CONDON v. BASI[1]

Negligence - Duty of Care - Sport Involving Physical Contact - Existence of Duty - Breach - Foul Tackle

The plaintiff in this case sustained a broken leg when tackled by the defendant during a game of soccer in an English local league. He brought an action in negligence claiming damages and succeeded at the trial. An appeal by the defendant to the Court of Appeal was dismissed.

Condon v. Basi is worthy of note in at least three respects. On a general level, it is one of a mere handful of appellate Court decisions in the common law world[2] to consider the liability to one another of participants in physical contact sports. Secondly, the case follows the decision of the High Court of Australia in *Rootes v. Shelton*[3] and comments usefully upon the divergent views that emerged in the High Court. Thirdly, no consideration was given to whether negligence is an appropriate remedy for injuries sustained in the playing of physical contact sports and it will be submitted that trespass to the person (more particularly, battery) is superior.

The plaintiff sustained his injury well into the second half of the game when the defendant executed a slide tackle. The slide was commenced about 3.5 metres away from the plaintiff, was 'late' (the plaintiff had kicked the ball away) and was made with the boot studs showing — the defendant's foot being about a quarter of a metre above the ground. The referee considered the tackle to be 'reckless and dangerous' and constituting 'serious foul play'.[4] He sent the defendant from the field and that was the most serious penalty which could be imposed during the game. The plaintiff commenced an action seeking damages and alleged that his injuries had been caused by the defendant's negligence. In allowing the claim the trial judge held that the defendant owed the plaintiff a duty of care and that his conduct amounted to '. . . 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.'[5] As to the defendant's state of mind, the trial judge concluded that 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" '.[6] It is not clear whether the judge meant by this statement that the defendant did not intend to make contact with the plaintiff or simply not to cause him any physical harm.

The defendant appears to have pursued two main grounds of appeal. First, he maintained that the trial judge had ignored his allegation that the plaintiff had impliedly consented to the risk of injury by virtue of participation in the game and that, therefore, the defendant did not owe the plaintiff a duty of care. Secondly, it was said the judge had erred in applying an objective standard of care and breach of the duty could only occur if the defendant was aware of a risk of injuring the plaintiff and it was unreasonable for him to take that risk; in other words, the defendant maintained that a subjective test of recklessness more familiar to the criminal law was required.

The Court of Appeal rejected both of these grounds. Sir John Donaldson M.R. (with whom Stephen Brown L.J. and Glidewell J. agreed) considered the trial judge's conclusions of fact to be correct and that as a matter of law it could not be said that the defendant was not negligent. Fortunately, by not adopting the trial judge's use of language such as 'reckless disregard for safety', the Court of Appeal may have avoided future debate about the meaning of such uncertain and potentially confusing terminology.

[1] [1985] 1 W.L.R. 866.
[2] The leading Canadian and United States authorities are *Agar v. Canning* (1965) 54 W.W.R. 302 (Man. Q.B.) aff'd (1966) 55 W.W.R. 384 (Man. C.A.) and *Hackbart v. Cincinnati Bengals, Inc.* 435 F.Supp. 352 (1977) (U.S. Dist. Ct.) rev'd 601 F.2d 516 (1979) (U.S. Ct. Apps. 10th. Cir.) *cert. denied* (1979) 100 S.Ct. 275 (S.C.) respectively.
[3] (1967) 116 C.L.R. 383.
[4] [1985] 1 W.L.R. 866, 869.
[5] *Ibid.*
[6] *Ibid.*

An initial difficulty facing the Court of Appeal was a lack of English authority.

> 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.[7]

While the Court's attention was not drawn to an unreported English decision[8] and to substantial Canadian[9] and the United States[10] case law (principally at the trial level), *Rootes v. Shelton* was cited and accepted.

That case concerned a water skiing accident in which the driver of a boat towing three skiers was held to be in breach of a duty of care owed to one of the skiers who was injured upon colliding with a stationary boat. The New South Wales Court of Appeal had reversed a jury verdict in favour of the plaintiff skier at least on the basis that any duty of care which was owed by the boat driver did not extend to the actions which caused the injury.[11] The High Court was unanimous in deciding that a duty of care did exist and restored the jury's verdict. The case is of special interest for the three different approaches used to disallow the driver's contention that he was free of a duty of care.

The existence of a sufficient relationship of proximity between the parties found a duty of care was not doubted by Owen and Taylor JJ., the issue for these judges was whether the plaintiff had voluntarily assumed the risk of injury thereby relieving the defendant of the duty of care under which he would otherwise have operated. That is, did the defence enshrined in the maxim *volenti non fit injuria* apply? The modern approach to this defence has been to curtail severely its role and in practice it is now quite difficult for a defendant to establish its elements, *viz.* that the plaintiff had knowledge of the basic facts constituting the danger, understood that those facts represented a danger and voluntarily (in the sense of freely and willingly) encountered it.[12] In keeping with this approach, Owen and Taylor JJ. held there was no evidence to indicate that the plaintiff had assumed the risk of the driver's conduct which was to steer a course too close to the stationary boat and to fail to point out its presence to the skiers who were likely to be temporarily blinded by spray produced by the manoeuvres they were performing.

In contrast, Kitto J. did not consider it necessary to decide the case by reference to the defence of voluntary assumption of risk. He preferred to enquire whether 'the defendant's conduct which

[7] *Ibid.* 867.

[8] *Lewis v. Brookshaw* (Dec. 1968, Lewes Assizes), discussed in Grayson, E., 'On the Field of Play' (1970) 120 *New Law Journal* 413.

[9] Collected in Barnes, J., *Sports and the Law in Canada* (1983) 294-8. Interestingly, the Canadian courts have been able to resolve most contact sport injury cases as instances of battery without any need to consider the role of negligence. See *e.g., Agar v. Canning (supra* n.2) and *Pettis v. McNeil* (1979) 8 C.C.L.T. 299 (N.S. S.C. (Tr.Div.)).

[10] Collected in Weistart, J. and Lowell, C., *The Law of Sports* (1979) 933-44 and *1985 Supplement* 229-31. United States courts have applied 'negligence' concepts to contact sports but insist upon the plaintiff establishing that the defendant was reckless by intentionally performing the injury causing act knowing there was a strong probability of the harm resulting even though not intending the harm. *Hackbart v. Cincinnati Bengals, Inc.* 601 F.2d 516, 525 (1979). This approach bears a resemblance to the second of the defendant's two grounds of appeal in *Condon v. Basi* — an approach rejected by the Court of Appeal. Had the Court of Appeal adopted it, the outcome probably would have been different given the trial judge's finding was that the tackle was executed in 'an excitable manner without thought of the consequences'.

The decision in *Hackbart's* case may be criticized on the basis that the tort committed was really battery (a deliberate blow to the back of the head behind the game) and the court stopped short of so finding to benefit a worthy plaintiff who would otherwise have been barred by the expired limitation period applicable to battery.

[11] *E.g.,* (1966) 86 W.N. (N.S.W.) 94, 101-3 *per* Jacobs J.A. See also, (1967) 116 C.L.R. 383, 389 *per* Kitto J. Asprey J.A. went further at (1966) 86 W.N. (N.S.W.) 94, 108-10 in that he considered that acts which unitentionally infringed the rules or practices or water skiing would not give rise to liability.

[12] See Fleming J.G., *The Law of Torts* (6th ed. 1983) 168-76.

caused injury to the plaintiff [was] reasonable in all the circumstances, including as part of the circumstances the inferences fairly to be drawn by the defendant from the plaintiff's participation in what was going on at the time.'[13] Thus, the driver could not have been liable if the skier had struck a submerged object which would not have been observed with the exercise of reasonable care. Yet in this case there was evidence to indicate that the driver had departed from the standard of care required in the circumstances.

This difference in viewpoint is the now familiar one alluded to earlier by Dixon J. in *Insurance Commissioner* v. *Joyce*[14] in the context of a motor vehicle passenger who accepted a lift from a drunken driver. When a person engages in a hazardous activity which is the better view to adopt — the absence of a duty flowing from the application of the voluntary assumption of risk defence or establishing a standard of care by reference to the hazardous conditions? Dixon J. considered it a moot point although he favoured the latter.[15] Yet rarely will the preference of one approach over the other make any significant difference to the outcome.[16] As is apparent from *Joyce's* case, contributory negligence may also be relevant although in neither *Rootes* v. *Shelton* nor *Condon* v. *Basi* was it in issue.

The approach adopted by Barwick C.J. (with whom McTiernan J. agreed) differed from the approaches of the other judges. He employed the idea of 'acceptance of risks'[17] and this may be called the no duty or limited duty approach. Regrettably it is quite easy to confuse it with the voluntary assumption of risk defence due to the similarity of language at least. The Chief Justice said that by 'engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime'.[18] The result flowing from this acceptance of inherent risks by virtue of participation is the limiting, or even the elimination, of the duty of care[19] which the plaintiff might be seeking to establish. It seems clear that an acceptance of inherent risks is not the same as a voluntary assumption of risk[20] because the Chief Justice, after concluding that the driver's actions causing the injury were not inherent risks, proceeded to consider separately the role of voluntary assumption of risk in these terms:

> If it is said that a participant in a sport or pastime has voluntarily assumed a risk which is *not* inherent in that sport or pastime so as to exclude a relevant duty of care, it must rest on the party who makes that claim to establish the case in accordance with recognized principles.[21] (Emphasis added)

According to the limited duty approach, for an injured sports participant to succeed in an action in negligence he would have to show that his injury was not caused by a risk inherent in the sport and was therefore within the scope of the duty of care owed to him, and the defendent would need to fail to establish that the risk (even though not inherent) had been voluntarily assumed in accordance with the principles that govern the defence.

The presentation of the limited duty approach as one distinct and separate from the approaches of the other judges may have to be treated with caution. As Kitto J. observed, the term 'inherent risk' is imprecise.[22] The Chief Justice did not define it other than to say that it is a risk which is 'accepted by those who engage in the sport'.[23] The only example which he mentioned was a

[13] (1967) 116 C.L.R. 383, 390.
[14] (1948) 77 C.L.R. 39, 56-7.
[15] *Ibid.* 59.
[16] While it can be said that the breach of duty approach entails the plaintiff bearing the burden of proof of breach whereas the defendant must prove the voluntary assumption of risk defence, often the defendant will need to adduce evidence of the special circumstances bearing upon the breach issue.
[17] (1967) 116 C.L.R. 383, 385.
[18] *Ibid.*
[19] *Ibid.*
[20] This appears to have been the view of the New South Wales Court of Appeal; see *supra* n.11.
[21] (1967) 116 C.L.R. 383, 386.
[22] *Ibid.* 390.
[23] *Ibid.* 385.

risk that could not be avoided by the exercise of reasonable care and so it might be argued that the limited duty approach offers nothing more than the modified standard of care approach of Kitto J. Also, a no duty or limited duty approach has been criticised as having the potential for reintroducing the voluntary assumption of risk defence via the 'back door' and without its present restrictions.[24]

In *Condon* v. *Basi* the Court of Appeal largely ignored the defence of voluntary assumption of risk in its traditional form and did not consider the judgments of Owen and Taylor JJ. Instead Sir John Donaldson M.R. quoted briefly from the judgments of Barwick C.J. and Kitto J. and noted that they employed different approaches. Then followed some comments which bear quotation at length:

> One [approach] 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 C.J. 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* . . . 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.[25]

Adopting the familiar 'duty — breach — damage' mode of analyzing the tort of negligence, the Barwick C.J. approach considers the issue of risk-taking in sport as part of the duty question while the Kitto J. approach assigns it to the breach stage. The Master of the Rolls does not offer any reasons for his preference for the Kitto J. approach and so it is of interest to speculate upon what reasons may be advanced.

First, there is an appeal from an equality of rights viewpoint for the assertion that as a general matter sportspeople do owe each other a *general* duty of care. This places them on an equal footing with, say, the users of highways and those injured in the workplace. Yet by formulating the standard of care in accordance with what is reasonable in the circumstances due allowance can be given to the desire of participants to encounter the hazards of physical injury in return for the benefits of participation in sport.

Secondly, the approach of Barwick C.J. can be viewed as tantamount to, or even confused with, the defence of voluntary assumption of risk. This may be illustrated by the references to 'consent' and 'implied consent to the taking of risks'[26] made by the Court of Appeal when considering the Chief Justice's judgment. Accordingly, it would be more in keeping with the modern practice of limiting the defence to favour the approach of Kitto J. which makes no use of it.

Thirdly, by referring to acceptance of risks but not meaning the defence, the Chief Justice's approach tends to imply that special rules of law are in operation in regard to sport when that is not necessarily the case. Another way of expressing the Chief Justice's view is to say that a participant bears the burden of being injured by non-negligent behaviour; a quite straightforward proposition. Yet for many injuries occuring in other contexts where that proposition would apply the language of acceptance of risks is not used. By virtue of its use in the sports context the implication may be drawn that some rule of law is at work in regard to sport which is not of universal application. As a general matter it is submitted that this is not so. Sports such as golf, tennis and water skiing which do not entail physical contact are amenable to the tort of negligence

[24] *See* Fleming, *op. cit.* 275-6.
[25] [1985] 1 W.L.R. 866, 868.
[26] *Ibid.*

in the same way as non-sport activities. So it is quite unnecessary to refer to acceptance of risk in regard to these sports and the Kitto J. approach is preferable. However, as will be considered *infra,* physical contact sports such as the various codes of football may need to be treated differently.

Some important conclusions can be drawn from *Condon* v. *Basi.* It affirms the now widely accepted proposition that participants in sporting events are not beyond the reach of the law.[27] In particular, the tort of negligence applies and participants owe each other a duty of care. The preferred view is that the risk-taking aspects of sport are best accommodated within the tort of negligence at the breach stage by judging what is reasonable conduct in the circumstances of the sport rather than by limiting the breadth of the duty or resorting to the defence of voluntary assumption of risk. In so judging the familiar objective standard of the reasonable man is to be used and reference to uncertain terminology such as 'reckless disregard for safety' can be avoided.

To regard the plaintiff in *Condon* v. *Basi* as worthy of compensation is understandable. Yet might not the reason for that view in fact stem from a suspicion lurking in the background, *viz.,* that the defendant was 'going for the man' rather than being negligent? If the contact was deliberate then battery would be committed[28] and, in particular, the plaintiff would be considered not to have consented to any intentional contact in deliberate breach of a rule designed to protect player safety.[29] However, the trial judge found that the defendant executed the tackle 'in a reckless and dangerous manner' and 'not with malicious intent'.[30] If by this the judge meant that the defendant, although intending contact, had no desire to hurt the plaintiff, there is still a sufficient intent for battery as the intentional touching is the essence of the tort, not physical injury.[31] Accordingly, the absence of intent to make contact would preclude an action in battery.[32] Even so, whatever may have been the factual situation, the plaintiff by alleging negligence did not invite the court to consider battery. Perhaps the plaintiff's lawyers were influenced by the circumstances that the injury occurred in the course of play and was not an 'obvious' battery like a punch thrown behind the game. Also, the tort of battery has distinct criminal overtones and as sport (rightly or wrongly) is often seen as above criminal behaviour, courts have been perceived in the past (at least) as unlikely to make the connection.

Putting to one side the factual characteristics of this case, it does raise a serious question concerning the role of negligence in relation to the playing[33] of physical contact sports. The circumstances in which physical contact can occur between participants vary among contact sports.[34]

[27] For example, in *Rootes v. Shelton* (1967) 116 C.L.R. 383, 389 Kitto J. considered that sport was not 'of the nature of a war or of something else in which all is notoriously fair'.

[28] It is not proposed to consider 'negligent trespass' which may still exist in Australia. Compare *Williams v. Milotin* (1957) 97 C.L.R. 465 and *McHale v. Watson* (1964) 111 C.L.R. 384 with *Letang v. Cooper* [1965] 1 Q.B. 232. Historically, the plaintiff who claimed in intentional or negligent trespass possessed the advantage of making the defendant bear the onus of disproving intention or negligence (compared with the onus being on the plaintiff to prove a breach of duty in negligence), although this must now be doubted. See *Hackshaw v. Shaw* (1984) 56 A.L.R. 417, 420 *per* Gibbs C.J. and 428 *per* Dawson J. In any event, once all the evidence is before a court it will be a rare case for the allocation of the onus of proof to make a difference to the result. As much was acknowledged on the facts of *Hackshaw's* case by Dawson J.

[29] *McNamara v. Duncan* (1971) 26 A.L.R. 584.

[30] [1985] 1 W.L.R. 866, 869.

[31] Fleming, *op. cit.* 23-4.

[32] But see *supra* n.28.

[33] It is not intended to reflect upon the role of negligence in regard to such matters as the choice and maintenance of playing equipment or the behaviour of participants toward one another before play commences. It is submitted that here the role of negligence is conventional.

[34] Some sports entail contact as part of the execution of their skills and tasks. Specifically, the purpose of such sports is in whole or part to engage in physical contact. They may be divided into two categories. First, there are those where the aim is to subdue or control the opponent by means of force. Examples are boxing, judo and wrestling. These might be called combat sports.

Yet there is one constant factor: in all sports and at all levels participants will be competing at or close to the limits of their respective abilities. This develops special significance given the normality of physical contact (often of a very forceful kind) in contact sports. Individuals and teams will be aiming to maximize their command of the skills of the sport and at the same time exercise mastery over the opposition. That mastery can be achieved in many ways. For example, an opponent may be defeated because he is not as fit or strong and therefore becomes tired more quickly and might be out-performed. Also, all manner of pressure (including physical buffeting — if permitted — and psychologically demoralizing propaganda) may be directed at the opponent to force playing errors and misjudgments: to put the opponent 'off his game'. These tactics are recognized as perfectly legitimate and constitute part of the challenge and enjoyment of many sports. Indeed, they are a part of the honing of the mental and physical skills that sport seeks to achieve. Furthermore, play may often become 'desperate'. Players may operate at the very limits of their physical and mental abilities in order to succeed or to prevent others from doing so. Decisions are made without time for reflection and often under great pressure. Moves may be attempted which have little chance of success.

It is submitted that these circumstances make the playing of contact sports an inappropriate subject for the application of the tort of negligence. How can a participant expect from another the exercise of reasonable care for his safety in the playing of a game when he is doing his very best to try to induce that other participant to make as many errors of judgment as possible? The response to this might be to say that the reasonable man in the circumstances formula approved in *Condon* v. *Basi* can easily account for the characteristics of modern contact sports just outlined and that it will be only the extreme and relatively rare instances of foolhardiness that will give rise to liability. Yet herein lies the dilemma because it is these rare cases which most markedly illustrate the problem. What is to be said to the soccer player who makes a genuine attempt to perform a match saving tackle on an attacker about to shoot for goal but in circumstances where there is only a small chance of not fouling the attacker? It is fair that he will be a hero if he deprives the attacker of possession without fouling him but liable in negligence for any injury if he fails? The answer is that it is not fair especially given the instinctive or reflex nature of contact sports. A duty of care should not be imposed because of the inconsistent nature of the concepts behind the tort of negligence and the playing of contact sports.

Advocating that negligence has no role in the playing of contact sports is not to say that there should be no legal control. Battery is still available and it is far more likely that sportspeople will readily understand and agree with the imposition of liability on the participant who makes intentional contact in deliberate breach of safety rules[35] while all other participants are left free to get on with the game. While it is conceded that the application of battery in this way may present problems of proof of intention, these may be no more onerous than establishing what was reasonable care in the circumstances and, more importantly, it is submitted that most sportspeople can distinguish genuine attempts to play the game from professional fouls and thuggery. Such legal doctrine would be readily comprehended by the ordinary sportsperson while the imposition of negligence principles with their nebulous concept of careful judgment may only serve to fundamentally alter the nature of contact sports and perhaps deprive them of their rationale.

Secondly, there are sports where physical contact is one of the means by which the aim of the sport is achieved: tackling a player to prevent him from scoring a goal in Australian rules football is a typical case. Other contact sports entail physical contact purely as an incident to the normal conduct of the sport but not as a means of carrying it out. Common ways in which contact of this type occurs are a batsman being struck by a ball in cricket and a collision between a batter and baseman in baseball. An added consideration is that many contact sports may not fall exclusively within one or other of these categories.

[35] A distinction needs to be made between rules designed to protect player safety and those for the better playing of the game. For instance, a player should not be liable for an otherwise permitted physical contact merely because he was offside.

Thus, while the approach of Kitto J. in applying the tort of negligence to sport has advantages, it might be best to acknowledge that the playing of contact sports is not amenable to regulation through the criteria of negligence.

HAYDEN OPIE*

KINSELA AND ANOR V RUSSELL KINSELA PTY LTD (IN LIQUIDATION)[1]

In this decision the New South Wales Court of Appeal has given the strongest judicial recognition yet of any British or Australian Court as to the fiduciary duty owed by the directors of a company to its creditors. The Court held that where a company is in a position of marginal commercial solvency the duty owed by directors to the company as a whole extends not only to the interests of the shareholders of that company, but to the interests of its creditors as well. Where the directors act in breach of this fiduciary duty, to the detriment of the company's creditors, the shareholders of the company do not have the power or authority to absolve the directors of their breach.

Members of the Kinsela family as directors of, and shareholders in various family companies carried on a business as funeral directors. These companies were well established, well known and had a reputation of which the family members were proud.

One such company, Russell Kinsela Pty Ltd ('the company') offered, in addition to the provision of funeral services, a form of contributory insurance against the cost of its clients' funerals. Regular payments, of small amounts were received from contributors in return for which they became entitled to cost-free funerals. The company did not structure the scheme properly, failing to make adequate provision for rising costs. In late 1976 the company had begun to incur regular and increasing trading losses and its liabilities greatly exceeded its assets.

During this period, the Funeral Funds Act 1979 (N.S.W.) was enacted. This Act, which came into operation in October 1980, incorporated provisions requiring companies carrying on funeral insurance schemes to disclose their financial position and conferred powers upon a statutory officer to intervene in the affairs of a defaulting company with a view to protecting the interests of creditors.

In this climate Mr. Kinsela, an appellant to the action and a director of the company, devised a scheme by which it was hoped the family business could continue despite the company's imminent collapse and the imposition of the statutory constraints of the Funeral Funds Act.

On 26 January 1981, the directors executed a lease of company premises. The lease was for a period of three years, with an option for a further three years and named Mr and Mrs Kinsela as lessees. The lease was on particularly favourable terms but was unanimously supported by all of the company's shareholders.

In April of the same year proceedings were brought to have the company wound up. The liquidator challenged the lease on three grounds, only one of which the Court found necessary to discuss in any detail. The liquidator argued that the company's power to lease the premises was exercised for a purpose which was not in the best interests of the shareholders as a whole and therefore the lease was voidable at the option of the company. The appellants argued that this submission could not be correct as the execution of the lease was an act of the company with the unanimous knowledge and approval of all the shareholders.

At first instance[2] Powell J. held that while the directors had power to lease company premises under the company's Memorandum of Association, the power had been exercised otherwise than in furtherance of the company's stated objects. Therefore the lease was voidable at the option of the company.[3] While his Honour held reservations as to the correctness of the principle, he

*B. Comm., LL.B. (Hons) (Melb.), LL.M. (Tor.).

[1] (1986) 4 A.C.L.C. 215.
[2] *Russell Kinsela Pty Ltd (In liquidation) v. Kinsela and Anor* [1983] 2 N.S.W.L.R. 452.
[3] *Ibid.* 464.