ELLEN VOGLER, QLD

Pedestrian liability: No duty to correct the obvious

This article examines five recent decisions of the New South Wales Court of Appeal where it has been held that the duty of care owed by local governments does not extend to ensuring that all footpaths and walkways are free from hazards. They have held that there is no duty to prevent obvious hazards such as cracked or uneven footpaths which can be avoided by a pedestrian exercising reasonable care for themselves. The duty only extends to preventing hazards which are hidden or are unusual or unexpected.

Following the High Court Authorities in *Brodie v Singleton Shire Council*[1] and *Ghantous v Hawkersbury City Council*[2], the New South Wales Court of Appeal has taken a narrow approach to the obligations owed by local governments to pedestrians. In five recent decisions, the court has held that where a hazard is obvious to pedestrians, there is no obligation on the part of local authorities to repair the hazard. According to the court, a pedestrian is in a position of relative advantage being able to observe latent imperfections in footpaths and avoid such hazards. In assessing the duty owed, this position of relative advantage must be taken into consideration and impacts upon the duty owed (in addition to being a consideration for contributory negligence purposes). The court has held that local authorities do not have an obligation to ensure all footpaths are free of hazards but only that they are free of unusual, unexpected or unavoidable hazards. The individual cases summarised below demonstrate the distinction drawn by the court.

Ellen Vogler is a Lawyer at Gilshenan & Luton Lawyers **PHONE** 07 3361 0206 **EMAIL** evv@gnl.com.au

RICHMOND VALLEY COUNCIL V STANDING[3]

Mrs Standing had tripped on a cracked and uneven cement footpath when she stepped into a hole approximately 15 mm deep. The trial judge held that the council had been negligent in failing to keep the footpath in a safe condition and awarded Mrs Standing $68,376.50 in damages. The Court of Appeal overturned this decision finding that the section of path was such that it did not pose a risk to an ordinary pedestrian who was keeping a reasonable lookout. Heydon JA, with Sheller JA and Handley JA in agreement, relied on the decision of the High Court in *Brodie v Singleton Shire Council*[4] and held that:

'The existence of a duty must be assessed in part by reference not to any requirement that the footpath "be safe ... in all circumstances", but by reference to the position of "users exercising reasonable care for their own safety".'[5]

After considering the various expert reports tendered by the plaintiff, Heydon JA held that the imperfections in the footpath were readily observable and therefore 'they were readily observable to pedestrians using reasonable care for their own safety on the day of the accident.'[6]

In considering the duty owed, Heydon JA stated that the footpath:

'was not a reasonably foreseeable risk of injury to pedestrians using reasonable care for their own safety. The plaintiff, like pedestrians generally, was ▶

in an excellent position to see and avoid imperfections in the surface. There could have been no expectation on her part that the surface would be smooth. The unevenness in the paving slabs, the cracks and the holes at the place where the plaintiff was moving were as obvious as similar features all over the country, and as obvious as other common features like raised tree roots and manhole covers. There was no concealment of any of the features of the site which the trial judge criticised. There was no inadequacy of lighting, or obscuring of the hazard by grass or otherwise. It was reasonable to expect the plaintiff to have seen what lay ahead of her as she walked along in broad daylight: what was there was obvious and called for no special vigilance.

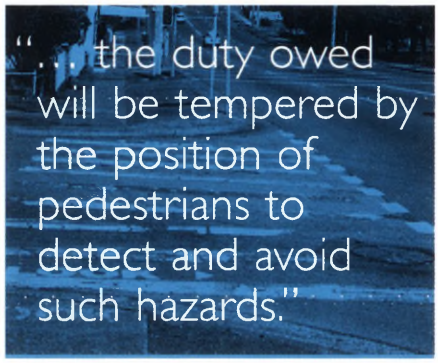
'So far as there was any hazard it was both not only obvious but insignificant and common. The condition of the pavement was typical of innumerable kilometres of pavements in the cities, suburbs and towns of this country. The imperfection was of a kind which users of footpaths have from childhood habituated themselves to look out for and avoid, in view of the fact that surfaces which pedestrians use may be uneven, not flat and not smooth.'[7]

In respect of the council's duty to maintain, inspect and repair the site, Heydon JA held:

'The conditions of the site were so obvious and so typical of those commonly to be encountered in daily life that the defendant was not under any duty to undertake inspections to identify them. Even if the defendant had become aware of the particular conditions of the site, it had no duty to alter them in view of their obviousness. In short, the defendant did not owe the plaintiff a relevant duty of care either to identify the features of the site or to remove them.'[8]

BURWOOD COUNCIL V BYRNESS[9]

In *Byrnes*, the Court of Appeal overturned an award of $43,699.47 to a woman who had tripped on a height differential of approximately 20 mm on a concrete paved footpath. The trial judge had held that the condition of the paver was discoverable on reasonable inspection and therefore the council had failed in its duty to maintain the footpath in a safe condition. Handley JA, with Beazley JA and Hodgson JA in agreement, held that:



'A height differential of 20 mm is not an unexpected or unusual danger to a pedestrian in the Sydney metropolitan area who is taking reasonable care and keeping a proper lookout... Pedestrians ... are in a position of relative advantage because they can generally protect themselves from uneven surfaces on footpaths and other public areas by keeping a lookout and taking care for their own safety. The position will be otherwise if the surface contains something unusual or unexpected which creates a real danger for ordinary pedestrians.'[10]

While the court agreed that the height differential in the footpath was a hazard, it considered it to be an obvious hazard which could have been avoided by Ms Byrnes. Handley JA formulated the duty owed as follows:

'A Council's duty to pedestrians is ... to take reasonable care to prevent or eliminate the existence of dangers in the road or footpath. The duty is not to prevent or eliminate "obvious hazards" which "could possibly be an occasion of harm"... The standard of care is that which is reasonably required to protect pedestrians who are taking reasonable care for their own safety. The care which pedestrians must themselves take enters into the definition of the duty and is not relevant only to contributory negligence.'[11]

RTA V MCGUINNESS[12]

Ms McGuiness tripped on the upstanding corner of a manhole cover in a footpath. The height differential created by the manhole cover was approximately 13 mm. The trial judge had awarded $599,752.07 holding that:

'The manhole and its cover that I must consider here was a danger to the public. It was obvious, and it was by no means far-fetched or fanciful that members of the public would trip over it, as the plaintiff did.'[13]

The Court of Appeal overturned the decision holding that the modest height differential did not present a hazard to a pedestrian exercising reasonable care. Handley JA held that the authority's:

'only obligation was to exercise reasonable care, and it did not have "a duty to ensure that this manhole ... did not become dangerous.. [T]he Authority was not liable to this plaintiff for her fall and its consequences. The upstanding corner was obvious. It was not in the nature of a trap and the modest difference in height did not make the footpath unsafe for a person taking ordinary care.'[14]

LOMBARDI V HOLROYD CITY COUNCIL[15]

In this case, Mrs Lombardi tripped on a 25 mm height differential between two concrete slabs on a footpath. Hodgson JA, with Foster AJA and Brownie AJA in agreement, stated:

'I do not accept that a plainly visible step of 25 millimetres in a footpath is correctly regarded as high risk or unacceptable risk. It is desirable that even obvious steps of 25 millimetres in footpaths be avoided and eliminated if possible; but that is not to say that the failure of a Council to detect and eliminate all such risk is negligent. As a general rule, in my opinion it is not.'[16]

PARRAMATTA CITY COUNCIL V WATKINS[17]

In the earlier decision of *Parramatta City Council v Watkins* the court also made similar findings. At first instance, Ms Watkins had been awarded $131,078.35 damages for injuries suf-

fered when she tripped on a manhole cover in a designated car parking area. The manhole cover was flush with the road on one side but approximately 50 mm below the road surface on the other. The manhole cover was partially covered by her parked car. The trial judge held:

'that it was reasonably foreseeable that persons using the designated parking area would trip or fall into such a manhole; and that [the Council's] failure to properly carry out the repair or construction of the road surface in the vicinity of the manhole constitute a clear hazard resulting in a foreseeable risk of injury to members of the public...'[18]

Hodgson JA, with Powell JA and Rolfe AJA in agreement, relied on the High Court decision in *Ghantous v Hawkesbury City Council*[19] and held that:

'[O]ur environment cannot be risk-free, and ... pedestrians cannot expect to have provided for them perfectly level and unblemished surfaces to walk on... I am inclined to think that sudden variations in level of this magnitude may generally be expected at the edge of footpaths, at transitions between different paths or surfaces, and even between footpaths slabs in the vicinity of trees; and also between paved and unpaved areas of road. However, the same may not be true within the paved surface of an apparently well-maintained road, particularly where the change of level is not obvious; and the circumstance that the change in level in this case was in a designated parking area, where it could be partially obscured by a parked car, would add to the risk. While the matter is not free from doubt, I am not satisfied that the primary judge was wrong to hold that the change in level was an unreasonable hazard in this case.'[20]

CONCLUSION

The above cases evidence a narrow approach to the duty of care owed to pedestrians. They show a clear tendency to treat pedestrians as in an advantaged position, in respect of their ability to detect and avoid minor hazards in footpaths and walkways. This is clearly stressed to be a lesser duty of care than that owed in respect of maintaining road surfaces to prevent hazards to vehicles. Pedestrians are clearly viewed by the court as being able to detect, and even that they should expect, uneven surfaces and avoid the hazards of same. Importantly, the scope of the duty owed by local authorities to pedestrians would appear to be tempered by the position of pedestrians to detect and avoid such hazards. In considering any action against local authorities, practitioners need to consider that the duty owed will be tempered by the plaintiff's ability to notice the hazard. While questions of contributory negligence will continue to play their role, the position of the plaintiff clearly will be considered a primary issue in respect of the duty owed. However, the decisions are clear that a local authority has a duty to exercise a reasonable standard of care to eliminate hazards which may be unusual, unexpected or undetectable to the ordinary pedestrian exercising reasonable care. PL

Endnotes:

1 [2001] 206 CLR 512.
2 [2001] 206 CLR 512.
3 [2002] NSWCA 359 (4 November 2002).
4 [2001] 206 CLR 512.
5 at para 29.
6 at para 52.
7 at para 54-55.
8 at paras 59-60.
9 [2002] NSWCA 343 (4 November 2002).
10 at paras 26-28.
11 at para 33.
12 [2002] NSWCA 210 (4 November 2002).
13 at para 10.
14 at paras 13 and 38.
15 [2002] NSWCA 252 (1 August 2002).
16 at para 32
17 [2001] NSWCA 364 (12 October 2001)
18 per Hodgson JA at para 6.
19 (2001) 206 CLR 512.
20 at paras 26-27.