

Sports Ordinary Negligence in the Final Furlong?

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 [Keywords to follow]

Abstract

In the December 2004 edition of J.P.I.L. Peter Charlish wrote about the appropriate standard of care in sport and recreational situations. A year later he revisits the issue with particular reference to negligence actions arising out of horse racing. ML

The sport of horse racing in the United Kingdom has in recent years had to fight accusations of race fixing and bribery scandals. It has also had to deal with three of its major stars facing one another across the courtroom, as one brought an action in negligence against two of his fellow professional jockeys who, he alleged, caused him severe injuries when he fell from his mount in a hurdles race.² Although this was the first case of its kind in England and Wales, similar actions have been brought elsewhere in Australia and the United States (under the jurisdiction of New York), and this provides the opportunity to examine the approach that is taken to sports participant negligence in each of the three jurisdictions.

The cases all stemmed from similar incidents; however, the results were very different, with New York applying a *standard of reckless disregard*, Australia applying a *standard of ordinary negligence*, and England and Wales applying a *standard of ordinary negligence*, holding at the same time that the behaviour necessary to breach that *standard* was likely to amount to *reckless disregard*. This is consistent with the later decision of the Court of Appeal in *Blake v Galloway*,³ where it seems as if the *standard* of care advocated for children's horseplay and recreational sports (obiter) was returned quite clearly to that of *reckless disregard* which had first been put forward in *Wooldridge v Sumner*.⁴

The United States and Australia

In *Turcotte v Fell*,⁵ in New York, the alleged interference was caused by the defendant's horse itself directly contacting the plaintiff's horse, in turn causing the plaintiff's horse to move

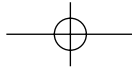
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²*Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. P6.

³*Blake v Galloway* [2004] EWCA (Civ) 814.

⁴*Wooldridge v Sumner* [1963] 2 Q.B. 43.

⁵*Turcotte v Fell* 474 N.Y.S. 2d 893.



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sideways, which then came into contact with another horse and, as a result, fell, causing the jockey serious injury. Ronald Turcotte suffered paraplegia at a time when he was at the very height of his profession, having won the prestigious “triple crown” (the Kentucky Derby, the Belmont Stakes and the Preakness Stakes) on board *Secretariat*, arguably America’s greatest ever racehorse, three years previously. Originally the case was argued under *ordinary negligence*, (i.e. reasonable care). The court ruled however that the proper *standard* to be applied was that of *recklessness or intentional conduct*. Lockman J. concluded that:⁶

“By engaging in the activities of a professional thoroughbred jockey, plaintiff reasonably consented to expose himself to certain risks in return for potential and substantial rewards. In so doing he relieved the other jockeys, including defendant Fell, of any duty of care with respect to the known and apparent risks of horse racing, **but he did not relieve them of their duty to refrain from reckless, wanton or intentional infliction of injury**”. [Emphasis added]

It was further held that, due to the dangers inherent in horse racing, that duty did not extend to merely negligent conduct. This followed the reasoning from the cases *Nabozny v Barnhill*,⁷ *Ross v Clouser*⁸ and many others. The plaintiff (*Turcotte*) was unable to establish either *recklessness* or indeed even *negligence* against the defendant, and so his action failed.

*Johnston v Frazer*⁹ also involved flat horse racing, in which the question surrounding the appropriate *standard* of care was central to the issues presented. The claimant suffered severe injuries and alleged that the defendant was negligent in allowing his mount *Taksan* to veer in whilst he lacked clear space to do so, and that this caused the catastrophic collision. The plaintiff argued further that the *standard* of care that should be applied was that of *ordinary negligence*, as held in *Rootes v Shelton*,¹⁰ and followed in England and Wales in *Condon v Basi*.¹¹ The defendant’s position on the other hand, was that the appropriate *standard* was that of *reckless disregard*, as held in *Wooldridge v Sumner*¹² and *Turcotte v Fell*.¹³

The court adopted the principles set out in *Rootes v Shelton*.¹⁴ Priestly J.A. expressly disregarded the judgment from *Wooldridge v Sumner*.¹⁵ He stated:¹⁶

“For the appellant, it was contended that the duty should be stated in the way that he contended for on the basis of what was said by the English Court of Appeal in *Wooldridge v Sumner* [1963] 2 Q.B. 43. I do not think it is necessary to go into the detail of that case beyond mentioning that if it stood alone in this area of the law it would furnish a reasonable foothold for the legal contention of the appellant. It does not stand alone however. . . . After *Wooldridge* was decided, Professor Goodhart, in a comment in (1962) 78 L.Q.R. 490 at 496, said that the limitation by the Court of Appeal in *Wooldridge* of liability to recklessness introduced a novel element to negligence.”

⁶ *Turcotte v Fell* 474 N.Y.S.2d 893, 123 Misc. 2d 877 *877.

⁷ *Nabozny v Barnhill* 334 NE 2d 258.

⁸ *Ross v Clouser* 637 SW 2d 11.

⁹ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89.

¹⁰ *Rootes v Shelton* (1967) 33 A.L.R. ???.

¹¹ *Condon v Basi* [1985] 1 W.L.R. 866.

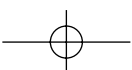
¹² *Wooldridge v Sumner* [1963] 2 Q.B. 43.

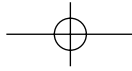
¹³ *Turcotte v Fell* 510 N.Y.S. 2d 49 (Ct App) (1986).

¹⁴ *Rootes v Shelton* (1967) 33 A.L.R. ???.

¹⁵ *Wooldridge v Sumner* [1963] 2 Q.B. 43.

¹⁶ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89 at pp.91–92.





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As far as the *Frazer* court was concerned, there was no doubt as to the appropriate *standard* of care to be applied. The position adopted was that a *standard of ordinary negligence* was appropriate to sports disputes. The court rejected the persuasive authority of *Turcotte v Fell*,¹⁷ despite the apparent similarity of facts with the case in hand. Priestley J.A. went on:¹⁸

“Although this Court will give full consideration to common law judgments from outside Australia and Great Britain, where there is doubt about common law principles to be followed in a particular case, and although also valuable assistance is to be obtained from cases from other jurisdictions, that assistance is only available to this court as distinct from the High Court, in areas of law where this Court is in some real doubt about what the Australian position, as stated by the High Court, may be.”

The court, in reasoning as it did, and accepting *ordinary negligence*, categorically rejected the *standard of reckless disregard*. Priestley J.A. concluded:¹⁹

“It seems to me that the kind of contention of the duty contended for by the appellant cannot be supported. Any formulation which involves an ingredient of recklessness or attempting to cause harm, seems to me to be inconsistent with the question the tribunal is bound to deal with in such cases, whether in all the circumstances in which he found himself, the defendant had done what was reasonable.”

Of crucial importance to the court was the inherent flexibility (as they saw it) of the *ordinary negligence standard* which the court believed was sufficient to deal with disputes involving sports participants. Finlay J. stated, concerning the appropriate *standard* of care:²⁰

“So it becomes in the present case the reasonable man riding as a licensed jockey in a horse race. Those circumstances do not negate the duty on the part of the defendant to take reasonable care to avoid a foreseeable risk of injury to the other jockeys, including the plaintiff. That single standard of care remains. But it does, shape what the reasonable response of a man in that situation would be. He is sitting astride a horse probably weighing between 1000 and 1200 pounds and travelling up to forty miles per hour. In short, what is reasonable will vary with the circumstances in which the parties are involved.”

In summarising his findings, Finlay J. held that:²¹

- the defendant caused his horse to cross dangerously close in front of the two horses immediately inside him, thereby severely compressing the horses further inside;
- a reasonable man in the defendant’s position would have foreseen the risk of injury to the horses and their riders;
- the defendant was guilty of failing to take reasonable care for the safety of the plaintiff;

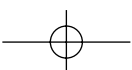
¹⁷ *Turcotte v Fell* 510 N.Y.S. 2d 49 (Ct App) (1986).

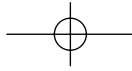
¹⁸ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89 at p.94.

¹⁹ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89 at p.94.

²⁰ *Frazer v Johnston*, unreported, 1989 N.S.W. Lexis 11674 at p.5.

²¹ *Frazer v Johnston*, unreported, 1989 N.S.W. Lexis 11674 at p.3.





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- **the defendant's actions constituted deliberately running an unjustifiable risk which constituted recklessness (although this finding was not required to establish liability).** (Emphasis added)

Although there was no real debate as to *why* this action was deemed to be *reckless* by the court, it is interesting to see a direct comparison (in as much as the incidents were very similar) to the case from the United States,²² where the appropriate *standard* was that of *reckless disregard*, but the action was deemed not to breach that *standard*, and the case from England and Wales,²³ which was argued under *ordinary negligence* principles, and where liability was also not found.

The issue concerning the appropriate *standard* of care has been revisited several times in more recent years in Australia, with the same basic ruling as that seen in *Johnston v Frazer*²⁴ resulting. In *Hargreaves v Hancock*,²⁵ a case heard before the Supreme Court of New South Wales, the circumstances were slightly different in that the event involved trotting horses and buggies, with a collision occurring between two leading horses. The circumstances, although involving some differences, are clearly similar enough for the same broad principles to apply and indeed for the same broad rules of racing etiquette to also apply. In the case, Simpson J., in very clearly following the decision seen in *Johnston v Frazer*,²⁶ ruled that,²⁷ “The defendant clearly owed the plaintiff a duty to take reasonable care in the circumstances.”

The defendant had already pleaded guilty to breaking r. 265 of New South Wales Harness Racing, which stated:²⁸

“Any driver who, in the opinion of the Stewards, caused or contributed to any crossing, jostling or interference by foul, careless or incompetent driving shall be deemed guilty of an offence against these Rules and may be dealt with accordingly.”

The breaking of any rules of the activity in question of course is not necessarily indicative of negligence. It is merely one of the circumstances that will be considered by the court. Simpson J. explained the position:²⁹

“I do not regard the fact that the defendant was in breach of r.265, or the fact that he pleaded guilty to the charge as conclusive of the issue I have to decide. The question is whether, on the facts as I have found them to be, the defendant was in breach of his duty to the plaintiff. I am satisfied that he was. I accept that the plaintiff participated in a sport which carries with it certain risks, and that the speed at which the sport is conducted increases those risks. Far from persuading me that the circumstance suggests that the defendant owes the plaintiff no duty of care or that it diminishes the extent of the duty, it persuades me more strongly that the defendant did owe the plaintiff a duty of care, and that what was encompassed in that duty is significantly greater than would have been the case in a sport carrying fewer, or lesser, risks.”

²² *Turcotte v Fell* 510 N.Y.S. 2d 49 (Ct App) (1986).

²³ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. P6.

²⁴ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89.

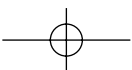
²⁵ *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685.

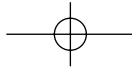
²⁶ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89.

²⁷ *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685 at p.3.

²⁸ Rules of Harness Racing of the Harness Racing Authority of NSW, *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685 at p.5.

²⁹ *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685 at p.5.





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If we consider that a sport carrying greater risks of injury inflicted by one participant on another should have a greater duty of care, then surely this could destroy the very nature of that sport. It is this concern that has proved crucial in leading most of the jurisdictions in the United States to adopt the *standard* of *reckless disregard* that Australia has rejected. Such a *standard* enables participants to compete on the edge of their sport, which, as illustrated very clearly by the defendant in *Hargreaves v Hancock*³⁰ is for many the very essence of competitive sport.³¹

“I am a driver that doesn’t give much room, that’s on the record. I drive very aggressively. I have done all my life and the day I can’t be competitive in this field, in this dangerous sport we are in, I’ll hang up my whip.”

The implications of this statement are clear—the defendant believes that he is justified in competing right to the very margins of acceptable conduct, almost heedless of the consequences for both himself and other competitors. A little bit of thought should establish that committed participation is desirable but that, at times, competitive instincts must be reigned in, for the good of all participants. There is a world of difference between aggressive participation and assertive participation and it may well be the case that in this particular instance, the court decided that such a distinction needed to be illustrated—hence the resultant victory in the case for the claimant. It is difficult to assess whether the court had this in mind in reaching its decision; whether it was attempting to send a message to the wider trotting community that some restraint of behaviour is necessary on the racetrack, or whether the concerns were limited purely to this particular dispute. The potential dangers from trotting races persuaded this particular court that there was a higher duty to take care than there would be in a less exacting and dangerous activity. Simpson J. concluded:³²

“I am satisfied that the plaintiff participated in a sport which carries with it certain risks, and that the speed at which the sport is conducted increases those risks. Far from persuading me that circumstance suggests that the defendant owes the plaintiff no duty of care or that it diminishes the extent of the duty, it persuades me more strongly that the defendant did owe the plaintiff a duty of care, and that what was encompassed in that duty is significantly greater than would have been the case in a sport carrying fewer, or lesser, risks”.

The implication is stark. Where a sport carries with it some danger (typically a contact sport), there is a heightened *standard* of care imposed upon the participants. This lies in direct contradiction to the principles espoused in most jurisdictions in the United States. This kind of approach will lead to a greater sanitisation of sports (particularly traditionally perceived dangerous sports), but those consequences may well destroy the very essence of such activities. Two recent decisions in Australia, both involving injuries received by jockeys during the course of horse races, have reaffirmed the *standard* of *ordinary negligence* in competitive sports in Australia. Both cases were heard in Queensland. The first, heard before the Supreme Court³³, and the second before the District Court.³⁴ In *Kliese v Pelling*,³⁵ the plaintiff was

³⁰ *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685.

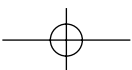
³¹ *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685 at p.4.

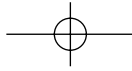
³² *Hargreaves v Hancock*, unreported, 1997 N.S.W. Lexis 685 at p.5.

³³ *Kliese v Pelling*, unreported, 1998.

³⁴ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000).

³⁵ *Kliese v Pelling*, unreported, 1998.





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on board *Walk Easy* and the defendant on *Cooper Queen*. The incident, which led to the litigation, was described by Chesterman J. in the following way:³⁶

“About 200 metres from the finish-line, the defendant urged *Cooper Queen* off the fence in order to pass *Piggy Miss* on the outside. In attempting this manoeuvre *Cooper Queen* struck *It's Showtime* moving that horse's shoulders to the left which squeezed *Walk Easy* between it and *Rocky Recalled*. Caught between the other horses, *Walk Easy* tripped and went down, throwing the plaintiff onto the track.”

The accident caused the plaintiff kidney injury and fractures and bone damage to a number of lumbar vertebrae, resulting in severe pain and discomfort.

The first question that the court addressed concerned the applicable *standard* of care. On this question, Chesterman J. was quite categorical explaining further the authority on which he was basing his opinion. He stated:³⁷

“Despite a flirtation by some cases in England with the concept of recklessness or intentionally caused harm as being necessary before an injured competitor may recover damages against a fellow competitor, the law in this country has remained constant to the notion that one owes one's neighbours a duty to take reasonable care in the relevant circumstances. In the case of injury caused in a horse race, the test to determine whether a jockey was negligent in his riding is whether the jockey failed to take reasonable care for the safety of a fellow jockey in the circumstances.”

Furthermore, the court stressed the need to retain *reasonable care* at all times during the race, even in the very heat of competition during a driving close finish to a race. Chesterman J. continued:³⁸

“*Racing is the sport of Lings [sic], not of savages. Endeavouring to win does not entitle a jockey to ignore the safety of fellow riders.* The ‘conflicting responsibility’, though an important factor, does not require the court to disregard the other factors identified in determining whether there has been a breach of duty to take care (i.e. the magnitude of the ask [sic], the likelihood of its occurrence and the difficulty or inconvenience of avoiding it).” [Emphasis added]

An issue of real concern and importance in the finding of negligence was the failure of the defendant to look to his side to ensure there was adequate space to move into before adjusting his position. Chesterman J. explained:³⁹

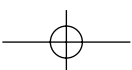
“I am reinforced in this view by some evidence which was led in relation to what was called the ‘crossing rule’. The exact status of the rule was not made clear but the evidence did establish that the stewards required jockeys to have their horses one and a half lengths clear of another horse whose path was crossed or in front of which a horse took up running. . . . The importance of the rule is not that it seems to have been breached by the defendant because breach of the ‘rules’ of a sport is an uncertain guide to negligence. See *Rootes v Shelton* at 385 per Barwick

³⁶ *Kliese v Pelling*, unreported, 1998 at p.2.

³⁷ *Kliese v Pelling*, unreported, 1998 at p.3.

³⁸ *Kliese v Pelling*, unreported, 1998 at p.5.

³⁹ *Kliese v Pelling*, unreported, 1998 at p.6.



C.J. *The importance of the evidence is that it shows a recognition that before moving laterally on the race track (ie, left or right), a jockey was expected to ensure that, in so doing, he would not interfere with another horse. The requirement could not be satisfied unless the jockey first looked.*” [Emphasis added]

The defendant failed to ensure that he had clear space to move and, as a result, liability was found. Whilst this may appear harsh and almost an application of strict liability, the finding can be justified as it is such a fundamental rule on the racetrack and no amount of reasons can possibly justify such an omission. If a *standard of reckless disregard* was applied in such a case then it is certainly more questionable as to whether liability would be held. Such a situation would do little for the general safety of jockeys and would encourage less care between participants on the racetrack. However, the finding of liability in this instance, based on a *standard of ordinary negligence*, in no way threatens the nature of the sport. All jockeys know that they must look before moving—they knew this before the accident and that knowledge remains after the accident.

In *Flanders v Small*,⁴⁰ the salient facts were that the plaintiff’s horse, *Miracle Knight*, clipped the heels of the defendant’s horse, *Campbell’s Kingdom*, causing the plaintiff to fall from his horse resulting in serious injury. The defendant had already moved left once but had straightened his mount following a warning shout from the plaintiff. As McGill D.C.J. explained:⁴¹

“The defendant had reacted as if he was aware of the plaintiff’s position, and in those circumstances there was no particular reason for the plaintiff to be anticipating a further move to the left in the immediate future by *Campbell’s Kingdom*.”

Shortly afterwards, however, this is precisely what happened. *Campbell’s Kingdom* was again prompted to move to his left by the defendant, without the defendant first checking that it was safe to move, causing the fateful collision. In addressing the issue of negligence, McGill D.J.C. commented:⁴²

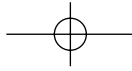
“If the defendant was not aware that his first move had caused some difficulty to someone to his left rear, he ought to have been aware of that. I also find that the defendant did not in fact look or glance to his left just before moving out the second time. The defendant admitted as much in evidence. I also find the move to the left was deliberate. Whether *Campbell’s Kingdom* ended up moving further to the left than the defendant had intended is, in my opinion, irrelevant, since I think the operative negligence occurred at the point where *Campbell’s Kingdom* began to move to the left”.

McGill D.C.J. is clearly stating that the failure of the defendant to look before moving laterally was the fundamental factor in the finding of negligence. (It seems likely that the actions of this particular defendant may have been held to be sufficiently reckless for liability to attach even if that was the *standard* of care applied. The court was obviously of the opinion that the movement itself was deliberate and further that the previous movement which the court

⁴⁰ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000).

⁴¹ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000), at para.33.

⁴² *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000), at paras 37–38.



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drew attention to should undoubtedly have alerted the defendant to the potential danger associated with his action.) McGill D.J.C. opined further:⁴³

“Whether or not, as a general proposition, a jockey is negligent if he or she moves to the left or right without first glancing in that direction to ensure that the move will not foul another horse, *in my opinion it was negligent of the defendant to move his horse deliberately to the left to some extent on the second occasion, in circumstances where he knew that a similar move a couple of seconds earlier had apparently caused difficulty to a rider to his left rear*, without first glancing to his left to ensure that such a move would not cause a similar difficulty.” [Emphasis added]

Caldwell v Maguire & Fitzgerald

Peter Caldwell (the claimant) suffered a broken back when his horse fell after contacting a leading horse that had been squeezed and checked by the horses of the two defendants. Both defendants were found guilty by the course stewards of *careless riding*. According to r.153 of the Rules of Racing promulgated by the Jockey Club⁴⁴ (in effect the governing body of all horse racing in the United Kingdom):

“A rider is guilty of careless riding if he fails to take reasonable steps to avoid causing interference or causes interference by misjudgement, or intention.”

Both defendants were subsequently banned from competitive racing for a period of three days (the maximum allowed being a 14-day ban).

Both parties provided testimony from illustrious expert witnesses from the world of racing. The experts, although disagreeing on some points, did concur on two very important ones. Holland J. reviews:⁴⁵

“In the event both Defendants had adopted courses that in conjunction served to deprive Royal Citizen, (the horse that actually brought down the claimant), of the inside line without there being that necessary clearance and accordingly both experts endorsed the finding of the Stewards that both defendants were guilty of careless riding as defined by the Rules. They advised that both Defendants should have checked by way of a glance to the left before regarding Royal Citizen as no longer in contention for the lead—*not least because the earlier pattern had been for recovery of position between hurdles*.” [Emphasis added]

The final part of this passage is a reference to the pattern of the race, which saw *Royal Citizen* falling back at the hurdles but then recovering between each hurdle to regain parity with the leader.

Holland J., in making his assessment of the appropriate *standard* of care, held:⁴⁶

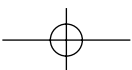
“That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to such fellow contestants.

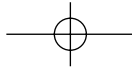
⁴³ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000), at para.38

⁴⁴ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. p.6, p.47.

⁴⁵ *Caldwell v Maguire and Fitzgerald*, unreported, 1997, at p.5.

⁴⁶ *Caldwell v Maguire and Fitzgerald*, unreported, 1997, at p.13.





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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."

In thus assessing the appropriate standard of care as *ordinary negligence taking account of all the circumstances*, Holland J. then sought to describe the type of behaviour which may amount to a breach of that *standard*. He wrote:⁴⁷

"In practice it may therefore be difficult to prove any such breach 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."

The language used may echo that of *Wooldridge v Sumner*,⁴⁸ and of cases in many American jurisdictions, but Holland J. as it seems at pains to emphasise the gulf between applying a *standard* of care predicated on *recklessness*, and utilising an *ordinary negligence standard* with a description of *recklessness* as the kind of behaviour that would breach that *standard*. In assessing the situation in this way, Holland J. is to some extent loyal to the comments of Phillimore J. in *Wilks v Cheltenham Homeguard*,⁴⁹ who, whilst accepting the *standard* of care from *Wooldridge v Sumner*⁵⁰ (that of *reckless disregard*), nevertheless stated:⁵¹

"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 to be applied if the circumstances warrant them."

Whilst apparently following precedent in announcing that the appropriate *standard* of care as *ordinary negligence*, it does appear to be unsatisfactory that Holland J. opined that only *reckless* or *intentional behaviour* would actually breach this *standard*. He seems, in fact, if not in form, to be applying just such a *standard* of *reckless disregard* but under the guise of *ordinary negligence taking account of all the circumstances*.

Contradicting the prevailing standard

Holland J., in his ruling in *Caldwell*, held that the defendants were guilty of lapses of care in their riding but that this did not constitute the *recklessness* or *intention* that in his mind

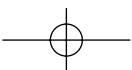
⁴⁷ *Caldwell v Maguire and Fitzgerald*, unreported, 1997, at p.13.

⁴⁸ *Wooldridge v Sumner* [1963] 2 Q.B. 43.

⁴⁹ *Wilks v Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 668.

⁵⁰ *Wooldridge v Sumner* [1963] 2 Q.B. 43.

⁵¹ *Wilks v Cheltenham Homeguard Motorcycle and Light Car Club* [1971] 1 W.L.R. 668 at p.676.



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was necessary to prove negligence. This however is not the approach that has been taken to participants in contact sports in English case law since *Condon v Basi*⁵² in the Court of Appeal and the source of Holland J.'s reasoning is elusive. The *standard* of care since *Condon v Basi*⁵³ has remained that of *ordinary negligence*, and not that of *reckless* or *intentional* action. Holland J. has apparently disregarded this *standard* in favour of offering, via the imposition of a *recklessness standard*, almost total immunity from prosecution for sports participants involved in horse racing.

Predictably, this judgment was met with approval by the racing fraternity. Mr Michael Caulfield, Chief Executive of the Jockeys' Association, commented:⁵⁴

“This is not a day for celebrations, because there is deep sympathy for Peter . . . but the implications for racing, and other sports where contact and injuries take place, were huge if the judgment had gone the other way.”

Similarly, Alan Lee (racing correspondent for *The Times*) wrote on the subject:⁵⁵

“The essential fabric of racing, stitched together by an unspoken assumption of risk, was tested and reprieved by a High Court judge yesterday. In finding against a civil claim for negligence filed by one jockey against two others, Mr Justice Holland settled a landmark case in the only way that could protect racing from a breakdown of trust and constant recourse to law.”

If this line is followed, then the implications for the jockey and it may be argued for any participant in a contact sport are that in future it may be very difficult to obtain compensation for another's negligence.

It is ironic that in attempting to justify his dismissal of the claim, Holland J. cited Chesterman J. in the Australian case *Kliese v Pelling*,⁵⁶ when he said:

“Thoroughbred horse racing is a competitive business, which is played for high stakes. Its participants are large animals ridden by small men at high speed in close proximity. The opportunity for injury is abundant and the choices available to jockeys to avoid or reduce risk are limited. It is, no doubt, for these reasons that claims for damages arising out of horse races have been rare and are likely to remain so.”

However, later in the same passage (not cited by Holland J.), Chesterman J. continued:⁵⁷

“But where evidence reveals that a rider has failed to take reasonable care which could and therefore should have been taken, the court is required by law to make a finding of negligence”.

Judgment was found for the claimant in *Kliese* and he gained a total of A\$91,996.25. In making his decision, Chesterman J. cited with approval the judgment of Kitto J. in *Rootes v*

⁵² *Condon v Basi* [1985] 1 W.L.R. 866.

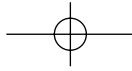
⁵³ *Condon v Basi* [1985] 1 W.L.R. 866.

⁵⁴ *The Times Online*, February 2, 2001, at p.2.

⁵⁵ *The Times Online*, February 2, 2001, at p.1.

⁵⁶ Chesterman J. *Kliese v Pelling*, unreported, 1998, at p.8, cited in *Caldwell v Maguire and Fitzgerald*, unreported, 1997, at p.15.

⁵⁷ *Kliese v Pelling*, unreported, 1998, at p.8.



*Shelton*⁵⁸ and it was this approach that was accepted unquestioningly in *Condon v Basi*⁵⁹ that has now apparently been disregarded in *Caldwell*.⁶⁰

In three jurisdictions, we have three different approaches adopted with a combination of results. In the United States (State of New York), a clear and categorical declaration of the *standard* of care to be applied—that of *reckless* conduct. The end result of the case was that there was no liability found. In Australia on the other hand, there was a rejection of the American approach and a clear acceptance that the appropriate *standard* of care is that of *ordinary negligence*. The situation in England and Wales demonstrated in *Caldwell*⁶¹ however lacks the clarity of the jurisdictions in United States and Australia and, consequently, it has led to an unsatisfactory result. The case has left the position related to contact sports in England and Wales shrouded in uncertainty. In one High Court judgment (confirmed in the Court of Appeal), Holland J. has stripped away the relative clarity that had been present since *Condon v Basi*,⁶² and replaced it with an unsatisfactory compromise that is going to need further judicial intervention to settle the appropriate *standard* of care for sports in England and Wales.

Conclusions

It is interesting to note that in most of the above-mentioned cases a failure to look before moving was found to be of crucial importance in finding liability, this failure to look demonstrating a clear lack of *reasonable care* on the part of the defendants. However, in the English “jockey” case, *Caldwell v Maguire and Fitzgerald*,⁶³ it was precisely this action (or lack of action) that led to the collision which precipitated the case; but the Court of Appeal in England and Wales was unable to reach the same conclusion as the Australian Courts. Judge L.J. stated:⁶⁴

“The defendants in this case were held by Holland J., after he had considered the evidence, to have made errors or lapses of judgment. What they failed to do was sufficiently allow for the presence of the horse ridden by Mr Byrne on their inside. . . . Their error in the heat and commitment of the race was to misjudge the exact opportunity that was available to them to take. They did not appreciate that Mr Byrne’s horse had not gone backwards as far as they thought it had. As they assumed that he was no longer in contention for the inside line, they did not physically look for him. Their assumption was wrong.”

The defendants’ clear failure to look before they moved was undoubtedly the cause of this accident, just as it had been in *Johnston v Frazer*,⁶⁵ *Kliese v Pelling*,⁶⁶ and also in *Flanders v Small*,⁶⁷ but there was no liability found, clearly lending weight to the suspicion amongst many that the *standard* of care being applied in English and Welsh courts is something different

⁵⁸ *Rootes v Shelton* (1967) 116 C.L.R. 383 at 389.

⁵⁹ *Condon v Basi* [1985] 1 W.L.R. 866.

⁶⁰ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. P6.

⁶¹ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. P6.

⁶² *Condon v Basi* [1985] 1 W.L.R. 866.

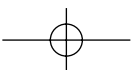
⁶³ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. p.6.

⁶⁴ *Caldwell v Maguire & Fitzgerald* [2002] P.I.Q.R. p.6, p.54.

⁶⁵ *Johnston v Frazer* (1990) 21 N.S.W.L.R. 89.

⁶⁶ *Kliese v Pelling*, unreported, 1998.

⁶⁷ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000).



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to that of the *ordinary negligence standard* being clearly applied in Australia. The question arises as to why it was held to be *unreasonable* to fail to look before moving in a race in Australia, but not in England and Wales.

When these cases are analysed, it can clearly be argued that, in England and Wales, while a *standard of ordinary negligence in all the circumstances* is applied *explicitly*, the conclusion may be drawn that it is in fact something rather different that is being *implied*. What makes the behaviour seen *negligent* in Australia, but not so in England and Wales? It can certainly be argued that, if anything, the conduct of the jockeys was actually more blameworthy in *Caldwell*.⁶⁸ Evidence showed that the defendants, based on the pattern exhibited in the race, had good reason to suspect that the claimant was close beside them (as was the case in *Flanders v Small*,⁶⁹ a factor of which that court was particularly scathing). In addition to that, the race in *Caldwell* was over jumps and therefore run at a slower pace than the races which took place in Australia. That the incident took place well away from the fences also serves to discount the jumps as a possible distraction for the jockeys. It is reasonable to argue that there may not have been the same sense of the *agony of the moment* that there may otherwise have been had the event been over the flat and consequently run at a far greater speed. Both of these factors would seem to point towards a greater sense of culpability in *Caldwell*,⁷⁰ yet it is in the Australian cases where liability was found. There seem to be no discernible reasons as to why there have been these different findings in what amounted to very similar cases. Each have authority stemming from the same case (*Rootes v Shelton*⁷¹), each involved the same basic error of judgment by the defendants (failure to look before moving their horse sideways), and each had the same consequential results. The culture involved in horse racing views the necessity of looking before moving as being absolutely essential. Such heedless movement is not something that jockeys may be considered to consent to in their profession. Whenever a jockey is aware of a riderless horse around his or her own horse, they must be mindful of the possibility of erratic and sudden movement (as was seen so graphically in the Grand National recently where such erratic movement caused the leading horse to refuse a fence). It is not something that they expect to happen when there is a jockey on board, despite the size, power and occasionally independent nature of the thoroughbred horse. And yet the courts involved were unable to agree on this basic issue, failing to show a common understanding of the sport.

⁶⁸ *Caldwell v Maguire and Fitzgerald* [2002] P.I.Q.R. p.6.

⁶⁹ *Flanders v Small* [2000] Q.D.C. 461 (November 30, 2000).

⁷⁰ *Caldwell v Maguire and Fitzgerald* [2002] P.I.Q.R. p.6.

⁷¹ *Rootes v Shelton* (1967) 33 A.L.R. ?????.