Neutral Citation Number: [2004] EWCA Civ 814
Case No: B3/2004/0464

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PLYMOUTH COUNTY COURT
District Judge Walker

Royal Courts of Justice
Strand,
London, WC2A 2LL

24th June 2004

B e f o r e :

THE VICE-CHANCELLOR
LORD JUSTICE CLARKE
and
LORD JUSTICE DYSON

Between:

BLAKE	**Claimant/ Respondent**
- and -	
GALLOWAY	**Appellant/ Defendant**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

Mr Richard Stead (instructed by Messrs Lyons Davidson of Plymouth) for the Appellant
Mr Nathan Tavares (instructed by Messrs Wolferstans of Plymouth) for the Respondent

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HTML VERSION OF JUDGMENT

Lord Justice Dyson:

1. On 29 May 1997, the claimant was practising with a jazz quintet in which he played with four of his friends. One of them was the defendant. They were all approximately 15 years of age at the time. They were at Battisborough House, near Mothercombe in South Devon. At lunchtime, they decided to take a break. They went into the grounds and started to engage in some horseplay. This involved throwing twigs and pieces of bark chipping at each other. At first, the claimant did not join in. But after a while, he picked up a piece of bark chipping, approximately 4 cm in diameter, and threw it towards the lower part of the defendant's body. The defendant picked up the same piece of bark and threw it back at the claimant striking him in the right eye, causing a significant injury. The claimant started proceedings claiming that the injury was caused by the defendant's battery and/or negligence. The defendant relied on the claimant's consent as a defence to the claim in battery, and denied negligence. At the trial, the main focus of his defence to the claim in negligence was his reliance on the maxim *volenti non fit injuria*: his case was that the claimant had consented to the risk of being struck by the piece of bark even if it was thrown without reasonable care. In the alternative, the defendant alleged that the injury was caused or contributed to by the claimant's own negligence. Damages were agreed at £23,500.

2. It will be necessary to examine the judgment in a little more detail later, but it is sufficient at this stage to say that 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. The defendant now appeals with the permission of Latham LJ.

3. There was very little dispute as to the facts at the trial. It was common ground that these youths were engaged in high-spirited and good natured horseplay. As the judge said (para 10): "there was general messing around by all the participants. Nobody was throwing items towards anybody's head. There was no feeling of animosity between anybody taking part, and indeed no-one was picking on any of the others". They were just randomly throwing twigs, pieces of bark and mulch in the general direction of each other.

4. As regards the throwing that resulted in the injury to the claimant's eye, the only dispute of fact was as to whether the claimant and the defendant were

between about 10 and 15 metres apart (as the defendant said in his evidence) or 4-5 metres apart (as the claimant said). The judge preferred the evidence of the claimant on this point. They were on a slight slope vis a vis each other, the defendant being at a higher level than the claimant. The claimant threw the piece of bark in the direction of the defendant's lower body, striking him on the bottom. He was not aiming at the defendant's head. The defendant picked the piece up, and threw it back in the general direction of the claimant, not aiming at his head. He did not shout any warning at the claimant, who was not looking in the direction of the defendant when the bark was thrown at him. Had he been doing so, it is probable that he would have seen it coming and been able to take avoiding action.

Negligence

5. As I have said, the principal issue at trial was whether the claim in negligence was defeated by the claimant's consent (encapsulated in the maxim *volenti non fit injuria*) as explained in a number of authorities, such as *Wooldridge v Sumner* [1963] 2 QB 43, 69:

> "The maxim in English law presupposes a tortious act by the defendant. The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk… and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran" (per Diplock LJ).

6. The judge expressed his conclusion on the issue of negligence and consent at para 27 of his judgment in these terms:

> "In my view, taking into account all the circumstances in this case, I find that the claimant may well have consented to some risk in participating in this game which perhaps might have been – I am sure nobody when they started off expected anybody (sic) to be caused any injury, but there was some risk of that in some similar way to the analogy of throwing snowballs but I do not think that in this particular case the defendant took sufficient care to make sure that injury to the claimant's head would not take place. It may be that in the minds of participants other than the claimant nobody particularly cared where items went. I am satisfied, as I say, in the particular circumstances of this case, there was, although consent to participate in a game which might have caused injury, no consent to the injury to the claimant's face. I do not think he had the adequate opportunity of defending himself as he was not facing the defendant when the piece of bark was thrown."

7. In this court, Mr Stead (who did not appear at the trial) submits that the claim in negligence should have been dismissed on the simple ground that, in the particular circumstances of this case, there was no lack of reasonable care on the part of the defendant. Accordingly, the issue of *volenti* did not arise. Alternatively, he submits that, if there was a lack of reasonable care, then the judge was wrong to reject the defence of *volenti*. Although this represents a significant shift of emphasis from the way in which the defence to the claim in negligence was presented in the court below, there was no objection by Mr Tavares.

8. I start with the question of breach of duty. I do not believe it to be disputed that, generally speaking, participants in sport and games generally owe each other a duty of care. Difficult questions can, however, arise as to whether on the facts of any particular case there has been a breach of that duty. The standard of care which the common law requires depends on all the circumstances of the case. In *Wooldridge*, the plaintiff was a spectator at a horse show who was injured when the defendant rode his horse too fast and lost control. Although that was a case about a spectator, and not a participant, it is clear that the observations made by this court, and in particular by Diplock LJ, are of application to spectators and participants alike. At p 67, he said that what is reasonable care in a particular circumstance is a jury question, which (in the absence of direct guidance from authority) may be answered by inquiring whether the ordinary reasonable person would say that in all the circumstances the defendant's conduct was blameworthy. At p 68, he said:

> "The practical result of this analysis of the application of the common law of negligence to participant and spectator would, I think, be expressed by the common man in some such terms as these: "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."

9. *Condon v Basi* [1985] 1 WLR 866 was a participant case. The plaintiff and the defendant were playing for opposing teams in a football match when the plaintiff suffered serious injuries as a result of a foul tackle by the defendant. The judge held that there was an obvious breach of the defendant's duty of care because he showed a reckless disregard of the plaintiff's safety and his conduct fell far below the standards which might reasonably be expected of anyone playing the game. The defendant's appeal to this court was dismissed. At p 867F, Sir John Donaldson MR cited from

the decision of the High Court of Australia in *Rootes v Shelton* [1968] ALR 33, saying:

> "Barwick CJ said, at p.34:
>
> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."
>
> Kitto J said, at p.37:
>
> "in a case such as the present, it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity. Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organised affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. 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."
>
> I have cited from those two judgments because they show two different approaches which, as I see it, produce precisely the same result. One is to take a more generalised duty of care and to modify it on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of the duty of care. That seems to be the approach of Barwick CJ. The other is exemplified by the judgment of Kitto J, where he is saying, in effect, that 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.

For my part I would prefer the approach of Kitto J., but I do not think it makes the slightest difference in the end if it is found by the tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event, there is liability."

10. The final decision to which I wish to refer is *Caldwell v Fitzgerald & others* [2001] EWCA Civ 1054, another decision of this court. The claimant, a professional jockey, had been injured when he was unseated as a result of manoeuvres by two fellow jockeys (the defendants). The trial judge (Holland J) reviewed some of the authorities (including *Wooldridge* and *Condon*), from which he extracted these five propositions:

> "[1] Each contestant in a lawful sporting contest (and in particular a race) owes a duty of care to each and all other contestants.
>
> [2] That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants.
>
> [3] The prevailing circumstances are all such properly attendant upon the contest and include its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant. Thus in the particular case of a horse race the prevailing circumstances will include the contestant's obligation to ride a horse over a given course competing with the remaining contestants for the best possible placing, if not for a win. Such must further include the Rules of Racing and the standards, skills and judgment of a professional jockey, all as expected by fellow contestants.
>
> [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 sport.

> [5] In practice it may therefore be difficult to prove any such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden."

11. On appeal, there was no dispute as to the correctness of the first three propositions, but it was submitted on behalf of the defendants that the last two were "unduly restrictive" and not supported by the earlier authorities. The criticisms of Holland J's formulation of the last two propositions were rejected. At para 22 of his judgment, Tuckey LJ said that the threshold for liability was high:

> "…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."

12. At para 37, Judge LJ said that, in the context of sporting contests, it is right to emphasise the distinction between conduct which is properly to be characterised as negligent "and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race". Lord Woolf CJ agreed with both judgments.

13. 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 any formal sense. Rather, it was in the nature of informal play, which was being conducted in accordance with certain tacitly agreed understandings or conventions. These were objectively ascertainable by the claimant, since he could see the nature of the horseplay in which his friends were indulging before he joined in. The understandings or conventions were that the objects that were being thrown were restricted to twigs, pieces of bark and other similar relatively harmless material that happened to be lying around on the ground; they were being thrown in the general direction of the participants in a somewhat random fashion, and not being aimed at any particular parts of their bodies; and they were being thrown in a good-natured way, without any intention of causing harm. The nature of the objects and the force with which they were being thrown were such that the risk of injury (almost certainly limited to injury to the face) was very small. There was no expectation that skill or judgment would be exercised, any more than there would be by participants in a snowballing fight. These were the characteristics of the game in which the claimant decided to participate.

14. The offending blow was caused by a piece of bark which was thrown in accordance with the tacit understandings or conventions of the game in which the claimant participated. It was thrown in the general direction of the claimant, with no intention of causing harm, and in the same high-spirited good nature as all the other objects had been thrown.

15. I recognise that the participants in the horseplay owed each other a duty to take reasonable care not to cause injury. What does that mean in the context of play of this kind? 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 to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay. But I do not consider that this is a significant distinction. 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.

16. 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.

17. If the defendant in the present case had departed from the tacit understandings or conventions of the play and, for example, had thrown a stone at the claimant, or deliberately aimed the piece of bark at the claimant's head, then there might have been a breach of the duty of care. But what happened here was, at its highest, "an error of judgment or lapse of skill" (to quote from Diplock LJ), and that is not sufficient to amount to a failure to take reasonable care in the circumstances of horseplay such as that in which these youths were engaged. In my view, the defendant's conduct came nowhere near recklessness or a very high degree of carelessness. It is true that this game was not being played in a manner that was closely analogous to the fast and furious conditions of a game of football or a horserace, where, in determining what reasonable care requires, account has to be taken of the fact that decisions are taken in the heat of the moment. But these youths were indulging in horseplay after spending the morning indoors. They were high-spirited and having fun, and no doubt the game was conducted at some speed and in a fairly vigorous fashion. It was

implicit that nobody was expected to take care to aim the objects at any particular part of the body. They were simply aimed in the general direction of the intended "victim".

18. The judge said at para 27 that he did not "think that in this particular case the defendant took sufficient care to make sure that injury to the claimant's head would not take place". Since the argument before him was directed primarily to the issue of consent, it is not surprising that he did not address the issue of breach of duty in any detail. Mr Tavares submits that we should respect the judge's finding, and that we should only interfere if it is plainly wrong. He points out that the judge had the advantage, denied to us, of seeing the witnesses, and forming a view on what is essentially a matter of judgment, and submits that the judge's finding cannot be said to be plainly wrong. There are two answers to this. First, the judge did not consider what standard of care was required in the circumstances of this case. Indeed, he was discouraged from doing so by Mr McLaughlin (then appearing for the defendant) who submitted that the only real issue in the case was consent, and that there was no need to consider authorities such as *Condon*. Secondly, for the reasons that I have given I consider that the judge's conclusion was in any event plainly wrong. This was an unfortunate accident, and no more. There was no breach of the duty to take reasonable care.

19. In these circumstances, it is unnecessary for the purposes of dealing with the claim in negligence to decide whether the judge was right to hold that the claim was not defeated by *volenti*. But I shall have to deal with the issue of consent when I deal with the claim in battery to which I now turn.

Battery

20. It is trite law that a battery is the intentional and direct application of force to another person, and that where there is consent there is no battery. The question of what amounts to consent in the context of games and sport is not always easy to determine. Consent is rarely given expressly: it can be, and usually is, implied from conduct. Thus it can obviously be inferred from the act of taking part in a boxing match or other contact sport that a participant consents to being subjected to a degree of force. I would accept as an accurate statement of the law the following passage at para 13-08 of Clerk & Lindsell on Torts (18th edition):

> "The claimant cannot claim compensation for the consequences of an act which he has freely invited, or in respect of which he has assumed the risk. The footballer cannot allege that a legitimate tackle is a battery. Thus, when the defendant maintains that the claimant consented to the force used against him, the key question becomes

whether that consent extended to the degree or type of force employed against him. The claimant's consent need not be specific to the alleged act of battery. He may be *volenti* to the general harm envisaged in a fight or in a sport."

21. In a sport which inevitably involves the risk of some physical contact, the participants are taken impliedly to consent to those contacts which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts. Thus, for example, in the context of a fight with fists, ordinarily neither party has a cause of action for any injury suffered during the fight. But they do not assume "the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence": see per Lord Denning MR in *Lane v Holloway* [1968] 1 QB 379, 386-7.

22. It is difficult to envisage circumstances in which a participant in a contact sport or game would be taken to have impliedly consented to an act which would otherwise amount to a battery, where that act was negligent in the sense previously explained. As we have seen, a breach of the duty of care in such circumstances will only be established where there has been recklessness or a very high degree of carelessness.

23. So how should these principles be applied in the present case? It was conceded on behalf of the defendant before the judge that, but for the issue of consent, he would be liable in the tort of battery. The judge said (para 27) that it may be that in the minds of participants other than the claimant nobody particularly cared where items went, but, he added: "I am satisfied, as I say, in the particular circumstances of this case, there was, although consent to participate in a game which might have caused injury, no consent to the injury to the claimant's face".

24. In my judgment, the judge's conclusion on this issue was clearly wrong. By participating in this game, the claimant must be taken to have impliedly consented to the risk of a blow on any part of his body, provided that the offending missile was thrown more or less in accordance with the tacit understandings or conventions of the game. As I have already explained, this is indeed what happened. There is no basis for holding that the claimant impliedly withheld his consent to the risk of being struck by a piece of bark thrown in accordance with those understandings or conventions and without negligence. The question of the extent of the claimant's implied consent is a matter for the court to determine in the light of all the surrounding circumstances. There is nothing in those circumstances which indicates that the claimant's consent was restricted to the risk of being struck by objects being thrown at the lower part of his body. The game was played on the basis that the objects were thrown at no particular part of the body. It

follows that an object thrown in the general direction of a participant, without negligence and without intent to cause injury, but which happened to hit him in the face, was being thrown in accordance with the understandings and conventions of the game, and in a manner to which the participants had consented.

Conclusion

25. This was a most unfortunate accident, but it was just that. Young persons will always want to play vigorous games and indulge in horseplay, and from time to time accidents will occur and injuries will be caused. But, broadly speaking, the victims of such accidents will usually not be able to recover damages unless they can show that the injury has been caused by a failure to take care which amounts to recklessness or a very high degree of carelessness, or that it was caused deliberately (ie with intent to cause harm). For the reasons that I have given, I would allow this appeal and dismiss the claim.

Lord Justice Clarke:

26. I agree.

The Vice-Chancellor

27. I also agree.

Order: Appeal allowed with the costs below and ½ costs in Court of Appeal, subject to detailed assessment if not agreed.
(Order does not form part of the approved judgment)