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A reckless approach to negligence

This paper considers the issue of the appropriate *standard* of care for sport and recreational situations in the light of the recent decision of the Court of Appeal in *Blake v Galloway*[1] which appears to advocate a return to the *standard* of *reckless disregard* first advocated in *Wooldridge v Sumner*,[2] but then clearly retreated from in subsequent caselaw such as *Condon v Basi*,[3] *Elliott v Saunders*,[4] *McCord v Swansea Football Club and Another*,[5] *Watson and Another v Gray and Another*,[6] and *Smolden v Whitworth and Nolan*. [7]

The *standard* of *reckless disregard* for issues of negligence in sports and recreational settings which was first advocated in *Wooldridge* was not wholly embraced when first applied. The approach received trenchant criticism almost as soon as the judgment of the Court of Appeal was handed down. Goodhart, in a withering attack on the finding of the court stated[8]:

It is on this point regarding the reckless disregard of the safety of others that the present case seems to introduce a novel element into the law, for it is unusual to find liability limited to recklessness. In most cases an error of judgment or a lapse of skill are sufficient to support a charge of negligence.

Although this academic criticism was not followed immediately by similar judicial intervention, the decision of the Court of Appeal in *Wooldridge*[9] clearly did not receive wholehearted support and it was not long before the retreat from the *standard* advocated previously in *Wooldridge* began. The genesis of this retreat can be found in *Wilks v Cheltenham Homeguard*. [10] Phillimore L.J. in discussing the *reckless disregard* standard, apparently advocated by both Sellers L.J. and Diplock L.J. in *Wooldridge v Sumner*, [11] stated [12]:

It is, however, important to remember that the test remains simply that of 'negligence and that whether or not the competitor was negligent must be viewed against all the circumstances – the tests mentioned in *Wooldridge v Sumner* are only applied if the circumstances warrant them.

This being the case, it becomes difficult to justify the explicit promotion of the *standard* applied in *Wooldridge v Sumner*[13], and it seemed that Denning M.R. also was less than enthusiastic about the *standard* which had been put forward previously. Although not going as far as Phillimore L.J., he did nevertheless attempt to distance himself from that decision, by distinguishing the particular facts of the case. Although apparently suggesting that the approach adopted in *Wooldridge* was appropriate for the particular circumstances of that case, the kind of language used by Denning M.R. in reaching his conclusions was nevertheless far short of an acceptance of the *standard* of *reckless disregard* which had been put forward in *Wooldridge*. He stated [14]:

In a race the rider is, I think, liable if his conduct is such as to evince a reckless disregard of the spectators' safety: in other words, **if his conduct is foolhardy**. (Emphasis added)

Foolhardy certainly seems to imply a different *standard* to that of *reckless disregard*. Following this partial retreat, the position in relation to the appropriate *standard* of care as applied to sports and recreation settings was clarified by the Court of Appeal in *Condon v Basi*.^[15] This case has become the most influential precedent in the area of negligence in sports and so it is appropriate to examine the case in some detail. Although Donaldson M.R. was responsible for formulating the appropriate *standard* of care that has been applied in subsequent cases, he does not actually offer help in any attempt to distinguish between the practicalities of *reckless disregard* and *ordinary negligence*. The Court seemed to pay little attention to the difference between these approaches. Whilst explaining the nature of the behaviour that resulted in the injury, Donaldson M.R. quoted directly from the experienced match referee's report. He thus related^[16]:

After 62 minutes of play of the above game, a player from Whittle Wanderers received possession of the ball some 15 yards inside Khalsa Football Club's half of the field of play. This Whittle Wanderers' player upon realising that he was about to be challenged for the ball by an opponent pushed the ball (a)way. As he did so, the opponent [the defendant] challenged, by sliding in from a distance of about three to four yards. The slide tackle came late, and was made in a reckless and dangerous manner, by lunging with his boot studs showing about a foot-18 inches from the ground. The result of this tackle was that [the plaintiff] sustained a broken right leg. In my opinion, the tackle constituted serious foul play and I sent [the defendant] from the field of play.

Subsequently, in the County Court, the judge wholly accepted this report, "subject to a modification in that he thought the defendant's foot was probably 9 inches off the ground"^[17]. The trial judge continued^[18]:

[The tackle] was made in a reckless and dangerous manner not with malicious intent towards the plaintiff but in an 'excitable manner without thought of the consequences'. (Emphasis added)

These judgments were completely accepted by Donaldson M.R., in the Court of Appeal. In drawing his conclusions, the County Court judge ruled^[19]:

It is not for this court to attempt to define exhaustively the duty of care between players in a soccer football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant's duty of care towards the plaintiff. He was clearly guilty, as I find the facts, 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. (Emphasis added)

Donaldson M.R., concluded by stating^[20]:

For my part I cannot see how that conclusion can be faulted on its facts,

and on the law I do not see how it can possibly be said that the defendant was not negligent.

It appears that Wootton J., in the County Court, was applying a standard of *reckless disregard*, (at this stage, *Wooldridge v Sumner*,^[21] with its imposition of the standard of *reckless disregard* appeared to be good authority for sports participant cases, albeit in that particular instance the case involved injury inflicted by a participant on a spectator and despite the seeming retreat signalled by *Wilks*), and through the application of that *standard* found the defendant liable in negligence.

There was a dearth of relevant precedent available to guide the Court in its decision, a fact that clearly surprised Donaldson M.R., who commented^[22]

It is said that there is no authority as to what is the standard of care which governs the conduct of players in competitive sports generally and, above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the position.

With no precedent to work from, the Court elected to accept a decision from the Australian High Court, which arose from an injury received whilst water-skiing. Donaldson M.R., wrote^[23] that, “I would completely accept the decision of the High Court of Australia, in *Rootes v Shelton*”^[24]. Why the Court would choose to accept a decision arising from a non-contact sport such as water-skiing, (particularly in the face of more convincing arguments from other jurisdictions), and apply it to an injury received in association football is a matter of some conjecture, it is though beyond the scope of this paper. The *standard* of care to be applied Donaldson M.R., described thus^[25]:

There is a general standard of care, namely the Lord Atkin approach in *Donoghue v Stevenson* [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.

The approach identified in *Rootes v Shelton*,^[26] and then adopted in *Condon v Basi*^[27] subsequently guided the application of negligence in sporting and recreational settings in England and Wales for the next fifteen years. The approach typified by the words of Curtis J. in *Smolden v Whitworth and Others*,^[28] who stated, “The law is as stated in *Condon v Basi*”, therefore accepting the *ordinary negligence standard* and rejecting the *reckless disregard standard* advocated in *Wooldridge*.

Despite the apparent harmony between principles of *ordinary negligence as applied generally* and the principles being applied to the appropriate *standard* in sports and recreation settings, there was not universal approval of the approach adopted as was demonstrated in *Caldwell v Maguire & Fitzgerald*,^[29] a case where a professional jockey suffered serious injury in a fall and brought an unsuccessful action against the two other jockeys involved in the incident. At first instance, Holland J. appeared to advocate an

approach more akin to that seen in *Wooldridge v Sumner*[30] than that adopted in *Condon v Basi*. [31] He listed five considerations, the final two of which stated:[32]

4) Given the nature of such prevailing circumstances 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) respectively when subject to the stresses of a race. Such are no more than incidents inherent in the nature of the sport.

5) In practice it may therefore be difficult to prove any such breach of duty **absent of proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety. I emphasis (sic) the distinction between the expression of legal principle and the practicalities of the evidential burden** (Emphasis added)

The reasoning of the court in *Caldwell*,[33] echoes very much the words of Phillimore L.J. in *Wilks v Cheltenham Homeguard*,[34] seen earlier, and the position advocated by Holland J. was confirmed in the Court of Appeal by Tuckey L.J., who stated:

In his fourth and fifth propositions, the judge made it clear that he was referring to the practicalities of the evidential burden and not to legal principle. All he was saying was that, in practice, given the circumstances which he had identified, the threshold for liability was high. Lord Bingham CJ said the same of a referee in *Smolden*, even though, as he pointed out, the referee was not in the same position as a player because one of the referee's responsibilities was the safety of the players. Lord Brennan accepted that the threshold of liability as between participants must be at least as high as that between player and referee. The judge did not say that a claimant has to establish recklessness. That approach was specifically rejected by this court in *Smolden*. As in *Smolden*, 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.

There is a clear similarity between the position of the law in this area following *Wilks* and the position which can be seen following this decision in *Caldwell* some thirty years later. Following the decision in *Wilks* the next time the Court of Appeal had to rule on such an issue, they chose to adopt the approach that the appropriate *standard* of care was that of *ordinary negligence taking account of all the circumstances*[35]. However, in the light of the decision in *Caldwell* which seemed to return to the uncertainty apparent in *Wilks*, the Court of Appeal this time seems to have adopted a different approach and it is to an analysis of this latest decision that this paper now turns.

The case *Blake v Galloway*,[36] involved a group of five friends, all 15 years old engaged in horseplay. This horseplay took the form of throwing small pieces of bark and twigs at one another. The claimant was injured when the defendant struck him in the eye with a

small piece of bark chipping causing serious injury. At first instance, [37]:

DJ Walker, sitting at Plymouth County Court, held that the injury was caused by the negligence and battery of the defendant, rejected the defence of *volenti non fit injuria*, but reduced the damages by 50% to reflect the claimant's contributory negligence.

Whilst there are clear differences between horseplay and regulated sports or recreational activities, the Court of Appeal viewed these differences as inconsequential where the question of the appropriate *standard* of care was concerned. Dyson L.J. explained[38]:

In the present case, the horseplay in which the five youths were engaged was not a regulated sport or game played according to explicit rules, nor was it organised in a formal sense. Rather, it was in the nature of informal play, which was being conducted in accordance with certain tacitly agreed understandings or conventions. ...No authority has been cited to us dealing with negligence in relation to injury caused in the course of horseplay, as opposed to a formal sport or game. I consider that there is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the guidance given by the authorities to which I have referred[39] to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay.

Dyson L.J. then continued[40]:

The common features between horseplay of this kind and formal sport involving vigorous physical activity are that both involved consensual participation in an activity (i) which involves physical contact or at least the risk of it, (ii) in which decisions are usually expected to be made quickly and often as an instinctive response to the acts of other participants, so that (iii) the very nature of the activity makes it difficult to avoid the risk of physical harm.

The Court of Appeal in *Caldwell*[41] clearly stated that although the level of behaviour which would breach the appropriate *standard* may be tantamount to *reckless disregard*, that *standard* nevertheless remained that of ordinary negligence taking account of all the circumstances. The decision of the Court of Appeal in *Blake v Galloway*,[42] was *enunciated* by Dyson L.J. in the following manner:

I would, therefore, apply the guidance given by Diplock LJ in *Wooldridge*, although in a slightly expanded form, and hold that in a case such as the present 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.

This appears to be moving further than the Court in *Caldwell* was prepared to go. There is no supplemental guidance that the *standard* should remain that of ordinary negligence and that the behaviour addressed merely relating to the evidential burden. It may well be the case that the statement made has been left deliberately open to necessitate clarification by another Court. Alternatively, it may also be seen as an acceptance by the Court of Appeal that in the light of the unique nature of such horseplay and in particular of sport and recreational activities, (which was discussed earlier in the judgment), the *standard* should indeed be modified in this manner to take better account of this unique nature. It is submitted that this approach is preferable to the ambiguous and confusing approach advocated by the Court of Appeal in *Caldwell*. The clear application of a *standard of reckless disregard* creates certainty and brings the application of legal principle into harmony with the realities of the nature of the activity.

This is an issue that is currently being debated in standing committee in the House of Commons with the discussion on the Promotion of Volunteering Bill. The aim of this Private Members Bill is to provide limited legal protection for those that volunteer to provide sports and recreational facilities. One way of doing this proposed in the Bill is to limit negligence liability to where a Court will[43]:

Only uphold any claim for negligence or breach of statutory duty where the volunteer has shown a **reckless disregard** for safety (Emphasis added)

Looked at in the light of the decision in *Blake v Galloway*,^[44] this proposed legislation takes on greater significance. There is the clear desire to provide limited protection for those involved in “volunteering”. This protection has its legal basis in the decision in *Wooldridge v Sumner*,^[45] a decision which appeared to have fallen from favour but which over recent years could be seen to be regaining a foothold in the debate concerning the appropriate *standard* of care in sports and recreation settings. The decision in the case in hand, coupled with the proposals contained in the Promotion of Volunteering Bill have moved the rationale behind *Wooldridge* full square back onto the centre stage of the debate between *reckless disregard* and *ordinary negligence*. It is submitted that this is where it should now remain.

[1] *Blake v Galloway* [2004] EWCA (Civ) 814

[2] *Wooldridge v Sumner* [1963] 2 QB 43

[3] *Condon v Basi* [1985] 1 WLR 866

[4] *Elliott v Saunders and Another* QBD (1994) unreported

[5] *McCord v Swansea Football Club and Another*, The Times, 11 Feb 1997

[6] *Watson and Another v Gray and Another*, (1999) CA, (Unreported)

[7] *Smolden v Whitworth v Nolan* [1997] E.L.R. 249

[8] Goodhart A.L. “The Sportsman’s Charter” LQR [1962] 78 p490 at p494

[9] *Wooldridge v Sumner* [1963] 2 QB 43

[10] *Wilks v Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 WLR 668

- [11] *Wooldridge v Sumner* [1963] 2 QB 43
- [12] *Wilks v Cheltenham Homeguard and Light Car Club* [1971] 1 WLR 668 at p676
- [13] *Wooldridge v Sumner* [1963] 2 QB 43
- [14] *Wilks v Cheltenham Homeguard and Light Car Club* [1971] 1 WLR 668 at p670
- [15] *Condon v Basi* [1985] 1 WLR 866
- [16] *Condon v Basi* [1985] 1 WLR 866 at p868
- [17] *Condon v Basi* [1985] 1 WLR 866 at p869
- [18] Wootton J., Cited by Donaldson MR in *Condon v Basi* [1985] 1 WLR 866 at p869
- [19] Wootton J., Cited by Donaldson MR in *Condon v Basi* [1985] 1 WLR 866 at p869
- [20] *Condon v Basi* [1985] 1 WLR 866 at p869
- [21] *Wooldridge v Sumner* [1963] 2 QB 43
- [22] *Condon v Basi* [1985] 1 WLR 866 at p867
- [23] *Condon v Basi* [1985] 1 WLR 866 at p867
- [24] *Rootes v Shelton* [1968] A.L.R. 33
- [25] *Condon v Basi* [1985] 1 WLR 866 at p868
- [26] *Rootes v Shelton* [1968] A.L.R. 33
- [27] *Condon v Basi* [1985] 1 WLR 866
- [28] *Smolden v Whitworth and Another*, The Times 23 April 1996 at p4 of lexis transcript
- [29] *Caldwell v Maguire and Fitzgerald* 1st February 2001, (unreported)
- [30] *Wooldridge v Sumner* [1963] 2 QB 43
- [31] *Condon v Basi* [1985] 1 WLR 866
- [32] *Caldwell v Maguire and Fitzgerald* 1st February 2001, (unreported) at p13
- [33] *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054 a p5 of Westlaw transcript
- [34] *Wilks v Cheltenham Homeguard and Light Car Club* [1971] 1 WLR 668 at p676
- [35] See approach in *Condon v Basi*
- [36] *Blake v Galloway* [2004] EWCA (Civ) 814
- [37] *Blake v Galloway* [2004] EWCA (Civ) 814 at para 2
- [38] *Blake v Galloway* [2004] EWCA (Civ) 814 at para 13-15
- [39] Dyson L.J. cited authority from *Wooldridge v Sumner* [1963] 2 QB 43, *Condon v Basi* [1985] 1 WLR 866, *Rootes v Shelton* [1968] ALR 33 and *Caldwell v Fitzgerald and Others* [2001] EWCA Civ 1054
- [40] *Blake v Galloway* [2004] EWCA (Civ) 814 at para 15
- [41] *Caldwell v Fitzgerald and Others* [2001] EWCA Civ 1054
- [42] *Blake v Galloway* [2004] EWCA (Civ) 814 at para 16
- [43] Promotion of Volunteering Bill s2(6)(c)
- [44] *Blake v Galloway* [2004] EWCA (Civ) 814
- [45] *Wooldridge v Sumner* [1963] 2 QB 43