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Title	Care on the court
Authors	James, MD and Deeley, F
Publication title	Solicitors Journal
Publisher	Waterlow Professional Publishing
Type	Article
USIR URL	This version is available at: http://usir.salford.ac.uk/id/eprint/2135/
Published Date	2001

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Care on the court

Mark James and Fiona Deeley discuss the duty of care between sports participants and the emerging test of reckless disregard.



SINCE *CONDON v Basi* [1985] 5 All ER 453, there has been much confusion and debate over the correct standard of care to be applied to sports participants where a potentially negligent act has caused injury to a co-participant.

The majority of the decisions claim to uphold the test of negligence in all circumstances. However, the judgments have often been phrased in terms of negligence occurring because there has been a reckless disregard for the health and safety of the co-participant.

This has led to a growing body of opinion that a new test – perhaps even a new tort – of reckless disregard is emerging. In *Caldwell, Maguire & Fitzgerald* [2001] EWCA 1054 this proposed new standard was rejected by the Court of Appeal and a more detailed explanation of the appropriate duty of care owed by sports participants to each other was explained. The affirmation of the test of negligence in all the circumstances and the clearer definition of those circumstances will be of considerable assistance to the claimant.

Background to the decision

The argument that reckless disregard should be the appropriate test is commonly advanced by defendants. It originates from the judgment in *Wooldridge v Sumner* [1963] 2 QB 43, a case involving injury to a spectator at an equestrian competition. The defendant lost control of his horse and rode into and injured a spectator who was taking photographs at the edge of the arena. It was held that a spectator accepts the risk of a lapse of judgment or skill in a competitor who is going all out to win, but does not accept the risk of a participant having a reckless disregard for his safety. Essentially, it was recognised that a sporting competitor, properly intent on winning the contest, was entitled to be all but oblivious of spectators.

Further judicial reference to this standard can be found in more recent cases involving injuries to participants. In *Condon v Basi*, the trial judge stated that, although he was not prepared to formulate a specific duty for football, the defendant had been guilty of dangerous foul play and, having a reckless disregard for the plaintiff's safety. In *Elliot v Saunders* (1994), unrep, Drake J held that the ordinary negligence standard used in *Condon v Basi* was applicable in such cases but went on to find that the defendant was not guilty of dangerous and reckless play and was therefore not in breach of the duty of care owed.

The question is, do the above judgments allow a participant-defendant who cause

to rely on a new, lower standard of care. The judges' statements in these cases were *obiter dicta*. They were unnecessary for deciding the case as the negligence standard was found to apply and was actually applied in each case. However, up until now, the problem for participant-claimants bringing actions in respect of their injuries has been that, while the judiciary claimed to be using the ordinary standard of negligence, they still appear to have given judgment in terms of the lower standard of reckless disregard or reckless and dangerous play.

Caldwell v Maguire & Fitzgerald

In 1994, Peter Caldwell, a professional jockey, suffered career-ending injuries caused while riding in a race. Caldwell brought a claim for personal injuries and lost earnings against two defendants who were jockeys in the same race. The accident involved four horses ridden by Caldwell, the two defendants and a fourth jockey, Byrne. The two defendants and Byrne, who was riding the inside line, were neck and neck, with Caldwell following close behind. As they approached a left hand bend, the two defendants pulled slightly ahead of Byrne, taking a line which left no room for him on the inside. Byrne's horse, reluctant to ride on into the closing gap, veered across the course into Caldwell's path, causing him to fall.

Following the race, a steward's inquiry found the defendants guilty of careless riding in that they had not left enough room for Byrne to come round the inside rail. A rider is guilty of careless riding if he fails to take reasonable steps to avoid causing interference or causes interference by misjudgment or inattention. Careless riding is the least serious of the interference offences listed in the Jockey Club Rules.

The trial judge dismissed Caldwell's claim and extracted five propositions from the previous sports-related cases. The first three can be taken together, whilst the latter two provide extra detail for their application. He found that

- each contestant in a lawful sporting contest owes a duty of care to each and all other contestants.
- that duty is to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants.
- the prevailing circumstances include the sports' object, the demands made upon its contestants, its inherent dangers, its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant.
- given the nature of the circumstances outlined above, the threshold for liability would in practice be inevitably high such that proof of a mere error of judgment or momentary lapse of skill and care will not be enough in itself to establish a breach of duty.
- finally, in practice, it may be difficult to prove a breach of duty unless there is proof

of conduct amounting to reckless disregard for a fellow contestant's safety.

The judge concluded that each of the defendants were guilty of lapses of care in their riding at the material time. However, looking at the circumstances prevailing in the race, neither defendant evinced a lack of care of sufficient magnitude to constitute breach of the duty of care owed to the claimant.

On appeal, it was common ground that participants in competitive sport owe one another a duty of care. Caldwell's complaint was that the judge, in his explanation of the applicable standard in his fourth and fifth propositions, set the standard of care too low by requiring proof of a deliberate or reckless disregard for safety.

The court dismissed the appeal, accepting the trial judge's five propositions. It was held that the judge was correct to adopt the Court of Appeal's approach in *Smoldon v Whitworth* [1997] ELR 249, by adopting the test derived from *Condon v Basi* that the duty was to exercise such degree of care as was appropriate in all the circumstances. Tuckey LJ added that 'there will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required.'

Thus, the court accepted that negligence in sport is dependent on the game being played and the risks involved with playing it. Reckless disregard was an expression of the degree of evidence required, not a new standard of care.

Rejection of reckless disregard

In rejecting the reckless disregard test, the court concluded that there is in fact no inconsistency between the conclusions reached in *Smoldon* and *Wooldridge* because it is the same test that is being applied.

The level of care required is that which is appropriate in all the circumstances. The difficulty is in providing evidence of the breach when the circumstances in which the injury took place include sport. Just as the Master of the Rolls in *Condon* said that the circumstances were very different in football when compared to a walk in the country, so also are they very different when comparing the playing and spectating of sport. In the normal course of events, a spectator will be at little or no risk from a competitor, therefore a competitor would have to be shown to have performed with a considerable degree of negligence for the safety of spectators before he could be held to have failed to exercise such care as was reasonable in the circumstances.

Likewise, because of the inherent risks involved with sports such as rugby, racing and football, considerable latitude is granted to sports participants by requiring of them only negligence in the circumstances of the sport that they are participating in. Thus, in racing, careless riding is insufficient, as would be a mistimed tackle

Disregarding reckless disregard

This decision has gone a long way towards clarifying this contentious area. We now have a clear statement that the test to be used is negligence in the circumstances, not a reckless disregard for an opponent's safety.

We also have a clear indication of what should be taken into account when deciding what the relevant circumstances are and whether the act was careless enough to be considered negligent.

The main concern of the proponents of the reckless disregard standard was that negligence failed to reflect adequately the state of mind of sports participants. This judgment in *Caldwell* allows future courts to reflect the expectations of the players in different sports by taking into account all relevant circumstances and also imposes the necessary objective standard on sports participants. By reinforcing objectivity in this way, the applicable standard cannot be defined self-referentially, as it would have been under the subjective reckless disregard test.

Thus, all participants will play the same game by the same rules and to the same legal standard. This new test is supposedly more beneficial to claimants as it requires the lower negligence standard to be applied.

However, as was shown in *Caldwell*, this is not necessarily the case. In future, defendants will have to claim that what they did was part of the game and reasonable in the circumstances, a mere lapse of judgment instead of trying to justify that they should be allowed to behave more carelessly just because they are playing sport.

in the various codes of football. The judges' development of which circumstances are to be taken into account in these cases develops the law to take into account the playing culture of a sport. A participant will only be liable for the injuries caused to another where he has acted beyond the accepted way of playing that game. In other words, if he has done an act not reasonably expected according to the way that the sport is played.

Those expectations will vary according to the sport being played. Netballers will satisfy the test by coming into contact with an opponent more easily than will rugby players where such contacts are an integral part of the game. The test applied is the same but evidence of different degrees of carelessness will be required depending on the circumstances of the case.

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