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Case Alert

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# When is a dangerous recreational activity risk obvious?

***Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11**

8 APRIL 2022

**AT A GLANCE**

- The High Court has addressed the dangerous recreational activity defence under the *Civil Liability Act 2002* (NSW) in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11.
- In the decision, the majority of the High Court clarified the process by which the 'risk of harm' in negligence cases must be identified under the *Civil Liability Act*. It also overturned the approach of considering 'liability-defeating' defences first.
- The final outcome in the appellant's favour will be of concern to sporting organisations and their insurers. However, the fact that there were split decisions in both the NSW Court of Appeal and the High Court illustrates that these matters are not straightforward and turn on their own facts. The characterisation of the risk remains a key focus in mounting any defence.

## Background

Campdrafting is a sport that involves a horse and rider working cattle quickly around a figure-eight course. A campdrafting event was organised on 8 January 2011 by the Australian Bushmen's Campdraft and Rodeo Association Ltd (the Association). Emily Tapp (Tapp) was aged 19 at the time she joined the campdraft. She was an experienced rider and competitor.

On the second day of the campdraft, over 700 rides had taken place on the area surface. After some rider falls, the Association temporarily stopped the event to assess the state of the ground. They determined that the competition should continue. When Tapp rode her horse in the competition, the horse slipped on the ground and she fell, suffering a catastrophic and permanent spinal injury.

## Litigation history

Tapp brought proceedings against the Association in the NSW Supreme Court. The parties agreed before trial that her damages should be assessed in the sum of $6,750,000 in the event that she succeeded. The only remaining issue was liability.

Tapp alleged the Association breached its duty of care to her by:

- not ploughing the ground before the start of the competition
- not stopping the competition when the ground became unsafe, and
- not warning the competitors that the ground was unsafe.

Judge Lonergan J delivered judgment for the Association in 2019.

Her Honour found for the Association by finding that the Association succeeded on its 'dangerous recreational activity' defence under s5L of *Civil Liability Act 2002* (NSW) (CLA). In essence, campdrafting was held to be a dangerous recreational activity that involved obvious risk. In this case, the risk of harm that materialised – which her Honour considered was "*the risk of falling and being injured or alternatively that the horse would fall and as a consequence of that, the plaintiff would fall and be injured*" – was deemed an obvious risk.

Her Honour concluded the 'obvious risk' defence before considering whether the Association was *prima facie* negligent. In doing so, she adopted the approach endorsed by Leeming JA in *Goode v Angland* [2017] NSWCA 311, who held in that case that a dangerous recreational activity defence:

> *"is an example of a "liability-defeating rule" which is "external to the elements of the claimant's action" and thus a clear example of something properly regarded as a defence…there is much to be said…for dealing with the defence at the outset."*

Tapp appealed. In the appeal, there was no dispute that campdrafting was a dangerous recreational activity. The remaining question was whether Tapp's injury was the materialisation of an 'obvious risk' of this activity.

A majority of the NSW Court of Appeal (per Payne JA with whom Basten JA agreed, with McCallum JA dissenting) upheld the primary judge's finding that the injury suffered was a result of the materialisation of an obvious risk of a dangerous recreational activity. It was significant to Payne JA that it had not been shown that the campdraft surface had deteriorated to an extent that reasonable care for competitors required the event to be stopped, the surface to be ploughed and/or for competitors to be warned.

Tapp appealed to the High Court and was granted special leave. The matter was heard in 2021. In a decision handed down on 6 April 2022, the majority of the High Court (Gordon, Edelman and Gleeson JJ) published a joint judgment in favour of Tapp and held:

1. the Association breached its duty of care by failing to stop the event 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,
2. that breach of duty caused Tapp's injuries, and
3. the injuries were not the result of materialisation of an obvious risk of a dangerous recreational activity.

Kiefel CL and Keane J joined in a dissenting judgment.

## Identifying the risk of harm and dealing with 'liability-defeating' defences

A key issue in this case at all levels was properly identifying the risk of harm. After it was accepted that campdrafting was a dangerous recreational activity, the remaining issue was whether the Tapp's injury was the materialisation of an 'obvious risk' of that activity, within the meaning of s5L of the CLA. Before all Courts could determine whether the risk was obvious or not, the risk itself first had to be properly identified. Liability can often turn on the way in which the risk is conceived.

The majority's reasoning considered the proper process by which the Courts should identify the risk. The majority distilled four relevant principles:

1. The majority confirmed [at 110] that "*contrary to views that have been expressed in the NSW Court of Appeal*", Courts can and should only properly identify the '*risk*' with which s5L CLA is concerned *after* a determination that there is *prima facie* liability for negligence. This effectively overturned the intermediate appellate court authority to the effect that liability-defeating defences should be considered first[1].
2. The risk under s5L of the CLA must be identified at the same level of generality as the risk that is identified for the purposes of considering whether the defendant is *prima facie* negligent. In other words, the Court must first consider whether a defendant was negligent in failing to take precautions against a "*risk of harm*" under s5B of the CLA. Then, if a dangerous recreational activity defence is relied on, it must consider whether that *same risk* identified was an '*obvious risk'* for the purposes of s5L CLA.

[1] *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].

3. The generality at which the risk is stated should include the same facts that established the risk for the purposes of the breach of duty, which caused the harm, but no more.
4. The identification of the risk does not need to descend into precise detail of the mechanism by which injury was suffered if that detail is unnecessary to establish breach of duty.

## Principles applied

The majority applied these principles to the case before them. Their Honours noted that the trial judge had identified the risk of harm as "*the risk of falling and being injured*". Expressed so generally, this risk was plainly obvious. Their Honours agreed with the majority of the NSW Court of Appeal that this characterisation of the risk was too broad and was expressed too generally. It failed to include the essential facts, which constituted the alleged breach of duty. However, the majority of the High Court also did not agree with the majority of the Court of Appeal's characterisation that the risk of harm had to include the risk that the surface area where the horse fell had become unsafe. Their Honours found the '*risk*' did not need to refer to the precise manner in which the injury was sustained.

Instead, the majority of the High Court found that the risk should be properly identified as the substantially elevated risk of injury by falling from a horse that slipped by reason of the deterioration of the surface area. It was not necessary to identify how the area had deteriorated specifically.

Once that risk had been identified, the majority found it ought to have been foreseeable to the Association. Other riders had fallen and there was evidence that Association members had considered the possibility that the area had become unsafe. It was not to the point that the Association members did not know exactly why it was unsafe. The majority of the High Court found the Association was negligent in failing to take the reasonable precaution of stopping the event until members had inspected the area. There was causation between this breach and the appellant's accident and injury.

Given the Association was *prima facie* negligent, the only remaining question was whether the Association was absolved of liability in light of its 'dangerous recreational activity' defence. As it was conceded campdrafting was a dangerous recreational activity, this defence essentially boiled down to whether the risk was obvious to a reasonable person in Tapp's position. The majority of the High Court found that this risk was not obvious, for the following reasons:

1. Tapp did not have the opportunity to inspect the area before riding her horse on it.
2. Tapp had no reason to be concerned about the surface area. She was unaware of the other falls.
3. Tapp was entitled to rely on an assumption that the Association was taking care of the surface area.

As the risk was not obvious, the Association's dangerous recreational activity defence failed and Tapp succeeded.

## The dissent

Kiefel CJ and Keane J published a joint dissenting judgment. In their Honour's opinion, the fundamental flaw in Tapp's case was that she had failed to prove why her horse fell.

Their Honours were also reluctant to find that the Association should have stopped the competition because of the risk of injury, because the risk of injury was not the only consideration. If it was, campdrafting would never be permitted because a risk of serious injury was intrinsic to that sport, whether on good surfaces or bad. The notion of reasonable precautions had to balance countervailing considerations, including that the competitors wanted to compete. Their Honours observed:

> *"It must be acknowledged that, in the present case, it is difficult, given the tragic injury suffered by Ms Tapp, not to focus on the circumstances of that 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".*

## Implications for insurers

At a simplistic level, Tapp fell from a horse while participating in a sport acknowledged as dangerous and where the risk of falls was an intrinsic risk of the sport. It is easy to question why the dangerous recreational defence was not available against that rationale.

However, while the approach adopted by the High Court gives insurers of sporting and recreational activity organisation a need to review their current defence strategy in active matters, this decision does turn on its unique facts, including that a number of falls had occurred immediately before the accident. As such, its impact on insurers may be constrained.

Nevertheless, the decision provides a reminder that, to trigger a 'dangerous recreational activity' defence, a proper characterisation of the risk is required. It is also important to determine the obviousness of that risk to a reasonable person, considering all the facts and circumstances available to that reasonable person.

The High Court has also clarified the process by which the 'risk of harm' in such cases must be identified. Instructively, it has overturned the approach of considering 'liability-defeating' defences first. Insurers and their lawyers must tackle the questions of duty, breach and causation before embarking on statutory defences that have been previously used to defeat a claim from the outset.

## Need to know more?

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