Common Law Division
Supreme Court
New South Wales

Case Name:	Menz v Wagga Wagga Show Society Inc (No 3)
Medium Neutral Citation:	[2019] NSWSC 541
Hearing Date(s):	24, 25, 26 and 27 September 2018
Date of Orders:	20 May 2019
Date of Decision:	20 May 2019
Jurisdiction:	Common Law
Before:	Bellew J
Decision:	1. Verdict and judgment for the defendant. 2. The plaintiff is to pay the defendant's costs as agreed or assessed.
Catchwords:	TORTS – Negligence – Where plaintiff was "warming up" riding a horse at an agricultural show prior to competing in an event – Where children were playing nearby – Where noise created by children caused a horse nearby to be startled – Where plaintiff's horse fell to the ground causing the plaintiff serious injury – Whether the defendant breached any duty of care owed to the plaintiff – Whether the plaintiff's injuries were due to the materialisation of an obvious risk of a dangerous recreational activity – Whether the plaintiff's injuries were the result of the materialisation of an obvious risk – Whether the plaintiff's injuries were the materialisation of an inherent risk – Whether the risk of injury was the subject of a risk warning given to the plaintiff by the defendant
Legislation Cited:	*Civil Liability Act 2002* (NSW) *Competition and Consumer Act 2010* (Cth)
Cases Cited:	*Action Paintball Games Pty Limited (In Liquidation) v Barker* [2013] NSWCA 128 *Avopiling v Bosevski* [2018] NSWCA 14 *Bitupave Limited t/as Boral Asphalt v Pillinger* [2015] NSWCA 298; (2015) 72 MVR 460

	Fallas v Mourlas (2006) 65 NSWLR 418; [2006] NSWCA 32 *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 *Goode v Angland* [2016] NSWSC 1014 *Jaber v Rockdale City Council* [2008] NSWCA 98 *Menz v Wagga Wagga Show Society Inc (No.1)* [2018] NSWSC 1446 *Ohlstein and ors v E and T Lloyd t/as Otford Farm Trail Rides* [2006] NSWCA 226 *Sharp v Parramatta City Council* [2015] NSWCA 260; (2015) 209 LGERA 220 *Streller v Albury City Council* [2013] NSWCA 348
Texts Cited:	
Category:	Principal judgment
Parties:	Kerrie Anne Menz – Plaintiff Wagga Wagga Show Society Inc – Defendant
Representation:	Counsel: M Cranitch SC, M Inglis & R Wathukarage – Plaintiff J Sexton SC & D Kelly – Defendant Solicitors: Commins Hendriks Solicitors – Plaintiff Mason Black Lawyers – Defendant
File Number(s):	2015/285709
Publication Restriction:	Nil

JUDGMENT

INTRODUCTION

1 On 27 and 28 September 2012, the Wagga Wagga Show Society Inc ('the defendant') conducted an agricultural show ('the show') at the Wagga Wagga Showground ('the showground'). Kerrie Anne Menz ('the plaintiff') was, at that time, a person of considerable experience in managing horses. She had been riding horses since the age of 11 or 12, and had gained experience through pony clubs, show riding and riding stock horses.

2 The plaintiff had competed in many agricultural show events with a registered stock horse officially named 'Cannon's Gladiator', to whom she referred as 'Sonny'. The plaintiff had taken delivery of Sonny when he was 2½ years of age. She trained Sonny with the assistance of her husband, and successfully competed with him in events at the Holbrook Show, the Bathurst Show and the Canberra Royal Show, amongst others.

3 On 27 September 2012, the plaintiff attended the first day of the show. She rode Sonny in a number of events,[1] entry to which was gained by buying tickets at the office of the show secretary.[2] She said that prior to competing on that day, she had "signed some forms which are routinely provided at agricultural shows". [3]

4 On 28 September 2012, the plaintiff attended the second and final day of the show to ride Sonny in some further events. She was not required to sign any forms by the show organisers on that day.[4] She took Sonny in a lead class but she has no recollection of anything else that happened.[5] It is the plaintiff's case that at approximately 10:00am she was riding Sonny in a designated warm-up area of the showground prior to the commencement of an event in which she was to compete. A number of children were nearby, playing and/or climbing on a fence surrounding a greyhound track which was located in the

[1] Exh H.
[2] First evidentiary statement at para 28, CB 23.
[3] First evidentiary statement at para 27, CB 23.
[4] First evidentiary statement at para 29, CB 24.
[5] First evidentiary statement at para 31, CB 24.

centre of the showground. Those children made contact with a metal sign on the fence, causing a very loud noise. This noise startled a horse called 'Banjo' which was being ridden in the plaintiff's vicinity by Cassandra MacDonald. Sonny was also startled. He faltered and fell onto his right side whilst the plaintiff was still in the saddle, causing the plaintiff to fall at the same time.

5 It is not in dispute that the plaintiff sustained serious injuries as a consequence of Sonny falling, and that she continues to suffer significant ongoing sequelae. The plaintiff asserts that the incident was caused by the negligence of, and/or the breach of contract by, the defendant. Although a number of particulars have been pleaded, the essence of the plaintiff's case is that there was a failure on the part of the defendant to have marshals and stewards available to control the presence and behaviour of children in and around the warm-up area. The defendant denies liability, and in doing so relies upon a number of provisions of the *Civil Liability Act 2002* (NSW) ("the CLA"). A pleaded allegation by the defendant of contributory negligence on the basis of the plaintiff's failure to wear a helmet was not pressed at the hearing.[6]

6 A Joint Court Book ('CB') was tendered containing the pleadings and the majority of the documentary evidence.[7]

THE FACTS

7 There is little dispute about the facts surrounding the incident in which the plaintiff was injured. To the limited extent that any factual issues have arisen on the evidence, I have identified them below and have expressed my concluded view in relation to them.

[6] T14.48 – T14.50.
[7] Exh B.

The showground area

8 Within the showground there was an oval-shaped trotting track.[8] Within the trotting track there was an oval-shaped greyhound track.[9] There was a grassed area between the trotting track and the greyhound track[10]. There was a fence around the external perimeter of the greyhound track.[11] There was also a fence around the internal perimeter of the greyhound track, inside which were four designated rings[12] which were separated by laneways.[13] The laneways were formed by bunting, in the form of flags affixed to lengths of rope strung between star posts.[14]

9 Between the trotting track and the greyhound track was a path which had been formed by vehicles driving through the area.[15] The plaintiff had brought her own vehicle and horse float into the area on the day of the incident and had left her vehicle there when Sonny was taken out of the float.[16] At that time there were people, including children, in the general vicinity.[17]

10 Near the four rings was a designated warm-up area.[18] There was some inconsistency in the evidence regarding its precise configuration. Notations on an aerial photograph of the showground[19] (the provenance of which is unclear) depicted the warm-up area as a generally triangular shape. However, the evidence of Cassandra MacDonald, who was present when the plaintiff was injured, was that the area was "more of like a pie shape".[20] Although nothing turns on it, I prefer the evidence of Ms MacDonald. Apart from anything else, her evidence in this respect appears to be consistent with

[8] Exh A.
[9] Exh A; T45.7-T45.11.
[10] T21.35 – T21.39; designated on Exh A by the words "show jumping".
[11] Exh 3; T60.20 – T60.25.
[12] T23.49 – T24.8.
[13] Exh A.
[14] T23.28-T23.30; T50.23 – T50.25.
[15] T22.35 – T22.37.
[16] Commencing at T22.49.
[17] T23.4 – T23.9.
[18] Exh A.
[19] Exh A.
[20] Exh D; T50.31 – T50.34.

what is shown in footage taken of the plaintiff competing at the show with Sonny on 27 September 2012.[21]

11 Competitors were permitted to warm-up in the rings before events started.[22] Warming-up was also permitted in a nearby show jumping area, providing no show jumping was taking place. Horses could not be ridden on the trotting track. Whilst a competitor had to cross the greyhound track in order to get into the rings and warm-up area, horses could not be ridden on the greyhound track itself.[23]

12 There was a grandstand nearby from which members of the public could view events.[24] Sideshows were located behind the grandstand towards either end.[25]

13 The plaintiff had been competing in events at the show for many years. The set-up at the show that I have described above was essentially the same during the whole time over which the plaintiff had competed.[26] It was the plaintiff's understanding that those who were officiating at the show were volunteers.[27] A fee of $2.50-$3.00 was paid for each event entered[28] and entry was gained by buying tickets at the show secretary's office prior to competing. [29]

The risk warning

14 Prior to the commencement of the show, the defendant issued the '148th Wagga Wagga Show Horse Program – 27 & 28 September 2012'[30] ('the program'), at p 7 of which the following was stated:

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[21] Exh H.
[22] T24.17 – T24.24.
[23] T24.29 – T24.35.
[24] Exh D, T52.19 – T52.26.
[25] Exh D; T51.19 – T51.28.
[26] T24.46-T24.48.
[27] T25.7 – T25.9.
[28] T25.11 – T25.12.
[29] First evidentiary statement at para 28, CB 23.
[30] Exh 1.

All competitors must sign waivers before they ride if not they will be ask (sic) to leave the ring and will not be allowed to compete until waivers are signed.

No exemptions will be granted and no certificates will be accepted from competitors.

John Hodges
Secretary/Manager[31]

15 It was the practice for those wishing to enter an event at the show to go to the secretary's office and obtain the program.[32] The plaintiff said that she "would have" obtained a program for the show in 2012 in order to ascertain what events she wished to enter. She could not remember whether she obtained it at the show, or at some point beforehand. However, nothing turns on that. I am satisfied that she obtained a copy of the program at some point.

16 The plaintiff competed with Sonny in approximately five stock horse classes on 27 September 2012, which was the first day of the show. She recalled that prior to competing in those events she had "signed some forms which are routinely provided at agricultural shows".[33] It is clear that one of the documents signed by the plaintiff ('the risk warning') was in the following terms:[34]

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.

[31] Emphasis in original.
[32] Commencing at T30.40.
[33] First evidentiary statement at para 27, CB23.
[34] Exh C.

> 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 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.
>
> 4. 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.[35]

17 The plaintiff's signature appears on the risk warning under the following words:

> I have read this Indemnity and Waiver form and acknowledge and agree with its contents. I have made any further inquiries which I feel are necessary or desirable and fully understand the risks involved in this activity.

18 At the bottom of the risk warning, under the heading 'Name of horse', the plaintiff nominated Sonny, by reference to his official name of Cannon's Gladiator.

19 This form of risk warning was common at agricultural shows at which the plaintiff had previously attended and competed. She had signed similar documents on a number of previous occasions.[36] She knew of the significance of the risk warning. She specifically knew that a horse could not be entered in any event unless the risk warning was signed.[37]

[35] Emphasis in original.
[36] T27.16 – T27.21.
[37] T31.19 – T39.21.

The behaviour of horses

20 The evidence before me establishes that horses, including those which might normally give the appearance of being placid, are prone to being frightened or 'spooked' by any number of external stimuli. Such stimuli may include loud noises, such as a PA system in a showground, and movement from other horses.[38] Even horses which are said to be conditioned to the type of stimuli which might occur at a showground can react unexpectedly. In short, there is no such thing as a 'bomb proof horse'.[39]

21 The plaintiff relied on an expert report dated 2 September 2016 of Debbie Smythe, a retired horse trainer and riding instructor.[40] Although a number of parts of Ms Smythe's expert report were excluded,[41] the passages of the report which remained in evidence included the following:[42]

> Horses have a 'fright to flight instinct" and can move/jump very quickly either forwards, backwards or sideways. They have very quick reflexes if they are spooked or freighted by something.

22 Importantly, the plaintiff, as an experienced horse rider and handler, knew that horses were unpredictable in their behaviour, and were prone to being spooked. In this regard, the plaintiff's evidence in cross-examination included the following:[43]

> Q. You said earlier in your evidence that you had taken your horse the day before into the ring?
> A. Yes.
>
> Q. Because you wanted to familiarise the horse with the area so it wasn't going to be spooked?
> A. Correct.
>
> Q. And by spooked you meant frightened by something which might cause the horse to shy?
> A. Correct, but I do that at every show, not just Wagga show.

[38] T26.20 – T26.50.
[39] T53.9 – T53.15.
[40] Commencing at CB 71.
[41] See *Menz v Wagga Wagga Show Society Inc (No.1)* [2018] NSWSC 1446.
[42] At [34].
[43] Commencing at T25.36.

Q. Even though your horse is a very quiet horse you recognise that horses are susceptible to being frightened by things?
A. They are, but he wasn't. Yeah, they are, but it's just a safety thing really, yes.

Q. A horse can be spooked, using your word, by a piece of paper blowing across the ground?
A. Some horses could. Mine does not but some horses could.

Q. Some horses can spook at a shadow?
A. Some horses can. Mine didn't, but some horses can.

HIS HONOUR

Q. You're not being asked about yours, what's being put to you is that some horses can?
A. Some horses can, yes.

Q. Just concentrate on the question, if you would.

SEXTON

Q. Some horses can be spooked by loud noises?
A. Yes.

Q. For example, if there's a PA system in a showground and there's a feedback noise that might spook some horses?
A. Yes.

Q. Sudden movement from other horses might spook a horse?
A. Yes.

Q. Sudden movement by humans can spook a horse?
A. Yes.

Q. You heard Mr Cranitch in his opening talking about rocking horses, didn't you?
A. Yes.

Q. The fundamental difference between a rocking horse and a real horse is that a real horse has got a mind of its own, correct?
A. Correct.

Q. And the difference between horses and bikes or scooters is that horses have minds of their own?
A. Correct.

Q. They can be spooked or frightened by all sorts of things?
A. Correct.

Q. You know from your long experience riding horses that any number of things can spook horses even horses which normally appear quiet?
A. Correct.

The events of 28 September 2012

23 On 28 September 2012 the plaintiff attended the second day of the show intending to compete with Sonny in (inter alia) a 'Galloway' event.[44] She has no recollection of the incident in which she was injured. Her first memory is waking up as a patient in St George Hospital.[45] However, evidence given by a number of other witnesses establishes what occurred.

24 Ms MacDonald was preparing to compete with Banjo in an event at the show on the morning of 28 September.[46] She trotted Banjo in the vicinity of the warm-up area for five to ten minutes, during which time she noticed two children in the vicinity of the outside fence of the greyhound track.[47] She thought they were aged between 7 and 10.[48]

25 Ms MacDonald was asked what it was that had drawn her attention to the children:[49]

> Q. And what drew your attention to them? What were they doing at the time?
> A. They were jumping up and down off the fence.
>
> Q. Which fence was that?
> A. The greyhound track fence.
>
> Q. Was that the one immediately adjacent to the arena itself or the one on the outside?
> A. The one on the outside.
>
> Q. Outside of the dog track?
> A. Correct.
>
> Q. When I say outside I mean further away
> A. Yes.
>
> Q. … from the oval where you were engaged. And were they the only children in that vicinity that you were able to see?
> A. Yes.
>
> Q. When you went around you saw them and when you went around again, what were they doing?

[44] Commencing at T30.7; Exh 1 at p 21 entry 316; Exh 1 at p 14 entries 126 – 128; T30.30 – T30.38.
[45] First evidentiary statement, paras 31 and 32, CB 24.
[46] T44.33 – T44.35.
[47] T45.42 – T47.4; Exh D.
[48] T47.15 – T47.18.
[49] Commencing at T47.20.

A. So there was a metal sign on the fence that they were jumping up and down from and as I came around that second time, I, they tapped their heels on it a couple of times but then they banged their heels on it.

Q. I take it there was a fair bit of noise going on in the showground arena, I take it there would have been loud speakers and some crowd noise and all that sort of stuff, and I think was it a windy day as well?
A. Yes.

26 Ms MacDonald said that a noise was created by the children banging their heels on the metal sign on the outside fence of the greyhound track.[50] She described the noise as "very loud" and said that it caused the metal sign to vibrate.[51] She likened the noise to that of a shot fired from a .22 calibre rifle.[52] She then described Banjo being spooked as a consequence of the noise:[53]

So he turned directly to my left…and basically jumped a couple of steps, sort of not quite bolting but sort of took off a little bit and we went in a straight line to our left from where we were and then I pulled him up.

27 Ms MacDonald pulled up Banjo on the side of the warm up area adjacent to the greyhound track.[54] She was asked whether she noticed anything about any other horse in the near vicinity at that time:[55]

Q. Did you notice anything about any other horse in the near vicinity by the time you pulled him up?
A. Yeah the chestnut horse that the lady was riding.

Q. And when you saw that horse was it under control?
A. I think it was being brought under control.

Q. Right?
A. Yeah.

Q. Were you very close to it at the time?
A. We passed closely before that.

Q. When you say before that, this is after the noise?
A. After the noise but before I pulled my horse up.

[50] T48.12 – T48.14.
[51] T48.16 – T48.24.
[52] T53.21 – T53.25.
[53] Commencing at T48.27.
[54] Exh D; T51.7 – T51.13
[55] Commencing at T48.34.

Q. Did you actually collide with the horse?
A. No.

Q. And what did you see the other horse do? Did it stay on its feet or what happened?
A. No, so the lady was trying to get the horse to back up and it took a couple of steps back but then it started going sideways and it basically just went from standing to flop sideways onto the ground.

Q. And did the lady get up or was she …
A. No.

Q. … under the horse? Did the horse get back up?
A. The horse got back up pretty quickly and she was on the ground still in the riding position.

Q. What does that mean?
A. So like you can imagine if you're sitting on a horse, it's almost like sitting on a seat I guess with your hands out on the reins and she was still in that position when the horse got up.

HIS HONOUR

Q. On the ground?
A. On the ground.

Q. On her side?
A. On her side, yep, so like she was frozen.

28 Ms MacDonald's reference to the 'chestnut horse that the lady was riding' was a reference to Sonny who was being ridden by the plaintiff. To Ms MacDonald's recollection, Banjo was between the two rings at the side of the greyhound track when he was spooked by the noise.[56] She agreed that Banjo was "conditioned" to certain stimuli that might occur in an area such as a showground.[57] She also agreed, and I accept,[58] that any horse can react unexpectedly to different stimuli, to the point that there is "no such thing as a bomb proof horse".[59]

29 Tayla Sutherland was working as a strapper at the show on 28 September 2012. She also saw children in the vicinity of the warm-up area "banging at

[56] Exh D; T51.11 – T51.13.
[57] T53.1 – T53.7.
[58] At [21] above.
[59] T53.9 – T53.15.

the fence with their feet" for about 10 or 15 minutes prior to the plaintiff being injured.[60] She was asked: [61]

> Q. So what did you see happen after you observed the children behaving in this manner on the fence?
> A. All I seen was the grey horse and the horse was shying.
>
> Q. Did you see it do anything in relation to any other horse?
> A. Yeah.
>
> Q. What did you see?
> A. I seen it go towards another horse and that's all I see.
>
> Q. Did you see the other horse do anything?
> A. Not from memory, no.

30 Ms Sutherland's reference to the 'grey horse' was a reference to Banjo. She agreed that during the period in which she saw the children banging on the fence there were a number of horses in the warm-up area, none of which were reacting to the noise which the children were making.[62]

31 Nadine Wilesmith was also competing at the show on 28 September 2012. She was standing between two of the rings on the side of the greyhound track[63] when a loud bang caught her attention.[64] She looked over to her left and saw what she described as "two young kids jumping over the fence, into the warm-up area".[65] When asked whether she saw anything else at the same time, Ms Wilesmith said:[66]

> The result of the boys jumping over the fence; they hit a sign and made a loud bang which then set a horse off and startled it. Which then this horse ran sideways, banged into Kerri's horse. Kerri's horse got startled, lost its footing and fell over on top of her.

32 Ms Wilesmith said that when the children jumped into the warm-up area they did not run towards the horses, but "stopped in their tracks" upon the

[60] T55.32 – T55.48.
[61] Commencing at T56.21.
[62] T56.45 – T57.9.
[63] Exh E.
[64] T58.49 – T58.50.
[65] T59.1 – T59.5.
[66] Commencing at T59.8.

realisation that they had startled a horse. It was Ms Wilesmith's recollection that it was the children jumping over the fence caused the startle.[67]

33 It will be apparent that there is some conflict in the evidence as to what exactly caused the noise. Specifically, there is an issue as to whether it was caused by the children kicking the fence, or climbing on it before then jumping into the warm up area. I prefer the evidence of Ms MacDonald in this regard as she was closer to what was occurring than either Ms Sutherland or Ms Wilesmith. I am satisfied that a loud noise was created by the children banging with their feet on a metal sign which was affixed to the outer fence around the greyhound track. This occurred whilst Ms MacDonald and the plaintiff were warming-up Banjo and Sonny respectively. I am satisfied that Banjo was spooked as a consequence of the noise.

34 There is also some conflict in the evidence as to whether Banjo and Sonny collided. Given that Ms MacDonald was actually riding Banjo at the time, I accept her evidence that the two horses did not collide. However, I am satisfied that Sonny was spooked, either by the noise, and/or by Banjo being spooked. As a result, Sonny fell to the ground with the plaintiff still in the saddle.

35 It was as a consequence of that fall that the plaintiff suffered the injuries I have discussed more fully below. I am satisfied that the children who caused the noise had been in the general vicinity of the warm-up area for 10-15 minutes prior to the plaintiff being injured.

36 Although nothing turns on it, I am not able to determine precisely where Sonny fell, other than to conclude that it was in and around the warm up area. Although there is a notation on Exh A in that respect, the provenance of that notation is, as I have observed, not clear. There is no other evidence which pinpoints the precise location of the fall.

[67] T60.45 – T61.7.

THE STATUTORY DEFENCES PLEADED BY THE DEFENDANT

37 In determining the issue of liability, it is appropriate to go firstly to the statutory defences pleaded in the amended defence filed on 23 November 2017.

DANGEROUS RECREATIONAL ACTIVITY

38 The defendant has pleaded[68] that it is not liable for any harm suffered by the plaintiff because her injuries were due to the materialisation of an obvious risk of a dangerous recreational activity.

The relevant statutory provisions

39 Section 5L of the CLA 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.

40 The provisions of ss 5F and 5K of the CLA are also relevant to this issue:

> **5F Meaning of "obvious risk"**
>
> (1) For the purposes of this Division, an "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
>
> (2) Obvious risks include risks that are patent or a matter of common knowledge.
>
> (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
>
> (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
>
> …

[68] Amended defence at para 14a.

5K Definitions

In this Division:

"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.

"obvious risk" has the same meaning as it has in Division 4.[69]

"recreational activity" includes:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

Submissions of the plaintiff

41 Senior counsel for the plaintiff accepted that the plaintiff was engaged in a recreational activity. However, he submitted that such activity was not a *dangerous* recreational activity, because it was not one that involved a significant risk of physical harm.

42 Senior counsel submitted that a determination of whether or not a recreational activity was dangerous depended, not on the generic activity in which the plaintiff was engaged at the time of suffering injury, but on the actual activity in which she was engaged. It was submitted that in the present case, the actual activity in which the plaintiff was engaged at the time of being injured amounted to nothing more than 'warming up' Sonny prior to competing, and that such activity was not dangerous.

43 Senior counsel further submitted that the risk of Banjo being spooked by the noise created by children playing nearby was one which was slight, to the point of being less than trivial.

[69] Set out at [69] below.

44 Senior counsel for the plaintiff further submitted that even if I were to find that the plaintiff was engaged in a dangerous recreational activity at the time of the incident, the risk leading to her injury was not an obvious one. He emphasised that s 5L of the CLA provided protection to the defendant only if the harm suffered by the plaintiff was the result of a materialisation of an obvious risk, as defined in s 5F. He submitted that for the purposes of s 5F the risk was a risk of noise emanating from children playing nearby. He submitted that this was external to the activity in which the plaintiff was engaged, and was thus something which was within the control of the defendant. He submitted that but for the failure of the defendant to properly supervise the area in which the plaintiff was engaged in warming up Sonny, the plaintiff would not have been injured.

Submissions of the defendant

45 Senior counsel for the defendant made a number of submissions in relation to the legislative history of s 5L of the CLA. He submitted that the legislature's underlying rationale in enacting the section was to have personal responsibility assume a much higher profile, by presuming that a person was aware of obvious risks. It was submitted that s 5L was to be construed in the context of a general legislative purpose and policy of effecting a significant change to the law of negligence by excluding from liability claims arising from risky activities, and by emphasising the necessity for, and importance of, personal responsibility when engaging in such activities. It was submitted that the fact that s 5L applied whether or not the plaintiff was aware of the risk was indicative of the broad and stringent application of the CLA generally.

46 Senior counsel submitted that in order to make out the defence under s 5L of the CLA, it was necessary for the defendant to establish that:

(i) the plaintiff was engaged in a recreational activity;[70]

[70] As noted at [41] there is no issue that this is the case.

(ii) the recreational activity was a dangerous one, i.e., one which involved a significant risk of physical harm;

(iii) there was a risk of that activity which was obvious, i.e. a risk that in the circumstances would have been obvious to a reasonable person in the position of the plaintiff; and

(iv) the harm suffered by the plaintiff was the result of the materialisation of that obvious risk.

47 Accepting that the first of those matters was not an issue, senior counsel pointed to the definition of "dangerous recreational activity" in s 5K of the CLA. He submitted that the risk of physical harm referred to in that description must be more than trivial, but need not be likely to occur, and that whether a particular activity is dangerous will depend upon the objective circumstances in which a plaintiff was injured.

48 Senior counsel submitted that there was an ever present risk of catastrophic injury which rendered the recreational activity of riding a horse dangerous. He submitted that such a risk resulted from the independent and uncontrollable movement of a large animal with a mind of its own, and which was prone to being startled by all manner of external stimuli. It was submitted that there was always a risk that even a 'bomb proof' horse could be startled and that in these circumstances, the activity of riding a horse was necessarily one which involved a significant risk of physical harm.

49 Senior counsel further submitted that the risk was not limited to a participant's horse being spooked, but extended to a participant's horse being part of a chain reaction of horses' responses. He submitted that the risk which rendered participating in horse riding in a showground environment dangerous was the risk that any one or more of a number of external stimuli might cause a single horse to be spooked, which in turn might cause the rider of that horse (or of another horse) to fall, or for a horse itself to fall. It was submitted that it was clear that such risks were obvious to the plaintiff, and

that in all of these circumstances, the harm she suffered was the result of the materialisation of obvious risk. Senior counsel emphasised that the relevant risk for the purposes of s 5H was not to be categorised as the risk that children would behave in an unruly manner, but was rather the risk of falling from a horse, or a risk of the horse falling as a result of that horse, or another horse, being spooked.

50 Finally, senior counsel submitted that the plaintiff's injury was the result of the materialisation of an obvious risk because the connection between the obvious risk and the harm was clear.

CONSIDERATION

51 In order to bring itself within the provisions of s 5L, the defendant must prove four matters. I will consider each of them in turn.

Was the plaintiff engaged in a recreational activity at the time of being injured?

52 There is no issue that at the time of being injured, the plaintiff was engaged in a recreational activity, namely horse riding.

Was the recreational activity dangerous?

53 In order for a recreational activity to be dangerous, it must be one that involves a significant risk of physical harm. To be significant, the risk of physical harm must be more than trivial, but it need not be likely to occur.[71] If the potential harm is catastrophic, an activity may a dangerous recreational activity even though the probably of such harm is low.[72]

54 In the course of submissions, senior counsel for the plaintiff referred me to the judgment of Ipp JA In *Fallas v Mourlas.*[73] It was submitted that his Honour's judgment was authority for the proposition that a whether a recreational

[71] *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [28]-[31]; *Jaber v Rockdale City Council* [2008] NSWCA 98 at [53]-[55]; *Streller v Albury City Council* [2013] NSWCA 348 at [43]-[51].
[72] *Falvo* at [31].
[73] (2006) 65 NSWLR 418; [2006] NSWCA 32 at [50].

activity was dangerous "depends not on the generic activity, but on the actual activity engaged in by the plaintiff at the time of the injury".[74]

55 His Honour did not draw any distinction between a 'generic' activity and an 'actual' activity. What his Honour said[75] was that deciding issues under s 5L by reference to all the circumstances that actually occurred may benefit a plaintiff in one case and a defendant in another. Moreover, his Honour recognised that prevailing circumstances may have a bearing on whether or not a recreational activity is to be regarded as dangerous in the sense contemplated by s 5L. His Honour's conclusion in respect of this issue was expressed partly in these terms:[76]

> Accordingly, in my view, the dangerousness (in terms of s 5L) of the recreational activity is to be determined by the activities engaged in by the plaintiff at the relevant time. All relevant circumstances that may bear on whether those activities were dangerous in the defined sense include relevant matters personal to the plaintiff and others of the kind I have mentioned.

56 His Honour cited[77] a number of examples of situations in which prevailing circumstances might convert a safe recreational activity into one that was dangerous. These included the example of a walk along a cliff being safe in daylight hours, but being dangerous at night. However, the present case is not one in which the danger of the recreational activity in which the plaintiff was engaged was dependent upon the existence of any prevailing circumstances. The evidence before me establishes that there is an inherent, and ever present, risk to the rider of any horse that a horse will be spooked or startled, giving rise to the risk of serious injury.

57 At the time of being injured, the recreational activity in which the plaintiff was engaged was that of horse riding. There is a risk of catastrophic injury to the rider of a horse simply as a consequence of a horse being ridden. There is evidence before me which makes it clear that horses are unpredictable in terms of their reaction to external stimulae. That unpredictability exists as a

[74] Plaintiff's written submissions at [5].
[75] At [44].
[76] At [50].
[77] At [36].

consequence of the fact that a horse as a powerful animal, with a mind of its own, and which is prone to reacting suddenly and unexpectedly to external stimulae. The fact that the plaintiff was warming up with Sonny at the time of the incident does not mean that her activity of riding him was not dangerous. The risk of serious injury resulting from a horse being spooked is continually present, regardless of whether a horse is being ridden in a warm up exercise, or in an event or competition.

58 It is also relevant, as senior counsel for the defendant pointed out, that the plaintiff asserts that the risk which the defendant should have addressed was the risk of unruly children doing something that might spook a horse and cause injury to a competitor. It follows that on the plaintiff's case, the risk of a horse being spooked and causing injury to a rider was not so trivial that it could be ignored. In these circumstances, I am unable to accept the submission of senior counsel for the plaintiff that the risk of a horse being spooked was slight.

59 For all of these reasons, I am satisfied that the recreational activity in which the plaintiff was engaged at the time of being injured was dangerous.

Was the risk of the dangerous recreational activity obvious?

60 A determination of whether the risk of the recreational activity was obvious is an objective one. The question is whether the risk was one that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff exercising ordinary perception, intelligence and judgment.[78] I accept the submission of senior counsel for the defendant that for the purposes of the present case, a reasonable person in the position of the plaintiff means an adult with long experience of equine behaviour, who knew that horses could be spooked by all manner of external stimulae, including by the behaviour of unruly children.

[78] *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247 at [61].

61 A wide approach must be taken when identifying whether the risk was obvious. It is both unnecessary and undesirable to define the particular risk of harm with a high degree of particularity.[79]

62 Ms MacDonald gave evidence, which I accept, that all horses can react unexpectedly to different external stimulate, and engage in behaviour which is unexpected. The essence of her evidence was that horses, particularly insofar as their reactions to such stimulae are concerned, are largely, if not completely unpredictable. That general view was also expressed by Ms Smythe in her report. It was also acknowledged by the plaintiff. The fact that there is no such thing as a bomb proof horse is a matter of common knowledge. In *Ohlstein v E and T Lloyd t/as Otford Farm Trail Rides*[80] Bryson JA said:

> 161 Ordinary common understanding of life and affairs is enough to show that a horse may make sudden and unexpected movements while being ridden. The skill of riding is a learned skill and equips the rider to control the horse although the horse has a will of its own and has far more physical strength than the rider. Although it is commonplace to hear of people who have great natural skill in riding, and such people say they have ridden from very early ages, sometimes using the imagery that they were born in the saddle, all of them needed to learn to ride at some stage in their lives however early. It is also common knowledge that even a highly skilled rider may encounter injury or death through unexpected behaviour of the horse. The best of riders are thrown, and the most placid of horses become nervous, start, make sudden turns, kick or bolt. This characteristic of horses is illustrated by cross-examination of Ms Pearson-Adams an expert witness called by the appellants, by senior counsel for the respondents (Black 1/150-151):
>
> > Q. Even a bomb-proof horse, because it is a large, strong animal, can behave in an unpredictable manner; that's right, isn't it?
> >
> > A. A horse is predictably unpredictable. There is no such thing as an unpredictable horse.
> >
> > Q. Even a bomb-proof horse is predictably unpredictable?
> >
> > A. Yes.
>
> 162 Any gathering of a score or so of riders will include someone with a plastered arm, a strapped shoulder, a limp or some recent experience of that

[79] *Bitupave Limited t/as Boral Asphalt v Pillinger* [2015] NSWCA 298; (2015) 72 MVR 460 at [153] per Ward JA, Emmett and Gleeson JJA agreeing.
[80] [2006] NSWCA 226 at [161]-[162].

> kind. They all wear helmets for a reason. Mortality from horseriding was high before mortality from motoring overtook it.

63 These observations were generally consistent with those of Harrison J in in *Goode v Angland*.[81]

64 The fact that the noise created by the children which caused Banjo to be spooked was external to the plaintiff's activity of riding Sonny does not mean that the risk was not obvious. On the evidence before me, the propensity of horses to make sudden and unexpected movements in response to external stimulae is constant. Those stimulae will invariably, if not always, be external. They may include a piece of paper blowing across the ground, the casting of a shadow, a sudden movement by another horse, or a sudden movement by a human being. The plaintiff was an experienced horsewoman. The risk of a horse being spooked was obvious to a person of her experience. That much is clear from those parts of her evidence to which I have previously referred.[82]

65 I am therefore satisfied that the risk of the dangerous recreational activity in which the plaintiff was engaged was obvious.

Was the harm suffered by the plaintiff the result of the materialisation of the obvious risk?

66 In the present case, the obvious risk was the risk of the plaintiff being injured falling from Sonny, or alternatively the risk of Sonny falling, as a consequence of Sonny or another horse being spooked. The evidence in the present case establishes that the plaintiff was injured, either from Banjo being spooked by the noise created by the children and Sonny being spooked as a result, or as a result of Sonny being spooked by the noise independently. In either case, the harm suffered by the plaintiff was the result of the materialisation of an obvious risk.

67 It follows that in my view, s 5L of the CLA applies and operates to deny the plaintiff's claim.

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[81] [2016] NSWSC 1014 at [134].
[82] At [22] above.

OBVIOUS RISK

68 The defendant has also pleaded[83] that any injury suffered by the plaintiff was the result of the materialisation of an obvious risk, and that it had no duty to warn the plaintiff of that risk.

The relevant statutory provisions

69 Section 5F of the CLA is in the following terms:

> **5F Meaning of "obvious risk"**
>
> (1) For the purposes of this Division, an
>
> "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
>
> (2) Obvious risks include risks that are patent or a matter of common knowledge.
>
> (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
>
> (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

70 Section 5H of the CLA is in the following terms:

> **5H No proactive duty to warn of obvious risk**
>
> (1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.
>
> (2) This section does not apply if:
>
> > (a) the plaintiff has requested advice or information about the risk from the defendant, or
> >
> > (b) the defendant is required by a written law to warn the plaintiff of the risk, or

[83] Amended defence para. 14c.

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

Submissions of the plaintiff

71 Senior counsel for the plaintiff submitted that the defendant had failed to address the fundamental circumstance that the risk of noise made by children playing on, and/or kicking, a fence with a metal sign was external to the activity engaged in by the plaintiff, and was thus something within the defendant's control. It was submitted that for that reason, the risk was not obvious because it was not 'inherent to the activity engaged in by the plaintiff, and the plaintiff could not be taken to have assumed the risk of the defendant's own negligence in failing to properly supervise the arena'.[84]

Submissions of the defendant

72 Senior counsel for the defendant relied, in large measure, on his previous submissions regarding the nature of the obvious risk. In short, he submitted that it would have been obvious to an experienced horse rider such as the plaintiff that any number of external stimuli, including children playing on or near the greyhound track at the showground, might spook one of the horses, and result in harm being caused. It was submitted that in in those circumstances, s 5H of the CLA applied.

Consideration

73 In my view, the categorisation of the relevant risk by senior counsel for the plaintiff reflects error. The relevant risk was not a risk of noise being made by children playing on and kicking a metal sign. The risk was that a horse might be spooked causing the rider of that horse or of another horse, to fall, or a horse itself to fall.

[84] Plaintiff's written submissions at para. 16.

74 For the reasons previously outlined, that risk would have been obvious to a reasonable person in the position of the plaintiff. The plaintiff accepted that to be the case.[85]

75 In the circumstances, s 5H of the CLA applies. There was no duty on the defendant to warn of the obvious risk that has been identified.

INHERENT RISK

76 The defendant has also pleaded[86] that the plaintiff's injuries were the result of the materialisation of an inherent risk and that accordingly, it is not liable for any harm suffered by the plaintiff.

The relevant statutory provisions

77 Section 5I of the CLA is in the following terms:

> **5I No liability for materialisation of inherent risk**
>
> (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
>
> (2) An "inherent risk" is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
>
> (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Submissions of the plaintiff

78 Senior counsel for the plaintiff relied on his submissions in respect of s 5H of the CLA.

Submissions of the defendant

79 Senior counsel for the defendant emphasised the definition of "inherent risk" in s 5I(2). He submitted that given the wide range of stimuli which may cause

[85] See the evidence set out at [22] above.
[86] Amended defence para 14b.

even a placid horse to be spooked, any resulting injury was an inherent risk of horse riding within the meaning s 5I.

Consideration

80 The evidence of Ms Smythe, Ms MacDonald, and the plaintiff identified some of the stimulae which may cause a horse to spook are many and varied. Such stimulae may be auditory or visual. The fact that they are so wide ranging is such that in my view, the identified risk could not have been avoided by reasonable care and skill. It follows that the plaintiff was injured as a consequence of the materialisation of an inherent risk.

THE RISK WARNING

81 The defendant further pleads[87] that it did not owe a duty of care to the plaintiff because the risk of injury was the subject of a risk warning to the plaintiff.

The relevant statutory provisions

82 Section 5M of the CLA is in the following terms:

> **5M No duty of care for recreational activity where risk warning**
>
> (1) A person ("the defendant") does not owe a duty of care to another person who engages in a recreational activity ("the plaintiff") to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
>
> (2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:
>
> > (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or
> >
> > (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).
>
> (3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is

[87] Amended defence para 15.

reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(10) The fact that a risk is the subject of a risk warning does not of itself mean:

> (a) that the risk is not an obvious or inherent risk of an activity, or
>
> (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(12) In this section:

"incapable person" means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

"parent" of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

Submissions of the plaintiff

83 Senior counsel for the plaintiff submitted that the terms of s 5M were to be construed narrowly. He submitted that the risk warning in the present case was general in its terms, was not directed to the particular risk that caused the injury, and therefore did not meet the requirements of s 5M(5).

84 Senior counsel further submitted that the risk of noise made by children playing on, and/or kicking a metal sign on the fence near the warm-up area was not inherent in, or incidental to, the activity in which the plaintiff was engaged at the time.

Submissions of the defendant

85 Senior counsel for the defendant emphasised that the risk warning in the present case incorporated an express acknowledgment that it was a risk warning for the purposes of Division 5 of the CLA[88]. He submitted that it clearly warned of the risks of participating in horse events at the show, and did so in terms which made its intended legal effect plain. That intended legal effect was, it was submitted, further reinforced by the contents of page 7 of the program.[89]

86 Senior counsel for the defendant also relied upon the plaintiff's evidence[90] that she was aware of the significance of the risk warning. He submitted that given that the risk warning was expressed to be for participants, and given that participants in horse events would know of the risk of injury as a result of a horse being spooked, the risk warning satisfied the requirements of s 5M(5). It was submitted that in these circumstances the defendant did not owe a duty of care to the plaintiff.

Consideration

87 The risk warning in the present case advised the plaintiff that (inter alia):

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[88] At para. 2.
[89] Exh 1; [14] above.
[90] T31.19-T39.21.

(i) participating with horses in events or activities at an agricultural show contained elements of risk which were both obvious and inherent; and

(ii) those risks may result in property damage, and/or personal injury, including death.

88 By signing the document, the plaintiff:

(i) acknowledged that her participation with horses generally, and specifically Sonny whom she nominated, in events and activities at the show carried an element of risk;

(ii) agreed to undertake any risk voluntarily, of her own free will, and at her own risk;

(iii) agreed and understood that the risk warning was a risk warning for the purposes of the CLA;

(iv) agreed to waive any and all rights that she may have in relation to any loss or injury suffered as a consequence of her participation in any event at the show; and

(v) agreed to indemnify the defendant in respect of any liability, loss, damage or expense she incurred or suffered, directly or indirectly, as a consequence of her participation.

89 In *Action Paintball Games Pty Limited (In Liquidation) v Barker*[91] ("Barker") Basten JA observed that it is possible to warn of a risk without instructing the recipient of the warning as to all of the steps which are necessary to avoid the risk. His Honour also observed that an adequate risk warning can be given, at least in some circumstances, by reference to the general kind of risk

[91] [2013] NSWCA 128 at [27].

involved, absent a precise delineation of each separate obstacle or hazard which may be encountered.

90 In *Sharp v Parramatta City Council*[92] the appellant suffered injuries when she landed awkwardly after jumping from a diving platform at a public swimming pool which was operated by the respondent. On the stairs leading up to the diving platform there was a warning sign displayed in the following terms:

> PERSONS USING THE PLATFORMS AND SPRINGBOARDS DO SO AT THEIR OWN RISK.

91 In rejecting the proposition that the sign did not, as required by s 5M(5), warn of the general nature of the particular risk concerned, Meagher JA (having referred to the judgment of Basten JA in *Barker*) said:[93]

> The general risk involved in using the 10 metre platform was of injury from diving or jumping from the platform. In my view the sign warns of that risk. The risk to which the sign is directed is that involved in the activity of "using" the platforms and springboards. The use referred to is that of jumping and diving into the pool below. That describes the purpose for which the platforms and springboards were intended to be used. Thus, the sign warns that there is a risk of injury in undertaking the activity of diving or jumping into the pool below from the springboards and platforms, including the 10 metre platform.

92 The risk warning in the present case was directed to the risk involved in participating in events or activities at the show with horses generally, and specifically with Sonny. In my view, that risk warning identified, and warned, of the general nature of that particular risk. It also warned that there was a risk of injury in undertaking any activity, or participating in any event, at the show involving the use of horses. That risk was one which was known to the plaintiff.

93 It follows that in my view s 5M of the CLA applies, and the defendant did not owe a duty of care to the plaintiff.

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[92] [2015] NSWCA 260; (2015) 209 LGERA 220.
[93] At [31].

CLAIMS UNDER THE AUSTRLIAN CONSUMER LAW

The relevant legislative provisions

94 The Australian Consumer Law ('ACL') is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA').

95 Section 60 of the CCA is in the following terms:

> **60 Guarantee as to due care and skill**
>
> If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

96 Section 275 of the ACL is in the following terms:

> **275 Limitation of Liability etc**
>
> If:
>
> (a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and
>
> (b) the law of a State or a Territory is the proper law of the contract,
>
> that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

97 Further, s 139A of the CCA provides as follows:

> **139A Terms excluding consumer guarantees from supplies of recreational services**
>
> (1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
>
> (a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law; or
>
> (b) the exercise of a right conferred by such a provision; or

(c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.

(2) Recreational services are services that consist of participation in:

(a) a sporting activity or a similar leisure time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:

(a) death; or

(b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or

(c) the contraction, aggravation or acceleration of a disease of an individual; or

(d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:

(i) that is or may be harmful or disadvantageous to the individual or community; or

(ii) that may result in harm or disadvantage to the individual or community.

(4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.

(5) The supplier's conduct is reckless conduct if the supplier:

(a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

(b) engages in the conduct despite the risk and without adequate justification.

98 The provisions of s 5N of the CLA are also relevant in this context and provide as follows:

Waiver of contractual duty of care for recreational activities

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

(3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(4) In this section,

"recreation services" means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.

(5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.

(6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

Submissions of the plaintiff

99 Senior counsel for the plaintiff submitted that the effect of s 60 of the ACL was to imply, into the contract to compete in events at the show, a guarantee on the part of the defendant that the services provided by it would be rendered with due care and skill. It was submitted that the defendant could not rely on s 5M or 5N of the CLA to defeat a claim under s 60 of the ACL.

Submissions of the defendant

100 Senior counsel for the defendant submitted that the plaintiff's claims pursuant to the ACL did not avoid the operation of ss 5H, 5I, 5L or 5M of the CLA

because of the fact that each of those provisions was 'picked up' by s 275 of the ACL.

101 Senior counsel for the defendant accepted that the risk warning could not operate as a waiver because s 5N of the CLA was not 'picked up' by s 275 of the ACL. However, it was submitted that s 139A of the CCA nevertheless applied.

Consideration

102 Each of the provisions of the CLA upon which the defendant relies is encompassed by s 275 of the ACL. In particular:

(i) s 5L of the CLA is a law which precludes liability;

(ii) s 5H is a law which limits liability;

(iii) s 5I is a law which precludes liability; and

(iv) s 5M is a law which precludes liability.

103 It follows that for the purposes of s 275, each of these sections is a law that 'applies to limit or preclude liability'. In those circumstances, the plaintiff cannot rely upon the provisions of the ACL to circumvent the operation of those sections of the CLA upon which the defendant relies.

104 Although s 5N of the CLA is not picked up by s 275 of the ACL, such that the risk warning cannot operate as a waiver, s 139A of the CCA nevertheless applies and liability is excluded.

THE COMMON LAW DUTY OF CARE

The relevant statutory provisions

105 Section 5B of the CLA is in the following terms:

5B GENERAL PRINCIPLES

(1) 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.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the 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.

106 Further, s 5C is in the following terms:

5C OTHER PRINCIPLES

In proceedings relating to liability for negligence:

(a) 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, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(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.

107 There is no issue that the defendant owed a common law duty of care to all of those entering, and competing in, events in the show. As I have identified, the risk of harm in the present case was the risk of harm being occasioned to a competitor, or a person preparing to compete, as a result of horse being spooked. The question is what a reasonable person would have done in terms of taking precautions.

108 Bearing in mind the evidence of the behaviour of horses, and the wide range of stimulae to which a horse might react, this was not simply a matter of the defendant having marshals present to monitor the behaviour and presence of

children. Children might have been expected to be present in many areas of the showground including the sideshow areas at either end of the grandstand. It was not simply a case of the defendant having marshals near the fence where children who made the noise were present. An acceptance of the plaintiff's case would have required the defendant to have a large number of marshals in and around the trotting track and the greyhound track.

109 In terms of the factors in s 5B(2), there was obviously a probability that harm would occur if care were not taken and that harm was likely to be serious. Because of the range of stimulae to which a horse might react, the burden on taking precautions to avoid the risk of harm was significant. I am also satisfied that the risk was both foreseeable and not insignificant.

110 I am not satisfied that in the circumstances, a reasonable person in the defendant's position would have taken the precautions which have been suggested. It is important to bear in mind that the burden of doing so was not limited to, as the plaintiff has suggested, placing marshals in and around the area to control the presence of children. Rather it extended to addressing a series of other circumstances to which a horse might suddenly react, including something as simple as a piece of paper blowing across the ground.

111 It is also relevant to bear in mind the terms of the risk waiver which the defendant required each competitor to sign. I accept the submission of senior counsel for the defendant that a reasonable response on the part of the defendant in the present was to make it clear to those who wished to compete, through the risk warning, that it would not be liable for any injury.

THE PLAINTIFF'S INJURIES AND ONGOING DISABILITIES

112 Upon being notified that the plaintiff had been involved in an accident, the plaintiff's daughter, Ryley, arrived at the showground at approximately 10:25am. She was unable to see the plaintiff at that time as she was being attended to by ambulance officers. Following the accident, the plaintiff was taken to the Wagga Wagga Base Hospital where she was intubated and ventilated, following which she underwent radiological investigations before

being transferred to the Intensive Care Unit at St George Hospital. Ryley saw her mother at Wagga Wagga Base Hospital. She described her as being "in a coma and on life support".[94] Along with the plaintiff's husband, Ryley then drove to St George Hospital where she was informed that the plaintiff would survive.[95]

113 A CT scan of the plaintiff's brain undertaken on 28 September 2012 established that there was a left-sided temporal lobe petechial haemorrhage, a subtentorial cerebellar petechial haemorrhage, and a suspected small subtentorial subdural haematoma in that vicinity. Diffuse left-sided cerebral oedema was also suspected in light of the asymmetry of the conspicuity of the sulci, and subtle reduced attenuation of the deep white matter. Facial and zygomatic arch fractures were also established following radiological investigation. All of which were either minimally displaced or undisplaced. There was also a right orbital haematoma.

114 A CT scan of the plaintiff's cervical spine reported rotation at C1-2 and some degenerative change, but no fractures. Alignment was otherwise anatomical. A CT scan of the chest noted that there was a fractured 10th rib anterolaterally, a fractured clavicle with possible pulmonary contusion, and an apical lymphatic thickening.

115 A CT scan of the abdomen, pelvis and lumbar spine noted that there was no intra-abdominal or lumbosacral spine injury. There was, however, mild to moderate degenerative changes of the lower lumbosacral spine, most marked at L-5.

116 On 8 November 2012 the plaintiff was transferred to the Brain Injury Rehabilitation Unit at Liverpool Hospital. On initial assessment she was alert and orientated, although there were deficits noted in her short-term memory. Her right eye showed a sluggish reaction to light.

[94] Evidentiary statement at para 9, CB 39.
[95] Evidentiary statement at para 10-11, CB 39.

117 A neuropsychological assessment confirmed that the plaintiff had sustained an extremely severe traumatic brain injury with the duration of post-traumatic amnesia being assessed at 38 days. There was a general decline in the plaintiff's intellectual skills involving attention (particularly for more complex attention), speed of information processing, new learning and memory (particularly for oratory material), planning/organisation, verbal fluency, monitoring, problem-solving and abstract reasoning. The plaintiff progressed through the Brain Injury Rehabilitation Unit and was discharged on 6 December 2012.[96]

118 In the first of her evidentiary statements, the plaintiff said the following about her injuries and disabilities:[97]

> 46 I have been treated for loss of motivation, loss of initiative and frustration and depression. I suffer from short term memory loss and I rely on my family for assistance 24 hours per day. I am easily fatigued and sleep a lot I have limited function in my right hand. I am unsteady on my feet. I have been prescribed an antidepressant medication.
>
> 47 On two occasions I have been admitted to the Southwest Brain Injury Rehabilitation Service at Tarkarrl for ongoing rehabilitation.
>
> 48 Following my return home I required a family member to be on call 24 hours per day. I received assistance in relation to all household and domestic tasks including cooking, cleaning, gardening, shopping, transport to appointments and looking after horses,
>
> 49 My husband took many days off work and still calls me many times per day,
>
> 50 My daughter Ryley was enrolled in a teaching degree at Charles Sturt University at Wagga Wagga at the time of my injury. Ryley withdrew from that course to assist with my care. Whilst I was in hospital in Sydney, Ryley lived with her uncle in Wollongong so that she could visit me on a daily basis.
>
> 51 I continue to have ongoing symptoms and disabilities including:-
> - Memory loss
> - Mood swings
> - Unable to concentrate for extended periods
> - Easily distracted
> - Deterioration of cognitive function
> - Loss of motivation
> - Loss of energy

[96] Report of Dr Brooder, Consultant Neurologist, CB 112.
[97] Commencing at para 46 CB 25.

- Needs to sleep in a recliner
- Tires easily Temperature sensitive
- Easily frustrated
- Dizziness and vertigo
- Loss of balance
- Intermittent dystonlc flexion in left big toe
- Sense of smell and taste impaired
- Blindness in right eye
- Intermittent head aches
- Depressed
- Tearful
- Unable to do housework

52 I have been able to obtain a driver's license but I use it rarely as I am not confident enough to drive. I rely on someone to be with me most of the time.

53 I continue to receive assistance with domestic tasks from my husband, my daughter and my mother. I estimate that the assistance I receive from family members is at least 21 hours per week. I require somebody to be available on call at all times.

54 I use to cook roast chicken and vegetables for dinner most nights. I now have 'TV dinners' because I have no motivation to cook.

55 I feel dizzy and often lose balance and fall over when I hang the clothes on the line. It takes me a lot longer to hang the clothes out.

56 I cannot use the internet for banking as I never remember how to use internet banking facilities and forget passwords. My husband does all of our finance management.

57 If my family was not available to provide care in relation to my household and domestic tasks, I would need to employ someone on a commercial basis.

58 I continue to take medication including antidepressant medication and anti-inflammatory medication.

59 I have become very withdrawn from society and I keep to myself most of the time.

60 I often have thoughts about how different my life was before the accident. I wish I had died and I wish they had turned off my life support.

61 I have been unable to return to any form of employment since my injury.

119 In her second evidentiary statement the plaintiff said the following:[98]

[98] Commencing at para 2, CB 29

2. Since my injury I have had increasing difficulties with keeping balance and I have lost vision in my right eye, these difficulties cause me to fall over 3 to 4 times a week.

3. The number of times I fall a week has been increasing in the past 3 months.

4. When I fall I require assistance to get back to my feet

5. I am unable to pick up objects from the ground. This causes me to lose my balance and fall over.

6. I no longer have the strength in my arms that I had before my accident to carry things like horse feed.

7. My mother Jean visits me at my house 2 to 3 times every day for 1 to 2 hours a visit to check on me. She helps me with tasks such as getting in and out of the shower and organising myself cups of tea or coffee.

8. On my mother's visits she has found me on the ground and unable to get myself back on my feet I have witnessed my mother calling my Husband fan and ask him to leave work and come home and help me up.

9. My mother has told me that she comes around to visit me as she is concerned that I may have fallen somewhere and hurt myself or cannot get back to my feet.

10. Ian calls me approximately 6 times a day to check on me.

11. 3 to 4 times a week I forget to take my phone with me when down at the horse paddocks and Ian is unable to contact me. On these occasions Ian leaves work to come home and check on me.

12. Jan also leaves work to come home and check on me at least once a day.

13. Ian has told me he calls and comes home to check on me as he is concerned that I have fallen and hurt myself or that I have turned on a hose in the back paddock, and forgotten to turn it off.

14. Further to paragraph 53 of my first Statement, before my accident I prepared and cooked all meals for my family. I was a good cook. Since my injury I am no longer able to cook at all. Since my injury the cooking has been done by Jack, Ryley's boyfriend.

15. My sense of taste has been impaired since my injury. I do not get hungry and I forget to eat unless Ian, Ryley or my mother reminded me too.

16. I have required constant supervision since my injury which is provided by Ian, Ryley or my mother. This Is to help me with domestic tasks 1 can no longer complete and to prevent me from injuries.

17. Further to paragraph 48 and 53 of my first Statement, since my injury I require domestic assistance in completing tasks such as cleaning, hanging and removing washing from the line, gardening and grocery shopping. Prior to

my injury I completed these tasks on my own. The assistance to complete these tasks has been provided to me by Ian, Ryley and my mother.

18. I have noticed that since my accident my personality has changed. I am now quick tempered and tearful before my injury I was a happy person.

19. I have noticed that since my accident I have .issues with short term memory loss. I ' will begin a task and forget what! am doing before finishing, or forget what I wanted when grocery shopping.

20. The short term memory loss since my injury frustrates and agitates me and requires me to have someone's assistance when completing day to day tasks. This assistance is provided by Ian, Ryley and my mother.

21. Further to paragraph 58 of my first Statement, I require Ian, Ryley or my mother to remind me to take my medication on a daily basis.

22. Further to paragraph 11 and 61 of my first statement, before my injury I was able to coordinate working 5 part time jobs at the same time. However I have been unable to return to any paid employment since my accident.

23. I have been unable to ride my horses since my accident.

24. Since my accident, I do not enter the horse paddocks in fear of being knocked over by one of my horses. I am unable to react quickly enough to move out of a horse's way before it bumps me.

25. Before my injury I completed all grooming and training of my horses. I have been unable to return to these tasks since my injury, I am no longer able to lead my horses due to the lack of vision in my right eye and my loss of balance.

26. Further to paragraph 52 of my first Statement 1 have been able to obtain my driver's license, however I do not have the confidence to drive and require Ian, Ryley or my mother to provide transport for me.

27. Since my injury I have been unable to steep in a bed I sleep in a recliner chair as lying flat makes me dizzy and causes cramps in my legs.

28. Further to paragraph 59 of my first report, after my injury I no longer enjoy going to social events, I find having a fall or running into objects very embarrassing. I no longer feel comfortable at social events. Since my injury I would prefer to stay at home.

120 None of this evidence was the subject of any challenge in cross-examination.

121 Contained within Exh B are a number of medical reports detailing the plaintiff's injuries. Dr Bala, a Consultant Physician in Rehabilitation Medicine,

examined the plaintiff for medico-legal purposes on 22 March 2018. She summarised the clinical symptoms reported to her by the plaintiff as follows[99]:

1. Right eye blindness due to optic nerve damage;
2. Ongoing dizziness;
3. Constant headaches;
4. Poor balance;
5. Bilateral toe clawing;
6. Unable to walk without shoe;
7. Problems with back with balance especially when walking in crowds;
8. Right big toe sticking up causing problems wearing shoes;
9. Forgetfulness;
10. Poor short term memory;
11. Uncontrolled emotions with anger outbursts and crying;
12. Extreme fatigue;
13. Leg cramps; and
14. Poor sleep.

122 At the time of her examination, Dr Bala noted that the plaintiff's current medication included Sertraline (25mg daily) and Ventolin as required.

123 Dr Bala expressed the following (unchallenged) opinion:[100]

> In my clinical opinion, Mrs Kerrie Anne Menz has sustained a severe traumatic brain injury as a pathological process resulting in residual permanent impairment of right monocular vision and left infra nasal visual field, impaired high level balance, ongoing cognitive impairment in the form of short term memory loss, reduced problem solving and information processing speeds; fatigue, behavioural impairment in the form of mood fluctuations, and amotivation. Mrs Menz (sic) activity limitations are:
>
> 1. Restrictions with her ambulation in a crowd due to visual impairment;
> 2. Behavioural issues impacting on her ability to self-manage her medication;
> 3. Lack of motivation impacting on her ability to return to work and affecting her ability to independently manage her community activities of daily living, and heavy domestic activities of daily living.

124 Dr Selwyn Smith, a Consultant Psychiatrist, also examined the plaintiff for medico-legal purposes on 30 August 2017. Dr Smith described the plaintiff[101] as a person who "displayed overt anxiety and agitation, particularly when

[99] CB 228
[100] CB 230.
[101] CB 204.

describing the impact the accident that occurred on 28 September 2012 has had on her" and who reported being "depressed, despairing, irritable and anxious, angry and self-contemptuous".

125 From a psychiatric point of view, Dr Smith concluded[102] that the plaintiff demonstrated a Major Neurocognitive Disorder and a Major Depressive Order. He stated:[103]

> As a result of the significant traumatic brain injury Ms Menz has experienced significant cognitive decline from her previous level of performance. From the documentation I have reviewed there is clear and convincing evidence of a decline in complex attention, executive function, learning, memory, language, perceptual-motor and social cognition. This has been noted not only by Ms Menz but her husband and family members. It has been confirmed by neuropsychological testing. There is a clear demonstrable, substantial impairment in her cognitive performance. Her cognitive deficits have in my opinion markedly interfered with her independence in everyday activities. She requires assistance with complex activities of daily living such as paying bills or managing medications. It is my opinion that her major cognitive disorder is a direct outcome of the traumatic brain injury she sustained. In association with her major cognitive disorder Ms Menz demonstrates a behavioural disturbance and in particular a mood disturbance, agitation and apathy. Ms Menz' mood has been persistently depressed, sad and unhappy. She describes feeling sad, empty and hopeless. She expressed the view that she should have been left to die following the accident that occurred.

126 This evidence was similarly unchallenged.

127 Dr Walker, a Consultant Neurologist, examined the plaintiff at the request of the defendant on 3 April 2017. He reported (inter alia):[104]

> Mrs Menz had a very severe trauma brain injury as a result of a horse riding accident on 28 September 2012. The acute radiological changes have been listed above, but there does not appear to have been any follow up MRI to assess whether there truly was diffuse axonal injury and whatever types of parenchymal abnormalities there might. She is both cognitive and psychological sequelae, but it is not clear to me whether she has been fully assessed by a neuropsychologist and psychiatrist respectively. She has ongoing position vertigo, but has not had any treatment – (balance exercises). She has ongoing areas of pain mostly in joint which are more likely related to her lifestyle than the accident per se, but she has had no investigations of any of these regions listed above. She is blind in the right eye due to the accident. She has poor balance which is the result of her traumatic brain

[102] CB 207.
[103] CB 207.
[104] CB 235.

injury, as is loss of sense of smell and discriminating taste. She has poor dentition which has not been fully assessed to determine whether there is relationship to her accident.

128 Dr Walker said[105] that it was difficult to foresee any significant improvement in any of the plaintiff's symptoms, other than that of positional vertigo which would improve with exercise. Again, there was no challenge to this evidence.

129 The nature and extent of the plaintiff's injuries is generally corroborated by the plaintiff's husband, daughter and mother. No substantive challenge was made to the evidence of any one of them.

130 In his evidentiary statement[106] the plaintiff's husband said:

> 19. Since Kerrie's accident I have noticed a change in her ability to complete everyday tasks. I have observed that since Kerrie's accident, she is unable to complete tasks such as preparing and cooking meals, mopping floors and cleaning bathrooms.
>
> 20. Since Kerrie's accident Ryley and I have been required to assist Kerrie in tasks such as vacuuming, grocery shopping, hanging and removing washing from the line and paying bills and managing finances.
>
> 21. Ryley's boyfriend Jack prepares and cooks meals for the family. Prior to her injury, Kerrie would do all the cooking and baking. Kerrie was a good cook.
>
> 22. I have observed a change in Kerrie's personality since her accident. I have found that since her accident Kerrie gets irritated and angry quickly. I have observed that Kerrie is easily frustrated. Kerrie has told me that this is due to her feeling useless.
>
> 23. Since Kerrie's accident, I have noticed that she is very forgetful. She often forgets what task she was completing and forgets whether or not she has eaten.
>
> 24. Since Kerrie's accident Ryley and I have been required to provide constant supervision to Kerrie.
>
> 25. I have observed that Kerrie is no longer able to ride her horses. Kerrie is no longer able to groom her horses, train them or lead them. Kerrie can only feed her horses by pushing the feed through the fence. Before her accident Kerrie completed all of these tasks on her own.

[105] CB 235.
[106] Commencing at para 19, CB 34.

26. Kerrie has told me that she will not get into the paddock with her horses in fear of a horse knocking her over.

27. Since Kerrie's accident Ryley and I have been required to complete the grooming of her horses.

28. I phone Kerrie approximately 6 times a day to check on her when I am unable to raise Kerrie on her phone, I leave work and drive home to check on her. I do this as I am concerned that she has fallen over and is unable to get back up.

29. I leave work and drive home at least once every day to check on her.

30. Since Kerrie's accident, she falls regularly. I have returned home to check on heron a number of occasions and found Kerrie fallen over near the clothes line or near the horse yards and unable to get herself back up.

31. Kerrie will go grocery shopping with Jean, Ryley or I, but needs constant supervision as she forgets what she is doing and walking across sloping pathways can cause her to fall; Kerrie has to stop at each item on the shelves to focus to see what is on the shelves as she cannot look at the items while moving as she gets dizzy. This takes a few hours to complete a shopping trip that use to take 30 minutes.

32. There have been a number of occasions where I have returned home to check on her and can see that Kerrie has had a fall, however Kerrie will not tell me that she has fallen.

33. I receive phone calls from Kerrie's mother Jean Wright 2 or 3 times a week, advising me that she has gone to visit Kerrie at our house and has found Kerrie fallen at home and unable get up.

34. I have received calls from Jean advising me that she has gone to visit Kerrie at our home and she is unable to locate Kerrie. I leave work to travel home and usually find Kerrie fallen over down near the horse paddocks and unable to get back up. Kerrie forgets where her phone is and cannot ring for help. This causes a lot of concern for me.

35. On occasions Jean calls me and advises me that Kerrie is in a depressed mood. On these days I leave work to drive home and check on Kerrie.

36. Kerrie has told me that since her accident she no longer enjoys going out socially. Kerrie has told me that it embarrasses her when she falls or stumbles in public and has become a recluse at home and no longer visits people.

37. Since Kerrie's accident I have noticed that she is always cold. Kerrie runs the wood heater at home at very high temperatures, at all times of the year. Kerrie has told me that she is always cold. The cost of this is approximately $200.00 per fortnight.

38. Kerrie's accident has been a very traumatic for Kerrie and our life together has changed permanently. Our sex life was very good prior to her injury and has been nonexistent since then. We no longer sleep In bed

because Kerrie cannot sleep lying down in bed, it causes her a headache and cramps.

39. It is very concerning for me to have my wife not wanting to continue to live and she makes constant threats about not wanting to continue to live.

131 The evidence of the plaintiff's daughter Ryley was to a similar effect:[107]

19. Prior to the accident my mother was an outgoing and independent person but is now dependent on others for almost everything in life. Sometimes my mother expresses suicidal thoughts because she feels like she isn't the same person that she used to be.

20. Whilst I am at work I telephone my mother on a regular basis (daily) to check on her. If my mother does not answer her phone I arrange for my father, my grandmother or my partner, Jack, to check on her.

21. My mother in incapable of doing most domestic tasks and these tasks are shared between myself, my partner and my father.

22. My mother often forgets to eat and I have on a regular basis gone home at lunch time to ensure that she remembers to eat.

23. I have noticed significant changes in my mother's personality. In particular, she has become short tempered and has become socially isolated. She cannot handle pressure and always appears unhappy.

24. I have also observed that my mother has significant balance problems. She runs into things and often falls over.

25. Since the accident my mother has become a hoarder. She keeps everything including food items which are out of date. My mother rarely sleeps and attempts to do things at all hours of the day and night

26. My mother used to enjoy cooking and baking. She does not cook anymore as she fears she may forget about the stove or oven being on.

27. I have also observed that my mother has significant short term memory loss.

28. My mother has always been very involved with our horses and she in no longer able to participate in that activity.

29. I also have to regularly remind my mother to take her medication, particularly, her antidepressants.

30. I have noticed that my mother does not seem to enjoy life at all anymore,

[107] Commencing at para 19, CB 39.

31. Since my mother's accident I discontinued my enrollment at university where I was studying to become a primary school teacher so that I could provide my mother with the care she needed. I continue to do so.

32. I have not been able to return to university and have been forced to take employment in an administrative role which is not my preferred career path.

33. My partner and I have not been able to obtain our own independent accommodation because of my mother's need for assistance. My partner also provides assistance on a regular basis in that he cooks most evening meals. This would take approximately 1 hour per day.

132 The plaintiff's mother, who is now 80 years of age said the following in her evidentiary statement:[108]

23. Since Kerrie's accident I have noticed that Kerrie gets frustrated and depressed that she can no longer keep her house in order.

24. On 28 September 2012, I was at the dog ring at the Wagga Wagga Show with Kerrie's sister Lindy.

25. I was informed by Kerrie's daughter Ryley, that there had been an incident at the horse event and that Kerrie had been taken to Wagga Wagga Base Hospital.

26. Lindy and I left the show immediately to pick up Kerrie's father (John) and to meet Kerrie at the Wagga Wagga Base Hospital.

27. I travelled with Lindy to Sydney to visit Kerrie whilst she was in St George Hospital and stayed for 4 nights.

28. I have noticed a major change in Kerrie's personality since her injury. She often seems depressed and tearful.

29. I have observed that Kerrie is often frustrated with herself, saying that she is useless and can't do anything and that they should have let her die.

30. I have noticed that Kerrie can get upset and angry quickly.

31. Since Kerrie's accident I go around to Kerrie's house most mornings between 9:00 am and 9:30 am to check on her.

32. I can tell as soon as I see her, how depressed she is that day.

33. Most mornings when I visit Kerrie, I stay for an hour or two before heading home. I then return to Kerrie's house for 1 to 2 hours throughout the day to check on her. I do this because Kerrie is very vague and often has falls.

[108] Commencing at para 23, CB 44.

34. On the mornings where her mood is more depressed, after the initial visit of 1 to 2 hours, I return every half hour to check on her and if she does not improve throughout the morning I call Ian to come and check on her.

35. In the few instances where I am away and cannot go and check on Kerrie, her father John checks on her for me.

36. As a consequence of Kerrie's lack of balance, she falls over regularly. Her lack of depth perception due to the loss of vision in her right eye also causes her to trip or run into things.

37. I have on a number of occasion's visited Kerrie's house and have found that she has had a fall. These falls have been occurred near the clothes line and also near the horse yards.

38. I am physically unable to help Kerrie get to her feet in these situations so I call fan for assistance.

39. There are times that on my visits to check up on Kerrie that t can see she has fallen over, but she does not tell me that she has.

40. On a number of occasions on my visits to check on Kerrie I have been unable to find her. Due to my physical condition ! cannot check all of the paddocks on the property so I call Ian to get him to leave work and come home and find Kerrie.

41. Kerrie also regularly forgets to take her mobile phone with her when she heads down to the paddocks on their property.

42. I have witnessed Ian having to leave work and come home as, he has been unable to raise Kerrie on the phone, or to check up on her.

43. I have been present on many occasions, when Ian has called Kerrie just to check up on her.

44. On a number of occasions on my visits to check on Kerrie, I have found that she has put items on the oven top or in the stove to cook and has forgotten about them. Because of this, she no longer cooks.

45. Kerrie is no longer able to perform tasks that she would prior to her injury such as vacuuming, hanging and removing washing from the line and mopping, due to them being activities that cause her to lose her balance and fall over.

46. I have witnessed Ian and Ryley complete domestic tasks that, as a consequence of her injuries, Kerrie can no longer complete. These tasks include doing the laundry and getting groceries.

47. Ian and Ryley complete tasks such as the washing and grooming of the horses that Kerrie can no longer attend to.

48. Ryley's boyfriend Jack cooks meals for the family however, should one of them be away I cook large meals and take them around to Kerrie.

49. Prior to Kerrie's injuries she had a fernery in her garden that she took great pride in. She is no longer able to care for the plants in her fernery and they are dying.

50. Since Kerrie's injury I have noticed that she tires very easily and is only able to complete a few tasks before she is exhausted. I have noticed that this frustrates Kerrie as prior her injuries she was a very active person.

51. Kerrie often complains of headaches and needs to be reminded to take medication.

52. I have observed that Kerrie is no longer able to perform tasks with her horses that she did prior to her injury, including grooming, training and leading her horses. Kerrie is only able to feed the horses by putting the feed through the fence.

53. Kerrie is no longer able to ride her horses.

54. Kerrie is no longer able to get in the paddock with her horses in fear of them accidently knocking her over.

55. Since her injury Kerrie has become withdrawn from society. Kerrie no longer enjoys going out as she finds it embarrassing when she forgets people's names or if she falls over.

56. Kerrie very rarely drives anywhere due to the loss of vision in her right eye and a lack of confidence.

57. On the occasions that I have been able to get Kerrie to come grocery shopping with me. I have to be very aware of any sloped walkways as these will cause Kerrie to lose her balance and fall over.

58. On the occasions that Kerrie has come grocery shopping with me, I have witnessed her have to stop and think as she has forgotten what item it was that she wanted.

59. I attended a funeral with Kerrie in Forbes recently. As Kerrie was walking back to the car, I witnessed her fall backwards and hit the back of her head on the concrete gutter.

60. Kerrie required assistance to help her back to her feet. I was unable to assist due to my physical restrictions and Kerrie required the help of others around her.

61. I go around and check on Kerrie regularly as I am worried about her mental health. I am also concerned that she may have fallen over somewhere and can't get up.

62. I visit Kerrie regularly, as if I ring her, she just tells me that she is fine.

63. On my visits to Kerrie's house, l assist her in and out of the shower as this task has caused her to fall on a number of occasions since her accident.

64. When I visit Kerrie's house I assist her with tasks such as pouring tea or coffee. Due to her loss of vision in her right eye Kerrie would miss the cup, pouring liquid on herself and burning her hand.

65. Due to our age, my husband John and I would like to sell up our property and move into a small house in Wagga Wagga. However this would require us moving further away from Kerrie and make it harder for me to keep up my regular supervision.

ASSESSMENT OF DAMAGES

Non-economic loss

133 In terms of non-economic loss, the severity of the plaintiff's injuries and her ongoing disabilities will be self-evident. In my view non-economic loss should be assessed at 75% of a most extreme case. That would entitle the plaintiff to damages of $476,500.00.

Past out of pocket expenses

134 Senior counsel for the defendant took no issue with the following past out of pocket expenses claimed by the plaintiff[109]:

Medicare	$2,511.70
Out of pockets	$2,736.00
Medication	
$23.16 per week x 308 weeks	$7,133.28

135 These items total $12,380.98.

Future out of pocket expenses

136 Senior counsel for the defendant took no issue with the following:

Physiotherapy	
13 sessions @ $120 per session[110]	$1,560.00
Occupational therapy – initial [111]	$3,300.00
Smartpen and accessories (including training)[112]	$754.00
Neuropsychologist – consultation [113]	$1,650.00

[109] T107.40.
[110] T108.19.
[111] T108.19
[112] T108.20.
[113] T108.21.

Dietician - consultation and review [114]	$525.00
Desk mounted magnifying glass (x 2)[115]	$218.00
Needle threader for sewing machine[116]	$6.99
Recording wall[117]	$75.90
Big point recording button[118]	$119.00
Feed hatch [119]	*$3,740.00*

137 These items total $11,948.89.

138 Senior counsel for the defendant submitted that in accordance with the decision in *Avopiling v Bosevski*[120] any future expenses claimed by the plaintiff for the balance of her life expectancy should be subject to an additional discount of 10%. Senior counsel for the plaintiff accepted that to be the case. Subject to that further discount being applied, senior counsel took no issue with the following future out of pocket expenses claimed by the plaintiff:

General Practitioner - review and prescription	
6 visits pa @ $70 per consultation	
$8.08pwx*M822.0 [121]	$6,641.76
Medication	
$23.16 per week x*M822.0[122]	$19,037.52
Occupational therapy - ongoing[123]	
4 sessions pa @ $150 per session	
$11.54 per week *M822.0	$9,485.88
Podiatrist - consultation and review[124]	
3 sessions pa @ $85 per session	
$4.90 per week *M822.0	$4,027.80
Soft tissue massage[125]	
12 sessions pa @ $80 per session	
$18.46 per week x *M822.0	$15,175.38

[114] T108.21.
[115] T108.31.
[116] T108.31.
[117] T108.31.
[118] T108.31.
[119] T109.8
[120] [2018] NSWCA 14.
[121] T108.10.
[122] T108.10.
[123] T108.20
[124] T108.25.
[125] T108.25.

Beauty professional[126]	
9 sessions pa @ $40 per session	
$6.92 per week *M822.0	$5,690.77

139 These items total $60,059.11. Applying a further discount of 10%, the total is $54,053.20.

140 The following future out of pocket expenses claimed by the plaintiff remained in issue.

141 Firstly, the plaintiff claimed the cost of a "Revitalife" King Bed at $14,120.00, with replacement every 10 years. The evidence of Ms Geach, who provided reports in the plaintiff's case, was that an electric bed was appropriate at a cost of $5,900.00[127]. I allow that cost, with replacement every 10 years.

142 Secondly, the plaintiff claimed an amount of $5,000.00 for the cost of a motorised scooter, based upon the opinion of Marcus Smith, Physiotherapist[128] that a scooter was necessary to enable the plaintiff to move around her property. However, the plaintiff gave evidence[129] that she has, and is able to ride, a quad bike. Her only qualification was that she had a propensity to "run into things" when she did so. If that is the case, it is necessarily an issue, irrespective of whether the plaintiff is riding a scooter or a quad bike. I do not propose to allow this claim.

143 Thirdly, the plaintiff claimed the cost of "natural horse retraining". There is no evidence to support that claim and I do not allow it.

144 Finally, the plaintiff sought the cost of a stable hand or a labourer to assist her with the care of her horses. I propose to allow this claim at a rate of $165.00 pw (based upon 7.5 hours pw) which totals $135,630.00.

[126] T108.31.
[127] CB 180.
[128] CB218.
[129] T34.10-T34.14.

Past economic loss

145 There is no issue that past economic loss should be calculated on the basis of gross earnings of $25,000.00 per annum. That calculation up to the present time is as follows:

$480.00 per week net for 344 weeks	$165,120.00
Superannuation at 9% of gross weekly	$14,860.00

146 Past economic loss therefore totals $179,980.00.

Future economic loss

147 In terms of future economic loss, the calculation should be based on a retirement age of 70 years as follows:

$480.00 per week net *M413	$198,240.00
Superannuation at 9% of gross weekly ($480.00 per	$17,841.00
Less 15% Vicissitudes	-$32,412.00

148 The total for future economic loss is therefore $183,669.00.

Domestic assistance

149 In terms of past domestic assistance, the plaintiff firstly claims for the period between 28 September 2012 and 30 November 2012. This was a period in which the plaintiff was in hospital, or in rehabilitation. In those circumstances, I do not propose to allow that part of her claim.

150 The plaintiff then claims past domestic assistance at 49 hours per week. In the first of her reports, Ms Geach estimated assistance on the basis of 7 hours per week.[130] In her second report, this estimate was increased to 29 hours per week.[131] Ms. McLaughlin, who reported for the defendant, estimated between 3.5 and 6 hours of care per week over varying periods.[132]

[130] CB 162.
[131] CB 179.
[132] CB 279.

151 In my view, taking into account the whole of the evidence, a period of 10 hours per week should be allowed, calculated as follows:

01.12.2012-18.05.2013	
10 hours per week for 23 weeks at $27.70 per hour	$6,371.00
19.05.2013-15.11.2013	
10 hours per week for 25 weeks at $27.82 per hour	$6,955.00
16.11.2013-16.05.2014	
10 hours per week for 25 weeks at $27.96 per hour	$6,990.00
17.05.2014-21.11.2014	
10 hours per week for 25 weeks at $28.24 per hour	$7,060.00
22.11.2014-15.05.2015	
10 hours per week for 24 weeks at $28.87 per hour	$6,928.00
16.05.2015-20.11.2015	
10 hours per week for 25 weeks at $29.41 per hour	$7,352.00
21.11.2015-20.05.2016	
10 hours per week for 25 weeks at $29.98 per hour	$7,495.00
21.05.2016-18.11.2016	
10 hours per week for 25 weeks at $29.77 per hour	$7,422.00
19.11.2016-21.08.2018	
10 hours per week for 128 weeks at $30.15 per hour	$38,592.00
Total	$95,165.00

Future domestic assistance

152 The plaintiff has claimed further domestic assistance on a paid commercial basis of 29 hours per week. There was an issue raised between the Occupational Therapists as to the necessity for an alarm for the plaintiff in the event that she fell and somebody needed to be alerted. In my view, that can be subsumed in the cost of care which I allow at 10 hours per week.

Future Domestic Assistance on a paid commercial	
basis	
10 hours per week *M822.0 at $44.00 per hour	$361,680.00

ORDERS

153 I make the following orders:

(1) Verdict and judgment for the defendant.

(2) The plaintiff is to pay the defendant's costs as agreed or assessed.

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