Negligence and the Condition of the Sports Field: *Williams v Latrobe Council* [2007] TASSC 2

CHRIS SALERNO*

1. Introduction

The recent Tasmanian case of *Williams v Latrobe Council*[1] is a good illustration of the civil liability that local councils and football clubs can incur for injuries sustained by footballers due to the condition of the football field. In this case the plaintiff was a professional footballer who successfully sued, in the tort of negligence, a local council and two football clubs. He suffered a serious ankle injury while playing football after landing on the uneven surface of the football field. This case note summarises the facts and the result of this case, and then looks at other recent cases in which local councils and clubs have been sued over injuries suffered by people due to the condition of sports fields.

2. A summary of the facts

The first defendant, the Latrobe Council, owned and maintained the Latrobe Recreation ground, located on Gilbert Street, Latrobe, in Tasmania. The ground was used for cricket in summer and for football in winter. At Christmas time the ground was also used for a sports carnival. It was generally described as an 'excellent ground'.

The surface of the Latrobe Recreation ground contained five irrigation taps. With the exception of one tap, which was larger than the other four, generally each irrigation tap sat at the bottom of a hole in the ground. The holes generally measured 200 millimetres by 400 millimetres, and were about 350 millimetres deep. In order to cover the holes, generally the following practice was adopted by the council. First, each tap was surrounded by a cement box, but the box had no top or bottom. Second, a metal covering was placed on the top of each box. Third, a piece of wood was placed on the metal covering in each hole. Fourth, a thin layer of soil was placed on top of the piece of wood in each hole. Fifth, each hole was filled in with a block of wood, which was covered by astroturf. Finally, soil was forced around the block in each hole to keep it stable.

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* LLB (Hons) (Melb); graduated from the University of Melbourne in 2007.

1 [2007] TASSC 2 (Unreported, Underwood CJ, 5 February 2007) ('*Williams*').

During the cricket season the taps were accessed many times each day for the purpose of watering the grass. In the football season, however, the taps were not accessed for many months.

The Latrobe Recreation ground was the home ground for the Latrobe Football Club. In 2003 the Latrobe Council entered into a lease with the Latrobe Football Club, under which the council leased the function centre, the secretary's room and the memorabilia room (but not the football field)[2] to the Latrobe Football Club. The council agreed to provide 'all ground care and maintenance for the sports arenas and facilities'.[3] The lease also provided that the council was 'solely responsible for the main area surfaces, carrying out all the broadleaf spraying, top dressing etc'.[4]

Football matches were generally organised by the Northern Tasmanian Football League. One of the first football games for 2004 was played on the Latrobe Recreation ground on Saturday 27 March 2004, between the East Devonport Reserves and the Latrobe Reserves. The plaintiff was a professional footballer who retired from football in 1998. He played for the East Devonport Reserves on this day because the East Devonport Reserves was short of players for this particular game.

In the third quarter of the game the plaintiff was running toward the ball, which was heading in his direction. The ball had passed over the heads of two Latrobe Reserves players. The plaintiff ran for about 20 metres and reached for the ball, but did not manage to obtain it. The next thing that occurred was that the plaintiff was on the grass with a severely broken left ankle. An irrigation tap cover was about one metre from where the plaintiff was sitting and it was generally located on the path the plaintiff had travelled.

The plaintiff sued the Latrobe Council, the Latrobe Football Club and the East Devonport Football Club for negligence. The particulars of negligence alleged that all three defendants, inter alia, failed to ensure that the Latrobe Recreation ground was safe and in reasonable condition and failed to ensure that the irrigation tap covers were level with the surrounding soil.

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2 But the Latrobe Football Club had a right to use the 'sporting facilities' by giving one month's notice to the council under Clause 9 of the lease.

3 Clause 12.2 of the lease.

4 Clause 14 of the lease.

3. Did the plaintiff's foot land on the cover?

The first problem that confronted the plaintiff was that there was no direct evidence of where his left foot landed. Instead, this was a case that relied heavily on circumstantial evidence. The trial judge, Underwood CJ, set out the evidential burden that confronted the plaintiff in the following terms:[5]

> The plaintiff cannot succeed unless he proves that it is more probable than not that after going for a mark, his left foot handed on, or partly on, a cover ('the cover') placed over a pit dug into the playing surface, at the bottom of which an irrigation tap was installed, and that the cover was not set flush with the surface of the surrounding soil and/or was not level.

The plaintiff relied heavily on the medical evidence of the nature of his injury in order to discharge this evidential burden. In addition, he relied on the following evidence: evidence that, immediately preceding the injury, no other player made physical contact with him, which might have caused him to fall awkwardly and suffer the ankle injury; evidence that the top of the cover was not level with the surrounding soil and, finally, evidence that the cover was in close proximity to where the plaintiff had fallen and was on the path on which the plaintiff had travelled immediately before the injury.

Underwood CJ first dealt with the medical evidence of the plaintiff's injury. The medical evidence revealed that the injury to the plaintiff's left ankle was serious, and caused by the ankle twisting outwards (called an eversion injury) rather than twisting inwards (called an inversion injury).[6]

At trial the plaintiff called his treating surgeon, Professor Einoder, who reasoned that because the plaintiff's injury was serious, because it was an eversion injury (something that was rarely seen on the football field but more commonly seen in car accidents), because the risk of ankle injury is greater if the foot lands on an unpredictable surface rather than on a predictable surface, and because the structure of the ankle is such that inversion is more likely than eversion, it was more likely that the plaintiff's foot landed on an unpredictable surface.[7] Professor Einoder stated that even a height difference between two surfaces of half a centimetre was sufficient to cause an eversion injury.[8] The defendant called an orthopaedic surgeon, Mr. McIntosh, who generally agreed with

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5 [2007] TASSC 2 (Unreported, Underwood CJ, 5 February 2007) at [2].

6 *Ibid* at [18]-[20].

7 *Ibid* at [22].

8 *Ibid* at [36].

Professor Einoder, but could not agree that it was more probable than not that the plaintiff's foot landed on an unpredictable surface.[9] Mr McIntosh believed that the key factor was the angle at which the foot hit the ground.[10]

Underwood CJ accepted a submission made on behalf of the plaintiff that there was little difference in the opinions of the expert witnesses.[11] Underwood CJ rationalised the difference in the medical opinions in the following way:[12]

> I accept that there will be eversion if an ankle hits even ground at an angle sufficiently acute and with a force strong enough to overcome the natural tendency for it to invert. In that sense, I accept Mr McIntosh's opinion that the angle of contact dictates whether the ankle will invert or evert. But the ankle is unlikely to adopt such an angle sufficiently acute to result in an eversion injury without good reason. In this context good reason is likely to be either an unpredictable landing on an even surface due to an immediately preceding unexpected event such as a mid-air tackle or a mid-air decision to change direction of travel on landing, or the pressure created by unexpectedly landing on an uneven surface. If it is accepted that the plaintiff was running for an uncontested mark and did not jump very high before landing...the probabilities are that he landed on an unpredictable surface...I accept Professor Einoder's opinion to that effect.

Underwood CJ then turned to the evidence given by spectators and players to determine whether the mark was contested and therefore to determine whether another player caused the plaintiff to land unpredictably. The evidence revealed that immediately before the injury as the plaintiff was going for the mark, there were players around the plaintiff, but none of whom made physical contact with the plaintiff.[13] The only exception was that a Latrobe Reserves player punched the ball away from the plaintiff.[14] Underwood CJ concluded that 'the direct evidence from the players and spectators supports the inference the plaintiff seeks to draw from circumstantial medical opinion evidence that...the plaintiff landed on an uneven surface'.[15]

Underwood CJ finally turned to perhaps the most important issue in this case: the state of the irrigation tap cover. There was much evidence on

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9 *Ibid* at [23].
10 *Ibid* at [23]-[24].
11 *Ibid* at [24].
12 *Ibid* at [25].
13 *Ibid* at [26]-[35].
14 *Ibid* at [32]-[33].
15 *Ibid* at [35].

the state of the cover, both before and after the plaintiff suffered his injury. The following evidence was presented on the state of the cover before the injury:

> On the Wednesday before the match Mr Jackson, a Latrobe Club committee member, inspected the ground for the purpose of filling in a checklist called the 'Faculty Inspection Sheet', which listed many questions such as 'Oval surface fit for purpose?' and 'Water tap holes covered and padded?' For these questions Mr Jackson ticked the 'OK' column;[16] and
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> On the morning of Saturday 27 March 2004 Mr Brett, the team manager for the Latrobe Under-19 team, which played the first game on the Latrobe Recreation ground on that morning, completed a checklist called the 'Match Day Check List'. Two questions, for which Mr Brett ticked 'Yes', were: 'Is the surface in good condition? (Grass length, free of holes)' and 'Are sprinkler covers correctly in place?'[17]

Underwood CJ did not place much weight on the evidence of Mr Jackson and Mr Brett. Both of these inspections were brief and from a standing position, and therefore insufficient to detect any difference in the level of the cover relative to the surrounding soil.[18] Any difference could only be detected by getting close to the ground or touching the cover.[19]

There was much evidence given by various persons on the state of the cover after the plaintiff suffered his injury. In this case note instead of detailing all this evidence, it is sufficient for present purposes to note the evidence given by the plaintiff's brother, Darren Williams, because his evidence was ultimately accepted by Underwood CJ. After the match, the plaintiff's brother, Darren Williams, and Mr Boon, an East Devonport player, inspected the cover. Mr Boon noticed that the cover was one or two inches below the surface of the surrounding soil.[20] Darren Williams took a photograph of the cover, but it was not available to be presented in evidence.[21] On the day after the match Darren Williams inspected the cover in more detail. He placed his hand on it and noticed that it was rocking.[22] He also noticed that the cover was one or two centimetres

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16 *Ibid* at [42].

17 *Ibid* at [46]-[47].

18 *Ibid* at [45], [47].

19 *Ibid* at [45].

20 *Ibid* at [38].

21 *Ibid.*

22 *Ibid* at [48].

below the surface of the surrounding soil.[23] He took photographs of the cover, but Underwood CJ found them to be of little assistance.[24]

Underwood CJ pointed out that after the plaintiff's injury, 'attention was then principally focused on whether the cover was stable, not whether its top was flush with the surrounding soil'.[25] Underwood CJ stated that whether the cover was level with the surrounding soil was difficult to discern unless a close inspection were undertaken, because grass had been allowed to grow around the cover.[26] Underwood CJ also stated that it was obvious that it can be difficult to position the cover so that it is always level with the surrounding soil, especially since rain can enter the irrigation tap holes and affect the soil.[27]

Underwood CJ favoured the evidence given by Darren Williams because he was the only person who carried out a thorough inspection of the cover relative to the surrounding soil.[28] This led to Underwood CJ concluding that the cover was at least half a centimetre below the surrounding soil, and that it was likely that the injury was caused by the plaintiff's foot landing on this height difference.[29]

4. The Liability of Latrobe Council

Citing Mason J in *Wyong Shire Council v Shirt*[30] and Lord Atkin in *Donoghue v Stevenson*,[31] Underwood CJ stated that a duty of care will arise when there is sufficient proximity between the defendant and the plaintiff, in that a reasonable person in the defendant's position would foresee that carelessness on their part might cause damage to the plaintiff.[32] It was on this basis that the council owed the plaintiff a duty of care, 'notwithstanding the demise of proximity as a conceptual unifying factor in the tort of negligence'.[33]

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23 *Ibid.*
24 *Ibid.*
25 *Ibid* at [53].
26 *Ibid.*
27 *Ibid* at [54].
28 *Ibid* at [59].
29 *Ibid* at [60].
30 (1980) 146 CLR 40 at 44.
31 [1932] AC 562 at 580.
32 [2007] TASSC 2 (Unreported, Underwood CJ, 5 February 2007) at [61].
33 *Ibid* at [62].

Underwood CJ turned to the standard of care and quoted the well-known passage in Mason J's judgment in *Shirt* concerning the calculus of negligence.[34] Underwood CJ stated that the risk of injury to a footballer posed by a cover not being level with the surrounding soil, creating a dangerous height difference, was not only foreseeable by a reasonable council but also obvious.[35]

Underwood CJ noted that the irrigation taps were used on a daily basis in summer but not for about six months of the year in winter.[36] There was evidence that at other football fields after the cricket season had ended the covers of the irrigation holes were removed, the holes were filled in with soil and grass planted on the top to avoid a risk of injury to footballers.[37] Since this was a reasonable and inexpensive precaution that the Latrobe Council failed to take, Underwood CJ concluded that it had breached the duty of care it owed to the plaintiff.[38]

5. The Liability of the Latrobe Football Club

In common with the council, and for the same reasons, Underwood CJ concluded that the Latrobe Football Club owed a duty of care to the plaintiff.[39] It was also concluded, as with the council, that a reasonable football club would have foreseen that a cover that was not level with the surrounding soil posed a risk of injury to footballers.[40]

Underwood CJ found that the club was in breach of its duty of care by failing to ensure that the ground was safe and in reasonable condition, and for failing to ensure that the covers were level with the surrounding soil.[41] The inspections carried out by Mr Jackson and Mr Brett prior to the game were not thorough to detect the danger posed by the cover not being level with the surrounding soil.[42]

6. The Liability of the East Devonport Football Club

The East Devonport Football Club also owed the plaintiff a duty of care, for the same reasons that the other defendants owed the plaintiff a duty of

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34 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8.

35 [2007] TASSC 2 (Unreported, Underwood CJ, 5 February 2007) at [64]-[65].

36 *Ibid* at [66].

37 *Ibid* at [67]-[68].

38 *Ibid* at [66], [69].

39 *Ibid* at [61].

40 *Ibid* at [64]-[65].

41 *Ibid* at [72]-[74].

42 *Ibid* at [73].

care.[43] Underwood CJ found that a reasonable football club would have inspected the football field prior to the football match, realised that the cover was not level with the surrounding soil and asked the council to rectify the problem.[44] The club's failure to undertake this inspection constituted a breach of the duty of care it owed to the plaintiff.[45]

7. Conclusion

The end result in *Williams* was that the Latrobe Council was 85% responsible for the injury suffered by the plaintiff, but since the football clubs had not exchanged notices of contribution, Underwood CJ declined to make final orders without the assistance of counsel.[46]

Williams is a good illustration of the civil liability that local councils and football clubs can face with respect to injuries suffered by sportspeople caused by the condition of sports fields. It is not the first negligence case involving a sports field, and it probably will not be the last case of this kind. In recent times, sports fields have proven to be quite fertile ground for litigation, especially against local councils. Local councils are usually targeted by plaintiffs because they are usually the occupier of sports fields, and it is well known that an occupier owes a general duty of care in negligence to take reasonable care to avoid foreseeable risks of injury to entrants.[47] The circumstances in which plaintiffs can suffer injuries on sports fields, giving rise to litigation, are multifarious. The following two cases are illustrations of both successful and unsuccessful litigation by plaintiffs for injuries suffered on sports fields.

Wagga Wagga City Council v Sutton[48] is a case similar to *Williams*. In that case the plaintiff was playing football on a football field maintained by the defendant council when his right foot became caught in a hole or depression near a sprinkler, causing him serious injuries. He was awarded damages of $158,232.60 at trial, which was upheld on appeal. On the other hand, the plaintiff in *Lanyon v Noosa District Junior Rugby*

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43 *Ibid* at [61].

44 *Ibid* at [75]-[76].

45 *Ibid.*

46 *Ibid* at [78].

47 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 487-8 (Mason, Wilson, Deane and Dawson JJ). See also Anthony Wright, 'Liability of Councils' (2004) 15 *Insurance Law Journal* 161.

48 [2000] NSWCA 34 (Unreported, Meagher, Handley and Sheller JJA, 10 March 2000).

League Football Club Inc[49] was not so fortunate before the courts. In that case the plaintiff was coaching rugby league one evening when his left foot slid into a depression in the ground, causing his Achilles tendon to rupture. This resulted in him being left with a permanent limp. He was unsuccessful, both at trial and on appeal, because it was held that the defendant had taken reasonable care by inspecting the ground before the game, and by relying on coaches to undertake an inspection of the ground (as they had been instructed to do). Helman J, with whom McPherson and Williams JJA agreed, stated:[50]

> It would be quite unreasonable to expect the respondent, which was a volunteer organization, to have the football ground free at all times of all unevenness and so require it to produce a surface of the kind suitable for lawn bowls or croquet.

It is interesting to also look at recent litigation involving injuries suffered by plaintiffs on golf courses. In *Ollier (by his litigation guardian Ollier) v Magnetic Island Country Club Inc*[51] the plaintiff suffered severe head injuries when he was struck behind the ear with a golf ball hit by the second defendant, who negligently failed to keep a proper lookout for other players. The second defendant was ordered to pay the plaintiff damages assessed at $2.6 million.[52] By contrast, in *Buttita v Strathfield Municipal Council*,[53] the plaintiff failed in his case against the defendant council, who owned and operated a golf course. In that case the plaintiff suffered injuries when he slid down a slope on the golf course, which was wet after recent overnight rain. Giles JA, with whom Spigelman CJ and Fitzgerald AJA agreed, rejected the argument that the slipperiness of the slope was a hidden danger.[54] Giles JA stated that '[g]olf courses are not nurseries' and that reasonable care did not require the golf course to be reconstructed or signposted.[55] Giles JA pointed out:[56]

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49 [2002] QCA 163 (Unreported, McPherson, Williams JJA and Helman J, 10 May 2002).

50 *Ibid* at [16].

51 [2004] QCA 137 (Unreported, McMurdo P, McPherson JA and White J, 30 April 2004).

52 The first defendant, the Magnetic Island Country Club, was found not liable at trial for the plaintiff's injuries. The appeal to the Queensland Court of Appeal concerned solely the liability of the second defendant.

53 [2001] NSWCA 365 (Unreported, Spigelman CJ, Giles JA and Fitzgerald AJA, 8 October 2001).

54 *Ibid* at [10].

55 *Ibid* at [6].

56 *Ibid* at [9].

> [I]t is relevant as a matter going to what reasonable care required that in well over 50,000 rounds of golf played prior to the appellant's fall, no fall or complaints of unsafety in relation to this slope had been reported to the course professional and there was no evidence of any other report of fall or complaint of slipperiness.

As these cases show, for local councils and clubs especially, the condition of sports fields, including golf courses, is not something that can be taken lightly. Even litigation in which the plaintiff ultimately fails can be a huge burden to defend, especially for defendants, such as local councils, with limited financial resources. Local councils and clubs must therefore be vigilant when it comes to identifying and reacting to possible dangers in sports fields.[57] The law of negligence requires reasonable care to be taken by occupiers of premises.[58] As a minimum, this will require a system of regular inspection and the reporting of hazards on sports fields.[59] However this does not mean that sports fields must be free of every possible risk. As Ipp JA pointed out in one recent case, '[t]here are undoubted risks involved in playing sport...It is impractical to require sports grounds to have surfaces that are perfectly level and smooth'.[60] Further, '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'.[61]

The decision in *Williams* does not impose an unreasonable burden on local councils and football clubs. This case is different from *Town of Mosman Park v Tait*.[62] In that case the plaintiff suffered injuries when she stepped into a large hole in an oval occupied and controlled by the council. The plaintiff was unsuccessful in the West Australian Court of Appeal because she failed to identify an alternative system that the council should have reasonably adopted and which would have minimised the risk of injury. McLure JA pointed out that a system involving employees physically inspecting the oval for holes with a stick had 'significant cost implications for the [council] and its ratepayers and

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57 Michael Preston and Glen McLeod, 'Casenotes: *Town of Mosman Park v Tait*; *Walton v Shire of Toodyay*' (2006) 11 *Local Government Law Journal* 193 at 193, 196.

58 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 487-8 (Mason, Wilson, Deane and Dawson JJ).

59 *Town of Mosman Park v Tait* (2005) 141 LGERA 171 at 183 (McLure JA).

60 *Favlo v Australian Oztag Sports Association* (2006) Aust Torts Reports 81-83 at [20]. The plaintiff also failed in this case.

61 *Ibid.*

62 (2005) 141 LGERA 171.

is prima facie unreasonable'.[63] By contrast, as Underwood CJ found in *Williams*, the care owed to the plaintiff could easily have been satisfied by the football clubs undertaking a thorough inspection of the ground, and by the council filling in the irrigation holes with soil for the duration of the football season.

POSTSCRIPT

The defendants lodged an appeal in the Full Court of the Supreme Court of Tasmania against the decision of Underwood CJ. The appeal was heard by Crawford, Evans and Tennent JJ.[64] The issue was whether the defendants had breached the duty of care they owed to the plaintiff.[65] The principal judgment was delivered by Crawford J, with whom Evans and Tennent JJ agreed. Crawford J noted the trial judge's decision that at other football grounds (Devonport and Girdlestone Park) the irrigation tap covers were removed after the football season had ended and filled with soil, and that the Latrobe Council's failure to do the same at the Latrobe Recreation Ground was negligent.[66] Crawford J noted that while the trial judge's decision was not erroneous, the defendant council could be held liable in negligence on an alternative basis:[67]

> The difference in height created a real risk of injury. On the evidence, it is likely that it would have been avoided if properly compacted soil, covered with grass, had replaced the covers for the football season or if in some other way, such a substantial difference in height had been avoided by a proper construction of the pit and its cover...On the evidence, a finding should have been made...that the structure of the pit and its cover was in some way deficient. The finding of the learned trial judge that the council breached its duty of care by not doing what was done at Devonport and Girdlestone Park has not been shown to be erroneous, although I also consider the council to be liable in negligence simply because it failed to take reasonable care to construct the pit and its cover in such a way as to avoid a hard edge height differential of the magnitude that in fact existed or, alternatively, failed to take reasonable care to maintain the pit and its cover in that condition.

The council's appeal was therefore unsuccessful. However Crawford J upheld the appeals lodged by the football clubs. It was noted that it was

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63 *Ibid* at 186.

64 *Latrobe Council v Williams* [2007] TASSC 77 (Unreported, Crawford, Evans and Tennent JJ, 27 September 2007).

65 *Ibid* at [3].

66 *Ibid* at [24]-[27].

67 *Ibid* at [37].

difficult from a standing position to determine whether the irrigation tap covers were level with the surrounding soil unless a close inspection, on one's hands and knees, were undertaken.[68] Crawford J held that to require the football clubs to allocate a member, such as a volunteer, to inspect the covers on their hands and knees was unreasonable and amounted to 'imposing too onerous a standard of care'.[69] The Match Day Checklist did not require such a comprehensive check, but only asked whether the covers were correctly positioned in the ground.[70] The visual inspection carried out by the Latrobe Football Club was not unreasonable.[71] Regarding the East Devonport Football Club, Crawford J held that the club was negligent for failing to inspect the ground at all, but the club was not liable on the basis that even if it had undertook such an inspection, the inspection would not have revealed the difference in height between the cover and the surrounding soil.[72]

This case was decided on common law principles of negligence, such as the 'calculus of negligence' proposed by Mason J in *Wyong Shire Council v Shirt*.[73] The judgments of the Supreme Court of Tasmania and the Full Court of the Supreme Court of Tasmania do not make reference to the provisions of the *Civil Liability Act* 2002 (Tas). However, lawyers practising in this area of the law of negligence involving plaintiffs injuring themselves on uneven surfaces, whether on the football field or on footpaths, should keep in mind that some provisions of the Act may be potentially relevant should a similar case arise in the future. A few examples are:

Section 7, which provides that an apology made by the defendant is not evidence of liability;

Section 11, which embodies the 'calculus of negligence' proposed in *Shirt*;

Section 12, which provides that the subsequent taking of action by the defendant which would have avoided the plaintiff's injury does not itself indicate that the defendant was negligent for causing the plaintiff's injury;

Section 13, which sets out the principles of causation;

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68 *Ibid* at [44]-[46]. This was also emphasised by Evans J in his short judgment: *ibid* at [52].

69 *Ibid* at [48].

70 *Ibid.*

71 *Ibid* at [48]-[49].

72 *Ibid* at [49].

73 (1980) 146 CLR 40 at 47-8.

Section 14, which provides that the onus of proof regarding causation remains on the plaintiff;
Sections 15 and 16, which deal with obvious risks;
Section 23, which deals with contributory negligence; and
Sections 36-43, which deal with the liability of public authorities such as local councils.