

## Personal Injury



## Sports injuries the test of negligence – Dangerous tackles in rugby

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### Introduction

1. In *Czernuszka v King* [2023] EWHC 380 (KB) C was tackled by D in an amateur rugby game as a direct result of which her spine was broken and she became paraplegic. The circumstances of the tackle have been widely reported in the media, the focus of this article is to identify points of practice that can be taken from the judgment and applied in pursuing personal injury claims in a sporting context.

2. The case is of particular interest as Martin Spencer J considered the test to be applied by the court when determining tortious liability for negligence in sport. The decision confirms that whilst serious injury may be an accepted risk of a sport, “sport is not exempt from, or immune to, the law of negligence” – the duty being to exercise such degree of care as is appropriate in all the circumstances (rather than a requirement of “recklessness”).

### The expert evidence

3. In addition to video footage and witness statements from both C, D and other participants in the match - the court had the benefit of hearing from two eminent retired referees, Mr Edward Morrison for C and Mr Anthony Spreadbury for D.

4. During the trial Mr Morrison (for C) maintained his overall assessment that in the context of the standard of the reasonable rugby player, D's action was a reckless disregard for C's safety and, in any event, fell below the standard of a reasonable rugby player. Mr Morrison's evidence was that as someone who had been involved in rugby for almost 60 years, as a player, coach, referee or administrator, he had never witnessed such a reckless incident. In cross-examination, Mr Morrison maintained that the tackle should never have taken place because of C's vulnerability, arising from her position bent over the ball, and the large physical disparity between the players.

5. As expressed in his report, Mr Spreadbury's (for D) opinion was that D did not “commit any act of foul or dangerous play in accordance with the Laws of the Game” – D executed a “legal tackle correctly”. However, Rob Weir KC (of Devereux), counsel for C 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.

6. As observed by the court, this put D in a difficult position because on her pleaded case, she did nothing wrong at all: she was not offside, the ball was out of the ruck, C 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 D's tackling technique. It had not been contended that D had made an error of judgment: in effect, D's case was that, faced with the same situation, she would have done the same again. It was therefore not open to D to seek to rely upon the window of opportunity afforded by Laws LJ's judgment in Caldwell (addressed below).

### **The legal principles and application to the facts**

7. Martin Spencer J identified Condon v Basi [1985] 1 WLR 866 as enunciating the correct test. That case concerned a game of football played in the Leamington local league in which the defendant broke the claimant's leg in a tackle. The Court of Appeal held that the duty was to exercise such degree of care as was appropriate in all the circumstances. The court observed that the standard of care is objective, but dependent upon the 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.

8. This approach was endorsed in Caldwell v Maguire [2001] EWCA Civ 1054 – the appellant, Peter Caldwell, a professional jockey, was seriously injured in a two mile novice hurdle race at Hexham. In dismissing the appeal Judge 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.

9. Furthermore, the court did not see any conflict between this approach and the judgment of Dyson LJ 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. In Martin Spencer J's view, the judgment of Dyson LJ was that, in the particular circumstances of that case, involving as it did horseplay and "tacitly agreed understandings or conventions" identified by the court, 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. Martin Spencer J did not understand Dyson LJ to have been laying down a requirement of recklessness 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 circumstance.

10. In determining that D had been negligent the court relied upon the following circumstances (in addition to the evidence as to the mechanics of the tackle):

- a. the characteristics of D: 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 to and who set the tone – she had previously played at a much higher level; and
- b. 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 C.

## Five take-aways

11. First, in a sporting context the test is “negligence” - the duty is to exercise such degree of care as is appropriate in all the circumstances (there is no ubiquitous requirement of “recklessness”).

12. Second, the standard of care is objective, but it is dependent upon the circumstances. For example, 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.

13. Third, careful consideration should be given to pleading and proving the relevant circumstances (by way of example Blake at para 13; and Czernuszka at para 47).

14. Fourth, liability does not attach simply because the defendant's actions are illegal, or even dangerous, within the laws of the sport in question (albeit relevant).

15. Fifth, it may be open to a defendant to mount a defence on the basis that that act in issue can be properly characterised as “errors of judgment, oversights or lapses of attention of which any reasonable [player] may be guilty in the hurly burly of [the sport in question]”.