Neutral Citation Number: [2020] EWHC 3205 (QB)

Case No: QA-2019-000370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2020

Before :

MR JUSTICE STEWART

- -

Between :

PHOEBE LEWIS	**Claimant**
- and -	
WANDSWORTH LONDON BOROUGH COUNCIL	**Defendant**

- -
- -

Mr Ian Clarke (instructed by **Taylor Rose TTKW**) for the **Claimant**
Mr Rachit Buch (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 18th November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This is an appeal by the Defendant against an Order made on 21st November 2019 by Mr Recorder Riza QC sitting at the Wandsworth County Court. Permission to appeal was granted by Order dated 26th March 2020 by Mr Justice William Davis.

2. The Recorder's Order, after a trial of the action, was to grant judgment for the Claimant for damages in the sum of £16,911.84, together with an Order that the Defendant pay the Claimant's costs, assessed in the sum of £17,422.03.

3. The grounds of appeal are:

    a) The Judge was wrong to find that a warning was necessary to discharge the Defendant's duty under the Occupiers Liability Act 1957 ("OLA")

    b) The finding that there was a greater risk of injury than usual at the time of the index accident was not open to the Judge.

    c) The Judge was wrong to distinguish *Bolton v Stone* [1951] A.C.850

    d) The Judge failed to give adequate weight to:

        i) The Claimant's evidence that she knew about the existence of the cricket pitch,

        ii) the Claimant's evidence that she had seen people on the boundary of the cricket pitch when first walking past the pitch,

        iii) the Defendant's evidence of signs that are placed in the park when hazards are sufficiently dangerous,

        iv) the Defendant's evidence on the period of time for which cricket has been played at the material location,

        v) the Defendant's evidence of the lack of knowledge of previous injury:

    e) The Judge was wrong to find that a warning would have been effective in the Claimant's case so as to be an effective discharge of the Defendant's OLA duty,

    f) The Judge failed to consider s.1 Compensation Act 2006

    g) Individually or together, these failings mean that the Judge was wrong to find that the Claimant had proved her case.

4. Given the nature of the challenge to the Recorder's decision and since his judgment sets out most of the essential facts in the case, it is appropriate to cite reasonably fully sections from the short judgment in the Court below.

5. The Recorder said this:

> "1. This is a claim by Phoebe Lewis against the London Borough of Wandsworth for injuries she received on 28th August 2014 while she was walking through Battersea park from a cricket ball that fell on her eye and caused a serious injury…
>
> 2. The facts which I pick from the particulars of claim and her statement are as follows. As I said the claimant was walking through the park on 28th August at about 6.20pm. She was walking with a friend at the end of a cricket pitch. On the pleadings it says….that she heard a cry from her left, turned her head to the left and inclined her head upwards, where upon she was struck on the left eye with a cricket ball, struck from the game of cricket being played on the cricket pitch.
>
> 3. According to the pleadings and again, a lot of this, I should say is uncontroversial, the cricket pitch is laid out in an area that is small and is bounded by a pathway. The second cricket pitch in Battersea Park is larger. A game of cricket that the defendant permitted to be played was therefore being played, according to the claimant, under dangerous conditions. It is also claimed that there was a greater hazard to passers-by than there would have been in a normal sized cricket pitch".
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> …
>
> 4. The evidence before me is basically a statement from Miss Phoebe Lewis, all of which is unchallenged….
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> 5…what she said in her statement is as follows:
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> "I was walking from the fountains and the path that span round to the rose garden. There are two parallel paths and I was on the southern-most one. I was not focused on the cricket at all and I was chatting to my friend, but I cannot deny that I might have seen the players. As I was on the designated path, which I believed to be outside the boundary of the pitch, I did not think that walking down the path was, in any way, risky".
>
> 6. This is important, this part of her evidence, because it is said that the warning would not have made any difference but I accept her evidence that she did not think that it was in any way risky which means that it follows that had she been warned, she might not have been of the same view. She continues:

> "I suddenly heard a shout from the pitch and turned my head to the left and inclined it upwards. At this point I was hit in my left eye by a cricket ball. The ball hit me square on the eyeball. I do not recall seeing it in time to even close my eye. I honestly do not remember any pain as the force with which the ball hit me was so much that I can only remember the sound, a sort of sucking thud noise and then total shock and confusion. I think the adrenaline stopped a bit of the pain at this stage and I clutched my face and fell to the floor. The cricketers came over to see if I and my friend were alright. I asked if someone could call an ambulance as if my eyeball had fallen out or been destroyed and then it began to be painful".

7. …She continues at paragraph 15 of her statement as follows:

> "I did not see any signs. I think there ought to have been some form of signage. I did not know that cricket played in a public park was played with a real cricket ball, which is really hard. If there had been a sign I think I would have noticed it, despite the fact that I was in conversation with Shona [?]. If I had seen a sign I would have taken note of it. If a sign had warned me of either hard balls or a risk of injury, I would have paid more attention to the game at that point and kept a watch out. If I had been watching I have no doubt I would have seen the ball coming and been able to duck out of the way as Shona did. Further, if a rope had been strung across the path with a sign warning prohibiting use of that path for the duration of the game or advising users to take a different route, then I would have heeded that advice. I am a member of MCC which is a cricket club, although I am not a playing member, I am a fan of cricket and understand it. Despite watching a number of professional matches in my life time it would never have occurred to me that a public park would allow use of a real hard cricket ball. I would also deem the pitch at Battersea park to be undersized and therefore would have thought a softer ball would be used. The risk of a cricket ball crossing this boundary is obvious to me, whether it is completely in the air or bounces before crossing the path or hitting someone. I find it hard to believe that the council appear to have taken no precautions whatsoever".

…

> 10. …I move at once to the evidence of Jeremy Birtles who put in a statement and also gave evidence in front of me. Now Mr Birtles is the chief parks officer for Enable Leisure who manage operations within Battersea park on behalf of Wandsworth Council. He was directly employed by the council at the time of the incident in 2014. He gave evidence and was cross examined briefly and so far as material, his statement beginning paragraph 6 is as follows:
>
> "The accident occurred on the path running to the north side of the cricket pitch, which is marked out in the fields to the south

> side of the Old English Garden. The pitch is one of three within Battersea Park of which I use for adult games. The cricket square, or wicket, of each pitch is located centrally within the field in which the pitch lies. The pitch is situated upon the smaller of the two adult cricket fields and as such the boundary is closer to the nearest path than in the case with our other adult pitch ".

11. Basically I think it is common ground between the parties that the boundary to the north is close to the path where the incident occurred that caused the claimant the injury to her eye. This is actually quite an important part of the evidence because, as I think I made clear during the course of argument, as it seems to me, given that the primary purpose of a batsman is to aim for the boundary, if you will, if you then put a pathway near the boundary, there is an increased risk of serious injury, not just injury, serious injury because, again it is common ground that the ball is a hard ball. It is normally struck to head for the air, although sometimes it goes along the ground. That means that as it is coming down, if it is a good enough hit, it could easily come down on a pedestrian using the pathway.

12. That in my judgment, was an important consideration in the Court's view in deciding the question in play here. I will read the whole thing and that is to say, the section 2 "the Court [inaudible] the duty under section 2(2) of the Occupiers Liability Act 1957 as follows:

> "The common duty of care is to take such care as in all circumstances of the case is reasonable to see that the visitor is reasonably safe in using the premises", i.e. in this case the pathway "for the purposes of which he is invited or permitted by the occupier to be there". That is the context. That is the law and this is the context.

13. Paragraph 9 of the statement of Mr Birtles, "the pitch in question is clearly visible as one walks along the path known as Maple Walk. It is visible at a very early stage from Central Avenue, if you approach from the bandstand. Cricket pitches are generally used", he says,

> "On Tuesday, Wednesday and Thursday and both weekend days during cricket season, which is summertime. Pitches are not used on a Monday or Friday. Due to the popularity of cricket and the location of Battersea park, pitches are booked and used at close to capacity. Anyone who frequents the park on a reasonably regular basis during the summer months would be aware that cricket is taking place. I have been asked how many records we have of pitch bookings. I have been able to produce a record of historic booking from the years 2014-2016 based upon information provided by our support contractor".

14. He then gives some statistics about how many games were played, which do not really matter. At paragraph 16 he says this about signage, "there is no signage about cricket or indeed any other sports being played within the open areas of the park. It is quite obvious that games are in progress as you approach them. We seek

to minimise signage, "this is what he says, the reason why, "as far as possible so as to keep the public space as clear as possible and to allow the space to be as de-urbanised an environment as possible". As I said during the course of argument, the reasons are primarily aesthetic as it seems to me, why signage has not been done. However of course the essential point put forward by the claimant is really that these signage could easily be mobile and done only for the purposes of and for the duration of a particular cricket match. They do not have to be permanently there. In addition they could be designed in a way as to match the scenery surrounding them so I am not much enamoured, I am afraid, by the aesthetic argument. There is not much in it.

> "The fact that the park is laid out with a number of sport pitches which are used to high capacity serves to show park goers that games happen there. My experience is that within a park setting people tend to pay little heed to signage as they are more concerned with whatever purpose or recreational leisure activity that brought them to the park our practice is not to install signage when we believe it will serve no purpose".

15. I already reject this as a justification, if a justification it be. In my judgment signage is extremely important. People take note of it. That is why it is put there and in my judgment it is fool hardy by a council to adopt the stance that it would make no difference. I accept the claimant's evidence here that it would have made a difference. An enormous difference indeed, the accident, according to her, might not have occurred if she was informed that a game was in progress and that hard balls were being used in particular. In my judgment it beholds *(sic)* the council to take precautions so that persons using the pathway are aware that it is close to the boundary where cricket is being played using a hard ball.

16. I was told during the course of submissions on instructions that on this occasion there was some kind of significant game being played to the extent that the players may have been wearing white and consequently the possibility that the boundary would have been reached was even greater.

17. One other important point that came out during the course of Mr Birtles' evidence was the fact that at some point, I am not sure when and it probably does not matter, but at some point the council relocated the larger pitch which had batted onto the other side of the path because, as Mr Birtles very fairly pointed out, it was thought that it did cause a danger because the pedestrians would have to look in both directions, [inaudible] that is the man, [inaudible] in two directions in order to evade any incoming cricket balls. In my judgment that was very fair of him to do so but it also enables me to say well yes, that is true as may be but the fact is that without any sign posting that a game is in progress and that the path is near the boundary and that the hard balls are used, the magnitude of damage that could be caused if things were to go wrong were such that in my judgment it was incumbent on the council to ensure that the dangers I have just identified were properly sign posted.

18. That really is the evidence. Now the submissions put forward by the defendant are contained in his skeleton argument and they focus on some remarks made, or rather actually I think it is the *ratio decidendi* of the case according to the

defendants. In the case of *Bolton v Stone* [1951] A.C. 850, the speech of Lord Porter in the House of Lords who said, amongst other things, the following page 858, "the question then arises: what degree of care must they", in that case it is the cricket club and members of the cricket club:

> "What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field? Undoubtedly they knew that the hitting of a cricket ball out of the ground was a possible event and, therefore, that there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely…drive a motor car since the possibility of an accident could not be overlooked and if it occurred some stranger might well be injured, however careful the driver might be. It is true that the driver desires to do everything possible to avoid, whereas the hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about. But in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused".

19. The defendant latches onto that as being applicable to the circumstances of this case. In my judgment Lord Porter makes it clear that that was facts specific to those circumstances which, as Mr Clarke pointed out, are wholly different to the circumstances for this case. That was a case that involved the highway. Whereas this case is, in my judgment, wholly different because what we have got here is a park, a pitch in the park, cricket pitch, with a boundary next to a path with no protection whatsoever and no warning signs whatsoever to provide some sort of warning to pedestrians about the cricket matches that were taking place involving the use of hard balls, notwithstanding that the trajectory of those balls was likely to be towards the vicinity of the pathway. Therefore I'm afraid I reject the submission that the case of *Bolton v Stone* can be of any assistance to the defendant in this case.

20. In my judgment on the facts of this case, the possibility of an incident and the possibility of injury are quite extensive. Obviously if a ball rains down on one as one is walking on the pathway and causes an incident, the incident is probably going to be serious injury as occurred in this case to be the area of the head, and in particular the eyes.

21. Therefore, in my judgment, in accordance with the test I identified earlier, the council did owe a duty of care that in all the circumstances of the case, it failed in its duty of care because it allowed pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe and that the use of the pathway was a use that the claimant was invited or permitted by the occupier to be there.

22. I am satisfied on the balance of probabilities that the claim has been established primarily because of the failure to warn this claimant that a game of cricket was in progress and that a hard ball was being using *(sic)*, and that the boundary of the cricket pitch was or went alongside the path which she was using.

> 23. The defendant also put in a claim for contributory negligence, in my judgment, having regard to what I just said and having regard to all the evidence there is absolutely no merit in that at all."

Authority

6. It is important to consider the case of *Bolton v Stone* carefully. The facts were that the Claimant who was on a side road of residential houses was hit by a ball struck by a batsman on the cricket ground which abutted the highway. The ground was enclosed at the material point by a fence which stood 17 feet above the level of the pitch. From where the ball was hit to where the injuries took place was some 100 yards. In his speech, Lord Porter at page 858 said that the question was "what degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?" Later on that page is the citation which the Recorder in this case incorporated into his judgment. Lord Porter then continued:

> "…it is not enough that the event should be such as can be reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.
>
> It must be remembered and cannot too often be repeated that there are two different standards to be applied when one is considering whether an appeal should be allowed or not. The first is whether the facts relied upon are evidence from which negligence can be inferred; the second, whether if negligence can be inferred, those facts do constitute negligence. The first is a question of law upon which the Judge must actually or inferentially rule; the second, a question of fact upon which the jury, if there is one, or, if not, the Judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the attendant circumstances of the case."

Lord Porter then referred to the fact that the trial Judge had concluded that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played. He said that that conclusion could not be said to be unwarranted.

7. Lord Normand at page 861-862 referred to the facts found by the trial Judge being (1) that a house substantially nearer the ground than where the plaintiff was injured had been hit by a cricket ball driven out of the ground on certain occasions (vaguely estimated at 5 or 6) in the previous few years, (2) the hit which occasioned the plaintiff's injury was altogether exceptional, (3) it was very rare indeed that a ball was hit over the fence between the road and the ground. The learned Judge continued:

> "It is perhaps not surprising that there should be differences of opinion about the defendants' liability even if the correct test is applied. The whole issue is, indeed, finely balanced. On the one side there are, as we were told, records of much longer hits by famous cricketers than the drive which caused the injury to the plaintiff and it is, of course, the object of every batsman to hit the ball over the boundary if he can. Again, the serious injury with which a cricket ball might cause must not be left out of account. But on the other side the findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight."

On that basis Lord Normand said that the trial Judge was entitled to come to the decision which he had done.

8. Lord Oaksey at page 863 said:

> "There are footpaths and highways adjacent to cricket grounds and golf courses onto which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks."

9. Lord Reid at page 866-867 referred to counsel for the plaintiff's submission that it was foreseeable that a ball could be hit out of the ground and somebody injured. Lord Reed agreed that if the true test was foreseeability alone then injury was foreseeable. He continued:

> "On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road, and it would not matter whether the road was the busiest street or the quietest country lane; the only difference between these cases is in the degree of risk
>
> It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life, even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial…in my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger

> …
>
> (Lord Reid then considered the circumstance of the case and continued)
>
> …I think that this case is not far from the borderline. If this appeal is allowed, that does not in my judgment mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organise matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small."

10. Lord Radcliffe said at page 868-869:

> "…there was only a remote, perhaps I ought to say only a very remote, chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground but it had also to coincide in its arrival with the presence of some person on what does not look like a crowded thoroughfare and actually distract that person in some way that would cause sensible injury. …
>
> It seems to mean that a reasonable man, taking into account the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing whether, if the unlikely event of an accident did occur and his play turned to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risk, I do not say, for I do not think that that is a consideration which is relevant to legal liability."

11. Important principles are to be distilled from *Bolton v Stone* and the quotations I have set out. In summary:

    i) Reasonable foreseeability of an accident is not sufficient to found liability.

    ii) The Court has to consider the chances of an accident happening, the potential seriousness of an accident and the measures which could be taken to minimise or avoid accident.

    iii) *Bolton v Stone* is not a case which provides authority for a proposition that there is no liability for hitting a person with a cricket ball which has been struck out of the ground or over the boundary. It is clear from the decision that there needs to be careful analysis of the facts.

iv) On appeal a Court has to consider the two stage test referred to by Lord Porter.

12. It is to be noted that in the nuisance case of *Miller v Jackson 1977 QB 966,* the Court of Appeal upheld an injunction against a cricket club on a complaint by a householder whose house had been built close to it. On a number of occasions cricket balls had been struck into the garden or against the house, as well as the gardens and houses of adjoining properties. Geoffrey Lane LJ at 985 F said:

> "In the present case, so far from being one incident of an unprecedented nature about which complaint is being made, this is a series of incidents, or perhaps a continuing failure to prevent incidents from happening, coupled with the certainty that they are going to happen again. The risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the plaintiffs, the defendants are guilty of negligence."

As *Clerk and Lindsell on Torts* 23rd Edition at 7-176 says:

> "It should be noted that *Bolton* is not authority for the view that it is always reasonable to disregard a low likelihood. The other factors in the balance, e.g. the severity of the harm and the cost of precautions must also be taken into account."

The Appeal Court's approach

13. By CPR 52.21(1) an appeal is limited to a review of the decision of the lower Court. Further sub paragraphs provide:

> "(3) the Appeal Court will allow an appeal where the decision of the lower Court was –
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> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.
>
> (4) the Appeal Court may draw any inference of fact which it considers justified on the evidence."

14. Considering the grounds of appeal, grounds (a), (b), (d) and (e) challenge the Recorder's evaluation from primary facts. Indeed, although the other grounds of appeal refer to matters of law, it is difficult to separate fact and law in this appeal. This Court in deciding whether the lower Court was "wrong" must have regard to the basic principles on appeal. These can be summarised as follows:

i) As May LJ said in *Dupont de Nemours (EI) and Co v ST Dupont (note)* [2003] EWCA Civ 1368 at [94]

> "The review…will accord appropriate respect to the decision of the lower Court. Appropriate respect will be tempered by the nature of the lower Court and its decision-making process. There will also be a spectrum of appropriate respect

depending on the nature of the decision of the lower Court which is challenged. At one end of the spectrum will be decisions on primary facts reached after an evaluation of oral evidence where credibility is an issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material".

ii) An Appeal Court will only interfere with a trial Judge's finding of fact, and allow an appeal on a basis of a challenge to such a finding, where it properly determines that the "finding of fact is unsupported by the evidence or where the decision is one that no reasonable Judge could have reached". The authorities for this are cited at paragraph 52.21.5 of Civil Procedure 2020 volume 1.

iii) Where a Judge's evaluation of facts is challenged it is very difficult for an Appellate Court to place itself in the position of the trial Judge who would have to take account of both written and oral evidence. In *Re Sprintroom* [2019] EWCA Civ 932 at [76] the Court of Appeal said:

> "…on a challenge to an evaluative decision of a first instance Judge, the Appeal Court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by some reason identifiable flaw in the Judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"

iv) It must be borne in mind that reasons for a judgment will always be capable of being better expressed. A Judge's reasons should be read on the assumption that the Judge knew how they should perform their functions and which matters to take into account. An Appellate Court should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the Judge, by a narrow textual analysis which enables it to claim that the Judge misdirected him/herself. See *Re C (a child) (adoption: placement Order) (practice note)* [2013] EWC Civ 431 at [39]; *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372

15. The Claimant referred me to the authorities on the restrictions on an appellate court interfering with the discretion of a judge in a lower court. The Claimant's skeleton argument concluded by saying:

"18. While it is accepted that a different tribunal *may* have come to a different conclusion it cannot be said that the decision of Mr Recorder Riza QC was outside the generous scope of his discretion"

This was not, however, a case for the exercise of any discretion. The issues were ones of fact and law. That is apparent from the speeches in *Bolton v Stone.*

Discussion of the issues on appeal

16. It was never in dispute that the Defendant owed a duty of care and/or a duty under section 2 of the Occupiers Liability Act 1957. It was not suggested that there was any difference in the two duties. The Recorder found (at [22]) that:

i) The Defendant failed in its duty of care because it allowed pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe.

ii) The claim had been established primarily because of the failure to warn the Claimant that a game of cricket was in progress, that a hard ball was being used and that the boundary of the cricket pitch was or went alongside the path she was using.

17. I now examine the challenges to these findings.

18. First, at [14], the Recorder said that the statistics as to how many games were played did not really matter. Paragraph 11 of Mr Birtles' statement was that in the years 2014 – 2016 the cricket pitches had 317 bookings, 225 bookings and 258 bookings respectively. At [12] Mr Birtles says that cricket fields have been laid out in Battersea park since the park was created. He attached a copy of an historic map dated 1897 which shows the park as it then was, the current layout of the park today being little changed. The path on which the accident occurred is still in the same location as it was in 1897 as is the cricket pitch in question. Cricket has continually been played on this pitch, with the adjacent path in place, since at least 1897. Mr Birtles has been employed by the Defendant in a variety of roles since November 1989. He says (at [22]) that in his opinion the risk of injury to spectators or casual passers-by is "extremely small". He is not aware of any injuries of this type being caused by stray balls elsewhere in the borough during the time of his employment with the Defendant. Mr Birtles attaches a photograph marked up with distances from the two wickets. This shows that for a straight drive the distance to the path is some 50.6 metres, of which over 8 metres are between the boundary and the path. For a ball which was hit by the batsman at the end nearer the path, i.e by a batsman whose shot would be behind the wicket, the distance is some 30.5 metres from wicket to path, of which some 3.3 metres are between the boundary and the path. There will be slight variations on these distances, but they give the essential context. Further, (at [19]) Mr Birtles says that Battersea park is a very busy park particularly in fine weather and in the summer months. He says (at [18]) that the best estimate for public use of Battersea park would suggest annual visitors amount to a minimum of 10 million visits throughout the course of the year and likely to be significantly more.

19. In the process of evaluating the risk of injury, the Recorder was wrong to say that the statistics about the games played "do not really matter". By expressly failing to take account of those statistics and, inferentially, the other facts which I have set out in the preceding paragraph, and which do not appear in his judgment, the Recorder clearly failed to take account of a material factor or factors. The Claimant submitted that the Recorder's words 'which do not really matter' were unfortunate and possibly careless, but should not be taken to mean that he failed to grapple with the issue. I do not accept this. He did fail to grapple with the issue. The use of his express words clearly demonstrates this. The lack of evidence of previous injury does not mean that no previous injury has occurred; nor is it determinative of the case in favour of the Defendant. It is an error which the Recorder made in making his evaluative decision, an error which amounted to, as the Court of Appeal said in *Re Sprintroom,* an "identifiable flaw in the Judge's treatment of the question to be decided".

20. Therefore I accept what is said in ground (d) (iv) and ground (d) (v) of the grounds of appeal.

21. The Recorder found breach of duty of care in allowing pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe. The above evidence of Mr Birtles, which the Recorder expressly failed to take into account, was germane to making the evaluation of the safety of pedestrians walking along the path.

22. Secondly, the finding that it was not reasonably safe needs to be considered in the context of the primary basis of the Recorder's decision, namely the failure to warn. I now turn to that.

23. There were three elements of the failure to warn, each of which need to be considered separately.

24. The first element was a failure to warn the Claimant that a game of cricket was in progress. She did however know not only of the existence of a cricket pitch and also accepted that she might have seen that a game of cricket was in progress. In her statement [2] she said: "I am a regular user of the park so can't deny that I knew there was a pitch there, but I have never thought there were professional style players using them…" She said (at [4]): "I was not focused on the cricket at all as I was chatting to my friend, but I can't deny I might have seen the players." Further, (at [1]) the Claimant said that she and her friend had done a loop of the park. She thought that she had passed the cricket pitch once before as she remembered seeing people sitting on the grass inside a white line which was, on reflection, obviously the boundary. In Mr Birtles' statement [9] he says that the pitch in question is clearly visible as one walks along the path. If you are approaching from the Albert Gate direction (as was the Claimant) you would only see a game taking place as you approached and then passed the cricket pavilion to your left. There was therefore, as the Claimant accepted, a clear view for pedestrians using the path to see a cricket match taking place.

25. Mr Clarke put the case on appeal on the basis that (i) the Claimant probably did not register the fact that a cricket match was taking place, (ii) the Defendant was under a duty to warn that a cricket match was taking place and (iii) if there had been such a warning, the Claimant would have registered it and heeded it. As to (i) it is not clear that this is what the Recorder found as a fact, though it might be inferred from his judgment (at [22]). Assuming that he did, was he entitled to find (ii)? There were here, not very far away to the Claimant's left and in her full field of vision, 13 (presumably) adult male cricketers wearing whites. Yet the defendant was said to be under a duty to warn that a cricket match was taking place? This I do not accept. It is not a finding which was open to the Recorder. The Defendant cannot in those circumstance have been under such a duty. My decision means that (iii) does not arise, though I must say that if the Claimant did not register a cricket match taking place at all, whether she would have registered a warning sign to the effect that it was taking place must be regarded as doubtful. It is to be noted that the statement by the Recorder [4] that the Claimant's evidence was unchallenged is, I am told, not correct. Her evidence in her statement (at [15]) that if there had been a sign "I think I would have noticed it" was challenged. Unfortunately, despite attempts to obtain a transcript of evidence, no further transcript was available from the County Court.

26. The second element was a warning that a hard ball was being used. The Claimant had said in her statement [15] that she did not know that cricket played in a public park was played with a real cricket ball, which is really hard. Later she says that although she is a member of MCC (not a playing member) she is a fan of cricket and understands it,

and despite watching a number of professional matches in her lifetime it would never have occurred to her that a public park would allow the use of a real hard cricket ball.

27. The Defendant criticised the Recorder for permitting information on whether the players were wearing cricket whites to be provided after the evidence and on instruction, and then used this evidence, without reasonable foundation, as a basis for finding (at [16]) that the likelihood of the ball reaching the boundary was higher. The Recorder asked the parties in final submissions to take instructions. Mr Buch said that it would be venturing into the provision of evidence. The Recorder responded that he just wanted to know. The Claimant did not recall. The Recorder asked for instructions to be taken from Mr Birtles. His instructions were that it was not obligatory but this was a league called the Last Man Standing and usually that means they do wear white. It was wrong of the Recorder to elicit this in final submissions and then use the information as a discrete finding for the basis of increased risk of reaching the boundary. Nevertheless, whether the men were or were not wearing whites, there was clearly a not insignificant risk of a ball reaching the boundary and the path. The error by the Recorder is not particularly causatively important in the circumstance.

28. What I frankly fail to understand is how the Recorder could envisage that a cricket match played by adult men could be assumed by any reasonable passer-by to be using a soft ball. This would have been particularly so if they were wearing whites and therefore playing what would appear to be a serious match. There is no evidence as to whether the hard ball could have been heard, though it would be surprising given the distances involved if this was not the case. Nevertheless, and in any event, the strong presumption must be that adult men playing a cricket match will be using a proper cricket ball. The finding that the warning should have been that a hard ball was being used about cannot be upheld. In fairness to Mr Clarke, he accepted that it was difficult to justify a warning that a hard ball was being used. He doubted that the reasonable person would pay attention to such a warning if they were aware a cricket match was taking place. Yet the Recorder expressly found that such a warning was necessary. It was a central part of his decision. For the above reasons that was a decision which was not open to him.

29. The third element of the warning finding was that the boundary of the cricket pitch was or went alongside the path. The Claimant, on her own case, had walked along the path on many previous occasions. More importantly, because the Defendant's duties apply to anybody walking along the path whether or not they had been therefore, she says in her statement (at [1]) that she remembered seeing people sitting on the grass inside a white line which was on reflection obviously the boundary. Further, irrespective of where the actual boundary was, it was clear that there were men playing cricket and the distance they were from the path. As was pointed out by their Lordships in *Bolton v Stone* a batsman hits a ball as hard as possible. As Lord Porter says hitting the ball out of the ground is an incident of the game and one which the batsman would wish to bring about. Therefore precisely where the boundary was seems to me to be largely irrelevant. No batsman would seek to hit the ball so that it just went over the boundary. As it says in the Recorder's judgment [7], the Claimant said: "If I had been watching I have no doubt I would have seen the ball coming and been able to duck out of the way, as Shona did…The risk of a cricket ball crossing this boundary is obvious to me..". The Recorder made no reference to these matters in his reasoning.

30. If one adds all these elements together one can see why Mr Birtles' statistics are of relevance. The lack of previous injury of itself is by no means sufficient to absolve a Defendant from liability. However when seen in the context of the analysis of the warning which the Recorder found should have been given, the absence of previous accident is in circumstances where (a) the fact that adults were playing cricket was clearly evident to people using the path, (b) reasonable people using the path would not assume that adults would be using a soft ball (c) precisely where the boundary was is of no relevance.

31. The case is very different from *Bolton v Stone*. The risk of balls being hit towards the path was so evident that any warning should have been superfluous. This Court does not need to overturn the finding of the Recorder that it would have made a difference to the Claimant. However it must be said that it seems to me that that statement, though undoubtedly honest, was one which may well have arisen with the benefit of hindsight. To a reasonable person a warning in the terms suggested by the Recorder was unnecessary and irrelevant.

32. Mr Birtles' evidence (at [16]) is that there was no signage about cricket or any other sports being played in the open areas of the park because it is quite obvious that games are in progress as you approach them. He then added that the Defendant seeks to minimise signage as far as possible so as to keep the public space as clear as possible, and to allow it to be as de-urbanised as environment as possible. The Recorder (at [14]) assumed that the aesthetic argument was the primary one but, on analysis, the first point made by Mr Birtles is the primary one.

33. The Claimant submitted that the evidence that the Defendant had moved one cricket pitch due to the risk of pedestrians (Recorder's judgment at [17]) was relevant as it reinforced the conclusion of reasonable foreseeability of injury and pointed to the utility of warning signs. I agree that it is relevant to the issue of foreseeability – something which was never in issue. I fail to understand why, given my above analysis, it pointed to the utility of warning signs.

34. I do not accept the Defendant's submission that the Recorder said (at [15]) that signage, according to the Claimant, would have made a difference in that her accident "might not have occurred", such that it would not probably have made a difference. He had earlier in that paragraph said that he accepted the Claimant's evidence that signage would have made a difference.

35. The Defendant also relied on section 1 of the Compensation Act 2006. This provides:

1 Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

Given that the sole basis of the finding of negligence/breach of statutory duty was failure to warn, I do not believe that the section comes into play.

Conclusion

36. I reach the conclusion that the Recorder's judgment was wrong. He failed to take account of material factors and there was a lack of logic in his analysis of the facts. In the circumstances which obtained, allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The remoteness is reinforced by Mr Birtles' evidence as to statistics. Further and in any event the alleged breach by failure to warn the Claimant in the terms suggested does not withstand proper analysis.

37. I have considered whether the case should be remitted. The primary facts are not seriously in issue so far as essential for the decision. In those circumstances the appeal is allowed and I substitute judgment on the claim in favour of the Defendant.