AUSTRALIA / JUDGMENT

Hornsby Shire Council v Salman

[2024] NSWCA 155

COURT
Court of Appeal

DECIDED
27 June 2024

BEFORE
White JA at [1];
Adamson JA at [34];
Basten AJA at [136]

CASE / FILE NUMBER
2023/451422
Decision under appeal

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Supreme Court
New South Wales

Medium Neutral Citation:	Hornsby Shire Council v Salman [2024] NSWCA 155
Hearing dates:	29 May 2024
Decision date:	27 June 2024
Before:	White JA at [1]; Adamson JA at [34]; Basten AJA at [136]
Decision:	(1) Dismiss the appeal. (2) Order the appellant to pay the respondent's costs of the appeal.
Catchwords:	NEGLIGENCE — breach — foreseeability of risk — whether height differential between surfaces in a playground gave rise to a reasonably foreseeable risk of harm — whether height differential was readily discernible — where the Australian playground maintenance standards applied — where council was independently advised to take steps to mitigate risk — where council did not take reasonable precautions advised NEGLIGENCE — breach — obvious risk — whether height differential between different surfaces in a playground was obvious — assessment to be made in all the circumstances — where it was foreseeable that playground users would be distracted by children NEGLIGENCE — causation — factual causation — whether council's failure to top up mulch in playground to even out the surfaces caused the respondent's injury NEGLIGENCE — duty of care — formulation of risk — whether primary judge erred in identifying the risk of harm as the risk of falling and sustaining injury when walking between two surfaces in a playground — whether the risk of harm could be reformulated on appeal — necessary specificity of formulation of risk of harm

APPEALS — point not taken below — where matters raised on appeal were not raised before the primary judge — where council's case on appeal differed substantially from the way in which it was conducted at first instance — extent to which parties are bound by the way in which their case was conducted at first instance

Legislation Cited:

Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D, 5G, Div 4
Evidence Act 1995 (NSW), s 69
Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HCA 7
Blacktown City Council v Hocking [2008] NSWCA 144; [2008] Aust Torts Reports 81-956
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161
Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169; [2015] Aust Torts Reports 82-227
Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29
Hackshaw v Shaw (1984) 155 CLR 614; [1984] HCA 84
Ho v Powell (2001) 51 NSWLR 572; [2001] NSWCA 168
Jolley v Sutton London Borough Council [2000] 1 WLR 1082; [2000] 3 All ER 409
Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30
Multicon Engineering Pty Ltd v Federal Airports Corporation (1997) 47 NSWLR 631
Richmond Valley Council v Standing [2002] NSWCA 359; (2002) 127 LGERA 237
Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HCA 42
Salman v Hornsby Shire Council [2023] NSWDC 506
Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527
Smits v Roach (2006) 227 CLR 423; [2006] HCA 36
State Rail Authority v Brown (2006) 66 NSWLR 540; [2006] NSWCA 220
Swain v Waverley Municipal Council (2005) 220 CLR 517; [2005] HCA 4
Tapp v Australian Bushmans Camp Draft & Rodeo Association Limited (2022) 273 CLR 454; [2022] HCA 11
Thompson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234; [2005] HCA 19
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62
Venues NSW v Kane [2023] NSWCA 192
Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12

Category:

Principal judgment

Parties:

Hornsby Shire Council (Appellant)
Kathie Beatrice Salman (Respondent)

Representation:

Counsel:

R Sheldon SC (Appellant)
D A Lloyd SC / E P Anderson (Respondent)

Solicitors:

Mills Oakley (Appellant)
Gerard Malouf & Partners (Respondent)

File Number(s):

2023/451422
Decision under appeal

Court or tribunal:	District Court
Jurisdiction:	Civil
Citation:	Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527
Date of Decision:	29 November 2023
Before:	Abadee DCJ
File Number(s):	2022/81971

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Hornsby Shire Council (the Council) is responsible for the care, control, inspection, management and maintenance of Lessing Playground (the playground) within Lessing Park (the park) in Hornsby. In the playground, a swing-set is located on a blue wet pour surface (the wet pour area) which is surrounded by an area covered with mulch and bark pieces (the mulch area).

On 28 February 2021, Kathie Salman (the respondent) attended the park and, when walking towards the swings where her nephew was swinging, rolled her ankles and fell as she stepped from the mulch area to the wet pour area. She identified that, although she was not paying attention to where she was walking, the ground between the two surfaces was uneven and that was what caused her to fall.

The respondent brought proceedings against the Council in the District Court, alleging it breached the duty of care which it owed her by failing to ensure that the level of mulch did not fall below the level of the wet pour area. In support of her case, the respondent tendered an expert report of Denis Cauduro which extracted parts of two Australian playground standards (the standards) which set out the Council's maintenance obligations in relation to the playground. Mr Cauduro opined that the mulch area "was not maintained correctly in accordance with the Australian Standards, creating potential trip/fall hazards". The respondent also tendered two inspection reports of the park which the Council had commissioned in 2020 (the Playfix reports) which stated that the mulch was low and "needs to be built up to the level of the wet pour rubber to eliminate any trip points".

Abadee DCJ (the primary judge) found the Council had breached its duty of care causing the respondent to suffer injuries and ordered the Council pay $283,200 in damages (after allowing a discount of 15% for contributory negligence).

The Council appealed on the following grounds:

(1) the primary judge erred in identifying the risk of harm (ground 1);
(2) the primary judge erred in applying the standards (ground 2);
(3) the primary judge erred in finding the height differential between the wet pour area and the mulch area was not readily discernible (ground 3);
(4) the primary judge erred in failing to find the risk of harm was obvious (ground 4);
(5) the primary judge erred in finding there was a causal relationship between the level of bark in the mulch area and the respondent's injury (ground 6);
(6) the primary judge erred in failing to find that a reasonable person in the position of the Council would have considered the risk of harm did not require a response (ground 7);
(7) the primary judge should have found the Council did not breach its duty of care (ground 8); and
(8) the primary judge reversed the onus of proof by imposing the burden on the Council to prove the cost of responding to any risk (ground 9).
The Court held (Adamson JA, White JA agreeing, Basten AJA dissenting) dismissing the appeal:

per Adamson JA, White JA agreeing:

Ground 1: alleged error in identifying the risk of harm
(1) The primary judge did not err in identifying the risk of harm: at [12] (White JA).
(2) The Council's submission as to the proper formulation of the risk of harm is inconsistent with the way in which its case was conducted in the Court below. It is not open to the Council to formulate the risk of harm differently on appeal: at [91], [93] (Adamson JA).
Smits v Roach (2006) 227 CLR 423; [2006] HCA 36; Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, applied.
Ground 2: alleged error in applying the standards
(3) The Council did not challenge Mr Cauduro's opinion that the standards applied in the court below. Its failure to do so has forensic consequences which this Court ought not undermine: at [101]-[103] (Adamson JA).
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, applied.
Ho v Powell (2001) 51 NSWLR 572; [2001] NSWCA 168, cited.
(4) The Playfix reports were expressed to have been prepared "in accordance with" Standard 4685. By retaining Playfix to inspect the playground and make the reports, it can be inferred that the Council accepted that standard applied: at [101] (Adamson JA).
(5) The standards were concerned with the safety of playgrounds. Unevenness of a surface, including a height differential, falls squarely within the category of "trip hazards" with which Standard 4685 is concerned: at [104] (Adamson JA).
Ground 3: alleged error in finding the height differential was not readily discernible
(6) This ground is not made out. The primary judge had the advantage of seeing and hearing the respondent's evidence (as the only witness who observed the state of the playground at the time of her fall) and, considering photographic evidence of the playground taken at a later time, accepted her evidence that that the height differential was not readily discernible. It would be wrong of this Court to overturn this finding merely on the basis of photographic evidence: at [108]-[112] (Adamson JA).
Ground 4: alleged error in failing to find the risk of harm was obvious
(7) Whether a risk is obvious is an assessment which must be made in all the circumstances. It was open to the primary judge to find that the risk was not obvious, taking into account that it was foreseeable that pedestrians approaching the

playground would be focussed on (as the respondent was) a child: at [113]-[115] (Adamson JA).
Ground 6: alleged error in finding causation
(8) The risk which ensued was not so divorced from the risk of tripping addressed in the Playfix reports as to breach the causal chain: at [122] (Adamson JA).
Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19; Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169, cited.
Ground 7: alleged error in failing to find a reasonable person in the Council's position would have considered the risk of harm did not require a response
(9) A reasonable person in the position of the Council would have acted on the advice contained in the Playfix reports: at [23]-[24] (White JA).
Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29; Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161, distinguished.
(10) The Council did not do what was advised in the Playfix reports and by Mr Cauduro and adduced no evidence explaining its inaction. Had the Council done what was advised, they would have reduced the risk of "tripping" in the narrow sense but also would have reduced the risk of harm identified by the primary judge. This ground is not made out: at [123]-[128] (Adamson JA).
Ground 8: alleged error in finding breach of duty of care
(11) This error is addressed when considering grounds 2 and 7 and is not made out: at [129] (Adamson JA).
Ground 9: alleged reversal of onus of proving reasonableness of precautions
(12) Mr Cauduro estimated the costs of the precautions to be $300. He was not cross-examined about this and the Council did not give their own evidence of the cost of precautions. Thus, it was open to the primary judge to accept that the precautions proposed were, at least with respect to cost, reasonable: at [130]-[132] (Adamson JA).

per Basten AJA (in dissent):

(13) The Court must form its own view as to whether any precaution was required. That involves the court exercising common sense based on experience, like a jury: [144]. There is no need to find "error" on the part of the trial judge: [152].
Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30 applied.
(14) The fact of the change in surface was obvious. Users taking reasonable care for their own safety could not have failed to realise that the nature of the surface was changing and that the new surface was at a higher level: at [157].
(15) The primary judge's findings as to the precaution the Council should have taken were problematic. The underlying proposition was that the slope was a hidden hazard: at [166], [168].
(16) Significant, if not dispositive, weight should be given to the absence of evidence of the "risk" which materialised in this case ever having materialised before: [178]. Different levels of adjoining surfaces do not give rise to a risk against which precautions are required (either for children or adults) within a playground: [159], [179].
Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29; Venues NSW v Kane [2023] NSWCA 192 discussed.
(17) Grounds 1, 3, 7 and 8 should be upheld: at [179].

JUDGMENT

WHITE JA: The appellant, the Hornsby Shire Council ("the Council"), appeals from a judgment of the District Court (Abadee DCJ) for the respondent (Ms Salman) in the sum of $283,200 plus costs (Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527).

Ms Salman's claim arose from an injury she suffered when she fell at a children's playground in Lessing Park on 28 February 2021. The place at which she fell is depicted in the photograph reproduced at [139] in the reasons of Basten AJA.

Adamson JA would dismiss the appeal. Basten AJA would allow the appeal. I agree with Adamson JA that the appeal should be dismissed and with her Honour's reasons. I would add the following observations, which assume familiarity with their Honours' reasons.

There was no issue with the primary judge's formulation of the Council's duty of care (at [31]), which was to exercise reasonable care so that the area was safe for pedestrians and other users, citing Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 at 488; [1987] HCA 7.

Where there is a reasonably foreseeable real risk of injury, the measure of the discharge of the duty is what a reasonable person would do by way of response to the risk (Hackshaw v Shaw (1984) 155 CLR 614 at 662-663; [1984] HCA 84, cited with approval in Australian Safeway Stores Pty Ltd v Zaluzna at 488).

The primary judge said:

> *"[32] As explained in its Counsel's final submissions, the Council disputed duty of care on the sole premise that Ms Salman did not keep a proper lookout. It relied upon the observation of Callinan J in Ghantous v Hawkesbury City Council (2001) 206 CLR 512 (at [355]) to support the contention that the occupier's duty of care only extended to entrants looking after their own interests. However, as Ms Salman's counsel submitted, with reference to observations of the plurality in Brodie v Singleton (2001) 206 CLR 512 at [163], not only should some allowance be made to inadvertence, but some dangers may not readily be perceived, inter alia, because of the nature of the danger, or the surrounding area."*

In Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HCA 42, Gummow J said (at [46]-[47]):

> *"[46] A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances. So much was recently reaffirmed in Leichhardt Municipal Council v Montgomery. Such an expression of the duty's scope has an obvious and direct consequence when assessing breach. As Gaudron, McHugh and Gummow JJ stated in Brodie:*

'In dealing with questions of breach of duty, whilst there is to be taken into account as a "variable factor" the results of "inadvertence" and "thoughtlessness", a proper starting point may be the proposition that the persons using the road will themselves take ordinary care.'

(Citations omitted.)

Their Honours went on to observe that persons exercising reasonable care will be able to avoid injury in some situations, whereas others will present 'a foreseeable risk of harm even to persons taking reasonable care for their own safety'.

> [47] The RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe 'for users exercising reasonable care for their own safety'. The essential point is that the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves."

Whether the question is framed as one of the scope of a duty of care, or what precautions, if any, are required to discharge a duty of care, the question is to be addressed prospectively from the perspective of the defendant. The Council should reasonably have had regard not only to the expectation that users of the playground would exercise reasonable care for their own safety, but also that some might be distracted or inattentive.

In Thompson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234; [2005] HCA 19, the High Court, in its unanimous judgment, said:

> *"[35] When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case...*
>
> [36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response...
>
> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Section 5B(1) of the Civil Liability Act 2002 (NSW) specifies circumstances in which a person is not negligent in failing to take precautions against a risk of harm.

The primary judge identified the relevant risk of harm as the risk of someone, in the course of walking between the mulch/bark surfaced area and the artificial ('spongy') surface area in the playground, falling and sustaining injury (at [39]).

For the reasons given by Adamson JA, the primary judge did not err in that identification of the relevant risk of harm. It was not materially different from that propounded by the Council at trial. That is not where the difference of opinion between Adamson JA and Basten AJA lies.

The difference lies rather in the factual question as to what precautions, if any, a reasonable person in the Council's position would have taken against that risk.

Section 5B(2) requires the Court to take account not only of the matters specified in paragraphs (a)-(d) of s 5B(2) but also other relevant things.

The obviousness of the risk of harm may well be a "relevant" matter that an occupier in the position of the Council should take into account in considering what precautions, if any, should be taken. The primary judge considered whether the risk his Honour identified was obvious and concluded that the height differential would not be readily discernible to persons walking across the mulch area to the spongy area or vice versa (at [34]).

The primary judge (at [51]) accepted Ms Salman's evidence that she was unaware that there was a height differential between the two surfaces when she fell. His Honour noted that her evidence was fundamentally unchallenged. His Honour appropriately warned himself against the dangers in the use of photographs and observed that the photographs admitted in evidence did not indicate a manifestly discernible difference in the height between the two surfaces (at [47]).

His Honour accepted the submissions of counsel for Ms Salman that "...only with a particular forensic or deliberative approach was it likely that a reasonable person walking across one surface to the other would have discerned the height differential" (at [48]).

I do not consider that there is sufficient reason to overturn these findings. His Honour found that Ms Salman's concessions in cross-examination were appropriately made, but were made with the benefit of hindsight.

But even if the height differential were obvious to a person exercising reasonable care, that would not be determinative of the question of breach. In Swain v Waverley Municipal Council (2005) 220 CLR 517; [2005] HCA 4, Gummow J said (at [140]) that it was clear that, in assessing the standard of reasonable care required of a local authority, the obviousness of the risk is a factor to be considered in determining the standard of reasonable care required. His Honour added:

> *"[142] Furthermore, in determining an issue of breach of duty, the circumstance that a risk is obvious is only one factor to be weighed and is not conclusive. A duty of care may extend to preventing injuries that result from the 'inadvertence and inattention' of plaintiffs to obvious risks." (Citations omitted)*

In Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, Gummow J (at [55]) agreed with the observations of Hayne J (at [162]-[163]) that:

> *"[162] ...obviousness of risk may divert attention from what would have been the reasonable response to foreseeable risk to consideration of someone other than the plaintiff could have avoided injury. Inquiries of this latter kind will be relevant when considering questions of contributory negligence. They are not useful, however, when considering breach of duty.*
>
> [163] That is not to deny the importance of considering the probability of occurrence of the risk in question. The probability of occurrence of a risk that is not apparent on casual observation of a locality or of a set of circumstances may be higher than the probability of occurrence of a risk that is readily apparent to even the casual observer. But the focus of inquiry must remain upon the putative tortfeasor, not upon the person who has been injured, and not upon others who may avoid injury. And in looking at the reasonable response to a foreseeable risk it is necessary to recall that there will be times when others do not act carefully or prudently."

This was also the view of McHugh J (at [46]), who said that discharge of a defendant's duty requires the defendant to eliminate a risk whether or not it is obvious when it would be unreasonable not to do so.

The question is what a reasonable person in the position of the Council would do in all the relevant circumstances, including, but not limited to, the fact that the height differential would be noticed by a person who paid attention to the ground immediately ahead of him or her, but also having regard to the Council's knowledge of the risk.

In this case, the Council had the Playfix reports, which identified the height differential as a trip hazard and advised that the "undersurface soft fall material" (that is, the mulch and bark) was low and needed to be replenished up to the level of the wet pour rubber (that is, the spongy rubber surface) to eliminate trip points (Adamson JA at [59]). In my view, a reasonable person in the position of the Council would have acted on that advice.

The fact that the Council had received that advice about the specific playground at which Ms Salman fell distinguishes this case from Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29, and Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161, to which Basten AJA has referred.

In any event, cases concerning breach of duty are fact-sensitive. As Gleeson CJ and Kirby J said in Vairy v Wyong Shire Council (at [2]) it is a sterile exercise, involving a misuse of precedent, to seek the solution to one case in decisions on the facts in other cases (see also Jolley v Sutton London Borough Council [2000] 1 WLR 1082 at 1089; [2000] 3 All ER 409 at 416; Swain v Waverley Municipal Council at [141] per Gummow J).

The primary judge found that the Council should have taken two precautions. One was to replenish the mulch to cover the sloped part of the wet pour (at [76], [80(a)]). The other was to paint the slope part of the wet pour to deal with the risk of displacement of the mulch to provide a warning (at [80(b)]).

I accept the Council's challenge to the second finding. There was no evidence as to the practicability of painting the surface. This is unsurprising as it was not a particular of negligence that the Council ought to have painted the edge of the spongy rubber surface and the suggested precaution was not raised until the respondent's closing submissions.

In respect of the first finding, the Playfix reports recommended replenishing the mulch up to the level of the wet pour rubber to eliminate trip points created by the low level of the mulch. Mr Cauduro opined that, to comply with the Australian Standards for the playground, the Council should have conducted regular inspections and topped up the bark chip area to ensure it was level with the soft fall area (Adamson JA at [56]).

The primary judge understood the "level of the wet pour rubber" or the "level with the soft fall area" to be the point at which the wet pour rubber surface or the soft fall area was level and not on a slope which created the risk of a trip or fall. His Honour said that the bark chip (or mulch) area should have covered the slope of the soft fall area.

This was consistent with Mr Cauduro's opinion that to comply with the Australian Standards the bark chip area should have been kept level with the soft fall area. Considering the soft fall area as a whole, for the bark chip area to be kept level with the soft fall area, the bark chip area should have covered the slope, as the primary judge found.

The Council did not call evidence that any of its officers considered that it was sufficient to comply with Playfix's recommendation that the bark chip area be replenished, not to the level surface of the spongy rubber material, but to the bottom of the slope of that material.

I have no difficulty in saying that Ms Salman tripped on the upward sloping surface of the spongy rubber material and this was a trip hazard against which the Council had been warned. This is so notwithstanding her evidence that, at the point she fell, the bark was over the spongy area.

For these reasons, in addition to those of Adamson JA, I would dismiss the appeal with costs.

ADAMSON JA: The appellant, Hornsby Shire Council (the Council), appeals against the judgment of Abadee DCJ (the primary judge) in the sum of $283,200 ordered on 29 November 2023 in favour of the respondent, Kathie Salman, in the District Court (the Court below): Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527 (the judgment).

In the Court below, the primary judge found that the Council had breached the duty of care which it owed to Ms Salman by failing to ensure that the level of mulch in the Lessing Playground (the playground) within the Lessing Park in Hornsby (the park) did not fall below the level of the "blue wet pour surface" (the wet pour area) which surrounded the play equipment. The primary judge found that the risk was not an obvious risk. The primary judge found that the Council's breach of duty caused Ms Salman to fall on 28 February 2021 and suffer injuries. His Honour assessed her damages at $283,200 (following a discount of 15% for contributory negligence). The appeal is limited to liability. There is no appeal against either the discount for contributory negligence or the quantum of damages.

All references to legislation in these reasons are, unless otherwise indicated, references to the Civil Liability Act 2002 (NSW) (the Act).

The grounds of appeal

The Council appeals on the following grounds:

"1 His Honour erred in identifying of the risk of harm for the purposes of the Civil Liability Act, 2002:

a. Generally;

b. In that his Honour did not identify a single risk of harm;

c. In that his Honour did not consider the level of risk by reference to a person exercising reasonable care for their own safety.

2 His Honour erred in finding the Australian Standard addressed a relevant risk having regard to the circumstances in which the Respondent was injured.

3 His Honour erred in finding the height differential between the two areas of the soft fall section was not readily discernible, contrary to the Respondent's evidence.

4 His Honour erred in failing to find the risk of harm would have been obvious to a reasonable person in the position of the Respondent and erred in the application of the provisions of the Civil Liability Act, 2002 relating to obvious risk.

5 His Honour did not give adequate or proper reasons and the reasons are internally inconsistent.

6 His Honour erred in concluding there was a causal relationship between the level of soft fall bark material and the Respondent's injury.

7 His Honour erred in failing to find that a reasonable person in the position of the Appellant would have considered the risk of harm, when correctly identified, did not require a response.

8 His Honour should have found the Appellant was not in breach of the duty of care it owed the Respondent.

9 His Honour reversed the onus of proof by imposing the burden on the Council of proving the cost of response."

The proceedings in the Court below

The applicable principle

I propose to set out the detail of what occurred in the Court below because several of the matters raised on behalf of the Council in this Court were not raised before the primary judge or differed from the way in which the Council conducted its defence of Ms Salman's claim. It is frequently the case that, on appeal, more experienced counsel are briefed. Those counsel may, had they been instructed at first instance, have conducted the case differently from the way it was in fact

conducted. In particular, they may have challenged evidence which was ultimately accepted by the primary judge and it is possible that a different result might have been achieved, had a different forensic strategy been adopted in the Court below. This is not to criticise the Council's trial counsel or its counsel on appeal but merely to observe that the conduct of a torts case involves many forensic decisions about which reasonable minds might differ.

However, for reasons given in more detail below, the applicable principle to be applied in this Court is as articulated in Coulton v Holcombe (1986) 162 CLR 1 at 7; [1986] HCA 33 (Gibbs CJ, Wilson, Brennan and Dawson JJ) as follows:

> *"To say that an appeal is by way of rehearing does not mean that the issues and the evidence to be considered are at large. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."*

The topography of the area where Ms Salman fell

The Council admitted that it was responsible for the care, control, construction, erection, inspection, management, maintenance and repair of the playground. It was not in dispute that there were swings in the playground on the wet pour area, which was surrounded by an area which was covered with mulch and bark pieces (the mulch area). Both the wet pour area and the mulch area were regarded as "soft-fall" surfaces.

The wet pour area was, in substance, a shallow mound made of "soft fall rubber", with sloping edges where it joined the mulch area. If the mulch was topped up to the level of the wet pour area, the ground was relatively even, but if it was not, the level of the mulch area was lower, leaving the side of the slope of the wet pour area exposed.

Ms Salman's evidence

Ms Salman gave evidence and was cross-examined. She said that on 28 February 2021 she attended a family barbecue in the park. At some point in the afternoon, she walked towards the swing located on the wet pour area where her nephew was swinging (with the intention of pushing him on the swing). However, she fell as she stepped from the mulch area to the wet pour area. Her evidence was that she "took a step up on that spongy rubber surface, [she] rolled [her] right ankle, and as [she] put [her] left foot down to catch [her] balance … [she] rolled [her] left ankle outwards as well and basically fell flat on [her] face forwards.". When she got up, she looked to see what had caused her to fall and identified "a big dip in the rubber surface, so it wasn't even ground".

In cross-examination, Ms Salman agreed that the reason she rolled her right ankle was that she was not paying attention to where she was walking. She also agreed that she did not "trip"; that she inadvertently rolled her right foot and ankle on the wet pour surface; that she knew of the presence of the mulch; and that there was a change in the surface, which would not provide a

firm footing. She agreed that there was some mulch on the wet pour area and that children might kick up the mulch for fun. Ms Salman also accepted that she did not look to see where she was placing her foot at the change in surface.

Ms Salman said that, about a fortnight after the fall, she and her husband returned to the park and took photographs of the area where she had fallen. In cross-examination, she agreed that it was obvious from the photographs that there were two different surfaces: the surface she was walking on (the mulch area) and the surface she was about to walk on (the wet pour area). She also agreed that if she had had a "proper look", she would probably have realised that there was a difference in height between the two areas but she explained that she had assumed that the two areas would be "all level".

Mr Salman also gave evidence, which is not material to the issues on appeal.

Denis Cauduro's evidence

The expert report of Denis Cauduro dated 10 August 2022 was admitted over the Council's objection: Salman v Hornsby Shire Council [2023] NSWDC 506. The Council did not challenge the ruling in its appeal. The Executive Summary at the commencement of the report expressed his conclusion as follows:

> *"The Plaintiff suffered a loss of balance and fall incident, when she was walking within a playground area and he[r] foot collapsed off the sharp sloped edge of the soft fall and bark chip junction. The Playground area had not been regularly maintained by the Defendant and allowed the bark chip surface to compact and become lower than the adjoining soft fall area. The Defendant did not maintain the playground area in accordance with Australian Standards."*

Mr Cauduro said, at 2.2.2:

> *"From the information provided within the briefing material and the Plaintiff, the soft fall area and junction of the bark chip area had not been maintained. The lack of maintenance and inspection of the playground area does not comply with the following Australian Standards:*

- AS 4685.0:2017 Playground equipment and surfacing.
- AS/NZS 4486.1:1997 Playgrounds and playground equipment."

Mr Cauduro extracted parts of AS 4685.0:2017 Playground equipment and surfacing (Standard 4685) and AS/NZS 4486.1:1997 Playgrounds and playground equipment (Standard 4486) in his report. No objection was taken by the Council to the failure to tender the whole of the standards.

The part extracted from Standard 4685 included the following. Paragraph 7.1, entitled, "General requirements", included sub-paragraph 7.1.1 (entitled "Trip hazards"), which provided that "[s]urfacing shall be free of trip hazards."

Paragraph 7.3, entitled "Loose-fill materials" provided in cl 7.3.1:

> *"The impact absorbing capabilities of any type of loose-fill will depend on the material type and depth. Loose-fill is extremely susceptible to scuffing and displacement, which may result in material becoming too shallow to provide the required impact attenuation. Loose-fill shall therefore be regularly inspected, and topped up as necessary, in order to ensure the correct material is maintained.*

In addition, these surfaces require maintenance tasks, such as raking, de-compaction and the removal of litter, sticks, syringes or other potential hazards."

Paragraph 8.5 referred to the need for regularity of inspections of the surface area for playground equipment. It contained cl 8.5.5, entitled "Comprehensive annual inspection" which said that, in addition to checking all items (referred to in cl 8.5.4 of the Standard), the inspection was intended to "establish the overall level of safety of the equipment, foundations and playground surfaces". The note to cl 8.5.5 read:

> *"Appendix B contains examples of factors that should be included in a comprehensive inspection."*

Appendix B contained the following example of a matter that should be included in a checklist when conducting comprehensive inspections:

> *"(iii) Is the surface free of any trip hazards?"*

The part extracted from Standard 4486 was from Part 1, "Development, installation, inspection, maintenance and operation", and contained paragraph 8.3, entitled "Inspections and maintenance", which dealt with the need for regular inspections and maintenance, principally of play equipment. However, it also provided:

> *"Manufacturers shall specify inspection frequencies for each item of equipment based on their knowledge of their product, with consideration given to the following recommended frequencies:*

(i) Routine inspections may be necessary each day for loose fill surfacing ..."

Section 9 of Standard 4486 provided in paragraph 9.5, "Procedures" as follows:

> *"It is the operator's responsibility to provide for regular inspection of playground equipment and surfaces to assist in their safe performance. It is crucial that regular inspections and corrective actions are carried out.*

NOTE: Sample playground safety procedures are given in Appendix C."

Standard 4486 includes a table which is to be used to record the results of an inspection of various areas where equipment is installed. It contains relevantly:

AREA CHECKPOINTS

RESULTS

REASON

ACTION

Tick (√) if answer is ‘yes’

Cross ( ) if answer is ‘no’

Dash (—) if not applicable

Write the letter of each area which does not comply, followed by the reason or ‘unknown’

Write the letter of each area which does not comply, followed by the action to be taken, and timing

A

B

C

D

1

…

√

√

√

…

…

2

…

3

Is the area free from any tripping hazards (tree roots, remains of removed equipment, fallen tree branches, uneven undersurfacing)?

4

…

5

Is this compacted loose undersurfacing at least {insert depth for that material and equipment fall height} cm deep

6

Is the rubber/synthetic undersurfacing adequate for the fall height of the equipment?

(Emphasis added.)

Mr Cauduro expressed the following opinions in his report:

> *"4 .7 The costs of maintaining and repairing the playground surface area (such as maintaining the surface level between the soft fall and the bark chips), from my experience of organising and managing construction of playgrounds would have been no more than $300.00 and could have been completed within 4 hours. The area could and should have been barricaded to prevent persons using the swing and walking within the surrounding area, until the area was made safe and rectified to Australian Standards.*

...

4.16 It is my opinion that the soft fall/ba[r]k chip area to the playground area should be regarded as having been unsafe and a risk to health, and therefore unfit for its intended purpose. This is because the soft fall was not maintained correctly in accordance with the Australian Standards, creating potential trip/fall hazards within the area.

...

4.18 Among the reasonable preventative measures that could (and in my opinion should) have been implemented by the Defendant, I would include appropriate combinations of actions from the following list - a list that is not intended to be exhaustive:

(a) Conduct regular inspections of the playground area, record and maintain and worn or damaged areas, in accordance with the Australian Standards;

(b) Top up the compacted bark chip area to ensure it is level with the soft fall area;

..."

Mr Cauduro was required for cross-examination. The Council's trial counsel's challenges to his evidence were limited to the following:

that Mr Cauduro's assumption that Ms Salman had tripped was incorrect;

Mr Cauduro's assessment of the angle of the "slope" of the wet pour area where Ms Salman fell;

that the photographs which Mr Cauduro took in June 2022 (16 months after the accident) could not reflect the condition of the slope at the time of Ms Salman's fall; and

his expertise (which elicited that he had not only visited other playgrounds but that he had also built playgrounds and that the majority of his work since 2016 had been providing expert forensic reports).

The Council's trial counsel did not challenge Mr Cauduro's opinion that the playground did not comply with the standards outlined in his report. Nor was Mr Cauduro challenged on his assessment of the costs of levelling the mulch area with the wet pour area in paragraph 4.7 of his report, which he estimated to be "no more than $300". Nor was it put to Mr Cauduro that there was, in effect, little point in trying to maintain the mulch area at the same level as the wet pour

are because children would kick the mulch anyway and thereby create a height differential between the surfaces of the two areas.

Documents tendered in Ms Salman's case

The documents tendered in Ms Salman's case included two inspection reports of the park, which the Council had commissioned from Playfix Pty Ltd (Playfix), dated 10 July 2020 and 18 November 2020 (the Playfix reports). In both reports, Playfix indicated that its reports were in accordance with, relevantly, Standard 4685. Both of its reports included the following statement with respect to the relevant area:

> *"The undersurface soft fall material is low and needs to be replenished.*

The undersurface material needs to be built up to the level of the wet pour rubber to eliminate any trip points created by the low level of the undersurfacing material."

A priority of "3" was allocated to this item in both reports. While no key explaining the priority numbers appears in the report, it can be inferred from other items that "3" was the greatest priority, at least of the items referred to in the reports as no higher priority was allocated to any other item.

The Council's case at first instance

The Council tendered documents relating to work orders for maintenance of the park. It was not suggested that of the work orders any related to the work identified by Playfix. The Council called no witnesses on liability.

The balance of the parties' evidence related to quantum and is not relevant to this appeal.

In its written submissions in the Court below, the Council's submission concerning Mr Cauduro's opinion that the playground did not comply with Standard 4486 and Standard 4685 was as follows:

> *"Mr Cauduro's reliance upon [Standard 4486] from [4] of his report, page 10, and to [Standard 4685] at [4.3] on page 15 of his report, together with the Work Health & Safety Regulations he referred to at [4.10] on page 24 and at [4.11] on page 25 of his report, are all subject to the provisions of the Civil Liability Act 2002 and caselaw."*

The primary judge's reasons

The primary judge's findings are as follows. The paragraph references are references to the judgment.

The primary judge set out the preliminary facts about Ms Salman being in the park and wanting to swing her nephew ([6]). His Honour found that when Ms Salman crossed the mulch area to get to the wet pour area, she approached it at an angle ([28]). She was walking a regular pace and was focussed on her nephew ([11]). When she stepped from the mulch area to the wet pour area, she did not appreciate that there was a difference in height between them ([51]). Although she

anticipated a change of surface, she assumed, incorrectly, that the mulch area and the wet pour area were the same height ([11], [27]). She accepted that, had she taken a proper look, she would have noticed the height differential between the mulch area and the wet pour area (and altered her gait accordingly). After she had fallen, she noticed that there was a "dip" in the mulch area as compared with the wet pour area ([27]). There was a difference in level between the mulch area and the top of the wet pour area "where the slope started downward" ([29]).

As she stepped from the mulch area to the blue surface, Ms Salman's right ankle rolled outwards. In an attempt to recover her balance, she put her left foot down, with the consequence that her left ankle rolled as well and she lost her balance, falling forward, flat on her face ([7], [28]).

The primary judge summarised Mr Cauduro's evidence at [13] as follows:

> *"(a) There was information available to the Council to know that there were potential trip and fall hazards;*
>
> (b) The soft fall/bark chip area was unsafe and a risk to health as it was not maintained in accordance with Australian Standards.
>
> (c) There was a significant risk of a potentially injurious trip or fall;
>
> (d) Reasonable preventative measures that could have been implemented included: regular inspections of the playground area; topping up the compacted bark chip area to ensure it is level with the soft fall area; barricading the swing area until maintenance work was completed (and assessed as being safe); and displaying notices prominently in the area about the need for a higher than usual level of care.
>
> (e) If the surface area of the soft fall area had met maintenance standards, consistent with the Australian Standards, or a proper risk assessment in accordance with WHS Regulations, it is unlikely that the plaintiff would have tripped and lost her balance."

At [14]-[16], the primary judge noted the parts of Standard 4486 and Standard 4685 extracted in Mr Cauduro's report.

The primary judge said at [21]:

> *"Mr Cauduro reiterated his view that the surface underneath the play swings should be completely level with the surface underneath the mulch."*

The playground was upgraded in 2018 and reached practical completion on 28 September 2018 ([23](1)). Ms Salman's complaint about the height difference between the mulch area and the wet pour area was the first of its kind ([23](2)). The park was regularly maintained but the records of such maintenance did not record that the mulch area was topped up with fresh supplies of mulch ([23](3)-(5)).

The primary judge extracted the identical passage in the Playfix reports (extracted above) in which Playfix advised the Council of the need to build up the mulch area to the level of the wet pour area ([23](6)(a)).

The primary judge found that the Council had offered no alternative view as to how Ms Salman could have fallen and accepted her evidence that she had not tripped but rather had lost her balance as she negotiated the change in surface from the mulch area to the wet pour area ([25]).

The primary judge found that the Council, as occupier, owed Ms Salman a duty to exercise reasonable care to make the park and the playground safe for pedestrians and other users ([31]). His Honour rejected the Council's submission, which relied on Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29 at [355], that the occupier's duty of care extended only to those entrants who were "looking after their own interests" ([32]). The primary judge, citing Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29 (Brodie) at [163], referred, at [32], to the need to make "some allowance for inadvertence" and that "some dangers may not readily be perceived". His Honour held, at [35], that the Council owed Ms Salman a duty of care to take reasonable care to avoid a foreseeable risk of injury.

The primary judge's reasons for his identification of the risk of harm (which is relevant to ground 1) are as follows:

> *"Risk of harm*
>
> 36 Ms Salman identified the risk of harm as the risk of a person falling and suffering injury whilst traversing the soft-fall surface surrounding the Playground.
>
> 37 The Council identified the risk of harm differently. It characterised the risk as being that pedestrians walking within Lessing Park might fall on uneven ground near the playground. Nevertheless, in his submissions, Counsel for the Council did not vigorously contest Ms Salman's characterisation.
>
> 38 The characterisation of the risk should not be unduly narrow, but nor in my view, should it be too general.
>
> 39 In my view, the risk of harm is appropriately identified as the risk of someone, in the course of walking between the mulch/bark surfaced area and the artificial ('spongy') surfaced area in the playground, falling and sustaining injury."

(Footnote omitted.)

At [46], the primary judge noted the Council's reliance on the photographs tendered in support of its submission that the height differential between the wet pour area and the mulch area was obvious. His Honour said at [47]:

> *"In what I am about to say, I am conscious as to warnings about the use of photographs by trial judges as explained in Blacktown City Council v Hocking [2008] NSWCA 144. I propose using them in the sense of supporting, or supplementing, Ms Salman's (fundamentally unchallenged) testimonial evidence. The photographs admitted in evidence did not indicate any manifestly discernible difference in the height of the blue coloured, spongy, 'wet pour' surface at the point when it 'abutted' the mulch surface area."*

The primary judge analysed the photographs by reference to Ms Salman's evidence and found that the risk was not obvious. His Honour also noted that the whole of the wet pour area, including its sloping edge which abutted the mulch area was the same colour (that is, blue). His Honour said at [49]:

> *"Unlike a step, there was no rigid indication or bright-line as between where the mulch surface stopped and where the slope of spongy surface began."*

The primary judge said further at [50]:

> *"Although there was no single bright-line or demarcation between mulch area and wet pour area, it is apparent from Exhibit A1, that on a very elementary view of where the spongy surface stopped and where the mulch started, that this was a very short distance from the playground equipment upon which children (such as Ms Salman's nephew) were playing. Because of that short distance, it was likely that a reasonable person in Ms Salman's position, approaching the swing, and moving across the different surfaces, could be distracted by the proximity of a child on the swing so that the reasonable person would be less attentive to the differences between those surfaces, including relevantly the possibility of an unevenness between them. In this way, there was very little time for that reasonable person to react, by exercising greater care in moving from one surface to the other."*

The primary judge accepted Ms Salman's evidence that she was not aware of the height differential. Accordingly, his Honour held at [51] that, even if the risk were "obvious", the presumption in s 5G of the Act that she was aware of an "obvious risk" has been displaced. Further, the primary judge found that the risk was not obvious, with the consequence that Ms Salman could rely on failure to warn as a particular of the Council's alleged negligence ([52]).

The primary judge found that the risk was foreseeable "because of the frequent height differentials between the spongy surface and the mulch surface into which users might place their feet, which were apt to be exacerbated by displacement of the mulch by users (by children but also by adults) of the mulch" ([55]). His Honour also found that the playground would be used by adults and children of different ages and physical conditions ([56]). The primary judge also found, at [57], that the risk of harm was "not insignificant" and said:

> *"Because of the not obvious differential in level, the risk that a user might lose balance by placing the foot on the slope on a different surface after having been on another surface elevates the risk beyond the designation of far-fetched or fanciful."*

The primary judge, when addressing Ms Salman's submission that she had discharged her onus of proving that a reasonable person in the Council's position would have taken the precautions outlined, rejected the Council's submission that the Playfix reports were concerned only with the risk of users of the playground "tripping" ([59]-[60]). His Honour found that the use of the word "tripping" could not "reasonably be taken by Council to exclude other similar hazards, of the kind that materialised, such as losing balance upon stepping on the slope on the wet pour surface" ([60]). The primary judge said further at [60]:

> *"Playfix could not reasonably be understood as limiting the way in which the undersurfacing might manifest or present a particular risk of harm at all. Its point was that the lower the level of the undersurfacing, the higher was the likely degree of a height differential between the wet pour surface and the mulch area in general. This was recognised in the statement of Playfix that the undersurface 'needs to be built up to the level of the wet pour rubber' surface."*

The primary judge noted the parties' submissions regarding s 5B(2)(a)-(d) of the Act, which provides:

> *"(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—*

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

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

At [70], the primary judge referred to the cost of the precautions and noted that the Council did not give evidence of the cost of undertaking the precautions for which Ms Salman contended "for the purpose of suggesting it was prohibitive or disproportionate to the risk of entrants to the playground falling."

For the purposes of the s 5B(2) inquiry, the primary judge referred, at [75], to the relevance of industry standards. His Honour rejected the Council's submission that Mr Cauduro's evidence ought be considered to be of little weight because he assumed that Ms Salman tripped rather than lost her balance as she was stepping from the mulch area to the wet pour area and said at [75]:

> *"Simply because the mechanism of the accident resulted from a loss of balance on an uneven surface did not take it out of the category of being a trip hazard for the purposes of those standards."*

The primary judge found that Standard 4486 indicated that the level of the mulch area and the wet pour area should be even and that "this was to be accomplished by periodical maintenance and proactive steps to achieve that levelling" ([76]). His Honour found that "[w]hat was required ... was mulch to have sufficient depth to cover the sloped part of the wet pour" ([76]).

The primary judge considered the forensic effect of the standards and the Playfix reports and said, at [77]:

> *"I agree with the plaintiff that the [Playfix] reports indicated a problem in July 2020 which had not been rectified by November 2020. As I have said, although those reports specifically instanced the risk of tripping, that was not to the exclusion of other associated risks. The point to be drawn from the Australian Standards, read with the results from the [Playfix] reports, was that the Council knew, or should have known, that a trip hazard arose from circumstances where the height of the mulch might be inadequate. Adequacy in that context included consideration of pedestrians or users moving from the mulch section to the wet pour area (and vice versa). In other words, the Council knew or should have known that it was desirable for a height differential to be addressed."*

At [78], the primary judge said:

> *"There was no evidence to indicate any system of maintenance associated with regular inspections, raking or topping up the mulch. It did not call any testimonial evidence to explain any steps it took to replenish the mulch."*

The primary judge found, at [80], that the following, viewed either individually or in combination, were reasonable precautions:

> *"(a) regular routine inspections of the condition of the mulch surface, with consequential replenishment of the mulch to produce a levelling with the wet pour surface, to the extent of covering the slope in the wet pour; and*
>
> **(b)** painting of the slope part of the wet pour area to deal with the ever present risk of displacement of the mulch, so as to provide effective warning of the unevenness between the wet pour and mulch surface. The colour of such painting would be starkly different to the blue colour of the balance of the wet pour (Implicit in this finding about a precaution is an ensuing precaution that the sloped surface might periodically require repainting as it fades)."

His Honour found that the Council's failure to take either of these precautions was negligent within the meaning of s 5B of the Act ([83]). The primary judge, who noted that neither party had referred the Court to s 5C of the Act, determined that it was, ultimately, not relevant ([84]).

The primary judge found that, had the Council taken the reasonable precaution set out in (a) above, it is likely that Ms Salman would not have lost her balance because the blue surface of the wet pour area would not have been "sloped" as the mulch area would have been approximately level with the wet pour area ([89]). The primary judge found that, had the Council taken the reasonable precaution set out in (b) above, Ms Salman would have appreciated that the surface was not even and moderated her gait accordingly so as not to lose her balance ([90]) (it is not necessary to address (b) further as the parties accepted that it had been raised for the first time in closing submissions in the Court below). On this basis, the primary judge found that Ms Salman had established factual causation within s 5D(1)(a) of the Act.

Consideration

Alleged error in describing the risk of harm (ground 1)

In support of this ground, the Council argued that the primary judge's formulation of the risk of harm did not capture the true risk of harm, which was the risk associated with the sloping surface. It contended that the primary judge ought to have found that the risk of harm was the risk "that a person could roll their ankle walking on the sloping surface causing injury". It submitted:

> *"The bark/mulch is irrelevant to this risk and to what happened. The Respondent knew the surfaces were different and that the poured surface would be spongy. The soft fall area was permanent and so would slope even if it was covered by bark, which would necessarily be shallower as it approached the relatively flat surface on top of the soft fall area."*

The primary judge accurately summarised the submissions of both parties and the differences in their respective formulations of the risk of harm in [36]-[39] of his Honour's reasons extracted above. The Council's present submission is at odds with the way in which its case was conducted in the Court below, by which the Council is bound Smits v Roach (2006) 227 CLR 423; [2006] HCA 36 at [46] (Gleeson CJ, Heydon and Crennan JJ); Coulton v Holcombe at 7-8; Water Board v Moustakas (1988) 180 CLR 491 at 497-498; [1988] HCA 12; Multicon Engineering Pty Ltd v Federal Airports Corporation (1997) 47 NSWLR 631 at 645-646 (Mason P, Priestley JA agreeing).

Mr Lloyd SC, who appeared with Mr Anderson on behalf of Ms Salman, identified the prospect that, had the Council formulated the risk of harm differently at first instance to incorporate the precise mechanism of the fall, she may have chosen to lead evidence which dealt with that specifically, for example, by leading biomechanical evidence. In circumstances where a proposed change by one party might, if it had been made at trial, have led to evidence being called or the case being conducted differently by the other party, the change ought not be allowed on appeal: Coulton v Holcombe at 7-8.

For this reason, ground 1 must fail because it is not open to the Council to formulate the risk of harm differently on appeal.

There are, however, further reasons why the ground ought fail, including that the risk formulated by the Council on appeal is too specific as it incorporates the precise mechanism of the fall. While more detailed formulations of risk may be necessary in some cases, "the risk does not need to descend to the precise detail of the mechanism by which an injury was suffered if that detail is unnecessary to establish a breach of duty": Tapp v Australian Bushmans Camp Draft & Rodeo Association Limited (2022) 273 CLR 454; [2022] HCA 11 at [110], [117]-[119] (Gordon, Edelman and Gleeson JJ).

Further, Mr Sheldon SC, who appeared on behalf of the Council, submitted (as part of ground 1) that the primary judge erred in formulating the risk of harm in the following three ways, which he contended were inconsistent:

> *"... the risk of harm is appropriately identified as the risk of someone, in the course of walking between the mulch/bark surfaced area and the artificial ('spongy') surfaced area in the playground, falling and sustaining injury." [39].*
>
> *"Because of the not obvious differential in level, the risk that a user might lose balance by placing the foot on the slope on a different surface after having been on another surface elevates the risk beyond the designation of far-fetched or fanciful." [57]*
>
> *"Simply because the mechanism of the accident resulted from a loss of balance on an uneven surface did not take it out of the category of being a trip hazard for the purposes of those standards." [75]*

The essential difference between the formulation of risk of harm in [39] and the references to "risk" in [57] and "hazard" in [75] is that the latter two include a references to the ground being "sloped" or "uneven". The formulation in [39] identified the risk of harm for the purposes of s 5B(1) of the Act. However, in [57], the primary judge was addressing the question whether the risk was "not insignificant". In this context, his Honour was entitled to take into account the topography of the area where the risk of harm arose, which was that there was a slope. In [75], the primary judge was addressing s 5B(2) of the Act and noting that industry standards were relevant to the determination whether a reasonable person would have taken precautions against the risk of harm. His Honour's point in [75] was to find that Standard 4685 and Standard 4486, which referred to "trip hazards", applied. The emphasis in [75] is "loss of balance on an uneven surface" (as opposed to tripping over an obstacle) and does not undermine the primary judge's formulation of the risk of harm in [39].

Ground 1 also includes the allegation that the primary judge, in formulating the risk of harm, did not consider the level of risk by reference to a person exercising reasonable care for their own safety. The primary judge, at [34], relied on the fact that the height differential was not readily discernible. The Council challenged that factual basis for the finding that the Council owed a duty of care to Ms Salman and argued that a reasonable person in her position would have observed the height differential and altered their gait accordingly.

For the reasons given by the primary judge at [32]-[35], relying on [163] of Brodie, the duty to take reasonable precautions to avoid the risk of harm was owed to Ms Salman, notwithstanding that she could have exercised better care for her own safety. A finding of contributory negligence is not inconsistent with a duty being owed to the injured party by the alleged tortfeasor.

For these reasons, ground 1 has not been made out.

Alleged error in applying Standard 4486 and Standard 4685 (ground 2)

The Council submitted that the trial judge was in error in applying the standards referred to in the judgment because they were concerned with a different risk than the one which ensued in the present case. It submitted that the standards were directed at maintaining the level of mulch in the mulch area at a sufficient level to ensure that it qualified as a "soft fall" area and, to the extent to which Standard 4685 was concerned with the level of the surface, it was concerned only

with “trip hazards” (see 7.1.1). The Council submitted that, as Ms Salman did not trip, the standards referred to by Playfix and Mr Cauduro were inapplicable.

I reject this submission. In the Court below, the Council did not challenge Mr Cauduro’s opinion that the standards applied (although it challenged other aspects of his evidence) either in its cross-examination of him (which did not address the standards) or in its submissions (which merely observed that it was the Act that governed whether the Council was negligent, not whether it was in breach of the standards). Further, the Playfix reports established that the Council retained Playfix to conduct inspections, including of the playground. The Playfix reports were business records within the meaning of s 69 of the Evidence Act 1995 (NSW). The reports purported to have been prepared “in accordance with” Standard 4685. By retaining Playfix to inspect the playground and report the results of such inspections, it can be inferred that the Council accepted that Standard 4685 applied and was relevant to its responsibility with respect to the playground. The Council did not submit that this inference was not open; nor did it call the author or authors of the reports to gainsay the inference.

Mr Lloyd’s submissions in this Court to this effect reflected the well-established principles of adversarial litigation articulated in Coulton v Holcombe in the passage extracted above. The hearing before the primary judge was no mere “preliminary skirmish”. The Council’s failure to challenge the matters set out above, either in cross-examination or submissions or by calling its own witnesses, has forensic consequences which this Court ought not undermine by accepting Mr Sheldon’s submissions that the standards do not apply or that compliance would be futile because the mulch will be disturbed anyway. This is not a case where Ms Salman (or the primary judge) ought to have otherwise appreciated that these matters were challenged: cf. State Rail Authority v Brown (2006) 66 NSWLR 540; [2006] NSWCA 220 at [58] (Basten JA).

The principle articulated by in Ho v Powell (2001) 51 NSWLR 572; [2001] NSWCA 168 is also relevant. Hodgson JA (Beazley JA agreeing) said:

> *“14 … in deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision. …*

15 In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so … As stated by Lord Mansfield in Blatch v. Archer (1774) 1 Cowp. 63 at 65 (98 ER 969 at 970):

All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.”

Turning to the facts of the present case, the two standards plainly applied as Mr Cauduro explained (Playfix referred, of relevance, only to Standard 4685). Both Standard 4486 and Standard 4685 were concerned with the safety of playgrounds. Standard 4685 was expressly concerned with “surfacing”. A narrow reading of the words in cl 7.1.1, “[s]urfacing should be free

of trip hazards", would not advance its purpose. There would be no reason for the standard to differentiate between tripping, in its narrow sense of the foot striking an obstacle, as opposed to the broader sense of a false step, which would encompass other mechanisms which may cause a pedestrian to lose balance and fall (such as a misapprehension of a height differential, as occurred here). What causes one person to "trip" might cause the ankle of another to turn, with the same result: loss of balance and falling. Unevenness of a surface, including a height differential, falls squarely into this category of hazard.

It is evident from Standard 4486 that topping up loose material fulfils two objectives: first, ensuring that the mulch area qualifies as "soft fall" (to protect those, including children who are playing, when they fall) and, second, evening out the surface where the mulch area meets the wet pour area (to avoid hazards to pedestrians which may cause them to fall). I reject the Council's submission that it was only the former with which the standard was concerned.

The application of the standards, when taken with the other evidence (including that of the Playfix reports), formed the evidentiary basis for two of the three reasonable precautions found: inspecting to ensure that the level of the mulch area was about the same as the level of the wet pour area and replenishing the mulch in the mulch area when its level fell below the wet pour area.

For these reasons, ground 2 has not been made out.

Alleged error in finding that the height differential was not readily discernible, contrary to Ms Salman's evidence (ground 3)

Ms Salman's evidence, which was accepted by the primary judge, was that she was not aware of the height differential between the mulch area and the wet pour area and assumed there to be none. She accepted that, had she taken better care, (and not been so focussed on her nephew), it would have been discernible. The primary judge accepted Ms Salman's submission that the height differential was neither "readily discernible" ([34]), nor "manifestly discernible", nor obvious ([49]-[52]).

When considering Ms Salman's evidence, the primary judge also had regard to the photographic evidence, before making this finding. The primary judge expressly referred to Blacktown City Council v Hocking [2008] NSWCA 144; [2008] Aust Torts Reports 81-956 in which this Court highlighted the need for caution when seeking to interpret photographic or video evidence at [149], [166]-[173] (Tobias JA, Spigelman CJ, Beazley, Giles and Campbell JJA agreeing).

It is also significant that the Playfix reports identified the height differential as a trip hazard, from which it can be inferred, first, that there was a height differential and, second, that Playfix did not regard it as "obvious" to a pedestrian (which was why it was a trip hazard). It is plain from the Playfix reports that their author or authors carried out a "comprehensive inspection" of the playground as required by Standard 4685 for the purposes of compiling the reports to Council. Those carrying out the inspection must have observed the height differential between the mulch area and the wet pour area, as well as taking photographs of the scene to be included in the

reports. Playfix's role was to check compliance with Standard 4685 and to inspect the playground for that purpose. Unlike parents or carers, Playfix's primary focus was on the safety of the playground, not on the equipment (in the case of the children) or the children (in the case of the parents or carers).

The finding that the height differential, though discernible, was not manifestly so, reflected the primary judge's advantage in seeing and hearing Ms Salman give evidence. She was the only witness called who observed the state of the wet pour area and the mulch area at the time of her fall. The wording of the ground contains the allegation that Ms Salman's evidence, properly construed, was that the height differential was readily discernible. I do not consider this to be a fair reading of her evidence. Furthermore, because of the caution required when interpreting photographs, it would be wrong of this Court to overturn this finding merely on the basis that the Court considered (if it be so) the difference in height to be manifestly discernible from the photographs.

For these reasons, ground 3 is not made out.

Alleged errors in failing to find that the risk of harm was obvious and in the application of the Act to an obvious risk (ground 4)

This ground is related to ground 3 (addressed above) and my reasons set out above for that ground also apply to ground 4. Whether a risk is obvious is an assessment which must be made in all the circumstances. What is obvious in one environment may not be obvious in another. In finding that the risk of harm was not obvious, the primary judge was entitled to take into account (as his Honour did) that pedestrians approaching the playground had to cross from the mulch area to the wet pour area and that it was foreseeable that such pedestrians would be focussed on (or distracted by) a child or children in the playground, as Ms Salman was.

That a risk may be discernible, does not make it readily discernible, much less obvious since the surrounding circumstances must be taken into account. For example, a hole in a floor may be obvious but where it is in an area where people, whether or not familiar with the location, regularly pass, such as a workplace or a shopping centre or public street, allowance must be made for inadvertence, as was said in Brodie. It is not enough to conclude that the hole or other hazard would be obvious to someone paying close attention. I am not persuaded that the Council has established error in the primary judge's finding that the risk was not an obvious risk for the purposes of Division 4 of Part 1A of the Act.

Accordingly, it is not necessary to address the consequences of the alleged error. It is sufficient to conclude that it was open to the primary judge to find that Ms Salman was not aware of the risk and had therefore discharged the onus which fell on her under s 5G(1) of the Act, and displaced the presumption which would otherwise have applied if the risk had been obvious.

Alleged inadequacy of reasons (ground 5)

Mr Sheldon confirmed that this ground was not separately pressed as a "stand-alone" ground and that, to the extent to which criticism was made of the primary judge's reasons, this could be addressed by reference to the other grounds in which such criticisms were made.

Alleged error in finding a causal connection between the level of the mulch area and Ms Salman's injury (ground 6)

The primary judge's key finding as to causation is at [89] (referred to above).

The Council submitted that the primary judge did not find that, if the mulch area had been topped up as advised by Playfix, it would have been at a level which covered the slope of the wet pour area on 28 February 2021, when Ms Salman fell, thereby preventing the fall. Further, it submitted that even if the mulch had been topped up, it would have been compacted by the weight of passing pedestrians or dispersed by the weather or by the activities of children.

This submission would appear to be at odds with the primary judge's finding at [89] and must, for that reason, be rejected.

Further, as noted above, the Council did not cross-examine Mr Cauduro on this basis in the Court below or otherwise challenge Ms Salman's case on that basis. The proposition that Playfix's repeated recommendations (which were endorsed by Mr Cauduro) would, in any event, have been futile to address the risk ought not be accepted, having regard to the way in which the Council conducted its case before the primary judge.

The Council also submitted that the risk of falling would be greater if the mulch were topped up because this would "obscure the true cause of the fall" (the slope on the wet pour area) and become even more uneven after use. As this submission was not made at first instance, it ought not, for the reasons already given, be entertained on appeal.

For completeness on the issue of causation, I accept Mr Lloyd's submission that it could not be said (and was not said in the Court below) that the risk which ensued was so divorced from the risk of tripping addressed in the Playfix reports as to breach the causal chain: see Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 (in which the consequences of a risk of which the surgeon failed to warn the patient were not compensable in circumstances where, had the warning been given, the patient would have proceeded with the operation); Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169; [2015] Aust Torts Reports 82-227 at [203] (Macfarlan JA and Sackville AJA) (in which Precision was held not to be liable for a breach of duty that was unrelated to its failure to detect the hazard that materialised).

Alleged error in failing to find that a reasonable person in the Council's position would have considered that the risk of harm, when correctly identified, did not require a response (ground 7)

In the seven months prior to the accident, the Council had received two reports from Playfix in relevantly identical terms, advising it that the mulch area was low and needed to be replenished to be built up to the level of the wet pour area "to eliminate any trip points created by the low

level" of the undersurfacing material". For the reasons set out above, it can be inferred that Council retained Playfix to ensure that it complied with, at least, Standard 4685, and also that it fulfilled the duty of care which it owed to users of the park, including Ms Salman. Without evidence to support it, any inference that, in retaining Playfix to prepare its reports, the Council was doing no more than engaging in a solemn farce or indulging in window-dressing, cannot rationally be drawn.

The Council's response to these reports was not to do that which Playfix had advised. It adduced no evidence as to the reason for its inaction (such as that the cost would have been too much or that its officers disagreed with Playfix's assessment that the height differential created "trip points"). In these circumstances, it can be inferred that such evidence would not have assisted the Council's case.

The Council submitted that the Playfix reports do not identify the sloped surface of the wet pour area under the mulch area as a risk. This is beside the point. Playfix recommended that the mulch area be topped up to bring it up to the level of the wet pour area. If this had been done, the "slope" would have been "filled in" by the mulch, thereby creating the reasonably level surface which Playfix advised was required.

I accept Mr Lloyd's submission that it is no answer to Ms Salman's case on breach to adopt a narrow construction of "trip points", as used in the Playfix reports or "trip hazards" in the Standards. Had the Council done what Playfix advised it to do, the mulch area would have been about level with the wet pour area. This would have not only reduced the risk of "tripping" in the narrow sense but also would have reduced the risk of harm identified by the primary judge at [39] and would have, as the primary judge found, prevented Ms Salman's fall.

The evidentiary foundation for Ms Salman's submission that the Council could not, consistently with the duty of care which it owed to those using the playground (either as observers or primary users of the equipment), do nothing was strong. It was supported by the Playfix reports (which the Council had commissioned) and Mr Cauduro's evidence which was relevantly unchallenged. The Council adduced no evidence to the contrary. Further, the Council submitted that Mr Cauduro's evidence did not support a finding of breach because he did not identify the slope as being either inappropriate or dangerous. This has been answered above: the solution recommended by Mr Cauduro was the same as the one which Playfix advised the Council was required. The area needed to be filled in to make the surface at the joining of the mulch area and the wet pour area relatively level.

The primary judge, in careful, detailed and comprehensive reasons rejected the submission which is incorporated in ground 7. Ground 7 has not been made out.

Alleged error in finding the Council breached its duty of care (ground 8)

This alleged error has already been addressed when considering grounds 2 and 7. For the reasons given in respect of those grounds, ground 8 has not been made out.

Alleged reversal of onus of proof regarding the cost of taking the precautions for which Ms Salman contended (ground 9)

The Council submitted that the primary judge erroneously imposed the burden of proving the cost of the alleged reasonable precautions on the Council. This ground is a reference to the primary judge's observation at [70] that the Council had not given evidence of the cost of precautions for the purpose of suggesting that it was prohibitive or disproportionate.

As is evident from the narrative of the way the trial was conducted, Mr Cauduro estimated the costs of the precautions to be $300 (paragraph 4.7 of his report). He was not cross-examined about this or asked how frequently the cost would be incurred. There was, thus, evidence before the primary judge which was adduced in Ms Salman's case as to this matter. As the Council did not challenge that evidence, either by cross-examining Mr Cauduro or by adducing its own evidence of cost, it was open to the primary judge to accept that the precautions proposed were, at least with respect to cost, reasonable.

For these reasons, ground 9 is not made out.

Conclusion

As none of the grounds of appeal has been made out, I would dismiss the appeal. Although the parties have not yet been heard on costs, I am not aware of any reason why costs ought not follow the event in accordance with the general rule: r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW).

Since preparing these reasons I have had the benefit of reading the additional reasons of White JA in draft, with which I agree.

Proposed orders

For the reasons given above, I propose the following orders:

Dismiss the appeal.

Order the appellant to pay the respondent's costs of the appeal.

BASTEN AJA: The respondent, Kathie Beatrice Salman (who is the plaintiff in the Court below and is conveniently referred to in that capacity) "rolled" her ankle at a children's playground operated by the appellant, Hornsby Shire Council. She was successful at trial and obtained a judgment in the sum of $283,200. [1] The Council challenged the finding of liability: it did not deny owing a duty of care to the plaintiff as a person lawfully present on the playground in a local park, but it denied breach of that duty. In my view, the appeal should be upheld and the judgment below set aside.

The circumstances of this case invite attention to the proper means of assessing "reasonableness", in considering whether a defendant has failed "to exercise reasonable care and skill", for the purposes of the definition of "negligence" in s 5 of the Civil Liability Act 2002 (NSW),

and in determining whether "a reasonable person in [the position of the Council] would have taken" a particular precaution against the risk, pursuant to s 5B(1)(c). The common law principle, which is to be adopted in applying the statutory test, also engages a reasonableness test, namely that the surface "be safe not in all circumstances but for users exercising reasonable care for their own safety". [2]

The matters to be applied in considering the test in s 5B(1)(c) of the Civil Liability Act, namely that "a person is not negligent in failing to take precautions against a risk of harm unless … in the circumstances, a reasonable person in the person's position would have taken that precautions", include (a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, and (c) the social utility of the activity that creates the risk of harm: s 5B(2).

The accident occurred when the plaintiff stepped from a mulched area surrounding the playground equipment onto the blue spongy rubberised base which was immediately under and surrounding the equipment. The point at which this occurred is illustrated in the following photograph. [3]

The photograph was taken two weeks after the accident, but it was common ground that it reflected the situation faced by the plaintiff when she stepped onto the edge of the blue spongy rubberised surface. The immediate question is whether, viewing the matter prospectively, the Court should be affirmatively satisfied that there was a hazard which it would be unreasonable for the Council to have ignored.

What was the "hazard"? It was said to arise from the fact that the level of the woodchip mulch was below the level of the surface of the blue spongy covering. The plaintiff's case was that the Council (through its relevant officers) was aware of the height disparity because a firm employed to inspect Council assets and properties had noted that fact in its report provided some months before the accident. So much may be accepted; the question remains whether the Council was legally obliged, in its duty to take reasonable care for the safety of users of the park, to bring the mulch up to the level of the blue spongy surface and, if so, whether it is more probable than not that taking that course would have avoided the accident.

Once the edge of the blue spongy covering was identified as a "trip hazard" the plaintiff then contended that the state of the playground surfacing failed to comply with the general requirements of the relevant Australian Standard, which stated that "[s]urfacing shall be free of trip hazards".

The Council submitted that this language was irrelevant in circumstances where the plaintiff did not "trip" but placed her foot upon the blue spongy area and rolled her right ankle. (She then rolled her left ankle, apparently in trying to regain her balance. [4]) That was a different kind of accident to a trip, in the normal meaning of the language. However, more generally, the Council contended that whatever the risk that arose at the junction between the loose-fill material and the blue spongy "impact-attenuating" material, it was not a risk against which the Council, acting reasonably, was required to take any particular precaution. The change in surfacing, and the

slight change in height of the surface, was obvious to any person taking reasonable care for their own safety.

It is an essentially lawyerly exercise to focus upon the language of a document and, especially a document purporting to establish a "standard" by which others must act. However, there are circumstances where such an exercise, rather than providing a sound basis for judgment, constitutes a distraction from what is essentially a factual assessment of the evidence. Furthermore, it is not a factual assessment which requires a judge to abandon common sense or experience. The fact that civil trials are no longer determined by juries does not mean that the decision-making exercise, in so far as it relates to factfinding, has changed. So much may be inferred from the analogous situation of a judge alone criminal trial governed by s 133 of the Criminal Procedure Act 1986 (NSW). A judgment according to the essentially evaluative and amorphous standard of reasonable care is a prime example of such an exercise.

This case has features in common with Ghantous v Hawkesbury City Council, [5] where the facts were summarised by Gleeson CJ:

> *"5 Mrs Ghantous tripped and fell while walking along a concrete footpath. Since the original construction of the footpath, which was not shown to have been negligent in any respect, erosion had resulted in subsidence of the earth in some places, so that the verge was about 50 mm below the concrete. When she stepped aside to allow other pedestrians to pass, the applicant placed her foot so that it was partly on the concrete and partly on the lower verge. This resulted in her fall."*

The Chief Justice referred to the abolition of the immunity of public authorities in England and continued:

> *"6 ... Even so, when general principles of negligence, unqualified by any rule of immunity, were applied, the courts insisted that an injured plaintiff had to show that the road or footpath was dangerous. That did not mean merely that it could possibly be an occasion of harm. The fact that there was unevenness of a kind which could result in a person stumbling or falling would not suffice. 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.*

7 In Littler v Liverpool Corporation, Cumming-Bruce J said: [6]

'Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green.'

8 I agree with Callinan J that no case of negligence was made out against the respondent."

Callinan J [7] pertinently stated:

> *"355 In my opinion the application should fail at the outset. ... Even if I were to assume that an action in negligence lay against the respondent for any failure to maintain or improve the footpath to keep or make it safe, whether as a matter of misfeasance or otherwise, I would conclude that there was no failure in that regard because the footpath was not, despite what the expert witness was allowed to say,*

> *unsafe. The case of the applicant in negligence was that a differential in height between the concreted part of the footpath and the earthen part of it created a dangerous situation. A court is not obliged to accept an expert, especially when his or her evidence is evidence purportedly resolving and concluding an issue of the kind which arose here. A court is not bound to accept that a matter of ordinary observation such as the readily apparent state of the footpath is a matter calling for expert opinion. But in any event the expert's opinion (uncontradicted as it was) did not go so far as to say that the 'poor maintenance' which caused the 'hazard' actually caused one of such a nature that to leave it unrectified was negligent. There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself admitted in cross-examination that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges. There was no negligence on the part of the respondent either in the construction of the footpath or in not keeping the concrete strip and verges level." (Footnotes omitted.)*

These observations, leading to dismissal of the claim by the trial judge, this Court and all members of the High Court, identify marked similarities with the present case. Importantly, the opinion of the expert (as here) was open to be disregarded, the difference in height and nature of the surfaces was obvious, and "[i]t is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along."

The Court's exercise of its fact-finding function is required to have regard to common experience. In Blue Op v De Roma, [8] the Court overturned a finding of liability where a plaintiff had tripped on a metal utility plate on a footpath, described by Meagher JA in the following terms:

> *"55 … 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."*

Meagher JA relied on some of the passages from Ghantous extracted above and added:

> *"62 To the same effect, in Richmond Valley Council v Standing [2002] NSWCA 359, [9] the plaintiff was injured on an irregular paved concrete surface in the vicinity of a school. The surface contained cracks and holes of various sizes, and some differences in height between its various portions. One of those holes was 15mm deep, another 10mm deep, and another 8mm deep. The differences in the levels of the respective concrete slabs were up to 50mm.*

63 At [54]-[55], Heydon JA (with whom Handley and Sheller JJA agreed) said:

‘But it was not a reasonably foreseeable risk of injury to pedestrians using reasonable care for their own safety. The plaintiff, like pedestrians generally, was in an excellent position to see and avoid imperfections in the surface. There could have been no expectation on her part that the surface would be smooth. The unevenness in the paving slabs, the cracks and the holes at the place where the plaintiff was moving were as obvious as similar features all over the country, and as obvious as other common features like raised tree roots and manhole covers. There was no concealment of any of the features of the site which the trial judge criticised. There was no inadequacy in the lighting, or obscuring of the hazard by grass or otherwise. It was reasonable to expect the plaintiff to have seen what lay ahead of her as she walked along in broad daylight: what was there was obvious and called for no special vigilance.

So far as there was any hazard it was both not only obvious but insignificant and common. The condition of the pavement was typical of innumerable kilometres of pavements in the cities, suburbs, and towns of this country... (Emphasis added.)’”

In a warning case, Gleeson CJ and Kirby J observed, somewhat acerbically, in Vairy v Wyong Shire Council [10] :

> *“7 ... If the owner of a ski report set up warning signs at every place where someone who failed to take reasonable care might suffer harm, the greatest risk associated with downhill skiing would be that of being impaled on a warning sign.*

8 ... Often, the answer will be influenced by the obviousness of the danger, the expectation that persons will take reasonable care for their own safety, and a consideration of the range of hazards naturally involved in recreational pursuits.”

It is necessary for this Court to apply its own experience and common sense to the very simple factual situation presented by the evidence; indeed, it is required to do so. If the Court, exercising its powers on a rehearing, is of the view that common sense dictates a different answer, the appeal should be upheld. [11] That it may not be possible to identify “error” in the trial judge’s reasons (although there were errors as explained below) is immaterial; often the question whether, viewed prospectively, the Council was duty bound to take a particular precaution against a risk will admit of little by way of logical exposition.

Consideration of facts

The Statement of Claim (par 8) identified the relevant risk as the risk of injury to a person “walking through the Park and stepping onto an uneven surface”. The relevant precaution was identified as a failure to maintain the loose fill to the level of the surface of the blue spongy material. That proposition invited attention to the effect of taking such a precaution. It would have diminished the difference in levels between the blue spongy surface and the surrounding mulched area. The hypothesis was that because the sloping area at the end of the blue spongy surface would then have been covered by loose-fill, the plaintiff would not have rolled her ankle if she had stood on it. That proposition never rose above the level of the hypothetical; it was not self-evidently true. Further, because the plaintiff did not in fact trip, but placed her foot on the

higher level, it is by no means clear that reducing the disparity in levels would have avoided the risk which materialised.

No doubt the risk satisfied the undemanding test of foreseeability, but applying the reasoning in Richmond Valley Council v Standing, one would conclude that the risk was not shown to be other than insignificant, for the purposes of s 5B(1)(b).

With respect to s 5B(2)(b), the "likely seriousness of the harm" which might have been foreseen, if the risk materialised, was low. A fall by a person approaching the blue spongy surface would likely involve a forward movement onto the softest area in the vicinity. Even the mulch was a soft-fall surface. It is hard to imagine a less dangerous out-door surface, except perhaps dry sand.

So far as social utility was concerned, the level of utility served by a children's playground was high. That was an important consideration, because playgrounds involve numerous risks of harm, particularly for children, but, indeed, for any person who may be in the vicinity of a moving swing or another piece of equipment. No such risk, of a kind which would have required careful consideration by the appellant, materialised.

The risk entailed moving from one kind of surface to another. Because the fact of the change in surface was obvious, no warning was required. Users taking reasonable care for their own safety could not have failed to realise that the nature of the surface was changing and that the new surface was at a higher level, as the plaintiff accepted in cross-examination, although the relevant test is objective and not subjective. (The reason why the test is objective is because the question must be addressed prospectively from the point of view of the party said to be negligent in failing to take a precaution.)

The language of the Australian Standard should be approached bearing these considerations in mind. First, the Standard known as AS-NZS4486.1:1997 relates to "Playgrounds and playground equipment". The full text of the relevant Standard was not in evidence, but specific parts were extracted by the expert who gave evidence for the plaintiff, Mr Cauduro. Apart from an occasional reference to "users" there is no reference to the fact that the primary purpose of a playground is to provide recreation to young children. However, the Standard should be read as primarily concerned with the safety of young children. The purpose of what is described as "impact-attenuating surfaces" and "impact-attenuation" is directed to use by children. Much of it is self-evident, such as the desirability of removing "litter, sticks, syringes or other potential hazards": par 7.3.1. Loose-fill is required to be "free of sharp materials" (7.1.2) and should not contain "any component known to present a toxic hazard, eg woodchips or other loose material treated with hazardous chemicals": par 7.1.3. It should also be free of "sawdust or finely shredded or granulated rubber" described as "inhalation hazard": 7.1.4. (Relevantly to conditions in this State, it should no doubt be free of asbestos.) Accordingly, when considering the meaning of "trip hazard" in that document, the primary focus must be on hazards to young children.

One further background consideration relevant to the proposed precaution is the widespread familiarity of adults with changes in level, changes in the nature of a surface and sloping or rounded edges, as compared with sharp edges. There must be innumerable pavements in urban

areas which are intersected by driveways and street intersections which will require a step, slope or dip, and commonly a slope with rounded shoulders. The mere existence of different levels is so commonplace that, at least for persons with reasonable eyesight, they may be said to constitute a risk of tripping or rolling an ankle, if reasonable care were not taken, but not as constituting "hazards". Similarly, every area with a grass verge is likely to have a pathway made of different material and stepping from one to the other involves an entirely automatic understanding that one is stepping from a hard surface to a soft surface, or vice versa. Many pavements have trees surrounded by soft material (and sometimes raised areas of paving). The idea that different levels of adjoining different surfaces give rise to a risk against which precautions are required (either for children or adults) within a playground is unrealistic, impractical and not required according to the standard of ordinary reasonableness.

Judgment below

With these matters in mind, it is convenient to address the reasoning of the trial judge. The reasoning is carefully and comprehensively set out, making it an easy task to identify the critical passages relevant for present purposes. They fall within a section headed "Absence of reasonable precautions being taken?", commencing at [58].

The judge's task was not made easier by a pleading which purported to identify some 35 particulars of negligence. Such pleadings are not to be encouraged. The apparent inability of the pleader to confine the plaintiff's case suggests a lack of confidence in the case, combined with the hope that a scattergun approach will hit the mark at some point. The trial judge was able to limit his consideration to two particulars expressed in the following terms:

> *"• 'failure to repair the height differential (being the area where the artificial surface met the surrounding surface made up of mulch/bark), and other dangerous sections of the Park, in a timely fashion or at all' (particular (l))*
>
> • 'failure to highlight the floor surface where the artificial surface met the surrounding floor surface made up of bark/mulch' (particular (u))."

Neither particular was well-expressed: the first appeared to assume that there should be no height differential between the two areas identified; the reference to "other dangerous sections of the park" was verbiage which should not have been included. The second particular, referring to "the floor surface" suggests a misuse of a pleading precedent, and should have referred to "the ground"; it should also have identified what was meant by "highlight".

Having identified those two particulars as material, the judge then identified the specific precautions sought by the plaintiff and the relevant criteria in s 5B(2)(a)-(d), which were explained in the following terms: [12]

> *"63 Asked during the course of closing submissions to identify what specific precautions the Council should reasonably have taken, Counsel for Ms Salman settled upon the following:*

(1) The Council should have extended the 'wet pour' (blue spongy surface) across all of the soft-fall section covering the playground (ie subsuming the mulch part of that area);

(2) The Council should have highlighted the height differential. This the Council could have achieved if it painted the slope section of the wet pour area;

(3) The Council should have responded to reports received about the low level of the mulch by replenishing the mulch.

64 Counsel for Ms Salman also submitted, with regard to s 5B(2)(a)-(d) that:

(a) The probability of personal injury was high if someone fell when traversing the soft fall floor surface of the playground.

(b) The burden of taking precautions to avoid the risk of harm was slight: it merely required the undersurface of the soft fall area to be replenished and/or properly maintained or subject to adequate risk assessment. Such measures were not likely to be expensive.

(c) Council should have constructed the soft area entirely of wet pour material, as it had done at other parks in its municipality (depicted in Exhibit H1-H3).

(d) The accident did not arise from a socially useful, but risky activity, but rather from hazards associated with different surfaces upon which children (and others) would traverse in order to get to and from the playground equipment in the park."

The trial judge rejected [64(c)], but accepted other aspects of the submissions: at [65]. He added to [64(b)] the proposition that "although the surfaces on the playground were designed to cushion the worst effects of falls (especially, but not exclusively, for children from playground equipment), if a person fell onto the surface, there was a real possibility of serious personal injury".

The judge's conclusions were ultimately expressed in the following terms:

> *"76 I find that reasonable precautions to the risk, viewed either individually or in combination, were:*

(a) regular routine inspections of the condition of the mulch surface, with consequential replenishment of the mulch to produce a levelling with the wet pour surface, to the extent of covering the slope in the wet pour; and

(b) painting of the slope part of the wet pour area to deal with the ever present risk of displacement of the mulch, so as to provide effective warning of the unevenness between the wet pour and mulch surface. The colour of such painting would be starkly different to the blue colour of the balance of the wet pour (Implicit in this finding about a precaution is an ensuing precaution that the sloped surface might periodically require repainting as it fades).

77 As to the first of these precautions, I do not suggest that there needs to be a perfect equivalence in the levelling between the two different undersurfaces. That, I expect, would be impracticable. What is important is a level of mulch crossing over on to the sloped part of the wet pour surface so as to effectively conceal it. In effect, the precautions were directed to a relatively seamless levelling between the mulch and the top part of the wet pour surface.

78 A reason for the latter precaution is that it would likely serve as a safeguard to the situation where, for whatever reason, the mulch could not cover the slope on the wet pour.

79 The Council did not take either precaution. Its failure(s) to do so was negligent within the meaning of s 5B."

Taken in their terms, these conclusions are problematic. The supporting reasoning, which precedes them is also problematic, as will be identified shortly.

The underlaying purpose of the first precaution, which is to "cover the slope of the blue spongy material", is contradicted by the second precaution, which assumes that the first will not be effective. That reasoning is understandable, though not fully explored. The premise is that regular inspections and replenishment of the mulch were not steps which, on the balance of probabilities, would have prevented the plaintiff from stepping on the slope of the blue spongy surface. As to the second precaution, if the reference to "highlight" in the second particular identified above was thought to include painting, there was simply no evidence to suggest that "painting" would render the slope any more obvious than it was when coloured a reasonably bright blue, as appears from the photograph. At best, this was speculation. But again, there was no basis for concluding that had the slope been painted, the plaintiff would not have put her foot on it.

The underlying proposition appears to have been that the slope was a hidden hazard. At least while it was uncovered it was not hidden, and there was no finding that the design of the playground was negligent which, given its purpose of protecting falling children, is unremarkable.

As to the judge's acceptance of the plaintiff's propositions set out at [64] of the judgment, other than (c), each involved exaggeration. As to (a), it may be assumed that it refers to adults, as children fall on playground surfaces continually. With respect to adults, both the possibility of a fall is unlikely and the likelihood of a significant injury for someone who did fall is well short of a probability and close to minimal. The blue spongy surface is therefore for a purpose. As to (b), the burden of taking the precaution may have been "slight", although there was no evidence one way or the other and it was for the plaintiff to prove; but the real question was rather whether such a precaution would have had any discernible effect on the conduct of the plaintiff. As to (d), the relevant activity is not that of the plaintiff, but of the Council, in providing the playground. To suggest that that did not have significant "social utility" verged on the bizarre. For reasons already given, if the playground is a source of relevant risk, the materialisation in the present case must be extraordinarily rare. No lawyer or expert was able to provide an example of that risk materialising although the design of the playground is replicated countless time across Sydney

and New South Wales (and probably other parts of Australia).

A further significant aspect of the judge's reasoning appeared at [70] in noting that "the number of incidents similar to that which befell Ms Salman" is relevant for the purposes of s 5B(2). That was true: however, there was none. That too is a relevant consideration as the judge recognised, but dismissed, in the following passage:

> *"However, as Counsel for the plaintiff submitted, first, there is a first time for everything and it logically does not follow that anyone else who had fallen in the way that Ms Salman fell would report the incident: that might depend, for example, upon the severity of the harm accompanying the fall."*

As to that matter, the statement that there is "a first time for everything" is mere rhetoric. There is only a first time for everything that occurs. And if this were the first time that a person had fallen by rolling his or her ankle on the edge of a blue spongy surface in a child's playground, that would be highly significant in terms of the reasonable precautions required of the Council. As to the second part of the proposition, of course there will be slips, trips and falls on every playground, none of which are reported because the design features of the playgrounds minimise the harm from such events. Accordingly, there is nothing illogical in relying upon the absence of reported injuries from such a risk. One might add that it is not merely the minor nature of the outcome which will necessarily diminish the likelihood of a report: many falls may occur where no-one gave a second thought to the possibility that the fall was other than an accident for which the occupier of the land could not be held responsible.

However, there is a more basic problem with the reasoning at [70], which commences with a reference at [68] to the recent decision of this Court in Venues NSW v Kane. [13] At [68] the primary judge noted that emphasis had been given in that case to matters requiring consideration under s 5B(2), including "the obvious nature of the dangers". [14] The judge continued:

> *"I accept that it was obvious that the two surfaces were different in texture. One was relatively solid; the other was inherently loose. The colour of the surfaces was different. But as I explained earlier, I do not regard it as obvious for persons walking across both surfaces that one would be more elevated, in height, in comparison to another."*

Each of these findings should be accepted, with the exception of the last. First, the evidence did not demonstrate that the plaintiff rolled her ankle because of a height differential, rather than because she trod on a sloping surface without looking where she was putting her foot. Secondly, if the slope was obvious, the height differential (or at least that there was a height differential) must also have been obvious.

To understand the thrust of the reasoning in Venues NSW, it is convenient to set out the principles stated in the paragraphs to which the trial judge referred, which were as follows:

> *"66 There were other matters which bore upon s 5B. One was the obvious nature of the danger presented by the steps. This Court said in Wilkinson v Law Courts Limited [2001] NSWCA 196 at [32]:*

Stairs are inherently, but obviously, dangerous. Many measures might have been taken to make the stairs as safe as human skill could possibly make them; but the duty is only to take care which is reasonable under the circumstances. Among the essential circumstances is the following fact: 'persons using steps may misjudge their footing and slip or trip but this is an everyday risk which members of the public avoid by taking care for their own safety': Stannus v Graham (1994) Aust Torts Reports 81-297 at 61,566 per Handley JA.

67 That is obvious, and has consistently been applied in this Court: see (without being exhaustive) Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 at [80] and Zaya v RPS Manidis Roberts Pty Ltd and UGL Engineering Pty Ltd t/a Energised Alliance [2019] NSWCA 320 at [7]-[8]. Most recently, in Russell v Carpenter [2022] NSWCA 252, this Court applied that passage in relation to a very short flight of three steps in a residential dwelling, and overturned the conclusion that a reasonable person considering the identified risk of harm presented by the stairs would have concluded that a handrail should have been erected as a precaution against that risk: at [38]-[51]."

From that correct understanding of Venues NSW, the trial judge returned to consider its relevance with respect to absence of evidence of any previous falls. At [70] the judge referred to the following statement of Leeming JA, immediately following the discussions set out above:

> *"68 Next, there was no evidence that anyone had fallen on the steps. This led to a relatively extensive debate when the appeal was heard on the significance of the absence of evidence that anyone else had fallen on these steps, or indeed any steps at the stadium. Ms Kane said that this was information known to Venues NSW. Venues NSW said that it was information readily available by the issuing of a notice to produce.*

69 Plainly it was open to either side to investigate the history of falls on the premises. A notice to produce might be issued by Ms Kane, although if Venues NSW's record keeping were poor, that might rebound against her. (To be clear, there is no suggestion that that is so, and the fact that one document tendered was a four page 'Pre-Event Safety Checklist' for the 'Knights v Warriors' game suggests that records were brought into existence and kept by Venues NSW.) The onus rested upon Ms Kane to prove her case. The decision taken by both sides not to adduce evidence of the history of falls at the stadium meant that s 5B was to be applied on the basis that there was not a history of falls on the stairs."

It should be clear that the majority in Venues NSW identified that consideration as a reason for concluding that the occupier of the stadium had not breached its duty of care in failing to put a handrail on sets of stairs, where that was practicable. The judge also referred to the brief concurrence of Simpson AJA who stated, in part, at [96]:

> *"(2) the stadium had, eight years previously, been certified as compliant with relevant building regulations;*

(3) although the stadium was used on numerous occasions by many hundreds of patrons, there was no evidence that the absence of handrails had given rise to any incidents similar to that involving Ms Kane. I do not infer that there were no such incidents. The evidence simply does not demonstrate any established need for handrail protection by reason of previous incidents;

(4) the use of stairs similar to those in the stadium is common place. The Court was not referred to any previous decision in which it has been held that stairs (of a similar kind) have been held to require the installation of handrails."

Against that background, the judge noted that the absence of such evidence "was a factor facilitating the conclusion that there was no breach of duty in that case". That was true, but apart from the possibility that the steps might have been slippery when wet, but in fact had a high degree of slip resistance even in wet weather, the matters set out above were the only factors relied on by Simpson AJA. Further, the trial judge continued, "[t]he same factor assists the Council in this case." That was partly true, but the "same factor" did more than assist the Council in the present case: it should have been a powerful consideration in favour of a finding that there was no breach of duty established on the evidence. The reasoning at [70] for rejecting that factor as having significant weight was flawed: as Leeming JA had explained in Venues NSW, the case should have been decided "on the basis that there was not a history of falls [at the playground]".

The trial judge erred in failing to give significant, if not dispositive, weight to the total absence of evidence of the "risk" which materialised in this case ever having materialised before.

Conclusions

The notice of appeal alleged error in that the trial judge, (i) in identifying the risk of harm, "did not consider the level of risk by reference to a person exercising reasonable care for their own safety" (ground 1); (ii) "erred in finding the height differential between the two areas of the soft fall section was not readily discernible …" (ground 3); (iii) "erred in failing to find that a reasonable person in the position of the [Council] would have considered the risk of harm, when correctly identified, did not require a response" (ground 7), and (iv) generically, "should have found the [Council] was not in breach of the duty of care it owed the Respondent" (ground 8). These grounds should be upheld.

A finding of breach of duty in the present case is, in my view, not open because it would be inconsistent with the Court's exercise of its proper function in applying its experience and commonsense to one of the most obvious and common situations experienced in day-to-day living. The cases referred to above, from Ghantous on, illustrate the application of that function in circumstances similar to the present case. They are not "precedents", but illustrations from which the nature of the exercise can be inferred.

When these factual questions were left to juries, carefully reasoned judgments were not to be found. Transparency has come at the expense of common sense. Experts are relied on where none is needed; expert evidence has proved, not merely otiose, but a distraction. The fact that a precaution could be taken is in this case self-evident and merely preliminary to the question as to whether it was unreasonable not to take it. That factual question should be answered in the negative: the respondent failed to prove a breach of duty.

The Court should make the following orders:

Allow the appeal and set aside the judgment and orders (1) and (2) made in the District Court on 29 November 2023.

In lieu thereof, order that the Statement of Claim filed 22 March 2022 be dismissed with costs.

Order that the respondent pay the appellant's costs in this Court.

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Endnotes

1.

Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527 (Abadee DCJ) ("Salman").

2.

Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council (2001) 206 CLR 512; [2001] HCA 29 at [163] (Gaudron, McHugh and Gummow JJ); Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HCA 42 at [47] (GummowJ); recently applied to the statutory formulation in Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 at [16] (Meagher JA, Mitchelmore and Kirk JJA agreeing).

3.

The plaintiff stepped onto blue spongy surface about a metre to the left (from the viewer's perspective) of the person depicted.

4.

Salman at [7].

5.

See fn 2 above.

6.

[1968] 2 All ER 343 at 345.

7.

With whom Gleeson CJ at [8]; Gaudron, McHugh and Gummow at [163], [167]; and Hayne J at [339] agreed; with Kirby J writing to similar effect at [244]-[248].

8.

See fn 2 above.

9.

(2002) 127 LGERA 237.

10.

(2005) 223 CLR 422; [2005] HCA 62 at [7].

11.

Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30 at [17-[18] (Kiefel CJ), [32], [40]-[41] (Gageler J), [85] (Nettle and Gordon JJ), [153] (Edelman J).

12.

The copy of the judgment in the appeal papers had mis-numbered paragraphs; the error had been corrected on Caselaw.

13.

[2023] NSWCA 192.

14.

Venues NSW at [66]-[67] (Leeming JA, Adamson JA agreeing).

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