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AGB ADAME GONZÁLEZ DE CASTILLA & BESIL

Authored by Alvaro Adame

For the first time in Mexican Sports History, The Mexican Economic Competition Commission fined 17 football teams of the Mexican Football League (Liga MX), the Mexican Football Federation and 8 individuals for partnering up in order to avoid salary caps in the league's draft.

The Plenary Session of the Mexican Economic Competition Commission (COFECE or Commission) imposed fines of $177.6 million pesos on 17 Liga MX football clubs for their responsibility in monopolistic practices. For helping to carry out these practices, the Mexican Soccer Federation (FMF or Federation) and 8 individuals were also fined.

The clubs colluded to prevent or inhibit competition in the league's draft through two conducts: 1) imposing maximum caps on female player salaries, which further deepened the wage gap between female and male soccer players; and 2) segmenting the player market by establishing a mechanism that prevented them from freely negotiating and contracting with new teams.

Since the creation of the Women's MX League in 2016, various clubs have agreed to establish a salary cap for these athletes based on three categories: 1) those over 23 years of age would earn a maximum of $2,000 pesos (£89GBP); 2) those under 23 years of age, $500 pesos (£22GBP) plus capacitation for their personal training and; 3) players in the Under-17 category would have no income but could have help with transportation, study and food. This agreement was replaced by another in the 2018-2019 season, through a statement, Liga MX informed the clubs that the maximum limit would be $15,000 pesos ($656 GBP) and only 4 of its players could earn more than that amount.

The first cap on the payment of the football players was part of the presentation of the Liga MX Femenil project and was approved by the Liga MX Sports Development Committee. Additionally, the Federation issued statements to persuade the clubs to comply with the salary cap and also carried out tasks to verify compliance.

This practice, which lasted up to 3 years, constituted a collusive agreement between the Clubs that had the purpose and effect of manipulating prices, specifically, the salaries of the female players and preventing the clubs from competing for their hiring through better salaries, which not only had a negative impact on their income but also had the consequence of widening the gender pay gap.

The 17 fined clubs, with the help of the FMF, agreed to apply the right of retention (better known as the "gentlemen's agreement"), through which each club affiliated with the Federation registered with it the players with whom they had a contract, but upon expiration, they maintained the right to retain them. If a different club was interested in hiring that footballer, they had to obtain the authorization of the first club that had them in their "inventory" and, often, pay a consideration fee for the change.

The conduct constituted a collusive agreement that had the object and effect of segmenting the player market to limit the competition of the clubs in hiring them, which unduly restricted the mobility of athletes and limited their ability to negotiate to obtain better salaries.

Together, both conducts generated damage to the market estimated at $83 million pesos (£363,162 GBP), for which the COFECE decided to sanction the aforementioned clubs, as well as the FMF and 8 individuals for their assistance, with fines that amount to $177.6 million pesos (£7,744,546 GBP).

For a developing country, having these kinds of breakthrough resolutions, not only helps to limit the gender pay gap between professional athletes but forces the Mexican professional leagues, to reach a "professionalization" level that, hopefully, will ensure that Mexican professional athletes have the security and protection other athletes have in more evolved leagues like the British Premier League or the NFL.

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Authored by Larry Reimer

One of the year's most noteworthy sports stories in Canada relates to the investigation by the Canadian Parliament into the governance of one of the country's largest sports associations in the context of a resolved civil claim for damages.

This has also highlighted the concept of Safe Sport, an environment where athletes can train and compete free from all forms of harassment and abuse.

With this backdrop, the recent creation of the Office of the Sport Integrity Commissioner ("OSIC") has received attention. Canadian Minister of Sport, Pascale St-Onge, recently set out an ultimatum to sports organizations: sign on to the OSIC by April 2023 or risk losing federal funding.

Becoming a signatory brings the sports-based entity within the jurisdiction of the OSIC, meaning, among other things, access to resources with respect to a Safe Sport complaint mechanism and investigations. Significantly, becoming a signatory to the OSIC means the mandatory adoption of the *Universal Code of Conduct to Prevent and Address Maltreatment in Sport* ("UCCMS"),https://sportintegritycommissioner.ca/uccms.

The UCCMS sets out several obligations for sport organizations, and a detailed list of prohibited behaviours for participants in the sport environment, including, among others, psychological, physical and sexual maltreatment, discrimination, neglect in care, grooming, boundary transgressions and failure to report. Participants subject to this code could include, without limitation, athletes, coaches, officials, trainers, volunteers and parents.

There is no disagreement that, in an ideal world, Canadian athletes should train and compete in a safe and respectful environment. The question is: to what extent will this initiative succeed given the prevalence and importance of grassroots and provincial organizations (as opposed to national).

If adopted by an organization, the UCCMS gives rise to a new layer of scrutiny in terms of civil duties potentially imposed. This is of relevance to organizations as they attempt to oversee their operations, create a safe environment, yet manage risk. It is of similar interest to insurers who may be forced to contemplate the new code in considering insurance placement or claims handlers in evaluating matters that arise.

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LAWYERS

The risky business of dangerous recreational activities

Authored by Rebecca Stevens, Rosalind Gilsenan, Alison Elmes, Stephanie Huestis and Elle Mariconte

In *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited*,[1] the High Court has recently handed down a judgment concerning the duty of care, breach and obvious risks within the context of dangerous recreational activities. At both the first instance and on appeal in the New South Wales Court of Appeal, the plaintiff failed in her action for damages. On appeal to the High Court, a slim majority (3:2) overturned the lower court decisions and found in the plaintiff's favour, awarding damages in the amount of $6,750,000. The case provides interesting insight into the court's approach to dealing with the probability of harm when engaging in risky pursuits, identification of risk and the obviousness of that risk.

THE FACTS

Ms Tapp, then 19 years old, sustained incomplete T11 quadriplegia when she fell from her horse whilst competing in the Ellerston camp draft event in 2011. Campdrafting involves riders on horseback rounding up cattle and steering them around an obstacle course. Ms Tapp was an experienced rider and had been involved in campdrafting events since age six. Ms Tapp's fall occurred on the second day of the event, at approximately 7.00 pm. Over 700 rides had taken place in the competition arena prior to the incident. Ms Tapp herself had ridden in two rides on the second day prior to her fall.

Ms Tapp's evidence was that, as she began her ride, she felt the ground was heavy. Her horse missed its stride which caused it to go down on its front with Ms Tapp falling from height. She felt excruciating pain in her chest and realised she could not move her legs.

Ms Tapp's case was that her horse fell because of deterioration in the surface leading up to her ride and that the Australian Bushmen's Campdraft & Rodeo Association Limited (Association) ought to have ploughed the arena during the course of the competition rather than just aerating. The day after the incident, the surface was ploughed for three hours before the day's competition commenced.

Ms Tapp led evidence that she was not permitted to inspect the ground herself before she commenced the event, she was not aware of the reason for a delay in her event commencing (it was because the surface condition was being considered by event organisers), no warnings were given about the surface condition, she was not aware that other riders had fallen during the course of the day, and nor was she aware that, not long before her own ride, one rider had complained about the surface condition and had asked the organisers to stop the event. There was a suggestion there were up to seven other falls prior to her event (with no injuries), at least four of which had occurred within one hour of Ms Tapp's event.

THE PRIMARY AND COURT OF APPEAL DECISIONS

At trial, the Association conceded that it owed a duty of care but it remained contested as to the extent to which the duty was breached, whether any breach was causative of Ms Tapp's injuries and whether the Association could rely on the defence of obvious risk as provided for in s 5L of the *Civil Liability Act 2002* (NSW) (CLA). The primary judge did not find there had been any breach by the Association (meaning any conclusions on causation were redundant).

The primary judge expressly rejected Ms Tapp's submissions that the taking of reasonable care required the Association to call off the event once it had received complaints about the surface and found that what was required (only) was the making of an informed decision about whether it was safe to continue the competition (which the Association did). The primary judge further found that in light of Ms Tapp's experience as both a horse rider and camp draft competitor, the risk of falling from a horse would have been well known to her and her ensuing injuries were a materialisation of those known risks. Section 5L consequently provided a complete defence to the event organiser.

The Court of Appeal (2:1) was not satisfied that Ms Tapp had demonstrated that her horse fell because of the deterioration of the surface of the arena and as such her case failed in the absence of such evidence.[2]

THE HIGH COURT DECISION

Ms Tapp's appeal was allowed. The High Court found the Association had breached its duty of care by failing to stop the competition to inspect the arena in order to ensure the surface was reasonably safe and that this breach had caused Ms Tapp's injuries. Furthermore, her injuries were not the result of the materialisation of an obvious risk and therefore the defence under s 5L was not made out.

The majority stated that, contrary to the views expressed by the Court of Appeal, the risk contained in s 5L should only be considered after prima facie liability for negligence has been established. The Court also observed that risk under s 5L should be characterised at the same level of generality that is used when assessing a breach of a duty of care, rather than descending into the precise detail of the mechanism of the injury.

However, the High Court held the trial judge's characterisation of the risk was too general and the risk was more properly characterised as the 'substantially elevated risk of physical injury by falling from a horse that slipped by reason of the deterioration of the surface of the arena' which was not obvious to a reasonable person in Ms Tapp's position because she did not have an opportunity to inspect the surface of the arena, she was unaware that there had been any prior falls and a reasonable person in her position would have expected the Association to assess the condition of the ground.

KEY TAKEAWAYS

The High Court appears to be trying to pull back from a series of previous decisions, mostly emanating from the courts in New South Wales, where defendants have been largely successful in relying on the obvious risk defence in the context of dangerous recreational activities.

The High Court's observations about the generality of the risk when considering a s 5L defence have drawn attention to the significance of properly identifying a risk. The High Court's identification of the risk with reference to the condition of the surface of the arena and not merely the risk of falling from the horse is an important distinction when considering this defence.
It is also worthwhile noting also that Ms Tapp's age did not appear to play a significant part for the High Court.[3] In fact, it appeared impressed by the amount of prior experience Ms Tapp had in both horse riding and campdrafting given her youth and that, even with such experience, it was not satisfied the risks she was presented with were obvious.

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REFERENCES

1 [2022] HCA 11.
2 The first instance findings were upheld (2:1).
3 There does not appear to have been any argument made (either at trial or on appeal) with regard to contributory negligence on the part of Ms Tapp. This may be because the case had its origins in New South Wales and this was seen as ancillary. It is possible had the case been argued in Victoria, that the defendant would have pleaded this in the absence of a complete defence of obvious risk.

LOPEZ-IBOR

Authoried by Ignacio Echazarra

"Right to claim damages under article 1902 of the Spanish Civil Code as a consequence of football direct hit to an audience member during a professional football game warm up."

BACKGROUND

During the warmup session of a La Liga (the Spanish Professional Football League), Mrs Vicenta suffered a direct hit to the face by a football kicked by one of the training players. Therefore, Mrs Vicenta suffered damages to her face and eyes. As a result of the damages, Mrs Vicenta filed a lawsuit against Real Zaragoza (the football club) and Generality España (the Football Club's insurance company), before the Zaragoza Cour First Instance Court (no. 19), claiming damages in the amount of $30,891.18 euros for the.

LEGAL PROCEEDINGS & THE STUDY OF RISK

Zaragoza First Instance Court issued a judgment dismissing the plaintiff's claim and ordered her to pay the costs of the proceedings.
The plaintiff appealed before the Provincial Court of Zaragoza, which dismissed the appeal.

As a consequence, an appeal in cassation[1] was lodged before the Supreme Court[2], based on the infringement of Art. 1902 of the Civil Code in relation to Art. 8. a) and c) of the General Law for the Defence of Consumers and Users.

Article 1902 of the Civil Code.
"Whoever by action or omission causes damage to another, through fault or negligence, is obliged to repair the damage caused".

Article 8. Basic rights of consumers and users. revised text of the General Law for the Defence of Consumers and Users.
"1. The basic rights of consumers and users and vulnerable consumers are as follows.
a) Protection against risks that may affect their health or safety.
[...[
b) Compensation for damages and reparation for the harm suffered.
[...]".

OPINION OF THE COURT

There is no infringement of Article 1902. There is no obligation to respond to the damage caused because there is no legal causal link. The causal link between the injuries caused to the spectator's eye disappears as soon as she assumes a risk inherent to the game or spectacle with which she is familiar.
It is, in short, an ordinary occurrence of the game, unrelated to the sports organiser. There is therefore a voluntary assumption of risk.
However, the court points out that the application of measures is not sufficient justification to exclude liability, but this does not mean that every time a harmful result is produced, liability is due because the measures were insufficient. After all, such an unqualified conclusion would lead us to pure strict liability, which is not the system regulated by articles 1902 and 1903 of the Civil Code.

In my opinion, most cases are resolved in this way, with very few cases in which the bystander is protected. The voluntariness of the tortfeasor is rarely taken into account, which I believe should be of importance. Finally, one assumes a risk when one attends, but one is never aware of being injured to such an extent that it should be taken into account too.

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REFERENCES

1. This is an extraordinary appeal before the Supreme Court and is only possible in very specific cases: lawsuits involving high amounts (over €600,000) or which are of great legal interest for the formation of jurisprudence (because they deal with recent legislation or matters on which the case law of the lower courts is contradictory).
2. "Sentencia Tribunal Supremo, Sala Primera, de lo Civil, Sentencia 122/2018 de 7 Mar. 2018, Rec. 2549/2015."

MARSHALL DENNEHEY

Authored by Jon E. Cross and Brad E. Haas

The appellate decision in the Pennsylvania zipline case may permit general pleadings for recklessness and gross negligence, which may nullify the early effectiveness of the defense of waiver and release.

Before being allowed to participate in sports and recreation activities, adults are often required to sign a waiver and release of liability agreement. When an adult brings a lawsuit, a defense in Pennsylvania is that the agreement the plaintiff signed acts as a complete bar to the negligence claims. *Vinson v. Fitness & Sports Clubs, LLC, 187 A.3d 253* (Pa. Super. 2018). Now, based upon a recent decision by the Pennsylvania Superior Court, plaintiffs' attorneys are permitted to generally plead recklessness and gross negligence in a complaint. Releases from liability do not relate to recklessness or gross negligence. As such, plaintiffs may be able to avoid the early motion defense of waiver and release by generally pleading recklessness or gross negligence.

In what can be seen as a setback for the defense bar, the Pennsylvania Superior Court recently addressed the long unsettled issue regarding the ability of plaintiffs to allege recklessness in a negligence complaint. Out of an abundance of caution, these types of allegations have routinely been subject to preliminary objections to avoid the potential for punitive damages. In *Monroe v. CBH2O LP, d/b/a Camelback Ski Resort,* 2022 WL 17087072 (Pa. Super. Nov. 21, 2022), the Superior Court held that, under Pa.R.C.P. 1019(b), allegations of recklessness and/or reckless conduct fall under "state of mind" allegations and, thus, may be pled generally. The opinion removes the requirement that plaintiffs plead allegations of reckless conduct with particularity.

The Monroe case arose out of an accident involving a zipline. While the court's review was based upon the granting of a motion for judgment on the pleadings related to allegations of recklessness, the Superior Court made clear that its holding would encompass cases in which a defendant files preliminary objections to a complaint on the same grounds.

The complaint in Monroe contained general allegations of recklessness, as follows:

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[Defendant's] recklessness, carelessness and negligence included, but was not limited to:

a. Failing to properly monitor the speed of the zipline, in disregard of the safety of [Plaintiff];

b. Failing to use reasonable prudence and care by leaving [Plaintiff] to land with no help, in disregard of the safety of [Plaintiff];

c. Failing to use reasonable prudence and care to respond to [Plaintiff]'s safety concerns during the ziplining, specifically when [Plaintiff] asked [Defendant] to slow down the ziplining machine, in disregard of the safety of [Plaintiff]; and,

d. Failing to inspect and/or properly monitor the ziplining machine engine, in disregard of the safety of [Plaintiff].

According to the decision, Pennsylvania Rule of Civil Procedure 1019(b) states: (b) Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally. "The plain language of this Rule thus indicates that, while a party must plead the material facts that support a cause of action, a party may generally aver knowledge, intent, and state of mind." *Monroe*, 2022 WL 17087072, at *8. The Monroe court went on to discuss the interplay between negligence and recklessness, stating,
"In other words, gross negligence and recklessness are states of mind; they are forms of negligence, not independent causes of action. Thus, our procedural rules allow the plaintiff to plead gross negligence and recklessness generally." *Id.* at *9.

The Monroe court held that allegations of recklessness are "subsumed" within the negligence allegation. See Id. at *9-10. As such, these allegations do not require a separate, more specific type of pleading. The court opined that doing so would place an undue burden on the plaintiff to plead specific facts related to the alleged recklessness at the pleading stage. It further noted that only through discovery and expert opinion could the plaintiff determine what the defendant knew or should have known about the risk involved in a given situation.
The opinion further stated that, only upon the completion of discovery, is a plaintiff required to produce evidence of recklessness and that, should a plaintiff fail to meet this burden, summary judgment should be entered on the claims of recklessness.

In a footnote to the opinion, the court discussed its awareness of the inconsistent rulings by various Pennsylvania trial courts and specifically stated that requiring a plaintiff to plead specific facts of recklessness was a misapplication of rule 1019. Id. at *10 n. 6. The court listed several trial level cases which either struck down allegations of recklessness or required a more specific pleading. In addressing these cases, the Monroe court held:

> *These and all other trial court decisions that have sustained preliminary objections or granted judgment on the pleadings based upon demands for heightened factual averments to support a claim of willful, wanton, or reckless conduct did not accurately apply the law. Our ruling today removes any doubt that, so long as a plaintiff's complaint (1) specifically alleges facts to state a prima facie claim for the tort of negligence, and (2) also alleges that the defendant acted recklessly, the latter state-of-mind issue may only be resolved as a matter of law after discovery has closed.*

Based upon the Superior Court's ruling, it appears that the split of authority amongst Pennsylvania trial courts has been settled and plaintiffs may plead gross negligence and recklessness in nearly every type of negligence case. The problem for the defense is agreements that include waivers and releases do not pertain to recklessness or gross negligence. *See Tayar v. Camelback Ski Corp.*, 47 A.3d 1190 (Pa. 2012) (holding that releases from liability do not apply to reckless conduct); *Feleccia v. Lackawanna College*, 215 A.3d 3 (Pa. 2019) (holding that releases from liability do not apply to grossly negligent conduct).

The court's holding will undoubtedly lead to an increase in complaints in sports and recreation cases, alleging reckless conduct or gross negligence conduct, with defense attorneys being forced to withhold attacking the sufficiency of such allegations until the summary judgment stage after discovery has closed and expert reports exchanged. While arguably the claims for negligence could be dismissed at or before the motion for summary judgment stages, based upon the waiver and release, there is the potential that the recklessness claims or gross negligence claims may remain. Certainly, defense counsel will need to remain mindful of the allegations of recklessness throughout a case because recklessness could lead to a finding of punitive damages. Attorneys need to strategize their defense to pave the way for an eventual motion for summary judgment to argue to the court that the recklessness claim was not supported in the record. Even if the negligence claims are dismissed on the basis of the waiver and release, the reckless claims could go to a jury and then there is the chance a jury will be asked to determine punitive damages.

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Weightmans

Team Selection is Key

Authored by Bruce Ralston

Team selection is key as all in sports know. Thus Gareth Southgate prefers the proven quality of Kane over the occasional burst from Rashford. Borthwick clearly prefers the nous and game management of Farrell over the show pony tricks of Smith. It is also key when one comes to deciding how to pursue, or defend, a civil action as demonstrated in the recent, much-publicised decision in *Czernuszka v King* (2023), a decision of HJ Spencer in a case that attracted much media attention.

The claim arose out of a women's rugby match between The Sirens and Bracknell RFC on 8 October 2017. The Claimant was a flanker standing, so it is said in the Judgment, 5ft 3in tall and weighing 9 stone (presumably an open side). The Defendant was slightly taller at 5ft 5in but weighed somewhere between 16 – 17 stone. A formidable opponent certainly at close quarters. The game was within the Developmental League of the RFU, a regime to encourage people to play the game. This incident and the behaviour of the Defendant saw a number decide that rugby was not for them.

Late in the game, the Claimant, acting as a scrum half at the back of a ruck was basically tackled by the Defendant as the ball came out of the ruck. There was debate over whether the Defendant was offside and whether the ball was out of the ruck. What was agreed was that at no stage did the Claimant have possession of the ball yet the Defendant forcibly tackled her as she was bent endeavouring to get the ball driving her to the ground and causing catastrophic, life-changing injuries which appeared to have been apparent almost immediately to that spectating. The referee called full-time immediately.

After a Trial of some 5 days in a reserved Judgment HJ Spencer found for the Claimant finding that the Defendant executed the tackle without any regard for the wellbeing or safety of the Claimant and it was executed in a manner not recognised in rugby. That whilst the Defendant did not intend to injure the Claimant the tackle was executed with reckless disregard for the Claimant's safety.

For various reasons Defendant was so angry that she closed her eyes to the risk to which she was subjecting the Claimant. There was no error of Judgment in the tackle. The Defendant did exactly what she set out to do and whether the Claimant had possession of the ball was irrelevant. Having considered the case law in the sporting arena from *Condon* through to *Caldwell* and *Blake v Galloway* he found that the Defendant's conduct breached the degree of care required in the circumstances.

The Judge was assisted by the match being videoed for future training purposes so he could see the tackle as it unfolded. He could also see the other players' reactions including that of the Claimant. He was clearly unimpressed by the Claimant's behaviour after the tackle, walking away with no regard being paid to the clear injury caused to the Claimant. What the Press reports did not touch upon was that the Defendant's expert resiled from his written evidence.

The Judge heard from two experts, Ed Morrison for the Claimant and Tony Spreadbury for the Defendant, both former international referees. Morrison had refereed the RWC final in 1995 between the All Blacks and the Springboks. Spreadbury had refereed at two rugby world cups among his many international games. Morrison was categoric that this was a tackle that in his almost 60 years in the game as a player, coach, referee or administrator he had never witnessed before. The Defendant chose to perform a hard and heavy tackle directly on top of the Claimant's neck and back. He believed there was reckless disregard for the Claimant's safety and the actions were not those of a responsible rugby player. He maintained his position under cross-examination. Mr Spreadbury took a different position to Mr Morrison. He noted the Defendant was not offside. Contended she did not commit any act of foul or dangerous play according to the laws of the game. That the referee was well placed to see the incident and did not penalise her. In cross-examination, however, he resiled from that position and moved much closer to the views of Morrison conceding that the Claimant was in a vulnerable position, she was also vulnerable by reason of her size and stature compared to the Defendant, that he would not want to see such a tackle on a rugby pitch as it was liable to give rise to serious injury and that it was the "very epitome of dangerous tackling". From start to finish the Defendant only had eyes for the Claimant and at no stage did she attempt to play the ball. As HHJ Spencer commented by the end of Mr Spreadbury's evidence essential struts to the Defendant's case had gone. Thus if the defence were to survive it had to be put forward on a very different basis.

expert. All litigators have been there. You cannot coach an expert. Their views have to be genuinely held. Those views, however, must be challenged vigorously in trial preparation. In the case of *Eaton v The ACU and others* (2022) again the disparity in experts was glaring. This was an action arising from an accident in a race at the Three Sisters Race circuit also in 2017 which saw the Claimant sustain life-changing injuries when he exited the circuit and collided with a safety barrier. The Defendant's expert was no doubt chosen because of his extensive experience in the field of motorsport as opposed to the Defendant's expert who was an engineer with experience in accident reconstruction and examination of safe defence systems. As the Judge commented the Claimant's expert "cut a rather sorry figure in the witness box" lacking the necessary expertise to substantiate and justify his conclusions. His evidence was entirely devoid of scientific foundation or logical analysis. The Defendant's evidence was a complete contrast referred to laboratory tests regarding the safety measures and his evidence simply could not be countered by the Claimant. The Judge noted that by the conclusion of the Trial the Claimant's submissions placed no emphasis on any part of their expert's evidence.

Hindsight is a wonderful thing. As stated all litigators have been in this situation. The only potential protection is thorough preparation and vigorous questioning of expert evidence. One can understand the decision in Eaton. Motorsport is a dangerous activity. The chosen expert was a former highly successful racer who had been involved in the sport throughout his life. Therefore he knew the sport, the risks attached but the Judge preferred the more forensic approach of the engineer. In *Tylicki,* the Claimants called Ryan Moore as their expert. The Defendant's called a highly respected equine expert. The case concerned a collision between the mounts of the Claimant and the Defendant in the 3.20 Mile Maiden at Kempton on 31 October 2016. Ryan Moore had never given expert evidence before but he had ridden winners in 5 classics. He understood the world of the flat race jockey and came across well having sympathies for both the Claimant but also for the Defendant, describing the matter as "a lose/lose either way". The Judge found him to be an extremely straightforward witness who was using his expertise to help the Court understand what happened in that race. Thus the choice of a novice expert but someone experienced in the sport paid off for that Claimant but they may also have been helped by the Defendant and that is where you have to play the hand you were dealt.

The Defendant in *Tylicki* was again a highly experienced jockey viewed as a skilled and talented rider. That was clear from the evidence and his own statement but what did not come through from his statement but from cross-examination was that subsequent to this race he lost his licence for testing positive for a metabolite of cocaine. That his ban was increased as it came to light that he coerced an apprentice jockey to provide a urine sample that he passed off as his own. That he failed a breath test at the races and accepted that he might drink on days that he was riding. Further, he had been imprisoned after failing four convictions for drink driving. The judge commented on his surprise at none of this being in the witness statement but having to come out in cross-examination. Thus a case that was probably finely balanced and the Judge presented with evidence from a top-class jockey who was clearly being balanced in his evidence and a Defendant who probably did not impress.

It is clear that the Defendant in the case of *Czernuszka* did not impress the Judge in terms of his findings of her language and demeanour to opposing players and that she was probably complicit in a number of off-the-ball incidents. It brings home that deciding whether one contests the Trial does not simply depend on one's assessment of the law and duty of care in sport but also in the team that you will be taking into Court.

Finally, even if you get all that right, expert witnesses & defendant all prepared, you then come up against a judge who does not fully understand the law as would appear to be the case in *Jones v Fulham FC (2022)* but that is for another day.

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