RECENT RECURRING ISSUES IN THE COURT OF APPEAL

The Hon Justice AS Bell

President, New South Wales Court of Appeal[*]

Introduction

1 It is a privilege to be able to address you all this morning, 12 months after I was originally meant to do so. 2020, as we all know, was a year to forget but a year never to be forgotten.

2 It was a year in which the courts of New South Wales continued to operate and function with great flexibility and dedication to judicial duty and the rule of law.

3 May I take the opportunity, at the outset of my speech, to say that the Court of Appeal is extremely conscious of the profoundly important work done by the District Court of New South Wales and the volume and nature of that work. It is diverse, unrelenting and challenging. Although my remarks this morning will focus on the civil side, most of the judges in the Court of Appeal, as you know, also sit on the Court of Criminal Appeal and are conscious of both the increase in judge alone criminal matters for District Court judges as well as the deeply confronting subject matter of many of the cases. The State is fortunate to be so well served by its judges and the magistracy.

4 To get the morning off to a scintillating start, let me begin with some statistics. As inauspicious as that sounds, they reveal an interesting and impressive outcome in terms of the District Court's civil work.

[*] An address to the annual conference of the District Court of New South Wales on 6 April 2021. The assistance of Mischa Davenport, Researcher to the Court of Appeal, in the preparation of this paper is gratefully acknowledged.

5 In 2019 and 2020, 87 and 85 new cases respectively came to the Court of Appeal from the District Court, representing less than a quarter of new cases in the Court each year. This is somewhat down from the preceding three years, 2016 to 2018, in which between 113 and 133 cases came to the Court of Appeal from the District Court each year, representing close to a third of new cases in the Court each year. In the last two years, we have had more appeals from the Supreme Court itself and also a spike in cases from NCAT.

6 Of the 85 new cases from the District Court in 2020, 45 involved appeals as of right (53%), 18 matters involved applications for leave to appeal (21%), and another 22 matters (26%) came by way of summons seeking judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW).

7 The median time for finalisation, that is to say from filing to delivery of judgment, was just over 6 months. Of matters finalised in 2020, 8 matters were heard as applications for leave alone (all of which were dismissed), and in another 10 matters an application for leave to appeal was heard concurrently with the appeal, with leave to appeal granted in 6 cases and the appeal allowed in 4 of those. Of 33 matters involving appeals as of right, 3 matters settled, 24 were dismissed and 5 appeals were allowed in whole or in part.

8 In total, of the 85 matters finalised in 2020, only 9 appeals were allowed at least in part (11% of finalisations) and orders were made in another 4 matters proceeding by way of summons for judicial review. In 2019, of 96 finalisations, 27 appeals were allowed at least in part (32% of finalisations) and orders made in another 4 matters proceeding by way of summons.

9 In the most recent year for which figures are available to me, 2019, the District Court finalised 4,739 civil matters, meaning that the proportion of District Court decisions subject to challenge in the Court of Appeal is extremely low – somewhere around 2% - and of course the proportion of District Court decisions subject to successful challenge in the Court of Appeal is significantly smaller.

10 The cases brought from the District Court to the Court of Appeal in 2019 and 2020 traversed a wide variety of subject areas. Torts matters, as always, were

common, as were judicial review applications, costs disputes, contractual matters and a number of matters relating to practice and procedure. Rather than providing an overview of matters brought to the Court of Appeal from the District Court, I propose to focus on a number of specific topics that have arisen relatively frequently in the past two years and on which the Court of Appeal has set out important principles that will be of interest and, I hope, of some practical assistance. They are:

a. Permanent stays in civil proceedings related to historical child abuse, following the abolition of limitation periods for such claims in light of the Royal Commission into Institutional Responses to Child Sexual Abuse;

b. Misleading or deceptive conduct under s 18 of the *Australian Consumer Law*; and

c. Recusal or disqualification of judicial officers for apprehended bias.

d. Obvious risks and their characterisation the purposes of s 5L of the *Civil Liability Act 2002* (NSW) ('CLA');

11 Before addressing these topics, however, I draw your attention to a number of resources maintained by the Court of Appeal on our website (www.nswca.judcom.nsw.gov.au) that may be of some interest or utility in dealing with civil matters. The first of these is the Decisions of Interest Bulletin, which contains summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia-Pacific appellate courts and other international appellate courts. The Bulletin is published regularly on our website, which contains an archive of bulletins going back to 2017.

12 The second useful resource is the Annotated *Civil Liability Act*, which provides summaries of significant cases from the New South Wales Court of Appeal and the High Court of Australia, going back to late 2012, that relate to the *Civil Liability Act*. Under each section of the Act you can find a list of key decisions relevant to the particular section, with brief summaries of the facts of each case and the treatment that the particular provision of the CLA received.

13 The website also contains useful notes related to matters of practice and procedure, the Court of Appeal's jurisdiction generally and principles relevant to the Court's supervisory jurisdiction in particular. We are always looking for ways to improve the Court's website as a practical resource and are open to suggestions. A good point of contact for any suggestions would be the Court of Appeal Researcher.

14 In addition, in the next month we plan to launch what will become an annual publication, namely a review of all Court of Appeal decisions delivered in the previous year. It will be styled "Court of Appeal: Year in Review" and will allow viewers to see and search, in a hyperlinked document, all of the decisions the Court of Appeal has delivered in the previous twelve months, arranged by subject matter.

Permanent stays in civil proceedings related to child abuse

15 In 2016 the *Limitation Amendment (Child Abuse) Act 2016* (NSW) introduced a new section 6A into the *Limitation Act 1969* (NSW). The reform was a direct response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, which was referred to in some detail in the Attorney General's second reading speech. The new section 6A is relevantly as follows:

> **6A No limitation period for child abuse actions**
>
> (1) An action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under this Act despite any other provision of this Act.
>
> (2) In this section, child abuse means any of the following perpetrated against a person when the person is under 18 years of age:
> (a) sexual abuse,
> (b) serious physical abuse,
> (c) any other abuse (connected abuse) perpetrated in connection with sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse).
>
> […]
>
> (6) This section does not limit:
> (a) any inherent jurisdiction, implied jurisdiction or statutory jurisdiction of a court, or

(b) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Note—

For example, this section does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

16 As a result of these legislative changes, courts have been faced with proceedings relating to events and allegations in the distant past and applications for permanent stays (pursuant to s 67 of the *Civil Procedure Act 2005* (NSW)) or summary dismissal (pursuant to UCPR r. 13.4(1)(c)) of those proceedings. A number of cases concerning proceedings commenced following the 2016 amendments to the *Limitation Act* have now been determined by the Court of Appeal, from which a number of significant principles can be derived. Again, it will be useful to deal with those cases chronologically.

17 *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102 ('*Moubarak*') involved a claim for damages in relation to alleged sexual assaults perpetrated against the plaintiff in 1973 or 1974, when the plaintiff was 12 years old. Proceedings were first commenced in 2016, shortly after the amendments to the *Limitation Act* and some 42 or 43 years after the alleged assaults. The assaults were not claimed to have been witnessed by anybody, though the plaintiff had apparently told various friends and relatives about them from as early as 1987, and discussed them with a psychologist and a psychiatrist between 2015 and 2017. A complaint was made to the police in 2015, and the file prepared in relation to that complaint subpoenaed for the purposes of the proceedings. The defendant had been living in a nursing home since 2014 and suffered from advanced dementia. It was accepted by both parties that he was unable to participate in the proceedings, either by giving instructions for his defence or by giving evidence.

18 The following issues were raised by the application for a permanent stay or summary dismissal of the proceedings (drawn directly from the judgment, at [12]):

a. What role, if any, does delay in bringing proceedings play (both as a matter of general principle and in the particular circumstances of this case)

in an assessment of whether the defendant would be deprived of a fair trial, and what is the significance, if any, of the existence or absence of any explanation for such delay?

b. Does a fair trial require as an essential element that the defendant be able to participate in the proceedings (in the sense of giving instructions and having the ability to give evidence) or could a fair trial nonetheless be possible where an otherwise incompetent defendant is represented by a tutor who is empowered to conduct a defence of the proceedings?

c. What relevance, if any, does the public interest in allowing claims for damages for historical sexual assault to be heard have in assessing whether or not a fair trial is available?

19 A number of uncontroversial propositions related to the granting of permanent stays generally were set out (at [71]; paraphrasing):

a. The onus of proving that a permanent stay should be granted lies on a defendant;

b. A permanent stay should only be ordered in exceptional circumstances;

c. A permanent stay should be granted when the interests of the administration of justice so demand;

d. The categories of cases in which a permanent stay may be ordered are not closed, but include the following:

i. where the proceedings or their continuance would be **vexatious or oppressive**, which they will be if their objective effect is "seriously and unfairly burdensome, prejudicial or damaging";

ii. where their continuation would be **manifestly unfair to a party**; and

iii. where their continuation would **bring the administration of justice into disrepute**.

20 As to the relevance of delay, in the absence of a limitation period there can be no requirement for a plaintiff to provide an explanation, and a plaintiff will generally be unable to be criticised for any delay (at [75]). General unfairness arising from the prolonging of uncertainty in relation to unresolved claims or as yet unarticulated future claims cannot be complained of where the legislature has not imposed any limitation period at all. However, a different form of unfairness may arise from the effect of delay on the trial process, by reason of the impoverishment of the evidence that the passage of time may have caused (at [77]-[87]).

21 The significance of any impoverishment of the evidence will vary from case to case, depending significantly on the nature of the facts in dispute and the nature of the evidence that would be needed to resolve those disputes. There are important differences, for example, between documentary and oral evidence, for obvious reasons relating to the fallibility of human memory. Importantly, the bar is set rather high – described by Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 (at [34]) as requiring "a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences' … such that any trial is necessarily unfair [and] would bring the administration of justice into disrepute" (cited in *Moubarak* at [83]).

22 What is the effect on the possibility of a fair trial of the inability of the defendant to participate? Whilst it must be remembered that a fair trial is not synonymous with a perfect trial, such that any defect in the available evidence would suffice to warrant a stay ([89]), nonetheless, the absence of a defendant by death or dementia is by any account a relatively serious defect ([92]). Principles derived from a criminal context concerning fitness to plead and the associated requirements for a fair trial are of some relevance in a civil context – to the extent that the primary judge was found (at [109]) to be in error for dismissing as irrelevant the well-known principles, in a criminal context, from *R v Presser* [1958] VR 45. Indeed, it would tend towards incoherence if the standard for a fair trial in a criminal context did not apply to a civil case involving identical

factual allegations (as may often be the case in actions for damages related to child abuse) (at [108]).

23 In the circumstances of *Moubarak*, although a number of forensic steps may have been open to the defendant's tutor in the proceedings (including cross-examining the plaintiff, and exploring potential inconsistencies in the accounts given to different witnesses) ultimately nothing that a trial judge could do could relieve against the unfairness of the defendant being at all times utterly in the dark about the allegations made against him and unable to give instructions (at [158]). The nature of the allegations was such that the enquiries potentially available to the defendant's tutor on his behalf were of extremely limited potential significance.

24 In the context of such barriers to a fair trial, the public interest in permitting claims for damages for historical sexual assault to be brought at any time, reflected in the legislative reforms in response to the Royal Commission, does not preclude the possibility that exceptional circumstances may arise in which proceedings of this kind should be stayed. *Moubarak* was one such circumstance.

25 The principles laid out in *Moubarak* were subsequently applied in *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292 (*Anderson*), with the facts of that case providing a useful comparison. *Anderson* concerned sexual assaults perpetrated by a teacher at Trinity Grammar School between 1974 and 1976, which had already been proven in criminal proceedings. The perpetrator, however, was dead and the question in the civil proceedings concerned the vicarious liability of the school for the assaults or any breach of a non-delegable duty of care owed to the appellant as a student. Key witnesses for the determination of these questions included the headmaster of the school at the time of the assaults and the master in charge of the preparatory school, who had died in 1997 and 2012 respectively.

26 The Court of Appeal, overturning the primary judge's decision, held that a permanent stay was warranted on the basis that the school was unable to deal meaningfully with the claims made against it (Bathurst CJ at [506]). A number of errors were identified in the primary judge's reasoning, including a failure to

give separate consideration to the claims based on vicarious liability and those based on non-delegable duty (Bathurst CJ at [432]-[434]). Each raised different, though overlapping, factual considerations in respect of which the availability of evidence had to be assessed.

27 Particular attention was directed to the adequacy of inquiries made by the school at the time it was informed of the appellant's intention to institute proceedings, in 2004. At the time, the school responded by denying liability and asking on what basis the claim would not be statute-barred, and did not receive a reply from the appellant's lawyers at the time. The failure of the school to make detailed inquiries of the then still living master of the preparatory school, and to make other inquiries suggested by the appellant, was not unreasonable in those circumstances. To require the school to pursue any line of inquiry, however remote, would be unfairly burdensome, and it was not unreasonable for the school to adopt the position that the claim was statute-barred and so did not require investigation of its underlying merits (Bathurst CJ at [489]).

28 Further comparison may be made with the application of the principles in *Moubarak* in *Gorman v McKnight* [2020] NSWCA 20 ('*Gorman*'). That case involved three sets of proceedings seeking damages in relation to alleged sexual assaults on the respondents between 1981 and 1993, each respondent having been aged between 13 and 17 at the time of the assaults. Significantly in this case, in 2015 one of the respondents gave a statement to police detailing his allegations, as a result of which the perpetrator was charged with offences in respect of each of the respondents. As a result, significant evidence had been collected as part of the police investigation prior to the alleged perpetrator's death in 2016. This included a recorded conversation involving admissions as to the existence of a sexual relationship with one of the respondents and as to the perpetrator's knowledge that the respondent was only 14 at the time. The primary judge had refused an application by the perpetrator's estate to permanently stay the proceedings.

29 One ground of the estate's appeal concerned the primary judge's reference to the public interest in allowing claims for child abuse to be brought at any time, and to a "balancing exercise" in the application for a stay. The estate submitted

that the only question was whether or not a fair trial was possible. While it was accepted that no different principle applies to permanent stays in child abuse proceedings, the Court of Appeal noted that concepts of 'balancing' or 'weighing' have been invoked by the High Court in the context of applications for permanent stays generally and are not necessarily inapt (at [65]-[70]).

30 The appellants also sought to impugn the primary judge's criticisms of the estate's failure to make certain inquiries, with reliance placed on Bathurst CJ's reasons in *Anderson* to the effect that a defendant is not obliged to pursue any line of inquiry however remote. However, the primary judge's comments were understood to mean that in the context of an application for an exceptional order in the nature of a permanent stay of proceedings, unfairness must be clearly demonstrated, and will not be able to be demonstrated if the party seeking relief and bearing the onus of proof has not explored all reasonable lines of inquiry that might bear upon the fairness or unfairness of a trial proceeding (at [54]). On its facts, *Gorman* was distinguishable from *Anderson* because a number of reasonable enquiries had simply not been made (at [55]).

31 As to the substantive question of the possibility of a fair trial following the alleged perpetrator's death, the facts in *Gorman* were also significantly different from those in *Moubarak*. The factual questions to be determined at trial, where many elements had either been established or admitted – at least to the extent that the existence of sexual interactions of the kind alleged could not seriously be put in issue (at [85]). The main issue at trial was likely to be the question of consent. In a tort claim, consent is at most an issue that would not depend significantly on the defendant's testimony but would instead turn on the evidence of the plaintiffs (at [72]). While there is an open legal question concerning the availability of the defence of consent, the unavailability of the defendant was irrelevant to the resolution of that question. It was held that the factual and evidentiary issues that might arise in relation to consent would not necessarily create such unfairness, in the absence of the deceased, as to warrant a permanent stay.

32 Before moving on, I would draw attention to the recent decision of the Court in *Magann v The Trustees of the Roman Catholic Church for the Diocese of*

Parramatta [2020] NSWCA 167. In that case, the Court had to deal with a deed of release entered into by a plaintiff whose claims had subsequently ceased to be statute-barred. The Court upheld the trial judge's finding that the *Contracts Review Act*, and indeed the general equitable doctrine of unconscionability, would not allow an agreement to be set aside having regard to injustice not reasonably foreseeable at the time the contract was made, including the subsequent removal of the limitation period. However, the Court also noted the existence of legislation in other states addressing this particular circumstance and the fact that such amendments were under consideration in New South Wales. Since then, the *Civil Liability Amendment (Child Abuse) Bill 2021* has been drafted and was introduced in Parliament less than a month ago, on 17 March. The Bill, if passed, will allow courts to set aside certain agreements settling claims for child abuse where it is just and reasonable to do so. This is likely to generate a significant volume of work for both the District Court and the Supreme Court.

Misleading or deceptive conduct

33 Section 18 of the *Australian Consumer Law* prohibits a person from engaging in conduct, in trade or commerce, which is misleading or deceptive or likely to mislead or deceive. A wide range of remedies is available for contravention of s 18. A number of cases before the Court of Appeal in 2020 involved claims of misleading or deceptive conduct. I would like to address two main issues: (i) the appropriate *characterisation* of a given representation for the purposes of s 18, and (ii) 'representations by silence' and the question of when non-disclosure will be considered misleading or deceptive conduct.

34 On the first issue I draw attention to three relevant recent decisions: *Ireland v WG Riverview Pty Ltd* [2019] NSWCA 307 ('*Ireland*'); *Wormald v Maradaca Pty Ltd* [2020] NSWCA 289 ('*Wormald*'); and *Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq)* [2020] NSWCA 23 ('*Norton*').

35 *Ireland* involved representations in an auction catalogue as to the parentage of a bull for sale at that auction that turned out to be incorrect. The catalogue

contained the following description of the Bull's sire: SJKF223 GRANITE RIDGE THOMAS F223 together with the following description:

> "Thick, soft easy going young sire. This fellow just oozes quality. He is clean fronted with plenty of length and thickness. *His sire is just breeding the house down for us* with daughters now in production you will hear alot more of him. This fellow[']s dam is a cow who has bred so consistently including a son who sold into a fantastic herd of the Battersby Family at 'Leighwood Grange' in Gippsland, Victoria. This cow has joined our donor program this Spring and we are excited to see what she will do going forward."

The auction catalogue contained a disclaimer to the effect that, whilst all due care and attention had been paid to accuracy in the compilation of the catalogue, the vendors did not assume any responsibility for the correctness of information contained therein. The primary judge had characterised the representation as to the bull's sire as a representation of fact, and consequently as misleading or deceptive within the meaning of s 18 because it was subsequently ascertained by DNA that the bull in question had not been sired by "Granite Ridge Thomas".

36 Significantly, the primary judge had first considered the representation itself, finding it to be misleading or deceptive, before then considering the effect of the disclaimer – an approach inconsistent with High Court authorities emphasising the need to consider a party's conduct as a whole, especially in the context of contemporaneous disclaimers which are likely to go to the characterisation of that conduct (*Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, cited in *Ireland* at [14], [66]).

37 The application of s 18 requires consideration of the whole of the circumstances, including the nature of the parties, the character of the transaction, and in this case the disclaimer in the auction catalogue. When all these factors were taken together, it was clear that all the vendors had in fact represented was that all reasonable care had been taken to confirm the bull's parentage and that they believed it to be the case (at [74]). This made the representation one of opinion rather than fact. A representation of opinion will only be misleading or deceptive if its maker did not genuinely hold it or lacked reasonable grounds for holding it. This is an important difference.

38 The case highlights that many representations that on one level present as representations of fact may, when properly characterised, be no more than representations of honestly held belief. The distinction between statements of objective truth and statements of a person's reasonable belief in or judgment as to the truth of a particular matter takes on particular importance in the context of the statutory prohibition on misleading or deceptive conduct. The characterisation of a representation, as one of fact or merely reasonably held belief or opinion, is to be viewed from the perspective of the ordinary or reasonable audience to whom the representation is directed – in this case, the ordinary participant at the auction.

39 The need to distinguish between statements of opinion and fact also arose in *Norton*. In that case, demands for payment made by a real estate agent to a property developer were alleged to have been misleading or deceptive. All of the relevant statements by the agent were statements of a legal conclusion of an entitlement to a contractual right – that is, a statement that certain fees were payable under their contract. While the agent did not use any words to the effect that it was his *opinion* that certain fees were payable, the application of section 18 turns on the nature of the conduct rather than any particular form of words used (Leeming JA at [89]).

40 Whether certain fees were payable was a question of law, based on the legal effect of the contract between the parties. Where all relevant facts were known to both parties, as in this case, it is difficult to interpret what one says to the other as anything other than an expression of opinion – *a fortiori* where the statement is on a topic "which is inherently disputable, open to disagreement or not based on certain knowledge" (J D Heydon, *Heydon on Contract* (Thomson Reuters 2019) at [14.260], cited by Leeming JA at [97]). In *Norton*, the demands for payment did not amount to misleading or deceptive conduct.

41 The need to consider the conduct of a party as a whole, in the context of a particular transaction, was highlighted again in *Wormald*. In that case, the majority shareholders of a company had entered into an agreement with a purchaser for sale of a company, with $200,000 set aside in an escrow fund to satisfy any potential claim for breach of warranty in relation to the sale. The

escrow fund was agreed to because of the vendors' need to finalise the transaction urgently, insisting that they did not have time to wait for the purchaser to do further due diligence. When the vendors, long after the end of the agreed period for retention of the escrow fund, commenced proceedings against the purchaser for release of the funds, the purchaser brought a cross-claim alleging misleading or deceptive conduct in relation to an alleged failure to disclose details of the company's relationship with another prospective purchaser who was also one of the company's major clients.

42 The primary judge found that the purchaser had a reasonable expectation that these arrangements would be disclosed. On appeal, however, it was held that the refusal to allow or entertain any further due diligence had the effect, in the context of the transaction, of negating any expectation that may have existed as to disclosure. The sale involved a calculated risk taken by an experienced commercial party (at [151]), and the explicit effect of the refusal to entertain further due diligence was to make clear that it was "buyer-beware", subject to the $200,000 in the escrow fund (at [130]). The setting aside of funds "to deal with any problems" did not amount to a representation or assurance that there were no problems, nor even that there were problems up to the value of $200,000, but that there might be problems and that the sum in question was what the vendors were prepared to set aside to deal with those problems in order to finalise the transaction in circumstances where they did not have time to allow for further due diligence (at [123]).

43 *Wormald* contains, at [107]-[121], what I hope will be a valuable survey of principles relating to silence and non-disclosure in the context of misleading or deceptive conduct.

44 On the issue of misleading or deceptive conduct by silence, I also to draw attention to another three cases: *Nadinic v Cheryl Drinkwater as trustee for the Cheryl Drinkwater Trust* [2020] NSWCA 2 ('*Nadinic*'); *James v Australia and New Zealand Banking Group Ltd* [2020] NSWCA 101 ('*James*'); *Primary Securities Limited v Aurora Funds Management Limited* [2020] NSWCA 230 ('*Primary Securities*').

45 In *Nadinic*, the respondent was originally involved in a joint venture development project with a company owned and controlled by the appellant. Following a dispute between the parties, they entered into a deed of settlement under which the respondent purchased the appellant's interest in the development project and the corporate entity involved. The alleged misleading or deceptive conduct was the non-disclosure of the fact that a significant GST input tax credit had already been refunded by the ATO to the corporate entity and paid out to an unrelated entity, such that the credits were no longer available to the purchaser as the purchaser believed them to be. Documents, provided by the appellant to the respondent, had indicated the existence of such credits and did not provide the means of deducing that they had already been claimed and paid out. This, the respondent claimed, gave rise to a misapprehension of which she has a reasonable expectation that the appellant would disabuse her. The appellant claimed that it was not reasonable for the respondent to expect to have been disabused of the misapprehension as the parties were engaged in a dispute at the time.

46 The Court of Appeal held that the particular principles relevant to misleading or deceptive conduct by silence were ultimately not required in the circumstances of this case, where the appellant had made initial representations giving rise to the misapprehension. The representations in question had the appearance of communicating objective information about the position occupied by the parties, with nothing to indicate a need to be cautious with respect to the accuracy or reliability of their content. The respondent was entitled to accept such communications at face value despite the fact, as relied upon by the appellant, that the parties were engaged in a dispute at the time (at [146]). That situation was irrelevant to the content of the initial representation, which was not framed as part of any bargaining process but purported merely to inform the respondent of objective information. Importantly, the prohibition on misleading or deceptive conduct does not cease to apply once a dispute has emerged such that all bets are off between the parties.

47 The principles relevant to misleading or deceptive conduct by silence or omission were more squarely raised by the allegations in *James*. In that case,

the applicant had entered into guarantees in favour of ANZ for a number of companies that subsequently defaulted. The guarantor consented to judgment against him, as guarantor, in approximately the total sum owing to ANZ, apparently believing, falsely as it turned out, that a substantial portion of the sum owing would be able to be recovered from the sale of the companies' assets.

48 The alleged misleading and deceptive conduct by ANZ was its failure to inform the guarantor of the true financial state of the companies. The Court of Appeal found, however, that nothing in the guarantor's conduct demonstrated to ANZ any reliance on his part on the ability of the receivers to recover a substantial part of the companies' liabilities from the sale of their assets – indeed there was no basis on which ANZ should have expected any such assumption on his part (at [42]). In those circumstances, where nothing communicated to ANZ the guarantor's reliance on a false premise, there could be no obligation on ANZ to correct that misunderstanding (at [44]).

49 The Court noted the following important principles with respect to misleading or deceptive conduct by silence.

a. To invoke the existence of a 'reasonable expectation' of disclosure is simply to ask the underlying question of whether the conduct violates the statutory prohibition on misleading and deceptive conduct, directing attention to the likely effect of the disclosure "unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute" (*Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR 53-193 at 53-195, cited in *James* at [38]).

b. The statute "does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. *A fortiori* it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power

and competence" (*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [22], cited in *James* at [39]).

50 A final example of alleged misleading and deceptive conduct by silence arose in *Primary Securities*. The appellant in that case (a financial services provider), called a meeting on behalf of a group of investors in a managed investment fund. The explanatory memorandum accompanying the notice of meeting did not say on behalf of which investors the meeting was being called. At the meeting, resolutions were passed replacing the respondent with the appellant as the fund manager. The respondent contended on appeal, ultimately unsuccessfully (though the appeal was dismissed on other grounds) that the primary judge ought to have declared the meeting invalid on the additional ground that the explanatory memorandum was misleading or deceptive. The alleged misleading or deceptive conduct was a failure to advert to the fact that the reason for the meeting was that investors holding a significant portion of units in the investment scheme were acting together in a covert attempt to remove the respondent as its manager.

51 The respondents were ultimately only able to establish that the appellant might have suspected the intent behind the investors' decision to call the meeting. On this basis, or even on the basis that the appellant in fact held the relevant suspicions, it would nonetheless not have been reasonable for other investors to expect such suspicions to be disclosed in an explanatory memorandum, particularly where those matters did not go directly to the merits of the proposed resolution, rose no higher than matters of suspicion and may have amounted to allegations of illegal behaviour (at [169], [171]). These are further examples of reasons for non-disclosure that may negative a claim that a party's silence was misleading or deceptive, by reference to what might reasonably have been expected in the circumstances.

Recusal of judges

52 I turn next to the question of recusal or disqualification of judicial officers, which is an issue regularly raised before the Court of Appeal, both in applications for recusal of judges of appeal, and in appeals from refusals of trial judges to

recuse themselves. In most cases decisions dealing with applications for recusal or appeals raising actual or apprehended bias make for relatively short reading: see *Florida Kitchens Pty Ltd v Number One Cutting Service Pty Ltd trading as Number One Marble and Granite* [2020] NSWCA 187 at [17]; *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235 at [48]; *Clark v Attorney General of New South Wales (No 2)* [2020] NSWCA 135 at [10]-[17]; *Quach v New South Wales Civil and Administrative Tribunal* [2020] NSWCA 214 at [4]-[8]; *Feldman v Nationwide News Pty Ltd* [2020] NSWCA 260 at [30]-[48]. However, the Court recently took the opportunity to set out more comprehensively the principles relevant to recusal for apprehended bias, which I hope might be of some use. It is obviously important to have these principles to hand because such applications invariably are made in the course of a hearing and need to be dealt with promptly.

53 In *Polsen v Harrison* [2021] NSWCA 23 the applicant had brought an action against the respondent for professional negligence in relation to surgery performed by the respondent. On the third day of the hearing, in the course of consideration of an amendment application, reference was made to the report of a joint conclave of medical experts, of which the trial judge had received a copy only that morning. The primary judge expressed the view that a psychiatrist should not have been at the conclave, that his presence was a problem for the proceedings, that he dominated on matters outside his area of expertise, and that his participation amounted to “advocacy in the extreme”. These views were expressed as “flagging” to counsel potential issues arising from the report, but were expressed in strong terms. Counsel for the plaintiff at the time did not dispute that the psychiatrist should not have been present, but subsequently applied for the judge to recuse herself on the basis of those comments. Separately from his participation in the conclave, the psychiatrist in question was expected to give important evidence for the plaintiff later in the proceedings.

54 The following general propositions were stated by the court with respect to disqualification for apprehended bias and the figure of the fair-minded lay observer (at [46], footnotes omitted):

(i) the application of the apprehended bias rule depends on the circumstances of each case;

(ii) the fair-minded lay observer is an hypothetical figure, founded in the need for public confidence in the judiciary;

(iii) there is an unavoidable level of imprecision in the standard of what a fair-minded lay observer “might” apprehend, such that a fanciful or speculative possibility must be clearly distinguished from the requisite “firmly-established” apprehension of bias;

(iv) a finding of apprehended bias is not to be reached lightly;

(v) this is because the training, tradition and oath or affirmation of a professional judge require him or her to discard the irrelevant, the immaterial and the prejudicial;

(vi) the duty of a judge to disqualify for proper reasons is matched by an equally significant duty to hear any case in which there is no proper reason to disqualify;

(vii) the fair-minded lay observer is presumed to approach the matter on the basis that ordinarily the judge will act so as to ensure both the appearance and the substance of impartiality, such that

(viii) the rebuttal of this presumption requires a “realistic possibility” of the apprehension of bias which is not “fanciful or extravagant” but is based on “the established facts” of the matter;

(ix) “neither complacent nor unduly sensitive or suspicious”, the fair-minded lay observer may have a level of scepticism as to professional pretensions, but will be cognisant of and vigilant against his or her own prejudices;

(x) the inquiry as to whether a judge might reasonably be apprehended to deviate from bringing an impartial mind to the resolution of a particular

issue “requires no prediction about how the judge … will in fact approach the matter” and “admits of the possibility of human frailty”;

(xi) the fair-minded lay observer is not presumed to reject the possibility of pre-judgment of a matter, otherwise an apprehension of bias would never arise in the case of a professional judge; however,

(xii) interventionist comments or conduct by a judge will not unilaterally create an apprehension of bias in the mind of the reasonable lay observer, who is taken to understand that such interventions are often motivated by the judge’s desire to understand the evidence and to advance the trial process;

(xiii) it is “difficult, and probably impossible, to state in the abstract, in a manner suitable for application to cases generally, the degree of knowledge to be attributed to a fair-minded observer”;

(xiv) there is to be attributed to the fair-minded observer a broad knowledge of the material objective facts as ascertained by the appellate court and the “actual circumstances of the case” as though the observer was sitting in the court;

(xv) the fair-minded lay observer is taken to know the nature of the decision, the circumstances which led to the decision and the context in which it was made;

(xvi) the context which must be considered includes the legal, statutory and factual context in which the decision is made, and “the totality of the circumstances”, although the fair minded lay observer will not be taken to have a detailed knowledge of the law or legal principles;

(xvii) the knowledge that the fair minded observer is taken to have is not limited to those facts and matters that were known at the time of an application for recusal and includes published statements made by the judge (whether prior, contemporaneous, or subsequent to the recusal application);

(xviii) the fair-minded lay observer will not act on “insufficient knowledge”, but will “inform himself [or herself]” of the relevant circumstances, without making “snap judgments”;

(xix) the judge’s own view about his or her ability to decide the case independently and impartially, as recorded in any reasons for dismissing a recusal application, carries little weight in the fair mind of the hypothetical lay observer, although

(xx) statements in a recusal judgment regarding factual matters, including the particular context of the comments or conduct in question, may be relevant;

(xxi) the fair-minded lay observer would not reasonably apprehend bias on the part of a judge from a short and emotional exchange taken out of context and weighed in isolation;

(xxii) the fair-minded lay observer will have regard to the cumulative effect of comments made by a judge and not to particular individual statements removed from their context; and

(xxiii) subsequent statements made by a judge, following the comments or conduct said to give rise to a reasonable apprehension of bias, may indicate that an earlier expressed statement or impression was not final or that the judge had not committed to a particular point of view.

55 To these propositions should be added the trial judge’s important observations concerning the importance of modern case management and the effect that this necessarily has on considerations of apprehended bias, such that tentative views expressed in the course of litigation, which can be of significant assistance to counsel in the presentation of their case, are not to be taken to indicate prejudgment (set out at [23]-[26]). That is to say, the fair-minded lay observer will not reasonably expect judges to sit mute throughout the presentation of a case or refrain from expressing views in the course of argument.

56 The application of these principles to the facts in *Polsen v Harrison* led to the conclusion that the reasonable observer hearing the impugned comments would have known or informed him or herself of a range of important facts, including that the trial judge was not ruling on the admissibility of the report, that she had responsibility for managing the proceedings in accordance with modern principles of case management, and that if impressionistic views expressed at an early stage of proceedings as to a particular matter were wrong, then counsel could be relied upon to point that out so that the judge could proceed with a correct understanding of that aspect of the case (at [50]). Ultimately, a fair-minded lay observer with these important facts in mind would not reasonably have apprehended bias on the part of the judge.

57 Another recent decision by the Court of Appeal concerned a pending criminal trial in the District Court: *Gleeson v Director of Public Prosecutions*. The Court of Appeal held that the prospective trial judge should have disqualified himself. As sometimes occurs, orders were made on the spot with reasons to follow. I expect that reasons for the decision will be published within the next week. That decision, too, will contain a helpful discussion of the issue of apprehended bias in a different factual context to *Polsen*.

Obvious Risks under the *Civil Liability Act*

58 The concept of 'obvious risk' is defined in s 5F of the *Civil Liability Act* in relatively straightforward terms. Section 5F(1) provides that 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. Sections 5F(3) and (4) clarify that a risk may be obvious notwithstanding that it has a low probability of occurring or that the risk is not prominent, conspicuous or physically observable. The obviousness of a risk is relevant to a number of provisions of the CLA, on which a few preliminary points may be made based on recent cases in the Court of Appeal.

59 First, as a preliminary consideration, it is important to bear in mind the exclusions from the CLA referred to section 3B, especially the exclusion of significant parts of the Act (including those provisions dealing with obvious risk)

from civil liability arising in respect of intentional acts done with intent to cause injury or death (s 3b(1)(a)). As a result of this exclusion, where the relevant risk is of an intentional act done with intent to cause injury or death, there will be no need to consider the obviousness of the risk. However, the exclusion in s 3B(1)(a) is narrower than might sometimes be thought. It was recently noted in *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294 that the phrase 'intent to cause injury' in s 3B(1)(a) refers to actual, subjective, formulated intention, to which the defendant has turned his or her mind. It does not include recklessness, or imputed or presumed intention (Basten JA at [4]-[9]; White JA at [19]). As a result, limitations on liability in respect of obvious risks will still apply where the obvious risk in question is that a person might recklessly cause injury or indeed perform an intentional act the natural and probable consequence of which involved injury to a plaintiff.

60 Second, the concept of obvious risk is applied in section 5G, which provides that a person who suffers harm is presumed to have been aware of the risk of harm if that risk was an obvious risk. The provision is of very general application in proceedings for negligence. However, the relationship between a finding that a risk which materialised was an obvious risk (of which the plaintiff is presumed to have been aware) and a finding of liability is not straightforward.

61 In the recent Court of Appeal decision in *Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre* [2020] NSWCA 354 ('*Capar*'), for example, the respondent sought to rely on ss 5F and 5G as the basis for a defence of voluntary assumption of risk, arguing that a security guard who left the safety of his office to confront an intruder must be presumed to have been aware of, and therefore to have accepted, the obvious risk of harm associated with that. It was noted, however, that the common law principles with respect to voluntary assumption of risk have been neither codified nor abolished by the CLA, but modified in one very specific respect by ss 5F and 5G, which are not alone determinative of the question (Basten JA at [39]). Voluntariness still needs to be shown, and cannot be determined on the sole basis of awareness (presumed or otherwise) of an obvious risk. In *Capar*, special considerations relevant to the

nature of workplace risks operated to make the defence of voluntary assumption of risk effectively unavailable (at [50], [53]-[61]).

62 Third, section 5H provides that there is no duty to warn of an obvious risk. The application of this provision depends upon the appropriate characterisation of an alleged duty. In *Council of the City of Sydney v Bishop* [2019] NSWCA 157 the plaintiff had alleged negligent failure to install a yellow reflective strip along a kerb on which she had tripped and fallen. The Court of Appeal held that the duty in question was appropriately characterised as a duty to warn, so that the defence in s 5H applied. A similar situation arose in *Hungry Jack's Pty Ltd v Fourtounas* [2020] NSWCA 325, in this case in relation to an alleged negligent failure to mark wheel-stops in a parking lot, which the Court also held was most appropriately characterised as a failure to warn so as to engage the defence (Basten JA at [4]-[6]). (The application for leave to appeal was dismissed on other grounds).

63 Finally, the most significant application of the concept of 'obvious risk' is found in s 5L, which provides as follows:

> **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.

64 A series of recent cases before the Court of Appeal has engaged with important principles relevant to the application of section 5L, including *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65 ('*Menz*'), *Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152 ('*Singh*'), *Carter v Hastings River Greyhound Racing Club* [2020] NSWCA 185 ('*Carter*') and *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 ('*Tapp*').

65 A preliminary question in the application of s 5L is of course whether or not a plaintiff was engaged in a "dangerous recreational activity". "Recreational activity" is defined in s 5K to include:

> (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.

A "dangerous recreational activity" is defined as a recreational activity involving a significant risk of physical harm.

66 In *Goode v Angland* [2017] NSWCA 311 ('*Goode*'), Leeming JA (Beazley P and Meagher JA agreeing) held that the first limb – "any sport" – does not distinguish between recreational and professional participation, so that professional horseracing fell within the definition of a recreational activity in s 5K (at [211]). An argument that "any sport" was not intended to include sporting activities of a non-recreational nature was rejected. Leeming JA described the definition as comprised of three limbs, triply disjunctive such that if any of the three limbs going to characterisation, purpose or location is satisfied the definition will be met (at [190], [193]). The purpose of the definition is to *expand* the scope of the ordinary meaning of the words "recreational activity" beyond activities with a recreational purpose.

67 This approach to the definition of "recreational activity" was recently challenged in *Singh*, again in relation to professional horseracing. The effect of the definition in expanding the ordinary meaning of the words was reiterated by Basten JA (at [19]), with some consideration given to the problematic nature of the alternative argument that the defined term should colour the meaning to be given to the definition which follows it (at [32]). While it was again accepted that the purpose of the definition in s 5K is to expand the ordinary meaning of the words used, so as to encompass sporting activities engaged in professionally,

Leeming JA noted that there is an important question of statutory construction that is not satisfactorily resolved by the application of a firm rule to the effect that a defined term can never be used to shed light on the meaning of the definition that follows (at [101]-[130]).

68 More recently a similar challenge to the reasoning in *Goode*, but in relation to the third limb of the definition – the "location" limb – was put forward in *Carter*. In that case the Appellant helped out at a greyhound racing club by operating a catching pen gate on the race track, which required him to allow a lure to pass between the inside rail and the gate before closing the gate so as to divert the dogs into a catching pen. He was injured when he was hit in the leg by the lure, which travels at around 70 kilometres per hour. The Court of Appeal overturned the primary judge's finding that the appellant was engaged in a recreational activity under the second, purposive limb of the definition (an activity engaged in for enjoyment, relaxation or leisure) (Simpson AJA at [50]-[51]) but upheld the finding that he was engaged in an activity satisfying the requirements of the third, location limb – that is, an activity or pursuit undertaken in a place where people ordinarily engage (i) in sport (the first limb), or (ii) in any pursuit or activity for enjoyment, relaxation or leisure (the second limb) (Simpson AJA at [75]-[101]).

69 The appellant argued that a literal application of the third limb would give an "artificial" meaning to the term "recreational activity", and that the definition should instead be construed by reference to the ordinary meaning of the defined term and limited to activities or pursuits themselves of a recreational nature. There was, however, no justification for modifying the express words of the legislative provision, and the reasoning in *Goode* and *Singh* was extended to the third limb of the definition. While the resulting definition of recreational activity is extremely broad, it is nonetheless constrained in terms of its effect, for the purposes of s 5L, by the requirement that the recreational activity engaged in be a dangerous one and that the risk that materialises be obvious (Simpson AJA at [63]-[64]).

70 The significant risk of physical harm that makes a recreational activity a dangerous recreational activity has been described as one that is more than a

trivial risk but need not rise as high as a risk that is *likely* to materialise (*Fallas v Mourlas* [2006] NSWCA 32, Ipp JA at [18]). In determining whether an activity carries a significant risk of physical harm, the activity should be identified with a degree of specificity, as in *Fallas v Mourlas* where Ipp JA rejected a characterisation of the activity as simply "shooting kangaroos by spotlight" in favour of a more precise description of "sitting in the vehicle, holding the spotlight for the shooters outside, on the basis that at various times one or more of the shooters might leave or enter the vehicle with firearms that might or might not be loaded" (Ipp JA at [75]). At the same time, as noted more recently in *Menz*, there should not be an artificially fine distinction between different aspects of an activity. In *Menz*, the dangerous recreational activity of competitive horse-riding also included necessary preliminaries such as the warm-up, though it was noted that even if the warm-up could be treated as a separate activity, it would also still likely be considered a dangerous recreational activity (Leeming JA at [81]-[88]).

71 Once it has been established that a plaintiff was engaged in a dangerous recreational activity as defined in s 5K, bearing in mind the breadth of that definition as discussed in *Goode*, *Singh* and *Carter* and the degree of particularity with which it is appropriate to characterise the activity, the more difficult question then arises. While I have already mentioned the definition of "obvious risk" in section 5F, the difficulties that arise are unrelated to the terms of that definition. Instead, they arise from the need to appropriately characterise the risk that materialised for the purposes of s 5L. This is the main issue arising in the aforementioned series of cases addressing s 5L. As noted by McCallum JA in *Tapp*, there is a "natural contest" between plaintiffs and defendants on this issue (at [148]). This contest reflects the fact, explained by HLA Hart, that "for any account descriptive of any thing or event or state of affairs, it is always possible to substitute either a more specific of a more general description" (HLA Hart, "Dias and Hughes on Jurisprudence" 4 J Soc of Pub Teachers of Law (NS 1958), 144-5, cited in *Menz* at [47]). In the case of s 5L, the plaintiff will naturally seek to advance a more specific characterisation of the risk of harm that materialised, in the hope that the harm so characterised will not appear to be an obvious one; the defendant will seek to advance a more general

characterisation with the opposite goal in mind. To understand how this issue is to be approached, it will be useful to consider recent cases on the subject in detail (and chronologically).

Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65

72 In *Menz* the plaintiff was injured while warming up her horse for the Wagga Wagga Show. When some children, left unattended beside the warm-up area, made contact with a metal sign on the fence, the resulting loud noise spooked the appellant's horse, which fell with her in the saddle. Leeming JA (Payne and White JJA agreeing) began by stating a number of general propositions relevant to the characterisation of risk for the purposes of s 5L:

a. The 'obvious risk' is in principle to be specified with a degree of generality (at [70]);

b. The specification of the obvious risk must be sufficiently precise as to capture the harm which resulted from its materialisation on the facts of a particular case (a greater degree of specificity will be required is the risk is so generally expressed that it mischaracterises the nature of what occurred) (at [71]);

c. A combination of foresight and hindsight is required in the formulation of the risk: foresight in considering the obviousness of a risk from the perspective of the plaintiff, and hindsight in considering the necessary causal connection between the risk relied upon and the harm in fact suffered by the plaintiff (at [72]);

d. The causal connection required by s 5L between the risk in question and the harm suffered is a close one, as the section is directed to risks of which the plaintiff ought reasonably to have known (at [73]);

e. The proper characterisation will depend on the facts of each case and the reasons for the alleged obviousness of the risk (at [74]).

73 In applying these principles it is for a defendant to propose a characterisation of the risk, alleged to have been obvious, the materialisation of which resulted in

the plaintiff's injury. For the plaintiff, "it will not be a sufficient answer to a contention that a state of affairs bears a particular character [in this case that of an obvious risk] to say that it bears a different character" (Leeming JA at [67]). If a plaintiff seeks to advance an alternative characterisation, it must be more than a more precise characterisation of the risk; it must point to elements that in some way falsify or render inappropriate the defendant's characterisation (at [68]). In advancing an alternative characterisation, an onus is placed on the plaintiff to demonstrate that the defendant's characterisation of the risk is in some way inappropriate. If a risk can be identified by a defendant that (i) is obvious and (ii) does not misrepresent or fail to capture what actually occurred, then s 5L will apply so as to defeat liability, regardless of any potential alternative characterisations put forward by a plaintiff.

74 An example of a characterisation that fails to capture or somehow misrepresents what occurred was drawn by Leeming JA from *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. In that case an eleven-year-old girl was injured during a guided quad bike excursion. The instructor had driven at excessive speed, forcing participants following him to drive faster than was safe for their level of experience. It was held that a characterisation of the risk as the general risk of injury if the plaintiff or another participant were to lose control of a quad bike failed to capture an essential element of the sequence of events resulting in injury, namely the instructor's dictation of an excessive speed (*Alameddine* at [40], cited in *Menz* at 64]). It was acknowledged in *Menz* (at [79]) that the task of appropriately characterising risk for the purposes of s 5L will give rise to difficult cases, as has been made clear by subsequent cases.

Singh bhnf Ambu Kanwar v Lynch [2020] NSWCA 152

75 Similar difficult questions arose in *Singh*. In that case, a bench of five judges was convened to hear the challenge to *Goode* mentioned earlier (in relation to the definition of a "recreational activity"). While all members of the Court agreed on the principles laid out in *Menz* (Basten JA at [49], Leeming JA at 136], Payne JA at 150, McCallum JA and Simpson AJA at [195]), the Court was split 3:2 in the application of those principles (Basten, Leeming and Payne JJA in

the majority, McCallum JA and Simpson AJA in dissent) with respect to the degree of particularity required to fairly characterise the risk in question.

76 The appellant in *Singh*, a professional jockey, had been injured when the respondent rode his horse so as to push the horse alongside him into the path of the appellant's horse (in breach of the Australian Rules of Racing) causing that horse to fall. The primary judge had characterised the risk as that of "the plaintiff's mount falling, bringing him to the ground and causing him injury" and concluded that that risk was an obvious risk of professional horse racing. The appellant contended that the appropriate characterisation of the risk was "that another rider would deliberately ride [his] horse so as to cause abrupt, reckless or deliberate contact with an adjoining horse", contrary to the rules of racing.

77 The majority held that the risk which materialised, resulting in the plaintiff's injuries, was an obvious one. They rejected fine distinctions between different species of unsafe riding, considering that breaches of the rules of racing were likely to be common in circumstances where jockeys were obliged to ride competitively (at [66], [136], [142]). Specifically, Basten JA observed that the *prospective* assessment of the obviousness of the risk should not reflect such fine distinctions (at [66]), presumably reflecting a view that a reasonable person in the position of the plaintiff would not have been expected to make such decisions when assessing the risks potentially involved in the activity. Whilst the characterisation of the risk in question needs to capture relevant elements of the events that led to the plaintiff's injury (being a fall caused by contact with another horse, which in turn resulted from the negligent riding of another jockey) for the majority "the precise degree of negligence was not material" (Basten JA at [68]).

78 The minority emphasised the need to have regard to the precise mechanism by which an injury was caused, which in this case, on the dissenting view, required attention to the nature of the riding that caused the appellant's horse to fall. For McCallum JA and Simpson AJA, it was necessary to more precisely describe the nature of the respondent's riding, which they described as "deliberately directing his horse to push sideways … against another horse so abruptly as to move that horse off her line of running and into the line of running of a third

horse" (at [212]). The question was whether it would have been obvious to a reasonable person in the position of the appellant that another professional jockey would ride his horse in the manner so described. In their view, while a jockey would have to expect a certain degree of careless riding on the part of other jockeys (as established by the evidence of such infractions of the rules of racing regularly occurring), a distinction had to be drawn between careless riding (an obvious risk) and a deliberate act like that of the respondent, grossly negligent as to the safety of the appellant, which would not have been obvious (at [225]-[228]).

79 As noted, no issue was taken in *Singh* with the reasoning in *Menz*. The disagreement between the majority and the minority as to the appropriate characterisation of the risk can be seen as a manifestation of the kind of hard case alluded to in *Menz*. In *Singh,* the majority was of the view that the characterisation of the risk as the risk of a fall from another jockey's careless riding did not mischaracterise what occurred; the minority was of the view that it did. Perhaps another way of framing this disagreement is in terms of whether a reasonable person in the position of the plaintiff would have considered, prospectively, that the more narrowly characterised risk was included within the more general, obvious risk put forward by the defendant. In any case the disagreement is one going to a question of fact, not principle.

80 An application for special leave to appeal from this decision to the High Court has been refused.

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263

81 The same difficult questions of characterisation arose in *Tapp*. In that case the plaintiff, a nineteen year old, was participating in a campdrafting competition – an event where participants, on horseback, herd a steer or heifer around a course. She lost control of her horse when it was unable to find its footing on the surface of the arena and fell. The plaintiff's allegations of negligence concerned the deterioration of the surface and the failure of the event

organisers to halt the event or repair the surface. As in *Singh*, the Court was divided with respect to the application of s 5L.

82 Payne and Basten JJA both found that the appellant had failed to adequately identify the way in which the surface of the arena was alleged to have deteriorated, a point that was critical to the formulation of the risk (Payne JA at [69]). In the event that there was no such deterioration, the formulation of the risk as the risk of a horse falling in the course of the campdrafting competition would have been both appropriate and obvious. In the event that there was such deterioration, they would have found a formulation of the risk as "the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface" to have also been appropriate and obvious (at [77]-[78]). On either formulation, s 5L was engaged and the primary judge's decision was upheld.

83 McCallum JA, in dissent, elaborated on the degree of specificity required in order not to mischaracterise the events of a particular case. The risk that materialised would be too broadly characterised if it would not allow the court to determine whether or not the risk in question was foreseeable by the organisers, capable of attracting liability (as distinct, for example, from an inherent risk of the activity) and obvious to a prospective participant (at [162]). Her Honour held that the primary judge's formulation of the risk, as the risk of a horse falling in the course of the campdrafting competition, was at such a level of generality that it failed to identify the alleged negligent conduct relied upon by the plaintiff (at [164]).

84 Ultimately McCallum JA agreed with Payne and Basten JJA's alternative formulation of the risk (the formulation that referred to the deterioration of the arena surface as the cause of the horse's fall) (at [166]) but disagreed as to whether the risk, so framed, was an obvious one. McCallum JA found that a reasonable person in the plaintiff's position and of the plaintiff's age and experience would likely assume, if they turned their mind to the question of the suitability of the surface at all, that competent organisers would have made an appropriate decision concerning the safe continuation of the event (at [185]).