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| IN THE COUNTY COURT OF VICTORIA | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

AT Melbourne

COMMON LAW DIVISION

GENERAL LIST

Case No. CI-14-98988

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| BRAD HALE[[1]](#footnote-1) | Plaintiff |
|  |  |
| v |  |
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| BELLVOIR FOOTBALL CLUB[[2]](#footnote-2)  SOUTHERN REGIONAL JUNIOR FOOTBALL LEAGUE[[3]](#footnote-3) &  BEACHFRONT CITY COUNCIL[[4]](#footnote-4) | Defendants |

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| JUDGE: | HIS HONOUR JUDGE DYER | |
| WHERE HELD: | Melbourne | |
| DATE OF HEARING: | 24, 25, 26, 29 February & 1, 2, 3, 4, 7, 8 March 2016 | |
| DATE OF JUDGMENT: | 21 October 2016 | |
| CASE MAY BE CITED AS: | Hale (a pseudonym) v Bellvoir Football Club (a pseudonym) & Ors | |
| MEDIUM NEUTRAL CITATION: | [2016] VCC 02222 |  |

REASONS FOR JUDGMENT

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Subject: Negligence

Catchwords: Public liability; Sporting injury; Duty of care; Evidence; Damages

Legislation Cited: *Wrongs Act 1958*

Cases Cited: *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34, (1985) 59 ALR 529; *Macquarie Pathology Services Pty Ltd v Sullivan* Unreported New South Wales Court of Appeal 28 March 1995; *Jones v Southern Grampians Shire Council & Anor* [2012] VSC 485; *Central Goldfields Shire v Haley & Ors* [2009] VSCA 101; *Cehner v Borg & Ors [2003] VSCA 72; Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39, 188 CLR 313; *Jones v Bartlett* [2000] HCA 56, 205 CLR 166; *Karatjas v Deakin University* [2012] VSCA 53; *Rowes Bus Service Pty Ltd v Cowan* and *Sufong v Cowan* (1999) NSWCA 268; *Jones v Southern Grampians Shire Council and Another* [2012] VSC 485; *Victorian Stevedoring Pty Ltd v Farlow [1963] VR 594*

Judgment: Judgment for the plaintiff in the sum of $589,525 plus interest to be calculated

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff | Mr P. Shandell QC with Mr N. Sparrow | Moulds Inkley Lawyers |
|  |  |  |
| For the First & Second Defendants | Mr J. Eaton QC with  Mr A. Rasmussen | Torrance & Hills |
| For the Third Defendant | Mr A. Norman | Latitude Partners |

HIS HONOUR:

Introduction

# On Sunday 29 June 2009 Brad Hale, then aged 17, was playing in a junior football match at the Brook Reserve in Bellvoir. He had just returned to playing football following an injury to his hand.

# At some time during the first quarter of the game Mr Hale was running at or near top pace towards the forward pocket area on the western or pavilion side of the ground, when he leapt into the air in order to mark the football. His evidence was that he was clear of his opponent, who he believed was behind him. Other evidence from witnesses suggested his opponent was to his side, nearer the goal posts. There was no evidence to suggest that he was in any way pushed. He apparently got his hands to the football, but was unsure as to whether or not he had completed the mark.

# As Mr Hale came down his left boot caught on the cyclone wire fence outside the boundary line and he crashed to the ground badly injuring his left knee.

# It was common ground that Mr Hale was playing in the Under 17 Bellvoir Eels football team which occupied Brook Reserve for that football season by agreement with the Beachfront City Council (“the council”). It was also common ground that the Bellvoir Eels Junior Football Club (“the club”) played in a competition organised under the auspices of the South Regional Junior Football League (“the league”). The club’s senior teams played with the Victorian Sportsman’s Football League (“VSFL”).

# In this proceeding Mr Hale claims damages against the league and the council.

# In essence the plaintiff’s claim can be very briefly stated. The boundary line at the point of the ground near the cricket nets area was too close to the fence, and shown to be so by the fact that the plaintiff could leap to take a mark from within the field of play and land in the fence without having been pushed or bumped by another player.

# The first and second defendants relied upon a joint Defence essentially arguing that the boundary line at the ground was in excess of the standard mandated by the VSFL, and also adduced evidence to show that there had been no previous complaints or incidents of this nature in the many years preceding Mr Hale’s incident when the club had played its matches at Brook Reserve. The first and second defendants (“the football entities”) raised contributory negligence as an issue and also sought indemnity and/or contribution from the third defendant.

# The council also denied liability and again placed considerable weight on evidence suggesting that the boundary line at the point where the incident occurred was well in excess of the specified minimum distance of three metres, set out in the VSFL Conditions of Play. Further, its own risk management practices were reflected in the ground occupancy arrangements, whereby the Bellvoir Football Club was given access to the ground. It was argued that this conduct by the council militated against a finding that it was in any way negligent.

# The council also alleged contributory negligence against Mr Hale, and sought indemnity and/or contribution from the football entities.

# The claim for damages related to the ongoing consequences of Mr Hale’s left knee and leg. The injuries suffered by him were very serious and none of the defendants called any medical evidence to challenge the plaintiff on this issue.

# Indeed, as evident from the final addresses by all parties, the potential quantum of damages was by no means the greatest area of disagreement. The ranges of general damages submitted by counsel for all parties did not vary greatly, although there was some variance in the submissions concerning the impairment of the plaintiff’s future earning capacity and the likely extent of future medical treatment. All other matters concerning quantum were essentially agreed.

# It is appropriate to note in the introduction to this judgment that the trial had proceeded initially before a jury for some eight sitting days before an application was made to discharge the jury, initially at the request of the plaintiff, and subsequently on alternative bases by counsel representing each of the three defendants. The jury was discharged and the matter proceeded before me for determination as a cause.

The factual background

# It is important to note as a preface to any findings of fact that the incident giving rise to the plaintiff’s claim occurred almost seven years ago. There was no real investigation conducted at the time of the incident and, but for obvious concerns about the welfare of the plaintiff by the members of the football club, there was no useful record made at that time.

# There are a number of non-contentious matters arising from the evidence given in the case. I set these out below:

* Brook Reserve in Bellvoir is a relatively large oval by the standard of local football grounds. It is bordered on the western side by Ash Street and the eastern side by Railway Parade. A pavilion sits near the south-west corner of the oval in about the forward flank position for the goals situated at the southern end of the ground.
* Immediately to the south of the pavilion is an area for cricket practice nets which are separated from the oval proper by three sets of steel gates.
* Further south of the cricket practice wicket area is a fenced area housing a roller used during the cricket season.
* A photograph tendered in evidence showing the plaintiff being attended immediately following the incident in 2009 shows him located between the fenced area where the roller is kept and the cricket practice wicket area.[[5]](#footnote-5)
* The fence surrounding the ground is comprised of steel mesh fencing which appears to be in the order of 770 millimetres to 930 millimetres in height. The type of fencing is evident in the photograph described above.[[6]](#footnote-6)
* Brook Reserve had been resurfaced and a new drainage system installed in the year prior to the plaintiff’s incident. The football club had been unable to use the ground during the 2008 football season.
* The plaintiff was playing in the club’s Under 17 team which catered for the oldest age group still playing within the junior competition conducted by the League.
* The plaintiff had trained at Brook Reserve, but had apparently sustained an injury to his hand earlier in the season and there was no challenge to his evidence that this was his first home game in 2009.
* Bellvoir is a relatively large club and fields somewhere between 20 and 24 teams in the League’s junior competition.
* The club has junior matches played at both Brook Reserve and another oval also maintained by the council.
* There was no record of any reports or complaints made to the club, the league or the council as to any potential hazards resulting from the marking of the boundary lines or the position of the fence at Brook Reserve either in the period leading up to the plaintiff’s incident or at any time thereafter.
* The evidence supported a finding that the club had not changed the method or indeed the measurements adopted in laying out the boundary line at Banksia Oval in the years since the plaintiff’s accident had occurred.

# The plaintiff’s case in essence was that the boundary line had been marked too close to the fence and was therefore a cause, and probably the major cause of injury to the plaintiff. It was apparent that attempts had to be made to reconstruct the suggested position of the boundary line as it was in 2009 in order for the plaintiff to succeed. I was not assisted by photographs in the jury book[[7]](#footnote-7) attempting to show traces of where the boundary line might have been had it been at distances varying between 2 and 3 metres from the fence.

# It was abundantly clear that a considerable degree of reconstruction underscored the taking of photographs of that type. It was pointed out in final address by Mr Eaton QC[[8]](#footnote-8), who with Mr Rasmussen[[9]](#footnote-9) appeared on behalf of the club and the league, that several photographs showing measurements of the placement of the boundary line were in fact taken at a point adjacent to the visitor’s race, which was an area perhaps 20 to 30 metres north of the point where the plaintiff is shown being treated in the actual photograph taken shortly after the incident in 2009.

# Again the evidence advanced on behalf of the club in particular suffered much the same difficulty with otherwise credible witnesses admitting that they had taken measurements of Brook Reserve shortly before the time of trial, presumably in order to fortify their evidence as to what had been the situation in 2009.

# A view was held on the second day of the trial and observations were made at various points on the oval between the southern end where goal posts would have been located, up to a position on the westerly wing near the coaches box. A digital recording of the view was tendered in evidence.[[10]](#footnote-10) Apart from providing a practical demonstration of where the boundary line may or may not have been in June 2009, the observations made during the view were ultimately of little assistance in determining the issues in this case.

# There were essentially only two variables which could have affected the placement of the boundary line relative to the fence. The first of these was the placement of the goal and point posts. This location defined the starting point for the boundary line. There was provision for both east-west and north-south variation.

# There was no disagreement that Brook Reserve had provision for some east to west movement of the goal and point posts arrangement at both ends of the ground. This was to enable the posts to be moved so as to protect the surface of the goal square area. Part of the photographic evidence tendered included two large scale “Near Map” overhead photographs of Brook Reserve dated 16 April 2010[[11]](#footnote-11). The parties were in agreement that the placement of the goal posts in that 2010 year were at their eastern-most alignment, with the probability that they would have been aligned one post further to the west during the 2009 season.

# The placement of the goal and behind posts north of the southern fence on the ground could also be varied. The evidence before me revealed that sleeves into which the posts were placed prior to the commencement of each football season had been removed during the renovation of the ground undertaken in 2008. The placement of these sleeves also impacted on the boundary line.

# Email correspondence passing between the club president, Jack Bourke[[12]](#footnote-12), and the council’s sport and recreation officer in February 2009 was tendered in evidence.[[13]](#footnote-13) Amongst these emails was a communication from Mr Jack Bourke to Mr Walter Patrick[[14]](#footnote-14) dated 23 February 2009:

“Walter,

One other matter we have discussed before as group is what size we want the ground to be. We have exposed drain grates all around the ground – 8 from memory but we have the luxury of a large surface area and we can keep clear of those and still have a good size ground. There are recommended ground sizes issued by the AFL. Can the Club suggest the ground size to the Council and if acceptable the goal post holes can be set according. Who do we liaise with on this matter?

Jack B”

# It would seem from the email chain that Mr Patrick acted promptly and communicated with another officer of the council on the same day. This was addressed to Mr David Coulson[[15]](#footnote-15) who later gave evidence in the trial:

“Hi David,

Is it possible to realign the goals as Jack has suggested to help take the drains further away relative to the playing surface in use on match day?”

# Therefore I am able to conclude that the club was aware at the beginning of the 2009 football season that the placement of the goals would necessarily impact on the size of the playing area at Brook Reserve. This would in turn lengthen or shorten the ground and would indirectly impact upon the distance available to separate the boundary line from the fence surrounding the oval.

# The other variable in the distance of the boundary from the fence was controlled by the person actually marking the boundary line, presumably prior to the start of the first football match of the season. Mr Jack Bourke, the then president of the club and author of the email correspondence referred to above, was in fact the person who had marked the boundary lines in 2009. He gave evidence in the trial. I also had evidence from the president of the junior club, Mr Richard Terrier[[16]](#footnote-16), who had similarly taken on the task of marking boundary lines at another ground used by the junior club.

# I found both Mr Bourke and Mr Terrier to be good witnesses who impressed me as attempting to give an honest and accurate version of what had occurred in 2009. There was also the evidence of the large scale overhead photograph which shows the ground, the position of the goals and the position of the boundary line in April 2010. I will return to the photographic evidence later.

# The plaintiff’s evidence in relation to the boundary line was quite vague, and not of itself probative of any fault on behalf of any of the defendants. The plaintiff was not particularly aware of the position of the boundary line relative to the fence in 2009 and simply gave evidence of going on a lead to take a mark and landing on the fence.[[17]](#footnote-17)

# When Mr Hale was cross-examined initially by Mr Eaton QC, he emphasised that he was running from the top of the goal square area for the ball and that his eyes were on the ball, he was not watching the boundary line.[[18]](#footnote-18) Mr Hale had also stated that he was not interfered with by any opposition player and that he had effectively got away from his direct opponent. He could not recall actually taking the mark, and did not believe that the umpire had signalled that the ball was out of bounds. The difficulty with the plaintiff’s own evidence on this issue is perhaps well illustrated by the following exchange in cross examination:

“Did it go out on the full? I marked it and I landed on the fence.

Yes? I got my hands on it and I landed on the fence.

I understand that. But did it go out on the full before you got your hands to it? No.

On the other hand, you don’t know where the boundary line was in relation to you when you’re attempting to mark it? Yes.

Is that correct? Pardon?

You don’t know where the boundary line was when you attempted to mark the ball? No, I don’t.

And you’ve got no idea where - the distance that you were from the fence at the time when you attempted to mark the ball? I wouldn’t have gone for the mark if I’d known it was going to get kicked over the fence out of the way.

To the question, please. You had no idea where the fence line was when you attempted to mark the ball? No.”[[19]](#footnote-19)

# Mr Hale was taken to answers he had given to interrogatories in this proceeding.[[20]](#footnote-20) These answers had been affirmed by Mr Hale on 12 October 2015. In substance the answers given by the plaintiff at that time varied from the evidence he had given in this proceeding in the following manner:

* The earlier answers describe the events leading up to the incident in following terms:

“… I attempted to mark it before it was called ‘out on the full’. Players from the opposing team also attempted to mark the ball at the same time.

* To the question concerning the plaintiff being knocked, bumped, pushed, hit or in any way physically moved by another person playing football shortly prior to the happening of the incident, the plaintiff had responded, “I cannot recall.”
* To the question concerning the speed at which Mr Hale was travelling when he contacted the fence, his answer recorded:

“I had been running at or close to full pace when I jumped, and I came into contact with the fence as I landed.”

# On the basis of the plaintiff’s own evidence it would be purely a matter of speculation to make findings in relation to the distance between the marked boundary line and the fence at the position where Mr Hale sustained his injury.

# No party sought to adduce evidence from any umpire or any other player who was on the field at the time when the incident occurred. The plaintiff did however call two witnesses, Mr Simon Walker[[21]](#footnote-21) and Mr Stephen Peacock[[22]](#footnote-22), who were both present at the ground as spectators when the incident occurred. I found both Mr Walker and Mr Peacock to be impressive witnesses.

# Mr Walker did not know the plaintiff prior to the incident occurring, but had attended Brook Reserve on that Sunday morning to view another game. He did not hold any official position with the football club at that stage, but had been a past player and had been involved with the club since his childhood. In relation to the incident he stated:

“… I wasn’t specifically there for the whole game. I had arrived as the incident occurred … I was standing right in front of the existing clubhouse ... I think it was in the first quarter … I just – it literally happened as I arrived at the club … He was running on an angle towards the fence and he went to attempt to mark the ball and he landed with his left foot impaled into the fence and he hit the fence first.”[[23]](#footnote-23)

# Mr Walker stated that when he observed the plaintiff he appeared to be looking at the ball.[[24]](#footnote-24)

# When Mr Walker was cross-examined initially by Mr Eaton QC, he reaffirmed that the plaintiff went leaping into the air, wasn’t physically being touched by anything or anyone else.[[25]](#footnote-25) He also stated that he had actually seen the plaintiff hitting the fence rather than simply hearing a noise.[[26]](#footnote-26)

# In cross-examination Mr Walker was asked to comment on whether the boundary lines at the oval were further away from the fence at the wings, as distinct from the pocket areas. He stated that this was his recollection and it had been like that for many years.[[27]](#footnote-27)

# Mr Stephen Peacock was also present at the ground when the incident occurred. His eldest boy, Thomas[[28]](#footnote-28), was playing in the same team as the plaintiff. Mr Peacock had done two years of coaching for the inter-league side in 2008 and 2009. He was acting as the team runner on the day the incident occurred. He would normally watch the game from the coaches’ box nearest to where the incident occurred. He described the incident as follows:

“What I remember is that the ball was kicked into the forward pocket. Brad was at full forward and led out at pace at the football to take a mark and, in flight, basically came down and struck the front face of the fence. … It had a cyclone wire mesh on it, so struck that part of it.”[[29]](#footnote-29)

# Mr Peacock was asked as to the position of the plaintiff before the incident and stated:

“So Brad was in play as he went for the ball. As I said, he actually went at pace. It was quite – it was actually running quite quickly towards the ball. The ball itself wasn’t the best kick, it was actually floating a fair bit. Brad went up for the mark and – there were other players around him but then he – as I said, he landed on the fence.”[[30]](#footnote-30)

# Mr Peacock was asked about the other players and described the plaintiff as being in front of other players. He was also asked about the size of Brook Reserve and stated:

“It’s a very large sized ground. It’s probably one of the larger that I’ve seen.”[[31]](#footnote-31)

# He described the location of the incident as “deep in the pocket.”[[32]](#footnote-32)

# He also stated in relation to the distance between the boundary line and the fence:

“There’s more room where I was standing at the coaches’ box and less room down the other end of the ground where I am there pictured in the photograph.”[[33]](#footnote-33)

# Mr Peacock was referring to the photograph taken of the plaintiff being treated immediately after the incident.[[34]](#footnote-34)

# Mr Peacock was also cross-examined by Mr Eaton QC. I noted the following matters as relevant to my determination:

* When Mr Hale was running he was at full pace,[[35]](#footnote-35) and was in front of other players, there were multiple players, probably three or four, all running in a certain direction.[[36]](#footnote-36)
* Mr Hale was the only person that had any show of marking the ball. He was a lot more elevated than the other players around him. There would have been an attempt to spoil, but “my recollection of that is Brad was quite clearly the person who was in the (box) seat to mark that ball.”[[37]](#footnote-37)
* He did not hear the umpire call the ball out of bounds or out on the full and his best recollection was that Mr Hale was not actually pushed, shoved or bumped.

# Mr Peacock could not comment meaningfully on measurements that had been taken of the boundary line. He reaffirmed his earlier statement in cross‑examination as follows:

“… Look, all I can say that is Brad was running at that ball with pace and that – to take an overhead mark, and I saw quite clearly that he hit the fence.”[[38]](#footnote-38)

# He was briefly cross-examined by Mr Norman[[39]](#footnote-39) on behalf of the third defendant and confirmed that as an official in 2009 he was aware that it was the club’s responsibility to mark the lines on the ground.

# Mr Eaton QC and Mr Rasmussen called a number of witnesses on behalf of the football entities. These witnesses included Ms Sally McNaught[[40]](#footnote-40) who in 2009 was manager of the Bellvoir Senior Football Club which played its home matches at Brook Reserve.

# Ms McNaught gave evidence that she had completed a ground inspection report on 20 June 2009, eight days prior to Mr Hale’s incident occurring. A copy of the ground inspection report signed by her was tendered in evidence.[[41]](#footnote-41) Ms McNaught also produced a DVD of the seniors football match played on that date, which was also received in evidence.[[42]](#footnote-42)

# Her evidence continued and I regarded the following matters as relevant:

* The ground inspection report would relate to a number of safety items including debris on the surface, sprinkler covers and certain other aspects.[[43]](#footnote-43)
* The inspection also included noting “is the boundary line three metres from the fencing (at all points)”.[[44]](#footnote-44)
* Ms McNaught described the main point of the regular inspection was walking around picking up rocks, stones, sticks and “just checking for the dog poo and that would be about it.” (She gave evidence that Brook Reserve was used as a dog walking park.)[[45]](#footnote-45)
* She would inspect the ground prior to a senior game each time the club played at home. This would be nine rounds during the season.
* She did not observe any changes to the boundary lines on that ground during the 2009 season.[[46]](#footnote-46)
* Ms McNaught was shown the “Near Map” photograph of the ground contained in Exhibit P3 and commented that the distance between the boundary line and the fence line in the area near the clubhouse would be:

“… from my inspections, always that would be from – between four and five metres.”[[47]](#footnote-47)

* She specifically rejected a suggestion that the distance was either 2, 2.4 or 2.5 metres stating:

“I don’t know how that could happen, because the line doesn’t change.”[[48]](#footnote-48)

# Ms McNaught’s evidence continued that apart from doing ground inspections she would be at the ground for other reasons, usually five nights per week, and in 2009 she had lived directly opposite the northern end of the ground.

# Ms McNaught agreed that the boundary line varied somewhat on the eastern side of Brook Reserve as the ground slanted up towards the playground. She did not agree that there was variance in the distance between the boundary line and the fence on the western side of the ground.

# Ms McNaught was not aware of any complaint or remonstration about the boundary line being too narrow in 2009 and had first learned of this allegation “towards the end of last year.”[[49]](#footnote-49)

# Ms McNaught had made enquiries in the week prior to the trial commencing and obtained a video of the seniors’ game taken on 20 June 2009. This included a passage where Ms McNaught’s son, who was officiating as a boundary umpire, had retrieved a ball from over the boundary line in the forward pocket area near where Mr Hale’s incident had occurred.[[50]](#footnote-50)

# After seeing the video shortly prior to the trial Ms McNaught had asked her son to pace out the distance between the line as it is presently and the fence. This she stated was four and a half to five metres, which was “similar” to that observed by her in 2009.[[51]](#footnote-51)

# Ms McNaught was cross-examined by Mr Shandell[[52]](#footnote-52) QC, who with Mr Sparrow[[53]](#footnote-53) appeared on behalf of the plaintiff, and the following evidence emerged:

* The ground inspection, certified by both Ms McNaught and the opposing team’s manager, signed off that the playing environment was fit for play, but the inspection was not done with the two walking together.[[54]](#footnote-54)
* The boundary line was marked by Mr Bourke.[[55]](#footnote-55)
* She did not know if representatives of the league had been at the ground, “Because I’m not there Sundays.”[[56]](#footnote-56)
* The video produced by her showed an area “towards the goal post end of the club rooms (southern end).”[[57]](#footnote-57)
* The section of the video showing Ms McNaught’s son retrieving the ball was on the edge of the cricket nets but was “not exactly” where the plaintiff was injured.[[58]](#footnote-58)

# In cross-examination Ms McNaught was asked a series of questions concerning the position of the boundary line if the goal posts had been moved. She agreed that the gap between the boundary line at the point of the cricket nets compared to the wing area would be reduced, but did not concede that the line would be “dangerously close to the fence.”[[59]](#footnote-59)

# In re-examination Ms McNaught was again taken to the “Near Map” photograph and stated that she did not recall any dog-leg or other deviation:

“… any of this straight line business running into the fence as put by Mr Shandell.”[[60]](#footnote-60)

# She further stated that on the eastern side of the ground the line was further out from the fence line because of an embankment basically running the whole side of that wing.[[61]](#footnote-61)

# Mr Jack Bourke, a former president and secretary of the football club was called to give evidence on behalf of the first and second defendants. He had two sons who had been involved both as juniors and seniors with the football club, and he had a lengthy involvement until ceasing his presidency in approximately 2009.

# Mr Bourke gave evidence that he had been involved in marking the ground since 2000. That included marking the boundary, the goals, the goal square and the centre markings.[[62]](#footnote-62) His evidence on this point was as follows:-

* He had marked the boundary under the requirements of the Victorian Sportmans Football League which required the boundary line to be three metres from the fence.

“… the requirement of the Victorian Football Association, under which I marked the ground, the requirements of those is that the boundary line must be three metres from the fence; must be three, and I marked the ground accordingly.”[[63]](#footnote-63)

* The distances between the goal posts and the goal and point posts was 21 feet in the old measurement, or about 6.5 metres.[[64]](#footnote-64)
* Mr Bourke was shown the “Near Map” photograph of the ground taken in 2010 and agreed that in 2009 the goal and point posts would have been moved 6.5 metres to the left from where they are shown in the photograph.[[65]](#footnote-65)
* The line marker used is about one metre long and you cannot put the machine up against the posts and go away from it.

“So from my initial marking is just to run a line directly into the point post, … - at both ends of the ground.”[[66]](#footnote-66)

* Once the initial markings are made:

“…that’s my line of sight to follow the fence around when I do the marking.”[[67]](#footnote-67)

and:

“… the luxury we’ve got at the Bellvoir ground (Brook Reserve) is that it’s a very large ground. So - I think that point post was measured at 5.1 metres (from the fence).”[[68]](#footnote-68)

* The initial straight line from the point post would be about 10 feet to taper in from the 5.1 metre distance to four and a half metres:

“That’s why the line looks so straight on the initial markings from the point posts. Otherwise I’d be 5.1 metres in all the way around … I’ve got the luxury of having a large ground.”[[69]](#footnote-69)

* On the eastern or Railway Parade side of the ground there are drainage grates visible and:

“I can move in some – you know, probably six metres on that side, seven metres from that side to take those grates out of play.”[[70]](#footnote-70)

* Mr Bourke was not specifically aware of publications relating to boundary line measurements, but:

“Well, as I understand it, all grounds that play Australian rules football come under the jurisdiction of the AFL … I follow the rules the VSFL and the VSFL stipulate it has to be three metres from the fence line.”[[71]](#footnote-71)

# Mr Bourke specifically rejected the proposition that it was his practice at the ground to mark boundaries at distances of 2.2, 2.4 or 2.5 metres from the fence. He further gave evidence that after 28 June 2009 no one approached him with a complaint or a remonstration about the boundary lines being of insufficient distance from the fence.[[72]](#footnote-72)

# When cross-examined by Mr Norman on behalf of the third defendant, Mr Bourke confirmed that it was his practice to mark the boundary by running a straight line out from the point post:

“… I do a straight line so I hit about the 4.5 metre mark from the fence and that’s where I start the arc, going around from there. Otherwise if I started it on the arc from that boundary, I would be 5.1 all the way around.”[[73]](#footnote-73)

# He agreed with the suggestion that as president of the club he had signed documentation forwarded to the council in relation to the ground occupancy agreement.[[74]](#footnote-74) He specifically agreed with the proposition that the documentation signed by him included the following:

“The duly-elected officials of the Bellvoir Football Club seniors have read all conditions included with the Beachfront City Council Sports Facility Policy conditions of occupancy and fully understand their meaning. The organisation agrees to abide by all of the conditions.”[[75]](#footnote-75)

# He did not recall specifically if the sports facility policy was attached and could not say whether it was the 2004 policy or the 2006 policy.[[76]](#footnote-76)

# Mr Bourke agreed that during the 2008 and 2009 football seasons the ground was refurbished and:

“It was the surface, it was the irrigation, it was the drainage, it was the contours …”[[77]](#footnote-77)

# Mr Bourke agreed that at that time new sleeves were put in on the ground, the sleeves that hold the goal posts and behind posts.

# He did not have any input as to where they went into the ground. He did not know whether they were in a different place to where they had been prior to the refurbishment, but stated:

“… I would say they were very, very close to where they were in the 2007 season.”[[78]](#footnote-78)

# Mr Bourke agreed that he had attended at Brook Reserve before a view had been held and had measured a distance of 4.8 metres from the goal posts sleeve to the fence:

“… a rough measurement and my rough measurement is a pointy stick and I go into the ground until I hear the metal, so I measured it at 4.6 and I believe the council measured it at 5.1.” (In response to my question Mr Bourke corrected his measurement to 4.8 metres)[[79]](#footnote-79)

# Mr Bourke stated that to his knowledge the sleeves holding the posts had not been re-positioned since the date of Mr Hale’s incident occurring in 2009.[[80]](#footnote-80)

# When cross-examined by Mr Shandell QC I found the following evidence to be relevant to factual issues:

* Mr Bourke was aware of council representatives checking the position of the point posts shortly prior to the hearing, but had made his own measurement of 4.8 metres from the fence weeks before.[[81]](#footnote-81)
* He had marked the boundary line further in to the oval on the eastern side of the ground to keep away from drainage grates.[[82]](#footnote-82)
* The grates on the western side are closer to the fence than they are on the Railway Parade side by about one metre, which is why there is a difference.[[83]](#footnote-83)
* He agreed writing to the council before the season started enquiring as to moving the goal posts to change the size of the ground.[[84]](#footnote-84)
* He did not specifically remember seeing an AFL document relevant to the boundary line and markings.[[85]](#footnote-85)
* Mr Bourke stated that he marked the ground under the jurisdiction of the VSFL which was under the jurisdiction of the AFL.[[86]](#footnote-86)
* The VSFL say not less than three metres and Mr Bourke assumed that was not less than three metres, but more than. He marked the boundary at 4.5 metres so that he would keep a metre and a half clear from the grates.[[87]](#footnote-87)
* With other use of the Brook Reserve by jogging or similar, he had the luxury of coming in or going out 400 millimetres with the boundary and agreed that he could go out 5 metres from the fence if he wanted to.[[88]](#footnote-88)
* In marking the ground he would go straight out from the point posts until he hit the 4.5 metre mark and then start his contour line around the boundary. He would mark this 4.5 metre point with a spray marker on the ground.[[89]](#footnote-89)
* He agreed he had recently measured the ground as he was curious that someone had marked distances of 2.4 or 2.5 metres near the visitor’s entry race and Mr Bourke wanted to see from a straight line where he would have had to mark the boundary in such a case.[[90]](#footnote-90)
* The contact person at the council in relation to the ground occupancy was Walter Patrick.[[91]](#footnote-91)
* When shown email correspondence contained in Exhibit P1 concerning the request to move the goal posts, Mr Bourke stated of the council:

“… they are the custodian of the ground and they’ll do what they want to do. We just work with them and liaise with them in good faith.”[[92]](#footnote-92)

* Mr Bourke commented that he had written to the council suggesting that as the AFL had minimum and maximum ground sizes:

“… we perhaps should look at the AFL offering and to bring the ground in accordance with that.”[[93]](#footnote-93)

* He agreed that that would have taken the drains out of the equation, and if there had been a problem with the fence known to him it would have possibly taken that out of the equation as well.[[94]](#footnote-94)
* He commented that the email was not specifically written with the drains in mind, but rather because of the ground size, but further stated that before the ground renovation, “we never had drains before on the ground.”[[95]](#footnote-95)
* The ground renovation in 2008 was a total renovation with no possibility for the goal post sleeves to have remained there during the process. Mr Bourke agreed that in February 2009 he had in effect “a brand new footy ground.”[[96]](#footnote-96)
* He agreed that he had signed off on the ground allocation document[[97]](#footnote-97) agreeing that he had read all the conditions and fully understood their meaning. But was unaware that anywhere included in those documents had been a risk management policy sent by the council.[[98]](#footnote-98)
* The junior teams played under the auspices of the Regional Southern Junior Football League, this included the Under 17s.[[99]](#footnote-99)

# Mr Bourke was asked a number of questions relating to the representatives of the second defendant, which was the league in which the junior teams played. He deferred the questions to a subsequent witness, Mr Richard Terrier, who was the junior president of the club at that time.

# To his knowledge no representative of council nor the league inspected the boundary line prior to the first game in 2009.[[100]](#footnote-100)

# Mr Bourke was adamant about the evidence he had given concerning the distance of the boundary line from the fence, but did agree with the proposition that if the evidence established that a boy had gone for a mark inside the ground and landed on the fence on the full, the boundary line would be too close.[[101]](#footnote-101)

# In re-examination Mr Bourke was taken to the Beachfront Council’s Sports Facility Policy[[102]](#footnote-102) and directed to the section dealing with inspections. He gave evidence that there had never been any contact or notification from an officer or employee of the council during 2009 that there would be an inspection. His evidence was that if he raised an issue with council, he would go to the ground to resolve that particular issue.[[103]](#footnote-103) He denied that any officer had attended the ground at the beginning, middle or completion of the season.[[104]](#footnote-104)

# He also confirmed, by reference to the “Near Map” photograph forming part of Exhibit P1, that in the year prior to that photograph being taken (i.e. 2009) the goal and point posts would have been aligned further to the west.

# He also stated in re-examination that he ultimately had no concern with the positioning of the goal posts as they were ultimately installed in 2009.[[105]](#footnote-105)

# In response to a question from me, he stated that the fence around Brook Reserve had not been removed while the ground was being renovated during the 2008 season. He further gave evidence that the metal gates near the cricket practice wickets had not been changed for 20 to 30 years.[[106]](#footnote-106)

# Further evidence was given on behalf of the club by Mr Richard Terrier, the junior president in 2009. He had no direct role in the marking of the ground at Brook Reserve, but performed a similar role at the club’s other ground at Ronald McGregor Reserve.

# Mr Terrier was president of the junior club from 2007 to 2010 and had previously been treasurer for seven years prior to that time. He stated in evidence that he had marked the lines on Ronald McGregor Reserve in Black Rock every Saturday morning and had continued to perform that role until last year.[[107]](#footnote-107)

# He stated that the boundary was marked approximately four metres from the fence at Ronald McGregor Reserve and he would stride out that distance.[[108]](#footnote-108)

# Mr Terrier further stated that he was very familiar with the Brook Reserve ground and was asked to estimate the distance between the boundary at the fence near the cricket practice nets in June 2009. He estimated this distance at four and a half metres. In particular he stated:

“I know where the boundary has been over a number of years. Last week I went and measured the distance from, firstly, the goalpost to the fence, which was about five and a half of my strides or five and a half metres. … From the goal post.”[[109]](#footnote-109)

# He then measured from the fence to:

“… where I know the boundary to have been, I believe to be four and a half metres and certainly wider than I knew the Black Rock boundary to be.”[[110]](#footnote-110)

# His evidence continued stating there were no complaints from opposition players or umpires in 2009 concerning the distance between the boundary and the fence either at the point near the cricket practice nets or any other point of the ground.[[111]](#footnote-111)

# Mr Terrier stated that as the father of sons who had played football, he had visited a number of other junior football grounds which he estimated at approximately 40. When asked to make a comparison he stated:

“I would suggest that the boundary at Brook Reserve would be wider than most, given the size of the ground.”[[112]](#footnote-112)

# Mr Terrier was taken to the Junior Football Club Ground Application which had been submitted under his signature.[[113]](#footnote-113) He confirmed that in the period between 2000 to 2009 he was never invited to an inspection with the council.[[114]](#footnote-114) He was also taken to parts of the Beachfront City Council’s Sports Facility Policy document[[115]](#footnote-115) and confirmed that he had never been given any education or training from the council on the topic of ground maintenance.[[116]](#footnote-116) He also stated that he had not seen the council’s Risk Management Policy.[[117]](#footnote-117)

# Mr Terrier also gave evidence that he had not been sent a copy of the ground risk assessment form said to have been provided by the council.[[118]](#footnote-118)

# Mr Terrier also confirmed that he had a very close relationship with the general manager of the league and also the president of the league. He stated that where there were issues:

“… we would raise them with the league, discuss them and generally solve them.”[[119]](#footnote-119)

# Mr Terrier referred to representatives of the league attending games stating:

“They did from time to time on an irregular basis, either as umpires/observers or as MSJFL, as they were at that time at the time, executive.”[[120]](#footnote-120)

# In response to questions put by me, Mr Terrier stated that the junior club had 23 teams and was “one of the largest clubs, if not the largest.[[121]](#footnote-121)

# Mr Terrier was cross-examined initially by Mr Norman on behalf of the council. I regarded the following matters as relevant to my determination:

* The usage applications for the seniors and juniors went in together because the club is actually one incorporated association.[[122]](#footnote-122)
* The senior application referred to a Risk Management Plan to which Mr Terrier was directed.[[123]](#footnote-123)
* Mr Terrier agreed that the junior application contained a passage:

“The duly elected officials of the Bellvoir Football Club junior section have read all the conditions included with the Beachfront City Council Sports Facility Policy conditions of occupancy and fully understand their meaning.”[[124]](#footnote-124)

* Mr Terrier was unaware of any occasion where council had interfered with lines marked by the club.[[125]](#footnote-125)
* Mr Terrier was referred to a section of the council’s Sports Facility Policy dated February 2006 and agreed that the section relating to ground marking was the same as in the earlier policy.[[126]](#footnote-126)
* He was not made aware of any inspection of the grounds or pavilions by council officers at the beginning, middle or completion of the season as stated in the Sports Facility Policy document.[[127]](#footnote-127)
* Mr Terrier agreed that his club did not contact the council to participate in any inspection.[[128]](#footnote-128)
* He further agreed that the contact at the club was Mr Bourke through the senior club rather than direct correspondence being sent to the juniors.[[129]](#footnote-129)
* The mail would go to a post office box and would be distributed as required by the club secretary.[[130]](#footnote-130)
* Mr Terrier confirmed with Mr Norman that his recent measurements of the boundary at Brook Reserve were taken from the second goal post from the western end of the ground and was paced out at five and a half metres.[[131]](#footnote-131)

# Mr Terrier was then cross-examined by Mr Shandell QC for the plaintiff. Once again I noted the following matters as relevant to the issues:

* The recent measurement pacing between the goal post and the fence was the only measurement Mr Terrier had made.[[132]](#footnote-132)
* He first heard about the plaintiff’s injury on the Sunday night, “I heard he had had a collision with the fence.”[[133]](#footnote-133)
* There was a fund-raising event for the plaintiff but no committee meeting concerning his injury.[[134]](#footnote-134)
* Mr Terrier agreed that Ronald McGregor Reserve was an unusual ground, “it’s a tight little ground.” In marking it he would start from the point post on a continuous curve maintaining a distance away from the fence which is equal to the distance from the fence at the point posts.[[135]](#footnote-135) (Mr Terrier later corrected this stating that there would be a very small straight line out from the point post indicating a distance of about 9 inches)
* When asked about the procedure for marking the line he agreed that at Ronald McGregor Reserve, doing it the way he did, was the way to guarantee that the line will stay equidistant from the fence. He disagreed that in the football season the boundary line was almost six metres from the fence stating, “I believe it’s closer to the fence than that,” but he had not measured it.[[136]](#footnote-136)
* To the proposition that the goal post and boundary line is in excess of eight metres from the fence at the Hampton Rovers’ ground, he responded that he had not seen the ground since it had been renovated and could not comment. He later stated that he had last seen the ground probably in 2011 before it had been renovated.[[137]](#footnote-137)
* The Bellvoir ground (Brook Reserve) was significantly bigger than Ronald McGregor Reserve and there was ample room to run the boundary line from the goal posts through the point posts and start on a continuous curve that would keep it four and a half metres or four and a half or five paces away from the boundary line.[[138]](#footnote-138)
* If the boundary at Banksia had been marked in that way then an accident with a player landing on a fence while attempting to mark would be unlikely.[[139]](#footnote-139)
* He agreed that at Brook Reserve the point post was approximately five metres from the fence and the line (marking the boundary) “runs in a straight line from the point post out a couple of metres.”[[140]](#footnote-140)
* He agreed with the proposition that if the boundary line was a continuous curve it would stay approximately five metres from the fence all the way round, exactly as it was done at Ronald McGregor Reserve.[[141]](#footnote-141)

# Mr Terrier was asked questions concerning the responsibilities of being junior president at the club and also concerning the role of the league. He agreed with the proposition that if the league had chosen to come and examine the ground, the distance between the goal posts to the fence, the boundary line and the fence, then there might have been an opportunity for someone to have a second look at the line marker’s work.[[142]](#footnote-142)

# He further agreed that he believed the league specified the distance between a boundary line and a fence in that competition to be three and a half metres.[[143]](#footnote-143)

# He did not measure the distance between the boundary line at the fence before the start of the junior season:

“It wasn’t measured specifically because the requirement of the seniors is greater than the requirement of the juniors.”[[144]](#footnote-144)

# He believed the senior requirement was a distance of four metres.[[145]](#footnote-145)

# Mr Terrier agreed with the proposition that the council provide the ground:

“… for which you pay a fee, and in return they give you some goalposts and you do the line marking.”[[146]](#footnote-146)

# He further agreed that the council did not inspect the ground (referring specifically to Ronald McGregor Oval).[[147]](#footnote-147)

# Mr Terrier was asked about the council’s Risk Management Policy.[[148]](#footnote-148) He stated that this policy was not brought to his attention in 2009.[[149]](#footnote-149) He further agreed that he was not aware of any information night or similar presentation to sporting clubs.[[150]](#footnote-150)

# When asked about an agenda item at the 2008 AGM concerning the ground size and movement of the boundaries and goal posts, Mr Terrier replied, “The size of the ground was left to the senior club.”[[151]](#footnote-151) He did not specifically remember this item being discussed.

# In response to my question Mr Terrier explained that when Brook Reserve as being used by junior teams the ground would be divided in half for the Under 9s and Under 10s. The Under 11s and upwards would play on the full size ground.[[152]](#footnote-152)

# When questioned about the junior league in 2009 Mr Terrier advised that the club played under the South Regional Junior Football League in that year and there would have been bylaws. He stated that he had seen a document dictating that the boundary line would be a minimum of 3.5 metres from the fence.[[153]](#footnote-153)

# When re-examined by Mr Rasmussen, Mr Terrier was taken to the council’s Sports Facility Policy dated February 2006, which was then tendered as an exhibit.[[154]](#footnote-154) He confirmed that was when he had paced out the distance between the fence and the boundary line near the cricket nets at five and a half paces. This was done near a yellow or orange mark painted on the fence.[[155]](#footnote-155)

# Mr Terrier also stated that he had watched a number of junior games from in front of the pavilion and stated:

“In junior football the play gets sucked into that area of the ground quite regularly … I believe the boundary line to have been where it always was, which was in my opinion about four and a half metres from the fence.[[156]](#footnote-156)

# Finally in response to my question Mr Terrier agreed that in marking the grounds there would be a great deal of common sense in thinking about where the boundary line was actually marked. He expected that Mr Bourke would also display a great deal of common sense in the marking that he had made.[[157]](#footnote-157)

# The final witness called on the question of liability was Mr David Coulson who was an employee of the third defendant and currently its Parks Management officer. He had been with the City of Beachfront for some 18 years and was responsible for supervising a number of other parks officers employed by the council. In 2009 he thought there were two other officers directly under his supervision.[[158]](#footnote-158)

# Although Mr Coulson was employed by the third defendant, he was called to give evidence by Mr Eaton QC on behalf of the first and second defendants. I noted the following matters from his evidence in chief as relevant to my decision:

* He was shown a document relating to the grounds inspection to be undertaken on behalf of the council.[[159]](#footnote-159)
* He believed this document had been created by the City of Westport in the early 2000s due to drought conditions:

“They have a particular problem with hardness and cracks and the like, so they would develop this tool to monitor the progress or the decline really of grounds.”[[160]](#footnote-160)

* That inspection document had been adopted by the Beachfront Council from approximately 2002.[[161]](#footnote-161)
* The form was modified in its usage by the third defendant so that the item shown on the form, “Check and measure boundary markings to compliance with Association regulations/guidelines – random check,” was not carried out in the years up to 2010, at which time the form was changed so that in 2011 and 2012 such wording no longer appeared on it.[[162]](#footnote-162)
* Mr Coulson identified a further part of the exhibit as showing inspection being conducted at Brook Reserve on behalf of the council in March, April, May and June 2009, but such inspection did not include boundary lines or fences.[[163]](#footnote-163)
* Mr Coulson was taken to the council’s Sports Facility Policy in relation to training and developing skills and was unaware of any direct training given to clubs on ground maintenance.[[164]](#footnote-164)
* He was similarly unaware of whether there was any such training to do with boundary markings and safe distance.[[165]](#footnote-165)

# Mr Coulson was then cross-examined by Mr Shandell QC. I noted the following matters as relevant to my determination.

* Beachfront Council had responsibility for 18 AFL football grounds.[[166]](#footnote-166)
* Turf cricket pitches could be dangerous in a football ground if players hit their head when tackled.[[167]](#footnote-167)
* The council would make sure that the turf pitches at various ovals were transferred from cricket to football season and vice versa at the start and end of each season.[[168]](#footnote-168)
* Mr Coulson agreed that the check list derived from the City of Westport had provision for holes of more than 20 centimetres or rabbit markings or similar, and provision for a pitch to be covered. He further agreed that two items that would impact on anyone running into them were the fence and the goal posts.[[169]](#footnote-169)
* The council does not put padding on the goal posts, but only puts in the goal posts. “We have no influence whether the club pads them or not.”[[170]](#footnote-170)
* Padding is removed by the clubs, “otherwise they get stolen.”[[171]](#footnote-171)
* The risk of a young player running into a goal post or a boundary line being too close to the fence are not matters that the council actually checks, “we don’t set the boundary lines.”[[172]](#footnote-172)
* The City of Beachfront did not use the section in the Westport document stating:

“Check and measure the boundary markings to compliance with association regulations/guidelines – random check.”[[173]](#footnote-173)

* Mr Coulson agreed that if a boundary line was very close to a mesh immovable fence that could be dangerous.[[174]](#footnote-174)
* There was no Parks Management procedure or policy which would protect users of a football ground from a boundary line that was too close to the fence.[[175]](#footnote-175)
* Mr Coulson was not familiar with the council’s Risk Management Policy, “Not in detail, no.”[[176]](#footnote-176)

# Mr Coulson was then cross-examined by Mr Norman on behalf of the council. I noted the following evidence as relevant to my determination.

* The council has different departments with different responsibilities. Mr Coulson’s role included overseeing the maintenance of Brook Reserve.[[177]](#footnote-177)
* Contractors did the actual work and Mr Coulson’s job was to make sure they were doing their job properly.[[178]](#footnote-178)
* The Westport document is completed each month and is used to produce a rating for the various grounds.[[179]](#footnote-179)
* There was no “score” in the Westport document relating to boundary marking, signage, fences or light towers. They were not used by the council as “they were irrelevant to our purposes.”[[180]](#footnote-180)
* The council had control, management or ownership of 42 sports grounds for AFL football, soccer, baseball and rugby.[[181]](#footnote-181)
* The ground users all do their own line marking. An estimate of council taking over this role would be $40,000 in initial costs and an ongoing cost of around $150,000 per year.[[182]](#footnote-182)
* Mr Coulson played no role in the ground allocations in 2009. He believed it was Mr Walter Patrick at that time. Mr Patrick has not been with the council for maybe six or seven years.[[183]](#footnote-183)
* Mr Coulson would visit Brook Reserve and walk the ground probably once or twice a month. During the football season he would not have focused on the position of the boundary line.[[184]](#footnote-184)
* Mr Coulson did play a role in the development of the ground inspection document where the references to boundary marking, signage, fences and light towers were taken out,

“Because they were superfluous to our needs. We didn’t use those sections at all.”[[185]](#footnote-185)

# Mr Coulson was re-examined by Mr Eaton QC. I noted as relevant the following evidence:

* He was unaware of any other persons within the council who had been asked to inspect the boundary line.[[186]](#footnote-186)
* He knew the risk management policy existed but he was not familiar with it.[[187]](#footnote-187)
* In relation to walking the ground he agreed that he would do it, or one of his subordinates or a Citywide operative. When he walked the ground:

“I would try and cover the whole ground … We would go near them (the boundary line areas) … traverse or look at the ground, look at the goal squares and the like.

And the centre squares, that sort of thing? Yes.”[[188]](#footnote-188)

* He agreed he would walk near the pavilion:

“… we would walk that area and observe that area. And the boundary lines would be there to be seen.”[[189]](#footnote-189)

* Mr Coulson did not believe the ground was marked on a Friday.

“I think they mark it on a Saturday so that the markings may or may not be there, still there. They usually are.”[[190]](#footnote-190)

The submissions in relation to liability

# Mr Norman on behalf of the council essentially submitted that the evidence did not support a finding of a breach of duty on behalf of either the council or indeed the other two defendants. I was provided with a written outline of submissions and it is prudent to set out, at least in skeletal form, the relevant matters which were addressed by Mr Norman.

# The council or their contractors put the goal posts into the ground at the start of every season.

# The club had not had any problems with placement of the sleeves.

# The western-most sleeve at the southern end of the ground had been measured at being 4.8 metres from the boundary fence.

# The sleeves had remained in the same place since their installation in early 2009.

# No complaint had ever been made to Mr Bourke or others at the club that the boundary line was positioned too close to the fence. Mr Bourke’s evidence, supported largely by Mr Terrier and Ms McNaught, was that the line marking the boundary would profile the fence at a distance of 4.5 metres.

# The overwhelming evidence supported a finding that the boundary line was placed at a distance in excess of the minimum distance of 3 metres recommended by both the VSFL and AFL.

# There was no submission that Mr Hale was in any way untruthful, but his evidence was probably unreliable as being reconstructed.

# The evidence of the witnesses Collins[[191]](#footnote-191), Collie[[192]](#footnote-192) and McNally[[193]](#footnote-193), together with the absence of any recorded complaints before or after the incident, militated against a finding that the boundary line was too close to the fence so as to constitute a breach of duty by the third defendant or indeed any defendant.

# Mr Norman made further submissions in relation to the nature of the duty owed by council, and particularly questions concerning the delegation of this duty. The following matters were put in support of the third defendant’s submission.

# The relationship between the council and the plaintiff was not of a special nature and there was no non-delegable duty created by the relationship.

# Any duty owed by the council to the plaintiff could be delegated in the circumstances to the football club.

# The duty of care owed by the council was a duty to persons entering the premises (Brook Reserve). The duty owed was as “an owner, at times an occupier and manager of the premises”.[[194]](#footnote-194)

# The council was able to discharge its duty by delegating it to the football club. The position of the boundary line and its placement in relation to the fence and any duty relating to that marking was delegated to the club.

# The football club president and senior football manager both acknowledged that the boundary line markings were the club’s responsibility.

# Mr Norman referred to *Central Goldfields Shire v Haley & Ors*[[195]](#footnote-195) and *Cehner v Borg & Ors*[[196]](#footnote-196) in support of the proposition that the duty of care created by s14B(3) of the *Wrongs Act* 1958 was an ordinary or general duty of care and not a special non-delegable duty. I was further referred to High Court authorities in *Northern Sandblasting Pty Ltd v Harris*[[197]](#footnote-197) and *Jones v Bartlett*[[198]](#footnote-198) in support of that proposition.

# Mr Norman sought to distinguish the position of the Beachfront Council in the present case from the position of Deakin University in *Karatjas v Deakin University*[[199]](#footnote-199) where it was found that the circumstances of that case established that the university had retained a degree of control over relevant premises. Mr Norman submitted that such control was absent in the present case.

# The submissions on behalf of the third defendant addressed matters concerning contributory negligence and the assessment of damages. At this stage, it is unnecessary to refer to those aspects of the closing address.

# Mr Eaton QC, on behalf of the first and second defendants, submitted that the football club had not only complied with accepted minimum standards, but had complied “with an increased level of the minimum standard which, by definition, we would submit is safe in the circumstances”.[[200]](#footnote-200)

# Mr Eaton QC emphasised in his submission that there was no suggestion that the standard which had been applied was inappropriate or inapplicable for this type of ground. He emphasised the size of the football club, the number of players and the absence of any report or any similar circumstance occurring over many years.

# The evidence did not establish with any conviction the place where the incident occurred and Mr Eaton QC submitted that the position where photographs had been taken near the visiting team’s race strongly suggested a reconstruction of Mr Hale’s evidence impacting upon its reliability. Notwithstanding the forthright manner in which the various witnesses had given their evidence, the plaintiff’s case is such that there is simply no evidence to identify the distance between the fence and the boundary line. Had that distance only been somewhere between 2 and 2.5 metres, Mr Eaton QC submitted, it was highly improbable that none of the lay witnesses would have appreciated that there was something wrong with the boundary line and given evidence in support of the plaintiff’s claim.

# This submission was put in relation to the evidence given on behalf of the plaintiff by Mr Morley[[201]](#footnote-201) and Mr Peacock and also in relation to the plaintiff’s father, who had made no recorded complaint concerning the boundary line. Mr Eaton QC submitted that any obvious problem would have been noted additionally by Mr Bourke, Ms McNaught or Mr Terrier, yet there was an absence of any supportive evidence on this central point.

# In further support of this proposition, Mr Eaton QC submitted that the evidence was that a boundary line in the relevant area had generally been marked in the same manner since approximately 2000 and has continued up to the present time. The absence of any other injury, complaint or anything to do with the position of the boundary line and its appropriateness should lead the Court to conclude that there was nothing inappropriate or unusual about its placement at the time of Mr Hale’s incident.

# Further submissions were made as to the speculative nature of any finding which could be made relevant to the position of the plaintiff relative to the marked boundary line when he attempted to mark the football. After a careful review of the evidence given by Mr Morley and Mr Peacock in particular, he submitted that there was little support for the proposition advanced by the plaintiff. He referred to Mr Walker’s evidence, noting that it was supportive of the plaintiff, but submitted that his evidence was given in circumstances where he had stated that he had literally arrived as the incident occurred, which could well explain why his evidence differed significantly from that given by Mr Morley or Mr Peacock. Mr Eaton QC additionally raised the potential of there being contact with other players shortly prior to the incident, and made reference to the plaintiff’s answers to interrogatories on this point which had differed from his oral evidence.

# The submission made by the first and second defendants urged the court to accept the evidence of the witnesses Collins, Collie and McNally in particular, and to conclude that the plaintiff had not discharged his onus of demonstrating that the boundary line was less than three metres from the fence at the relevant point.

# The first and secondnamed defendants made further submissions in relation to contributory negligence and quantum, to which it is not necessary to refer at this stage.

# Mr Shandell QC, on behalf of the plaintiff, submitted that the evidence supported the proposition that the plaintiff had attempted to take a mark at or near the boundary line and landed on the fence, the boundary line must have been too close to the boundary fence, and thus it was evidence of a breach of duty on behalf of the defendants.

# Mr Shandell QC further submitted that the only obvious risks of injury, apart from those involving contact with another player, were the risks of a young footballer colliding with the goal posts or with the boundary fence. He was critical of the absence of any attempt being made, particularly on behalf of the third defendant, to identify such a hazard at Brook Reserve. Mr Shandell QC made reference to the fact that the third defendant had omitted parts of the checklist it had adopted from the Westport document relevant to checking boundary signage and measurement of the boundary line. He was therefore not critical in particular of Mr Coulson, stating that Mr Coulson had no real opportunity to see if there was a problem with the boundary line because the City of Beachfront had not instructed him to do so.

# Mr Shandell QC submitted that the distance between the fence and the boundary line was a risk which was neither farfetched nor fanciful, and could have simply been rectified if any of the defendants had done an appropriate risk assessment. He made reference to the practice adopted by Mr Terrier at another reserve nearby where the boundary line followed a profile of the fence from a distance only some 9 inches out from the behind post, whereas the evidence of Mr Bourke was that he had drawn a straight line out from the behind post until he reached a distance of 4.5 metres from the boundary fence and then commenced to follow the profile.

# Although the submissions on behalf of the plaintiff did not directly attack the credit of Mr Bourke nor indeed the other witnesses called by the respective defendants, Mr Shandell QC was critical of the reliability of Mr Bourke in particular, referring to an admission made by him in evidence that he had gone out to the ground during the trial to check his measurements, thus indicating a degree of uncertainty as to where the boundary line was marked in 2009.

# Although Mr Shandell QC placed no reliance upon the email sent by the club to the council concerning the placement of the goal posts, he submitted that this email was at least indicative of the relatively large size of Brook Reserve and the inference that the goal posts, and therefore the boundary line, did not need to be as close to the fence as they were in fact located during the 2009 season.

# Mr Shandell QC concluded his submissions in relation to liability by restating the duty owed by each defendant as an occupier, as set out in the *Wrongs Act*. He submitted that each of the defendants owed to the plaintiff a duty to take such care as ought to be taken in the circumstances to ensure that the premises and the state of the premises, and things done or omitted to be done on the premises, ought not injure the plaintiff. He submitted that the collective breach by the defendants in this regard was palpable and clearly made out in this case.

# Once again there were further submissions made in relation to contributory negligence and quantum, to which it is unnecessary to refer at this stage.

Analysis

# There is no issue between the parties that the defendants owed to the plaintiff a general duty of care such as was codified in the occupiers’ liability provisions of the *Wrongs Act 1958*.[[202]](#footnote-202)

# The submissions by Mr Eaton QC raised the question of foreseeability emphasising that there had been no history of any similar incident prior to 2009, nor since the incident involving the plaintiff. Mr Eaton QC submitted that the incident was so remote as to be far-fetched or fanciful and any duty of care owed by the first and second defendants would not extend to this incident. Whilst I agree that there had been no similar incident involving injury, it seems to me that the presence of a rigid metal fence abutting an area where active sporting contests involving young persons were being played, is an obvious risk to be taken into account when boundary markings are laid down. This is particularly so having regard to the nature of the sport of Australian football which frequently requires players to run at or near full pace in order to take possession of the ball which would otherwise go out of play. The presence of a rigid metal and mesh fence close to the boundary line presents, in my assessment, a very similar hazard to that of an unprotected goal or behind post. As Mr Shandell QC raised in cross-examination of several witnesses, the only objects on a football field presenting a hazard to players would be the goal and behind posts and the surrounding fence. I am not satisfied that the risk of injury to the plaintiff was far-fetched or fanciful.

# The first and second defendants, having jointly defended the plaintiff’s proceeding, agree that any breach of duty found against either the first or second defendant would be accepted as a breach by the other defendant.

# The third defendant made particular reference to the delegable nature of the duty of care, and specifically relied on the documentation in relation to Brook Reserve and its use by the first defendant.

Has the plaintiff established a breach of duty by any or all of the defendants?

# There is no doubt, on the evidence, that the plaintiff had suffered injury after colliding with the boundary fence following an attempt to mark a football during the course of a game. Sadly, that is probably the extent of the factual findings to be made in this case that is not in dispute.

# A simplistic approach in this case would be to adopt the principal submission made on behalf of the plaintiff that the fact of the incident occurring is of itself proof that the boundary line was too close to the fence and thus evidence of a breach of duty. This would be incorrect in law.

# The plaintiff accepts that he must prove not only that the incident occurred, but that the boundary line at or near the place of the incident was at a distance less than three metres from the fence, being the minimum standard applicable for a local ground conducting games of AFL football. Mr Eaton QC, on behalf of the first and second defendant, submitted that if such a finding could not be made, then the plaintiff’s claim must fail. Mr Shandell QC made reference repeatedly to the large size of the particular ground, and also made reference to the fact that it had been effectively reconstructed following the 2008 football season, and that the 2009 season during which the plaintiff was injured was the first occasion that the ground had been used after extensive changes including the installation of new drainage facilities.

# The first defendant was certainly aware of the new drainage, and the email sent by the club to the third defendant in 2008 is supportive of the proposition that the club had considered potential risks by reason of the new drainage grates, although the particular concern related to the eastern side of the ground and not the south-west portion where Mr Hale’s injury occurred.

# There was no oral evidence advanced on behalf of the plaintiff which would enable me to conclude that at the time of this incident the boundary line had been placed at a distance less than the minimum required of three metres from the fence. Further, the absence of any complaint to the club representatives in particular, and the absence of any evidence called by other participants or officials in the particular game, does not assist me to reach any conclusion in favour of the plaintiff on that critical point.

# Additionally, the evidence called on behalf of the defendants (from Mr Bourke in particular), is strongly supportive of a finding that the boundary line was well in excess of 3 metres from the fence and probably somewhere in the order of 4.5 metres from the fence at the point on the ground where the incident occurred.

# Nevertheless there is some evidence which does enable me to reach a positive conclusion as to the likely distance between the marked boundary line and the fence at the time of the incident occurring in 2009. The “Near Map” photograph, being photograph 2 forming part if Exhibit P3, enables me to make observations as to the relative distance of the boundary line in the area of the goals and the boundary line in the area of the southern pockets of the ground relative to the boundary fence as in 2010.

# The evidence of Mr Bourke was that he had done a rough measurement of the distance between the goal or point posts and the fence at 4.8 metres. He had also observed the “council” measuring it with a metal detector at a distance of 5.1 metres.[[203]](#footnote-203) He also confirmed that the position of the goal posts and behind posts when recently measured were in the same spot as they had been in 2009.[[204]](#footnote-204) This distance can be measured on the photograph at 9.5 millimetres.

# The photograph taken in 2010 clearly shows a lesser distance between the boundary line at the fence at or near the cricket practice wickets areas. I have measured it at 7 millimetres. Further west on the 2010 photograph between the wing and half forward flank on the ground the distance between the boundary line and the fence narrows to a measured distance of 5 millimetres.

# If I accept the largest distance measured between the goal post and the fence at 5.1 metres, and note this is measurable on the photograph at 9.5 millimetres, then a measured distance of 7 millimetres near the cricket practice area would indicate that the distance at that point is just over 3.75 metres. The narrowest point I have observed on the 2010 photograph on the western side of the ground is measurable at 5 millimetres, which would calculate at an actual distance between the fence and the boundary line of 2.68 metres at that point.

# The unchallenged evidence in this case is that the goals were moved laterally each season by a distance of one goal square, so as to protect the surface of the ground in that area. Therefore in the 2009 season the goals would have been aligned the distance of one goal width[[205]](#footnote-205) further to the west.

# Further observations of the “Near Map” photograph show that the boundary line in the south-eastern quadrant of the ground varies in its measurable distance from the observable fence line between 4.5 millimetres at its narrowest point close to the eastern-most behind post to 8 millimetres between the wing and half forward flank area. I note the evidence revealed that there were newly installed drainage grates on that portion of the oval.

# The distance measurable on the south-eastern quadrant of the oval at a point opposite the cricket practice net area in the south-western quadrant shows the boundary line to be a distance of 5 millimetres, measured from the fence. This makes the marked boundary line was slightly less than 2.7 metres from the fence.

# On the basis of the observations that can be made from the exhibit, I am able to conclude that in 2010 the boundary line was at certain points of the ground a lesser distance than 3 metres from the fence. This is not probative of the actual location of the boundary line relative to the fence in 2009. It does however cast doubt on the accuracy, and indeed the reliability of Mr Bourke’s evidence as to the manner in which he did mark the boundary line.

# In relation to the 2009 boundary line position I am satisfied that the goal posts were located further to the west by a distance of 6.5 metres than as shown in the exhibit. Assuming that the boundary line was marked in the same manner as it had been done by Mr Bourke in previous years, it is likely that the overall distance of the boundary line on the eastern side of the ground would be slightly further to the west (away from the drainage grates) and conversely the boundary line on the western side of the ground would be closer to the fence than as shown in the 2010 photograph. There is no evidence to satisfy me that the point at which the incident occurred was necessarily at the point where the distance between the boundary and the fence was at its narrowest. As a matter of probability I am satisfied that the distance between the fence would have been as shown on the photograph at the point directly opposite the cricket practice wicket area at the southern end of the ground. That is a distance I have measured at 5 millimetres on the photograph, which equates to 2.68 metres.

# If the distance between the goal post and the fence was in fact 4.8 metres, as measured by Mr Bourke, then the calculable distance between the boundary line and the fence at the point where the incident occurred would have been 2.52 metres.

# I am therefore satisfied on the balance of probabilities that the distance between the marked boundary line and the fence with which the plaintiff came into collision was at the time of the incident a distance significantly less than the mandated league minimum of 3 metres.

# I accept the evidence that the sleeves in which the goal and behind posts were placed at the southern end of the ground remained in 2009 as they had been in previous seasons. I also accept the evidence that measurements taken from those sleeves to the fence varied between 5.1 metres and 4.8 metres.[[206]](#footnote-206) This is consistent with the curve of the fence producing a slight variance in the distance between the fence and the goal and behind posts (depending on which sleeve was used to measure the distance).

# I am fortified in my conclusion as to the likely circumstances of the incident by evidence of Mr Morley, Mr Walker, and Mr Peacock, and reach the following conclusions:

# The plaintiff was probably attempting to mark a football kicked into the south-west forward pocket area, which was more likely than not in the field of play at the time the plaintiff attempted to mark.

# The absence of any evidence concerning an umpire’s whistle or call that the ball was out of play or out of bounds reinforces my conclusion as to the accuracy of the evidence given by the lay witnesses mentioned above.

# The collision with the fence occurred during the attempt by the plaintiff to mark the football, and was not as a matter of probability occasioned by him being bumped or pushed by another player. (Again, the absence of any evidence concerning complaints or protest as to another player’s conduct is supportive of my conclusion.)

# The fact that the plaintiff, in the course of attempting to mark, landed on the fence, is strongly suggestive of an inadequate distance between the boundary line and the surrounding fence at the point where the incident occurred. This is supported by my own calculations of distance, based upon my examination of the “Near Map” photograph.

# I am therefore satisfied that a breach of duty by one or all of the defendants was a cause of the plaintiff’s injury.

The relative culpability of the defendants

# The first defendant had undertaken the responsibility of marking the boundary line at Brook Reserve for many years. I was generally impressed by the evidence given by Mr Bourke, who had undertaken this duty for many years and during the 2009 season. Nevertheless, his evidence that he would mark a straight line out from the goal and behind posts to a point of 4.5 metres measured from the fence, and then profile the line of the fence, did not accord with my own conclusions based upon all of the evidence, and in particular my scaled observation of the likely 2009 position of the boundary line as shown on the “Near Map” photograph.

# I also note that the evidence given by Mr Terrier, who had marked the first defendant’s other ground in a different manner, illustrated at the very least a lack of awareness by the club of the importance of making adequate provision for player safety when marking the boundary lines. I do not place any real significance on the evidence given by Mr Terrier that he believed the league minimum requirement was 3.5 metres for the boundary line to be placed from the fence. I accept it is likely he was simply mistaken in this evidence. I accept that the minimum standard prescribed under the relevant league rules was a distance of 3 metres.

# On the basis of my factual finding the first defendant, and indeed second defendant, which shares a common liability, must bear significant responsibility for the lack of distance between the boundary line and the fence which I have found was a cause of injury to the plaintiff.

# The third defendant emphasised, in Mr Norman’s final address, the contractual relationship existing between the council and the football club as its permitted occupier of Brook Reserve. Mr Norman emphasised that the duty of care owed by his client was one which could be delegated. Notwithstanding this proposition, which I accept, the City of Beachfront had adopted a risk-management plan but had taken no positive steps to enforce it. Coupled with its modification of the Westport protocol to remove any reference to checking the boundary markings, in my view this indicates an abrogation of its duty of care rather than a delegation. The third defendant has also significantly contributed to the plaintiff’s injuries.

# The decision of the High Court in *Podrebersek v Australian Iron and Steel Pty Ltd[[207]](#footnote-207)* is concerned with the question of contributory negligence, the principles discussed in that case are accepted as being applicable when determining the relative culpability of contributing tortfeasors;

“It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.[[208]](#footnote-208)

# That principle was applied by the New South Wales Court of Appeal in *Macquarie Pathology Services Pty Ltd v Sullivan.[[209]](#footnote-209)* In that case Clarke JA stated:

“The making of an apportionment involved a comparison of both culpability and of the relative importance of the acts of the parties in causing the damage. To put it another way, the court is concerned with considering relative blameworthiness and the relevant causal potency of the negligence of each party.[[210]](#footnote-210)

# This principle has been quoted with approval and applied in numerous subsequent cases.[[211]](#footnote-211)

# In my view the placing of the boundary line at a distance closer to the fence than mandated by the League rules was primarily the responsibility of the first and second defendants. It was also the responsibility of the first and second defendants to ensure that the ground was inspected prior to the commencement of the game, much in the manner as described by Ms McNaught.

# I also take into account the fact that the committee of the first defendant had considered the size of the ground and the placement of the goal posts late in 2008 and I also accept the evidence of Mr Bourke that the football club was well aware of the new drainage pits following the refurbishment of the ground during the 2008 season. The danger to players from the rigid steel mesh fence, close to the boundary line was, in my view, an obvious risk.

# The third defendant also contributed, in my view, first by modifying the Westport protocol document so as to remove the necessity of inspecting, checking or measuring the boundary markings even on a random basis

# The third defendant also failed to take any action in relocating the goal posts in response to the email sent by the first defendant in 2008. The relocation of the goal post sleeves would in my view have necessarily provided a more generous area to the first defendant when marking the boundary line.

# I regard the first and second defendants as being the more direct contributors towards the incident involving the plaintiff largely on the basis of the greater familiarity of use of Brook Reserve and the frequency of the attendance at that ground, particularly in the case of the first defendant. Nevertheless the council ultimately had abrogated the management tools which it could have easily put in place. Its role in the incident is not minimal by any means. I apportion liability 60 per cent as against the first and second named defendants and 40 per cent as against the third defendant.

**Contributory negligence**

# The onus of proof of contributory negligence in this case rests with the defendants. Both Mr Eaton QC and Mr Norman made submissions along similar lines noting that the plaintiff played on Brook Reserve the previous season, had attended for training at the ground on about five occasions before the particular game in which he was injured, and had probably run the boundary line in the area where the injury occurred on occasions in training.

# The submissions by Mr Eaton QC noted that it was odd that the plaintiff had made no note of the boundary line being in the order of 2 to 2.4 metres from the fence if that were in fact the case. The submission continued that the plaintiff was aware that football, like most other sports, had its own inherent risks and:

“… the plaintiff ran from the goal square at or near full pace, eyes at the ball, did not look at the fence or boundary line at any time. … For the plaintiff to be running over the distance from the goal square where he had no idea of the boundary line and/or the fence, … in circumstances where he didn’t know how far he had run and literally he was abandoning himself to the risk of injury occurring.”[[212]](#footnote-212)

# Mr Norman effectively made a very similar submission on behalf of the third defendant. It was not submitted either by Mr Eaton QC or Mr Norman that contributory negligence was of a high order, however it remained there to be considered.

# I am again guided by the authority of *Podrebersek* and must examine the whole of the conduct, in this case of the plaintiff, as to whether he had realistically been shown to have failed in his duty to take reasonable care for himself so as to be partly responsible for his own injuries.

# The plaintiff was 17 years of age at the time the incident occurred. He was doing nothing other than what one might expect of a young footballer that is attempting to mark a ball which had been kicked in his general vicinity. There is no evidence to satisfy me that he had already crossed the boundary line or consciously placed himself into a position where he unnecessarily exposed himself to the risk of injury at the time he leapt to mark the football. I am not satisfied that contributory negligence has been made out against the plaintiff.

**The plaintiff’s injuries**

# The medical evidence in this case was largely non-controversial. The plaintiff called evidence from his treating orthopaedic surgeon, Mr Phillip Brown[[213]](#footnote-213), his treating physiotherapist, Mr Martin Brasey[[214]](#footnote-214), and a consultant orthopaedic surgeon, Mr James O’Loughlin[[215]](#footnote-215). Evidence about the consequences of injury was given by the plaintiff, his mother and his girlfriend, Martine Brady.

# In layman’s terms Mr Brown described the plaintiff as having had a “wiped out knee”:

“In terms of the structures in the knee, was everything damaged?---Yes.

In terms of a knee injury at a sporting contest, in your experience how does it rate in terms of severity? In the context of isolated single trauma with soft tissue injury, it’s very severe.”[[216]](#footnote-216)

# Mr Brown also referred to the plaintiff as suffering very significant internal nerve damage which he described as neuropraxia:

“That means incomplete damage or recovery. This was complete damage, it was basically severed. The nerve was severed, et cetera.”[[217]](#footnote-217)

# This condition had resulted in the plaintiff suffering from foot drop which required the use of a prosthetic device to hold his foot in a fixed position. Mr Brown had operated initially using external fixators and internal pins in the left femur and tibia. He described in his evidence the detailed reconstruction treatment involving repairs to both the anterior and posterior cruciate ligaments and also referred to the likely long-term consequences:

“… later on you see instability as these grafts can stretch up with time. Also, there’s a risk with that sort of injury with what we call post-traumatic arthritis, or developing degenerative arthritis in the knee prematurely.”[[218]](#footnote-218)

# Mr Brown was unable to comment specifically on the prognosis for the plaintiff in terms of his working life stating he may be able to go to retirement age of 65 years with light work, but:

“Depends on the heavy manual work; possibly not, though again it’s hard to predict what he’d be like in 20 years’ time.”[[219]](#footnote-219)

# Mr Brown also described the immediate consequences for the plaintiff who had developed an infection whilst still in hospital following the initial surgery. The plaintiff had initially been hospitalised for some three weeks, but a wound breakdown developing two weeks after discharge saw him re-admitted for skin grafting and further immobilisation for another week.

# He commenced physiotherapy about six weeks after his injury and continued to wear a splint and used crutches for approximately three months. He was then able to use a walking stick for a further month, and then walk, albeit with the aid of an ankle/foot orthotic aid. He has continued to wear this aid to the present day.

# The physiotherapy lasted for about 12 months and Mr Hale had attempted to return to work approximately six months after his injury in January 2008.

# Notwithstanding the ongoing effects of his injury he managed to complete his apprenticeship as a carpenter in early 2012 and has worked in that capacity to the present date.

# When he was examined by Mr O’Loughlin in October 2014 Mr O’Loughlin felt that the plaintiff had:

“… perhaps the worst inter-articular injury one could have; Inter-articular meaning the actual inside of the joint has been damaged.”[[220]](#footnote-220)

# Mr O’Loughlin had noted the extensive physiotherapy treatment given to the plaintiff, but felt that the condition was:

“… a deteriorating injury but it’s certainly not fluctuating … I’ve seen the patient five years since injury, I would expect no recovery or no improvement.”[[221]](#footnote-221)

# Mr O’Loughlin’s evidence supported the likelihood of there being a development of post traumatic arthritis:

“So, as I said before, inevitably this man will get post traumatic arthritis which will be symptomatic, it will be progressively symptomatic.[[222]](#footnote-222)

# Mr O’Loughlin did not believe that a tendon transfer operation at this stage would be recommended, although he was prepared to leave that decision up to the plaintiff. He did however opine that the future would inevitably lead to deterioration and the prospect of a knee replacement, although he could not be certain as to when that would occur:

“I would say it’s a hundred per cent certain that this patient will progress. I would suggest it’s not far off that percentage that he will require a total knee replacement. But I’m sorry I can’t say whether it’s going to be five, ten, 15, 20 years.”[[223]](#footnote-223)

# The evidence from the physiotherapist, Mr Brasey, related to his treatment of the plaintiff up until June 2010. He had seen him on some 40 occasions and described the plaintiff as being very motivated in terms of the treatment offered to him. Nevertheless there remained a restriction of movement of the left knee and saw no real prospect for improvement. His evidence otherwise was consistent with the plaintiff’s evidence of working as best he could to recover from his injury.

# It is clear that the plaintiff has sustained a severe injury to his left knee, which in all probability will be progressive, although the timeframe for that progression is unclear.

# Mr Hale has avoided medication and has effectively had no real treatment for the last three years at least, and he seems well motivated to minimise the impact of his knee injury on his ability to work and his day to day life. This evidence was supported by his mother and girlfriend.

# I should note for completeness that the cosmetic deformity of the plaintiff’s left knee, his left lower leg and the area of skin at the rear of the left foot where the orthotic device is worn, is obviously an embarrassment to the plaintiff and must be taken into account in assessing damages.

**Damages**

**(i) Pain and suffering, loss of amenity of life**

# Mr Eaton QC in final submissions suggested a figure of $300,000 for general damages, as did Mr Norman. Mr Shandell QC submitted that a figure of not less than $400,000 would be fair and reasonable for the plaintiff.

# The plaintiff was 17 years of age when he suffered this injury, which has been described in quite non-controversial terms by the treating orthopaedic surgeon as a “wiped-out knee”. He has the complication of foot drop and faces a realistic prospect of a total knee replacement at some uncertain time in the future. His attempts at rehabilitation and making the best of his future life could only be described as exemplary, nevertheless he does have a very substantial impediment to his ability to lead a normal life and any award of damages must take into account that he had engaged in a variety of sporting activities apart from football in his teenage years. I note that he had been a surfer and a skier in the past, and even attempted on one occasion to snowboard following his knee injury. Mr Shandell QC emphasised the simple truism that he cannot run and when he takes off the orthotic support, whether at home or perhaps at the beach, he will simply trip over his drooping left foot. The cosmetic deformity and the loss of function of the left foot must inevitably impact on his intimate personal life.

# In my assessment a figure of $300,000 is inadequate compensation, bearing in mind the plaintiff’s age at the date he sustained his injury, his complicated course of treatment, including the development of an infection requiring extensive skin grafting, and the high likelihood of a knee replacement operation at some time in the future, warrants a higher award of damages than suggested on behalf of all defendants. The figure suggested by Mr Shandell QC is probably at the upper end of the range which could realistically be awarded. In my view a figure of $375,000 is fair and reasonable in the circumstances.

**(ii) Past medical expenses**

# This amount was not in dispute and was agreed at $4,805.

**(iii) Past loss of earnings**

# This figure was also agreed at $6,720.

**(iv) Costs of gratuitous care**

# This was agreed at $6,500.

**(v) Loss or impairment of future earning capacity**

# The plaintiff faces an uncertain future in terms of his earning capacity. On any view his fortitude and persistence in returning to complete his carpentry apprenticeship and taking over the conduct of his deceased father’s hedge trimming business, provide strong indications that the plaintiff will continue as best and as long as he can, to earn income in future years.

# As against this the medical evidence strongly suggests that his left knee will deteriorate at least to the point where at some future time he will require knee replacement surgery. Additionally it is unlikely that he will be able to continue with heavy physical work for the remainder of his working life.

# The plaintiff has frankly conceded, when cross-examined, that he would like to move to a more managerial role as the years progress. Based on his past history I am satisfied that he will most probably be successful in this endeavour. Nevertheless I am satisfied there is likely to be a significant impairment of his future earning capacity.

# The plaintiff is certainly precluded from a wide variety of physical activities which would undoubtedly impact on his employability in the open labour market. Fortunately, and largely due to his own initiative and motivation, he has minimised his actual loss of earnings to the present date. He is nevertheless faced with the prospect of a deteriorating knee and at this stage, an aspiration to work in a more managerial role so as to minimise the impact of his knee injury on his future earning capacity.

# Mr Shandell QC submitted that there should be an allowance of something in the order of three years total loss based upon projected net earnings estimated at $101,303. This was prior to any reduction for vicissitudes. Mr Eaton QC in final address made a number of points in relation to the lack of specificity of the material advanced in support of the plaintiff’s claim. In particular there was no evidence of business overheads or income sharing arrangements placed before the Court relevant to either of the businesses in which the plaintiff is presently involved. Mr Eaton QC highlighted the evidence given by Mr Hale that he does not know what his total gross income would presently be.[[224]](#footnote-224)

# Nevertheless in the course of his final address he did not quibble that some allowance could be made in accordance with the principle in *Victorian Stevedoring Pty Ltd v Farlow.[[225]](#footnote-225)*

# Mr Norman in final submissions for the third defendant submitted that such an allowance should be for a total period of between one and one and a half years.

# I am satisfied in this case that there is a high likelihood that the plaintiff will need to be out of the workforce for a period of at least several months should he undergo a total knee replacement procedure whilst working in any physical capacity. Indeed it is likely that he would require at least two to three months away from work even if he were at the time of the procedure involved in managerial work. There is also in my view a significant risk that the plaintiff may have other difficulties in maintaining his present work rate, and therefore earning capacity, as the condition deteriorates with time. He is presently only 24 years of age. In my view there is some justification in the submissions advanced by Mr Eaton QC as to the lack of specificity in relation to the claimed net income of $101,303. I am also not inclined to make an allowance of three years on the limited evidence of economic loss before me.

# In my view an allowance of $150,000 in accordance with the principle in *Farlow* is a fair and reasonable sum in Mr Hale’s case.

**(vi) Future medical expenses**

# Argument was advanced on behalf of Mr Hale that he is likely to undergo a tendon transfer which would necessarily take him out of the workforce for a period of nine to 12 months. The contrary proposition, principally advanced by Mr Eaton QC, is that the tendon transfer is unlikely and would have taken place already if the plaintiff had wished to undergo it. I was referred to the evidence of Mr O’Loughlin stating that even if there were operative intervention, it would still be advisable for the plaintiff to continue wearing the orthotic. He referred me also to Mr Hale’s own evidence that he has done nothing to suggest that he has a positive intention to have such an operation.[[226]](#footnote-226)

# I am satisfied that there is a very high probability that Mr Hale will require a left knee replacement operation at some time in the future. Mr O’Loughlin could not put an accurate timeframe on the proposed surgery, saying it could be at any time between five years and 20 years into the future.

# I am satisfied there is a realistic probability that he will require more than one knee replacement procedure having regard to his present age of 24 years. His treating surgeon, Mr Brown, was asked about the prospect of knee replacement surgery and expressed a view that the lifespan in older individuals was in the order of ten years, although it might only be five to eight with younger more active people. Mr Brown also gave evidence that if the prosthesis was replaced, the surgery would be harder and the lifespan of the prosthesis would be less.[[227]](#footnote-227)

# Taking into account the plaintiff’s age there is in my view a realistic likelihood that there may be a second knee replacement operation required. The probability of this would be less than the probability of the first operation. In my view it is reasonable to allow a 50 per cent probability of that second operation being necessary and reasonable.

# The tendon transfer operation is in my view relatively unlikely to occur and in any event the total cost of this surgery appears to be in the order of $1,500 to $1,700 with an allowance of another $3,500 for subsequent physiotherapy.

# Conversely the figures that were advanced by Mr Shandell QC in final address without opposition from any counsel representing the defendants was that the cost of a total knee replacement at present values would range from $23,070 to $25,750. Added to this would be physiotherapy at a total cost of $5,760. Mr Shandell QC referred to a raft of recent decisions in New South Wales where allowances had been made of between $25,000 and $32,000 for similar treatment.

# I believe it is reasonable to allow a sum totalling $30,000 in respect of the likely first knee replacement operation and consequent necessary adjunctive treatment. I would propose to allow a further sum of $15,000 in respect of the less likely second knee replacement procedure. I believe the tendon transfer procedure is relatively unlikely, but it is reasonable to allow a further sum equating to approximately one-third of the true cost of that surgery and rehabilitation expenses. I would allow a further $1,500. The total for future medical and like expenses is $46,500.

|  |  |
| --- | --- |
| Pain and suffering and loss of amenity of life | 375,000 |
| Past medical expenses | 4,805 |
| Past loss of earnings | 6,720 |
| Costs of gratuitous care | 6,500 |
| Future medical and like expenses | 46,500 |
| Future loss or impairment of earning capacity | 150,000 |
| Total | 589,525 |

# I propose to make orders in accordance with these findings. I will hear the parties in relation to the form of orders to be made and any further issues concerning damages by way of interest and the question of costs.

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1. a pseudonym [↑](#footnote-ref-1)
2. a pseudonym [↑](#footnote-ref-2)
3. a pseudonym [↑](#footnote-ref-3)
4. a pseudonym [↑](#footnote-ref-4)
5. Exhibit P3 (Photograph No. 3) [↑](#footnote-ref-5)
6. Exhibit P3 (Photograph No. 4J) [↑](#footnote-ref-6)
7. Exhibit P3 (Photographs 7D, G, H & I) [↑](#footnote-ref-7)
8. a pseudonym [↑](#footnote-ref-8)
9. a pseudonym [↑](#footnote-ref-9)
10. Exhibit P4 [↑](#footnote-ref-10)
11. Exhibit P3 (photographs 1 and 2 behind Tab 1) [↑](#footnote-ref-11)
12. a pseudonym [↑](#footnote-ref-12)
13. Exhibit P1 [↑](#footnote-ref-13)
14. a pseudonym [↑](#footnote-ref-14)
15. a pseudonym [↑](#footnote-ref-15)
16. a pseudonym [↑](#footnote-ref-16)
17. Transcript (“T”) 88, Line (“L”) 15-19 [↑](#footnote-ref-17)
18. T 159, L 2-4 [↑](#footnote-ref-18)
19. T 163, L 31 to T 164 L 16 [↑](#footnote-ref-19)
20. Exhibit 1D A [↑](#footnote-ref-20)
21. a pseudonym [↑](#footnote-ref-21)
22. a pseudonym [↑](#footnote-ref-22)
23. T 329, L 28 to T 332, L 30 [↑](#footnote-ref-23)
24. T 337, L 22-28 [↑](#footnote-ref-24)
25. T 339, L 9-14 [↑](#footnote-ref-25)
26. T 340, L 6-8 [↑](#footnote-ref-26)
27. T 341, L 6-9 & T 341, L 25 to T 342, L 1 [↑](#footnote-ref-27)
28. a pseudonym [↑](#footnote-ref-28)
29. T 348, L 11-18 [↑](#footnote-ref-29)
30. T 348, L 21-27 [↑](#footnote-ref-30)
31. T 350, L 9 [↑](#footnote-ref-31)
32. T 350, L 9-18 [↑](#footnote-ref-32)
33. T 351, L 2-5 [↑](#footnote-ref-33)
34. Exhibit P3 (Photograph 2) [↑](#footnote-ref-34)
35. T 351, L 19-21 [↑](#footnote-ref-35)
36. T 351, L 23-31 [↑](#footnote-ref-36)
37. T 352, L 15-17 [↑](#footnote-ref-37)
38. T 354, L 10-13 [↑](#footnote-ref-38)
39. a pseudonym [↑](#footnote-ref-39)
40. a pseudonym [↑](#footnote-ref-40)
41. Exhibit 1D C [↑](#footnote-ref-41)
42. Exhibit 1D B [↑](#footnote-ref-42)
43. T 383, L 24 to T 384, L 4 [↑](#footnote-ref-43)
44. T 384, L 13-14 [↑](#footnote-ref-44)
45. T 384, L 24-30 [↑](#footnote-ref-45)
46. T 385, L 24-28 [↑](#footnote-ref-46)
47. T 387, L 20-21 [↑](#footnote-ref-47)
48. T 387, L 25-26 [↑](#footnote-ref-48)
49. T 389, L 15-30 [↑](#footnote-ref-49)
50. T 391, L 2-9 [↑](#footnote-ref-50)
51. T 392, L 13-17 [↑](#footnote-ref-51)
52. a pseudonym [↑](#footnote-ref-52)
53. a pseudonym [↑](#footnote-ref-53)
54. T 393, L 12031 [↑](#footnote-ref-54)
55. T 394, L 17 [↑](#footnote-ref-55)
56. T 394, L 30 to T 305, L 2 [↑](#footnote-ref-56)
57. T 398, L 7-11 [↑](#footnote-ref-57)
58. T 400, L 27 to T 401, L 9 [↑](#footnote-ref-58)
59. T 403, L 4-23 [↑](#footnote-ref-59)
60. T 405, L 2-6 [↑](#footnote-ref-60)
61. T 405, L 7-13 [↑](#footnote-ref-61)
62. T 410, L 20-26 [↑](#footnote-ref-62)
63. T 411, L 22-26 [↑](#footnote-ref-63)
64. T 412, L 18-20 [↑](#footnote-ref-64)
65. T 412, L 21 to T 413, L 3. [↑](#footnote-ref-65)
66. T 414, L 11-27 [↑](#footnote-ref-66)
67. T 414, L 27-29 [↑](#footnote-ref-67)
68. T 415, L10-13 [↑](#footnote-ref-68)
69. T 416, L4-13 [↑](#footnote-ref-69)
70. T 417, L 19-21 [↑](#footnote-ref-70)
71. T 418, L 20-27 [↑](#footnote-ref-71)
72. T 419, L 16-22 [↑](#footnote-ref-72)
73. T 485, L 26-31 [↑](#footnote-ref-73)
74. Exhibit 3D A [↑](#footnote-ref-74)
75. T 487, L 8-14 [↑](#footnote-ref-75)
76. T 489, L 4-12 [↑](#footnote-ref-76)
77. T 493 L 3-5 [↑](#footnote-ref-77)
78. T 493, L1-14 [↑](#footnote-ref-78)
79. T 493, L30 to T 494, L 5 [↑](#footnote-ref-79)
80. T 494, L 16-21 [↑](#footnote-ref-80)
81. T 495, L 1-28 [↑](#footnote-ref-81)
82. T 498, L 31 to T 499, L 2 [↑](#footnote-ref-82)
83. T 499, L 15-23 [↑](#footnote-ref-83)
84. T 499, L31 to T 500, L 5 [↑](#footnote-ref-84)
85. T 501, L 15-25 [↑](#footnote-ref-85)
86. T 502, L 24-28 [↑](#footnote-ref-86)
87. T 503, L 7-16 [↑](#footnote-ref-87)
88. T 503, L 21-28 [↑](#footnote-ref-88)
89. T 505, L 10-29 [↑](#footnote-ref-89)
90. T 507, L4-14 [↑](#footnote-ref-90)
91. T 511, L 8 [↑](#footnote-ref-91)
92. T 513, L 24-27 [↑](#footnote-ref-92)
93. T 514, L 15-19 [↑](#footnote-ref-93)
94. T 514, L 20-25 [↑](#footnote-ref-94)
95. T 517, L 3-4 [↑](#footnote-ref-95)
96. T 517, L 13-25 [↑](#footnote-ref-96)
97. Exhibit 3D A [↑](#footnote-ref-97)
98. T 519, L17-21 [↑](#footnote-ref-98)
99. T 520, L 28-29 [↑](#footnote-ref-99)
100. T 523, L 7-11 [↑](#footnote-ref-100)
101. T 523, L 18-24 [↑](#footnote-ref-101)
102. Exhibit 3D D [↑](#footnote-ref-102)
103. T 529, L 5-7 [↑](#footnote-ref-103)
104. T 528, L 28 to T 529, L 7 [↑](#footnote-ref-104)
105. T 531, L 10-18 [↑](#footnote-ref-105)
106. T 531, L 22 to T 532, L 3 [↑](#footnote-ref-106)
107. T 540, L 13-20 [↑](#footnote-ref-107)
108. T 540, L 27-30 [↑](#footnote-ref-108)
109. T 541 L 35-30 [↑](#footnote-ref-109)
110. T 541, L 26 to T 542, L 3 [↑](#footnote-ref-110)
111. T 542, L 21-30 [↑](#footnote-ref-111)
112. T 543, L 23-25 [↑](#footnote-ref-112)
113. Exhibit 3D C [↑](#footnote-ref-113)
114. T 544, L 20-21 [↑](#footnote-ref-114)
115. Exhibit 3D D [↑](#footnote-ref-115)
116. T 545, L 4-7 [↑](#footnote-ref-116)
117. Exhibit 1D E [↑](#footnote-ref-117)
118. T 546, L 7-11 [↑](#footnote-ref-118)
119. T 547, L 2-3 [↑](#footnote-ref-119)
120. T 547, L 4-7 [↑](#footnote-ref-120)
121. T 548, L 1 [↑](#footnote-ref-121)
122. T 548, L 16-18 [↑](#footnote-ref-122)
123. Exhibit 3D B [↑](#footnote-ref-123)
124. T 549, L 27 to T 550, L 1 [↑](#footnote-ref-124)
125. T 549, L 23-35 [↑](#footnote-ref-125)
126. Exhibit 3D E [↑](#footnote-ref-126)
127. T 551, L 19-26 [↑](#footnote-ref-127)
128. T 552, L 5-8 [↑](#footnote-ref-128)
129. T 553, L 6-11 [↑](#footnote-ref-129)
130. T 553, L 23-27 [↑](#footnote-ref-130)
131. T 554, L 12-17 [↑](#footnote-ref-131)
132. T 554, L 20-23 [↑](#footnote-ref-132)
133. T 555, L 17-20 [↑](#footnote-ref-133)
134. T 555, L 25-30 [↑](#footnote-ref-134)
135. T 556, L 18 to T 557, L 6 [↑](#footnote-ref-135)
136. T 558, L 4-13 [↑](#footnote-ref-136)
137. T 558, L 26-30 [↑](#footnote-ref-137)
138. T 559, L 1-8 [↑](#footnote-ref-138)
139. T 559, L 9-19 [↑](#footnote-ref-139)
140. T 564, L 20-24 [↑](#footnote-ref-140)
141. T 564, L 25-30 [↑](#footnote-ref-141)
142. T 566, L 1-6 [↑](#footnote-ref-142)
143. T 566, L 12-14 [↑](#footnote-ref-143)
144. T 566, L 25-29 [↑](#footnote-ref-144)
145. T 566, L 31 to T 567, L 1 [↑](#footnote-ref-145)
146. T 567, L 26-29 [↑](#footnote-ref-146)
147. T 568, L 1-7 [↑](#footnote-ref-147)
148. Exhibit 1D E [↑](#footnote-ref-148)
149. T 569, L 19-26 [↑](#footnote-ref-149)
150. T 569, L 27-31 [↑](#footnote-ref-150)
151. T 570, L 13-22 [↑](#footnote-ref-151)
152. T 571, L 8-19 [↑](#footnote-ref-152)
153. T 574, L 3-22 and T 574, L 29 to T 575, L 4 [↑](#footnote-ref-153)
154. Exhibit 1D F [↑](#footnote-ref-154)
155. T 576, L 29 to T 577, L 12 [↑](#footnote-ref-155)
156. T 578, L 20 to T 579, L 1 [↑](#footnote-ref-156)
157. T 584, L 7-12 [↑](#footnote-ref-157)
158. T 589, L 18-28 [↑](#footnote-ref-158)
159. Exhibit 1D G [↑](#footnote-ref-159)
160. T 591, L 1-5 [↑](#footnote-ref-160)
161. T 591, L 14-17 [↑](#footnote-ref-161)
162. T 592, L 28-30 [↑](#footnote-ref-162)
163. Exhibit 1D G, page 454 and T 593, L 11-16 [↑](#footnote-ref-163)
164. T 593, L 27 to T 594, L 2 [↑](#footnote-ref-164)
165. T 594, L 6-7 [↑](#footnote-ref-165)
166. T 594, L 15-20 [↑](#footnote-ref-166)
167. T 595, L 19-24 [↑](#footnote-ref-167)
168. T 595, L 25-29 [↑](#footnote-ref-168)
169. T 596, L 4-10 [↑](#footnote-ref-169)
170. T 596, L 11-15 [↑](#footnote-ref-170)
171. T 596, L 21-28 [↑](#footnote-ref-171)
172. T 597, L 2-11 [↑](#footnote-ref-172)
173. T 597, L 12-18 [↑](#footnote-ref-173)
174. T 597, L 28-31 [↑](#footnote-ref-174)
175. T 599, L 19-25 [↑](#footnote-ref-175)
176. T 600, L 23 to T 601, L 2 [↑](#footnote-ref-176)
177. T 601, L 14-17 [↑](#footnote-ref-177)
178. T 601, L 19-22 [↑](#footnote-ref-178)
179. T 602, L 20-28 and Exhibit 1DG [↑](#footnote-ref-179)
180. T 603, L 2-10 [↑](#footnote-ref-180)
181. T 603, L 11-16 [↑](#footnote-ref-181)
182. T 603, L 17-25 [↑](#footnote-ref-182)
183. T 604, L 9-18 [↑](#footnote-ref-183)
184. T 604, L 21-29 [↑](#footnote-ref-184)
185. T 605, L 2-7 [↑](#footnote-ref-185)
186. T 605, L 10-15 [↑](#footnote-ref-186)
187. T 605, L 16-17 [↑](#footnote-ref-187)
188. T 605, L 22-30 [↑](#footnote-ref-188)
189. T 606, L 2-3 [↑](#footnote-ref-189)
190. T 606, L 7-10 [↑](#footnote-ref-190)
191. a pseudonym [↑](#footnote-ref-191)
192. a pseudonym [↑](#footnote-ref-192)
193. a pseudonym [↑](#footnote-ref-193)
194. T 624, L 23‒26 [↑](#footnote-ref-194)
195. [2009] VSCA 101 [↑](#footnote-ref-195)
196. [2003] VSCA 72 [↑](#footnote-ref-196)
197. [1997] HCA 39, 188 CLR 313 [↑](#footnote-ref-197)
198. [2000] HCA 56, 205 CLR 166 [↑](#footnote-ref-198)
199. [2012] VSCA 53 [↑](#footnote-ref-199)
200. T 630, L9‒11 [↑](#footnote-ref-200)
201. a pseudonym [↑](#footnote-ref-201)
202. *Wrongs Act 1985* Part IIA especially section 14B [↑](#footnote-ref-202)
203. T 493, L 26 to T 494, L 5 [↑](#footnote-ref-203)
204. T 494, L 10-18 [↑](#footnote-ref-204)
205. 21 feet or 6.5 metres [↑](#footnote-ref-205)
206. Mr Bourke at T 493, L 26 to T 494, L 15 [↑](#footnote-ref-206)
207. [1985] HCA 34; (1985) 59 ALR 529 [↑](#footnote-ref-207)
208. Ibid at 533 [↑](#footnote-ref-208)
209. Unreported New South Wales Court of Appeal 28 March 1995 [↑](#footnote-ref-209)
210. Ibid at 19 [↑](#footnote-ref-210)
211. *Rowes Bus Service Pty Ltd v Cowan* and *Sufong v Cowan* (1999) NSWCA 268 and more recently in Victoria in *Jones v Southern Grampians Shire Council and Another* [2012] VSC 485 [↑](#footnote-ref-211)
212. T 650, L 30 to T 651, L 20 (Mr Eaton QC’s submissions) [↑](#footnote-ref-212)
213. a pseudonym [↑](#footnote-ref-213)
214. a pseudonym [↑](#footnote-ref-214)
215. a pseudonym [↑](#footnote-ref-215)
216. T 171, L 26-31 [↑](#footnote-ref-216)
217. T 172, L9-12 [↑](#footnote-ref-217)
218. T 177, L 5-9 [↑](#footnote-ref-218)
219. T 177, L 14-25 [↑](#footnote-ref-219)
220. T 213, L 25-28 [↑](#footnote-ref-220)
221. T 213, L 1-6 [↑](#footnote-ref-221)
222. T 214, L 25-28 [↑](#footnote-ref-222)
223. T 228, L 3-8 [↑](#footnote-ref-223)
224. T 116, L 9-13 [↑](#footnote-ref-224)
225. [1963] VR 594 [↑](#footnote-ref-225)
226. T 205, L 1-22 [↑](#footnote-ref-226)
227. T 182, L 17 to T 183, L 26. [↑](#footnote-ref-227)