Recreational activities uncoloured under the Civil Liability Act: They include professional sports

***Goode v Angland* [2016] NSWSC 1014**

26 July 2016

Charles Simon (Partner) and Jacqueline Grace (Senior Associate) consider the NSW Supreme Court decision of ***Goode v Angland* [2016] NSWSC 1014** (***Goode***), which provides the insurance and sporting industry a ray of sunshine against liability where a person voluntarily engages in sport that is deemed to carry with it a significant risk of physical harm. The decision provides more comfort to insurers of professional sporting clubs seeking to rely on the dangerous recreational activity/obvious risk defences available in NSW under the **Civil Liability Act (NSW) 2005** (**the CLA**).

IMPLICATIONS

Since the decision in ***Dodge v Snell* [2011] TASSC 19** (**Dodge**), debate has raged as to whether a recreational activity under the CLA extended to include professional sport. In ***Dodge***, the Tasmanian Supreme Court concluded that "*recreational activity*" did not include professional sports. That conclusion was arrived at notwithstanding that the definition of recreational activity expressly includes "*any sport*", because the concept relied on "*enjoyment, relaxation or leisure*" and it was assumed that the legislature could not have intended to deprive employees of rights to sue their employers.

Refreshingly, the decision in ***Goode*** gives a literal meaning to "*any sport*" and finds that a "*recreational activity"* for the purpose of the CLA does not discriminate between a sport played for "*enjoyment, relaxation or leisure*" and a professional sport. The finding is of importance to insurers of sporting clubs and sportspersons because:

- there is scope to now find that, where a court makes a factual determination that the sport involves a significant risk of physical harm, a professional sport will be considered a dangerous recreational activity; and

- where the harm suffered is as a result of the materialisation of an obvious risk of a dangerous recreational activity, section 5L guards against a finding in negligence.

While the decision may yet be subject to an appeal (the time for lodgement has not yet lapsed), it remains timely for insurers in circumstances where governing bodies of sport are seeing a growing trend of claims from former players arising from concussive injuries suffered from their participation in sport.

BACKGROUND

The decision involved a claim for damages brought by one professional jockey, Mr Goode, against another, Mr Angland, arising from a fall suffered by Mr Goode in a horse race on 29 June 2009 at Queanbeyan Racecourse.

Shortly after the race started, Mr Goode was thrown from his horse and sustained catastrophic injuries. Mr Goode alleged that his injuries, loss and damage were caused by Mr Angland's negligence or breach of duty by riding in a manner which caused interference to him and his horse.

An argument was advanced by Mr Goode that Mr Angland's conduct in riding his horse, caused or contributed to his fall because he shifted his horse close to Mr Goode's horse, causing the horse to throw him. Notably, Mr Goode gave evidence that he called out to Mr Angland just prior to Mr Angland moving his into the gap near Mr Goode's mount. Competing evidence relied on by Mr Angland was that he did not hear Mr Goode call out, and that Mr Goode's horse was *"over-racing"* which was evident in video footage of the race.

Whilst not binding on the Supreme Court, the racing stewards had previously formed the view that the fall could not be attributed to a racing error on Mr Goode's part, nor to any negligence in the riding of Mr Angland.

FINDINGS

Harrison J, held:

- factually, on the basis of all of the evidence, and his detailed review of the video footage of the race, that Mr Angland did not ride his horse in a way that caused or contributed to Mr Goode's fall;

- in any event, when considering the potential defence under section.5L of the CLA (that there is no liability where the risk of harm is as a result of a materialisation of an obvious risk of a dangerous recreational activity) that:

    - while neither party sought to argue that horse riding in general or professional horseracing did not each carry to varying degrees a risk of injury or even death from a fall or that such risks were not obvious, his Honour nevertheless stated: "*Both the risk that a rider might fall from a horse and the risk that serious injury might be caused by the fall are obvious risks of riding a horse in almost any situation*".

    - in the same sense, while neither party sought to argue that horse riding in general or professional horseracing were not also dangerous, his Honour observed that "…*As much flows from a recognition of the magnitude of the risk of falling or being thrown from a horse, seen as a function of the likelihood of the occurrence of the risk and the magnitude of the consequences if the risk eventuated*".

    - the parties focus was on the concept of defining a recreational activity for the purpose of the CLA. Unlike the Tasmanian Supreme Court in ***Dodge***, which sought to limit the term "recreational activity" to sport pursued for enjoyment, relaxation and leisure, his Honour found:

        > "*For better or worse, once it is accepted that horseracing is a sport, a matter about which minds might legitimately differ, but which was never put in issue before me, s 5K(a) of the Act seems to be unanswerable.* ***The definition of recreational activity in a way that includes "any sport" leaves no room for an argument that relevantly enlivens the distinction between sport that is undertaken or pursued for enjoyment, relaxation or leisure and sport that is undertaken or pursued as a profession or occupation****."* (our emphasis)

- Mr Angland was entitled to rely on section 5L of the CLA as a defence to the claim because Mr Goode's harm was suffered as a result of a materialisation of an obvious risk of a dangerous recreational activity.

For further information please contact: **www.wottonkearney.com.au**

Charles Simon
PARTNER
Sydney Office
T: +61 2 8273 9911
charles.simon@wottonkearney.com.au

Jacqueline Grace
SENIOR ASSOCIATE
Sydney Office
T: +61 2 8273 9931
jacqueline.grace@wottonkearney.com.au