

## The Standard of Care in Sports Negligence Cases<sup>1</sup>

*Caldwell v. Maguire and Fitzgerald* [2001] EWCA 1054

Lord Woolf L.C.J., Judge and Tuckey L.J.J.

### Facts

The claimant, a professional jockey, had suffered career-ending injuries caused by an accident in a race. The two defendants were jockeys involved in the accident. The incident which led to the injuries involved four horses ridden by the claimant, the defendants and a fourth jockey, Byrne. The two defendants and Byrne were riding neck and neck, with Byrne taking the inside line. Caldwell was close behind in fourth place as they approached a left-handed bend. As they rounded the bend, the two defendants pulled ahead and in front of Byrne, leaving him no room to maintain his inside line. Byrne's horse was unwilling to ride into the closing gap and veered outwards into Caldwell's path, causing him to fall and seriously injuring him.

The steward's inquiry after the race found that the two defendants had been guilty of careless riding because they had not left sufficient room for Byrne to maintain his line on the inside rail. According to Rule 152 of the Jockey Club's Rules of Racing, a rider is guilty of careless riding where he fails to take reasonable steps to avoid causing interference or causes interference by misjudgement or inattention. Although careless riding is the least serious of the interference rules, the defendants were both banned from racing for three days.

### Held

The Court of Appeal dismissed the appeal and affirmed the trial judge's decision that there was no negligent conduct in this situation. In coming to their decision, both courts conducted a detailed review of the previous judgments on sports-related negligence, paying particular attention to *Condon v. Basi* [1985] 2 All ER 453 and *Smoldon v. Whitworth* [1997] ELR 249. The particular point at issue was whether a defendant participant should be liable for damages because he had been negligent in all the circumstances or only when he had acted with a reckless disregard for the health and safety of the injured co-participant. In dismissing the reckless disregard standard, the Court approved the five legal statements of the trial judge. Firstly, that each participant in a lawful sporting contest owes to

every other participant a duty of care. Secondly, that the duty is to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to such co-participants. Thirdly, that the prevailing circumstances include that sport's object, the demands made upon its contestants, its inherent dangers, its rules, conventions and customs and the standards, skills and judgement reasonably to be expected of a participant. Fourthly, that given the nature of sport and the test outlined above, the threshold for liability would be high and that proof of a mere error of judgement or a lapse of skill or care would not be sufficient to establish a breach of the duty. Finally, that in practice, it may be difficult to prove a breach of duty unless there is proof of conduct amounting to reckless disregard for a co-participant's safety. However, this latter was an expression of the degree of evidence required to prove a breach, not a new legal standard of care.

On the facts, the defendants had made errors of judgement or had acted with lapses of skill. However, this was only to be expected in a fast-moving sport such as professional horse racing and was not a sufficient degree of culpability to amount to negligent conduct.

### Comment

This decision has had the effect of distancing the law from the notion that reckless disregard is the appropriate standard of care in sports by forcing courts to pay closer attention to the way that sport is actually played; not just by its rules but according to an unwritten code or playing culture. Although such an idea as playing culture is likely to outrage those who feel that any injurious act committed outside of the rules of a game should result in at least the tortious liability of the perpetrator, it is in fact a pragmatic response to the way that modern sport is actually played.

The idea that reckless disregard was an appropriate standard of care to impose on sports participants can be traced back to the decision in *Wooldridge v. Sumner* [1963] 2 QB 43, where it was held that a competitor in a show jumping event could only be responsible in negligence for the injuries caused to a press photographer where he had shown a reckless disregard for the safety of the photographer. Over time, and with particular reference to case law from the United States, it came to be accepted in some quarters that *Wooldridge* had created a new standard of care for cases where injury was caused by the actions of a sports participant. The rationale, of particular importance to a defendant, is that the dynamics of sport, particularly contact sports and inherently dangerous sports such as horse racing, are so different from any other injury causing context that if sport is to continue in its current forms, then sports participants must be allowed to

act with a greater degree of carelessness towards their co-participants before liability is imposed upon them.

The confusion was compounded by the judgments in many of the sports-specific cases where judges, presumably with an eye on a potential appeal, discussed potential liability in terms of a defendant being negligent because he had acted with a reckless disregard for the safety of the claimant. This left a situation where defendant participants would always argue that they were allowed to act with a greater degree of carelessness towards a co-participant than would a person in any other context. Meanwhile the claimant would continue to argue that the correct test was negligence in all the circumstances as described in *Condon*. Thus, the scene was set for a decision of the higher courts that would decide precisely the nature of the test applicable in sports cases.

In dismissing the reckless disregard standard the Court has ensured that sports participants are judged by the same legal standard as everyone else. The law is neither prevented nor discouraged from entering onto the pitch nor are sports participants allowed to cause injury with a degree of impunity greater than actors in other situations. Instead, the Court has emphasised that the playing of sport and the conditions in which participation takes place are prevailing circumstances that must be taken into consideration where deciding on liability.

This tacit acceptance by the Court of the concept of the playing culture of sport is essential to sports related litigation. By looking to the playing culture of a sport it can be established whether the act of the defendant was an integral part of the playing of the game and an inherent risk taken by all participants, or it was unconnected with the proper playing of the sport and therefore negligent. It concentrates on the playing of the game and its inherent dangers rather than allowing the defendant to show a greater degree of negligence to the claimant before liability is imposed.

In *Caldwell* itself, the Court held that a jockey is bound to try and win the race, or if he cannot win then to go all out for the best possible placing; that the physical and mental demands on jockeys are great and that it is inherently dangerous to ride a horse at such speeds, in such close proximity to other horses particularly when the horse itself might make an unexpected or uncontrollable manoeuvre. In the light of these findings, the defendants had made the kind of lapses of skill or errors of judgement that are an inherent part of sport in general and horse racing in particular.

The five propositions established by the Court will be applicable to all sports. Wherever injury in sport occurs, the Court will have to examine whether the injury-causing incident was an acceptable means of playing the game. It also means that foul play is considered to be an acceptable means of playing sports in some circumstances. Just as careless riding was held to

be an inherent danger of professional horse riding, so also would a mistimed tackle in the various codes of football. The tackle may constitute a foul, but if it was only an error of judgement or through lack of skill, liability will not arise.

However, until there is further litigation arising from sports, the legality of deliberate foul play will continue to trouble the courts. Their interpretation of the 'rules, customs and conventions' of a sport will prove to be a key issue in deciding the liability of defendant participants. Inevitably a degree of public policy will come into the equation, however, this alone does not provide sports participants with an obvious solution. For example, what will be the legal position in respect of a deliberate trip in a game of football? In *Condon* it was found to have been negligent. However, is a deliberate trip outside of the conventions and customs of modern football? It is clearly against the laws of the game and the spirit of those laws to intentionally foul another player. But is it accepted by those other players as an inherent part of the game?

The answer to such a question is fraught with difficulties. FIFA's Fair Play Charter would condemn such behaviour as cheating. Others would argue that it occurs so frequently that it must now be considered to be an integral part of the playing of the game. From a practical point of view, such instances of foul play only ever come to court where injury, usually serious injury, has occurred to the fouled player. Thus we are left with the even more contentious argument that such a foul is only contrary to the law where it causes injury. Legal liability dependent upon the degree of injury caused would be almost impossible to police. It would run the risk of being applied capriciously and inconsistently. Either the original challenge was negligently made, or it was not. The degree of injury caused should be relevant only to the amount of damages payable.

Such a legal rule runs the further risk of allowing too much foul play to be considered to be an inherent part of the game. This would have the concomitant effect of only outlawing batteries rather than negligent foul play. Such a development would not be welcomed because of the associated adverse insurance implications. Only further litigation can clarify precisely when the law will become involved in incidents of participator violence.

This decision is to be welcomed on many obvious grounds. It finally acknowledges that sports injuries should be subject to the same law as injuries incurred elsewhere. Further, it gives a good deal of guidance on what factors can be taken into account when trying to establish tortious liability. The list of factors is not meant to be exhaustive. It must be presumed that, where appropriate, the age and experience of the players would also be taken into account. Perhaps also so would the level at which the game took place. Although a variable standard of care depending on the

league in which the incident occurred was rejected in *Elliott v. Saunders & Liverpool FC* (1994) unreported decision of the High Court, the level of play must at least be a relevant prevailing characteristic when trying to establish the negligence of the defendant and the extent of the risk run by the claimant.

Although it is dangerous to try and second-guess the courts, the likely outcome of this decision is that more acts associated with the playing of the game will be considered to be within the conventions and customs of the sport and therefore an inherent risk of that sport. Only those challenges that are clearly unacceptable and beyond the playing culture of the sport will be considered to be unlawful. Thus, instead of defendants claiming that they are able to show less care towards a co-participant, claimants will now have to establish that the defendant's act was an unacceptable means of playing their sport. Future judgments will examine more explicitly which acts are acceptable until we reach the situation where we have a list of acceptable and unacceptable behaviour. This may have the effect of creating a degree of judicial certainty but will also create the potential for a knock-on effect that could see a changing of the rules of the game and the way that sport is played, either of which would be a dangerous precedent.

The governing bodies of sport should take note of this decision. Too often in the past they have assumed that the law does not apply to them and that they are in some way immune from its application. Each time this notion is questioned, the law is found to apply and the governing bodies claim that they do not understand how this has happened. The constant development of the law of tort over the last 17 years can no longer be ignored. Either the governing bodies must take a more pro-active role in risk management in their sports or they will find that more cases like this will come before the courts. If that happens, it is only a matter of time before they find themselves joined as defendants for failing to adequately control their sports and protect their players from injury.

#### NOTE

1. For an earlier version of this article by the same authors see, 'Care on the Court' (2001) 145 (35) Sol J 864.

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