

Mock Trial Script

2016 1st Elimination Round

INDEX

This is a civil case concerning a negligence claim by the Plaintiff, Peter/Penny Smith, against the Defendant, Windsor City Council, under the *Civil Liability Act, 2002* (NSW). The Plaintiff will need to provide his/her case on the balance of probabilities.

The Plaintiff team will receive the following:

1. Legal Notes
2. Statement of Claim
3. Defence Statement of Claim
4. Statement of First Plaintiff Witness – Peter/Penny SMITH
5. Statement of Second Plaintiff Witness – Michael/Michelle FRASER

The Defendant team will receive the following:

1. Legal Notes
2. Statement of Claim
3. Defence Statement of Claim
4. Statement of First Defence Witness - Bridget/Brian JONES
5. Statement of Second Defence Witness – Pablo/Paige PHILLIPS

Duty and breach only are in issue in this mock trial. Causation and damage will be determined by the Court at a later date.

2016 1st Elimination Round Defence Script

LEGAL NOTES

Duty of Care

For the purpose of this mock trial, a duty of care, if one is owed, is a duty to take precautions to avoid foreseeable risks of injury to those persons taking reasonable care for their own safety.

Section 5B *Civil Liability Act, 2002 (NSW)*

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.

Section 45(1) *Civil Liability Act, 2002 (NSW)*

A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

Botany Bay City Council v Latham [2013] NSWCA 363

Ground 3 raises the application of s 45 of the Act. The "harm" referred to in the last words of s 45(1) if a reference to the "particular harm" which has resulted from the materialisation of the "particular risk", being the "particular harm" to which the determination of causation in s 5D is addressed.

It follows that "the particular risk" is s 45(1) is at the same level of generality. In this case, given the way Ms Latham put her case that a particular paver that was uneven or irregular caused her to trip, the actual knowledge required is actual knowledge of the particular risk posed by the unevenness or

2016 1st Elimination Round Defence Script

irregularity of the very paver that caused her to trip and fall. It would not be sufficient for the Council to know of the more general risk that she might trip and fall on an area of irregular pavers between the tree and the adjacent building, as was contended on her behalf on the appeal.

There was no evidence that the Council had actual knowledge of the particular paver which caused Ms Latham to trip. Such evidence as there was (the email sent by Mr Butenshaw referred to above), was to the contrary. Accordingly, in my view, the evidence was insufficient to establish that the Council had “actual knowledge of the particular risk, the materialisation of which resulted in the harm” within the meaning of s 45 (per Adamson J at [45] – [49]).

2016 1st Elimination Round Defence Script

Form 3A (version 7)
UCPR 6.2

STATEMENT OF CLAIM

COURT DETAILS

Court	District Court of New South Wales
Registry	Sydney
Case number	2016/123456

TITLE OF PROCEEDINGS

Plaintiff	Peter/Penny Smith
Defendant	Windsor City Council

FILING DETAILS

Filed for	Peter/Penny Smith, Plaintiff
Legal representative	Mark Wright, Wright Compensation Lawyers
Legal representative reference	Smith 14527
Contact name and telephone	Mark Wright, + 61 2 9284 7453
Contact email	mwright@wrightcompensation.com.au

TYPE OF CLAIM

Torts – Negligence – Personal Injury

PLEADINGS AND PARTICULARS

1. The Plaintiff is a person.
2. The Defendant is the local council for Windsor City.
3. On 17 July 2015, the Plaintiff was walking along New Canterbury Road, Windsor NSW. He/She tripped and fell over a raised paver on the footpath.
4. The Defendant owed the Plaintiff a duty of care.

2016 1st Elimination Round Defence Script

5. The Defendant breached its duty of care because it failed to take steps which reasonable person in its position would have taken to avoid the raised paver.

Particulars

- a. Failed to inspect the footpath
 - b. Failed to repair the raised paver
 - c. Failed to warn the Plaintiff about the raised paver
6. The failure by the Defendant to take the steps listed at paragraph 5 caused the Plaintiff's accident.
 7. As a result of the omissions of the Defendant, the Plaintiff suffered injury, loss and damage.
 8. The Plaintiff makes a claim for damages, costs and interest.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

mWright

Capacity

Mark Wright

Date of signature

9 May 2016

2016 1st Elimination Round Defence Script

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

1. **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
2. **If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.

2016 1st Elimination Round Defence Script

- Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
3. **If money is claimed, and you believe you owe part of the money claimed, by:**
- Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	John Maddison Tower, 86-90 Goulburn Street, Sydney NSW 2000
Postal address	PO Box K1026, Haymarket NSW 2000
Telephone	1300 679 272

2016 1st Elimination Round Defence Script

Form 7A (version 4)
UCPR 14.3

DEFENCE TO STATEMENT OF CLAIM

COURT DETAILS

Court	District Court of New South Wales
Registry	Sydney
Case number	2016/123456

TITLE OF PROCEEDINGS

Plaintiff	Peter/Penny Smith
Defendant	Windsor City Council

FILING DETAILS

Filed for	Windsor City Council , Defendant
Legal representative	James George, George Lawyers
Legal representative reference	JMGSS/15267
Contact name and telephone	James George, +61 2 8376 7485
Contact email	jgeorge@georgelawyers.com.au

PLEADINGS AND PARTICULARS

1. The Defendant does not admit paragraph 1.
2. The Defendant admits paragraph 2.
3. The Defendant does not admit paragraph 3, but admits it is the roads authority for New Canterbury Road, Windsor NSW.
4. The Defendant denies paragraph 4 and, further, says the duty is not owed to persons who were not taking reasonable care for their own safety such as the Plaintiff.
5. The Defendant denies paragraph 5 and each and every particular of negligence pleaded therein.
6. The Defendant denies paragraph 6.

2016 1st Elimination Round Defence Script

7. The Defendant does admit the Plaintiff suffered injury, loss and damage but, otherwise, denies paragraph 7.
8. The Defendant does not admit the Plaintiff is entitled to the relief sought in paragraph 8 or any relief at all.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

James George

Capacity

James George

Solicitor for the Defendant

Date of signature

9 May 2016

2016 1st Elimination Round Defence Script

STATEMENT OF BRIDGET/BRIAN JONES (Defence)

1. My name is Bridget/Brian Jones. I am 36 years old. I work at Windsor City Council. My job title is Manager, Engineering Services. I am responsible for two teams of five staff members each.
2. One team carries out inspections of the roads and footpaths in the local government area of Windsor City. The other team carries out repairs of any defects identified by the first team during their inspections.
3. Windsor City Council inspects New Canterbury Road one a fortnight. It is a visual inspection carried out on foot.
4. The staff member who inspects the area is looking for defects in the road and footpath, such as potholes and raised footpath pavers.
5. If a defect is identified, the staff member reports the defect to me. I then organise for the other team to carry out any necessary repairs.
6. I recall speaking to Michael/Michelle Fraser about the state of the footpath along New Canterbury Road, Windsor. I think the conversation occurred sometime during February 2015, but I cannot be sure because I did not take any notes. He/She asked me to come and have a look at the large number of pothole along New Canterbury. He/She said someone would be seriously injured if not killed if Windsor City Council did not do something about them. I told him/her I was too busy to come and have a look but I would try to get one of the staff members who did carry out inspections to do so.
7. I did not create a CRM in response to this conversation. A CRM is a Customer Request Management form. It is the document used by Windsor City Council to record complaints or reports received by it from members of the public or third parties.
8. I do not recall if anything was done in response to my conversation with Michael/Michelle Fraser. I do not recall if I made any notes or if I spoke to one of my team members about it.
9. I know Michael/Michelle Fraser quite well. He/She rings Windsor City Council all the time. I would say he/she is a vexatious complainer. I have spoken to him/her about many things. He/her likes to complain about rubbish on kerbs and in gutters and broken playground equipment. My conversation with Michael/Michelle in February 2015 is the only one I can recall in which Michael/Michelle complained about potholes and a raised footpath paver along New Canterbury Road.

2016 1st Elimination Round Defence Script

STATEMENT OF PABLO/PAIGE PHILLIPS (Defence)

1. My name is Pablo/Paige Phillips. I am 42 years old. I work at Windsor City Council. I am employed as its Risk Manager and I am responsible for the storage of documents created by Windsor City Council.
2. One of the documents created by Council is called a CRM. A CRM is a Customer Request Management form. It is created in Council's database when a complaint is made by a member of the public or a report is made internally by another Council staff member.
3. Complaints and reports are typically received by Windsor City Council by email, mail or telephone.
4. Once a CRM is created, it will be sent to the correct department of Council for action. For example, a request to mark lines at a sportsground will be sent to the Opens Spaces team and a complaint about a pothole will be sent to the Engineering team.
5. Each team or department is expected to respond to a complaint or report appropriately and record what action is taken in the history notes section of the CRM.
6. I have searched the CRM database for Windsor City Council. I searched for CRMs created between 17 July 2010 and today's date. I found three records relating to New Canterbury Road.
7. Only one CRM was a complaint made by Michael/Michelle Fraser. The date of the complaint is 17 July 2015. It reported an accident involving a Peter/Penny Smith.
8. The other two CRMs were complaints, one was a pothole and one was a raised paver.
9. The date of the complaint about the pothole in the grass verge was 25 July 2010. The pothole was repaired on 26 July 2010.
10. The date of the complaint about the raised paver was 5 May 2015. The history notes for this CRM do not say the raised paver has been repaired.
11. Neither of these CRMs states where on New Canterbury Road the defects are located.

2016 1st Elimination Round Defence Script

STATEMENT OF PETER/PENNY SMITH (Plaintiff)

1. My name is Peter/Penny Smith. I am 84 years old. I live at 15 Addison Road, Windsor NSW.
2. On 17 July 2015, I was walking along New Canterbury Road, Windsor NSW with my partner, Michael/Michelle. We were going to the nearby shops to purchase milk, a newspaper and cigarettes.
3. Michael/Michelle and I have lived at our house on Addison Road for nearly 25 years. We have walked from our house along New Canterbury Road to the shops every day. It is our usual morning walk. We like to get regular exercise by getting out of the house and walking around our neighbourhood.
4. I was walking between Michael/Michelle and the road. He/She was walking on the footpath and I was walking on the grass verge between the footpath and the road. Sometimes I would walk on the footpath if there was a telegraph pole or post office box on the grass verge and blocking my way. I was not walking fast. I would describe it as a normal walking pace.
5. Michael/Michelle and I had only just left home. I think we had only been walking for five minutes when I fell. There was no warning. It was sudden. I felt my left foot trip and I just flew through the air and the noise when my body hit the ground was horrible. I landed on my face and left side. It hurt really badly and I was screaming in pain. There was blood everywhere. I lost several teeth.
6. I do not know what caused me to trip and fall. I did not look at the ground while I was walking. I was talking to Michael/Michelle and I was looking at him/her. I was also looking at the trees and the vehicles driving by.
7. Michael/Michelle helped me get up from the ground. I then had a look around. I could not concentrate on anything because I was in so much pain.
8. I think I saw a footpath paver which did not appear to be level with the other pavers in the footpath. I also remember a pothole in the grass verge nearby. I think I walked over this area immediately before I fell but I am not sure.
9. The footpath along New Canterbury Road is in terrible condition. There are raised pavers and potholes all along it.

2016 1st Elimination Round Defence Script

10. Michael/Michelle has complained to Windsor City Council a number of times over the last 25 years. Each time nothing is done. Windsor City Council needs to repair the area before someone else is seriously injured or killed.

2016 1st Elimination Round Defence Script

STATEMENT OF MICHAEL/MICHELLE FRASER (Plaintiff)

1. My name is Michael/Michelle Fraser. I am 88 years old. I live with my partner, Peter/Penny Smith. I have been in a long term de facto relationship with Peter/Penny for the last 25 years.
2. Peter/Penny was in an accident on 17 July 2015. He/She fell while we were walking to the shops on New Canterbury Road.
3. I do not know why Peter/Penny fell. I did not see him/her fall. He/She was walking between me and the road. Sometimes he/she was walking on the footpath and sometimes he/she was walking on the grass verge. Just before Peter/Penny fell, he/she was walking behind me as I was impatient to get to the shops and he/she is a really slow walker.
4. I suddenly heard a yell. I turned around and saw Peter/Penny lying face down at the edge of the footpath and grass verge. I remember walking over a footpath paver which was not the same height as the others immediately beforehand. There were also several potholes on the grass verge.
5. I went over to Peter/Penny and helped him/her to her feet. He/ She was crying and there was blood pouring down his/her face. There were also several teeth lying on the ground next to him/her. I took him/her straight home, sat him/her down and cleaned his/her face. I then made him/her a cup of tea.
6. I went back outside 30 minutes later and took some photographs. I also measured the raised paver. It was 10 mm higher than the surrounding pavers.
7. There are a number of potholes and raised pavers all along the footpath in New Canterbury Road. I have rung and spoke to Windsor City Council at least 5 times each month since I have been living at Addison Road.
8. I think I spoke to someone called Bridget/Brian each time. I told her/him there were potholes and raised pavers at the corner of Addison Road and New Canterbury Road which needed to repair. Nothing has ever been done about the state of the footpath.
9. I have never seen any Windsor City Council workers in the area since I have lived. I have never seen any signs installed on the grass verge. There is no yellow paint marking the raised pavers.