

WALK THIS WAY - COURT OF APPEAL RULES ON OBVIOUS RISK

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“Occupiers are entitled to assume that people will take care not to trip on the multitude of obstacles, both large and small, that are likely to be in their paths in walking from one place to another.”

In the recent case of *Council of City of Sydney v Bishop* [2019] NSWCA 157, the Council successfully appealed a verdict which awarded an injured plaintiff \$750,000 in damages. The majority in the Court of Appeal found that the Council breached no duty of care in allowing the construction of a kerb in a pedestrian walkway, and upon application of s5F of the *Civil Liability Act 2002* (NSW) (the CLA) found no duty to warn pedestrians of an obvious risk.

IN ISSUE

- Whether the council owed a duty to warn pedestrians of a height differential.
- Whether the risk was obvious.
- Whether the failure to use yellow highlighting constituted breach of a duty to warn.
- Whether absence of warning causative of harm to the plaintiff aware of the hazard.

THE BACKGROUND

In 2013 the plaintiff tipped and fell on a kerb in a pedestrian precinct, sustaining a fractured hip. The kerb was adjacent to a pedestrian walkway, and varied in height over a length of 8 metres from 16 centimetres at one end, to flush at the other. The kerb was made of material which varied in colour to the adjoining surfaces, and it was not contended that the kerb was constructed contrary to any design standard.

The Decision at Trial

The trial judge found the Council owed the plaintiff a duty of care and was negligent in failing to install, or requiring the developer to install, a yellow reflective strip along the kerb to alert pedestrians to the height differential, and that such negligence was causative of the fall.

THE ISSUES ON APPEAL

The Council challenged the trial judge’s findings on obvious risk, duty, breach, and causation.

THE DECISION ON APPEAL

The majority (Basten and Macfarlan JJA, Brereton JA dissenting) allowed the appeal, finding:

- If there was a duty of care, the risk was an 'obvious risk' as defined in s5F of the CLA, so that no duty of care to warn was owed (s5H of the CLA);
- The risk of a person tripping was not such that a reasonable person in the Council's position would have taken the precaution of utilising a yellow reflective strip; and
- If duty and breach were established, the plaintiff conceded that she was aware of the location of the kerb, and indeed was trying to step up onto it at the time that she fell, and thus the absence of a yellow reflective strip was not therefore causative of her injuries.

Brereton JA in dissent found that the risk of harm posed by the kerb was not obvious, and given its location in a pedestrian precinct a reasonable person in the Council's position would have installed, or required to be installed, a reflective yellow strip to highlight its presence.

IMPLICATIONS FOR YOU

- Occupiers need to ensure that hazards are easily discernible, but need not take every precaution available to them and are entitled to assume that people will take reasonable care for their own safety.

Council of the City of Sydney v Bishop [2019] NSWCA 157

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