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Case Alert

Shaping the future of insurance law

NSW Court of Appeal addresses obvious risks in dangerous recreational activities

***Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152**

24 JULY 2020

AT A GLANCE

- This recent NSW Court of Appeal case addressed two key questions of interpretation regarding s. 5L of the *Civil Liability Act.*
- The Court reinforced that 'dangerous recreational activities' include professional sports that are not 'recreational' in the ordinary meaning of the term.
- The majority of the NSW Court of Appeal also found the obvious risks involved in horse racing include accidents caused by negligence, as well as deliberate and reckless wrongdoing on the part of another rider.
- The broad interpretation of s. 5L of the *Civil Liability Act* provides a level of comfort to insurers of potentially dangerous recreational activities.
- However, given the decision was split, the case may attract the interest of the High Court to give certainty.

BACKGROUND

The appellant, a professional jockey, was seriously injured in a horse fall during a race at Tamworth Racecourse in 2012. The fall was caused by another rider, the respondent, who (it was alleged) deliberately and recklessly rode his horse into another horse in the race, causing that horse to stumble and fall. The stumbling horse brought down the appellant's horse, causing injury.

AT FIRST INSTANCE

The appellant commenced proceedings against the respondent in the NSW Supreme Court. On 18 October 2019, his Honour Fagan J gave judgment for the respondent.

The key issue was section 5L of the *Civil Liability Act.* According to section 5L, a person (such as the respondent) is not liable in negligence for harm suffered by another person (such as the applicant) if it is the result of a materialisation of an obvious risk of a dangerous recreational activity.

The trial judge held that the plaintiff's injury was the result of the obvious risk materialising, which occurred in the course of a dangerous recreational activity. It was also held that the respondent's conduct was not negligent.

THE APPEAL

The appellant's appeal involved three questions:

1. Is horse racing a dangerous recreational activity?
2. If so, was the appellant's injury the "result of the materialisation of an obvious risk", which occurred in the course of a dangerous recreational activity?
3. Was the respondent's conduct negligent?

The matter was heard before the full Court of the NSW Court of Appeal, given the Court was asked to overturn one of its own decisions. The Court was comprised of Basten JA, Leeming JA, Payne JA, McCallum JA and Simpson AJA.

The NSW Court of Appeal held in the case of *Goode v Angland* [2017] NSWCA 311 that horse racing is a dangerous recreational activity. The appellant argued that *Goode* was wrongly decided on the basis that the jockey was engaged in a professional sport, not 'recreation'. This argument failed. All five judges agreed that while professional sports are not 'recreation' within the ordinary meaning of the term, professional sport is a 'recreational activity' as defined in the *Civil Liability Act*. The Act's definition includes 'any sports', which must include professional sports.

With the second question, the appellant argued that – even if horse racing was a dangerous recreational activity – the respondent's reckless conduct was not an obvious risk.

There was a split decision on this issue. Three of the judges held that the injury was the result of an obvious risk materialising. Basten JA held:

> "*A prospective assessment of the obviousness of a risk should not reflect fine distinctions differentiating aspects of unsafe riding. It is clear from a consideration of the Rules of Racing that breaches are likely to be common …"*

As Leeming JA noted, hundreds of jockeys are found guilty of careless riding each year.

In contrast, McCallum JA and Simpson AJA found that the accident was not due to an obvious risk materialising. Their Honours accepted that horse riding involves an obvious risk of injury of falling from a horse. However, they said that is not the end of the enquiry. There are a wide range of reasons a horse can be caused to stumble, involving risks of varying degrees of obviousness.

In this case, the reckless conduct by the respondent would not have been obvious to the appellant before the race. Their Honours cautioned against interpreting s. 5L in a way that would give "*licence to individuals to engage in conduct that involves risk of harm beyond that which may reasonably be expected*".

On the third question, all five judges concluded that the respondent's conduct was negligent. However, given the operation of s. 5L, this made no difference to the case's outcome.

IMPLICATIONS

The Court reinforced that dangerous recreational activities can include professional sports that are not 'recreational' in the ordinary meaning of the term. As there are greater statutory protections from liability for dangerous recreational activities, this should give comfort to insurers who provide cover for professional sporting activities that carry a significant risk of harm to participants.

This case highlights how broad the statutory protections are for such activities. The obvious risks involved in those activities can include accidents caused by negligence or carelessness, as well as breaches of participation rules under the sport and deliberate and reckless wrongdoing on the part of another participant. The majority of the Court of the Appeal has said that "fine distinctions" between these types of risk are irrelevant because a finding regarding the obviousness of a risk does not depend on the range of ways in which a risk may be characterised. Rather, it depends on whether the risk of a fall as a result of another jockey's careless riding, constituted by the deliberate contact with another horse and contrary to the rules of racing, was the materialisation of an obvious risk.

If the injury arises from risks in professional sport falling within the definition of dangerous recreational activity, including carelessness and breaches of the rules, s. 5L may be invoked. The broad interpretation of s. 5L of the *Civil Liability Act* relied on in this case provides a level of comfort to insurers who cover dangerous recreational activities, including professional sports.

As a final word of caution, the split decision on the question of obvious risk sounds a warning that an application seeking leave to appeal to the High Court may entice the High Court to weigh in on this issue.

Need to know more?

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