ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

CARTER V HASTINGS RIVER GREYHOUND RACING CLUB [2020] NSWCA 185

New South Wales Court of Appeal, Gleeson JA, White JA, Simpson AJA, 21 August 2020

A volunteer claims negligence by a Cub in the operation of a race meeting.

Key words: Volunteer, New South Wales, Liability, Recreational Activity, *Civil Liability Act*, Breach of Duty

1. The Hastings River Greyhound Racing Club (the Club) operated a greyhound racing track in the mid-north coast of New South Wales. Jason Carter (Carter) suffered a serious injury to his left leg in an incident that occurred at a greyhound racing track.

2. Since 2009 Carter owned and trained about ten dogs as a hobby and entered them in races conducted by the Club. He volunteered at the Club to assist in the operation of race meetings. He was operating a 'catching gate' for the first time and was hit in the leg by a fast travelling lure. He received no instruction on its operation.

3. He claimed that the Club was negligent as it owed him a duty to take reasonable care to avoid a risk of injury to him as an entrant or as a volunteer, and that that duty covered the "static condition" and the activities being carried out on the premises. The Club denied the allegations of negligence. It pleaded the common law defence of *volenti non fit injuria*[1] and invoked a number of specific provisions of the *Civil Liability Act 2002* (NSW) (CLA).

4. At first instance the Court found that the Club owed Carter a duty of care and that the risk of injury was foreseeable and not insignificant, but that Carter had failed to demonstrate any breach of duty. Further, in operating the catching gate, Carter was engaged in a dangerous recreational activity, and his injury resulted from the materialisation of an obvious risk of that activity. Accordingly, the Court upheld the defence under s 5L of the CLA:

    (1) A person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

    (2) This section applies whether or not the plaintiff was aware of the risk.

[1] A common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort or delict.

5. Section 5K of the CLA defines "recreational activity" inclusively as:

    (a) any sport (whether or not the sport is an organised activity), and

    (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.

6. The Court in the first hearing found that the operation of the gate was not a sport.

7. Carter appealed, arguing that the lower Court had conflated the broader recreational activity of greyhound racing, which he did as a hobby and for personal enjoyment, with the relevant alleged recreational activity– operating the catching pen gate. The Appeal Court accepted that the finding that the activity of operating the catching pen gate was a recreational activity within par (b) of s 5K was erroneous. However, did the activity of operating the catching pen gate come within par (c), as a "pursuit or activity engaged in at a place where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure."? The Court believed that such a construction was not supported by the context of the section and the mischief that was addressed.

8. Carter also challenged the finding that the activity of operating the catching pen gate was a dangerous recreational activity. On the evidence this was not upheld by the Appeal Court, as the lure travelled on a rail at more than 70 kph and presented an obvious danger to anybody standing in its way.

9. The appeal was dismissed unanimously.

IMPLICATIONS

The fact that the appellant was a volunteer did not affect his responsibility to take care for his own safety. The Court noted that (at [69]):

> It may be noted in passing (as mention was made of volunteer firefighters and lifesavers) that liability under the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (NSW) is also, by s 3B(1)(g), excluded from the operation of the Act. This has the effect of protecting volunteers, such as members of the Rural Fire Service, emergency service workers and rescue association workers (including surf lifesavers) from the restrictive provisions of the CLA.

At [93] the Court noted the purpose of the CLA, as expressed in the debate on the bill in the New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 23 October 2002 at 5765:

The bill will limit claims that arise from an inherent or obvious risk, or from the plaintiff's own contributory negligence. There will be a presumption that a person is aware of obvious risks, as was recommended in the Ipp Report. Similarly, there will be no duty to warn of an obvious risk, providing that no written law requires such a warning in a particular case. Nor will there be any liability for the obvious risks of particularly dangerous sports and other risky activities. The bill will also codify the current law so that there is no liability for the materialisation of inherent risks."

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/nsw/NSWCA/2020/185.html

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