

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
KEANE, GORDON, EDELMAN AND GLEESON JJ

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EMILY JADE ROSE TAPP

APPELLANT

AND

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO  
ASSOCIATION LIMITED

RESPONDENT

*Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited*  
[2022] HCA 11  
*Date of Hearing: 10 November 2021*  
*Date of Judgment: 6 April 2022*  
S63/2021

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 23 October 2020 and, in their place, order that:*
  - (a) *the appeal be allowed with costs; and*
  - (b) *the orders made by the Supreme Court of New South Wales on 4 November 2019 be set aside and, in their place, it be ordered that:*
    - (i) *there be verdict and judgment for the plaintiff in the agreed amount of \$6,750,000; and*
    - (ii) *the defendant pay the plaintiff's costs.*

On appeal from the Supreme Court of New South Wales



**Representation**

D F Jackson QC with D F Villa SC and J Hillier for the appellant (instructed by Commins Hendriks Solicitors)

J T Gleeson SC with D A Lloyd SC and K I H Lindeman for the respondent (instructed by RGSLAW)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited**

Tort – Negligence – Breach of duty of care – Causation – Obvious risk of dangerous recreational activity – Where appellant competing in campdraft competition – Where campdrafting a dangerous recreational activity – Where appellant's horse slipped and fell causing serious injury to appellant – Where four other contestants had falls prior to appellant's fall – Where experienced contestant warned organisers about condition of arena surface – Where organisers twice refused to stop competition – Whether respondent breached duty of care – Whether breach of duty of care caused appellant's injuries – Whether harm suffered by appellant result of materialisation of obvious risk of dangerous recreational activity.

Words and phrases – "breach of duty", "causation", "dangerous recreational activity", "liability for harm", "obvious risk", "precautions against a risk of harm", "reasonable person", "significant risk of physical harm".

*Civil Liability Act 2002* (NSW), ss 5B, 5C, 5D, 5F, 5L.



1 KIEFEL CJ AND KEANE J. On 8 January 2011, the appellant ("Ms Tapp") was injured while competing in a campdrafting event organised by the respondent, the Australian Bushmen's Campdraft & Rodeo Association Ltd ("the Association"). Ms Tapp's horse slipped, causing Ms Tapp to fall and suffer a serious spinal injury<sup>1</sup>. Ms Tapp brought an action in negligence for damages against the Association. Ms Tapp's claim was dismissed by the primary judge (Lonergan J). That decision was upheld by a majority of the New South Wales Court of Appeal (Basten and Payne JJA, McCallum JA dissenting).

2 The appeal to this Court raises two issues: first, whether Ms Tapp had established that the Association failed to take reasonable precautions against the risk of injury (and whether such a breach was a cause of her injuries); and secondly, if liability were otherwise established, whether her injuries resulted from the materialisation of an "obvious risk" such that s 5L of the *Civil Liability Act 2002* (NSW) ("the Act") operated to deny liability on the part of the Association. For the reasons that follow, the first issue must be resolved against Ms Tapp, and, on that basis, the appeal should be dismissed. It is unnecessary to consider the second issue.

3 It is convenient to begin with some uncontroversial factual background, drawn from the concurrent findings of fact by both the primary judge and the Court of Appeal.

## Background

4 Campdrafting is a sport that involves a horse and rider working cattle. In a campdrafting competition, a rider on horseback rides into a "camp" containing between six and eight head of cattle and attempts to separate, or "cut out", one animal from the herd. The rider must first manoeuvre the animal two or three times back and forth across the camp to demonstrate the rider's control of the animal. The rider then calls for the gate to the "arena" to be opened. After entering the arena, the rider must "draft" the animal around two pegs in a figure eight course before finally guiding it through another gate marked by two pegs, thus completing the campdraft<sup>2</sup>. A campdrafting competition is judged on horsemanship and

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1 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [6].

2 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [7]-[8].

2.

control over the animal, and must be completed within set time limits (usually between 45 and 47 seconds)<sup>3</sup>.

- 5 The Association is a not-for-profit incorporated association with overall control of the sport of campdrafting in Australia<sup>4</sup>. The Association organised and managed the campdrafting event at which Ms Tapp was injured<sup>5</sup> at Ellerston in New South Wales. Mr Shorten was the director of the Hunter Zone of the Association and was a directing mind of the Association whose acts and knowledge were properly to be attributed to the Association. He was the only member of the Association to give oral evidence<sup>6</sup>. His description of campdrafting, which was unchallenged in this respect, was as follows<sup>7</sup>:

"Campdrafting is competitive and involves riding a horse at high speed, often in a full gallop, around a course which has pegs. It involves the rider steering the horse around the course. *There are a number of risks. The horse could fall by losing its footing or contacting the hooves of the animal being chased. The rider could lose balance and fall off. Horses can be unpredictable animals and so can the livestock which the riders chase in the events.*" (emphasis added)

- 6 Ms Tapp began riding horses at the age of five and became involved in campdrafting events when she was aged six. She won a number of junior campdrafting competitions. From age 12, Ms Tapp and her family would travel

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3 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [14].

4 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [32]-[33].

5 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [88]-[89].

6 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [38]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [90].

7 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [9].



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around New South Wales to participate in campdrafting events organised by the Association, usually attending four to six events each year<sup>8</sup>.

7 Ms Tapp, with her sister and her father, nominated to compete in the Ellerston campdraft event that was to take place between Friday, 7 January 2011 and Sunday, 9 January 2011. The entry form indicated that Ms Tapp was to compete on two horses, Xena Lena and Chiquita<sup>9</sup>.

8 Ms Tapp's fall occurred on Saturday, 8 January 2011, the second day of the event. Over 700 rides had taken place on the arena surface over the first two days of the event leading up to the incident<sup>10</sup>. On the day of the incident, Ms Tapp had completed two rides herself in the ladies' division, her father had competed three or four times and her sister three times<sup>11</sup>.

9 At around 5 pm, soon after the open draft commenced, Ms Tapp's father offered her his place in the open draft, riding on his horse, Xena Lena. Ms Tapp had ridden Xena Lena on many occasions, recreationally and at campdrafts, including at a campdrafting competition the previous weekend<sup>12</sup>. Ms Tapp warmed the horse up, and returned to the arena to find that the event had been delayed. Unaware of the reason for the delay, Ms Tapp waited for about five minutes before the event recommenced<sup>13</sup>.

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8 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [13], [17]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [10].

9 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [11]-[12].

10 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [87]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [40], [79], [176].

11 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [40].

12 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [13].

13 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [14].

*Ms Tapp's fall*

10 Ms Tapp's fall occurred at around 7 pm while she was competing in the open draft<sup>14</sup>. Ms Tapp described the incident in a statement dated 18 December 2013 in the following terms<sup>15</sup>:

"I waited for the judge to announce that I could start my run. My horse and I entered the camp and we were able to cut out a beast and turn it two or three times in the camp. I then called for the cut out gates to be opened to enter the arena. There was a peg on my right and one on my left. I had moved forward and was turning to the left on the other side of the left peg. My horse went from a short trot to a canter once outside of the camp gates. I was seated in the centre of the saddle. 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. She got up after about 15 seconds and I tried to get up and could not. I was in excruciating pain in my chest but realised that I could not move my legs."

11 Ms Tapp's description of her fall in a second statement, dated 25 May 2017, was in slightly different terms<sup>16</sup>:

"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. My horse got up after about 15 seconds. I tried to get up but could not ..."

12 The primary judge found that nothing turned on the slightly different wording of Ms Tapp's two statements<sup>17</sup>. Ms Tapp's descriptions of the incident

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14 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [88]-[89].

15 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [28].

16 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [29].

17 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [29].

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were consistent with the statements of her sister ("the horse looked like its front legs slid from under it and the horse and [Ms Tapp] fell") and her father ("the horse and [Ms Tapp] fell because the front legs of the horse slid from beneath it")<sup>18</sup>.

13 As to the crucial issue<sup>19</sup> – what the evidence demonstrated as to the reason Ms Tapp's horse fell – it was Ms Tapp's case that her horse fell because of deterioration in the surface of the arena leading up to her ride. Ms Tapp alleged that the Association, by allowing the event to continue in these circumstances, breached its duty to Ms Tapp to take reasonable care for her safety. The Association admitted that it owed Ms Tapp a duty of care to organise, manage and provide the campdrafting event with reasonable care and skill, but it denied that it had breached that duty<sup>20</sup>. Ms Tapp's amended statement of claim set out the standard of care that she alleged the Association had breached<sup>21</sup>:

"92. A reasonable person in the position of the Defendant would have:

92.1. Ploughed the ground at the site of the campdrafting event prior to commencement of competition on 8 January 2011;

92.2. Stopped the competition when the ground became unsafe;

92.3. Warned competitors, including the Plaintiff, that the ground at the site of the campdrafting event had become unsafe."

14 In relation to the contention that the surface of the arena should have been ploughed, it is relevant to note that the Association's Rule Book contains a

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18 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [31]-[32].

19 See *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [33].

20 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [199], [201].

21 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [195].

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reference to the surface being ploughed, in the context of a general requirement that the arena surface be safe. Rule 15.5 provided<sup>22</sup>:

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

15 Ms Tapp did not conduct her case on the basis of a breach of the Association's Rules<sup>23</sup>. It can be seen, however, from Ms Tapp's contended breaches on the part of the Association that a significant issue was the evidence adduced at trial concerning the state of the surface of the arena. It is convenient now to turn to consider that evidence.

*Evidence concerning the surface of the arena*

16 A hazard and risk assessment form had been completed "in the days prior to the event"<sup>24</sup> by Ms Shorten, who was the Secretary of the Ellerston District Sports Club<sup>25</sup>. That form identified a list of parameters and corresponding risks and was to be completed by indicating the "risk level" relating to each one. The "risk level" for every risk on the form was indicated to be "L", presumably intended to mean "Low". That included, relevantly, the risk of "Injury to spectators and competitors" in respect of the parameter "Ground surface". The form identified the "control" that had been implemented in respect of that risk to be: "ground maintenance carried out prior to event"<sup>26</sup>.

17 An incident report prepared by the Ellerston District Sports Club and dated 12 January 2011 ("the Incident Report") noted that the surface had been

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22 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [25].

23 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [26], [57].

24 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [45].

25 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [46], [62].

26 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [48].

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"renovated" at 7 am and 6 pm on Friday, 7 January 2011<sup>27</sup>. Mr Shorten, in his evidence, stated that on the Friday evening, although he had not received any complaints and was not aware of any problems with the surface of the arena, he and several other organising members had decided to renovate the arena "just to keep it nice and soft and competitive"<sup>28</sup>. The references to "renovation" of the surface were to the soil being "aerated", not "ploughed"<sup>29</sup>.

18        There was evidence that it had rained at Ellerston on Friday, 7 January 2011, but on Saturday, 8 January 2011, the sun was out<sup>30</sup>. Ms Tapp led evidence of a soil expert, although the primary judge found that his evidence was of little weight because assumptions as to rain measurements had not been established on the evidence<sup>31</sup>. Otherwise, the only evidence as to the condition of the surface of the arena was that of Mr Shorten.

19        Mr Shorten competed in the campdraft on Friday, 7 January 2011, and gave the following evidence as to the state of the surface at the time<sup>32</sup>:

"I did not think there was anything wrong with the surface. In fact I thought it was better than previous years, as it had a better ground covering and did not appear to be as dusty. There was moisture in the topsoil, but it was not wet."

20        Mr Shorten competed again on Saturday, 8 January 2011, as did his wife and his two sons. He stated that he would not have competed, or allowed his family

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27    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [44], [52].

28    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [49].

29    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [48].

30    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [42].

31    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [76], [78].

32    *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [43].

members to compete, if he thought the ground was unsafe<sup>33</sup>. Mr Shorten fell after completing his first ride early in the open draft. He said that he fell because he had slackened off the reins after completing the course. In his opinion, his fall had nothing to do with the surface of the arena<sup>34</sup>.

- 21 Mr Shorten gave evidence that the arena at Ellerston had never been ploughed until it was ploughed for the first time on Sunday, 9 January 2011, the day after Ms Tapp's injury<sup>35</sup>. Mr Shorten said the surface was ploughed because "we didn't want another accident"<sup>36</sup>.

*Evidence of other falls*

- 22 There was evidence that, besides Mr Shorten, several other riders fell off their horses on Saturday, 8 January 2011. The evidence was unclear as to the precise number of falls preceding Ms Tapp's incident. The Association, in its amended defence, admitted that there were falls at 6.14 pm (Mr Clydsdale), 6.36 pm (Mr Gillis) and 6.58 pm (Mr Piggot)<sup>37</sup>. The Incident Report referred to there having been seven falls over the course of the Saturday<sup>38</sup>. A document in the evidence described as the "Open Draft Draw" recorded four falls, all occurring in the hour leading up to Ms Tapp's incident, at 6.14 pm, 6.22 pm, 6.36 pm and

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33 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [53].

34 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [55].

35 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [49].

36 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [50].

37 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [70].

38 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [70], [88].

6.58 pm. All four falls were annotated on the draw as being "bad falls", which Mr Shorten explained as meaning that the rider was lucky not to be injured<sup>39</sup>.

23 The primary judge made no finding as to the number of falls that occurred before Ms Tapp's incident. Her Honour noted that the only fall with respect to which there was admissible evidence as to the reason for the fall was Mr Shorten's, and he, as already noted, did not attribute the fall to a problem with the surface of the arena<sup>40</sup>.

24 The primary judge accepted Ms Tapp's evidence that she had been unaware that there had been any falls before her ride in the open event<sup>41</sup>. There were no falls on Sunday, 9 January 2011<sup>42</sup>.

*Evidence of complaints about the surface*

25 Prior to Ms Tapp's incident, two complaints were made by Mr Stanton, a competitor, about the surface of the arena. Mr Shorten recounted the circumstances of those complaints in his evidence in the following terms<sup>43</sup>:

"Around mid-way through the open draft I was approached by John Stanton (John), a competitor. He said 'I think the open draft should be stopped. The ground is getting a bit slippery'. I said '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'. I had my arm in a sling at the time and he said 'look at you' and I said 'that's not fair it had nothing to do with the ground, it was my own stupid fault'.

John then rode away. I approached Jack Gallagher the judge, and said 'hold the event up, wait a minute'. I then saw Allan Young, who is the Chairman

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39 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [72], [88]-[89]; Trial transcript, T198/21.

40 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [72].

41 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [69].

42 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [88].

43 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [174].

of the Members Representative Council, and is also a board director of the [Association]. I said '[John Stanton] doesn't think the ground is that good. I don't think it is too bad. What do you think?' Allan said 'the surface is okay. Competitors need to ride to the condition of the ground'. I said to Jack 'what do you think'. He said 'yes, keep it going'. I then told Jack Gallagher to resume the event. I did not think that the condition of the surface was such that the event should be cancelled.

I then returned to my truck. Before speaking to John Stanton again ... I spoke to John, and two friends who were competing, Pat Gillis and Adam Sadler. I knew that they had fallen off their horses that day. Pat Gillis said 'I left the camp and heard the judge say 22 so I tried to ride to get a good score and I rode too hard. I thought I had a chance of making the final'. Pat Gillis did not blame the arena surface. Adam Sadler said 'I am annoyed because I fell just before the gate which meant I didn't get a score'. He didn't blame the surface for his fall.

I can't say how long after the first time John Stanton approached me, but he approached me a second time. This was after Jack Callinan had come to see me to see if I was alright. John approached me and said 'I think you should do something about this event. I think the ground is unsafe'. Jack Callinan and I walked around and told Jack Gallagher to pull the draft up for the moment. We then went over and spoke with Allan Young again and Wayne Smith, also a MRC board member. One or both of them said 'the riders should ride to the conditions'. Allan said 'I think the arena surface is still alright'.

I considered the condition of the ground. I had noticed that the surface was not wet, it was moist in parts. Dust was still flowing up."

Clearly enough, Mr Shorten viewed the surface in order to assess its condition. It is reasonably to be inferred that the other persons with whom he spoke on that topic likewise did so.

It can be seen that, on two occasions, competition was suspended while the members of the Association responsible for the conduct of the competition considered Mr Stanton's suggestion that the event be cancelled. It can also be seen that, while Mr Stanton urged that course because the "ground [was] unsafe", that view was not shared by other participants who were in a position to make a responsible judgment. To the contrary, the prevailing view was that competitors should "ride to the conditions". In this regard, each of Mr Shorten, Mr Young and



Mr Smith had competed on the arena surface that day<sup>44</sup>. Mr Gallagher was a judge of the campdrafting event<sup>45</sup> and Mr Callinan was the President of the Ellerston District Sports Club<sup>46</sup>. Neither Mr Gillis nor Mr Sadler suggested that the state of the surface of the arena had anything to do with their falls. It may also be noted that there was evidence that Mr Young himself competed again on the arena surface after these discussions and immediately before Ms Tapp's injury<sup>47</sup>.

27 It is also necessary to say something about the evidence of what Mr Stanton said to Mr Shorten. Mr Shorten's evidence about this stands as evidence of the fact of Mr Stanton's complaints and no more. Mr Stanton was not called by Ms Tapp to give evidence of his opinion and the basis for it. In these circumstances, the evidence of his complaints is not due any weight as evidence of the dangerous state of the surface of the arena, nor is there any basis to prefer him as an expert over Mr Shorten and the other four persons whose contrary views were expressed.

28 Mr Stanton did not advise Mr Shorten what was wrong with the surface. If Mr Stanton had expressed an opinion about that subject, no doubt it would have been necessary for Ms Tapp to call him to support that opinion if the primary judge were to be asked to act upon it. Absent that key aspect of the evidence in her case, it was not possible to put to Mr Shorten what form the deterioration in the surface took, for comment. Mr Stanton did not say to Mr Shorten that the surface should be ploughed. The highest Mr Shorten's evidence in this regard can be put is that Mr Stanton suggested that the competition be called off for the night, presumably to recommence the following day.

29 Mr Shorten, Mr Young and Mr Smith agreed that an announcement would be made over the loudspeaker that any competitors who wished to withdraw from the event could do so and receive a full refund<sup>48</sup>. The primary judge accepted the

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44 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [43].

45 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [42].

46 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [62].

47 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [43].

48 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [56]. See also [57], [60], [64]-[65].

evidence of Ms Tapp and her father that neither heard the announcement at that time; in particular, the primary judge accepted that Ms Tapp was busy focussing on preparing for her ride<sup>49</sup>. It should be emphasised here that it was no part of Ms Tapp's case of negligence in this Court that the Association should have done more to bring the announcement to her attention.

### **The reasons of the primary judge**

30 Before the primary judge, only liability was in issue, the parties having agreed the quantum of damages for Ms Tapp's injuries in the sum of \$6,750,000<sup>50</sup>.

31 The primary judge began by considering the application of s 5L of the Act, adopting<sup>51</sup> the approach adverted to by Leeming JA in *Goode v Angland*<sup>52</sup> that, since s 5L is a "liability-defeating rule", it may be appropriate to consider the defence at the outset. The primary judge concluded that the Association was not liable for Ms Tapp's injuries on the basis that her injuries were the materialisation of an obvious risk of a dangerous recreational activity within the meaning of that section<sup>53</sup>. Additionally and alternatively, her Honour held that even if the defence in s 5L were not made out, Ms Tapp had not shown that the Association had breached its duty of care to Ms Tapp<sup>54</sup>.

32 Relevantly for present purposes, the primary judge rejected Ms Tapp's submission that the taking of reasonable care required the Association to stop the event after receiving the complaints from Mr Stanton; rather, what was required was the making of an informed decision about whether it was safe to continue with

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49 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [66].

50 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [6].

51 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [99].

52 (2017) 96 NSWLR 503 at 540-541 [185].

53 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [133].

54 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [215].

the competition<sup>55</sup>. Her Honour found that Ms Tapp failed to demonstrate that the Association breached this standard of care<sup>56</sup>. In this regard, the primary judge emphasised that campdrafting was a sport that was "known to entail a risk of falling", the activity being one that involved a competitor "riding at speed on a horse and corralling a beast, in a particular required configuration, in a relatively confined space"<sup>57</sup>.

### **The reasons of the Court of Appeal**

33 In the Court of Appeal, Payne JA (with whom Basten JA agreed) found no error in the primary judge's conclusion that Ms Tapp had failed to demonstrate that the Association breached its duty to Ms Tapp, or that any such breach was a cause of her fall<sup>58</sup>.

34 Importantly, Payne JA held that Ms Tapp had failed to prove the cause of her horse's legs sliding out from under it<sup>59</sup>. In particular, his Honour concluded that Ms Tapp could not demonstrate that her horse fell because of deterioration in the surface of the arena, as distinct from some other cause<sup>60</sup>:

"There were on the evidence a number of reasons why campdrafting carries a risk of a horse slipping and falling. Those reasons include the speed the horse is travelling, the complexity of the manoeuvre being made and the qualities of the horse. Mr Shorten's evidence that the risks of campdrafting include a risk that the 'horse could fall by losing its footing' was not

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55 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [211].

56 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [215].

57 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [145]. See also [212].

58 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [55].

59 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [33].

60 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [38]. See also [33], [37].

challenged. [Ms Tapp] did not prove that [her] horse slipped because of any deterioration in the surface of the arena."

35 Payne JA observed that, insofar as the case for Ms Tapp assumed that it had been established that "a cause of [Ms Tapp's] horse falling was the deterioration in the condition of the surface of the arena which made the arena 'slippery'"<sup>61</sup>:

"The primary judge made no such finding. It bears emphasis ... that at the trial, and on the appeal, [Ms Tapp] never clearly identified the way in which it was alleged the surface had deteriorated: (i) that it was hard and compacted when it should have been soft, (ii) that it was rough and broken up when it should have been smooth, or (iii) that it was slippery in some other way (for example by reason of rainfall during the day)."

36 It was also noted that Ms Tapp's case relied heavily on the number of falls that had occurred that day, without evidence as to the particular circumstances of any of those falls or as to any causal connection between those falls and the supposed deterioration in the surface of the arena<sup>62</sup>. The other matters relied upon by Ms Tapp as evidence of deterioration in the surface of the arena – including the circumstance that Ms Tapp's fall occurred after the complaints made by Mr Stanton, and the fact that the ground was ploughed for three hours the day after the incident – were dismissed as the product of hindsight reasoning<sup>63</sup>. Payne JA saw no basis to differ from the conclusion of the primary judge that it had not been shown that the surface had deteriorated to such an extent that reasonable care for competitors required the event to be stopped, the surface to be ploughed and/or the competitors to be warned. Payne JA agreed with the primary judge that what was required in taking reasonable care was for the Association to make an informed decision as to whether it was safe to continue with the competition<sup>64</sup>.

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61 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [24].

62 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [56]-[58]. See also [39].

63 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [50]-[53].

64 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [54].

37 Basten JA dismissed the appeal for the same reasons as Payne JA<sup>65</sup>. Basten JA observed that Ms Tapp's claim in negligence failed for the fundamental reason that she had failed to establish why her horse fell, and whether this was due to deterioration in the surface or some other cause<sup>66</sup>.

38 On the other hand, McCallum JA thought Ms Tapp's case was "strong" and had no difficulty drawing the inference that Ms Tapp's horse fell because of deterioration in the surface of the arena<sup>67</sup>. Her Honour provided four reasons for reaching that conclusion.

39 First, her Honour emphasised that the Association's Rules required that the arena surface be safe – either ploughed or soft surface (sand or loam) – and that the Ellerston surface was neither<sup>68</sup>.

40 Secondly, her Honour thought it significant that two complaints had been made about the state of the surface, in response to which the representatives of the Association did not conclude that the surface complied with r 15.5, or was safe, but rather that it was "[not] too bad", "okay" and "still alright"<sup>69</sup>. In this regard, her Honour considered that the primary motivation for the decision to continue the competition did not appear to be a positive satisfaction that the surface was safe, but rather that the competition should be continued in the interests of fairness to competitors who had already ridden<sup>70</sup>.

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65 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [1], [3].

66 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [2].

67 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [171], [182].

68 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [172]-[173].

69 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [174]-[175].

70 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [175].

41 Thirdly, McCallum JA said that the offer that competitors could withdraw from the event for a refund was "the clearest recognition" that there was some force in the concerns as to the state of the surface<sup>71</sup>.

42 Finally, McCallum JA relied upon the following answer given by Mr Shorten in cross-examination<sup>72</sup>:

"Q. Do you agree with me that the fact that a disc plough was used demonstrates how bad the condition was of the ground at 6.45 pm on Saturday, 8 January 2011?

A. Yes, I would."

McCallum JA considered that, by this answer, "Mr Shorten as good as conceded that the competition should have been stopped before Ms Tapp competed because the surface was unsafe"<sup>73</sup>.

43 McCallum JA held that the primary judge ought to have found that the Association breached its duty by failing to suspend the competition at the very latest when the announcement was made, but probably earlier<sup>74</sup>.

### **The cause of the fall**

44 It is convenient to begin by addressing the principal flaw in Ms Tapp's case before the Court of Appeal and in this Court: that Ms Tapp failed to prove the reason why her horse fell. As Payne JA observed<sup>75</sup>:

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71 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [176].

72 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [50].

73 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [177].

74 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [177].

75 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [33].

"There is no doubt that it was established that immediately prior to [Ms Tapp's] horse falling its legs slid. What was left unproven was the reason for that slide."

45 It bears repeating that Ms Tapp bore the onus of proving any fact relevant to the issue of causation<sup>76</sup>. In this Court, Ms Tapp's submissions proceeded by way of a broad appeal to what might be said to be "common sense"<sup>77</sup>. Those submissions emphasised: Ms Tapp's unchallenged evidence that her horse had "slipped"; that Ms Tapp's fall had been preceded by several "bad falls" after two days of competition in which there had been some 700 rides over the surface of the arena; that Mr Shorten on behalf of the Association conceded in cross-examination that the surface of the arena was "dangerous"; and that when competition resumed on the Sunday, after the surface of the arena had been ploughed, no further falls occurred. In coming to grips with these contentions, it is necessary to make five preliminary observations.

46 First, this Court has recognised that the Act does not apply a test of "common sense"<sup>78</sup>.

47 Secondly, the argument for Ms Tapp that, as a matter of common sense, this Court should find – as neither Court below had found – that Ms Tapp's horse slipped because of deterioration in the surface of the arena over the course of the event is an attempt to make a virtue of necessity. At trial, Ms Tapp's case included evidence from two expert witnesses by which it was sought to prove that the surface of the arena was unsafe for campdrafting because of the presence of "standing water" on the surface of the arena as a result of earlier rainfall. The evidence of both these experts was rejected by the primary judge, and no member of the Court of Appeal took a different view<sup>79</sup>. It is not necessary to describe that expert evidence in any detail here because no reliance was placed on it in this

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76 See s 5E of the Act.

77 As to the reasons why this notion should not be used in connection with causation, see Stapleton, "Law, Causation and Common Sense" (1988) 8 *Oxford Journal of Legal Studies* 111 at 123-124; Mason, "Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?" (2000) 19 *Australian Bar Review* 201 at 210; Stapleton, "Factual Causation" (2010) 38 *Federal Law Review* 467 at 469-470.

78 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [43].

79 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [74]-[98]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [27], [44]-[46].

Court. The point is that, at trial, Ms Tapp had sought to establish specific reasons for inferring that the surface of the arena had deteriorated to the point where it was unsafe, and this attempt failed.

48 The failure of an attempt to establish by expert evidence specific identified defects in the surface of the arena does not negative, as a matter of strict logic, the possibility that there was some other, unidentified defect in the surface of the arena that contributed to Ms Tapp's fall. Nevertheless, the failure of the expert evidence to identify the cause of Ms Tapp's fall is, at the very least, good reason for a sceptical response to an invitation to judges – persons with no relevant expertise or experience – to infer, as a matter of common sense, that her fall was caused by an unidentified defect in the surface of the arena for which the Association was responsible, rather than by one or more of the manifold risks involved in competitive campdrafting.

49 Thirdly, in considering a "common sense" submission as to the cause of a horse slipping in the course of a campdrafting event, one must not lose sight of the intrinsic risks associated with that kind of competitive recreational activity. The risk of a horse slipping as a result of losing its footing during a manoeuvre performed at speed is part and parcel of competitive campdrafting on even the most benign of surfaces. This risk may be elevated by a deterioration in the surface, just as it may be elevated by the rider pressing hard to secure a competitive advantage, or by the unpredictability of the reactions of horse, cattle and rider as they interact with each other. That being so, in approaching the question whether any particular fall occurred because of deterioration in the quality of the surface of the arena to the point where the surface became unsafe, one cannot speculate that deterioration in the surface is a more likely explanation than the materialisation of one or more of the other risks that are intrinsic to this form of recreation. In *Betts v Whittingslowe*<sup>80</sup>, Dixon J found that the defendant's breach of duty, coupled with the occurrence of an accident of the kind that might thereby be caused, was enough to justify an inference that the breach caused the accident. His Honour was careful to explain, however, that that inference could be drawn because "the facts warrant no other inference inconsistent with liability on the part of the defendant".

50 Fourthly, the suggestion that the occurrence of a number of falls shortly before Ms Tapp's fall should have indicated to the Association that there was plainly a problem with the surface of the arena sits uneasily with the circumstance that none of the information on which the Association's decision-makers acted suggested that deterioration in the surface was the cause of those falls. To the contrary, the information available to the Association at the time the competition

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80 (1945) 71 CLR 637 at 649.



was suspended included statements from Mr Shorten and Mr Gillis, each of whom blamed his own management of his horse for his fall.

51 Fifthly, the decision of the Association, after Ms Tapp's fall, to suspend competition and to plough the surface of the arena before competition resumed on the Sunday cannot be relied upon to inform either the Association's appreciation at the time of her fall of the extent of any deterioration in the surface, or the reasonableness of the precautions Ms Tapp contends should have been taken. Nor can the circumstance that no falls occurred on the day following Ms Tapp's fall, after the surface had been ploughed, be relied upon to overcome the primary judge's findings as to the factual deficit in the case advanced for Ms Tapp. The dangerous lure of hindsight reasoning was recognised and addressed in s 5C(c) of the Act:

"In proceedings relating to liability for negligence:

...

- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

Quite apart from the operation of s 5C(c) of the Act to prohibit the use of hindsight to establish negligence on the part of the Association, it is readily understandable that riders competing on the Sunday would have been especially circumspect in their riding in reaction to Ms Tapp's injury on the Saturday evening.

52 The question whether the case for Ms Tapp as to the cause of her fall was made out cannot now be approached in this Court as if it were a matter of first impression for this Court as a tribunal of fact unconstrained by the concurrent findings of fact in the Courts below. Contrary to the view of McCallum JA, the Court of Appeal had no sufficient basis for setting aside the findings of the primary judge<sup>81</sup>.

### **The Association's concession as to causation**

53 In this Court, in addition to her appeals to a common sense view of the circumstances, Ms Tapp submitted that she was not required to prove the specific mechanism by which the surface had deteriorated, causing it to become unsafe;

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81 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686-687 [43]; 331 ALR 550 at 558-559.

instead, all she was required to prove was that the surface had deteriorated to such a degree that the Association, acting reasonably, ought to have suspended the competition. This position was said to follow from the Association's concession at trial<sup>82</sup> that causation would be established if the relevant breach was the Association's failure to stop the competition, because if the competition had been stopped, the incident would not have happened.

54 The concession of the Association at trial does not support Ms Tapp's case as it was presented in this Court. Ms Tapp's case at trial – in response to which the Association made that concession – involved the contention that the Association breached its duty of care by failing, *inter alia*, to stop the competition<sup>83</sup>. However, Ms Tapp's case before the Court of Appeal, and in this Court, was one of a failure to *suspend* the competition to allow the surface of the arena to be ploughed.

55 That "slide" in the formulation of Ms Tapp's case is significant. If the breach of duty were held to consist of a failure to permanently stop the competition, then it might be said that a causal connection between a failure to stop the competition and Ms Tapp's injury could be established simply on the basis that, absent the breach, Ms Tapp would not have been riding at all. But if the breach of duty were held to consist of a failure to suspend competition to allow the surface to be remediated by ploughing prior to the competition recommencing, the establishment of a causal connection between breach of duty and Ms Tapp's injury would be more complicated. In the counterfactual where the competition had been suspended, Ms Tapp would still have competed, albeit at a different time. Even assuming that reasonable precautions would have entailed remediation of the surface before the competition resumed, it cannot be assumed that a different outcome would have ensued. Because the cause of Ms Tapp's fall was not identified, it cannot be assumed that this exigency would have been obviated by ploughing or other remediation of the surface.

### **Reasonable precautions**

56 Quite apart from the evidentiary difficulties in Ms Tapp's case as regards causation, Ms Tapp was unable to demonstrate that the Association ought reasonably to have taken the precaution of suspending the competition and ploughing the surface before allowing the event to continue.

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82 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [217].

83 See [13] above.

57 The question whether the Association breached its duty to Ms Tapp because it failed to suspend competition in order to plough the surface of the arena is a question that cannot be approached on the basis that the only relevant consideration was to ensure the safety of competitors. If that were the only consideration, no campdrafting events would be permitted, because the risk of serious injury is intrinsic to the sport. The notion of reasonable precautions necessarily contemplates the balancing of countervailing considerations<sup>84</sup>. In that vein, the decision of the Association fell to be made in a context in which competitors wanted to compete and were known to want to compete in their chosen form of recreation.

58 In *Agar v Hyde*<sup>85</sup>, Gleeson CJ said:

"People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. ... Sport commonly involves competition ... A sporting contest might involve body contact where physical injury is an obvious risk, or the undertaking by individual competitors of efforts which test the limits of their capabilities in circumstances where failure is likely to result in physical harm. Rules are of the essence of sporting competition. Individuals, or teams, wishing to compete must agree, personally or through membership of some form of association, upon the rules which will govern their competition. ... Making and changing the rules may require giving weight to many considerations, some conflicting. ... [T]hey may include considerations relating to the safety of participants in the sport."

59 In the context of the organisation and management of a campdrafting competition, a decision to allow the event to continue is not shown to be "wrong", much less negligently so, by pointing to the occurrence of a catastrophic injury without taking into account the willingness, indeed the eagerness, of competitors to engage in what is, on any view, a form of recreation fraught with risks of physical injury. In this context, and contrary to the approach of McCallum JA, one may recognise that competitors have varying appetites for risk, without concluding that an event is unsafe for all its participants. This notion may be seen in the circumstance that competitors were offered the opportunity to withdraw from the event for a full refund based on their own assessment of the risk level.

60 It must be acknowledged that, in the present case, it is difficult, given the tragic injury suffered by Ms Tapp, not to focus upon the circumstances of that

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84 See s 5B(2) of the Act.

85 (2000) 201 CLR 552 at 561-562 [15].

tragedy. But one must not judge the wisdom of the Association's decision to continue the competition with the benefit of hindsight. Hindsight has the power to make an accidental injury appear both foreseeable and avoidable by the taking of precautions that now seem obvious. Hindsight may also cause one to focus on the particular risk of injury that ultimately materialised, thus losing sight of the potentially manifold risks intrinsic to the activity engaged in.

61 As Gleeson CJ observed in *Rosenberg v Percival*<sup>86</sup>, in litigation the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated and harm has resulted. The particular risk becomes the focus of attention. This focus on how the particular injury happened may be misleading in attempting to determine issues of duty and its breach<sup>87</sup>. In *Rosenberg v Percival*, Gleeson CJ went on to refer to the danger, identified in judgments of this Court<sup>88</sup>, which is posed by hindsight reasoning – the failure to take account of the context in which a risk was to be evaluated at the time the evaluation was made. Whether or not reasonable care was exercised in striking the balance between taking care for the safety of participants and allowing the competition to continue must be determined by reference to the knowledge of the circumstances available to those who made the decision for the Association when it was made.

62 Moreover, and as relevant to this case, ascertaining the risk which in fact eventuated requires determination of the cause of the injury. Here, as the majority of the Court of Appeal correctly held, it could not be determined as a fact that some kind of deterioration to the surface was the risk which eventuated. It could not be a correct approach, as the case for Ms Tapp proceeded, to assume what needed to be determined as a fact, and then to proceed to determine whether a duty was owed with respect to it and what could have been done to avoid it.

63 That hindsight is apt powerfully to distort one's appreciation of the extent and acceptability of a risk is poignantly illustrated in this case. Ms Tapp's father, himself an experienced campdrafter, offered Ms Tapp his place, and the use of his horse, in the open draft during which she was ultimately injured. Both he and Ms Tapp's sister had ridden the arena earlier that day, and there is no suggestion that either held any concerns that the arena was unsafe.

64 Hindsight is apt also to distort one's perception of what precautions are reasonable. While, in hindsight, it seems obvious that the prudent course may have

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86 (2001) 205 CLR 434 at 441-442 [16].

87 *New South Wales v Fahy* (2007) 232 CLR 486 at 505 [57].

88 *Jones v Bartlett* (2000) 205 CLR 166 at 176 [19]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [17], 291-292 [109].

been to suspend competition for the Saturday evening, the Association's decision-makers did not have the benefit of hindsight, and they were making their decision in a context in which their expectation was that competitors wished to continue with the competition and their concern was to ensure fairness to all competitors. Moreover, and importantly, the circumstance that the Association chose to plough the surface after Ms Tapp's catastrophic injury says nothing about whether the Association, even if its decision-makers had decided to suspend competition on the Saturday evening before Ms Tapp's run, would have ploughed the arena before resuming competition on the Sunday. Certainly, Mr Stanton had not suggested that course, nor was the possibility of ploughing the arena raised in the discussion that took place thereafter.

65 If one has regard only to what was known to the Association's decision-makers before Ms Tapp's injury, no sufficient reason appears to set aside the concurrent findings of the primary judge and the Court of Appeal. It may be accepted that there were reasons to consider whether continuing the competition might expose riders to an unacceptably increased risk of a fall by reason of some deterioration in the state of the surface of the arena; but there were also reasons to think that any increase in risk from deterioration in the surface of the arena was no more than could be dealt with by competitors "riding to the conditions".

66 A decision reflecting reasonable care for competitors required an assessment whether the level of risk posed by the state of the surface required the competition to be suspended. The decision made by the Association to continue the competition, viewed in the context in which it was made, does not appear to be unreasonable. It was also far from apparent to the Association's decision-makers that it was the quality of the surface of the arena that was to blame for the falls which preceded Ms Tapp's fall, rather than any of the other manifold possibilities intrinsic to the dangerous activity in which Ms Tapp, her father, her sister, members of Mr Shorten's family and Mr Young were all willing to engage. The absence of evidence at trial from any of the other riders who fell as to their experience that the deteriorated surface caused their falls is emphatic confirmation that Ms Tapp's case was bound to fail for want of proof that deterioration in the surface caused her fall.

### **The role of an appellate court**

67 As Payne JA noted in the Court of Appeal<sup>89</sup>, the primary judge did not find that "a cause of [Ms Tapp's] horse falling was the deterioration in the condition of the surface of the arena which made the arena 'slippery'". That being so, the case of negligence advanced by Ms Tapp could not succeed. It was no part of the

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<sup>89</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [24].

function of the Court of Appeal, as it is emphatically no part of the function of this Court, to reformulate the case a party seeks to make. The majority of the Court of Appeal, rightly, proceeded in conformity with the limits of their role in the administration of justice, both in refraining from reformulating the case sought to be made for Ms Tapp, and in recognising that there was no proper basis upon which the appellate court might make a finding as to the cause of Ms Tapp's fall which the primary judge was not able to make on the evidence.

68 In the Court of Appeal, McCallum JA emphasised, as a significant indication that the Association had failed to take reasonable precautions, that the Association had not complied with the terms of r 15.5 concerning the composition of the surface of the arena. But Ms Tapp's case was not put on the footing that the Association was negligent because the surface of the arena had not been treated as required by r 15.5. There was little admissible evidence at trial as to the composition of the surface of the arena and no specific findings as to whether the terms of r 15.5 had been breached<sup>90</sup>. Nor was there any complaint about the absence of such findings. To seek to build a case on the footing that the surface of the arena should have been ploughed before competition began in accordance with r 15.5, and that the failure on the part of the Association to do so created an unreasonably elevated risk of a fall that came to pass as a cause of Ms Tapp's fall, would confront the difficulty that some 700 rides took place without incident until shortly before Ms Tapp's injury.

69 In this Court, Ms Tapp argued that Payne JA erred in discounting as hindsight evidence certain concessions made by Mr Shorten in cross-examination. Had these concessions been given appropriate weight, Ms Tapp submitted, breach would have been established as held by McCallum JA.

70 The concessions relied upon by Ms Tapp in this regard included Mr Shorten's statements that:

- (a) it was "practically unprecedented" to have seven falls occur over the course of one event, let alone on a single day<sup>91</sup>;

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90 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [26]-[27].

91 Trial transcript, T168/11-14.

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- (b) a "bad fall" was "a signal that the surface needs attention to prevent another fall"<sup>92</sup>;
- (c) at the time of Ms Tapp's fall, the arena surface had been "identified by [himself] and others by that stage as being dangerous"<sup>93</sup>;
- (d) the surface was ploughed after Ms Tapp's fall "because we thought at the time that would be the reason for no more falls"<sup>94</sup>;
- (e) the circumstance that the surface was ploughed after Ms Tapp's fall "demonstrates how bad the condition was of the ground" at the time of the incident<sup>95</sup>; and
- (f) the event was allowed to continue following the complaints because "the event had to go on" and this "took precedence over safety"<sup>96</sup>.

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A consideration of each of these concessions in turn reveals that the primary judge, and the majority of the Court of Appeal, made no error in their treatment of this evidence. It can be seen that concession (a) rested on the unproven assumption that seven falls had occurred. In addition, concession (b) cannot be considered in isolation from the context that Mr Shorten and others did consider the safety of the surface before deciding to proceed. Concession (c) must be understood fairly as reflecting Mr Shorten's acknowledgement of what he had been told by Mr Stanton rather than a statement of his own considered opinion, bearing in mind that the question to which Mr Shorten responded referred to the identification of the state of the surface by himself "and others", a reference apt to encompass Mr Stanton. Concessions (c) to (f), and in particular (d) and (e), reflected a degree of hindsight. As to the ploughing of the surface the day after the incident, the cautious approach taken in light of Ms Tapp's fall demonstrated nothing as to whether, prior to the incident, a reasonable person with the knowledge of the Association's decision-makers would have concluded that the competition ought to be suspended and the ground ploughed.

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**92** Trial transcript, T165/9-12.

**93** Trial transcript, T190/8-10.

**94** Trial transcript, T172/16-21.

**95** Trial transcript, T172/23-26.

**96** Trial transcript, T198/27-33.

72 It is important to appreciate that the primary judge had the advantages noted by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*<sup>97</sup>:

"On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'<sup>98</sup>. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record<sup>99</sup>. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share<sup>100</sup>."

73 The primary judge was best placed to assess the significance of Mr Shorten's concessions, and in particular to gauge the extent to which his evidence is fairly to be understood as his response, in hindsight, to the tragic injury suffered by Ms Tapp. In this regard, her Honour was in the best position to assess the concessions, so-called, given by Mr Shorten by reference to the way that they were put to him in cross-examination, including as to the choices given to him by way of answer, and in light of his earlier evidence as to what had in fact occurred on the evening in question and what he had thought and done then. The concessions were to a large extent inconsistent with that evidence. That being so, it was properly a matter for the primary judge, who saw and heard Mr Shorten give evidence, to determine which aspects of his evidence to accept or reject, not an appellate court.

74 The majority of the Court of Appeal, recognising the peculiar advantages of the primary judge in this regard, but having conducted their own review of the evidence, arrived at the same conclusion as the primary judge that the Association's decision to allow the event to proceed was not an unreasonable failure to take care for the safety of those who wished to take part in the event.

75 In addition, there is little to be gained from a consideration of selective extracts of Mr Shorten's evidence divorced from other aspects of the evidence

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97 (2003) 214 CLR 118 at 125-126 [23].

98 *Dearman v Dearman* (1908) 7 CLR 549 at 561. ...

99 *Dearman v Dearman* (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-281.

100 *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637 ... See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.



27.

before the primary judge. The evidence as to Mr Shorten's supposed concessions must be understood in light of the evidence weighing against such a conclusion. That included the following:

- (a) Ms Tapp, her father and her sister had each competed earlier on the day of the incident, and none raised any concern about the surface;
- (b) Ms Tapp's father offered Ms Tapp his spot in the open draft, which he would not have done if he had had concerns as to the safety of the surface;
- (c) Mr Shorten's wife and sons competed earlier on the day of the incident, and the primary judge accepted Mr Shorten's evidence that he would not have let them compete if he had perceived any danger;
- (d) the decision that the surface was sufficiently safe for the competition to continue was made by a group of people who were experienced in organising and conducting campdrafting events, most of whom had either competed themselves earlier on the day of the incident (Mr Shorten, Mr Young and Mr Smith) or judged the competition, thereby being in a position to observe other riders (Mr Gallagher); and
- (e) no competitor other than Mr Stanton raised any concern as to the safety of the surface, notwithstanding that there had been over 700 rides prior to Ms Tapp's fall.

76           The majority of the Court of Appeal rightly recognised that there was no sufficient basis shown for them to overturn the decision of the primary judge.

### **Orders**

77           The appeal must be dismissed. Ms Tapp must pay the Association's costs of the appeal to this Court.

GORDON, EDELMAN AND GLEESON JJ.

**Introduction**

78 The sport of campdrafting involves a rider on horseback working cattle. The rider rides into a "camp" or "cut out yard" where there are six to eight head of cattle. The camp is separated by a gate from an arena. The rider must "cut out" or separate one beast from the rest of the herd and, after demonstrating control of the beast, must call for the gate into the arena to be opened. The rider must then work the beast around two pegs in the arena in a figure of eight. Then, the rider must guide the beast through two further pegs to complete the course. Points are awarded for equestrianism and control of the beast within set time limits.

79 Most campdrafting events start and end without any rider falling from their horse. That was not the case at a multi-day campdrafting event organised by the respondent, the Australian Bushmen's Campdraft & Rodeo Association Ltd ("the Association"), with the involvement of the Ellerston District Sports Club Inc ("the Sports Club") on 7-9 January 2011. During the first two days of the event, 700 rides took place in the arena. As the trial judge concluded, it was "unsurprising" that the ground would have deteriorated over that period<sup>101</sup>.

80 Towards the end of the second day, and in the period of less than an hour before the appellant, Ms Tapp, competed in the open campdraft event, there were four falls. After the first three of those falls, a contestant, Mr Stanton, who was a "very, very experienced horseman and campdrafter", told Mr Shorten, a director of the Hunter Zone of the Association and a member of the organising committee of the competition ("the Committee"), that the event should be stopped. The event was not stopped. Mr Shorten considered that if the event were stopped then riders who had not yet ridden would have an advantage if the ground were better in the morning.

81 Very shortly after the three falls, yet another rider fell. Mr Stanton again told Mr Shorten that the event should be stopped because the ground was "unsafe". In cross-examination, Mr Shorten accepted that at that time the condition of the arena had been identified by him and others "as being dangerous". But, again, members of the Committee or the Members Representative Council of the organising body ("the MRC"), including Mr Shorten, chose not to stop the event. One or more of those members said that riders needed to ride to the conditions. Mr Shorten agreed in cross-examination that the justification in his mind for

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101 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [87]. See also *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [176].

continuing the event was that "the event had to go on" and that this took precedence over safety.

82           Very shortly after the fourth fall there was a fifth fall. This time the fall had catastrophic consequences. The rider who fell from her horse was Ms Tapp. Ms Tapp was unaware of the preceding four falls. She was not aware of Mr Stanton's warnings. She had not been told anything about the condition of the ground of the arena by any member of the Association or any other person. As a contestant, she was not entitled to ride her horse in the arena prior to competing. Ms Tapp fell when her horse slipped on the ground of the arena. She suffered a serious spinal injury.

83           There was no dispute at any stage of this proceeding that the Association owed a duty to take reasonable care to avoid foreseeable risks of personal injury to participants in the campdrafting event, including Ms Tapp. The Association admitted that it owed Ms Tapp a duty of care to organise, manage, and provide the campdrafting event with reasonable care and skill. The Association did not contest the trial judge's finding that "[w]hat was required in taking reasonable care was for an informed decision to be made as to whether it was safe to continue with the competition". But the Association claimed that it had not breached its duty, that any breach had not caused Ms Tapp's injuries, and that Ms Tapp's injuries were the result of the materialisation of an obvious risk. The trial judge and a majority of the Court of Appeal of the Supreme Court of New South Wales accepted those submissions.

84           This appeal concerns: (i) whether the Association breached its duty of care to Ms Tapp within s 5B of the *Civil Liability Act 2002* (NSW); (ii) whether that breach of duty caused Ms Tapp's injuries within s 5D of the *Civil Liability Act*; and (iii) whether the Association was not liable in negligence to Ms Tapp by reason of s 5L of the *Civil Liability Act* because her injuries were the "result of the materialisation of an obvious risk of a dangerous recreational activity". For the reasons below, (i) the Association breached its duty of care by failing to stop the event in order to inspect the ground of the arena and to consider its safety when the Association knew of substantially elevated risks of physical injury to the contestants; (ii) that breach of duty caused Ms Tapp's injuries; and (iii) the injuries were not the result of materialisation of an obvious risk. The appeal should be allowed.

### **Background to the appeal**

85           Although only 19 years old at the time of her spinal injury, Ms Tapp was an experienced and very able horse rider and campdraft contestant. She had participated in campdrafting events from the age of six and had excelled at

campdraft competitions. From the age of 12, Ms Tapp had participated in about six campdrafting events per year<sup>102</sup>.

86 On the morning of 8 January 2011, Ms Tapp watched her father compete on the arena in different events. She competed twice in the Ladies' Campdraft at about 11 am. Later in the day, her father offered her his place in the Open Campdraft, riding his horse, Xena Lena. The Open Campdraft commenced at about 5 pm and Ms Tapp competed at around 7 pm as contestant 101.

87 The Association's principal witness at trial was Mr Shorten. The trial judge found Mr Shorten to be "a genuine person who was flustered by the processes of cross-examination, but was doing his best to be truthful and to assist the Court"<sup>103</sup>. Mr Shorten's evidence established that a contestant might fall for reasons other than their horse slipping because of the poor condition of the surface. Mr Shorten described the risks of campdrafting as including the horse falling by losing its footing or contacting the hooves of the animal being chased, or the rider losing balance and falling off.

88 Mr Shorten, himself, fell off his horse during the campdraft for reasons unrelated to the surface of the arena. Mr Shorten was contestant 17 in the Open Campdraft. The trial judge recorded Mr Shorten's account that "he had no problems with the ground[,] returned a good score of 88 but after completing the course '... he slackened off the reins, he relaxed the horse relaxed' and he fell onto his shoulder ... and that in his opinion, his fall had nothing to do with the surface"<sup>104</sup>.

89 It appears that the Open Campdraft proceeded without incident from the time of Mr Shorten's ride as contestant 17 until the time of contestant 65. At 6.14 pm, contestant 65, Mr Clydsdale, fell from his horse<sup>105</sup>. At 6.22 pm and 6.36 pm, two more contestants, Mr Sadler and Mr Gillis, respectively

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**102** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [13], [17].

**103** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [68].

**104** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [55].

**105** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [70].

contestants 70A and 82, fell from their horses<sup>106</sup>. A document entitled "Open Draft Draw" contained the order in which contestants had been drawn to compete in the Open Campdraft, and recorded the number of points they had scored. The document also recorded which contestants had had falls. The falls of Mr Clydsdale, Mr Sadler, and Mr Gillis were described in the Open Draft Draw as "bad falls". It was conceded by Mr Shorten that a bad fall is accepted "in campdrafting circles as a signal that the surface needs attention to prevent another fall", although Mr Shorten's evidence was that, other than Ms Tapp's fall, he only saw the falls of Mr Gillis and Mr Sadler, and that Mr Gillis' fall was a "bad fall", but Mr Sadler's was not.

90 After the falls of Mr Clydsdale, Mr Sadler, and Mr Gillis, the Open Campdraft was delayed. The delay arose because Mr Shorten was approached by an experienced campdrafter, Mr Stanton, who was listed as contestant 116 in the draw. The trial judge recorded Mr Shorten's evidence of Mr Stanton's first approach to Mr Shorten<sup>107</sup>. On that first approach, Mr Stanton said that the Open Campdraft should be stopped because "the ground [was] getting a bit slippery". Mr Shorten's reply was that this was not 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".

91 Mr Shorten then spoke with Mr Young, the Chair of the MRC and a director of the Association, and Mr Gallagher, who was the competition judge. Mr Young said that "the surface is okay. Competitors need to ride to the condition of the ground". And Mr Gallagher said that he thought that the competition should keep going. Mr Shorten also spoke with two contestants who had fallen from their horses, Mr Gillis and Mr Sadler. Mr Gillis said that he rode too hard and Mr Sadler said that he fell just before the gate. There was no evidence that either contestant was asked about the condition of the ground. And neither contestant said anything about whether the surface of the arena had caused their fall.

92 At about 6.58 pm, another contestant fell from his horse. That contestant was number 98, Mr Piggot<sup>108</sup>. Mr Piggot's fall was also described in the Open Draft

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**106** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [70].

**107** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [56].

**108** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [70].

Draw as a "bad fall". Very shortly after Mr Piggot's fall, Mr Shorten was again approached by Mr Stanton. Mr Stanton said, yet again, that something should be done about the event because he thought that the ground was "unsafe". The event was delayed while Mr Shorten and Mr Callinan (the President of the Sports Club, which coordinated and conducted carnivals and rodeos affiliated with the Association) walked around and spoke with Mr Young and another MRC board member, Mr Smith. One or both of Mr Young and Mr Smith said that "the riders should ride to the conditions". And Mr Young said again that he thought that "the arena surface is still alright".

93 Mr Shorten said that he had considered the condition of the ground and noticed that the surface was not wet but was moist in parts and dust was still flowing up. Mr Shorten gave evidence that he told Mr Gallagher that "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". An announcement was then made over the loudspeaker. Mr Shorten's evidence was that he had 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*" (emphasis added), but the trial judge found that the content of the announcement was only an offer of a refund if riders chose not to compete<sup>109</sup>.

94 The direct evidence of how Ms Tapp fell was given by Ms Tapp, her sister, and her father. Each gave accounts which the trial judge appears to have accepted<sup>110</sup>. Importantly, a common factor in each account was that Ms Tapp's horse's front legs had slid from underneath it on the surface of the arena.

95 In her first statement, Ms Tapp said that, immediately before the fall, "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"<sup>111</sup>. In her second statement,

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**109** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [65].

**110** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [27]-[31].

**111** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [27].

Ms Tapp said<sup>112</sup>: "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 evidence from Ms Tapp's sister included a statement that<sup>113</sup>: "I remember the horse looked like its front legs slid from under it and the horse and [Ms Tapp] fell." And Ms Tapp's father gave evidence that, as best he could tell<sup>114</sup>, "the horse and [Ms Tapp] fell because the front legs of the horse slid from beneath it". After Ms Tapp's fall, the competition stopped for the day. The Sports Club's Incident Report records that, the following day, the arena was ploughed for three hours before the competition recommenced.

### **The Civil Liability Act**

96 This appeal concerns issues of breach of duty, causation, and the s 5L defence under Pt 1A of the *Civil Liability Act*<sup>115</sup>. The central issue in relation to both breach of duty in s 5B as well as "obvious risk" in s 5L is the level of generality at which the risk is characterised. In other words, what is the degree of specificity required in the statement of the risk?

#### *Sections 5B and 5C*

97 For the purpose of assessing breach of duty, s 5B(1) of the *Civil Liability Act* provides that "[a] person is not negligent in failing to take precautions against a risk of harm unless: (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and (b) the risk was not insignificant, and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions".

98 Section 5B(2) provides that "[i]n determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the

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112 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [28].

113 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [31].

114 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [32].

115 Part 1A was inserted into the *Civil Liability Act* by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), largely implementing recommendations of the Ipp Report: Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002). See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002 at 5765.

following (amongst other relevant things): (a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm, (d) the social utility of the activity that creates the risk of harm".

- 99           Section 5C(a) is important. It provides that "the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible".

*Section 5D*

- 100           Sub-sections (1) to (3) of s 5D of the *Civil Liability Act* provide as follows:

- "(1) A determination that negligence caused particular harm comprises the following elements:
- (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
  - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
- (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
  - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest."

- 101           A negligent action will be a "necessary condition" of the occurrence of harm if, "but for" the negligence, the harm would not have occurred. As French CJ,



Gummow, Crennan and Bell JJ said in *Strong v Woolworths Ltd*<sup>116</sup>, "[t]he determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence". In this assessment, notions of "common sense" have no place<sup>117</sup>. Not only do those notions have no foothold in the text of s 5D, but it has been repeatedly said in this Court that "it is doubtful whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm"<sup>118</sup>. The task of adjudication requires transparent reasoning, not consideration of whether a judge's "sense" of a result might be common with that of others.

102 No issue was raised at any stage of this litigation concerning the scope of the liability of the Association, nor was any issue raised concerning any exceptional case of causation pursuant to s 5D(2).

#### *Section 5L*

103 Division 5 of Pt 1A of the *Civil Liability Act* is concerned with "Recreational activities". Within Div 5, s 5L expresses a defence, the onus of which lies on the defendant<sup>119</sup>. Section 5L 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.

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<sup>116</sup> (2012) 246 CLR 182 at 190 [18] (footnote omitted).

<sup>117</sup> *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [43].

<sup>118</sup> *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642 [45]. See also *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 532-533; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-597 [96]-[98]; *Comcare v Martin* (2016) 258 CLR 467 at 479 [42].

<sup>119</sup> *Fallas v Mourlas* (2006) 65 NSWLR 418 at 423 [24], 438-439 [122]-[123]; *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 at [31]; *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 113 [41].

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

104 The defence in s 5L requires a defendant to prove that: (i) the plaintiff was engaged in a "recreational activity"<sup>120</sup>; (ii) the recreational activity was dangerous in the sense that it involved "a significant risk of physical harm"<sup>121</sup>; (iii) there was a risk of that activity that was obvious<sup>122</sup>; and (iv) the harm was suffered by the plaintiff as a result of the materialisation of that obvious risk. Once these four elements are proved, the defence in s 5L will apply to the extent that the harm suffered by the plaintiff was a result of the materialisation of that obvious risk.

105 There was no dispute in the Court of Appeal or in this Court that Ms Tapp was engaged in a dangerous recreational activity, namely campdrafting. The issue was whether there was a risk of that activity that was obvious and that materialised. An "obvious risk" is defined by ss 5F and 5K as "a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person", including "risks that are patent or a matter of common knowledge", and can include risks that have "a low probability of occurring" or which are "not prominent, conspicuous or physically observable".

### **Characterising "risk" at the appropriate level of generality**

106 The proper assessment of the alleged breach of duty depends on "the correct identification of the relevant risk of injury"<sup>123</sup>, because it is only then that an assessment can take place of what a reasonable response to that risk would be<sup>124</sup>. The enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks

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120 See *Civil Liability Act*, s 5K.

121 *Civil Liability Act*, s 5K.

122 *Civil Liability Act*, ss 5F, 5K.

123 *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 338 [18].

124 *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 351 [59].

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damages<sup>125</sup>. The characterisation of the relevant risk should not obscure the true source of the potential injury<sup>126</sup>.

107 The correct approach to characterisation of the risk for the purposes of breach of duty under s 5B of the *Civil Liability Act* was adopted in *Port Macquarie Hastings Council v Mooney*<sup>127</sup>. In that case, a pedestrian slipped and fell into a stormwater drain on an unlit, temporary gravel footpath. The characterisation of the risk ignored the manner in which the pedestrian fell, and the particular hazard which precipitated the fall (the stormwater drain). Sackville A-JA said<sup>128</sup>:

"The relevant risk of harm created by the construction or completion of the footpath was that in complete darkness a pedestrian might fall and sustain injury by reason of an unexpected hazard on the path itself (such as an unsafe surface or variation in height) or by unwittingly deviating from the path and encountering an unseen hazard (such as loose gravel, a sloping surface or a sudden drop in ground level)."

108 Section 5C(a) of the *Civil Liability Act* reflects, and is consistent with, the common law. The effect of this provision is that a defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. As this Court said in *Chapman v Hearse*<sup>129</sup>, "one thing is certain" and that is that in identifying a risk to which a defendant was required to respond, "it is not necessary for the plaintiff to show that the precise manner in which [their] injuries were sustained was reasonably foreseeable". The Court continued:

"it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [their] capacity to foresee the precise events leading to the damage complained of".

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125 *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at 22 [98].

126 *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at 22 [99], quoting *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 351 [60].

127 (2014) 201 LGERA 314.

128 (2014) 201 LGERA 314 at 329 [67].

129 (1961) 106 CLR 112 at 120-121.

109 Similarly, in *Rosenberg v Percival*<sup>130</sup>, Gummow J said:

"A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected. Thus, in *Hughes v Lord Advocate* [[1963] AC 837], there was liability because injury by fire was foreseeable, even though the explosion that actually occurred was not."

110 In the context of s 5L, as Bryson JA observed in *C G Maloney Pty Ltd v Hutton-Potts*<sup>131</sup>, "[m]uch depends, in the application of provisions dealing with obvious risk, upon the degree of generality or precision with which the risk is stated". Although the identification of the appropriate level of generality will not always be straightforward, there are four significant matters that must guide the reasoning process concerning the selection of the correct level of generality. First, and contrary to some views that have been expressed in the New South Wales Court of Appeal<sup>132</sup>, the "risk" with which s 5L is concerned will usually need to be assessed after a determination that there is prima facie liability for negligence. Secondly, the s 5L risk should be characterised at the same level of generality as the risk is characterised in the course of assessing whether the defendant has breached a duty of care. Thirdly, the generality at which the risk in s 5L is stated should include the same facts as established the risk for the purposes of the breach of duty which caused the harm to the plaintiff, but no more. Fourthly, and consequently, the characterisation of the risk does not need to descend to the precise detail of the mechanism by which an injury was suffered if that detail is unnecessary to establish a breach of duty. Each of these four matters is explained in turn below.

111 First, as to the usual need for s 5L to be assessed after a determination of the existence of prima facie liability in negligence, this can be seen from the structured approach taken by the *Civil Liability Act* and from the terms of s 5L itself. Division 2 of Pt 1A, entitled "Duty of care", is concerned with when a person will be negligent for "failing to take precautions against a risk of harm". Division 3 of Pt 1A, entitled "Causation", is concerned with whether negligence "caused

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<sup>130</sup> (2001) 205 CLR 434 at 455 [64] (footnotes omitted).

<sup>131</sup> [2006] NSWCA 136 at [173].

<sup>132</sup> See *Goode v Angland* (2017) 96 NSWLR 503 at 506 [5], 539 [177], 541 [185]; *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 113 [38]-[39].

particular harm". And Divs 4 and 5 of Pt 1A are concerned with matters including the exclusion of liability for "obvious risks". In particular, Div 5 applies *only* in respect of "liability in negligence for harm to [the plaintiff] resulting from a recreational activity engaged in by the plaintiff"<sup>133</sup>. In other words, Div 5 presupposes that there would otherwise be liability for negligence arising from a failure to take precautions against a risk of harm where that negligent failure caused the harm. This conclusion is reinforced by the terms of s 5L, as a defence that excludes liability in negligence that would otherwise arise. In other words, s 5L is a "liability-defeating rule"<sup>134</sup>, of the same nature as those defences that were formerly described as "confession and avoidance"<sup>135</sup>.

112 Secondly, the risk to which s 5L refers should be characterised at the same level of generality as it is characterised when assessing whether the defendant has breached a duty of care under s 5B<sup>136</sup> as well as for the purposes of assessing causation under s 5D. Since s 5L operates upon established liability based on duty, breach, and causation of harm, the risk to which s 5L refers must be the same risk that has "materialised" as a result of the "harm" for which "liability in negligence" would arise. That is the risk to which s 5B refers in the context of the requirement to establish a breach of a duty of care, upon which, in turn, the requirement of causation depends<sup>137</sup>.

113 Although the risk should be characterised in the same way for the purpose of s 5B in Div 2 (Duty of care) and s 5L in Div 5 (obvious risks), the assessment of the obviousness of the risk in s 5L proceeds from the perspective, not of a

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133 *Civil Liability Act*, s 5J(1).

134 *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 113 [38], citing Goudkamp, *Tort Law Defences* (2013) at 2.

135 Ibbetson, "Pleading Defences in Tort: The Historical Perspective", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 25 at 28-30. See also *Astley v Austrust Ltd* (1999) 197 CLR 1 at 33 [77]; *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767 at 782 [74], 790 [118]; 392 ALR 540 at 556, 567.

136 cf *Cox v Mid-Coast Council* [2021] NSWCA 190 at [47]-[48]; see also at [1], [85].

137 See Stapleton, *Three Essays on Torts* (2021) at 76-77.

reasonable person in the defendant's position<sup>138</sup>, but of a reasonable person in the position of the plaintiff<sup>139</sup>.

114 Thirdly, consequent upon the risk to which Divs 2, 4 and 5 refer being assessed at the same level of generality, the characterisation of the risk for the purpose of s 5L should be at the same level of generality as the risk considered for the purposes of the breach of duty which caused the harm to the plaintiff. Another way of putting this point, as expressed by the Court of Appeal of the Supreme Court of New South Wales in a passage to which Payne JA referred in this case<sup>140</sup>, is that the characterisation of the risk must include the "general causal mechanism of the injury sustained" which "gave rise to the potential for the harm for which the plaintiff seeks damages"<sup>141</sup>.

115 Fourthly, just as it is unnecessary in the characterisation of risk for the purposes of assessing a breach of the duty of care for the plaintiff to show the reasonable foreseeability of the "precise manner in which [the] injuries were sustained"<sup>142</sup>, so too for the purposes of s 5L it is unnecessary for the defendant to show the precise manner in which the injuries were sustained for the purpose of characterising the risk<sup>143</sup>.

116 For these reasons, it has correctly been observed that "an examination of the case law suggests that courts have consistently included the conduct alleged to be negligent as part of the risk description where that negligence involves commission rather than omission"<sup>144</sup>. To the extent to which any distinction can sensibly be drawn between negligence in the commission of an act and negligence by an omission, in neither case have courts characterised the risk by reference to

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138 *Civil Liability Act*, s 5B(1).

139 *Civil Liability Act*, ss 5F(1), 5K.

140 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [76].

141 *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at 22 [98].

142 *Chapman v Hearse* (1961) 106 CLR 112 at 120-121.

143 *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1 at 22-23 [100]-[101].

144 Perry, "Obvious risks of dangerous recreational activities: How is risk defined for Civil Liability Act purposes?" (2016) 23 *Torts Law Journal* 56 at 68.

something that the defendant could or should hypothetically have done<sup>145</sup>. The focus should be upon the same essential circumstances which established the necessity for a reasonable person in the position of the defendant to take reasonable precautions in performance of a duty of care. The risk with which s 5L is concerned is thus the same risk as that with which s 5B is concerned.

117 The first example of the correct application of the four factors discussed above in the characterisation of risk under s 5L is the decision in *C G Maloney*<sup>146</sup>. In that case, the plaintiff overlooked a warning sign, slipped on floor polish which had been spilt by a cleaner, and fell on a hotel floor, striking her knee. The risk, within s 5L, for which the defendant would be "liable in negligence for harm suffered" by the plaintiff was not "a risk that a recently polished floor will be slippery", because no liability would arise from a statement of the risk at that level of generality. "A higher degree of intensity [was] required in stating the risk."<sup>147</sup> The risk, stated with the correct level of generality, and consistently with the essential circumstances in respect of which a person in the position of the defendant should reasonably have taken precautions, was the risk of falling from slipping on "polishing material on the floor which was not visible, and had not been removed in the buffing process"<sup>148</sup>. The proper characterisation of the risk did not, however, require any more precision or detail concerning the manner of the plaintiff's fall.

118 The second example is the decision of the Court of Appeal of the Supreme Court of New South Wales in *Menz v Wagga Wagga Show Society Inc*<sup>149</sup>. In that case, the appellant had been injured after falling from her horse while warming up before a competition at a show managed by the respondent. The fall occurred when the horse was "spooked" by very loud noises made by children, described as a "loud bang" like a gunshot. In the course of dismissing a ground of appeal concerned with the trial judge's rejection of any breach of duty, Leeming JA

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**145** Perry, "Obvious risks of dangerous recreational activities: How is risk defined for Civil Liability Act purposes?" (2016) 23 *Torts Law Journal* 56 at 69.

**146** [2006] NSWCA 136. See *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at 117-118 [61]-[63].

**147** [2006] NSWCA 136 at [173]-[174].

**148** [2006] NSWCA 136 at [174].

**149** (2020) 103 NSWLR 103.

observed that "a horse could be spooked by a dog barking or a car backfiring"<sup>150</sup> and the presence of additional stewards and marshals, even to prevent harm by risks that they could control, was not a precaution that a reasonable person should have taken<sup>151</sup>.

119 When the Court of Appeal in *Menz* went on to consider an exclusion of potential liability under s 5L, the risk was characterised at the same level of generality, involving the essential facts that would have established any breach of duty that caused the harm to the plaintiff. Leeming JA, with whom Payne and White JJA agreed, concluded that the risk, which was obvious, was falling from a horse after it was "spooked by some stimulus"<sup>152</sup>. The proper characterisation of the risk did not require any further detail as to the manner in which the fall occurred. The Court of Appeal thus rejected the submission by the appellant that the risk should be characterised as including additional matters concerning the precise mechanism by which the injury was suffered, namely falling from a horse after it was "spooked" by children making very loud noises<sup>153</sup>.

### **The proper characterisation of risk in this case**

120 There is no dispute that the horse on which Ms Tapp was riding slipped on the surface of the arena and that both horse and rider fell. Ms Tapp's case was that, by the time she competed in the Open Campdraft, the surface of the arena was not safe in that the surface had deteriorated beyond what could reasonably be expected so as to present a substantially increased risk of personal injury arising from falls of contestants.

121 The trial judge dealt with the s 5L defence before considering breach of duty and, in doing so, characterised the risk for the purposes of s 5L as "the risk of falling and being injured" or, alternatively, as the risk "that the horse would fall and as a consequence of that, [Ms Tapp] would fall and be injured"<sup>154</sup>. At another point in the trial judge's reasons, her Honour characterised the risk, in a third way,

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**150** (2020) 103 NSWLR 103 at 127 [112]. See also at 112 [33].

**151** (2020) 103 NSWLR 103 at 127-128 [112]-[120].

**152** (2020) 103 NSWLR 103 at 121 [79].

**153** (2020) 103 NSWLR 103 at 118 [65].

**154** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [133].



with more particularity, as "the risk of falling from the horse and suffering an injury whilst competing in a campdraft competition, given the complexities and risks inherent in and associated with that activity"<sup>155</sup>. The trial judge found that the relevant risk was "obvious" for the purposes of s 5L and, in any event, that Ms Tapp had not established that the Association breached the duty of care that it owed to Ms Tapp.

122 In the first two characterisations, as Payne JA correctly said, the trial judge's approach was "far too broad"<sup>156</sup>. Put differently, the trial judge's characterisation was at too high a level of generality. The trial judge's characterisation did not include the essential facts that constituted the alleged breach of duty. As explained above, the characterisation of the risk for s 5L should be the same as the characterisation of the risk for s 5B.

123 On appeal, a majority of the Court of Appeal (Basten and Payne JJA, McCallum JA dissenting) concluded that the trial judge did not err in finding that no breach of the Association's duty of care had been established<sup>157</sup>. Basten JA agreed with Payne JA in relation to the question of breach, adding that, without clear evidence as to the nature of the risk posed by the surface of the arena where Ms Tapp's horse fell, it was not possible to identify the risk of harm against which the Association should reasonably have taken precautions<sup>158</sup>. Payne JA concluded that Ms Tapp failed to establish, other than by reference to hindsight, that the surface of the arena had become unsafe for campdrafting<sup>159</sup>.

124 The difficulty with the approach to characterisation of risk taken by Basten and Payne JJA is that it required Ms Tapp to identify the risk by reference to the

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155 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [131].

156 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [78].

157 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [3], [59].

158 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [2].

159 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [58].

precise manner in which her injuries were sustained. That is inconsistent with the requirement deriving from s 5C(a) of the *Civil Liability Act*.

125 A more accurate characterisation of the risk was that expressed by McCallum JA<sup>160</sup>, in her Honour's description of the risk 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". To adapt that description, consistently with the essential facts that established the risk for the purposes of the breach of duty, the risk should be characterised as the substantially elevated risk of physical injury by falling from a horse that slipped by reason of the deterioration of the surface of the arena. Just as the characterisation of the risk in *C G Maloney* did not include the way in which a person might slip on a polished floor and the characterisation of the risk in *Menz* did not include the way in which a horse might be "spooked" by stimulus, no more precision than this was necessary in characterising the relevant risk in this case. Contrary to the reasoning of Payne JA, it was unnecessary to identify "the way in which ... the surface had deteriorated"<sup>161</sup>.

**Whether breach of the Association's duty of care was established: s 5B**

126 Once the risk is identified at the correct level of generality, it can be seen, with respect, that McCallum JA was correct to "assess Ms Tapp's case on that issue [of breach of duty] to be strong"<sup>162</sup>. The factors which the court must consider under s 5B(2) of the *Civil Liability Act* all point to the conclusion that a reasonable person in the position of the Association would have taken the immediate precaution of stopping the event in response to the substantially elevated risk of contestants being injured from falling from a horse that slipped on the deteriorated surface of the arena.

127 In short: (i) the relevant risk was substantially elevated, so that a reasonable person in the position of the Association could have foreseen a probability that harm would occur if the competition were not stopped until members of the Committee or MRC had taken precautions beginning with inspecting the arena to be satisfied that the ground of the arena was reasonably safe; (ii) the likely seriousness of the harm was at the level of physical injury that could be

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<sup>160</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [166].

<sup>161</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [69].

<sup>162</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [171].

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catastrophic; (iii) the burden of taking precautions to avoid the risk of harm was the simple act of stopping the event to inspect the arena and consider the safety of the ground of the arena; and (iv) these matters could not be outweighed by the social utility of continuing the event so that contestants who had already competed on worse ground were not at a competitive disadvantage.

*The probability of harm: s 5B(2)(a)*

128           The probability of harm falls to be assessed at the time at which a reasonable person in the position of the Association should have taken precautions. That time was shortly before 7 pm on 8 January 2011, being the time before Ms Tapp competed in the Open Campdraft. It is irrelevant that the condition of the ground might have been entirely safe the previous day, or in the morning of 8 January 2011.

129           In assessing a substantially elevated risk or probability of harm shortly before Ms Tapp competed, it is necessary to identify the knowledge about the nature of the ground of the arena that would be held by a reasonable person in the position of the Association, ascertained by the matters that were known or ought to have been known by the relevant members of the Committee or MRC on behalf of the Association who were responsible for ensuring that the surface of the arena was reasonably safe for the event.

130           There had been four falls in a very short time before Ms Tapp rode, all of which were described in the Open Draft Draw as "bad falls". As already noted, the falls occurred at 6.14 pm (Mr Clydsdale, contestant 65), 6.22 pm (Mr Sadler, contestant 70A), 6.36 pm (Mr Gillis, contestant 82), and 6.58 pm (Mr Piggot, contestant 98). Mr Shorten accepted that in Mr Gillis' fall, the horse "slipped from under" the rider. Mr Shorten's evidence was that "by far the majority of campdrafting events start and end without there being a fall". He also conceded that a bad fall is accepted "in campdrafting circles as a signal that the surface needs attention to prevent another fall", although, as explained, his evidence was that Mr Gillis' fall was a "bad fall", but that Mr Sadler's fall was not. He did not see the falls of Mr Clydsdale or Mr Piggot.

131           The trial judge and the majority of the Court of Appeal made limited reference to this evidence concerning the four falls. After observing that the evidence as to the total number of falls for the whole of the day of 8 January 2011 was unclear, the trial judge referred to Mr Shorten's evidence that he had seen two falls (those of Mr Gillis and Mr Sadler) and that "they were both in the arena when

they fell"<sup>163</sup>. The trial judge also stated that she was "conscious of the evidence and submission that falls at campdrafting events were rare"<sup>164</sup>. But her Honour did not advert to Mr Shorten's acceptance that a "bad fall" is an accepted "signal" that the surface of the arena needs attention. Nor did the majority of the Court of Appeal.

132 The four falls were accompanied by two warnings given to Mr Shorten by the very experienced contestant, Mr Stanton: the first warning was given after the first three falls and the warning was that the competition should be stopped because "the ground [was] getting a bit slippery". The second warning was given after the fourth fall and was that something should be done about the event because he thought "the ground [was] unsafe".

133 Nonetheless, the Committee and MRC chose not to stop the event in order to inspect the ground of the arena and to consider its safety. One or more of the Committee or MRC members said that riders needed to ride to the conditions, and Mr Shorten agreed in cross-examination that the justification in his mind for continuing the event was that "the event had to go on". In cross-examination, Mr Shorten accepted that, immediately before Ms Tapp entered the arena, the condition of the arena had been identified by him and others "as being dangerous". Contrary to the views of the majority of the Court of Appeal, none of that evidence is infected by hindsight reasoning. The questions put to Mr Shorten made clear that they were directed to Mr Shorten's state of mind prior to Ms Tapp's fall.

134 Ms Tapp relied on the evidence contained in the Incident Report that it took three hours for the arena to be disc-ploughed and harrowed on the morning after Ms Tapp's fall and, when the competition commenced thereafter at 8.30 am, there were no further falls. The evidence that the arena was ploughed for three hours and that no further accidents occurred cannot be used to assess with the benefit of hindsight the response of a reasonable person in the position of the Association shortly before Ms Tapp competed in the Open Campdraft. But that evidence is a relevant matter from which an inference can be drawn about the extent to which it must have been apparent that there was a significant deterioration of the ground of the arena and the consequential substantially elevated risk of a rider falling. Mr Shorten agreed that the use of a disc plough demonstrated "how bad the condition was of the ground at 6.45 pm on Saturday, 8 January 2011".

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163 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [72].

164 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [125].

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135 There was a submission that the surface did not comply with the Association's Rule Book, specifically Rule 5 under the heading "Committee Rules", which required the following:

**"Com.15. Campdrafting.**

...

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

Hard surfaces, grass surfaces, uncovered trotting tracks and the like do not constitute 'safe arena surfaces', unless a special concession is granted by the Board."

136 This should be put aside in any consideration of breach of duty. There may have been great force in a case that was based on Rule 5 of the Committee Rules, particularly in light of the 11 photographs of the grassy surface of the arena, described by McCallum JA in her dissenting reasons as showing "beyond dispute from every one of them that the surface of the arena was not as prescribed by the rules"<sup>165</sup>. But, as Payne JA observed, Ms Tapp's case was never "based on" the breach of such a rule<sup>166</sup>. And, although Ms Tapp pleaded a breach of Rule 5 as one factor relevant to an assessment of breach of duty, the trial judge did not find a breach of Rule 5<sup>167</sup>. In this Court, Ms Tapp did not dispute that the "essence" of her case in the Court of Appeal was correctly identified by Payne JA as being that, "following a number of falls on the Saturday afternoon, in particular after the fall by Mr Piggot[], there should have been steps taken by the [Association] which would have prevented [Ms Tapp's] fall"<sup>168</sup>. Rule 5 merely confirms what was not in issue, namely, that the Association was required to take reasonable steps to ensure the safety of the surface of the arena.

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<sup>165</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [173].

<sup>166</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [26].

<sup>167</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [78].

<sup>168</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [57].

137 The Court of Appeal should have accepted that, by the time Ms Tapp competed in the Open Campdraft, as contestant 101, there was a substantially increased risk or probability of physical injury to her by reason of deterioration of the condition of the surface of the arena.

*Seriousness of the harm, burden of taking precautions, and social utility of the activity: s 5B(2)(b)-(d)*

138 The substantially increased probability of harm is, however, only one factor in the assessment of breach of duty. The other factors contained in s 5B(2) – the likely seriousness of the harm (physical injury that could be catastrophic), the simplicity and ease of the response of stopping the event to consider and respond to the safety issues, and the almost trivial social disutility of contestants who had already competed that day being at a competitive disadvantage – were the subject of limited submissions. That is unsurprising. They all support a finding of breach of duty.

*Precautions that a reasonable person in the position of the Association should have taken*

139 Given the probability of harm, the potential magnitude of injury, the ease with which the event could have been stopped, and the minimal social disutility of disadvantage to contestants who participated in the Open Campdraft on 8 January 2011, the only available conclusion is that the event should have been stopped until members of the Committee or MRC on behalf of the Association inspected the arena and were satisfied that the ground of the arena was reasonably safe in that the risk of injury from falling from a horse that slipped on the ground of the arena was not substantially elevated.

140 The Association submitted that, although it did not stop the event for the day after Mr Piggot's fall, it did respond by temporarily suspending the event while the ground of the arena was inspected and therefore it did not breach its duty of care. That submission cannot be accepted.

141 The Association's submission was based upon the reasoning of Payne JA that the campdraft was delayed prior to Ms Tapp's fall "because various people, on behalf of the Association, were inspecting the arena and deciding whether it was safe to continue the event"<sup>169</sup>. That conclusion was not open on the evidence. While it is not in doubt that Mr Shorten delayed the Open Campdraft on each of the two occasions when Mr Stanton had questioned the safety of the arena surface, neither

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**169** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [14].

the trial judge's findings nor the evidence supported the finding that the arena was inspected at that time or at any time during the Open Campdraft on 8 January 2011. Apart from Ms Tapp's evidence of a delay, the only relevant evidence comprised evidence from Mr Shorten and the Incident Report. That evidence does not support a finding that "various people ... were inspecting the arena". The highest the evidence could be put is that Mr Shorten "considered the condition of the ground" and "noticed that the surface was not wet, it was moist in parts" and "[d]ust was still flowing up". In cross-examination, Mr Shorten did not give evidence that he had inspected the arena. The relevant evidence was as follows:

"Q: When you agreed with me a minute ago that Mr Stanton was right in identifying the dangerous condition of the ground, you'd actually inspected it?

A: I walked across it, I didn't – I asked for them other fellows opinions.

Q: When Mr Stanton came back and said point blank 'Somebody's going to get hurt out there', did you inspect it again?

A: We went to the judge and asked him to halt the event, we walked across and seen Alan Young and Wayne Smith and spoke to them."

142 In this Court, the Association also submitted that the duty of care owed by the Association was satisfied by an informed decision that it was safe to continue with the competition. The Association submitted that the organisers made an informed decision that it was safe to continue the competition, on two occasions stopping it, considering Mr Stanton's warnings, inspecting the ground, and consulting with experienced campdrafters including the judge and participants (some of whom had themselves fallen) before unanimously deciding to proceed. On the available evidence, there was no such informed decision. Not only was there no inspection of the ground but, as McCallum JA correctly found, in the conversations that ensued, no one concluded that the surface was safe<sup>170</sup>.

143 Accordingly, the Association breached its duty of care by failing to stop the competition in order to inspect the ground and to make "an informed decision ... as to whether it was safe to continue with the competition". The Court of Appeal erred in failing to find that the Association had breached its duty of care in this respect.

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**170** *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [175].

**Whether causation between the negligence and the harm was established:  
s 5D**

144 At trial, the Association conceded that, if the Court found that "the breach involved a failure to stop the event before [Ms Tapp's] ride, then it is self-evident that the failure to stop the event was a necessary condition of the harm and the requirements of s 5D are met", because "the accident wouldn't have happened".

145 The extent of this concession was in issue in this Court. In particular, the Association submitted that its concession did not apply to the manner in which Ms Tapp ran her case in the Court of Appeal because, it was said, her case had shifted in the Court of Appeal from a case that the reasonable response of a person in the position of the Association would have been to "stop" the event, to a case that the reasonable response would have been to "suspend" the event. Putting to one side the philosophical question of how an event can be suspended without stopping it, no member of the Court of Appeal saw any distinction between Ms Tapp's pleaded case at trial, that the Association should have stopped the event, and her ground of appeal, that the Association should have "suspended" the event. There had been no suggestion at trial that "stopping" the event (which was the language used by Mr Stanton in his warnings to Mr Shorten) required the event to be terminated permanently. Indeed, Payne JA<sup>171</sup> described Ms Tapp's case on appeal as one that the competition should have been stopped to "plough the arena and/or warn competitors that the site of the campdrafting event had become unsafe", and McCallum JA<sup>172</sup> used "stopped" and "suspended" interchangeably. The concession should equally apply whether the counterfactual is described as "stopping" the event or "suspending" the event, and the Association should not, in this Court, be permitted to resile from its concession.

146 In any event, the concession was properly made. In this Court, the Association submitted that: (i) there was insufficient basis to find that shortly before 7 pm after the fourth fall there had been "a deterioration of the ground of the kind for which [Ms Tapp] contends"; and (ii) Ms Tapp's fall might have occurred in any event if she competed when the competition resumed the next day. Those submissions should not be accepted.

147 As to the first matter – the alleged insufficiency of evidence of deterioration of the ground – that has been explained and rejected in relation to breach of duty.

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171 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [39], [54].

172 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [177].



The evidence comprised: (i) the four falls in a period of less than an hour in circumstances where falls at campdrafting events are rare, and the relevance of a single "bad fall" as a "signal" that the ground needed attention to prevent another fall; (ii) the two warnings about the state of the ground by the very experienced contestant, Mr Stanton; (iii) Mr Shorten's concessions, including that immediately before Ms Tapp entered the arena he and others had identified the ground "as being dangerous"; and (iv) that it had taken a disc plough three hours to remediate the ground the next morning, which demonstrated how apparent it would have been that the condition of the ground was poor. The inference to be drawn from this evidence about the condition of the ground of the arena, together with the unchallenged evidence of Ms Tapp, her sister, and her father that her fall occurred as a result of her horse slipping on the surface of the arena, is that the condition of the ground was the cause of the fall.

148 As to whether Ms Tapp's fall would have occurred in any event if the competition had been stopped before she competed, and resumed so that she had competed the next day, the Association relied upon the conclusion by the trial judge that there was no evidence that ploughing the arena would have led to a different outcome. But that conclusion had been reached as a consequence of the trial judge's incorrect premise that the ground had not substantially deteriorated and that no breach of duty had been established.

149 A consideration of the counterfactual of what would have occurred if the Association had stopped the event must proceed on the basis that the Association would have acted lawfully<sup>173</sup>. The counterfactual must be assessed on the basis that the Association would have stopped the event in order to inspect the ground of the arena and to consider whether it was safe. In any event, to adapt what was said by Gummow J in *Chappel v Hart*<sup>174</sup>, it would be "unjust to absolve" the Association "from legal responsibility for [the] injuries by allowing decisive weight to hypothetical and problematic considerations of what could have happened ... in conditions of great variability".

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**173** *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 498-499, citing *Baker v Willoughby* [1970] AC 467. See also *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) at [938]-[941].

**174** (1998) 195 CLR 232 at 262 [81].

**Whether the risk would have been obvious to a reasonable person in the position of Ms Tapp: s 5L**

150 Difficult issues can sometimes arise concerning which characteristics of a plaintiff or of a defendant are to be attributed to a reasonable person in their position<sup>175</sup>. None of those issues was raised in this case. The only issue was whether, from the perspective of a reasonable person in the position of Ms Tapp, the risk would have been obvious.

151 There are three reasons which, in combination, preclude any conclusion that the risk of injury as a result of falling from a horse that slipped by reason of substantial deterioration of the surface of the arena beyond the normal deterioration that might be expected would have been obvious to a reasonable person in Ms Tapp's position.

152 First, unlike the organisers of the competition on the Committee or MRC, Ms Tapp did not have the opportunity to examine the condition of the ground at all during the Open Campdraft, and particularly not in the hour before she competed, during which the other falls occurred. In cross-examination, Mr Shorten was asked about the opportunity of contestants to "walk the arena, or walk the field in which they're going to be competing". He said that the opportunity was offered to contestants "before the [O]pen [Camp]draft started" and that "[n]o competitor gets a chance before [they] ride[] in a camp to go around the course first".

153 Secondly, a reasonable person in Ms Tapp's position would not have had any concerns about the condition of the ground from observations of other contestants or information about other contestants. On the day that Ms Tapp had her accident, she had already competed twice that morning, her sister had competed three times, and her father had competed four times (including one occasion shortly before Ms Tapp), all without incident.

154 The trial judge held that Ms Tapp "did not observe any falls and was unaware that there had been any falls during the [O]pen [Campdraft] event"<sup>176</sup>. Indeed, from around 5 pm, when Ms Tapp accepted her father's offer to take his place in the Open Campdraft, until she competed at around 7 pm, Ms Tapp had warmed up her horse, Xena Lena, twice in an area about 200 metres from the arena. When asked in cross-examination about her awareness that a man had fallen

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175 Compare *Imbree v McNeilly* (2008) 236 CLR 510 with *Cook v Cook* (1986) 162 CLR 376.

176 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [69].

shortly before she competed, Ms Tapp explained that she had been away from the arena and had been unaware of that fall.

155 Thirdly, as Mr Shorten said, and consistently with Rule 5, decisions concerning the quality of the surface and how the surface is maintained were made by the Committee or MRC. A reasonable person in the position of Ms Tapp, who was preparing herself and her horse to compete in the hour before being called, would have relied upon the Committee or MRC for that assessment. Further, although Ms Tapp was experienced in campdrafting, as a 19-year-old she was still a teenager and, as McCallum JA correctly observed, "teenagers are likely to be less attuned to risks that would be obvious to more experienced, settled members of the community"<sup>177</sup>. Ms Tapp's age thus reinforces the point that a reasonable person in her position would be unlikely to pause, while waiting for her run in a high-turnover event, to reflect upon the appearance of the surface of the arena. A reasonable person in her position would, if they turned their mind to the issue at all, likely assume the Committee or MRC had made an appropriate decision about the surface.

156 During the time before Ms Tapp's event, she became aware that the event was delayed but no announcement was made about the reason for the delay and no one told Ms Tapp about the reason. The trial judge found that "no specific oral warning was given to [Ms Tapp] and no suggestion was made, by announcement or otherwise, that competitors 'rode at their own risk'"<sup>178</sup>. All that had been announced was that there was an offer of a refund of the entry fee if riders chose not to compete, but Ms Tapp did not hear the announcement and there was no suggestion that the announcement was loud enough that a reasonable person in her position, while warming up her horse in the separate arena, would have heard it. In any event, a reasonable person in Ms Tapp's position would have known, as she knew, that events were held up for other reasons such as "an injured beast ... coming out of the yard".

## Conclusion

157 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 23 October 2020 should be set aside and, in their place, it should be ordered that:

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177 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [185].

178 *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2019] NSWSC 1506 at [65].

*Gordon*        *J*  
*Edelman*     *J*  
*Gleeson*      *J*

54.

- (a) the appeal be allowed with costs; and
- (b) the orders made by the Supreme Court of New South Wales on 4 November 2019 be set aside and, in their place, it be ordered that:
  - (i) there be verdict and judgment for the plaintiff in the agreed amount of \$6,750,000; and
  - (ii) the defendant pay the plaintiff's costs.

