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THERE IS NO HORSING AROUND WHEN IT COMES TO DANGEROUS RECREATIONAL ACTIVITIES

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Unsuccessful appeal against a finding that campdrafting is a dangerous recreational activity and quadriplegic injuries sustained were the result of materialisation of an obvious risk.

IN ISSUE

- Whether the Australian Bushmen's Campdraft & Rodeo Association Ltd (the respondent) breached its duty of care to Ms Tapp (the appellant).
- Whether injuries suffered as a result of falling from a horse during a campdrafting competition could be considered an obvious risk of a dangerous recreational activity (Section 5L of the *Civil Liability Act 2002* (NSW) (CLA).

THE BACKGROUND

This is an appeal from an earlier decision in the NSW Supreme Court (see our previous case note for details). The appellant was rendered quadriplegic when she fell from her horse while participating in a campdraft competition, an activity where participants muster cattle at high speed around a course, while on a horse, aimed at showing their control over both the horse and the cattle. A number of riders had fallen in the hour prior to the appellant's accident, and queries had been made about the safety of the ground, and whether the competition should continue.

THE DECISION AT TRIAL

While it was established that the respondent owed the appellant a duty of care, it was ultimately held that the respondent did not breach that duty of care. Furthermore, it was held that riding a horse during a campdrafting competition was a dangerous recreational activity and the injuries suffered by the appellant in the accident were a materialisation of an obvious risk.

THE ISSUES ON APPEAL

Whether the trial judge erred in:

- Failing to find that the respondent breached its duty of care to the appellant.
- Finding that an injury suffered by the appellant was a result of the materialisation of an obvious risk of a dangerous recreational activity.
- Finding that the respondent was not liable to the appellant by reason of the

volunteer defence under the CLA.

THE DECISION ON APPEAL

The majority of the Court of Appeal found that the respondent had not breached its duty of care. They found that the appellant's evidence did not establish that the cause of her fall was a deterioration of the surface of the arena, and that the exercise of reasonable care in all the circumstances would have caused the respondent to stop the campdrafting event, plough the arena ground, and/or warn the appellant that the ground had become unsafe prior to her injury. Although the surface of the arena was ploughed on the day after the incident, this did not constitute an admission of liability and the Court of Appeal held that this was an impermissible use of hindsight pursuant to s 5B(1)(c) of the CLA.

As regards Section 5L of the CLA, the appellant argued that the risk could be identified as "the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena". The majority did not accept this classification of the risk, bearing in mind it had not been accepted that the horse slipped as a result of a deterioration of the surface. The majority found that the particular risk of harm did not need to be specified with any degree of particularity, and the risk was obvious to a rider who had previously competed in these types of events, and who had many years of experience. Even if the appellant's evidence had established that the cause of the horse's fall was a deterioration of the arena's surface, the majority held that it would have still been a manifestation of an obvious risk of a dangerous recreational activity.

Whilst it did not affect the outcome of the appeal, there was also a finding that the trial judge erred in finding that the respondent could rely on the volunteer's defence in s 61 of the CLA, finding that a volunteer can only be a natural person and therefore the respondent could not rely on it to defeat allegations of direct negligence, even though the work was carried out by volunteers.

IMPLICATIONS FOR YOU

This decision demonstrates the importance of relying on evidence that is not based on hindsight when attempting to establish that a party has breached its duty of care. This ultimately proved fatal to the appellant's case prior to any discussion regarding whether the risk of injury was obvious.

Additionally, this decision illustrates a continuing trend in NSW, where a broad approach is taken when considering the question of an obvious risk arising from a dangerous recreational activity. In this instance, the Court of Appeal considered that the injury was a risk which arose from the activity of campdrafting, rather than the specific element that allegedly gave rise to the risk (the ground's surface).

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263

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