Frederik Tylicki v Graham Gibbons

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***Tylicki v Gibbons** reminds us that a high threshold of carelessness is required before the duty of care is breached by participants in a fast moving sport like horse racing.*

The claimant and defendant were both experienced flat race jockeys. They were both racing at the Kempton all-weather course in the 3.2 Mile Maiden race on 31 October 2016.

A collision between the defendant's and the claimant's horses led to the claimant and his horse falling. As a consequence, the claimant sustained T4 AIS complete paraplegia leaving him wheelchair bound for the rest of his life.

It was admitted by the defendant that jockeys owed a duty of care to each other. In dispute was the standard of care to be taken by a jockey racing in a competitive environment and whether the defendant fell below that standard. It was agreed that the leading authority of relevance here was Caldwell v Maguire. [1]

In Caldwell, several important principles were established, but given that the facts differed markedly from this case[2] the most important principle was that seen in most sporting cases, namely that each case will be determined on its own facts: *"In an action for damages by one participant in a sporting contest against another participant in the same game or event, the issue of negligence cannot be resolved in a vacuum. It is fact specific."* (per Judge LJ, as he then was at [30] of Caldwell)

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At first instance in Caldwell, five principles had been established from the case law; the latter of which it was argued established a requirement of recklessness to establish liability.

The Court of Appeal dismissed the appeal finding that the judge below had not said that the claimant had to establish recklessness in order to establish a breach of duty. There would be no liability for errors *J.P.I. Law C110 of judgment, oversights or lapses which might occur in the context of a fast moving contest. Something more serious was required but that would be fact specific.

In horse racing, highly skilled jockeys seeking to win on thoroughbred horses with wills of their own brought its own challenges.

In Caldwell, this was summarised in this way:

"The demands on professional jockeys to ride at all are very heavy. They require skill and physical and mental courage. To win, beyond skill and courage, they need determination and concentration, the ability rapidly to assess and re-assess the constantly changing racing conditions, and to adjust their own riding and tactics accordingly - a quality that must depend in part on experience and in part on intuition or instinct.

[1] Caldwell v Maguire [2001] EWCA Civ 1054; [2002] P.I.Q.R. P6.

[2] A national hunt race as opposed to a flat race on an all-weather course.

Accidents and the risk of injury, sometimes catastrophic, both to horses and to riders, are an inevitable concomitant of every horse race - certainly over hurdles."

In Caldwell, it was said that a jockey riding his horse in contravention of the rules could not alone be determinative. It was one relevant consideration in the context of the race but not the sole one.

The argument that liability here would open the "floodgates" to claims was not well founded as each case rests on its own facts.

A similar argument was rejected in Smoldon v Whitworth[3] in a claim alleging fault arising out of the collapse of a rugby scrum.

In this case, a Stewards Enquiry was undertaken as it was unusual for four horses to be involved in a fall on a flat course, but it was not determinative of any outcome before the court:

55. *"Drawing these points together, the evidence received by the Stewards and the conclusion reached from their Enquiry, all form part of the evidence before this court. It is accepted that the finding of the Stewards Enquiry is not binding on this court. The Stewards are highly skilled and experienced and their determination after a short hearing is an important part of the matrix, but it would be wrong to give that finding a greater weight than it deserves, particularly given the significant limitations with respect to the evidence they received. The Stewards' finding is not binding, it is also not determinative."*

From the witness evidence and video footage it was possible to discern that the defendant would or ought to have known that the claimant was coming alongside him on the inside of the bend prior to the collision[4] and that the claimant was in a space that he was entitled to be in at that point.

The issue for the court was whether the collision was a "racing incident" or the actions of the defendant were such that he was liable for the injuries. The threshold was high:

*"The threshold for liability is high and mere error of judgment or lapse in skill is not sufficient, taken in the context of this highly competitive and inherently risky sport. In effect, while recklessness has been expressly stated not to be the test for a finding of negligence, in effect the evidential burden is such that requires a reckless disregard for the safety of others. Of course, in placing the threshold at that high level, regard is being had to all the circumstances of the sport, the inherent dangers and the high degree of competitiveness with a requirement on jockeys to win or be best placed. The fact that the threshold is high does not mean, however, that no duty of care is owed between jockeys. *J.P.I. Law C111"*

The defendant began to move his horse across and accelerate at a time that would push other riders to the barriers. The claimant, in the moment, could not be criticised for taking a pull on his horse or decelerating and instead pushing on or accelerating in an attempt to get out of trouble. In the context of a race, it would have been counter-intuitive. The effect of the defendant's manoeuvre towards the rail was to cut across the racing line of another rider.

The expert evidence was that:

"If [the defendant] manoeuvred [his horse] across to the rail either at all or without checking for the presence of a horse on his inside then in my opinion he would have been in breach of the Rules which

[3] Smoldon v Whitworth [1996] EWCA Civ 1225; (1997) E.L.R. 249:
"The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed."

[4] "If Mr Gibbons was not aware of Nellie Deen's presence he clearly should have been. He was considered to be a highly skilled and talented jockey and a jockey, particularly riding at this very high level, both needs to be, and is, able to assess and re-assess the constantly changing racing conditions, which includes the positioning of other horses that are nearby, in order to be able to adjust their own riding and tactics."

might fall within a range of Careless to Dangerous riding."

The judge agreed. After the initial collision there was a shout from the claimant to the defendant which gave the defendant a further opportunity to avoid the second collision that led to the fall. The defendant continued to move towards the rail and the claimant even when pulling hard or decelerating could not avoid the collision. During that spell there was a reckless disregard for the safety of other riders by the defendant. Even if he was unaware of the presence of the claimant initially, by the time the shout he must have been aware.

Liability was therefore made out on the facts of the case:

"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."

Case Comment

In the 2021 Formula 1 race season, particularly in the battles between Max Verstappen and Lewis Hamilton, there were a number of controversial incidents as combative drivers went aggressively for the racing line with the result of cutting off the car coming up on the inside, sometimes leading to collision. Some of these were determined by the stewards to be racing incidents (a natural result of competitive racing where there was no deliberate intent or malice). Others resulted in apportionment and blame and penalties for unsafe driving. The present case involved similar issues but in the context of a horse race on the flat. The defendant was found to have swung across to the fencing rail and blocked off the claimant who was coming up the rail on the inside of the bend. The judge found that this was not a mere lapse or error of judgment on the part of the defendant, but a course of action over a number of seconds which involved reckless disregard for the claimant's safety.[5] The irony was that in this case the Stewards' Enquiry had absolved the defendant of blame, but the judge - with far more evidence available to her - found the contrary. By contrast, in Caldwell (referred to above), the Jockey Club had found the defendant to be liable for careless riding, but the trial judge (upheld by the Court of Appeal) found him not to have breached his duty of care. This case emphasises for us once more that the results of investigations or enquiries carried out by quasi-judicial bodies (in this case the racing authorities) are not determinative although they may be persuasive. In addition, the fact that a competitor has ridden his horse in breach of the rules of the sport does not decide the issue of liability. It is merely one of the circumstances to be taken into account and may have much or relatively little weight.

The threshold for finding a breach of the standard of care in horse racing, as with most sports, is high. This is as it must be: jockeys are riding powerful thoroughbreds at upwards of 40mph whilst jostling (jockeying even) for position. The margins for error are small and there is always a risk of significant injury. Accidents come with the territory, and in public policy terms it would not be in the interests of sport if every act of carelessness or error of judgment causing injury led to a damages claim. The courts *J.P.I. Law C112 have, for a long time, recognised that participants in sport are broadly comparable to individuals faced with an emergency in that they have to take decisions in the heat of the moment. When one is responding to an emergency, that fact is regarded as relevant to the objective standard of care required.[6] Momentary carelessness in such situations should generally not be characterised as negligence. A high degree of carelessness is required, albeit not necessarily recklessness. What tipped the scales against the defendant in the present case was that his actions were not momentary, but taken over a number of seconds, and they were characterised as reckless.

At the trial, there were several evidential issues of note. One was that the defendant had, since 2016, received a suspension from riding for two and a half years because he had failed a urine drugs screen and had also coerced an apprentice jockey to provide a false sample for him. This and other racing-related offences had not been mentioned at all in his witness statement. The judge was naturally unimpressed with this situation and the defendant's excuse that it was all public knowledge. As the judge emphasised, it was not something the court could have been

[5] See Frederik Tylicki v Graham Gibbons [2021] EWHC 3470 (QB) at [89] and [90]

[6] See Clerk & Lindsell on Torts, 23rd edn (Sweet and Maxwell, 2022), 7-165

expected to know about. The judge determined that the failure went to the defendant's credibility but did not assist as to what actually happened during the index race. A second anomaly was that the report of one of the claimant's experts, a highly successful flat racing jockey, was drafted by the claimant's solicitors following a number of conference calls in which the expert had given his opinion orally. In the witness box he told the judge that he rides horses, he does not sit at a computer! The judge held that the report although written by the solicitor was truly the experts report and opinion. Finally, there was some criticism of the defendant for having his expert analyse three races in which the claimant's expert had been found by stewards to be guilty of careless riding. The judge did not find that the evidence was helpful, particularly as each race was particular to its own circumstances, and all it showed is that stewards make findings of carelessness even against the most successful of jockeys.

This case was highly fact sensitive. It was the actual circumstances of this particular race and collision which mattered: not much else was directly relevant. The decision sets no legal precedent but will clearly have implications for the race industry as it is the first occasion in which a jockey has made a successful claim for damages against another jockey for a mid-race incident. It may be seen as giving some indication of what constitutes reckless riding in a race. One anticipates that there may now be increased thoroughness in stewards enquiries, and a lower threshold for penalising riders.

Practice Points

- A high threshold of carelessness is required before the duty of care is breached by participants in a fast moving sport like horse racing. Good quality evidence of dangerous behaviour will be required.

- Witnesses should always be frank and open about relevant negative aspects of their character. Leaving such disclosures to cross-examination will likely damage the witness' credibility.

- Experts can be drawn from all walks of life, including jockeys who may not have the time or inclination to write a report themselves.

Case details

Court: King's Bench Division
Judge: HHJ Karen Walden-Smith sitting as a Judge of the High Court
Judgment: Tylicki v Gibbons [2021] EWHC 3470 (QB)

Find out more

This article was first published in the Journal of Personal Injury Law (JPIL) and was written by Nathan Tavares KC, barrister at Outer Temple Chambers.

Nathan Tavares KC specializes in Personal Injury with a particular specialism in cases with an international element. He also has experience of acting in claims in other jurisdictions, including in the Privy Council and in Jersey.

Nathan is an experienced horse rider and has acted predominantly for riding institutions in many horse-related claims. In the leading case of Mirvahedy v Henley he acted alone for the defendant at the quantum trial. He also acted successfully for the Defendant in Schoultz v Ball [2022] EWHC 2452 (KB).

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