Neutral Citation Number: [2022] EWHC 1108 (QB)

Case No: CF066/2021 CA

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from Recorder Craven sitting in Swansea Civil Justice Centre

Cardiff Civil and Family Justice Centre

Date: 18 May 2022

Before :

THE HON. MR JUSTICE LANE

- -

Between :

Fulham Football Club	**Appellant**
- and -	
Mr Jordan Levi Jones	**Respondent**

- -
- -

Mr L. Krsljanin (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr A. Arentsen (instructed by **David W Harris & Co. Solicitors**) for the **Respondent**

Hearing date: 12 April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE LANE

Mr Justice Lane :

1. On 10 December 2016, a football match took place at Motspur Park, London between the under 18 teams of Fulham Football Club and Swansea City Football Club. The respondent, Mr Jones, was playing for Swansea, whilst Mr Harris was a member of the Fulham side, playing in midfield.

2. Towards the end of the first half of the match, Mr Harris tackled Mr Jones, as a result of which Mr Jones suffered a serious injury to his right ankle, which very regrettably ended his professional football career.

A. THE PROCEEDINGS

3. On 10 December 2019, Mr Jones commenced proceedings against Fulham, as the employers of Mr Harris vicariously liable for his actions, on the grounds that the tackle on Mr Jones amounted to an assault, or alternatively, negligence on the part of Mr Harris.

4. The trial of the action took place on 5 and 6 August 2021 before Mr Recorder Craven. The trial was conducted remotely by CVP. The recorder heard evidence from Mr Jones, Mr Harris, Mr Anthony Pembridge (the coach of the Fulham side) and two expert witnesses, Mr Keith Hackett, who was called by Mr Jones, and Mr George Cumming, who was called by Fulham.

5. The recorder handed down his judgment on 13 October 2021. In it, the recorder dismissed the claim for assault but held that Fulham was vicariously liable for what he found to be the negligent act of Mr Harris in tackling Mr Jones as he did. At the hand-down, Mr Krsljanin, then as now counsel for Fulham, applied for permission to appeal. The recorder refused permission. In doing so, he made a number of statements upon which Fulham seeks to rely.

6. Permission to appeal was granted by Eady J on 10 February 2022 on each of the four grounds of appeal advanced by Fulham. I heard the appeal on 12 April 2022. At the request of Mr Krsljanin and Mr Arentsen (who appeared for Mr Jones, as he had before the recorder) I viewed the video recording, which the recorder had seen at the trial. I am grateful to Mr Krsljanin and Mr Arentsen for the quality of their written and oral submissions.

7. I bear in mind that this appeal is governed by CPR 52.21. CPR 52.21 (3)(c) provides that the task of the appellate court is to decide whether the decision of the lower court was "wrong". A decision will not be "wrong" because the appellate court merely disagrees with the lower court's legitimate findings of fact.

B. THE TACKLE

8. Before turning in detail to the recorder's judgment, it is, I consider, helpful to describe the tackle in a little more detail, based on the recorder's findings on which no issue is taken. Shortly before the tackle, Mr Jones had possession of the ball. He had started to run into Fulham's half of the pitch, towards its goal. Mr Jones was running close to the touch line. Mr Harris chased after Mr Jones. He came more or less parallel to him and made his tackle from the side. The experts agree that Mr Harris's tackle was not

from behind. Mr Harris led with his right foot and made contact first with the ball, stopping it. Mr Harris's right foot came into contact with Mr Jones, as did Mr Harris's left foot.

9. Mr Jones was brought to the ground. Immediately after, Mr Harris rose to his feet, collected the ball (which was still in play) and played on. The recorder did not find the tackle to be a "scissors tackle" in the sense of "a deliberate trap or pincer manoeuvre" (paragraph 64 of the judgment).

10. The tackle happened in full view of the referee, who was only a few metres away from Mr Jones and Mr Harris. He is a fully-qualified FA-accredited referee, working as such part time. He did not award a foul against Fulham, let alone a yellow or red card.

11. The video discloses no adverse reaction from spectators, players or coaching staff. A number of spectators were present on the touchline near to where the tackle took place.

12. Before the issuing of the claim, no complaint had been made in respect of the tackle; nor was any disciplinary action or investigation instigated.

C. CASE LAW ETC

13. In order to do justice to the recorder's judgment - and to understand the challenge made to it - it is necessary to examine the case law relating to claims of negligence arising from the actions of participants in sporting competitions. The first case is Condon v Basi [1985] 1 WLR 866. Condon involved a tackle which broke the plaintiff's leg, during a Sunday afternoon match between Whittle Wanderers and Khalsa Football Club, playing in the Leamington local league. The referee described the challenge as a sliding tackle which came late and was made in a reckless and dangerous manner, by lunging with the defendant's boot, showing about a foot to 18 inches from the ground. The referee considered that this constituted "serious foul play" and he sent the defendant off the field.

14. The trial judge accepted the "value judgments" of the referee, concluding as follows:-

> "It is not for me in this court to attempt to define exhaustively the duty of care between players in a soccer football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant's duty of care towards the plaintiff. He was clearly guilty, as I find the facts, of 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".

15. Sir John Donaldson MR, giving judgment in the Court of Appeal, could not see how the trial judge's conclusion could be faulted on the facts. On the law, the Master of the Rolls did not see how it could "possibly be said that the defendant was not negligent".

16. In the course of his judgment, Sir John Donaldson MR cited the case of Rootes v Shelton [1968] ALR33, in the High Court of Australia. He considered the judgments in that case of Barwick CJ and Kitto J. Sir John Donaldson MR preferred the approach of Kitto J. The latter had emphasised that "it must always be a question of fact, what

exoneration from a duty of care otherwise incumbent upon, the defendant was implied by the act of the plaintiff in joining in the [sporting] activity". Kitto J said that:-

> "…the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organised affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused, a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances".

17. In McCord v Swansea Football Club and another [1996] UK 409, Ian Kennedy J adopted the following passage from the unreported judgment of Drake J in Elliott v Saunders and another (10 June 1994); Having pointed out that regard must be had to the "circumstances of each individual case". Drake J held:-

> "In considering the circumstances, the court should not forget that football is a game necessarily involving strong physical contact between opposing players, that it is a game sometimes played at a very fast speed, and the players have to take very very quick decisions as to how to react in where's [the] situation immediately confronting them. It is easy enough for the armchair video watcher to replay the incident frame by frame and then decide how the player should ideally have reacted to the situation, but in the real world, that is to say in the agony of the moment in the heat of the game, the player has no more than literally a fraction of one second in which to make a decision. What might be considered a mistake or error of judgment on replaying a video frame by frame may be no more than the ordinary reaction of even a skilled player.
>
> Even the very best players will not always do what in retrospect seems to have been the ideal thing to have done. Therefore, an error of judgment or mistake will certainly not always mean that the player has failed to exercise a duty of care appropriate in the circumstances."

18. At this point, we move to the sport of horse-racing. In Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054; [2022] PIQR P6, the jockey was seriously injured in the course of a race. A steward's enquiry into the incident found that Maguire and Fitzgerald had been guilty of careless riding. The injured jockey sued them. The trial judge dismissed his claim. The judge held that what was reasonable in the

circumstances to avoid injuring fellow contestants, included an analysis of the object of the contest, the demands made upon the contestants, any inherent dangers, the rules of the contest, its conventions and customs; and the standards, skills and judgment, reasonably to be expected of a contestant. The judge considered the threshold for liability to be inevitably high and it was not enough to show an error of judgment or momentary lapse in skill when subject to the stresses of a race. This meant it might be difficult to prove a breach of duty in the absence of reckless disregard for the safety of a fellow contestant.

19. The appellant appealed on the basis that the trial judge had set the standard of care too low, by effectively requiring proof of deliberate or reckless disregard for safety.

20. The Court of Appeal dismissed the appeal, finding that the trial judge had not said that a claimant has to establish recklessness; merely that in practice, given the circumstances, the threshold for liability was high.

21. Tuckey LJ noted that the respondents admitted they should have checked to see that the line they were taking was safe. Like the trial judge, however, Tuckey LJ did not think that "their failure to do so can be characterised as anything more than an error of judgment, an oversight or lapse which any participant might be guilty of in the context of a race of this kind". What was unusual about the incident was the exceptional seriousness of the injuries sustained by the appellant. Although the Jockey Club's rules and findings "are of course relevant matters to be taken into account... as the authorities made clear, the finding that the respondents were guilty of careless riding is not determinative of negligence. As the judge said, there is a difference between response by the regulatory authority and response by the courts in the shape of a finding of legal liability." (paragraph 28).

22. Judge LJ agreed:-

> "We are here concerned with a split-second, virtually instantaneous, decision made by professional sportsmen entrusted with powerful animals, paid and required by the rules of their sport to ride them, at speed, to victory or, failing victory, to the best possible placing: in other words, to beat all the other horses in the race, or endeavour to do so. The course has no lanes; nor is it straight. The horse, as this case demonstrated, has a will of its own. The demands on professional jockeys to ride at all are very heavy. They require skill and physical and mental courage. To win, beyond skill and courage, they need determination and concentration, the ability rapidly to assess and re-assess the constantly changing racing conditions, and to adjust their own riding and tactics accordingly—a quality that must depend in part on experience and in part on intuition or instinct." (paragraph 31).

23. Judge LJ approved the judgment of Kitto J in Rootes v Shelton in holding that "a finding that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability and negligence". He emphasised that in the context of sporting contests, a distinction needs to be drawn between "conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment,

oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race". (paragraph 37)

24. Overall, Judge LJ found that the "threshold of liability is a high one. It will not easily be crossed".

25. At this point, it is necessary to make reference to chapter 17 of *Football and the Law* (2019) edited by De Marco QC. Chapter 17 is entitled "Personal injury" and is written by Alistair McHenry.

26. Mr McHenry considers that, when courts have been required to adjudicate claims arising from football matches "they have been hesitant in doing so, treading carefully, perhaps mindful of intervening in a world which is heavily self- regulated." He considers that such caution is apparent in the use by courts of language with which football is familiar: "part and parcel of the game", the "general run of play" and the "heat of the battle" are all terms which have been used readily by judges. The author considers that the phrases "strike to the heart of when judicial intervention has been, and will continue to be, necessary."

27. At 17.2, Mr McHenry makes reference to the unreported judgment of Hallett J in Pitcher v Huddersfield Town Football Club, (HQ 0005953 - QBD transcript, 17 July 2021) in which she described cases in which the threshold for liability is reached as "football crimes". At 17.9, referring to an essay by James and Deeley entitled "the standard of care in sport negligence cases", it is said that the courts would now have to accept that they needed to "play closer attention to the way that sport is actually played; not just by its rules but according to an unwritten code of playing culture". The concept of a "playing culture" was one which ensured that the inherent dangers of the sport were being taken into account, whilst preserving the common logic that participants should be bound by the same legal duty to take reasonable care as is everyone else away from the sporting environment. Only those challenges that are "clearly unacceptable and beyond the playing culture of the sport will be considered to be unlawful".

28. The final case under this heading is one which was decided after the recorder had given judgment in the present appeal. In Tylicki v Gibbons [2021] EWHC 3470 (QB), HHJ Karen Walden-Smith, sitting as a judge of the High Court, found in favour of the claimant who had been catastrophically injured as result of a collision between his mount and that of the defendant, during a race at Kempton in October 2016.

29. The judge noted, at paragraph 30 of her judgment, that a distinction falls to be drawn in the case of sporting contests, between conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention which do not sound in damages. She noted that incidents of interference in horseracing are common and that some of these are sanctioned by the stewards after an inquiry as being careless or, on extremely rare occasions (possibly as few as one every 10 years according to the evidence), as dangerous. In the case before her, the judge noted that the stewards' inquiry concluded that there had only been accidental interference by the defendant. The judge took careful account of that outcome, concluding, however, that having regard to all the evidence before her, this finding was not determinative. She found it "very surprising that the stewards did not decide to adjourn the inquiry, which they had power to do, in order that they could carry out a

more thorough investigation, and, in particular, hear from the other jockeys" (paragraph 54).

30. The judge conducted a careful analysis of the totality of the evidence, including that of the respective experts and the video recordings. At paragraph 75, she stated that the issue for the court was whether what happened at a certain point during interactions between the horses and their jockeys was a "racing incident", amounting to a very unfortunate accident with tragic consequences, or whether the actions of the jockey, Mr Gibbons were such that he was liable:-

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

31. At paragraph 76, the judge confirmed that she had given "very detailed consideration and close scrutiny to the evidence given by both jockeys and the experts on this part of the race in order to be able to ascertain what happened, and why".

32. At paragraph 87, after consideration of the evidence of the jockeys in the race, the video evidence and the evidence of the three experts, "the judge accepted the evidence of the claimant's expert with respect to what happened at that point. She then explained her conclusions, which included the following:-

> "88. After that initial collision and the shout "Gibbo" from Mr Tylicki there was a further opportunity for Mr Gibbons to act in a way that may have avoided the second collision, namely by then moving out to the left away from Nellie Deen in order to give her the opportunity to progress safely. He didn't, but continued pulling across to the rail which gave Nellie Deen no space. Despite Mr Tylicki pulling hard to decelerate and bring Nellie Deen backwards as quickly as possible, the consequence of Mr Gibbons continuing with bringing Madame Butterfly into the rail, is that there was the second collision between the forelegs of Nellie Deen and the back heels of Madame Butterfly which brought down Nellie Deen and Mr Tylickil with her.
>
> 89. In my judgment, during this spell of riding between 15:27:51 through to 15:27:55, Mr Gibbons had a reckless disregard for Mr Tylicki's safety. Mr Gibbons knew, or at the very least ought to have known, that Mr Tylicki was inside on the rail and had moved up to within a half-length of Madame Butterfly. He did more than merely control Madame Butterfly to enable her to

keep a racing line around a bend that had started 6 seconds before at 15:27:45. He exerted real pressure on the right hand rein of Madame Butterfly in order to bring her across Nellie Deen's racing line and did not stop bringing her in close to the rail even after the first collision on the cusp of 15:27:53/15:27:54. Even if, which I do not accept is credible, Mr Gibbons was unaware of the presence of Nellie Deen until he heard the shout of "Gibbo" from Mr Tylicki, he certainly knew of the presence of Mr Tylicki and Nellie Deen at that time and he does nothing to pull Madame Butterfly off the rail in order to give Mr Tylicki a chance."

D. THE LAWS OF THE GAME

33. The following is taken from Appendix 2 to the expert report of Mr Hackett. The relevant laws of Association Football for our purposes are as follows:-

"**LAWS OF THE GAME 2016/17 Page 81**

If an offence involves contact it is penalised by a direct free kick or penalty kick.

- Careless is when a player shows a lack of attention or consideration when making a challenge or acts without precaution. No discipline sanction is needed.

- Reckless is when a player acts with disregard to the danger to, or consequences for, an opponent and must be cautioned

- **Using excessive force is when a player exceeds the necessary use of force and endangers the safety of an opponent there must be sent off**

LAWS OF THE GAME 2016/17 Page 86/87

Sending-off offences

A player, a substitute or substituted player who commits any of the following offences is sent off:

- denying the opposing team, a goal or an obvious goal-scoring opportunity by deliberately handling the ball (except a goalkeeper within their penalty area)
- denying an obvious goal-scoring an opportunity to opponent moving towards the opponent's goal by an offence punishable by a free kick (unless as outlined below)
- **serious foul play**
- spitting at an opponent or any other person
- violent conduct

- using offensive, insulting or abusive language and/or gestures
- receiving a second caution in the same match.

LAWS OF THE GAME 2016/17 Page 88

Serious foul play

A tackle or challenge that endangers the safety of an opponent or uses excessive force or brutality must be sanctioned as serious foul play. Any player who lunges at an opponent in challenging for the ball from the front, from the side or from behind using one or both legs, with excessive force and endangers the safety of an opponent is guilty of serious foul play."

E. THE JUDGMENT OF THE RECORDER

34. The judgment records in detail the evidence given to the recorder by the witnesses, including what they said in cross-examination and re-examination. Mr Harris was recorded as agreeing under questioning from Mr Arentsen that if he had leapt in the air and made contact with Mr Jones, then that would be dangerous and he would be out of control, the implication being that this would be because his leg had left the ground. He denied that both of his legs had left the ground shortly before the contact.

35. Mr Hackett told the recorder that Mr Harris had, in his view, launched himself feet off the ground. With his right leg leading, he lunged at Mr Jones bringing him to the ground following through in a scissors movement with his left leg. Mr Hackett considered this was an act of serious foul play. He could not explain why the referee had not given a foul. In his opinion, Mr Harris should have been sent off.

36. Mr Cumming considered the tackle made by Mr Harris to be a legal sliding tackle, which displayed a high degree of skill. It was not made carelessly, recklessly or using excessive force. Under cross examination, Mr Cumming agreed that at one point Mr Harris had both legs off the ground. He nevertheless maintained that it was a straightforward football challenge and that he considered Mr Harris was in control. The video was not good and was limited in its usefulness. The tackle was a good professional challenge. Mr Harrison got the ball. He could have just done a sliding tackle, put the ball in touch. It was, in fact, an excellent display of skill.

37. In paragraph 33 of his judgment, the recorder made reference to the joint statement of the experts, which included the following points:-

"They agreed the referee gave clear signals throughout most of the match but disagreed on the one signal he made following the tackle.

They agreed the tackle was initiated when Harris was level with the Claimant but also agreed that an illegal challenge can be made can be from behind, from the front or from the side.

Mr Hackett believed the challenge was a lunge and Harris was not in control of his body when he made it; Mr Cumming

> disagreed and considered the challenge was a legal and skilful and successful attempt to win the ball.
>
> They agreed that refereeing in many instances was subjective and different referees could have different views of the same incident. They agreed that the referee raised his right arm and then lowered it as Harris moved forward with the ball. Mr Hackett says he expected the referee was about to award a foul but then allowed play to continue, and he considers that the referee thereby made a mistake. Mr Cumming considers the referee raised his right arm to indicate that play should continue, which he says is a generally recognised and accepted indication, and the referee was correct.
>
> The experts saw no indication of any reaction by the spectators near to the incident but this they say would be normal. They found it surprising that the Claimant says he heard gasps from the Swansea coaching staff who were over 50 yards away."

38. At the beginning of paragraph 47, the recorder noted the submissions of counsel. Mr Arentsen referred to Caldwell, which held that there would be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. It was not possible to characterise momentary carelessness as negligence. Mr Arentsen also told the recorder that "the tackle was serious foul play within the meaning of the laws and Harris's conduct was a breach of the duty of care owed to a fellow player". The tackle was dangerous because, being in the air, Mr Harris could not exercise control. The referee's decision not to penalise the tackle was by no means conclusive. Mr Harris did not say that he made an error of judgment and Mr Arentsen argued that Mr Harris made "a deliberate decision to leap."

39. As for the experts, Mr Arentsen submitted that the evidence of Mr Hackett should be preferred to that of Mr Cumming, who had been be too influenced by the fact that Mr Harris got the ball. The fact of a serious ankle injury showed that considerable force had been used and that Mr Harris's conduct "fell below that which was expected".

40. Mr Krsljanin urged caution so as to avoid applying in hindsight an "armchair video analysis", finding mistakes or errors of judgment in acts which had been committed "in the agony of the moment in the heat of the game". The expert evidence of Mr Cumming was to be preferred. It must be relevant that Mr Harris had gone for and claimed the ball.

41. The recorder's findings begin at paragraph 56:-

> "56. In *Basi* Lord Donaldson said:
>
> "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.

> The circumstances in which negligence is judged include the fact that association football is a contact game. It is apparent from what Tuckey LJ said at paragraph 23 in *Caldwell v Maguire* (and Lord Woolf CJ agreed) that the threshold of liability in negligence high. Whilst a claimant does not have to establish recklessness, there is *"no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required ."* Breach of the rules is not itself determinative of liability and neither is a referee's decision one way or the other but actual serious foul play "that endangers the safety of an opponent or uses excessive force or brutality (see p.116) would very likely amount to negligence."

42. At paragraph 57, the recorder found that Mr Harris had not committed an assault on Mr Jones. Mr Harris had not acted "spitefully and malevolently". Accordingly, at paragraph 58, the recorder said that he therefore had to concentrate on the claim in negligence.

43. At paragraph 59, the recorder described how he would approach the video evidence:-

> "I have watched I have watched the video of the incident many times including frame by frame and I have looked at the other videos and photographic evidence and considered the evidence of the witnesses. I [sic] interpreting the video I take into account (i) it is only two dimensional making it difficult to judge depth (ii) the camera appears to be at least the full width of the pitch away, (iii) the camera zooms in and out (iv) the quality is not high and the stills are somewhat blurred (v) the action happens very quickly (vi) nevertheless the whole incident is shown; (vii) the evidence of the Claimant and Mr. Harris about what happened, (viii) the evidence of the experts who may be able to see and interpret things I cannot or would not if they were not pointed out to me, (ix) the parties' submissions about what it does or does not show. I may conclude the video does not show or does not show clearly enough certain aspects of what happened and whatever I provisionally think the video shows may be outweighed by other evidence and considerations."

44. There then follow five paragraphs in which the recorder did no more than describe his approach to the video and to the still photographs. The only reference to other evidence is in paragraph 64, where the recorder stated that "I think the video shows Harris's left leg going immediately behind the claimant's right leg in the end Mr Cumming accepted this".

45. Paragraph 65 reads as follows:-

> "So I conclude that as he drew towards the Claimant Harris launched himself off the ground, both legs coming off the ground. He could protect himself in a certain direction at project point of take-off but would not then have control over his flight

> except to some extent being able to move where his legs went . Though the Claimant was aware of somebody coming up behind him the precise moment of such a tackle would have come as a surprise to him. Harris could aim for the ball and I accept he did, but he could not be sure what else he might contact or do or, being a large man, with what force he might do it. He was aiming at a ball which was being played forward by the other running player and he was intending to get between that player's feet and legs and the ball."

46. In the concluding paragraph 66, the recorder said that in the "particular way" in which Mr Harris carried out the tackle "it was in my view a reckless manoeuvre involving excessive force". Mr Harris "leapt or launched himself forward with two legs off the ground". Mr Harris was "out of control in the sense of once in the air he could not alter his impetus short of perhaps bringing both feet down abruptly to stop himself, which is not what he did". Mr Harris "aimed for the ball but that was bound to involve a collision with the Claimant and Harris would not know what effect that would have except that he should have realised it would be very likely forceful and bring the other player down".

47. The recorder found that it "does not matter that Harris did not intend to injure the claimant or that in a general sense it can be said the tackle was made in a fast moving heat of the moment context". It was "a serious error of judgment to make the tackle in the way he did, going beyond the kind of mis-judgments, mis-timings and relatively minor or momentary lack of care which all players have to accept as an inherent risk of the game not amounting to negligence".

48. The recorder concluded that what Mr Harris did:-

> "… was a foul which the referee should have penalised. That he did not is a puzzle, but not a sufficient one to negative my views about what actually happened. I bear in mind the risks of making judgments in hindsight, but that is not the same as carefully studying the evidence from witnesses, photographs and coming to a decision that was not made on the day. I also bear in mind the high standard of liability referred to in the authorities and that I am rejecting Mr Cumming's view, though of course accepting Mr Hackett's. What Mr Harris did was a breach of his duty to take the reasonable care for another player's safety that was appropriate in all the circumstances of a professional game of football. He was therefore guilty of negligence and therefore the defendant is vicariously liable for that negligence and for the injury to the claimant and its consequences".

F. THE HAND-DOWN

49. The judgment was handed down on 13 October 2021, Mr Krsljanin applied for permission to appeal on four grounds. Mr Krsljanin draws attention to the following passage from the recorder's decision on permission:-

> "ii) As to not perhaps analysing bit by bit why I decided in favour of one expert, Mr Hackett rather than Mr Cummings, I felt as I stated in my judgment, that having set out the various contentions, having in particular set out that on looking in detail and time after time again at the video evidence, I was bearing in mind the various other evidence, including the experts' ways of analysing it and what they said as experts they could or could not see in it and, in the end, as I had to judge, formed my own view bearing all that in mind and I feel that what I have said as to why I have reached my conclusions set against my setting out of what, in particular, Mr Cumming said is sufficient to analyse why, as I have said, towards the end of my judgment, I reject his view. It is not so much because I think he is wrong. It is because I conclude otherwise on the evidence as a whole.
>
> iii) As to not taking into account contemporaneous reactions, I adopt what Mr Arentsen has just said. I said why I was not persuaded in the opposite direction by what the referee did or did not do.
>
> iv) As to what the other players or crowd of spectators did or did not do, I do not feel that was weighty enough in any way to draw any conclusion and so I did not take it into account in the end."

G. DISCUSSION

Ground 1

50. Ground 1 contends that the recorder erred in failing to apply the test set out in the authorities concerning the standard for liability for personal injury claims in the professional sports context. This requires the court to apply a two-stage analysis. First, it must be determined whether the defendant breached the Laws of the Game and, second, it must then be determined whether there was negligence (which is set at a materially higher standard than the Laws of the Game). Fulham contend that the recorder did not adopt this approach and as a result his conclusion is wrong in law.

51. In advancing Ground 1, Mr Krsljanin criticised paragraph 56 of the recorder's judgment. It was, he said, simply wrong for the recorder to give a self-direction that actual serious foul play, "that endangers the safety of an opponent or uses excessive force or brutality" would "very likely amount to negligence". Mr Krsljanin submitted that what the recorder did was to omit the second stage of the inquiry demanded by the judgments in Caldwell, which requires more than a finding that the Rules of the Game have been breached.

52. Mr Arentsen submitted that there was, in fact, only a single question; namely, whether the person concerned had been guilty of actionable negligence. The last sentence of paragraph 56 of the judgment was in the nature of an *obiter* remark by the recorder, who had earlier noted correctly the legal submissions made to him on this matter.

53. I am far from satisfied that the case law invariably requires the application of a mechanistic two-stage test of the kind for which Mr Krsljanin contends. One does not

see it in, for example, the judgment of HHJ Karen Walden-Smith in Tylicki , which Mr Krsljanin relies upon (albeit for a slightly different point).

54. I am, nevertheless, satisfied that paragraph 56 of the recorder's judgment contains a material misdirection. The error lies in the recorder treating certain breaches of the Rules of the Game as being "very likely" to amount to negligence. The consequence of the error was to distort the recorder's analysis of whether Mr Harris was guilty of negligence.

55. I do not consider there was anything in the submissions advanced by Mr Arentsen that led to this error. On the contrary, at paragraph 48 of the judgment, the recorder noted the submissions for Mr Jones as being that Mr Harris's "tackle was serious foul play within the meaning of the laws **and** Harris's conduct was a breach of the duty of care owed to a fellow player". (my emphasis)

56. The record of proceedings reinforces this. At page 257 of the trial bundle, Mr Krsljanin is recorded as saying that:-

> "The standard for civil liability is set higher than the Laws of the Game. The Laws of the Game govern how a game is played and within the scope of those laws and the bodies that govern the game there are certain sanctions that can be imposed, of course the yellow card, the red card, the sending off. What is imposed within a finding of civil liability is something much more serious, as your honour will appreciate. "

57. Mr Krsljanin then went on to say it was for this principled reason that if the recorder could not be satisfied that there was a breach of the Laws of the Game, there could not be negligence. At that point, Mr Arentsen intervened to say that "I don't mean to interrupt my learned friend at all, but I don't think that there is anything at all between us in relation to that, if it assists".

58. As we have seen, Caldwell was a case where the race stewards had found the defendant guilty of careless riding. That finding of carelessness, however, in the context of the rules of racing was not determinative of liability for negligence.

59. The laws of horseracing deal with wrongs of different degrees of seriousness. The judgment in Tylicki refers to 'dangerous riding', which is found by stewards only in extremely rare cases, estimated as one every 10 years.

60. The laws of Association Football likewise involve a hierarchy of playing offences. Careless behaviour attracts a direct free kick or penalty kick. Such behaviour is commonly referred to as a "foul". A reckless offence occurs when a player acts with disregard to the danger to, or consequences for, an opponent. The player concerned must be cautioned, which currently means the referee showing a "yellow card". Using excessive force is where a player exceeds the necessary use of force and endangers the safety of an opponent. For this, the player must be sent off (i.e. shown a "red card "). Leaving aside the use of "or" as opposed to "and", the definition of "serious foul play" deals with the "red card" offence in the case of tackles or challenges.

61. Mr Krsljanin submitted that the definition of "serious foul play" contains no mental element; it is, in his words, entirely concerned with the "*actus reus*". A player could, accordingly, be sent off for serious foul play even though they acted innocently.

62. I am not sure this is entirely right. Given that "yellow card" conduct is specifically described as reckless, with a player acting in disregard of danger to consequences for an opponent, it is plain that, at this point, the Laws of the Game are concerned with establishing a player's state of mind, however difficult that might be for a referee during a match. The more serious "red card" breaches appear, therefore, to be aimed at conduct which is judged to be at least reckless and may be deliberate.

63. Having said this, it seems to me that there is little to be gained by this court pursuing such a line of inquiry. This is because I agree with Mr Krsljanin's overarching submission that the Rules of the Game of Association Football have not been drafted with civil liability in mind. Their drafters were simply not concerned with whether, at any point in the hierarchy of sanctions, there is a correlation with the laws of negligence. Although shorthand expressions such as "football crimes" and the "unwritten code of playing culture" must be handled with care, the fact that such crimes or violations of the unwritten code are (or should be) the subject of sending-off of the player concerned does not mean that any sending-off is, without more, very likely to amount to actionable negligence. In this regard, I take judicial notice of the fact that red cards are exhibited by professional referees much more frequently than racing stewards make findings of dangerous riding.

64. The real problem, therefore, with the self-direction in paragraph 56 of the recorder's judgment is that by closely aligning serious foul play in the Laws of the Game with actionable negligence, he wrongly reduced the ambit of the inquiry required in order to answer the question of whether, in all the circumstances, Mr Harris's tackle was not only a breach of the Rules of Game but negligent.

65. The result of this error can most clearly be seen in the following passage from the concluding paragraph 66 of the judgment:-

> "I consider what Harris did was a lunge within the meaning of the definition of serious foul play in paragraph 18 above and in any event, it endangered the claimant's safety. It does not matter that Harris did not intend to injure the claimant or that in a general sense, it can be said the tackle was made in a fast moving heat of the moment context".

66. On the contrary, as Mr Krsljanin submitted, it matters very much whether or not the tackle was made in such a context.

67. Ground 1 is made out.

Ground 2

68. Ground 2 complains that the recorder failed in his duty to give adequate reasons, in that he failed to give <u>any</u> reasons why he rejected outright the evidence of Mr Cumming, Fulham's expert, who is a co-author of the Laws of the Game and an eminent former referee who, as the first FIFA Head of Refereeing, was responsible for the management

of referees at the 2002 World Cup. At the hand-down of the judgment, the recorder was invited to give reasons for his dismissal of Mr Cumming's evidence but declined to do so, stating that his reasoning was clear from his judgment. However, Fulham contends that the judgment does no more than summarise Mr Cumming's evidence, and the arguments of the parties on that evidence, before the bare conclusion: "I am rejecting Mr Cumming's view although of course accepting Mr Hackett's". This was reflected in the recorder's remark at the hand-down hearing that "I felt that what I said, in the light of my summary of the expert evidence was clear. It's not so much because I think Mr Cumming is wrong, but I considered the evidence as a whole and concluded it was a serious error of judgment".

69. In support of Ground 2, Mr Krsljanin relies upon the judgment of the Court of Appeal in Flannery and another v the Halifax Estate Agents Ltd. [1999] 1 WLR 377. In that case, the plaintiffs instructed the defendants, a firm of surveyors, to make a valuation of a first-floor flat which they subsequently purchased on the strength of the survey. The plaintiffs later discovered damage to the flat and brought a claim in negligence against the defendants. At trial, the judge heard evidence as to the cause of the damage from each side's expert valuer and expert engineer. The judge preferred the evidence of the experts called by the defendants and dismissed the claims. The plaintiffs complained solely that the judge had failed to give reasons for that decision.

70. Allowing the appeal, Henry LJ, giving the judgment of the court, held that the judge was under a duty to explain why he had reached the decision. Instead, all he said was "I prefer the expert evidence that was given for the defendants to that which was given for the plaintiffs". Although Henry LJ held that it was possible, indeed likely, that the judge had accepted an attack which had been mounted on the plaintiffs' expert evidence, he held that "this court cannot properly infer that. To do so would be to guess, and that the court cannot do". The requirement to give reasons is a function of due process. It also "concentrates the mind", in that if reasons are given the resulting decision is more likely to be soundly based on the evidence than if it is not.

71. Mr Krsljanin placed particular emphasis upon the passage of Henry LJ's judgment in which he stated that:-

> "Where the dispute something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation, whereas here there is disputed expert evidence; but it is not necessarily limited to such cases".

72. In the present case, I was taken to passages in the transcript of the hearing (beginning at page 178) in which Mr Hackett and Mr Krsljanin engaged in what the latter described as intellectual exchanges, during cross-examination. The exchanges were concerned with the stark contrast between the evidence of Mr Cumming, who considered the referee had been right not to award even a foul in respect of Mr Harris's tackle, and Mr Hackett, who considered that the tackle amounted to serious foul play.

73. Mr Krsljanin also relied upon the reason given by the recorder on 13 August 2021, for refusing permission to appeal; namely, that it was "not so much because I think [Mr Cumming] is wrong. It is because I conclude otherwise on the evidence as a whole".

74. So far as that last submission is concerned, one must be very cautious about treating *ex tempore* reasons for refusing permission to appeal as being in some sense part of the judgment that is under challenge. I shall return to the issue of whether the recorder thought Mr Cumming was "wrong", when dealing with the nature of the order that follows my judgment. So far as the last quoted sentence is concerned, Mr Arentsen submitted that it was plain, from reading the judgment as a whole, why the recorder had rejected the evidence of Mr Cumming. Once the recorder had accepted that Mr Hackett was right about Mr Harris having leapt into the air, then even Mr Harris accepted this would be dangerous, and that he would be out of control (paragraph 22 of the judgment).

75. I do not consider that what the recorder said about the evidence of Mr Harris at paragraph 22 of the judgment blunts the criticism contained in ground 2. Although what the player thought the position might be in that hypothetical context was plainly relevant, it cannot be a reason for rejecting the expert view of Mr Cumming. Even if it could be such a reason, then it at least needed to be expressed in the judgment. Mr Harris was, in any case, not conceding that, if he had leapt in the air, that would be actionable negligence on his part. Although both expert reports were, understandably, written by reference to the Laws of the Game, the evidence of Mr Cumming fell to be analysed as part of the overall question of whether Mr Harris was guilty of actionable negligence.

76. It seems to me that the reason why the recorder fell into error in his treatment of the expert evidence of Mr Cumming was that, despite what he said at paragraph 59 of the judgment about the evidence of experts being able to see and interpret things that the recorder could not, and that what the recorder provisionally thought about the video might be overweighed by other evidence and considerations, the following paragraphs in the judgment simply show the recorder forming his own view about the video evidence; and concluding that because his view was contrary to the view of Mr Cumming, Mr Cumming's evidence fell to be rejected. In so far as that was the reason, it was a legally flawed one.

77. Ground 2 accordingly succeeds.

Ground 3

78. Ground 3 contends that the recorder erred in law by expressly refusing to take into account the context of Mr Harris's tackle and the realities of the playing culture of professional football, which is a fast-paced, competitive game necessarily involving physical contact. Fulham contends that the recorder instead analysed the tackle in a vacuum, with the benefit of hindsight, thereby imposing a counsel of perfection on Fulham and Mr Harris. This can be seen from paragraph 66 of the judgment, where the recorder said that "It does not matter that... in a general sense it can be said the tackle was made in a fast moving heat of the moment context". I have already referred to this criticism, in the context of Ground 1.

79. Mr Arentsen drew attention to the fact that, at paragraph 56, the recorder expressly acknowledged that "football is a contact game", and that he cited the judgment of Tuckey LJ in Caldwell that no liability will attach for errors of judgment, oversights or lapses of which a participant might be guilty in the context of a fast-moving contest.

80. I am in no doubt that this part of paragraph 56 cannot remedy the problem with the sentence "It does not matter that... fast moving heat of the moment context" in paragraph 66. For the reasons I have given, it does matter.

81. Mr Arentsen attempted to draw support from the judgment in Tylicki. The course of action leading to the collision and injury in that case extended over several seconds, during which there had been an earlier collision between the horses. This was a crucial element in the judge's conclusion that Mr Gibbons had had a "reckless disregard for Mr Tylicki's safety".

82. Mr Arentsen said that, in the present case, there had similarly been a period leading up to Mr Harris's tackle during which Mr Harris had, in effect, been following Mr Jones, both towards the Swansea goal and towards that of Fulham. Mr Harris had tracked back and should not have made the tackle. In all the circumstances, this was not a split-second mis-judgment or momentary lack of care.

83. I fully accept that is a finding which the recorder could have made. It is, however, plain from his judgment that he did not, in fact, make it. I do not consider it is a finding which can be properly inferred.

84. There is a further aspect to Ground 3. I have set out paragraph 65 of the judgment. This contains the sentence: "Harris could aim for the ball and I accept he did, but he could not be sure what else he might contact or do, or, being a large man, with what force he might do it." Mr Krsljanin submitted that this sentence imposes an extraordinarily onerous burden on a football player. If allowed to stand, it would mean that a player could never make a tackle in football match where they "could not be sure" that they would not make contact with another player.

85. Appellate courts must be cautious not to pick apart judgments of first-instance decision makers, so as to take a word or phrase out of context. Even applying that degree of caution, however, I am satisfied that paragraph 65 contains a material error. It purports to set a standard for reckless or quasi-reckless behaviour in the context of professional football, which is far below what is needed to establish such liability.

86. Ground 3 succeeds.

Ground 4

87. Ground 4 contends that the recorder erred in law by failing to take into account all the contemporaneous evidence. It is said to be not disputed that the tackle happened in full view of a fully FA-accredited referee; that the referee did not consider a foul had been committed; that no sanction was issued in the form of a yellow card or a red card; that there was no adverse reaction from the spectators or coaching staff; and that prior to the issuing of the claim some years later after the incident, no complaint was made of the tackle and no disciplinary action or investigation instigated in respect of it. The recorder gave no weight at all to these factors, as confirmed by his comment at the hand-down hearing that "I considered the weight to be given to the referee and the crowd's reactions... I set out in my judgment why I didn't take it into account".

88. Ground 4 is rightly described by Mr Krsljanin as one of mixed fact and law. It is trite that a judicial fact-finder is entitled to decide what weight to ascribe to any particular

evidential item. It is not for this court to substitute its own view of the weight that it would have accorded to that item.

89. Nevertheless, I find that the recorder erred in law in affording no weight at all to the fact that the referee did not award a foul. He merely found that "it was a foul which the referee should have penalised. That he did not is a puzzle but not a sufficient one to negative my views about what actually happened". The recorder accordingly failed to have any regard to the important policy consideration, in cases of this kind, which requires the court to pay a proper regard to the decisions of the officials tasked with administering the Rules of the Game. The fact that such officials have decided to take no action, or relatively minor action, is, of course, not determinative: see Tylicki. It is, however, a matter to be engaged with by the court, in determining whether actionable negligence has occurred.

90. In the present case, the recorder was faced with the striking scenario in which a professional referee, with an unarguably clear view of the tackle, did not award a foul, let alone show Mr Harris a red card. That feature was part of the evidential landscape which the recorder was required to traverse. Instead, he took a different path and, having reached his destination, merely reduced the referee evidence to "a puzzle, but not a sufficient one". The recorder's hand-down statement that he was "not persuaded in the opposite direction by what the referee did or did not do" added nothing to the judgment.

91. What, though, of the lack of reactions from other players and the spectators? I am not satisfied that the recorder fell into error on this issue. This is because the joint statement of the experts, mentioned at paragraph 33 of the judgment, says in terms that they "saw no indication of any reaction by the spectators near to the incident but this they say would be normal". Surprising though that may seem to a lay person, this undisputed evidence negated the relevance of any lack of reaction from the spectators, such that I cannot conclude the recorder erred in refusing to give it any weight.

92. This leaves the lack of reaction from players. Although the experts said nothing specific about them, any failing by the recorder to have regard to the players' lack of reaction is rendered irrelevant, in view of my finding that Ground 4 is made out for the much more significant reason relating to the referee evidence.

H. OUTCOME

93. Accordingly, all four grounds of appeal succeed. The recorder's judgment must, therefore, be set aside.

94. Should this be the outcome, Mr Krsljanin submitted that the proper course was for me to enter judgment in favour of Fulham.

95. In support of this submission, Mr Krsljanin emphasised the recorder's statement at the hand-down that, although he had rejected the evidence of Mr Cumming, this was "not so much because I think he is wrong". Mr Krsljanin argued, therefore, that on the facts, Mr Jones had failed to make good his case. The joint statement of the experts contains a passage in which they agree that refereeing in many instances is subjective and that different referees could have different views of the same incident. If Mr Cumming was not "wrong", in the view of the recorder, then both his interpretation of Mr Harris's tackle and that of Mr Hackett were valid views. Mr Jones, had not, therefore, proved

on balance that the tackle was a breach of the Rules of the Game. This meant that his claim could not succeed, on the basis of the case law; in particular Caldwell.

96. Mr Arentsen said that, if this was Fulham's stance, then it was noteworthy that Mr Krsljanin had not sought summary judgment. Mr Krsljanin countered by pointing out that the position reached was by reference to the facts, as found in the judgment and in the hand-down comments of the recorder.

97. I find that Fulham's request for judgment to be entered in its favour must be rejected. The comment of the recorder at the hand-down hearing about Mr Cumming not being "wrong" is not to be treated as part of his judgment. It is not a finding, or even confirmation of a finding, that Mr Cumming's evidence was not being rejected. On the contrary, the recorder held in his judgment that he was rejecting that evidence (albeit for reasons which I have found to be legally flawed). Accordingly, there is no scope to pray in aid the joint statement concerning refereeing being in many instances a subjective matter. Furthermore, Mr Hackett's evidence, properly read, was that he thoroughly disagreed with Mr Cumming, beyond the points described in the joint statement. This is evident from the recorder noting at paragraph 37 of the judgment that Mr Hackett "was surprised and disappointed with" Mr Cumming's view that the tackle was not a foul.

98. There will, accordingly, need to be a new trial.

99. The appeal is allowed. I invite counsel to prepare the draft order.