# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Dennison v Brisbane City Council* [2026] QCA 193 |
| PARTIES: | **VICTOR GEORGE DENNISON by his litigation guardian JUTHIKA MELONIE DENNISON**<br>(appellant)<br>**v**<br>**BRISBANE CITY COUNCIL**<br>(respondent) |
| FILE NO/S: | Appeal No 2398 of 2026<br>SC No 1809 of 2022 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2026] QSC 83 (Crowley J) |
| DELIVERED ON: | 29 September 2026 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 September 2026 |
| JUDGES: | Boddice JA, Doyle JA, Cooper J |
| ORDERS: | **1. The appeal is allowed.**<br>**2. Judgment is given in favour of the appellant against the respondent in the amount of $675,926.77 plus interest to date in the amount to be agreed between the parties or failing agreement to be determined by the trial judge.**<br>**3. The respondent pay the appellant's costs of the proceedings below and of this appeal.** |
| CATCHWORDS: | TORTS – NEGLIGENCE – OTHER PARTICULAR CLAIMANTS, DEFENDANTS AND CIRCUMSTANCES – GOVERNMENT AND PUBLIC AUTHORITIES – where appellant brought negligence claim against local council – where claim alleged wrongful exercise of authority's function – whether s 36 *Civil Liability Act 2003* (Qld) was confined to claims for breach of statutory duty or applied also to common law negligence<br><br>TORTS – NEGLIGENCE – OTHER PARTICULAR CLAIMANTS, DEFENDANTS AND CIRCUMSTANCES – GOVERNMENT AND PUBLIC AUTHORITIES – where Council excavated and re-concreted footpath – where barricade erected to protect wet concrete – whether erection and maintenance of barricade constituted an exercise of the Council's function |

TORTS – NEGLIGENCE – OTHER PARTICULAR CLAIMANTS, DEFENDANTS AND CIRCUMSTANCES – GOVERNMENT AND PUBLIC AUTHORITIES – where Council left barricade overnight on a shared pedestrian and cyclist path – where barricade lacked reflective warning signs, lighting and delineated alternate route – where relevant standards and procedures required warning and delineation – whether omission was so unreasonable that no authority could properly consider it a reasonable exercise of its functions under s 36 *Civil Liability Act 2003* (Qld)

*Acts Interpretation Act 1954* (Qld), s 14B
*City of Brisbane Act 2010* (Qld), s 65, s 66
*Civil Liability Act 2003* (Qld), s 4, s 7, s 9, s 10, s 11, s 12, s 14, s 15, s 21, s 22, s 34, s 35, s 36, s 37
*Civil Liability Act 2002* (NSW), s 43, s 43A,
*Fire Brigades Act 1909-1956* (NSW), s 46
*Local Government Act 1993* (Qld), s 901

*Benning v Wong* (1969) 122 CLR 249; [1969] HCA 58, applied
*Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; [1961] HCA 71, distinguished
*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; [1995] HCA 24, cited
*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2, cited
*Collins v Clarence Valley Council* (2015) 91 NSWLR 128; [2015] NSWCA 263, cited
*Curtis v Harden Shire Council* (2014) 88 NSWLR 10; [2014] NSWCA 314, cited
*Della Franca v Lorenzato* [2021] NSWCA 321, considered
*Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40, considered
*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55, cited
*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited
*Hamcor Pty Ltd v State of Queensland* [2014] QSC 224, not followed
*House v The King* (1936) 55 CLR 499; [1936] HCA 40, distinguished
*Hunt Leather Pty Ltd v Transport for NSW* (2025) 100 ALJR 89; [2025] HCA 53, considered
*Lee v NSW Crime Commission* (2013) 251 CLR 196; [2013] HCA 39, cited
*Queensland Bulk Water Supply Authority (t/as Seqwater) v Rodriguez & Sons Pty Ltd* (2021) 393 ALR 162; [2021] NSWCA 206, cited
*Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679; [2016] HCA 22, cited

COUNSEL: C C Heyworth-Smith KC, with D M Cormack and M A Eade, for the appellant

J M Horton KC, with D J Schneidewin and K T Grimshaw, for the respondent

SOLICITORS: Hall Payne Lawyers for the appellant
Barry Nilsson for the respondent

[1] **BODDICE JA:** I agree with Doyle JA.

[2] **DOYLE JA:** Prior to dawn on 18 December 2009, the appellant was involved in what the primary judge described as a "horrific accident" whilst riding his bike along a section of the concrete footpath beside Zillmere Road, Aspley. He collided with an orange mesh barricade that had been temporarily erected by the respondent (the Council). Given the nature and extent of his injuries, the appellant has no recollection of the incident.

[3] The Council had, the previous day, dug up part of the footpath to carry out some underground works on the water main. The works, having been completed, the hole was filled and the path re-concreted. The barricade was erected to allow that concrete to cure overnight.

[4] The primary judge concluded[1] that but for the operation of s 36 of the *Civil Liability Act 2003* (Qld) (the Act) the Council would have been held liable in negligence to the appellant, and assessed damages on that basis in the amount of $675,926.77.

[5] However, his Honour concluded that in light of s 36(2) of the Act, the appellant's claim failed. It is that issue which is the subject of this appeal.

**The *Civil Liability Act***

[6] Section 36 of the Act provides as follows:

> "**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."

[7] As well, the words "duty" and "function" are defined in that Act as follows:

> "***duty*** means—
>
> (a) a duty of care in tort; or
>
> (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or

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1 *Dennison v Brisbane City Council* [2026] QSC 83 (Reasons or R).

(c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

***function*** includes power."

**Issues on Appeal**

[8] There are three issues which arise on this appeal concerning the operation of s 36.

[9] *First*, contrary to the submission made by the appellant, the primary judge concluded that s 36 did apply to the appellant's claim in negligence against the Council. In this respect the primary judge favoured the reasoning in the NSW Court of Appeal decision of *Queensland Bulk Water Supply Authority (t/as Seqwater) v Rodriguez & Sons Pty Ltd* (2021) 393 ALR 162 (*Rodriguez*), over the reasoning of Dalton J (as her Honour then was) in *Hamcor Pty Ltd v State of Queensland* [2014] QSC 224 (*Hamcor*).

[10] *Second*, his Honour found that the work of the Council in erecting the barricade was part of the function being performed by the Council so as to fall within the operation of s 36. The function identified by the trial judge was the function of controlling roads (which includes this footpath) under s 901 of the *Local Government Act*.

[11] *Finally*, his Honour concluded that the appellant had not established breach of the standard prescribed by s 36, namely, that the Council's exercise of its function was so unreasonable that no public authority having the functions of the Council could properly consider the exercise to be reasonable.

[12] The appellant contests each of these conclusions.

**The First Issue: Is s 36 limited to statutory duties?**

[13] In *Hamcor* Dalton J rejected the submission made on behalf of the State of Queensland that s 36 applied so as to modify the standard of care it owed in respect of its tortious duty of care. Her Honour concluded that s 36 applied only to "actions for breach of statutory duty": [193]. Her Honour took the view that was the most natural reading of the words used having regard to the section including its heading. Her Honour was reinforced in this view by the consideration that s 36 would drastically reduce the rights of persons to a remedy "by very significantly lowering the standard of care owed by public or other authorities": ([196]), attracting the proposition that her Honour extracted from the reasons of Kitto J in *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at p 116. This is to the effect that there was a presumption requiring clear language if a statute is to be construed so as to seriously derogate from rights of individuals.

[14] As already mentioned, the contrary view was taken by the NSW Court of Appeal in *Rodriguez*. The issue in that case concerned, relevantly, whether s 36 applied to impose a standard in respect of Seqwater's liability for allegedly negligently managing floodwater controls which it was said led, in material respects, to the aggravation of the damage flowing from the January 2011 floods in South-East Queensland. After referring to *Hamcor* their Honours stated:

> "[68] Whilst the heading forms part of the statute, and can be relied upon in construing the operative provision, the manner in which it was applied is not persuasive. The term 'duty' is defined in

> the Dictionary to the Civil Liability Act to mean a duty of care 'in tort', 'under contract', or another duty under statute or otherwise that is 'concurrent with a duty of care in tort or under contract'. The fact that the defined term 'duty' is not used in s 36 suggests that the section was not limited to any particular cause of action. As the primary judge observed, 'the definition of 'function' in s 34 is not confined to a 'duty'.' Further, the phrase 'breach of statutory duty' used in the heading is at best a paraphrase of the third limb of the definition of duty, the meaning of which is not without its own difficulties. Finally, s 36(1) makes explicit provision for the application of the section, and does so by reference to 'function' rather than the type of duty which is alleged to have been breached.
>
> [69] The better view is that s 36 should not be read down as applicable only to a proceeding in which the cause of action is a breach of statutory duty. The reasoning of the primary judge was correct." (citations omitted)

[15] The scope of sections 43 and 43A of the NSW *Civil Liability Act* (the NSW close but not identical analogue of s 36) was also mentioned in *Hunt Leather Pty Ltd v Transport for NSW* (2025) 100 ALJR 89. However, the issue presently under discussion was not decided by the Court: see Gageler CJ at [55], Gordon and Edelman JJ at [143]-[144] (though there is discussion of the meaning of the expression "based on" to which I shall return below).

[16] In both *Hamcor* and *Rodriguez* regard was had to the context of the Act, its evident purpose, the terms of the explanatory notes and to the Ipp Report referred to in those notes.

[17] The task of construction cannot be approached by considering the language used isolated from its context and the extrinsic matters which properly can be employed to aid that task: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].

[18] Nonetheless for the purposes of discussion of my reasons it is convenient to analyse the language used at the outset. The Act is described as one "to reform the law of civil liability for negligent acts, and for other purposes" and arose out of an Australia wide concern in the late 1990s and early 2000s, as to the costs of insuring against liability.

[19] By s 4(1), with some limited exception, the Act is to apply to "any civil claim for damages for harm". It is made clear by s 7(1) that, again subject to some qualifications, the Act does not create or confer any cause of action for the recovery of damages. Moreover, the Act is not a codification of the law relating to civil claims for damages for harm: s 7(5).

[20] In chapter 2, which is entitled "Civil liability for harm", part 1 is concerned with "breach of duty". Various provisions, in that part, refer to the breach of a duty, or analogue expressions: see s 9(1); s 10; s 11(1); s 12; s 14(1). Section 15 states that

a person "does not owe a duty" to warn against obvious risk: s 15(1). In relation to professionals again the language of "breach of duty" is used in s 21, s 22.

[21] Part 3 deals with "liability of public and other authorities and volunteers". It contains a definition of function as including power. Section 35 provides:

> "**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."

[22] It should be noted that the principles articulated in that section are said to be relevant to deciding in proceedings whether a public or other authority has a duty, but additionally whether it has breached a duty. In each case language of duty is employed. That expression includes a duty under a statute "that is concurrent with a duty of care" inter alia, in tort. Section 36, which is set out above, departs from the language of duty, other than in its heading.

[23] Section 37 introduces a fresh drafting technique of providing, in subsection (1):

> "(1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority—
>
> (a) to repair a road or to keep a road in repair; or
>
> (b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair."

[24] Section 36 is stated to apply to a proceeding that has the characteristic that it is "based on" an alleged "wrongful exercise of or failure to exercise" a function or power of a public authority.

[25] Subsection 36(2) provides then, for the purposes of those proceedings, an act or omission will not be wrongful unless it meets the standard that in the circumstances

it was so unreasonable that no public authority, having that function, could properly consider the act or omission "to be a reasonable exercise of its" function or power.

[26] As a matter of construction of the language used, the issue in the present case is whether the tortious negligence action against the Council can be said to be a proceeding "based on" something, that something being the wrongful exercise of a function or power of the Council. As to that:

(a) The nature of the proceedings is not otherwise prescribed in s 36.

(b) The language of "based on" suggests something more than a mere connection between the proceedings and the wrongful performance of the function or power.

(c) On the other hand, the proceedings are required to be based on that alleged wrongful performance rather than the statute governing the performance of the function or power being such as to itself be the source of some civil entitlement to bring the proceedings. That is, the text of the section is not expressed in terms directed to a cause of action for damages for breach of a statutory duty which arises as a matter of the proper construction of the statute creating the function: cf *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424.

(d) It has been observed in *Hunt Leather Pty Ltd v Transport for NSW* (2025) 100 ALJR 89 by Gordon and Edelman JJ in relation to the NSW Civil Liability Act, ss 43 and 43A that whether liability is "based on" the relevant statutory duty or based on the exercise of or failure to exercise a special statutory power (the language employed in those sections) requires "characterisation of the plaintiff's claim" as a matter of substance: at [143]. The NSW section 43 is the analogue of s 36 in this State, but with some significant differences to which I shall return later.

[27] In section 36 the language of "duty" is not employed at all other than in the heading. That is a part of the Act and to be construed as such.

(a) The heading suggests that the proceedings referred to are those based on "breach of statutory duty". The law recognises the possibility of civil claims for breach of a duty imposed by statute and the language employed in the heading is apt to refer to that nominate cause of action. Senior Counsel for the appellant urged that some significance needed to be given to the word "statutory" when used in the heading when one construes the text of the section. This is some indication that the drafter had in mind that the expression used in the heading could be assimilated with the (different) language employed in the text of the section, such that proceedings identified by reference to being based upon "an alleged wrongful exercise of or failure to exercise" of a function or power are to be read as meaning, and only meaning, proceedings based upon "breach of statutory duty".

(b) That is the view which ultimately found favour in *Hamcor*.

[28] However, that in my view requires the heading to do too much work; and is inconsistent with the language otherwise employed.

(a) A heading, even as part of the Act, is nonetheless a heading. Headings of their nature are short guides to what follows. What is set out in the body of the section is not confined to the performance of a *statutory duty* at all if that is to be understood as referring to such a duty that may give rise to a civil claim. The reference to the wrongful exercise of or failure to exercise a function (including a power) is not limited to circumstances which impose a duty on the public authority rather than a function or power.

(b) The appellant's contention requires s 36(1) to be read as if it referred, not to proceedings "based on" an allegation of "wrongful exercise of or failure to exercise a function ...", but a proceeding "for breach of statutory duty". Such an approach represents too much of a distortion of the language used to be accepted.

(c) On the other hand the composite expression "statutory duty" when employed in the heading can be viewed as representing no more than an inelegant way of referring to the alleged exercise of or failure to exercise a 'function' or 'power' the origin of which is statutory.

(d) This is a conclusion more readily reached, as in my view it should, if the defined term of "duty" is not to be transposed into the meaning of the composite expression used in the heading of "statutory duty".

[29] Having regard to the language used, the construction urged by the appellant ought not to be accepted.

**Explanatory Notes**

[30] It is appropriate to have regard to the Explanatory notes: s 14B *Acts Interpretation Act 1954* (Qld). The explanatory notes for this Act identify the main purpose of the Act as being to further facilitate the ongoing affordability of insurance for damages for personal injury, and as containing fundamental changes to the law of negligence. The background to the Act is recited as including the Queensland Government's engagement with other states and the Commonwealth, including referring to the "Ipp Report" as being the product of the work of a panel appointed pursuant to that inter-jurisdictional engagement.

[31] The explanatory notes state as follows:

> "*Clause 34* sets out the definitions relevant to this division.
>
> *Clause 35* specifies certain principles that are to apply when assessing whether a public authority has breached a duty of care. These principles are peculiar to public and similar authorities, and relate to the decision making power required to allocate resources in circumstances where the authority has certain functions.
>
> It is to be accepted that the functions of a public authority are necessarily limited by the financial and other resources available to that authority. Accordingly, the allocation of those resources generally is not open to challenge. Further, in assessing the duty of care of a public authority, the fact that the authority has more than one function to which the proceedings relate is to be taken into consideration, along with the content of those functions.
>
> Finally, the clause provides that a public authority may rely upon evidence of appropriate general actions when exercising its functions as evidence of the proper exercise of those functions in a specific instance.

*Clause 36* provides that the mere fact that a public or other authority undertakes a certain activity under **a statutory power**, or does not undertake a certain activity despite holding a statutory power to do so, of itself does not mean the authority must act in the same way in each circumstance. However, if the actions of the public authority are manifestly unreasonable in the circumstances, those actions may constitute a wrongful act or a failure to act. The standard by which the actions of the public authority are to be considered is that of a reasonable public authority." (bold added)

[32] In my view it is of some significance (as contrary to the construction urged by the appellant) that:

(a) the section is described as operating upon the exercise or non-exercise of a statutory power (consistently with my view as to the proper role of the heading of the section in the Act) and not by reference to the existence of a statutory duty; and

(b) the language suggests that it is seeking to set the "standard by which actions of the public authority" are to be considered, and this is not limited to the subset of such actions where the statute is construed as giving rise to a civil cause of action.

[33] Further, as will be seen below, the Ipp Report proposed that in claims arising from the performance or non-performance of a public function, a policy decision based on financial, economic, political or social factors or constraints would attract the Wednesbury standard. While the recommended language of that Report was not mirrored in the Act in Queensland there is nothing in the Explanatory Notes to suggest that a choice was made not to adopt that standard at all for negligence claims against public authorities.

**The Ipp Report**

[34] The Ipp Report contained a number of recommendations which are potentially relevant to the construction of the Act. In chapter 10, dealing with "Public Authorities" the authors of the report used the shorthand descriptor "the policy defence" to refer to whether and when a defendant should be allowed to answer a negligence claim asserting that it failed to take reasonable care on the basis that this was the result of a conscious and considered decision, made in good faith, on the basis of financial, economic, political or social considerations: see [10.13]. The authors of the Report expressed the view that public authorities should be able to plead the policy defence in a claim for negligently caused personal injury where the alleged negligence arises out of the exercise or non-exercise of a public function: see [10.25].

[35] The Report continues:

"The Panel's firm view is that the policy defence should not operate in this way to give immunity from liability. Rather, we think that Australian law should follow the lead of English law in this respect (see *Stovin v Wise*) by providing that in a claim for negligently-caused personal injury or death against a public functionary, where the alleged negligence consists of the exercise or non-exercise of a public function, and the public functionary pleads that the failure to take

> precautions to avoid the relevant risk was the result of a decision about the allocation of scarce resources or was based on some other political or social consideration, liability can be imposed only if the decision was **so unreasonable that no reasonable authority in the defendant's position could have made it.**" (emphasis added)

[36] After discussing that question the authors made recommendation 39 as follows:

> "The Proposed Act should embody the following principle:
>
> In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it."

[37] The report then went on to consider, under the heading "Breach of Statutory Duty" a consequential issue which the authors identified as being the proper approach to liability for damages for personal injury or death, resulting from a breach of statutory duty. Their discussion at [10.40] to [10.41] was as follows:

> "10.40 A consequential issue that needs to be considered in this context concerns liability for breach of statutory duty. There are various possible approaches to liability for damages for personal injury or death resulting from breach of a statutory duty. One approach (adopted widely in United States jurisdictions) is that breach of a statutory duty constitutes 'negligence *per se*'. … A second approach, adopted by Canadian law, is to treat breach of statutory duty as evidence of negligence, but never as anything more than evidence of negligence.
>
> 10.41 A third approach is that adopted by Australian (and English) law. Under this approach, breach of statutory duty may be adduced as evidence of negligence in a claim based on breach of a non-statutory (that is, common law) duty of care. However, breach of a statutory duty may, in certain cases, alternatively and independently give rise to a claim for damages based directly on the breach of the statute. Such a claim is not strictly a claim for negligence and so would not fall within the terms of Recommendation 2 unless (at least) the statutory duty were formulated as a duty to take reasonable care."

[38] This discussion suggests what was intended was a situation where the public authority could raise the policy defence, but that a floor was set that it could not be relied on if the decision was one no reasonable authority could have considered the proper exercise of its functions.

[39] The circumstance that by Recommendation 2 of the Ipp Report the proposed Act was to apply "to any claims for damages for personal injury…resulting from negligence regardless of whether the claim is brought in tort … under a statute or any other cause of action" meant that a claim for breach of statutory duty would not be caught by the Act unless special provision was made. Accordingly the Report recommended that the special provision be made to put such a claim on the same footing as a tortious duty of care.

[40] What was recommended (as recommendation 42) was as follows:

> "The Proposed Act should embody the following principle:
>
> In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act."

[41] The Act in Queensland is expressed to apply to "any civil claim for damages for harm": s 4(1) and thus is broader than Recommendation 2. Yet despite that broadening of the application of the Act, the construction urged by the appellant would mean that in Queensland (without this being explicitly identified as intended in the explanatory notes) the standard of care identified in the Ipp Report in its discussion of the policy defence did not apply at all (though the criteria which informed the policy defence are listed in s 35) other than to a small class of cause of action (where the statute gives rise to a civil cause of action). If correct that represents a significant departure from the Ipp Report and this will have occurred without being adverted to in the explanatory notes.

**Other Authority**

[42] There has been no Queensland appellate authority which has discussed and decided the conflict of approach between *Hamcor* and *Rodriguez*. Later NSW authorities of course have dealt with the Civil Liability Act (NSW) which is in different terms.

[43] The provisions adopted in NSW are materially different from those in s 36 of the Act. Sections 43 and 43 A of the *NSW Civil Liability Act* provide:

> "**43 Proceedings against public or other authorities based on breach of statutory duty**
>
> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.
>
> …
>
> **43A Proceedings against public or other authorities for the exercise of special statutory powers**
>
> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.
>
> (2) A ***special statutory power*** is a power—
>
> (a) that is conferred by or under a statute, and
>
> (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.
>
> (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special

> statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power."

[44] However, such authority as there is follows *Rodriguez*. In *Della Franca v Lorenzato* [2021] NSWCA 321, which concerned a negligent misstatement claim against a council, Basten JA stated at [18]-[19]:

> "[18] As noted in *Zraika*, s 43A assumes the existence of a general law duty of care; it then fixes the relevant standard to be applied. …
>
> [19] Given that, under the general law, a duty of care may operate with respect to a public authority exercising a statutory function, whether discretionary or obligatory, there is no reason to distinguish between the performance of a duty and the exercise of a discretionary power in fixing the standard of care…"
>
> (footnotes omitted)

***Board of Fire Commissioners (NSW) v Ardouin***

[45] Senior Counsel for the appellant relied on the decision in *Board of Fire Commissioners (NSW) v Ardouin supra*, for two propositions. The first concerns the approach to be taken to construing a statutory provision which detracts from common law rights. This approach was also adopted by Dalton J in *Hamcor*. The second proposition flows from the first: that in a provision providing immunity to (and by analogue a lower standard of care owed by) a public authority for the performance of its functions, that should be limited to the performance of the function itself and not incidental matters.

[46] In *Ardouin* the plaintiff sued the Board for injuries sustained when his motorcycle collided with a vehicle owned by the Board which was being driven by the fire brigade to a site in response to a fire. A provision of the *Fire Brigades Act* (section 46) *1909-1956* (NSW) provided that:

> "The board, the chief officer, or an officer of the board, exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers."

[47] The decision in that case was that the section did not apply to exonerate the Board. This turned on the nature of the language of that section and the nature of the function being performed while driving on the public road. Dixon CJ stated (at page 110):

> "But it may be said generally that once a power is found which depends upon the statute and involves detriment or disadvantage to others, either necessarily or in consequence of its improper or faulty exercise, it appears to me that s. 46 is capable of applying: it is not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority."

[48] The passage relied on by Dalton J is found in the reasons of Kitto J at page 116 where his Honour stated:

> "Section 46 operates, then, to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow."

[49] In *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, Gleeson CJ considered the general construction principle that "where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation." His Honour posited some qualification to this general principle at [19]:

> "The generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. It is also true that there is a presumption, relevant for example to the construction of privative clauses, that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied. However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd* modern legislatures regularly enact laws that take away or modify common law rights. The assistance to be gained from a presumption will vary with the context in which it is applied." (footnotes omitted)

[50] McHugh J suggested at [118]:

> "Given that modern Parliaments routinely enact laws which adversely affect or modify common law rights, **the application of each presumption varies according to its context**." (emphasis added)

[51] Indeed in that case McHugh J concluded at [119]:

> "In the present case, the natural and ordinary meaning of the legislation evinces an intention to curtail the common law rights of negotiating parties and third parties who suffer actionable damage as a result of certain industrial action to take civil action against the person who took the industrial action."

[52] The description 'jealous' interpretation used by Kitto J in *Ardouin* might lead to error. French CJ subsequently summarised the acceptable approach in *Lee v NSW Crime Commission* (2013) 251 CLR 196, at [3]:

> "When the text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms. However, subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected."

[53] In this case the Act has a purpose to curtail the common law rights of injured litigants and in doing so it is stated that fundamental change is being effected. It may be presumed that Parliament chose what it wanted to achieve and the task for the court is to objectively determine what that is. As explained in my view the language employed points against the construction adopted in *Hamcor* and it is not an answer to that to contend (which I would accept) that perhaps clearer language could have been employed.

**Based On**

[54] Section 36 requires that the proceedings be "based on" an alleged wrongful exercise of or failure to exercise a function of a public authority. Other than to the extent raised by the second issue, the primary judge was not invited to make a determination of whether the proceedings were "based on" an alleged wrongful exercise of or failure to exercise a function of a public authority. This issue was relied on in this Court only to support a contention that a tortious claim is not, but a claim for breach of statutory duty is, based on an alleged wrongful exercise of or failure to exercise a function of a public authority. That is, in support of the construction question.

[55] In this case if the barricading of the path is in some sense the exercise or failure to exercise a function of the Council (the second issue), in my view the allegation that it was done negligently (tested by whatever standard may be invoked) is of such significance to the proceedings of the appellant that the proceedings are to be characterised as "based on" the alleged wrongful exercise of that function.

**Conclusion**

[56] Having regard to the language of section 36, in the context of the Act and also taking into account the extrinsic material I have mentioned, I would reject the approach taken in *Hamcor*. The section is not limited in its operation to proceedings based on a breach of a statutory duty and accordingly is expressed so as to apply to the claim made in this case.

[57] This ground of appeal is not made out.

**The Second Issue: Is the installation of the barricade the performance of a function of the Council**?

[58] The primary judge recorded the competing contentions as follows:

> "[159] …However, Mr Dennison maintains that whatever task the work crew performed on this occasion to erect the barricade was simply not a function within the scope of s 901, as any 'construction, maintenance or improvement' of the footpath was complete once the new concrete was laid.
>
> [160] The BCC accepts that the footpath works were carried out as part of its cathodic protection works. However, it submits that in doing so it was nevertheless performing a statutory function conferred upon it by s 901 of the LGA. On its argument, it does not matter that the function was collateral or incidental in the way that Mr Dennison categorises it.
>
> [161] In my view, the evidence demonstrates that the footpath works, including the erection of the barricade around the freshly laid

> concrete, were works carried out by the BCC's workers for the maintenance or repair of the footpath, pursuant to the statutory functions conferred upon the BCC under s 901 of the LGA. It is artificial to view the erection of the barricade as a separate activity, unconnected with the footpath reinstatement works…"

[59] The primary judge determined that the installation and maintenance of the barricade was part of the Council's performance of its functions, pursuant to s 901 of the *Local Government Act 1993*: R [161] and that accordingly, the standard of care to be applied is that provided for by s 36(2) of the Act. The appellant submits that this is in error for two (in my view related) reasons:

(a) first, that the correct characterisation is that the Council was not controlling roads but performing cathodic protection or maintenance.

(b) second, the standard of care required by s 36(2) only applies to the performance of the function, and not something incidental to it.

**The Identification of the Function**

[60] The Council contends that the trial was run below on the basis that it was accepted the function being performed was that under s 901 of the *LGA*, and that the appellant should not now be permitted to depart from that position.

[61] In the Statement of Claim it is pleaded that the Council is constituted by the *City of Brisbane Act 2010*: [2]. The allegation is admitted: [2](a) of the defence.

[62] It is pleaded in the Statement of Claim that the pathway on which the barricade was erected was a "road" within the meaning of the *Local Government Act 1993* and that the Council under s 901 of that Act had control of the road including, the capacity to take all steps necessary for the construction, maintenance, repair and improvement of any road. The Council initially pleaded that those things were done pursuant to its function under s 66 of the *City of Brisbane Act* but later amended its defence to adopt the plea in the Statement of Claim.

[63] It seems to me that little turns on this amendment because s 65 of the *City of Brisbane Act 2010* defines road in a way which would capture the footpath or bicycle path and by s 66, that Act confers upon the Council the control of roads in Brisbane which includes being able to construct, maintain and improve the roads.

[64] The Statement of Claim did not specifically plead that the barricade was erected pursuant to a function of the Council under s 901 of the *Local Government Act*. It was pleaded, however, in terms of mirroring the scope of s 36 of the *Civil Liability Act*, as follows:

> "(m) the use of the barricade and its placement on the pathway, by the use of uncapped road dogs without warning and effective illumination of the bunting and barricade, was an act or omission of the Defendant in circumstances which were so unreasonable that no public or other authority would properly consider the act or omission to be a reasonable exercise of its functions."

[65] As to that, the Council initially pleaded that the cause of action in the proceedings was one "based upon an alleged wrongful exercise of or failure to exercise a function"

of the Council, namely that referred to in s 66 of the *City of Brisbane Act 2010*. It subsequently deleted that reference and substituted a reference to "s 901 of the *Local Government Act 1993* (repealed)… as pleaded in subparagraph 3(d) of the Statement of Claim": [2](b)(v).

[66] In its reply the appellant pleaded that, inter alia, "it is a matter for the court to determine the nature and extent of the barricade and whether it fell within the exercise of [the Council's] function under s 66 of the 2010 Act": see [5](d) of the Second Further Amended Reply.

[67] On that state of the pleadings it could not be said that the appellant had accepted that the Council was performing any specific statutory function or power when erecting the barricade. Nonetheless, the controversy on the pleadings was confined to whether (if it was doing so) it was pursuant to s 901 of the LGA or s 66 of the *City of Brisbane Act*.

[68] The premise of the first of the appellant's contentions is that the performance by the Council of the cathodic protection activity was not the performance by it of a function or power within the meaning of section 36 (2) of the Act. As to that the primary judge stated at R [161]:

> "Whilst neither party sought to identify the statutory source of the BCC's power to perform the cathodic protection works, it seems obvious to me that the BCC must also have been performing those works pursuant to a function conferred upon it by statute. Irrespective, I am concerned here with the case as pleaded, which fixes upon BCC's wrongful exercise of, or failure to exercise, its functions as a public authority with control of roads under s 901 of the LGA. The case was never styled or run as one involving the negligent carrying out of cathodic protection works or some other activity."

[69] Ultimately this issue does not advance the appellant's case. The Council was performing one of its functions when conducting the cathodic protection or maintenance work. The power to conduct that work would include at least the ancillary power to do those things necessarily incidental (which would include making good the works and protecting the public from harm which might arise from the Council doing so): *Benning v Wong* (1969) 122 CLR 249 at 256. It is not possible in my view to view the function as not extending to those protective activities.

[70] Further, the ability of the Council to access the pathway, to dig it up and then to reinstate and protect the pathway until the concrete cured was within the powers conferred by s 901 of the LGA (or s 66 of the *City of Brisbane Act*) to construct and maintain roads (including this path). So, again, its doing so is the performance of one of its functions. This conclusion is not detracted from merely because, as is the case, the occasion to dig up the path was to fulfil some other function viz cathodic protection or maintenance.

[71] Accordingly in my view the allegations made are correctly characterised as alleged wrongful performance of a council function.

**Merely Incidental to the Function**

[72] For the second of the propositions above, the appellant relied on passages from *Ardouin* and *Rodriguez*. In the first of these, Kitto J construed the immunity conferred on the Board as limited to damage:

> "… caused 'in' the bona fide exercise of powers. In my opinion the meaning is that the immunity attaches in respect only of damage resulting from an act which, if it had not been negligent, would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act other than s. 46 or the by-laws gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of, the exercise of a power."[2]

[73] Thus it was said the immunity did not extend to damage caused by the negligent driving of a fire engine on the way to the scene of a fire. In *Rodriguez* the Court adopted this distinction at [73] stating that:

> "Seqwater would not obtain the protection of s 36 if a flood operations engineer, making an urgent trip in his work vehicle to undertake flood control work, had an accident as a result of negligent driving. On the other hand, a decision to release or not release water, clearly a power conferred on the authority which was capable of exercise only by a body having the necessary statutory function, would attract the protection. The powers in issue were not those which must generally attach to a corporation or authority as a result of its institutional existence."

[74] It may well be accepted that the Council is not exercising its function or power to maintain or control roads (or to perform cathodic protection work along with related work) if workers are driving to the site to commence doing so. But that does not mean the protection of a site, in order to preserve the work carried out and to protect the public from the altered state of the site due to the performance of work (which involves digging up then relaying a public path) is not itself an ancillary part of, so as to amount to being an act or omission in, the exercise of that function or power. The conferral of a power to do that work would, in my view, necessarily confer on the Council the power to make it secure and safe.

[75] In the present case no-one, without the statutory authority conferred on the Council, could lawfully dig up the path, then reinstate it and barricade its use. That differentiated this factual situation from that in the examples given in both *Ardouin* and *Rodriguez*. I find support for this in the reasons of the Chief Justice in *Ardouin* where (as to the driving of the fire truck to the site) Dixon CJ said that the immunity was " not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority."

[76] I would therefore reject the second of these contentions advanced by the appellant.

[77] This second ground of appeal is not made out.

**The Third Issue: The Standard of No Reasonable Authority**

[78] I now turn to consider the third issue: whether, in any event, the appellant was successful in establishing that the Council did not satisfy the standard prescribed by s 36(2) of the *Civil Liability Act*.

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2 At page 117.

**The Primary Judge's Reasons**

[79] The primary judge found that the barricade was erected using orange mesh. It was of a rectangular shape running around the area of the path that had been re-concreted.

[80] The dimensions of the area enclosed by the mesh were that it was wider than the path at each end and a few metres long on either side. Four "road dogs" which are a form of metal pole, were used to support the corners of the barricade. The road dogs were not capped in any way.

[81] The primary judge recorded the orange mesh extended further across the entirety of the grass strip between the side of the path and the perimeter fence, where it was attached to the bars of the perimeter fence by cable ties.

[82] The mesh, whilst orange in colour, was not reflective or fluorescent. The road dogs themselves, similarly, were not reflective or fluorescent. The primary judge recorded that there were no lights or signs placed on or around the barricade as a warning or as a control measure to direct pedestrians away from the area that was cordoned off: R [55]. No pathway around the meshed area was formed or identified for pedestrians or cyclists to take to avoid it.

[83] Four orange-coloured witches hats with white reflective centre bands had originally been placed on the path around the barricade; two at the front and two at the rear. However, the primary judge further found that they were not there in the morning at the time of the appellant's accident, the likelihood being that they were stolen overnight: R [58].

[84] It is probable that the appellant was travelling at approximately 15 km/h with a bike light on his bike. He was found to be a "cautious and responsible rider" : R [102(c)].

[85] The street light closest to the barricade (that on pole number 620157) was not operating at the time of the appellant's collision. The first person on the scene after the accident (Mr Booth) described the area as dark and that at the time of the accident that streetlamp was not working.

[86] The lighting levels at the location of the barricade were generally poor: R [99(i)]. The primary judge recorded at R [102(b)]:

> "I am satisfied that the low level of light and prevailing conditions of reduced visibility were major contributing factors that led to Mr Dennison colliding with the barricade."

[87] His Honour then described the mechanism of the accident as follows at [102]:

> "(c) Because of the poor lighting levels, reduced visibility and the lack of other delineation or signage, Mr Dennison did not see and appreciate the full nature and extent of the barricade until he was almost upon it, and he was unable to avoid a collision. …;
>
> (d) Mr Dennison veered to the right of the footpath onto the grass strip between the footpath and the fence. At this time Mr Dennison most likely did not see or appreciate that the barricade was attached to the perimeter fence, completely

> cutting off any passage down that side. I reject any suggestion that Mr Dennison failed to see and properly negotiate the barricade because he failed to exercise reasonable care and keep a proper lookout. The more obvious and likely conclusions, of which I am comfortably satisfied, are that he saw the hazard late and, because it was still dark and there were no witches hats or other markers in place sufficiently identifying its dimensions, he did not appreciate its extent and thought he could go around it to the right. I further note in that respect that whilst the BCC workers considered it was sensible and convenient to attach the barricade to the fence, I consider it to be a measure that would be unlikely to be anticipated and expected by a cyclist riding along the footpath in the dark, even if they saw the barricade obstacle across the footpath ahead of them."

[88] Accordingly, the position is that on a pathway which could plainly be foreseen as being used by bike riders and at night, a barricade was erected using neither reflective nor fluorescent materials, apart from four witches hats which were moveable (and removed). The lighting in the area was poor and, in particular, the street light closest to that point was not operating. To compound matters, there was no indication that the barricade was tied to the perimeter fence which would make passing to that side of the barricade unviable. There was no sign ahead of the mesh warning path users of the existence of the barricade and no sign identifying for pedestrians or other users of the pathway another direction they should use to pass around it.

[89] The risk of cyclists colliding with the barricade was plainly foreseeable and the potential for significant personal injury was also reasonably foreseeable. The barricade was present not to prevent path users being injured as a result of encountering the works on the path but rather to enable the concrete to cure overnight. There was evidence of a raft of other steps that could have been taken to better alert the appellant (and others) of the barricade before it was too late to avoid injury and no evidence that such steps could not be taken because of issues of cost, or availability or even inconvenience.

[90] The primary judge found that the Council was negligent but in the end was not satisfied that the appellant had established a failing of the kind required by s 36(2) of the Act.

[91] The primary judge concluded, correctly in my view, that s 36(2) of the Act required him to take into account "all pertinent circumstances relating to the act or omission, including the nature of the relevant risk and the circumstances in which it arose, the materialisation of that risk and the harm it occasioned": R [166]. This must include the magnitude of the risk and the foreseeable seriousness of the consequences.

[92] In reaching his conclusion the primary judge, inter alia, had regard to:

(a) The evidence of Mr Rodgers, the Council's team leader for the works;

(b) The expert report and evidence of Mr Harris, a senior road safety auditor;

(c) A variety of manuals, guidelines and internal Council protocols to which it will be necessary to return. The primary judge recorded that each of these provided guidance (in the sense that none was mandated to be complied with by any statutory provision).

[93] None of the primary facts found by the trial judge are the subject of challenge. Rather it is the conclusion to be drawn from them, or from the absence of evidence, which is disputed. That said, there is one 'fact' which is found by the primary judge (at R [236]) to which it will be necessary to return.

[94] The Council urged that the appellant has to establish error of the kind discussed in *House v The King* (1936) 55 CLR 499 in order to displace the primary judge's conclusions: see Council's Submissions at [61]. This is not correct. The approach of this court on the appeal is to determine if the findings of fact were correct (subject in cases where the trial judge enjoys a unique advantage over appellate courts where the approach is that discussed in *Fox v Percy* (2003) 214 CLR 118; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679.

**The Standards and Policies**

[95] Dealing first with external standards, policies and the like, the primary judge referred to Part 3 of the Manual of Uniform Traffic Control Devices (Queensland) entitled "Works on Roads" (**the Manual**). It is a Queensland government publication based on an Australian Standard.

(a) It applied to paths such as involved in this case: R [170].

(b) Some parts are identified as mandatory, identified by the use of 'shall' as distinct from 'should' which is advisory. That said, the Manual is not a statutory standard to be applied. The use of mandatory language, however, emphasises the importance of the matters identified in that way.

(c) Paragraph 1.5 identifies the Council 'shall' take steps "to warn the public of prevailing conditions and to guard, delineate, and, where necessary, illuminate work which may pose a hazard to road users." The first step contemplated as something that should be done, is to identify all safety risks, evaluate them and the likelihood of adverse consequences (item 2.2.3). Item 2.4.1 provides that advance warning signs and devices should allow adequate time for correct response under the anticipated conditions. Signs "shall be either retroreflective or floodlit" (item 2.4.3). Item 3.9.3 refers to the use of "temporary hazard markers" as things that "should be used to show any lateral change of direction … and to delineate hazards and non-trafficable work areas adjacent to the travelled path". This refers to witches hats and it was accepted they could be moved or stolen: R [175].

(d) Paragraph 2.1 identifies that there are four "important basic principles to be observed". They are:

> "(i) Signs and devices should be used in a standard manner and be appropriate to the conditions at the work site.
>
> (ii) Signs and devices should be erected and displayed before work commences at a work site.
>
> (iii) Signs and devices should be regularly checked and maintained in a satisfactory condition.
>
> (iv) Signs and devices should be removed from a work site as soon as practicable. However, appropriate signs should remain in place until all work (including loose stone removal and linemarking following bituminous surfacing) has been completed."

(e) The Manual contemplated there would be a risk assessment conducted in advance of the works: R [173(b)].

[96] The publication "Guide to Road Design -Part 6A: Pedestrian and Cyclist Paths" (**the Austroads guide**) was a relevant national standard or guideline. The primary judge records that this document provides that where works are carried out for a period exceeding one day "the works should be made sufficiently visible for night-time path travel so that path users are able to observe conditions under low ambient light conditions, …and take appropriate action": R [179].

[97] An internal work safety reference plan of the Council (**the safety reference plan**) is a composite of a work method statement, safety guide, checklist, risk assessment document and more: R [182]. The safety instructions include at section 9.5 an instruction to provide a safe and clearly defined pedestrian path past the work site: R [184]. The reference to pedestrian path would include a shared path of the kind involved in this case. The safety reference plan by appendix A18 provided a checklist which asked whether pedestrian or vehicle traffic was affected with yes/no prompts. If pedestrian traffic was affected the prompts included " Signs erected" and "Barriers erected": R [186]. These boxes were ticked but Mr Rodgers said not by him and he presumed this was from some earlier project: R [187].

[98] The Council's Project Management Plan for Cathodic Protection Works (**the Cathodic Plan**) also contains work safety checklists and risk assessment sections. Section 9 headed "Project Site Rules" states "A safe and clearly defined path for pedestrians must be provided in accordance with BCC specifications": R [190]. Mr Rodgers could not remember what the specifications were: R [193]. A comprehensive risk assessment is required before any works start. Pedestrian traffic is to be controlled by "signage identifying alternate routes": R [191]. Again I read this as also including cyclists on the shared path. The same document had a checklist (ticked off but the primary judge recorded that the locations and dates of the works were not identified) that included "Site left for public in a safe state overnight (barricades/hazard lights/signs)": R [192]. Mr Rodgers was not able to state when or for what work the checklist had been completed: R [193].

[99] The Council "Construction Safety for Small Size Projects, Cathodic Protection of Trunk Main" (**Small Works Plan**) also requires the provision of "a safe and clearly defined pedestrian path past the work site": R [195]. The checklist asks if signs/barriers were erected. Mr Rodgers signed, as team leader, the Project Responsibilities and Accountabilities section. He accepted that one thing that he understood from that document was if the work created a hazard on a footpath he was "required to have signs delineating a safe passage around the works during the night-time": R [198]. He could not recall if any were erected. The checklist "Site Safety Signage displayed correctly" had been ticked for two weeks and Mr Rodgers agreed that this would be incorrect if signs had not been provided: R [199].

[100] The Council "Pathway Barricading Procedure" document set out what the primary judge recorded were the minimum requirements for path barricades: R [201]. This document is dated 7 January 2010 and accordingly post-dates the appellant's accident. The primary judge expresses his understanding that this document reflects the Council's revised work instructions after investigating that accident. Its use is therefore limited. But it gives insight into what the Council in early 2010 (and only a short time after the accident) identified as the minimum requirements for

delineation of paths if barricaded. No new development of knowledge or fresh standards are referenced as having influenced the revisions made in this document. This document includes a set up requirement described in an appendix which in addition to mesh and road dogs included a sign placed in front of the barricade showing the word Pedestrians and an arrow pointing to an alternative route or similar. The document noted that "Supervisors are to ensure signs and devices are securely mounted [and] readily visible" : R [202]. It further provided that if the barricade was left overnight it "shall be lit with a battery operated flashing yellow lamp at each corner": R [203]. The standard described the set-up of the barricade to be secured taut to an existing structure (a fence) with traffic cones "to be secured at each corner": R [204].

[101] The Council "Safe Works on Roadways" document was also relevant as it referred to working safely on roads and footpaths. It required a risk assessment be conducted and then signs were to be such as to "provide sufficient advance warning and allow adequate time for a correct response under the worst anticipated conditions": R [206]. Specifically for the pedestrian traffic (which would include cyclists) "Appropriate signs, warning lamps and illumination must be provided" and a well-defined walkway should be provided day and night: R [206].

[102] It should be immediately appreciated that the setup of the barricade in this case did not satisfy these various standards. The witches hats were not secured. More significantly for present purposes, there were no signs provided at all (advance of the site or otherwise), no alternative route around the barricade was identified and there was no illumination. The checklists, if they were completed in relation to the subject work, were completed in a formulaic way without regard to the prompts they contained about signs and hazard lights. What was provided was a barricade to protect the concrete seemingly without any real attention given to the risks to pedestrians being accommodated other than by the provision of moveable witches hats. The risk to cyclists would be demonstrably greater because of the speed they might travel compared to foot traffic.

**The Evidence of Mr Rodgers & Other Council Workers**

[103] As mentioned, Mr Rodgers was the Council team leader. He has no independent recollection of the specific work at the site: R [27]. He accepted in evidence that if he was creating a hazard on the footpath, he needed to put up signs and also delineate a safe passage around the works at night: R [198]. During the day time in fact signs were in place but they were packed up at the end of the day: R [34]. The witches hats were left in place "outside the barricade": R [34] seemingly not attached to it. To Mr Rodgers' thinking (if material) the barricade was there to protect the concrete: R [36].

[104] The site foreman was interviewed following the accident and he confirmed that the barricade was present to protect the wet concrete and that was his standard practice to protect such minor works: R [53]. Signs were not left up at night he said because they get stolen and were a hazard for people: R [53]. This is despite Mr Rodgers' accepting in evidence that he was "required at that site to have signs delineating a safe passage around the works during the nighttime".[3]

[105] Mr Malcolm Burgin, the Council Safety Manager was interviewed after the accident and his view is set out at R [54] as follows:

3 T3-75 lines 47-48.

"During the interview, Mr Burgin confirmed his role with the BCC at the time of the incident was as the Acting Workplace Health and Safety Manager for Brisbane City Works; that works had been done onsite for about three weeks; that the work site had been managed by the Team Leader, Michael Rodgers; that the work involved digging down to the water main to earth the infrastructure; that the Team Leader would make the decision as to the controls to be put in place and the barricading of the works; … that a working group involving the Team Leader and Senior Safety Advisors had completed a 'Construction Safety Plan' work method statement for the job; that ordinarily excess concrete left over at a job would be poured within the barriers of the job site, so that it may set and be taken away the next day, and that any turf outside the job site should be fenced in; and that advance warning signs would be put up where the whole footpath was closed, but here it was not as it was deemed there would be sufficient room for people to go around the barrier on the left-hand side (roadside)."

[106] Mr Rodgers said he assessed the lighting around the site and assumed that a large advertising sign nearby as well as the street lights would be on at night and sufficient: R [62]-[63]. No assessment of lighting was made beyond the assumptions Mr Rodgers made.

[107] There was no evidence that the Council did not have the means available to it to take the further precautions referred to in the various standards and policies dealt with above: R [128]. Mr Rodgers "simply did not turn his mind to the possibility that a cyclist might run into the barricade in darkness": R [128].

[108] His Honour concluded, at R [242]-[243]:

"[242] Ultimately, I am not satisfied that the way BCC exercised its functions here was so unreasonable that the test in s 36(2) is satisfied. In particular, I do not consider its failure to provide one of the two suggested kinds of retroreflective warning sign was so unreasonable in the circumstances that no other public authority could properly have considered it to be a reasonable exercise of its functions with respect to the footpath works. Despite the existence of the standards, guidelines and internal policy documents recommending or requiring such signs to be displayed, the decision whether to erect such a sign remained a matter for the exercise of judgement. The documents did not prescribe mandatory actions that must be taken in every case without regard to the prevailing circumstances. Although it is easy to criticise Mr Rodgers' judgement in hindsight, I am unable to conclude that his decision to set up the barricade in the way that was done, without placing a warning sign to alert pedestrians and cyclists of the barricade hazard, shows that BCC's conduct was so unreasonable no other public authority could properly have considered it to be a reasonable exercise of its functions with respect to the footpath works.

[243] I am of the same opinion in relation to the BCC failings to conduct a risk assessment; to check the streetlight functionality

> and lighting levels in the area at night; to provide additional lighting; and to provide additional delineation at and around the barricade. … In particular, I am not satisfied that the failure to check lighting levels or install additional lighting, based on Mr Rodgers' assumption that there would be sufficient lighting from nearby sources, demonstrates that the BCC's acts or omissions were so unreasonable that no public authority with like functions could properly have considered them to be a reasonable performance of its functions. Whilst these various additions may have been optimal or preferable their absence does not establish that the way the BCC exercised its functions falls outside the range of options as to what could properly be considered to be a reasonable exercise of those functions."

[109] In arriving at this conclusion the primary judge recorded at R [236]:

> "[236] On my assessment of the evidence, the BCC's use of the orange mesh with supporting uncapped steel road-dogs appears to have been consistent with its own work practices, procedures and its own 'WH&S4lO Construction Work Procedures' work instruction document. It also seems to be generally consistent with industry practice."

[110] It is evident that the last sentence of this quoted passage is referring only to the construction of the mesh barricade and the use of supporting uncapped road dogs. It is not a finding that the other aspects of the configuration of the barricade or the absence of signs, lighting and directions to a safe alternative path, were generally consistent with industry practice.

**The Expert Evidence**

[111] Mr Harris is a senior road safety auditor who (at the time of his report) had 19 years' road safety and traffic engineering experience. He identified and considered the Council's traffic management by reference to relevant standards, guidelines and internal Council material. He regarded the orange mesh as principally a barrier rather than a delineation device and noted that neither the mesh nor the road dogs were retro-reflective. In his view, the relevant considerations included the low light conditions, the shared use of the path, the obstruction extending across the path, the lack of delineation of the safe path around the barricade, and the potential hazard presented by the road dogs. The primary judge found that it was likely the appellant (when at the last moment he saw the barricade) veered off toward the grass between it and the fence (seemingly not appreciating it had been secured to the fence): R [102(c)-(d)]. Mr Harris considered that the arrangement gave substantial priority to securing the worksite but provided insufficient warning and guidance to path users. The 'treatment options' he identified included advance warning, improved delineation at the obstruction, a suitable surface around the worksite and the use of a more forgiving support in place of a road dog.

[112] Mr Harris accepted various qualifications to those opinions in cross examination. His inspection occurred in winter, more than 12 years after the accident. The nearby streetlight was operating during the corresponding period of nautical twilight at his inspection. He also accepted that the presence of four reflective witches hats, if

present at the barricade, would improve the delineation. His report identifies "delineation" as a term referring to the "selection of the appropriate path and speed or position, to allow a manoeuvre to be carried out safely and efficiently."

[113] In his cross examination Mr Harris when asked, by reference to a summary section of his report, whether he was suggesting "something more by way of delineation, something by way of signage?" responded "it's not necessarily the case. It would've assisted. Yes." This is relied on by the Council as indicating acceptance that what the Council did in this case was reasonable (or within the range as to not fail the test in s 36(2)). However, that is to mis-read his evidence. Reading the questions asked of him and by reference to the passage of this report about which he was being questioned, his evidence is clear that proper delineation was required and that signage might have been necessary to enhance delineation but not necessarily always. His response presupposes that appropriate delineation was already present.

[114] Mr Harris identified the various standards to which he referred as "relevant to temporary roadworks in this setting". Their terms are canvassed above. The principal areas of those standards in his view "relevant to the incident are planning and risk assessment, warning/delineation/visibility/visual cues and devices used". The set up used here in his view had "very little to do with public safety". The outcome was not, in his view, "fit for purpose/commensurate with the risks posed".

[115] In addition, a number of photographs of the site of the accident (with the orange mesh and road dogs in place) taken at various (relevant) times were exhibited. Of course they cannot fully convey the scene to the human eye. That said, the orange mesh is very difficult to see and given the lattice appearance of the mesh the sight line of the path appears clear before, through and after it. The road dogs themselves are even less visible. It is difficult to make out a safe path either side of the path, or to see the extent of the mesh extending beyond the concrete path to the fence line. However, photos showing reflective signs at other locations are clearly visible.

**Challenge to s 36(2) Conclusion**

[116] The appellant had the onus of establishing his claim by the standard imposed by s 36(2).

[117] That said, there is no evidence that any local authority with the functions of the Council could have considered the provision of the barricade as it was with the combination of having no advance or other reflective warning signs, no direction to an alternative path and no local lighting provided, as a proper exercise of the function.

[118] On the other hand, the evidence of the various manuals, standards and guidelines, with that of Mr Rodgers and Mr Harris give strong support to the appellant's case.

[119] The Manual prescribed in mandatory terms additional precautions "to warn the public of prevailing conditions and to guard, delineate and where necessary illuminate work which may pose a hazard" as well as the provision of advance warning signs and devices to allow adequate time for correct response under the anticipated conditions. Signs "shall be either retroreflective or floodlit".

[120] The Cathodic Plan called for signage identifying alternative routes. The Small Works Plan called for, as Mr Rodgers appreciated, there to be signs delineating safe passage

around the works. The Pathway Barricading Procedure and Safe Works on Roadways documents likewise called for such signs and indeed for lighting if the barricade was left overnight. The safety reference plan specifically in relation to the circumstance where pedestrian traffic was affected, inter alia, prompted the question whether signs had been erected.

[121] None of this was done. None of these documents permits the primary consideration to be protection of concrete as it cures rather than an assessment of, and steps taken to ameliorate, risk to pedestrians and cyclists. Mr Rodgers accepted that he was "required at that site to have signs delineating a safe passage around the works during the nighttime".

[122] The contrary considerations are:

(a) That signs or other devices may be stolen overnight. But there is no basis to conclude that could not be protected against by securing the signs.

(b) That Mr Rodgers assumed the street light and advertising sign would provide illumination. Neither proved to be correct. He had however taken no steps to determine if that was the case, or assess if it would have been sufficient if he had checked.

(c) The primary judge in my view misstates the conclusion to be drawn from the various documents to which his Honour referred (and which are touched upon above) by suggesting that what they call for is to be characterised as "optimal or preferable". The sense one gets from the reading them is not that the provision of reflective signage is something to be indulged in where an optimal outcome is sought. I would agree with the description of the provision of such signage as being preferable, but that tells one nothing about the unreasonableness of them not being provided, and I read his Honour's use of that description as also suggesting something of an over indulgence would be achieved by providing the signage. That is not supported by the documentation or indeed by Mr Rodgers' evidence.

(d) The barricade did not block the whole path, but allowed a space between the path and the road edge. This seems to me to add to the case against the Council. It would have been relatively easy and inexpensive to put up signs directing the users of the path onto that grassed area until they passed the barricade. On the other hand, the mesh did block the passage to the other side of the path close to the fence. Yet, that this was done, was not delineated in any way beyond the use of the latticed mesh.

(e) The actual configuration of the barricade was orthodox. But the identified vice is not the provision of the barricade but the absence of any of the precautions I have mentioned above.

[123] In terms of s 36(2) the question is whether, in the performance of its function, it can be concluded the Council acted (or omitted to act) in a way which in the circumstances was 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.

[124] There have been a number of decisions discussing the proper construction of the language in s 36(2) (or its analogue). The standard invites, in my view, consideration

prospectively (not with the benefit of hindsight of what occurred) whether what was done could be viewed by a local authority acting reasonably to be the or one of the proper ways to exercise its function or power. This recognises that there may well be a range of things that a notional reasonable local government would have done in exercise of its function. However, I agree with Bathurst CJ in *Curtis v Harden Shire Council* (2014) 88 NSWLR 10 at [6] that "what is important is that the standard is set by what a holder of the statutory power could properly consider reasonable." The same approach is expressed in *Collins v Clarence Valley Council* (2015) 91 NSWLR 128 at [177].

[125] The Council urged on this Court that the appellant must fail because in order to discharge proof of the breach of the standard required by s 36(2) the appellant had to establish what steps public authorities exercising the Council's function in fact take, and determine if what happened in this case fell below the least demanding of those steps. That is perhaps one way to approach the discharge of the burden. But in my view, it cannot be accepted as a substitute for the statutory test. The approach urged on us would include in the mix the steps taken by authorities themselves not performing in a way that public authorities *properly* consider reasonable.

[126] Further, it will seldom be possible to adduce evidence which is comprehensive of what all like authorities might consider doing in exercise of their functions or powers and even if it was, it would not be practicable to determine how many of them are to be properly considered reasonable. In this case applicable standards were tendered and relied on. The Council's own standards were tendered and relied on. The standards often involve matters of judgement and assessment and accordingly might in any specific situation leave open a range of acts, treatments or precautions which may properly be considered a reasonable exercise of the function or power. But that is not this case. No evidence would suggest, and Mr Rodgers refuted, that it was appropriate to leave a barricade overnight on this pedestrian and cyclist path without any delineation which would enable "selection of the appropriate path …, to allow a manoeuvre to be carried out safely and efficiently".

[127] It is possible for a court to put itself in the position of the notional public authority informed by such evidence as the parties adduce and decide if the steps taken in the case before the court fall below the standard set by s 36(2). In my view it is difficult to accept that a public authority *could* reasonably consider that it was a proper exercise of its functions or powers here (if it was not providing hazard lighting or other precaution) not to provide at least reflective signs providing advance warning of the barricade and the need to divert to another safely identified passage. The risk of harm to cyclists of the catastrophic kind suffered in this case, while described by the primary judge as moderate, was nonetheless not remote: R [127]. Accordingly I do not accept that a local authority could consider itself acting in the reasonable discharge of its powers not to protect against those risks by the provision of reflective signs at least.

[128] The third ground of appeal in my opinion should be accepted.

**Conclusion**

[129] In my view the appeal succeeds and judgment in the amount assessed by the primary judge should be given in favour of the appellant.

[130] There is no reason why costs should not follow the event.

[131] Accordingly, in my view the appropriate orders are:

1. The appeal is allowed.

2. Judgment is given in favour of the appellant against the respondent in the amount of $675,926.77 plus interest to date in the amount to be agreed between the parties or failing agreement to be determined by the trial judge.

3. The respondent pay the appellant's costs of the proceedings below and of this appeal.

[132] **COOPER J:** I agree with the reasons of Doyle JA.