

Facial Injuries and Football Before School

ANNE RUFF

Introduction

Sir Alex Ferguson may be grateful that David Beckham did not seek legal redress for the injury caused to his left eyebrow by a flying football boot. In *Kearn-Price v. Kent County Council* [2002] EWCA Civ.1539, a 14-year-old pupil suffered a serious eye injury when he was struck by a football while standing in the school playground. The Court of Appeal dismissed the local education authority's appeal against the decision of the county court that the school had been negligent in failing to prevent the injury to the pupil.

The case is concerned with the liability of a school for injuries incurred by pupils on school premises outside school hours. It also illustrates the arguably capricious approach by the courts to the meaning of 'negligence' in the school context. In addition, a number of broader issues emerge. These include the adequacy of school safety policies and their enforcement, as well as the legal implications for school football of research into the effect of heading the football on the brain. The increasing recognition of children's rights and presumably concordant responsibilities raises the question whether the courts are justified in adopting a protective attitude towards teenage pupils.

The Facts

In July 1998 the claimant, a 14-year-old Year 10 pupil, was struck in the eye by a full-size leather football while he was standing in the lower playground with friends before the start of the school day. As a consequence he has lost all useful vision in his left eye. The school day began at 8.45am. Thirty to 40 teachers would be in the staff room between 8.30 and 8.45am preparing for the school day. Pupils were expected to arrive 'at least five minutes before the school begins', and most pupils started to arrive at about 8.30am. However, in common with many schools, there was no supervision of pupils in the playground before 8.45am, although they were supervised during break periods. The lower playground, which was used by the pupils in Years

Anne Ruff is Principal Lecturer in Law, Middlesex University.

Entertainment Law, Vol.2, No.1, Spring 2003, pp.89-97
PUBLISHED BY FRANK CASS, LONDON

9–11, was visible from the staff room but it was difficult for a member of staff to see what size or type of football was being used by the pupils. There were 5-a-side football posts in that playground, and up to eight games of football could be played at any one time, both before school started and during the school breaks.

There was a school policy banning the use of full-size leather footballs in the playground, although foam footballs were permitted. In March 1998 another pupil was hit in the face by a leather football in the playground, and the school reiterated the ban on the use of leather footballs. There was a series of incidents involving relatively minor facial injuries in May and June 1998. The judge found that the staff did not properly enforce the ban, and that pupils played with leather footballs in the playground on a daily basis. In particular teachers did not pay ‘flying visits’ to the playground or check the pupils’ bags on arrival at schools to see whether leather footballs were being used or brought to school. Footballs were occasionally confiscated during break time but never during the pre-school period. The judge also found that ‘apart from occasional reminders of the ban no positive steps were taken to ensure that the ban was enforced in the lower playground during the pre-school period’. The judge stated that the teachers must have known that football was being played regularly, and if they had visited the playground ‘it would have been obvious that the banned balls were being used’.

The Decision

The Court of Appeal in *Kearn-Price* rejected the proposition that a school never owes a duty of care towards children who are in the playground before or after school hours, and held that *Ward v. Hertfordshire County Council* [1970] 1 WLR 356 was not authority for that proposition. Dyson L.J. approved the decision of the High Court of Australia in *Geyer v. Downs and anr* [1977] ALR 408. In this case a pupil suffered severe injuries when she was struck on the head by a softball bat by a fellow pupil who was playing in a softball game in the school playground before school started. The High Court held that the question whether a school owes a pupil a duty of care depends upon ‘the nature of the general duty to take reasonable care in all the circumstances’. Dyson L.J. in the Court of Appeal considered that, ‘a school owes to all pupils who are lawfully on its premises the general duty to take such measures to care for their health and safety as are reasonable in all the circumstances’.

Dyson L.J. stated that:

The real issue is what is the scope of the duty of care owed to pupils who are on school premises before and after school hours. It may be

that it is not reasonable to expect a school to do as much to protect its pupils from injury outside school hours as during school hours ... Moreover, it may be unreasonable to expect constant supervision during the pre-school period, but entirely reasonable to require constant supervision during the break periods.

The Court of Appeal held that the school was in breach of its duty of care in failing to enforce the ban on leather footballs more effectively, in particular by not having a more rigorous policy of enforcement and spot-checking during the pre-school period. Such steps were reasonably required having regard to the fact that (a) the ban on the use of full-size leather footballs was known to be regularly flouted, (b) they were known to be dangerous, and (c) the additional steps would not impose an undue burden on the school. The judge was entitled to hold that the scope of the duty of care owed by the school to the boys encompassed a duty to take reasonable steps to enforce the ban on full-size leather footballs, and to carry out spot checks during the pre-school period to that end.

Dyson L.J. considered that it was important to emphasise that the claimant was not playing football; he was merely a bystander in a crowded playground where a number of games were being played, and he was behaving entirely reasonably in being where he was and what he was doing. The school appreciated that full-size leather footballs were dangerous and that the ban on their use was being flouted daily. The attempts to enforce the ban during school breaks was desultory, and during the pre-school period non-existent.

Discussion

There are a number of interesting issues raised by this case. First, both the English and the Australian courts have rejected Lord Denning's view in *Ward*, that there was no duty on the school to supervise pupils before the start of the school day as the staff were indoors preparing for the day's work and could not be expected to be in the playground as well. In *Ward* an eight-year-old pupil was injured while playing in the playground five minutes before the start of school. Salmon L.J. considered that liability might have arisen were the pupils engaged in 'some particularly dangerous game' that should have been stopped had a teacher been present. Cross L.J. considered that increased supervision would have been 'useless' in the circumstances.

The Court of Appeal's decision in *Kearn-Price* means that schools must supervise pupils whenever they are lawfully on the school premises, not just during school hours. The degree of supervision may be less before and after school than in break times during the school day, but this will depend upon

the particular circumstances. Secondary schools, which are often spread over a large area including playing fields, may find this an onerous task.

Second, *Kearn-Price* illustrates the difficulty of predicting whether particular facts amount to a breach of the duty of care. In *Etheridge v. Kitson and East Sussex County Council* [1999] Ed CR 550, the High Court dismissed the claim brought by a teacher who was injured by a basketball thrown by one pupil to another during change-over time between classes. There was a basketball craze at a school and a number of pupils carried basketballs around with them. A basketball weighs over one pound and is slightly larger and heavier than a conventional football. There was no rule that basketballs had to be kept in the lockers while pupils were in the school. The claimant was injured when a pupil passed the basketball to another pupil further down the staircase. That pupil either did not see the basketball or ignored it, and in consequence the ball bounced and struck the plaintiff a glancing blow to the head.

The High Court dismissed the plaintiff's claim for damages against both the pupil who passed the ball and the Local Education Authority (LEA) employer. The court held that the first defendant, as an ordinary prudent and reasonable 13-year-old, would not have realised that what he did gave rise to the risk of injury or the significant risk of the likelihood of injury; and that the second defendants, the LEA, had kept the school premises reasonably safe for the purpose for which persons were permitted to be there and had a proper system of working.

Both these conclusions seem surprising. First, a pupil aged 13 is surely aware that someone may be hit by a basketball that is thrown or passed down a staircase at changeover time. Second, passing or throwing of balls within the school building would seem to constitute a safety risk and such activity should have been banned. If the ball had injured another pupil would the court have been so forgiving? Were the facts of *Etheridge* to arise again, the teacher may well be successful.

Third, the case highlights the inadequacy of school safety policies and in particular their enforcement. Researchers from Hull University are reported to have found that six out of ten headteachers and governors said that not all their staff responsible for health and safety had been given formal instruction.¹ A similar proportion admitted that their health and safety policies were 'not very workable', but more than a third believed that they would not be personally liable if anything went wrong. Forty per cent of schools had not set money aside for health and safety training for staff, while 20 per cent had not checked that they had the right arrangements in place for after-school clubs.

The Health and Safety at Work etc Act 1974 places overall responsibility for health and safety with the employer. Who is the employer varies

according to the type of school. In the case of community schools, community special schools, voluntary controlled schools, maintained nursery schools and pupil referral units, the employer is the LEA. For foundation schools, foundation special schools and voluntary aided schools, the employer is usually the governing body. For independent schools, the employer is usually the governing body or proprietor.

The Department of Education and Skills (DfES) has issued guidance on health and safety to LEAs and schools.² The guidance states that school employers must have a health and safety policy and arrangements to implement it. It is good practice for community, community special and voluntary controlled schools where the LEA is the employer to draw up their own more detailed health and safety policies based upon their LEA's general policy. The LEA is required to monitor how its schools are complying with the LEA policy. An LEA may give a warning notice to any maintained school (community, community special, foundation, foundation special, voluntary aided or voluntary controlled) in its area where the safety (not the health) of staff or pupils is threatened by, for example, a breakdown in discipline.³

The guidance provides that school employers must assess the risks of all activities, introduce measures to manage those risks, and tell their employees about the measures. The guidance goes on to state that the LEA must provide health and safety guidance to those schools and services where it is the employer. It must ensure that staff are trained in their health and safety responsibilities as employees and that those who are delegated health and safety tasks (such as risk assessment) are competent to carry them out. If an LEA risk assessment shows that training is needed, the LEA must make sure this takes place.

Bearing in mind that leather footballs have not been used in professional football since the 1970s, having been replaced by polyurethane with a maximum weight of 16oz, it is surprising that in *Kearn-Price* there are repeated references to 'leather' footballs. Probably, the term is used by the court to distinguish a 'proper' football from the foam footballs that were permitted in the school playground, and with which no self-respecting teenage footballer would dream of playing. There is considerable evidence that heading footballs can cause injury to the head and the brain. In November 2002 a coroner ruled that Jeff Astle, who played for West Bromwich Albion and England in the late 1960s and early 1970s, died of an industrial disease after 20 years of heading heavy leather footballs.⁴ A consultant neurologist gave evidence that a scan revealed a brain injury consistent with 'repeated minor trauma'.

Suggestions have been made that other professional footballers are suffering from dementia, although it is not clear to what extent heading

footballs was a contributory factor.⁵ The Minister for Sport has recently commented that, ‘the effect of heading on former professional footballers is a complex matter ... There is evidence documenting subtle brain injuries among people who have played football for many years, while other studies have suggested there is no significant risk’.⁶ He concluded that, ‘what is clear is that most experts agree that the data collected so far are inconclusive and that further longer-term studies are required’.⁷

The government established a cross-departmental Accidental Injury Task Force, which published its report in 2002.⁸ The task force based its report on the findings of three expert working groups, one of which was chaired by a consultant neurosurgeon and was concerned with preventing the incidence of serious injury, illness, disability and death in organised sport. One of the priority areas identified by the task force was the need to ‘produce guidelines for safety in children’s sports’, and in the longer term to ‘create a sports injury database’. The Minister for Sport has confirmed that UK Sport will issue guidance on health and safety issues for sport including health and safety policies for different types of sport.⁹

Despite the Minister’s view that the data so far is inconclusive, a US study found that Dutch soccer players suffered the same number of concussions as American footballers.¹⁰ Fifty-three Dutch footballers were monitored, and 45 per cent of them were found to have some form of brain injury. In Australia guidelines on the prevention of head injuries in Australian rules football were published in 2001.¹¹ In the same year the Football Association and the Professional Footballers Association began a joint ten-year project to learn about how heading a football affects the brains of young players. The study involves 33 professional footballers, who will be given regular MRI scans and neurological assessments. The Wellcome Trust is funding a study which is expected to report in September 2003, involving participants from youth and university football teams.¹² Dr David Williams, a psychiatrist at a Swansea hospital, noted an excess of footballers with dementia among his patients. A study was undertaken of eight patients who had previously been amateur or professional footballers. The authors reported in March 2002 that the results of the study added to the emerging evidence that repetitive mild head trauma over the course of an amateur and professional footballer’s career may heighten an individual’s risk of increasing dementia in later life.¹³ Dr Williams is also reported to have stated that children should not head a football because of this risk.¹⁴

US research tends to support the view that children should not head footballs.¹⁵ The American Association of Neurosurgeons estimates that approximately five per cent of soccer players sustain head injury as a result of head-to-head contact, falls or being struck on the head by the

ball. Heading a ball is the riskiest activity in the Association's view. Children aged 5–14 account for nearly 40 per cent of sports-related injuries, and of those 75 per cent are boys, with soccer being one of the sports associated with such injuries.¹⁶ Modern footballs may be lighter than leather footballs, but evidence is accumulating that they may also cause an unacceptable level of head injuries and brain damage, particularly to players of school age.

The decision in *Kearn-Price*, together with the accumulating research on the effect of heading the football on the brain, has implications both for playground football and for official games of school football. In order to avoid liability in negligence, LEAs and schools should ban the use of 'proper' footballs other than on the football pitch. Second, schools must properly police the ban whenever pupils are lawfully present on the school premises. At the very least schools should check on a daily basis the type of footballs being played with by pupils, and these checks should occur both before and after school as well as during lunch and other breaks. During the break-times schools should consider whether constant supervision is necessary to enforce the ban.

Local education authorities and schools should also consider whether to ban all playground football. This is likely to prove difficult to enforce and unpopular with pupils. One possibility is to ban playground football but introduce more formal sports within the school day. The government is reported to be looking favourably on a pilot scheme that is to be introduced in the London Borough of Brent from September 2003.¹⁷ The scheme will extend the school day in five secondary schools and will involve two hours of sport each afternoon. Pupils in Year 7 will start school at 8am and will finish at 5.30pm or 6pm.¹⁸ The initiative has been proposed by the MP for Brent North, and has the support of the School Standards Minister and the Minister for Sport.

Although, neither UK Sport, the Football Association, nor the government has published guidance banning headers by pupils or recommending the wearing by pupils of a helmet or other protection for the head or face, this may not be enough to absolve LEAs and schools from liability where a pupil suffers such an injury on the football pitch. Clearly football cannot be risk-free. However, where the risk of serious injury to vision or the brain could be minimised by the introduction of a relatively simple measure, the courts may consider that the failure to introduce such a measure amounts to a breach of the duty of care owed by the LEA or the school to the pupil. In order to minimise the risk of eye injury, England Squash has from 1 September 2000 made it mandatory for under-19 junior players to wear eye protection (goggles) at specified events. These include all junior-graded tournaments and county-closed tournaments. Middlesex

County also requires goggles to be worn at all inter-club junior matches. At the very least, LEAs and schools should formulate and properly implement a policy on safety on the football pitch that takes into account current good practice and medical research.

Fourth, the court arguably adopted a protective attitude towards the teenage claimant. The judge rejected the defendant's plea that the claimant was contributory negligent because he stood in the playground where football was being played rather than in an adjacent football-free picnic area which was infrequently used by the pupils. This finding was not appealed. The defence of consent to the risk was not raised. Dyson L.J. considered that it was important to emphasise that the claimant was not playing football; he was merely a bystander in a crowded playground where a number of games were being played, and he was behaving entirely reasonably in being where he was and what he was doing. Arguably, he was more vulnerable than a participant in the game because he was probably not watching the ball. What difference would it have made had the claimant been injured while participating in a casual football game in the playground? The defendant may have argued that the claimant consented to the risk of injury. However, if the school was in breach of its duty of care by allowing pupils to play with a 'proper' football in the playground, that defence may not be available. Similarly the defence may not be available where a spectator is injured by the football at a football match.¹⁹

Lord Denning's approach in *Ward* reflects an earlier and more robust attitude. Even eight-year-old pupils were expected to look after themselves 30 or more years ago. In an era of developing children's rights, it is ironic that a 14-year-old pupil may be *Gillick* competent and capable of obtaining contraceptive advice and entering into an unlawful sexual relationship, yet is not perceived as being competent and capable of recognising the risks of standing in a crowded playground where a number of football games are being played, nor the risks of passing a basketball down a busy staircase.

Finally, despite Dyson L.J.'s concern about 'the ever increasing pressures piling upon the teaching profession', the Court of Appeal's decision has placed an additional duty on schools and their staff.

The court's decision perhaps reflects the understandable sympathy it felt for the pupil. It also reflects a society that no longer accepts that accidents happen, and considers that 'someone' must be to blame and made to pay. The argument for a system of no fault liability in the maintained education system is strengthened by this decision.

NOTES

1. *The Times Education Supplement*, 30 October 2002.
2. Health & Safety: Responsibilities and Powers, DfES Guidance 0803/2001, December 2001.
3. School Standards and Framework Act 1998, s.15(2)(iii).
4. *The Times*, 21 November 2002.
5. For example, Hansard, 18 December 2002, col.979 (Dr Gibson, MP for Norwich North).
6. Hansard, 18 December 2002, col.980.
7. Hansard, 18 December 2002, col.981.
8. Accidental Injury Task Force, 'Preventing Accidental Injury: Priorities for Action', October 2002.
9. Hansard, 18 December 2002, col.981.
10. BBC News, 21 September 1998 (report of a study published in the scientific journal of the American Academy of Neurology).
11. National Health and Medical Research Council, 'Head and Neck Injuries in Football: Guidelines for Prevention and Management'.
12. Dr Andrew Rutherford, Keele University; and A. Rutherford *et al.*, 'Neuropsychological Review' (forthcoming), a major review of the football heading literature.
13. Abstract from a meeting of the Faculty of Old Age, in collaboration with the British Geriatric Society, Royal College of Psychiatrists Press Release, 8 March 2002.
14. *The Times*, 12 November 2002.
15. For example, 'Heading the Ball in Soccer', a list of sources provided by the National Youth Sports Safety Foundation, Boston, MA (www.nyssf.org) on heading the ball and brain injury.
16. 'Fact Sheet Head Injury – What is the significance of sports-related injuries?', September 1999.
17. *Observer*, 29 September 2002.
18. Schools are normally permitted to change the times of school sessions from the beginning of the school year, but under the Education Act 2002, s.2(1), it is now possible for a school to apply to the Secretary of State to vary the school sessions from, for example, the start of the Spring Term.
19. See, for example, *Wooldridge v. Sumner* [1963] 2 QB 43.