[2002] WASCA 7

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	THE ROMAN CATHOLIC BISHOP OF BROOME -v- WATSON [2002] WASCA 7
CORAM	**:**	WALLWORK J SCOTT J OLSSON AUJ
HEARD	**:**	21 NOVEMBER 2001
DELIVERED	**:**	1 FEBRUARY 2002
FILE NO/S	**:**	FUL 94 of 2001
BETWEEN	**:**	THE ROMAN CATHOLIC BISHOP OF BROOME Appellant (Defendant) AND ELEANOR FRANCES WATSON Respondent (Plaintiff)

Catchwords:

Negligence - Contributory negligence - Employer's duty of care - Employee tripped on protruding rock in remote school grounds - Whether a foreseeable risk of injury

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant (Defendant)	:	Mr M H Zilko
Respondent (Plaintiff)	:	Mr I L K Marshall

Solicitors:

Appellant (Defendant)	:	Pynt McKay
Respondent (Plaintiff)	:	S C Nigam & Co

Case(s) referred to in judgment(s):

Brodie v Singleton Shire Council [2001] HCA 29
Crombie v Uniting Church in Australia Property Trust (WA) (1997) 17 WAR 291
McLachlan & Ors v Purchas & Ors [1998] WASCA 350
Mifsud v Campbell (1991) 21 NSWLR 725
Romeo v Conservation Commissioner (NT) 192 CLR 431
Vozza v Tooth & Co Ltd (1964) 112 CLR 316
Wyong Shire Council v Shirt (1979-80) 146 CLR 40

Case(s) also cited:

Abalos v Australian Postal Commission (1990) 171 CLR 167
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430
Devries v Australian National Railways Commission (1993) 177 CLR 472
Kelly's (Coleambally) Pty Ltd v Malone [2001] NSWCA 146
Lloyd v Faraone [1989] WAR 154
Stannus v Graham (1994) A Tort Rep 81-293
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) (1999) 73 ALJR 306
Warren Coombes (1979) 53 ALJR 293

1 **WALLWORK J**: I agree with the reasons for judgment of Scott J and with the conclusions which have been reached by his Honour.

2 There is nothing I wish to add.

3 **SCOTT J**: The appellant (defendant) has appealed against the decision of Judge Charters of the District Court held at Perth in which his Honour found the appellant (defendant) liable in negligence. The respondent (plaintiff) was injured when she tripped and fell at the John Pujanjangka-Piyirn Catholic School ("the school") at Mulan, near Lake Gregory.

4 The facts surrounding the accident were that at around about 10.00 am on 20 November 1996 whilst in the course of her employment the respondent was walking on a gravel pathway from the front of the staff room going towards the adult education block which was also known as the primary/pre-primary school when she tripped over an embedded protruding stone on the pathway. She fell heavily to the ground and was injured.

5 The school is situated in a very remote area of Western Australia near Lake Gregory, south of Halls Creek. The school is towards the Northern Territory border in arid country.

6 The respondent at the relevant time was a 62 year old teacher having spent many years with the Education Department in Western Australia. The respondent had been employed by the appellant since January 1994 and had worked at Balgo Hills as a secondary school teacher. In November 1994 she was given training for the duties of a principal by the Catholic Education Office in Leederville and in December 1994 she took over the position of principal at the school. The school premises comprised a primary school, a pre-primary school and a secondary school. The primary and pre-primary schools had been built in the 1980's but the secondary school had been constructed in the early 1990's. There were pathways constructed between some of the buildings but there was no constructed pathway between the primary/pre-primary school and the secondary school.

7 When the respondent first went to the school as principal there was one pre-primary teacher, two primary teachers, two secondary school teachers, one adult education teacher and herself. In addition there were some 40 to 60 students.

8 The appellant's evidence was that there was constant traffic between the pre-primary/primary school and the secondary school.

9 The respondent's claim arose from an incident which occurred on 20 November 1996 at around 10.00 am, when the plaintiff was walking on the gravel pathway in front of the staff room to go to the adult education block. She tripped over an embedded protruding stone on the pathway between the two buildings, fell heavily to the ground and was injured.

10 The respondent sued the appellant under the provisions of the *Occupiers Liability Act 1985* and also for negligence. The defendant denied negligence and pleaded that the plaintiff was under a duty to ensure her own safety and health at work. In addition, the appellant pleaded contributory negligence.

11 The learned Judge found the appellant negligent and dismissed the appellant's claim for contributory negligence against the respondent.

12 The only issue for determination by the trial Judge was the question of liability. He was not required to make an assessment of the plaintiff's damages.

13 The grounds of appeal are:

> "1. The learned trial judge erred in law in failing to deal at all in his reasons for decision with a substantial body of evidence led in the case about the state of the path on which the Respondent fell and the general state of the terrain in and around the school grounds.
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> **Particulars**
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> (a) In his reasons for decision the learned trial judge did not refer to or have any regard for the evidence of Peter David Pullen, Caroline Hunneybun, Sister Veronica Ryan, Sister Marie Williams and Bernadette Kennedy all of whom gave evidence for the Appellant regarding the safety of the path on which the Respondent fell;
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> (b) the learned trial judge referred in his reasons for decision to minor and selective parts of the evidence of the Appellant's witnesses Matthew Murray Harold Edwards, Diana Louise Edwards,

Vernon Charles Stanford, Sister Janet Lowe and Sister Barbara Raye Broad but did not refer to or have any regard for the substantive evidence given by each of them regarding the safety of the path on which the Respondent fell;

(c) the learned trial judge failed to refer in his reasons for decision to any of the cross-examination of the Respondent or the witnesses called by the Respondent, namely, Graeme Campbell, Dennis Frederick Kickett, Andrew Hugh Christopher Christie, John Chalwell, Gladys Chalwell and Alistair Alphonsus Peacock notwithstanding that several of those witnesses made important concessions to their primary evidence on the safety of the path;

(d) the overwhelming weight of the evidence to which the trial judge did not have regard, and which is referred to in sub-paragraphs (a), (b) and (c) above, was to the effect that there was nothing unusual about the path on which the Respondent fell, that it was not dangerous, that it was no different to any other part of the school terrain or the area surrounding the school and that the path did not pose a foreseeable risk for users;

(e) by reasons of the above matters it is not possible to know whether the learned trial judge rejected all or part of the evidence before him and, if so, upon what grounds, or whether he accepted all or much of it but drew from it inferences different to those which were contended for by the parties, or whether the learned trial judge overlooked some or all of that evidence to which he did not refer in arriving at his ultimate findings.

2. The learned trial judge erred in law in failing to properly evaluate all of the evidence given at the trial.

Particulars

The Appellant repeats the particulars in paragraph 1 above.

3. The learned trial judge erred in law in finding that the Appellant was negligent in failing to construct a concrete path in the area where the Respondent fell, such finding being manifestly against the weight of the evidence.

    (a) The Respondent adduced no evidence that anyone else had been injured by falling on the path either prior to or since her accident;

    (b) the Respondent admitted that she used the path six to eight times per day over two years (in excess of 2,000 journey) without mishap;

    (c) none of the witnesses called by the Respondent could say that they knew of any accident occurring on the path;

    (d) the witnesses called for the Appellant and the Respondent in relation to the nature of the path described it as typical of the terrain of the school and the area surrounding the school, such that the path itself was indistinguishable from any other area in the school. If anything, the witnesses described the path as more level and less affected by small stones and pebbles than other areas in and around the school;

    (e) the Respondent gave evidence that she tripped on a stone which protruded 1 – 1-1/2 inches from the ground, and that she was aware before the accident of other similar stones on the path but had never tripped or fallen on those other stones despite undertaking numerous journeys on the path;

    (f) the Respondent failed to establish that the stone on which she fell was any more than an everyday risk which the Respondent could have avoided by taking care for her own safety."

14 In developing the grounds of appeal, senior counsel for the appellant contended that the learned trial Judge had failed to refer adequately to the evidence and particularly had failed to refer to substantial bodies of evidence called by the appellant at the trial. Senior counsel for the

appellant accepted that the learned trial Judge had, in his judgment indicated that he accepted the evidence of the plaintiff and her witnesses but maintained that the learned trial Judge had not adequately considered the evidence called on behalf of the appellant.

15 Having reviewed the evidence called on behalf of the parties at trial, whilst it is fair to say that the learned trial Judge summarised the evidence in a succinct manner, I am quite unable to conclude that his Honour failed to deal with the evidence adequately. The learned trial Judge summarised the evidence called for each of the parties without going into detail. Having indicated that he accepted the evidence called by the plaintiff, his Honour said at [45]:

> "The evidence called on behalf of the defendant does not persuade me to take the view that I cannot rely upon the evidence of the plaintiff and her witnesses."

16 The trial Judge then went on to refer to the evidence called on behalf of the appellant, but did not refer in any detail either to the cross-examination of the plaintiff and her witnesses, nor indeed, to the cross-examination of the defendant's witnesses.

17 In ***Mifsud v Campbell*** (1991) 21 NSWLR 725 Samuels JA with whom Clarke JA and Hope AJA agreed said at 728:

> "In *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, the High Court (at 667) said that it was right to describe the giving of reasons as 'an incident of the judicial process' although a normal but not a universal one. In *Soulemezis v Dudley (Holdings) Pty Ltd (1987)* 10 NSWLR 247, McHugh JA (at 278) makes some comments upon that holding, and goes on to say (at 281) that the failure to explain the basis of a crucial finding of fact involves a breach of the principle that justice must not only be done but must be seen to be done.
>
> Similarly, in my opinion, it is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case.

> Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge – as the defendant's denial of having consumed alcohol – may promote a sense of grievance in the adversary and create a litigant who is not only 'disappointed' but 'disturbed' – to use the words which appear in the New Zealand case of *Connell v Auckland City Council* [1977] 1 NZLR 630 at 634."

18 Having taken those principles into account, I am unable to conclude that this ground of appeal is made out.

19 The learned trial Judge held that the respondent had sought approval for the construction of a concrete or cement pathway of a verandah type which he considered reasonable. His Honour held at [61]:

> "That construction was desirable, for safety and convenience and bearing in mind the terrain and the considerable traffic along that pathway it was foreseeable that someone could be injured by tripping and falling over uneven and stony ground.
>
> The defendant was in breach of his duty of care to his staff and others using that path, in failing to make it as safe as was reasonably possible."

20 Senior counsel for the appellant criticised this paragraph of the judgment of the learned trial Judge in that it was submitted that the wrong duty of care was applied by his Honour. In that respect it was said that the appellant's duty was not to make the path "as safe as was reasonably possible" but to take reasonable care for the safety of the respondent.

21 Senior counsel for the appellant maintained that the path although not sealed was not unusual in any sense of the word. He submitted that the path being made of gravel had pebbles and stones on it, but that such a path was commonplace in the Kimberley region. He contended that there was no failure to take reasonable care on the part of the appellant by not concreting this path.

22 Senior counsel for the appellant pointed out that many witnesses were called by the appellant at the trial who testified that the path had been used daily and on many occasions by witnesses who said that they

had no trouble traversing it. Counsel maintained however that the learned trial Judge had erred in failing to refer to that evidence.

23 In my view it is important to analyse carefully the reasons of the trial Judge. The path in question was an extensively used path traversing about 30 metres between the primary/pre-primary school and the secondary school (which included the adult education centre). The pathway was never constructed as a pathway. As his Honour the trial Judge said: "It came into being by use as a walkway from the administration block to the secondary school".

24 It is important also to note the circumstances surrounding the accident. On the day in question the respondent was walking with a prospective adult education officer from her office in the administration block towards the adult education centre. She was wearing jogging shoes and socks. Upon descending from the concrete verandah she walked at a casual pace with the prospective employee and about four to five metres from her office close to the area of a tree "her left foot struck an object causing her to lose her footing and fall forward to the ground". The trial Judge found that the respondent had tripped on a stone, fallen to the ground and struck her left knee and right wrist.

25 In my view, importantly, there had recently been rain in the area. The respondent's evidence was that she frequently used the path without difficulty. She said in her evidence "it had rained on previous days and the ground was slippery in patches and new rocks had been unearthed". That evidence in my view was significant. Without a sealed pathway, this area which was frequently traversed by the respondent, may well have changed its physical characteristics. As the respondent said in her evidence because of the rain "new rocks had been unearthed". In such circumstances, a danger such as an unearthed section of rock was, in my view, foreseeable. With the notorious heavy rain in the Kimberleys, on unsealed portions of ground, rocks of the type encountered by the plaintiff, can be, and frequently are, uncovered. In this case the respondent's evidence was that the stone in question had been unearthed to the extent of an inch to an inch and a half and it was implied in her evidence that the rock was embedded in the soil to such an extent as to cause her to trip.

26 The respondent was obviously familiar with the area, and said in her evidence that she used the path on average six to eight times a day. In cross-examination the respondent said that because of the recent rains the stone must have been unearthed. Whether it was the rain alone, or the

rain coupled with strong winds that caused the stone to be unearthed, she did not know.

27 There were other concrete pathways constructed around the school but not in this particular area.

28 The respondent's evidence was not that she had tripped on a pebble or a stone, as was submitted by senior counsel for the appellant, but rather that she had caught her foot on the embedded rock which was protruding from the ground. Such a protrusion is of course significant, particularly on a path which was frequently used by the respondent without difficulty.

29 On the evidence, in my view, it was open to the learned trial Judge to conclude that this previously unearthed section of rock had been exposed either by wind or rain or both so as to create a protrusion on or near the path on which the respondent tripped. In that respect in his findings, the learned trial Judge said at [64-66].

> "There has been evidence given by the plaintiff of recent rain which may have unearthed the protruding stone. Other evidence was given that insignificant rain fell in relatively close districts in November. I accept the plaintiff's evidence despite that of the Department of Meteorology as the latter did not record rainfall at Mulan. That evidence does not, however, bear upon my judgment that the path was potentially a risk to those walking along it and a protruding stone resulted in the plaintiff's injury.
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> The risk is particularly evident when one has regard to the pre-occupation of a busy principal involved in her daily work, travelling frequently between the buildings.
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> The absence of any earlier recorded injury does not absolve the defendant from ensuring that much used pathways should be safe."

30 In analysing the appellant's submissions it is important to recall that this was not a public roadway but a small school in the Kimberleys at which the respondent worked. In that respect the case is to be contrasted with ***Brodie v Singleton Shire Council*** [2001] HCA 29. In the course of her employment the respondent was required to traverse the path frequently each day. The appellant's duty of care towards the respondent was that which an employer owed to his employee that is "to take reasonable care for the safety of employees" ***Crombie v Uniting Church***

in Australia Property Trust (WA) (1997) 17 WAR 291 per Malcolm CJ at 301. An employer is not required to safeguard employees completely from all perils – ***Vozza v Tooth & Co Ltd*** (1964) 112 CLR 316 where Windeyer J with whom McTiernan, Kitto, Taylor and Owen JJ agreed said at 318:

> "The statement that the common law requires that an employer have a safe system of work for his employees means only that he must take reasonable care for their safety. It does not mean that he must safeguard them completely from all perils. 'The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle'. That statement, made by Lord Keith of Avonholm in *Cavanah v Ulster Weaving Co Ltd* [1960] AC 145 at 165 was repeated and approved by the House of Lords in *Brown v Rolls Royce Ltd* [1960] 1 WLR 210."

31 Senior counsel for the appellant maintained that the learned trial Judge was in error when he said:

> "The defendant was in breach of his duty of care to his staff and others using that path, in failing to make it as safe as was reasonably possible."

32 Read in context, however, in my view the trial Judge was not expressing a principle of law but rather a conclusion of fact at the end of his analysis of the factual evidence. Later in his reasons at [69] his Honour said:

> "The defendant failed to exercise reasonable care for the safety of the plaintiff and is liable in damages for the injury suffered by her."

33 In my view his Honour's conclusion of law was expressed at par 69 rather than at par 62 and I am not persuaded that his Honour applied the wrong principle.

34 Senior counsel for the appellant maintained that the evidence established that there had been no prior accidents of this type on the relevant path at the school. The evidence supports that contention. Counsel for the appellant maintained that the risk of injury to the plaintiff was unlikely, and I accept that as being so. That, however, does not mean that such a risk of injury is not foreseeable – see ***Wyong Shire Council v***

Shirt (1979-80) 146 CLR 40 per Mason CJ with whom Stephen and Aickin JJ agreed at 47.

35 Senior counsel for the appellant also relied upon the decision of ***McLachlan & Ors v Purchas & Ors*** [1998] WASCA 350 which was a case involving a dental nurse who slipped on an area of wet grass whilst alighting from her motor vehicle. The appellant was on her way to work. She had been working for about a year prior to the accident. The appellant when she went to alight from her vehicle put her right leg out of the vehicle and was in the process of standing when her right foot slipped on the wet grass causing her to fall. She sued for negligence and pursuant to the *Occupational Safety and Health Act 1994* and the *Occupiers Liability Act 1985.* The trial Judge dismissed her claim. On appeal Miller J, with whom Kennedy and Pidgeon JJ agreed, said at 5:

> "The learned trial Judge was, in my view, correct in equating any risk to persons parking on wet and possibly slippery grass with an 'every day risk which members of the public avoid by taking care for their own safety', …In the every day activities of life many people will step out of their motor vehicles onto a wet and sometimes slippery grass surface. That does not, however, constitute either a 'danger' within the meaning of the *Occupiers' Liability Act*, nor a 'hazard' within the meaning of the *Occupational Safety & Health Act*, nor, in my view, is it a foreseeable risk of injury against which a prudent employer should guard in relation to his employees. It is nothing more nor less than an every day experience. If it be categorised as 'risk' at all, it is the very risk which citizens in the course of their daily activities are required themselves to guard against."

36 As I have already indicated in my view, the danger in this case was not an ordinary and everyday risk. The embedded rock in question had been unearthed, either by heavy rain or wind or the combination of both. The path which was frequently used by the respondent was in a changed condition. The embedded rock which protruded an inch and a half was a significant hazard which was not an ordinary everyday risk which the respondent would have been expected to guard against.

37 The risk in this case could easily have been avoided by the construction of a concrete path. Whilst senior counsel for the appellant contended that no evidence was given concerning the construction of such a path, the appellant said in cross-examination that paths were provided for in the specifications for the school. Whilst it is correct to say that

neither the architect nor the builder of the school testified as to that aspect of the matter, the appellant's evidence emerged in cross-examination. The plans produced in evidence indicated that pathways were originally included in the plans, but they were never in fact constructed. The respondent testified that she had sought to have a path constructed, (not for the reason of preventing the protrusion of rocks), but for protection from the weather. A solution to the problem that caused the respondent's injury was readily available and inexpensive. In that respect there was evidence that other schools in this area of the Kimberleys did have sealed pathways. Photographs of another school, produced in evidence as part of the plaintiff's case, showed constructed pathways. The fact that a simple and inexpensive solution to the problem was readily available, was a matter properly to be taken into account. In ***Romeo v Conservation Commissioner (NT)*** 192 CLR 431 Toohey and Gummow JJ said [53]:

> "If reasonable foreseeability is isolated from any other consideration, there may have been a 'risk' of someone falling over the edge of the cliff in the sense used by Mason J in *Wyong Shire Council v Shirt* (1981) 46 CLR 40 at 48:
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> > 'A risk which is not far-fetched or fanciful is real and therefore foreseeable.'
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> But in the present case the risk existed only in the case of someone ignoring the obvious.
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> In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality. But reasonable steps did not extend to fencing off or illuminating the edge of a cliff which was about 2 km in length."

38 The evidence in this case, which the learned trial Judge accepted, indicated that there was a proposed and effective solution to the problem which caused the respondent's injury, namely the sealing of the pathway so as to prevent unearthed and embedded rocks from becoming exposed.

39 Senior counsel for the appellant contended that the construction of such a path may have created a greater hazard. Apparently, children at the school played in the area where the path would have been constructed,

and because of heavy rain, it is possible that the path would have been slippery. However, paths can be constructed in such a manner as to minimise those risks, and there is no reason to suppose that such a path could not have been constructed in this case. The construction of such a pathway would have minimised or eliminated the risk which brought about the plaintiff's injury.

40 I am not persuaded that the appellant's grounds of appeal, or any of them, have been made out. Whilst in my opinion the reasons of the learned trial Judge could have been more comprehensive, I am unable to conclude that any error of fact or law has been demonstrated.

41 I would dismiss this appeal.

42 **OLSSON AUJ**: I have had the advantage of reading the judgment of Scott J in this matter, in draft. I agree with both his reasoning and also the conclusion to which he has come.

43 There is only one specific point that I would seek to emphasise.

44 As Scott J emphasises, the extent to which a trial Judge is required to review specific evidence in detail necessarily depends on the circumstances of the case.

45 In the case at bar, having regard to the aspects referred to by Scott J, there was simply no point in traversing much, if not all, of the evidence adverted to by the appellant in detail because, having regard to the primary findings made, there would have been no profit in doing so.

46 The plain fact was that, regardless of the past history of use of the relevant area as a traffic way (it not even being a formed pathway), the learned trial Judge was amply entitled to conclude that, on the balance of probabilities, recent rain had unearthed the projecting segment of rock which caused the respondent to trip and fall.

47 I agree with Scott J that such a possibility was plainly foreseeable in the particular locality and could readily have been avoided, at relatively small cost, by the construction of a proper concrete path. That was a conclusion of practical common sense.

48 For the reasons expressed by Scott J, the various grounds of appeal have not been made good. I, too, would dismiss the appeal.