October 2023

Case Note

"Obvious risk" a key consideration in personal injury cases

Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 (July 2023)

In *Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161*, it was held that tripping on a raised edge formed by a pit lid and frame set in a footpath was an "obvious risk" under the *Civil Liability Act 2002* (NSW) (***CLA***).

Facts

On 2 February 2017, Ms De Roma (**respondent**) was injured when she tripped and fell while walking over a utility pit lid and metal frame set in a concrete footpath (**pictured**) on Parramatta Road, Ashfield NSW (**the incident**). Immediately prior to the incident, the respondent was walking quickly to catch a bus, that had stopped and was waiting for her.

The pit lid surface and surrounding frame had a height differential of up to 10mm. The appellant, Ausgrid, was responsible for the inspection, maintenance and safety of the pit lid and frame.

Initial District Court Decision

The primary judge ruled in favour of the respondent's claim for damages in negligence, on the grounds that Ausgrid breached its duty of care as occupier of the pit lid, to warn the respondent of the height differential between the pit lid, and the surrounding metal frame.

His Honour stipulated that a reasonable person in Ausgrid's position would have taken the precaution of "*painting or applying lines on the raised surface in an obviously bright colour in order to draw attention to the trip hazard so posed*".

Notwithstanding the primary judge's ruling regarding Ausgrid's failure to warn the respondent of the risk, His Honour also applied a 20% discount for contributory negligence. This discount was applied due to the respondent's *"lack of due self-care… because as [the respondent] approached the pit lid there was a need for her to consider whether the pit lid and its structure was a safe thing to walk upon as it may not have been a uniform area of uninterrupted pavement"*.

Decision on Appeal

Grounds of Appeal

Ausgrid contested the primary judge's finding of negligence, on several grounds. In particular, Ausgrid argued that the risk of tripping on the uneven surface of the pit lid was an obvious risk as defined in s 5F(1) of the CLA. Consequently, it was asserted that, pursuant to s5H(1) of the CLA, there was no obligation for Ausgrid to provide a warning of the risk.

Held

On appeal, their Honours Meagher, Mitchelmore and Kirk agreed that the raised edge of the utility pit lid and frame created a risk of tripping and falling due to the uneven surface. However, it was held that this risk was an obvious risk pursuant to s 5F(1) of the CLA, and therefore triggered the application of s 5H(1). As a result, Ausgrid did not owe a duty of care to the respondent to warn her of the raised edge of the pit lid.

In determining whether the 10mm height difference between the level of the utility lid surface and the top edge of the footpath frame constituted an "obvious risk", Meagher JA at [54] – [55] stated the following:

> *With respect to that risk of harm, the relevant question posed by s 5F(1) … was whether it was obvious that a risk of that kind might be present and materialise as she walked across the footpath containing the utility pit lid and frame.*
>
> *Walking towards the utility pit lid and frame, the following matters were readily apparent and obvious. There was a checkerplate steel lid which was set in some sort of a steel frame in the concrete footpath ahead. The rusty colouration of the edges of the steel plate surface and frame suggested that there was a gap between the steel plate and frame, and that there might be height discrepancies between the level of the plate and the frame edges, and between those edges and the surrounding concrete. That meant that there were or were likely to be uneven levels or surfaces within that area which presented a risk of tripping.*

The appeal was successful, and the District Court judgement was overturned.

Implications

The outcome of this appeal further encourages a common sense approach to cases involving trips in public places.

Every reasonable person should have some understanding that "*not all footpaths are perfectly level. Many footpaths are unpaved. People are regularly required to walk on uneven surfaces on both public and private land*"[1]. A failure by an individual to take due care for their own safety, will not automatically qualify as negligence of another party.

Whilst this case analysed the application of the CLA (in particular ss 5F and 5H), similar provisions can be found in other jurisdictions[2]. As such, this decision provides valuable guidance on the way in which Courts in many jurisdictions may assess whether a risk is an "obvious risk", as well as the application of the reasonable person test in similar personal injury cases.

This Insurance Insight was written by Associate Illana Kraus and Lawyer Shenay Ozsoy, with assistance from Principal Robert Minc. For further information, please contact Robert.

[1] *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 29 at [6]

[2] See ss 53 and 56 of the *Wrongs Act 1958* (Vic), s43 of the *Civil Law (Wrongs) Act 2002* (ACT), ss13 and 19 of the *Civil Liability Act 2003* (Qld), ss 15-20 of the *Civil Liability Act 2002* (Tas), ss 36-39 of the *Civil Liability Act 1936* (SA), and ss 5H-5J, 5M-5P of the *Civil Liability Act 2002* (WA).

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Robert Minc
Principal
+61 3 9810 6765
rminc@meridianlawyers.com.au

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