DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Civil Liability Amendment Bill 2019

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Madam Speaker, I move that the Bill now be read a second time.

The *Civil Liability Act* 2002 was enacted following the recommendations of a national expert panel appointed to review the law of negligence. This panel released its Final Report, referred to as the Ipp Report, in September 2002.

One of the major reasons that a review of the law of negligence was undertaken was the fact that public liability insurance had become unavailable or unaffordable, in particular for not-for-profit organisations, following the collapse of HIH Insurance in 2001. It was thought that reform of the common law to restrict liability and encourage greater 'personal responsibility' would lead to lower insurance premiums for recreational providers. The focus was on protecting the providers or organisers of recreational services who are generally responsible for taking out public liability insurance.

The Ipp Report recommended that recreational activities and recreational services be treated as a special category for the purposes of personal injury law. The Report clearly stated that this special category was based on the fact that "people who participate in such activities often do so voluntarily and wholly or predominantly for self-regarding reasons…" The Report goes on to say "people who participate in recreational activities in the course of their employment do not do so voluntarily in the relevant sense…Therefore any rule limiting liability in respect of recreational services should not apply to them".

The Tasmanian *Civil Liability Act* 2002 was passed with the intention of following this recommendation in the Ipp Report. The Second Reading Speech package on the Bill that inserted Division 5 of Part 6 into the Tasmanian Act implies that the Division was intended to apply only to sport as a recreation, not to sport as a profession. The clause notes state that 'Dangerous recreational activity' is "confined to those activities which are engaged in for sport, enjoyment, relaxation or leisure".

A 2017 decision of the New South Wales Court of Appeal has the potential to impact on the original intent of the Tasmanian legislation. The 2017 decision of the NSW Court of Appeal of *Goode v Angland* found (amongst other findings) that the jockey, Goode, was knowingly participating in a dangerous recreational activity (horse riding) where falling from a horse is an obvious risk, and was therefore prevented by the statutory provisions of the *Civil Liability Act* 2002 (NSW) from making a claim for damages for the injury.

The arguments in the appeal centred on sections 5J – 5L of the NSW *Civil Liability Act* 2002, in particular the definition of 'recreational activity' as including 'any sport'. The NSW Court of Appeal ruled that the NSW Act did not make any distinction between dangerous sports undertaken for leisure or as a profession, with the effect that the relevant sections were a 'liability-defeating rule' in respect of Goode's claim.

The Ipp Report recommended a definition of 'recreational activity' as 'an activity undertaken for the purposes of recreation, enjoyment or leisure'. 'Any sport' was not included in the recommended definition.

While many of the recommendations of the Ipp Report were implemented nationally, only New South Wales, Tasmania, Western Australia and Queensland adopted a provision excluding liability for harm suffered from an obvious risk of a dangerous recreational activity. The Queensland definition of 'dangerous recreational activity' mirrors the definition recommended by the Ipp Report and does not include a reference to 'any sport' and will therefore be unlikely to be affected by the NSWCA decision, which turned on the inclusion of that phrase. The Western Australian and Tasmanian provisions mirror the NSW provision in that both include 'any sport' in the definition of recreational activity and therefore will be subject to the NSW decision.

Sections 18 – 20 of the Tasmanian *Civil Liability Act* 2002 almost entirely mirror sections 5J – 5L of the NSW Act. Therefore a Tasmanian Court, if facing a similar case in the future, would be obliged to follow this NSW decision.

The breadth of the exclusion of liability resulting from the NSW Court of Appeal decision was not in contemplation at the time the Tasmanian provisions were introduced. The interpretation of the Tasmanian provisions in the earlier Tasmanian case of *Dodge v Snell* reflects the understanding of the effect of the provisions at the time of introduction to this House.

In that matter Justice Wood noted "it is evident from the Final Report that the rationale for treating recreational activities and recreational services as a special category justifying reform does not apply to people who participate in recreational activities in the course of their employment …This rationale for the legislation is also evident from the Second Reading Speech".

Her Honour found that the word 'recreational' colours the word 'sport' and that the exclusion from liability did not apply to professional jockeys. The decision in *Dodge v Snell* was specifically not followed by the NSW Court of Appeal and, as I have said, the NSW decision will prevail in future Tasmanian cases. As a result, claims for injury arising from negligence in any sport, including professional fixtures, will be statute barred.

The NSW Court of Appeal decision clearly broadens the exemption from liability beyond that recommended in the Ipp Report and beyond that contemplated when Division 5 of Part 6 was introduced into the *Civil Liability Act* 2002. In her judgment in *Dodge v Snell* Justice Wood expressed the opinion that such an interpretation would have far reaching consequences. It was Her Honour's view that the extension of the exemption to professional sports people arguably means employees engaged in a sport as an occupation, such as conducting a kayaking tour or teaching others a sport, may also be precluded from seeking damages for negligence. Her Honour went on to say that there was no indication that Parliament intended such a sweeping change to the common law entitlements of many Australians.

The NSW Court of Appeal indicated that their ruling was in large part due to the definition included for "recreational activity", specifically the inclusion of the term "any sport". This varied from the wording recommended by the Ipp Report and, therefore, the Court found that the scope of the definition varied from that recommended in the Ipp Report.

This Bill returns the definition of recreational activity to that recommended by the Ipp Report so as to ensure professional sportspeople, such as jockeys, are not barred from pursuing a civil claim for breach of duty.

Therefore, this Bill seeks to amend the *Civil Liability Act* 2002 so as to ensure the Act fulfils the original intention of the Tasmanian Parliament.

Madam Speaker, I commend the Bill to the House.