HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 04 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S63/2021
File Title:	Tapp v. Australian Bushmen's Campdraft & Rodeo Association
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	04 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF
NEW SOUTH WALES

No. S63 of 2021

BETWEEN: **EMILY JADE ROSE TAPP**

Appellant

and

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED
ACN 002 967 142

Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

1. The issues in this appeal are:

   (a) whether the Court of Appeal erred in failing to find that the respondent had breached its duty of care to the appellant;

   (b) whether the harm suffered by the appellant was the materialisation of an obvious risk of a dangerous recreational activity engaged in by the appellant within the meaning of ss 5F and 5L of the *Civil Liability Act 2002*.

COMMINS HENDRIKS
23 Gurwood Street
Wagga Wagga NSW 2650
DX 5403 WAGGA WAGGA

Telephone: 02 6933 6900
Fax: 02 6933 6933
Email: j.potter@chlaw.com.au
Ref: GJP:326354

PART III: SECTION 78B NOTICES

2. The appellant considers that no notice need be given in compliance with s. 78B of the *Judiciary Act 1903*.

PART IV: REASONS FOR JUDGMENT BELOW

3. The judgment of the primary judge is unreported and has the medium neutral citation *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506. The judgment of the New South Wales Court of Appeal is unreported and has the medium neutral citation *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263.

PART V: FACTS

4. The appellant, who was then aged 19 years old, suffered spinal injuries on 8 January 2011 when the horse she was riding in a campdrafting competition at Ellerston in the Upper Hunter region of New South Wales slipped and fell: {CAB 92, CA[2]; CAB 102, CA[33]; CAB 149, CA[182]}. Her injuries were severe, and damages were agreed at trial at $6,750,000 {CAB 93, CA[6]}.

5. The respondent conducted the campdrafting competition over Friday to Sunday, 7 to 9 January 2011. The respondent admitted that it organised, managed and provided the campdrafting event, and that it owed the appellant a duty of care to do so with reasonable care and skill. There was no dispute that the campdrafting competition was being conducted by the respondent under the respondent's "ABCRA Rule Book" {CAB 142 CA[172]}, Rule 15.5 of which required:

> "The arena surface MUST be safe, either being ploughed or soft surface (sand or loam) arena. ATTENTION MUST BE GIVEN TO ARENA SURFACES."

6. On the morning of Saturday, 8 January 2011 the appellant watched her father Ben and her sister Courtney compete in a number of events. The appellant herself competed twice in the Ladies' campdraft at about 11 am, but did not compete again that day until her father offered her his place in the Open campdraft riding his horse,

Xena Lena {CAB 95, CA[13]}. The open campdraft commenced at around 5 pm, and the appellant competed at around 7 pm.

7. During the period from 11am until the appellant competed in the Open campdraft a number of competitors fell from their horses. The evidence with respect to the circumstances of these falls consisted of the respondent's Incident Report (Exhibit 8), an annotated copy of the Open Draft Draw (Exhibit 9) and the evidence of Mr Darren Shorten, the Director of the Hunter Zone of the respondent.

8. The respondent's Incident Report, speaking of the period immediately before the appellant's participation, recorded that "there had been 7 falls over the course of the day."

9. The annotated Open Draft Draw recorded "bad falls" as having occurred at:
   (a) 6:14 pm – the rider being Nick Clydesdale;
   (b) 6: 22 pm – the rider being Adam Sadler;
   (c) 6:36 pm – the rider being Pat Gillis;
   (d) 6:58 pm – the rider being Brad Piggott.

10. One competitor, Mr John Stanton, complained about the condition of the surface of the arena to Mr Shorten saying: "I think the open draft should be stopped. The ground is getting a bit slippery." Mr Shorten did not cavil with Mr Stanton's description of the condition of the surface as being "slippery", instead responding: "I don't think that's fair because people have already competed and they have their scores and if the ground is better in the morning the people who have already ridden on the ground might not make the final and that's not fair." Mr Shorten approached the judge, Mr John Gallagher, and asked him to hold up the event.

11. Mr Shorten then spoke to Mr Allan Young, Chairman of the Members Representative Council and a Director of the respondent, saying "Stando [ie Mr Stanton] doesn't think the ground is that good. I don't think it is too bad. What do you think?" to which Mr Young replied: "The surface is okay. Competitors need to ride to the condition of the ground". Mr Gallagher agreed, and Mr Shorten directed Mr Gallagher to resume the event: {CAB 105, CA[42]; CAB 145, CA[174]}.

12. At about 6:58pm another competitor, Mr Brad Piggott, had his "bad fall". Mr Stanton again called for the event to be stopped, saying: "I think you should do something about this event. I think the ground is unsafe." Mr Shorten again told Mr Gallagher to hold up the event, and went and spoke again to Mr Young and to Mr Wayne Smith who was also on the Members Representative Council. One or both of them said: "The riders should ride to the conditions" and Mr Young said, "I think the arena surface is still alright". Mr Shorten then said to Mr Young and Mr Smith: "We will announce that if competitors wanted to scratch they would get their full entry fee back or they could compete at their own risk". Mr Shorten then said to Mr Gallagher: "We will continue but we will make an announcement that any competitor who wishes to withdraw can do so and they will get their money back": {CAB 145, CA[174]}.

13. Mr Shorten then spoke to Pat Gillis and Adam Sadler, each of whom had fallen from their horses. While neither rider blamed the surface of the arena for their falls, Mr Shorten did not ask them for their opinion as to the condition of the surface. Indeed there is no evidence that he asked them why they fell.

14. An announcement in the terms described to Mr Gallagher was made, although the appellant did not hear any such announcement as she was warming up away from the arena. The appellant was unaware that any of the competitors had fallen, or that the event had been held up twice by the organisers because of concerns regarding the safety of the surface of the arena: {CAB 26, J[65]-[69]; CAB 150, CA [186]}.

15. The appellant described her fall in two statements. In her first statement {CAB 148, CA[180]} she said: "When I rode on my horse in the camp, I felt that there was good traction but as I came to do the figure 8 area the ground felt heavy and my horse struggled to get a proper stride. My horse could not get her next stride and she went down on her front that is, she fell straight in a direct line and then we both slid onto the ground."

16. In her second statement {CAB 149, CA [181]} the appellant said: "I was about half way around the first peg on an arch when I felt my horse's front legs slide from beneath me and slide toward the right. My horse went down onto her front and both my horse and myself landed on the ground." The appellant's sister gave a

description of the accident {CAB 101, CA[31]}: "the horse looked like its front legs slid from under it and the horse and [the appellant] fell", as did her father {CAB 102, CA[32]}: "the horse and [the appellant] fell because the front legs of the horse slid from beneath it."

17. Mr Shorten was the only lay witness who gave evidence for the respondent. During the course of his evidence he acknowledged that it was "practically unprecedented" to have seven falls occur in an entire event let alone a single day (T168) and that a "bad fall" was "a signal that the surface needs attention to prevent another fall" (T165). He conceded that the arena surface had been identified by himself and others "at that stage as being dangerous" (T190), that "it was getting more unsafe" (T185) as the afternoon progressed. He also conceded that the fact that the surface was ploughed following the appellant's fall "demonstrates how bad the condition of the ground was" (T172) and the reason for ploughing the surface was "because we thought at that time that would be the reason for no more falls" (T172). He frankly conceded that the reason why the event was allowed to continue was because "the event had to go on" (T177, 178, 198) and that this "took precedence over safety" (T198).

18. The competition was suspended for the remainder of Saturday, 8 January 2011. Overnight, the arena surface was ploughed and the competition resumed on Sunday, 9 January 2011. There were no further falls for the remainder of the competition.

PART VI: ARGUMENT

(a) Breach of Duty

19. In the Court of Appeal the principal majority reasons were those of Payne JA. Payne JA held that the appellant had failed to establish that a cause of her fall was the deterioration in the surface of the arena {CAB 99, CA[24]; CAB 102, CA[33]; CAB 103, CA[88], and therefore that she failed to establish that the respondent breached its duty of care in not suspending the event until the surface had been repaired {CAB 109, CA[56]}. Basten JA appears to have been of a similar view {CAB 92, CA[2]-[3]}

20. The reasoning of the majority appears to have misunderstood the narrower case advanced by the appellant on appeal, and the concessions made by the respondent at trial with respect to causation. At trial, a broad-ranging case was advanced that impugned the general preparation (or lack thereof) of the surface of the arena prior to the commencement of the event on Friday, 7 January 2011, including the use of an aerator but not a plough to prepare the surface. On appeal, a narrower case was advanced, namely that having regard to the known deterioration of the surface of the arena the competition ought to have been suspended until the arena surface was repaired (a course of action that was belatedly undertaken after the appellant's fall, with spectacularly successful results). At trial, the respondent conceded that the appellant would succeed on causation if it were established that the relevant breach by the respondent was the failure to stop the competition. It was expressly conceded that in that circumstance "the accident would not have happened."

21. It was therefore not incumbent upon the appellant to prove the precise mechanical mechanism by which the deterioration of the surface of the arena had caused it to become unsafe. Having regard to the respondent's admitted duty of care and the concessions made in relation to causation, all the appellant was required to do was establish that the surface of the arena had deteriorated to such a degree that the competition ought to have been suspended to enable the renovation of the surface.

22. Turning then to the extent of the deterioration of the surface, in rejecting the appellant's contentions Payne JA disregarded the concessions made by Mr Shorten in his evidence (described at [17] above), and in doing so his Honour made two fundamental errors.

23. The first error was to regard the concessions as having been made with hindsight and therefore irrelevant. However, the concessions are not all properly regarded as being made with hindsight. The evidence included concessions as to what the events occurring at the time (in particular, the unusual number of falls) indicated to Mr Shorten about the condition of the surface of the arena. They also included concessions as to his then state of knowledge. They cannot simply be dismissed as the product of hindsight, particularly given that Mr Shorten himself was careful to identify when his answers were being given with the benefit of hindsight (T198).

24. The second error was failing to distinguish between the permissible use to which hindsight evidence could be put (ie as evidence from which inferences could be drawn as to the state of the surface of the arena at relevant points in time) from the use that might have been impermissible (ie as evidence as to what the respondent ought to have done in response to the deterioration in the surface).

25. The appellant was entitled to an appeal by way of rehearing: *Supreme Court Act 1970*, s. 75A(5). That required the Court of Appeal to consider for itself the whole of the evidence and to draw such inferences as were available from that evidence. In rejecting the relevance of Mr Shorten's concessions the majority deprived the appellant of an appeal according to law. Once proper regard was had to those concessions then, as McCallum JA found:

(a) it was clear that the surface of the arena had deteriorated throughout the course of the afternoon to the extent that it was unsafe;

(b) the inference should have been drawn – consistently with the number of falls on the Saturday and the absence of falls once the surface had been renovated on the Sunday morning, and the fact that the event was stopped until the surface could be renovated because the very experienced event organisers believed that to be necessary in order to prevent further falls – that it was the deterioration in the surface that caused the appellant's horse to fall;

(c) a reasonable person in the position of the respondent, prior to the appellant's accident and certainly no later than immediately following the fall by Mr Gillespie, would have taken steps to renovate the surface of the arena and to have prevented further competition until that had occurred.

(b) Obvious risk of a dangerous recreational activity

Statutory provisions

26. The trial judge and the majority in the Court of Appeal upheld the respondent's defence based upon s 5L of the *Civil Liability Act*, which provides:

> **No liability for harm suffered from obvious risks of dangerous recreational activities**
>
> (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.

27. The term "obvious risk" is in turn defined by s 5F:

Meaning of "obvious risk"

(1) For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

28. Central to the operation of these provisions is the proper identification of the relevant risk. As Leeming JA observed in *Uniting Church in Australia Property Trust (NSW) v Miller* (2015) 91 NSWLR 752 (***Miller***) at [103] the terms "risk" and "risk of harm" recur throughout Part 1A of the *Civil Liability Act*. However, it is important to recognise that the terms perform different functions depending upon the particular provision in question, and approach the determination of liability from different perspectives. Thus, while s 5B draws attention to the risk of harm against which the defendant ought to have taken precautions, s 5L draws attention to the risks of harm that ought to have been obvious *to the plaintiff*. In addition, as Leeming JA observed in *Miller* at [114], while s 5C(a) suggests that the relevant "risk of harm" must be described sufficiently narrowly that the defendant can point to similar but distinct risks of harm, s 5G suggests that the relevant risk of harm is sufficiently general that it may be described as a "type" or "kind" of risk.

29. The relevant description of the risk must encompass the risk that in fact materialised in the case of the plaintiff: it must identify the "true source of potential injury" (*Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at [60]) and the "general causal mechanism of the injury sustained" (*Perisher v Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at [98]). It must also be described with

sufficient particularity so that where there are a number of different risks to which a plaintiff is exposed a court can determine what, if any, reasonable precautions ought to have been taken in order to avert it: *Perisher Blue* at [106]; *Avopiling Pty Ltd v Bosevski* (2018) 98 NSWLR 171 at [44].

30. In the language of Leeming JA in *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at [62] a relatively high degree of specificity is required in the present case in order fairly to capture the risk which materialised causing harm to the appellant and against which reasonable precautions ought to have been taken by the respondent.

Reasoning in the courts below

31. The trial judge described the relevant risk of harm in a number of different ways. At {CAB 43, J[131]} her Honour referred to "the risk of falling from the horse and suffering and injury whilst competing in a campdraft competition, given the complexities and risks inherent and associated with that activity." At {CAB 43, J[133]} her Honour described the risk of harm as being "the risk of falling and being injured" or alternatively "that the horse would fall and as a consequence of that, the plaintiff would fall and be injured." Each such formulation failed to identify the "true source of potential injury" with sufficient particularity to enable a consideration of what reasonable steps ought to have been taken to avert the risk.

32. At {CAB 116, CA[77]-[78]} Payne JA considered two different descriptions of the risk. The first was "the [appellant's] horse falling in the course of the campdrafting competition". His Honour correctly observed that this was "far too broad" as it, too, suffered from the same defects as the various formulations adopted by the trial judge.

33. Payne JA next considered the description advanced by the appellant, namely "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". His Honour held that this too was inadequate because "although it refers to the state of the arena, it fails to identify the nature of the deterioration which led to the risk of the fall." This latter observation echoed the earlier criticism made of the appellant's case at {CAB 113, CA[69]} that it did not identify whether the surface had deteriorated because it had become hard

and compacted when it should have been soft, or whether it had deteriorated because it had become soft when it should have been harder. His Honour held that this description of the risk was inadequate for not being sufficiently particular, even though at {CAB116, CA [75]} his Honour had somewhat inconsistently criticised the very same description for not being sufficiently general.

Argument in relation to the relevant risk of harm

34. The majority in the Court of Appeal did not make any finding as to what was the (or an) appropriate description of the relevant risk of harm. As discussed above it rejected the description of risk advanced by the appellant, and as described below the majority nonetheless held that the risk as described by the appellant was obvious.

35. As noted above, any description of the risk for the purposes of the application of ss5F and 5L must be sufficiently particular that it identify the true source of potential injury and the general causal mechanism of the injury sustained. It must also be described with sufficient particularity to enable a court to determine what, if any, reasonable precautions ought to have been taken in order to avert it.

36. It is submitted that the preferable description of the relevant risk is that advanced by the appellant, and upheld by McCallum JA in dissent at {CAB 143, CA[66]}, namely "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." As her Honour demonstrates, such a description achieves the necessary balance of generality and specificity necessitated by different ways in which "risk" and "risk of harm" are used throughout Part 1A.

Reasons of the majority of the Court of appeal in relation to obviousness of the risk

37. Payne JA at {CAB116, CA[77]} held that even if the risk were correctly described in the manner advanced by the appellant it was nevertheless an obvious risk of harm. The reasoning for this conclusion commences with the contention at {CAB17, CA[79]-[80]} that after 700 individual rides the fact that the surface of the arena would have deteriorated so as to heighten the risk of a horse slipping and falling was obvious. This proposition is unsupported by any evidence (it was not put to the appellant, or any other witness, nor was a submission to that effect made at first

instance or in the Court of Appeal). It is also inconsistent with Mr Shorten's evidence that falls were rare.

38. The reasoning concludes at {CAB117, CA[80]}. Here, however, in discussing s 5L(2) Payne JA elides two distinct concepts: knowledge of the risk on the one hand, and knowledge of the conditions giving rise to the risk on the other hand. Contrary to his Honour's conclusion, there is no inconsistency between on the one hand observing (as was the fact) that the appellant was not aware of the earlier falls (or of the interventions of Mr Stanton) and also advancing the proposition that the appellant's fall was predictable to a decision-maker in the position of Mr Shorten who had actual knowledge of the earlier falls, actual knowledge of the concerns expressed by Mr Stanton, and actual knowledge that the surface conditions were such that he was prepared to refund entry fees to those who did not in fact want to court the very risk he knew to exist. They are very different inquiries, from very different perspectives, informed by a significant knowledge imbalance. As McCallum JA in dissent correctly observed at {CAB 136, CA[144]}, the Act contemplates the imposition of liability where the risk that materialised was foreseeable to the provider of the recreational activity, but not obvious to the participant.

Argument in relation to obviousness of the risk

39. Again, the analysis of McCallum JA in dissent at {CAB150, CA[185]-[186]} should be preferred.

40. As her Honour correctly observes, the relative youthfulness of the appellant was a material consideration in the assessment of risk, notwithstanding the appellant's experience in campdrafting.

41. A further material consideration was the absence of any knowledge on the part of the appellant of the conditions that gave rise to the risk of harm. The appellant was not in fact aware of the previous falls, or the fact that the event had twice been suspended because of concerns about the surface. The appellant was not aware of the fact that the respondent was so concerned about the conditions that it was prepared to refund the entry fee for competitors who did not wish to continue competing. Nor was she aware that the motivation for continuing the competition was so as to not

disadvantage riders who had already competed. Similarly, she was not aware that no representative of the respondent had arrived at a positive state of persuasion that the surface of the arena was safe.

42. What the appellant *was* aware of was what she could observe about the condition of the ground when she rode onto the arena, some 8 hours after she had previously competed. There was no suggestion by way of cross-examination or otherwise that the appellant did or ought to have observed something about the condition of the ground that put her on notice that the ground had deteriorated to the extent that it was no longer safe. This was *not* one of the risks that the appellant acknowledged in her evidence.

43. In the same way that the risk of injury as a result of falling from a horse that put its hoof into a rabbit burrow on a racetrack is not obvious (cf *Singh v Lynch* [2020] NSWCA 152 at [140]), nor was the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the campdrafting arena.

44. Accordingly, the respondent's defence based upon s 5L should have failed.

PART VII: ORDERS SOUGHT

45. Appeal allowed with costs.

46. Set aside the orders made by the NSW Court of Appeal on 23 October 2020 and in lieu thereof order:

    (a) appellant's appeal to the Court of Appeal allowed with costs; and

    (b) the orders made by Lonergan J on 4 November 2019 be set aside and in lieu thereof it be ordered:

        (i) verdict and judgment for the plaintiff in the amount of $6,750,000;

        (ii) defendant to pay the plaintiff's costs.

PART VIII: ESTIMATE OF TIME REQUIRED

47. The appellant estimates no more than 2 hours will be required to present oral argument.

Dated: 4 June 2021

D F Jackson QC
(02) 9151 2009
jacksonqc@newchambers.com.au

D F Villa SC
(02) 9151 2006
villa@newchambers.com.au

JA Hillier
(02) 9223 8088
hillier@counsel.net.au

10

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF
NEW SOUTH WALES

No. S63 of 2021

BETWEEN: **EMILY JADE ROSE TAPP**

Appellant

and

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED
CAN 002 967 142

Respondent

ANNEXURE

LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

1. *Civil Liability Act 2002* (NSW) No 22 (as at 1 January 2011), ss SF and SL