GAME CHANGER? PROFESSIONAL SPORT AND DANGEROUS RECREATIONAL ACTIVITY: REVISITING THE RULING IN *DODGE V SNELL*

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This article examines whether professional athletes are liable for injury to opponents when engaged in 'dangerous recreational activity' under state civil liability legislation. It reviews two apparently conflicting Supreme Court judgments and concludes that the resolution of the distinctions in this important area may depend upon appeal to a higher court.

Introduction

Professional athletes and their sporting organisations may have thought themselves immune from claims of negligently harming an opponent in a sport classifiable as a 'dangerous recreational activity' under state civil liability legislation. The relief this legislation might have provided to tortfeasors was placed in doubt when, in 2011, Wood J of the Supreme Court of Tasmania in *Dodge v Snell*[1] found that the word 'recreational' did not apply to professional sport. In consequence, those who negligently harmed another in that context remained, *ceteris paribus*, exposed to civil liability.

The ruling of Wood J was itself under challenge when, in 2016 in *Goode v Angland*,[2] Harrison J, making specific reference to *Dodge v Snell*, determined that the dangerous recreational activity provisions of the *Civil Liability Act* (NSW) *did* apply to professional athletes.

Both *Dodge v Snell* and *Goode v Angland* concerned professional jockeys injured when their mounts fell to the track during race meetings in Tasmania and New South Wales respectively. Two Supreme Court judgments in different states, applying identical provisions to similar facts, delivered two incompatible judgments, leading to uncertainty for legal advisers, officials and athletes themselves. The reasoning of each judgment in respect to the dangerous recreational provisions is so fundamentally at odds that there can be no reconciliation.

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[1] *Dodge v Snell [*2011] TASSC 12.
[2] *Goode v Angland* [2016] NSWSC 1014.

On one level the ruling in *Dodge* was a welcome exception to legislation that appeared counter-intuitive; where the greater the danger, the less care a potential tortfeasor was required to take. Consequently, where the risk of serious injury is obvious to a person in the position of a potential victim, the victim bears the entire cost of the tortfeasor's negligence removing any financial incentive for the tortfeasor to take reasonable care. The consequence of *Goode v Angland*, should it, or a like case be upheld on appeal, is to again protect the negligent professional athlete from the consequences of his or her conduct. On a practical level, Mr Dodge suffered a number of injuries, including a non-catastrophic injury to the neck, and was awarded $772 895; whereas, Mr Goode suffered a catastrophic neck injury confining him to a wheelchair. It is reasonable to believe that in the decision to bring his case Mr Goode would have relied on the finding in *Dodge v Snell*. Liability did not, however, attach to the defendant, as Harrison J found Mr Goode's injuries were the 'result of the materialisation of an obvious risk of a dangerous recreational activity'.[3]

This article examines the legal and factual basis of the rulings in *Dodge v Snell* and *Goode v Angland* and considers the application of the dangerous recreational activity provisions. The article also considers in light of *Goode*, the potential application of the *Dodge v Snell* decision on forms of employment where sport is a mandated or encouraged activity.

Dangerous Recreational Activity Immunity

Under state civil liability legislation, a person is not liable for negligent harm resulting from the materialisation of an obvious risk of a 'dangerous recreational activity' engaged in by the victim.[4] For example, section 20 of the *Civil Liability Act 2002* (Tas) provides:

> (1) A person [the defendant] is not liable for a breach of duty of 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.

Section 19 of the *Civil Liability Act 2002* (Tas) defines 'dangerous recreational activity' and 'recreational activity, as follows:

> dangerous recreational activity means a recreational activity that involves a significant risk of physical harm;

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[3] Ibid [146]. It can be noted that Harrison J in *Goode*, although discussing the dangerous recreational activity provisions, found that the defendant Angland had not engaged in negligent conduct: at [130].

[4] *Civil Liability Act 2002* (NSW) ss 5F, 5K–5L; *Civil Liability Act 2003* (Qld) ss 13–14, 17–19; *Civil Liability Act 1936* (SA) ss 36–7; *Civil Liability Act 2002* (Tas) ss 15–16, 20; *Wrongs Act 1958* (Vic) ss 53–4; *Civil Liability Act 2002* (WA) ss 5F–5H.

> …
> recreational activity includes –
> (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.

'Obvious risk' is defined in section 15 of the *Civil Liability Act 2002* (Tas), as follows:

> (1) … an 'obvious risk' to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
> (2) Obvious risks include risks that are patent or a matter of common knowledge.

The word 'obvious' is not defined in any of the civil liability legislation, although it has been found and accepted to mean: 'that both the condition and the risk are apparent to and would be recognised by a reasonable man, in the position of the [plaintiff], exercising ordinary perception, intelligence and judgment.'[5]

Accordingly, an athlete tortfeasor seeking to avoid damages following his or her negligent conduct will accept responsibility but claim that as the harm was caused by the materialisation of an obvious risk of the dangerous recreational activity, he or she cannot be liable in law.

The DRA provisions, along with broad tort law reform, arose from the so-called 'insurance crises' of the early 2000s. Premier of New South Wales, Bob Carr, announced steps to 'restore sense and balance in the law of negligence'.[6] A 'Panel of Eminent Persons', the 'Ipp Committee', chaired by Justice David Ipp, was formed by the federal and state governments in 2002 to undertake a 'Principles-based Review of the Law of Negligence', and tasked to 'examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal death and injury.'[7] As discussed further below, according to Ipp JA, the exemption is based on the notion that 'a plaintiff who engages in a dangerous recreational activity in circumstances where the risks are obvious is to be regarded as having assumed those risks'.[8] The provision therefore offers to a tortfeasor a complete defence to a finding of negligence.[9]

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5 *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports ¶81-754, 65 892 at [161] (Tobias JA).
6 New South Wales, Parliamentary Debates, Legislative Assembly, 8 May 2002, 1764.
7 David Ipp et al, 'Review of the Law of Negligence Final Report' (Report, September 2002) ix ('Final Report').
8 Fallas v Mourlas (2006) 65 NSWLR 418, 426 [45], citing ibid 65–67 [4.20]–[4.24].
9 Final Report, above n 7, 65–6 [4.20]. For further discussion of state civil liability legislation as it applies to sport and recreation see David Thorpe, et al, *Sports Law* (Oxford University Press, 3rd ed, 2013) ch 5.

The Decision in *Dodge v Snell*

Mr Dodge, an experienced professional jockey, was forced to retire after being severely injured in a fall at the Elswick Racecourse in Tasmania. Mr Dodge's horse, Oceano, fell following a series of events which began when the defendant jockey, Mr Snell, in breach of a 'two-lengths policy', moved towards the rails into the path of two other horses ridden by jockeys Mr McCoull and Mr Bandy, compressing the field. One of these horses, Colonel Parker, shifted in front of Tal Jack. Both horses clipped hooves. Tal Jack fell onto the track. Oceano tripped over the stricken Tal Jack, catapulting Mr Dodge onto the track, and then landed on top of Mr Dodge. Evidence was given by Mr McCoull and Mr Bandy that they had called out to Snell warning him not to cross over.

To avoid breaching careless riding rules or interfering with the running of other horses a jockey is not permitted to move his or her horse into the path of another horse unless there are at least two horse lengths of space available in which to slot.[10] The rule takes into account that galloping horses extend their rear hooves backward beyond their rump, and their front legs forward from their shoulders.

Mr Dodge claimed Mr Snell was negligent in failing to keep a proper look out and in breaching the two-lengths policy. Mr Snell disputed Mr Dodge's claim on the basis that he did not breach his duty of care and, in the alternative, should it be found he had breached his duty he was not liable under the dangerous recreational activity provisions of the *Civil Liability Act 2002* (Tas).[11]

A stewards' inquiry found that Snell had breached rule 137 of the Australian Rules of Racing by engaging in 'careless riding', the least serious charge that can be brought under that rule, which states: '[a]ny rider may be punished if, in the opinion of the Stewards, … he is guilty of careless, reckless, improper, incompetent or foul riding'.[12] However, Woods J noted that the Steward's finding 'does not assist the plaintiff in proving that the defendant was negligent. It is no more than a finding by a tribunal on the evidence before it, that the defendant breached a rule of racing.'[13]

Justice Wood found that '[j]ockeys owe a duty of care to their fellow jockeys to take reasonable care to avoid creating a foreseeable risk of injury'.[14] Mr Snell had breached this duty by shifting in and exposing Mr Dodge and the jockeys riding on his inside, to a foreseeable and 'not insignificant' risk of injury because

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[10] The 'two-lengths policy' was described in *Dodge v Snell* [2011] TASSC 19, [36] as:
> the length of a horse standing still from the tip of its nose to its tail, about eight feet or 2.4 metres, and another length of daylight, so '2.4 metres times two'. Mr Gleeson went on to note that the definition is clear and people who are involved in racing do not have any difficulty in interpreting the two lengths policy during the running of a race.

[11] Snell also claimed that Dodge had voluntarily accepted the risk of breach of duty of care: ibid [4].
[12] Ibid [33].
[13] Ibid [67].
[14] Ibid [183].

> [i]n the circumstances that existed, including the number of horses racing in a tight bunch, there was a clear prospect that another horse or horses would be adversely affected if Mr McCoull's horse lost its rightful running. There was the risk that one of the horses affected by the manoeuvre would clip hooves with another horse. As a consequence of Mr Snell's actions of shifting inwards, with a clearance of no more than one and a quarter lengths, there was an obvious risk of a jockey falling and serious injuries resulting. Clearly, the fall and injuries of the type suffered by Mr Dodge were foreseeable. It was a risk of harm of which Mr Snell was both well aware, and of which he ought reasonably to have known.[15]

Although in breach of his duty of care to Mr Dodge, the defence of 'dangerous recreational activity' was argued by Mr Snell to relieve him of liability. Justice Wood determined that, 'there can be no question that the activity of horse racing qualifies as dangerous and satisfies the test in the Act of "a significant risk of physical harm to a person".'[16] The gravamen, however, was whether horse riding, as a professional sport, was to be classified as a 'recreational activity'.[17]

Section 20 of the *Civil Liability Act 2002* (Tas) requires that the activity the plaintiff is engaged in at the time of suffering harm be a 'recreational activity', as defined in section 19. Justice Wood found that the word 'recreational' does 'not extend to activities carried out in the course of employment or occupation.'[18] The rationale and methodology by which Wood J reached this conclusion is discussed below in conjunction with the relevant findings in *Goode v Angland.*

The Decision in *Goode v Angland*

On 29 June 2009, at the Queanbeyan Race Course the plaintiff, Mr Paul Leslie Goode, an English jockey, sustained a catastrophic injury resulting in paraplegia after a race fall. Mr Goode claimed that his injuries were caused by jockey Tye Angland's negligence, who is said to have breached his duty of care by riding in such a manner as to cause interference to him and his mount Shot of the Rails. He contended that the breach was due to Mr Angland's alleged steering inwards across his clear and rightful line on his mount Port Gallery, which was contrary to the 'two lengths' rule.[19] Mr Goode asserted that Shot of Rails' front legs clipped the heels of Port Gallery as it moved across. Mr Angland denied liability and submitted to the court that the 'two lengths' rule was no more than a guideline to which strict adherence was not required. The 'two lengths' rule being the position that no rider is permitted to shift or veer in front of another horse unless or until it is safe to do so, whether that safety margin is measured

15 Ibid [184].
16 Ibid [242].
17 The element 'obvious risk' was affirmed by Wood J: ibid [281].
18 Ibid [277].
19 Racing Australia, *Australian Rules of Racing* (at 1 May 2009) r 136(1) provides: '[i]f a horse … crosses another horse so as to interfere with that, or any other horse … such horse … may be disqualified from the race.'

by a distance of two lengths or some greater distance. He further argued that Mr Goode had to prove that Port Gallery moved an unreasonable distance laterally and in such a manner as to deprive him of a reasonable opportunity to adjust Shot of the Rails' position in response.

Justice Harrison concluded that Mr Angland was not negligent and did not breach his duty to Mr Goode. After careful and thorough review of the video evidence, his Honour concluded that the fall was caused by Mr Goode's horse running uncontrolled into the rear of Port Gallery, which resulted in the animals' legs coming into contact. Further, Harrison J found that Mr Goode was not in total control of his horse due to his horse 'over racing' immediately before the fall.[20]

Although finding Mr Angland was not negligent, Harrison J nonetheless addressed the argument that Mr Goode had been injured from the materialisation of an obvious risk of a dangerous recreational activity. His Honour found that the harm which befell Mr Goode was an 'obvious risk' of riding in a horse race. However, in contradistinction to the decision of Wood J in *Dodge v Snell*, Harrison J found that horse racing fell within the meaning of 'sport', stating:

> Sport can be defined as an activity involving physical exertion and skill in which an individual or team competes against another or others for entertainment or enjoyment and/or as a job. Horseracing is sometimes described as the sport of kings. I am unaware of any definition of sport that limits it to purely recreational or leisure activities or that excludes professional sport. [21]

Because the harm caused to Mr Goode was the result of a materialisation of an obvious risk of a dangerous recreational activity, section 5L of the *Civil Liability Act 2002* (NSW) would have served to 'exclude Mr Angland's liability'.[22]

The Methodologies of Interpretation

Matters of Contention

The decisions of Harrison J in *Goode v Angland* and Wood J in *Dodge v Snell* are at odds in respect to the application of the legislation to 'recreational activity'. In essence whether professional sport is to be included under the definition of 'recreational activity. Given the identical wording of the legislation, both cannot be correct.

Justice Harrison in referring to the decision of Wood J stated

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[20] *Goode v Angland* [2016] NSWSC 1014, [117]–[130].
[21] Ibid [145].
[22] Ibid [146].

> [I]n Dodge v Snell the Court concluded that 'recreational activity' did not include professional sports. That conclusion was arrived at notwithstanding that the definition of recreational activity expressly includes 'any sport' ... To the extent that it is necessary for me to do so, I respectfully disagree with the Tasmanian decision: having regard to their ordinary meaning, the words in the equivalent New South Wales provision do not permit of such a conclusion.[23]

As noted above, Wood J found that Mr Dodge, as a professional jockey carrying out his occupation, 'was not engaged in a recreational activity. The exclusion in s20, does not apply.'[24]

General Principles of Interpretation

Important to the present discussion, Wood J in *Dodge v Snell* noted an absence of precedent and juridical discussion regarding 'recreational activity', stating, 'I have not been referred to, or located in my research, any decisions from other jurisdictions which have examined the meaning of "recreational activity" in the context of a dispute about whether the activity engaged in was recreational in nature.'[25] There is, then, little guidance other than the words of the provision itself and the principles of statutory interpretation.

The process of statutory interpretation necessitates a base appreciation that, '[t]he Act means what it says, and, what is more important, it does not mean what it does not say.'[26]

Construing the meaning of statutory words, however, has been described as a matter of initial inquiry only such that, 'the natural and ordinary meaning of what is actually said in the Act must be the starting point.' One must then consider the adjuration to give to words 'the meaning that the legislature intended them to have.'[27]

In construing parliamentary intention there is a line to be drawn, at least as a first step in interpretation, between the words of the legislation itself and what individuals may say in regard to the legislation: 'legislation must be construed by reference to what Parliament has said through its enactment, as distinct from what others, including ministers, may wish or think Parliament intended. … the duty of courts is to give effect to that intention, but only as expressed in legislation.'[28]

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[23] Ibid [137] (citations omitted).
[24] *Dodge v Snell* [2011] TASSC 19, [278].
[25] Ibid [244].
[26] *Secretary of Department of Health v Harvey* (1990) 21 ALD 393, 393 (Meagher JA).
[27] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[28] *Harrison v Melhem* (2008) 72 NSWLR 380, 398–9 [159]–[160] (Mason P).

In *Alcan (NT) Alumina v Commissioner of Territory Revenue*, French CJ restated, in line with traditional approaches, that

> the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. … The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy.[29]

The Interpretative Process in *Dodge v Snell*

Justice Wood found, '[o]n the evidence before me there can be no question that the activity of horse racing qualifies as dangerous and satisfies the test in the Act of "a significant risk of physical harm"' to a person.[30] Nonetheless, although the activity was 'dangerous', the provision also requires that the danger be incurred whilst the plaintiff was engaged in a 'recreational activity'. The question before Wood J was whether professional sport was a 'recreational activity' for the purposes of the Act.

The plaintiff, Mr Dodge, submitted that the provisions of the *Civil Liability Act 2002* (Tas) relieving a tortfeasor of liability were not intended to include people who participate in 'recreational activities' in the course of their employment. In other words, as the jockeys were engaged in the activity of professional horse riding, the defendant is not to be relieved of liability for the harm caused through his act of negligence.[31] The defendant, Mr Snell, argued that it would be incongruous for a division to be made between professional or amateur 'sport' such that he was protected from liability because Mr Dodge was engaged in a dangerous 'recreational' activity.[32]

Justice Wood proposed several reasons to support his view that section 19 did not apply to professional employment in sport: first, the natural meaning of the words within their context; secondly, the purpose of the legislation supported such a construction; thirdly, the consequences visited on those employed in sport if such a construction was not adopted; and fourthly; the support of such a construction by extrinsic material.

Justice Wood reasoned that while it was clear that Parliament intended 'any sport' to fall within the definition of recreational activity, the natural and ordinary meaning of section 19 is informed by the word 'recreational': '[w]hen the provision is read as a whole it is apparent that the word "recreational" has a role in identifying and conveying the reach of the provision and the activities

[29] (2009) 238 CLR 27, 46 [47].
[30] *Dodge v Snell* [2011] TASSC 19, [242].
[31] See ibid [248].
[32] Ibid [246].

that fall within the provision. The 'word "recreational" imparts meaning to the word "sport".'[33]

Her Honour looked to the Oxford and Macquarie dictionaries to discern the meaning of the word 'recreational'. Several meanings were offered including 'by some pleasant occupation, pastime or amusement … An instance of this; a pleasurable exercise or employment' and 'refreshment by means of some pastime, agreeable exercise, … a pastime, diversion … or other resource affording relation and enjoyment.'[34] In this context, Wood J found a base supporting the opinion that the dangerous recreational activity provisions did not apply to professional sport, stating, '[r]ecreational activity is the antithesis of paid employment, and perhaps also toil and unremunerated labour. Duties such as housework or charity work would also … be excluded from the ordinary meaning of "recreational activity".[35]

According to her Honour the word 'recreational' determines the scope of all activities listed within section 19, be they 'any sport', 'any pursuit or activity engaged in for enjoyment, relaxation or leisure' or 'any 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.' As Wood J stated,

> The word 'recreational' is over-arching in its effect, and the purpose of the provision is to assist with the ambit of the phrase and the nature of activities covered by the provision within the parameter of being recreational in nature. The provision conveys a wide reach extending to any sport and, indeed, any other activity providing it is for enjoyment, relaxation or leisure. However, it is a given requirement that the activity must be "recreational" and the provision is designed to assist with the breadth of activities that are captured by the phrase.[36]
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> When effect is given to the word 'recreational', the ambit of the provision coincides with the ordinary meaning of "recreational activities". In considering the provision I can see no indication that it was intended by the legislature that the word 'recreational' was to be treated as superfluous or to be ignored.[37]

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33 Ibid [261].
34 Ibid [262]–[263].
35 Ibid [264].
36 Ibid [266].
37 Ibid [268].

The Use of Extrinsic Material

Justice Wood determined that as the *Civil Liability Act 2002* (Tas) did not intrude into claims of negligence in employment, there was no indication that Parliament intended section 19 to operate as an exception. Her Honour stated:

> The context of the provision and a consideration of the Act as a whole does not suggest that the exclusion regarding "dangerous recreational activities" was intended to extend to professional sportspeople carrying out their paid occupations. … The Act as a whole indicates an intention to avoid incursions into civil liability arising from employment (see s3B excluding civil liability against employers relating to personal injury).[38]

Her Honour found that Parliament could not have meant the Act to have the 'far-reaching' consequence of precluding an injured party claiming relief from a 'fellow sportsman' or 'their employer or others owing them a duty of care'.[39]

Justice Wood further relied upon the Final Report in respect of what it said about 'voluntary' participation in recreational activity and how that likely informed the intention of Parliament:

> 4.11 The Panel is of the view, however, that a principled reason can be given for treating recreational activities and recreational services as a special category for the purposes of personal injury law, regardless of whether the provider of the service is an NPO or a for-profit organisation. The reason is that people who participate in such activities often do so voluntarily and wholly or predominantly for self-regarding reasons.
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> 4.12 This is not always the case, of course. Members of schools and other institutions may be required to engage in sporting and other recreational activities. Also, people who participate in recreational activities in the course of their employment do not do so voluntarily in the relevant sense. The rationale for treating recreational services and activities as a special case does not apply to such persons. Therefore, any rule limiting liability in respect of recreational services should not apply to them.[40]

To support the inference that those parts of the Final Report influenced the intention of Parliament, Wood J made reference to the second reading speech of

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[38] Ibid [270].
[39] Ibid [272].
[40] Ibid [274] (emphasis added).

the Civil Liability Amendment Bill 2003 (Tas), which reinforced the notion that 'recreation' should be confined to 'voluntary' recreational activity as opposed to 'employment':

> The third category of reforms are those which emphasise the concept of personal responsibility and the need for each person to accept responsibility for his or her own actions, without always looking for someone else to blame for any misfortune suffered. This is particularly so in relation to recreational activities which a person voluntarily undertakes for their personal enjoyment.[41]

The word 'voluntary' is not written into the dangerous recreational activity provisions. Her Honour nonetheless formed the view that the second reading speech, 'reveals an intention to limit the activities to activities that are recreational, and presumably the voluntary nature of those activities was seen as implicit in the definition as drafted.'[42]

As Wood J had stated earlier in the judgment, the 'CL Act, s19, is not ambiguous'.[43] Her Honour's reference to the Final Report and the second reading speech, both of which are extrinsic material, rely, apparently, on section 8B (1)(c) of the *Acts Interpretation Act 1931* (Tas), which provides:

> (1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –
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> (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
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> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or
>
> (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

Although not referred to directly in her Honour's judgment, section 8B(1)(c) permits referral to extrinsic material to confirm whether the 'ordinary meaning' of a word or provision, in this case section 19, aligns with the court's initial denotation. Clearly there is no need for ambiguity or absurdity.

The modern approach to statutory interpretation as considered in *CIC Insurance Ltd v Bankstown Football Club Ltd*[44] implies that no limit is placed at common law on the kinds of extrinsic material to which reference may be made, although

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41 Ibid [274], quoting Tasmania, *Parliamentary Debates*, Legislative Council, 24 June 2003, 53 (emphasis added).
42 Ibid [276].
43 Ibid [271].
44 (1997) 187 CLR 384 at 408.

there are limits on the use that may be made of it. That case was taken as resolving the position that, at common law, reference to extrinsic material is permissible at first instance without identifying an ambiguity. This is, however, in conflict with *Saaed v Minister for Immigration and Citizenship*,[45] where French CJ, Gummow, Hayne, Crennan and Kiefel JJ said: 'it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.' The position, therefore, does remain uncertain.[46] In a later decision, Kiefel J observed relevantly that

> It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute.[47]

Much of course rests on whether the meaning of 'recreational' as proposed by Wood J, accords with the 'ordinary meaning' of that word. It is arguable that it does not.

In Sherritt Gordon Mines Ltd v Commissioner of Taxation, McInerney J considered the application of 'includes' in the passage: '"Business" includes a profession, trade, employment, vocation or calling, but does not include occupation as an employee.' Justice McInerney took the view that the use of 'includes' expands the meaning of the definition beyond the ordinary meaning, stating, '[i]n such case, the definition adds the meanings given in the definition clause to the natural meaning of the word. The added meaning is often one not otherwise within the natural meaning, so that the natural meaning of the word is to that extent amplified.'[48]

According to Pearce and Geddes the 'intention' of the use of the word 'includes' when used in a definitional provision is to 'enlarge the ordinary meaning of the word'.[49] In this sense the word to be defined retains its ordinary meaning, in addition to the meaning as defined in the statute. The application serves to support the analysis of Wood J in that 'sport' within the provision is referenced to the natural meaning of 'recreation'.

Nonetheless, the assumption is not conclusive and doubt may be expressed as to whether the legislature intended the words 'any sport' to exclude sport as a profession. To illustrate, in Dilworth v Commissioner of Stamps, the Privy

[45] (2010) 241 CLR 252, 265 [33].
[46] See, eg, Justice Susan Kenny, 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, Melbourne, 3 September 2013); Justice Nye Perram, 'Context and Complexity: Some Reflections by a New Judge' (Speech delivered at Challis Taxation Discussion Group, Sydney, 6 August 2010).
[47] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 412 [89].
[48] *Sherrit Gordon Mines Ltd v FCT* [1977] VR 342, 353.
[49] D C Pearce and R S Geddes, Statutory Interpretation in Australia (LexisNexis Butterworths, 7th ed, 2011) 248 [6.61].

Council had to determine whether the expression 'charitable devise or bequest' possessed an exhaustive meaning or a meaning that was expanded beyond the ordinary meaning. Lord Watson stated:

> But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.[50]

Using this characterisation, the words 'recreational activity' are defined by the words listed within the subsections, including 'any sport'. 'Sport' in this sense would take on an 'exhaustive meaning'. While 'recreational activity' may include activities additional to those listed in the subsections, it is, for the purposes of the provision, a definition that identifies 'sport' as a recreational activity. As such, an additional meaning to be given to the word 'recreational' does not impact upon, or restrict, the meaning of 'sport'. Justice Wood has, by looking to the general meaning of 'recreational', narrowed the application of 'any sport' within the subsection to exclude professional sport. While it is true that professional sport may not be a recreation, it does not necessarily follow, given the task of the subsection is to give definition to the word 'recreational' for the purposes of the provision, that 'sport', as a professional undertaking, should necessarily be excluded.

As applied by Wood J, the meaning of the word 'recreational' is informed by the meaning of the word in general usage in addition to the words of the provision. In summary, Wood J found that the 'word "recreational" imparts meaning to the word "sport".'[51] Although the definition of 'recreational' is not exhaustive, as indicated by the use of the word 'includes', the word 'sport' is of clear denotation.

The Interpretative Process in *Goode v Angland*

Justice Harrison began his assessment of the 'dangerous recreational activity' provisions[52] by stating:

> In Dodge v Snell the Court concluded that 'recreational activity' did not include professional sports. That conclusion was arrived at notwithstanding that the definition of recreational activity expressly

[50] *Dilworth v Commissioner of Stamps* [1899] AC 99, 106.
[51] *Dodge v Snell* [2011] TASSC 19, [261].
[52] *Civil Liability Act 2002* (NSW) s 5K, concerns 'recreational activity' and has the equivalent wording of s 19 of the *Civil Liability Act 2002* (Tas). *Civil Liability Act 2002* (NSW) s 5L, concerns 'dangerous recreational activity' and has the equivalent wording of s 20 of the *Civil Liability Act 2002* (Tas).

> includes 'any sport' … To the extent that it is necessary for me to do so, I respectfully disagree with the Tasmanian decision: having regard to their ordinary meaning, the words in the equivalent New South Wales provision do not permit of such a conclusion.[53]

Justice Harrison in considering the semantic basis to the question nonetheless gave recognition to the alternate proposition stating:

> It is difficult to see how a professional activity, sporting or otherwise, can be considered to be something engaged in for enjoyment, relaxation or leisure. That is Mr Goode's point. By the same token, it is also difficult to see how the ordinary meaning of the words 'any sport' does not include professional sport. … That is Mr Angland's point.[54]

Although identifying the apparent contradiction in classifying a profession as recreation, his Honour found the expression 'any sport' to be definitive and consequently accorded it paramountcy over 'recreational':

> For better or worse, once it is accepted that horseracing is a sport … s 5K(a) of the Act seems to be unanswerable. The definition of recreational activity in a way that includes "any sport" leaves no room for an argument that relevantly enlivens the distinction between sport that is undertaken or pursued for enjoyment, relaxation or leisure and sport that is undertaken or pursued as a profession or occupation.[55]

In arriving at that determination, a point of some interpretive importance was that section 5K, 'Definitions', of the Civil Liability Act 2002 (NSW), the equivalent to section 19 of the Civil Liability Act 2002 (Tas), defined 'dangerous recreational activity' and 'recreational activity' separately. For convenience, section 5K of the Civil Liability Act 2002 (NSW), is reproduced:

> In this Division:
>
> **"dangerous recreational activity"** means a recreational activity that involves a significant risk of physical harm.
>
> …
>
> **"recreational activity"** includes:
>
> (a) any sport (whether or not the sport is an organised activity), and

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53 *Goode v Angland* [2016] NSWSC 1014, [137].

54 Ibid [143].

55 Ibid [144]. As an aside worth noting, Harrison J stated that while the characterisation of horse racing as a sport was not argued before him, it was a 'matter about which minds might legitimately differ': at [144]. His Honour later stated, '[h]orseracing is sometimes described as the sport of kings. I am unaware of any definition of sport that limits it to purely recreational activities or that excludes professional sport': at [145].

(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.

As his Honour stated, it is 'at least clear, if it were not otherwise, from the fact that both "dangerous recreational activity" and "recreational activity" are separately defined in the Act.'[56] One would assume, given the separate definitions, that once a recreational activity involved 'a significant risk of physical harm', the analysis need move no further. A recreational activity includes 'sport'. A sport that is dangerous relieves the tortfeasor of liability. Horse racing is a sport that is dangerous.

The application, however, is not definitive as, assuming that 'recreational activity' as used in the definition of 'dangerous recreational activity' has a common meaning with 'recreational activity' in subparagraph (a) of s5K, the argument raised in Dodge v Snell, that the word being defined (recreational) continues to carry its ordinary meaning, remains alive. That is, only a sport that is 'recreational' can have the epithet 'dangerous' attached to it.

Goode offered two cases where 'recreational activity' was defined according to characteristics of 'enjoyment, relaxation or leisure'. In Belna Pty Ltd t/a Fernwood Fitness Centre Parramatta v Irwin, exercise in a gym to lose weight was a recreational activity because the plaintiff in those proceedings described her goal for undertaking the program was to 'enjoy life'.[57] In Motorcycling Events Group Australia Pty Ltd v Kelly, the argument that 'teaching motorcycling skills was a serious business and that such instruction was not a recreational activity' was rejected on the basis that the respondent's goal in participating was for 'enjoyment'.[58] Although these cases emphasised 'enjoyment', it did not necessarily follow that sport may involve characteristics that did not include enjoyment. Justice Harrison commented that,

> it is … difficult to see how the ordinary meaning of the words 'any sport' does not include professional sport. Indeed, the reference to 'any sport' in s 5K(a) is unique in that it does not contain any reference to the words enjoyment, relaxation or leisure that is contained in s 5K(b) and (c).'[59]

Given the certainty of his Honour's judgment and a commensurate absence of ambiguity, no recourse, presumably, could be made to extrinsic materials.

[56] Ibid [139].
[57] [2009] NSWCA 46, [14] (Ipp JA).
[58] Motorcycling Events Group Australia Pty Ltd v Kelly (2013) 86 NSWLR 55, 80 [100]–[105] (Gleeson JA).
[59] *Goode v Angland* [2016] NSWSC 1014, [143].

As noted above, the second reading speech in respect to the Civil Liability Act 2002 (Tas) provided an additional reason for Wood J to find the statute was directed to 'voluntary' activities, rather than professional employment. The second reading speech of the NSW statute offered little to clarify the meaning of 'recreational activity', stating merely, '[n]or will there be any liability for the obvious risks of particularly dangerous sports and other risky activities.'[60] There were no references to the 'voluntary' engagement in 'dangerous recreational activity'.

Appellate Court Determinations

The judgments in *Dodge v Snell* and *Goode vAngland* were made by single judges of the Supreme Courts of Tasmania and New South Wales respectively. It is, of course, desirable that uniformity of interpretation apply across the jurisdictions of Australia where statutes designed to achieve similar objects are expressed in very similar terms. Should *Dodge v Snell* or *Goode v Angland* be appealed, the determination of the Court of Appeal to first hear the matter, unless believed to be 'plainly wrong', will, apply in all jurisdictions that have adopted the uniform national legislation, at least until the High Court itself decides the correct interpretation.[61]

In *Farah*,[62] Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ held:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.[63]

It is worth noting that despite the clarity of the Court's ruling in *Farah*, the rationale is not without criticism. Justice Rares, writing extrajudicially stated that,

'It is the High Court's role to resolve conflicts which may arise between the different courts properly exercising their judicial functions. That role should not be exercised simply by prescribing a default position that once one Australian intermediate appellate court has pronounced upon the position, its decision is, in a de facto sense, binding unless the subsequent court is convinced it is plainly wrong.' According his Honour, 'the proper approach is to permit different appellate courts to be free to arrive at their own decisions, although mindful and respectful of the persuasiveness of the reasoning of the earlier courts' decision.'[64]

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[60] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5765 (Bob Carr, Premier and Minister for the Arts).

[61] *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*').

[62] (2007) 230 CLR 89.

[63] Ibid 151–2 [135].

[64] Justice Steven Rares, 'The Role of the Intermediate Appellate Court after *Farah Constructions*' (Speech

Where the decision of an earlier Court of Appeal is not followed, the latter court is obliged to justify its determination on the basis of a plain error. In *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*,[65] the question was whether a proprietor or licensee of a hotel in Tasmania owed a duty to take reasonable care to prevent an intoxicated patron from riding a motorcycle as he left the hotel. The New South Wales Court of Appeal, in a case involving similar facts, had held that there could be no such duty except in exceptional circumstances.[66]

Justices Gummow, Heydon and Crennan said, in a passage with which French CJ and Hayne J expressly agreed:

> In contrast, the Full Court [of the Supreme Court of Tasmania] majority did not say whether it thought the decision of the New South Wales Court of Appeal in Cole's case was plainly wrong, but it did not follow it. It distinguished it. This was a legitimate course to take, and consistent with the New South Wales Court of Appeal's approach, if the Full Court majority regarded the present case as 'exceptional'. ... The Full Court majority did not in terms describe the case as exceptional. Unless the Full Court majority had concluded, giving reasons, either that the present case was exceptional, or that the New South Wales Court of Appeal was plainly wrong, it was its duty to follow the New South Wales Court of Appeal. The Full Court majority did not conclude that the present case was exceptional or that the New South Wales Court of Appeal was plainly wrong. Hence it did not carry out its duty to follow the New South Wales Court of Appeal. If these appeals had not been brought, there would have been an undesirable disconformity between the view of the New South Wales Court of Appeal as to the common law of Australia and the view of the Tasmanian Full Court majority. At best the Full Court decision would have generated confusion. At worst it would have encouraged the commencement of baseless and ultimately doomed litigation, to the detriment both of the unsuccessful plaintiffs and of the wrongly vexed defendants.[67]

delivered at the 4th Appellate Judges Conference of the Australasian Institute of Judicial Administration, Melbourne, 7 November 2008) [31]–[32] (emphasis in original).

65 (2009) 239 CLR 390.

66 Cole v South Tweed Heads Rugby League Football Club Ltd (2002) 55 NSWLR 113.

67 CAL No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390, 412–13 [51].

Conclusion

The essence of the difference between the two decisions lies in the emphasis given to the wording 'recreational activity' in Dodge v Snell and 'any sport' in Goode v Angland.

As noted above, Wood J considered that

> [t]he word 'recreational' is over-arching in its effect … The provision conveys a wide reach extending to any sport and, indeed, any other activity providing it is for enjoyment, relaxation or leisure. However, it is a given requirement that the activity must be 'recreational' and the provision is designed to assist with the breadth of activities that are captured by the phrase.[68]

On the other hand, according to Harrison J, '[t]he definition of recreational activity in a way that includes "any sport" leaves no room for an argument'.[69]

The approaches taken in each case are not without authority. A definition which includes 'any sport' may include professional sport, however, under conventions of statutory interpretation a word to be defined may also retain its ordinary meaning. While the rulings in *Dodge v Snell* and *Goode v Angland* are mutually unsustainable, each is nonetheless, not without cogent argument. Resolution would seem to rest upon appeal to a higher authority. As it stands, there is no certainty in an area of law of no small social and legal import.

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[68] *Dodge v Snell* [2011] TASSC 19, [266].
[69] *Goode v Angland* [2016] NSWSC 1014, [144].

IN DEFENCE OF AUSTRALIAN SPORT: AN OVERVIEW OF STRATEGIES TO COMBAT MATCH-FIXING

Genevieve Lim*

Match-fixing in sport is an escalating issue across the globe. Australian sports and governments have pro-actively sought to combat match-fixing by developing disciplinary policies, criminal laws and gambling regulation, implementing appropriate education for participants and creating specialist sports integrity units.

This article surveys the major steps taken by law makers and the larger Australian sporting organisations. While these measures constitute a positive move, deficiencies in their formulation and application affect Australia's protection against match-fixing. Deficiencies include a lack of uniformity in their application across different Australian jurisdictions and substantive problems within disciplinary policies and laws.

Strengthening Australian measures against match-fixing, particularly by improving consistency across jurisdictions and sports, would be beneficial. Providing greater resources to law enforcement agencies to investigate match-fixing and potentially creating an additional over-arching agency would also assist Australia to address and deflect match-fixing activity. Greater international engagement by government, and improved sporting governance and player welfare would also support these aims. Finally, investigation of the cultural factors influencing sports betting and the unique features of fixing as they relate to individual sports may help agencies modify their activities to reduce the risks of corruption.

Introduction

Canadian match-fixing authority Declan Hill has repeatedly warned Australian sports of the danger of infiltration by match-fixers.[1]

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1 Hill first warned Australia at the ANZSLA Conference in 2009. 'Australia a Target for Match-Fixing', *Australian Leisure Management* (online), 9 October 2009 <https://www.ausleisure.com.au/news/australia-a-target-for-match-fixing>.