

John de Mestre & Co



Liability for Sports Injuries

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Liability for Sports Injuries

INTRODUCTION

Large claims for compensation arising from injuries sustained by people involved in recreational activities (including sporting events), captured media attention late last year as insurance companies claimed they could no longer provide insurance coverage for such events. The NSW State Government stepped in, and enacted two principal pieces of legislation – the Civil Liability Act 2002 (CLA) and the Civil Liability Amendment (Personal Responsibility) Act 2002 (CLAPRA). NSW is the first state to act on what is perceived will ultimately be a National Response to the growing problem of litigation in this area.

The CLA was designed to limit damages by placing caps on various heads of damages. It also removed some heads of damages. The CLAPRA was designed to amend the CLA, and essentially limits the circumstances where an injured party can bring a claim for compensation, placing more responsibility on the injured party for looking after their own safety.

The introduction of the CLA and the CLAPRA brought an immediate response from the insurance industry, with the introduction of a new insurance scheme which was specifically designed to provide coverage for community organisations. That scheme, Community Care Underwriting Agency, is underwritten by three of the main insurers (Allianz, NRMA and QBE). Coverage is open to amateur sporting clubs, groups offering arts, cultural and recreational services, artists operating with government grants, welfare and community groups and ratepayers' associations. The scheme is limited to non-profit organisations.

The introduction of this scheme indicates that the difficulties experienced in the past of obtaining suitable insurance coverage for such events may be easing. It will be necessary for the regulatory bodies to ensure that the insurers pass on the savings achieved by the legislative changes.

This paper proposes to identify the potential liabilities that arise when an athlete is injured whilst competing in a race, and how the current wave of reforms to personal injury legislation are likely to effect the various avenues of compensation open to the injured athlete.

Case Study: A full-time professional bike rider named George is badly injured during a race when a car hits him. As a result, he is unable to ride again indefinitely.

What are his potential remedies?

1. Common Law Claims (negligence)

Depending on the precise circumstances of the accident, there are a number of avenues which George may be able to follow.

1.1. Another Bike Rider caused the Collision

For George to proceed against another rider in the race, he would have to be able to prove that the accident was caused as a result of the negligence of that rider.

A number of issues would have to be considered before pursuing the other rider. These include whether there was any contributory negligence on the part of George and whether the other rider has any insurance coverage or assets which may eventually satisfy a judgment in George's favour.

1.2. The Motor Vehicle Driver Caused the Collision

If George is able to prove the driver of the car was negligent in causing the accident, then he may be able to bring proceedings against the driver.

Issues to consider are whether the vehicle and driver are identifiable, whether the driver is insured, and whether there was any contributory negligence on George's part.

In the event that the car was not identifiable, then it would be necessary to proceed against the Nominal Defendant. In the event that the driver is uninsured, it would be necessary to consider whether they are likely to have sufficient assets to satisfy a judgment in George's favour.

Changes to the Motor Accidents Act have limited the amount of damages that are recoverable by an injured party, and in particular, damages for non-economic loss are only recoverable in circumstances where the injured party has greater than 10% whole person impairment (Section 131 of the Motor Accidents Compensation Act 1999).

1.3. Claim against the Race Organiser/Promoter/Security

Issues which have to be addressed are whether the organiser/promoter/security were negligent in allowing the car to enter the circuit and to drive near the riders, or for not allowing sufficient distance between the circuit and the road, or whether there were inadequate crowd control or safety measures.

Another question is whether the organisers were negligent in failing to warn George of the potential of injuries occurring. The case of Wood v Multi-Sport Holdings Pty Limited [2002] HCA 9 (7 March 2002) found that due to the nature of sport, organisers are not obliged to warn participants about potential injuries which may occur if they choose to play.

As noted in the introduction, this position has been picked up by the NSW State Government in the Civil Liability Amendment (Personal Responsibility) Act 2002 which came into force on 6 December 2002. The Act provides protection for failure to warn of obvious or inherent risks. The changes are referred to in more detail in Section 5 below.

1.4. Claim against the Land Owner/Local Council

In the event that a poorly maintained road or pathway contributed to the accident, it may be possible to commence proceedings against the person or authority responsible for the maintenance of the road or pathway where the accident occurred.

For example if the collision resulted from George hitting a pothole and being thrown into the path of the car, then this form of action could be considered.

Recently, in “council” cases¹ involving tripping hazards and pedestrians, the Court has been moving towards the position that where a hazard is “obvious”, it is harder for a plaintiff to establish negligence on the part of the Council. Depending upon the precise circumstances of the accident, this may become a relevant consideration.

¹ The case of Ghantous v Hawkesbury Shire Council (2001) made the finding that “persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes.”

The case of RTA v McGuinness (2002) NSWCA 210 states that “The duty to pedestrians is therefore to take reasonable care to prevent or eliminate “obvious hazards” which “could possibly be an occasion of harm”

The case of Burwood Council v Byrnes (2002) NSWCA 343 states that “If the Plaintiff had been keeping a proper lookout, she could have passed in safety either by avoiding the sunken area or by taking additional care as she walked across it”.

The case of Richmond Valley Council v Standing (2002) NSWCA 359 states that “The conditions of the site were so obvious and so typical of those commonly to be encountered in daily life that the Defendant was not under any duty to undertake any inspections to identify them. Even if the Defendant had become aware of the particular conditions of the site, it had no duty to alter them in view of their obviousness.”

1.5. Claim against a Spectator

If the accident was caused by a spectator (for example an over-zealous photographer stepping onto the race track and causing George to veer off course into the path of the motor vehicle), then there may be a cause of action against the spectator.

A major consideration is whether the spectator would have the means to satisfy a judgment. It may be a better course of action to sue the organisers (who are more likely to have insurance) for failing to ensure the crowd was properly contained.

1.6. Claim of negligence against George's Employer

In the event that George is an "employee", and that his employer has been negligent in some way in causing the accident, George may be able to commence a common law action in negligence against his employer.

Recent changes to the Workers Compensation legislation have placed a stricter injury threshold requirement on an injured worker to commence such an action. Section 151 (H) of the Workers Compensation Act 1987 provides that "No damages may be awarded unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%".

2. Workers Compensation

Section 155 of the Workers Compensation Act 1987 requires that all employees are covered by Workers' Compensation insurance.

Section 261(1) of the Workplace Injury Management Act 1998 requires claims for compensation to be made within 6 months of the injury. A WorkCover approved claim form should be served on either the employer or its insurer.

If George is employed as a bike-rider, he may have a claim in Workers Compensation. The Workplace Injury Management and Workers Compensation Act 1998 contains a definition of worker, however there are some exceptions to the definition including registered players of a sporting organisation (Section 4(1)(d).

Schedule 1, Clause 15 contains a list of certain persons deemed to be workers. Of particular interest to us is that boxers, wrestlers, referees and entertainers are all deemed to be workers under the Act.

If George is covered under the Workers Compensation Act then he is entitled to receive various forms of compensation as follows:

2.1. Weekly Payments

George can obtain payments of weekly benefits on a partial or total incapacity basis. In the event that he is certified as fit for suitable duties, and his employer is not able to provide suitable duties, then he will be entitled to payment of weekly compensation at a higher rate for up to 1 year. Question what would be suitable duties for George.

2.2. Medical Treatment

George is entitled to receive payments for the cost of medical or hospital treatment, rehabilitation, as well as the related travel expenses as long as such treatment is deemed to be “reasonably necessary” (Section 60 of the Workers Compensation Act 1987).

2.3. Permanent Loss Compensation and Pain and Suffering

Under the Workers Compensation Act 1987 (Sections 66 and 67), it is possible for George to claim lump sum compensation in respect of any permanent injuries received by him in the accident.

Recent changes to the Workers Compensation Legislation in NSW mean that where George may have in the past been able to make claims for compensation in respect of each injured body part, he is now required to have an assessment of “whole person impairment” which takes into account the totality of all his injuries. The degree of compensation payable is determined on this basis.

Once the degree of permanent impairment has been agreed on by both parties, compensation is payable in accordance with a schedule. In the event that there is a dispute between the parties as to the degree of permanent impairment, the matter must be referred to an Approved Medical Specialist recognised by the Compensation Commission. (*Note, the Compensation Court of NSW is due to close on 31 December 2003. From that date, medical panels will be directly appointed and administered by the staff of the Sporting Injuries Commission.*)

If the injuries sustained by the worker represent more than 10% of a whole person impairment, there is an entitlement to a further lump sum for pain and suffering. The maximum payable is \$50,000.00 for a most extreme case.

2.4. Compensation for Property Damage

Sections 74-78 of the Workers Compensation Act 1987 deal with property damage. George may be able to claim compensation for damaged crutches, artificial members, eyes or teeth, other artificial aids, or spectacles, as well as damaged clothing.

3. Sports Insurance

3.1. SportsCover

Sports insurance underwriters deal in accident, liability, contingency and property insurance for athletes. They mainly deal with amateur sports, but do cover a select range of professional sports also.

Insurance cover is through various insurance organisations such as WWSI (Worldwide Sport Insurance Pty Limited), Concord Sports Insurance Agencies Pty Limited (Soccer only), QBE, Insurance Advisernet Australia Pty Limited.

Further information on SportsCover can be found at <http://www.sportscover.com>

Sports accident insurance for amateurs can cover the following:

- Death;
- temporary or permanent disablement;
- medical expenses such as physiotherapy, chiropractic hospital and ambulance;
- loss of income;
- rehabilitation of sporting injuries;
- repatriation of an injured athlete.

Professional sports accident insurance can offer additional cover for professional athletes for their loss of income from any source, including their sport, from injury or illness. Policies can also cover career ending injuries which results in the loss of future income (up to five times their current earnings from sport).

Policies can also be purchased by others (including managers and agents) whose income depends on an athlete.

3.2. NSW Sporting Injuries Scheme

NSW Sporting Injuries Committee set up under the NSW Sporting Injuries Scheme (under the Sporting Injuries Insurance Act (NSW) 1978) under WorkCover is a government body which sporting organisations can elect to join. Amateur and professional sportspersons may be covered however professionals can only be covered if the organisation they belong to is largely amateur.

Its mission statement is to “reduce the personal and financial impact of serious injuries in sport and support sports injury prevention initiatives”.

Premiums start at \$0.93 per adult up to \$17.38 per adult per year, depending on the risk involved with the particular sport. The total minimum organisation rate is \$165.00.

The Organisation automatically covers all school children in NSW under its supplementary scheme (Consider whether George is school aged). It provides cover for all amateur and professional sportspersons who are covered through their sporting organisation (again, George may be covered by his sporting organisation).

The Sporting Injuries Insurance Act (NSW) 1978 provides permanent loss compensation as set out in Schedule 1 of that Act. The threshold of injury required before benefits are payable for permanent loss are high, with a minimum of 33% loss of use in respect of arm and leg injuries, 11% for hearing loss injuries and 50% for all other specified injuries.

Claims under the Sporting Injuries Benefits Scheme go directly to the Committee staff and there is no provision for the payment of legal expenses if a solicitor acts for the injured sportsperson.

4. Victims Compensation

In the event that George was intentionally run off the road into the path of the motor vehicle, or that the motor vehicle driver intentionally hit him, he may have a claim pursuant to the NSW Victims Compensation Scheme.

The aims of the Victims Support and Rehabilitation Act 1996 are:

- (a) to provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme,
- (b) to enable compensation paid under the statutory compensation scheme to be recovered from persons found guilty of the crimes giving rise to the award of compensation,
- (c) to impose a levy on persons found guilty of crimes punishable by imprisonment for the purpose of funding the statutory compensation scheme,
- (d) to give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime.

The Act (Section 1) defines an “act of violence” as:

an act or series of related acts, whether committed by one or more persons:

- (a) that has apparently occurred in the course of the commission of an offence, and
- (b) that has involved violent conduct against one or more persons, and
- (c) that has resulted in injury or death to one or more of those persons

Under the Act, George would be able to recover compensation for any permanent injuries sustained in accordance with Schedule 1 of the Act. The Schedule contains references to specific injuries, and assigns each injury with a specific dollar value (for example, a fibula fracture of one leg (with continuing disability) would attract compensation of \$12,000.00).

Where injuries to more than one body part are sustained, the victim is entitled to receive 100% of the amount payable for the most serious injury, 10% of the amount payable for the second most serious injury, and 5% for the third most serious injury. Any further injuries are not compensable.

The Act also allows injured parties to claim damaged or stolen personal effects to the maximum value of \$1,000.00, weekly wage loss at the rate applicable to Section 37 of the Workers Compensation Act 1987 (as discussed above) and actual expenses incurred by the injured party (including medical expenses). The maximum payable for the above items is a maximum of \$10,000.00.

The maximum amount of compensation payable to a single person in respect of an act of violence (including permanent disability, expenses, wage loss and personal effects) is \$50,000.00.

5. Civil Liability Amendment (Personal Responsibility) Act 2002 (CLAPRA)

Generally, the CLAPRA was designed to limit the ability of an injured person to sue for injuries sustained while involved in recreational activities.

This Act concerns a waiver of duty of care for recreational activities, and came into effect on 6 December 2002 amending the Civil Liability Act 2002 (CLA). Recreational Activities are defined to include:

- (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.

The CLAPRA deals with claims for harm resulting from negligence. The following references to sections are as they appear in the CLA following the amendment of that Act. Section 5 of the CLA contains definitions as follows:

5 Definitions

In this Part:

"harm" means harm of any kind, including the following:

- (a) personal injury or death,
- (b) damage to property,
- (c) economic loss.

"negligence" means failure to exercise reasonable care and skill.

"personal injury" includes:

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition, and
- (c) disease.

The CLA deals with the duty of care at Section 5B, which provides:

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was not insignificant, and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

The section also provides guidance for the Courts in relation to relevant factors to be considered at 5B(2) and 5C.

Section 5D deals with causation, and provides that the plaintiff has the onus of proving factual causation (Section 5D(1) (a)) and the scope of liability (Section 5D(1) (b)).

Section 5F deals with the meaning of "obvious risk", and states the following:

- (1) For the purposes of this Division, 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.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

Section 5G, 5H and 5I state that injured persons are presumed to be aware of obvious risks, that there is no necessity to provide a warning of an obvious risk and that there is no liability for the materialisation of an inherent risk (inherent risk is defined as "a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill".)

Sections 5J, 5K, 5L and 5M apply the changes to those participating in "recreational activities". Section 5L specifically provides that there is no liability for harm suffered from obvious risks of dangerous recreational activities.

Section 5M potentially contains some of the strongest protection to organisers of recreational activities, with the section providing that there is no duty of care for recreational activity where there is a risk warning. The section contains an exception in the case of an “incapable person” (defined as a person who, because of the person’s young age or a physical or mental disability, lacks the capacity to understand the risk warning). The provision states that the warning can be given orally or in writing, and can be a general warning of the risks.

The Act also contains a definition (at Division 6, Section 5O) of the standard of care owed by a person practising a profession (a “professional”). The Act fails to define profession or professional. The professional is not considered to incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice. Peer professional opinion cannot be relied on if the Court considers the opinion is irrational.

The Act represents a major step towards a limitation of civil liability. The provisions of the Act appear to limit the number of claims that can be brought. This should in turn make the provision of insurance for public events easier to obtain, as well as cheaper. At this stage, however, there are no checks in place to ensure that any cost savings that arise from the implementation of the new legislation are passed on to the consumer by the insurance companies.

6. How to quantify damages?

The following items have to be considered when assessing George’s potential damages:

- 6.1. Personal injury;
- 6.2. Psychological injury, loss of self esteem in having to give up career for an office job which can be difficult to quantify;
- 6.3. Loss of earnings which can also be difficult to quantify in the case of an athlete whose career was on the rise;
- 6.4. Loss of glory & potential to become the next Olympics Gold Medallist;
- 6.5. Loss of sponsorships & income.

7. Changes to Sporting Injuries Insurance Scheme, expected to be in effect from 1 July 2003

(taken from letter to Members of Scheme, 3 April 2003)

The legislation governing the operations of the Sporting Injuries Insurance Scheme has undergone some changes.

7.1. Changes to claims procedures

i) Medical Panels

It has been the Committee's practice for many years to utilise the expertise of the Compensation Court's Medical Division to provide medical panels of specialist practitioners to assess injuries and the degree of permanent disability suffered by applicants for benefits. From 31 December 2003 when the Compensation Court of NSW will be abolished this service will no longer be available and medical panels will be directly appointed and administered by the staff of the Sporting Injuries Committee. The medical specialists appointed to the panels will be specialists accredited by the Workers Compensation Commission.

(ii) Appeals against decisions of the Committee

Also as a result of abolition of the Compensation Court of NSW appeals against a decision of the Committee will from 1 January 2004 be heard in the District Court of NSW instead of the Compensation Court.

7.2. Changes to premiums procedures

From 1 July 2003 sporting organisations that have paid players or officials within their ranks who could be deemed to be workers under the Workplace Injury Management and Workers Compensation Act 1998 can have the option of:

- (1) Participating in the New South Wales Sporting Injuries Insurance Scheme,
- (2) Covering their paid players and officials with Workers Compensation, or
- (3) Covering their players and officials under a private insurance scheme in accordance with an exemption that is granted under Section 5A of the Sporting Injuries Insurance Act 1978

This last option is a change to the legislation that provides for a member sporting organisation declared under the NSW Sporting Injuries Insurance Act 1978 to be granted an exemption from the

compulsory provisions of the Workplace Injury Management Act if their participants are insured with an approved private insurance scheme subject to the following conditions:

- (a) Any New South Wales organisation which chooses to participate in a approved private insurance scheme and take advantage of the exemption will be liable to pay to the New South Wales Sporting Injuries Committee a levy equal to 10% of the premium that would otherwise be payable by the organisation as a participant in the New South Wales Sporting Injuries Insurance Scheme.
- (b) The benefits offered under the approved private insurance scheme must be equal to or better than those offered under the Sporting Injuries Insurance Scheme.
- (c) Any such exemption granted to a member organisation will be subject to annual renewal, and
- (d) the application for exemption will be determined by the Committee.

All funds raised by the levy imposed under (a) will be applied by the Committee to its sports injury prevention and reduction programs which include the Research and Injury Prevention Scheme and the New South Wales Sports Safety Awards Scheme.

8. How to get Involved

- 8.1. The Sporting Injuries Committee often runs sports injuries seminars in country areas of NSW, aimed at the sporting community. They are keen to hear from lawyers with an interest in the sports law field who are eager to present one of these seminars.

The Committee pays travel expenses for lawyers. Prior experience in the field is unnecessary.

Ms Linda Chapman, Claims Manager, can be contacted at the Sporting Injuries Committee at 4321 5394 or by email: lindachapman@workcover.nsw.gov.au.

- 8.2. Netball NSW has strong relationships with law firms who provide paid and voluntary services to them, including sitting on appeals committees.

There is a need for volunteer lawyers to sit on appeals committees and panels in the District Associations & Clubs.

Any interested lawyers can contact their local clubs or contact Mr Ian Harkness, General Manager, on 9646 5666 or by email: iharkness@netballnsw.com. Mr Harkness can collect contact details to refer on to local clubs.

- 8.3. Many local clubs appreciate the assistance of lawyers to offer advice on policy and to sit on panels and committees. Contact your local club to volunteer your time and expertise.