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Judgment: approved by the Court for handing down | *Delivered:* **01/04/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

COURTNEY HARRIS BROWNING

Plaintiff:

-and-

ODYSSEY TRUST COMPANY LIMITED
AND
BELFAST GIANTS 2008 LIMITED

Defendants.

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GILLEN J

Introduction

[1] The plaintiff claims damages in this action for personal injuries sustained on 6 September 2008 whilst she was attending an ice hockey game at the Odyssey Arena between Belfast Giants and Cardiff Devils. In the course of the warm up before the game she was sitting as a spectator when she was struck on the forehead by a puck which left the ice rink. The defendants are the owners of the Belfast Giants Hockey team and the occupiers of the Odyssey Arena where the game was played.

[2] The plaintiff alleges that the defendants were guilty of negligence and breach of the Occupiers' Liability Act (Northern Ireland) 1957 in failing to provide barriers and netting which would afford sufficient protection for spectators.

Quantum

[3] At the outset of this case it may be helpful if I determine the quantum in this case before moving on to the liability issues. This girl received a nasty laceration

above her eye which required suturing and has left a scar of which she is conscious. It requires her to apply make up around her eye to cover it and there is still a certain numbness in the scar with tenderness around the area. I viewed the scar and I came to the conclusion that if I was to make an award in this case it would amount to £30,000.

The evidence in this case

[4] There was little controversy as to the primary facts in this case. The plaintiff at the time of the accident was 12 years 10 months and had gone to watch this game with two of her female friends of similar age. They were seated approximately 14 rows back from the ice rink.

[5] The plaintiff gave evidence that the game had been delayed and the Cardiff Devils had come out on to the rink to warm up for some time. At that stage there may have been approximately 15-20 pucks on the rink.

[6] She had obtained a ticket to go to the game on which was printed a warning to "keep your eye on the puck at all times". She did not recall reading the ticket.

[7] There were about 20 warning signs displayed on all entrances to the arena. Again she did not recall seeing those signs because the area was crowded.

[8] The plaintiff did, however, recall announcements over the PA system on more than one occasion warning spectators to keep an eye on the pucks.

[9] During the warm up she had turned her head to speak to a friend. That friend shouted "here comes a puck" but as she turned the puck struck her over the eye causing a laceration, which subsequently required four stitches.

[10] The plaintiff made the case that because so many pucks were in play during the warm up it was impossible to keep her eye on all of them.

[11] The plaintiff called in evidence the friends who had been with her, namely Ms Montgomery and Ms McLean. They both gave broadly similar evidence about the number of pucks on the ice during the warm up, the circumstances of the accident, the fact the puck seemed to come at a straight angle, and that they had heard approximately two warnings over the PA prior to the warm up starting.

[12] In addition, Ms McCarney gave evidence that when she was 13 years of age she had attended on 8 February 2008 a similar ice hockey match, sitting approximately 18 rows back from the rink. During the course of the game a puck had come off the ice and struck her on the right eye. As in the case of all the other girls, she had not noticed the warning on the ticket or the notices but had heard warnings over the tannoy system.

[13] The plaintiff also called a consulting engineer, Dr Marrs. He made the following points in examination- in- chief and cross-examination:

- The rink is approximately 60 metres long by 30 metres wide.
- Around the arena there are wooden boards approximately 1.08 metres above the ice. Towards the goal there is perspex erected making a total height of 3.5 metres above the ice. On the wooden boards around the rest of the arena the perspex is approximately 1.82 metres, making a total height of 2.9 metres including the wooden boards.
- He had seen and read a document containing a risk assessment carried out by the defendants dealing, *inter alia*, with the risk of the puck leaving the rink during a game. The risk of the puck going into the crowd was recorded as "high".
- That risk assessment does mention the area of the nets as being a high risk area but does provide a separate risk assessment for other areas.
- There was nothing by way of documentation to suggest further steps had been addressed between the date of Ms McCarney's accident on 8 February 2008 and the plaintiff's injury on 6 September 2008.
- He was aware of and had read the International Ice Hockey Federation Rules and Regulations dated 2006-2010, which set out the precautions to be taken in arenas to prevent injury to players and spectators. The height of the perspex at the end and sidesexceeded the minimum requirements set down by the Federation. Accordingly, the defendants had complied with all the safety requirements relevant to this accident.
- Steps to be taken to address the risk of the puck coming into the crowd would include netting around the entire ice rink up to a very high level and perspex panels increased in height to reduce the risk.
- He felt the risks were increased in the warm up because of the number of pucks in use.
- He acknowledged that he had checked out the precautions taken in a number of arenas for ice hockey throughout the United Kingdom and he found that none had taken any different steps from those taken by the defendants in this instance. He opined that some North American arenas were considering nets all around but he could not identify any arena where netting had been provided the whole way around.
- He felt that the effect of the overall netting on the view of spectators would be marginal.

[14] The defendant called one witness, namely Todd Kelman, the General Manager of the Belfast Giants, who had been seven years as a player with the team and seven years as General Manager. He had played college ice hockey in the United States of America and had played in England as a professional for three years before coming to the Belfast Giants. In the course of his evidence- in- chief and cross-examination he made the following points:

(1) He was very familiar with arenas in the United Kingdom having attended approximately 20/25 such arenas. These visits included arenas such as the Odyssey of which there were approximately 5-6 in number. In particular, Newcastle and Nottingham had perspex glass around the rink shorter than the perspex of the Odyssey arena and none of them had any different or better precautions than the Odyssey.

(2) To provide netting all around the arena would cost a further £50,000-£60,000 since the netting would have to be placed from rooftop to the perspex. Heightening the perspex glass provided logistical problems because of the danger of players slamming into the staunchions which would render it less stable.

(3) In short, the defendants had complied with the International Ice Hockey Federation Regulations – a body which covered every country in the world which played ice hockey, i.e. approximately 30. There were warnings at every single entrance and on every ticket together with regular announcements over the PA system. It is his voice which is played over the PA system and the recording states:

> "Please keep your eye on the puck at all times. Pucks travel at very high speeds but if it comes your way you are welcome to keep it."

These are played regularly throughout the course of the evening.

(4) He serves on the Board of Ice Hockey in the United Kingdom and on the Elite League Ice Hockey Board which covers top teams playing throughout the United Kingdom. He was unaware of any successful claim ever having been brought against such an arena as a result of a puck striking a spectator or of any instance where a claim had been brought successfully against an arena which had complied with the rules and regulations of the International Ice Hockey Federation.

(5) During the warm up time, the puck is not played at such an intense level. There are regular drills, which all teams carry out, involving passing between players and then shooting at the goals. In a match the puck is played at full speed and the risk is much higher than in a warm up. Before this accident he had never seen a puck struck into the crowd during a warm up, whereas he had seen it happen during the actual game itself. Although there are an increased number of pucks in use during the warm up, the danger of a puck coming into the crowd is much less than during the match, which is at full speed. A possibility might arise if a goalpost was hit and the puck spun off the goalpost. However, during the warm up the main action is at the nets. There are usually four drills with concentration on shooting,

although some other drills will be carried out but never at a fast speed likely to cause a puck to go into the crowd.

(6) There are perhaps 120,000 spectators attending the Odyssey to watch ice hockey during a season and the two incidents referred to in this case were the only incidents in which someone had been hit. In his whole time with the Giants, he had only been aware of the two incidents in which someone had been injured as a result of a puck going into the crowd, although pucks did go into the crowd from time to time without any injury.

(7) After the injury to Ms McCarney, he did not recall any meeting about the issue but management had probably spoken about it. It was his view that once they had complied with the International Standards, no further steps would be taken. In any event, the puck tends to go up in an arc and then down. It would be impossible to increase the height of the perspex to ceiling level and thus the danger could never be fully removed.

(8) He felt the compliance with the International Federation Regulations was sufficient. As a worldwide collective body it should decide if further precautions need to be taken. There are a number of rinks, e.g. Dundonald Ice Bowl, where there is no netting even provided on their rinks. Accordingly, the Odyssey takes more than adequate precautions.

Principles governing this case

[15] I am grateful to Mr Fee QC who appeared on behalf of the plaintiff with Mr Stewart and Mr Elliott who appeared on behalf of the defendant for skeleton arguments which were analytically rigorous. Harvesting from these and other sources, I have distilled the following guiding principles in cases of this genre.

[16] In Wooldridge v Sumner [1963] 2 QB 43, at 48, Diplock LJ said that:

> "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition."

[17] This is not an application of *volenti non fit injuria*. This is no more than saying that, in the absence of a battery, there is no liability for non-negligently inflicted injury, and in this sense everyone assumes the risk of accidental injury when liability depends on the proof of negligence. Thus spectators do not assume the risk of negligence simply by being present at the event.

[18] In Murray v Harringay Arena Ltd [1951] 2 KB 529, a six year old boy was injured when a puck at an ice hockey match was hit out of the rink and landed among the spectators. The Court of Appeal held that the defendants were not liable but this was on the basis that there had been no negligence. A small child, no more than the plaintiff in this case, cannot be said to have agreed to assume risk and/or waived a right to claim.

[19] However, there are some dangers which every reasonable spectator foresees and of which he takes the risk. Singleton LJ said in the course of Murray's case:

> "I regard it as clear from the authorities that the implied term is not that the occupier shall guard against every known risk. There are some dangers which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six year old boy, but, in considering liability under an implied term in this contract, it would not be right to introduce a wider term because one of the parties is a youth. The implied term is to take reasonable care. In measuring that one must have regard to the reasonable man (or spectator), and the duty arising under it does not involve an obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk."

[20] Mr Elliott also helpfully drew my attention to an American authority cited as Austin v Miami University, (2013) – Ohio – 5925. This was a case where a female plaintiff suffered personal injury during a pre-game warm up prior to an inter collegiate ice hockey game at an ice arena located on the campus of Miami University. During the pre-game warm up a puck left the ice and struck her on the head.

[21] Dismissing the case, the court concluded at [5]:

> "In reference to the instant claim, the court can find no difference between baseball and hockey when applying the doctrine of primary assumption of the risk to spectators who are injured by flying objects leaving the area of play and entering the stands. … There is no obligation on the part of the operator of a hockey game such as Miami University to protect a spectator against being hit by a flying puck, a danger incident to the entertainment which any reasonable spectator could and did foresee. Evidence has shown

> the defendant take measures by erecting glass and boards around the perimeter of the Ice Arena to provide some safety to spectators from errant pucks. Nevertheless, pucks do enter the stands; an inherent risk in the game of hockey which is common, expected and frequent."

[22] Thus the ordinary principles of negligence apply in cases such as this but a court must recognise that such principles require that, in a sporting context, the circumstances derived from that context go into the melting pot when judging the issues of reasonableness which are inherent within the principles themselves. The context will fashion the decisions required in the application of legal principles.

[23] I recognise that individual judgements as to what is reasonable may change with time. What was regarded as reasonable in years gone by may later be deemed unreasonable because of the changing times and the different circumstances which they may bring. Hence I must bear in mind that cases such as Murray and for that matter Wooldridge were decided many years ago. I must be conscious that the circumstances in which those principles were applied and the public's perception of what is and is not acceptable behaviour may have changed.

[24] Promoters and organisers must take appropriate steps to minimise such risks where reasonably practicable by the provision of safety measures of one form or another. An occupier of an arena such as the Odyssey, and these defendants in particular, are not taking decisions in the excitement of the competition. Their assessments should be measured and proportionate to the risks involved. The issue is whether or not the particular risk in question is one which the spectator has accepted or which the occupier should take steps to prevent.

[25] However, time has not altered the principle that a defendant generally has no duty to prevent exposure to risks which are inherent in activities which are freely undertaken and that, particularly in fast moving sports in a competitive setting, risks will be inherent in the sport itself. Cricket balls, hockey balls, footballs, golf balls, rugby balls etc are regularly hit with force into spectators in various arenas/courses and grounds. Crowds will often be even closer to the play than occurred in this instance.

[26] I consider that the position was well summarised in the New Zealand case of Evans v Waitemata District Pony Club [1972] NZLR 773 at 775 (when a horse tethered to a fallen tree broke free and ran amok during a pony club gymkhana) where Speight J said:

> "If a plaintiff is a paying customer at a spectator sport, there are certain duties owed to him by both organisers and competitors but those are not absolute. He may well have volunteered to accept such risks

> (for example, a flying cricket ball from a big hit) as no reasonable precautions on the part of the organiser or observation of care on the part of the competitor could be expected to prevent and such risks can be said to be within the type of danger that the customer is prepared to run. *But it must be apparent that a spectator only recognises and accepts the risks which prudent management and control and sensible competition cannot be expected to avoid* … Did the organisers fail to take sufficient precautions to make the area and the operations as safe as reasonable care and skill could achieve in the circumstances including the nature of the contest and the known vagaries of the .. animals and competitors likely to be engaged."

[27] Of relevance to this case, I consider that the extent of compliance or non-compliance with relevant codes of practice is a material consideration in appropriate cases. In *"Civil Liability Arising Out of Participation in Sport"* by Lewis and Taylor 2008 Second Edition, the authors state at D5.83:

> "Such codes may well be regarded as an indication of acceptable conduct and a measure of the kind of safety measures which reasonably ought to be taken to provide protection from foreseeable risks. In particular, to contravene a provision in a code may make it difficult for an organiser to plead that an injury was caused by a risk which was inherent in the sport which spectators and others were obliged to accept and against which there was no obligation in exercise of a duty of reasonable care to guard against."

(See also Hinchcliffe v British Schoolboys Motorcycle Association (April 2000, unreported QBD), Headcorn Parachute Club Limited v Pond (QBD transcript 11 January 1995 (Alliott J), Slack v Glennie (19 April 2000, unreported CA) and the Australian case of Woods v Multisport Holdings Pty Ltd (2002) 76 ALJR 483).

[28] Equally so, adherence to a commonly accepted standard may not always be sufficient to avoid liability (see Watson v British Board of Control [2001] QB 1134). Similarly, the fact that no accident has previously occurred of itself may provide no answer to a negligence claim, depending on the circumstances.

Conclusions

[29] Applying the principles adumbrated above, I have come to the conclusion that the plaintiff in this case has failed to satisfy me on the balance of probabilities

that the defendants were guilty of negligence or in breach of the Occupiers' Liability Act (Northern Ireland) 1957. I have come to that conclusion for the following reasons.

[30] First, I consider that the arena where this match was played was as safe a place as could reasonably be expected. The steps taken with the provision of netting at the ends of the goals and the perspex glass at the height outlined by Dr Marrs, in my view were reasonable precautions. The plaintiff was injured as the result of a danger inherent in the sport itself which she must be taken to have accepted and against which the defendants cannot reasonably have been expected to guard.

[31] Secondly, in addition to the physical safety precautions, there were a plethora of warning signs throughout the arena, a warning was placed on every ticket and, most importantly, regular announcements were made in the course of the event warning people of the dangers of the pucks and the need to look out for them. No spectator could have been unaware or in any doubt as to the need to watch out for pucks during the course of the warm up and of the game.

[32] The fact that a similar incident had occurred several months beforehand, must be seen in the context of the experience of Mr Kelman that over 14 years he was unaware of any similar injury, despite the fact that from time to time pucks do go into the crowd. There are approximately 120,000 spectators over the course of a season and so far as is known the only two incidents of injury were those to the plaintiff and Ms McCarney. This is not a case of relentless occurrence. I consider, therefore, that the risk of this injury was so small that it was unnecessary to take any further precautions other than those which had been invoked by the organisers and occupiers in this instance. The law is characterised by dialectic between theory and experience. In theory steps might have been taken to remove every conceivable risk to spectators in this arena .However, experience and conventional practice revealed that it would be unreasonable and unnecessary to expect all risks to be removed, given the precautions that had been taken. In short, the risks were no different from those which exist in a number of other sporting arenas including field hockey, football, cricket, rugby or golf. Such risks are amongst the jolts and jogs to be expected of sporting life.

[33] In coming to this decision, I have taken into account the compliance of this arena with the International Hockey Federation Rules and Regulations. I accept the evidence of Mr Kelman, and indeed that of Dr Marrs, that the defendants in this case have provided more than the minimum requirement laid down under those regulations and that neither of them were aware of any arena anywhere in the United Kingdom where better or further safety precautions had been taken. These are all *indiciae* of the reasonable care adopted by the defendants in this case. Given the nature of the safety precautions that comply with the Federation Rules, it did not surprise me that counsel was unable to point me to even one case anywhere in the United Kingdom in which a claim had been successfully brought for injury to a spectator in an ice skating context where compliance with the rules had been met.

The assessment of a high risk of pucks going into the spectators must be the same for every such arena but there is a limit to the reasonable precautions that can be taken. It seemed to me that there was a compelling logic in Mr Kelman's assertion that the risk was even smaller during the warm up than in the actual game itself, because players are not moving at speed or with the intensity that would occur in the game itself. Hence I see no reason to take further precautions – if this were possible – during the warm up period.

[34] The Occupiers' Liability Act 1957 imposes upon an occupier the common duty of care:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[35] It does not, of course, necessarily follow from the fact that the plaintiff was struck that the defendants are liable. The question is whether the defendants took such care as in all the circumstances was reasonable to see that the plaintiff would be reasonably safe in spectating. The duty of care is, therefore, only to take reasonable steps in the circumstances. It does not extend to ensuring the safety of a visitor such as the plaintiff in every circumstance. Unfortunate accidents will always happen. In this case, I am satisfied that the duty of care was properly fulfilled by the defendants to ensure that the arena was as safe as reasonably possible for the plaintiff.