

Sports Law Coursework

When an individual is injured as a result of another's carelessness, the usual route of action for them is to claim under the tort of negligence. The necessary requirements of negligence are proof that a duty is owed, there is a subsequent breach of this duty and some actual harm is done.¹ The standard of care that is ordinarily used in negligence cases is that of the reasonable man². However, the difficulty arises when considering the standard expected between participants in sports, 'complications arise in sporting context, usually consented to in the everyday rough and tumble which may reasonably be expected.'³ There is a different standard of care in sports because, 'there is consent to the physical contact that necessarily is involved; a standard based on ordinary principles of negligence and the behaviour of the reasonable man could give rise to such an influx of claims that it would be impractical to use it as a basis for liability.'⁴ Therefore, should a standard of ordinary negligence be used for contact sports or should it be replaced with the standard of reckless disregard as adopted in the US⁵? The case that is definitive in English law and set the standard of ordinary negligence in the UK was *Condon v. Basi*⁶. However, although it had appeared that the standard was settled, subsequent case law re-evaluated this position, as we shall observe.

One of the first cases, which attempted to disentangle the issue, was the case of *Wooldridge v. Sumner*⁷. Even though the actual event (horse show) that took place was not a high adrenaline, sporting event or race, the landmark decision introduced

¹ Caparo Industries Plc v Dickman [1990] 2 A.C. 605

² Blyth v. Birmingham Waterworks Co (1856) 11 Ex. 781

³ Kevan T, Sports Personal Injury, *International Sports Law Review* [2005] *61

⁴ Fafinski S, Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries, Vathek Publishing, 2005

⁵ Nabozny v. Barnhill 31 Ill. App 3d 212, 334 N.E. 2d 258

⁶ [1985] 1 WLR 866; [1985] 2 All ER 453

⁷ [1963] 2 QB 43

the reckless disregard rule, 'The competitor must have regard to the rules of the game or competition and not act recklessly, but unless it can be shown that he acted in reckless disregard of the safety of the persons he knows to be present he cannot be held liable for an accident.'⁸ The decision therefore, 'seemed to be at odds with the general principle in tort that the defendant must 'only' reach the standards of the reasonable man.'⁹ It was a ruling, which appeared to be an attempt to bring the law into line with sports. On examination of the case, Goodhart was of the opinion that, '...the present case seems to introduce a novel element into the law. In most cases an error of judgment or a lapse of skill are sufficient to support a charge of negligence.'¹⁰ This is certainly true as in cases before this, sports players were being held liable for any form of negligent misconduct¹¹. However, McArdle argues, 'proving that a defendant acted in reckless disregard is certainly not an imperative for the founding of a successful personal injury claim.'¹²

In sports, a competitor has little time to think and acts in 'the heat of the moment' to win the competition with little regard to the circumstances of his actions. The judgment in this case acknowledges this, 'He is entitled to expect that he can concentrate on winning the competition.'¹³ Charlish believes; 'it certainly brings the application of the legal principle into harmony with the reality of the nature of the activities.'¹⁴ However there has been criticism, 'Wooldridge is a problematic case

⁸ Woolmington v. Sumner [1963] 2 QB *45

⁹ Fafinski S, Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries, Vathek Publishing, 2005

¹⁰ Goodhart AL, 'The Sportsman's Charter' 1962, 78 *LQR* 490 *494

¹¹ Cleghorn v. Oldham (1927) 43 TLR 465, South Eastern Circuit [1963] 1 QB 43 Scrutton LJ spoke of using 'reasonable care' in Hall v Brooklands Auto Racing Club [1933] 1 KB 205

¹² McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

¹³ Woolmington v. Sumner [1963] 2 QB

¹⁴ Charlish P, A Reckless Approach to Negligence, [2004], *J.P.I. Law* *295

which should be approached warily.’¹⁵ The Canadian case of, *Agar v. Canning*¹⁶ followed *Wooldridge*, ruling that the, ‘conduct of a player in the heat of a game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.’ Although the duty should be looked at from a social perspective, the duty should not be ‘modified’¹⁷, as to seem subjective, ‘reasonableness is all.’¹⁸

In the case that followed, *Wilks v. Cheltenham Homeguard*¹⁹, the court partially retreated from the decision in *Wooldridge*. Phillimore L.J. stated that, ‘the test applied in *Wooldridge* only applies if the circumstances warrant them’²⁰. Also, McArdle argues that the ruling was a, ‘guide rather than an indication that the standard of care differed in any way from the ordinary Donoghue standard.’²¹ It could be argued that the standard of reckless disregard was applied in the *Wooldridge* case because it was essentially about the safety of spectators at events, and to maintain consistency the same standard was to be used interchangeably between participants of sports and spectators. The ruling in *Wilks* gave the impression, particularly in Lord Denning’s judgement, that the standard had been diluted, ‘In a race the rider is, I think, liable if his conduct is such as to evince a reckless disregard of the spectators safety: in other words, if his conduct is foolhardy.’²² The word ‘foolhardy’ certainly does not show support for the application of reckless disregard. Foolhardy would

¹⁵ McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

¹⁶ (1965) 54 W.W.R. 302, *304

¹⁷ This is an issue which McArdle D investigates in depth

¹⁸ Miles CJ, *Champion v Canberra World Cup Showjumping Ltd and Carnell* [2001] ACTSC 54

¹⁹ *Wilks v. Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 668

²⁰ Phillimore L.J., *Wilks v. Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 668

²¹ McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

²² Denning L.J. *Wilks v. Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 670. Edmund Davies L.J. also gave the judgment ‘...it is upon him to exercise such degree of care as may reasonably be expected in all the circumstances. I would hold him liable only for damages caused by errors of judgment or lapse of skill going beyond such as, in the stress of circumstances, may reasonably be regarded as excusable.’

normally consist of ‘momentary lapses in skill’ or mistakes made by the competitor, which gives the contestant little room for error. According to Kevan, it is, ‘right to emphasise the distinction to be drawn between conduct which is properly to be characterised as negligent, and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race.’²³

The subsequent case of *Condon v. Basi*²⁴, advocated ordinary negligence in looking at the circumstances. It therefore allowed for misjudgement by the competitor in the heat of the moment. A decision, which apparently, ‘restored the harmony disturbed by the concept of reckless disregard.’²⁵ McArdle believes the, ‘proper application of Caldwell will ensure a correct approach.’²⁶ Lord Donaldson adopted the approach identified by Kitto J, in the Australian water-skiing case of *Rootes v. Shelton*²⁷, stating that, ‘you are under a duty to take all reasonable care taking account of the circumstances in which you are placed, which in a game of football, are quite different from those which affect you when you are going for a walk in the park.’²⁸ There is a break from traditional legal rules of negligence on this very point; that the circumstances differ to everyday life. A participant may do as he did and still not be acting unreasonably as they could still be complying with the playing culture of that sport. However, Charlish argues, ‘Why the court would choose to accept a decision arising from a non-contact sport such as water-skiing and apply it to an injury received in association football is a matter of some conjecture.’²⁹

Ordinary negligence under the circumstances takes into account the varied levels of

²³ Kevan T, *Sports Personal Injury International Sports Law Review* [2005] *I.S.L.*

²⁴ [1985] 1 WLR 866; [1985] 2 All ER 453

²⁵ Fafinski S, *Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries*, Vathek Publishing, 2005

²⁶ McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

²⁷ [1968] A.L.R. 33

²⁸ *Rootes v. Shelton* [1968] A.L.R. 33

²⁹ Charlish P, A Reckless Approach to Negligence, [2004], *J.P.I. Law* *293

contact permitted in sports and attempts to look at what would be acceptable under the circumstances.

In Lord Donaldson's judgement he commented, 'there will, of course, be a higher degree of care required of a player in a First Division football match than of a player in a local league football match.'³⁰ This appears to be a direct contradiction of the reasonable man test³¹. C Moore commented that, 'If Lord Donaldson's reasoning is followed to its logical conclusion, the practical effect when a Premier League side plays a non-league team in the FA Cup, players of the former side will owe a higher standard of care to their opponents.'³² 'All participants in a game must be deemed to consent to playing the same game according to the same standard of care. It is illogical that each participant should have their own version of what is acceptable.'³³ Nevertheless, the fact that players at different levels have varying skills must be considered, because, 'if applied uniformly throughout a sport it would either impose too strict a standard on those at the lower ends or allow too great a degree of leniency to those at the higher levels of play.'³⁴ This problem could be solved by introducing a separate test for elite-level players, a system which has been adopted in cases of medical negligence.³⁵ 'If a similar test were developed in sport, then participants would not be liable for playing in a manner accepted and expected by other professionals...it would take into account the apparent tensions between sport as it is played and the relevant legal test for negligence.'³⁶

³⁰ Condon v. Basi [1985] 1 WLR 866; [1985] 2 All ER 453, this was disagreed with in Elliott v. Saunders and Another QBD (1994) unreported

³¹ Nettleship v. Weston [1976] 2 QB 691

³² Moore C, *Sports Law and Litigation*, CLT Professional Publishing, 2nd edition, 2000, *145

³³ Gardiner S, *Sports Law*, pg 699

³⁴ Gardiner S, *Sports Law*, pg 700

³⁵ Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582

³⁶ Gardiner, *Sports Law*, pg 701-702

The standard which derived from *Condon*, was to be used in the UK in subsequent cases³⁷ until the case of *Caldwell v. Maguire and Fitzgerald*³⁸. Holland J reviewed previous authorities and extracted five propositions. In summary, he believed that on looking at the prevailing circumstances, ‘the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse in skill, ‘and, ‘therefore be difficult to prove any such breach of duty absent proof of conduct that in point amounts to reckless disregard for the fellow contestants safety.’³⁹ On appeal, this position was confirmed by Tuckey LJ who stated that, ‘there will be no liability for errors of judgment, oversights or lapses. *Something more serious is required.*’⁴⁰ The ruling therefore reinforced the fact that a duty of care existed between participants, and the circumstances would be considered, however, it appeared that in order to breach that duty, a reckless disregard for a competitors safety was necessary. However, ‘the decision in *Caldwell*...seemed to return to the uncertainty in *Wilks*.’⁴¹

One recent case that dealt with sporting negligence was *Blake v. Galloway*⁴². On applying guidance given by Diplock LJ in *Wooldridge v Sumner*, Dyson LJ held that, ‘the participants in horseplay owed each other a duty to take reasonable care not to cause injury; that a participant breached that duty of care only where his conduct amounted to recklessness or a very high degree of carelessness; that the defendant’s conduct constituted at worst an error of judgement or lapse of skill.’⁴³ Thus, the court went further in their judgment than *Caldwell*. Is this standard now to be associated

³⁷ *McCord v. Swansea City*, *The Times*, 11 Feb 1997, *Watson and Bradford City AFC Ltd v. Gray and Huddersfield Town AFC* 1997 QB, The judge ruled that the defendant had made a serious mistake, which, although not reckless, was inconsistent with his duty of care towards the claimant

³⁸ [2001] EWCA Civ 1054

³⁹ Holland J, *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ 1054

⁴⁰ *Wilks v. Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 668

⁴¹ Charlish P, *A Reckless Approach to Negligence*, [2004], *J.P.I. Law* *294

⁴² [2004] EWCA (Civ) 814

⁴³ *Blake v. Galloway* [2004] EWCA (Civ) 814

with sporting negligence cases or was the issue deliberately left open for further clarification? There is certainly a lack of clarity of what the standard is presently in the UK. McArdle argues, ‘the fact that Wooldridge even reared its head in Blake occasions surprise and bodes ill.’⁴⁴ However, Charlish believes that the decision in *Wooldridge* ‘appeared to have fallen from favour but which over the years could be seen to be regaining a foothold in the debate concerning the appropriate standard of care in sports and recreation settings.’⁴⁵

Within the U.S. the standard clearly used is reckless disregard. The necessity for violation of the rules, rather than mere negligence was debated in the case of *Tavernier v. Maes*⁴⁶. It was stated that the, ‘Violation of a rule designed to protect participants, rather than merely further the better playing of the game, will subject the violator to liability for the resulting injury to another participant.’ Section 50 of the Restatement, Torts 2d actually codifies the regulations on consent in participating in competitive events, ‘The doctrine of consent applies even where there is intentional invasion of personal interests.’ Comment b to this section specifies that, ‘participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game.’⁴⁷ However, the issue was dealt with in detail in the case of *Nabozny v. Barnhill*⁴⁸. Justice Adesko explained the standard that was required to breach the duty as, ‘a player is liable for the injury if his or her conduct is either deliberate, wilful, or with a reckless disregard for the safety of

⁴⁴ McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

⁴⁵ Charlish P, A Reckless Approach to Negligence, [2004], *J.P.I. Law* *296

⁴⁶ (1966) 242 Cal App 2d 532, 51 Cal Rptr 575

⁴⁷ Restatement, Torts 2d, Â§ 892(2)

⁴⁸ 31 Ill. App 3d 212, 334 N.E. 2d 258 Grazis S states the legal duty was described in the case as, ‘When athletes are engaged in competition involving teams trained and coached by knowledgeable personnel, and when the competition is subject to a recognized set of rules which includes safety rules designed to protect players from serious injury, the court stated, a player becomes charged with a legal duty to all other players to refrain from conduct proscribed by a safety rule.’

another player so as to cause injury,⁴⁹ which was followed by subsequent cases⁵⁰ and is still good law at present⁵¹.

Although the standard in the US appears consistent, it does not necessarily mean that it is correct. 'There is no place for 'reckless disregard' beyond its use to connote a sufficient, but by no means a necessary, evidential guide for the courts to bear in mind when dealing with sports injury litigation.'⁵² With ordinary negligence, a participant may become injured, bring a claim for negligence and liability will fall on the offender, thus, deterring people from making any contact with other participants, resulting in the sport becoming less entertaining and therefore attracting less people. In comparison, if the standard of reckless disregard is to be used, through participation an injury occurs due to another's negligence, no liability is incurred, and therefore there is no deterrence. This standard encourages participation but provides no protection. Also, '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.'⁵³ This would therefore have an adverse affect on the role of sport of setting an example for children who look to their idols. As we have yet to see, The Promotion of Volunteering Bill may have an impact on further litigation. The Bill puts forward the idea of a written statement, 'the statement of Inherent Risk', which explains the inherent risks to that activity. If the statement is accepted by the participant, 'any subsequent proceedings for negligence, a court shall (a) have regard to the Statement of Inherent Risk...(b) take note...whether the person suffering harm had knowingly

⁴⁹ 31 III. App 3d 212, 334 N.E. 2d 258

⁵⁰ *Lestina v West Bend Mutual Insurance Co.* (1993) 501 NW2d 28, 176 Wis 2d 901, 55 ALR5th 863

⁵¹ *Whelihan v. Espinoza* 2 Cal Rptr 3d 883 (Cal App 3 Dist 03)

⁵² McArdle D, The Enduring Legacy of 'Reckless Disregard', *Common Law World Review*, December 2005 CLWR 34.4(316), Vathek Publishing

⁵³ http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume1/number1/james_deeley.pdf

accepted that there were risks involved.⁵⁴ Charlish believes that the proposals contained within the Bill, 'have moved the rationale behind *Wooldridge* full square back onto the centre stage of the debate between reckless disregard and ordinary negligence.'⁵⁵

In conclusion, the law in the UK, unlike in the US, is still developing. Even though the standard of care of ordinary negligence was deemed appropriate in the UK by common law, there are indications that the law is changing. It may be a matter of looking at the particular facts of the case, 'should this player be found to be liable for the injuries he has caused? Did he act unreasonably in all the circumstances?'⁵⁶ Maybe, the way forward is the idea that has been proposed by Griffith-Jones and Barr-Smith, which is, 'the concept of acting "out of all proportion to the occasion".'⁵⁷ This standard would be less difficult to breach than reckless disregard; yet, it would take into account the circumstances and investigate the event itself. Whatever the standard is to be accepted, it is time the governing bodies also take a, 'pro-active role in risk management in their sports...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.'

Word Count: 2189

⁵⁴ <http://www.publications.parliament.uk/pa/cm200304/cmbills/018/04018.1-i.html>

⁵⁵ Charlish P, A Reckless Approach to Negligence, [2004], *J.P.I. Law* *296

⁵⁶ Kevan T, Sports Injury Cases: Footballers, Referees And Schools, *J.P.I. Law* 2001, 2, 138-148

⁵⁷ David Griffith-Jones and Adrian Barr-Smith, *Law and the Business of Sport* (Butterworths, 1997), *12