ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

# MENZ V WAGGA WAGGA SHOW SOCIETY INC [2020] NSWCA 65

**NSW Court of Appeal, Leeming JA, Payne JA, White JA, 21 April 2020**

Seriously injured rider sued show society for negligence when she fell from her horse after it was startled and Civil Liability Act defences relied upon.

**Key words: Negligence, New South Wales, Civil Liability Act, Dangerous Recreational Activity, Australian Consumer Law Statutory Guarantee**

1. Menz was seriously injured when her horse was startled and fell whilst warming up for an event at a show in Wagga Wagga. Children playing on a fence surrounding a track in the centre of the showground caused a very loud noise which startled the horse. Menz had signed an "Indemnity and Waiver" form, which stated that it constituted a "risk warning" for the purposes of the *Civil Liability Act 2002* (NSW).

2. Menz sued the Wagga Wagga Show Society Inc (Show Society) in negligence and pursuant to the statutory guarantee imposed by section 60 of the *Australian Consumer Law (*ACL). The Show Society relied on statutory defences under the *Civil Liability Act 2002* (NSW) (the Act), and also that these qualified the federal statutory guarantee.

3. The primary judge held that the injury was a result of an obvious risk of a dangerous recreational activity and the Show Society was not liable in negligence, pursuant to section 5L of the Act. The primary judge also rejected the allegation that the respondent contravened section 60 of the ACL, on the basis that, pursuant to section 275 of the ACL, section 5L of the Act operated to defeat the federal claim as well. The primary judge further held that the Show Society had not breached its duty of care to the rider, applying section 5B of the Act.

4. The issues in the appeal were:

    a) Whether the primary judge erred in characterising the risk as an "obvious risk", and in finding that the appellant was engaged in a "dangerous" recreational activity, such that section 5L of the Act applied to defeat her claim.

    b) Whether the primary judge erred in rejecting the expert evidence called by the appellant at trial.

    c) Whether the primary judge erred in finding that the respondent had not breached its duty under section 5B of the Act by failing to station marshals.

5. The appeal court dismissed the appeal.

**Obvious Risk**

6. Section 5L of the Act is in the following terms:

> 5L No liability for harm suffered from obvious risks of dangerous recreational activities
>
> (1) A person (*the defendant*) is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
>
> (2) This section applies whether or not the plaintiff was aware of the risk.

7. When section 5L applies, a defendant who can establish that the harm has resulted from the materialisation of an obvious risk of a dangerous recreational activity will have a complete defence. Menz accepted that she had been engaged in a "recreational activity", but argued that she had not been engaged in a "dangerous" recreational activity, and, even if she were, the risk which materialised resulting in her injury was not an obvious one.

8. The Show Society submitted that there was always and inevitably the possibility of a large animal with a mind of its own being spooked by some stimulus, leading to a fall with the possibility of very serious injury to the rider. It followed that the activity was "dangerous", and the risk which materialised was "obvious". The Court found [at 75]:

> In the present case, the harm was caused as a result of the fall. True it is that the indirect cause was the noise made by the children. But that does not deny a conclusion that the entirety of the personal injury may fairly be said to be "as a result of" the horse being spooked and its rider losing control.

9. And further [at 79]:

> There were three basal and inescapable facts in this litigation. The first was that, as it was put, there was "no such thing as a bomb proof horse". The second was that horses may at any time be spooked by a noise, or a shadow, or some other stimulus. The third was that a rider runs a risk of serious injury in the event that a horse is spooked and behaves unpredictably. Those facts make it appropriate to characterise the harm suffered by Ms Menz as the materialisation of the obvious risk of her horse being spooked by some stimulus. It is not necessary in order fairly to describe what occurred to provide the additional particularity that the noise made by children spooked the horse.

10. The court decided that the challenge to the section 5L defence was not made out.

**Expert Evidence**

11. The primary judge was correct to exclude the evidence in the report. The report did not explain how the author's opinions derived from her specialised knowledge or explain the reasoning process underlying her conclusions that marshals should have been present and children prevented from being present.

**Station Marshals**

12. The common law claim was subject to section 5B of the Act, being:

> 5B. General principles
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) …
>
> (b) …
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

13. The court found that the presence of additional stewards or marshals might reduce some of the stimuli which might spook horses, but could not reduce them all. This was to be borne in mind when determining whether a reasonable person would have taken precautions. Menz failed to establish prospectively that a reasonable person in the position of the Show Society would have taken precautions with additional stewards.

## IMPLICATIONS

For those associations and their members engaging in dangerous pursuits, this case serves as an example of how the Civil Liability provisions will be applied by the courts. The waiver that was used by the association was included in the judgment and may be of some use in drafting similar provisions in other association.

> "**Agricultural Societies Council of New South Wales Incorporated**
>
> **Participants Indemnity and Waiver**
>
> **RISK WARNING - HORSES**
>
> **The Agricultural Societies Council of New South Wales advises that the participation, including passive participation, in events or activities at an agricultural show contains elements of risk, both obvious and inherent. The risks involved may result in property damage and/or personal injury including death.**
>
> 1. I the signatory acknowledge, agree and understand that participation, including passive participation, in events and activities at this, or at any show contains an element of risk of injury and I agree that I undertake any such risk voluntarily of my own free will and at my own risk.
>
> 2. I the signatory acknowledge, agree and understand that the risk warning at the top of this form constitutes a 'risk warning', for the purposes of Division 5 of the *Civil Liability Act 2002* (NSW).

3. I the signatory acknowledge the risk referred to above and agree to waive any and all rights that I, or any other person claiming through me, may have against the Wagga Wagga Show Society in relation to any loss or injury (including death) that is suffered by me as a result of my participation in this show/event.

The signatory must continually indemnify the Wagga Wagga Show Society on a full indemnity basis against any claim or proceeding that is made, threatened or commenced and any liability, loss (including consequential loss and loss of profits), damages or expense (including legal costs on a full indemnity basis) that the Wagga Wagga Show Society incurs or suffers, as a direct or indirect result of the undersigned's participation in any event held by the Wagga Wagga Show Society." (emphasis original)

## VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/nsw/NSWCA/2020/65.html

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