs [15] - [18] above, Mr Ellis consistently said in evidence that he had seen the protruding paver on prior occasions. Mrs Ellis said she had seen it, had nearly fallen on it, and told her husband about that incident. As I have said Mr Ellis, a man of apparent intelligence, must have realised that to admit

prior knowledge of the danger must have been against his interest. Then there is the evidence of Mr Burns.

[34] Mr Ellis, in evidence, suggested that Mr Burns bore him ill-will and had promised to "get you back" for requiring him to terminate his boarding status with them. Mrs Ellis was highly critical of him, even to the point of describing him as an inveterate liar and a hopeless drunk, whom she and her husband shunned. I can only observe that Mr Burns did not display any such enmity either in the witness box or in earlier statements he made to various people. In fact, his evidence has given Mr Ellis very valuable assistance. He said that the initial complaint of Mr Ellis to him was that he fell on a paver at Lifeline. He said in cross-examination (T.210):

> "You were aware, weren't you, that there was a paver in the front of the Lifeline premises at the Gold Cast that was raised?-- Yes.
>
> Yes. And it was a paver-----?-- Yes.
>
> -----that was in the walking area of the footpath?-- Yes.
>
> All right. And, in fact, you yourself had tripped on a brick in the Lifeline driveway?-- Yes, I've noticed it before and I think I just stumbled on it, not like crashed into it, but I just didn't take any notice of it because there's a lot of rough footpaths around the place."

and (T.211):

> "Right. Now, it's the case, isn't it, that the brick in the driveway of Lifeline that you were aware of protruded from the driveway by about an inch in height?-- Yes, that would be true.
>
> Yep. It was very prominent and clearly visible in daylight?-- Yes."

and (T.212):

> "HIS HONOUR: Was it the same day?-- The next – yes, yes, it was the next morning on the way to work because I had a little camera that Mrs Ellis gave me, a little flash camera, which I took a photo of the brick, but, again, it was dark and it didn't come out very well, the picture, or the photo, and Mrs Ellis bought another camera to see if I could get a photo in the daytime two or three days later but the brick had been fixed by then.
>
> MR KELLY: But you took photographs-----?-- Yes.
>
> -----of the area?-- Yes.
>
> All right. And on the morning as you walked to work-----?-- Yes.
>
> -----you identified the raised paver in the driveway, didn't you?-- Yes, because there was some yellow – some white and yellow paint close to where the brick was and it was very easily to spot – or very east to spot.

> HIS HONOUR: Was it still standing up about an inch or so out of the level?-- When I took the daytime photo, no, it was fixed. Like – like a new brick there.
>
> When you took the one at night with the flash-----?-- Night-time-----
>
> -----it was still standing up-----?-- Yes-----
>
> -----about an inch, was it?-- -----Yes, yes, but very hazy photo, but."

[35] It seems to have been on 30 September 2003 that he noticed that the offending paver had been re-positioned flush. The presence of the yellow paint remains unexplained. In August 2004 he demonstrated to an assessor where that paver was and how it had protruded by about 1½ inches at the material time (photograph, exhibit 26). In cross-examination he agreed with a suggestion that the protrusion was about 1¼ inches when he tried to take flash photographs on 28 September 2003 at about 5am. The photographs are far too hazy to make out the paver in any useful detail, but one of them does, however, support the evidence of Mr Ellis that the bulb of the street lamp closest to the driveway was not illuminated on the night in question.

The paver – defence evidence

[36] Mr Nowland, a part-time psychologist with Lifeline recalls 22 September 2003 when he saw a raised paver just to the south of the bins (within the property line), at a point he marked on a photograph, exhibit 7K. That led him to make an entry in the maintenance book kept at Lifeline to record such things. The paver was not replaced flush for some days. He again looked at it over the next few days and it was still raised. This all occurred some two or three weeks before he heard of the claim that someone had tripped.

[37] Mr Merson was the part-time handyman for Lifeline. His evidence was that he worked on Tuesdays and Thursdays. He recalled having attended to displaced pavers but in front of, that is, to the south of, the donation bins. He would have checked generally, and replaced any which were in need of fixing. He was not prepared to deny that pavers in the footpath area could have been raised. He said (T.281):

> "Can I ask you to devote your attention, please, to the area outside of the property line of Lifeline?-- Yes.
>
> That is, in the paved area?-- Yes.
>
> At about that time were you ever called upon or did you ever decide to replace pavers in that area?-- Look, the very best I can say to you in response to that is if there was a paver in that area that needed repair or redoing, whatever the word is, I would have taken note of it and done it, but I'm not able to say to you, "Yes, I did."
>
> All right. Were there ever occasions in about that general time that you can recall adjusting-----?-- Yes.

> -----or replacing pavers in the footpath area?-- I'm not – I'm not able – I wouldn't – I'm not sure that that is – would have been correct if I said yes to that, no.
>
> Are you saying you don't know one way or the other?-- This is similar to my last response. If there had been a paver in that area that required attention, I certainly would have done it. I'm not – absolutely not aware in my own mind that I did do any work on pavers in that particular area, the footpath area.
>
> All right. Thank you.
>
> MR MORGAN: Did you ever identify any hazards in the footpath area?-- Not that I'm aware of. Not that – and, as I say, my memory is not as sharp as it used to be but I'm not aware that I did."

and (T.283):

> "Were there occasions when pavers in the footpath area did lift and you did actually fix them up?-- Yes, I-----
>
> Fix them up?-- I understand. I understand what you're saying. In the footpath area, which is now the concrete Gold Coast City Council footpath.
>
> Yes?-- Look, again – I would have to say that's quite possible; however, I'm not prepared to say absolutely yes because I do not recall-----
>
> Yes?-- I do not recall repairing or re-adjusting any pavers in that particular area near the roadway."

[38] Mr McMenamin, a counsellor with Lifeline, was with Mr Nowland and saw the raised paver just to the south of the bins, which he said stood proud some ½ to ¾ of an inch. He said he did not recall seeing a problem with the pavers on the footpath, nor did he on an inspection he made some weeks after he heard something about a man tripping on the footpath. In cross-examination he agreed that the passage of cars could cause pavers to lift to a point where they could be a tripping risk and he illustrated that by reference to the photograph, exhibit 32, which does show some pavers which are raised above the level surface but I could not estimate to what extent.

[39] Evidence was given by Ms Fisk who was at the material time the Workplace Health and Safety officer for the Broadbeach Lifeline office. She set up a system of regular inspection of the premises, noting possible danger areas and organising remedial work by a tradesman if necessary, otherwise by a volunteer handyman. She produced a photocopy of a page of the maintenance book (the book is now unattainable) which had an entry "Brick raised about 1½", needs to be dug out, lowered". It was addressed to "Ashley", that is, Mr Merson, the handyman, and was entered in the book by Mr Nowland. Although the date of the entry in on the photocopy is indistinct, the preponderance of the evidence establishes it to be 22 September 2003. Ms Fisk inspected the paver and found it to be in front of the

collection bins provided for donations from the public. She marked the position of the paver in a photograph exhibit 7F. That paver was not in the area where Mr Ellis complained of falling; it was within the Lifeline property. When inspecting the displaced paver she looked about generally and saw no other pavers which were raised. Such inspections were usually on Fridays. She had the paver replaced by Mr Merson.

[40] In cross-examination Mrs Fisk accepted that the passage of cars over the pavers frequently caused them to become uneven and she accepted that this occurred to the extent that she then recognised it as creating the risk of causing people to trip. She said it was a continuing problem which was the reason for the later replacement of the pavers with pebblecrete. She was aware that many pedestrians beside the highway crossed the paved Lifeline driveway. She said (T.191):-

> "And it was identified by you that the system in place, that is, of inspecting the driveway which, when it was paved, identifying raised pavers and replacing those – or relevelling those raised pavers, wasn't being effective, was it?-- That's right.
>
> That it wasn't a system which stopped the risk entirely?-- That's correct.
>
> And the reason for that was because of the vehicle traffic that was coming in over the pavers, the risk kept occurring didn't they?-- Yes.
>
> Yeah. And you weren't monitoring it every day?-- No.
>
> No. So, there could have been occasions when a vehicle caused the paver to be raised for days before you saw it?-- Could have been.
>
> Yeah. Perhaps even a week?-- Yes, that's possible.
>
> Yes. With those cars coming in every day, it was a matter, wasn't it, where any vehicle could have caused any of those pavers to pop up?-- Yes.
>
> Yes. And that was what particularly concerned you enough to put in a smooth, level surface?-- That's right."

and in re-examination (T.194):-

> "Now, when you were asked by Mr Kelly, he put to you that it was an ongoing problem with the pavers being disturbed by vehicles?-- Yes.
>
> What was the most common thing that happened to the pavers as a result of vehicles?-- The loosening of them I think, and – and the other thing was during – there was a period when the new convention centre was being built opposite us and there was a lot of blasting and a lot of work trucks and that and actually was causing a lot of vibration, like even throughout the building.

Yes?-- And so it was mainly a lot of shifting. And the pavers had been down for a long time and whenever the material that they use underneath pavers was starting to disintegrate and that was also causing the pavers to loosen."

and (T.196):-

"HIS HONOUR: Did these pavers involve constant or continuous maintenance to get them level again?-- Yes.

On a weekly basis?-- Probably not on a weekly basis. There were times when probably fortnightly I would ask the maintenance man if he could fix one or two, especially in the area right outside reception because-----

Well, I'm particularly interested, of course, in the area of the public footpath?-- Well, quite honestly, that was the least area that I had problems with.

And do you recall replacing or repairing the level of any of the pavers out there?-- Out on the footpath?

Mmm?-- A few here in this area in front of the bins because the trucks would come right up fairly close to those and crack them.

Yes, but the area which would be followed by pedestrians, that is if you look-----?-- Down near the footpath.

Yes, where the concrete footpath joined up with your brick cross-over?-- No, we didn't carry out a lot of work in that area at all.

To what extent would these pavers that you've referred to as giving you continual trouble stand above the proper level of the surface?-- Well, if – I would walk around and if I could not walk smoothly on one, well, then I would mark that as one that needed to be repaired. So if they were just jutting up a few centimetres, then I'd ask the maintenance man to do his best to level them.

Right. Now, you just gave with your fingers an indication and it looked to me like a few centimetres. That's what you mean, is it?-- Mmm, mmm, yes."

and in further cross-examination (at T.198):-

"MR KELLY: It's the case though, isn't it, that you were aware of problems with the pavers in that area?-- Not in that immediate area.

You've given evidence-----?-- To some degree there were problems with the pavers in this whole area. My job was to assess the risk and classify it as a high, medium or low risk. If it's a high risk, it needs attending to immediately, it needs repairing.

> And-----?-- And this area here along the footpath was not a high risk.
>
> Wasn't it a high risk because of the fact that it was subjected to greater pedestrian traffic than anywhere else?-- It was subjected to greater traffic but maybe it was done in a – better, but it was not shifting, that area was not shifting.
>
> It wasn't shifting when you saw it-----?-- As – as others were.
>
> You've given evidence, haven't you, that the area – the material underneath the pavers was disintegrating?-- Mmm, in a lot of areas, yes.
>
> Yes. And cars driving over them would cause the pavers to lift?-- Yes.
>
> Right. Cars driving over them would cause the pavers to go down again, wouldn't they?-- Yes.
>
> So there would be periods, wouldn't there, were there may have been pavers lifted that you didn't observe?-- There may have been, yes.
>
> Yes. And then, of course, you only fixed the ones that you observed?-- Yes.
>
> So you can't say for certain, can you, that there were no pavers that posed a risk of a trip in that footpath area out the front of the premises?-- No, I can't say that for certain.
>
> No?-- No.
>
> And it's likely, isn't it, that there were pavers that posed a risk there at times because that's why you replaced it with pebblecrete?-- Yes, that's right."

[41] The Lifeline evidence certainly does not rule out the possibility of pavers, and in particular the relevant paver, being raised at the relevant time. Indeed it acknowledges the possibility. Ms Fisk accepted that periods of up to a week might go by without inspection of the area of the relevant paver. A vehicle entering the driveway at some speed, an event which no doubt occurred from time to time, would put considerable stress on a paver in the position of the paver under review. If traffic (or the shock caused by nearby construction) should cause a paver to rise it might not immediately settle back to its proper position. A loose bit of material – concrete or a pebble – could prevent it doing so. It is not inconceivable that it could cause the paver, or one side of it, to stand proud by the inch or 1½ inches which Mr Burns described. It might not, on the Lifeline evidence be re-laid for some days.

[42] Given the concessions made by the Lifeline witnesses and particularly by Ms Fisk I am persuaded that the evidence given by Mr Ellis, and Mr Burns as to the presence of an actual raised paver, the relevant one, on 27 September 2003 should be accepted. It was known to employees of the defendant, in particular Mrs Fisk that

the rising of pavers above the proper level could and did occur and that they could remain thus raised for up to a week, and it was recognised that raised pavers could pose the risk of tripping. However there had never been a reported incident of a pedestrian actually tripping or otherwise coming to grief because of a raised paver.

[43] No Lifeline witness apparently remembers seeing the material paver in its raised state. Perhaps no-one thought it mattered because of its position at the very western end of the driveway. Perhaps Mr Merson coincidentally replaced it soon after the accident without realising the significance and has since forgotten. Recent ill health has apparently adversely affected his memory.

Liability

[44] The offending paver was at the extreme western end of the driveway. The part of it which stood proud to the extent of an inch or a little more (that is somewhat less than 3 cm) did so at its end closest to the highway. That is the view I take of the evidence, but if that is wrong, if the vertical projection involved more of the paver, only the vertical projection at the extreme western, or highway end matters. That is because it was the unevenness at that end which must have led to the inversion of the ankle, the rolling outward of the lower leg or, as Dr Curtis put it, the lifting of the sole of the foot towards the mid-line of the body. We are all familiar with the mechanism of this which we tend to call the "twisting of an ankle" outward. Had Mr Ellis not been walking so as to put his foot partly on and partly off the western end of the paver that inversion would not have occurred.

[45] The photographs which are exhibit 9 make it more probable than not that Mr Ellis must have been walking along his extreme left edge of the concrete Council footpath and heading for the extreme left of the continuation of the concrete footpath. He fell on the western end of the pavers which can be seen in the photographs to form a straight line joining the western edges of the concrete path. And, as I have said, at least at the time of contact with the material paver, his left foot was partly off that line, even closer to the highway.

[46] As I have said, Ms Fisk accepted that the pavers in the footpath area could rise, remain elevated for a considerable time, and could pose the risk of tripping. And I have found that the material paver was elevated when Mr Ellis stood on it and had been so elevated for a substantial period of time. But that is not the end of the matter. The question is, was it a material risk so that the failure of Lifeline to see it and to remedy it amounted to a breach of duty?

[47] In *Neindorf v Junkovic* (2005) 222 ALR 631, at para [111] Callinan and Heydon JJ cite with approval (see para [117]) a passage from the judgment below of Doyle CJ which I take the liberty of paraphrasing and adapting to the circumstances of this case:-

> "Lifeline knew, or should have known of the hazard.
>
> It was foreseeable that a pedestrian might stumble or fall because of the unevenness, and might suffer injury. Although the unevenness was easily to be seen, it was foreseeable that a particular type of pedestrian, such as a young child or an elderly person with limited vision, might fail to see the hazard. It was equally foreseeable that in particular lighting conditions the hazard might not be seen.

> But there is a significant factor pointing the other way. The unevenness in the paving was of a kind and of an extent that pedestrians on roads and footpaths encounter daily. Tree roots, erosion, soil movement and other factors all play a part in producing this state of affairs. On many footpaths a pedestrian will encounter the precise kind of hazard that Mr Ellis encountered. He is equally likely to encounter undulations due to tree roots, pavers that have lifted or dropped slightly, cracking in concrete paving, erosion at the edge of hard paving.
>
> Such hazards (it cannot be denied that they are hazards) are encountered daily by people using footpaths. They are usually easily seen. Sometimes they are not. When encountered they usually do not cause injury, although clearly enough sometimes they do. They are accepted as an everyday aspect of life. This kind of unevenness in paving and paths is a normal hazard of daily life.
>
> I consider that the law of negligence would depart from the concept of fault according to everyday standards, and from the concept of taking reasonable care for one's neighbours, if it imposed a duty to protect pedestrians on footpaths against such a hazard."

[48] Everyday experience tells us that the surface of a paved footpath frequently is not perfectly level and, importantly here, is often not level with the adjoining surface. I consider that some of the photographic exhibits (for example photos 9A, 7C, 7D and 7F) show that very thing of this footpath. So there is the commonly experienced risk of an unwary pedestrian twisting an ankle by stepping on the uneven surface created by the footpath and its lower adjoining surface. Yet these footpaths are negotiated by day and by night by the vast majority of pedestrians without mishap. In this case I regard as very important the position of the paver. It actually formed part of the uneven border between the footpath and the adjoining surface. That unevenness should reasonably be observed by someone choosing to walk on that border but reasonably might not be a matter of concern to the person charged with the duty of care to pedestrians, here Lifeline. Indeed it might reasonably not even be consciously noted during the regular Lifeline inspections because of the slightness of the risk it presented. I conclude those two possibilities in favour of Lifeline. It is the fact that this paver posed a risk to Mr Ellis only because of the unusual route he was following, one which he must have known he was following. While there was rain which was increasing and while the nearest street light was not operating, Mr Ellis did not say that it was not possible to see his intended path. He simply said, in exhibit 14, that it was very dim. It must have been sufficiently light at least to be able to distinguish that he was following the extreme edge of the formed footpath. So the prevailing conditions did not elevate the slight risk to one of sufficient gravity as to amount to one giving rise to a duty of care on the part of Lifeline. It was a route he knew well. He should have adverted not just to the potential risk involved in his chosen path but to the actual risk. The offending paver was well known to him. He knew where it was. Indeed the risk it posed had been the subject of discussion he had held with other people. The gist of what he said in exhibit 14 and in evidence is that in the circumstances prevailing he simply paid no attention to the paver.

[49] While Callinan and Heydon JJ predominantly decided *Neindorf* on the provisions of South Australian legislation, they made it clear (at para [115]) that their conclusion at Common Law would have been the same. They described the danger in that case as "minor, obvious and of a kind encountered unexceptionally on suburban footpaths." As Gleeson CJ put it at para [15], "The unevenness of the surface on which the respondent tripped was so ordinary, and so visible, that reasonableness did not require any action on the part of the occupier." That was the rationale of the majority decision in the case.

[50] It is important not to judge with hindsight what reasonable step might have been taken. While the Lifeline system of inspection and correction was commendable, on the facts I have found it failed to detect and correct this one paver which was out of level for some considerable time. It would have been relatively simple to correct it, just by re-laying it. But that does not overcome the hurdle which Mr Ellis has failed to clear, that is, to satisfy me that there was a duty to remove a slight and obvious danger. In *Neindorf* at para [93] Hayne J said:-

> "This inquiry about what would have been reasonable and practicable is not to be undertaken in hindsight. Nor is it to be confined to what could have been done to eliminate, reduce or warn against the danger. Asking what could have been done will reveal what was practicable. It is necessary to ask also: would it have been *reasonable* for the occupier to take those measures?"

[51] *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512 concerned a set of facts very like those of this case. The plaintiff put her foot partly on a concrete footpath and partly on the verge, some 50 mm (2 inches) lower. It was held that there was no negligence on the part of the Council because the footpath was not unsafe for a person taking ordinary care. At 525-6 Gleeson CJ said:-

> "Even so, when general principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice. Not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land.
>
> In *Littler v Liverpool Corporation*, Cumming-Bruce J said:
>
> > '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.'"

[52] In *Ghantous* at 639 Callinan J said:

> "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 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."

[53] I am driven to the conclusion on the balance of probabilities that the cause of Mr Ellis's unfortunate injury was not any breach of duty on the part of Lifeline but his own carelessness in failing to keep a proper lookout, failing to make use of a wide, safe footpath and choosing to walk in a potentially risky line, indeed in failing to pay heed to a risk of which he was well aware. If I were wrong in finding no breach of duty by Lifeline, I would assess the contributory negligence of Mr Ellis at 40%.

[54] I note the provisions of s 23 of the *Civil Liability Act 2003* (*"the Act"*) which do not seem, in any event, to apply any new principles. I was referred also to s 13 (obvious risk) but again I do not think the section assists at all in this case.

[55] It follows that the claim of Mr Ellis for damages must fail. But in accordance with established principles I will proceed to assess damages.

Quantum

[56] On 27 September 2003 at about 6.00am Mr Ellis was admitted to the Gold Coast Hospital with a fractured left ankle. On 2 October he underwent surgery under general anaesthetic in which a closed fracture of the left lateral malleolus (outer aspect of the left ankle) was performed. Five days later, he was again taken to theatre to undergo open reduction and internal fixation of the ankle under general anaesthetic but the observed condition of the soft tissues led the surgeon merely to manipulate the fracture. The following day, again under general anaesthetic, he had an open reduction and internal fixation of the lateral malleolus. Then a week later, under general anaesthetic surgery occurred involving wound debridement, open reduction and internal fixation of the left medial malleolus (inner aspect of the left ankle). Three days later, under general anaesthetic, the wound was washed out. The following day, 20 October 2003, he was discharged from the Gold Coast Hospital and taken by ambulance to the Princess Alexandra Hospital where on 21 October he underwent surgery under general anaesthetic to transfer an artery and muscle flap from the left arm to the ankle. On 19 November 2003 he was discharged from hospital to go home.

[57] Thus he was an inpatient for some seven weeks and underwent six procedures under general anaesthetic. Then he was reviewed at the hospital on eight occasions until 19 January 2004, that is, over two months, with, according to Mr Ellis further reviews over another four months. He undertook physiotherapy about ten times over a two month period.

[58] Mr Ellis did not particularly emphasise the pain he felt during all of that period except to describe the pain he felt when beside the highway on 27 September 2003 as excruciating and he said that the physiotherapy was "a bit painful". However he felt the need to take two to three packets of painkillers for six to twelve months and still takes them at a reduced rate. He was unable to walk without crutches for some six to seven weeks. When he resumed walking the pain was "pretty bad" and it took up to two years before his ability to walk and stand reached its current static condition. He still feels some pain in his shin. His left thumb has pins and needles

constantly and he feels his left hand has only 50% of the strength it had pre-accident. He is right handed.

[59] He said that before the accident he used daily to run on the beach for 45 minutes, then walk home. He and his wife used to walk together frequently apart from that. He cannot run now. If he stands or walks ordinarily for two hours his leg starts to ache. He prefers to wear jogging shoes rather than leather footwear.

Pain and suffering and loss of amenities

[60] The assessment for this head of damage is undertaken by reference to ss 61 and 62 of the *Act* and schedule 4 of the *Civil Liability Regulation* 2003 ("the *Regulation*").

[61] In my opinion the appropriate item in the *Regulation* is item 142 for a "serious ankle injury". It falls within the criteria laid down by the item. It was "an injury requiring a long period of treatment, a long period in plaster and insertion of pins and plates". There is a residual difficulty of a significant ankle instability, and a severely limited ability to walk. There is unsightly scarring. So the range of injury scale value ("ISV") is 11 to 20.

[62] There is a complication in that his ankle injury required surgery to his left wrist to provide grafts for his ankle. The result is an unsightly scar, and some weakness in his grip which restricts his strength and therefore his ability to use the arm. For example he could not hold and operate the high pressure hose he used to operate.

[63] Because he sustained the arm disability purely to ameliorate the ankle disability the arm injury is compensible. The ankle injury is more severe than the arm injury so the ankle injury, the "dominant injury" is the injury to which recourse is had for the appropriate ISV which itself can be adjusted upward to reflect the arm injury. See the *Regulation*, s 3.

[64] In my view those considerations would justify adopting the top figure of 20. Turning then to s 62(d) of the *Act* the sum under this head is $26,000.

Future economic loss

[65] Mr Ellis' employment, which began when he left school at 13, has always been in unskilled or semi-skilled manual occupations. After he and his wife moved to the Gold Coast about 10 years ago he worked as a cleaner, then got a job as a security guard for the Phoenician Resort at Broadbeach. A small part of that employment involved cleaning. Then he decided to try high pressure cleaning. He had his own van, two ladders and the high pressure cleaner and the work was to clean driveways, walls and roofs. It was physically demanding work and he realises he could not now manage it, having tried it after he recuperated from his injury. His left arm is too weak and he lacks agility on ladders and roofs.

[66] In late December 2003 Mr Ellis resumed work in the form of a part-time sedentary job, putting brochures in envelopes. That work built up until it was full time, five days a week, supplemented by a little cleaning and gardening for the body corporate of the units he lived in.

[67] In 2007 (the evidence does not specify the actual date) he and his wife moved to Phuket and with the money he got from the sale of his Gold Coast unit, they bought the three year lease of a bar there. He said that from this he earns no more than

sustenance money (supplemented by his savings) and stays because he enjoys the lifestyle.

[68] In examination-in-chief he was asked (T 45) about his intentions after the three year lease expired. He said:

> "If we've had enough after three years, we decide to come back to Australia, one, see if they can remove that plate from me ankle and two, resume – see if I can resume another occupation."

[69] It is difficult to make any finding, even on the balance of probabilities, on the important question whether Mr Ellis is likely to come back to Australia at some time in 2010, (or even some other time) and if so, what he is likely to take up by way of gainful employment and what he might earn. In his cross-examination he said he had held hopes of building the high pressure cleaning business up to comprise three operating units but that all seems to have been dependant on his obtaining a contract from the Gold Coast City Council. However his tender was not even acknowledged. I note also that in the period he ran that business before the accident he made a loss. In those circumstances I think his evidence of taking up this business again and his hopes of making it profitable are probably wishful thinking.

[70] The income tax returns (summarised in the schedule, exhibit 20) show a drop in gross income of about $6,000 for the financial year ending June 2004 which doubtless reflects his inability to earn for a few months following his accident in September 2003. However, as recorded in paragraph [65], he achieved full time employment in 2004. His net weekly income of $340 for the financial year ended June 2005 demonstrates that he had almost regained his pre-accident earnings. In the next financial years he improved those figures quite substantially (eg 2006 – net income per week of $366; 2007 – net income per week $480).

[71] So the evidence does not establish any actual post-recuperation income loss. But it is axiomatic that the permanent injuries to his left ankle and to his left arm have reduced his capacity to work. His area of employment is reduced. He may not be able to regain the sedentary work he took up in December 2003 or similar work. I am satisfied that any work involving agility, or physical exertion involving his legs or left arm, is probably beyond him.

[72] I consider that his probable working life would not have extended, ignoring the accident, past the age of 65. On the rather doubtful assumption that he will be looking for work in Australia when his 3 year lease of the Phuket bar runs out at age 52, that limits the period to 13 years. As to the weekly loss, I can realistically make an assessment of his reduced earning capacity only in the relatively minor (and admittedly arbitrary) sum of $100 net per week. On the 5% tables that comes to a loss of $50,200.

[73] Future loss of superannuation at 9% is $3,114. Mr Kelly's assessment of the probable cost of future surgery and painkillers at $2,000 seems to be reasonable.

Past earning loss

[74] Past earning loss cannot be assessed accurately and so I accept the figure conceded by Mr Morgan in his written submissions, of $10,000. The figure for past lost

superannuation, at 9%, is $900. Interest on past economic loss at 3.25% per annum for 3.6 years is $1,170.

Special damages

[75] I consider the estimates of Mr Kelly of $40,181 for special damages to be reasonable.

Total damages

[76] The total of damages is therefore:

(a) pain and suffering and loss of amenities	$26,000
(b) future economic loss	50,200
(c) future surgery and pain killers	2,000
(d) past loss of income	10,000
(e) interest on past lost income	1,170
(f) past loss of superannuation	900
(g) special damages	40,181
	$130,451

Conclusion

[77] There will be judgment for the defendant.