39/03; [2003] VSC 492

SUPREME COURT OF VICTORIA

WALTERS v SHIRE OF WAKOOL

Smith J

2, 13 November, 17 December 2003

CIVIL PROCEEDINGS – NEGLIGENCE – RELEVANT PRINCIPLES IN RELATION TO THE STANDARD OF CARE – INJURY TO CHILD IN PLAYGROUND CONTROLLED BY MUNICIPALITY – STANDARD OF CARE - NO WARNING SIGN – INADEQUATE MAINTENANCE – FAILURE TO MAINTAIN UNDER SURFACE – WHETHER ABSENCE OF SOFT FILL WAS A CAUSE OF THE INJURY – NATURE OF THE INJURY – DAMAGES – EXTENT OF FUTURE DISABILITIES.

W., aged 2 years 5 months and his mother were sitting in a park managed by the Shire of Wakool. When W. and his mother went to use playground equipment in the park, W. fell through a gap between a steel platform and a horizontal bar and landed on hard bare ground. As a result of the fall, the femur of W's left leg was broken. Subsequently, W. sued the Shire seeking damages for the injury together with consequential loss and damage. W. alleged that the Shire breached its duty of care by failing to place any warning sign that the equipment was unsuitable for use by and dangerous for children aged under 3 years. Also, that the Shire failed to adequately maintain the surface beneath the equipment.

HELD: Order in favour of W.

1. In considering the standard of care imposed on the defendant, the relevant principles have been stated in the following terms: In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and a degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the Tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

***Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278; and**

***David Jones Ltd v Bates* [2001] NSWCA 233, applied.**

2. The Council had installed the playground for use by children. It knew or should have known of the nature and extent of the risks associated with its use. Assuming that the Shire was entitled to expect parents in charge of their children to exercise reasonable care over them, it had an obligation to exercise reasonable care to ensure that the parents had information sufficient to enable them to exercise reasonable care. In discharging its obligation to exercise reasonable care the Shire was under an obligation to warn visitors, attracted to and wanting to use its adventure playground, having regard to the nature and extent of its dangers.

3. The ground on which W. fell was hard and bare and that was the result of the failure of the Shire to take reasonable care in the inspection and maintenance of the area. In discharging its duty of care, the Shire was under an obligation to maintain a soft fill surface under the equipment to a depth of at least 200 mm – a simple and cost-effective process. The Shire, through its servants and agents, failed to exercise reasonable care in inspecting and maintaining the under surfacing. The question to be resolved was not whether the fracture would not have occurred if there had been 200 mm of soft fill into which W. fell but whether the absence of such soft fill was a cause of the fracture. Bearing in mind that the spiral fracture suffered was caused by both rotational force and impact force, the absence of the soft fill was a probable cause of the injury. What occurred was that a small boy fell only 1.25 metres. Two hundred millimetres of suitable soft fill would have had a significant effect in reducing the impact and, if appropriately loose, lessened the forces contributing to the rotational stress. The absence of any suitable soft fill could, on the balance of probabilities, fairly and properly be considered a cause of the fracture.

4. The appropriate course to follow is to assess damages on the basis of a consideration of the future options and risks and to include an amount for future pain and suffering and loss of enjoyment

of life having regard to the assessment of those risks rather than to simply award an amount to cover the cost of a possible operation. Taking the likely future into account, the sum of $84,000 including consequential loss and damage would provide fair and reasonable compensation.

SMITH J:

Events giving rise to the proceedings

1. At about 3.00 pm on 25 April 2000, the plaintiff and his mother, the litigation Guardian, Miss Stead, were sitting in Howard Park in Main Street, Moulamein, New South Wales. The plaintiff was then aged two years and five months, having been born on 20 November 1997.

2. Howard Park was managed by the defendant the Shire of Wakool. It had established and was maintaining an adventure playground in the Park. With the plaintiff and his mother was a friend, Ms Veering. She had brought them from Narrandera. They were to be met at the Park by the plaintiff's aunt, Ms Hodson.

3. While they waited for Ms Hodson, the plaintiff went to play in the adventure playground equipment. His mother and Ms Veering went with him. His mother, in particular, followed him closely beside the equipment as he went through it. Having crossed a bridge, he moved on to a flat steel platform 1.25 m above ground. At its side, and forming part of a corner with the bridge and the platform, was an arched climbing frame connecting the steel platform to the ground. It had several bars across it but the spaces between the bars and between the top bar and the steel platform were large enough for a child of the plaintiff's size to fit through.

4. The plaintiff walked to the far edge of the platform and fell through the gap between the top bar of the arched climbing frame and the platform. When he fell he was beyond the reach of his mother who was still standing in the above-mentioned corner. As a result of his fall, the femur of his left leg was broken.

The Issues

5. The plaintiff brings these proceedings against the defendant seeking damages to compensate him for the injury and consequential loss and damage.

6. The plaintiff has sued the defendant as the occupier of the Park who conducted an adventure playground in the park which was open to members of the public. The proceedings have been brought in Victoria because he and his mother live in Victoria. The applicable law is the law of New South Wales. The common law applies.[1] The plaintiff has alleged that the defendant owed him a duty of care and that he suffered his injuries as a result of the defendant breaching that duty of care. The defendant has conceded that it owed a duty of care to the plaintiff.

7. The plaintiff has alleged that the defendant breached its duty of care by

- failing to place any signs warning that the particular equipment was unsuitable and dangerous for children under the age of three, and

- failing to adequately maintain the surface beneath the equipment.

The defendant denies any breach of that duty.

8. In considering the standard of care imposed on the defendant, the relevant principles have been stated in the following terms –

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and a degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the Tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."[2]

9. The defendant has also argued that, if it did breach its duty of care, the plaintiff has failed to prove a causal connection between such breach of duty and the injury suffered.

Breach of duty – Failure to Warn_

10. Counsel for the plaintiff submitted that the defendant in discharging its duty of care should have erected a warning sign for adults in charge of children, attracted to the adventure playground, telling them that the particular equipment in question was unsuitable and dangerous for children under the age of three. Counsel for the plaintiff submitted that this obligation arose, in part, because the defendant had been put on notice some years before, by persons looking after young children who used the equipment, that it was unsuitable and dangerous for children under the age of three. In support of this argument, counsel for the plaintiff relied on a number of documents produced on discovery by the defendant.

• *Correspondence.* In and between March and June of 1997, there was correspondence between people involved in daycare and the Council about the need to provide equipment in Howard Park for children under the age of five because the equipment there was unsuitable and unsafe for children under that age. The Council's letters were written by Mr Stockwell, Manager of Engineering Services for the General Manager. He indicated that he would refer the matter to Council but that it was a matter for special funding. Apparently the issue was put over by the Council until the following year.

• *Playground Equipment Survey, March 1998.* In March 1998 a report was prepared for the defendant assessing the condition and safety of playground equipment. In relation to Howard Park it concludes with the following:

> "Suggestion: **Install a sign indicating age limits permitted to play on equipment**."[3]

11. Counsel for the defendant submitted that there was a lack of evidence in support of the plaintiff's case such as expert evidence about signage and evidence of signage in other parks. But such evidence is not necessary. The likely cost of any signage was minimal. On the contrary, it is significant that the defendant chose to call no evidence on this issue. The clear conclusion is open that people writing to the defendant were expressing concerns for the safety of children under the age of five when playing on the equipment in question and the defendant's staff advised in 1998 that warning signs were required. The defendant was well aware of the problem but chose not to address it.

12. Counsel for the defendant also submitted that to require the defendant to place a warning was in effect requiring more of the defendant than the plaintiff's mother expected of herself. It was put that what occurred was within the responsibility of the plaintiff's mother and the defendant was not required to do any more in discharging its duty in circumstances where a parent was in charge of the child.

13. This argument begs the question. The Council had installed the playground for use by children. It knew or should have known of the nature and extent of the risks associated with its use. Assuming that the defendant was entitled to expect parents in charge of their children to exercise reasonable care over them,[4] it had an obligation to exercise reasonable care to ensure that the parents had information sufficient to enable them to exercise reasonable care. This obligation would extend to visitors who had never been to the park before. The plaintiff and his mother were such visitors. The defendant, in my view, in discharging its obligation to exercise reasonable care was under an obligation to warn visitors, attracted to and wanting to use its adventure playground, having regard to the nature and extent of its dangers. The plaintiff's mother was sufficiently concerned to accompany the plaintiff but did not have experience of the equipment and was not fully aware of the nature and extent of its dangers.

Failure to warn – causation

14. The plaintiff's mother gave evidence that if there had been a warning to the effect to that children under the age of three should not be on the equipment, she would not have let the plaintiff use it. Counsel for the defendant submitted that I should reject this evidence as not being plausible.

15. In my view, her evidence was highly plausible. In accompanying the plaintiff to and at the equipment, she showed a responsible concern to protect him. Her devotion to him was demonstrated by the fact that for the many weeks that he was in hospital in a gallows harness she remained with him 24 hours a day. She impressed as a caring, responsible and protective parent, one who would have paid close attention to an appropriate warning sign.

Breach of Duty – Failure to maintain the under surface

16. Plaintiff's counsel also argued that, at the time the plaintiff fell, the surface on which the plaintiff landed was essentially bare hard earth. Counsel argued that the defendant, in exercising reasonable care, should have maintained a soft mulch on the surface to a depth of a minimum of 200 mm. He further argued that the absence of any such mulch was the result of the defendant's failure to take reasonable care in its management of the park and pointed to negligence in the inspection of the playground or the provision of the required mulch or both.

17. The defendant disputed the evidence that the surface was bare hard earth. It argued also that, on the evidence, the defendant had in place the sort of systems for inspection and maintenance required of a person taking reasonable care in the management of such premises and that that discharged its duty of care. The defendant submitted that, to establish a breach of duty of care, the plaintiff must do more than demonstrate that the accident could be avoided with some alternative action. Counsel for the defendant submitted that plaintiff's case could not be put any higher.

18. Counsel referred to two authorities – *Owners Strata Plan 30889 v Perrine*[5]; *David Jones v Bates*[6]. Counsel submitted that they establish that the duty is one of reasonable care and the issue is not simply one of saying that the elements of safety in the park could have been improved. Counsel submitted that having regard to all the duties and responsibilities of the Shire of Wakool, it had acted reasonably in discharging its duty of care.

19. The first issue is one of fact – what was the state of the ground on which the plaintiff fell. The plaintiff relied upon the evidence of his mother, Ms Veering and Ms Hodson. They gave evidence that the ground where he fell was hard and bare save for some pieces of bark. Their evidence is the only direct evidence of the state of the ground at that time. Counsel for the defendant submitted that it should be rejected because the three women were not impartial. He submitted that they used the same language and that the conclusion should be drawn that they agreed as to what the evidence should be.

20. The three women were not challenged in their evidence on the basis of partiality or concoction but on the basis that they were exaggerating. They appeared to me to be telling the truth. As to their use of the same language, it would be difficult to give an account of what occurred without using similar language. In fact, they used slightly different language. The consideration of other evidence supports the conclusion that they were telling the truth about the state of the ground. I refer to the photographs taken by the plaintiff's mother and to the photographs taken by Mr Lightfoot three weeks after the event. The photographs taken by the plaintiff's mother support her evidence. Those of Mr Lightfoot show uneven mulch and are not inconsistent with her evidence. Photographs, however, can be misleading. More significant, I suggest, are extracts from Inspection Reports of the Defendant dated 21 January 1999 and 26 May 2000, the latter being dated approximately one month after the event, each of which records that 100 mm of soft fill was required.

21. Against this evidence, the defendant has called no witnesses to give direct evidence about the state of the premises. In cross-examination of the litigation guardian, evidence of an inspection by Council employees was foreshadowed but none was led. The defendant has led no evidence to account for the absence of such evidence. The defendant did call a Mr Hunter who was at the relevant time in charge of the people whose job it was to inspect and carry out maintenance work on the playground. They comprised a gardener who would attend more than once a week and a person who attended more than twice a week to collect rubbish. Mr Hunter gave evidence of the systems in place for inspecting, reporting, maintaining and aerating the mulch. He gave no evidence of the reporting of deficiencies or difficulties. Counsel for the defendant submitted that if the surface was as bad as was claimed for plaintiff, the deficiencies would have been reported. A difficulty with that argument is that the deficiency was reported in 1999 and 2000**.** Counsel for

the plaintiff also pointed to the fact that the financial records of defendant showed very substantial activity at Howard Park three days after the accident. Counsel raised the possibility that remedial work was being done on the surface. I do not think that that conclusion can be drawn in light of the evidence of the plaintiff's mother that the surface remained unchanged for at least three weeks and in light of the May 2000 Inspection Report.

22. The defendant also relied upon the evidence of Mr Hutchison whose company advises local government authorities on safety and other issues concerning playground facilities. He expressed the opinion based on an inspection in 2002 and some other information, that the area on which plaintiff fell would have had 200 mm of soft fill. I regret to say that this was not the only occasion where, in my view, Mr Hutchison revealed a lack of objectivity.

23. For the foregoing reasons, I am satisfied that the ground on which the plaintiff fell was hard and bare. I am also satisfied that that was the result of the failure of the defendant to take reasonable care in the inspection and maintenance of the area. I am also satisfied that in discharging its duty of care, the defendant was under an obligation to maintain a soft fill surface under the equipment to a depth of at least 200 mm – a simple and cost-effective process. I did not understand the defendant to dispute that obligation. Rather, the argument was put that any duty of care was discharged by having the systems in place to which Mr Hunter and deposed. Those systems were not applied, however, with reasonable care.

24. The 200 mm requirement is in fact laid down in the relevant Australian Standard, AS/NZS 4422:1996 "Playground Surfacing - Specifications, Requirements and Test Method". In the Foreword, it is stated

> "Over the last few years in Australia and New Zealand there has been increased interest in the use of soft surfacing underneath and around playground equipment. This surfacing is variously known as soft fall, soft surfacing and under surfacing. The need for, and usefulness of, such under surfacing has been vigorously debated during that time and there is now widespread agreement that adequate under surfacing is required underneath and around all playground equipment from which a user might fall, in order to reduce the effect of those falls."

25. The standard used a head injury criterion value not only because of the relative seriousness of such injury compared to a broken bone but also because there were recognised methods available for calculating the effect of deceleration on the brain but not for predicting the likelihood of bone breakage. The Standard noted in its Foreword that

> "Fall height and the impact energy attenuating characteristics of the under surfacing . . . do not seem to be the determining factors for longer bone injuries."

It stated a little later that should a reliable method of predicting the likelihood of long bone injuries become available, the Standard would be revised. The Foreword concluded, after referring to the fact that it would not always be possible to ensure all injuries were prevented,

> "However, adequate under surfacing will minimise the incidents and severity of head injury, and will reduce the occurrence of long bone injuries."

26. The Standard referred in clause 6.5 to a minimum depth of 20 cm for impact absorbing under surfacing and to the need for regular inspection and topping up (clauses 5.5, 6.5), particularly in areas of heavy traffic.

27. It should be noted that the standard put the defendant on notice, if any were needed, of the risk of long bone injury and the fact that provision of under surfacing would reduce the occurrence of such injury, although the precise extent of such effect could not be quantified.

28. As stated above, I am satisfied on the balance probabilities, that the defendant, through its servants and agents, failed to exercise reasonable care in inspecting and maintaining the under surfacing.

Failure to maintain surface – causation issue

29. The defendant also submitted that the plaintiff had not proved on the balance of

probabilities that, assuming that the plaintiff landed on bare hard earth, the state of the surface was a cause of the fracture that occurred. Counsel submitted that the highest the plaintiff's case could be put was that provision of 200 mm of soft mulch could have avoided the injury and that this was not enough. Counsel referred to *Chappel v Hart*[7], and the following passage[8] in the judgment of McHugh J:

> "The existence of the relevant causal connection is determined according to commonsense ideas and not according to philosophical or scientific theories of causation. The reason for this distinction was pointed out by Mason CJ in *March v E and MH Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095:
>
> > 'In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.'
>
> [24] In *March* this Court specifically rejected the "but for" test as the exclusive test of actual causation. Instead the court preferred the same commonsense view of causation which it had expressed in its decision in *Fitzgerald v Penn* [1954] HCA 74; (1954) 91 CLR 268; [1955] ALR 1. There, the court said that the question is to be determined by asking 'whether a particular act or omission can fairly and properly be considered a cause of the accident'. As a natural consequence of the rejection of the 'but for' test as the sole determinant of causation, the court has refused to regard the concept of remoteness of damage as the appropriate mechanism for determining the extent to which policy considerations should limit the consequences of causation-in-fact. Consequently, value judgments and policy as well as our "experience of the 'constant conjunction' or 'regular sequence' of pairs of events in nature" are regarded as central to the common law's conception of causation."

30. Counsel for the defendant submitted that the treating specialist Mr Young said no more than that "If you fall on hard ground you are more likely to get hurt" and that he conceded that in most cases a spiral type of fracture, as occurred in this case, results from a rotational force. He also referred to the evidence of Mr Nattrass that the fracture was the result of a combination of impact and a rotational force. Counsel submitted that the very highest the plaintiff can put his case is to appeal to commonsense and argue that if there was bare ground that was the cause it might have been, or could possibly have been avoided, if there had been more soft filling.

31. The question to be resolved is not whether the fracture would not have occurred if there had been 200 mm of soft fill into which the plaintiff fell but whether the absence of such soft fill was a cause of the fracture. Bearing in mind that the spiral fracture suffered was caused by both rotational force and impact force, the absence of the soft fill was a probable cause of the injury. What occurred was that a small boy fell only 1.25 metres. Two hundred millimetres of suitable soft fill would have had a significant effect in reducing the impact and, if appropriately loose, lessened the forces contributing to the rotational stress. In my view, the absence of any suitable soft fill can, on the balance of probabilities, fairly and properly be considered a cause of the fracture.

Damages – The injury and its aftermath

32. The evidence is that plaintiff fell through the gap between the steel platform and a horizontal bar and appeared to land on both feet, fall backwards on to his backside and roll on to his side. He was very distressed and when picked up by his mother clung to her neck. His mother and her friend attempted to check his body to see that he was all right but did not remove his trousers. When they went to leave with his aunt, he was still very distressed and clinging to his mother and they had some difficulty sitting him in the car seat. Once he was sitting there, he appeared to be more comfortable and as they drove he alternated between going to sleep and waking. What in fact was occurring was that he was being woken by muscle spasms in his fractured leg. When they got home, he was still distressed and when they removed his trousers they saw a very large lump in his left thigh. They immediately took him to the Balranald hospital. He was seen there at 1640. Dr Marton examined him and formed the opinion that his left femur bone had been fractured but it was decided that x-rays were needed before decisions could be made about treatment. He was given a dose of Pethidine to deal with his pain and Maxolon to relieve nausea.

33. He was taken to Swan Hill hospital by ambulance where an x-ray was taken. A spiral fracture of the left femur was diagnosed. The treatment recommended was the "gallows" type traction apparatus. He remained in that apparatus for seven and one half weeks. Photos of him

in it are in evidence. Both legs had adhesive strapping attached and that strapping was used to suspend his legs and hips with his legs in a vertical position while he lay on his back. He had to remain in that position 24 hours a day for the seven and a half weeks. On four occasions, the strapping failed with the result in each case that a leg fell to the bed. On three occasions the leg that fell was the one that had sustained the fracture. Each occasion was extremely painful. At the end of the seven and one half weeks, the plaintiff's legs had to be lowered. He was given Pethidine to cope with the extreme pain associated with blood flowing into the limbs. Notwithstanding that, his mother who observed and took part in the exercise, said that he was in extreme pain and that the nursing staff had to physically force his legs down.

34. He was x-rayed before discharge. The x-ray showed a slight shortening but good new bone formation. As at 29 August 2000, the treating surgeon, Mr Young, noted a 15 mm shortening of the left leg but commented that this was not alarming because growth would compensate for it. The plaintiff returned home. It took him three weeks to begin walking again.

35. When seen by Mr Nattrass on 12 March 2003, he was found still to have a mild diaphyseal varus angulation of the left femur of 12 degrees and mild external rotation relative to the right side. His gait was somewhat unusual in that the foot progression angle on the right side was plus 10 degrees and the left side plus 20 degrees. Plus 10 degrees is normal. His hip rotation on the right side was 80/20 (inset) but on the left side was 45/60. A mild leg length difference was found of approximately 5 mm.

Damages – positions of the parties

36. The plaintiff seeks general damages for the injury, including the deformity resulting from it, pain, suffering and loss of enjoyment of life associated with the injury and its treatment – in the past and up to the present and into the future. Counsel for the plaintiff submitted that bearing in mind the traumatic experience of the treatment over the first seven and a half weeks and the length of time it took to recover and the probable impact on his life as he goes through his childhood and adolescence with the permanent deformity, general damages in the sum of $75,000 to $80,000 would be appropriate. Counsel also submitted that items of special damages should also be awarded. Firstly an amount of $5116 for the care given by his mother and grandmother during his treatment and recovery[9]. An amount of $2500 is also sought for the annual replacement of orthotic equipment and an amount of $1000 as the present sum to compensate for the possibility of surgery to rectify the deformity when the plaintiff reaches adulthood[10].

37. Defendant's counsel submitted that general damages in the range of $30,000 to $40,000 were ample and for the various pecuniary items, $5000 would be generous. Counsel emphasised the positive opinions for the future of the plaintiff expressed by the plaintiff's medical experts and their judgment that there were no major problems facing the plaintiff in the future from the deformity with which he has been left. He referred in particular to the treating surgeon's view that as the plaintiff grew the 15 mm shortening in the left leg which he had identified would be dealt with by normal growth compensation. He referred also to the view of Mr Nattrass that the injury did not affect the plaintiff's ability to participate in sport or any other activity. He conceded that the initial treatment would have been a very difficult experience for the plaintiff. Counsel submitted however, that on the balance of probabilities there is no more than a possibility of residual problems 10 years down the track and such problems were not in fact probable.

Damages – extent of future disabilities

38. All the medical experts have treated the aftermath of the injury as mild and are dismissive of suggestions that the varus angulation will affect the plaintiff's ability to engage in sports and other activities. A partial explanation for this may lie in the reticent way the plaintiff's mother talks about his problems. I refer, for example, to the evidence of Mr Nattrass. The plaintiff's mother had told Mr Nattrass in March of this year that she was concerned that he may be favouring his leg, that when he ran he lifted the shoulder up and at the end of the day he had a noticeable limp. She also told him that she thought that this had been increasing since he had gone to school. She also said that he had occasional aching in the left hip. Mr Nattrass's report, however, concluded with the following prognosis

> "I suspect that Jesse will get along without any major problems whatsoever. It is still a bit concerning that three years after his injury he continues to have some gait abnormalities that are brought on

> by increasing fatigue when he is tired. I suspect he will get along well in the long-term without any long-term problems."

He was not questioned about his use of the word "suspect". A little later he commented as to the future:

> "I doubt very much this injury does affect his ability to participate in sports or any other activities that he wants. The only cause for some concern is the mild varus angulation of the femur. However to correct it now is a relative big operation and in light of the fact that he is doing so well I do not feel justified at this time."

In cross-examination he confirmed his statement about doubting that the injury would affect his ability to participate in sport and other activities and stated that he would not describe the deformity as severe by any means.

39. The defendant's specialist Mr Davie, while noting in February 2002 that the plaintiff had some difficulty in running expressed the opinion that the plaintiff should be able to carry out any career that he may wish and to play sport.

40. In considering the evidence of the medical witnesses it should be noted that none of them had had the benefit of recent examinations or recent information about the varus angulation's effect on the plaintiff. In particular, his mother gave evidence of observing her son at a recent sports day at his school. She observed him coping with walking events and throwing events but having difficulty running and jumping through hoops and he was a lot slower than other children including other children who had their own problems. He is still noticeably limping when tired, for example, after school and tires more quickly than he did prior to the injury.

41. This evidence provides additional information relevant to the plaintiff's future. In particular, it seems, contrary to the medical opinions, that his ability to take part in physical activity and, in particular, sporting activity has been affected. He is still very young and has many years ahead of him as he grows up where he is likely to be disadvantaged in his peer group because of his slowness and tendency to tire. I note also that sport is a significant part of his parents' lives. His parents are athletic people interested in sport. His mother was a very good competitive swimmer (Riverina champion) and plays tennis and netball. His father played AFL football with St Kilda and is still playing football for Wakool at the age of 37. There is also a risk that he will have some physical problems as he grows up and his enjoyment of life will be affected. Whether these issues will continue into adulthood is unclear. It appeared to be common ground that surgery to correct the deformity would not be contemplated while the plaintiff was still growing. There is also uncertainty as to whether such surgery would be recommended. While the medical evidence suggested that it was more likely than not that surgery would not occur, that evidence did not have the benefit of the more recent information.

42. In these circumstances, damages for the injury, and the deformity and damages for the pain, suffering and loss of enjoyment of life should be awarded for the past and for the future – approximately 15 years until adulthood. They should also be awarded for the years after he reaches adulthood, but that part of the future is unclear. There is the possibility of an operation which, if carried out, is likely to be successful. But there are, of course, real risks associated with that course and there are also real risks of his physical condition worsening whether an operation occurs or not. I have considered whether it would be appropriate to approach that aspect of his future on the basis that sum be provided to cover the cost in the future of such an operation which in turn would be likely to be successful. On reflection, I have come to the conclusion that the appropriate course to follow is to assess damages on the basis of a consideration of the future options and risks and to include an amount for future pain and suffering and loss of enjoyment of life having regard to the assessment of those risks rather than to simply award an amount to cover the cost of a possible operation. I bear in mind, however, that the damages for the future loss are to be received now.

43. The range suggested by counsel for the defendant for the plaintiff's injury and deformity and pain, suffering and loss of enjoyment of life seem to me to be inadequate as damages for the past and the future. The figure suggested allows very little for the future. I reject counsel's analysis of the future. Taking the likely future into account, it seems to me that the range of figures

suggested by counsel for the plaintiff of $75,000 to $80,000 would provide fair and reasonable compensation. I err on the side of caution and award $77,000.[11]

44. The *Griffiths v Kirkmeyer* claim should be allowed at $5116. That figure was not disputed in the end by the defendant. An amount should be allowed for expenditure on orthotics. On the evidence, this is likely to involve something of the order of $500 at present prices each time footwear has to be replaced. Bearing in mind the age of the plaintiff and discounting for the present award for future damage, the sum suggested by his counsel of $2500 is a reasonable amount.

45. The above amounts total $84,616.00. Looked at globally, I consider that an amount of $84,000 would provide fair and reasonable compensation.

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[1] *Australian Safeway Stores Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479; 69 ALR 615; (1987) 61 ALJR 180; [1987] Aust Torts Reports 80-073; *Marrickville Municipal Council v Moustafa* [2001] NSWCA 372; (2001) 117 LGERA 291

[2] *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40, 47-8; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278; *David Jones Ltd v Bates* [2001] NSWCA 233.

[3] The words appear in bold in the Report.

[4] Cf, *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5 (1998) 192 CLR 431; 151 ALR 263; 72 ALJR 208.

[5] (2002) NSWCA 324.

[6] (2001) NSWCA 233.

[7] [1998] HCA 55; (1998) 156 ALR 517; (1998) 72 ALJR 1344; (1998) 14 Leg Rep 2.

[8] at 523.

[9] *Griffiths v Kirkmeyer* [1977] HCA 45; (1977) 139 CLR 161; (1977) 15 ALR 387; 51 ALJR 792.

[10] Mr Nattrass assesses the present cost at about $6,500.

[11] In view of the ranges suggested by counsel, and their bases, it is unnecessary to quantify separately the items contributing to that overall figure.

APPEARANCES: For the plaintiff Walters: Mr T Monti, counsel. Garden & Green, solicitors. For the defendant Shire of Wakool: Mr N Bird, counsel. Hunt & Hunt, solicitors.
