

Bankstown City Council ats Lisa-Marie Forrester

CLAIM DETAILS

- Date of incident: 8 November 2010
- Location of incident: Footpath adjacent to 874 Hume Highway, Bass Hill
- Claimant: Lisa Marie-Forrester – aged 20 at the date of accident, single female, unemployed, residing with parents

INCIDENT DETAILS

- At approximately 11.30pm on 8 November 2010, the Claimant and her brother were walking on the footpath along the Hume Highway at Bass Hill.
- The Claimant came to a section of the footpath adjacent to Rydges Hotel which was covered in water. The water was flowing across the footpath and onto the roadway.
- The Claimant did not want to walk through the water so she stepped off the footpath and stepped with her right foot onto the bottom left corner of a stormwater pit lid. The lid supported her weight.
- However, when the Claimant took a step forward with her left foot onto the top left hand corner, the lid failed to support her weight and cantilevered. The Claimant's left foot and leg descended into the pit.
- After an initial period of shock (with her brother laughing at her), the Claimant was able to extricate herself from the pit.
- The Claimant returned home whereby her mother took her to hospital.

WHAT EVIDENCE WAS PRESENT – COUNCIL RECORDS, STATEMENTS, PHOTOS

- Council had no records of the stormwater pit lid. In fact, Council was not aware of the presence of the pit lid or that it was a Council asset until notification of this claim.
- Following the incident, Council carried out an investigation which indicated the stormwater line was blocked. During the cleaning, numerous car parts were found in it which appeared to cause the blockage, causing the water to force the lid up and become unstable, and surcharge over the lid.
- CCTV inserted into the drainage line indicated it appeared to be Council's line. However, the pit lid was not an approved Council type lid and Council was unable to say how the pit would have been constructed with that type of lid.
- Claimant served a liability report from Mr Adams. Mr Adams expressed the opinion the pit lid did not comply with Australian Standards as it did not have any perforations which would act as drainage holes in the event of excess flow of water.

WAS COUNCIL LIABLE AND WHY?

- Was the hazard obvious? No.
- Did Council know about the hazard? No
- Did Council warn of the hazard? No
- Did Council inspect the area? No

- We relied on s 45 of the *Civil Liability Act* in the defence of the claim. We argued maintenance in relation to the pit lid was roadworks within the meaning of the *Civil Liability Act* as the drainage line was necessary for the drainage of Rixon Street.

This view was supported by the Court of Appeal in *Council of the City of Liverpool v Turano* [2008] NSWCA 270.

- There was no evidence Council constructed the pit lid. There was direct evidence Council had never inspected the pit or lid nor had it received any complaints. In order to overcome s 45, the Claimant needed to prove Council was on notice water pressure would dislodge the lid when the Claimant trod on it.
- The trial judge found Council constructed the pit and pit lid (despite our submissions). He made that finding based on an internal Council email which had been produced on subpoena which assumed the pit belonged to Council. The evidence confirmed the lid was not an approved Council type lid in that it was not a hinged cast iron gatic type lid. The trial judge drew the conclusion, based on common sense, that if the lid had been hinged, the rising water pressure would not have dislodged the lid so that it tipped in the way it did.
- The trial judge made the following findings:
 - The risk which Council knew or ought to have known that the lid might be dislodged was foreseeable (s 5B(1) of the *Civil Liability Act (CLA)*);
 - The risk was not insignificant (s5B(1)(b) CLA).
 - It was foreseeable the drainage pit could fill up with water due to a blockage and potentially dislodge the lid. This was a real risk which was not far-fetched or fanciful.
 - A reasonable person in the position of Council would have taken precautions against the foreseeable risk of injury to the Claimant or pedestrians using the pathway (s5B(1)(c) CLA). It was probable harm would occur to a person walking along the footpath at night trying to avoid water flooding the area where the pit was located if precautions were not taken against the harm.
 - A reasonable person in Council's position would have taken the precautions of constructing the pit lid with hinges and a reasonable council in Council's position would have known about this precaution.

WHAT WAS THE CLAIMANT SEEKING?

- The Claimant alleges she suffered an injury to left knee, left foot, left ankle and psychological injury.
- She claimed as a result of the injuries that she was unable to work as a hairdresser (which she had completed her studies just prior to the accident) or work in any other occupation.
- She also claimed she required domestic assistance of 7 hours per week as she was unable to attend to the domestic tasks as a result of her accident.
- The medical evidence obtained on behalf of Council and from the Claimant's treating doctors indicated there was nothing wrong with the Claimant's left knee, left foot and left ankle. We also obtained surveillance on the Claimant which showed she was able to walk, over uneven ground, for an hour at a time.
- At trial, the Claimant sought damages of \$514,817 plus costs. We submitted she was not entitled to anything other than approximately \$700 in medical expenses.

HOW MUCH DID SHE GET?

- Fortunately, the trial judge saw through the Claimant and awarded her compensation of only **\$29,500** plus costs made up of non economic loss (15% MEC), past out of pocket expenses of \$2,000 and past economic loss of \$22,000.

- The trial judge found any ongoing incapacity as a result of the accident ceased by April 2012 and she had made no attempts to obtain employment from that period onwards.

SUMMARY OF THE DECISION

- The trial judge's finding Council breached its duty of care to the Claimant was based not on Council having actual knowledge of the particular risk resulting in the harm but on the basis of negligent construction (misfeasance as opposed to nonfeasance).
- The trial judge's finding that Council constructed the pit and pit lid was, in our opinion, tenuous, given the finding was made based on a comment in an internal Council email that *'it appears to be council's line'*. There was no direct evidence Council constructed the pit and pit lid.
- Whilst we were of the opinion there were some issues with his Honour's reasons, the judgment amount did not, in our opinion, warrant lodging an appeal. As the judgment was less than \$100,000, leave to appeal would need to be obtained by the Court of Appeal. The costs of seeking leave and proceeding with an appeal, should leave be granted, would be in the order of \$45,000 to \$50,000 which is the value of the judgment. The Claimant resided with her parents and was unemployed so had no ability to meet an adverse cost order.