

# Supreme Court of New South Wales - Court of Appeal Decisions

## Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17 (2 March 2006)

CITATION: Falvo v Australian Oztag Sports Association & Anor [\[2006\] NSWCA 17](#)

FILE NUMBER(S):

41110/04

HEARING DATE(S): 13/02/06

DECISION DATE: 02/03/2006

PARTIES:

Thomas Falvo (Appellant)

Australian Oztag Sports Association (First Respondent)

Warringah Council (Second Respondent)

JUDGMENT OF: Ipp JA Hunt AJA Adams J

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): DC 9190/02

LOWER COURT JUDICIAL OFFICER: Hungerford ADCJ

COUNSEL:

S Norton SC/M Fraser (Appellant)

P Dwyer (First Respondent)

D J Russell SC/J Sewell (Second Respondent)

SOLICITORS:

Bryden's Law Office (Appellant)

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CATCHWORDS:

NEGLIGENCE - plaintiff injured playing Oztag on an uneven playing field - liability of Council and Oztag Association - appropriate standard of playing field for amateur sporting games - meaning of "dangerous recreational activity" in [s 5K](#) of the [Civil Liability Act 2002](#) (NSW) - determination of whether Oztag is a "dangerous recreational activity" - [ss 5K](#) and [5L](#) of the [Civil Liability Act 2002](#) (NSW) - causation. D

LEGISLATION CITED:

[Civil Liability Act 2002](#) (NSW), [ss 5K](#), [5L](#)

DECISION:

Appeal dismissed with costs.

JUDGMENT:

**IN THE SUPREME COURT**

**OF NEW SOUTH WALES**

**COURT OF APPEAL**

**CA 41110/04**

**DC 9190/02**

**IPP JA**

**HUNT AJA**

**ADAMS J**

**Thursday 2 March 2006**

**THOMAS FALVO v AUSTRALIAN OZTAG SPORTS ASSOCIATION & ANOR**

**Judgment**

**1 IPP JA:** Oztag is a form of touch rugby. In Oztag, players have tags attached by Velcro to the sides of their shorts. A player in possession of the ball must release it as soon as the opposition has ripped off a tag from his or her body. This reduces the need for physical contact between players to a minimum.

2 On 18 January 2000 Mr Thomas Falvo seriously injured his right knee while playing a game of Oztag. The game was organised by the Australian Oztag Sports Association Incorporated (the "Oztag Association") on Millers Reserve, a sports field occupied and controlled by the Warringah Council (the "Council").

3 The playing field on Millers Reserve was grassed, but it had a number of areas where, through wear and tear, the grass had disappeared. The Council had topped these areas up with sand. The condition of the field was obvious to all.

4 As Mr Falvo was running towards the opposing team's try line with the ball in his possession, he moved from a grassed area to a patch devoid of grass. As he encountered the bare patch, his knee gave way and he collapsed in pain on the ground. He testified that it felt as if his foot "went into sand more than [sic] anything else". He said that when his foot went into the sand, "it gave way". His team mate, Mr Trapuzzano, said that when one ran over the areas topped up with sand, one would "slightly lose balance" and "sink a bit".

5 Mr Falvo brought proceedings in negligence against the Oztag Association and the Council. His claim against the Association was based also on breach of contract. The breach of contract claim rested on an implied term to take proper care for Mr Falvo's safety and the particulars of breach of that term were the same as the particulars for the negligence cause of action. **On appeal, the Oztag Association did not dispute that it owed Mr Falvo a duty of care. Accordingly, for all practical purposes, there was no difference between the claim in negligence and the claim in contract.** For this reason, only the negligence claim was argued.

6 On three grounds, the trial judge, Hungerford ADCJ, held against Mr Falvo and these were challenged on appeal.

7 The first ground concerned the state of the Millers Reserve field. The particulars of negligence were all based on the proposition that the field was not in a fit condition for Oztag. The trial judge found, however, that, at most, the surface had slight depressions. There was no evidence of sharply uneven cavities. In effect he found that the field was consistent with acceptable standards. This finding alone meant that Mr Falvo's case failed.

8 The second ground was based on his Honour's finding that Oztag was a "dangerous recreational activity" within the meaning of [ss 5K](#) and [5L](#) of the [Civil Liability Act 2002](#) (NSW).

9 The third ground concerned causation. His Honour was not satisfied that Mr Falvo's injuries were caused by the condition of the field.

10 I turn, firstly, to the condition of the field.

11 The field was not perfectly level and there were many bare patches that had been filled in with sand. The tops of the grassed sections were slightly higher than the sections topped up with sand. That was because the level of the earth on which the grass grew was more or less the same as the bare patches. It was submitted that this unevenness, alone, was dangerous.

12 The first difficulty that Mr Falvo faces in regard to this argument is that he did not fall because of the slight difference in levels between the top of the grass and the top of the sand. He fell because his foot sank in the sand.

13 Secondly, there was expert evidence, which the trial judge accepted, that the surface of the field was adequate for amateur sport such as the game in which Mr Falvo was participating. Mr Westall, a turf grass consultant, wrote in a report:

“19. In conclusion, based on the facts that the field is a multi-use city Council grade field, I regard the playing surface as satisfactory for amateur sport. This grade of field cannot fairly be compared to higher-grade playing fields as they do not possess sophisticated construction design, intensive turf culture maintenance practices, high grade soil profiles and highly qualified permanent ground staff.

20. Demand on Council fields is often concentrated on weekends and mid-week by many users and sometimes used in wet conditions, which result in compacted soils and deterioration of the turf cover. When grass cover is destroyed, play causes erosion, which leads to distinct shallow surface depressions particularly in areas where concentrated play occurs.

21. In my opinion the lack of grass coverage and condition of the surface over the field at the time of the injury, is a normal consequence of playing fields of this grade and usage.

22. There is no official industry standard for playing fields. The International Curator’s Association is currently researching guidelines for playing field surfaces, which will vary from site to site depending on budget and resources.”

Mr Halstead, another expert, wrote in a report:

“Miller’s Reserve is not used for an elite level of sport as would be Brookvale Oval where a ‘top class’ playing surface is required, accordingly its playing surface is of a lesser standard. The playing surface at Miller’s Reserve is consistent with other sporting grounds, where the usage is similar and the level of sport played is of the same standard, namely at a level less than ‘elite’.

Ground usage of Miller’s Reserve during the summer of 1999/2000 was and remains consistent with other sporting grounds/ovals in local council areas throughout NSW. The said usage was similar to ground usage in council area within which I was employed between 1965 and 1993 ...”

14 Two principal criticisms were made on behalf of Mr Falvo in regard to these two expert witnesses.

15 Firstly, it was pointed out that the Council had employed Mr Westall for at least two years until 1999. It was submitted that the state of the field in early 2000 when the accident occurred was partly dependant on how well Mr Westall had done his job as an employee of the Council. This meant, it was said, that Mr Westall was not impartial. Whilst this criticism had some substance, it was put to the trial judge who expressly took account of it. Mr Westall was cross-examined and the weight to be attached to his testimony was essentially a matter for the judge.

16 Secondly, it was pointed out that certain documents that were inspected by Mr Westall were not produced and he had not attached documents on which he relied to his report. It was submitted that these matters detracted from Mr Westall’s credibility. Again, it was essentially a matter for the judge to determine the extent to which the missing documents should affect the weight to be given to Mr Westall’s opinions. Moreover, the missing documents related to the maintenance and inspection of the field and do not appear to be particularly relevant to the condition of the field at the time of the accident.

17 Mr Falvo did not require Mr Halstead to attend for cross-examination. His evidence, on the crucial issue of the condition of the field, confirmed and reinforced that of Mr Westall.

18 In the circumstances, it has not been shown that the trial judge erred in placing reliance on the evidence of Mr Westall and Mr Halstead.

19 Senior counsel for Mr Falvo did not challenge the testimony of Mr Westall and Mr Halstead that the condition of the Miller's Reserve field, in substance, was similar to that of other grounds provided throughout the State by local authorities for amateur sport. This means that, every week (sometimes every day) games of every kind are played all over New South Wales on grounds in similar condition to the Miller's Reserve field on which the accident occurred. This is a fact of paramount importance.

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

21 Slightly differing levels and sandy patches on sports grounds are part of the practical realities of everyday life to which legal principle must be applied: *Neindorf v Junkovic* [2005] HCA 75 at [8] per Gleeson CJ. In my view, no negligence can be attributed to the Oztag Association and the Council stemming from the condition of the ground.

22 Before leaving this topic, two points should be made.

23 Firstly, the case at trial was not run on the basis that the Oztag Association and the Council were negligent in failing to compact or compress the sand used to top up the worn areas. Thus, the question whether it would have been a reasonable response for them to take steps to prevent the sand from sinking was not investigated. No point in regard to this issue may be made on appeal.

24 Secondly, this case is very different to *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2005] NSWCA 457. In *Bujnowicz* a boy running in the course of a school touch rugby game stepped into a pothole on the school's rugby field. He caught his foot in the hole and he sustained severe injuries to his leg. The hole in *Bujnowicz* was not obvious and could not be categorised as a depression in the ground or a mere alteration in levels. It was in effect a trap and the respondent in that case did not dispute that if the hole existed the rugby field was unsafe.

25 I turn now to the argument concerning ss 5K and 5L of the *Civil Liability Act 2002*. Section 5K defines a "dangerous recreational activity" as "a recreational activity that involves a significant risk of physical harm". Section 5L provides:

"(1) A person (*the defendant*) is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk."

26 In his Second Reading Speech introducing the *Civil Liability Amendment (Personal Responsibility) Bill* (which led to various amendments to the Act, including the insertions of [ss 5K](#) and [5L](#)), the Premier said that one of the consequences of the proposed Act would be that there would not “be any liability for the obvious risks of particularly dangerous sports and other risky activities” (Hansard, 23 October 2002 at 5764). The Premier also said that many of the provisions of the Bill were modelled on the Recommendations in the Final Report by the Panel appointed by the Commonwealth and State Governments to review the law of negligence.

27 Recommendations 11 and 12 of the Final Report concerned liability for harm suffered in the course of participating in recreational activities. Division 5 of the [Civil Liability Act](#), which incorporates [ss 5K](#) and [5L](#), is based on but differs from Recommendations 11 and 12. The differences are material but, nevertheless, it does seem to me that, properly construed, the Act takes up the observation in para 4.19 of the Final Report (which immediately preceded Recommendation 12) that, in the context of dangerous recreational activities, it would be “more appropriate” for the definition of recreational activities to involve “significant risks of physical harm”.

28 In my view, the definition of “dangerous recreational activity” in [s 5K](#) has to be read as a whole. This requires due weight to be given to the word “dangerous”. It also requires “significant” to be construed as bearing not only on “risk” but on the phrase “physical harm” as well. The expression “significant risk of physical harm” is coloured by the word “dangerous” and the phrase “significant risk” cannot properly be understood without regard being had to the nature and degree of harm that might be suffered, as well as to the likelihood of the risk materialising.

29 The view that a risk is “significant” when it is dependant on the materiality of the consequences to the person harmed is consistent with the views expressed by the High Court in *Rogers v Whitaker* [\[1992\] HCA 58](#); (1992) 175 CLR 479 at 490.

30 Thus, in my opinion, the expression should not be construed, for example, as capable of applying to an activity involving a significant risk of sustaining insignificant physical harm (such as, say, a sprained ankle or a minor scratch to the leg). It is difficult to see how a recreational activity could fairly be regarded as dangerous where there is no more than a significant risk of an insignificant injury.

31 In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the “risk of physical harm” may be “significant” if the risk is low but the potential harm is catastrophic. The “risk of physical harm” may also be “significant” if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the “risk of physical harm” may not be “significant” if, despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is “dangerous”.

32 Oztag, like touch rugby, is not what is normally understood as a contact sport. Oztag, in fact, is designed to reduce the extent of physical contact that might be experienced in ordinary touch rugby.

33 A “dangerous recreational activity” cannot mean an activity involving everyday risks attendant on games such as Oztag which involve a degree of athleticism with no tackling and no risk of being struck by a hard ball. In my opinion, the trial judge erred in finding that Oztag was “a dangerous recreational activity”.

34 I come finally to the causation argument.

35 At trial, the Oztag Association and the Council contended that Mr Falvo had been injured in the way described by the treating orthopaedic specialist, Dr Pinczewski, and Dr Sikander Khan, a surgeon in injury management and disability assessment. Dr Pinczewski and Dr Khan considered that the injuries were caused by Mr Falvo attempting to change his direction while running at pace and not by the condition of the field. Dr Pinczewski’s opinion was based on the nature of the injuries as well as a description of the incident apparently given to him by Mr Falvo. Dr Khan, who had read Dr Pinczewski’s report, based his opinion largely on the character of the injuries.

36 In a report dated 16 May 2003, Dr Pinczewski wrote:

“Mr Falvo reported that he was running with the ball and there was a slight ditch in the ground. As he pivoted to side step from the right lower limb Mr Falvo felt the knee give way with a loud crack which was followed by immediate pain and swelling. Mr Falvo recalls twisting the knee as the cause of his injury.”

Later in that report, Dr Pinczewski said:

“The history obtained from Mr Falvo and the injuries sustained are both consistent and classic to this type of non-contact change of direction injury. Although many patients feel that they stepped into a hollow on the ground, it is extremely unlikely that is the cause of the resultant ligamentous injuries, rather it was the change of direction at pace that is the cause of his injuries.”

37 Dr Khan also described a side step involving the twisting of the leg and pivoting on the knee as “the classical way in which injury to the cruciate ligament occurs”. He expressed the opinion that Mr Falvo’s injuries did not occur as a result of the conditions on the playing field, but by “a side stepping manoeuvre that he carried out while running with the ball”.

38 Hungerford ADCJ expressed the opinion that the views of Dr Pinczewski and Dr Khan had “substance”.

39 Hungerford ADCJ also said, with regard to Mr Falvo’s evidence that he was running straight ahead and not dodging or pivoting to escape the defenders, that “there was some credible evidence to the contrary”. This evidence to the contrary comprised Dr Pinczewski’s account of the history obtained from Mr Falvo and also a note taken by a physiotherapist, Mr Tracy, who examined Mr Falvo immediately after he had injured his knee. Mr Tracy’s note described what happened to Mr Falvo as, “Playing tag, twisted + Collapsed, fell”.

40 Persuaded by the evidence I have described, the judge concluded that Mr Falvo had not discharged the onus of proving a causal connection between his knee injury and any act or omission on the part of the respondents.

41 Senior counsel for Mr Falvo submitted that the judge should have accepted the evidence given by Mr Falvo himself that he had not pivoted, and had not attempted to side step an opponent, and that his injury had been caused by his foot sinking into the sand. She pointed out that Mr Falvo's evidence was supported by that of Mr Trapuzzano, who had seen the incident. Mr Trapuzzano testified that he did not see any side step by Mr Falvo and, indeed, there was no reason for Mr Falvo to side step at the point where he fell to the ground.

42 The judge was not convinced by the evidence of Mr Falvo and Mr Trapuzzano. This is readily understandable.

43 Firstly, Mr Falvo did not tender any evidence to rebut the medical opinions of Dr Pinczewski and Dr Khan to the effect that the very nature of Mr Falvo's injuries indicated that they were caused by a change of direction at pace.

44 Secondly, Dr Pinczewski explained that many persons who suffer this injury "feel that they stepped into a hollow on the ground", but it is "extremely unlikely" in fact that their injuries were caused in such a way. The judge was entitled to accept this evidence and regard Mr Falvo as being mistaken.

45 Thirdly, Mr Trapuzzano's evidence that he did not see Mr Falvo sidestep is explicable by the fact that Mr Falvo collapsed before he would have been able to make any sideways movement.

46 Fourthly, more than a year before the trial the Oztag Association and the Council gave Mr Falvo's legal representatives notice of their intention to call Dr Pinczewski and Dr Khan. Nevertheless, Dr Pinczewski and Dr Khan were not required to attend for cross-examination. In these circumstances, it is difficult for Mr Falvo to contend that the judge should not have accepted their testimony both as to matters of fact and matters of medical opinion.

47 Accordingly, I would not uphold Mr Falvo's argument in relation to causation.

48 I would dismiss the appeal with costs.

49 HUNT AJA: I agree with Ipp JA.

50 ADAMS J: I agree with Ipp JA.