

# Referee! Foul Play and Negligence in Sports Personal Injury Cases

---

Speakers:



Dr David Sharpe KC  
Sharpe@12kbw.co.uk



Spencer Turner  
Turner@12kbw.co.uk

# Introduction

- This talk will consider the recent decision in Fulham Football Club –v- Jones [2022] EWHC 1108 (QB) and review the relevant principles which apply in personal injury cases arising in sports
  - Consider the facts surrounding the injury;
  - Analyse the four grounds of appeal;
  - Review the authorities; and
  - Summarise the principles applying to personal injuries during sport.

# The Background Facts

- The Claimant (Jones) played in an Under 18s match for Swansea City FC against Fulham FC;
- Towards the end of the first half of the match, Harris (who played for Fulham) tackled Jones, as a result of which he suffered a serious injury to his right ankle, which ended his professional football career.
- Claimant commenced proceedings against Fulham, as the employers of Harris vicariously liable for his actions, on the grounds that the tackle on the Claimant amounted to an assault, or alternatively, negligence on the part of H.
- At first instance – heard evidence from Claimant, Harris, Fulham’s Coach, and 2 experts. Recorder dismissed the claim for assault but held Fulham vicariously liable in negligence. Fulham appealed on 4 grounds.

# The Tackle

- Jones has the ball and running along the touch line into Fulham's half of the pitch towards the goal. Harris chases after Jones, comes more or less parallel and tackles from the side. Harris leads with his right foot and makes contact with the ball stopping it. Harris's right foot and then his left foot make contact with Jones. Jones brought to the ground.
- Happens in full view of referee, no foul awarded against Fulham let alone a yellow or red card. No adverse reaction from the spectators, players or coaching staff.
- No complaint made, no investigation or disciplinary action.

# The Laws of the Game

- The laws of Association Football involve a hierarchy of playing offences. Careless behaviour attracts a direct free kick or penalty kick. Such behaviour is commonly referred to as a “foul”. A reckless offence occurs when a player acts with disregard to the danger to, or consequences for, an opponent. The player concerned must be cautioned, which currently means the referee showing a “yellow card”. Using excessive force is where a player exceeds the necessary use of force and endangers the safety of an opponent. For this, the player must be sent off (i.e. shown a “red card”).

# The four grounds of Appeal

- Failure to apply the correct test for standard of liability for personal injury in a sporting context;
- Failure to give adequate reasons for rejecting expert evidence;
- Failure to take into account context of the tackle and the realities of the playing culture of professional football; and
- Failure to take into account all of the contemporaneous evidence.

## Ground 1: Failure to apply the correct test for standard of liability for personal injury in a sporting context;

- Appellant asserted that proper test was (i) to determine first whether breached the laws of the game and if so (ii) whether there was negligence. Recorder had referred to serious foul play as amounting to negligence.
- Lane J did not accept there was a 2-stage test. However, considered that the Recorder had misdirected himself by closely aligning foul play in the Laws of the Game with actionable negligence .

# Condon v Basi [1985] 1 WLR 866

- Involved a tackle which broke claimant's leg. Referee described it as a sliding tackle which came late and was made in a reckless and dangerous matter. Referee considered it was serious foul play and sent defendant off.
- Lord Donaldson MR giving judgment did not see how it could “possibly be said that the defendant was not negligent”. Referred to decision of High Court of Australia in *Rootes v Shelton* [1968] ALR 33 and approved the reasoning of Kitto J (in preference to that of Barwick CJ) where it was held that there was a 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 and specifically:

## Condon v Basi [1985] 1 WLR 866 (Continued)

- “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”.

# McCord v Swansea FC (1996) The Times 11/2/97 [1996] Lexis Citation 3845

- Injury occurred during 3rd Division match between Stockport County and Swansea. The two players ran towards the ball, a 50/50 or possibly 60/40 in C's favour. C got to the ball first and struck it with tight foot, the second player a fraction later and his foot struck C's leg breaking both bones.
- Kennedy J adopted the unreported judgment of Drake J of Elliott -v- Saunders (10<sup>th</sup> June 1994). This approach considered 'the circumstances of each individual case' and noted that an error of judgment or mistake will certainly not always mean that the player has failed to exercise a duty of care appropriate in the circumstances.
- "However skilfully, even delicately, it is played, it is a contact sport and speed brings it is played, it is a contact sport and speed brings its own hazards. Incidents which involve no infringement can have dreadful consequences just as the worst foul may cause no harm at all"

## Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054

- Horse racing case.
- Jockey injured during race; steward's enquiry found that the defendants were guilty of careless riding. Injured jockey sued them. Trial judge dismissed the case and Claimant appealed on basis that the standard of care had been set too low effectively requiring proof of deliberate or reckless disregard for safety.
- CA dismissed the appeal holding that the trial judge had not said that recklessness was required and that given the circumstances the threshold for liability was high. Judge LJ approved of the judgment of Kitto J in *Rootes v Shelton* and stated (a) that a breach of the rules of racing does not decide between the issue of liability and negligence and (b) that the threshold is a high one.

# Tylicki v Gibbons [2021] EWHC 3470 (QB)

- HHJ Walden-Smith, sitting as a judge of the High Court, found in favour of the claimant. She drew attention to the high threshold for liability in sporting contests and the distinction between conduct which is properly characterised as negligent and errors of judgment, oversight or lapses of attention.
- Found that the conclusion of the steward's enquiry that the collision was accidental was not determinative or binding on her.
- At [95] she said:

*“In making that finding, I stress that the threshold of liability for negligence is a high one and has been determined as made out in this case, on its own particular facts. The finding does not set a precedent either within horse-racing or in sport generally.”*

## Ground 2: Failure to give adequate reasons for rejecting expert evidence;

- Appellant asserted that the Recorder had failed to give adequate reasons for rejecting evidence of Fulham's expert who was an extremely experienced ex-Referee and co-author of the Laws of the Game. The Claimant's expert had considered that the tackle amounted to serious foul play.
- Lane J held that the Recorder had formed his own view about the video evidence and because it was contrary to the Appellant's expert his evidence had been rejected. This was a legally flawed reason.

# Flannery and another v the Halifax Estate Agents Ltd. [1999] 1 WLR 377

- C instructed the defendants, a firm of surveyors, to make a valuation of a first-floor flat which they subsequently purchased on the strength of the survey. Later discovered damage to the flat and brought a claim in negligence against the defendants. At trial, the judge heard evidence as to the cause of the damage from each side's expert valuer and expert engineer. The judge preferred the evidence of the experts called by the defendants and dismissed the claims. C complained solely that the judge had failed to give reasons for that decision.

# Flannery and another v the Halifax Estate Agents Ltd. [1999] 1 WLR 377

- Henry LJ, giving the judgment of the court, held that the judge was under a duty to explain why he had reached the decision.
- At [382]: “Where the dispute something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation, whereas here there is disputed expert evidence; but it is not necessarily limited to such cases”.

## Ground 3: Failure to take into account context of the tackle and the realities of the playing culture of professional football

- At [56] of the first instance decision: “The circumstances in which negligence is judged include the fact that association football is a contact game. It is apparent from what Tuckey LJ said at paragraph 23 in *Caldwell v Maguire* (and Lord Woolf CJ agreed) that the threshold of liability in negligence high. Whilst a claimant does not have to establish recklessness, there is *“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.”*”

## Ground 3: Failure to take into account context of the tackle and the realities of the playing culture of professional football

- At [66] of the first instance decision: "I consider what Harris did was a lunge within the meaning of the definition of serious foul play in paragraph 18 above and in any event, it endangered the claimant's safety. It does not matter that Harris did not intend to injure the claimant or that in a general sense, it can be said the tackle was made in a fast moving heat of the moment context".
- The Claimant attempted to draw support from the reasoning in *Tylicki* and argued that the tackle was not a split-second mist-judgment or momentary lack of care.
- At [84] of the appeal: "I fully accept that is a finding which the recorder could have made. It is, however, plain from his judgment that he did not, in fact, make it. I do not consider it is a finding which can be properly inferred."

## Ground 3: Failure to take into account context of the tackle and the realities of the playing culture of professional football

- At [65] of the first instance decision: “Harris could aim for the ball and I accept he did, but he could not be sure what else he might contact or do, or, being a large man, with what force he might do it.”
- At [84] of the appeal: “The judge below purported to set a standard for reckless or quasi-reckless behaviour in the context of professional football which is far below what is needed to establish such liability”

## Ground 4: Failure to take into account all of the contemporaneous evidence

- The tackle happened in view of an FA accredited referee.
- No foul was awarded.
- No yellow or red card was given.
- There was no adverse reaction from spectators or coaching staff.
- Prior to the issuing of the claim, no complaint had been made of the tackle and no disciplinary action had been taken.

## Ground 4: Failure to take into account all of the contemporaneous evidence

- At first instance: "I considered the weight to be given to the referee and the crowd's reactions... I set out in my judgment why I didn't take it into account ... it was a foul which the referee should have penalised. That he did not is a puzzle but not a sufficient one to negative my views about what actually happened".
- At [89] of the appeal: "The recorder accordingly failed to have any regard to the important policy consideration, in cases of this kind, which requires the court to pay a proper regard to the decisions of the officials tasked with administering the Rules of the Game."

## Ground 4: Failure to take into account all of the contemporaneous evidence

- At first instance: "I considered the weight to be given to the referee and the crowd's reactions... I set out in my judgment why I didn't take it into account ... it was a foul which the referee should have penalised. That he did not is a puzzle but not a sufficient one to negative my views about what actually happened".
- At [89] of the appeal: "The recorder accordingly failed to have any regard to the important policy consideration, in cases of this kind, which requires the court to pay a proper regard to the decisions of the officials tasked with administering the Rules of the Game."

## Ground 4: Failure to take into account all of the contemporaneous evidence

- At [90] of the appeal: “In the present case, the recorder was faced with the striking scenario in which a professional referee, with an unarguably clear view of the tackle, did not award a foul, let alone show Mr Harris a red card. That feature was part of the evidential landscape which the recorder was required to traverse. Instead, he took a different path and, having reached his destination, merely reduced the referee evidence to "a puzzle, but not a sufficient one". The recorder's hand-down statement that he was "not persuaded in the opposite direction by what the referee did or did not do" added nothing to the judgment.”

## Conclusion

- At [93]: “Accordingly, all four grounds of appeal succeed. The recorder's judgment must, therefore, be set aside.”
- A new trial was ordered, despite the Appellant’s submission that judgment should be entered for Fulham FC.

## Conclusion

- The standard of civil liability is set at a materially higher level than a mere breach of the rules of the game.
- The context and realities of a fast moving and competitive game are crucial to consider in a sports injury claim.
- A judge cannot reach an independent conclusion. They must be guided by, and have regard to, the available expert evidence.
- The view of the referee is not necessarily determinative, but is part of the relevant evidential landscape in a sports injury claim.

# Thank you for listening

- We are happy to answer any questions.