

NSW Court of Appeal confirms 'dangerous recreational activity' defence under CLA available in context of professional sports

Goode v Angland [2017] NSWCA 311

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Summary

In *Goode v Angland*, the Court of Appeal considered the application of section 5L *Civil Liability Act 2002* (NSW) (CLA) to a personal injury claim by a professional jockey injured during a horse race.

The Court held that professional horseracing is a 'recreational activity' for the purposes of section 5K CLA, enabling the defendant to successfully argue that the statutory defence of 'obvious risk' of a 'dangerous recreational activity' applied to defeat the claim.

Facts

- Mr Goode, a professional jockey, was injured when his horse fell during a race at Queanbeyan Racecourse on 29 June 2009.
- Mr Goode brought proceedings against fellow jockey Mr Angland, alleging the fall was caused by Mr Angland's negligence in veering or changing direction during the race, when it was unsafe and unreasonable to do so.

Statutory defence under Civil Liability Act

Mr Angland denied liability and sought to rely on section 5L CLA by way of defence to the whole of the claim.

Section 5L CLA provides that there is no liability in negligence for harm suffered as a result of the materialisation of an 'obvious risk' of a 'dangerous recreational activity'.

The term 'dangerous recreational activity' is defined in section 5K CLA as 'a recreational activity that involves a significant risk of physical harm'.

'Recreational activity' is, in turn, defined as including:

- (a) any sport (whether or not the sport is an organised activity), or
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, or
- (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.

NSW Supreme Court

Mr Goode was unsuccessful at first instance, with the Supreme Court finding that the defence of 'obvious risk' of a 'dangerous recreational activity' under section 5L *CLA* was established and this operated to defeat the claim in its entirety.

NSW Court of Appeal

The Court of Appeal unanimously upheld the Supreme Court's decision on the application of section 5L *CLA*.

The central issue in dispute was whether professional horseracing fell within the definition of a 'recreational activity' under section 5K *CLA*, and more specifically, the scope of the first limb of the definition; '*any sport (whether or not the sport is an organised activity)*'.

The Court of Appeal rejected Mr Goode's argument that the definition only extends to sports engaged in for recreational, as opposed to professional, purposes.

The Court of Appeal concluded that as a matter of statutory construction, the phrase '*any sport (whether or not the sport is an organised activity)*' does not require that a distinction be drawn between sports engaged in as a recreational pursuit and professional sports¹.

Leeming JA observed that this limb of the definition was concerned with the nature or character of the sport not the purpose for which it was being engaged in.

The Court of Appeal had regard to a 2011 Tasmanian Supreme Court decision², in which it had been held that professional horseracing was not a 'recreational activity' for the purposes of a similarly worded provision, and expressly disagreed with the Court's reasoning in reaching that conclusion.

Implications

This Court of Appeal decision has effectively expanded the scope of the 'obvious risk' defence for dangerous recreational activities³ to encompass professional, and not merely amateur, sports.

The impact of the Court's interpretation of this *CLA* provision extends beyond the horseracing industry, to professional sports clubs, amateur sporting associations and players of contact sports and sports that may be considered to involve a high risk of injury. This may include the various football codes, adventure and snow sports.

This decision will be a welcome development for insurers of such sporting organisations. Defendants should now be more easily able to rely on the statutory defence of 'obvious risk' of a 'dangerous recreational activity'⁴ as a complete defence to a negligence claim under the *CLA* in appropriate cases where injuries were sustained during a professional sporting activity or an amateur sports contest in which prize money is offered.

¹ Leeming JA at 210

² *Dodge v Snell* [2011] TASSC 19

³ Pursuant to section 5L *Civil Liability Act 2002* (NSW)

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