SUPREME COURT OF QUEENSLAND

CITATION:	*Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QCA 388
PARTIES:	**JOHN ELLIS** (plaintiff/appellant) **v** **UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q)** (defendant/respondent)
FILE NO/S:	Appeal No 4403 of 2008 SC No 7650 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2008
JUDGES:	McMurdo P, Fraser JA and Mackenzie AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION OF NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – OCCUPIERS – trip and fall accidents – where appellant tripped whilst walking across a brick paved driveway where it crossed a public footpath outside the respondent's premises – where trial judge held that the respondent did not breach a duty of care it owed to the appellant – where appellant contended that the primary judge erred by failing to find that the respondent owed to the appellant a duty of care more demanding than that of an occupier to entrants of ordinary residential premises or by a local authority to users of public roads and footpaths – enquiry into the nature of the duty of care owed by the respondent to the appellant TORTS – NEGLIGENCE – GENERAL MATTERS – degree of risk – obviousness of risk – evidence of – where appellant tripped on paver which protruded less than 3cm – where trial judge made findings of fact as to the degree and obviousness of the risk – whether the findings of the trial judge were open

on the evidence

Ellis v Uniting Church in Australia Property Trust (Q) [2008] QSC 074, affirmed
Garrett v North Rockhampton Sports and Recreation Club Inc [2002] QCA 493, cited
Brodie v Singleton SC; Ghantous v Hawkesbury Shire Council (2001) 206 CLR 512; [2001] HCA 29, cited
Jones v Bartlett (2000) 205 CLR 166; [2000] HCA 56, distinguished
Miller v Council of the Shire of Livingstone & Anor [2003] QCA 29, cited
Neindorf v Junkovic (2005) 222 ALR 631; [2005] HCA 75, cited
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354, distinguished
Thompson v Woolworths (Q'land) P/L (2005) 221 CLR 234; [2005] HCA 19, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: D J Kelly for the plaintiff/appellant
R W Morgan for the defendant/respondent

SOLICITORS: Parker Simmonds for the plaintiff/appellant
HBM Lawyers for the defendant/respondent

[1] **McMURDO P:** I agree with Fraser JA's reasons for dismissing the appeal subject to the following brief comments.

[2] The well-known community organisation, Lifeline, through the respondent the Uniting Church in Australia Property Trust (Q), had premises on the Gold Coast Highway, Broadbeach. The appellant, Mr Ellis, tripped on a protruding brick paver on the public footpath outside the respondent's premises where its driveway to the Highway crossed the public footpath. He suffered serious injuries and brought an action for damages in negligence against the respondent. The primary judge gave judgment for the respondent. Mr Ellis appealed from that order.

[3] The essence of the submission of Mr D Kelly, who appeared for Mr Ellis both at trial and in this appeal, was that the primary judge erred in not determining Mr Ellis's claim on the basis that the respondent's duty to him was that owed by a commercial occupier to members of the public.

[4] In making that submission, he placed some reliance on this Court's decision in *Pascoe v Coolum Resort P/L*.[1] Ms Pascoe fell on a paved pathway belonging to the defendant in the course of her employment with it. Hardly surprisingly, this Court distinguished Ms Pascoe's claim from *Ghantous v Hawkesbury City Council*,[2] where Ms Ghantous sued a local authority for damages for personal injuries when she fell from a footpath under control of the local authority. This Court observed, again hardly surprisingly, that the scope of the duty owed by the defendant to Ms Pascoe,

---

1 [2005] QCA 354.
2 (2001) 206 CLR 512; [2001] HCA 29.

its employee, was not analogous to that owed by a local authority to users of the highway.[3] *Pascoe* does not assist Mr Ellis in this appeal. The scope of the duty of care owed by an employer to an employee is not analogous to the scope of any duty which may be owed to a member of the public using a public footpath by an owner of premises adjacent to the footpath over which the property owner's driveway crosses.

[5] In the course of his oral submissions at the hearing of this appeal, Mr Kelly stated that his research had revealed but one case where a property owner was found liable in negligence for injuries suffered by a pedestrian who fell on an adjacent footpath: the New South Wales Court of Appeal decision of *Turnbull v Alm & Anor*.[4] *Turnbull* is also clearly distinguishable from the present case. Mrs Alm was injured when she stepped into a hole in the footpath adjacent to shops owned by Mrs Turnbull. The street and a rough area adjacent to the concrete footpath were owned by the second defendant, the Council of the City of Dubbo, but, by contrast with the present case, the footpath where Mrs Alm fell was owned by Mrs Turnbull. Bryson JA, with whom Giles JA and Tobias JA agreed, noted that the relationship between a public authority owning a road and a pedestrian was different from the relationship between a commercial occupier and an entrant in respects material to the application of the Shirt calculus;[5] Mrs Turnbull could not discharge her duty of care to users of the footpath by leaving the safety of users to be attended to by the local authority; the duty of care owed by a local authority in relation to publicly owned footpaths may well impose a less onerous standard of care than the duty imposed on an occupier of commercial premises.[6]

[6] An occupier of commercial premises owes a duty to members of the public using their premises to take all reasonable care for their safety: *Australian Safeway Stores Pty Ltd v Zaluzna*.[7] The respondent in the present case was not the occupier of the land where Mr Ellis fell and suffered his injuries. The scope of the duty owed by the respondent to Mr Ellis was not that of the occupier of commercial premises to members of the public.

[7] The primary judge accepted that the respondent owed Mr Ellis a duty of care but found it did not breach that duty. I agree with Fraser JA that whether the duty of care was breached depended on the application of the Shirt calculus. Applying those principles to the facts found by the trial judge, which were well open on the evidence, the respondent did not breach its duty to Mr Ellis.

[8] The appeal should be dismissed with costs to be assessed.

[9] **FRASER JA:** The appellant was badly injured when he tripped whilst walking across a brick paved driveway where it crossed the public footpath outside the respondent’s premises on the eastern side of the Gold Coast Highway at Broadbeach.

[10] The trial judge rejected the appellant's claim that his unfortunate injury was caused by the negligence of the respondent.

---

3 [2005] QCA 354 at [18].

4 [2004] NSWCA 173.

5 *Wyong Shire Council v Shirt* (1980) 146 CLR 40; [1980] HCA 12 at 47 (Mason J) (the Shirt calculus).

6 *Turnbull v Alm & Anor* [2004] NSWCA 173 at [47].

7 (1987) 162 CLR 479; [1987] HCA 7.

[11] The appellant's principal contention in this appeal is that the trial judge erred by holding the respondent to a duty of care which was less demanding than that owed by an occupier of commercial premises to a person entering those premises.

The trial judge's findings of fact

[12] The appellant was aged 45 on the date of his accident, 27 September 2003. The appellant tripped and fell whilst he was walking home in the early hours of that day, at about 12.30 am, after a social occasion. He had drunk some beer during the course of the evening but the judge concluded that although the appellant probably would not have been allowed legally to drive, he was not materially impaired in his ability to keep a proper lookout or to walk with reasonable skill and agility.

[13] The appellant's route home along the eastern footpath of the highway required him to cross a driveway that provided vehicular access to the respondent's premises, at which a charity ("Lifeline") conducted a commercial operation. The statement of claim alleged and the defence admitted that the respondent owned and controlled Lifeline, that the respondent owned the premises at which it allowed Lifeline to conduct its business or, alternatively, that the respondent was the occupier or the person in control of those premises; and that access to those premises was provided by the paved brick driveway upon which the appellant fell.

[14] The appellant was familiar with this footpath, particularly including the driveway to the Lifeline premises. His evidence was that he was aware that there were several raised pavers on the part of the driveway the footpath traversed.

[15] The trial judge thoroughly analysed the evidence and then summarised the circumstances of the appellant's accident in the following passage[8]:

> "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."

[16] The appellant does not challenge those findings but under a notice of contention the respondent contends that the trial judge's finding that the appellant tripped on the paver should be set aside. The respondent's counsel argues that the finding should be set aside because it was an inference which was no more plausible or likely than competing inferences;[9] that because the appellant did not claim to have seen the raised paver on the evening of his accident either before, during or after the fall the

---

8 *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [22].

9 Cf *Garrett v North Rockhampton Sports and Recreation Club Inc* [2002] QCA 493; *Miller v Council of the Shire of Livingstone & Anor* [2003] QCA 29.

inference was equally open that he had simply rolled his ankle on the edge of the paved footpath where it met the grass verge.

[17] There was, however, ample evidence, accepted by the trial judge, which supported the conclusion that the appellant tripped on the raised paver he identified. The respondent does not contend that this Court should set aside the trial judge's finding that there was a raised paver where the appellant located it. The appellant gave evidence in which he identified the location of his fall as corresponding with the location of that paver; he said he tripped on that paver where it "was protruding"; he made it clear that "where I tripped over" was on the paver that he had avoided on earlier occasions "because when you're walking down the highway during the daytime, you can see it …". He said "I have seen it beforehand, when we walk down the street even with a couple of friends and I watch out for that brick paver, you know".

[18] The appellant's wife also gave evidence, accepted by the trial judge, that she had seen a raised paver in the place identified by the appellant as the place where he tripped on a raised paver. A Mr Burns (who boarded with the appellant and Mrs Ellis, and who coincidentally discovered the seriously injured appellant sheltering from the rain under a small tree near the place of his accident and many hours after it) also gave evidence in which he described the same protruding brick paver to which the appellant attributed his fall.

[19] In these circumstances the trial judge was entitled to accept that although the appellant did not see the raised paver on the evening of his fall he did accurately attribute his fall to his having stood on it.

[20] Apart from that challenge by the respondent which I have rejected, neither the appellant nor the respondent challenges the following findings of the trial judge:[10]

> "[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

---

10 *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [44]-[46].

> 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[11] 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?"

The trial judge's conclusions

[21] The questions in this appeal concern the trial judge's reasons for concluding that the respondent did not breach a duty of care it owed to the appellant:[12]

> "[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.

---

11 One of the respondent's employees with responsibility for attending to workplace hazards.

12 *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [46] – [53].

> 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 sur-face 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 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 beach of duty by Lifeline, I would assess the contributory negligence of Mr Ellis at 40%."

Did the respondent owe the duty of a “commercial occupier” to an entrant?

[22] The appellant’s primary contention is that the trial judge erred in failing to determine that the duty of the respondent was that owed by a "commercial occupier" rather than the less demanding duty owed by an occupier to entrants of "ordinary

residential premises" (as in *Neindorf v Junkovic*[13]) or by a local authority to users of public roads and footpaths (as in *Ghantous*[14]).

[23] There are several difficulties with this contention, not the least of which is that the respondent was not found to be the occupier of the land upon which the appellant tripped and fell.

[24] The statement of claim did not allege, the respondent did not admit, and there was no evidence that the respondent occupied any part of the driveway where it crossed and formed part of the footpath outside the Lifeline premises. The obvious inference from the evidence referred to in the passages of the trial judge's reasons set out earlier is that the local council was the occupier of that part of the driveway. In any event there was no suggestion that the respondent had any entitlement to control or restrict access to that land. The appellant's counsel did not ask this Court to find that the respondent occupied the relevant land. No such finding would be open on the evidence. For these reasons the appellant's primary contention must be rejected.

[25] Accordingly there is no occasion to consider the difference between the measure of the duty of care owed by an occupier of private land to an entrant upon that land and the measure of the duty of care owed by a local authority to users of a public highway, [15] or whether in a case of this kind there is any difference between the content of the duty owed by a "commercial occupier" or a "residential occupier" of land upon which a plaintiff is injured. Nor it is necessary to decide whether a "commercial occupier" of such land owes a "higher duty"[16] than that owed by a local authority to users of a footpath within its local government area.

[26] The factual basis of the appellant's claim that the respondent owed the appellant a duty of care appears to have hinged upon uncontentious allegations (adverted to in paragraphs of the statement of claim that asserted the content and breaches of a duty of care) that the respondent constructed, inspected and maintained the driveway, including that part of the driveway which formed the footpath outside and provided access to part of the respondent's premises. However, there was no allegation concerning the relationship, if any, between the respondent and the occupier of the land (presumably the local authority) which was prima facie responsible to the public for hazards upon it.

[27] It is not necessary to consider whether these matters formed a sufficient foundation for a finding that the respondent owed the appellant a duty of care. The trial and the appeal were conducted on the premise that the respondent did owe the appellant a duty of care. Further, it appears from the trial judge's analysis, and particularly from his Honour's references to *Neindorf v Junkovic*, that his Honour assumed (generously to the appellant, in my opinion) that the respondent owed the appellant the duty of care that would have been owed by the respondent had it occupied the

---

13 *Neindorf v Junkovic* (2005) 222 ALR 631; [2005] HCA 75.

14 *Brodie v Singleton SC; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; [2001] HCA 29.

15 See *Pascoe v Coolum Resort Pty Ltd* [2005] QCA 354.

16 Cf *Jones v Bartlett* (2000) 205 CLR 166 at [251] per Kirby J; [2000] HCA 56.

driveway, namely a duty of care under the ordinary principles of negligence to take reasonable care for the safety of entrants.[17]

[28] Apart from the argument I have rejected on the footing that it was based upon the false premise that the respondent occupied the relevant land, no submission was advanced to support the appellant's contention that the respondent owed the appellant a higher standard of care than that owed by the local council responsible for the footpath. Because the relevant part of the driveway was not occupied by the respondent and because it formed part of the public footpath the immediately adjoining parts of which were constructed and maintained by the local authority, no basis appears for imposing any higher duty.

[29] It is, however, not necessary to pursue questions of that character. In the view I take, the trial judge's findings in any event required rejection of the appellant's claim. Although the trial judge did not advert to the well known passage in the judgment of Mason J in *Wyong Shire Council v Shirt* [18] which sets out the approach required in deciding whether there has been a breach of the duty of care (sometimes referred to as the "*Shirt* calculus"), it is clear that the trial judge adopted that approach: the essence of his Honour's decision is that the magnitude of the risk and the degree of probability of an accident was so slight that reasonableness did not require any corrective action on behalf of the respondent.

[30] In my respectful opinion, upon the facts found by the trial judge (including in particular that the unevenness was of the same kind and extent found in the public footpath) there was no error in his Honour's conclusions[19] that the unevenness which caused the appellant to trip reasonably might not be a matter of concern to the respondent and might reasonably not even be consciously noted during the respondent's regular inspections because of the slightness of the risk it presented. Those findings of fact explain the trial judge's conclusion, in paragraph [50] of his Honour's reasons, that the failure of the respondent's commendable system of inspection to detect and correct this one paver which was out of level for some considerable time did not constitute a breach of duty by the respondent to the appellant.

Degree of the risk

[31] On behalf of the appellant it is submitted that the trial judge's finding in paragraph [48] that the unevenness between the footpath and the adjoining surface "reasonably might not be a matter of concern to the person charged with the duty of care to pedestrians, here Lifeline" was inconsistent with the evidence of that person, namely Ms Fisk. It is submitted that Ms Fisk's evidence is that the raised pavers posed a risk to persons such as the appellant that was known by the respondent not to be a slight one; that she regarded the risk as being high; that the respondent courted the risk of an accident; and that Ms Fisk accepted that the footpath area was the highest area of risk because it was subjected to the highest level of pedestrian traffic.

---

17 *Neindorf v Junkovic* (2005) 222 ALR 631 at [6] per Gleeson CJ, at [90] per Hayne J, at [113]-[114] per Callinan and Heydon JJ; [2005] HCA 75; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7.

18 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47; [1980] HCA 12.

19 *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [48], referring to the "two possibilities in favour of Lifeline".

[32] Ms Fisk gave evidence to the effect that before the appellant's accident the driveway pavers moved, that the resulting risk of an accident was recognised on behalf of the respondent, that the respondent attended to necessary maintenance of the driveway, and that for that purpose the respondent maintained a maintenance book, set up a system of regular inspections of the premises, and organised remedial works where necessary. That evidence, however, was not directed to any particular area of the driveway, which extended into the Lifeline premises. It appears that most of the problems were inside those premises rather than in the area of the public footpath where the appellant fell.

[33] When the attention of Ms Fisk was drawn to the relevant area where the driveway also constituted the public footpath Ms Fisk said:

> "Well, quite honestly, that was the least area that I had problems with."

[34] After referring to a "few" pavers that required replacement or repair in front of some bins (which were within the Lifeline premises) she said of the area where the brick driveway crossed over the concrete footpath:

> "No, we didn't carry out a lot of work in that area at all."

[35] When the topic was returned to and Ms Fisk was asked in cross-examination whether she was aware of problems with the pavers in that area she said:

> "Not in that immediate area."

[36] Whilst Ms Fisk went on to acknowledge that there were "problems with her pavers in this whole area" she said that "the footpath was not a high risk" and that whilst the footpath was subjected to greater traffic "may be it was done in a – better, but it was not shifting, that area was not shifting." That was a reference to her earlier evidence in which she attributed the loosening of the pavers to the disintegration of the underlying bedding material. It seems clear that at the relevant time Ms Fisk did not consider that this problem extended to the area of the driveway outside the respondent's premises where the appellant fell.

[37] The appellant's contention that the respondent regarded the risk in the relevant area as being high is contradicted by the evidence of Ms Fisk, which the trial judge was plainly entitled to accept and did accept. That formed part of the body of evidence that justified the trial judge's conclusion that the risk was so slight that it might reasonably not even be noticed or, if noticed, removed.

The appellant's decision to walk on the far left hand edge of the footpath

[38] The appellant challenges the trial judge's conclusions[20] attributing significant importance to the position of the raised paver and attributing to the appellant a conscious decision to take the "unusual route" of walking on that far left hand edge of the footpath. On behalf of the appellant it is argued that there is no evidence to support the finding that the appellant made a conscious choice to take that route, but rather that he was focused on getting home; that the footpath was not well lit; and

---

[20] *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [48].

that all areas of the footpath should be expected to be traversed by persons such as the appellant.

[39] As the trial judge observed in the same paragraph of the reasons, whilst the appellant said that the light was "very dim" he did not say that it was not possible to see his intended path. There is thus no reason to think that the appellant did not choose to walk where he did walk. In any case, that question related primarily to his Honour's subsequent conclusion concerning contributory negligence[21] rather than to the question whether the respondent was negligent.

[40] The relevance of the location of the accident to the negligence issue lay not in the consciousness of the appellant's decision to walk in that region but in the obvious unlikelihood that many pedestrians would walk on the very edge of a footpath where the adjacent surface was appreciably lower than the footpath. That bore on the magnitude of risk that someone would trip on the raised paver, a question that was undoubtedly relevant to the reasonableness of the respondent's failure to notice and correct the defect.

Obviousness of the risk

[41] It is argued for the appellant that the trial judge erred by relying upon the obviousness of the risk as a reason for concluding that the respondent did not breach its duty to the appellant. I reject that submission: the passage in *Ghantous* cited by the trial judge in paragraph [52] of his Honour's reasons justified his Honour's view that the obviousness of the risk to one who chose to walk on the edge of the footpath was a relevant consideration.

[42] I accept the appellant's submission that the possibility that users of the footpath might not act carefully or prudently is a relevant factor,[22] but that does not mean that the respondent's failure to notice and correct this raised paver bespoke negligence. It clearly appears from paragraph [48] of the trial judge's reasons that his Honour appreciated the possibility that some pedestrians might fail to observe the raised paver, but his Honour's finding in the same paragraph that the unevenness should reasonably have been observed by someone choosing to walk on that border was properly taken into account as bearing upon the question whether the risk required a response.[23]

Other matters

[43] In view of my conclusions it is unnecessary to consider the respondent's additional defensive argument, foreshadowed in its notice of contention, that the trial judge should have found that the respondent did not breach any duty of care to the appellant because the system of inspection and maintenance was adequate having regard to the level of risk. It does seem, however, that a finding to that effect is implicit in the findings in paragraphs [48] and [50] of the trial judge's reasons.

---

21 *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [53].

22 *Brodie v Singleton SC; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512 at [163] per Gaudron, McHugh and Gummow J; [2001] HCA 29.

23 See *Thompson v Woolworths (Q'land) P/L* (2005) 221 CLR 234 at [36] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ, a case concerning the duty of care owed by an occupier of commercial premises; [2005] HCA 19.

[44] I would add that the appeal was argued with reference to common law principles. The trial judge appreciated that the *Civil Liability Act* 2003 (Qld) applied but considered that it did not in this case require relevant departure from the common law principles.[24] Neither party made any submission to the contrary effect.

Disposition

[45] I would dismiss the appeal, with costs to be assessed on the standard basis.

[46] **MACKENZIE AJA:** I agree that the appeal should be dismissed for the reasons given by Fraser JA. I agree with the order he proposes.

---

[24] *Ellis v Uniting Church in Australia Property Trust (Q)* [2008] QSC 074 at [54].