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**University of the Sunshine Coast**

**HIGH SCHOOL MOOTING COMPETITION**

*MOOT PROBLEM*

CITATION: *Bakers Brook Equestrian Club Inc v Burke* [2024] USCHC 1

PARTIES: Bakers Brook Equestrian Club Inc. (Appellant) v Daisy Burke (by her next friend) (Respondent)

FILE NO/S: UniSCHC No 1 of 2024

DIVISION: High Court of Australia

Daisy Burke is 14 years old and one Sunday attended a Bakers Brook Equestrian Club (the ‘Club’) riding event with her family and some friends. She was going to compete in the barrel race on her horse, Trigger. Barrel racing involves riding a horse at speed around a series of barrels and the fastest time wins.

The event was held at a local equestrian facility owned and managed by the Club. During event days a number of Club employees were present and filled a variety of roles such as marshalling in the main arena, supervising the warm-up area and the two other outside arenas.

It had been a rainy few weeks. The main arena where the events were to be held was quite still quite wet, although it was not raining on the day. The Club had attempted to smooth out the arena a week or so before the event, but it was still lumpy and slippery on the day itself. The main arena was not smooth, had some small puddles on it and was not in great condition (as it usually was).

It was Daisy’s turn to compete. She did her first run without incident but on her second attempt, as Trigger rounded the far barrel, he slipped and fell onto Daisy. She suffered paraplegia as a result.

Daisy commenced action in the Supreme Court of Queensland against the Club, alleging negligence and seeking damages of $5,000,000. Daisy admitted in evidence at trial that she had noticed that the arena surface was quite lumpy but had assumed it must be safe since other people had been competing on it all morning. The evidence also established that the Club inspected the arena on a weekly basis, usually on a Friday but sometimes on other days. The Club had a special grader that it used to smooth the arena surface. Club employees admitted that they regularly used the grader machine if they thought it needed smoothing and also conceded that the surface could very easily have been used on the arena before the event.

On the Friday before the Sunday event, the Club employee responsible for organising the event, Renee, had noticed the appearance of the arena surface in passing thinking it did not look as good as it normally did (but had not properly seen that it was very slippery and lumpy, as she was driving past in her car at the time). She rang Andrew, the Club employee responsible for carrying out inspections and maintenance of the surface. Andrew told Renee that he was busy at another area at that moment, and although he could come later that afternoon, it was not worthwhile to do so, since he would be at the Club on Sunday afternoon for the post-event clean-up in any case.

On the day of the event, people were jumping on horseback, racing and riding quickly in the warm-up areas, the reserve parkland adjacent to the Club (but not under its management) and in the arena itself in between events. Other Club employees had noticed that people were riding quite hard and fast on what appeared to be slippery surfaces and informed Renee. However, Renee did not instruct them to prevent riding at speed, turning quickly on any of the event arenas or give any warning about the possible dangers of the surface.

Daisy argued at trial that the Club should have smoothed the arena surface (the condition of which they were aware) on the Friday before the event, given the added risk of injury posed by the large number of people attending the event. She also argued that, failing that, the Club should at least have instructed staff to prevent people riding and turning quickly and also give warnings of the dangers to riders. The Club had authority to prohibit activities: indeed, warning signs throughout the Club warned users about the dangers of speed, dangerous riding in the Club grounds, and the need to ride according to the conditions.

The Club argued in reply that the arena surface posed a minimal risk such as not to require the Club to smooth it immediately upon being notified. Further, it argued that there was no reason to allocate Club staff to prevent riding quickly in the arena as it went against the point of the competition and many people were using all parts of the land both in the Club grounds and reserve parkland adjacent to it and therefore could have suffered injury anywhere in the immediate vicinity. No other falls had occurred before Daisy was injured.

The Club also argued that Daisy had been injured as a result of the obvious risk of a dangerous recreational activity. This would deny liability even if the Club had been negligent.

You can assume for the purposes of the problem that the Club is vicariously liable for any negligence of any of its employees.

*Daisy lost her original claim in the Supreme Court and appealed.*

In the judgment of the Court of Appeal, two judges Shelly and Howling JJ, allowed the appeal and held for Daisy, in part for the following reasons:

*“The Club was negligent. The risks posed by the arena surface were foreseeable and serious. A reasonable Club would have smoothed the surface once aware of it, since the Club knew that many more people than usual would be using the arena for the competition, and this would only make the conditions worse. Although immediate action to do so would require some time and effort, this was justified given the heightened risk.*

*We would follow the decision of Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd [2020] NSWCA 263. In any case, failing immediate action to smooth the surface, a reasonable Club would have deployed Club staff to restrict riding at excess speed for the conditions in all areas of the Club and at the access point for adjacent reserve. Although all parts of the Club and the adjacent parkland reserve were being used and posed some risk, the main arena area posed an especially high probability risk of even more serious injury (s 9 of the Act), due to the extra traffic on it as a confined space and extra steps were warranted. This would include also issuing a warning to competitors that surfaces were slippery due to the recent rain and that need to exercise caution on the main arena surface in particular.*

*Finally, the defence argued by the Club under s 19 of the Act does not apply. The risk of falling from a horse was obvious, but that is not what happened. Daisy fell, due to the arena surface. And although the lumpy condition of the arena surface could be observed, a 14-year-old girl would not be able to properly assess the likely risk of the surface causing her horse to fall, especially since it had been used without incident by others.*

*We should note recent psychological studies that show that teenagers, even if aware of a risk, are ‘wired’ to discount the seriousness of those risks and to put more emphasis on the ‘rewards’ of thrill-seeking. The risk of the arena surface was not obvious to a reasonable 14-year-old in Daisy’s position.”*

One judge, Corr J, dismissed the appeal (that is, Daisy would have lost) for the following reasons, amongst others:

*“Clearly the Club owed Daisy a duty of care and this is not disputed by the Club. Applying the reasonable standard of care of the ordinary and reasonable occupier of land, and specifically the requirements of s 9 Civil Liability Act 2003 (Qld) (the Act), we do not consider, however, that the Club has breached its duty of care.*

*We conclude this for a number of reasons.*

*Firstly, Renee had noticed the condition of the surface only in passing and therefore did not know it was in quite bad condition. Although the risk posed by the arena surface was foreseeable, it was not such a high risk as to require the Club to take extra steps, beyond its usual weekly maintenance and inspections, to fix it immediately. Otherwise, Club employees would need to immediately follow up all possible dangers on all Club lands, whenever alerted to any such dangers (eg, broken glass, holes in the ground, hidden objects in long grass etc).*

*Similarly, it was unreasonable to require the Club to deploy additional staff to the arena, since people were engaging in high-risk riding in other parts of the Club grounds and those adjacent to it, and no number of staff could have prevented that. There was no reason to allocate more staff near the arena, and not to other areas, or adjoining reserve parklands. The Club could assume that people would look after their own safety if engaging in such high-risk activities. Signs were also posted to this effect.*

*We would reach the same conclusion as in Streller v Albury City Council [2013] NSWCA 348 for similar reasons adopted in that case. The facts in that case are different but analogous to the issues in dispute here. We would distinguish Tapp v Australian Bushmen as in that case there were previous falls noted in the arena which was not the case here. Such falls would have clearly brought to the attention of any reasonable person in the place of the Club the uncertainty of the surface and the need to take address the issue or issue warnings. That was not the case in this matter.*

*Further, even if the Club breached its duty of care, we consider that that Daisy engaged in a dangerous recreational activity of riding and turning a horse sharply at speed. Daisy does not dispute that the activity was dangerous but argues that the issue with the arena surface was not an obvious risk.*

*We disagree. It does not matter how one’s horse falls, the risk in question is a horse falling as a result of riding and turning sharply at speed: that is obvious to anyone, even a 14-year-old girl. Precisely how or why the fall occurred is not of relevance.*

*In any case, if we are wrong in this conclusion, the risk of a horse falling on a slippery surface whilst turning and being ridden at speed (and of Daisy being hurt by the falling horse) was also obvious. The arena surface was clearly lumpy, slippery, and obviously so.*

*The Club has a valid defence on the basis of s 13 and s 19 of the Act.*

*We would dismiss the appeal.”*

The Club appeals to the High Court (which has granted leave to appeal) from the decision of the Queensland Court of Appeal. The grounds of appeal are as follows:

(1) The Court of Appeal erred in finding the Club did breach its duty of care.

(2) The Court of Appeal erred in finding that even if the Club did breach its duty, that Daisy’s injury was the result of an obvious risk of a dangerous recreational activity and therefore this defence should apply.

**Argue the appeal either on behalf of the Club as appellant, or on behalf of Daisy as respondent.**

Ignore any issues of contributory negligence, incorporated associations and litigation on behalf of minors (next friend).

**RELEVANT MATERIALS:**

***Streller v Albury City Council [2013] NSWCA 348***

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

**Civil Liability Act 2003 (Qld):**

**9 General principles**

(1) A person does not breach a duty 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

reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would

have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a

risk of harm, the court is to consider the following (among 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.

**Section 13 Meaning of obvious risk**

(1) For 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.

(5) To remove any doubt, it is declared that a risk from a thing, including a living

thing, is not an obvious risk if the risk is created because of a failure on the part of a

person to properly operate, maintain, replace, prepare or care for the thing, unless

the failure itself is an obvious risk.

*Examples for subsection (5)—*

*1) A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.*

*2) A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.*

**19 No liability for personal injury suffered from obvious risks of dangerous**

**recreational activities**

(1) A person is not liable in negligence for harm suffered by another person as a

result of the materialisation of an obvious risk of a dangerous recreational activity

engaged in by the person suffering harm.

(2) This section applies whether or not the person suffering harm was aware of the

risk.

\*\*\*Acknowledgment to Bond University for inspiration for this scenario\*\*\*