SUPREME COURT OF QUEENSLAND

CITATION:	*Lynch v Kinney Shoes & Ors* [2004] QSC 370
PARTIES:	**ALLOUISE JOAN LYNCH** (Plaintiff) **v** **KINNEY SHOES (AUSTRALIA) LIMITED** **ACN 004 327 566** (First Defendant) AND **VENATOR GROUP AUSTRALIA LIMITED** **ACN 004 327 566** (Second Defendant) AND **COLORADO GROUP LIMITED** **ACN 004 327 566**
FILE NO/S:	S183 of 2002
DIVISION:	Trial
PROCEEDING:	Claim for damages
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 October 2004
DELIVERED AT:	Townsville
HEARING DATE:	18-19 October 2004
JUDGES:	Cullinane J.
ORDER:	**Judgment for the defendants against the plaintiff with costs to be assessed.**
CATCHWORDS:	TORTS — OCCUPIER'S LIABILITY — NEGLIGENCE — SHOP OWNER — whether breach of duty of care — where plaintiff suffered injuries due to fall in shoe store — where shoe racks were placed on shop stand — whether risk of injury was foreseeable to plaintiff *Hackshaw v Shaw* (1984) 155 CLR 614 at 622-623 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488

COUNSEL: Mr Drew for the plaintiff
Mr King-Scott for the defendants

SOLICITORS: Roati & Firth Lawyers for the plaintiff
McInnes Wilson Lawyers for the defendants

[1] The plaintiff has instituted proceedings against the three defendants claiming damages for personal injuries suffered by her on 15 March 1999.

[2] On that day the plaintiff tripped and fell upon the floor of premises at which a business "Mathers for Shoes" was conducted at a shopping complex known as Stockland Plaza at Townsville.

[3] The defendants were jointly represented. It is admitted that the first defendant was the registered lessee of the relevant premises and I was informed that it was the first defendant who should be treated as the occupier of the relevant premises.

[4] The plaintiff was born on 13 January 1974. She is a married woman with two children, one almost four and the other fourteen months.

[5] She was educated to grade 12 level at school and upon leaving school undertook a hairdressing apprenticeship which she completed in 1995.

[6] On 15 March 1999, she and her mother-in-law had travelled from Ingham where they lived to Townsville where they intended shopping. One of their purposes in doing so was to buy a pair of shoes and a handbag for the plaintiff's mother-in-law. The plaintiff's brother-in-law was shortly to be married.

[7] After attending some other shops they went to Stockland Plaza Shopping Centre and at mid-afternoon found themselves at the Mathers for Shoes Store.

[8] There are photographs in the report of an engineer, Mr Kahler (exhibit 1(a)) which show the shop in the premises. It is not suggested that these show the premises internally as they were but photograph number 1 is an external view showing the entrances to the shop. The entrance which the plaintiff and her mother-in-law entered is marked with an "A" on that photograph.

[9] As they entered the store the plaintiff's attention was drawn to a pair of shoes situated upon a stand against the back wall of the shop. She focussed her attention upon these shoes and commenced to walk towards them. These shoes were at about eye level and there is a plan in Mr Kahler's report which suggests that the distance which would have separated the plaintiff at the time she entered the shop from the back wall was about eight metres.

[10] She says that she was walking towards the shoes "and next thing I know I'm on the floor".

[11] When she got up she looked and says that she saw that she had tripped on the corner of a platform that was jutting out from under a stand. Objection was taken to

this evidence upon the ground that it was a reconstruction. When asked what it was that she recalled happening as she was walking towards the back wall, she said:

> *"My foot hit something and I fell to the ground."*
>
> *"You mean it kicked something or it - you glanced against something - I mean or don't you recall? -- I don't recall how I actually - I just - I was walking and I hit something and I fell."*

[12] The plaintiff fell onto her side and landed on her right arm and sustained injuries to which reference in more detail will be made a little later in these reasons.

[13] The plaintiff saw after she had fallen that there was a platform approximately 15cm high covered with the same coloured carpet as was on the floor. The evidence suggests that this was a greyish or greenish colour. The plaintiff said that the colour was dark green while there was evidence from a former employee that it was greyish.

[14] The plaintiff says that she had not seen the platform before.

[15] She says that after the incident she noted that there was a stand with shoes of some sort upon it.

[16] She says that she did not fall against the stand with the shoes on it but rather fell forward and landed on the carpet.

[17] The plaintiff says that after the fall she saw that part of the platform protruded out from under the stands on it and says that this was the only thing that she could see which could have accounted for her fall.

[18] Exhibit 5 is a photograph of what is said to be a similar platform although it is accepted that it is not the very platform. Two witnesses called for the defendant (Mary-Ann Louise Hintz, a former sales assistant and Margaret Ann Johnson, former manager) gave evidence that the platform there on the day of the accident was larger than the one which appears in the photograph and had more stands on it. Each agree that there was a clear area in front of the platform as appears in exhibit 5 on which shoes were placed and perhaps also a very small stand with shoes on it.

[19] Their evidence varies as to the dimensions of the platform. One has it as 1.5m by 1.5m and the other has it 4 feet by 3 feet with a height of 6 inches. The assumption made by Mr Kahler in his report that the platform was 150mm in height is, I accept, a reasonable estimate.

[20] The plaintiff's evidence was that the carpet on the surrounding floor and on the platform was a dark green colour. The evidence of Johnson was that it was the same colour as appears in exhibit 5 although the carpet on the platform was of a slightly lighter colour. It does not seem to me that the colour of the platform and the floor is a critical issue but I prefer the evidence of Johnson on this subject.

[21] There was evidence from both Johnson and Hintz that following the accident the plaintiff was interviewed by a security officer. After this, the plaintiff according to Johnson and Hintz said something to the effect that the accident was her fault and

that she was not going to sue or that she should have been looking where she was going.

[22] The plaintiff says that she was in a good deal of pain after her fall and when interviewed by the security officer felt that she was being investigated as someone who had done something wrong and as a result she became upset. She doesn't recall making the statements which Hintz and Johnson say she made. I am satisfied however that she did say something to this effect.

[23] According to Hintz the platform was about a metre inside the entrance to the store whilst according to Johnson it was approximately two inches inside.

[24] Johnson says that the platform had been there for eight years prior to the accident whilst she was there and remained there for some three years afterwards at which time there was a refurbishing and the whole shop was altered. According to Johnson during this time no-one, so far as she was aware, tripped over it or made a complaint about it.

[25] The altered shop is reflected in the photographs shown in Mr Kahler's report. The various items shown in the photographs are according to Mr Kahler unexceptionable and do not create any risk of injury.

[26] Mr Kahler specialises in workplace health and safety matters. He gave evidence of the prevalence of slipping and tripping incidents and expressed the view that the platform posed a risk of injury to persons entering the premises for two reasons. Firstly, the fact that it was covered by a carpet of the same colour as the surrounding floor would make it less obvious to persons entering the premises. Secondly, it was said that any protrusion beyond the level of the goods stationed upon it would constitute a risk to persons passing in that area. He says that the platform should be no wider than the stands placed upon it although if the stands are to be moved it would be necessary for there to be some small protrusion.

[27] Mr Kahler's evidence was that people entering premises such as these would be inclined to have their attention focussed on the goods on display and for this reason raised areas protruding beyond the stands upon which the items are displayed should be avoided. The taking of this step is in his view the preferable measure to avoid such a risk although the risk would also be reduced by having the carpet on the platform a different colour to the surrounding carpet.

[28] His evidence was that advice from those with expertise in the field of safety in the taking of safety measures so as to avoid injuries as a result of people tripping and slipping is readily available although he acknowledged that this is not an area in which he has had much experience providing advice to shop owners. He acknowledged that one could walk into most shops in a city like Townsville and find something which was probably ergonomically hazardous in his view.

[29] It was asked whether if platforms were confined to the width of the stands which they support a difficulty would be that people would tend to bump into such stands and the items upon them. He agreed that this would be the case but suggested that it could be to some extent overcome by steps such as setting back the upper tiers of the stands somewhat.

[30] He gave evidence by reference to what he described as the narrow cone of vision of the eye.

[31] When asked by me how one could prevent a person from coming to grief on an object situated at a level below eye level (the plaintiff's evidence was that the shoes that she had focussed her attention on were at eye level) when that person's attention was focussed there he said:

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

[32] I take the relevant considerations to be those set out in the judgment of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 622-623 adopted by the High Court in the later judgment of *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488:

> "*All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. A measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk.*"

[33] There is no doubt that the defendant owed a duty of care to the plaintiff as an occupier entering its premises.

[34] The issues then are whether there was a foreseeable risk of injury to the plaintiff, whether the defendant failed to do what a reasonable person would in the circumstances do by way of response to the foreseeable risk, and whether there is any causal relationship between any failure to act reasonably by way of such response and the plaintiff's injuries.

[35] I accept that the platform extending as it did beyond the stands and being covered by a carpet in a similar colour to that of the surrounding floor could be regarded as giving rise to a foreseeable risk that a person might trip or fall on it. Although counsel for the defendant contended otherwise, he did so rather faintly.

[36] However the question whether the second defendant ought reasonably to have taken steps to remove such a risk has to be answered by considerations beyond the existence of the risk itself.

[37] A proprietor of a store of this kind is entitled to assume that persons coming on to the premises would to use the language of *Mahoney JA* in *Phillis v Daly* (1988) 15 NSWLR 65 at 75 "pay heed to the obvious and act accordingly".

[38] The platform in this case had been in the premises for many years and nobody, according to Johnson, had tripped or fallen on it before. There is nothing to suggest that there was anything unusual about it in the sense of it being of a kind which one would not expect to find in such premises. Whilst a different coloured base might have made it more readily apparent, the platform on my assessment of the evidence ought to have been seen by persons who were looking where they were going. It cannot be described as being in the nature of a hidden danger or a trap. Nor can the situation be equated to that of a supermarket where customers walk along aisles with their attention focussed upon the contents of shelves.

[39] In any consideration of the suggested step to be taken to avoid the risk namely confining the platform to the width of the stand, it is necessary to take into account the disadvantages associated with people in such circumstances coming in contact with and knocking the merchandise from the stands.

[40] I am not persuaded that a failure to take either of the steps referred to above is when all of the circumstances are considered such as to amount to a breach of the duty of care which the second defendant owed to the plaintiff.

[41] The matter bears a close resemblance to the case of *Dailly v Spot-on Investments Pty Ltd* (1995) Aust Torts Reports 81-363.

[42] Finally I should add that even if the plaintiff had satisfied me that the second defendant was in breach of its duty to her. I am not satisfied that the taking of either of those steps would have avoided the incident.

[43] The cause of the incident was it must be said Mrs Lynch's failure to look where she was going because she had her eyes focussed on the shoes on the back wall.

[44] She was thus at risk of coming to grief on any item at a level below her eye level. I am not convinced that any different coloured carpet on the platform would have probably attracted her attention. Furthermore since even on Mr Kahler's approach it would be necessary for there to be some (much smaller) protrusion of the platform beyond the stands if they were to be moveable, I am also not convinced that it is probable that she would have avoided tripping on the edge of the platform even if the stands were brought close to the edge of the platform as suggested.

[45] For these reasons the plaintiff's claim must fail.

[46] There is a claim for contributory negligence. I think that if the plaintiff had succeeded she must plainly bear a substantial proportion of the blame for the accident given her failure to look where she was going. I think a reduction of 50% would, as in *Dailly's* case (*supra*), have been appropriate.

[47] The plaintiff suffered what is described in the medical evidence as an unusual injury to her right elbow in the nature of a vertically displaced coronal split fracture of the capitellum. She was hospitalised for about two days during which she

underwent a surgical reduction of the fracture which has produced an excellent result. I accept that she also sustained an injury to the right shoulder rotator cuff tendon. There is some dispute between the orthopaedic surgeons (Dr Graham for the plaintiff and Dr Pincus for the defendant) as to whether she has any residual consequences of this injury.

[48] The plaintiff appears to have a fairly full range of movement at the elbow but has a palpable tender screwhead in the posterior aspect of the elbow. She complains of pain in this area which is greater on certain activities. She also complains of a loss of strength and some internal crepitus and a lack of full extension. Dr Graham thought that there was a lack of extension in the elbow whilst Dr Pincus was, I think it fair to say, doubtful about this. The left elbow hyper extends and it appears that there is a lack of this movement on the right side.

[49] The plaintiff gave evidence that she has pain in her right shoulder particularly when lifting her arm up. Abduction to 90 degrees causes significant symptoms. She finds difficulty with internal rotation involving activities such as doing up her bra, lifting overhead, hanging out washing, washing her hair and the like.

[50] Dr Graham's view is that the plaintiff has a permanent disability of the right upper limb. The elbow disability equates to a 10% impairment function of the right arm and this equates to 6% of the whole person whilst the shoulder rotator cuff injury equates to 5% of the upper limb or 3% of the whole person so that the total combined disability in his view is some 9% of the whole person.

[51] It may be she will have to undergo arthroscopy of the elbow to ascertain the state of the cartilage on the distal capitellum and/or to debride any scar tissue. This would in Dr. Graham's view greatly improve her function since she has a full range of movement. Some further investigation may also have to be carried out into her shoulder complaints. This might include ultrasound examination to assess the state of the rotator cuff tendon and the degree of impingement and size of the subacromial bursar. A trial of cortisone injections may be helpful. There are other possibilities including surgery in the form of an arthroscopic decompression.

[52] The plaintiff is as has already been mentioned a hairdresser which involves a good deal of upper limb activity. Dr Graham says this predisposes her to ongoing pain and problems.

[53] Dr Pincus could not find any "significant rotator cuff pathology" and he does not think that she suffered a significant injury to her shoulder. However, I prefer the evidence of Dr Graham and the plaintiff on this subject.

[54] He thought that the plaintiff suffers a disability of the elbow lacking some degree of extension compared to the other arm. He made an assessment of 5% permanent impairment to the function of the elbow equating to 3% permanent function of the arm or 2% of the body overall.

[55] At the time of the accident the plaintiff was a principal in a hairdressing business. The financial records of this business are in evidence. Following the accident she was unable to return to work for a period of approximately four months although towards the latter part of this she did some of the book work.

[56] She thereafter resumed work and found that she suffered a good deal of pain and discomfort with her arm.

[57] After some time she reduced her work to part-time work. Her first child was born in November 2000 and she was off work for four months following this. She sold her share in the business in May 2001.

[58] Thereafter she has worked on a part-time basis at the business until September 2001 when she commenced to work for another hairdresser in Ingham initially performing 22 hours per week and then reducing that to 19 hours in December 2002. Her second child was born on 28 June 2003. She returned to work in early December 2003 and since that time has worked approximately 15 hours per week. She says that she has found the increased work involved in caring for her two children causes pain to her arm and that because of these domestic commitments it is not possible for her to work more than 15 hours per week given the pain that she suffers from the combination of these activities. She says were it not for the pain she would work full time and would take on out of hours work involving balls and weddings. This type of work is particularly painful and she avoids it as it requires her to hold her arms in an elevated position for a long period of time.

[59] The records of the partnership do not show that the plaintiff suffered any loss of earnings following the accident and until it was sold. Indeed it seems that as a result of a wage paid to her as a partner and a distribution as a partner she was in fact receiving more than she was prior to the accident. It must of course be accepted that the business was a developing one at this time but on the evidence before me there is no identifiable loss during the period between the time that the plaintiff was injured and when she sold her interest in the business.

[60] I have evidence of what the plaintiff would earn pursuant to the relevant award were she in full-time employment as a hairdresser. A schedule of earned income shows what she has earned during the period since she has been employed following the disposition of her interest in the partnership. Of course there must be taken into account the period that she would have been away from work following the birth of her second child in any case.

[61] I accept that the plaintiff suffered an injury to her shoulder and that she continues to suffer symptoms from it.

[62] The evidence satisfies me that the plaintiff suffers a good deal of pain and discomfort with the activities she describes in her quantum statement and that this interferes with her enjoyment of life particularly in relation to the domestic aspects of it. I also accept her complaints that pain prevents her from carrying out some of the activities of a hairdresser and that as a result she has confined her work to that of a part-time hairdresser. The problems arise because of the disabilities at both the elbow and the shoulder. The former causes problems when carrying out certain twisting motions which she described and which are necessary in certain aspects of the work of a hairdresser whilst the latter makes it painful for her to hold her arm at or above shoulder level for any extended period.

[63] I do not think it is impossible that the plaintiff could return to full-time work when her domestic situation permits this. There is also the prospect that successful

intervention in one or other of the ways Dr Graham suggests may overcome some or all of her present difficulties. At present it seems to be the combination of looking after the two young children and working as a hairdresser which causes her sufficient pain to restrict the latter activity.

[64] If she did return to the work of a hairdresser she would plainly suffer pain from time to time in the course of her work. It is reasonable to accept that she would be as things currently stand at a significant disadvantage on the labour market if she was not able to perform some of the tasks which she describes as causing her difficulties.

[65] I think the case is one in which there should be a global assessment of the plaintiff's loss of future earnings rather than any attempt to calculate it on a mathematical basis. It is impossible to know what the future would have held for Mrs Lynch in any case. It may be that she would have ceased work or only worked part-time at some time in her life.

[66] So far as general damages are concerned, I assess the plaintiff's damages at $37,500. Of this I ascribe $17,500 to the past. I allow interest at the rate of 2% for 5.58 years producing an amount of $1,953.

[67] So far as past economic loss is concerned, I allow the sum of $22,500. I allow interest at 4% on this for 5.58 years producing a figure of $5,022. I allow past loss of superannuation in the sum of $1,575.

[68] As I have said future economic loss is it seems to me something which can only be calculated on a global basis. The plaintiff is plainly at a disadvantage on the labour market. It is reasonable in my view for her at present to be working on a part-time basis only. However it may well be that she is able to return to full-time work with some difficulty or that her condition may be improved and her difficulties wholly or partly overcome. However she is now only 30 and any impact upon her earning capacity must necessarily be reflected in a significant sum of money.

[69] There are plainly forms of employment which she would not be suitable for given the disability which she has. I have already referred to the imponderables associated with what would have occurred in any case. It is possible that with further children Mrs Lynch would have ceased work altogether or would have worked only from time to time. The ordinary vicissitudes and contingencies have to be taken into account.

[70] Doing the best I can I allow the sum of $60,000 for future economic loss. I allow for loss of superannuation on future economic loss the sum of $5,400.

[71] Special damages are claimed in the sum of $14,127. The defendant contended that there should be some reduction in this amount. One of the reasons for this is that it is suggested that in so far as the claims relate to visits to Townsville this would not have been wholly related to treatment. However it is sworn to and I see no reason to further discount it. I allow the sum of $14,127.40 and I allow interest in the sum claimed at $2,059.75 representing interest on past outlays of $7,490.

[72] There are claims for future expenses in the form of medication, travel expenses and medical expenses in the sum of $12,767.90.

[73] The future medical expenses are based upon the possibility that the plaintiff will incur the costs ($3,500) of surgery in the form of an arthroscopic decompression. This it would seem is very much something which is a possibility only if other options fail. However an allowance of $1,000 does not seem to me to be unreasonable.

[74] The claim for pharmaceutical expenses is based upon a continuation of the plaintiff's consumption of panadol and panadeine over 53 years. There are claims for future rehabilitation expenses in the form of regular massage treatment which the plaintiff says enables her to control the pain and to improve her range of movement and thus enables her to continue her employment.

[75] I accept that the plaintiff will in the future incur expenses of this kind but I do not think it reasonable for them to be allowed over a period of 53 years. The usual contingencies have to be allowed for as well as the fact that the plaintiff's condition may improve and she may need less of such medication or even be able to dispense with it altogether.

[76] Doing the best I can I allow in respect of future medical expenses for medication and massage the sum of $8,000.

[77] There are claims for past and future care. The plaintiff plainly required substantial assistance for a significant period. This is dealt with in the report of Catherine Purse an occupational therapist. The calculations upon which this claim is based is set out in Schedule 2 of the plaintiff's statement (exhibit 6). Some discounting it seems to me is probably required since this head is not susceptible to a calculation of the precise number of hours which have been involved throughout this period. Moreover during the latter part of it it is based upon a calculation of some four hours per week care and assistance. This is the basis of the future claim. Having heard Miss Purse's evidence it seems to me that the activities for which it is said the plaintiff requires this type of assistance (some of them only occasionally) would not justify an award based upon that level of need week in and week out.

[78] Doing the best I can I assess past care and assistance in the sum of $15,000 and I allow interest at 5% per annum for the period since the accident producing a figure of $4,350.

[79] So far as the future is concerned this again involves many imponderables. One of the contingencies which has to be taken into account is that she will be able to do some or all of the tasks which Miss Purse says she needs assistance with now if her capacity is improved by one or more of the steps which Dr Graham suggests.

[80] I allow in respect of future care and assistance the sum of $30,000.

[81] The total of the sums then in respect of which the plaintiff's damages are assessed is $212,255.05.

[82] There will be judgment for the defendants against the plaintiff with costs to be assessed.