Off Road New Zealand (1992) Ltd v Machinery Inspector

High Court Wellington CIV-2018-485-819; [2019] NZHC 1996
1, 2 July; 15 August 2019
Cooke J

Judicial review — Outdoor go-karting — Decisions of Machinery Inspector — Requirement for seatbelts and roll cage — Whether Machinery Act 1950 s 21A applies — "Amusement device" — Interpretation of "amusement device" — Whether regulations can aid interpretation of primary legislation — Whether other public law breaches arose from the procedure — Machinery Act 1950, ss 3, 21A, 21A(1), and 21A(2); Machinery Amendment Act 1963; Health and Safety at Work Act 2015, s 208; Health and Safety in Employment Act 1992, s 39; Interpretation Act 1999, s 6; Wildlife Act 1953; Amusement Devices Regulations 1978, regs 4,4(2),4(3),5,5(1)(d),6,7 and 8.

Off Road New Zealand (1992) Ltd (Off Road) operates an outdoor go-karting facility near Rotorua under the trading name "Raceline". Members of the public pay to be permitted to drive a go-kart on a track that has been constructed to simulate a race environment. Over a number of years, there has been controversy surrounding the need or appropriateness of go-karts of the kind operated at Raceline to be fitted with seatbelts. Off Road was of the view that requiring seatbelts to be worn by the drivers of the go-karts does not improve safety and in fact decreases it. This is particularly so in relation to go-karts that travel at higher speeds.

The first respondent, the Machinery Inspector, was appointed pursuant to the Health and Safety at Work Act 2015. Off Road challenged two decisions made by the first respondent, the first on 5 February 2017 requiring Off Road to fit seatbelts and roll bars on its go-karts, with a second decision on 19 July 2018, effectively confirming the first decision.

Held (Granting a Declaration that the applicant's operation does not meet the statutory definition of an "amusement device" pursuant to s 21A of the Machinery Act 1950, and dismissing the other claims for judicial review).

1 In prescribing the regulations under the Amusement Devices Regulations 1978 (the Reugulations), the drafters did not have go-karts in mind, and were more naturally directed at fairground attractions.

2 On the plain wording it can properly be said that each individual go-kart can be seen as an appliance (namely, a vehicle) to which motion of a prime mover (namely, an engine) is transmitted as set out under s 21A of the Machinery Act 1950. It would seem therefore, that on the literal meaning of the words the definition applies to each individual go-kart, and accordingly that s 21A applies, and thus the Regulations consequentially apply.

Trax Indoor Motor Sport Ltd v Department of Labour [1996] DCR 165 considered.

3 However, the text of an enactment must be interpreted in light of its purpose. Through the task of interpretation, the statute should be made to work as Parliament intended. As such, the "amusement device" and "appliance" are not to be one and the same thing. What is contemplated is a contraption that has the interlinked, but separately apparent, elements as outlined in the definition. On that basis a single motorized vehicle could not be an amusement device.

Northern Milk Ltd v Northland Milk Vendors Association Inc [1988] 1 NZLR 530 (CA) applied.

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767 applied.

4 Whilst it is appropriate to interpret regulations in light of the legislation under which they are promulgated, the reverse is not necessarily true. There are constitutional reasons for limiting to particular circumstances when it will be appropriate to interpret primary legislation by reference to regulations. First, the regulations must be contemporaneous with the empowering Act. Second, the statute itself must be ambiguous. Third, the utility of a regulation when interpreting legislation is limited to when it assists in a better understanding of the wider context, and according to what Parliament was driving at in the legislation. Fourth, a regulation should not be used to alter the meaning of the statute.

Interfreight Ltd v Police [1997] 3 NZLR 688 (CA) considered.

Campbell v Accident Compensation Corporation CA 183/03, 29 March 2004 applied.

Cases referred to in judgment

Campbell v Accident Compensation Corporation CA 183/03, 29 March 2004.

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.

Department of Labour v Waitomo Big Red Ltd [2010] DCR 381.

Interfreight Ltd v Police [1997] 3 NZLR 688 (CA).

Northern Milk Ltd v Northland Milk Vendors Association Inc [1988] 1 NZLR 530 (CA).

PauaMAC5 Inc v Director-General of Conservation [2017] NZHC 1182.

Trax Indoor Motor Sport Ltd v Department of Labour [1996] DCR 165.

Text referred to in judgment

R H Grzebieta, R Mitchell, R Zou and G Rechnitzer "Go-kart-related injuries and fatalities in Australia" (2013) 18 International Journal of Crashworthiness 397.

Application
This was an application for judicial review against two decisions of the Machinery Inspector appointed pursuant to the Health and Safety and Work Act 2015, first requiring seatbelts and roll bars to be fitted on the applicant's go-karts, and second confirming the first decision made.

PV Cornegé for the applicant.
TGH Smith and *NLK Szeto* for the respondents.

COOKE J.

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[1] Off Road New Zealand (1992) Ltd (Off Road) operates an outdoor go-karting facility near Rotorua under the trading name "Raceline". Members of the public pay to be permitted to drive a go-kart on a track that has been constructed to create a simulated race environment. The facility has been operating since 2010.

[2] Over a number of years there has been a controversy surrounding the need, or appropriateness, of the go-karts of the kind operated at Raceline to be fitted with seatbelts. That is not an issue that has been limited to Off Road's activities, as the appropriateness of fitting seatbelts to go-karts is an issue of debate not only in New Zealand, but internationally. Off Road is of the view, which is shared by others, that requiring seatbelts to be worn by the drivers of go-karts does not improve safety and in fact decreases it. The view is that it is safer during any accident for the driver to be thrown free from the go-kart rather than being belted into it (in much the same way as it would be unsafe for motorcyclists on the open road to be belted into their motorbike). That is particularly so in relation to go-karts that travel at higher speeds.

[3] The first respondent is the Machinery Inspector appointed pursuant to the Health and Safety at Work Act 2015. Off Road challenges two decisions made by him under powers I will address in detail below. On 5 August 2016 he made a decision requiring Off Road to fit seatbelts and roll bars on its go-karts by 5 February 2017. There followed a period

of engagement between Off Road and the respondents concerning that decision during which time the decision was not enforced. Following that engagement, a second decision was made by the first respondent on 19 July 2018 effectively confirming the first decision. Off Road challenges both decisions by way of judicial review.

A. Relevant legislative provisions

[4] The key legislative provisions relevant to this case are set out in the now repealed Machinery Act 1950. Section 21A of that Act provided:

> **21A Regulation of amusement devices**
>
> (1) In this section—
>
> **amusement device** means an appliance to which the motion of a prime mover is transmitted and which is used, or designed or intended to be used, for the amusement, recreation, or entertainment of persons being carried, raised, lowered, or moved by the appliance or any part thereof while it is in motion; and includes the prime mover, transmission machinery, supporting structure, and any equipment used or intended to be used in connection therewith
>
> **local authority** means a territorial authority within the meaning of the Local Government Act 2002.
>
> (2) Every person commits an offence against this Act who erects for the purposes of operation or operates any amusement device unless—
> (a) it is registered under this section and a certificate of registration in respect of the device is for the time being in force; and
> (b) a permit has been issued by the appropriate local authority for the erection and operation of the device and the permit is for the time being in force.
>
> (3) Application for registration of an amusement device shall be made in the prescribed form to the Inspector by or on behalf of the owner of the amusement device and shall be accompanied by documentary evidence that the device can be erected and operated without danger to persons operating or using the device or in the vicinity thereof.
>
> (4) If the Inspector is of the opinion that an application is in order, he shall issue to the applicant, either unconditionally or subject to such conditions as are specified therein, a certificate of registration in the prescribed form.
>
> ...
>
> (6) Before commencing to operate an amusement device the owner shall obtain from the local authority having jurisdiction in the locality where the device is to be operated a permit in the prescribed form.
>
> (7) On application in that behalf by or on behalf of the owner of the amusement device, accompanied by such evidence as may be prescribed, including evidence,—
> (a) that a certificate of registration under this section is in force in respect of the device; and
> (b) that, having regard to the situation in which the device is erected, the device can be operated without danger to persons operating or using the device or in the vicinity thereof —
> the local authority shall issue a permit in the prescribed form.
>
> ...

(9) Any certificate of registration or permit under this section may be cancelled by the issuing authority if—
  (a) the owner is convicted of an offence against this section; or
  (b) the amusement device can no longer, in the opinion of the issuing authority, be operated safely.

(10) Where an amusement device is materially altered or is repaired after suffering damage necessitating repair by welding or by the replacement of a load bearing part other than a bolt, the owner shall notify the Inspector, who may require the owner, before operating the device, to produce evidence that the device can be safely operated.

(11) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
  ...
  (c) prescribing conditions to which certificates of registration and permits under this section shall be subject:
  ...

[5] Section 21A was inserted into the Machinery Act 1950 by the Machinery Amendment Act 1963 with effect from 1968. Regulations contemplated by s 21A(11) were promulgated. They are now the Amusement Devices Regulations 1978 (the Regulations). I will not set out the relevant provisions of the Regulations at this point, although they are significant for the issues that arise.

[6] The Machinery Act 1950 was repealed by the Health and Safety at Work Act 2015, but under cl 2(3) of sch 1 of that Act, s 21A is treated as continuing in force until the Regulations are revoked, and under cl 2(1)(a) the Regulations are to be treated as Regulations made under the Health and Safety at Work Act 2015. The legislation is administered by the second respondent (WorkSafe).

B. Factual background

[7] The factual background is complex, and to some extent controversial. I will not address that background as fully as the parties did, but I will identify some of the more important matters.

[8] Off Road commenced research into the operation of a go-kart facility in 2009 and decided to proceed. Under the Regulations an engineer must certify that an amusement device subject to the Regulations can be erected and operated without danger to persons operating or using it in its vicinity, and issue a certificate with any conditions (rr 5–7). The application is then referred to the Inspector who registers the amusement device subject to any additional conditions (r 8). An engineer was instructed by Off Road for the purposes of the original certification, and he issued a certification without a requirement to fit seatbelts in July 2010. In response WorkSafe advised that it had a policy requiring the fitting of seatbelts. It nevertheless permitted Off Road to commence operation without seatbelts, and referred the issue for consideration by a Technical Interest Group of the Professional Engineers of New Zealand (IPENZ). WorkSafe did, however, indicate that if the engineer did not change his view it might make a complaint to IPENZ.

[9] The respondents undertook further work, including seeking advice from Mr Neil Rogers, a mechanical engineer with kart racing experience. He visited Off Road's facility. On 5 October 2010 he

provided a report. It was highly complementary of Off Road's facility, but concluded "on balance" that the safety environment was not substantially different from other kart operations such that seatbelts were unnecessary. Other work, such as a meeting with IPENZ personnel, also took place.

[10] In January 2011 WorkSafe issued an improvement notice under s 39 of the Health and Safety in Employment Act 1992, which allows an Inspector to give such a notice when a person is failing to comply with any provision of the Act. Under that regime the affected person had a right to appeal to the District Court, which is empowered to vary, rescind or confirm the notice. In 1995 the District Court had allowed such an appeal by an indoor go-kart operation challenging the requirement to fit seatbelts.[1] In *Trax Indoor Motor Sport Ltd v Department of Labour* Judge Lawson had said:[2]

> It is not disputed that seat belts act as restraints, restraining a driver of a vehicle from being thrown forward and possibly injured by contact with the steering wheel or other solid object on an impact crash. What is disputed is the likelihood of injury being sustained in such impact-type situations contrasted with the likelihood of injury being sustained from other causes for which seat belts offer no protection. It is clearly the experience of outdoor operators, and a large number of operators of indoor karts, that it is preferable not to have seat belts fitted. It is, of course, trite that some risk will always be involved and accidents will occur despite every precaution. The question really is whether seat belts will reduce or increase safety overall with indoor go-karts. I believe it has been established that the two likely forms of accidents are impact and roll-over. The preponderance of evidence was that roll-over was the more likely to be injurious. The kart and an adult driver weigh approximately the same. The kart has a very low centre of gravity and without seat belts has a flexible chassis which is part of its safety design features. When a kart rolls over or crashes, the preponderance of opinion was that it is better that the driver be thrown free of the vehicle in much the same way as a motor-cyclist is better to be thrown free than restrained by a seat belt ...

[11] Off Road challenged its improvement notice on a similar basis – that it was unreasonable, and would reduce safety.

[12] Prior to the hearing of that application there was a meeting in Rotorua where WorkSafe agreed to withdraw the improvement notice, but that a more detailed risk assessment would be undertaken. The operation would continue without seatbelts in the meantime. The Inspector, Mr Flood, then issued a certificate in August 2011 without the need for seatbelts.

[13] Mr Flood explains in his affidavit that he did not attend the meeting, and he was advised afterwards by legal counsel that the matter had been settled. He says that after examination of materials supplied to him following that meeting he was not satisfied that a certificate of registration should be issued but that he was "instructed to proceed to issue the registration, and I did so".

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1 *Trax Indoor Motor Sport Ltd v Department of Labour* [1996] DCR 165.
2 At 182.

[14] A further certificate in similar terms was later issued in May 2014. Mr Flood similarly says that he was advised by his superior, Mr Murray, that WorkSafe had reached "the end of the line" on the issue and that a certificate needed to be issued, although on this occasion it was issued by somebody other than Mr Flood.

[15] In the meantime, WorkSafe had continued its complaint against the original engineer with IPENZ. IPENZ dismissed the complaint, but made some criticisms of the engineer's work. As part of that process a further engineer, Mr Geraint Bermingham, was called by IPENZ as an independent witness. Off Road then approached Mr Bermingham to undertake the risk assessment of its operation. Mr Bermingham concluded that seatbelts decreased the safety of the operation. His views were peer reviewed, and the peer reviewer confirmed the view that safety standards were met. This was put forward in the 2016 re-registration process supported by the certification of a further engineer.

[16] The application was made in May 2016. After it was assessed, on 5 August 2016 Mr Flood made the first decision challenged in these proceedings. The decision required Off Road to fit seatbelts and roll bars no later than 5 February 2017. Amongst the reasons outlined for the apparent change in Mr Flood's position was the promulgation of a new standard in Australia (AS 3533).

[17] The applicant did not comply with the decision. In May 2017 WorkSafe asked the applicant to confirm that it was operating with seatbelts and roll bars, and it provided a review authored by a further engineer instructed by WorkSafe to assess the risk assessment undertaken for the purposes of the new application, Mr Tim Gibney. Mr Gibney had concluded that the view that the operation was safer without seatbelts was contrary to the research he had accessed. In July 2017 there was an agreement that there be further discussions, and a further review letter from Mr Gibney was obtained by WorkSafe.

[18] A meeting was then held in August 2017. That meeting was not attended by Mr Flood, but by his manager, Mr Murray. It was agreed that further information would be provided to Mr Murray by Off Road, which was duly provided in December 2017. Mr Murray indicated he would pass it on to his successor, Mr Humphries.

[19] In March 2018 WorkSafe wrote to Off Road advising that it was considering enforcement action if it did not comply with the first decision. It advised that prosecution would be considered against s 208 of the Health and Safety at Work Act 2015 which provides:

> **208 Requirement to comply with conditions of authorisation**
> (1) A person must comply with the conditions of any authorisation given to that person that are prescribed in or under regulations.
> (2) A person who contravenes subsection (1) commits an offence and is liable on conviction,—
> (a) for an individual, to a fine not exceeding $20,000:
> (b) for any other person, to a fine not exceeding $100,000

[20] After further exchanges, the Chief Executive of WorkSafe advised that WorkSafe would carry out a review of the applicant's concerns relating to the decisions made. It would be undertaken by

Mr Craig Marriott, the Acting General Manager of High Hazards and Energy Safety.

[21] The Marriott review concluded, amongst other things, that the overall risk appeared to be increased through the use of seatbelts when the operation was viewed holistically. It recommended that WorkSafe visit the site and determine what track conditions were required to maintain an operation without seatbelts.

[22] Off Road did not receive a copy of this review until August 2018. In the meantime, in July 2018, Mr Flood made the second decision challenged by Off Road. The second decision required seatbelts to be installed as a condition of certification.

[23] Prior to releasing the review by Mr Marriott, WorkSafe contracted Professor Raine of the University of Technology, Auckland to conduct a review. Off Road complains about the limited scope of the exercise that Professor Raine undertook. In his report Professor Raine referred to the limitation of his instructions and identified what work would be needed to identify whether Off Road's operation was safer without seatbelts. He indicated that if that work was undertaken the conclusions that he reached in his report might be different. He said:

> 157. To determine, on an evidential basis, whether a driver restraint system should be prescribed in higher speed leisure karting operations, an extensive analysis would be needed of crashes and injury incidents involving the Sodi GT3 type leisure kart, at the Off Road NZ operation, and as used on similar concession racing tracks across a large number of operations internationally. This may make it possible to build a valid statistical picture of driver injuries or fatalities related to the nature of the crash and influencing factors. A more detailed review of existing Off Road NZ crash incident records should be conducted as a first step.

[24] He nevertheless reached the following conclusion:

> 148. In the absence of much more quantitative operational evidence to support the use of karts without driver restraints, it is my view that low-speed leisure kart racing operations where speeds do not exceed 40 km/h should require drivers to wear a full four or five-point harness, with a certified factory or after-market roll bar. Such operations should nonetheless ensure that tracks have soft trackside barriers to avoid high crash decelerations.

[25] He also concluded that the risk assessment that had been done had not demonstrated that Off Road had met the Australian standard or demonstrated that a safer outcome would be achieved by not fitting seatbelts. He gave the following recommendations:

> (i) Seatbelts and roll bars are required for all low speed leisure karting operations, but with trackside barriers sufficiently deformable to avoid potentially fatal decelerations from crashes at 40 km/h.
>
> (ii) The desirable future state for leisure kart concession racing operations involving higher speeds, such as at the Off Road NZ Mamaku circuit, is one where driver safety is more inherent in the design of the track and the karts that are used. This would involve specification of a certified roll bar and five-point harness seatbelts, together with a number of kart and track design features included to largely preclude high crash

> decelerations and to more or less eliminate fire risk. Some the key design features that would be needed are covered in this report. The practicality of their execution is challenging, for example designing leisure karts with substantial crush zones to reduce the magnitude of crash decelerations to the driver's body.

[26] It is also appropriate to record that other academic research into the issue relied upon by the respondents also generally supports the use of seatbelts for go-karts. In a paper entitled "Go-kart-related injuries and fatalities in Australia" by R H Grzebieta of the University of New South Wales and others the authors conclude, for example:[3]

> It appears that accessible safety devices, such as seat belts, roll bars and well-designed energy dissipating crashworthiness protection systems for barriers, are not being sufficiently incorporated into or used in the current designs of go-karts and the barriers they impact. Further research and crash testing needs to be conducted to demonstrate the benefits of safety protection systems and go-karts, so policy makers and go-karting enthusiasts are aware of the detriment of not using such validated equipment during a crash.

C. Nature of the challenge

[27] By way of summary Off Road advances two main kinds of challenge:

(a) First, that s 21A of the Machinery Act 1950, and the Regulations, do not apply as Off Road's operation is not a "amusement device" as defined by s 21A.

(b) Secondly, challenges to the procedure followed by the respondents, involving allegations of procedural impropriety, breach of legitimate expectation, breach of natural justice, mistake of fact and irrationality.

[28] As the argument developed, however, it became apparent that the key argument in the proceedings was directed to whether the Off Road operation was within s 21A and the Regulations at all. The argument is based on the premise that the enactment of s 21A by Parliament in 1968 was directed to the type of machinery, or devices, that can be described as fairground attractions such as ferris wheels or roller coasters.[4] The definition of "amusement device" should be interpreted accordingly.

[29] It is appropriate that I also record before addressing the issues that it was accepted by both sides that the issue as to whether go-karting, and particularly outdoor go-karting at facilities such as Off Road's facility, is safer with or without seatbelts is a matter of legitimate debate. This is particularly so in regard to outdoor go-karting operations at higher speeds. It is not disputed that Off Road genuinely believes its operation would be less safe if fitted with seatbelts. It is not bringing these proceedings for any reason associated with cost, as the cost of fitting seatbelts to their go-karts has been well exceeded by the costs of this litigation. Equally, and

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3 R H Grzebieta and others "Go-kart-related injuries and fatalities in Australia" (2013) 18 International Journal of Crashworthiness 397 at 404.

4 Schedule 2 to the Regulations has a list of such attractions.

notwithstanding that Off Road had included irrationality as part of its grounds of judicial review, it needs to be remembered that the ultimate conclusion on this kind of issue would be for the Inspector to make if the Regulations apply. If s 21A and the Regulations apply, then the legislation identifies the Inspector as the person who is required to form the opinion on such issues.[5] This further demonstrates why the real issue in this case is the applicability of s 21A and the Regulations.

D. Regulations mandate seatbelts

[30] The argument before this Court suggests that whether or not the Inspector should have required seatbelts is ultimately not relevant. That is because of the terms of the Regulations. They provide:

> **5 Amusement device must be examined before certificate issued**
>
> (1) An engineer must not issue an engineer's certificate in respect of an amusement device (including a model engineering amusement device) and a competent person must not issue a competent person's certificate in respect of a model engineering amusement device unless the engineer or competent person (as the case may be) has examined the device in accordance with these regulations and is satisfied:
>
> ...
>
> (d) in the case of a device the dynamic effects of whose movement during normal operation, as a result of the failure of its normal controls during normal operation, or as a result of the application of an emergency braking system after such a failure, could result in the ejection of passengers, that the device is equipped with passenger restraining and containing apparatus, incapable of inadvertent release by a passenger or by accident, sufficient to prevent such ejection:
>
> ...

[31] It seems to me that this means what it says. If the Regulations apply, then seatbelts are required.

[32] Both sides mounted somewhat artificial arguments in relation to the scope of r 5(1)(d). Mr Cornegé argued that if the Regulations did apply, then r 5(1)(d) did not mandate seatbelts for Off Road's go-karts on the basis that being thrown free from a go-kart was different from "the ejection of" the passenger. Equally Mr Smith for the respondents argued, in response to a submission that the respondents' approach would lead to the mandating of seatbelts in other circumstances which would not be sensible (such as jet ski operations which are regulated under the Regulations), that there was a similar difference between being thrown from, and ejected out of, a device.

[33] I regard these arguments as untenable. As I will address in greater detail below, it seems apparent from r 5 (and the Regulations overall), that the drafters of the Regulations did not have go-karts in mind in prescribing the requirements, and that they are more naturally directed at fairground attractions. But it appears to me to be inescapable that if the Regulations do apply, r 5(1)(d) applies – that is as a result of a failure of normal controls, (or possibly the application of an emergency braking

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5 I note that Mr Flood has personally owned and operated a go-kart.

system),[6] that passengers could be ejected from the go-kart. It is accordingly required to be fitted with a passenger restraining and containing apparatus (ie seatbelts).

[34] It is apparent that this may have unfortunate ramifications. To the extent that operations such as jet ski hiring operations are covered by the Regulations, r 5(1)(d) will apply. This is likely to be positively dangerous. I was not provided with much evidence about other hiring operations, although the evidence I do have suggests there is a wide range of activities potentially affected by this requirement. As I indicate below, this is indirectly relevant to the interpretation questions.

E. Does s 21A apply

[35] The key issue in this case is whether s 21A of the Machinery Act 1950 applies to Off Road's operations, and in particular whether the definition of "amusement device" in s 21A(1) covers Off Road's go-kart operations.

[36] The terms of s 21A are set out in full at [4] above. The interpretation section of the Act also provides associated definitions for the following terms used in the definition of "amusement device" in s 21A(1):

> **prime mover** means an engine, motor, or other appliance which provides mechanical energy derived from steam, water, wind, electricity, gas, gaseous products, compressed air, the combustion of fuel, or any other source
>
> **transmission machinery** means any shaft, wheel, drum, pulley, system of fast and loose pulleys, gearing, coupling, clutch, driving belt, chain, rope, band, or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance

Is a go-kart an amusement device?

[37] The respondents' stance is based on the wording of the definition of an "amusement device". On the plain wording it can properly be said that each individual go-kart is an appliance to which motion of a prime mover is transmitted. The word "appliance" is not a defined term and carries its normal meaning – an analogous term is an "apparatus". It can potentially encompass a vehicle. A go-kart can be seen as an appliance (ie a vehicle) to which the motion of a prime mover (ie an engine) is transmitted. A go-kart is used for the amusement, recreation or entertainment of persons being carried or moved by the appliance while it is in motion. It would seem, therefore, that on the literal meaning of the words the definition applies to each individual go-kart, and accordingly that s 21A applies, and the Regulations consequentially apply.

[38] This view appears to have been adopted by the District Court in *Trax Indoor Motor Sport Ltd v Department of Labour*.[7] Here Judge Lawson rejected the argument that go-karts were not amusement devices. He held:[8]

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6 I say this notwithstanding the argument that the emergency braking system is something different from, and additional to the braking system (see r 5(1)(b) and (c)).

7 *Trax Indoor Motor Sports Ltd v Department of Labour*, above n 1.

8 At 172.

> The respondent, however, strongly submitted s 21A was wide enough to "catch" go-karts and if they were not caught, then it would seem there was no statutory criteria available at all which would be a major gap in public safety legislation.
>
> In my view, s 21A does include go-karts: "... the motion of a prime mover is transmitted and ... [the machines are] designed or intended to be used, for the amusement, recreation, or entertainment of persons being carried ... or moved by the appliance ... while it is in motion".
>
> Regulation 5 of the Amusement Devices Regulations 1978 enacted pursuant to the Machinery Act 1950 in my view contemplates vehicles or appliances such as go-karts.
>
> ...
>
> Dodgems which are connected directly to a power source in the confines of a walled arena would seem to qualify and I can see no reason for excluding go-karts. I find therefore that they are amusement devices within the ambit of the Machine Act and the Regulations made thereunder.

[39] Off Road challenge this interpretation. I accept that there is an alternative interpretation available on the wording. That is that the various constituent elements that make up an amusement device are contemplated to be separate things. An amusement device is made up of a prime mover (some sort of engine) with a separate appliance (that is an apparatus such as a seat or capsule) where the motion of the engine goes through transmission machinery connecting the two, resulting in the carrying, raising, lowering or movement of the appliance. It does not contemplate a single vehicle that has all such constitutive elements inbuilt within it. Another way of putting this is that the "amusement device" and the "appliance" are not to be one and the same thing. What is contemplated is a contraption that has the interlinked, but separately apparent, elements as outlined in the definition. On that basis a single motorised vehicle could not be an amusement device. A dodgem enclosure at a fairground would be, however. That is because it has such separate elements – it has a central motor, transmission machinery, and a series of appliances to which the power of the motor is transmitted. This approach corresponds to Off Road's contention that the definition only captures fairground type devices.

[40] The ultimate question is which approach corresponds to the intended meaning. Statutory interpretation is not a matter of the literal meaning of words. The text of an enactment must be interpreted in light of its purpose.[9] Through the task of interpretation the statute should be made to work as Parliament must have intended.[10]

Problems with respondents' approach

[41] There are three closely related reasons why the respondents' proposed interpretation is problematic.

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9 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

10 *Northern Milk Ltd v Northland Milk Vendors Association Inc* [1988] 1 NZLR 437 (CA).

[42] First, the respondents' approach catches each individual go-kart but not the overall go-karting operation (including key features such as the track, and the barriers around the track) as part of the thing that is controlled and regulated by s 21A. The purposes of the enactment do not appear to be achieved if critical safety related aspects are not regulated. That contrasts with amusement devices that are unambiguously within the definition, such as traditional fairground attractions. The only way in which the overall go-karting operation could be said to be covered is by saying that they are brought in though the concluding words – "and any equipment used or intended to be used in connection therewith". It would be surprising if these residual mop-up words were needed to enable such key features of the activity to be brought within its reach. At the very least that is strained.

[43] Secondly, s 21A contemplates that amusement devices are "erected". This is referred to a number of times within the section. Reference is made to operation separately from erection – for example in the offence prescribed in s 21A(2) – but looked at overall, the section contemplates that amusement devices are erected for operation, and then operated.[11] That is why a separate permission is required from the Territorial Authority where the amusement device is to be so located. An individual go-kart is not erected. Only the overall go-kart racing facility, comprising a track and all associated equipment, on which go-karts are operated could be said to be constructed (and thereby erected). But on the respondents' approach the definition applies because it covers individual go-karts.

[44] Thirdly, if each individual go-kart is defined as an amusement device, then everybody who operates such a device must obtain a certificate from the Inspector (and possibly permission from the Territorial Authority) – including anyone who owns and operates a go-kart for their personal use. This is reasonably common. Indeed, any motorised vehicle used for amusement, recreation or entertainment would appear to be captured, which would likely include speed boats, pleasure boats, jet skis and other similar motorised vehicles/craft.

[45] It was issues of this kind that led Judge Tompkins to conclude in *Department of Labour v Waitomo Big Red Ltd* that an outdoor quad biking operation offered to the public did not involve an amusement device under the Regulations.[12] Here the operator had been prosecuted under s 21A(2) of the Machinery Act 1950 for not obtaining a certificate under the Regulations. A tourist had been hurt in an accident and the prosecution was laid. The Judge recorded:

> [85] In essence, the informant's case is that because a quad bike has "a prime mover" as defined in s 2 (its engine), which transmits its motion to the wheels of the quad bike (by way of a differential) and because the rider sits astride the running quad bike and is moved around by it for the purpose of amusement, recreation or entertainment, then the quad bike is an amusement device for the purposes of the Act and regulations. There is more than a hint,

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11 That is also true of the Regulations – see for example r 15(1).
12 *Department of Labour v Waitomo Big Red Ltd* [2010] DCR 381.

when put that way, of forcing, under some strain, the activity to comply with the definition.

[46] After an analysis of the legislative history and particular passages from the Parliamentary debates on the insertion of s 21A, the Judge held:

> [95] Although, superficially, quad bikes correspond to the statutory definition, in my view that correspondence occurs without a proper consideration of the context both of the statutory definition within the wider scheme of the Machinery Act, and the underlying purpose of that Act. As the parliamentary debates show, the legislature did not intend "amusement devices" to encompass anything other than the traditional fairground type of amusement devices, which are erected for varying lengths of time (sometimes permanently) in fixed, discrete and ascertainable locations. Those debates are clear as to the enacting legislature's purpose, that being an important matter to be considered in ascertaining the meaning of a statutory provision as both directed by s 5(1) of the Interpretation Act 1999, and by the many authorities in which that section's predecessor was interpreted and applied.
>
> [96] The relevant purpose of the legislation is to regulate, for public safety purposes, fairground and similar entertainment machines which are "erected" and "operated" in fixed locations. The statutory split between the original engineering certification, and subsequent local body inspection, is appropriate to this category of services but difficult sensibly to apply to an operation in the nature of a quad bike tour.
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> [97] Similarly s 21A, with its references to the device being "erected" and "operated", cannot sensibly be applied to quad bikes being used over many kilometres of hill country farm track.

[47] Although this conclusion focussed on the erection of the device at fixed locations, in my view it identifies the issue more broadly.

[48] It is apparent that s 21A was inserted into the Act in 1968 to deal with machinery of a more specific kind. On introduction the Minister of Labour, the Honourable T P Shand said:[13]

> ... The principal clause in the Bill introduces a new principle, dealing with the management of amusement devices – fairground devices such as merry-go-rounds and the various modern machines erected on fairgrounds for the amusement of the public. It provides for the introduction of regulations and the institution of a procedure to ensure that such machinery is safe to operate, not only from the point of view of the employee working the machinery, but also from the point of view of the public – mostly children – who use the equipment. New Zealand has been free of serious accidents caused by fairground machinery, and this is a tribute to the sense of responsibility of those who over the years have operated fairground machinery. When one thinks of the fantastic number of such devices erected quite hurriedly before an agricultural show or in some amusement park and then operated day after day for multitudes of young children, one is amazed that so far in New Zealand there has been no serious accident due to a defect in that machinery.

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13 (14 August 1963) 336 NZPD 1157.

> The trend is to more and more sophisticated machinery. The old merry-go-round, which was about the most complex piece of machinery in my childhood, has given way to all sorts of fearsome animals which to me appear to have come out of space fiction. It is the potential danger from these devices, if they should be mechanically unsound, which has led to the introduction of this legislation and to the decision to institute a system of inspections and licensing of such equipment.

[49] It is also apparent from the Parliamentary debates, and the legislation itself, that Parliament was seeking to cover all kinds of devices of this nature notwithstanding the potential for future development. The definition of "amusement device" was in broad terms to ensure that future inventions came within the definition. As was put by the member for Sydenham, Mrs Mabel Howard, in the Parliamentary debates:[14]

> ... We found the operators of amusement appliances had no insurance cover of any kind at all, and they were operating huge ferris wheels, switchback railways, and boats, which swung right out. The atomic age has really hit these fair people, and they have all sorts of queer devices. There has been no cover for these fun fairs , and for the shows held in showgrounds or school grounds, where there are large concentrations of children in small areas, but now those children will be covered, and we believe that is all to the good that the owners of the machines should take out insurance.

[50] These passages were referred to by Judge Tompkins in reaching his decision. They support the view that "amusement device" was directed to a more distinct type of device, the kind that are erected at locations for entertainment purposes, and was not intended to cover all motorised vehicles when used for such purposes. They show that Parliament had something more particular in mind and more consistent with the proposed interpretation set out in [39] above.

[51] It is significant that the Machinery Act 1950 as enacted regulated all kinds of machinery. Under the scheme of that Act machinery had a comprehensive definition, but certain types of machinery were excluded from its reach by s 3, which included the ability to exclude machinery by order in council. It is perhaps also notable that this was legislation first enacted in 1950 prior to the comprehensive regulation of motor vehicles under later Land Transport legislation.

The Respondents' answers

[52] The respondents answered these potential difficulties by emphasising two factors.

[53] The first point emphasised by Mr Smith is that legislation must be interpreted in a manner that keeps it up to date with changes over time – a concept expressed in s 6 of the Interpretation Act 1999 as "an enactment applies to circumstances as they arise". This principle is also expressed in other ways, including that legislation is "always speaking", or that an "ambulatory" interpretative approach should be adopted. This may be seen to be particularly pertinent in the current circumstances where it is apparent on enactment in 1968 that Parliament was concerned

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14 At 1164–1165.

about future developments. That explains why the definition has a certain open-ended quality.

[54] Looked at in this way, the current outdoor go-karting operation by Off Road can be seen as simply the result of incremental development. A dodgem was given its own engine and no longer relied on a centralised power source. It was then operated on a racetrack constructed for outdoor use. The ambulatory approach to interpretation would suggest that such a device is still intended to be caught notwithstanding these developments, even though they may not have been contemplated at the time of enactment.

[55] The respondents' second point relies on the following provision in the Regulations:

> **4 Applications for registration**
> (1) Every application for registration under section 21A of the Act shall be made to an Inspector of Machinery in form 1.
> (2) Every such application shall be in respect of 1 amusement device only.
> (3) For the purposes of subclause (2), a number of individually propelled machines such as dodgems, mini-bikes and the like intended to be used and operated in the 1 enclosure and each suitably identified by number shall, together with all other equipment and machinery intended to be used during their use and operation, be deemed to constitute a single amusement device.
> ...

[56] Regulation 4(3) is of central importance to the respondents' argument in two respects. First, Mr Smith argued the reference to "mini-bikes" appears to contemplate something very similar to a go-kart. If a mini-bike with its own power source operated within a single enclosure is an amusement device, then a go-kart operated within such an enclosure (inside or outside) should be seen to be too. I accept that this a is a powerful point.

[57] Secondly this provision potentially responds to the difficulties associated with the desirability of covering the whole go-karting operation and not just individual go-karts. As Mr Smith said it deems the overall operation to be a single amusement device. It is true that deeming is only for the purpose of making the application for certification under r 4(2) – but at the very least it gives rise to a need to reconsider whether the concluding words in the definition of "amusement device" in s 21A should indeed be interpreted so that the whole operation is an amusement device. It is possible to get to that point by reading the two provisions together.

Are these answers persuasive?

[58] Notwithstanding these points, it seems to me that the arguments do not provide a comprehensive or persuasive answer to the problems with the respondents' approach, and that the interpretation outlined at [39] should be preferred. That is so for a series of reasons.

[59] First, whilst it is appropriate to interpret regulations in light of the legislation under which they are promulgated, the reverse is not necessarily true. Only in particular circumstances will it be appropriate to interpret primary legislation (here s 21A) by reference to regulations. The

position was summarised by the Court of Appeal in *Interfreight Ltd v Police* in the following terms by Tipping J for the Court:[15]

> The circumstances in which regulations may be considered as an aid to the interpretation of a statute are limited. In short, the general rule is that the regulations must be contemporaneous with the statute, and the statute itself must be ambiguous: see Burrows : Statute Law in New Zealand (1st ed 1992 at p 127); *Hanlon v Law Society* [1981] AC 124, [1980] 2 All ER 199 per Lord Lowry at 193–194 and *Vergara v Attorney-General of Hong Kong* [1988] 1 WLR 919 per Lord Ackner in the Privy Council at 926–927.

[60] There are constitutional reasons for this approach. What the executive says or does should only be referred to to interpret the meaning of a Parliamentary enactment in certain circumstances. It seems to me that the situation where it would be appropriate to consider regulations when interpreting legislation is when they assist at a better understanding of the wider context, and according to what Parliament was driving at in the legislation. But regulations should not be used to alter the meaning of the statute.[16]

[61] In the present case there is ambiguity, but the Regulations were not contemporaneous with the statute. Section 21A was inserted into the 1950 Act in 1968. The Regulations were promulgated 10 years later in 1978. The earlier regulations promulgated when s 21A was inserted, the Amusement Device Regulations 1968 (repealed by the 1978 Regulations), do not contain these provisions or their equivalent. That means that r 4(3) should not be used as an interpretive guide to s 21A.[17]

[62] Moreover, any interpretive influence of the Regulations does not answer all of the problems identified above. It does not respond to the issue that s 21A contemplates that amusement devices are erected as well as operated. In addition, whilst r 4(3) deems the whole go-karting operation a single amusement device under r 4(2) of the Regulations, that will not prevent privately owned go-karts that are not operated as part of an overall facility being an “amusement device” as defined in s 21A. In response to my questions, Mr Smith indicated that motor vehicles in common use by the public would not be amusement devices because they were used for the purpose of transportation rather than “entertainment” within the words of the definition. But that does not address the situation for other vehicles that are operated for amusement, recreation or entertainment purposes – such as go-karts, jet skis, speed boats, and some types of motor vehicle.

[63] It is noteworthy that the definition of “amusement device” does not contain an element associated with the device being offered to the public by an operator, presumably because Parliament considered that the definition did not need such an element to capture the machinery in issue.

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15 *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) at 692.

16 See *Campbell v Accident Compensation Corporation* CA 183/03, 29 March 2004 at [52].

17 The fact that s 21A was continued by cl 2(3) of sch 1 of the Health and Safety at Work Act 2015, and the Regulations are treated as regulations under that Act cannot solve that problem. The definition of “amusement device” could not have comprehensively changed in 2015.

This again suggests that a narrower interpretation is more consistent with what Parliament intended.

Is there a regulatory hole?

[64] Counsel for the applicant and the respondents both addressed submissions to whether the approach advocated by Off Road would lead to a significant gap in relation to activities that should be regulated. I accept that this could be a legitimate concern, and that the interpretation that is adopted can be influenced by such considerations. However, for a number of related reasons, this point does not lead me to interpret the provisions in a different way.

[65] The first point is that I am not convinced that the Regulations are truly fit for the purpose of regulating outdoor go-karting operations (and possibly other operations). I received evidence on the requirements for safe regulation of go-karting. That included evidence related to the debate concerning the fitting of seatbelts and roll bars, and other significant items, such as the layout of the track, the positioning of barriers around the track and their composition, and related issues concerning safety equipment, such as the wearing of helmets. Amongst the materials were the standards that had been applied in other countries, including the promulgation of the Australian standard (AS 3533).

[66] The Regulations were promulgated in 1978. They set out a list of detailed requirements, particularly in r 5. None of these are directed to the safety issues concerning outdoor go-karting operations. One of those requirements that appears to be primarily directed to fast moving fairground attractions, and the need for passenger restraint in those circumstances (r 5(1)(d)) is now relied upon by the respondents as a complete answer to a debate about go-kart seatbelts that has gone on for many years. That debate went on without reference to this regulation. It seems to me that the extent to which it is said to provide such an answer it is a complete accident. It is unrealistic to suggest that when these Regulations were promulgated the safety issues evident in the fitting of seatbelts for outdoor go-karting were being considered. Moreover, there would now be adverse consequences if the respondents' argument is accepted – in particular the apparent need to fit seatbelts in activities such as jet ski operations which I understand to be currently regulated under the Regulations. Mr Flood explained that the Regulations were applied to a range of other activities when they involve motor power – such as bungy jumping where a winch or crane was involved, and flying foxes in similar circumstances. Again, it does not seem to me that the Regulations were promulgated with such activities in mind, and it seems to me potentially arbitrary to capture such activities when a motor is used, and not otherwise.

[67] It is true that s 21A and the Regulations also give general discretionary powers that can be used if they apply. It is this residual overall discretion that has been used for the effective regulations. But to the extent that the Regulations set out specific requirements in detail, they are ill-fitting to outdoor go-karting. I see some analogy with the decision of this Court in *PauaMAC5 Inc v Director-General of Conservation* where Clark J held that the Wildlife Act 1953 did not provide the appropriate

regulatory framework for the regulation of shark cage diving operations.[18] She said in that case:

> [60] The end result is that the Department's regulation of shark cage diving operations, which have increased in attractiveness over the years, has been attempted in the context of a statute that provides no suitable framework for such regulation much less any scope to address the risk to other water users that such operations are said to create. The solution must lie in a legislative framework that confronts the varied and sometimes competing interests at stake. The solution does not lie in giving to the words "catch alive or kill" a meaning that they do not bear – on any principle of statutory construction.

[68] The suggestion that r 5(1)(d) provides the regulatory answer to the seatbelt debate similarly involves the use of a regulatory framework formulated for very different activities.

[69] The second point is that accepting Off Road's arguments does not mean these activities are unregulated. The general obligations under the Health and Safety at Work Act 2015 will still apply to Off Road, and to any other operations previously thought seen to be covered by the Regulations that are not so covered. This includes all the general obligations under that Act associated with a safe workplace. It may be unwise for operators who have hitherto operated under the Regulations to now depart from WorkSafe imposed conditions for safe operation. Those requirements may likely reflect appropriate safety standards.

[70] I also note that it may be possible to promulgate new regulations under s 211 of the Health and Safety at Work Act 2015 if that was thought necessary. Indeed in 2016, possibly as a consequence of the decision of the District Court in *Department of Labour v Waitomo Big Red Ltd*, the Health and Safety at Work (Adventure Activity) Regulations 2016 were promulgated.[19] These regulations deal with particular adventure activities that are land or water based. It covers activities of the kind set out in sch 2, including abseiling, caving, mountaineering, and "quad-biking or trail biking" and "off road vehicle driving". It sets out regulatory standards for activities of this kind.

[71] Mr Cornegé advanced an argument that Off Road's activities were covered by these regulations. My preliminary view is that may not be so as go-karting may not involve the participant being "deliberately exposed to dangerous terrain or dangerous waters" with the participant being "guided, taught how, or assisted to participate in the activity" (r 4(1)(a)(iii) and (vi)). The respondents have not applied these regulations as they explicitly exclude amusement devices (r 4(2)(d)). I reach no concluded view about the reach of those regulations, however. But I do not want to encourage the use of other ill-fitting regulations to deal with the situation. It seems to me that if there is perceived to be a need to more fully regulate this kind of activity it should take the form of specifically formulated standards. Those standards could be in the form of new regulations or amendment to regulations, in much the same way as standards have been promulgated in Australia.

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18 *PauaMAC5 Inc v Director-General of Conservation* [2017] NZHC 1182.

19 *Department of Labour v Waitomo Big Red Ltd*, above n 12.

Applicant's other challenges

[72] As indicated, in addition to contending that s 21A and the Regulations did not apply to Off Road's operations, Off Road advanced a series of other judicial review challenges to the respondents' decision-making.

[73] As a consequence of my findings above, those judicial review challenges are not relevant. Indeed, had I accepted the respondents' argument on the meaning of s 21A, none of the grounds of challenge advanced by Off Road could have been successful (unless I had accepted the argument that r 5(1)(d) of the Regulations did not apply). If s 21A and the Regulations apply, and r 5(1)(d) applies, then seatbelts would have been mandatory irrespective of the interactions between Off Road and the respondents.

[74] It may be appropriate to record, however, that had I reached that point I may well have been prepared to grant Off Road declaratory relief to reflect what appears to me to have been procedural impropriety in the way its position was approached by the respondents. For example, on the evidence of Mr Flood, he was directed to issue the Inspectors certificate under s 21A and the Regulations when he did not think it should be issued.[20] As Mr Smith for the respondents submitted, he was thereby acting under dictation, and accordingly unlawfully. Such conduct cannot create a legitimate expectation by Off Road that it would be so granted the certificate, but it does involve an admission that the respondents acted unlawfully in relation to Off Road's application. It also means that Off Road can complain of significant inconsistency in treatment by the respondents. In those circumstances I would have been prepared to grant the applicant declaratory relief to reflect this. But, as I say, this is not relevant given my primary findings.

Conclusion

[75] For the reasons identified above, I grant a declaration that the applicant's operation does not meet the statutory definition of an amusement device pursuant to s 21A of the Machinery Act 1950. I dismiss the applicant's other claims for judicial review.

[76] The applicant is entitled to costs. If the parties are unable to reach agreement on costs memoranda may be filed.

Reported by: Kim J McCoy, *Barrister*

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20 See [12]–[14] above.