CASE NOTE: *Dearman v Mytravel UK Limited* **[2008] 18 December (Southend CC, HHJ Dedman)**

Introduction

As long ago as 1985 the Court of Appeal held that the duty owed by a participant in an organised sporting event towards his fellow participants is a duty to take reasonable care "*taking account of the circumstances in which you* [as participant] *are placed*": *Condon v Basi* [1985] 1 WLR 866, 868D *per* Sir John Donaldson (CA) (a case involving injury in the course of a local league football match). Whether such care has been exercised will always, of course, involve questions of fact and will be assessed by reference to the rules of the game. However, a failure to comply with the rules of the game will not necessarily amount to negligence for which liability will follow; it is possible to infringe the rules without acting unreasonably in breach of the *Condon v Basi* formula. There have been occasional tweaks to the *Condon v Basi* formula over the years. In *Caldwell v Maguire* [2002] PIQR P 28 for example, a case in which injury was sustained in a professional horse race, the Court of Appeal re-emphasised that sporting contestants owed each other a duty of care and re-stated the *Condon v Basi* formula. However, the Court (Tuckey LJ) also went on to direct that the "*threshold for liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse in skill (and thus care).*" Indeed, so Tuckey LJ suggested, it would be difficult to prove fault without conduct amounting to a "*reckless disregard*" for the fellow contestant's safety.

In the light of this, and in the context of organised (and refereed) sporting events, the *Condon v Basi* formula sets the standard of care and *Caldwell v Maguire* emphasises the evidential difficulties that Claimants will likely face in discharging the burden of proving fault.

However, what is the proper approach to informal or amateur games or physical activities? The recent case of *Dearman v Mytravel UK Limited* raised some of these issues.

Facts

At the time of his accident the Claimant (then aged 14 years) and his family were on a package holiday to Spain. The Defendant was the tour operator for the holiday. The family stayed at a Hotel in Alcudia, Majorca and this is where the accident occurred. The Claimant and several other teenage children participated in a game of street hockey. It was the Claimant's case that the game had been organised under the auspices of a club which the Hotel ran for teenagers at the Hotel. The Defendant's case was that the game was a "*general activity*" (available to guests of all ages), rather than part of the children's programme. However, this distinction was not directly material because it was common ground that the guests participating in the game were all children (of and around the same age as the Claimant). The game was organised, supervised and, indeed, participated in by 2 members of the Hotel's entertainment staff. One of the staff members was employed by the Defendant (T) and the other (L) was working under contract for the Hotel. It was common ground that some safety instructions were given by T and L to the children participating in the game before it commenced. It was also common ground that the children were told not to raise their hockey sticks. The Claimant's evidence was that sticks were to be kept below knee or shin height and, after an initial dispute as to how high sticks were permitted to be raised, there was a degree of consensus about this as the evidence emerged at trial.

The Claimant's case was that he was behind T (who had the ball) and was trying to tackle him. The Claimant leant forward with his stick which was quite long and which he held in his right hand. T shot at goal (the goal of

the Claimant's team). He swung his stick back and connected with the ball. T then followed through with his stick (like a golf swing). This entailed him raising his stick and the end of this struck the Claimant in the eye. There was no other contact between the Claimant and T. The Claimant dropped to the ground. The Claimant alleged that T failed to follow his own safety instructions by raising his hockey stick to a dangerous height and causing injury to the Claimant.

The Defendant's evidence was that T had not raised his stick (at least, had not raised it deliberately). Instead, he had the ball at the relevant time and the Claimant had tackled him by making body contact. T had been knocked off balance and, as a result, had inadvertently raised his stick (without control or intent) and caught the Claimant. The Defendant's case was that the accident (while unfortunate) was simply the result of an unintended event during the course of a fast moving and competitive game.

It was common ground that the sticks were made of plastic. A witness giving evidence for the Claimant, stated that the bottom end of the stick "*had been made sharp and jagged*" where it had scuffed the floor of the playing surface. The Defendant denied that there was anything wrong with the sticks.

The Claimant's injury was a serious one: a blunt injury to his left eye which resulted in damage to the back of the eye. There was swelling involving the macula area required for central detailed vision. As the swelling settled further changes took place with the result that the Claimant was left with a permanent limitation to his sight.

The case was managed as a split trial. Liability was tried first.

Issues of law

At first blush, this was just another case turning on its own facts. Indeed, there was a significant issue of fact between the parties. However, the parties also joined issue on the appropriate *standard* of care. The Claimant's case was, following the *Condon v Basi* formula, that the standard expected of each player was to take reasonable care and skill in the

particular circumstances in which the players of the game were placed. These circumstances included (on the material occasion):

a. The fact that T organised and supervised the game;

b. The fact that T and L were adults supervising and playing with/against children.

It was submitted that these factors were relevant to the standard of care to be expected: a higher standard of care could reasonably be expected where children were being supervised in the context of an organised game.

Equally, the Claimant's case was that the selection and provision of equipment also required reasonable care and skill to ensure his reasonable safety in the context of a game played without helmet/visor/goggles or other safety equipment.

The Defendant's Defence denied that there was any duty to prevent injury arising from an ordinary and amateur ball game using sticks. Unsurprisingly, the Defendant did not pursue this line at trial. The Defendant's contingent case was that there was an inevitable risk of injury and that, "*The standard of care in the context of a sporting contest is such that ... the duty is breached only on proof of such a high degree of negligence as to be tantamount to recklessness*." While the Compensation Act 2006 was not in force at the time of the Claimant's accident, the Defendant sought to rely on the provisions of the Act (as an expression of the position at common law). The Defendant also relied on *Watson v Bradford City* [1998] (QBD) and *Caldwell v Maguire*. These cases concerned personal injury inflicted during the course of, respectively, professional football and, as indicated above, professional horse racing. The Claimant submitted that these cases were distinguishable. The standard of care expected of one professional sportsman towards another in the context of a highly regulated and professionally refereed sporting fixture was, the Claimant argued, light years away from a game played informally with children in a hotel's back yard which was not refereed and where the supervisors were untrained, active participants.

The Claimant submitted that a much closer case on the facts was *Leatherland v Edwards* [1998] (QBD, Newman J) in which an adult police officer was injured while participating in an informal ("*friendly*") hockey game with colleagues as part of a training exercise. The authorities relevant to the standard of care in sports and games were reviewed (notably, *Condon v Basi*). In *Leatherland* the Claimant was struck in the eye by the raised stick of a colleague and fellow participant (the stick was raised above waist height). Liability was established. It was held that participants in the game owed a duty of reasonable care to each other and that the raising of the stick above waist height was a serious and dangerous breach by the Defendant of a rule which, given the potential for injury, "*was at the heart of and itself central to the spirit and the purpose of the game.*" In other words, while non-compliance with the rules of the game would not, of itself, lead to a finding of liability (on which, see *Condon v Basi*), the "*foul*" in *Leatherland* was so fundamental – such a serious breach of the rules – that it was a powerful factor in favour of a finding of negligence.

Judgment

The Judge held as follows: (1) the account of the accident given by the Claimant and his witnesses was more "*cogent and explicable*" than the account from T and L (who also gave oral evidence at trial) – the Judge was particularly unimpressed by the fact that T's account of the accident did not appear in the contemporary records; (2) accordingly, T had swung his hockey stick too forcefully and had followed through (thereby catching the Claimant) when he had specifically warned participants against doing this in the pre-match safety instructions he had given; (3) an almost reckless disregard for the safety of one's fellow participants was, according to the case law, generally required before liability would be imposed; (4) a higher standard of care may be expected in the context of a professional football match, than in the context of the informal game played in the present case (a finding consistent with what was stated in *Condon v Basi*); (5) however, *Leatherland* was a closely analogous case in which the Judge had found that it was negligent to raise the hockey stick as high as the Defendant had raised it (this was a serious breach of the rules of the game); (6)

Leatherland had not, as the Defendant had submitted, been overruled or overtaken by *Caldwell* and remained good law; (7) applying *Leatherland*, T had been negligent by showing a disregard of rules of the game which came close to recklessness; (8) accordingly, the tour operator was liable; (9) there was no basis for any contributory negligence finding.

Conclusion

The judgment in *Dearman* represents a pragmatic middle course between the *Condon v Basi* formula and the Claimant's evidential burden recognised in *Caldwell v Maguire*. The result of *Dearman* was, however, unlikely to be in doubt in the light of *Leatherland*. While the Claimant was successful, he could be forgiven for wondering why it was necessary for T's non-compliance with the rules to amount to recklessness before liability could be established. Professional sports are tightly regulated and, generally, professionally refereed. Participants are protected, as far as possible, from their fellow contestants' negligence. In the circumstances, it makes sense for the Courts to adopt a light touch and to call for evidence of conduct tantamount to recklessness before liability is established. However, there seems less justification for this evidential hurdle where amateur fixtures and informal events are concerned. While these events carry their own inherent (and unavoidable) risks of injury, participants in such contests are, perhaps, more in need of the protective intervention of the civil courts when things go wrong. One wonders why they should be required to adduce evidence of conduct close to recklessness when they are injured by the obviously negligent acts of a fellow competitor.

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