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Blue OP Partner Pty Ltd v De Roma [2023] NSWCA 161

Background

The primary decision

On 2 February 2017, Ms De Roma (**the respondent**) was walking "quickly" along a footpath towards a waiting bus at a nearby bus stop when she tripped and fell over a sunken steel checker plate utility pit lid and frame set in a concrete footpath, sustaining injury, loss and damage (**the incident**). The height differential in the footpath caused by the sunken pit lid was between eight and 10 millimetres.

Ms De Roma brought personal injury proceedings in the District Court of New South Wales at Sydney against the Inner West Counsel (**the Council**) and a partnership of five entities, Blue OP Partner Ptd Ltd (**the appellant**), alleging they were occupiers responsible for the inspection, maintenance and safety of the pit lid and footpath.

In its defence to the primary proceedings, Blue OP Partner Ptd Ltd plead that the incident was the manifestation of an obvious risk and, therefore, it did not owe the respondent a duty of care. It was submitted that the pit lid was *"an ordinary pit lid sitting on an ordinary footpath"* that required no barricade or warning as to the existence of a height differential, while the pit lid did not constitute a hidden or concealed trap.

The primary judge found that the sunken position of the pit lid was not due to disrepair or subsidence but was a feature of the pit lid's design and construction such that it was not *"an ordinary pit lid sitting on an ordinary footpath"* and, therefore, not an obvious risk. It was also found that a height differential of six millimetres or more in a pedestrian surface constitutes a trip hazard that merits a warning to pedestrians.

The Ms De Roma claim against the Council failed due to her failure to establish that they knew or ought to have known of the specific risk of harm, however, Ms Dr Roma succeeded against Blue OP Partner Ptd Ltd but was found contributorily negligent by 20%.

The appeal

Blue OP Partner Ptd Ltd appealed the primary decision, largely on the basis that the primary judge erred in his rejection of Blue OP Partner Ptd Ltd's defence of obvious risk.

Meagher JA (with Mitchelmore JA and Kirk JA agreeing) found that the primary judge's characterisation of the risk of harm for the purpose of considering Blue OP Partner Ptd Ltd's obvious risk defence was more specific than that which was adopted for the purpose of determining negligence.

Referring to the 'correct approach' addressed by the majority in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11 at [110]-[116], Meager JA held that a degree of generality was necessary in describing a risk of harm but that the risk must be sufficiently precise to capture the harm which resulted from its materialisation on the facts of the particular case.

Based on the facts of this case, Meager JA found that it was readily apparent and obvious that there was a steel lid set into a frame within the footpath which had a rusty colouration around its edging, suggesting there was a gap between the lid and the frame, and that there might be a height differential between the lid and the frame and between the frame and the footpath. As such, there was or was likely to be uneven levels or surfaces within the area which presented a risk of tripping which would have been obvious to a reasonable person in the position of the Ms De Roma.

In light of the above, Meager JA held that the risk of tripping and falling because of an uneven surface or surfaces was sufficient to satisfy the requirements of section 5F(1) of the *Civil Liability Act 2002* (NSW) in relation to the risk that materialised, and to engage the application of section 5H(1) of the *Civil Liability Act 2002* (NSW), with the consequence that Blue OP Partner Ptd Ltd did not owe a duty to warn Ms De Roma of that risk. As such, it was determined that the primary judge had erred in not coming to the same conclusion and that Blue OP Partner Ptd Ltd did not breach any duty of care requiring it to provide a warning to draw attention to the trip hazard.

The appeal was allowed and the proceedings against Blue OP Partner Ptd Ltd were dismissed, with Ms De Roma being ordered to pay Blue OP Partner Ptd Ltd's costs of the primary action and the appeal.

Lessons Learned

- The correct approach to the characterisation of a risk of harm in the application of the *Civil Liability Act 2002* (NSW) when dealing with obvious risk, as well as with breach of duty, requires a level of generality which also accounts for the particular circumstances of a case, and to be analysed from the perspective of a reasonable person in a defendant's position.
- The presence of a utility pit and its surroundings in the footpath itself was an adequate visual cue to warn a reasonable person exercising care for their own safety that there was or might be an uneven surface ahead.

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