SUPREME COURT OF QUEENSLAND

CITATION:	*The Thistle Company of Australia Pty Ltd v Bretz & Anor* [2018] QCA 6
PARTIES:	**THE THISTLE COMPANY OF AUSTRALIA PTY LTD** ACN 109 154 467 (applicant) **v** **VERNON ALWYN BRETZ** (first respondent) **TAM FARAGHER & ASSOCIATES PTY LTD** ACN 054 486 743 (second respondent)
FILE NO/S:	Appeal No 4532 of 2017 DC No 25 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Bundaberg – Unreported, 10 April 2017 (Clare SC DCJ)
DELIVERED ON:	9 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2017
JUDGES:	Gotterson and Philippides JJA and Bond J
ORDER:	**The application for leave to appeal be refused with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – MISCELLANEOUS DEFENCES – OTHER DEFENCES – where the first respondent sustained injuries at a petrol station owned and operated by the applicant – where the first respondent had filled his car with petrol and tripped over the plinth of a petrol bowser as he was walking to the pay stations – where the plinth of the bowser was constructed at right angles and was painted the same colour black as the surrounding tarmac – where the trial judge made findings that management had identified that the camouflaged plinth was an obvious tripping hazard – where the trial judge held that the risk was not an obvious one – whether the trial judge's findings as to whether the risk was obvious were inconsistent – whether the trial judge erred in introducing an impermissibly subjective test as to whether the risk was obvious to a person in the position of the first respondent – whether the plinth was a risk that would have been obvious to a reasonable person in the first respondent's position such that there was no duty on the part to warn the first respondent of the risk

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – GENERALLY – where the trial judge found that the risk of tripping on the petrol bowser plinth when it was painted black was not insignificant on the basis of inferences that other patrons had stumbled or tripped on it – where there was a lack of incident reports detailing prior tripping incidents – where there were observable marks caused to the plinth and pedestrians were likely to inadvertently interact with the plinth when it was painted black – where the occupier had knowledge of the situation and considered that there was a need to report and discuss it – where the applicant submitted that the trial judge erred by failing to consider that the nature of the risk prospectively rather than with the benefit of hindsight – whether the risk of tripping was not insignificant such that there was a breach of the applicant's duty

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the applicant contended that the first respondent was contributorily negligent in failing to watch where he was walking when he tripped on the plinth – where the first respondent stated in cross-examination that he was not watching where he was walking – whether the trial judge erred in finding that the first respondent had not been negligent – whether the conduct of the first respondent amounted to mere inadvertence, inattention or misjudgement or to negligence on his part

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the primary judge awarded the first respondent general damages, special damages and an additional sum for past and future gratuitous care – where the special damages and damages for past and future gratuitous care related to the first respondent's shoulder surgery – where the first respondent had suffered from a degenerative shoulder injury but had previously decided not to undergo surgery because of the attendant risks – where the applicant submitted that the trial judge erred in finding that the first respondent's decision to undergo the surgery was causally related to his fall at the applicant's petrol station – whether the first respondent would have pursued the surgery but for the fall – whether the first respondent was entitled to special damages or damages for past and future gratuitous care in relation to his shoulder surgery

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION – EXEMPTION CLAUSES – where at first instance the applicant made a third party claim against the second respondent – where the second respondent had provided design, engineering and construction supervision to the applicant during the renovation – where each of the contracts between the applicant and the second respondent contained an exclusion clause that stated

that the second respondent would be discharged from liability after the expiration of one year from the date of the final invoice – where the applicant contended that the exclusion clause was inapplicable as there was no evidence that a final invoice had been issued – where the applicant contended that the contractual exemption of liability did not occur because the work required to be performed was carried out other than under the contract – whether the trial judge was correct to dismiss the third party claim against the second respondent on the basis that the exclusion clause was effective in excluding liability

Civil Liability Act 2003 (Qld), s 9, s 13, s 15, s 23, s 59
Civil Liability Regulation 2003 (Qld), Sch 4
District Court of Queensland Act 1967 (Qld), s 118(3)
Law Reform Act 1995 (Qld), s 10(1)(b)
Uniform Civil Procedure Rules 1999 (Qld), r 166

Cains v Mathers Shoes Pty Ltd [1993] QCA 193, considered
Clampett v Queensland Police Service [2016] QCA 345, cited
Clark v Ryan (1960) 103 CLR 486; [1960] HCA 42, cited
Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500; [1986] HCA 82, considered
Green v Hanson Construction Materials Pty Ltd [2007] Aust Torts Reports 81-907; [2007] QCA 260, applied
Hines v Commissioner of Police [2016] QCA 3, cited
Sharp v Parramatta City Council (2015) 209 LGERA 220; [2015] NSWCA 260, cited
State of Queensland v Kelly [2015] 1 Qd R 577; [2014] QCA 27, applied
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, applied

COUNSEL:	K N Wilson QC, with M M Walker, for the applicant R J Douglas QC for the first respondent M T Hickey for the second respondent
SOLICITORS:	Australia Property Lawyers for the applicant Shine Lawyers for the first respondent Clyde & Co Australia for the second respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.

[2] **PHILIPPIDES JA:**

Background

[3] The applicant seeks leave to appeal against a decision of the District Court, pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld), granting judgment in favour of the first respondent, Mr Bretz (the plaintiff in the proceeding below), and against the applicant (the defendant below) for personal injuries sustained by Mr Bretz as a result of the negligence of the applicant and awarding damages of $96,361.13.

[4] Mr Bretz sustained the injuries on 5 October 2012 at a petrol station in Bundaberg owned and operated by the applicant, when, after filling his car with petrol, he was walking to the pay station and tripped over the concrete plinth on which the petrol bowser was positioned. He was 80 years of age at the time. The plinths had previously included a sloping edge but were redesigned so that the edges of the plinths were constructed at right angles, with a vertical elevation of approximately 37 to 39 mm. On 9 September 2012, at the request of the applicant, they were repainted black rather than yellow, as was previously the case, because the yellow paint had been slippery, was deteriorating, was hard to keep clean and for aesthetic reasons, black being the colour specified in the original design.[1] The evidence of the applicant's general manager, Mr O'Donovan, was that the issue of repainting arose from a meeting with Shell and that a decision was made to return the plinths to their original design specification of black with a brushed finish.[2]

[5] The trial judge found that the risk of tripping on the plinth was foreseeable and a not insignificant one and that a reasonable service station operator in the position of the applicant would not have obscured the visibility of the plinth by repainting it in the same colour as the surrounding ground. Her Honour also held that the plinth did not present as an obvious tripping risk, being camouflaged by the repainting and that accordingly s 15 of the *Civil Liability Act* 2003 (Qld) (the Act) did not apply. The trial judge found that the substantial cause for the incident was the elevation of the plinth and the absence of colour differentiation or other warning of the two ground levels. The applicant's failure to give adequate warning of the presence of the elevation was a breach of the duty it owed to Mr Bretz and the probable cause of his fall. The trial judge rejected the applicant's contention that Mr Bretz was contributorily negligent by not looking where he was going; that is, in failing to "watch his feet" did not amount to a failure to keep a reasonable lookout.

[6] The judge also dismissed a third party proceeding brought by the applicant against the second respondent, an engineering company, involved in the renovations to the petrol station.

[7] In seeking leave to appeal under s 118(3) of the Act, the applicant contended that leave ought to be granted because an appeal was necessary to correct a substantial injustice and there was a reasonable argument that there was an error to be corrected.[3] The applicant sought leave to appeal the judgment on the grounds that the trial judge erred:

(a) in finding that the applicant was negligent, and that its negligence caused Mr Bretz to fall, by misapplying the tests in s 9(1) and s 15(1) of the Act.

(b) in finding that Mr Bretz was not contributorily negligent.

(c) in the assessment of damages by having regard to a significant pre-existing injury.

(d) in finding that an exclusion clause in the contract between the applicant and the second respondent was effective and thereby dismissing the third party proceedings.

[8] For the reasons that follow, I consider that leave to appeal should be refused.

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1 Transcript at 11.18-11.25.

2 Reasons at [23].

3 *Hines v Commissioner of Police* [2016] QCA 3 at [7]; *Clampett v Queensland Police Service* [2016] QCA 345 at [9]. See *McDonald v Queensland Police Service* [2017] QCA 255 at [24].

The incident

[9] Her Honour set out the following evidence concerning the incident:

> "[3] There was no dispute that Mr Bretz fell as he attempted to move from the bowser to the pay station. The bowser was centred on a raised concrete platform or plinth. The base of the plinth extended forward 300mm from the edge of the bowser. It was 37 to 39 mm high. It was painted the same colour as the pavement that surrounded it.
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> [4] Mr Bretz did not notice the plinth. He testified that, after filling his van and some drums, he '*took off to walk around the bowser, and the next thing [he] knew [he] was heading for the bitumen as hard as [he] could*'. He fell onto his right hand and elbow. He deduced that the ball of his foot had hit the plinth. Perhaps not surprisingly, he was unable to recall the precise mechanism of the fall. … An incident report filled out by the site manager on the same day attributed the fall to be the 'uneven surface around the pumps'. Mr Bretz had no injury to his toes, but the pad of his foot was sore for a number of days. It is a reasonable inference that he had tripped or lost his footing when the ball of his foot hit the edge of the plinth; in other words, he was tripped by the elevation.
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> [5] Mr Bretz said he '*didn't even see the plinth*'. He could not see the difference in height between the cove and the ground surround it (sic) '*because the whole lot was painted out the one colour*'. He had since returned to the station and the plinth had been repainted yellow. He understood yellow '*tells you it's raised. There's something there ...to draw your attention to the fact*'. Had the plinth been painted yellow on the day he tripped, he would have understood what it indicated."

[10] Her Honour found at [35] that Mr Bretz tripped on the plinth:

> "… because he was unaware of the presence of the plinth. If the plinth had been highlighted in yellow, as it had been a few weeks earlier, Mr Bretz probably would have identified the hazard in advance. But for the breach of duty, he probably would not have fallen."

Error in finding the trial judge's finding of negligence?

The finding that the plinth was not an "obvious risk"

[11] The applicant argued that the trial judge ought to have held that the risk created by the plinth was an "obvious risk" as defined in s 13; that is, "a risk that would have been obvious to a reasonable person" in Mr Bretz's position, such that by virtue of s 15 of the Act, there was no duty to warn Mr Bretz of the risk. In rejecting that argument, the trial judge stated:

> "[28] The [applicant's submission was] that the plinth was obvious, particularly to anyone standing over it to refuel, as Mr Bretz did. The difficulty for the [applicant] is that its site manager had

> identified the problem prior to Mr Bretz's fall. The repainting had camouflaged the plinth. Mr Bretz had limited experience of that site. The plinth had not been an 'obvious risk' for him."

[12] It was submitted by the applicant that the trial judge's conclusion and finding at [15] that the plinth was not an "obvious risk" was inconsistent with the reasoning at [14] that the plinth was an "obvious tripping hazard". In considering that contention, it is convenient to set out paras [14] and [15] in full:

> "[14] The location of the plinth and its colour made it an obvious tripping hazard. It was recognised by Ms Nerad as such and she had warned the [applicant's] retail manager about it prior to Mr Bretz's fall. Ms Nerad testified that the plinth and the ground '*all looked the same colour to me*'. The plinth was originally yellow. It had been repainted black while Ms Nerad was on leave. She thought the repainting made the plinth '*harder to see*'. She had promptly raised the issue at the first management meeting on her return from leave.
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> [15] Security footage showed Mr Bretz's feet close to the edge of the plinth when he reached for the fuel hose. The protrusion was an unusual feature of this site. Neither the [applicant's] project officer, Mr Robb, nor the safety engineer, Dr Ludcke, had seen protruding bases on any bowsers other than this site. Mr Bretz was not very familiar with the site. He had only been to that petrol station a few times previously. He did bend over to fill a fuel can, but I am satisfied that the plinth was not obvious. It was not an obvious feature like a display platform in a shop."

[13] It is also useful to set out the following further paragraph of her Honour's reasons:

> "[16] The cement plinth presented a solid obstruction to a likely pedestrian. The edge of the plinth was very close to the area where customers would usually park to use the [bowsers]. The **rise of the plinth was only 37 millimetres**, less noticeable than a substantial step. It was **high enough to trip someone, but not so high to be immediately apparent**. As a matter of common experience, a small definite rise is more likely to cause a trip than a substantial step that is easy to see. Here it was **effectively camouflaged by the repainting**. Photographs confirm Ms Nerad's assessment that the plinth was more difficult to see. It was also very close to the area where customers would usually park to use the [bowsers]. Standing between their fuel tank and the bowser, the perspective would be an aerial view, making the elevation even less noticeable than a profile view." (emphasis added)

[14] When regard is had to the entirety of the paragraphs, it is evident that, contrary to the applicant's contention, there is no inconsistency in the trial judge's reasoning. As submitted by the respondents, para [14] is concerned with the potential for harm, identifiable to the applicant through its employee (Ms Nerad), and thus whether the risk was one that was patent or obvious to management. That was an entirely distinct issue from that dealt with at [15] as to whether the plinth would present as an "obvious risk" for the purpose of s 13(1), which is directed to whether the risk was obvious to

a reasonable person in the position of Mr Bretz. Those paragraphs are consistent with the conclusion at [20] that the risk was not an obvious risk for the purposes of s 13 and s 15(1) of the Act.

[15] A further argument raised by the applicant was that the trial judge erred by impermissibly introducing a subjective element to the test of whether a risk was an "obvious risk". The relevant inquiry was whether the risk "in the circumstances, would have been obvious to a reasonable person", being the test in s 13 of the Act. That question, the applicant contended, was to be determined by asking whether the risk would have been obvious to a reasonable person in Mr Bretz's position.

[16] Citing *State of Queensland v Kelly*,[4] the applicant submitted that the judge's focus ought to have been on a reasonable person, in the position of Mr Bretz (including his experience of the area), exercising ordinary perception, intelligence and judgment.[5] Senior counsel on behalf of Mr Bretz referred to a line of New South Wales authority concerning the analogues of s 13 and s 15, which was considered by this Court in *Kelly*, which concluded that while the test is "objective", "the plaintiff's evidence was relevant to what a reasonable person would know about the risk".[6] Reference was also made to *Sharp v Parramatta City Council*,[7] where it was held that the test for an "obvious risk" entailed identifying the particular risk which materialised and caused a plaintiff's injury and then enquiring, prospectively, whether such risk "would clearly have been apparent to and understood by a reasonable adult in the [plaintiff's] position".

[17] In my view, the trial judge's reasoning was consistent with that approach. Her Honour's finding that the risk was not "obvious" to a reasonable person in the position of Mr Bretz, was made in the context of findings as to the shallow nature of the plinth's protrusion (some 37 to 39 millimetres) which extended beyond the body of the bowser, that it was an unusual feature of the site and that it had been painted black from its original colour of yellow, the same colour as the adjacent tarmac, resulting in a "colour homogeneity of the stepped levels". Her Honour concluded at [28] that, in those circumstances, the repainting "camouflaged" the plinth and, given Mr Bretz's limited experience of the site, the plinth was not an obvious risk "for him". The use of the words "for him" read in context does not indicate the introduction of an impermissible element of subjectivity into the test under s 13 of the Act.

[18] I am also unable to accept the further related argument made by the applicant that the trial judge's finding did not adequately deal with the "knowledge" that a reasonable person would acquire in Mr Bretz's position. The reference by the trial judge to Mr Bretz's "limited experience" was a reference to the number of occasions on which Mr Bretz had visited the site in the past. The applicant maintained, however, that the trial judge erred in failing to take into account that, on the occasion in question, Mr Bretz had stood for a prolonged period next to and above the plinth as evidenced by the video footage tendered of Mr Bretz's visit to the petrol station. (That footage showed Mr Bretz walking around the vicinity of the bowser for some minutes.) Reference was also made to Mr Bretz's acceptance, in his evidence, that when he first reached for the fuel bowser, his feet were "at or about the edge of the plinth", that he was looking down,[8] and that he then filled his van with fuel, at which time his right foot

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4 [2015] 1 Qd R 577.
5 [2015] 1 Qd R 577 at [29], [33] and [57].
6 *Kelly* at [40] and [57].
7 [2015] NSWCA 260 at [41].
8 AB at 27.

was very close to the edge of the plinth. Mr Bretz then filled two 20 litre drums with fuel,[9] one of the drums was removed from the van and placed on the ground between the bowser and the van. While filling that drum, he leaned against the bowser for a time with his head directly over the plinth, looking down. Having regard to those factors, the applicant submitted that, a reasonable person in Mr Bretz's position would have acquired information about the plinth from "standing above it, looking in its direction" and moving around it during the refuelling process. The applicant argued that the trial judge failed adequately to deal with the acquisition of that information by that reasonable person in erroneously finding that the presence of the raised plinth was not an obvious risk. That submission cannot be accepted.

[19] Her Honour had particular regard to the positioning of Mr Bretz's feet close to the edge of the plinth as he reached for the bowser hose in assessing whether the risk was "obvious", as is apparent from paras [15] and [16] of the reasons. Her Honour's approach was to consider whether the potential for tripping was apparent to a reasonable person in Mr Bretz's position, hence the reference to the "likely pedestrian" at [16]. In addition, as was submitted on behalf of Mr Bretz, the applicant's prior identification of the risk, through Ms Nerad, which it failed to remedy in any way, served to underscore that the risk was not only real, but in the nature of a non-obvious risk requiring remedial action.

[20] In my view, there is no basis to challenge the trial judge's finding that the tripping risk posed by the camouflaged plinth was not an "obvious risk" within the meaning of s 13(1) of the Act and that s 15 had no application in the circumstances of this case.

The finding that the risk was "not insignificant" under s 9(1) of the Act

[21] Section 9 of the Act states:

> "**9 General principles**
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> (1) A person does not breach a duty to take precautions against a risk of harm unless—
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> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
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> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
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> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
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> (a) the probability that the harm would occur if care were not taken;
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> (b) the likely seriousness of the harm;
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> (c) the burden of taking precautions to avoid the risk of harm;

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9 AB at 20.

> (d) the social utility of the activity that creates the risk of harm."

[22] The applicant contended that the trial judge ought to have found that the risk of tripping on the plinth was insignificant, with the result that liability should have been decided adversely to Mr Bretz by operation of s 9(1)(b) of the Act. On that basis, the applicant challenged the following reasoning by the trial judge:

> "[20] I am satisfied, on balance, that other people stumbled or tripped on the plinth when it was painted black. The absence of other incidence reports makes it less likely that other trips caused substantial injury. But that does not mean the risk of tripping was insignificant. The plinth was a clear tripping hazard. It was not an insignificant risk."

[23] The applicant contended that the finding that the risk was not insignificant was underpinned by two subsidiary findings. The first was that other customers had complained of slipperiness in the plinths when they were painted yellow.[10] The second was that wear in the black paint of the plinths indicated that people had tripped on the plinth in the past at [17] of the reasons.

[24] As to the first matter, the applicant argued that the trial judge appeared to conflate the episodes of complaint about slipperiness with that of tripping. The trial judge noted the practice of recording incidents that took place, but remarked at [13]:

> "… the existence of written reports for all incidents at the site was contradicted by Ms Nerad's concession in relation to another plinth related hazard. She was aware there had been multiple customer complaints about the slipperiness of the original surface, yet she thought only one incident report had been prepared. It follows that the absence of other incidence reports does not mean that other customers did not complain to staff of tripping. Furthermore, there is no way of knowing how many customers may have tripped without advising staff. A customer who tripped without significant injury would be less likely to report it."

[25] The applicant's argument was that the trial judge erred in reasoning that, since complaints about slipping on the original surface had not always been recorded, it followed that likewise some customers may have tripped on the renovated plinth without a report being generated. Moreover, the conclusion in [13] was contrary to evidence given by Ms Nerad that incident reports were kept in response to complaints or statements by customers and that the only incident report of tripping was that of Mr Bretz.[11] However, the trial judge's observations concerning Ms Nerad's evidence are to be considered in the context of Ms Nerad's other evidence that a pro-forma incident report was not completed every time a complaint was made. I am unable to accept that the process of inference reflected in [13] of the reasons was not open to her Honour, nor that there was any impermissible conflation of slipping and tripping; her Honour's emphasis was on the fact of complaint being made.

[26] Nor is there merit in the contention that [13] evidences an erroneous approach by the trial judge as to the assessment of whether the risk was not insignificant, by failing to

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10 Reasons at [13].

11 AB at 136.

consider the issue of the nature of the risk prospectively, rather than with the benefit of hindsight.

[27] Mr O'Donovan accepted in giving evidence that the prospect that a customer might trip and fall while visiting one of the businesses was among the highest operational risks that could exist.[12] Her Honour's conclusion at [20] was made in the context of her findings at [26] that;

(a) While it is reasonable for the applicant to repaint the surface to reduce slipperiness, there was no operational reason to make the plinth the same colour as the surrounding ground beyond the aesthetic.

(b) Removal of the visual clue for the presence of the cement elevation would obviously increase the risk of tripping, and if there was a risk of falling there was a risk of serious injury.

[28] Those findings and the conclusion at [20] reflected evidence given by Dr Ludcke, that the presence of a 37 to 39 millimetre projecting object, the corner of the raised concrete slab, in the path of travel of pedestrians, would on the basis of research referred to in his report, be considered to pose a significant hazard. His evidence was also that, in such circumstances where there are no conspicuous clues as to the presence of a hazard, it is highly predictable that pedestrians would trip and fall on the raised corner of the raised concrete slab.

[29] That evidence was not challenged at trial by the applicant. Indeed, the applicant sought to rely on aspects of his evidence in its third party claim. Yet, before this Court, part of the challenge to the trial judge's findings stemmed from a contention that Dr Ludcke's evidence did not come from his own specialist knowledge (being in biomechanics, medical engineering and occupational health and safety) and so did not meet the requirements for the admissibility of an expert opinion.[13] Given the approach taken at trial by the applicant, it is not now open to raise a challenge to Dr Ludcke's evidence on the basis of his area of expertise to which no objection was made below.

[30] The applicant also submitted that the trial judge's finding that the risk was not insignificant, which relied on Dr Ludcke's evidence which was circumstantial evidence as to the interaction of other customers with the plinth, was set out at [17] to [19] of the reasons:

> "[17] There was also circumstantial evidence that others had tripped or slipped through patterns of wear on the plinths. Photographs taken at an inspection 14 months after the incident showed areas of black paint worn away to expose the original yellow underpaint. The same pattern of wear was seen on each plinth. The [first respondent] called Dr Ludcke. He has a Doctorate in biomechanics and medical engineering, an undergraduate degree in medical engineering, and an advanced diploma in occupational health safety. It was his opinion that the wearing of the black paint was most likely caused by pedestrians, by tripping or slipping on the slope.

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12 AB at 128.

13 That is, it did not arise from the course of study or experience which gives the witness an advantage in judging the facts above that enjoyed by non-experts: *Clark v Ryan* (1960) 103 CLR 486 at 491-492.

> [18] The [applicant] criticised Dr Ludcke's opinion as speculative. The [second respondent] submitted the wear was just as likely to be the result of cars or cleaning or inadequate coverage with the black paint. The [applicant's] project officer, Elvin Robb, produced a photo of another bowser with a bent panel, said to be hit by a vehicle in September 2012. He said '*these things happen from time to time*'. But Dr Ludcke's expert opinion was not contradicted by another expert. He demonstrated his specific expertise in relation to wear marks. 'It is from previous experience and understanding where people walk in relation to stairways and other edges of similar type, the wear like that is experienced in stairways and other lips and discontinuities in the ground's surface, where people generally walk through and the surface is impacted regularly and worn'. It was 'based on reviewing hundreds of different services, hundreds of stairways, hundreds of edge delineation issues like this, where we audit facilities and identify and understand where people walk regularly and see wear marks that look like that'. In his opinion, the most likely explanation was people tripping or slipping. His reasons for excluding other explanations were logical. The wear was on the front edge of the plinth in the middle and one corner. There was no sign of wear on the other corner, where a pole ahead of the plinth obstructed a path away from it. Cleaning or scrubbing with equal pressure would ordinarily result in equal wear, whereas a trip or fall would cause unequal wear because of the uneven interaction with the surface. Cars were unlikely to travel over the edge of the plinth because it was too close to the bowser…
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> [19] He explained the indications of tripping or slipping on the plinth by reference to the location of the wear:
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> 'Tripping, stepping on, even stepping on top of it and slipping down the slope will create a higher friction, higher wear scenario than a standard footstep on flat ground…the wear like that is experienced in stairways and other lips and discontinuities in the ground's surface, where people generally walk through and the surface is impacted regularly and worn...'"

[31] The applicant argued that the photographs contained in Dr Ludcke's report (taken on an inspection of the premises by a colleague on 4 February 2014) showing worn black paint revealing yellow paint and his opinion that that demonstrated that "pedestrians have interacted with this edge on numerous occasions"[14] was irrelevant to a consideration of whether the risk of tripping was not insignificant when the incident occurred on 5 October 2012. Given the time that had elapsed, assessing whether the risk of tripping was "not insignificant" on the basis of Dr Ludcke's report involved the use of hindsight rather than approaching the question prospectively. In any event, Dr Ludcke's evidence was said not to support the trial judge's conclusion, since his evidence in cross-examination was that "Tripping, stepping on, … even stepping on top of it and slipping down the slope will create a higher friction, higher wear scenario

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14 AB at 339.

than a standard footstep on flat ground". It was submitted that the wear on the plinth was thus not necessarily caused by tripping but could be created "as a result of pedestrian interaction". Moreover, the applicant argued that Dr Ludcke's evidence, as the trial judge acknowledged, was "circumstantial evidence only that others had tripped or slipped through the patterns of wear". It was argued that it did not support the conclusion at [20] that others had *in fact* tripped on the plinth, which was the risk identified by the trial judge as giving rise to the risk of injury.

[32] It is true that there was no way of determining when the observable marks of wear on the black plinth were caused. The trial judge's finding at [20] that other people stumbled or tripped on the plinth, formed a basis for the finding that the risk of becoming "not insignificant" occurred once the plinth was painted black. There was no dispute that the plinth had been painted black before Mr Bretz's fall. As mentioned, Dr Ludcke's expertise was not challenged. The applicant's argument faces another difficulty in that the very risk that eventuated was one that was identified prior to the incident. As was submitted on behalf of Mr Bretz, although not determinative, an occupier's knowledge of a situation sufficiently risky to warrant a need to report and discuss it, is a persuasive factor in concluding that the risk was not insignificant. The trial judge's inferential finding that, once the plinth was painted black, other patrons had stumbled or tripped on it, was open on the evidence that was considered by her Honour. However, it was not the critical finding and cannot detract from the finding made at [20].

The Notice of Contention concerning whether bollards ought to have been erected

[33] Given the lack of substance in the submissions that the trial judge erred in finding that the risk of tripping was not an obvious risk and that it was also not an insignificant risk, there is no need to consider the Notice of Contention filed on behalf of Mr Bretz contending that the decision be affirmed on the basis that the trial judge ought to have found that the applicant's failure to erect hoop bollards in the vicinity of the plinth was a breach of its duty and causative of his injury.

Error in failing to find contributory negligence?

[34] I do not consider that the applicant's complaint concerning the trial judge's finding in relation to the issue of contributory negligence has any merit. The applicant relied on the following passage of the reasons:

> "[39] The [applicant] contends that [Mr Bretz] contributed to his own injuries by not looking where he was walking. Mr Bretz may not have seen the plinth even if he had looked at it because it was inconspicuous. He had not noticed it when looking down at his tank. But he was asked whether he watched where he was putting his feet when he moved towards the shop. He said, '*No. I wouldn't have been, I guess. I don't know.*' I am not persuaded that his inadvertence amounted to a failure to take reasonable care for himself. Mr Bretz had to navigate between the close proximity of the bowsers, fuel hoses, and his car. He had to be mindful of those obstructions. The proper placement of the hoses could be confirmed by looking at the hitching points in the middle of the bowsers. Returned to their right place, the

> hoses did not reach the ground. Those circumstances did not oblige Mr Bretz to watch his feet to avoid unexpected obstructions. Such omission would not amount to a failure to keep a reasonable lookout." (footnotes omitted)

[35] The applicant submitted that the trial judge erred in two respects. It was contended that the trial judge erred in failing to have any, or any sufficient, regard to s 23 of the Act, which deals with the standard of care in relation to contributory negligence. There is no merit in the contention that the mere absence of reference to s 23 supported that argument. In truth, the applicant's complaint was as to the decision reached by the trial judge on the issue of contributory negligence. Nor is there merit in the further contention that the trial judge erred in failing to have any, or any sufficient, regard to Mr Bretz's admission that he was not watching where he was walking at the time he fell. The applicant's argument was essentially that the trial judge did not adequately consider the following cross-examination exchange: "*Did you watch where you were walking?--- No. Take off and walk*". Mr Bretz's answer was said to reveal "a cavalier attitude" on his part and a failure to keep a proper lookout for where he was walking. However, the trial judge referred at [39] to the evidence of Mr Bretz of looking at his feet as he moved towards the shop and, as observed in *Astley v Austrust Ltd*,[15] the question for the trial judge was whether Mr Bretz did not, in his own interest, take reasonable care of himself and contributed, by his want of care, to his own injury. That involved a consideration of whether his conduct "amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage".[16] The trial judge's finding that Mr Bretz's inattention fell into the former category was entirely open on her Honour's consideration of the evidence, which included the location of the bowser, hoses and vehicle and the necessary navigation of those elements and the plinth.

[36] A further submission made by the applicant was that the trial judge incorrectly applied the decision in *Cains v Mathers Shoes Pty Ltd*,[17] which, it was contended, was distinguishable from the present case. *Cains* concerned a plaintiff who tripped over a small rise at the entrance to a shop. In relation to the issue of contributory negligence, Fitzgerald P and McPherson JA stated:[18]

> "… where the very intention of the defendant was that the display should attract attention, the plaintiff's conduct in moving along without watching her feet was both predictable on her part and reasonably foreseeable by the defendant as a shopkeeper occupying those premises. The fact that the plaintiff did not look down at her feet when moving along in those circumstances is not evidence of fault on her part."

[37] It was submitted that, unlike the position in *Cains*, there was no evidence that the fuel hoses created obstructions that would take attention away from obstacles on the ground. In support of that contention, it was said that the video footage previously referred to demonstrated a distance between the bowser and the vehicle amply wide for Mr Bretz to traverse without making contact with the fuel hoses. The decision of *Cains* was cited by the trial judge at [16] of her reasons in relation to the statement

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15 (1999) 197 CLR 1 at [30].
16 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 310.
17 [1993] QCA 193.
18 [1993] QCA 193 at 9.

that "as a matter of common experience, a small definite rise is more likely to cause a trip than a substantial step that is easy to see". It was submitted on behalf of Mr Bretz that *Cains* is one of a number of cases supporting the proposition that, as a general rule, pedestrians are not obliged to watch their feet in order to avoid unexpected obstructions as they walk, the plinth in this matter being an example of an unexpected obstruction in the path of travel of Mr Bretz. *Cains* was a case where the display presented in a shop was a distraction for the customer who fell. The plaintiff's conduct in that case of moving along without watching her feet was both predictable on her part and foreseeable on the part of the shopkeeper. That the plaintiff did not look down at her feet was not evidence of fault on her part. The trial judge, in referring to *Cains* was merely emphasising that the small rise was likely not to be noticed particularly where it was camouflaged by being painted black. I see no difficulty in her Honour's approach.

Error in the assessment of damages?

[38] The trial judge found that Mr Bretz had suffered moderate shoulder and wrist injuries and assessed general damages at $11,540. Her Honour awarded special damages for Mr Bretz's claims for medical costs for the shoulder treatment, the shoulder replacement surgery and the associated follow up and a sum for consequent gratuitous care was also awarded pursuant to s 59 of the Act. In doing so, her Honour rejected the applicant's submission that Mr Bretz ought not be permitted to recover the costs of the surgery or care in recuperation because the surgery addressed the pre-existing injury and was required anyway, stating:

> "[63] The shoulder replacement was undertaken in December 2012, 2 months after the fall. Mr Bretz had previously discussed the possibility of that same operation with his general practitioner a year or so before the fall. He was told his heart condition made him unfit for surgery. There was no further mention of surgery in the medical records until after the fall. Mr Bretz said once the possibility of surgery was discounted, it was never raised again until after the fall.
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> [64] After the fall, he pursued the matter. The circumstances indicate that whilst he had a condition that might be alleviated by a shoulder replacement, the level of pain or disability was not bad enough for him to pursue it in the face of the attendant risks. It was only after the fall that it became a risk worth taking. I am satisfied that the surgery would not have been undertaken but for the fall."

[39] The challenge to the assessment of damages turned on para [64] of the reasons. The applicant took issue with the awards for the costs of the surgery and the concomitant care during Mr Bretz's recuperation on the basis that the trial judge erred in finding that the need for shoulder surgery was *causally* related to his fall, contending that the evidence indicated that Mr Bretz had a pre-existing injury to his shoulder.

[40] Section 11 of the Act which deals with factual causation relevantly provides:

> "(1) A decision that a breach of duty caused particular harm comprises the following elements –

(a) the breach of duty was a necessary condition of the occurrence of the harm (factual causation);

…

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty has not been so in breach –

(a) the matter is to be decided subjectively in light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest."

[41] The applicant pointed to the evidence of Mr Bretz's pre-existing tear injury and that surgery to the right shoulder had been considered previously for the same operation he eventually had, but was discounted as unsuitable because of an underlying heart condition. Further, while the report of Dr Shaw, an orthopaedic surgeon, suggested that the incident had aggravated the pre-existing tear, it was also the case that Dr Shaw accepted that the earlier condition was worse than he understood when preparing his report. The applicant accepted that there was evidence that Mr Bretz experienced an increase in the level of his pain following the fall that caused him and his doctors to reconsider surgery and that there was some evidence of a different type of tear in his shoulder. However, it was argued that, given Dr Shaw's misunderstanding as to the extent of the pre-existing damage, Mr Bretz had failed to adduce sufficient evidence to suggest that the surgery was directed to any *alteration* in the underlying condition, rather than simply to the underlying, pre-existing condition itself. It also followed that the trial judge erred in making an award for gratuitous care, since it was not necessitated by the surgery, as it was not causally related to the accident.

[42] I do not accept that there is any substance to the contention that the trial judge erred in relation to her conclusion in para [64]. As her Honour observed at [57] of the reasons, Dr Shaw accepted in cross-examination that Mr Bretz's impairment prior to the accident was worse than he had previously understood to be the case. The fact that a greater apportionment of Mr Bretz's impairment could have been given to the pre-existing injury, in the degree of 50 per cent as opposed to 30 or 40 per cent, does not detract from this finding and the reasoning in paras [63] and [64]. The uncontested medical records, together the evidence of Mr Bretz and Dr Shaw, were capable of supporting the trial judge's finding that there was a worsening of the state of Mr Bretz's shoulder after his fall that was causally linked to Mr Bretz's decision to undergo the surgery. In particular, there was evidence that, while Mr Bretz chose not to have surgery before the accident given the attendant associated risk, the increased pain experienced after the incident meant, as the trial judge found, that the risk was worth taking to alleviate the pain. The trial judge was entitled to consider that the test for causation set out in s 11(1)(a) of the Act had been met.

[43] On the hearing of the application, the applicant expanded on its contention that Mr Bretz was not entitled to an award for gratuitous services. It was argued that, given Mr Bretz's medical history of right shoulder symptomology, he had not satisfied the requirement in s 59(1)(b) of the Act that the need for the services arose

"solely out of the injury in relation to which the damages were awarded", as the need for the services was also related to the underlying pre-existing shoulder condition. That submission also is without merit. Her Honour gave detailed consideration to Mr Bretz's pre-existing injury, his general state of health and anticipated decline in his condition due to aging in assessing damages for gratuitous services. On behalf of Mr Bretz, reference was made to the New South Wales authority of *Woolworths Ltd v Lawlor*[19] dealing with s 15(2)(b) of the *Civil Liability Act* 2002 (NSW), the analogue to s 59 of the Act. That decision was approved in *Angel v Hawkesbury City Council*.[20] Particular reference was made to the following observations in *Lawlor* by Beasley JA (with whom Hodgson and Tobias JJA agreed):

> "[28] … [The appellant defendant] submitted that s 2(b) only operated where there was no other cause or reason why the gratuitous services needed to be provided. An example on the appellant's argument in which an award under s 15 would be precluded was where a plaintiff with pre-existing symptomatic degenerative changes already required assistance of say five hours per week at the time of an accident. If, as a result of an accident causing an aggravation of those pre-existing changes, it was found that such a person needed more attendant care services, say 15 hours per week, there was no entitlement under s 15 because of the operation of s 15(2)(b). In other words the need for attendant care services had more than one cause. The opposing argument and one which was adopted by senior counsel for the [plaintiff] respondent, was that in such a case, the plaintiff would be entitled to an award of ten hours for gratuitous attendant care services because the need for those ten hours had arisen 'solely because of the injury to which the damages relate'. This construction derives directly from the definition of 'injury' which includes 'impairment of a person's physical or mental condition'."

[44] This is not a case where a pre-existing symptomatic condition required assistance. There is no basis to impugn the finding at [91] that prior to the incident, Mr Bretz had been remarkably self-sufficient. In relation to future care, her Honour also stated that:

> "[91] …The injury had a serious impact on his life. However, the pre-existing injury and Mr Bretz's advancing age is relevant to the likely need for future care. There is a substantial likelihood that, even without the fall, Mr Bretz would have developed the need for the same kind of care (whether at the same or a lesser level) at some time in the future. Diminishing independence is an unfortunate symptom of old age for most people. In addition, Dr Shaw identified that the pre-existing condition was likely to deteriorate with time.
>
> [92] It is impossible to approach the matter with precision, but the discount of 15% for vicissitudes suggested by the plaintiff is too low. Given the inevitability of decline, I allow 45%."

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19 [2004] NSWCA 209 at [28]-[29].

20 [2008] NSWCA 130 at [130]. See also *Westfield Shoppingtown Liverpool v Jevtich* [2008] NSWCA 139 at [22]-[26].

[45] Her Honour discounted the award to allow for both inevitability of decline due to old age and the pre-existing condition, an approach consistent with *Lawlor* and not illustrative of error.

Error in dismissing the third party proceeding?

[46] The second respondent provided design, engineering and construction supervision to the applicant during the renovation of the service station pursuant to three successive contracts, the third of which was dated 20 April 2009 and concerned the stage 3 contract. Each contract contained an identical exclusion clause, relevantly cl 8, which provided:

> "After the expiration of one (1) year from the date of invoice in respect of the final amount claimed by [the second respondent] pursuant to clause 4, [the second respondent] shall be discharged from all liability in respect of the services whether under the law of contract, tort or otherwise."

[47] The trial judge dismissed the third party proceeding brought by the applicant against the second respondent alleging that, if the plinth was a tripping hazard, it was because it had been negligently designed by the second respondent, who was thus a joint tortfeasor who had breached its duty to the applicant. The applicant's argument was that there had been negligence in the design of the plinth in that it should not have extended the distance it did. That design was unconventional design and there was no evidence of a reason for the extension. Alternatively, it was said that there was negligence in the design specification that the extension be painted black. The second respondent denied that it had acted negligently and, in the alternative, contended that cl 8 was effective in excluding its liability.

[48] The trial judge dismissed the third party claim against the second respondent on the basis of the operation of the exclusion clause. In doing so, her Honour found that there was an obvious typographical error in the reference in cl 8 to cl 4. That reference was nonsensical and intended to refer to cl 5, which imposed upon the applicant an obligation to pay the second respondent's fees and expenses and in respect of which a final invoice could be made. No challenge is made to that finding.

[49] The trial judge construed cl 8 to limit the liability of the second respondent to 12 months from the date of the invoice in respect of the final amount claimed under cl 5. Her Honour rejected the applicant's contention that the expiration of the relevant time period had not been proved. Having held the exclusion clause applied, the trial judge did not find it necessary to make any findings as to whether or not the second respondent had been negligent as alleged by the applicant.

[50] In finding that the applicant's claim was made after the expiration of the time period in cl 8, her Honour referred to the bundle of invoices and payment certificates in evidence, including the last certificate dated 9 November 2009 and the last invoice dated 31 January 2010 and stated at [104]:

> "There was no document in evidence purporting on its face to be a final claim. The [applicant's] argument is that without proof there was a compliant final claim under the [*Building and Construction Industry Payments Act* 2004 (Qld)], there was no invoice that satisfied clause 8. But clause 8 only required that an invoice for the final amount issue. While

> there was no direct evidence as to when or what was the final invoice, it is reasonable to infer that the final invoice issued more than some years ago. The station opened in 2010. I am satisfied, on balance, that the [applicant's] claim against the third party was out of time."

[51] The applicant raised two matters. The first matter was that the trial judge erred in finding that that the second respondent proved that the claim was made against it *after the expiration of one year from the date of the invoice in respect of the final amount claimed*. The second matter raised by the applicant concerned whether the second respondent's liability arose *in respect of the services provided under the contract*.

[52] As to the first matter, the applicant's contention was that there was no evidence that the invoice dated 31 January 2010 was the invoice for the final amount claimed. The second respondent contended that not only was the trial judge correct to find that the invoice dated 31 January 2010 was a final invoice, but (contrary to her Honour's view) there was direct evidence in support of that conclusion. In contending that there was clear evidence to support the finding the second respondent relied upon a document tendered as part of the bundle at trial without objection. The document was a summary dated 17 January 2011 in support of an adjudication application brought by the second respondent. It referred to a payment claim dated 26 November 2010 and adjudication application filed on 17 January 2011. In outlining, the "Project Background" summary stated: "This payment claim relates to Stage 3 project management of construction works for the Bundaberg service station". It also stated that "Stage 3 Construction Practical Completion was reached on 2 December 2009 with a 12 months defects liability period ending 2 December 2010". The payment claim was stated as being for the "balance outstanding" for Stage 3 Project management services. That document and the fact that, unlike the previous invoices, the invoice of 31 January 2010 referred to "final" certificates being held pending finalisation and completion of outstanding accounts, provided abundant evidence for her Honour's finding that the invoice of 31 January 2010 was the invoice in respect of the final amount claimed. In those circumstances, there is no basis for the impeaching of the trial judge's process of reasoning in inferring that the final invoice was issued "some years ago".

[53] In those circumstances, it is not necessary to deal with the issue raised in the second respondent's written submission, that the applicant's reply contained a deemed admission, because the third-party defence in raising the exclusion clause provided tax invoices dated 31 May 2009 and 31 January 2010 as particulars of the final invoice, but the applicant did not respond to that part of the pleading. As counsel for the second respondent himself raised with the Court, the trial was conducted on the basis that the matter was in fact in issue. Quite properly, counsel did not seek to further the written submission.

[54] In advancing its second contention, that the second respondent's liability did not arise "in respect of the services provided under the contract", the applicant placed reliance on *Darlington Futures Ltd v Delco Australia Pty Ltd*.[21] In that case, it was held that a contractual exemption of liability in a brokerage contract did not apply to brokerage contracts undertaken without its client's authorisation, such conduct being outside the purview of the contract. By analogy, the applicant argued that the second respondent had failed to ensure adequate supervision in order to detect that the plinths were not

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21 (1986) 161 CLR 500 at 511.

constructed or painted in accordance with the second respondent's designs, resulting in a breach of the second respondent's contract. It was contended that, according to the designs of the second respondent, the plinths were intended to have a sloping edge and be painted the same colour (being black) as the surrounding tarmac, whereas the plinths, when constructed, had a vertical edge and were painted yellow. The failure to ensure that the construction was as in accordance with the second respondent's designs was said to constitute a breach of contract. Therefore, the second respondent had failed to perform the "services", with the result that the exclusion clause was not in effect. There is no substance in this argument.

[55] Leaving aside that this was not the applicant's case before the trial judge, which the applicant candidly acknowledged, as the second respondent submitted, *Delco* does not assist the applicant; that case concerned an agent acting outside its authority and thus outside the contemplation of the contract. In the present case, whether framed as a breach of contract or as tortious negligence, the applicant's complaint was clearly "in respect of the services" that had been contracted.

Second respondent's Notice of Contention

[56] The second respondent filed a notice of contention by which it contended that her Honour ought to have held that the second respondent was not negligent and that Mr Bretz's loss and damage was not caused by anything the second respondent did or failed to do. Rather, it was caused only by the applicant's decision to paint the plinths black and the applicant's failure to take any reasonable measures to ameliorate the foreseeable risk of injury to Mr Bretz (or people like him), when that very risk had been identified by its employee, Ms Nerad, after the applicant caused the plinths to be painted black. The second respondent submitted that the third party proceedings were a disingenuous attempt to shift liability in circumstances where the evidence established that the applicant's own negligence was the cause of Mr Bretz's loss and damage. Given that there is no substance in the complaint that the trial judge erred in dismissing the third party claim against the second respondent, it is not necessary to consider the second respondent's Notice of Contention.

Order

[57] The order that I would make is that the application for leave to appeal be refused with costs.

[58] **BOND J:** I agree with the reasons for judgment of Philippides JA and with the order which her Honour proposes.