



Neutral Citation Number: [2007] EWCA Civ 21

Case No: B3/2006/1105

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Brighton County Court
Mr Recorder Charles MacDonald
BN303354

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2007

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE RIX
and
LORD JUSTICE HOOPER

Between :

Mountford
- and -
Newlands School and Anr

Respondent

Appellants

Mr Tim Kevan (instructed by DHM Stallard) for the Respondent
Mr Jonathan Bellamy (instructed by Badhams Law) for the Appellants

Hearing dates : 11th December 2006

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Lord Justice Waller :

1. On 19th February 1997 the claimant (MM) then a 14 year old schoolboy at Shoreham College Sussex, broke his elbow as a result of a tackle during an inter school 7-a-side under-15 rugby match being played against Newlands Manor School. Under-15 by the Junior Rugby Guidelines of the England Rugby Football Schools' Union (ERFSU) required boys to be under 15 as at 1st September in any year. Although before the judge there were many issues, for the purposes of this appeal, the facts can be stated as follows. The tackle was carried out lawfully but by a boy (RK) who had been selected for the Newlands Manor team although he was well over 15 on the relevant date. RK was considerably bigger than MM but (again not in issue on the appeal) not of a size that, if he had been under 15, ought to have led to him being excluded. The guidelines provided that players should not normally be allowed to play other than in their own junior group. Mr Recorder MacDonald QC held that the master who selected RK was in breach of a duty of care in selecting RK when he was over age, that the breach of duty caused the injury and that Newlands Manor School were vicariously liable. This is an appeal by Newlands School by virtue of permission granted by Gage LJ. There is no cross appeal seeking to challenge other aspects fought out at the trial. The appeal raises two issues which I can put in the following way for simplicity although there are nuances which arise when I come to consider each of the questions:-
 - i) Since there was no absolute rule against playing a boy over age, and since the judge found that it would not have been a breach of duty to select RK taking account of his size and weight if he had been under 15, should he also have found that, although the master did not realise RK was over age, the master could properly have selected RK and that thus there was no breach of duty?
 - ii) In any event even if there was a breach of duty, since a boy of RK's size and weight could have played and performed the lawful tackle and/or since (on the appellant's submission) RK's size or weight on the judge's findings did not contribute to causing MM's injury, was the judge entitled to find that the injury was caused by a breach of duty?
2. As already indicated other issues were resolved at the trial in favour of the appellants and there is no cross appeal. I should just identify those issues as a matter of background to the points that do arise. First MM was suggesting in his evidence that the tackle was itself a dangerous tackle alleging that RK swung him around and indeed alleging that RK was deliberately trying to "take him out of the game". The judge rejected that evidence preferring the description of the tackle provided by Simon Kibler (SK) who was the master who had selected RK for Newlands Manor School and was also refereeing the match that afternoon. Second it was alleged that RK had been deliberately selected in disregard of the fact he was over age as "Newlands' exocet missile"; the judge found that SK admitted he did not even know of RK's age and that that admission was so much against SK's interests that he believed it and thus any allegation of deliberately playing RK over age failed. Third it was alleged on behalf of MM that RK's size and height were such that even if he had been under 15 he should not have been allowed to play and thus should either not have been selected or should have been withdrawn by SK when acting as referee; the judge's finding in this regard is important. He held:-

“32. I cannot see that SK was at fault, if at all, in his separate capacity as referee. Regarding his role as schoolmaster and team selector, I take first the C’s complaint that in view of the different physiques of RK and C, RK should not have been allowed to play. This disparity has a separate role in the case in connection with the Rule 5 aspect, but viewed as a free standing allegation of fault I consider that it cannot survive the expert evidence. This took due account of the Baalpe publication relied upon by the C; anyway this was a training manual, not a match playing manual. The experts were in clear agreement that the physical disparity as such was not objectionable: see also the Joint Memo para 4 at TB p 144N. In this respect I cannot find that SK was at fault.”

3. The joint note of the experts to which he was referring reads as follows:-

“We note from various items of evidence a disparity in the size of [RK]. According to evidence, [RK] was 5 feet 11 inches tall and weighted 13-14 stone. We AGREE that [RK] was larger than the Claimant (based on the evidence of the Claimant’s size at the time, i.e. 5 feet 2 inches tall and weight about 7 stones). We AGREE that Rugby Football is a game which has been designed for players of various statures. And we are aware of instances where players of similar disparities have played together in a safe manner at under 15 and under 16 levels.”

4. The critical findings of the judge commenced with a consideration of the ERFSU guidelines for Junior Rugby and in particular the following :-

“Group . . . Juniors . . . Age Range . . . Under 13 on 1st September; Under 14 on 1st September; Under 15 on 1st September; Under 16 on 1st September; as required . . .

General . . . Structure . . .

4. Junior rugby covers the under-13, under-14, under-15, and under-16 age groups . . .

5. Players should not normally be allowed to play other than in their own junior age grouping.

6. No player aged 16 and below should be permitted to play against any team in which there are adult players, i.e. those aged 19 years and over.”

5. At the trial the two experts Mr Quittenton and Mr Petherick were allowed to express views on the interpretation of the guidelines. Mr Quittenton for MM expressed an absolutist position. Mr Petherick’s was more flexible. The judge’s consideration of that question by reference to the expert evidence is not criticised and was in the following terms:-

“34. The Quittenton position was that Rule 5 was an absolute rule; that the word “normally” was in practice treated as though it were not there; and that since around 1950 or 1955 the rule had never been interpreted as allowing a schoolboy player to move down an age group. This expert considered however that Rule 5 did allow a boy to move up, albeit only by one year. On this basis there had been an absolute rule against RK being played down into an Under 15 age group team.

35. The Petherick position was that Rule 5 (like all the ERFSU Guidelines) was no more than that – a guideline. Therefore none of the rules, by definition, was absolute. That was the more so in the case of Rule 5, since it used the formula “should not normally”. This was to be contrasted with other rules which used the formulae “must not” (e.g. Rule 13) or “should not” (e.g. Rule 6). It was clear that a “must not” rule was different from a “should not normally” rule and that the latter was not mandatory. Movement could be up or down (so long, presumably, as Rule 6 was not infringed). This expert explained the need for flexibility, in that for valid educational reasons a boy might be in the school year below his ERFSU age group (as in the case of RK), but for example might be unable to get a game unless he were allowed to “play down”. This could be because for example there was no team in his school for his age group; or because all inter school matches for his age group were played on a different day from the matches for the age group corresponding to his school year group. In such a case this expert was of the view that before allowing such a boy to “play down” the selector should carry out a risk assessment.

36. I have no doubt that the Petherick view of the meaning of the rule is the correct one. That accords with its linguistic meaning. Mr Quittenton’s view not only runs counter to the wording of Rule 5 but also lacks internal consistency, in that he considered Rule 5 to allow a boy to “play up”, so that even on his testimony the rule was not absolute. I do however take his evidence to indicate that departures from the rule are rare, especially perhaps departures involving “playing down”.”

6. Two points should be noted. First that the view of Mr Petherick, which the judge was accepting, involved a need for flexibility so as to allow for a boy who for educational reasons might be in a school year below his ERFSU age group (as was RK) but who might not otherwise get a game; and second, that the judge was persuaded by Mr Quittenton’s absolutist position that “departures from the rule are rare, especially departures involving playing down”.
7. The judge then considered how “rule 5” should be applied in practice and accepted Mr Petherick’s evidence. The judge found as follows:-

“On this basis what SK should have done was as follows: (a) he should have been aware that Rule 5 was material and consciously applied it (b) he should have known and thought about RK’s age (c) he should have considered whether, in the case of RK, there was on the face of it any sound reason to disapply the norm so as to allow RK to play down and (d) if so, he should have carried out a risk assessment before permitting that.”

8. No criticism is made of this finding by Mr Bellamy, who appeared for the school. The finding recognises that “rule 5 “is for guidance and is qualified by the word normally. The rule is not a rule of law such that a breach will bring about an automatic finding of liability. The guidance does however inform as to the content of a duty.
9. The judge then also found that a “risk” assessment would include consideration of whether RK might pose “any undue physical threat”, supporting this view by reference to Mr Quittenton’s rationale for “Rule 5” which was:-

“You just don’t put an older player against a younger one in a contact sport . . . the older player is more physically able, stronger, bigger. The older will broadly speaking tend to injure the younger, if only by accident”

10. The judge concluded that SK did none of the things he should have done. Furthermore the judge found that there was no reason for not applying the guidance. For example there was no suggestion on the evidence that RK would be unable to play if he did not play for the under 15 team, and the judge found as follows:-

“40. Therefore SK failed to think about and apply Rule 5 and there was no evidence of any legitimate reason to take RK out of the norm. It follows that he should not have been selected because he was not eligible. Because of SK’s general approach, he did not give evidence as to what risk assessment he would have carried out. Mr Petherick said he would have let RK play at least on a trial basis. But I do not see these matters as relevant. Because there was nothing in RK’s case to take him out of the norm, he was not eligible to play down and the stage of risk assessment was not reached. The fact that viewed in isolation the physical disparity between RK and other players was not objectionable may have been a reason not to re-apply the norm, but it cannot have been a reason to disapply it in the first place.”

11. Then having considered the law he said as follows:-

“MY DECISION AS TO LIABILITY

47. The C’s case based on the alleged tort of RK fails on the facts and in law. I acquit SK of any fault in his capacity as referee. I have to consider whether the omissions of SK in respect of selection were merely bad practice or amount to

negligence. On my findings SK exercised no judgment at all in respect of Rule 5. Having regard to the rationale of Rule 5 and to the evidence of the need for risk assessment, I regard the Rule as having existed at least partly to ensure the safety of players such as the C. I have to conclude that the complete failure to apply or justify a departure from the age rule in the case of RK did amount to negligence by SK. In one sense this may be said to be a curious result. This is because the experts agreed that the physique of RK was not in itself an issue. In this and perhaps in other ways the rule may be said to be arbitrary in its effect. But it existed and the C was entitled to its protection.

CAUSATION

48. I see no difficulty here. It is obvious that the presence of RK on the field materially increased the risk to the C (among others), by virtue of the far superior height and weight of RK, that a tackle (lawful or otherwise) would lead to injury. Rule 5 was intended to protect players such as the C from that risk and that is exactly the risk which eventuated. I do not think that the C has to exclude the possibility that he could have been similarly injured by a lighter tackler. That seems to me to be tantamount to saying that a participant in a risk sport can never prove that the negligence of an official or organiser caused him damage.”

12. These last three paragraphs, with respect to the judge, are not as clear as they might be. Rugby is a contact sport in which injuries occur without anyone being in breach of duty; the rationale of “Rule 5” is as accepted by the judge to prevent the increased risk of injury which flows from older, physically more mature and physically bigger boys playing against younger, physically less mature and smaller boys. What the judge appears to be saying in paragraph 40 is that if there was a legitimate reason, such as RK not otherwise being able to get a game, the joint evidence as to there being no objection to RK playing because of his physique would have allowed him to play. Mr Bellamy indeed, for Newlands School, submits that that is what the judge is holding. He furthermore submits that if that is right MM has failed to establish any relevant breach of duty. If SK could have played RK without being in breach of duty, any breach in failing to be aware of RK’s age (submits Mr Bellamy) has no causative effect. His being over age did not cause any injury as such.
13. Mr Kevan submitted that one cannot dissociate age from size and maturity, and that therefore a breach of the rule allowed a more mature player of RK’s size and weight to play whereas he should not have been. Although he did not do so directly by implication he must challenge the final sentence of paragraph 40.
14. In my view the joint expert evidence could not fairly be understood in the way the judge may have understood it having regard to Mr Quittenton’s approach to the rules. In my view the joint statement must be read as agreeing only that if boys were within the correct age bands then the physical size would not preclude the larger boy playing. There will be some boys who grow more quickly and subject to them not being so

large that they will be dangerous, they should be allowed to play in their age group, but it does not follow as it seems to me that reasoning along the following lines is acceptable. "Since a 15 year old might have been of height X and of weight Y, it is permissible to bring down someone over the age band who is of height X and of weight Y." The boy who is older is the size he is and the weight he is because he is more mature. To bring such boys down an age group must be to increase the risk of injury because the older boy is more mature and because it brings a bigger and more mature boy onto the field who should not be there. I accept that the word "normally" is present in "Rule 5" and I accept that that does allow for a discretion even to bring a player down an age group, but prima facie "Under -15" means "under-15", and schools playing one another would not expect over 15s to be playing.

15. In this case even if there might have been a reason to disapply the norm such as, for example, an inability for RK to play otherwise, if SK had known the age of RK and also taken account of his superior size weight and maturity, despite Mr Petherick's evidence that it would have been alright to have a trial, I do not agree. Even in such circumstances it is my view that having regard to his size - size due to maturity I emphasise - and the fact he was well over age, SK should not have selected him. Although it was very much with the benefit of hindsight I would understand SK's own evidence to be that he would agree that if he had known RK's age he would not have played him. In paragraph 16 of the judge's judgment he records "SK himself said with the benefit of hindsight it would definitely have been better to have applied the ERFSU guidelines on this occasion".
16. But in any event there is no suggestion that there was some special reason, such as an inability to get a game elsewhere, why on this occasion RK should be allowed to play and in my view a breach of duty was established.
17. In paragraph 47 the judge in dealing with breach of duty suggests that in one sense he is reaching a "curious result" because "the experts agreed that the physique of RK was not itself an issue . . ." I understand what the judge is saying, because he is right that if RK had been under 15 and of the same weight and physique no complaint could have been made. I can also see that the guidance could be said to be "arbitrary" in one sense - only a few days, even hours can make the difference once one selects one date in the year as dictating the age band. But the rule has the objective which I have sought to indicate and which the judge recognised. If it is applied as it "normally" should be, it is guidance there to protect smaller less mature boys from being injured by larger and more mature boys whether in incidents which involve legal tackles or illegal tackles. In my view the judge was right in saying that MM was entitled to its protection.
18. As regards causation, it was not in issue that the test is conveniently stated in *Chester v Afshar* [2005] 1 A C 134 at para 95 citing McHugh J in *Chappel v Hart* :-

"Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. If a wrongful act

or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers, whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff. That being so, whether the claim is in contract or tort, the fact that the risk eventuated at a particular time or place by reason of the conduct of the defendant does not itself materially contribute to the plaintiff's injury unless the fact of that particular time or place increased the risk of the injury occurring."

19. Furthermore although Mr Kevan had an alternative argument that since the rule was there to protect MM once a breach of the rule was established i.e. a boy over age was playing in a game in which he should not have been, any injury could be taken to have been caused by breach of the rule, his primary case accepted that to establish causation MM would have to establish that the injury was caused or contributed to by the danger the rule was seeking to avoid, i.e. the danger of a more mature and physically bigger boy injuring a smaller boy.
20. Much time was spent at the hearing analysing the very succinct finding on causation of the judge (at his para 48). In fairness to the judge it should be recognised that he had many issues to deal with and causation seemed "obvious" to him. But the problem arises as to whether he was finding that there was a breach of the rule and all else followed, or whether he was finding that the risks against which the rule was guarding occurred, i.e. that the tackle was the type of tackle which an older more mature and physically bigger boy might make and that caused the injury.
21. Mr Bellamy for Newlands School submitted that the judge does not say in paragraph 48 that the tackle was of the type that an older and bigger boy would make on a smaller boy and suggests that all the judge can be holding having regard in particular to what the experts had agreed as to the relevance of physique was that a mere breach of the rule as to age established causation. If the judge had intended to hold that RK's maturity, weight or physique had contributed to the injury he could have said so in terms and he did not.
22. Mr Kevan submitted that the judge is clearly saying that the increase in risk was by virtue of size and weight, and then saying the risk eventuated. That he submits is a clear finding that RK's superior weight and size contributed to the injury.
23. In my view the judge is finding that the risk against which the rule was guarding eventuated i.e. the superior size weight and maturity contributed to MM being injured. If the case had concerned some incident which could have nothing to do with size and weight, there might be some doubt about the judge's conclusion. But the judge found the mechanics of the tackle in para 24 in the following words:-

"The only other version of the tackle was given by SK in his oral evidence. That too must be treated with circumspection in that these events all happened very fast a long time ago and SK

did not, in either of his two statements (dated 30/03/98 and 18/05/05), give a detailed description of the tackle. The particulars of defence (amended and unamended) are relatively inexplicit on this aspect and in any event SK was not the signatory. His oral evidence in cross examination was that the C had just passed the ball but his statement (evidence in chief) said that the C was carrying the ball when tackled. In his oral evidence SK told me that the direction of play at the critical moments was not Northwards but Southwards. He bore this out with geographical details of the location. It is common ground that play continued for a short time after the tackle until it was realised that the C had been injured. If the direction of play had been to the North there would have been a try scored by SG but instead, according to SK, play proceeded to the half way line. I accept his evidence as to the direction of play. SK said that RK came towards the C from the South West and that the C passed the ball to his left (to the East) as the tackle came in. The angle of the tackle was 45 degrees. RK grabbed the C's right arm shortly followed by his left arm (or the other way round) and the C was twisted bodily to the C's left. RK pulled the C in with a twisting but not a swinging motion and twisted him to the ground. RK contacted the C's body in the midriff area or at waist height. SK was about 5 metres away when this happened."

24. In paragraph 17 he had put the matter shortly this way:-

"The match took place at the Salts Recreation Ground, Seaford, Sussex. Each side fielded a team of seven boys (with further players in reserve). MG had selected the Shoreham team and SK had selected the Newlands team. SK was referee, with an Australian gap year student from Newlands acting as one touch judge and MG acting as the other. Within a few minutes of the start of the first lot of play RK tackled the C. The C came to the ground with his left arm behind him in such a way that he fractured his left elbow. As soon as it was appreciated that the C was badly injured the match was abandoned and the C was taken to hospital."

25. I am extremely sympathetic both with the judge and the witnesses who were seeking to describe an incident which occurred some 8 or more years previously and we have had no real explanation as to why it took so long for this comparatively straightforward case to come to trial. Thus if, even from the judge's description, it cannot be said with absolute precision what occurred one should not be surprised. But what is apparent is that the judge was satisfied that RK did not tackle round the legs, that he got hold of MM's arms and physically twisted MM to the ground. His weight did not fall on MM but it was the kind of physical tackle which a bigger boy does perform on a smaller boy.

26. I have no doubt that in that context the judge was holding rightly that the increased risk that the rule was meant to guard against eventuated i.e. RK's maturity, size and weight contributed materially to the injury MM suffered.
27. I would accordingly dismiss the appeal.

Lord Justice Rix: I agree.

Lord Justice Hooper: I also agree