Ratewave Pty Limited v BJ Illingby [2017] NSWCA 103 (19 May 2017)

JUDGMENT

1. **MACFARLAN JA**: I agree with the order proposed by Meagher JA and with his Honour's reasons for judgment.

2. **MEAGHER JA**: Shortly before midday on 19 June 2009 the respondent tripped over the corner of a raised timber platform in the lobby area of the Manly Pacific Hotel. As a result he suffered injuries to his neck, right shoulder and back. That relatively dark timber platform was a permanent structure in the hotel lobby and was positioned to the right side of the walkway to the main bar area, the entrance to which was on the left hand side of the foyer area. It was rectangular in shape – 1770 mm wide, 2625 mm long and 151 mm in height. The bottom edge of the platform was raised 55 mm above the floor, so that the top edge was about 20 cm (8 inches in the respondent's own estimate) above the floor. A strip of illuminated LED lights under that bottom edge cast light onto the white marble floor tiles of the lobby.

3. The primary judge (Levy SC DCJ) found that the respondent did not see the raised timber platform before he tripped and fell and that his ability to do so was affected by "intense glare" from a window or windows to the south of the bar area, which was the direction in which the respondent was walking with his sister when he tripped and fell: *Illingby v Ratewave Pty Ltd t/as Novotel Manly Pacific Hotel* [2015] NSWDC 302.

4. By its amended notice of appeal, the appellant occupier of the hotel (Ratewave) appeals against the primary judge's rejection of its allegation that the risk of harm represented by the platform was an "obvious risk" within s 5F of the *Civil Liability Act 2002* (NSW) (the Act) (ground 7A), and his Honour's conclusions as to negligence (grounds 1, 2, 3, 4, 5, 6, 7 and 8), causation (grounds 9 and 10) and the absence of contributory negligence (ground 11). Its appeal on damages issues (grounds 12 and 13 in the original notice of appeal) is no longer pressed.

5. The appellant contends that the primary judge erred in accepting the respondent's explanation for why he did not see the raised platform as being or including that his vision was affected by glare. It contends that in the absence of that finding his Honour should have held that the reason the respondent did not see the raised platform was that he was not looking where he was going. In support of its position the appellant says that the primary judge erred in not accepting the evidence of its expert, Dr Cooke, that glare was unlikely to have affected the respondent's ability to see the platform. It submits that in the absence of such an explanation the primary judge should have concluded that there was no breach of duty on its part as occupier, and no duty to warn of the presence of the platform because it was an "obvious risk" (s 5H).

The respondent trips on the corner of a raised platform

6. The following facts are not controversial. The respondent visited the hotel on 19 June 2009 with his sister to meet his brother-in-law for lunch in the hotel restaurant. Although the entrance to the hotel faces in a south-easterly direction it is convenient to describe the location of the various areas of the hotel relative to one another on the assumption that the hotel faces east.

7. Upon entering the hotel through the glass front entrance doorway the respondent and his sister were in the hotel lobby area. They turned to their right and walked into the restaurant on the northern side of that area. They waited there for about 10 minutes and then decided to see whether the respondent's brother-in-law was in the main bar, the entrance to which was situated on the southern side of the lobby area. As the respondent and his sister commenced to walk in a southerly direction from that restaurant area and across the lobby towards the main bar area (passing the front entrance doors on their left), the raised timber platform was in front of them, slightly to their right and immediately before the entrance to that area. To the right of the platform was dark coloured flooring and seating, which formed part of the bar area.

8. At the time of the accident, there was a sculpture positioned on the platform which consisted of one or two roughly spherical shapes constructed of wire, wicker or some similar looking material. The rectangular platform ran in a north-south direction. The two corners on its eastern side protruded beyond the widest part of that sculpture. Immediately behind the southern side of the platform was a timber divider wall consisting of vertical slats running from the floor level to the ceiling. The eastern side of that divider was roughly in line with the eastern most side of the sculpture (and accordingly was not aligned with the eastern side of the platform).

9. The respondent and his sister commenced walking across the lobby towards the main bar area. His sister was on his left. They walked in a direction roughly parallel with the glass wall of the hotel, which was on their left. There were two large pot plants positioned against that wall. As they walked past the platform the respondent caught his right foot on the corner closest to him, causing him to fall heavily onto the marble floor. The primary judge found, accepting the respondent's evidence, that he did not see or become aware of the raised nature of the timber platform at any time before he tripped: Judgment [36]. That finding is not challenged.

10. Before identifying in more detail and addressing the issues in the appeal, it is convenient to set out the respondent's evidence concerning the circumstances in which he tripped and fell. The primary considered the respondent to be an "impressive" and "generally reliable" witness: Judgment [22].

The respondent's evidence as to his not seeing the raised platform

11. In his evidence-in-chief the respondent was asked whether as he walked to the bar area he noticed anything. He responded:

A. I've had six years to think about this. So it's quite vivid, and I recall that there was bright sunlight coming through the walkway where I was trying to walk from the other side of the bar. It was quite intense.

12. He also described the sculptures on the raised platform:

A. ... On the right, there were some statues I would call them round cylinder wicker basket-type display things sitting on the floor - I thought was the floor. Now I realise that they were sitting on the platform which I didn't notice at the time. I never saw any platform when I was walking to the bar at all. I did see these ornamental cylinders - what they did call cylinders.

13. The respondent gave the following evidence as to his sister's reaction to his fall:

A. ...she was horrified. Her exact words were, "Where did that come from?" She never saw it, or she would have steered me away from it.

14. In answer to a question in cross-examination directed to the opportunity he had to see the platform as he was walking towards it the respondent gave the following evidence:

A. If I was looking down on it [the platform], your Honour, yes. But the light up the top, you know, I'm looking at eyesight and I never saw the platform so did I have an opportunity to see it if I had - if I had stared down instead of looking straight ahead, possibly. Well, of course I would have seen it if I'd looked down, but I didn't, I was looking straight ahead, and I did see the sculpture that's in the centre, but I thought that was sitting on the floor. I never saw the platform, no, it - it seemed to me to - not to be there. That light was quite bright as you can see, coming from the bar area up there.

15. The reference to the light "coming from the bar area up there" was to a light source shown in a photograph taken from the restaurant area and looking in a southerly direction towards the main bar area. That photograph, referred to in the evidence as photograph 8, was taken by the respondent's expert Dr Cooke when he inspected the premises for a second time on 20 March 2014. At the southern end of the hotel, and beyond that bar area, there was a window which in that photograph appeared as a white or bright area. (Another photograph taken of the same area, and from roughly the same position, but by the respondent on the day of the accident, does not contain such a pronounced white or bright area and shows more clearly the sculpture and platform. A copy of that photograph was in evidence as an attachment to Dr Cooke's first report.)

16. The respondent agreed in cross-examination that he was not looking down at the floor as he approached the platform. When asked whether, had he been looking down towards the floor he would have seen the edge of the platform, he responded:

A. I can't answer that because that's a hypothetical question. Obviously, if I stopped right in front of the platform and looked down, I'd be some kind of a bonehead if I didn't see it. I mean, it's there, right, so I must have been able to see it.

17. It was then suggested to him that the reason he tripped was because he was not watching where he was going. The witness disagreed saying "I look forward, straight ahead when I walk".

18. In elaboration of that answer the respondent gave the following further evidence by reference to what was shown in photograph 8:

A. I saw a clear walkway to the left of [the vertical timber panels] and that was what my line of sight focussed on because I was heading for that bar that you see the ladies at... So I incorrectly figured that to the left of those vertical whatever you want to call them, trellis work, was clear walk space. I had no reason to think there would be a platform there. Normally, a platform has a purpose, like there's something on it... With the light the other way, it somewhat – odds are, if there had been no sunlight coming in the intensity that it was, I would have seen it.

...

A. I aimed between that wall there [the eastern glass wall containing the front entrance doorway to the lobby] on the left – and there used to be plants there that kind of encouraged you to walk more to the right than you normally would.

19. Finally, in answer to a question from the primary judge the respondent added:

A. I mean, I was totally blown away when that platform appeared. Had the light not been there, as bright as it was, odds are I would have seen that platform, but it was blinding. You can see it on the picture there, or photo, should I say. Thank you.

20. The appellant's incident report recorded:

The guest tripped over the step near the bar. Step not clearly visible.

The primary judge's reasoning and conclusions

21. The primary judge accepted the respondent's evidence that as he was walking towards the bar area he did not see that the platform was raised: Judgment [36]. As is already mentioned, the appellant does not challenge that finding. It does however challenge the finding that the respondent's vision, as he walked towards the bar area, was significantly affected by glare coming from a window or windows to the south of that area: Judgment [160], [164], [168].

22. Taking account of the effect of that glare (which at one point is described as having the effect of precluding the respondent from seeing the raised platform) the primary judge rejected the appellant's argument that the risk of tripping would have been obvious to a reasonable person in the respondent's position, and accordingly an "obvious risk" within s 5F(1): Judgment [168], [171], [173].

23. More significantly for the respondent's claim that the appellant occupier was negligent, the primary judge found that in the circumstances, which included the presence of glare, there was a risk of persons tripping and injuring themselves on the platform. His Honour concluded at Judgment [175]:

... transmitted glare within the premises from sunlight made it difficult to see the raised nature of the platform, especially where the sculpture on the platform was of a kind and at a location that attracted the visual attention of persons walking in the foyer, and where the ambient lighting could give rise to a reasonable perception that the raised timber structure was part of the floor, but of a different colour.

24. His Honour found that risk was "foreseeable" (s 5B(1)(a)) and "not insignificant" (s5B(1)(b)): Judgment [179]-[180]. He then addressed whether a reasonable person in the respondent's position would have taken

precautions against that risk (s 5B(1)(c)). In doing so he separately considered the matters in s 5B(2): Judgment [185]-[188], and concluded that the appellant had breached its duty of care.

25. In relation to the content of that duty, his Honour observed at Judgment [197]-[198]:

... in placing an unusual object such as a raised platform in an area of the foyer that was accessible to pedestrian traffic, in a visual context where the timber background could provide misleading visual cues, those responsible for safety in the premises should have viewed the issue of whether the raised nature of the platform was sufficiently visible from a number of perspectives. That included the distracting effect of placing an ornamental sculpture on the platform and considering the visibility and the definition of the raised edge of the platform in the whole array of lighting conditions, including glare, that might from time to time apply at different times of the day or the year, and which were likely to affect what guests could see within the premises.

In that consideration, those responsible also needed to take into account the need to alert guests to the unusual and raised nature of the structure and its placement. This could have readily been achieved by appropriate warnings. Aesthetic considerations should take second place to safety considerations.

26. Addressing factual causation, the primary judge found at Judgment [194], albeit in very general terms, that "the negligence that led to the [respondent's] fall was a necessary condition of the harm suffered" by him. The precautions which the primary judge held could and should have been taken included the giving of an "appropriate" warning which his Honour considered would have alerted guests such as the respondent "to the unusual and raised nature of the structure and its placement": Judgment [198].

27. Finally the primary judge dealt with the allegation that the respondent had been contributorily negligent, rejecting the appellant's argument that the accident was a result of his "not looking where he was going": Judgment [202].

The arguments on appeal

28. The appellant challenges the primary judge's finding "that the [respondent] was so affected by glare that he could not see the raised platform" (ground 3). It submits that in the absence of such a finding there is no satisfactory explanation for the respondent's not having seen the raised platform before he tripped over it. For that reason it is said that the primary judge should have concluded that the respondent was not looking where he was going and, in the circumstances, not taking care for his own safety. It is also submitted that in the absence of that finding the primary judge should have concluded that the risk of injury from tripping on the raised platform was an "obvious risk" (ground 7A) and one against which, for reason of its obviousness, a reasonable person in the appellant's position would not have taken precautions.

29. In particular, the following conclusions are said to follow from the rejection of the finding as to intense glare. First, there was no risk of injury from tripping which arose because of the presence of glare (ground 4). Secondly, because the fact that the platform was raised was readily observable, there was no "foreseeable" risk of injury from tripping and any such risk of injury was "insignificant" (ground 2). For those reasons the appellant was not negligent in failing to take any precautions against such risk of harm (grounds 1 and 8). Thirdly, because that risk of injury was an "obvious risk", the appellant did not owe a duty of care to the respondent to warn of it (s 5H(1)). Fourthly, if the appellant was negligent, the respondent was contributorily negligent in failing to look where he was going (ground 11).

30. The appellant also submits that the primary judge erred in holding that it was negligent in failing to carry out a risk assessment following an earlier accident (ground 5 and 8(a)), and in failing to erect a warning sign (ground 8(b)). In addition, it challenges the primary judge's findings as to causation (grounds 9 and 10). With respect to the latter grounds the appellant makes three submissions. The first is that any finding that the appellant was on notice of a glare problem following the trip injury sustained by Ms Gibberson in February 2009 was not justified because the circumstances of that injury did not involve glare. The second is that the primary judge made no finding of factual causation arising from any failure of the appellant to undertake a risk assessment following that earlier trip injury. The third submission is that in relation to any failure to warn the primary judge did not make findings as to the nature of any warning sign and where it would be positioned so as to leave uncertain whether the respondent would have heeded such a warning had it been given.

The challenge to the finding that the respondent was affected by glare (grounds 3, 6 and 7)

31. At Judgment [168] the primary judge held that "intense glare" precluded the respondent from seeing the raised platform, whereas at Judgment [160], [164] and [175] the finding made is that glare affected the respondent's ability to see the raised platform. The appellant's argument is directed to a finding to the latter effect. At the outset, it is pointed out that the suggestion that glare or bright light affected what the respondent could see first emerged at the hearing and, for that reason, was not the subject of evidence from Mr Burn, the expert called in the respondent's case, or Dr Cooke, until after the respondent's oral evidence. Secondly, it is submitted that the respondent's evidence, with reference to photograph 8, was a reconstruction based on what appears in that photograph to explain why he had not seen what was obvious. Thirdly, it is said that the bright light shown in the photograph could not have been sunlight shining directly through ground floor windows at the southern end of the building, as the respondent's evidence suggested, because of the time of the year and day when the accident occurred. Fourthly, it is submitted that the respondent's evidence as to the existence of glare is contrary to the evidence of Dr Cooke as to the light levels in the foyer, and the likely absence of any glare and shadows which might have affected the respondent's vision. The primary judge is said to have erred in giving little or no weight to that evidence. This submission is the

subject of ground 6. Finally, it is noted that the respondent's evidence as to the effect of glare was not supported by any evidence of Mr Burn. Ground 7 is that the primary judge erred in preferring Mr Burn's evidence in circumstances where he did not express any opinion that the respondent was affected by glare. These grounds make it necessary first to consider the evidence of those experts.

The evidence of Mr Burn and Dr Cooke

32. In his first report, dated 27 March 2013, Mr Burn identified factors which influence the extent to which a pedestrian will see hazardous obstacles in his or her path. They include how obvious the object is, whether there is an expectation that such an object might be encountered, what other features are present at the time and the existence of other factors affecting the person's alertness and attention, including their state of mind, as well as things happening in the immediate vicinity. He also observed that a pedestrian entering the foyer "with the light behind them" would be walking "into varying degrees of shadow" while their eyes are adjusting to the dimmer light of the foyer. He described the "situation" at the time of the incident as being that the "timber platform appears as a visual extension of the timber floor surface used in the bar" and that the "platform was not within the range of [the respondent's] visual perception as he approached the front corner". This last comment appears to address the respondent's position at the point just before he tripped, and assumes that at that time he was looking straight ahead, rather than down and at the surface of the floor.

33. Dr Cooke responded by his first report dated 6 June 2013. For the purpose of making that report he inspected the hotel on 5 June 2013 at 12:45pm, recording that the sky was "covered with light cloud, but the day was bright". He also recorded that he had been asked to assume that 19 June 2009 was a "bright and sunny day". He disagreed with Mr Burn's reference to the "dimmer light of the foyer". Having measured levels of illuminance within the lobby area he considered that in the lighting conditions at the time of his inspection there was "no shading of any significance within the foyer"; and that the arrangement of daylight and artificial light sources avoided any "debilitating glare" in the entrance area.

34. In support of his conclusion that "the existence and detail of the platform is obvious to pedestrians (including those following the same route as [the respondent]) exercising a proper lookout for where they are walking on a bright and sunny day", Dr Cooke reasoned:

• The platform is made of timber that contrasts strongly in colour with the white marble floor surface ... . In addition, lighting is provided within the platform that illuminates the face of the platform and the marble floor below it, ... I do not agree with Mr Burn's opinion that the platform "stands in the direct route from the restaurant entrance to the bar". It is to one side of the direct route. Even if the [respondent] had not looked down at the floor as he entered the foyer, the platform would have been within his cone of vision as he approached the platform for a considerable length of travel, with the colour contrast between the platform surface and the marble floor providing a strong visual cue to the existence of the platform. In addition, the sculpture standing on the platform (higher than eye level) was a further visual cue to the fact that the [respondent] was approaching an obstacle, as was the timber screen behind the platform in the [respondent's] line of sight on his approach from the entrance door.

• ... even if the plaintiff was fixating on the distance, the sculpture standing on the platform would have been within his line of sight, as would the timber screen behind the platform; and, as discussed above, the platform would have been within his cone of vision for a considerable distance before he reached the platform.

• As the platform is clearly visible on approach from a considerable distance, there is an expectation for the raised platform to be encountered en route.

• The platform is low to the floor, but the sculpture standing on the platform is in the line of sight of a pedestrian approaching from the doorway. In addition, the strong colour contrast between the marble floor and the timber platform and the lighting within the base and the marble floor surface provide good visual cues to the existence of the platform from a considerable distance. The fact that the platform is low to the floor therefore does not create a trip hazard to pedestrians taking reasonable care for their own safety.

35. Mr Burn prepared a responsive report dated 8 July 2013. He disagreed with Dr Cooke's opinion that the existence of the raised platform when viewed from a distance was "obvious". He considered that whilst the change in the surface from marble to timber was obvious, the change to the level of the surfaces was not; and that whilst those contrasting surfaces were visible from a distance, the differences in surface type did not create any expectation for the raised platform.

36. Dr Cooke conducted a second inspection of the hotel foyer and entrance area on 20 March 2014 at about 2pm, and prepared a further report on that day. He described that day as "bright and sunny with some light, scattered cloud". He took photographs (including what became known as photograph 8) and measured levels of illuminance. That report responded in part to Mr Burn's opinions as to the visibility of the platform. In relation to that question Dr Cooke said, on the basis of the levels of illuminance measured by him that the "quality of the lighting within the foyer and the incident site is optimum".

37. The experts also prepared a joint report in which they addressed the question whether there was "evidence that the defendant was negligent". Notwithstanding the form of that question, their responses were admitted without objection. Mr Burn's opinion was that there was a variation to the intensity of lighting away from the entry and towards the platform; that the visual cues available including the sculpture and slatted timber wall behind the sculpture drew visual attention away from the edge of the raised platform so as to give the perception that the edge of the platform was at the same level as the marble tiling; and that the placement of the sculpture on the platform and the position of the slatted wall did not provide a visual barrier directing the path of a person crossing the foyer away from the edge of the platform on which the respondent tripped.

38. Dr Cooke's view was that the level of lighting in the lobby area was excellent and provided optimum light conditions at the transition from the exterior to the foyer, and within the foyer. He considered that the platform was

within the field of vision of pedestrians in the respondent's direction of approach, and in addition that there were strong visual cues as to the existence and position of the platform.

39. None of this evidence was directed to any light source or glare in the line of the respondent's sight as he and his sister walked across the lobby area. That question was addressed to Dr Cooke in his oral evidence in chief. He was shown photograph 8 and his attention was drawn to what he referred to as "daylight coming from a window" on the south side of the hotel. Dr Cooke said that he had looked for adverse light effects and that "that external daylight source didn't appear to me to be a glare source". He then answered the following question of the primary judge:

Q: In your interpretation of a photo as you've just said you wouldn't have thought this represented glare but I have the evidence of the plaintiff which is to the contrary. Is there any aspect of your expertise that enables you to say that the plaintiff's subjective experience as described was an unlikely one?
A: Well, based on – what I've tried to do is analyse the lighting from an objective point of view which I done in the report. I've also, as I've said in my report also requires – an analysis of lighting also requires an appraisal which involves some – to some extent a subjective element. Having carried out that exercise I was satisfied there was no glare from any source. Now, it's possible, I can't rule out the possibility that a particular person with different eyesight might experience a different condition.

The primary judge's treatment of Dr Cooke's evidence

40. The primary judge described Dr Cooke's opinions as "unpersuasive" and "without adequate factual foundations". He preferred the opinions of Mr Burn, which he described as "soundly based": Judgment [154]-[155]. In particular his Honour considered that Dr Cooke's evidence as to the level of lighting and absence of glare and shading was without adequate factual foundation because it was given on the wrong assumption that the lighting conditions at the time of his first inspection were not relevantly different from those at the time of the respondent's accident: Judgment [114]-[117], [138]-[140], [142], [147], [165].

41. The appellant submits, correctly in my view, that this conclusion is not soundly based because it misconstrues Dr Cooke's description of the conditions at the time he made his first inspection. It also does not take account of the fact that Dr Cooke carried out two inspections and that during the second he made further measurements of the levels of illumination in the lobby and took photographs, including photograph 8 which the respondent relied on as showing the glare conditions that he experienced at the time of the accident.

42. Dr Cooke described the conditions at the time of his first inspection as being that the sky was "covered with light cloud but the day was bright". The primary judge treated that description as being of a "clouded sky" (Judgment [138]) and concluded that the fact that the sky was "cloud covered" was a "very likely factor that resulted in Dr Cooke not seeing reflected light at that time" (Judgment [142]). The primary judge took no account of Dr Cooke's evidence that the conditions under which that inspection occurred would have been "similar to the conditions at the time of the incident because my inspection occurred at a similar time of year and at a similar time of day under bright sky conditions". No cross-examination was directed to challenging this evidence.

43. Furthermore any difference between the conditions existing at the time of the first inspection and those experienced by the respondent could not justify the rejection of Dr Cooke's evidence which was also based on observations and light measurements made during his second inspection. That inspection was conducted in conditions described as "bright and sunny with some light, scattered cloud".

44. The difficulties with the primary judge's treatment of Dr Cooke's evidence are most apparent in the following observation at Judgment [140]. Dr Cooke was asked by the appellant's counsel whether he considered the light shown in photograph 8 "constituted glare through the window when you conducted your inspection". Dr Cooke responded that "that external daylight source didn't appear to me to be a glare source". In relation to that evidence the primary judge remarked:

At the time of Dr Cooke's inspection, he said that he saw no source of glare: T102.29. Presumably the clouded sky had some influence on that observation.

45. That observation wrongly assumes that the "inspection" referred to was Dr Cooke's first inspection. That appears from the primary judge's reference to the "clouded sky" having some influence on his response. In fact Dr Cooke's response was directed to a question addressing the glare as it appeared in photograph 8, which was taken by him during his second inspection.

46. For these reasons the primary judge was not justified in giving little or no weight to Dr Cooke's evidence concerning the likely existence of "intense" or "blinding" light or glare conditions at the time of the accident. That makes it necessary for this Court to consider for itself the correctness of his Honour's finding as to the existence of such conditions and any effect of glare on the respondent's ability to see and recognise the raised nature of the platform on which he tripped. Neither party submits that this Court is not in a position to review that finding and his Honour's conclusions concerning the various liability issues; or that this Court should not give effect to its own conclusions in relation to those issues in the event that they differ from those of the primary judge. That is so notwithstanding that the primary judge had the advantage of seeing the respondent give his evidence and considered him to be a "generally reliable" witness.

Did "intense" glare affect the respondent's ability to see the raised nature of the platform?

47. Dr Cooke's evidence was that he did not observe any "glare source" on the day of his second inspection when photograph 8 was taken. That reference to "glare" in his oral evidence is reasonably to be understood, in the context of his first report which refers to the discussion of glare in Australian Standard 1680.1-1990 (s 8), as being to

debilitating glare which impairs vision by causing a reduction in the contrast of an object which is closer than the source of the glare, so as to make details of that object less visible. At the same time Dr Cooke accepted that any analysis of lighting and glare is "inevitably somewhat subjective".

48. Dr Cooke's evidence as to the light conditions within the lobby area, and as to the absence of any source of debilitating glare, was not contradicted by Mr Burns or successfully challenged in cross-examination. It contradicted the respondent's evidence, given by reference to photograph 8, that light from a window or windows to the south of the bar area was "intense" or "blinding". The respondent's description of "blinding" glare, if accurate, was not consistent with his evidence that as he walked across the lobby area (and in the direction of the source of light from the southern window or windows) he was able to see the outline of the sculpture and the vertical timber slats but did not appreciate that the surface on which the sculpture sat was not at the same level as the marble floor. The suggestion that glare played such a significant role in the respondent's not having seen the raised platform was not the subject of any contemporaneous record following the accident. The appellant's incident report noted that the "step was not clearly visible", possibly reflecting something said by the respondent.

49. The respondent's evidence as to there being significant glare was given by reference to what was shown in photograph 8, to which his attention was drawn early in his evidence in chief. That photograph, as reproduced in evidence, showed a white or bright area which Dr Cooke described as "reflected light". He also observed that it was "difficult" to rely on that photograph as accurately revealing the presence or absence of significant glare. That is confirmed by reference to the similar photograph taken on the day of the accident by the respondent (see [15] above) which, whilst showing a distance light source, does not show "intense" glare of the kind described by the respondent. Finally, the terms in which the respondent commenced his evidence as to that light source (see [11] above) suggested, as the appellant submits, that he was, albeit honestly, attempting to provide an explanation for why he had not seen what was said to be obvious by recourse to what he perceived the photograph to show.

50. In my view the evidence only permitted the primary judge to find that there was a distant source of reflected light behind the bar area towards which the respondent was walking. It did not however support a finding that this light source was "bright" or "intense" or that it was debilitating glare as described by Dr Cooke. For that reason it could not provide the explanation for why as he walked towards the bar area the respondent did not see that the platform was raised. Accordingly, grounds 3 and 6 are made out. Ground 7 does not arise because the primary judge did not in any sense prefer the evidence of Mr Burn to that of Dr Cooke in making his finding as to the effect of "intense" glare.

51. This makes it necessary to reconsider the primary judge's conclusion that the appellant breached its duty of care as occupier and that the risk of harm from tripping on the platform was not an "obvious risk".

Did the appellant breach its duty of care to the respondent? (grounds 1, 2, 4 and 8)

The occupier's duty of care

52. The duty of an occupier to an entrant is no longer defined by reference to different categories of entrant. That duty is governed by the general principles of the law of negligence, and the measure of its discharge is what a reasonable person would in the circumstances do by way of response to the relevant foreseeable risk of injury: *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 (Mason, Wilson, Deane, Dawson JJ) adopting as correct the statement of Deane J in *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 at 662-663. Whether that duty has been breached must be considered in this State by reference to the provisions of the Act, and in particular s 5B: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [27] (French CJ, Gummow, Hayne, Heydon, Crennan JJ); [2009] HCA 48.

53. Section 5B is in the following terms:

5B General principles

(1) A person is not negligent in failing 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 to have known), and
(b) the risk was not insignificant, and
(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst 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.

54. In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42. The weight to be given to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Limited* [2005] HCA 19; (2005) 221 CLR 234 at [35]; [2005] HCA 19; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):

The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to

circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Was there a risk of harm which was foreseeable and not insignificant (grounds 2 and 4)

55. The primary judge identified the risk of harm as being that people might trip on the raised platform injuring themselves. He held at Judgment [179] that "it was plainly foreseeable that a low raised platform located in a hotel foyer near where people would be expected to walk, posed a risk of such persons tripping on such a structure". It is implicit in that conclusion that such persons might do so because they were not aware or conscious of the existence of the raised structure as they stepped or moved in a way which resulted in their tripping. There was evidence that such incidents had occurred before. At the time of his accident the respondent was told by the assistant hotel manager that he was "not the first one to have fallen over the platform". The incident report produced by the appellant included a record of Ms Gibberson's fall (see [30] above) which described her as having "tripped upon the raised wooden flooring adjacent to the end of the bar". Whilst her fall occurred in different circumstances to that of the respondent it nevertheless confirmed that the platform was a trip hazard to those who were not aware of its presence.

56. Dr Cooke's evidence does not contradict that conclusion. The thrust of his evidence, directed to a person in the position of the respondent when approaching the raised platform from the northern side of the lobby, was that the lighting conditions were such that "exercising a proper look out" he would have seen the platform "from a considerable distance", and recognised that it constituted a trip hazard which had to be avoided. Putting aside any effect of glare, Mr Burn and Dr Cooke disagreed as to whether such a person crossing the foyer who was looking in the direction of the sculpture would have seen that the wooden surface of the platform was raised above the marble floor. That description would not necessarily include someone who was distracted or inattentive or whose field of vision was obstructed at that time. Taking account of the likelihood of there being such persons, the primary judge was correct to conclude that the appellant knew or ought to have known that there was a risk that people might trip and injure themselves on the platform.

57. At Judgment [180] the primary judge also held that the risk of such a tripping incident occurring "in the circumstances described by the plaintiff" was not insignificant (s 5B(1)(b)). That conclusion must be reconsidered without regard to the presence of any debilitating background glare. Doing so, in my view that remained the position. The presence of such a low platform on one side of an area of the lobby providing pedestrian access to and from the main bar area was not likely to have been expected (cf the uneven surface of the occupier's suburban driveway in *Neindorf v Junkovic* [2005] HCA 75 at [94] (Hayne J), [116] (Callinan and Heydon JJ); [2005] HCA 75; (2005) 80 ALJR 341). At the same time it was reasonably to be expected that users of that means of access would include those who were distracted or inattentive or even less than careful. In these circumstances the risk of someone not seeing the raised platform and tripping on it was not insignificant; and grounds 2 and 4 do not give rise to any different conclusions than those reached by the primary judge.

Whether a reasonable person in the appellant's position would have warned of the existence of the raised platform (grounds 1, 2 and 8)

58. Addressing the issues raised by s 5B(1)(c) and (2), the primary judge concluded that a reasonable person in the respondent's position would have taken precautions to bring the existence of the raised platform to the attention of persons walking across the foyer: Judgment [181]. In reaching that conclusion his Honour appears to have treated the requirements of s 5B(2) as to be separately addressed rather than as to be considered in determining the question posed by s 5B(1)(c). His Honour's reason for concluding that a reasonable person would have taken such precautions emerges earlier in Judgment [175] (which is set out at [23] above). There he concludes that the platform presented a risk to persons walking across the foyer "taking reasonable care for their own safety" because in circumstances of "transmitted glare" it was difficult to see the raised nature of the platform. That conclusion also must be reconsidered having regard to his Honour's unjustified finding that there was such glare having that effect.

59. The present case, like *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; [2002] HCA 9, is one in which the respondent plaintiff asserts, among other things, that reasonableness required the defendant occupier to warn of a hazard and the occupier responds by saying that the hazard was so obvious that no warning was required. As Gleeson CJ there observed whether in such a case reasonableness requires that a warning be given is a question of fact which depends "on all the circumstances, of which the obviousness of a risk may be only one" (at [45]).

60. I have already noted that the experts disagreed as to whether a person crossing the foyer and taking care could be expected to have seen that the platform was raised. The evidence of those experts as to the obviousness or otherwise of that hazard may be tested against the respondent's account of what he and his sister did and saw, which the primary judge accepted and which is not challenged on appeal.

61. The respondent's evidence was that as he walked towards the bar area, he was looking straight ahead and saw the sculpture but "thought [it] was sitting on the floor". He also saw the slatted timber divider and focussed on the "clear walkway to the left" of its slatted panels. He disagreed with the suggestion that he was not looking where he was going. At the same time he accepted that as he proceeded across the lobby he was talking to his sister and that

he might have turned his head towards her whilst he was doing so. However he rejected that as a reason for his not having seen corner of the platform on which he tripped. He also said that he had "no reason to think there would be a platform there".

62. The disagreement between Dr Cooke and Mr Burn was as to how someone walking towards the bar area might observe and interpret the "visual cues" presented by the wooden surface of, and sculpture on, the platform. Those cues were identified as the colour contrast between the timber surface and the marble floor (together with the lighting onto that floor from the base of the platform) and the position of the sculpture on the timber surface and the timber screen behind it.

63. Dr Cooke considered the first provided a "strong" indication of the existence of the raised platform and that the second was a cue that the observer was "approaching an obstacle". Mr Burn, on the other hand, said that whilst there was a contrast in colour between the surfaces that contrast was explained as due to a difference in the surface materials rather than in those surface levels. He considered that the position of the sculpture and timber wall drew attention away from the edge of the timber surface and did not provide a visual barrier directing the path of a person crossing the foyer away from the edge of the platform, as distinct from the edge of the sculpture and wall.

64. The respondent's evidence (see [12] ff above) indicates that he saw each of these visual cues, but interpreted them as Mr Burns suggested they might be interpreted. That evidence also shows, contrary to the appellant's submission, that the respondent was looking where he was going sufficiently to see the objects before him which Dr Cooke considered he would have seen if he was taking reasonable care for his safety.

65. Accepting the respondent's evidence as to what he did see, and taking account of the difference between the experts, the presence of the low platform on which he tripped was not so obvious that from the perspective of an occupier considering the hazard which it represented it could confidently be predicted that a person walking towards the bar area who was looking where they were going would necessarily have become aware of its presence.

66. Accordingly addressing whether a reasonable person in the appellant's position would have sought to warn of that risk of harm, the following factors are significant: that people using the hotel lobby would not ordinarily expect to come across a low but raised platform in an area providing pedestrian access to and from different facilities in the hotel; that people walking in the lobby area would include those who were looking where they were going, with varying degrees of care, as well as those who might be distracted or inattentive; that it was not to be expected, in part because of the nature of the platform and where it was, that people exercising care for their safety would necessarily see and avoid it; that a person tripping on the platform could sustain serious injuries; that people could be made aware of the existence of the raised platform in a way which enabled them to avoid it if it was isolated by roping it off or by placing some form of warning at each of its exposed corners; that these precautions could be taken without difficulty or expense, and that there was little or no social utility in having the platform supporting the sculptures slightly raised above the floor or not accompanied by such a warning. These considerations (which take account of the things in s 5B(2)) would in my view have led such a reasonable person to have taken one or other of those precautions. It follows, subject to the possible application of s 5H of the Act, that grounds 1, 2 and 8 do not result in any different conclusion on the question of breach of duty.

Was the risk of tripping on the platform an "obvious" risk (ground 7A)

67. Section 5H(1) provides that a person does not owe a duty of care to another person to warn of an obvious risk of harm to that other person. Section 5F(1) provides that an "obvious risk to a person that suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person."

68. Descriptions of such a risk as "clearly apparent" or "easily recognised or understood" identify characteristics or features of the risk which support a conclusion that it would have been obvious to a reasonable person in the same position, as required by the definition in s 5(1): see, for example, *Jaber v Rockdale City Council* [2008] NSWCA 98; (2008) ATR 81-952 at [35], [38]-[39] (Tobias JA) and *Laoulach v Ibrahim* [2011] NSWCA 402 at [79]- [80] (Tobias AJA).

69. The primary judge's holding at Judgment [160] that the risk was not an obvious one in circumstances which included the conditions of glare which the respondent described must be reconsidered. For the reasons which appear in [60]-[65] above it cannot be said that the risk represented by the raised platform "would have been obvious" to a reasonable person in the respondent's position. It follows that ground 7A is not made out.

Contributory negligence (ground 11)

70. The primary judge rejected the allegation of contributory negligence on the basis that the respondent did not see the raised timber platform in part because of glare and that there was no evidence to suggest that a reasonable person in his position would have seen the platform: Judgment [203]-[204]. That conclusion also must be reconsidered. The appellant submits that the fact that the platform was raised was "obvious" and that the reasonable inference to be drawn because the respondent did not see it, was that he was not looking where he was walking.

71. The evidence does not justify a finding that the respondent was not taking reasonable care for his own safety. It indicates that the respondent was looking where he was going and did see the visual cues which Dr Cooke says he ought have seen, taking reasonable care for his own safety (again see [60]-[65] above). Dr Cooke's evidence was that someone crossing the foyer who was taking care for their safety would have seen and recognised those visual cues so as to create an "expection for the raised platform to be encounted en route" (see [35] above). His evidence does not support the conclusion that, absent such an expectation and taking reasonable care, the

respondent must nevertheless have seen the hazard later and before he tripped. Accordingly, ground 11 is not made out.

Causation (grounds 9 and 10)

72. Although the primary judge at Judgment [189] considered that the earlier tripping incident involving Ms Gibberson "required that a risk assessment of the area be undertaken" he did not identify that as a "precaution" which the appellant failed to take in breach of its duty as occupier. For that reason ground 8(a) does not arise, and it is not necessary to consider the appellant's causation arguments made on the basis that the failure to undertake that assessment was the or a relevant failure to take reasonable care found by the primary judge.

73. The appellant's remaining arguments on causation accept that the primary judge is to be understood as having found that there was a failure to give an "appropriate" warning. That is tolerably clear from Judgment [189] and [192], which should be understood as identifying the pleaded failure to warn as the relevant breach. The appellant correctly points out that the primary judge did not identify what such a warning sign might say or where it might be positioned and, as a result, submits that it is doubtful that the respondent would have heeded any such warning sign had it been given. The primary judge's reference to an "appropriate" warning is in my view to be understood as one which would have brought the existence of the exposed corners of the raised platform to the attention of someone in the position of the respondent. It was not suggested in argument that that could not have been achieved by placing some form of stand containing a sign at each of the exposed corners of the platform. The existence of such a sign standing on the platform would have come to the attention of the respondent, as did the existence of the sculpture and slatted wall behind it. The primary judge did not err in concluding that such a sign would have been sufficient to alert people such as the respondent to the presence of the raised platform: Judgment [189]. Accordingly grounds 9 and 10 are not made out.

Conclusion

74. The appeal should be dismissed with costs.

75. **FAGAN J**: I agree with Meagher JA's conclusion that appeal grounds 3 and 6 are made out. That is, the learned trial judge erred in finding that the respondent was so affected by glare that he could not see the platform and in rejecting Dr Cooke's evidence that lighting in the foyer was adequate and not significantly subject to glare. I also agree that the platform constituted a not insignificant trip hazard, especially taking into account the risk that entrants to the foyer might be distracted by talking to companions or by other circumstances and might thereby fail to navigate around the structure. I agree with his Honour's reasons set out at [2] – [51].

76. However I consider that the risk of tripping on the platform was obvious within the meaning of s 5F of the *Civil Liability Act 2002* (NSW). Division 4 of Pt 1A of that Act (ss 5F – 5I) is headed "Assumption of Risk". Sections 5F – 5H as applicable at the hearing in the court below provided as follows:

5F Meaning of "obvious risk"
(1) For the purposes of 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.
5G Injured persons presumed to be aware of obvious risks
(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.
5H No proactive duty to warn of obvious risk
(1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.
...

77. In my opinion the photographs appended to Dr Cooke's report of 21 March 2014 and the photograph taken on the day of the accident show that from at least 20 metres away from the platform a pedestrian looking ahead with reasonable care along the route which was followed by the respondent would have seen that this was a raised structure which would have to be avoided. The platform would have been within what Dr Cooke referred to as a pedestrian's "cone of vision", which I take to mean a wide area ahead of the pedestrian, angled out in all directions in both the horizontal and vertical planes. That which is visible to a pedestrian is not limited to pinpoint objects in a single line of sight.

78. The timber platform was tan or mid-brown. This colour contrasted strongly with the surrounding floor. The floor was of highly polished white marble with a grey irregular fleck through it. The demarcation of the vertical elevation of the platform was enhanced by LED lighting around its base. The LED lights around two sides of the platform reflected off the polished surface of the marble, giving the appearance of a fluorescent line highlighting the edge of the structure. The vertical sides of the platform were about 96 mm deep, their lower edges at 55 mm above floor level and their top edges at 151 mm. These vertical sides were themselves reflective, either because they were coated with varnish or because they were sanded to a smooth finish or both. The reflective timber surfaces caught the natural light coming in through a wall of floor to ceiling windows to the left of the respondent in the direction he

was walking. The reflection of light off the vertical edges of the platform gave them a brighter appearance than the platform's horizontal timber surface. This emphasised that the face edge of the platform stood up vertically from the marble floor.

79. I take into account that the sculpture mounted on the platform and the vertical timber panelled wall behind the sculpture (which stood at right angles to the respondent's direction of travel) were both set back from the edge of the platform which lay nearest to the route along which the respondent was walking. These features have been described as "visual cues" which had the capacity to distract a person walking along the route adopted by the respondent from appreciating where the edge of the platform lay. I do not consider that those features would have so distracted a pedestrian exercising reasonable care for his own safety in looking ahead and taking in the other features of the platform to which I have referred. I consider that from eye level at least 20 metres away from the platform a reasonable person could readily discern that there were raised vertical edges to this platform's structure, reflecting light coming in from the wall of glass to the left, and that these vertical edges extended beyond the alignment of the sculpture and of the timber panelled wall.

80. I conclude that the risk of tripping over the edge of this platform was obvious to the respondent, according to the definition of that statutory term in s 5F(1). The presence and characteristics of the platform would have been obvious to a reasonable person in the position of the respondent and once these facts were appreciated the risk of tripping over it was self evident.

81. Sections 5F, 5G and 5H are very ill adapted to cases of risk of injury to entrants to premises, arising from a static condition of the relevant property. They are more readily and more meaningfully applied to cases where the defendant has engaged in an activity with the plaintiff, or an activity which may affect the plaintiff, and where the question is whether that activity holds a risk which the plaintiff must have appreciated. That is, cases which involve an issue as to whether the plaintiff by undertaking the activity, or permitting the defendant to do so in relation to him or her, assumed a risk – as the title of Div 4 of Pt 1A suggests. Nevertheless, these sections are expressed in terms which make them generally applicable, including to cases of occupier's liability.

82. In *Glad Retail Cleaning Pty Ltd v Alvarenga* (2013) 86 NSWLR 191; [2013] NSWCA 482 Sackville AJA (Barrett and Gleeson JJA agreeing) explained the operation of these provisions in an occupier's liability case as follows:

[56] The definition of "obvious risk" in Div 4 of Part 1A of the CL Act is significant for three main reasons. First, a defendant does not owe a duty of care to another person (the plaintiff) to warn of an obvious risk to that person: s 5H(1). Secondly, a defendant is not liable in negligence for harm suffered by the plaintiff as a result of the "materialisation" of an obvious risk of a dangerous recreational activity engaged in by the plaintiff: s 5L(1). Thirdly, there is a statutory presumption that a plaintiff was aware of the risk of harm if it was an obvious risk: s 5G(1). The presumption can be important if a defendant relies on the defence of voluntary assumption of risk. See on these matters *Carey v Lake Macquarie City Council* [2007] NSWCA 4; (2007) Aust Torts Reports 81-874, at [71], [86]-[90], per McClellan CJ at CL.

[57] A finding that a risk of harm is an obvious risk does not automatically prevent a defendant being held liable for breach of duty. Such a finding eliminates any common law duty to warn but does not, of itself, have any other relevance to whether the defendant was in breach of duty: *Angel v Hawkesbury City Council* [2008] NSWCA 130; (2008) Aust Torts Reports 81-955, at [83], per Beazley and Tobias JJA (with whom Spigelman CJ, Giles and Campbell JJA agreed). Of course, the obviousness of the risk may be relevant to the question of breach, but that is not because of Div 4 of Part 1A: *Angel v Hawkesbury CC,* at [84].

83. The particulars of negligence given in the amended statement of claim went beyond failure to warn of the trip hazard. On the finding I consider should have been made about obviousness of risk, that particular was not maintainable. The other particulars were expressed in terms of such broad generality as hardly to deserve the name. On those particulars it was open to the trial judge and it is now open to this Court to find that the appellant breached its duty to exercise reasonable care to avert injury to the plaintiff from the foreseeable risk by failing to take other steps which were reasonably available. The case was conducted on the basis that precautions other than merely warning of the danger should have been taken. The respondent's expert identified some other available precautions and his counsel addressed on them.

84. For my part I would have this Court find breach of duty in respects other than failure to warn. A barrier could have been placed in such a position as to steer foot traffic away from the platform. Such barriers are commonly seen in public spaces, in the form of portable staunchions, each mounted on a firm base, with a cord or tape between them. Alternatively the platform could have been raised so that it would be still more visible and so that if a pedestrian should bump into it this would occur at thigh level rather than at the ankle or lower shin. Otherwise, the platform could have been removed and replaced with timber flooring at the same level as the marble. If it was desired to raise the sculptures this could have been done on a platform or mounting base of dimensions restricted to the diameter of the sculptures and not protruding beyond them. The failure of the appellant to take any of these steps was negligent.

85. The presumption pursuant to s 5G that the respondent was aware of the obvious risk was rebutted in this case. I consider that he proved on the balance of probabilities that he was in fact not so aware. The presumption therefore plays no part in determining whether the appellant discharged its duty of care owed to the respondent.

86. Although I consider that this Court should hold the appellant in breach of its duty of care upon the alternative basis referred to at [84], I also respectfully disagree with the conclusion of Meagher JA on contributory negligence (ground 11, addressed by his Honour at [70] and [71]). In my view the respondent should have been found contributorily negligent, in a significant proportion, for the following reasons.

87. For ease of reference I reproduce part of that passage of the respondent's evidence quoted by Meagher JA at [14]:

Well, of course I would have seen it if I'd looked down, but I didn't, I was looking straight ahead, and I did see the sculpture that's in the centre, but I thought that was sitting on the floor. I never saw the platform ... .

88. In this answer, the respondent's statement that he would have seen the platform if he had looked down is necessarily a reference to the situation when the platform was at his feet or very nearly so. The respondent's statement that he was looking straight ahead relates to that time and location. In my view, if the respondent had exercised reasonable care for his own safety, he would have looked ahead along the route that he would walk, well before he reached the platform. Had he done this he would have been able to see the platform for what it was so that by the time it was close to his feet he ought not to have been looking "straight ahead", as he said, but should have been looking down intermittently to ensure that he cleared the object. The respondent would have been able to see the platform because of those features of it which I have identified earlier in discussing whether the risk was obvious within the meaning of s 5F.

89. Meagher JA has explained at [47] – [50] why the respondent should not be accepted with respect to his assertion that glare from a window directly ahead of him in the bar area (which, from a floor plan amongst the evidence, appears to have been 40 metres away) affected his ability to observe the platform. I consider the respondent failed to take reasonable care for his own safety in that he must have either

- (a) failed to keep a reasonable lookout in the direction he was walking, sufficient to identify the features of the platform and to recognise that he should have avoided it or
- (b) (if he did identify the platform for the obstacle that it was) failed to take reasonable steps to maintain it in his field of view, either continuously or by glancing towards it at reasonable intervals, as he approached it.

90. I do not consider that the platform was deceptive of a pedestrian such as the respondent. Although I accept it was a not insignificant trip hazard and that less than reasonable care was taken by the appellant to protect entrants to the hotel in respect of it, I take into account that the platform was not a thing which, from its very nature, the plaintiff was entitled to assume would be in a different position or of different dimensions or configuration. I would contrast this case with the facts of *Ryde City Council v Smith* [2003] NSWCA 57, for example, where the hazard was constituted by drain cover that had been raised above its normal position during an inspection and had not been properly replaced. In that case the layout of related elements on the ground was such that the plaintiff was deceived into walking across the drain cover as if it were properly fitted and thus she tripped. The hazard posed by the platform in this case was of a lesser order and more discernible. I consider the degree of the respondent's shortfall in taking reasonable care for his own safety was significantly greater than that of the plaintiff in *Ryde City Council v Smith.* I would uphold ground 11 and reduce the respondent's damages by one third on account of contributory negligence.

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