CLYDE&CO

Red Cards and Red Flags – Judicial attitude to Sports

David Spencer, Partner - Head of Sports Practice Group

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Rugby

Rugby in the Courts #1

World Rugby Litigation

- Letter of Claim issued 17 December 2020 in RFU Claims – World Rugby, RFU, WRU
- Now Litigated with very (very) generic Particulars of Claim
- RFL litigation being case managed together
- Professional **and** amateur players
- 2 x CMCs in attempt to put the case in order
  - Further CMC – January 2025 – listed for 2 days
- Substantive hearing c.2027
- Causation = the unknown.

Rugby in the Courts #2

Czernuszka (nee Watts) v King [2023] EWHC 380 (KB)

- 2017 amateur women's match
- Claimant's first competitive match- (28YO mum of 2) suffered a T11/12 fracture dislocation with a T10 ASIA B spinal cord injury (T12 Motor complete) leaving C paralysed from waist down and full-time wheelchair user
- **Liability only trial**
- ***"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"***
- ***"Whether the Defendant was "entitled" to tackle the Claimant was not the primary issue … 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."***


Oracle


Oracle


786
Oracle

Rugby in the Courts #2

Czernuszka (nee Watts) v King [2023] EWHC 380 (KB)

- The inappropriate approach of the Defendant in the first match (5 months prior to the index match) led to a Sirens player (Keeley) breaking her arm, Claire Cook sustaining a head injury and Sarah-Jane Garside getting punched
- 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;
- 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:
- 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;

Rugby in the Courts #2

Czernuszka (nee Watts) v King [2023] EWHC 380 (KB)

"*reckless and dangerous act and fell below an acceptable standard of fair play*."

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;

I therefore find that in this very unusual and exceptional context ……. the Defendant is liable to the Claimant for the injuries which the Claimant sustained, and there shall be judgment for the Claimant

Rugby in the Courts #3

Elbanna v Clark [2024] EWHC 627 (KB)

- 2017 - amateur men's match
- As the game was restarted for the second half, the Defendant ran forward to chase the ball and collided with the Claimant causing him to suffer a serious spinal injury at the C5/C6 level.
- The Claimant's case: - " … *the collision resulted from a reckless or negligent breach of the duty of care owed by the Defendant to the Claimant as a fellow participant in the game*."
- **Law 10.4(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*"
- The Defendant does not appear to slow down or try to maximise the area of contact; in fact, quite the reverse. The Defendant's change of position involves him bringing his arms in and rotating his upper body so that his left upper arm and shoulder dip and are driven into the centre of the Claimant's upper back. The force is plainly considerable. The Defendant is 5 feet 7 inches tall and weighed 80 kilogrammes on his own estimation. The Claimant was a much taller and heavier prop forward. The force of the impact throws the Claimant forward even though he is moving partly sideways.

Rugby in the Courts #3

Elbanna v Clark [2024] EWHC 627 (KB)

- With 4 to 5 strides to go the Claimant was directly in the Defendant's path with his back to the Defendant. A collision was not inevitable at that point but it required the Defendant to reduce his speed or alter his line if it was to be avoided. He did neither. Mr Goddard, to the Defendant's left did check his speed. It is apparent that the Defendant could also have done so. In fact he chose to run so close to the Claimant that, at best, he would have been brushing past him at speed.
- He was courting the risk that even a slight movement would result in a forceful contact, with most of the kinetic energy being transferred to the claimant, given that he was virtually static in comparison to the Defendant
- The collision was avoidable or at the very least could have been reduced to a soft contact which would not have caused injury. Whether or not the collision was intentional, to have run directly at the Claimant at full speed and to have collided with him in the manner in which the Defendant did was **reckless**. It amounted to playing an opponent without the ball in contravention of the laws and courted the risk of injury; a risk which eventuated with catastrophic consequences for the Claimant. In the circumstances I conclude that liability has been made out.

Conclusions

Underlying legal principles set out in e.g. *Condon v Basi* [1985] remain

A Defendant has a duty **"*to exercise such degree of care as was appropriate in all the circumstances.*"**

Agreed in *Czernuszka* between counsel that:

> "*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.*"

Czernuszka – not penalised by match ref

Elbanna – not penalised by match ref. Not considered by (Ind.) disciplinary committee to have been an issue (at first hearing or on appeal)

AND YET – single judge, reliant on evidence concluded it was reckless

Floodgates?

The game generally is (now far) more focussed on athlete safety

Both cases show it does not require an on-field penalty (or card, of any colour) for an incident to be considered actionable – and for it to succeed

Motorsports

Motorsports in the Courts #1

Eaton v ACU & Ors. [2022] EWHC 2642 (KB)

- Competitive (amateur) event at Three Sisters Circuit
- C 'clipped' wheel of another competitor, causing loss of control and into collision with safety barrier – a tyre wall
- C alleged that straw bales should have been placed at point of collision (as they once were) and had they been in situ, he would have avoided the serious injury he suffered – so per **OLA 1957**, event was not safe for his reasonable use for the purpose invited

- The "others" :
  - D1 - ACU
    Governing Body
  - D2 – Motor Sport Circuit Management Ltd-
    Owner and operator of the circuit
  - D3 – Preston & District MC Club -
    Organiser of the event
  - D4 – Eddie Nelson -
    ACU appointed track inspector
  - D5 – Chris Beresford -
    ACU qualified CoC on day of accident

Motorsports in the Courts #1

Eaton v ACU & Ors. [2022] EWHC 2642 (KB)

Straw bales argument failed – C's expert "*lacked the necessary expertise to substantiate and justify his conclusions*"

Secondary argument – that the tyre barrier should have been banded, but was not. Had it been, the injury suffered would have been lessened

- "*…the duty in this case was one to take such care as was reasonable not to expose a participant in any given race to a risk over and above that inherent in the sport of motorcycle racing.*"
- I am satisfied that the injuries sustained by the claimant were simply not within the risk created by the negligence
- Furthermore, I am not satisfied that if the claimant had been told about the removal of the straw bales he would have chosen not to race. Many of his colleagues continued to race on the course at meetings after the accident in the full knowledge of the removal of the bales and I am sure that the claimant, but for his accident, would have followed suit

Motorsports in the Courts #2

Moore v ACU & Aintree Motorcycle Racing Club (judgment 16.02.2024)

- As *Eaton*, save that this time, there was no safety barrier / protective device to the rear of steeplechase fences on the adjacent horseracing circuit where impact occurred
- C lost control, left the (m/c) circuit and collided with the rear of a steeplechase fence, suffering a T5 complete spinal cord injury
- Benefit of a video recording from spectator mobile phone
- C highside @ c 65mph. Left the tarmac and travelled c.58m before C intentionally capsized his bike (38mph) before travelling c.14m and colliding head first with rear side of steeplechase fence post at c.19mph
- Following a Track inspection – circuit was required to cover the first 3 meters of the steeplechase fencing with straw bales – the remaining 17m of the fence required no protection at all

> *"I did not foresee the possibility of anybody leaving Village Corner in such a manner that they might collide with the middle of the fence. I was not aware of any history of any accident whereby that had happened. I understand the members of the Club also had no knowledge of any such accident."*

Motorsports in the Courts #2

Moore v ACU & Aintree Motorcycle Racing Club (judgment 16.02.2024)

Quoting the 1951 case of *Bolton v Stone*,

> "*an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee*"

- I conclude that the judgment that the centre of Fence 11 did not require additional protection before Mr Moore's accident was one to which a reasonably competent track inspector was entitled to come
- In the language of *Bolton v Stone*, Mr Moore's accident was foreseeable, but the chance that somebody would collide with Fence 11 was small, and the likely seriousness of the consequences were also small. In my judgment, the Club took sufficient steps in all the circumstances of the case to ensure that Mr Moore would be reasonably safe in using the premises for the purposes for which he was permitted to be there
- On causation – and query what additional protection may have prevented the claimant's injury:

> "*Mr Way considers that the claimant's injuries convey such a high level of energy transfer that no form of barrier would have dissipated energy sufficiently to offset this… Mr Way notes a flat surface or barrier still has an initial contact point and that energy transmission occurs at that point and thus disagrees with the theory that a flat surface would have changed the energy transfer at initial contact.*"

Motorsports in the Courts #3

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Superbike rider suing sporting bodies after major crash

GETTY IMAGES

Shane Byrne, known as Shakey, is the most successful rider in British Superbike Championship history

Callum Parke
PA Media

16 May 2024

Motorsports in the Courts #3

Shane Byrne v MCRCB & MSVR

- Trial in May 2024
- Basic argument: Safety systems (incl. barriers) on an official test day for the race series ought to comply with the safety systems in place for the race weekend
- Combinations of *Eaton* and *Moor* to consider but underlying principles (OLA / *Bolton*) remain
- Judgment awaited (now overdue)

Motorsports in the Courts

Conclusions

- Inherent risk has its place in pleadings.
- Re-statement (and not even clarification) of well-thumbed precedents (*Condon* / *Bolton* / *Bolam*) identify that there is nothing new under the sun
- The obligation on clubs (rugby, motorsport etc) is to take reasonable care for participants in their sport, without diluting the sport to cater for claimant outcomes (per *Bolton*)
- Governing bodies (national / world?) should and are taking the lead with reference to safety BUT there is necessarily a consideration of the inherent risk of the endeavour.
- Important not to lose sight of the fact that where C's succeed (*Czernuszka*, *Elbanna*, *Byrne*???) it does not toll the bell for the sport overall – there will always be an argument that more could have been done to mitigate risk – we remain reliant on quality of evidence – experts (who do not capitulate (Spreadbury) stay in lane (Jowitt)) and lay witnesses alike.
- Where there is an ever-growing use of video, important too to consider that medium as objective, 'pure' evidence in the context of frailty of human recollection

Thank you. Any questions

David Spencer, Partner

+44 (0)161 838 6800

David.Spencer@clydeco.com

Clyde & Co LLP

www.clydeco.com