Court of Appeal
Supreme Court

New South Wales

Case Name:	Eddy v Goulburn Mulwaree Council
Medium Neutral Citation:	[2022] NSWCA 87
Hearing Date(s):	26 April 2022
Date of Orders:	7 June 2022
Decision Date:	7 June 2022
Before:	Bell CJ at [1] Gleeson JA at [2] Kirk JA at [3]
Decision:	(1) Appeal allowed with costs. (2) Orders (1) and (2) made by the District Court on 30 April 2021 are set aside. (3) Matter remitted to the District Court to be determined according to law.
Catchwords:	NEGLIGENCE — Defences — Civil Liability Act 2002 (NSW), s 45 — Whether defendant had actual knowledge of the particular risk the materialisation of which resulted in the harm — Extent of specificity required by phrase “particular risk”
Legislation Cited:	Civil Liability Act 2002 (NSW), ss 5B, 5C, 5F, 5G, 5H, 5L, 5M, 45 Civil Liability Act 2003 (Qld), s 37
Cases Cited:	Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 Botany Bay City Council v Latham (2013) 197 LGERA 211; [2013] NSWCA 363 Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29 Buckle v Bayswater Road Board (1936) 57 CLR 259; [1936] HCA 65

Collins v Clarence Valley Council (2015) 91 NSWLR 128; [2015] NSWCA 263
Collins v Clarence Valley Council (No 3) [2013] NSWSC 1682
Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd (2013) 248 CLR 619; [2013] HCA 36
Goondiwindi Regional Council v Tai (2020) 92 MVR 218; [2020] QCA 119
Menz v Wagga Wagga Show Society Inc (2020) 103 NSWLR 103; [2020] NSWCA 65
Nightingale v Blacktown City Council (2015) 91 NSWLR 556; [2015] NSWCA 423
North Sydney Council v Roman (2007) 69 NSWLR 240; [2007] NSWCA 27
Roads and Traffic Authority of NSW v Dederer (2007) 243 CLR 330; [2007] HCA 42
Sibraa v Brown [2012] NSWCA 328
Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited (2002) 399 ALR 535; [2022] HCA 11
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12

Category:	Principal judgment
Parties:	Ricky Eddy (Appellant) Goulburn Mulwaree Council (Respondent)
Representation:	Counsel: JE Sexton SC / DP Kelly (Appellant) R Sheldon SC / RG Gambi (Respondent) Solicitors: Stacks Law Firm (Appellant) Mills Oakley (Respondent)
File Number(s):	2021/00152128
Decision under appeal:	
Court or Tribunal:	District Court
Jurisdiction:	Civil
Citation:	[2021] NSWDC 150

Date of Decision:	30 April 2021
Before:	Strathdee DCJ
File Number(s):	2020/95802

[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]

The appellant fell and was injured when the ramp on which he was walking slipped from under him. The ramp had been placed over repaving work outside a shopping centre. In the weeks before the accident the respondent local council had twice been notified about problems with ramps in the work area where the accident took place. The appellant brought proceedings in the District Court against the Council, which accepted it had had responsibility for the securing of ramps placed in connection with the work.

The Council sought to rely on the immunity in s 45 of the *Civil Liability Act 2002* (NSW), which provides that a roads authority is not relevantly liable "for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm".

The s 45 issue was the subject of a separate determination before the District Court. The primary judge found that s 45 applied for two reasons. The first was that the ramp encountered by the appellant was of a different type to those the subject of the two prior notifications. The evidence was that there were two types of ramps, some smaller and some larger, in use in the area. The second

reason was that her Honour was not satisfied that the appellant had proven that the Council was aware of the particular risk which materialised.

The Court of Appeal (per Kirk JA, Bell CJ and Gleeson JA agreeing) allowed the appeal and remitted the matter to the District Court.

On the first issue, the Court held that the second notification made to the Council was in respect of the same kind of ramp as the ramp on which the appellant fell. The Council had actual knowledge of a risk that the smaller ramps which were involved in the incident involving the appellant were unstable unless secured: at [23]-[24] and [34].

On the second issue, the appellant contended that it was sufficient that the Council had actual knowledge that the type of ramp on which he fell was being used in the relevant area, that they could be unstable and dangerous unless secured, and that they were not always secured. The Council contended that the criterion in s 45 was not satisfied because it did not know that the particular ramp, placed wherever it was at the time of the accident, was unsecured.

The Court held as follows:

1. The word "particular" in s 45 of the *Civil Liability Act* is meant to require greater specificity than arises for other references to risk in the Act, such as in ss 5B, 5C, 5F, 5G and 5L, or than arose under the common law principles: at [59].

2. What is necessary in applying s 45 is meaningfully to capture the practical reality of the risk which came home. That reflects the provision's purpose, which is to limit liability of roads authorities for liability arising from omissions unless they have actual knowledge of the particular danger, and thus have had some opportunity to respond. Factors likely to be important in this regard include the precision of the road authority's actual knowledge of the location and of the nature of the risk to be found there. It does not require knowledge of every aspect of the precise causal pathway that led to the claimant suffering harm: at [81]-[85].

Botany Bay City Council v Latham (2013) 197 LGERA 211; [2013] NSWCA 363, *Collins v Clarence Valley Council* (2015) 91 NSWLR 128; [2015] NSWCA

263 and *Goondiwindi Regional Council v Tai* (2020) 92 MVR 218; [2020] QCA 119 considered.

3. The risk of which the Council had actual knowledge here was a very specific risk in a very specific area. It did, therefore, have actual knowledge of the particular risk the materialisation of which resulted in the harm within the meaning of s 45: [89]-[93].

JUDGMENT

1 **BELL CJ:** I agree with Kirk JA.

2 **GLEESON JA:** I agree with Kirk JA.

3 **KIRK JA:** At 5.45pm on the evening of 27 April 2017 Mr Eddy, the appellant, was going to get some bread and milk from Coles at the Centro Centre in Goulburn. For some time there had been repaving work being done on the footpath outside the Centre. That work involved removal of the existing paving. The ground was then excavated, concrete poured, and some three weeks later new paving was placed on top of the cured concrete. The work was done in stages, moving along the footpath.

4 In the course of the work being done temporary ramps would be placed over portions of the work to facilitate customers gaining access to the Centre. As explained below, it appears that there were two types of ramp.

5 In Mr Eddy's path that night, as he entered the Centre, was one ramp going up to the kerb and one going down the other side. Between the kerb and the entrance to the Centre was an area which had been excavated and was awaiting repaving. Mr Eddy's claim is that as he walked up the first of these ramps it slipped out from under him, causing him to fall heavily to the ground, leading to significant injury. I will assume here that Mr Eddy did fall in this manner.

6 The footpath was under the care, control and management of the respondent, Goulburn Mulwaree Council. Mr Eddy sued the Council in the District Court for negligence. He also claimed against the company which was undertaking the works. That latter claim was settled.

7 One of the Council's defences was to rely on s 45 of the *Civil Liability Act 2002* (NSW) (**CLA**). That section is entitled "Special non-feasance protection for roads authorities". The Council's reliance on the defence was the subject of separate determination. The primary judge held that s 45 applied to render the Council immune from Mr Eddy's claim. The claim was dismissed with costs. The other issues in the case – including what duty of care was owed and whether it was breached – were not determined. Mr Eddy appeals from that decision.

8 Mr Eddy does not dispute that s 45 is capable of being invoked by the Council with respect to the footpath in question, and he accepted that if the immunity applied then it was a complete answer to his claim. His argument is that the immunity did not apply as he says that, contrary to the decision of the primary judge, the Council *did* have "knowledge of the particular risk the materialisation of which resulted in the harm" (to quote s 45(1)). The central issue in the appeal is whether prior notification to the Council of earlier issues with ramps was sufficient to constitute knowledge of the particular risk in the sense employed in the section. That turns on issues of characterisation of the risk and the level of specificity required.

9 In my view the appeal should be upheld and the matter remitted to the District Court for determination of the remaining issues in Mr Eddy's claim.

10 In this judgment I first examine the evidence of the prior notifications and what the primary judge concluded, then address the nature of the requirement for knowledge of the particular risk in s 45, then turn to applying the law to the facts.

The ramps, the prior notifications, and the judgment below

11 The repaving work outside the Centro Centre was being undertaken by a contractor engaged by the Council pursuant to a written agreement. The agreement was not in evidence. Indeed, the evidence before the Court below was rather thin.

12 In her judgment the primary judge relied upon statements made by counsel appearing for the Council in explaining the factual context at the opening of the

hearing. No objection has been taken to her Honour having done so. Counsel said the following:

> "GAMBI: … Part of those works were the repaving or paving – I'm not sure what was there first, but certainly paving, which had been going on for some time, and the way it works is that the excavations – the second defendant would set a work zone, was responsible for traffic management. This is all in the documentation. There's no dispute about this, your Honour, and it would work in stages. They would excavate. Once they've excavated to the proper level, they would then pour concrete in order to form the base. After three weeks and the concrete was properly cured they would come back, put sand down and put pavers on it to get it to the right level. In the course of doing that work there were temporary ramps put on, yellow ramps.
>
> HER HONOUR: Put on by the company doing?
>
> GAMBI: No. There's no dispute, your Honour, that - not put on. We're not sure who put them on, but responsibility for securing them was my client's under the contract. The shift was from 6pm to 6am, so at the end of the shift my client would go along wherever the ramps were placed and secure them."

13 In this exchange the Council was accepting that it, not merely the contractor, had "responsibility for securing" the ramps. This way of putting it is perhaps a little surprising. It might have been expected that the contractor would secure whatever ramps it placed as the work progressed, and the Council would then *check* that they had been secured by the contractor. Indeed, that is how her Honour understood the situation, stating at J [13]:

> "There is no dispute that the responsibility for securing the ramps, in accordance with the contract, rested with the Council. The Council had a system whereby a representative of the Council would check the works twice daily. The shift was from 6:00am to 6:00pm, and at the end of each shift, someone from the Council would go along wherever the ramps were placed and check that they were secure. If they were not so, the Council representative would secure the ramps."

14 However, that is not quite what was conceded on behalf of the Council. It was accepted by the Council in the hearing of the appeal that there was no other relevant evidence before the Court below on this issue. The concession was that it had *responsibility* for securing them itself, and at the end of each shift it "would go along wherever the ramps were placed and secure them". Further, it appears that the shift was actually from 6pm to 6am, not the other way around (as the primary judge suggested). However, nothing appears to turn on that point.

15 In the month prior to the event in question there had been reports to the Council of two other incidents involving ramps in the area of the footpath works outside the Centro Centre.

16 First, there is an internal Council "request" document dated 3 April 2017, which records the following:

> "Maintenance - [redacted] came into the Civic Centre today (3/417) and [redacted] is concerned about the yellow ramps that are being temporarily used while the work is going on in the main street is unsafe. [redacted] is in a wheelchair and [redacted] used this ramp (the one on the same side as the Goulburn Mall (Coles) , however almost fell out, it was only that [redacted] grabbed onto the rail to prevent this fall and then two girls helped [redacted] back into [redacted] chair. [redacted] believes this ramp is unsafe for people in wheelchairs. [redacted] was hoping the ramp could be made a little longer so that it isn't as steep? Can this please be looked into to prevent this from happening again. [redacted] didn't leave a contact number, [redacted] just wanted this looked into or fixed."

17 There is a handwritten follow up message, marked 2.30pm on 3 April 2017, which states: "Inspected. Couldn't identify which yellow ramp was the problem. But has been inspected."

18 The Council submitted that there were two types of ramp being employed around the repaving works: more significant ramps with handrails (which it described as "more permanent pedestrian ramps"), and smaller ones without handrails (which it described as "temporary or portable ramp[s]"). It found support for that distinction in the brief oral evidence of the appellant. He described the type of ramp that he said he slipped on as about a metre wide, and perhaps a bit more than a metre long, which went up to the gutter (ie the kerb), with another one going down again on the other side. He described this as a "safety ramp". Beyond those ramps, as one walked towards the Centre, was:

> "like a bridge with handrails that once you got off there, there was a bit of a sort of a standing area, then you walk along toward the front door, like a – like a walkway with some rails, I guess, to keep the public in there so they're not in the work zone".

19 He also called it "a separate walkway type thing". This second type of bridge or ramp seems to have been a significantly larger and heavier item than the type of ramps going over the kerb.

20 The Council submitted, and the primary judge seemingly accepted (J [33], [35] and [49]), that the ramp being described in the 3 April notification was the larger type of ramp. On appeal, the Council also argued that the notification was not relevant to notification of the risk at issue here because the notification related to the steepness of the ramp, not to instability. In light of the second notification, it is not necessary to address this evidence further.

21 The second incident is recorded in another "request" document record, dated 20 April 2017 (7 days before the event involving Mr Eddy), as follows:

> "Changed priority to HIGH - [redacted] - called to advise of the ramps out the front of centro are unstable, and too steep, yesterday she went to use the ramp but because she is in a wheel chair she nearly fell out. Can someone please investigate this and look at securing the ramps."

22 There is again a follow-up note of the same date which states: "This has been inspected 20.4.17 by [a council officer]. Additional ramps need to be placed. He will speak to [the Council maintenance superintendent] regarding this".

23 The Council submitted below and on appeal that this second notification also relates to the larger type of ramp, with handrails, and that it is not the same kind of risk as materialised for Mr Eddy. Yet there is no positive reason to conclude that it was the larger type of ramp. And there is reason to conclude that it is more likely to have been the smaller type of ramp given that the complaint was that the ramps were "unstable", as well as being too steep. Whilst steepness could be a problem with either type of ramp, instability appears more likely to be a characteristic of the smaller ramps than the larger ones. It is notable, too, that the proposed response was that someone should "look at securing the ramps", which tends to suggest a smaller, unstable structure. The fact that the second complainant, like the first, was in a wheelchair does not appear material to the nature of either the ramp or the problem. On balance, I am persuaded that this second notification more likely than not relates to the same type of ramp as is the subject of Mr Eddy's complaint.

24 The second notification thus meant that the Council had actual knowledge of a risk that the smaller ramps which were involved in the incident involving Mr Eddy were unstable. It is implicit in the notification that this instability created a

risk of injury to persons using that type of ramp unless the ramp was secured in some way. That understanding was no doubt what prompted the internal Council response to the 20 April notification: "Can someone please investigate this and look at securing the ramps".

25 As for the incident involving Mr Eddy, there is a Council document which appears to be an inspection checklist, with various entries, which indicates that an inspection was carried out at 7.20pm on the night in question, 27 April 2017. No reference is made to the incident, of which the Council was seemingly not yet aware. Nor is there any reference to ramps. The primary judge concluded that "inspection of the works area was conducted at about 7:20pm and nothing untoward was found with any of the ramps" (J [29]).

26 There is then a Council "request" document dated 28 April 2017 which records the following:

> "last night at 5:45pm Ricky was entering Centro Mall at the entrance near Bryant's Pies and the Chemist, he walked over the ramp from the gutter to the footpath. He put his foot on the roadside end of the ramp and it spat out from underneath him and he fell to the ground, ripping his pants, his knee is bruised and cut and his back is stiff and sore this morning. He is heading to the Doctor's today to have it checked out.
>
> Can this please be investigated ASAP to avoid further injury and protect public safety."

27 There is a handwritten response to the request which states as follows:

> "A ramp was placed at this location last night by persons unknown. [A council officer] removed it early this morning when it was discovered. He is inspecting the site again today. [Another person] is speaking with the contractors to see if they know who placed the ramp … "

28 Also in evidence was an email of 13 June 2017 from the Council's maintenance superintendent which stated as follows:

> "I do not have much more to add other than the attached Inspection Report carried out the night before which gives an indication of the location of the works that night/following morning. There is no mention of the ramp being un secure [sic] in the inspection report in the location this person is claiming. The ramp which [a council officer] found un secure [sic] was off the end of the pavers that were completed that night which would have been somewhere between the Mall doors and Goulburn Soap World.
>
> Below is the response from the Service Request RR0809\1617
>
> . ramp was placed by persons unknown at this location last night. [A council officer] removed it early this morning when it was discovered. He is inspecting

> the site again today and [another person] is speaking to the Contractors to see if they know who placed the ramp at this location.
>
> Golden Star denied placing the ramp on the kerb when asked, the ramp was not in place the evening of the 27th of April. According to the inspection report works were concentrated to the northern end of Auburn St east side that night (this inspection took place at 7:20pm). There would have been no reason for the ramp to be placed in that position due to the disabled ramp being easily accessible right next to it.
>
> Sorry I have no further details to add or photos."

29 This email indicates that there was a ramp that was found "unsecure" early on the morning after the incident, albeit seemingly somewhat away from the paving works. This evidence suggests that the ramp may have been moved after the incident, by some person unknown. That does not seem to matter, apart from illustrating that a ramp – possibly the one connected to the incident – could be moved and had not been secured.

30 The Council submitted below and on appeal that (to quote its written submissions on appeal):

> "From the foregoing it is apparent the kerb ramp on which the appellant fell was moved after the appellant's fall but there is no evidence the respondent was aware of its being in the location where he fell before the appellant's accident occurred. The impression is of the ramp having been moved several times in a relatively short time. There is no evidence of the respondent knowing of this fact."

31 The conclusions of the primary judge were captured at the end of her judgment, as follows:

> "48. I find that the particular risk was the risk of the ramp being susceptible to movement because it was not properly installed or connected.
>
> 49. The two notifications to the Council on 3 April 2017 and 20 April 2017 detailed that the ramps were unsafe for use by people in wheelchairs. I accept that those notifications could be construed as giving the Council actual knowledge of the risk posed to people in wheelchairs using the ramps, could be in danger, but I am not satisfied on the balance of probabilities that these are the same ramps that the plaintiff fell on.
>
> 50. Furthermore, even if it is the same ramp, I cannot accept that those two notifications are sufficient to import to the Council actual knowledge of the risk particularised by the plaintiff in his pleadings—that is the risk of a person using the ramps, sustaining a physical injury because the ramps were not properly installed or connected and were therefore susceptible to movement. Counsel for the plaintiff conceded that it was not alleged that the ramp itself was defective, but that the movement of the ramp simplicita [sic] was the risk to which the plaintiff was exposed. I am not satisfied that the plaintiff has proven that the Council were aware of that specific risk.

> 51. Accordingly, s 45 is enlivened and the defendant is entitled to the immunity provided by the section. Thus, the plaintiff must fail."

32 Her Honour thus gave two reasons for concluding that s 45 applied. The first, at J [49], seems to have been based upon a conclusion that the ramp encountered by Mr Eddy was of a different type to those the subject of the two prior notifications. The parties accepted as much on the appeal. In my view her Honour's first reason was in error. The second notification is best understood as relating to the same type of ramp as that at issue here, as addressed above. The fact that the complainant in that incident experienced difficulties in a wheelchair is not material. What is material is that that person experienced the same type of problem as that complained about by Mr Eddy, namely instability.

33 The "particular risk" at issue for the purposes of s 45, as stated by the primary judge at J [48], was based upon how the case had been pleaded by Mr Eddy. Her Honour identified that risk as "the risk of the ramp being susceptible to movement because it was not properly installed or connected".

34 As for the primary judge's second reason, at J [50], I have found that the Council did have actual knowledge of the type of risk that materialised, namely, that the smaller, portable ramps were unstable, creating a risk of injury unless secured. The question is whether that knowledge is sufficient to satisfy the criterion in s 45 of the Council having "actual knowledge of the particular risk the materialisation of which resulted in the harm", such that the immunity in that provision does not apply.

35 The Council submits that it did not know where the particular ramp was placed at 5.45pm when the incident occurred, and did not know whether or not the particular ramp was secured. Neither point is in dispute. Mr Eddy did not suggest that the Council knew the precise location of the ramp in question at the time of the incident. And senior counsel appearing for Mr Eddy on the appeal accepted that the Council "didn't know that this ramp was not properly secured".

36 The difference between the parties on this issue comes down to the following. Mr Eddy submits that it is sufficient that the Council had actual knowledge that "there was a risk that this ramp was not properly secured", in the sense that it knew that these types of ramp were being used in this particular area outside

the Centro Centre, that they could be unstable and dangerous unless secured, and that they were not always secured. The Council submits that the criterion in s 45 is not satisfied here because it did not know that this particular ramp, placed wherever it was at 5.45pm, was unsecured. It says that the fact that there was a known type of risk does not suffice; rather, there needs to have been actual knowledge of the precise danger, constituted here by the ramp at issue being in a particular place at the relevant time whilst being unsecured. The issue raised goes to the level of specificity required in characterising a risk for the purposes of s 45.

Section 45 of the CLA and "actual knowledge of the particular risk"

The enactment of s 45

37 Section 45 is within Part 5 of the CLA, which is entitled "Liability of public and other authorities". The section provides as follows:

> "**Special non-feasance protection for roads authorities**
>
> (1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
>
> (2) This section does not operate—
>
> (a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or
>
> (b) to affect any standard of care that would otherwise be applicable in respect of a risk.
>
> (3) In this section—
>
> ***carry out road work*** means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the *Roads Act 1993*.
>
> ***roads authority*** has the same meaning as in the *Roads Act 1993*."

38 This case turns on the meaning of the requirement in s 45(1) that "the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm", and how that applies in the circumstances of this matter. To address that issue it is useful to refer to the context of the enactment of the provision.

39 Until the High Court's decision in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29, the common law of Australia incorporated the so-

called "highway rule". A classical statement of this rule was that of Dixon J in *Buckle v Bayswater Road Board* (1936) 57 CLR 259; [1936] HCA 65 at 281 (footnote omitted):

> "It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway. Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an absolute, as distinguished from a discretionary, duty of repair and to confer a correlative private right."

40 As Gleeson CJ put it in *Brodie* at [14], "[t]he essence of the rule is that a highway authority may owe to an individual road user a duty of care, breach of which will give rise to liability in damages, when it exercises its powers, but it cannot be made so liable in respect of a mere failure to act". A distinction was thus drawn between misfeasance and non-feasance.

41 In *Brodie*, a majority of the High Court overturned the highway rule. That meant that there was no longer an immunity protecting roads authorities from non-feasance. Whether or not a particular claim could succeed depended on being able to establish, in accordance with general principles, that the authority in question owed a relevant duty of care to the claimant, which duty was breached: see *Brodie* at [137]-[140] and [150]-[151] per Gaudron, Gummow and Hayne JJ, [238]-[239] per Kirby J.

42 Section 45 was introduced in 2002. It was plainly enacted as a response to *Brodie*. The section creates a somewhat different immunity to the highway rule. For example, the limitation on the statutory immunity relating to actual knowledge is different to the common law. It should also be noted that it is not limited to liability for negligence (see ss 40 and 45(1)). The section has to be applied according to its own terms. The section has been amended once since its enactment, in a way which is not material for current purposes.

43 The section only applies "for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work". Thus the section applies only if and to the extent that there is an *omission*, that is, where it is alleged that the liability of the roads authority arises from a failure to carry out road work or a failure to consider doing so. If the alleged liability is said to arise from some positive action, then the section will not apply. No doubt in some cases there may be disputes as to whether or not a liability arises from a positive act

or an omission. Further, the section only applies to certain kinds of omissions, relating to carrying out road work. That phrase is defined in s 45(3). If the liability of the road authority is said to arise from some other type of omission, then the section is not applicable. If the immunity does not apply, then the general law applies (including as per *Brodie*), subject to other provisions in the CLA or other statutes.

44 It is not necessary to address such issues further here, as Mr Eddy accepted that s 45 would be a complete answer to his claim if the criterion relating to actual knowledge of the "particular risk" was satisfied. He thus necessarily accepted that his claim was appropriately characterised as involving a claim against the Council as a road authority, based on harm resulting from an omission by the Council with respect to carrying out road work or considering doing so.

Text and context of s 45

45 The key issue that arises in this case goes to how the criterion of "actual knowledge of the particular risk the materialisation of which resulted in the harm" in s 45(1) is to be understood and applied, especially as regards the level of particularity required.

46 Before turning to that issue, it is useful to locate where s 45 fits in the legal analysis. It creates an immunity from civil liability for roads authorities in the circumstances in which it applies. As noted above, its application is not limited to claims in negligence. Where negligence is what is in question, the liability of the roads authority will first depend upon establishing a duty of care of relevant scope. That issue is addressed in *Brodie*, amongst other cases. Where there is such a duty of care, the common law requires the duty-holder to exercise reasonable care to avoid risks of harm to those to whom the duty is owed: see eg *Roads and Traffic Authority of NSW v Dederer* (2007) 243 CLR 330; [2007] HCA 42 at [18] and [43] per Gummow J. Failure to do so is a breach of the duty.

47 In New South Wales, analysis of breach of duty is to be determined in accordance with the principles set out in s 5B of the CLA: note *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48, at [13]. That section

is addressed to whether a reasonable person "would have taken precautions against a risk of harm". The section deals with the foreseeability, probability and significance of the risk of harm, along with burden and consequences of taking precautions against such a risk. The focus is as at the time of the breach, not after the breach has occurred. The section "requires risks to be assessed prospectively. As a matter of ordinary language a 'risk of harm' relates to harm that has not yet happened": *Sibraa v Brown* [2012] NSWCA 328 at [41] per Campbell JA.

48 At common law, a reasonable person is only expected to exercise such care as regards risks of injury which a reasonable person would have foreseen: *Wyong Shire Council v Shirt* (1980) 146 CLR 40; [1980] HCA 12 at 47 per Mason J. It is only necessary that the *kind* of injury and the *kind* of chain of events leading to the claimant's particular injury was reasonably foreseeable. The same applies under s 5B of the CLA, read together with s 5C. Illustrating the issue as regards both the common law and statutory position, in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* (2002) 399 ALR 535; [2022] HCA 11, Gordon, Edelman and Gleeson JJ said the following (at [108]-[109], and see generally at [106]-[119]):

> "[108] Section 5C(a) of the *Civil Liability Act* reflects, and is consistent with, the common law. The effect of this provision is that a defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. As this Court said in *Chapman v Hearse* [[1961] HCA 46; (1961) 106 CLR 112 at 120-121], "one thing is certain" and that is that in identifying a risk to which a defendant was required to respond, "it is not necessary for the plaintiff to show that the precise manner in which [their] injuries were sustained was reasonably foreseeable". The Court continued:
>
> > 'it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [their] capacity to foresee the precise events leading to the damage complained of'.
>
> [109] Similarly, in *Rosenberg v Percival* [[2001] HCA 18; (2001) 205 CLR 434 at 455 [64]], Gummow J said:
>
> > 'A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected. Thus, in *Hughes v Lord Advocate* [[1963] AC 837], there was liability

> because injury by fire was foreseeable, even though the explosion that actually occurred was not.'"

49 Liability in negligence can only arise if the risk which came home to injure the claimant is encompassed by the types of risk against which the defendant was required to take precautions, taking account of ss 5B and 5C. But the types of risk encompassed by s 5B will commonly be wider than the risk that crystallised so as to occasion harm to the claimant.

50 Section 45 stands in contrast to both the common law and ss 5B and 5C. It speaks of "the *particular* risk the materialisation of which resulted in the harm". That suggests a focus on the very risk that came home to cause the injury of the claimant. It looks backwards, from the perspective of the events that actually occurred to cause the alleged harm when the risk materialised. It does not bespeak a focus on the *type or kind of risk* which encompasses the risk that came home: note *Nightingale v Blacktown City Council* (2015) 91 NSWLR 556; [2015] NSWCA 423 at [41] per Basten JA; *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103; [2020] NSWCA 65 at [59] per Leeming JA.

51 As a result, the particular risk spoken of in s 45 must be a manifestation of a kind of risk identified for the purposes of s 5B, and commonly will be a narrower, more particular risk than that which is identified for the forward-looking purposes of s 5B. That being said, it may be that in some cases the two will be expressed in terms which are similar or the same, as addressed further below by reference to some cases.

52 Senior counsel for Mr Eddy sought to place some reliance on other provisions in the Act, submitting that "for the purposes of s 5B and the purposes of 5F and 5L, you don't have to know the precise mechanism, which includes the precise item, which makes the risk come home". He submitted that a similar, though not identical, approach should be taken to s 45. If anything, those provisions militate the other way, serving to reinforce the more specific and backward-looking focus of s 45.

53 Section 5B has already been addressed. Section 5L(1) provides that a person "is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational

activity engaged in by the plaintiff". An "obvious risk" is defined in s 5F(1) as "a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person". The notion is then further elucidated in s 5F(2)-(4). The definition looks forward, addressing risks which would have been obvious before they have crystallised. Section 5L(1) also speaks of the obvious risk having materialised. That means that the immunity only applies where the risk that came home fell within the class of obvious risks in the (forward-looking) sense defined.

54 In *Tapp*, at [112], the majority of the High Court held that "the risk to which s 5L refers should be characterised at the same level of generality as it is characterised when assessing whether the defendant has breached a duty of care under s 5B". Their Honours stated at [115] that "it is unnecessary for the defendant to show the precise manner in which the injuries were sustained for the purpose of characterising the risk".

55 Neither ss 5F nor 5L uses the language of "*particular* risk" employed in s 45.

56 The phrase "particular risk" is used in one other provision in the CLA, s 5M(5), which provides as follows:

> "A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk)."

57 This provision thus draws a distinction between a warning specific to the particular risk and "a general warning of risks that include the particular risk". That again illustrates that a "particular risk" is a specific notion.

58 Section 5G(2) draws a similar distinction in providing that a person is taken to be aware of an obvious risk "if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk".

59 Section 45(1) stands in contrast to ss 5B, 5C, 5F, 5G and 5L. The word "particular" in s 45 evidently is meant to require greater specificity than arises for other references to risk in the Act, or than arose under the common law principles referred to above which were encapsulated in the quotation from

Tapp. That requirement is reinforced by the reference in s 45 to that risk having materialised and resulted in the harm in question.

60 That conclusion does not mean that no issue of characterisation of the risk arises. So much is illustrated by cases which have considered the issue. It is also implicit in closer consideration of the purpose of the section, which I address below.

Relevant cases on s 45

61 In *Botany Bay City Council v Latham* (2013) 197 LGERA 211; [2013] NSWCA 363 the claimant had tripped on an uneven paver on a footpath. Her claim failed first on the basis that she had not made out that the Council had breached its duty of care. This Court went on to consider the application of s 45. Justice Adamson, delivering the judgment of the Court, said as follows (emphasis added):

> "[45] … The "harm" referred to in the last words of s 45(1) is a reference to the "particular harm" which has resulted from the materialisation of the "particular risk", being the "particular harm" to which the determination of causation in s 5D is addressed.
>
> [46] It follows that "the particular risk" is s 45(1) is at the same level of generality. *In this case, given the way Ms Latham put her case that a particular paver that was uneven or irregular caused her to trip, the actual knowledge required is actual knowledge of the particular risk posed by the unevenness or irregularity of the very paver that caused her to trip and fall*. It would not be sufficient for the Council to know of the more general risk that she might trip and fall on an area of irregular pavers between the tree and the adjacent building, as was contended on her behalf on the appeal.
>
> [47] The primary judge identified three distinct levels of generality in respect of which her Honour found there was "particular risk" for the purposes of s 45. In [76] the "particular risk" identified was the general risk of large street trees causing disruption to pavements. In [77] the risk of raised pavers in Coward Street was identified and a finding of either actual or constructive knowledge was made. This finding was refined in [78] where her Honour inferred from the presence of the yellow paint around the tree nearest to where Ms Latham fell that the Council had actual knowledge of the risk.
>
> [48] At no point did the primary judge descend to the requisite level of detail required by the words "particular risk" in s 45: namely, the need for there to be actual knowledge of the unevenness or irregularity of the paver that created the risk which later ensued when Ms Latham walked along the footpath and tripped on it.
>
> [49] There was no evidence that the Council had actual knowledge of the particular paver which caused Ms Latham to trip. Such evidence as there was … was to the contrary. Accordingly, in my view, the evidence was insufficient

> to establish that the Council had "actual knowledge of the particular risk, the materialisation of which resulted in the harm" within the meaning of s 45."

62 In the present case the Council sought to rely on this decision in support of its argument that there needed to be a very precise focus on the risk that came home. But the reasoning needs to be understood in context. The focus on the particular paver was directly connected to the way the claimant had put her case. So much is manifest by the second sentence of [46], as italicised in the above extract. The Court did not find it necessary to engage in detailed examination of the level of particularity required by s 45.

63 Shortly after *Latham* Beech-Jones J handed down his decision in *Collins v Clarence Valley Council (No 3)* [2013] NSWSC 1682. In that case a cyclist was injured crossing a wooden bridge. The front wheel of her bike had become stuck in a gap between the planks, and she fell off the bridge, over low guardrails at the side. His Honour held that there was no duty to warn her of the risk, because it was an obvious risk and s 5H of the CLA applied. He further held that the immunity in s 45 applied. After quoting [45]-[46] of *Latham*, he stated as follows (at [144]):

> "However, the emphasis put in this extract on the way the respondent put her case in *Latham* is significant. In *Latham* the respondent "put her case" on the basis that the area of pavers in question was generally suitable but that there was one "rogue" paver. Hence the Council was required to have knowledge of the "particular risk" posed by that paver. In this case, Dr Collins' case was that the Bluff Bridge was riddled with dangers, one of which ensnared her, even though she cannot point to the particular hole she fell in. In these circumstances the "particular risk" corresponds with the risk of harm I have already identified in [117]."

64 The risk his Honour had identified at [117] was the risk that he identified for the purposes of the "obvious risk" provision in s 5H, which he expressed in this way: "the relevant 'risk of harm' that materialised was the injury that might be suffered from a cyclist falling after their wheel becomes stuck in the holes or gaps in the planks on the bridge". His Honour held that it had not been shown that the defendant council had actual knowledge of this risk, such that the qualification to the immunity in s 45 was not engaged.

65 In light of the High Court's decision in *Tapp*, the level of generality of the notion of "obvious risk" for the purposes of s 5H would be equated with the level of generality of risk for the purposes of s 5B. And, as explained above, that would

usually be at a higher level of generality than would apply for the purposes of s 45. That being said, in some instances there may be no material difference between the two levels, in circumstances where the risk for s 5B purposes is appropriately stated at quite a specific level. Furthermore, to some extent analysis may be affected by the manner in which the arguments of the two sides are pleaded and put. Such issues of characterisation raise matters of fact and degree, but ultimately involve legal conclusions based upon the statute: note *Menz* at [43] and [54]. Nevertheless, some arguments can conveniently fall to be resolved by reference to how the case has been put, as *Latham* illustrates.

66 The decision in *Collins* was appealed to this Court: *Collins v Clarence Valley Council* (2015) 91 NSWLR 128; [2015] NSWCA 263. McColl JA, relevantly speaking for the Court, held at [159] that the conclusion of Beech-Jones J with respect to the council's lack of actual knowledge had been open to him. Her Honour noted that a submission had been made, but seemingly pressed only faintly, that the primary judge had erred in construing "particular risk" in s 45 as being the same as the s 5B(1) risk. On this, her Honour said the following at [164] (citations omitted, emphasis in the original):

> "The primary judge recognised that *Botany Bay City Council v Latham* identified the s 45 "particular risk" of which the relevant public authority must have "actual knowledge" by reference to the way the plaintiff put her case, being one relating to her tripping on a "*particular paver that was uneven or irregular*". In the present case, his Honour identified the way the appellant put her case as relating to the condition of the bridge generally, being that "Bluff Bridge was riddled with dangers, one of which ensnared her, even though she cannot point to the particular hole she fell in", such that the "particular risk" corresponded with his s 5B(1) risk of harm."

67 McColl JA thus regarded the significance of *Latham* as limited in the same way as Beech-Jones J had, which is consistent with my own reading of that case. The second sentence of McColl JA's reasoning is consistent with understanding the decision of the primary judge as turning on the way the case had been put. Again, as in *Latham*, it was not necessary for the Court to engage in significant analysis of the level of particularity required by s 45.

68 In Queensland, s 37 of the *Civil Liability Act 2003* (Qld) is equivalent to s 45. It is not expressed in identical terms, but the immunity is similarly qualified so as not to arise "if at the time of the alleged failure the authority had actual

knowledge of the particular risk the materialisation of which resulted in the harm". The provision was considered by the Queensland Court of Appeal in *Goondiwindi Regional Council v Tai* (2020) 92 MVR 218; [2020] QCA 119. The claimant in that case was a motorbike rider who had been riding along a floodway on the Leichhardt Highway when she struck a large pothole, fell and sustained injuries. The pothole had been caused by a recent flood. Council officers had inspected that portion of the highway more than once over the three days before the accident, were aware that dangerous potholes were beginning to develop there, and indeed had erected signs on both approaches which said "rough surface" and "reduce speed". Unfortunately these signs had not been properly secured. The one facing the direction from which the claimant was coming had fallen over by the time of her accident.

69 The case bears some similarity to this matter. The claimant argued that the relevant risk for the purposes of s 37 was "the presence of large potholes on the floodway which gave rise to the particular risk of a motorist such as the plaintiff, being injured when striking the pothole" (see at [52]). The council contended that "the particular risk for the purposes of s 37 … was the particular pothole which [the claimant] struck" (at [55]). It relied on, amongst other things, the decisions in *Latham* and *Collins*. Morrison JA, with whom Burns J agreed, stated at [82] that *Latham* "does not assist here where the actual knowledge was not contended to be confined to the particular pothole". As for *Collins*, his Honour said at [78] that the case "turned simply on its facts". His Honour went on to at [84] effectively to adopt the risk as articulated by the claimant, and on that basis the s 37 defence was rejected. There was little discussion of why that level of characterisation should be adopted.

70 McMurdo JA (with whom Burns J also agreed) also rejected the council's argument, stating at [134] that the particular pothole "was not the particular risk which materialised"; rather, the risk which materialised was that which his Honour had described earlier finding a breach of the duty of care. Again, in my view, in general the risk should be characterised with greater specificity than that which is required for the purposes of the breach analysis.

71 Although *Goondiwindi* does not offer detailed analysis of why the members of the Court adopted the level of characterisation that they did, the case nevertheless offers a powerful example of how s 45 of the New South Wales Act, and its Queensland equivalent, might be thought to operate too stringently if required to be applied at a very high level of specificity. The road authority there was aware of there being a specific risk of harm – the formation of dangerous potholes – in a specific place. To require the claimant in that case to have proved actual knowledge in relevant council officers of the particular pothole would have made it practically impossible to satisfy the criterion of actual knowledge of the particular risk. That would be so even though there was very specific actual knowledge in the council which had in fact led to an appropriate, if negligently executed, response.

Purposive considerations and conclusion

72 In *Menz* at [54] Leeming JA stated, as regards the obvious risk provision in s 5L, that "[i]n order to identify the appropriate level of generality or specificity, the starting point is to recall that the question is one of statutory construction". So much was confirmed by the analysis undertaken by the majority of the High Court in *Tapp*. And the same is true of s 45.

73 As indicated above, as a matter of text and context the particular risk spoken of in s 45 must be a manifestation of a kind of risk identified for the purposes of s 5B, and commonly will be a narrower, more particular risk than that which is identified for the forward-looking purposes of s 5B. The word "particular" must be given work to do. The question is how much work.

74 In the second reading speech for the introduction of the reforms which included s 45, Premier Carr said the following (Hansard, Legislative Assembly, 23 October 2002, at 5767):

> "The bill will also protect regulatory and roads authorities if they could have done something to avoid a risk but did not do so. It is more than reasonable that functions performed by a public authority are treated differently under the law. Public authorities carry out what is often a limitless task with necessarily limited resources. We must ensure, therefore, that it is not left to the courts to determine a public authority's expenditure on its tasks. In keeping with this approach, the bill will also provide immunity for a public or other authority for breach of statutory duty, unless it has acted irrationally.

> … A 'roads authority' that has not exercised a discretionary power to mend, for example, a pothole will not be liable unless it actually knew about the particular risk that led to the injury. This will reintroduce a protection for certain 'non-feasance' on the part of roads authorities. If a roads authority did know about the particular risk, it will still be able to rely on the general 'resources' protection in the bill for public authorities."

75 The Premier did not state that the common law highway rule was being reinstated. Rather, he spoke of reintroducing a protection for *certain* non-feasance on the part of roads authorities. He referred to the resource implications of public authorities being held liable with respect to the exercise or not of discretionary powers.

76 In *North Sydney Council v Roman* (2007) 69 NSWLR 240; [2007] NSWCA 27, at [56], McColl JA stated that s 45:

> "indicates a legislative intent to strike a balance between the community's legitimate expectation, that public roads will be reasonably safe to traverse, and the extreme consequences which would flow, in revenue terms, if a roads authority could be found prima facie liable for injuries arising from risks of which it had only constructive knowledge. So much, at least, is evident from the structure of the provision and the Second Reading Speech."

77 Her Honour was in dissent in that case. Nevertheless, Basten JA (who had been in the majority in the case) subsequently stated that "the 'balance' identified [in this passage] may be accepted", although his Honour did not find the statement to be of assistance in resolving the issue of who within a roads authority must have the actual knowledge referred to in s 45: *Nightingale v Blacktown City Council* (2015) 91 NSWLR 556; [2015] NSWCA 423 at [27].

78 The notion that s 45 manifests a balance is not surprising, as "no legislation pursues its purposes at all costs": *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [41].

79 Premier Carr's speech contemplated that there would be circumstances in which the criterion of actual knowledge of the particular risk would be met. Thus he referred to the ability of a roads authority to rely on the general resources protection (s 42) if the roads authority did know of the particular risk. That suggests that the provision should not be understood to require such a high degree of specificity as to make it generally impossible for claimants to satisfy the criterion.

80 The Premier accepted that the s 45 immunity would not apply "[i]f a roads authority did know about the particular risk". That acceptance reflects the requirement for actual knowledge in the section. That requirement suggests that the purpose was relevantly to avoid such authorities being liable – and thus have the courts trench upon the discretionary expenditure of resources (as it was seen by the Premier) – unless they had a real chance to respond to a risk of harm because they had actual knowledge of that risk.

81 That does not require that the authority know of every detail of the risk. In the *Goondiwindi* situation there can be no doubt that the council in question had a real chance to respond to the risk of harm (and had in fact done so) regardless of whether it knew precisely how many potholes there were, exactly what size they were, or whether it knew of the existence of the particular pothole that caused the claimant's injury. It knew that there was a risk of harm of a particular kind at a particular location.

82 Similarly, in this case senior counsel for the Council disclaimed any suggestion that the Council could only be liable if it had had knowledge that the precise piece of plastic used as the ramp which caused the injury, out of a possible set of such physical ramps used, was not secured. That acceptance is not surprising, in part because which particular piece of plastic had been used would not appear to have any causal significance. More generally, to have suggested to the contrary would have been to take the requirement for particularity to an absurd level, and one which does not seem likely to have been intended.

83 What is necessary is meaningfully to capture the practical reality of the risk which came home, such that the risk of harm which led to the injury to the claimant was a risk that the roads authority was already actually aware of at the time of the incident in question. The specificity of the identity of the location and of some particular risk (beyond that roads can deteriorate, or be dangerous, or the like) will be relevant.

84 That understanding reflects the apparent purpose of the provision, which is to limit liability of roads authorities for liability arising from omissions unless they have actual knowledge of the particular danger, and thus have had some

opportunity to respond. It should be noted that it is not necessary to undertake some assessment of whether or not there was in fact sufficient time or resources to respond to the prior knowledge of the risk. The notion of having been put on notice so as to have had an opportunity to respond is relevant as a purposive consideration influencing the level of characterisation of risk to be adopted. It is not a legal test. Those are the sorts of issues which may be involved in the separate question of assessing whether any claim in negligence can be made out.

85 None of this analysis should be understood to suggest substitution of other words or tests for the language employed in s 45. And the issue will always be one of fact and degree. But taking account of the text, context and purpose of s 45, in my view the following can be said of the characterisation exercise with respect to the road authority's "actual knowledge of the particular risk the materialisation of which resulted in the harm":

(1) It will usually involve a higher degree of particularity than that required by the s 5B breach analysis (assuming that s 5B analysis is called for at all, that is, that it is a claim involving negligence).

(2) It must meaningfully capture the risk that has come home, so that it reasonably can be said that the roads authority did know of a particular risk which caused the injury prior to incident in question. Factors likely to be important in this regard include the precision of the road authority's actual knowledge of the location (eg a particular location as opposed to a large area) and of the nature of the risk to be found there (eg the knowledge that there were dangerous potholes, as opposed to some generic concern being raised that the roadway is unsafe).

(3) It does not require knowledge of every aspect of the precise causal pathway that led to the claimant suffering harm.

86 No doubt this understanding may evolve as further cases throw new light on the issues that arise.

Application of s 45 to the facts here

87 It will be recalled that the difference between the parties here is that Mr Eddy submits that it is sufficient that the Council had actual knowledge that "there was a risk that this ramp was not properly secured", in the sense that it knew that the relevant type of ramp being used in the particular area outside the Centro Centre could be unstable and dangerous unless secured, and they were not always secured. The Council submits that the criterion in s 45 is not

satisfied here because it did not know that this particular ramp, placed wherever it was at 5.45pm, was unsecured. Mr Eddy accepted that it had not been shown that the Council knew that the ramp in question was not properly secured.

88 In my view the Council's arguments should be rejected.

89 As noted above, the particular risk in question was expressed by the primary judge as "the risk of the ramp being susceptible to movement because it was not properly installed or connected": J [48]. Neither side sought to challenge that characterisation. However, senior counsel for the Council accepted that the word "because" should probably be understood as meaning "if", such that the particular risk was "the ramp being susceptible to movement *if* it was not properly installed or connected".

90 So understood, the Council did have actual knowledge of that risk. That risk did not depend upon the placement of any particular ramp at any specific time. Rather, it related to a dangerous feature of the types of ramps being used on the worksite. The primary judge stated at J [50] that Mr Eddy had conceded that "it was not alleged that the ramp itself was defective". That was correct. The ramps had no inherent defect and (so far as the current evidence discloses) were safe to use *if properly secured*. That is a contingent form of safety. There was an inherent risk of harm in use of the ramps.

91 That characterisation of the risk is appropriate in all the circumstances. It meaningfully and practically captures the risk that came home. Contrary to the submissions of the Council, this was not merely a known *type* of risk. It was not, for example, merely a knowledge that a type of product being used by the Council generally in the course of roadworks in its local government area was potentially dangerous. By the time of the incident the Council had actual knowledge that the smaller, portable ramps being used at the site were unstable, creating a risk of injury, unless secured. This knowledge related to the use of a particular type of ramp at a confined set of works being undertaken at a particular site – the pavement outside a shopping centre – which was used by the public during the course of the day.

92 The Council had actual knowledge of a very specific risk in a very specific area. It has not been argued that that knowledge was not held by the relevant persons inside the Council: cf *Nightingale v Blacktown City Council* (2015) 91 NSWLR 556; [2015] NSWCA 423.

93 For these reasons, in my view the primary judge erred in concluding that the Council did not have actual knowledge of the particular risk the materialisation of which resulted in the harm. The Council did have such knowledge. As a result, it was not able to rely on the immunity conferred by s 45 of the CLA.

94 There are many aspects of Mr Eddy's claim which remain to be determined. The matter should be remitted to the District Court for those to be addressed.

Orders

95 The orders I propose are as follows:

(1) Appeal allowed with costs.

(2) Orders (1) and (2) made by the District Court on 30 April 2021 are set aside.

(3) Matter remitted to the District Court to be determined according to law.

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