DISTRICT COURT OF QUEENSLAND

CITATION:	*Hodges v Townsville City Council* [2022] QDC 272
PARTIES:	**BARBARA JOSEPHINE HODGES** (Plaintiff) **v** **TOWNSVILLE CITY COUNCIL** (Defendant)
FILE NO:	252 of 2017
DIVISION:	District Court
PROCEEDING:	Civil
ORIGINATING COURT:	District Court
DELIVERED ON:	7 December 2022
DELIVERED AT:	Townsville
HEARING DATE:	21 – 22 February 2022
JUDGE:	Coker DCJ
ORDER:	**1. The Defendant is liable for the injuries sustained by the Plaintiff.** **2. Judgment is made for the Plaintiff in the sum agreed between the parties, $301,603.23.** **3. Should costs not be agreed between the parties then each party has leave to file submissions by 20 January 2023.**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – where the plaintiff attended a park maintained by the defendant – where the plaintiff whilst walking in the park stepped into a concealed hole causing her to fall and suffer a spiral fracture to the left tibia, fibula and malleolus – whether the plaintiff was responsible for the fall through a lack of observation of her surrounds – whether the defendant maintained the park including appropriate inspection and maintenance – whether the defendant breached its duty of care to the users of the park.
LEGISLATION:	*Civil Liability Act 2003* (Qld), S. 9, 10, 11, 12, 13, 35, 36.
CASES:	*Bartels v Bankstown City Council* [1999] NSWCA 129, considered. *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, considered.

Lanyon v Noosa District Junior Rugby League Football Club Inc [2002] QCA 163, considered.

COUNSEL: McClymont. J.O. for the Plaintiff
De Jersey D.P. for the Defendant

SOLICITORS: Rapid Legal Solutions for the Plaintiff
Barry Nilsson Lawyers for the Defendant

Introduction

[1] Some time between 9 and 10am on 15th October 2015 Barbara Josephine Hodges, hereinafter referred to as the Plaintiff, met her daughter and grandchild at Sheriff Park, situated on Love Lane, Mundingburra. She parked her car in the off-street carpark at the front of Sherriff Park on Love Lane. She was dressed for and planned to engage in some exercise in the park, as she had done in the past and therefore was not carrying anything more than her mobile phone and car keys.

[2] Whilst at the park and traversing a grassed area, she stepped into what she described as a hole with her left foot, causing her to fall and suffer a spiral fracture of the left tibia, fibula and malleolus.

[3] Liability remains in dispute between the Plaintiff and the Townsville City Council, hereinafter referred to as the Defendant, but quantum has been agreed in the sum of $301,603.23.

[4] Whilst liability remains in issue, it is common ground, as noted in the outline of submissions for the Defendant that,

a. *the Council was the occupier of and vested with responsibility for the parks, gardens and footpaths within the City of Townsville;*

b. *included within its responsibility was a grassed area near the car park of Sherriff Park at Love Lane, Mundingburra in Townsville;*

c. *the Council owed a duty to persons such as the plaintiff to exercise reasonable care so that parks such as Sherriff Park were reasonably safe for people to use;*

d. *the duty owed by the council was to take reasonable precautions in respect of risks of harm which were reasonably foreseeable and not insignificant*

and that would be taken by a local government in the Council's position in respect of the risk of harm, having regard to ss.35 and 36 Civil Liability Act 2003.

[5] Acknowledging its responsibilities and duties owed to persons such as the Plaintiff arises specifically pursuant to the *Civil Liability Act 2003* (Qld). Provisions relevant to this claim include Sections 9, 10, 11, 12, 13, 35 and 36 and are in these terms:

Division 1 General standard of care

9 General principles

(1) A person does not breach a duty to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(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.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—

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

(b) the likely seriousness of the harm;

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

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

10 Other Principles

In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 2 Causation

11 General Principles

(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (factual causation);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

12 Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 3 Assumption of risk

13 Meaning of obvious risk

(1) For this division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

...

35 Principles concerning resources, responsibilities etc. of public or other authorities

The following principles apply to a proceeding in deciding whether a public or other authority has a duty or has breached a duty—

(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;

(b) the general allocation of financial or other resources by the authority is not open to challenge;

(c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);

(d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

36 Proceedings against public or other authorities based on breach of statutory duty

(1) This section applies to a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority.

(2) For the purposes of the proceeding, an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

[6] What is clear from these matters is that there is a duty owed by the Defendant to users of the park, such as the Plaintiff, including the obligations to exercise reasonable care to ensure that the park was reasonably safe for people to use and further that the Defendant would take reasonable precautions in respect of risks of harm which were reasonably foreseeable and not insignificant.

[7] The Plaintiff alleges that she stepped into a hole that caused her to fall, that the hole was concealed and that the hole would have been detected if the Defendant had appropriately instructed its staff and that they had acted in accordance with those instructions.

[8] It is necessary therefore to consider the evidence to determine a number of matters, including whether there was a 'hole' rather than as the Defendant suggests, '*a slight depression or unevenness*'. It is also necessary to assess, if there was a hole, whether it created a risk which the Defendant was required to take precautionary steps against and if so, were such reasonable precautions taken?

[9] The necessary assessment begins therefore with consideration of the evidence of the Plaintiff and her witnesses. The Plaintiff gave evidence that she was born on 7th May 1960 and was therefore 55 years of age at the time of the incident. More particularly, the Plaintiff indicated her regular attendances at Sherriff Park over a considerable number of years and the repeat nature of where she parked her car and then ventured into the park itself. She also described the qualities that made the park as she described it, "*a family friendly park*".

[10] She specifically spoke of the maintained or mown lawns of the park and confirmed that on the day of the accident, she had gone to meet up with her daughter and grandson and "*just to go for a walk*". She indicated that she had arrived before her daughter and she was looking at some exercise equipment when she noticed her daughter. Her evidence then went as follows:

> *What happened then?---Yeah. I was just on the exercise equipment, I just got off to walk back, I think and it's getting on anyway so I was walking just up past the exercise and I look up and see me daughter coming, yeah.*
>
> *Okay. And where were you walking towards at that point, where did you intend to walk to?---Straight towards the car park, straight towards them.*
>
> *Okay. And what happened next?---When I met up with my daughter, probably three-quarters the way maybe back towards the end, I – she said to me, "Mum why don't we just go down the Strand, Braxton can play along the Strand while we walk." You know, the stuff under the little play areas, whatever. [indistinct] we decided to go to the Strand. And as I was walking back towards the car, closer to the car, I fell. My foot went down and I fell.*
>
> *Now, can you described, please, what you noticed when you fell?---I just felt my feet uneven underneath me, my leg – left leg uneven, and I went to – when I was walking – I just went to walk and just fell down, and went to brace myself at first but didn't hold me up, I went down.*
>
> *And can you elaborate, please, what you mean when you say that it was uneven?---I think my foot was in a hole or something at that time because just – was like dudged – budged. Yeah, I just couldn't walk, I just went down.*

And did you feel any change in the height of the ground beneath your foot?---Yes, on the left side, yes.

And what was that change? Can you describe what that was?---Just uneven, like I'd stood in a hole. Like I stood in something, yes.

[11] The Plaintiff subsequently in her Evidence-In-Chief indicated that she was attended to by two ambulance officers, placed on a stretcher and strapped onto the stretcher and that after this, when she was to be moved, the stretcher toppled over. She indicated a vague recollection of being taken off the toppled over stretcher and then reloaded onto the stretcher again. This toppling over has some significance and I shall come to it again when considering other evidence produced.

[12] In Cross-Examination, the Plaintiff was asked about the size of the hole that she says she stepped in and indicated clearly, that whilst she had signed a statutory declaration, giving some dimensions to the hole she stepped in, she was unable to provide any really specific details. The Plaintiff was challenged about the situation, being referred to her use of the words "*uneven terrain*", but ultimately she remained staunch that there was a hole. She said:

And when you say it was uneven, is that a description of what you felt with your left hand foot when it entered the region where there was this problem?---Yeah.

Yes. And can I suggest to you that the word "uneven" is inconsistent with the proposition that the hole was perhaps between 17 and 20 centimetres in depth?---I just felt that. I don't know. I just felt my leg, you know, go – going in some hole, in a hole, and I went down.

And can I suggest to you that the proposition that the earth was uneven at that point is more consistent with the variance being in the order of, let's say, one or two centimetres in depth or something of that like?---No, it was a bit deeper than that.

Deeper than that. Are you able then to identify now, having – having been reminded of your evidence-in-chief – of how deep you think the hole was? Can you put a centimetre or an inch measurement on it?---No.

[13] The Plaintiff was also challenged about how observant she was, or whether she might have been otherwise distracted. She was adamant however that she was watching where she stepped and as she described in her statutory declaration, "*the hole was covered by grass and I was unable to see it prior to falling in it*".

[14] She also described in her evidence, her foot feeling stuck in the hole and was asked why that description was not included in her earlier statement. She could not provide any real explanation but generally I would not find a great deal that turns on that point.

[15] Generally, I found the Plaintiff an honest and open witness. She did her best to describe the recollection of the 15th October 2015 without embellishment or exaggeration.

[16] Also called on behalf of the Plaintiff were her daughter Christie Lyn Mains and her son, Daniel Wayne Mains. Ms Mains was the daughter met by the Plaintiff at Sherriff Park on 15th October 2015 and was able to provide some evidence relating to the incident. She described meeting with her mother, the exchange of greetings involving her, her son and the Plaintiff and then walking across the grassed area of the park towards the carpark.

[17] She described her mother as "*just walking*" and falling, "*within metres of the car*". She described seeing her mother fall out of the corner of her eye. She described her being in some view and then not being in view and hearing a snap, which made her turn to her mother and seeing her on the ground. She specifically was asked about any observations as to what had caused her mother to fall and said,

> *---Yes. There was a hole. It was right beside her at the time and it was an indentation. Like, it was – yeah. It was clear it was the hole.*
>
> *And can you describe that hole?---It was about ... that big. We didn't exactly get a measurement but it was about ... that big.*
>
> *Okay. I'll just stop there because the transcript can't record what you've done with your hands there?---Oh, sorry.*
>
> *So - - -?---Size of a basketball in diameter, I guess. You know, 30 centimetres, 20 centimetres. About that.*
>
> *Okay. And what was inside the hole?---It was overgrown with grass.*
>
> *When you saw what you were describing: that – that hole in the grass, did that appear to be different to or the same as the area around you?---It seemed pretty the same. There was, like, when you're walking up to it you couldn't walk up to it and go, there's a hole, let's just stand in it. You couldn't – you wouldn't know that there was a hole there until you fell in it.*

And having regard to the grassed area that you've described walking across to get to the playground, would you, from your previous experience of walking through there, have expected a hole?---No.

Why not?---Because it's well maintained. It's a clean park. It's a busy park. You see council workers there all the time. It's – it's an inviting park to go to. It's a very busy park.

[18] Ms Mains in her evidence used a few descriptions including a hole and an indentation and then went on to note the falling of the stretcher her mother had been placed on. She specifically noted that it was the hole that caused the stretcher to fall and that as it was being moved, "*it got stuck in the hole*".

[19] She also identified various photos taken by her and admitted as Exhibit '7' including photos of her brother in-law's foot in the hole to show some perception of size and depth and she specifically noted the hole as "*about ankle deep*". Ms Mains also noted that in subsequent visits by her to Sherriff Park, she had observed the hole filled in with some grey dirt.

[20] In Cross-Examination, Ms Mains was challenged regarding what she may have directly seen and what might have been, as I would describe it, constructed from that, and she remained adamant that there was a hole that her mother had stepped in which caused the incident. Similarly, she recalled the stretcher, with her mother upon it being moved by the ambulance officers and falling to the ground. When questioned she said:

What I'm – sorry, that was my fault. What I'm asking is when the stretcher wheel went over the depression and caused the stretcher to become unstable, did the stretcher then fall and hit the ground of its own accord or did someone catch it before it did that and lower it down?---It fell of its own accord.

Right?---So the two ambulance officers were on either side. They were moving it, and they were directing it to where to go. And then, once it fell, both of the ambulance officers let go. No one tried to brace it, no one tried to stop the fall. Mum was tied strictly onto it, and her and the bray – and the stretcher fell down. Both of them looked at each other, and the shock on their face still sticks to me this day; because they both went white, and one of them went – swore. Like, in silent words, went, "Oh, fuck." And I was like – I kind of thought it was kind of funny at that time. It wasn't funny, obviously, but I really handle those things differently.

Right. Okay. All right. Now – so your evidence is, then, that the stretcher with your mother on it free-fell to the ground and hit the ground, what, with some force?---With force, the natural force of what anybody would be tied to a stretcher.

[21] Also called was the Plaintiff's son Daniel Wayne Mains. Mr Mains was not present at the time of the accident but was familiar with the park and attended the next day at Sherriff Park with his brother in-law, Yunek. Mr Mains confirmed that he took some photographs whilst at the park, including of the area of the hole, though it had been filled in with cracker dust.

[22] Mr Mains also gave evidence as to the appearance of the lawns as well maintained, and interestingly described it as a, "*surface like that, you wouldn't expect to find hidden hazards*". He also spoke of attending at the park again at 8th December 2015, some 7 or 8 weeks later and of changes he observed.

[23] The evidence of Mr and Ms Mains assisted in my understanding of the surrounding circumstances of the accident, though the Plaintiff's evidence is fundamental to the determination of this matter.

[24] Also giving evidence for the Plaintiff however, was one of the attending ambulance officers, Jodie Miranda Byron. Ms Byron noted an incident occurred, from the ambulance perspective at least, of, "*a stretcher fall*". In her Evidence-In-Chief Ms Byron said:

> *Okay. Now, with respect to what you described as the falling of the stretcher or the falling of the trolley, could you explain to the court, please, what you recall about that?---So when we lifted the patient we lifted the head end, that came up okay; we lifted the foot end of the stretcher and we noticed that it was going to tip. So there were bystanders on the scene that helped us, the stretcher was never allowed to freefall. We – between, I think there was four of us, it was kind of lowered to the ground. Then we took the patient off the stretcher, moved the stretcher and then recommenced loading the patient.*
>
> *And when you described that you noticed that the stretcher was about to tip. What was it that had caused that?---The hole.*
>
> *And what was – what was the issue with the hole that cause the stretcher to – to tip, did part of the stretcher go into the hole?---Yeah, I think one of the wheels. I think I've got it in here.*
>
> *Yes. You can have regard to what you've written when you're answering my question?---No, it doesn't say –*
>
> > *I feel like one wheel was going into it and that's what was causing it to overbalance.*

[25] It is noteworthy that Ms Byron refers to a hole and later describes a photograph which is part of Exhibit '6' as, "*a picture of my foot in the hole*".

[26] Ms Byron's evidence was helpful in a number of respects relating to the scene itself, but specifically relating to there being a hole, large enough for her foot to be placed in it and that it was the hole that caused the stretcher to overbalance.

[27] A number of witnesses were called for the Defendant. With the exception of Mr Ray Hardy, a senior operations supervisor for Queensland Ambulance, they were employees of the Defendant. The first called was Frank Thompson, a ride-on mower operator. He gave evidence regarding his responsibility for mowing several parks including Sherriff Park. He explained that in his mowing he would be looking out for obstacles and identifying them for attention.

[28] Of some significance in respect of Mr Thompson's evidence was the fact that the hole, identified as the cause of the accident, was within a few metres of the carpark and bollards, and Mr Thompson indicated that he would not mow in between the bollards but that another labourer would "*weed eat it out*" and that he did not go in there.

[29] Mr Thompson also, when shown a photo of the hole with a foot in it, indicated that if he had have seen it, he would have fixed it or notified of it and as he acknowledged, it could present a danger to people using the park. He also acknowledged that when riding the mower, if he felt a hole it would be because one of the wheels of the mower or the jockey wheels on the batwing, went over it and that that would be the only way that it would be known if a hole was there.

[30] Next called for the Defendant was Andrina Ellen Miller, senior construction and maintenance and operation park inspector. Ms Miller was responsible for certain inspections at parks of infrastructure and play equipment. She was not responsible for lawns or garden beds. She did however photograph and report problems not related to her responsibilities if observed. She noted that she had not seen a hole 17 to 20 centimetres deep.

[31] In Cross-Examination Ms Miller indicated, similar to Mr Thompson, that if she had come across a hole such as that she would have taken action, as it would be a danger to users of the park. She was also asked, having worked in similar type roles with the Defendant, whether she recalled more trees than are currently present along beside/between the carpark and the lawns. She could not however recall.

[32] Next called was Laura Collier, a labourer employed by the Defendant. She was responsible for, as she described it, '*brush cutting*' around paths, bollards, trees and the like. She was not responsible for moving. She also confirmed that whilst brush cutting was attended to on Thursday's, she performed visual inspections of the equipment in the park on Friday's.

[33] Ms Collier confirmed that she, like other employees would keep an eye out for hazards such as holes and would take steps to protect the public if such hazards were found. She also said that she not seen a hole that looked like the one identified in this matter. More particularly however, she also confirmed in Cross-Examination that she would report a hole filled with cracker dust as it would be a hazard to equipment and to persons and that on 19th November 2015 she did not see any cracker dust in the park.

[34] Significant, and arising from this evidence was a clear indication of the nature of inspections conducted as is clear from the following evidence:

> *And if you had seen a patch of crusher dust, as it is shown in those photos, you would've noted that in your report on the 19th of November 2015?---Yes.*
>
> *You did not see a patch of crusher dust on the 19th of November 2015?---No.*
>
> *And that's because you didn't specifically inspect the area that's shown in this photograph; correct?---I did not see it.*
>
> *No. You path to your next – to your first point of inspection, being the playground equipment, just took you along the concrete path?---Yes.*
>
> *And you must not, you would agree with me, have been looking at the grass where that crusher dust was?---No.*
>
> *You agree with me that you mustn't have been looking?---No, I did not see it.*
>
> *And that's because, when doing the inspections for the routine visual inspection record sheet that you've got in front of you, you weren't given any specific instruction to inspect the area where that patch is shown, were you?---No.*
>
> *If you had been given that sort of instruction, you would've carefully inspected that area?---Yes.*
>
> ...

MS McCLYMONT: So I'm going to ask you questions now about prior to October 2015. So I think your evidence was that you had been undertaking inspections at Sherriff Park for about two years by that time?---Yes.

So from about 2013 to 2015, was it a part of your job to go to the park and undertake a routine visual inspection?---Yes.

Did the form change over that time, or - - -?---No.

- - - were you always using this form?---Same form.

Okay. And were your instructions, in respect of those inspections from 2013 to 2015, any different over that period of time?---No.

Okay. So when you did your inspections from 2013 to 2015, did you do so under the same instructions as when you attended on 19 November 2015?---Yes

[35] Ms Collier's evidence was in a similar vein to that of the other witnesses called earlier, but assisted with my understanding of the nature of inspections, reporting and if necessary, rectifications.

[36] Finally called for the Defendant was Cody Rod Ratcliffe. Mr Ratcliffe was a rude on operator, but in 2015 was an Acting Team Leader. He described quite comprehensively the nature of the work of he and his crew and noted that on Friday he would do a park inspection, as he put it, "*a visual inspection*".

[37] In particular, Mr Ratcliffe was asked about the observations made at the time of the accident and what he would have done if he had seen holes filled with cracker dust. He said:

Can I show you a photograph. Now, did you see a hole or a depression or any kind of unevenness like that on the – in the August 2015 visit that we discussed? Either on the Thursday or the Friday or the following Monday?---No.

And if you had seen something like that – that is, a depression that comes up, perhaps, to the – halfway up the side of the seat of the foot, what would you have done about it?---Probably just gotten a shovel and gone to the closest garden bed, got some soil out of there an fill that depression, I guess.

Sorry, I said August. I meant to say October?---Okay.

So if I was to ask you the same questions about your October visit, would – what would your answers be?---It'd be the same answer.

All right?---Just a bit of soil from the garden.

And can I show you another photograph. Have you seen that photograph before?---Yeah. Not in colour, but yes.

Did you see that on the October inspection that you did?---No, not at all.

And you see what appears to be cracker dust in the hole next to the cattle dog?---Yes.

Is that the kind of work you would authorise?---No.

And you see also, there's – there is what appears to be cracker dust between the bollards of the – adjacent to the footpath?---Yep.

Would you authorise those holes to be filled up with cracker dust?---No.

Why not?---Same reason. It's close to a carpark. You run over it with the mower, you're just shooting little missiles all across the carpark.

Right. And if you saw the park in that condition, what would you – if you saw cracker dust in those holes, what would you do about it?---I'd probably find out who put it there and get them to remove it and replace it with sandy loam.

[38] In Cross-Examination Mr Ratcliffe, like the other employees acknowledge that a hole, as seen in photographs and as described posed a risk to the public. He noted:

With respect to the photograph you've just been shown, Mr Ratcliffe, with the man's foot in the hole or depression in the ground – I think you said if you'd seen a hole like that, you would have either got some soil from a garden bed and filled it or, if it were deeper than you thought, put a witch's hat on it and send somebody to Flinstones; is that correct?---Yes.

The reason you'd do that, I'd suggest, is because that hole could pose a risk to users of the park.

HIS HONOUR: You've nodded, sir. We – everything's recorded so I have to - - -?---Yes, yes.

Thank you.

MS MCCLYMONT: And if you saw that hole in the position where the picture of the crusher dust was immediately close to the car park - - -?---Yep.

- - - you'd be particularly concerned about it being a risk to users, because people pass through there from the car park to access the park, don't they?---Yes. Yes.

Yeah. And on that grassed area in front of the bollards is a, sort of, flat, open, grassed area, isn't it?---Yes.

And people that share a park commonly play sport and children run around - - -?---Yes.

- - - on that area? Yes. And some people undertake exercise activities on that area?---Yeah, sure do. Yeah.

Yeah. So a hole in that area would be a danger for people who are undertaking exercise and activities on the area, wouldn't it?---Yes.

And particularly it would be a danger to people coming from the car park or using that flat area if it had grass growing in it, so that it was harder to see?---Yes.

And you'd be aware of all of those things in your position as acting team leader as at 2015?---Yes.

[39] Additionally, and again similar to the other employees, Mr Ratcliffe indicated that he had not seen the crack dust near the bollards adjacent to the carpark, at least as indicated in the photographs provided. He did say that he had seen a spot where there was cracker dust on the ground but described it as a "*coffee mug worth of cracker dust*". Interestingly, Mr Ratcliffe indicated that there was never cracker dust on the ground to the extent indicated in the photographs. This is however an indication of what he did not see rather than what existed.

[40] Mr Ratcliffe was also asked about what steps he or others took in relation to a patch of cracker dust, which he indicated was a hazard to equipment and to persons. His explanation of what was done and when, was however unconvincing when related back to other evidence, for example, the continued observation of cracker dust on 8th December 2015. I gained the impression that Mr Ratcliffe was simply recalling a history not from he saw or did, but rather from a recreation of what he would/should have done.

[41] Also called for the Defendant, but not as an employee was Raymond Hardy. His evidence related to a report by Queensland Ambulance employees of an incident at Sherriff Park, where a patient was on a stretcher and when raised to height, a leg "*had gone into a hole and the stretcher rolled to the side*". He gave evidence of what he saw when attending as follows:

Did you look at the surface of the earth around where the incident had occurred?---Yes.

And what did you see?---There was a – a divot in the ground, I suppose, about a dinner plate in diameter, probably about five, six centimetres deep, and the

crew described that the stretcher – when raised to height, the back head-end right leg had gone into the hole and rolled to the side.

[42] Mr Hardy also indicated that he had requested those in a council work truck to place some fill in the hole and he had seen crusher dust in the truck. In Cross-Examination, Mr Hardy was more fulsome in what occurred that day, when he was at Sherriff Park as well as to the contents of his incident review. The evidence was:

MS McCLYMONT: Inspector Hardy, when you saw the council works gentlemen at the park, including your neighbour, did you have a conversation with them about why you were there and what'd happened, in broad terms?---In very broad terms, probably, that there'd been an incident there and just asked him if he could put a shovelful of sand – sorry, crusher dust from the back of the ute into the hole.

Yes. So that broad conversation would've been something along the lines of, "We're here because there's a hole here. A member of the public fell and suffered an injury, and then when our crew came to retrieve them, the trolley tipped over."?---I probably didn't go into the patient's details.

No. But certainly you would've communicated something along the lines of that your ambulance crew was there attending to an injury, and in the course of doing that, the trolley tipped over because of the hole?---It'd be something like that.

Yes?---I can't recall the exact conversation that I had with him.

No. But it would be logical, wouldn't it, for you to give them - - -?---It would be.

- - - that kind of general background as to what you were doing there looking at a hole in the ground?---Yes.

And you asked them to fill in the hole?---I did.

...

And is the information contained in that incident review accurate as it was – as it was reported to you?---I think I reviewed this the other day and there is a section in the chronology where I said that the head end had been raised twice. Obviously, you can't do that. That would've been the head end and the foot end.

Yes. But other than observing that you'd made that error, were you otherwise satisfied that the content of that incident review was – was accurate so far as you knew it at the time?---Yes.

Now, if we look at the synopsis on page 2, that's your sort of summary of the incident?---Yes.

And in your terminology, so far as you use the word, you identified that hole as a hazard?---The crew identified the hole as a hazard.

Yes. And that was what was conveyed to you, that the - - -?---Yes.

- - - crew identified it as a hazard. Yes? I'm sorry?---Yes, yes.

Thank you?---The crew identified that there was a hazard

[43] Mr Hardy's evidence was of assistance to me, especially in relation to the size of the hole and the quantity of fill required as well as in my assessment of the other evidence called, particularly the Defendant's evidence. Whilst with the exception of Mr Ratcliffe, I would find that the witnesses gave their evidence to the best of their ability and recollection, I would also find that there was little if any instructions regarding the manner in which inspection was to take place and certainly no follow up in relation to how the inspections were expected to be or were performed.

[44] Having considered the evidence at some length, it is now necessary to consider the questions that arise and the findings to be made. The first of those questions relates to whether there was a hole and if possible, to find how it came to be.

[45] Insofar as how it came to be, there are a number of possibilities. The Plaintiff suggests that it came into existence when the Defendant removed a tree, that had been planted in conjunction with a number of others, between the carpark and the lawn but had been removed as it had not thrived. Reliance was placed by the Plaintiff on a number of aerial photographs taken of the park over a span of some 15 years, but that is not certain by any means.

[46] It may also have arisen through other means, such as water erosion or subsidence, as seems to have occurred in the past where holes/depressions had been filled prior to a seniors week function.

[47] Ultimately, the means by which the hole came into existence is not as significant as the fact that there was, I find, a hole. Whether it was as much as 17 to 20 centimetres deep as suggested by the Plaintiff, though her evidence in that respect

was hard to gauge, or as Mr Hardy suggested, the size of a dinner plate in diameter and 5 – 6 centimetres in depth is of little consequence.

[48] It was more than an indentation or depression in the surface of the park, as is clear from the various photographs taken not only by members of the Plaintiff's family but also that showing the ambulance officer, Ms Byron's foot, in the hole.

[49] It was certainly larger than the contents of a coffee cup, both in diameter and depth as was suggested by Mr Ratcliffe and it was concealed, noting the evidence of each of the Defendant's employees, trained to look for hazards and to act upon them. That is even more apparent when it is recognised that even though the hole was filled with cracker dust after the accident, the employees did not see it, in their weekly attendances at Sherriff Park and in their trained observations.

[50] Most influential however in my determination of there being a hole and it being a hazard, is the fact that the ambulance officers, being aware of the hole, having been told about it by the Plaintiff and her daughter, and having no doubt, observed it, still found themselves in a situation where the stretcher, that the Plaintiff had been placed on, toppled over when the wheel was in the hole. Such a degree of destabilisation does not come from, unevenness, an indentation or a slight depression.

[51] I am also satisfied that the hole was concealed. The photographs tendered in evidence clearly example the difficulties in discerning a hole, even when its presence was known. This is shown again as obvious when the ambulance officers, knowing of the hole and its position, still had the stretcher topple over when a leg went into the hole.

[52] Having determined that there was a hole, the next question is whether it created a risk of injury against which the defendant was required to take precautions. In the outline provided by the Plaintiff, there are 5 factors noted as making the hole hazardous for users of the park. They are noted at paragraph 19(a) – (e) as follows:

> a. *It was obscured when grass was growing in it, as the grass in the hole had been cut to the same level as the surrounding grass;*

b. *Importantly, it was in close proximity to the only off-street carpark for the park, and would be traversed by members of the public for access to and egress from the park via the carpark;*

c. *Users of the park included seniors, children, parents with prams and people undertaking exercise;*

d. *The park was intended by the defendant to provide a place for active and passive recreation and this grassed area was used for playing informal sport, undertaking exercise, etc;*

e. *The surface of this area was otherwise flat and even, not an area with a rough terrain in which undulations of the ground would be anticipated.*

[53] For the Defendant, it was argued that there was no hazard but rather that it was, "*uneven land varying about 20 millimetres at most*". This is suggested to be plain from the various photographs exhibited such that the court would find

> *… that the depression was insignificant and, as a matter of common experience, such as might ordinarily be expected to be encountered in a typical suburban park, on a typical suburban nature strip or in a typical backyard …*

[54] I am not at all attracted to this argument. Firstly because the photographs show much more than uneven land varying about 20 millimetres at most, where a mans foot could be placed in the hole, to around ankle depth. This is much more than an unevenness or a depression, but more significantly, the Defendant's own witness, Mr Hardy estimated the hole at 5 – 6 centimetres deep.

[55] This again is evidence of a much greater variation than 20 millimetres at most and constitutes much more than an unevenness. It is rather than, as was submitted by the Defendant, an insignificant depression but a hazard or danger not readily able to be perceived, as the hole was concealed by grass. In such a situation, as noted by the High Court in *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury Shire Council*[1], "*… in such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety*."

[1] (2001) 206 CLR 512

[56] I was in this regard referred specifically to the comments of Judge McGill, as his Honour then was, in *Fuller v Logan City Council*[2], where in speaking about an incident in many respects similar to the situation here he said:

> *[28] ... The footpath becomes a particular danger to users, in the nature of a trap, if the grass is short enough so that people are not actually deterred from using it, but long enough to conceal the presence of hazards which might cause them to fall.*
>
> *[29] This was a matter mentioned in the joint judgment in Ghantous (supra) at [163]:*
>
> > *"Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in Webb v State of South Australia (1982) 56 ALJR 912), or the surrounding area (as in Buckle v Bayswater Road Board (1936) 57 CLR 259), where the hole was concealed by grass). In such circumstances, there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety. These hazards will include dangers in the nature of a 'trap'...:*
>
> *[30] In Webb, the hazard was an open gap between a false kerb and a permanent kerb created when the false kerb was constructed. The defendant was liable because it had created the hazard by works which could easily have been undertaken differently so as to avoid creating the hazard. In Buckle, the plaintiff suffered an injury as a result of putting his foot in a hole which was caused by a break in a pipe drain, and which was concealed by a growth of grass. It is not unusual for a person injured as a result of stepping into a hole, the presence of which is concealed by grass, to recover damages for that injury.*
>
> *[31] In the present case, the hazard in the footpath was not a hole, but because of the length of the grass it was not an obvious hazard. That it was a hazard is clear enough. In Roman Catholic Bishop of Broome v Watson [2002] WASCA 7, a rock protruding one and a half inches above the surface of a pathway was described (at [36]) as "a significant hazard which was not*

[2] [2005] QDC 305

an ordinary everyday risk which the [plaintiff] could have been expected to guard against." In that case, it does not appear that the presence of the rock was even concealed by grass. That case was cited without disapproval by the Court of Appeal in Pascoe v Coolum Resort Pty Ltd [2005] QCA 354 at [25]. The employee of the defendant who conducted the inspection of the footpath on 9 April 2002 referred to in paragraph 6A of the second further amended defence of the defendant did not dissent from the description of this lump of concrete as a hazard, and said that if she had seen it, she would have arranged to have it removed, and that it could cause trouble for anyone who chose to walk along that point of the footpath: p 193. In fact, she did not see it on that occasion, because she did not on that occasion examine the footpath for hazards which might be concealed in the grass. Indeed, it seems unlikely that she even got out of her car at the site.

[57] In *Fuller*, Judge McGill made reference to *Pascoe v Coolum Resort Pty Ltd* and to the acknowledgement by an employee of the Defendant, of a lump of concrete as a hazard. It is noteworthy that each of the employees of the Defendant in this case also acknowledged the hole as a hazard or as posing a danger to users of the park.

[58] What is clear in this case, is that the position of the hole in close proximity to the carpark, gives rise to a foreseeable hazard. Users of the park traverse the grass to depart from, and return to their vehicles. Such is clearly expected when the Defendant took the steps it did to maintain the park as user friendly and available for multiple purposes of exercise as well as for more sedentary recreation.

[59] As submitted by the Plaintiff, the expanse of grass had the appearance of being relatively flat and even and was mowed to an even height. The hole, even to those taking reasonable care for their own safety was not obvious, even as I have previously noted, to the ambulance officers who were alerted to its presence.

[60] The hole, particularly in circumstances where it was concealed as it was, constituted a risk, for which the Defendant was required to take precautions and did not. Inspections, as is clear from the evidence of the various employees, particularly in relation to the ground itself was perfunctory and uninstructed. None of the employees called gave any indication that they, or anyone else had responsibility for inspections of the areas near the carpark, bollards, paths and trees. Those working in

those areas would take steps if they came upon a hazard, but none had the specific responsibility or obligation to perform thorough or comprehensive inspections.

[61] The lack of any real or serious observation is clear, when the evidence of each of the employees, excluding Mr Ratcliffe, was that they did not even see the cracker dust which had been used to fill the hole on 15 October 2015. This is also clear from the Council records produced showing entries relating to the attendances and actions of various employees, and there was specifically no entries regarding a hole, filled with cracker dust, though all employees again gave evidence of this type of fill, actually giving rise to a hazard itself, as small rocks in the cracker dust could damage the mowing equipment or be launched as a missile, endangering the employees and members of the public.

[62] It is submitted, and I would concur, that the irresistible conclusion that should be drawn is that the inspections undertaken by the persons who completed an "Infrastructure – Routine Visual Inspections Record Sheet", did not include an inspection of the grassed area near the carpark.

[63] The position taken by the Defendant in this matter is the exact opposite of that contended for by the Plaintiff. The Defendant says in paragraph 28 of its written submissions that its evidence in in this matter supports finding:

a. *the Council did not fail to detect and remedy a hole or depression during inspections of the park or while maintaining the grass in the park prior to the incident;*

b. *the Council adequately instructed its employees to inspect the area adjacent to the carpark during their inspections of the park and/or undertaking maintenance of the grass, and the defendants' employees did so;*

c. *the inspections did not identify the hole or depression described by the plaintiff in paragraph 4A of the amended statement of claim because there was no such hole or depression in the grass as alleged;*

d. *the Council warned pedestrians of hazards which warranted such warnings;*

e. the Council did not allow or permit hole or depressions to remain in the grassed area. It did not know and, in view of its inspection and maintenance regime, there was no reason why it or ought to have known that a hole or depression existed. But where holes or depressions were observed, they were filled with sandy loam as soon as possible (usually, on the spot);

f. there was no hidden trap as alleged or at all, and the grassed area reasonably safe for use by pedestrians exercising reasonable care for their own safety;

g. the Council did not cause or permit the grassed area to be, become or remain a danger. The Council undertook reasonable inspections of Sherriff Park, adequately performed maintenance that was reasonably required as Sherriff Park;

h. reasonable care did not require the Council to take any steps in respect of any slight depressions and/or unevenness in the grassed areas at Sherriff Park, and if the plaintiff injured herself by stepping into a depression, it was one which reasonable care did not require the Council to correct; and

i. imposing an obligation on the defendant to identify and/or remove minor imperfections or unevenness in the surface of the ground at a public park, like Sheriff Park, goes beyond the requirement that the defendant take reasonable precautions and would not constitute a proper use of the Council's resources.

[64] Such matters as are detailed in the suggested finding fly in the face of the findings that I have made in these reasons. In particular however, I would note that I agree with the matters raised in points a. and i., were it not for the fact that I do find that there was a concealed hole, not a slight depression, an unevenness in the grassed area or a minor imperfection.

[65] The Defendant, in presenting its argument as to why they should be found not to have breached their duty of care, refer to a number of cases including, *Bartels v*

Bankstown City Council[3], *Falvo v Australian Oztag Sports Association*[4], *Lanyon v Noosa District Junior Rugby League Football Club Inc*[5] . Each however, is in my view, distinguishable from the present case, particularly in the circumstances of my finding that there was a concealed hole, that the Council and its employees had not performed any real inspection or observation and that there is a real distinction to be drawn between those engaging in more strenuous activities, with the obvious risks inherent in such activities and that of the user of a park, walking over a mown and apparently even surface.

[66] For completeness, I would also note the arguments on the part of the Defendant regarding whether the depression, being the term used by the Defendant, existed for a sufficient period of time such that the Council ought to have noticed it and filled it in so as to prevent it creating a hazard. I would dismiss any such argument noting the depth of the hole and the fact that it was grassed and therefore concealed, recognising the time needed for that to occur and the regular attendances at Sherriff Park for mowing and maintenance.

[67] Any argument that the Plaintiff had failed to show reasonable care for her own safety and wellbeing, in my assessment also fails when recognition is given to the finding made that the hole was concealed as a result of the mowing over.

[68] Finally, for the Defendant it is argued that the provisions of S. 35 of the *Civil Liability Act 2003* (Qld), sets out the principles which apply when deciding whether a public authority has breached its duty. It refers to financial limitations as well as resource considerations and the Defendant argues that what existed here was a depression of minimal depth, concealed by grass such that it was barely able to be noticed. That of course is at least partly true in that the hole was concealed by grass, but it was a hole, not a depression or unevenness and that it caused a risk, apparent as a result of the Plaintiff's injuries but most obviously as a result of the toppling of the ambulance stretcher.

---

[3] [1999] NSWCA 129.
[4] [2006] NSWCA 17.
[5] [2002] QCA 163.

[69] I find the Defendant liable for the injuries sustained by the Plaintiff, and judgment for the Plaintiff in the sum agreed between the parties, $301,603.23.