SUPREME COURT OF QUEENSLAND

CITATION:	*Deans v Maryborough Christian Education Foundation Ltd* [2019] QCA 75
PARTIES:	**DEBBIE ANN DEANS** (appellant) **v** **MARYBOROUGH CHRISTIAN EDUCATION FOUNDATION LTD** ACN 069 844 211 (respondent)
FILE NO/S:	Appeal No 8810 of 2018 DC No 1093 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2018] QDC 123 (Farr SC DCJ)
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDERS:	**1. Appeal dismissed.** **2. The appellant is to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION OF NEGLIGENCE – STANDARD OF CARE – where the appellant was employed by the respondent as a specialist schoolteacher – where the appellant fractured her left patella after she slipped on a grape while walking through a foyer outside classrooms where junior school students were having "fruit break" – where the learned trial judge applied the liability provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) in determining whether there was any breach of duty of care owed to the appellant – where the learned trial judge found that the risk of an employee sustaining an injury by slipping on a piece of fruit while walking through the foyer area of the classroom block when a fruit break was occurring was not foreseeable under s 305B(1)(a) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where the learned trial judge found the risk of injury was insignificant – where the learned trial judge also found that a reasonable person in the position of the defendant would not have taken the precautions suggested by the appellant –

whether the risk of injury was foreseeable – whether the risk of injury was not insignificant – whether the respondent breached its duty of care to the appellant

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – where the respondent pleaded that the risk, which was denied, was an obvious risk for the purpose of a finding of contributory negligence – where the appellant argued that the respondent essentially conceded that the risk was foreseeable – where the learned trial judge rejected the appellant's argument – whether the respondent conceded that the risk was foreseeable under s 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) in its the plea of obvious risk for the purposes of s 305H

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B(1)

Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319; [2012] QCA 315, cited

COUNSEL: R A Perry QC, with J M Sorbello, for the appellant
G W Diehm QC, with S P Gray, for the respondent

SOLICITORS: Morton & Morton for the appellant
HopgoodGanim Lawyers for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Gotterson JA and the orders his Honour proposes.

[2] **GOTTERSON JA:** The appellant, Debbie Ann Deans, was employed as a specialist schoolteacher at the Riverside Christian College ("the College") in Maryborough. The College is operated by the respondent, Maryborough Christian Education Foundation Ltd, which was the appellant's employer.

[3] The appellant commenced a proceeding against the respondent in the District Court at Brisbane on 24 March 2017. In her amended statement of claim,[1] she alleged that on 4 March 2015 she was performing her duties at the College. At about 8.55 am she was walking from a classroom known as G6 through an adjacent foyer area. As she was walking through the foyer, she slipped on a grape. That event was referred to in the pleading as "the Incident".

[4] The appellant further alleged that she suffered a fracture of the left patella as a consequence of the Incident. The injury caused her enduring pain and suffering and loss of the amenities of life. She has required continuing medical treatment and was incurring economic loss.

[5] The claim against the respondent was founded upon alleged breaches of obligations and duties arising both in contract and under the law of negligence.[2] The appellant claimed both general and special damages together with interest.

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1 AB38-43.

2 Amended Statement of Claim ("ASC") paragraphs 3, 4.

[6] Evidence was heard over two days in April 2018. Written closing submissions were filed during the following month. On 25 July 2018, the appellant's claim was dismissed.[3] In reasons for judgment which were published on the same day, the learned trial judge held that the respondent had not breached its duty of care to the appellant. His Honour concluded separately that had it been necessary to make a finding with respect to the respondent's allegation of contributory negligence, he would have found against it. His Honour also made assessments of the various heads of loss and damage claimed.

[7] On 17 August 2018, the appellant filed an appeal to this Court.[4] The grounds of appeal challenge the finding that there was no breach of the duty of care. There is no challenge to the assessment of quantum.

Factual aspects of the appellant's employment, the work environment and the Incident

[8] **Appellant's evidence:** The appellant began employment with the respondent in 2006. She became a literacy coach, a role in which she would move from classroom to classroom to provide specialist coaching in reading to students with identified needs for it.

[9] The Incident occurred in G Block. The foyer was an area which provided access to three lower primary classrooms, G2, G4 and G6. It had linoleum flooring. Each classroom was being used on the day of the Incident. There were 25 students in each classroom with their class teacher. As well as those persons, teachers' aides and parents would traverse the foyer area.

[10] The appellant's evidence was that classes started at 8.45 am. At about 8.55 am, she was preparing to go to a prep class and demonstrate an oral language lesson. She needed to collect a large chart book with pictures for the lesson. The chart book was about one metre in length, half a metre in width. It had a spiral binding. She collected the book in classroom G6 which was accessed from the foyer area. At the time, the children in the classroom were sitting on the floor eating fruit. Children from one of the other classrooms accessible from the foyer were coming in and out of their classroom.

[11] The appellant gave evidence that the children in the classrooms accessed from the foyer would have a fruit break. The objective of the break was to energise younger children in junior classes for the day. It was up to the class teacher to decide when the break would be held and how long it would last. It usually preceded the mid-morning recess and was not part of it.

[12] To prepare for the break, children would leave their classroom and go to their bags which were stored on port racks in the foyer area. They would collect the fruit they had brought to school for the break and then bring it back with them to the classroom.

[13] According to the appellant, she was carrying the chart book by a metal hook. Her intention was to walk from G6 through the foyer and down a passage to a prep classroom, A3. She was looking towards the doorway of A3. As she was crossing

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3 AB37.
4 AB1-5.

the foyer, her leg went forward and slipped. She ended up lying on the ground on top of the book. She looked over and saw a squashed grape on the floor.[5]

[14] **Other witnesses' evidence:** The respondent adduced evidence on liability from Ms AM O'Brien, the Principal of the College at the time when the Incident occurred. Ms O'Brien gave evidence that for regular recess breaks, teachers were rostered to areas. They would patrol their area and ask students to pick up litter or pick it up themselves to ensure general cleanliness.[6]

[15] Apart from that, the need for cleanliness of the grounds was impressed on the teaching staff. In an overall way teachers in the three classrooms accessible from the foyer were responsible for the cleanliness of their respective classroom and the foyer area.[7]

[16] The fruit break was held within the classroom. It had been instituted before she commenced employment with the College. There had been no report to her of any injury associated with a fruit break. Nor had there been any reported injury from slipping in the foyer area outside junior school classrooms where a fruit break was held.[8]

[17] Ms O'Brien gave evidence that in early 2016, the linoleum flooring in the foyer was replaced with carpet. The reasons for the replacement were that it was the original flooring; it was about 17 years old; and it had become discoloured.[9]

[18] In cross-examination, Ms O'Brien agreed that there were no specific rosters for fruit breaks.[10]

[19] Evidence was also adduced from Mr G Bentley who was head of the junior school (prep to year five) at the College at the time of the Incident. He had worked at the College for more than 20 years and had taught prep to year three classes. He gave evidence that the fruit break was introduced "approximately eight years ago". It took place at the start of the day.[11]

[20] Once children were in the class and the roll was marked, they would be directed to get their fruit. They would go to their bags, retrieve the fruit and then bring it back into the classroom. Typically, the break would last five minutes during which they would eat the fruit and be read a story or be led in devotions. When the break finished, children who had not finished would be asked to place their remaining fruit back in their bags. Any food scraps would be placed in a bin in the classroom.[12]

[21] Mr Bentley confirmed that the bags were stored on bag racks in the foyer area. To his knowledge, there had been no report of a person slipping in that area.[13] Usually,

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5 The appellant's evidence on these factual aspects is in evidence in chief at AB134: Transcript ("Tr") 1-24 l28 – AB135: Tr1-25 l35 and AB144: Tr1-34 l41 – AB145: Tr1-35 l13, and in cross-examination at ABl50: Tr1-40 l19 – ABl53: Tr1-43 l32.

6 AB186: Tr2-6 ll5-16.

7 AB192: Tr2-12 ll22-27.

8 AB186: Tr2-6 ll30-37.

9 AB187: Tr2-7 ll15-30.

10 AB192: Tr2-12 l15.

11 AB199: Tr2-19 ll14-43.

12 AB199: Tr2-19 l45 – AB200; Tr2-20 l13.

13 AB202: Tr2-22 ll9-13

children would bring in whole fruit for the break.[14] Grapes were not excluded.[15] Occasionally, the fruit would be packed in a container.[16]

The pleaded cases with respect to liability

[22] In her pleading, the appellant identified the classroom from which she exited with the chart book as F3. The respondent's relevant knowledge and the particulars of breach alleged against it were pleaded in paragraphs 6 and 8 of the Further Amended Statement of Claim as follows:[17]

> "6. Prior to the Incident, the defendant was aware that:
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> (a) the foyer area adjacent to F3 is a high volume pedestrian traffic thoroughfare;
>
> (b) children between the ages of five and six years old would access the area during the "fruit break" and traverse the area with fruit and other snacks;
>
> (c) it had no system of cleaning the foyer area following "fruit break"…
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> 8. The Injury was caused by the defendant's breaches of its obligations and duties pleaded at paragraphs 3 and 4 above as the defendant failed to:
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> (a) take reasonable for the plaintiff's safety;
>
> (b) establish, maintain and enforce safe methods and systems for the plaintiff to carry out her employment;
>
> (c) supervise the plaintiff so as to ensure she carried out her employment safely;
>
> (d) warn the plaintiff of the possibility of injury to her in carrying out her employment and instruct her in methods of work to avoid the possibility of such injury;
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> (e) provide a safe work environment within which the plaintiff was required to perform her duties;
>
> (f) not require the plaintiff to perform work where the defendant knew, or ought to have known, that the carrying out of the work may cause injury to the plaintiff;
>
> (g) failed to implement a system of inspection and cleaning following "fruit break" when it knew, or ought to have known, that there was a high probability of slip hazards being created in the area due to the fact that five and six year old children were carrying fruit through the area;

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14 AB201: Tr2-21 ll44
15 AB203: Tr2-23 l32.
16 AB201: Tr 2-21 ll45-46.
17 ASC: AB39, 40.

(h) failing to make arrangements for the five and six year old children to store their "fruit break" snacks in an area that was not a high traffic pedestrian area."

[23] The "high volume pedestrian traffic thoroughfare" pleaded in paragraph 6(a) was particularised as referring to "the area being an area which has a high volume of pedestrians accessing the area including:

"(a) teachers, children, parents, teachers' aides, administration staff and grounds people;

(b) the peak period for pedestrians traversing the area was between 8.45 am and 9.30 am;

(c) the number of people commonly traversing the area was approximately 75 children, eight to ten parents, three teachers and one teacher aide."[18]

[24] In its Further Amended Defence, the respondent did not admit paragraph 6(a) and admitted 6(b). It denied paragraph 6(c) "because the system of work was:

"(1) The teachers, including the Plaintiff were responsible for identifying rubbish, including food scraps, in the school grounds;

(2) The Defendant employed grounds staff;

(3) If the teachers, including the Plaintiff, identified rubbish, including food scraps, in the school grounds they could either pick up the rubbish themselves, direct the students to pick up the rubbish or arrange for the ground staff to attend to the rubbish."[19]

[25] In response to paragraph 8 of the Amended Statement of Claim, the respondent pleaded the following:[20]

"7. The Defendant denies the allegations in paragraph 8 of the Statement of Claim because:

(a) It took reasonable care for the Plaintiff's safety by implementing the system pleaded at paragraph 5(c) of this Defence;

(b) It established, enforced and maintained safe systems of work as pleaded at paragraph 5(c) of this Defence;

(c) The Defendant was not reasonably required to provide the Plaintiff with constant supervision during her working day as she was an experienced and qualified teacher;

(d) Any failure to supervise the Plaintiff, which is not admitted, did not cause the injury;

(e) If the allegation in paragraph 6 of the Statement of Claim is correct, which is not admitted:

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18 Further and Better Particulars of the Statement of Claim paragraph 1: AB44.

19 Further Amended Defence paragraph 5: AB46, 47.

20 Further Amended Defence: AB47, 48.

(1) The risk of injury was obvious within the meaning of sections 305H and 305I of the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA)**;

(2) The Plaintiff was aware of the risk of injury;

(3) The Defendant was not reasonably required to provide the Plaintiff with specific warnings in relation to the risk of injury;

(4) Any failure to provide a warning, which is denied, did not cause the Plaintiff's injury; and

(5) The Plaintiff caused or contributed to her injury by failing to take reasonable care for her own safety by keeping a proper lookout.

(f) It provided a safe work environment by implementing the system pleaded at paragraph 5(c) of this Defence;

(g) Its duty of care did not extend to removing the Plaintiff from the place of work having regard to the seriousness and probability of the relevant risk of injury in accordance with s 305B of the WCRA;

(h) It denies there was a high probability of slip hazards being created in the area because such allegation is untrue;

(i) If there was a high probability of slip hazards being created in the area, which is denied:

(1) The risk of injury was obvious within the meaning of sections 305H and 305I of the WCRA;

(2) The Plaintiff was aware of the risk of injury; and

(3) The Plaintiff caused or contributed to her injury by failing to take reasonable care for her own safety by keeping a proper lookout.

8. The Defendant does not admit the allegations in paragraph 8(h) of the Statement of Claim because the allegations are unclear and the Defendant requires further and better particulars in order to answer same.

9. If the allegations in paragraph 8(h) of the Statement of Claim are correct, which is not admitted, any such failure did not amount to a breach of duty by the Defendant because the Defendant was not reasonably required to take the alleged step having regard to the seriousness and probability of the relevant risk of injury in accordance with s 305B of the WCRA."

[26] By way of a Reply, the appellant denied the contributory negligence alleged against her in paragraphs 7(e)(5) and 7(i)(3) of the Further Amended Defence.[21]

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21 Reply paragraph 2; AB 1 51.

The judgment at first instance

[27] The learned primary judge found that the appellant, when walking in the foyer area, stepped on a grape on the floor, slipped and fell.[22] He also found that her left patella fractured as a result of the fall.[23] His Honour noted that it was not in dispute that an employer, such as the respondent, owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury.[24]

[28] The issue to which the learned primary judge next turned was whether the respondent had breached its duty of care to the appellant. His Honour referred to common law principles for determining whether a duty of care had been breached as enunciated by Mason J in *Wyong Shire Council v Shirt*,[25] namely, that it is first necessary to consider whether a reasonable person in the defendant's position would have foreseen the risk of injury and, if so, then to determine what a reasonable person would do by way of response to the risk.[26]

[29] The learned primary judge observed, correctly, that the provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("WCRA") must be applied when determining whether there had been a breach of duty to take care owed to the appellant. His Honour set out the general principles in s 305B and the other principles in s 305C WCRA. He adopted the general principles as the relevant frame of reference for his consideration of the appellant's claim. Those principles are as follows:

> "(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
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> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
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> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
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> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury."

[30] The learned trial judge then posed a series of questions which addressed the principles. The first question posed was: "Was the risk of injury foreseeable?" His Honour identified the relevant risk as one that an employee might sustain an injury

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22 Reasons [10].
23 Reasons [11].
24 Reasons [12].
25 (1980) 146 CLR 40 at 47-48.
26 Citing per Bowskill QC DCJ in *Rudd v Starbucks Coffee Company (Australia) Pty Ltd* [2015] QDC 232 at [147].

because of slipping on a piece of fruit whilst walking through the foyer area of the classroom block at the time a fruit break was occurring.[27] His answer to the question was that he was not satisfied that the risk was reasonably foreseeable.[28]

[31] The reasoning of the learned primary judge towards that answer occupied a number of paragraphs. The substance of it appears, sufficiently for present purposes, in the following paragraphs:

> "[35] The plaintiff relies heavily upon the general notoriety of young children dropping things and leaving them on the floor. I note though that there is no evidence before the court that over the approximate period of five years that "fruit break" had been taking place prior to the time of the incident, that fruit had been dropped and allowed to remain on the floor.
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> [36] Furthermore, I have no reason to believe or infer that the children were inadequately supervised at any stage when "fruit break" was taking place. It follows, that if adequate supervision was occurring, then if any fruit was dropped on the floor, it should be picked up either as a result of a child being directed to do so or by a teacher doing so himself or herself in accordance with the general school policies.
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> [37] The evidence does not support the allegation that the defendant knew, at the relevant time, of the alleged foreseeable risk. Neither, does the evidence support the contention that the defendant ought to have known of such risk. There has been no evidence placed before the court as to problems at other schools that may have arisen from "fruit break", there is no evidence of public notoriety of the dangers of such a system or of any particular risk of harm arising from it. There is no suggestion that there are publications, or workplace safety manuals or academic knowledge which might be expected to inform the defendant as to the potential danger.
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> [38] Furthermore, the lack of any previous incident involving someone slipping on a piece of fruit, notwithstanding that "fruit break" had been taking place for approximately five years until the time of this incident, is strongly suggestive that the incident was not reasonably foreseeable, although of course it is not determinative of the issue.[29]"

[32] His Honour supplemented his analysis with a rejection of a proposition advanced by the appellant that the respondent's plea of contributory negligence was an implicit concession of the existence of a foreseeable risk of injury.[30] He regarded the

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27 Reasons [23].

28 Reasons [39].

29 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [82]; referred to in *MR & RC Smith Pty Ltd v Wyatt (No 2)* [2012] WASCA 110 at [101] per Pullin JA. See also (*Erickson v Bagley* [2015] VSCA 220) at [43] and [45] and *Suncorp Staff Pty Ltd v Larkin* [2013] QCA 281 at [26]-[27] per Muir JA; *Rudd v Starbucks Company (Australia) Pty Ltd* at [177].

30 Reasons [40]-[43].

proposition as one that had been "denounced" by the decision of the High Court in *Thompson v Woolworths (Qld) Pty Ltd*.[31]

[33] The learned primary judge proceeded to consider two further questions notwithstanding his answer that foreseeability of risk had not been established. The first of these questions was: "Was the risk of injury not insignificant?" That question was answered in the negative. His Honour reasoned as follows:

> "[49] In this matter, given that "fruit break" had occurred for approximately five years prior to the plaintiff's injury, and the fact that there is no evidence of any previous complaints of injury sustained because of the "fruit break" being conducted nor even any complaints of anyone slipping on the floor surface in the foyer area due to the "fruit break" being conducted, the reasonable conclusion is that the degree of probability of the risk of harm eventuating was low. When that evidence is considered together with the fact that during that period of time the area would have been traversed by thousands if not tens of thousands of people at and around the relevant time leads to the almost inevitable conclusion that any such risk could only be categorised as "insignificant", as that term is defined in section 305B(1)(b)."

[34] Next, the learned primary judge considered the question: "In the circumstances would a reasonable person in the position of the defendant have taken precautions?" His Honour referred to authority to the effect that where an employer's negligence is alleged to consist of an omission to provide certain safeguards, the employee must prove that provision of such safeguards would have avoided the risk of harm.[32] It is not sufficient that they could or might have avoided it.[33] Further, the duty is to take precautions that a reasonable person would take. It is not a duty to ensure that the risk is eliminated.[34]

[35] The learned primary judge proceeded to consider submissions in respect of each of the failures on the respondent's part alleged in paragraph 8 of the Amended Statement of Claim. He found that none of them were made out. In the course of his reasoning, he reached a number of conclusions which include the following.

[36] His Honour was unpersuaded that the respondent had failed to establish, maintain and enforce safe methods and systems for the appellant to carry out her employment.[35] He found that there was nothing about the duties she was required to perform, or the manner in which she was obliged to perform them, that required any warning or instruction from the respondent.[36] He concluded that the respondent had not failed to provide a safe environment by not having arranged for the linoleum flooring in the foyer to be replaced by carpet.[37] As well, his Honour

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31 [2005] HCA 19; (2005) 221 CLR 234 per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ at [37].

32 *Lusk v Sapwell* [2011] QCA 59 per Wilson AJA at [76].

33 *Queensland Corrective Services Commission v Gallagher* [1998] QCA 426 per de Jersey CJ at [26], [27] (Pincus JA and White J agreeing); *Woolworths Ltd v Perrins* [2015] QCA 207; [2016] 2 Qd R 276 per McMeekin J at [173] (Fraser and Gotterson JJA agreeing).

34 *Brisbane Youth Services Inc v Beven* [2017] QCA 211 per McMurdo JA at [186].

35 Reasons [71].

36 Reasons [80].

37 Reasons [81]-[83].

rejected a submission that the respondent ought to have had in place a system of inspection and cleaning of the foyer of a kind that would have detected the presence of the grape and removed it before the appellant slipped on it.[38]

The grounds of appeal

[37] There are 14 grounds of appeal, each one of which challenges a separate finding made by the learned trial judge. Grounds (a) to (i) contest findings made as his Honour answered the first question; Ground (j) as he answered the second question; and Grounds (k) to (n) as he answered the third question.

[38] I preface my consideration of the grounds with the explanation that I have concluded that the risk of injury of the kind sustained by the appellant was foreseeable; that it was a very low risk; and that the appellant failed to establish by evidence any precaution that the respondent ought to reasonably have taken which would have avoided the risk. It is therefore convenient to consider a number of the grounds together.

Grounds (a) to (i) – foreseeable risk of injury

[39] Grounds (a) to (g) challenge findings made in paragraphs 35 to 38 of the Reasons and the conclusion drawn from them in paragraph 39 that it had not been established that the risk was foreseeable in terms of s 305B(1)(a) WCRA. Grounds (h) and (i) concern his Honour's conclusion that the respondent had not by its pleading conceded that there was an obvious risk of injury.

[40] I mention first that, in my view, the conclusion that there was no concession is plainly correct. The trial was conducted as between the parties on the basis that there was an issue as to whether there was a foreseeable risk of injury at all and, if so, whether it was not insignificant. The appellant led evidence relevant to those issues. No objection was taken by her to comparable evidence adduced by the respondent or to submissions by the respondent on the issue. It is clear enough that the case was not litigated on the basis of a concession of obvious risk.

[41] In any event, the submission for the appellant on this issue was advanced on the footing of the pleas in paragraphs 7(e)(5) and 7(i)(3) of the Further Amended Defence that the appellant failed to take reasonable care for her own safety. Each of these pleas was made within a context where the respondent had not admitted or had denied certain facts and was pleading that had those facts existed, then there was a failure by the appellant to take reasonable care. For example, for paragraph 7(i)(3), the denial was of a high probability of slip hazards in the foyer area. It is, I think, plain that there was no concession that an obvious risk existed.

[42] Turning to the foreseeability of risk, I note that a perusal of paragraphs 35 to 38 of the Reasons indicates that the learned primary judge concluded that there was no foreseeable risk having regard to an absence of evidence of a number of factors, namely, that fruit had been allowed to drop and remain on the floor during a fruit break in the five years that fruit breaks had existed;[39] or that there had been fruit break problems at other schools, public notoriety of such problems or publications

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38 Reasons [88].

39 At [35], [36].

which referred to them;[40] or that someone had slipped on a piece of fruit during a fruit break.[41]

[43] To my mind, an absence of evidence of those factors provided an incomplete frame of reference for determining whether the risk of injury was foreseeable. As well, it was an insufficient basis for a finding against foreseeability.

[44] His Honour was right to observe that the absence of evidence of someone slipping on a piece of fruit during a fruit break was not determinative of the issue. It and the absence of evidence of fruit having been dropped and left on the foyer floor during a fruit break have a relevance to foreseeability as they do also to the significance of risk. However, neither is determinative of the foreseeability of risk.

[45] The absence of evidence of fruit break problems at other schools, of public notoriety of such problems, or reference to them in published material has some, arguably indirect, relevance to the issue of foreseeability. It, too, has a like relevance for significance of risk.

[46] In my view, the determination of whether a risk is foreseeable for the purposes of s 305B(1) must begin with the ascertainment of what the relevant risk is. Within the evidential framework in this case, it is a risk that at or about a fruit break, a child would drop fruit on the floor of the foyer; that the child (or someone else) would not pick it up; that a person familiar with fruit breaks (as, on the evidence those who accessed the foyer area were) who was traversing the foyer on foot would fail to see the grape; that the person would tread on it, slip and fall to the ground; and that the person would be injured as a result.

[47] Is that risk one of which the respondent knew? There is no evidence that imputes to an employee of the College knowledge of dropped fruit in the foyer area on which a person had slipped. A finding of actual knowledge of risk cannot be made on the evidence.

[48] Was it a risk of which the respondent, in any event, ought reasonably have known? In circumstances where children from three classes would carry fruit, usually whole pieces not in containers but including grapes, through the foyer area on their way to and from the classroom, it was foreseeable that fruit might be dropped onto the floor. It was also foreseeable that the child who dropped it (or someone else) would not notice and pick it up. Further, it was foreseeable that even a person who was familiar with the fruit break, who was crossing the foyer on foot and who failed to look at the floor in front of them, would tread on the fruit, slip, fall to the floor and injure themselves. In these circumstances, it was, I think, reasonably foreseeable that injury would occur in that way.

[49] I appreciate that it is reasonable foreseeability of all of these factors that in aggregate make up the risk that is required. However, that the risk arising from these factors so aggregated might ultimately be assessed as low or even insignificant does not negate the existence of foreseeability of the risk in the first place.

Ground (j) – significance of risk

[50] This ground of appeal contends that the learned primary judge erred in the finding at paragraph 49 of the Reasons that the risk was "insignificant".

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40 At [37].
41 At [38].

[51] His Honour acknowledged that the common law test for probability of risk is that it not be "far-fetched or fanciful" in order for there to be a duty of care. He referred to authority in which the phrase "not insignificant" had been held to be a more onerous test for a plaintiff than the common law test, but "not by very much".[42]

[52] At paragraph 49 of the Reasons the learned primary judge reasoned that the absence of evidence of injury during a fruit break including by slipping on the foyer floor justified a conclusion that the risk of injury here was "low". The additional consideration that, on the evidence, a large number of persons would have traversed the foyer area over the five years at or about a fruit break time, led his Honour to an "an almost inevitable conclusion" that the risk was properly categorised as "insignificant". By that categorisation, his Honour foreclosed a finding that the risk was "not insignificant".

[53] There is no challenge by the appellant to the articulation by his Honour of the test for a risk to be "not insignificant". It accords with the observations of Fraser JA in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd*[43] concerning s 9(1)(b) of the *Civil Liability Act* 2003(Qld), an analogue of s 305B(1)(b). His Honour said:[44]

> "… Nevertheless, the provision was designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable. I think that it did produce some slight increase in the necessary degree of probability. A far-fetched or fanciful risk is necessarily so glaringly improbable as to be insignificant, but the obverse proposition may not necessarily be true. The generality of these descriptions makes it difficult to be dogmatic about this, but the statutory language does seem to convey a different shade of meaning. The difference is a subtle one. The increase in the necessary degree of probability is not quantifiable and it might be so minor as to make no difference to the result in most cases. Nevertheless, in deciding claims to which the Act applies the "not insignificant" test must be applied instead of the somewhat less demanding test of "not far-fetched or fanciful"."

[54] The appellant did not in written or oral submissions present the Court with a critical analysis of the reasoning in paragraph 49. The challenge to the conclusions in it was based upon broad propositions that children notoriously drop things and that if there was a perceived need to roster teachers to supervise children during recess breaks, then the same need would have existed for a fruit break.

[55] In my view, the appellant's propositionally-based challenge to the provisional finding fails to address the relevant risk as I have described it. That risk was not merely that children might drop things. It was an aggregation of factors well beyond that.

[56] In my view, on the evidence, the probability of occurrence of the relevant risk was very low. I am unpersuaded that the learned primary judge erred in not categorising it as not insignificant. On the basis of the categorisation he did make, there was no breach of duty. Notwithstanding, it is appropriate that consideration be given to the remaining grounds of appeal.

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42 Citing *inter alia Erickson v Bagley* [2015] VSCA 220 at [36].

43 [2012] QCA 315; [2013] 1 Qd R 319.

44 At [26] (White JA and Mullins J agreeing).

Grounds (k) and (n)

[57] These grounds are related. They contend that the learned primary judge misapprehended the evidence and, at paragraphs 71 and 89 of the Reasons, drew conclusions on the factual footing that the rostering of teachers for recess breaks applied during the fruit break. It is, of course, correct that, on the evidence, rostering did not take place for the fruit break. However, I do not accept the appellant's contention that his Honour acted on a footing that it did.

[58] It is, I think, tolerably clear from what his Honour said at paragraphs 68, 69 and 70 of the Reasons that he understood that the overall instruction that had been given to teachers with respect to cleanliness of the grounds applied during the fruit break. He did not proceed on the footing that the recess roster applied during the fruit breaks.

[59] Within the context of these grounds, the appellant contended that a precaution that the respondent, acting reasonably, ought to have taken was to have applied the recess roster system to the fruit break. In oral submissions, the system by which the appellant advocated was explained as one in which the class teacher or a teacher's aide or a parent would leave the classroom as children went to their bags to collect or return fruit and supervise them as they did so to ensure that no fruit was dropped and left on the foyer floor.[45]

[60] The difficulty with this submission is that the appellant did not adduce evidence or otherwise establish a body of relevant fact from which a finding could be made that that was a system that the respondent ought reasonably have adopted. There was no evidence that at the fruit break there was available in the classroom a teacher's aide or willing parent who could have carried out the supervision. If that role was to fall to the class teacher, there was no evidence as to how long it took all children who participated in the fruit break to collect and return fruit, how long the teacher would be absent from the classroom, and how might children who remained in the classroom be adequately supervised in the teacher's absence. That latter issue would not, of course, arise with a recess break when all children and the teacher left the classroom.

[61] Moreover, there was an inadequate evidentiary basis for a finding that such a system would have avoided the risk of injury to the appellant. I accept that the appellant was required to establish that on the balance of probabilities, but that did not mean that all that had to be established was a 50 per cent or more probability of avoidance of the risk.

[62] Here, it was not known how long the grape had been on the floor before the appellant stood on it. It may have been for a few seconds only. Had that been the case, a supervising teacher may not have noticed it or picked it up, particularly if a number of children were accessing their bags at the one time.

[63] Taking these considerations into account and allowing for the very low probability of risk of harm, I conclude that the appellant has failed to establish that this is a precaution that the respondent ought reasonably have taken.

Ground (l)

[64] This ground of appeal alleges that the learned primary judge erred in finding at paragraph 80 of the Reasons that there was nothing about the duties that the

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45 Appeal Transcript ("AT") 1-20 l37 – AT 1-21 l21.

appellant was required to perform or the manner in which she was obliged to perform them that required any warning or instruction. The submission is that the respondent ought to have instructed the appellant that before traversing the foyer area immediately after a fruit break, she should check it for any spillage of fruit.[46]

[65] This is a difficult argument for the appellant to make good. She taught at the school. She was familiar with the fruit break and what the children did during it. On her own evidence, she was aware that children can drop things. Further, adults know of the need to maintain some look out for objects on the ground as they move about. There was nothing relevant of which the appellant was unaware and of which the respondent reasonably needed to have given the appellant warning.

Ground (m)

[66] The contention in this ground of appeal is that the learned primary judge erred in not having regard for the replacement of the linoleum flooring with carpet. The failure to replace it before the appellant slipped, it was submitted, was evidence of a failure to provide a safe work environment.

[67] His Honour regarded the submission as based entirely on the benefit of hindsight. That may be so. Nevertheless, the real difficulty with the submission is that there was an absence of evidence that had there been carpet on the floor, a slip and fall as a sequel to treading on a grape, would have been avoided.

Disposition

[68] Notwithstanding the appellant's limited success on the issue of foreseeability, for these reasons, this appeal must be dismissed. The appellant ought to pay the respondent's costs of it.

Orders

[69] I would propose the following orders:

1. Appeal dismissed.
2. The appellant is to pay the respondent's costs of the appeal on the standard basis.

[70] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.

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46 Appellant's Outline of Submissions paragraphs 48, 49.