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LAWYERS

THERE IS NO SUCH THING AS A 'BOMB PROOF' HORSE

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An agricultural show society successfully defended a claim by a participant warming up for a horse riding event, who sustained significant personal injuries when another horse was spooked by a loud noise and caused her horse to fall over. The society successfully raised various defences to liability pursuant to the *Civil Liability Act 2002* (NSW) (CLA).

IN ISSUE

The key issues for determination by the NSW Supreme Court were whether the injuries were the result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff (s5L of the CLA) or the materialisation of an inherent risk (s5I of the CLA) and whether a risk warning within the meaning of s5M of the CLA had been provided.

THE BACKGROUND

The defendant conducted an annual agricultural show at the Wagga Wagga Showground. The plaintiff (who was a horse rider and trainer of considerable experience) attended the show to ride her horse Sonny in certain events. At approximately 10am, the plaintiff was riding Sonny in a designated warm-up area of the showground. A number of children were playing with and/or climbing a fence near the warm-up area and made contact with a metal sign on the fence, causing a very loud noise. The noise startled a horse being ridden in the plaintiff's vicinity, which in turn caused Sonny to startle. Sonny faltered and fell onto his right side, also causing the plaintiff to fall and sustain serious injuries.

The plaintiff alleged that the incident was caused by the defendant's negligence in failing to have marshals and stewards available to control the presence and behaviour of children in and around the warm-up area.

THE DECISION AT TRIAL

The court accepted that horses, including those which might normally appear placid or are conditioned to certain stimuli, are prone to being frightened or spooked by any number of external stimuli, and react unexpectedly. The plaintiff, as an experienced horse rider and handler, knew that horses were unpredictable in their behaviour and were prone to being spooked.

The relevant risk of harm was found to be that a horse might be spooked causing the rider of that horse or of another horse to fall, or a horse itself to fall. The plaintiff's attempt to characterise the risk as being that a horse could be spooked by noises made by children playing on and kicking a metal sign was held to be too specific.

The plaintiff did not dispute that she was engaged in a recreational activity at the time of the injury but denied it was a dangerous one, which requires the recreational activity to involve a significant risk of physical harm. The plaintiff argued that the risk of harm was slight rather than significant having regard to Sonny's nature and the fact that the activity being undertaken at the time was nothing more than 'warming

up'. However, the evidence established that there was an inherent, unpredictable and ever present risk that a horse will be spooked or startled, giving rise to the risk of serious injury, including catastrophic injury. The court was therefore satisfied that the recreational activity in which the plaintiff was engaged at the time of being injured was dangerous within the meaning of the CLA.

The court determined that s5L of the CLA was satisfied given the plaintiff's long experience of equine behaviour and there was no real dispute that the plaintiff's harm was the materialisation of that obvious risk.

The court also found that the plaintiff's injury was the materialisation of an inherent risk, for which s5I of the CLA provided a defence to the plaintiff's claim. The risk could not have been avoided by reasonable care and skill due to the fact that potential stimuli which may cause a horse to spook are so wide ranging.

The defendant also pleaded that it did not owe a duty of care to the plaintiff because it had given a risk warning. On attending the show and participating in events on 27 September 2012, the plaintiff signed a form containing a risk warning stating that participating with horses in events or activities at the show contained elements of risk, both obvious and inherent, which may result in personal injury. It was found that risk warning identified, and warned, of both the general nature of the particular risk and that there was a risk of injury in undertaking any activity, or participating in any event, at the show involving the use of horses. Accordingly, s5M of the CLA operated and the defendant did not owe a duty to the plaintiff to take care in respect of the relevant activity.

Given the defendant established various statutory defences, verdict and judgment was entered in its favour.

IMPLICATIONS FOR YOU

The decision reinforces the considerations necessary to satisfy the statutory defences under the CLA, examining in particular the elements required to establish that a recreational activity is a dangerous recreational activity. The precise characterisation of the relevant risk is an important part of this and various other statutory provisions and the court has cautioned that this should not be defined with a high degree of particularity. The decision is also a useful example of a case where a risk warning only needs to refer to the general kind of risk involved in an activity.

Menz v Wagga Wagga Show Society Inc (No 3) [2019] NSWSC 541

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