Civil Liability Act 2002

This information sheet provides information relating to liability and legislation reforms for land owners, land managers and other providers of sporting or recreational activities (referred to as 'providers'), as well as sport and recreation participants.

In 2002, nationally agreed reforms to legislation were introduced in order to arrest the trend of increasing litigation for personal injury and address the public liability insurance crisis. In Tasmania, the relevant legislation is the Civil Liability Act 2002.

The reforms:

- place emphasis on personal responsibility of participants for actions resulting in their injury where they are participating in a 'dangerous recreational activity' with 'obvious risks'; and
- afford public authorities and land owners who allow recreation on their land greater protection from liability.

These changes have had a significant impact on claims that can be made by people who have been injured whilst participating in sporting or other recreational activities.

General principles

Providers of sporting or recreational activities may be liable for injuries suffered by participants where the actions of the provider have caused or contributed to the injuries. The law makes it clear that a provider does not breach the duty to take reasonable care unless:

- there was a foreseeable risk of harm – so that the provider knew or should reasonably have known that a risk of harm existed;
- the risk was not insignificant; and
- in the circumstances, a reasonable person would have taken precautions to avoid the risk, and in fact the provider did not take adequate precautions.

A person is not liable for harm suffered by another person where there is an "obvious risk of a dangerous recreational activity."

Obvious risks

The law also makes it harder for injured participants to succeed in negligence claims where the injury they have suffered results from a risk that is 'obvious'. An 'obvious risk' is defined in the legislation to mean a risk that would be obvious to a reasonable person in the circumstances, or that is patent or a matter of common knowledge. A risk can be obvious even though it has a low probability of occurring, or it

Current as at XXX 2019

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is not prominent, conspicuous or even physically observable.

Jaber v Rockdale City Council [2008] NSWCA 98 provides a useful definition of the term 'obvious risk'. The claimant in Jaber had dived from a wharf and struck his head on the sea bed, sustaining serious injuries to his spine. The term 'obvious risk' was defined by the Court to mean a risk that would be recognised by a reasonable person in the position of the participant using ordinary perception, intelligence and judgment. The question is not whether, in fact, the participant actually recognised the risk. The Court found that the risk of serious injury from diving into water of an unknown depth was an obvious one, and ruled that the council was not liable for the injuries suffered.

Under the Tasmanian legislation, there are two consequences of a risk being classified as obvious. First, a provider has no proactive duty to warn participants of this risk (unless the person has requested advice or information about the risk). Secondly, in any claim for a resulting injury, it is easier for a provider to argue that the participant voluntarily assumed the risk.

Definition of Recreational Activity

The definition of recreational activity in Section 19 of the Civil Liability Act 2002 (Tas) has recently been amended to remove the words 'any sport'. The definition of a recreational activity now reads '*recreational activity includes any pursuit or activity engaged in for enjoyment, relaxation or leisure*'.

The definition of recreational activity was amended to overcome a recent NSW Court of Appeal decision, *Goode v Angland* [2017] NSWCA 311. In *Goode*, the plaintiff was a professional horse rider who attempted to sue the defendant for veering into the plaintiff's path causing him to fall off his horse and sustain serious injuries. The Judges in *Goode* found that because 'any sport' was included in the definition of recreational activity, the defendant was not liable for the plaintiff's injuries as they were the result of an obvious risk of a dangerous recreational activity.

The relevant legislation which was considered in *Goode* is very similar to that in Tasmania. As such, the Tasmanian legislation has been amended to avoid a similar decision.

The effect of the recent amendments to the Tasmanian legislation means that if a professional sportsperson is injured as a result of an obvious risk, the defendant will no longer be immune from liability simply because the plaintiff was injured whilst participating in sport and recreation.

Definition of Dangerous

Whether an activity will be classified as a 'dangerous' recreational activity will depend on the facts of the case. As a general guide, dangerous recreational activities *may* include:

- Horse riding
- Off-road motor vehicle driving
- Spear fishing
- Spotlight shooting
- Rock climbing
- White water rafting
- Other extreme sports or activities with a significant degree of risk of physical harm to the participant

Waivers and exclusions of liability

In some circumstances, an activity provider that is a corporation can exclude, restrict or modify liability for death or personal injury by including an exclusion clause or waiver in a contract entered into with participants. Such clauses, however, need to be carefully worded so they are not later found to be invalid. Clauses

excluding 'all liability' for 'any loss' have generally been regarded by the Courts as insufficient to exclude negligence claims. However, a well worded clause may help to prove that all parties were aware of the risks and understood their responsibilities.

Public authorities and risk warnings

The provisions described above apply to all providers of sport and recreational activities, regardless of whether the provider is a private company, a public company or a public authority, or whether the activity is undertaken on public or private land.

For public authorities there are additional protections relating to the issuing of risk warnings. A public authority does not owe a duty of care to a person for any risks involved in recreational activities for which it has issued a risk warning. The risk warning can be issued either orally or in writing but must be given in a manner that is likely to result in people being warned of the risk before engaging in the activity. There are several exceptions to this exclusion of liability, however, including where the risk warning was not issued by the authority itself, where it was contradicted by any other representation made by the authority or where the injury resulted from a contravention of other laws.

Suggestions for participants

The legislation places emphasis on personal responsibility of participants for actions resulting in their injury where they are participating in a dangerous recreational activity with obvious risks. Participants should make themselves aware of the risks involved in sporting or recreational activities and take precautions to avoid any risks.

Suggestions for providers

Not all risks will be considered 'obvious' and not all activities 'dangerous', therefore it will always be prudent for providers of sport and recreational activities to take reasonable precautions and ensure appropriate levels of safety and maintenance.

However, the current laws certainly reduce liability for claims of negligence arising from activities engaged in for enjoyment, relaxation or leisure. There is no duty to proactively warn participants about obvious risks. It will be easier for a provider to defend a claim where a participant voluntarily assumed an obvious risk. In addition, including an exclusion clause in a contract signed by participants may assist in limiting liability if carefully worded.

A full copy of the Civil Liability Act 2002 can be viewed at: www.thelaw.tas.gov.au

This information sheet was prepared for the Crown in Right of Tasmania represented by Communities, Sport and Recreation, by Lander and Rogers Lawyers' Sport Business Group, who can be contacted on (03) 9269 9325.

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This information sheet was updated by the Department of Communities in November 2019.