



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No. S63 of 2021

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

BETWEEN:

EMILY JADE ROSE TAPP

Appellant

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and

AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED

ACN 002 967 142

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I. This Outline is in a form suitable for publication on the internet.

PART II. Outline

- 20 1. There are two issues in the appeal:
- (a) duty of care; and
 - (b) whether the appellant's injury was the materialisation of an obvious risk of a dangerous recreational activity engaged in by the appellant in terms of ss. 5F and 5L of the *Civil Liability Act 2002* (Appellant's Submissions ("AS")[1]).
2. **Duty of care.** The circumstances leading to the appellant's injury are set out at AS[4] to [14]. The evidence from the appellant, and from her father and sister, all experienced campdrafters, was that her horse fell because its front legs slid from beneath it: AS[15], [16].
- 30 3. There had been at least four "bad falls" in the period under an hour preceding the appellant's fall at 7.00pm: AS[9]. These can be seen at 1 Further Materials ("1 FM") 223 (Contestants 65, 71, 82) and 222 (Contestant 98). The appellant was Contestant 101.)

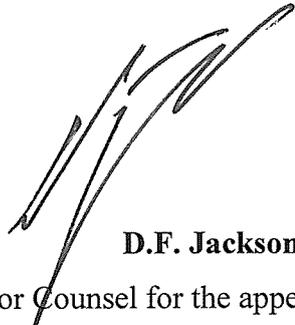
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4. The evidence of Mr Shorten, the only substantive witness for the respondent on this issue, was that a “bad fall” was a signal that the surface needed attention to prevent another fall: AS[17].
5. The campdrafting event was under the control of the respondent, a body which conducts and controls such events throughout Australia. It does so under Rules which deal with a large number of topics, including responsibility for various aspects of safety to the competitors, the animals involved and the public: AS[5], Reply [7].
6. Amongst the Rules was the obligation of the respondent to ensure that the arena surface was safe: AS[5], 1 FM 86. All that was done was to make an announcement that any competitor who wishes to withdraw can do so and they can get their money back: AS[12]. The appellant was not aware of the announcement, or of the falls; or of the fact that the event had already been held up twice because of concerns about the safety of the surface: AS[14].
7. A great deal of the RS is devoted to showing that Mr Shorten’s evidence, adverse to the respondent, should not be given the weight it deserved. These contentions should be rejected: see AS[17], [23]-[25], Reply [10]-[12].
8. For the reasons summarised at AS[25] and Reply [20] the appellant should have succeeded on the duty of care issue.
9. **Materialisation of obvious risk of a dangerous recreational activity.** Section 5L(1) of the *Civil Liability Act* provides that a defendant is not liable in negligence as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
10. Actual awareness is not necessary (s. 5L(2)). See too ss. 5F(2), 5F(3) and 5F(4). In the end, however, the relevant *test* is that referred to in s. 5F(1). As its words make clear, it turns on whether the risk would have been obvious to a reasonable person *in the position of the appellant*.
11. Here the appellant was competing in a competition conducted under Rules binding her, and binding the respondent. Each had roles and functions.
12. She was entitled to assume that the respondent would carry out *its* function of ensuring that the surface was in accordance with the Rules. This was not something optional to the respondent.
13. Further there was her relative youthfulness (AS[40]), her lack of knowledge of the conditions giving rise to the risk.

14. It should have been held that ss. 5F and 5L did not have a relevant application.
15. **Disposition.** The appeal should be allowed, with the appropriate orders being those in AS[45] and [46].

Dated: 10 November 2021



D.F. Jackson QC
Senior Counsel for the appellant

10