

King's Bench Division

Czernuszka v King

[2023] EWHC 380 (KB)

2023 Feb 6–10; 23

Martin Spencer J

Tort — Duty of care — Competitive sport — Claimant and defendant playing in opposing rugby teams comprising novice and experienced players — Defendant tackling claimant when latter bending down and not in possession of ball — Claimant suffering serious spinal injury — Whether defendant breaching duty of care so as to be liable in negligence — Appropriate standard of care to be applied — Whether liability in sporting context requiring recklessness or very high degree of carelessness

The claimant was a member of a rugby team as part of which she participated in her first competitive league match at the “developmental” or starter level for those learning the sport. Many team members on both sides were novice players. The opposing team included the defendant who attempted to dominate the play and use her weight and greater experience (as well as her language) to intimidate the claimant’s team. As the game went on the defendant became increasingly frustrated as her tactics appeared not to be succeeding. Towards the end of the match, the defendant tackled the claimant but was winded by her own tackle. Shortly thereafter, a ruck formed after which the claimant, acting as scrum half, bent down to pick up the ball. Before the ball was in the claimant’s possession the defendant launched herself at the claimant, while the latter was bending over in a highly vulnerable position, and landed on her with full weight in a belly flop position, directly on top of the claimant’s neck and back with her hands on the claimant’s legs. The claimant suffered an injury to her spine which left her paraplegic and wheelchair-dependent for the rest of her life. She brought a claim against the defendant for damages in negligence, alleging breach of duty of care by failing to exercise such a degree of care as was appropriate in all the circumstances. The defendant resisted the claim, contending, inter alia, that in a sporting context liability could be established only if a defendant was shown to have been reckless or to have demonstrated a very high degree of carelessness. The court ordered that liability be tried as a preliminary issue.

On the preliminary issue—

Held, allowing the claim with damages to be assessed, that, within the law of negligence, the test was whether the defendant had failed to exercise such degree of care as was appropriate in all the circumstances; that there was no rule or principle that, in the sporting context, the conduct complained of had to be reckless or that a very high degree of carelessness had to be demonstrated in order for liability to be established, although there might be cases where that was the appropriate standard on the particular facts; and that, in the present case, where the evidence established that the defendant had carried out a reckless and dangerous act which fell below an acceptable standard of fair play, liability based on recklessness was in any event made out (post, paras 59–62).

Smoldon v Whitworth [1997] ELR 249, CA and *Condon v Basi* [1985] 1 WLR 866, CA applied.

Blake v Galloway [2004] 1 WLR 2844, CA distinguished.

PRELIMINARY ISSUE

By a claim form and particulars of claim, the claimant, Dani Laura Czernuszka (née Watts), sought damages from the defendant, Natasha Mercedes King, for personal injuries and financial losses arising out of an incident on 8 October 2017, allegedly caused by the negligence and/or recklessness of the defendant. On 22 April 2022 deputy master Toogood KC ordered that liability be tried as a preliminary issue.

The facts are stated in the judgment, post, paras 3–33.

Robert Weir KC (instructed by *Irwin Mitchell LLP*) for the claimant.

Geoffrey Brown (instructed by *Plexus Law*) for the defendant.

The court took time for consideration.

23 February 2023. **SPENCER J** handed down the following judgment.

Introduction

1 On 8 October 2017, the claimant, aged 28 and a mother of two, in her first competitive game of rugby, suffered an injury to her spine which has left her paraplegic and wheelchair-dependent for the rest of her life. By this claim, she claims damages in negligence against the defendant, who carried out the tackle which caused this injury. Unfortunately, injuries sustained in the course of games of rugby, and other sports such as association football, are not uncommon, these being contact sports played at speed where players can differ in height, stature and weight. In general, injuries, even serious injuries, are an accepted risk of the sport and do not sound in damages. However, sport is not exempt from, or immune to, the law of negligence. As will be seen (see paras 35–45 below), the courts have deemed actionable injuries sustained where the conduct of the opposing player fell below the standard of care appropriate and to be expected in all the circumstances. Sometimes, by reason of the particular circumstances, the bar for that standard will be set high requiring recklessness or a very high degree of carelessness: see, for example, *Blake v Galloway* [2004] EWCA Civ 814; [2004] 1 WLR 2844 discussed at paras 44 and 45 below. The main issues in this case are whether, for the defendant to be found liable, it is necessary for the court to find that she was reckless or exhibited a very high degree of carelessness given the particular circumstances of this case and whether, depending on the court's findings in relation to the first issue, the tackle executed by the defendant which caused the claimant's injury met this test so as to render the defendant liable to the claimant in damages.

2 Pursuant to the Order of Deputy Master Toogood KC dated 22 April 2022, liability has been tried as a preliminary issue, with the assessment of damages to abide the outcome of this liability trial.

The background facts

3 The Redingensians Rugby Club, known as the Rams Rugby Football Club since May 2018, was founded as Old Redingensians in 1924 by former pupils of Reading School: they celebrate their centenary next year. The club runs five male adult teams and the first team plays in South West Division 1. Players often come up through the youth teams, with the youth section being one of the biggest in the area with approximately 400 boys and girls playing on Sundays. The club fields sides at every age group from Under 6 to Colts.

4 Inevitably, there are many women associated with the club, whether as wives/partners of players or as mothers of juniors or in various other capacities. There is also a growing interest among women in playing the game of rugby. In about October 2016, the club decided to set up a women's team, known as The Sirens.

5 Bracknell Rugby Football Club was founded in 1955. The defendant told me that its ladies' team folded in 2014: by that time, she had been playing rugby for about eight years, and they had reached quite a high level in the league. The ladies' team was re-formed in 2016 and re-joined the league in 2017 at the lowest level—the “developmental level”—with a team which was a mixture of experienced ladies, such as the defendant, and those who were new to the game. The defendant was the captain and, as Amber Clark (one of the Bracknell players who was called to give evidence) said, all the Bracknell team looked up to the defendant.

6 Sirens' first ever game, and the first game of the re-formed Bracknell Ladies team, was after the end of the 2016/17 season, a friendly game against each other at Bracknell on 8 May 2017. For the majority of the Sirens team, this was their first ever game of rugby. Unfortunately, it was not a happy experience for some of the Sirens. Although the perceptions differ on each side, I have no doubt that the description by the Sirens players genuinely represents their perception of the game, and of the defendant:

The claimant says:

“The game was meant to be a friendly but it was played hard and very aggressively. Tash [referring to the defendant] stood out as a prominent player. She was very large and aggressive and had punched SJ [referring to her friend, Sarah-Jane Garside] during the game. It was also during this game that she broke Keeley's arm.”

Claire Cook states:

“During the match the defendant whacked me hard on the forehead. I wasn't expecting it as neither of us had the ball in hand. I saw her running towards me before it happened but the whack came out of nowhere, it was like a massive rock had fallen from the sky! My head flipped back with the force and I was immediately dizzy. I saw

the defendant near to me afterwards and starting to move away from me. She's a big, strong lady and not easy to stop. I wasn't aware of her name at the time but we quickly got to know who she was. I didn't see her actually hit me because it came from nowhere but she was the person approaching me when it happened and the person closest to me before and afterwards. It seemed as though no one had really seen what happened to me. I asked to come off because I wasn't feeling right. After the game and in the evening, I cried a lot; I was in such shock. I did go to my GP and I was told that it wasn't a concussion but that I had damage to my middle ear. I'm sure the GP said something about damage to the 'crystals' in my middle ear but I can't now be sure of exactly what the diagnosis was. It did however stay with me and I was dizzy for weeks afterwards. I had been down to play the next game for the Sirens, I turned up but when I got there, I couldn't face playing due to what had happened in the previous game. In fact, I've never played rugby again."

Although, in cross-examination, Ms Cook stated that there could be no certainty that the blow was administered by the defendant because she had not seen the defendant do it, I find that, on the balance of probability, she did so. In making this finding, I take into account my findings in relation to what has been termed "Incident 5" in the match on 8 October 2017, as to which see para 11 below. Sarah Louise Leicester states:

"The whole team noticed Tash straight away. She was the ringleader. She was very vocal and swore a lot. She encouraged her team-mates to play aggressively. It was a bad-tempered game. There was one occasion during a line out when I heard Tash say, 'as soon as they hit the floor, we're going to fucking smash them'. The game was fought hard and one of our players, Keeley, was involved in an off the ball tackle with Tash and broke her wrist as a result. We won the game, but I came away with a sour feeling. It made me question whether I wanted to play rugby again. After the first game Tash had left a lasting impression upon all of us. We were playing a developmental game and we were supposed to be helping each other learn. Tash was not there to help people learn about rugby. It seemed as though she was only interested in the physical side of the game. It was like she enjoyed hurting people. Tash is a good and incredibly strong player. She stands out against the other players in our league because of her size and attitude."

7 After the game, the claimant was nominated by the Sirens coaches as the "player of the match" for her performance.

The game on 8 October 2017

8 For the new season starting in October 2017, both Sirens and Bracknell Ladies joined the league at the "developmental" level and their first game was against each other on 8 October 2017. As Mr Reynolds, the CEO of the Reading club, stated, although this was meant to be at the starter level for women's rugby, it was a competitive and physical game. He described the defendant, Tash, as

"far too good for the level the game was supposed to be at. She didn't have regard for the players she was coming into contact with. Throughout the match Tash played explosively and threw her weight around."

9 Additionally, there was concern about the general approach of the Bracknell Ladies side towards the game, and the approach of the defendant in particular. Thus, Sarah Leicester said:

"I heard Tash trying to psych out our players. She called us 'cunts' and told us how she was going to 'smash' us."

Although the defendant denied using such language, she accepted that there was "trash talk" with a lot of swearing and I find that this reflected the very different attitudes of the two teams, the attitude and approach of the Sirens being much more appropriate to the level of the game and the fact that the majority of the players on the field were still learning the game.

10 In this game, the claimant, who was 5 foot 3 inches in height and weighed 9 stone, played in the position of flanker with number 7 on her back. The game was video-recorded by Sirens, so that it could be used for coaching purposes. I have therefore had the advantage of watching the whole of the match, and in particular the tackle in which the claimant was injured, which was

captured in full on the recording. Throughout the game, the defendant was executing what have been termed “dominant tackles”, namely tackles where the opposing player is driven backwards and onto the ground. The defendant is 5’5 inches tall and weighed between 16 and 17 stone at that time. Sarah Leicester, who was an impressive witness and whose evidence I wholly accept, assessed the game as follows:

“It was clear from the start that our teams were playing very different games. The Bracknell players were much bigger. They relied on their size and their aggression whereas we relied on our speed. As we started to take the lead, the Bracknell players upped their rough tactics. I think the Bracknell players had Dani marked as one of our star players, as Dani was incredibly quick. I heard Tash say specifically to the team to ‘smash the number 7’, which was Dani.”

11 Ms Leicester stated that there were several incidents involving the defendant during the game that stood out and she refers to one in particular which was designated Incident 5 in the trial. This occurred towards the end of the second half and the defendant was carrying the ball. Ms Leicester, a second row forward wearing number 4, went to tackle the defendant, who was able to offload the ball to a teammate. The defendant remained on her feet, but Ms Leicester was off balance, bent over and struggling to regain her balance. The defendant then put her forearm on the top of Miss Leicester’s back and pushed downwards causing Ms Leicester to fall to the ground. This was well after the ball had gone and when Ms Leicester was clearly no longer trying to tackle the defendant. This was described by Mr Morrison, the claimant’s expert, as follows:

“After the (D) offloads the ball to a teammate, both the (D) and B4 [Miss Leicester] are running towards the next phase of play. Clearly the (D) deliberately brings her forearm in contact with the back of B4’s head, ensuring she falls to the ground and is temporarily out of the game, contrary to Law 10.2(d).”

In her evidence, the defendant accepted that she drove Miss Leicester to the ground but asserted that Ms Leicester’s left arm was still between her legs and she was simply trying to disengage from Ms Leicester. In cross-examination, it was put to Mr Morrison on the defendant’s behalf that the defendant had pushed down on Ms Leicester’s back to release herself, but Mr Morrison disagreed, stating:

“I think the defendant knew exactly what she was doing and this is an example of her total lack of respect for the game and the individual. She took Miss Leicester out of the game, contrary to the game’s values. We see her step over the line too often as to what is acceptable. I disagree that it was marginal: I think it was deliberate.”

Having viewed the incident several times from the video recording, my assessment is the same as that of Mr Morrison: this was a deliberate, gratuitous action by the defendant to take Ms Leicester out of the game, contrary to both the Laws and Spirit of the game.

12 In general, and in accordance with the assessment of both Mr Morrison and Ms Leicester, I take the view that the defendant, despite attempting to dominate the play and use her weight and greater experience (as well as her language) to intimidate the Sirens players, became increasingly frustrated as the game went on and her tactics were seen not to be succeeding. The Sirens were the quicker, more skilful team and one of their standout players was the claimant. She showed great speed, skill and resilience and she was impervious to whatever the Bracknell players in general, and the defendant in particular, threw at her.

13 Then, at 63:02 minutes into the video recording of the match and therefore near the end of the game, there occurred what has been called Incident 7. The claimant, in possession of the ball, runs at speed towards the defendant who executes one of her dominant tackles by grabbing the claimant around the waist and driving her to the ground, with both players hitting the ground hard. As before, the claimant immediately gets to her feet and re-joins play, apparently unaffected. However the defendant is winded by her own tackle and is seen on all fours, in some distress and in need of assistance: play is stopped whilst the defendant is attended to by the trainer. Whilst play is stopped, the Sirens number 6 comes across to the claimant and lifts her in the air triumphantly. Sarah Leicester does a “high 5” with the claimant. Ms Leicester told me that they were just celebrating generally how well they had played and that the game was effectively won, but it could have been perceived by the Bracknell players as celebrating the

way that their star player, to whom they all looked up and whose lead they followed, had been injured in tackling the claimant and thus, on one view, humiliated.

14 Sarah Leicester said in her statement:

“Tash was clearly annoyed by the fact she had come away worse off than Dani. I could see she was talking to her teammates and pointing towards Dani. Tash looked visibly angry with Dani. In the next scrum I told Dani that I thought that Tash was going to be after her as she wanted to get her own back. I was so sure that Tash was going to go after Dani that I kept a close eye on Tash in the moments that followed. I even said to Dani at this point that Tash would have to get through me before hurting her because I felt very protective over Dani and was so sure that Tash was going to come for her.”

As I have stated, I accept Ms Leicester’s evidence and in particular that this was her perception, at the time, of the effect of Incident 7 on the defendant.

15 In her evidence, the claimant said that, after Incident 7, she heard the defendant say:

“That fucking number 7, I’m going to break her.”

When this was put to the defendant in cross-examination, she denied saying it. Her evidence was:

“No. I wouldn’t have known it was Dani and I wouldn’t say that to a player. I just see shirts, not players. I wouldn’t have known it was the number 7.”

She denied that she had been infuriated by coming off second best from the tackle. However, I prefer the evidence of the claimant and I find that she did say those words and that, after that incident, she was looking for the next occasion when she could get her revenge on the claimant in retaliation for what had happened. That opportunity came about 3–4 minutes later in what was referred to as Incident 9 and what I call “the injuring tackle”.

Incident 9: The injuring tackle

16 The movement which ends with the injury to the claimant starts with a scrum which takes place at 66:50 minutes into the recording, midway between the halfway line and the Sirens’ 10 metre line. The ball comes out to the Sirens number 13 who makes a break over the halfway line and the Bracknell 10 metre line where she is tackled (67:08). The ball comes to the Sirens no 6 who makes a further break over the Bracknell 20 metre line and is tackled halfway between the 20 metre line and the try line (67:25). From the ruck which forms, the ball is recycled on the Sirens side and fed to the claimant who runs towards the Bracknell try line and is tackled about 15 metres short by a Bracknell player other than the defendant. The ball is fed to the Sirens no 14 who is immediately tackled by the defendant: at the same time the claimant is getting to her feet (67:35). A ruck forms from the tackle to no 14. The defendant has got to her feet from tackling the no 14. The ball rests between the legs of the Sirens no 16, but she is not bound to the ruck and the ball is arguably out. The Bracknell coach, Mr Rosi, shouts from the side line “ball’s out”. The claimant has come round to the back of the ruck and, acting as scrum half, bends down to pick up the ball from between the legs of no 16. At the same time as the claimant is bending down, the defendant is coming round the side of what was the ruck with eyes only on the claimant, she does not wait for the claimant to pick up the ball, which remains at all times on the ground and never in the claimant’s possession. Bent over to pick up the ball, the claimant is in a highly vulnerable position. The defendant does not compete for the ball, as she would arguably have been entitled to do, but instead goes straight for the claimant, as shown in this still:



The defendant then puts her whole bodyweight forward and down on the claimant's back, parcelling up the claimant by grasping her thighs just above the knees. The ball is left behind in the same position on the ground:



The claimant is driven down onto her bottom with her body still bent forward and the full weight of the defendant lands on top of her, with her head, neck and spine all put at risk:



The claimant immediately sustains a T11/12 fracture dislocation with a T10 ASIA B spinal cord injury: this injury is T12 motor complete leaving the claimant paralysed from the waist downwards and a full-time wheelchair user.

17 Claire Cook, who was running the line, said in her statement:

“I heard a crack and Dani didn’t get up. Dani said something like, ‘I’ve broken my back!’”

On the video, a clearly audible gasp of “ohh” is heard from the spectators near the video camera witnessing this tackle. Ms Cook, who is close to the incident, is seen with her hand on her head, clearly in shock at what she has seen.

18 The defendant simply gets up and walks away towards her own try line: she shows no concern for the claimant whatsoever. The referee has blown the whistle for full time (“no side”).

The expert evidence

19 Although various factual witnesses expressed their views about the tackle executed by the defendant, I had the benefit of hearing from two very eminent retired referees as experts, Mr Edward Morrison for the claimant and Mr Anthony Spreadbury for the defendant, and I therefore took the view that it was their views which I should take into account in making my judgment about the injuring tackle. The expert evidence was primarily directed to the following issues: whether the defendant was offside within the Laws of rugby; whether the claimant had possession of the ball within the Laws of rugby; whether, therefore, it was legitimate for the defendant to tackle the claimant at all; and how the defendant executed her tackle. Although views were expressed by Mr Morrison about the defendant’s motivation, I considered that this trespassed on the court’s fact-finding domain. I was also conscious of the fact that whether the defendant was “entitled” to tackle the claimant was not the primary issue for the court which, as will be seen, was whether the defendant was negligent, but clearly the legality of the tackle within the Law of the game forms part of the circumstances which should be taken into account by the court in deciding the primary issue. In particular, as will be seen, the fact that a person in the scrum-half position, bending down to pick up the ball, is in a vulnerable position is recognised by the Laws of the game which are intended to protect the scrum-half, particularly, perhaps,

when there may be a great disparity in height, weight and stature between the scrum-half and, for example, a front-row forward.

20 A further aspect of the expert evidence, again principally arising from Mr Morrison's evidence, was that it was necessary always to bear in mind that the referee was not a defendant and the court was not concerned with whether the game was refereed well or not. It was therefore not pertinent to know whether either of the experts would have refereed the match differently.

Edward Morrison

21 Mr Morrison is a former full-time Professional referee, employed by the Rugby Football Union. He was appointed by World Rugby to over 40 Major Tier 1 International matches, between the period 1990–2001. He was one of only three referees in England to be offered full time status in 1998, having previously trained and worked as an engineer. He has refereed at all levels of the game including Underage Rugby, Men's and Women's Rugby at amateur level. He was appointed by World Rugby to referee at the 1991, 1995 and 1999 Rugby World Cup Finals Tournaments and he refereed the World Cup Grand Final between South Africa and New Zealand in 1995. He refereed the Women's World Rugby Grand Final in Amsterdam between New Zealand and USA in 1998. Upon retiring from active refereeing in 2002, he continued to be employed by the RFU as a Referee Development Officer. In 2007 he was appointed as the Elite Referee Manager, a position he held until 2013. He has attended numerous disciplinary hearings either as a witness, or in an advisory capacity, when players were either cited or sent from the field in cases appertaining to Foul Play incidents.

22 He told the court that the development league was an initiative set up under the guidance of the RFU who in 2017 were witnessing positive growth in the number of women wishing to become involved in the game. As women traditionally had not enjoyed the luxury of being taught the game through PE in schools, the development league was used as a means of introducing women into the game via affiliated clubs.

23 Mr Morrison placed great emphasis upon the principles and Laws of rugby. He referred to the playing charter, whereby, rugby union being a sport which involves physical contact and, as such, presents inherent dangers, it is very important to play the game in accordance with the laws of the game, which are designed to protect the safety of participants, and be mindful of player welfare at all times. The principle of fair play cannot be upheld solely by the referee. Responsibility for its observance also rests on unions, other affiliated bodies, coaches and (pertinently for this claim) players. The application of the principles of the laws of the game imposes an overriding obligation and duty on the players to observe the laws and to respect the principles of fair play and so as not to risk causing injury to other players. The laws must be applied in such a way as to ensure that the game is played according to the principles of fair play.

24 So far as the laws of the game are concerned, the applicable Laws at the time of this match were those produced by World Rugby in 2017. Mr Morrison referred in particular to Law 10 which deals with Foul Play, including dangerous tackling. Foul Play is defined as follows: "Foul play is anything a player does within the playing enclosure that is against the letter and spirit of the laws of the Game. It includes obstruction, unfair play, repeated infringements, dangerous play and misconduct which is prejudicial to the game." Law 10.4 deals with Dangerous Play and Misconduct, included within which is "Dangerous Tackling". Law 10.4(e) provides (inter alia):

"(e) Dangerous tackling. A player must not tackle an opponent early, late or dangerously.

"Sanction: Penalty kick.

"A player must not tackle (or try to tackle) an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders. A tackle around the opponent's neck or head is dangerous play.

"Sanction: Penalty kick ...

"Playing a player without the ball is dangerous play.

"Sanction: Penalty kick."

Complementary to 10.4(e) is 10.4(f) which provides:

"(f) Playing an opponent without the ball. Except in a scrum, ruck or maul, a player who is not in possession of the ball must not hold, push or obstruct an opponent not carrying the ball.

"Sanction: Penalty kick."

Possession of the ball is defined as follows:

“Possession: This happens when a player is carrying the ball or a team has the ball in its control; for example, the ball in one half of a scrum or ruck is in that team’s possession.”

Thus, the Laws distinguish between possession by a player and possession by the team. For a player to be in possession, he or she had to be carrying the ball. It was Mr Morrison’s opinion, not in the end disputed by Mr Spreadbury, that at no time when the Injuring Tackle occurred was the claimant in possession of the ball and therefore the defendant’s tackle on her was dangerous play within the definition of the Laws of the game.

25 In his report, Mr Morrison set out his understanding of the relevant legal test for reasonable conduct by a player. He, of course, deferred to the court as to whether the defendant acted negligently or recklessly but, subject to that, he stated:

“The expert opinion that I provide in this report is based on the application of the general standard of care placing all sports participants under a duty to take all reasonable care to avoid causing injury to co-participants, taking account of the circumstances in which the acts take place. That duty of care of each player is to exercise care that is objectively reasonable in the circumstances to avoid injuring fellow contestants.

“This does not include a mere error of judgment but does take into account the circumstances of the game in question and includes an acknowledgement of the inherent dangers of rugby, its rules and conventions that each player is expected to demonstrate and therefore not to indulge in any practice that has a reckless disregard for a fellow player’s safety.

“The game in question was a developmental league game, as set out above. For players of this level, I would expect the game to be played within the spirit of the laws showing respect for their opponents as well as not undertaking any unnecessary action that put an opponent at risk of injury. I have this in mind when assessing the conduct of D during this game and I would not referee this developmental league game in the same way as I would a professional game.

“My overriding priority would be to ensure a safe environment for the participants to enjoy the game of rugby, showing empathy, by not necessarily being overtechnical with some of the minor issues appertaining to the Laws of the Game. However, there would not be any compromise whatsoever when dealing with incidents that could potentially put players in risk of injury.”

26 Having carried out an analysis of the game as a whole, Mr Morrison expressed the opinion that, whilst at no stage did he find any reason to question the claimant’s actions in terms of complying with the law of the game, in contrast, up to the time of the claimant’s injury,

“it is evident that there were a number of incidents of D breaching the law of the game, and in some cases, these actions constituted foul play. I have highlighted earlier in this report, the incidents where I believe D did not show due regard to the Spirit or the Laws of the game and was in breach of her duty of care towards her opponents.

“D was clearly one of the most experienced players on the field, which is noted from her own witness statement confirming that she has played the sport for ten years and is apparent from her decision-making throughout the video footage of the match. She was also captain of Bracknell Ladies and clearly the main decision-maker throughout the game. She also took all kicks from penalties awarded against her opponents. On viewing the footage of the game it became apparent to me all the players in the Bracknell side look to the D for leadership. It is my expert opinion that up to the incident in question, D’s conduct did not meet an acceptable standard required of a responsible rugby player.”

27 In relation to the injuring tackle itself, Mr Morrison, in his report, expressed the view that, at the time that the claimant was bending down to pick up the ball, the ball was still in the ruck and the defendant was therefore offside. He stated:

"The C's hands are on the ball, ready to be lifted but she is yet to gain possession and the ball remains in the ruck. The C is in the most vulnerable position possible, bent down at the waist with her head and neck exposed. If the D had not been offside and had been further away from C, C would have been able to lift the ball, and raise her head and neck up as she stood up holding the ball, leaving her in a much less vulnerable position, removing the ball from the ruck and leaving her open to a lawful tackle. Instead, the D was dangerously close to the C and despite witnessing C in this vulnerable position, D chose to perform a hard and heavy tackle, directly on top of C's neck and back. ...

"My overall assessment of the play of D in the context of the standard of the reasonable rugby player leads me to conclude that this action was a reckless disregard for the C's safety and, in any event, fell below the standard of a reasonable rugby player. My reasons are detailed below.

"(1) The action of performing a belly flop with full weight down on top of C whilst having her hands on C's legs (or at least having her hands on them) had the effect of pushing C's head towards her legs in dangerous manner. Any reasonable rugby player would have been known that this act of applying force in this way risked causing a serious injury to her spine (or other serious injury), particularly given her weight.

"(2) C's legs were out in front of her and so by D placing her hands round, or at least on, C's legs and forcing her full weight on her spine, then C would have had no possibility of avoiding that pressure upon her spine.

"It is ultimately a matter for the court to determine whether this was a negligent or reckless act and why she should have acted in this manner. Particularly as there was no attempt to gain possession of the ball, or push C off the ball, but simply to forcefully flop onto C with her full weight, onto C's back was inherently dangerous. As someone who has been involved in rugby for almost 60 years, as a player, coach, referee or administrator, I have never witnessed such a reckless incident.

"These actions are not those of a responsible rugby player. In my opinion, it was a reckless and dangerous act and fell below an acceptable standard of fair play."

28 In cross-examination, Mr Morrison maintained his position that the claimant, with her head low to the ground and bent over as she was, was in a vulnerable position. He did not agree that the defendant's movement was predominantly forwards: he said that it was both forwards and downwards, and involved not only a tackle of a player without the ball, but also a tackle above the line of the shoulders even though the starting point was below the height of the shoulders. He said: "My view is simple: this tackle should never have taken place because of the claimant's vulnerability [arising from her position] and the large physical disparity." He stood by his description set out above.

29 However, Mr Morrison conceded that, under the laws of the game, Mr Spreadbury was right that the defendant was not offside because the ruck was over, the ball was out and Sirens' no 16 was not bound. He maintained, though, that what the defendant did was outside the spirit of the game: at this level of rugby, with the claimant bending over in the position of acting scrum-half as though the ball was still in the ruck, he maintained that the defendant would or should have known that the claimant was treating the ball as in the ruck, that she would be completely unaware that she was about to be tackled and in those circumstances, the defendant should not have persisted in tackling the claimant but should have desisted. In any event, the claimant was not in possession of the ball and therefore could not be tackled, even if the defendant thought she was onside and that the ball was out.

Anthony Spreadbury

30 Mr Spreadbury is also a renowned, experienced and accomplished referee. He set out his career in summary as follows:

"At the time of this incident, I was Head of Professional Game Match Officials Team (PGMOT) at the RFU. This involved management of all professional staff, contracting part-time staff, appointments of all match officials for all professional competitions, Director of Rugby Liaison, performance reviewers and coaching strategy. I received international recognition when I refereed my first Tier 1 v Tier 1 international between Australia v France in May 1990. I have refereed 44 international matches and refereed at the 2003 and 2007 World Cups. I am now the Head of Match Officials at European Professional Club Rugby. I became a member of the Rugby Football Union County

Championship Panel in 1984. I joined the RFU as a full-time referee in 2001. I have refereed several domestic and European games. I retired at the end of 2007/8 season and then joined the RFU as an elite referee coach. I am a World Rugby Match Official Selector and have been for the last two years."

31 In his report, he took a position which was very different to that of Mr Morrison. He stated his opinion as follows:

"Rugby Union is a contact sport. It is permitted in rugby to tackle your opponent, providing the player has the ball or is attempting to control the ball and, using your hands, to take them to ground. In my opinion the video of the match is clear. Natasha King was not off-side, nor did she commit any act of foul or dangerous play in accordance with the Laws of the Game. The referee was well placed to see the incident and he did not penalise Natasha King. I was assisted with the video and audio of the incident. In my view these confirm that the ball was out of the ruck (blue no 16 is not bound at the ruck) and there is a shout of 'ball's out'. Natasha King executes a legal tackle correctly.

"A legal tackle in Rugby Union is when a player of one team attempts to hold a player of the opposing team who has the ball and to take him/her to ground with the intention of obtaining possession of the ball or of preventing the other player from advancing with the ball or passing it to a team-mate. A legal tackle is one that is made on the opposing player from the shoulders down.

"The sanctions open to a referee for a breach of the laws are (a) penalty (b) yellow or (c) red card. There was no basis for any sanctions."

32 In cross-examination, however, Mr Spreadbury resiled from his somewhat extreme position and came much closer to the position of Mr Morrison. He agreed that, within the definition of "possession" as set out in the 2017 laws of the game, the claimant was not in possession and that his gloss of a player being in possession who is "attempting to control the ball" did not accord with the actual definition. He further conceded that, within Law 10.4(e), to tackle a player who is not in possession of the ball amounts to a dangerous tackle, which also falls within the definition of an early tackle, and was therefore dangerous on that account too.

33 It was, however, in relation to the mechanics of the tackle that Mr Spreadbury conceded the whole of the claimant's case and the views put forward by Mr Morrison in a way which represented a complete volte face from the position he had taken in his report. Mr Weir KC's skilful and precise cross-examination elicited the following concessions:

- The claimant was in a vulnerable position because she was not bracing herself for a tackle but was stationary, leaning forward, thereby exposing her head, neck and back;
- The claimant was vulnerable by reason of her size and stature, compared to the defendant;
- All the defendant's weight went into and onto the claimant's back from the start of the tackle;
- The mechanism of the tackle had the effect of concertinaing the claimant about her lower back;
- He would not want to see such a tackle on a rugby pitch because this was liable to give rise to serious injury: he had only seen 2 such tackles in all his career as a referee;
- This was the very epitome of dangerous tackling;
- A player in the position of the defendant has a choice whether to execute the tackle and has a duty of care towards the other player;
- From start to finish, the defendant only had eyes for the claimant and at no stage did she attempt to play the ball.

34 As Mr Weir submitted, these concessions on the part of Mr Spreadbury put the defendant in a difficult position. On her pleaded case, she did nothing wrong at all: she was not offside, the ball was out of the ruck, the claimant was in possession of the ball and therefore liable to be tackled, and there was nothing wrong in, or in relation to, the physical contact used to make the tackle or in the defendant's tackling technique. Thus, it was not contended that the defendant had made an error of judgment: in effect, the defendant's case was that, faced with the same situation, she would have done the same again. Two of the essential struts to the defendant's case had, by the end of Mr Spreadbury's evidence, gone: the claimant was not in possession of the ball and so should not have been tackled at all; and the mechanics of the tackle itself were dangerous and liable to give rise to serious injury whereby such a tackle had no place on the

rugby field. This meant that, if the defendant's defence to this claim were to survive, it would have to be put forward on a very different basis.

The legal principles and authorities

35 In chronological order, the first authority to be considered is *Wooldridge v Sumner* [1963] 2 QB 43 where a spectator was injured at a horse show by a horse whilst it was being ridden in the competition. At p 57, Sellers LJ described how the performer in a sport might well be held liable for any injury caused by his act where his conduct was "reckless and in disregard of all safety of others so that it is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game". At p 68, Diplock LJ explained that the participant owes a duty of care, not a duty of skill, and put the standard of care in these terms:

"A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."

It was generally thought that the principles espoused in that case in relation to the duty owed to a spectator applied equally to the duty owed to a fellow competitor.

36 In *Condon v Basi* [1985] 1 WLR 866, where *Wooldridge's* case was not cited, the Court of Appeal had to address the standard of care owed by one player to another on the field of play. This arose out of a game of football played in the Leamington local league when the defendant so tackled the claimant as to break his leg. Sir John Donaldson MR observed that there appeared to be no authority as to what is the standard of care which governs the conduct of players in competitive sports generally or in a competitive sport where the rules and general background contemplate that there will be physical contact between the players, in particular. In a judgment with which the other members of the court agreed, the Master of the Rolls, having cited the judgments of Barwick CJ and Kitto J in the Australian case of *Rootes v Shelton* [1968] ALR 33, said, at p 868:

"I have cited from those two judgments because they show two different approaches which, as I see it, produce precisely the same result. One is to take a more generalised duty of care and to modify it on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of the duty of care. That seems to be the approach of Barwick CJ. The other is exemplified by the judgment of Kitto J, where he is saying, in effect, that there is a general standard of care, namely the Lord Atkin approach in *Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562 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 countryside.

"For my part I would prefer the approach of Kitto J, but I do not think it makes the slightest difference in the end if it is found by the tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event, there is liability." (Emphasis added.)

37 The passage in the judgment of Kitto J which the Court of Appeal approved reads as follows:

"In a case such as the present, it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity. Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair [presumably alluding to the maxim 'all is fair in love and war'], the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though

he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances." (Emphasis added.)

38 In *Condon's* case, the court observed that the standard of care was objective, but objective in a different set of circumstances; thus there will be a higher degree of care required of a player in a first division football match than of a player in a local league match. The court also noted how the judge at first instance had found that the defendant had made a tackle "in a reckless and dangerous manner not with malicious intent towards the plaintiff but in an 'excitable manner without thought of the consequences'" and how the judge had described the defendant to have been guilty of "serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game". That conclusion by the trial judge was one which could not be faulted on its facts: on the law it could not be said that the defendant was not negligent.

39 In *Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] PIQR P6, the appellant, Peter Caldwell, a professional jockey, was seriously injured in a two-mile novice hurdle race at Hexham. His claim against two other riders, Adrian Maguire and Mick Fitzgerald, was dismissed by Holland J. His appeal to the Court of Appeal failed.

40 In the course of his judgment at first instance, Holland J referred to the case of *Smoldon v Whitworth* [1996] EWCA Civ 1225; [1997] ELR 249. In that case the claimant sued another player and a referee at a rugby match in which he was badly injured when the scrum collapsed. The claim against the player was dismissed, but the referee was found liable and appealed. Lord Bingham CJ, giving the judgment of the court, recorded that the defendant had invited the judge to say that nothing short of reckless disregard for the claimant's safety would suffice to establish a breach of the duty which the referee admittedly owed to the player. The judge, however, had adopted the test proposed by the claimant derived from *Condon* that the duty was to exercise such degree of care as was appropriate in all the circumstances. The court said that the judge was right to accept the plaintiff's approach. This supports Mr Weir's submissions as to the appropriate test to be applied in the present case.

41 Tuckey LJ, in *Caldwell*, emphasised that Holland J had not said that, in order to succeed, a claimant has to establish recklessness, saying:

"That approach was specifically rejected by this court in *Smoldon*. As in *Smoldon*, 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. I do not think it is helpful to say any more than this in setting the standard of care to be expected in cases of this kind."

42 Judge LJ, in his judgment in *Caldwell*, whilst agreeing with Tuckey LJ, emphasised two particular points: first, it is clear from the authorities that a finding that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability in negligence. Second, in the context of sporting contests he considered it right to emphasise the distinction to be drawn between conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race.

43 Those are both points which are highly pertinent in the context of the present case. Ms King would not be liable simply because she had effected a tackle which was illegal, or even dangerous, within the Laws of Rugby: the fact that the tackle is illegal for the purposes of the Laws of Rugby is simply one of the factors to be taken into account in deciding whether the defendant's conduct was negligent because she had failed to exercise such degree of care as was appropriate in all the circumstances. As to the second point, as I have mentioned (see above at para 34), the defendant's case was not that this was an error of judgment and it remains to be considered whether, in the light of the concessions made by Mr Spreadbury, a defence can be mounted on that basis given that the defendant's principal defence is no longer viable.

44 Finally, I turn to the decision of the Court of Appeal in *Blake v Galloway* [2004] 1 WLR 2844, which concerned horseplay between 15-year-old boys who were throwing twigs and pieces of bark chipping at each other. The claimant picked up a piece of bark chipping and threw it at the defendant, who then picked it up and threw it back. Unfortunately, it struck the claimant in the right eye, causing a significant injury. The judge at first instance found the defendant liable, but Court of Appeal allowed the defendant's appeal. The judgment of the court was given

by Dyson LJ (as he then was). Having referred to the authorities including *Wooldridge*, *Condon* and *Caldwell*, Dyson LJ first defined the characteristics of the game in which the parties were participating as:

“informal play which was being conducted in accordance with certain tacitly agreed understandings or conventions ... [namely] that the objects that were being thrown were restricted to twigs, pieces of bark or other similar relatively harmless material that happened to be lying around on the ground; they were being thrown in the general direction of the participants in a somewhat random fashion and not being aimed at any particular parts of their bodies; and they were being thrown in a good-natured way, without any intention of causing harm. The nature of the object and the force with which they were being thrown were such that the risk of injury (almost certainly limited to injury to the face) was very small. There was no expectation that skill or judgment would be exercised, any more than there would be by participants in a snowballing fight.”

In those circumstances, and given those characteristics of the game, the court held that there is a breach of the duty of care owed by participant A to participant B “only where A’s conduct amounts to recklessness or a very high degree of carelessness”. The court found that the defendant’s actions did not reach this high standard and that what had happened was “an unfortunate accident, and no more”.

45 For the claimant, Mr Weir KC submitted that the court should not follow and adopt the approach of the Court of Appeal in *Blake’s* case but should prefer the test derived from *Condon*, namely that a defendant has a duty “to exercise such degree of care as was appropriate in all the circumstances”. However, I do not see that there is necessarily a conflict between the *Condon* test and the decision and reasoning in *Blake’s case*: my understanding of the judgment of Dyson LJ is that, in the particular circumstances of that case, involving as it did horseplay and the various other characteristics set out above, only if the defendant were to be found to have been reckless or to have shown a very high degree of carelessness could he be found liable. I do not understand Dyson LJ to have been laying down such a test for every case, nor to have dissented from the proposition that the overarching test for liability is whether the defendant failed to exercise such degree of care as was appropriate in all the circumstances. All he was saying was that, in those circumstances (horseplay with all the characteristics he describes), the appropriate degree of care is not satisfied, and the defendant is not liable, unless he could be shown to have been reckless or guilty of a very high degree of carelessness.

The claimant’s submissions

46 For the claimant, Mr Weir KC relied, unsurprisingly, on the concessions made by Mr Spreadbury that the tackle executed by the defendant was dangerous by reference to the mechanics of the tackle and he submitted that, in this context, the distinction between a tackle being dangerous and the defendant being legally negligent is “paper thin”.

47 In *Blake v Galloway*, Dyson LJ had set out what were the relevant characteristics of the game in which the participants were engaging for the purposes of assessing liability and what was the appropriate degree of care (see para 44 above) and therefore, at the court’s invitation, Mr Weir set out what he submitted were the relevant characteristics or circumstances by which the appropriate degree of care should be assessed in the present case. These were, he submitted:

(i) The characteristics of the defendant: she was big and heavy (weighing over 16 stone), a dominant tackler who was able to use her size and weight to drive other players back and down into the ground and she was the captain of the team, the player to whom the other members of the team looked up and who set the tone—she had previously played at a much higher level;

(ii) The level of the game and the (in)experience of many of the players: both sides were fielding novice players who were learning the game and for whom this was their first competitive game in what was only a developmental league, and who had only played a handful of games before: this applied to the claimant.

48 Mr Weir submitted that the court should make findings concerning the defendant’s conduct both generally and in the two matches against the Sirens, and take those findings into account in assessing the injuring tackle. He commended to the court the evidence called on behalf of the claimant, and in particular the evidence of the claimant and Miss Leicester. He submitted that the court should find that the Bracknell players in general, and the defendant in particular, engaged in “trash talk” with a lot of swearing on the pitch and calling the Sirens players cunts, and that the defendant was overly aggressive, whacking Ms Cook on the head in the first game,

causing a broken arm in that match and driving Miss Leicester into the ground (Incident 5) in the second match. He submitted that the defendant made a “call to arms” that the Bracknell players should “fucking smash the no 7”, that she adopted intimidatory tactics and became frustrated and angry when these were ineffective, culminating in her humiliating experience when she was winded in the course of tackling the claimant, leading to her saying: “that fucking no 7, I’m going to break her.”

49 In relation to the injuring tackle itself, Mr Weir referred to a number of features which the court should take into account in making its assessment as to whether it transgressed the line from “all part of the game” to something that was negligent for the purposes of the law:

- The ball was being treated as still in the ruck and therefore the defendant was offside;
- The claimant never had possession of the ball;
- The defendant could see that the claimant, whom she knew to be a much smaller player, was acting scrum-half and adopting a vulnerable position in order to pick up the ball;
- The defendant went straight for the claimant: she made no attempt to compete for the ball;
- The defendant executed the tackle exactly as she intended: there was no error of judgment;
- The tackle was wholly unconventional such that it was executed in a way that had never been seen before by Mr Morrison in his 60 years of experience and only twice by Mr Spreadbury in all his experience;
- The tackle was committed without concern for the claimant’s safety;
- The tackle was dangerous, both in terms of the Laws of Rugby and as that word is used in common parlance;
- The defendant had a choice whether to proceed with the tackle or desist given the danger to the claimant, for example by competing for the ball instead, but chose to proceed: in so doing, she ignored her duty of care towards the claimant.

50 In the light of the above, Mr Weir submitted that this was a case where the defendant failed to exercise such degree of care as was appropriate in all the circumstances and was therefore liable to the claimant for her injuries.

The defendant’s submissions

51 On behalf of the defendant, Mr Brown conceded that, in the light of Mr Spreadbury’s evidence, he could not argue that the defendant’s tackle was not dangerous, but he submitted, correctly, that the concept of a dangerous tackle within the Laws of Rugby is wider than a tackle which is actionable, and tackles which are “dangerous” within the definition in Law 10.4 may not be actionable even where they cause injury. He invited the court to apply the approach of Dyson LJ in *Blake v Galloway* and consider the injuring tackle to be actionable only if the court finds that it was reckless or satisfied a very high degree of carelessness.

52 In relation to recklessness, Mr Brown agreed with the definition which had been proposed by Mr Weir KC in his opening skeleton argument: “whilst reckless is not defined in the sports cases, it is generally taken to involve being aware of the risk of injury resulting from such conduct and unreasonably taking that risk”. He submitted that this is essentially a subjective test and that, in considering the injuring tackle, the court should seek to sift the legitimate from the illegitimate. He asked the court to bear in mind the following general points:

- It all happened very quickly: the court should beware of slow motion breakdowns of the tackle;
- The referee did not penalise the tackle at the time and the reaction of the players was not condemnatory;
- It was not illegitimate for the defendant to make the tackle simply because the claimant was stationary and bending forwards: subjectively, the defendant believed that she was entitled to tackle the claimant. The only legitimate criticism relates to the way in which she executed the tackle;
- The defendant was not offside;
- Whilst it is correct that the claimant didn’t have possession of the ball, she was bending down in order to pick up the ball and she would have had possession of the ball, and therefore been liable to be tackled, a very short time later: thus, this was a tackle which was essentially mistimed by the defendant.

53 Referring to the mechanism of the tackle, Mr Brown submitted that, in principle, it was legitimate for the defendant to tackle hard and heavily: this was conceded by Mr Morrison. There is no Law of rugby which seeks to regulate the amount of force used in making a tackle and he submitted that it was legitimate for the defendant to have tackled the claimant hard and heavily in the situation that arose so long as the technique or mechanics of the tackle were not dangerous. The defendant should be given a wide latitude where physical contact is part of the game and

decisions have to be made very quickly. The element of the tackle on which to focus was the injuring element, namely the downwards force: in considering the degree of reprehensibility, the court should take account of the fact that the defendant went into the tackle going forwards, lowering her body position and driving essentially forwards, albeit a manoeuvre which also entailed an element of downward pressure: he compared this to a situation where the essential movement is downwards rather than forwards. He submitted that the fact that the movement was essentially forwards in this case is relevant to the court's assessment of the gravity of what the defendant did. Although the defendant did fall on top of the claimant, this was after the tackle had been completed and she then rolled away very promptly.

54 The second aspect of the mechanics to which Mr Brown referred was the way that the defendant wrapped her arms around the claimant. He submitted that for a tackler to wrap her arms around the person being tackled is not illegitimate per se, indeed it is a "no arms" tackle which is specifically mentioned in Law 10.4 as being dangerous. Nor was it illegitimate in this particular tackle: it amounted to little more than the defendant having her hands resting on the claimant's thighs and legs, and this made no difference to the compression or downward force.

55 Mr Brown submitted that, in the light of the above, the two aspects upon which the court should focus its attention were:

- (i) this was an illegitimate way to tackle because of the downward force and
- (ii) the claimant was tackled when not in possession of the ball.

Focusing on these aspects for the purposes of recklessness, Mr Brown posed the question: did the defendant know of the risk of injury arising from those features and was she indifferent to that?

56 In relation to the mental element, Mr Brown submitted that the court should find that this was not an act of retribution by the defendant. So far as the claimant's evidence that she heard the defendant say "that fucking no 7, I'm going to break her" is concerned, he submitted that the court should reject this evidence as it was uncorroborated, that it was entirely inherently unlikely that it was said, and there was uncertainty and inconsistency as to when it was said. There were many people around, and if it had been said, someone else would surely have heard it. He also invited the court to reject the evidence of Miss Leicester that she heard the defendant urge her teammates to "smash the no 7". He submitted that, watching and listening to the whole of the match via the video recording, the overall conduct of the defendant was not intimidating and that there was in fact surprisingly little "trash talk". Having considered the evidence surrounding the previous incidents, Mr Brown submitted that the court should find that the injuring tackle was made without malicious, inappropriate or illegitimate intent. What happened was that the defendant got it wrong because of the element of downward force exerted on the claimant and because the claimant was not (quite) in possession of the ball, but the court's conclusion should be that the defendant didn't know that what she was doing was wrong and didn't intend to get anything wrong. He submitted that for a scrum-half to be tackled with the ball still on the ground is not difficult to imagine and although the defendant made an error in her tackling technique, such errors will occur in games of rugby. Judging this tackle within its timeframe, it was not reckless or such as to represent a very high degree of carelessness, but was an error of judgment by the defendant in how to carry out the tackle, a tackle which she got wrong in a split second, and as such it was a highly unfortunate risk of the game.

Discussion and findings

57 As stated, I was impressed by the witnesses called by the claimant and in particular the evidence of Miss Leicester (whose evidence I wholly accept) and the claimant herself. I was also impressed with the overall evidence of Mr Morrison and his views of the match in general, and the way in which the defendant conducted herself in particular, which accorded with mine.

58 I find that the injury occurred against the following background and in the following circumstances:

(i) Although this was a league match, the nature of the league being developmental meant that the players were still learning the game and it should have been played in that spirit: the players had a duty to be mindful of each other and to play with the understanding that enjoyment and learning were the main objectives, not winning;

(ii) However, even in the "friendly" match between the sides on 8 May 2017, Bracknell played the game in an inappropriately aggressive and intimidatory manner, using "trash talk" (swearing a lot, including using abusive language directed at the opposing players), with the Bracknell players taking their lead from the defendant, and this carried through into the game on 8 October 2017;

(iii) The inappropriate approach of the defendant in the first match led to a Sirens player (Keeley) breaking her arm, Claire Cook sustaining a head injury and Sarah-Jane Garside getting punched;

(iv) In the match on 8 October 2017, as Miss Leicester said, the two sides were playing very different games: the Bracknell players, generally much bigger, relied on their size and their aggression whereas Sirens relied on their speed. As the game slipped away from Bracknell, the Bracknell players upped their rough tactics, which included the defendant driving Miss Leicester to the ground well after the ball had gone, in an “off the ball” incident: I agree with Mr Morrison’s assessment of this incident as set out in para 11 above;

(v) The defendant, despite attempting to dominate the play and use her weight and greater experience (as well as her language) to intimidate the Sirens players, became increasingly frustrated as the game went on and her tactics were seen not to be succeeding;

(vi) This culminated in the incident at 63:02 minutes into the video recording (and therefore towards the end of this 60 minute match) when, after tackling the claimant, the defendant succeeded in winding herself: whilst the defendant was being treated, the Sirens players were celebrating. They may well have been celebrating the fact that they had played so well and the match was effectively won (the score was 14–0) but it could have been interpreted by the Bracknell players as celebrating the injury to their captain and her ultimate humiliation in sustaining an injury from her own tackle;

(vii) I have no doubt that the defendant did, as the claimant said, utter the words: “That fucking number 7, I’m going to break her.” Thereafter, she was looking for an opportunity to get her revenge on the claimant: the red mist had metaphorically descended over the defendant’s eyes;

(viii) That opportunity came about three minutes later when, after a ruck, the claimant took up the position of acting scrum-half, and bent down to pick up the ball: the defendant, with eyes only for the claimant, not the ball, and before the ball was in the claimant’s possession, launched herself at the claimant who was obviously bent over in a highly vulnerable position, unsuspecting and unprepared to protect herself against what was about to occur;

(ix) The defendant, without any regard for the well-being or safety of the claimant and intent only on exacting revenge, executed the “tackle” in a manner which is not recognised in rugby: she drove the claimant backwards and, importantly, downwards using her full weight and strength to crush the claimant in a manoeuvre which was obviously dangerous and liable to cause injury: it is no mitigation for what the defendant did that she was going forwards, as Mr Brown submitted: the force and momentum were equally downwards, as Mr Morrison said;

(x) I do not find that the defendant intended to injure the claimant, indeed that is not alleged against her: I do find, though, that the “tackle” was executed with reckless disregard for the claimant’s safety in a manner which was liable to cause injury and that the defendant was so angry by this time that she closed her eyes to the risk to which she was subjecting the claimant, a risk of injury which was clear and obvious;

(xi) In particular, there was no error of judgment in the tackle: I find that the defendant did exactly what she set out to do, and whether or not the claimant had possession of the ball was irrelevant so far as she was concerned: at that moment she was not attempting to play within the Laws of the game, but to exact retribution on the claimant;

(xii) Consistently with the above, despite the claimant lying prostrate and obviously injured, the defendant walked away towards her own goal line, apparently unconcerned for the claimant and what she had done: nothing could have been further from the spirit of the game, as described and advocated by Mr Morrison in his evidence.

59 I agree with, and adopt, Mr Morrison’s description of the tackle set out at para 27 above, and in particular his assessment that this was a “reckless and dangerous act and fell below an acceptable standard of fair play”. I also adopt and rely on the concessions made by Mr Spreadbury as elicited by Mr Weir KC in cross-examination, as set out at para 33 above.

60 So far as the legal test is concerned, I endorse Mr Weir KC’s basic proposition that, within the law of negligence, the test is whether the defendant failed to exercise such degree of care as was appropriate in all the circumstances: this was the test endorsed in *Condon v Basi* [1985] 1 WLR 866 where the Court of Appeal adopted the formulation and approach of Kitto J in *Rootes v Shelton*. In particular, I do not consider that the Court of Appeal, in *Blake v Galloway* did, or intended to, lay down any rule or principle that, in the sporting context, the conduct complained of must be reckless or demonstrate a very high degree of carelessness in order for liability to be established. That was the standard applied in that particular case, and in the particular circumstances of that injury arising out of horseplay with the factors described by Dyson LJ and

set out at para 44 above. Indeed, a requirement to establish recklessness was expressly rejected and disapproved by the Court of Appeal in *Smoldon v Whitworth*. However, if I am wrong about that, it doesn't make any difference in this case because, on my findings, the defendant was indeed reckless and so satisfies this higher, more stringent, test in any event.

61 In relation to the particular circumstances of the present case, which underpin the (legal) standard expected of the defendant in this match, I agree with and adopt the characteristics advocated by Mr Weir KC and set out in para 47 above relating to both the defendant and the level of this game. Furthermore, I agree with and adopt the features relied on by Mr Weir and set out at para 49 above, save in one respect: I do not think that the defendant was offside. However, at this level and against this opposition, the defendant should have modified her conduct because it was or should have been apparent that the claimant was *treating* the situation as though there was still a ruck and had adopted a stance consistent with that, namely the stance of a scrum-half bending down to pick up the ball from the scrum which made her vulnerable as she was stationary, bent over and not suspecting that tackle was coming; so much was, or should have been, obvious to the defendant.

62 I therefore find that in this very unusual and exceptional context, the defendant executing a manoeuvre which was not within the experience of Mr Morrison and virtually outside the experience of Mr Spreadbury, the defendant is liable to the claimant for the injuries which the claimant sustained, and there shall be judgment for the claimant.

Claim allowed.

Damages to be assessed.

CATHERINE MAY, Solicitor