How flat is your playground?

Implications of *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2005] NSWCA 457

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The Bujnowicz case

In March 2001, 14 year old Shane was playing touch football on the school grass playground at the Good Samaritan Catholic College at Hinchinbrook. As he ran with the ball, his left foot went down a hole in the ground, twisting his leg and injuring his knee. The Court was asked to decide whether the College had breached its duty of care to Shane.

The playground was approximately the size of a football field. New soil and grass had been laid on the ground in about October 2000. The ground was then not used until school began at the end of January 2001. During the summer, the ground had flooded to waist height. Staff on lunch duty would report anything they noticed about the surface of the ground and occasionally, after rain, students on detention were required to collect rocks which rose to the surface of the ground, but there was no systematic method for checking the surface of the ground. There had been no injuries at the ground prior to Shane's.

On the day of the injury, there were about 20 boys playing touch football with three teachers supervising. The hole into which Shane's foot went was, according to him, about 30cm in diameter and 6-8cm deep. The hole was covered in grass, as was its surrounding area, and, for this reason, was difficult to see. Taking into account the grass, Shane estimated that the hole would have been depressed 3-4cm below its rim.

In December 2004, the trial judge in the District Court found that the risk of injury to students was reasonably foreseeable and that the way to prevent such risks was to have the playground inspected regularly section by section. However, he said that, as this would be time consuming and perhaps expensive, and no complaints had been made prior to the injury, it was not reasonable to require the school to do this. The judge concluded that the school had not breached its duty of care to Shane.

Shane appealed to the NSW Court of Appeal which sought to determine:

> *whether the [school] failed to take such reasonable precautions for the safety of those playing the game as would have prevented the harm that in fact befell [Shane] in the present case. In other words, in all the circumstances was it reasonable for the [school] to take the precaution of instituting a system of regular inspections of the surface of the*

playing area, square metre by square metre, in order to identify any unexpected potholes or indentations in that surface which, if not remedied, might result in a student who was focussed on the game he was playing inadvertently stepping into that hole or indentation and thereby twisting an ankle or knee.

In its judgment of December 2005, the Court of Appeal unanimously answered yes. The College did fail to take precautions and it was reasonable for it to have instituted a system of regular inspections of the surface of the playing area.

The Court decided that the ad hoc system of examining the state of the playground was inadequate to identify potholes and indentations such as those which caused Shane's injury. There was no evidence that regular checking of the playground was beyond the school's resources and the fact that there had been no prior complaints was not relevant to determining the reasonable response to the risks. There was a high risk of injury from a depression in the ground due to the types of activities played there. The Court also noted that the students could not be expected to notice and avoid any holes as they were playing sport. The Court said that the school should have implemented a system of regular, close inspection of the condition of the surface of the playing area before sports were played on it. In summary, the Court said that:

even though such a system would have required the inspection of the surface "square metre by square metre" as his Honour observed, there was no reason to believe that the implementation of such a system would have been time-consuming as his Honour suggested. After all, the dimensions of the playing field were only 100 metres by 30 to 40 metres and therefore covered an area of approximately 4,000m². Even an inspection "square metre by square metre" once a week should not have taken more than two hours. But if such an inspection regimen proved too burdensome, the area to which it was applied could have been reduced to a size sufficient for the playing of the games which required its implementation. In any event, as I have already noted, the respondent did not suggest to either the primary judge or this Court that it did not have the human resources to enable such a regime of inspection to be implemented.

The school had therefore breached its duty to Shane by not doing this and damages were awarded to him.

Subsequent reference to the Bujnowicz case:

Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17

In a judgment of the Supreme Court of Appeal in March 2006, the Court was again asked to consider liability in relation to an injury caused by an uneven playing field. In this case, Mr Falvo was playing Oztag on a field at Miller's Reserve which was covered in some areas in grass and, in other areas, sand had been used to fill in where grass no longer grew. This variation of surface was obvious to any player. When running towards the opposition, Mr Falvo moved from an area covered by grass to a sandy area, in which his foot sank deeper into the ground, and his knee was injured.

Mr Falvo claimed that the Australian Oztag Sports Association Inc (which organized the game) and the Warringah Council (which occupied and controlled the field) breached their duty of care

to him. He argued that the Association breached an implied term of its contract with him by failing to take care for his safety and that the Council was liable in negligence, but the terms of the claim against both parties involved the same issues of duty of care and breach of that duty.

The trial judge in the District Court found that the field may have had slight depressions but adhered to acceptable standards for playing Oztag. There was expert evidence supporting this view which was not challenged by Mr Falvo. This factual finding was an important basis for the decisions that followed.

One of the matters raised by the Court of Appeal was the societal value of having sports grounds available for the public:

> *There are undoubtedly risks involved in playing sport (even of a non-contact kind), on surfaces of this standard. But it is a standard that the community accepts. It is impractical to require sports grounds to have surfaces that are perfectly level and smooth. Common sense tells one that the cost of perfection would be exorbitant and, if perfection were insisted upon, countless people in this country would be deprived of the opportunity to participate in sporting activities.*

The Court of Appeal agreed with the trial judge in concluding that no negligence could be attributed to either the Association or the Council for the condition of the ground.

Comparing *Bujnowicz* with *Falvo* and considering the way forward for schools

However, it should be noted that *Falvo* can be differentiated – and was, explicitly, by the Court – from *Bujnowicz* for at least two reasons:

> *Firstly, the case at trial was not run on the basis that the Oztag Association and the Council were negligent in failing to compact or compress the sand used to top up the worn areas. Thus, the question whether it would have been a reasonable response for them to take steps to prevent the sand from sinking was not investigated. No point in regard to this issue may be made on appeal.*
>
> *Secondly, this case is very different to Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney [2005] NSWCA 457. In Bujnowicz a boy running in the course of a school touch rugby game stepped into a pothole on the school's rugby field. He caught his foot in the hole and he sustained severe injuries to his leg. The hole in Bujnowicz was not obvious and could not be categorised as a depression in the ground or a mere alteration in levels. It was in effect a trap and the respondent in that case did not dispute that if the hole existed the rugby field was unsafe.*

These comments suggest that it is possible that the case may have had a different outcome if Mr Falvo had argued that the ground had not been properly compacted in the way that it should have to prevent the injury he suffered. This approach would have had parallels with the argument in *Bujnowicz* that the play area should have been checked systematically to prevent Shane's injury. It is hard to tell from the judgments in the two cases what difference it made to the decision-making that Shane was a student at school, whereas Mr Falvo was voluntarily playing sport on Council grounds. However, the cases still support the principle of balancing the social utility of

sporting events with the responsibility of schools, organisers or occupiers to take reasonable care to prevent injuries to players.

In the *Bujnowicz* case, some importance was given to the recent history of the ground prior to the injury and the reasonable response which should have followed the flooding over summer:

> *Simply to assume that the effect of those floodwaters on an area, which had been levelled, top dressed and seeded only some two or three months prior to the flood, would have resulted in no damage to the surface of the playing area, other than bringing some pebbles or stones to the surface, was without justification.*

This comment indicates that, not only do schools need to have a regular system for assessing the suitability for their grounds, equipment and buildings for the purposes for which they are used, but they also need to be aware of the special risks which may result from unusual occurrences. Expertise following certain events may be required to properly consider the impact of natural disasters or other hazardous events. However, most of the time, it is likely that a careful method for regularly identifying risks and changes to the environment will reveal areas of concern. It is evident from the cases that it is particularly important that the checking of the school environment should be thorough enough to identify risks not readily visible to those at risk from the situation. For example, grass covering holes and unstable structures which appear sturdy would create risks that are not obvious – courts have usually taken a stronger approach to the standard required by schools or other bodies in relation to such risks.

Conclusion

Cases such as Bujnowicz may give the impression that the burden of responsibility on schools is unmanageable. Clearly, there is a duty on schools to take reasonable steps to prevent injuries to their students, perhaps even a higher duty than the duty to the general public faced by other organisations. This duty includes developing a risk management system which identifies and addresses potential hazards regularly and proactively, not just after accidents have happened. But it is important to remember that the cases still explicitly affirmed principles from previous cases which provide some balance to the responsibilities a school faces:

> *(a) The relationship between a school and one of its pupils is such as to give rise to a duty to take reasonable care to prevent injury to that pupil.*
>
> *(b) That duty is only to take reasonable care for the safety of the pupil concerned: a school is not absolutely liable for injuries sustained by pupils whilst they are under the supervision of their teachers. It is not an insurer.*
>
> *(c) Where games are being played, it is foreseeable that there is a risk of a player acting in such a way, whether deliberately or accidentally, as to cause injury to another player.*
>
> *(d) Nevertheless, the risk of serious injury whilst playing some types of games (although real and not far-fetched) is remote particularly where the games are properly controlled,*

with the consequence that merely to allow children to participate in them will not, in the absence of special circumstances, be regarded as negligent.

(e) Accordingly, where an injury is caused by an unfortunate concurrence of circumstances that reasonable precautions could not have prevented, no breach of duty will have occurred.

(f) Further, the mere fact that a serious injury may occur while a child is playing a game at school will not automatically result in a finding of breach of the school's duty of care even if such an injury is foreseeable. In order to establish breach, the injured pupil must establish that the school did not take such reasonable precautions for the safety of the student as would have prevented the relevant harm.

(g) Factors such as the benefits of the game, the magnitude of the risk involved, the degree of probability of its occurrence, the degree of possible inadvertence or negligent conduct on the part of the participating students, the training given to them and their level of skill are all relevant in determining whether reasonable steps have been taken to prevent the injury occurring.

(h) The question of what amounts to reasonable care in a given case must be seen in the context that it is neither practicable nor desirable to maintain a system of education that seeks to exclude every risk of injury.

(i) When assessing whether the taking of or the omission to take particular precautions is to be regarded as reasonable or otherwise, the Court must bear in mind the following observation of Gleeson CJ in Rosenberg v Percival *(2001) 205 CLR 434 at 441 [16]:*

> *"In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the alleged tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumes. Recent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated."*