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Case Alert

Shaping the future of insurance law

NSW Court of Appeal requires actual subjective intent to cause injury to exclude operation of the CLA

***Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294**

23 NOVEMBER 2020

AT A GLANCE

- On 18 November 2020, the Court of Appeal handed down its decision in *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294.
- The Court upheld the primary judge's decision and found the Northern Lakes Rugby League Sport & Recreation Club Inc and its player, Brendan Fletcher, not liable to the Plaintiff.
- The case confirms, for the purposes of s.3B(1)(a) of the *Civil Liability Act 2002* (NSW), that recklessness is insufficient to engage s.3B(1)(a) and what is required is an actual, subjective intention to cause injury.
- This should give great comfort to insurers of sporting and recreational activities as attempts to circumvent the statutory defences available is now that extra bit harder!
- Wotton + Kearney acted for the Northern Lakes Rugby League Sport & Recreation Club Inc and Brendan Fletcher in their successful defence of the appeal proceedings.

THE FACTS:

The Claimant, Michael Dickson, was a member of the Berkeley Vale Panthers Club. On 24 April 2016, he was playing in a Reserve Grade Rugby League match in the Central Coast competition (conducted by the Central Coast Division Rugby League, a division of the NSW Country Rugby League) against the Northern Lakes Rugby League Sport & Recreation Club Inc (the Club). Brendan Fletcher was a member of the Club and played in the match on 24 April 2016.

Just before half time, Fletcher tackled the Claimant. The tackle ultimately resulted in what was described as a "*spear tackle*" of the Claimant, with Fletcher's shoulder landing on the Claimant's face as he completed the tackle. Fletcher's evidence was that he lost control at a certain point while effecting the tackle (the Incident). The Claimant sustained serious facial injuries including severe maxilla-facial and cranial fractures, which resulted in multiple surgeries. He continued to have ongoing disabilities, including double vision requiring corrective lenses. The Incident was captured on video. The footage was described as "*confronting*" viewing.

The Claimant sued:

- Fletcher on the basis that he was negligent in his execution of the tackle by committing a dangerous

throw and that he intended to cause injury (although not the injury ultimately sustained) to the Claimant, and

- the Club on the basis it was vicariously liable for the actions of Fletcher, as the 'employer' of Fletcher.

AT FIRST INSTANCE

At first instance, the Court dealt solely with the issue of liability.

The case was conducted on the basis that Fletcher's tackle fell outside s.3B(1)(a) of the *Civil Liability Act 2002* (NSW) (CLA) and in an effort to circumvent the statutory defences available under the CLA to both the Club and Fletcher.

S.3B(1)(a) of the CLA provides:

> *"(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows--*
>
> *(a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death …"*

It is well established that if the claim fell outside the CLA, the defences available regarding dangerous recreational activities (s.5L – the materialisation of an obvious risk of a dangerous recreational activity) would not apply. Conversely (and accepted by the Claimant), if the claim fell within the CLA, the Claimant's action would fail.

The Claimant relied on the expert evidence of Warren Ryan, a well-known commentator and former elite level coach. Notably, Mr Ryan had previously given expert (and indeed strikingly similar) opinion in the case of *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107; [2007] NSWCA 353.

In the first instance, the Court found in favour of the Club and Fletcher, finding that Fletcher had not intended to injure the Claimant and that his intention was to complete the tackle and ground the Claimant to prevent further forward play of the ball.

THE APPEAL

The Claimant appealed the first instance decision. The Claimant pleaded a number of grounds of appeal (14 in total), all of which were ultimately rejected by the Court.

The ultimate issue for the Court was whether Fletcher intended to cause injury to the Claimant so as to bring the claim within the ambit of s.3B(1)(a) of the CLA.

Fletcher and the Club conceded at the trial that the tackle effected by Fletcher was an intentional act, thereby satisfying the first limb of s.3B(1)(a). The issue then became whether Fletcher's tackle was *"done [by Fletcher] with intent to cause injury"*.

While the Court delivered three separate judgments, Simpson AJA provided the leading judgment with Basten JA and Whyte JA concurring.

Simpson AJA rejected the Claimant's submission that a person intends the natural and probable consequences of his or her conduct (*Palmer Bryun and Parker v Parsons* (2001) 208 CLR; [2001] HC 69), as that case was directed to questions of causation and remoteness. The presumption had not been applied where the tortfeasor's actual intention was in question and did not apply in the context of the exclusion to the CLA.

Having viewed the video footage, Simpson AJA found that the inevitable result of Fletcher's tackle was that some injury to the Claimant would occur, even if relatively minor. However, this did not equate to an intention to cause injury.

In Simpson AJA's view, the key to the appeal was the interpretation to be given to the phrase "*intent to cause injury"*. After reviewing several intermediate appellate Court decisions, she noted that no authoritative determination had been ascribed to this phrase in s.3B(1)(a).

Having rejected that intention can be presumed by the inevitability of injury, Her Honour accepted that intention may be proved by inference drawn from established facts. Proof of specific intent was required, and Simpson AJA confirmed that recklessness on the part of a tortfeasor does not equate to intention to injure and does not engage s.3B(1)(a). Consistently with Basten JA and Whyte JA, she held that: *"In my opinion, the words "intent to cause injury" … means at least actual, subjective intention to which the defendant has turned his or her mind. It does not include recklessness. It does not include imputed or presumed intention."*

Consistently with Her Honour, Basten JA found that to satisfy s3B(1)(a) of the CLA, a specific actual or subjective intention to achieve that consequence was required, relying on the decision of *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34. That decision defined "an actual, subjective intention" is one where the person's mind is directed to a particular result, achievement of that result being the purpose or design of the action. Even foresight that a particular action would have 'an inevitable or certain consequence', whilst strong evidence of an actual subjective intention, was not to be equated with such an intention".

Basten JA commented that "injury" referred to in s.3B(1)(a) was clearly intended to refer, if not to the injury that was the subject matter of the claim, then at least to an injury of that character that has resulted in compensable loss. S.3B(1)(a) was not engaged where the intent was to cause an injury that is not the subject of the claim. Fletcher fell on the Claimant's head and caused injury. There was no evidence he subjectively intended to do so or to cause the injuries that resulted from that act.

Whyte JA agreed with Basten JA that the intent to cause injury is an actual subjective intent stating that recklessness was insufficient to enliven s.3B(1)(a) of the CLA. The trial judge accepted Fletcher's evidence. To overturn the trial judge's credit findings as to Fletcher's evidence, the Court was required to find that the judge's acceptance of Fletcher's evidence was glaringly improbable or contrary to compelling inferences in line with *Fox v Percy* (2003) 214 CLR; [2003] HCA 22.

The Claimant submitted that the Court should find that Fletcher's description of his 'usual' tackling style, and his assertion regarding his intention, was inconsistent with the video footage of the tackle and Mr Ryan's opinion of the video footage. He argued that, on this basis, the required "intent to injure" in s.3B(1)(a) had been satisfied. This argument was rejected by Whyte JA who found there was no proper basis on which to set aside the trial judge's findings on Fletcher's credibility. The acceptance of Fletcher's evidence that he intended to put the Claimant on the ground forcefully, fell short of an intention to injure him.

Notably, Whyte JA held a different view to Basten JA regarding "injury" referred to in s3B(1)(a) of the CLA, finding that "it is arguable that the operation of s 3B(1)(a) is not excluded because the injury suffered is more severe than the tortfeasor intended to inflict."

It was unnecessary to decide whether intent to cause injury should be read as intent to cause 'unlawful' injury. Basten found this term to be imprecise and would result in difficulties in determining the scope of 'unlawful' in s.3B(1)(a) where the word 'unlawful' does not appear. In contrast, Whyte JA, considering the Parliamentary Explanatory Note for the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), left open whether s.3B(1)(a) should be restricted to 'unlawful' intentional acts.

IMPLICATIONS FOR INSURERS

The decision provides direction for the first time on how s.3B(1)(a) of the CLA is to be applied and confirms that actual subjective intention to injure is required to succeed. Such intention cannot be presumed but can be inferred.

Importantly, there is now clarity for insurers providing cover to sporting and recreational clubs and other instrumentalities/authorities subjected to intentional tort claims. Attempts to circumvent the statutory defences under the CLA by arguing an intent to cause injury are unlikely to succeed unless there is actual subjective intent on the part of the defendant.

The Court's interpretation of "*intent to injure*" is consistent with the purpose and objective of the operation of the CLA. Given the purpose of the CLA (to modify or reduce the availability of damages to participants who suffer harm in certain "obvious" and "dangerous" activities), any other meaning would allow many sports and recreational activities, intended to be subject to the CLA, to fall outside its ambit. The Court's emphatic decision should give comfort to insurers covering these activities.

Need to know more?

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