

**COMMENTS ON
RECREATIONAL SERVICES ASPECTS
OF
STATUTES AMENDMENT AND REPEAL
(FAIR TRADING) BILL 2008**

BY JOHN DAENKE

BACKGROUND

1. There is before the South Australian Parliament a Bill entitled the Statutes Amendment and Repeal (Fair Trading) Bill 2008. This is currently being debated in the Legislative Council.
2. In part, the Bill repeals the *Recreational Services (Limitation of Liability) Act*. The Bill further introduces statutory warranties in relation to the provision of services in Section 74H. Finally the Bill provides in Section 74I for a limited class of service providers, namely providers of recreational services, to exclude, modify or vary the statutory warranties if certain conditions are fulfilled.
3. The *Recreational Services (Limitation of Liability) Act* was introduced in 2002 in response to the “insurance crisis” where many recreational service providers were apparently unable to obtain public liability insurance at all or at a reasonable cost. The Act has not proved workable. In my view the Act was never workable. It ought to be repealed.
4. The first issue to consider is whether, following the repeal of the *Recreational Services (Limitation of Liability) Act*, it is necessary to introduce any further legislation.
5. Given that the rationale for the original legislation was the “insurance crisis”, one has to now enquire whether, for recreational service providers, it is still difficult to obtain public liability insurance at a reasonable cost.
6. The insurance industry itself recognises that it is a cyclical industry with at times a “hard” market (insurance is difficult to obtain, the premiums increase and there are onerous conditions imposed on insureds) and at other times a “soft” market (easy to obtain, low premiums and easy conditions).
7. The information released and the second reading speech does not address this issue but the insurance industry would now accept that the market is not in the same cycle as in 2002.

8. The second issue to consider (again not addressed in the second reading speech) is whether the proposed amendments will make any significant difference to the availability or affordability of public liability insurance for recreational service providers. No information has been provided as to enquiries with the insurance industry as to the likely effect of the legislation.
9. If there is no significant difference to insurance cover, premiums or availability, then there is no necessity to introduce a further regulatory requirement purportedly to provide that assistance to the recreational services industry. It is merely adding a further layer of complexity and confusion in the area.

COMMON LAW – DUTY OF CARE

10. The common law imposes a duty of care on recreational service providers to persons who use the service, whether through a contract or otherwise. The common law imposes a duty upon the recreational service provider to use the reasonable skill and care of a competent provider of that service.
11. If a person using the recreational service suffers an injury caused by the failure of the recreational service provider to use reasonable skill and care, then the injured person has a right to claim damages for the tort of negligence at common law. If the person has a contract then they are also entitled to bring a claim for breach of the contract.
12. Some, but not all, users of the service will have a contract with the recreational service provider. In very simplistic terms a person may purchase a ticket which is handed to another person, who may be a child, but the ticket purchaser would have a contract and the person who did not purchase the ticket would not have a contract. There may be circumstances where it is arguable that the person purchased the ticket as the agent for the other person and that the second person had a contract with the service provider. The classic example is the seminal case in negligence of *Donohue v Stevenson* where the person injured did not herself purchase the contaminated soft drink which caused the injury. The injured person could not sue for breach of contract but the Court held that the manufacturer had a duty of care in negligence to provide a proper product to the ultimate consumer.
13. The common law of contract will imply into the contract obligations which are the same as the obligations in tort, namely a duty to use the reasonable care and skill of a competent provider of the service.
14. If a person is injured as a result of the failure of the service provider to meet the standard of care of a competent provider of that service, it is irrelevant whether the injured person has a contract, that is, the person purchased the ticket themselves or it was purchased by another. The injured person has a cause of action in tort and may have one in contract.

15. A service provider has probably taken out public liability insurance to provide indemnity against claims for injury suffered by consumers of the services. The insurer may impose conditions in the contract of insurance based upon the claims history for the type of activity and the service providers own claims history.
16. The service provider may have to comply with conditions imposed by its insurers in its policy of insurance. Those conditions may be as to the manner of the service or may be as to the requirement for waivers or other contractual provisions. Such conditions are imposed as a result of the claims experience of insurers arising from the activity. The conditions are designed to reduce the incidence of claims and are a form of risk management imposed on the service provider by the insurer.
17. Apart from these obligations, there is no mandatory requirement for a recreational service provider to undertake any form of risk management to ensure that its system is safe for consumers.
18. The statutory warranties set forth in proposed Section 74H of the Bill do no more than enshrine in legislation what is already the common law applying to all service providers.

PURPOSE OF SECTION 74I

19. The purpose of proposed Section 74I is to enable recreational service providers to modify, exclude or restrict the warranty implied into contracts under Section 74H of the *Fair Trading Act*. Not all recreational service providers will seek to modify, exclude or restrict the warranty.
20. Those who do not seek to modify the statutory warranty and the common law warranty, or who seek to do so but fail to comply with any necessary statutory provisions could be sued at common law in negligence or for breach of contract if a consumer suffered injury caused by the failure to meet the required standard of care. Recreational service providers ought to endeavour to meet the standard of care and skill of a competent operator because they may have persons who are not subject to any exclusion or modification of the statutory warranty.
21. There may be an anomalous situation where two consumers of services from a recreational service provider are injured in a common accident and one is entitled to recover a claim for damages and one is not depending upon whether a workable exclusion clause applies to one and not the other.
22. The insurers of recreational service providers may, as a condition of providing insurance, require that recreational service providers include in their contracts some modification or exclusion or restriction of the general warranty and the common law provisions upon them.

23. There is no necessity for such a provision to be included in an insurance policy as a matter of general course and it may be possible for recreational service providers to negotiate with insurers to delete any requirement as a condition of the insurance that such modification, exclusion or restriction be contained in a contract with consumers.
24. In many instances it is arguable that such exclusions may not actually apply to the consumers. For example, there was a line of authorities called the “Ticket Cases” where persons hired goods and were given a ticket which contained the conditions on the back of the ticket. It was held in such cases that the fact that the ticket was a receipt given after the contract was entered into and/or the fact that it was not brought to the attention of the consumer contracting party prior to the contract being entered into meant that it did not become a condition of the contract. Courts have generally been reluctant to uphold exclusion clauses.
25. Therefore, unless the condition is made clear to the intending consumer before entering into the contract, and probably an acknowledgement obtained by way of signature, then the consumer can argue that the restriction is not applicable to him or her.
26. There are also many arguments as to the interpretation of the wording of individual restrictions or modifications which often mean that the incident is outside the exclusion in any event and the exclusion does not actually exclude liability for negligence.
27. The proposed Section 74I is an enabling section which does enable service providers to modify, exclude or restrict their liability subject to the conditions proposed in that section. Service providers are not obliged to exclude the warranty but if they attempt to do so they must comply with any conditions.
28. There are a number of issues which arise relating to the interpretation of the section.

“PROVIDERS” OF RECREATIONAL SERVICES

29. The first interpretational issue relates to who is a “provider” of “recreational services”. There is no definition of the term “provider”. Whilst it might be clear in some instances, it is not always clear as to whether a not-for-profit organisation which has members who are entitled to use its facilities as a benefit of membership would be regarded as entering into a contract to provide those facilities as a “recreational service provider” and thus be entitled to the benefit of the section.
30. Furthermore, there may be persons who make recreation grounds or other land available for use by consumers for recreational purposes. There might be an argument that the landowners are in fact “recreational service providers” to whom the statutory obligations apply and who might be entitled to exclude the operation of those provisions in any agreement to use the property.

WAIVERS AND MINORS

31. So-called “waivers” are ineffective to prevent or reduce claims by minors (under 18 years) who suffer injury caused by the negligence of a recreational service provider.
32. Where a minor is injured in an incident caused by a recreational service provider who has failed to reach the required standard of care, the first issue might be whether the service was provided to the minor, either pursuant to a contract with the minor or pursuant to a contract with another person (usually a parent or friend of the minor).
33. If it was a contract with the minor, that is, the minor paid for the service, then the minor can sue the service provider for a breach of the standard of care both in contract and in tort.
34. Except in the case of “necessaries”, which would not include the supply of recreational services, the other party to a contract with a minor cannot enforce the provisions of a contract against a minor. If the contract contained a “waiver” provision which might be effective against an adult, the provision would be unenforceable against a minor.
35. If the contract to supply services is not with the minor but with another person, then the minor has a cause of action in tort and no contractual waiver can be binding on the minor.
36. If a parent has signed a waiver, that waiver cannot be binding on the minor.
37. In some cases, recreational service providers require a “consent” to a contract supposedly entered into by a minor. Such consent, even if the contract contains a waiver clause, is not effective to make the waiver clause operate against either the minor or the person signing the contract.
38. In some other cases the “consent” also contains an indemnity provision by which the parent agrees to indemnify the service provider against any claims brought by the minor. Such indemnity clauses may in very limited circumstances operate for the benefit of the service provider’s insurers who could, if a claim is brought by a minor, join the parent who signed the indemnity seeking to recover from the parent any money paid in respect of the claim by the minor. Such joinder by the insurers may only occur rarely. (I have no personal knowledge of statistics and am not aware of any specific cases where this has occurred. This claim against the parents may be used as a tactical ploy by an insurer to bring pressure on a parent to deter a child from suing for fear that the parent, who was not directly responsible for the injury, might have to pay out. In my personal view this is an entirely improper purpose, but that is a matter of personal opinion.)

39. I would suggest that generally, the operation of waivers in relation to infants is ineffective.
40. A further issue to consider is the extent to which insurers actually require recreational service providers to include waivers in their contracts. The corollary is that recreation service providers may mistakenly believe that there is a benefit to them, and not consider their insurers, by preparing documentation which contains waivers.
41. Recreational service providers should only be obliged to provide waivers where insurers require such waivers and ought not provide those waivers just as a matter of general practice without considering the purpose and effect of such waivers.
42. Information ought to be obtained from the insurance industry as to whether, as a matter of practice, insurers require as a condition of insurance, that recreational service providers include such waivers or indemnities in contracts with consumers and whether insurers, through ignorance of the law, might require such waivers to apply to minors.
43. In any event the proposed Section 74I (2)(b) expressly provides that a clause excluding the operation of the statutory warranty (a waiver) does not apply unless both the consumer and a third party consumer are of full age and capacity. Thus, even if the legislation is passed in its present form, there can be no waiver in respect of a minor or a person who for other reasons does not have full capacity.

SIGNIFICANT INJURY

44. Sub-Section 74I(3) provides that a warranty cannot exclude liability where a person suffers a “significant injury” through reckless conduct.
45. There is no definition of “significant injury”. The term is vague and uncertain and there would undoubtedly be Court cases to determine its meaning. Obviously the purpose of including such a provision is to enable persons who are injured through reckless conduct to overcome a threshold test before bringing a claim.
46. In South Australia there is already a threshold test for injury claims with respect to all damages claims which have been in operation for some time and has been tested in the Courts. If there is to be a threshold test, then it really is appropriate to have only one test in the statutes. There is no reason for two conflicting tests which would no doubt give rise to greater uncertainty with a greater chance of litigation.
47. Section 52 of the *Civil Liability Act* (formerly introduced as Section 35(A)(1) of the *Wrongs Act* in relation to motor vehicles), which is not now limited to claims arising from motor vehicle accidents, provides that damages for non-economic loss may only be claimed –

- (a) if the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least seven days; or
 - (b) medical expenses of at least the prescribed minimum have been reasonably incurred in connection with the injury.
48. As to (b), the prescribed minimum as set out in the Definitions Section 3 and is the sum of \$2,750.00 indexed by the CPI from September 2001 (the amount as at late-2008 was \$3,440.00).
49. This section now applies in respect of motor vehicle accidents or any other accident caused by negligence, unintentional tort or breach of contractual duty.
50. The provisions of sub-section (a), as to a person's ability to lead a normal life being significantly impaired by the injury for at least seven days has been the subject of a decision in the Full Court of the Supreme Court of South Australia in the case of *State Government Insurance Commission & Squire v Fiorenti, Worthley v Fiorenti* [1991] SASC 2897 (13 July 1991). In that case a person had suffered a soft tissue injury which had effects for more than seven days. The Court found that this was a significant impairment to lead a normal life. The Court said that the section was to oust from compensation very trivial complaints of very minor aches and pains. The threshold is significantly low.
51. There is no reason for a second statutory test to be introduced.

RECKLESS CONDUCT

52. The term "reckless conduct" is not defined.
53. The law defines "negligence" as a breach of the standard of care offered by the reasonable service provider.
54. It is a question of fact in each case as to what that standard is and whether there has been a breach of the standard.
55. Courts can reach different conclusion based on evidence of experts and persons in the industry. (See *Oblstein v Orford Farm Trail Rides* a decision in the NSW Supreme Court and Court of Appeal arising from a child being badly injured in a horse-riding accident where the trial Judge refused the claim because he found that there was no breach of the duty of care but on the same facts the New South Wales Court of Appeal found that there was such a breach and allowed the claim.)

56. There is no court determined test for “reckless conduct”. It is obviously a more significant breach of duty than mere negligence. The application of the section would have to be interpreted by the Courts and each case would have to be determined based on the evidence of the circumstances arising in each matter.
57. The example in this second reading speech is one possible example in circumstances which might vary considerably.
58. Comments have been made to the effect that some insurance policies may have a provision by which the service provider would be indemnified in the event of mere negligent conduct, but would not be indemnified in the event of reckless conduct. Insurance policies in this regard may vary between different insurers and there may be persons who are indemnified in some cases when a similar incident with a different insurer would not provide indemnity. The policy document which I have seen has a provision stating that the insurance does not extend to any “alleged or actual fraudulent act, dishonest, malicious, wilful or criminal act or omission of the Insured”. In my view this would not exclude a claim for “reckless conduct” but there may be some instances where “reckless conduct” may be equated with “wilful act or omission”. The terms of the policy would be a matter for individual service providers and their insurers.
59. Where there is an allegation of reckless conduct and where there is a provision in an insurance policy enabling the insurer to deny indemnity in the event of reckless conduct on the part of the insured service provider, then a service provider may be liable to the consumer but not be indemnified by its insurer. The insurer may also refuse to conduct the defence of the claim thereby causing the service provider to incur very significant legal costs, both defending the claim and fighting the insurer even if successful. The costs of a major piece of litigation alone would cripple most small businesses.
60. In the event that a person was very seriously injured, that person would no doubt maintain, in order to negative the exclusion clause, that the conduct which caused the injury was reckless and this would lead to substantial litigation, both between the consumer and in turn the service provider and its insurer.
61. There is no simple test or precedents established in the Courts for what constitutes “reckless conduct”.

NEW SOUTH WALES PROVISIONS

62. Section 5M of the *Civil Liability Act 2002* of New South Wales has a different regime as the statute provides for no duty of care to a person who engages in a recreational activity, which is defined, where there is a risk warning brought to the attention of a consumer of the services.

63. There are requirements laid down in the legislation for risk warnings. Provisions are included which appears to entitle a service provider to use the defence of risk warning to claims by minors including where circumstances where the risk warning was brought to the attention of a parent.
64. On 26 February 2009 the NSW Court of Appeal delivered a judgment on a claim where issues under Section 5M were dealt with. See *Belna Pty Ltd trading as Fernwood Fitness Centre Parramatta v Irwin* [2009] NSWCA 46. The principal judgment was delivered by Justice of Appeal Ipp who was the author of the Ipp report which led to changes in the law of negligence following the “insurance crisis”. A client of a fitness centre injured her knee whilst performing “lunges”. She had previously injured her knee. She recovered damages at trial and the decision was upheld on appeal. The Court held:
- (a) the fitness centre was in breach of its duty of care (negligent);
 - (b) the activity of participating in a fitness program was a “recreational activity” as defined under Section 5M of the *Civil Liability Act*;
 - (c) the wording of the “risk warning” contained in an acknowledgment in a questionnaire signed by the plaintiff did not warn the plaintiff of the risk involved in the lunge and therefore was not a “risk warning” within the meaning of Section 5M;
 - (d) a clause in the contract which purported to exclude liability was beset with problems in that it was “not merely ambiguous” but also “unintelligible” and so vague as to be “meaningless” and therefore did not exclude liability.
65. This case is another example of courts being reluctant to allow exclusion clauses to actually exclude liability.

SUMMARY

66. At the present time no information has been put forward as to the hardship suffered by recreational service providers in the current insurance market in obtaining insurance at a reasonable cost where they are insured in respect of negligent acts for their activities.
67. Information ought to be obtained from the insurance industry as to –
- (a) whether the legislation would have any significant effect on insurability and/or the level of premiums or conditions;
 - (b) whether the lack of any legislation would have any significant effect on insurability or the level of premiums or conditions;

- (c) whether insurers generally now impose conditions in the contract of insurance requiring a recreational service provider to obtain a “waiver” and if so to provide the wording to be used by the recreational service provider;
 - (d) whether no such requirements are imposed by insurers (and if so, determine whether recreational service providers are using waivers of their own initiative without any obligation for insurers in the belief that it gives some protection from claims and will assist them to obtain insurance at a lower premium;
 - (e) whether insurance contracts generally contain clauses which purport to exclude liability where a service provider is “reckless” thereby rendering the insurance cover useless for serious claims.
68. A balance has to be struck between the rights of consumers, who are in fact injured through negligence of the service provider and who may suffer significant financial loss, to obtain compensation for such damage and the financial ability of the service provider to provide such service in the light of insurance premiums.
69. Whilst many examples are given, particularly relating to bungee jumping, it needs to be borne in mind that persons partaking in certain activities which are inherently dangerous, may suffer some injury without negligence on the part of the service provider, but that service providers are now protected by the provisions contained in Sections 36-39 inclusive of the *Civil Liability Act* dealing with obvious risk and inherent risk. Section 39 provides that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
70. The proposed legislation does not introduce any obligation on the service provider to undertake a risk management or risk minimisation arrangements. Parliament might need to consider whether as a balance for allowing recreational service providers to have benefits there should be obligations such as a requirement to undergo risk management programs or to have compulsory insurance on approved terms.
71. A service provider who is able to have a person other than a minor sign a waiver may avoid liability for their own negligence unless they go to the point of being “reckless”, whatever that might mean. However, if the provider is in such serious breach of the standard of care as to be “reckless”, the waiver will not operate, but given comments from an insurer provided to me, there may be a refusal to indemnify by the insurer. Thus a consumer, who suffers serious traumatic injury and substantial economic loss through the reckless conduct of a recreational service provider, may not be able to recover appropriate compensation without significant litigation and the ultimate winding up or bankruptcy of the service provider.

72. The whole concept of liability and insurability of recreational service providers needs to be considered in the light of further information.
73. As a personal view, I suggest that if any legislation is to be introduced, there needs to be an obligation placed on service providers to implement a suitable risk management plan to ensure that there is proper protection for consumers of the recreational services. In fact, voluntary implementation of such a plan by a service provider, whilst incurring some expense, may enable the service provider to negotiate cheaper premiums on a basis of a probable reduction of potential claims.

JOHN DAENKE

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John Daenke is an experienced legal practitioner who has worked in the area of sports law and insurance law. He is a member of the Australian and New Zealand Sports Law Association and the Australian Insurance Law Association. He is a consultant at Lynch Meyer Lawyers. He has provided advice to Sport SA in relation to the *Recreational Services (Limitation of Liability) Act* and Proposed Sports Codes. The views expressed in this paper are his own.