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Client Update

Shaping the future of insurance law

When recreation means more – NSW Court of Appeal reinforces broad recreational activity definition

Carter v Hastings River Greyhound Racing Club **[2020] NSWCA 185**

25 AUGUST 2020

AT A GLANCE

- With *Carter*, the NSW Court of Appeal has again confirmed 'recreational activities' do not need to be 'recreational' in the ordinary meaning of the term to attract the statutory defences under the Civil Liability Act 2002 (NSW) (the Act).
- The Court's decision also reinforced the position that being a volunteer does not affect a person's responsibility to take care of their own safety.
- This decision adds further comfort for insurers who cover recreational activities that carry a significant risk of harm.

BACKGROUND

The appellant was seriously injured in an incident that occurred on 25 April 2015 at the greyhound racing track in Wauchope, which was controlled and managed by the respondent, the Hastings River Greyhound Racing Club (the Club).

The appellant was voluntarily assisting the Club by operating a 'catching pen gate', which required him to let the lure pass through a gap between the inside rail and the gate, and then to close the gate to divert the dogs into a catching pen. He alleged that during the race he was distracted by a dog that had fallen, causing him to be struck in the leg by the lure, which was travelling at around 70 kilometres per hour.

AT FIRST INSTANCE

The appellant commenced proceedings in the Supreme Court of NSW alleging that the Club owed him a duty to take reasonable care to avoid a risk of injury to him as an entrant or volunteer.

On 27 June 2019, the primary judge, Harrison AsJ, found for the Club confirming that in operating the catching pen gate the appellant was engaged in a dangerous recreational activity and that the injury was due to an obvious risk materialising. Her Honour added that the appellant bore 50% of the responsibility for his own injuries.

THE APPEAL

On appeal, the appellant challenged:

1. the finding that in operating the catching pen gate he engaged in a dangerous recreational activity,
2. the finding that the Club did not breach its duty of care and that was not responsible for his injuries, and
3. the apportionment of contributory negligence at 50%.

The appeal, which was dismissed, was heard in the NSW Court of Appeal before Gleeson JA, White JA and Simpson AJA.

The dangerous recreational activity argument

The key issue before the Court was whether the activity engaged by the appellant was, under section 5K, a recreational activity. 'Recreational activity' is defined to include: (a) any sport; (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.

There was little doubt that the activity engaged in by the appellant was not a sport.

The appellant argued that he engaged in the activity as a volunteer and there was no evidence that he did so for "enjoyment, relaxation or leisure". The Court accepted the appellant's argument and found that he "may have derived some satisfaction from performing a service for the Club but [that] does not equate to pursuing that activity with the goal of deriving enjoyment or relaxation for leisure". Accordingly, the Court found paragraph (b) did not apply.

In understanding the interpretation and context of paragraph (c), the Court indicated that there is little doubt the appellant's activity fell within the literal meaning of the definition. The appellant argued that the literal interpretation gives an artificial meaning to the word 'recreational' or to the concept of 'recreational activity'. He further argued, that if applied literally, section 5L has a potentially unacceptably wide operation with unintended consequences. This argument was rejected by the primary judge.

Considering the purpose of the Act, the Court found that there is no satisfactory reason to depart from the literal meaning of the words in paragraph (c) or for reading those words in a modified way. It held that the effect of modifying the construction of the words would, in effect, make paragraphs (b) and (c) redundant.

The Court found operating a catch pen gate fell within the definition of "recreational activity" as contemplated by the Act. As the activity carried a significant risk of harm, it followed that it was a dangerous recreational activity that triggered the statutory protections under the Act.

The appellant also placed a heavy emphasis on the fact that he was performing his role as a volunteer and that paragraph (c) was not intended to apply to volunteers. This argument was rejected by the Court.

The duty of care argument

The Court found there was no doubt that the Club owed the appellant a duty of care. The primary judge also found that the risk of injury was foreseeable and not insignificant but that there was no breach of duty by the Club. The Court accepted the primary judge's conclusions confirming that "it is difficult to contemplate what more the Club might have done, by way of training or instruction…" to not stand between the gate and the inside railing so that he was not in the way of the lure, as "to state the proposition is to state the obvious."

> **The decision again reinforces that recreational activities can include activities that are not 'recreational' in the ordinary meaning of the term.**

The contributory negligence argument

The appellant argued that he was asked as a volunteer to undertake the task and was provided with no warning, training, instruction or supervision.

The Court confirmed the decision in *Hrybunyuk and Mzaur* [2004] NSWCA 374, which found that being a volunteer does not affect a person's responsibility to take care of their own safety. The fact that the appellant was distracted emphasised his own level of responsibility. The primary judge's apportionment of 50% for contributory negligence was upheld.

IMPLICATIONS FOR INSURERS

With this decision, the Court of Appeal again reinforces that recreational activities can include activities that are not 'recreational' in the ordinary meaning of the term (see also our coverage of the recent decision of *Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152).

The decision should give further comfort to insurers who provide cover for recreational activities that carry a significant risk of harm. It clarifies that the statutory protections available under the Act apply to participants of a sport as well as to participants who are engaged in ancillary activities in places where people ordinarily engage in sport, or in any pursuit or activity for enjoyment, relaxation or leisure.

The Court also confirmed that no distinction should be made for someone participating in recreational activities in a voluntary capacity. The fact that a person is a volunteer does not affect their responsibility to take care of their own safety.

NEED TO KNOW MORE?

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