



Neutral Citation Number: [2021] EWHC 3470 (QB)

Case No: QB-2019-000545

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2021

Before:

HHJ Karen Walden-Smith sitting as a Judge of the High Court

Between:

FREDERIK TYLICKI	<u>Claimant</u>
- and -	
GRAHAM GIBBONS	<u>Defendant</u>

LORD FAULKS QC and ANGUS PIPER (instructed by **STEWART-MOORE SOLICITORS**) for the **Claimant**
PATRICK LAWRENCE QC (instructed by **ASHFORDS LLP**) for the **Defendant**

Hearing dates: 29 and 30 November, 1, 2 and 3 December 2021

Approved Judgment

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

.....

HHJ KAREN WALDEN-SMITH:Introduction

1. This is a personal injury claim brought by Frederik Tylicki against Graham Gibbons. Both Mr Tylicki and Mr Gibbons were successful and experienced professional flat race jockeys. Mr Tylicki alleges that Mr Gibbons was in breach of his duty of care to him when they were racing the Kempton all-weather course in the 3.20 Mile Maiden on 31 October 2016. As a consequence of a collision between Mr Tylicki's mount, Nellie Deen, and Mr Gibbons mount, Madame Butterfly, Nellie Deen fell with Mr Tylicki. As a consequence, Mr Tylicki sustained T4 AIS complete paraplegia. He is wheelchair-bound for the rest of his life.
2. While everyone involved in this case has been acutely conscious of the tragedy of this case, namely that a talented jockey suffered catastrophic and life-changing injuries as a consequence of the fall, the court is only concerned with whether Mr Gibbons was in breach of his duty of care to Mr Tylicki. It is accepted, on behalf of Mr Gibbons, that there is a duty of care owed by jockeys to each other. The core of the legal dispute is the standard of care to be taken by a jockey racing in a competitive environment and the core of the factual dispute is whether, on this occasion, Mr Gibbons' riding fell below that standard of care. It is said on behalf Mr Gibbons that his riding did not fall below the standard of care owed in the circumstances and that this was merely a racing incident and that the court should conclude that there was no significant defect or shortcoming on the part of Mr Gibbons or, if there was any shortcoming it fell below the threshold of liability. Mr Tylicki contends that he suffered injury because of Mr Gibbons' actionable negligence in the way that he rode Madame Butterfly on 31 October 2016.
3. I am grateful to both Lord Faulks QC, and his junior Mr Piper, for the Claimant, and to Mr Lawrence QC, on behalf of the Defendant, for the thorough and detailed presentation of their respective cases.
4. I heard over 4 days both factual evidence and expert evidence on issues of liability, with an additional day of submissions. There is not a considerable amount of documentary evidence in this case and, aside from the witnesses, the most helpful evidence available to the court is that of the Racetech recordings of the race, which recorded the race from several different angles, together with the stills of those videos. It is important to note that those videos and photographs were themselves subject to limitations given the different angles and the distortion of distances due to foreshortening and lengthening. This difficulty was recognised by both sides, but we were all assisted by the helpful playing and replaying of those videos by the video operator and through the course of the trial, both lay and expert witnesses were referred to sections of those videos on numerous occasions. I have watched all that video evidence many, many times.

The Parties

5. The Claimant, who is known as Freddie Tylicki, is now aged 35 and works principally as a racing analyst and TV pundit for Sky Sports Racing as well as a bloodstock agent. Prior to the incident that took place at Kempton on 31 October 2016, he had been a professional flat-racing jockey. His career had started in 2003 as an apprentice jockey in Ireland. He had moved to England in 2008 and was champion apprentice jockey of

Approved Judgment

the year in 2009. By 2016 he had won approximately 560 winners from over 4,000 rides and had won two group 1 races in 2016.

6. The Defendant, Graham Gibbons, was also a professional flat-racing jockey. He is now aged 39 and started riding pony races in Ireland when he was 13. He too was an apprentice jockey in England from the age of 19 and then became the stable jockey for various trainers. In 2016, Mr Gibbons rode 657 races. Over his racing career he won nearly 1,100 races including important races, such as the Gimcrack Stakes and the Lincoln Handicap. The professional flat-racing jockeys who gave evidence said that Mr Gibbons said was a skilful and talented rider. Mr Ryan Moore, who gave expert evidence on behalf of Mr Tylicki, referred to him as “an excellent horseman, a fantastic rider” and “a very good race rider”. The newspaper reports I have seen refer to him as being “at one time seen as the most effective flat-race jockey based in the North”.
7. Mr Gibbons gave oral evidence that he has not ridden since 2016. The reason for him not riding is that he lost his licence when his urine sample tested positive for a metabolite of cocaine in December 2016 after another Mile Maiden at Kempton. The initial suspension of 6 months led to a further longer suspension of an additional two years when he was found to have coerced an apprentice jockey to provide a urine sample which Mr Gibbons had passed off as his own. His licence has not been renewed. According to the press reports in the papers before the court, Mr Gibbons had earlier been banned for five weeks in November 2007 after failing a breath test at Hamilton Racecourse when he was, according to the newspaper reports, the first jockey in Britain to have been found over the drink-drive limit when taking a breath test at the races. Additionally, the newspaper reports, brought to the courts’ attention by the Claimant, set out that he was imprisoned after his fourth conviction for drink driving in September 2019.
8. Mr Gibbons did not mention any of these issues in his witness statement in which he had set out, over a section of 9 paragraphs, his horse racing experience. At no point did he say he had been suspended from horse racing, that he is currently without a licence, and that he had not ridden in any races since 2016. During his cross-examination Mr Gibbons explained his failure to be candid about his situation in his witness statement on the basis that this was public knowledge. However, it is not something that the court could have been expected to know about and, having put forward his evidence of his skills as a rider, it is surprising that it was not considered appropriate to give the court a full picture of his history.
9. This unfortunate history goes to Mr Gibbons’ credibility, but otherwise does not assist with respect to what happened on 31 October 2016. Mr Jim Crowley, who was also riding in the 3.20 on 31 October 2016, gave evidence that he was sitting close to Mr Gibbons in the weighing room and that there was a strong smell of alcohol on Mr Gibbons’ breath, although he did not otherwise display any outward sign of being under the influence of alcohol. No other rider mentioned the smell of alcohol on Mr Gibbons’ breath and in response to being cross-examined about why he had not told anyone else at the time about the strong smell of alcohol, Mr Crowley said that it was a common occurrence and that he was used to it. It is denied by Mr Gibbons that he was drinking on that day, and he said that there was no way he would have smelt of alcohol on that day. He did accept that he might drink on days that he was riding.

Approved Judgment

10. In my judgment, this evidence about Mr Gibbons' history goes to his character but is not something about which I should, or could, make a finding with respect to 31 October 2016. It was not pleaded as an allegation in the Particulars of Claim and was not dealt with in the thorough way it would have needed to have been dealt with if it were an issue to be determined.

The Witnesses

11. In addition to evidence from Mr Tylicki, I heard evidence on behalf of the Claimant from Mr Crowley (referred to above) and Mr Pat Cosgrave, both recognised highly successful professional jockeys, who were also racing in the 3.20 on 31 October 2016 at Kempton. Mr Crowley's mount, Electrify, fell behind Nellie Deen while Mr Cosgrave came in second on Cutty Sark, some five lengths or so behind Madame Butterfly.
12. Mr Tylicki relied upon riding expert evidence from Mr Ryan Moore and expert evidence on the rules of racing from Mr Jim McGrath.
13. Mr Gibbons did not call any witnesses other than his expert, Mr Charles Lane, an expert in equestrian matters who dealt with both the standard of riding and the rules of racing.
14. Lord Faulks, on behalf of Mr Tylicki did not seek to challenge Mr Lane's evidence on the basis that he could not properly hold himself out as an expert in equestrian matters, but his conclusions were challenged in various respects and the quality of his expertise was challenged on the basis that he did not have the experience or understanding of flat racing that a professional jockey, used to competing in that arena, enjoys.
15. Mr Lawrence, on behalf of Mr Gibbons, challenged the expert evidence of Mr Jim McGrath strongly, submitting that he had overstepped his expertise by commenting upon the standard of racing and that he had gone too far in suggesting that the Stewards had not merely erred by finding the interference on 31 October 2016 to be accidental but that they had got it completely wrong. Mr McGrath's conclusion was that the riding of Mr Gibbons, in accordance with the rules of racing, was not merely careless but dangerous. Mr McGrath is a very well-known and well-established race reader and presenter for Sky Sports. His experience of giving expert evidence was relatively limited and his main employment is not the giving of evidence but in television broadcasting. It is appropriate to note that Mr McGrath made it clear that he would not get involved in the case unless a professional jockey was able to give opinion evidence and that he was not charging for his own time or expertise.
16. Mr Lawrence's most sustained criticism was levelled at Mr Ryan Moore. Mr Moore is widely recognised as a hugely successful professional flat-racing jockey both in the United Kingdom and abroad having ridden tens of thousands of races and having won more than 2,500 of them including, on multiple occasions, the five classic races in the United Kingdom and numerous major races abroad. Mr Moore had never given expert evidence before this case, but I accept that he was a true expert in flat-racing with a full understanding of the work of the flat-race jockey. He was approached directly for his opinion by Mr Tylicki after a chance encounter on a plane from Ireland and, like Mr McGrath, he was giving his time and expertise for free. When cross examined about his sympathies for Mr Tylicki, he straightforwardly responded that he had a great deal of sympathy for Freddie [Tylicki] but also a great deal of sympathy for Graham

Approved Judgment

[Gibbons] *“it’s a horrible situation”*. After he had been cross-examined in detail, he said this: *“To be honest, this whole thing has been tiresome and boring and sad. I wanted to write a report which I felt was fair, on what I believed happened during the race and this racing incident. That’s all I’m trying to achieve. To be honest, it’s a lose-lose either way”*. That statement supports my conclusion that Mr Moore was an extremely straightforward witness who was using his expertise in order to assist the court in understanding what happened on 31 October 2016.

17. I have absolutely no doubt that Mr Moore was endeavouring to provide a fair report based upon his professional experience and understanding of what was in the witness statements and what he saw on the video footage of the race. The evidence of Mr Moore, and the manner in which he gave it, did not support the suggestion that he was motivated by feelings of pity or that he was constructing his evidence in a way to make sure that it supported Mr Tylicki’s case.
18. The evidence of Mr Moore was also criticised by Mr Lawrence with respect to the way his report came to be drafted. The expert’s overriding duty is to the court (CPR 35.3). Given that duty, the expert’s evidence must truly be that of the expert and the expert is not there to be a mere conduit of the views of the party who has instructed them. In paragraph 7 of his report, Mr Moore set out that the report had *“been made from notes made by the lawyers [for the Claimant] from what I have told them at face-to-face meetings with them and in telephone calls”*. In my judgment, that statement was made for no other reason than to be candid with the court, but it did give rise to a legitimate question from those acting for Mr Gibbons as to whether this expert’s report was truly the report of Mr Moore or whether it was the report of the Claimant’s solicitors to which Mr Moore had merely put his name. In order to ensure that the court could be certain that this was Mr Moore’s evidence, and in order to ensure that Mr Lawrence was able to question Mr Moore fully, I acceded to the Defendant’s application to have disclosure of the notes. In my judgment those notes showed nothing more than Mr Moore had answered the questions asked of him, which were then drafted into Mr Moore’s final report. Mr Moore was closely cross-examined on his report, and it was clear from his evidence that he was a very careful witness. He made concessions where appropriate, and he was not someone who would put his name to a document that did not contain his own views. He was certainly not just a conduit for the views of others. He described the iterative process by which the report was written, with questions asked and answered, numerous telephone and in-person meetings with Mr Tylicki’s solicitor, which took place over a matter of months (including one on the touch line of his son’s football match), with the report being drafted, amended and redrafted under Mr Moore’s instruction. When asked about who he took instructions from in a race, he said both the trainer and the owner were the boss; when asked who his client was in these proceedings, he said that he did not have a client. I was satisfied that the involvement of the solicitors in the drafting of Mr Moore’s report was a practical means by which the report could be put together (as Mr Moore told the court, he rides horses, he does not sit at a computer). I am satisfied that the report dated 23 April 2021 was truly Mr Moore’s report, containing his opinion; just as the joint report, although drafted by Mr Lane, contained the views of both Mr Lane and Mr Moore.
19. In the joint report of Mr Moore and Mr Lane, Mr Lane referred to three races and the Stewards’ findings of careless riding in those three incidents, suggesting that the footage of the three other races would enable the race on 31 October 2016 to be put in

Approved Judgment

context. One of the three races was one at Goodwood on 31 July 2020 which involved Mr Moore being suspended for five days for careless riding.

20. It is difficult to know why such reliance was placed upon these three particular rides, given that the nature of horse racing is that each race will be peculiar to its own circumstances, given the infinite variables (including, but not limited to, the length of the race, the shape of the course, the type of surface, the weather, the quality of the horses and the riders). The only legitimate point to be made is that Stewards do make findings of careless riding against even the most successful of flat-race jockeys. Lord Faulks understandably objected to the use of all or any of this footage in court as it was irrelevant to the issue as to whether Mr Gibbons had fallen below the standard of care he owed to Mr Tylicki on 31 October 2016 and he raised the concern that this was a deliberate attempt to unsettle Mr Moore in the giving of his evidence. I allowed the footage to be played to Mr Moore as I considered that Mr Lawrence needed to be able to develop any points that he wished to make in cross-examination. If the intention had been to unsettle Mr Moore, it did not succeed and, indeed, as Mr Lawrence correctly says, the footage of the Goodwood Race was not put to him until after he had been cross-examined about Mr Gibbons riding. While Mr Moore was quite plainly embarrassed that he had been unable to control his mount on this occasion, the footage showed that he plainly had tried hard to do so. The footage was good evidence as to what efforts a jockey can make (even if unsuccessful), very quickly, to seek to avoid a collision: *“I did try to pull my horse off... there was an effort and this did not take place over 3 to 4 seconds – it took place over half a second where the horse shifted to his right”*. Mr Moore was found by the Stewards to have been careless by interfering with the horse that finished second behind him, by allowing his mount *“to hang right-handed towards the rail without timely correction”* which caused the other mount to tighten against the rail and for that jockey to take a significant check and go into the rail. No horse or rider fell and there were no injuries. It was Mr Moore’s first careless riding ban for a few years.
21. I did not find the footage of Mr Moore on 31 July 2020 of any assistance in coming to conclusions with respect to whether there was a breach of duty of care in this case. It was a race on a different track: Goodwood rather than Kempton, where the track is shaped, as Mr Moore put it, like a 20p piece; it was a grass and uneven surface, rather than an all-weather surface; the incident occurred towards the end of the race, rather than in the middle of the race; there were different horses and different riders; and Mr Moore gave evidence that a jockey more senior to him had been due to ride that particular horse at Goodwood but had refused to do so as the horse was known to be difficult.
22. Prior to the liability-only trial the solicitors for Mr Tylicki had objected to the introduction of additional footage from other races as not being relevant. Mr Tylicki’s solicitors wrote *“... we find it breath-taking that your expert is now apparently proposing to rely upon footage of other selected races (from the tens of thousands of races that have taken place in the UK from 2019 to date) ...”*. The obvious concern from Mr Tylicki’s solicitors was that this was an attempt to unsettle and undermine their expert. The response from Mr Gibbons’ solicitors was that *“The footage of the three races has been considered by Mr Lane in the light of what your experts say on that issue. Your client is not entitled to dictate what material the Defendant’s expert considers to be of assistance to the Court”*. That letter clearly implied that Mr Lane

Approved Judgment

had selected the footage as being of assistance to the court. What was not mentioned, and what became clear from the cross-examination of Mr Lane, was that this particular footage had been selected, not by the expert Mr Lane, but by Mr Gibbons' solicitors. Mr Lane did not in fact know why those clips had been selected. He had assumed that they had been shown to him as examples of careless riding and that careless riding covers a broad range of behaviour. He said it was difficult to say that the races were representative and accepted that circumstances are different in each race and that each course is different, both in layout and surface. He also said that races are different depending upon the stage of the race and depending upon the horses and riders involved in a race. Indeed, every single race will have its own very particular circumstances and, while it is possible to say that the nature of horse racing means that incidents of interference are bound to occur relatively regularly, that does not assist in determining whether in a particular case a jockey has failed to fulfil the duty of care that is owed by each jockey to every other jockey.

The Law

23. Counsel for the Claimant and the Defendant both acknowledge that the leading authority applicable to this claim is *Peter Harvey Caldwell v (1) Adrian Maguire and (2) Mick Fitzgerald* [2001] EWCA Civ 1054.

24. *Caldwell* establishes several important principles. It is necessary, however, to recognise that the facts of *Caldwell* differed significantly from this matter (most starkly *Caldwell* was a National Hunt race over jumps whereas this was a flat race on an all-weather course) and that, ultimately, this case (as is true of all sporting cases and cases brought in negligence generally) will be determined on its own particular facts:

“In an action for damages by one participant in a sporting contest against another participant in the same game or event, the issue of negligence cannot be resolved in a vacuum. It is fact specific.” (per Judge LJ, as he then was, at paragraph 30 of *Caldwell*)

25. In *Caldwell*, the Stewards had found that both Messrs Maguire and Fitzgerald were careless (giving them a modest sentence of 3 days' suspension in a bracket of 2-14 days potential suspension for careless riding). The judge at first instance, Holland J, had found that the defendants had made errors or lapses of judgment:

“What they failed to do was sufficiently to allow for the presence of the horse ridden by Mr Byrne on their inside. If they had done precisely what they did do, at a time when their horses were a few additional yards further ahead of Mr Byrne's mount than they were, no error of judgment would have taken place and their riding would have been commended. In exclusively racing terms they were right to go for the inside lane. Their error in the heat and commitment of the race was to misjudge the exact opportunity that was available to them to take. They did not appreciate that Mr Byrne's horse had not gone backwards as far as they thought it had. As they assumed that he was no longer in contention for the inside line, they did not physically look out for him. Their assumption was wrong, in real terms by no more than

Approved Judgment

a few yards. They made what the Jockey Club Stewards decided was a breach of the rules of racing and what Holland J. considered was a lapse of judgment ... a finding that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability in negligence.” (per Judge LJ in paras 33 and 34)

26. Holland J, at first instance in *Caldwell*, extracted five principles from his review of earlier authorities.
- (1) Each contestant in a lawful sporting contest (and in particular a race) owes a duty of care to each and all other contestants. As Barwick CJ found in the Australian case, *Rootes v Shelton* [1968] ALR 33: by engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime ... but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and if it does, its extent, must necessarily depend in each case upon its own circumstances.
 - (2) That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants.
 - (3) The prevailing circumstances are all such properly attendant upon the contest and include its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant. Thus in a particular case of a horse race the prevailing circumstances will include the contestant’s obligation to ride a horse over a given course competing with the remaining contestants for the best possible placing, if not for a win. Such must further include the Rules of Racing and the standards, skills and judgment of a professional jockey, all as expected by fellow contestants.
 - (4) Given the nature of such prevailing circumstances the threshold for liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse in skill (and thus care) respectively when subject to the stresses of a race. Such are no more than incidents inherent in the nature of the sport.
 - (5) In practice it may therefore be difficult to prove any such breach of duty absent proof of conduct that in point of fact amounts to reckless disregard for the fellow contestant’s safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden.
27. The Court of Appeal dismissed the appeal, making it clear that the judge did not say that the claimant has to establish recklessness in order to establish a breach of the duty of care, but that there would be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required. The Court of Appeal did not give further guidance as to what would amount to a breach of the duty of care, rather than an error of judgment, as that determination can only be made in the context of all the circumstances of the contest.

Approved Judgment

28. Quite clearly, each case is fact specific and horse racing is a sport which requires highly skilled professional jockeys, paid, and as required by the rules of their sport, to ride powerful thoroughbred horses, with wills of their own, to win or be as best placed as is possible. Lord Justice Judge eloquently summarised the situation in *Caldwell*:

“The demands on professional jockeys to ride at all are very heavy. They require skill and physical and mental courage. To win, beyond skill and courage, they need determination and concentration, the ability rapidly to assess and re-assess the constantly changing racing conditions, and to adjust their own riding and tactics accordingly – a quality that must depend in part on experience and in part on intuition or instinct.

Accidents and the risk of injury, sometimes catastrophic, both to horses and to riders, are an inevitable concomitant of every horse race – certainly over hurdles”

29. The ability of a professional jockey rapidly to assess and re-assess the constantly changing racing conditions, and to adjust riding and tactics, accordingly, is important in the context of this case. The nature of horse-racing means that jockeys are experienced in making split-second, almost instantaneous decisions. They need to be able to do so, both to ensure that they fulfil their obligation to win, or be best placed as they possibly can be, and to fulfil their duty of care to others and to protect themselves.
30. A distinction is to be drawn between conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention, which would not sound in damages. Incidents of interference in horse racing are common, and arise from a multitude of reasons, some of which are sanctioned by the Stewards after an enquiry as being careless or, on extremely rare occasions (possibly as few as 1 every 10 years according to the evidence of Mr Moore), as dangerous. In this case, the Stewards Enquiry concluded that this was accidental interference. I will return to the issue of the Stewards Enquiry, and the impact of the Stewards’ finding on this case, as the contention on behalf of Mr Gibbons is that the Stewards’ finding creates an obstacle in the path of Mr Tylicki establishing his claim.
31. In *Caldwell* it was held that the fact that a jockey has ridden his horse in breach of the rules of racing does not decide the issue of liability and that, while non-compliance with the rules, conventions or customs is necessarily a consideration to be attended to upon the question of reasonableness, it is only one consideration, and it may be of much or little or even no weight in the circumstances of a particular race.
32. It has further been submitted on behalf of Mr Gibbons that there are good public policy reasons as to why the court in this case should be extremely reluctant to make a finding against him and must take, what has been described as, “a robust approach”. It has been suggested that a finding of negligence in a case such as this would “open the floodgates” and would make it very difficult for any jockey, and indeed any sportsman or woman, to be confident that they would be able to compete as hard as they can in order to win for fear that they could be sued if someone suffers an injury. I do not accept that such would be the consequences of a finding of negligence against Mr Gibbons. Cases are determined upon their own particular facts. In *Smoldon v Whitworth* (1997) ELR 249, a claim was brought against a player and a referee in a rugby match when a scrum

Approved Judgment

collapsed. Bingham LJ (as he then was) said that the floodgates argument was not well-founded.

“The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed.”

33. Similarly, this case is determined upon all the circumstances and the factual context in which this incident took place. It does not set a precedent either within horse-racing or in sport generally. It is not the thin edge of the wedge.

The Race on 31 October 2016

34. The race was a maiden race for fillies aged three-years or older at the time of the race. Maiden races are for horses who have not yet won a race. The race was listed for 3.20 at the all-weather track at Kempton. There are two circuits at Kempton sharing the same ground, with the other circuit exiting at an earlier point on the back straight. The circuit being run for this race starts at the beginning of the back straight. The horses run down the back straight for about four furlongs and then turn right at a bend which runs for a furlong before the horses enter the home straight. There is a cutaway so that space opens up for the horses towards the end of the race.
35. Mr Tylicki on Nellie Deen was drawn in the first stall nearest to the rail, Mr Gibbons on Madame Butterfly was drawn in the second stall. Nellie Deen was having her seventh race and was for the first-time wearing cheek pieces which have the impact of making the horse concentrate and can make the horse run more enthusiastically or “keenly”. Mr Cosgrave on Cutty Sark was drawn in stall 5. Mr Crowley on Electrify was drawn in stall 4. The other two horses and riders involved in the incident were Skara Mae ridden by Steve Drowne and Sovrano Dolce ridden by Ted Durcan.
36. The race did not start on time, according to the timer on the video footage. If the timer is accurate, the race started at approximately 15:27:06. Nellie Deen fell at approximately 15:27:55, and in the next couple of seconds the other two horses fell and the fourth stumbled, unseating her rider. Madame Butterfly crossed the finishing line at approximately 15:28:46. The fall of Nellie Deen therefore took place approximately 49 seconds into the race and 51 seconds before the finish. It was very much at the mid-point of the race, at approximately the four-furlong post, that the interference and falls occur.
37. Two of jockeys who fell, Mr Tylicki and Mr Crowley, were both treated on the track and transported on body boards to hospital. Mr Crowley suffered a broken nose. The injuries to Mr Tylicki are summarised above. He was treated in hospital for a period of four months.

The Stewards Enquiry on 31 October 2016

38. Subsequent to there was a Stewards Enquiry. Given what had happened, such an Enquiry was inevitable. While there was some difference in emphasis as to just how unusual an event this was, all were agreed that to have four horses involved in a fall on an all-weather flat racecourse, in the middle of the race, was unusual. Mr Lane said that he had not known of four falls in a single race at Kempton at any other occasion during the 30 years that he had gone to Kempton. Mr Moore said that he had 14 falls in all of his racing over a 21 year period, and that the stages in the race where interference was more likely to take place is at the start, where the horses come out of their stalls, and towards the end when the horses are racing for position. Mr McGrath provided evidence that any significant incidents of interference on a flat race generally occur either at or shortly after the start of a race or at the end of the race as the horses can change position. He gave evidence that there was an incident of three horses coming down at Goodwood in 2007 because of clipping of heels, that two horses came down at Goodwood in 2011 as a consequence of a horse suffering a fatal injury, and that otherwise the only incidents of multiple horses falling was where there had been subsidence on the track at Doncaster in 1989 and at a Derby back in 1962. As he put it, incidents of multiple horses falling on a flat race are very few and far between. Incidents on all-weather tracks are more unusual because the surface is not naturally uneven.
39. While it is correct to say that two horses fell and another threw its rider as a consequence of Nellie Deen coming down, the fact that three horses fell and another threw its rider in the middle of a flat race on an all-weather track is significant. None of the horses had just come out of their stalls and none were stretching for home. It is a clear indication that something had gone wrong in a way that is not usual.
40. It is important to consider the Stewards Enquiry and its significance as a discrete matter. It is suggested on behalf of Mr Gibbons that the outcome of the Stewards Enquiry, where they found the interference to be accidental, creates a real forensic hurdle for Mr Tylicki being able to establish negligence. Heavy reliance is placed on the Stewards Enquiry by Mr Gibbons for understandable reasons.
41. The Enquiry took place a matter of minutes after the end of the race after the jockeys had weighed back in. None of the jockeys who fell or who were brought down, Messrs Tylicki, Crowley, Drowne and Durcan, were able to give evidence. Mr Cosgrave, who had been riding Cutty Sark and came in second behind Mr Gibbons on Madame Butterfly, was the only jockey other than Mr Gibbons to be called into the Enquiry. Mr Cosgrave said he, like all professional jockeys, was familiar with being before the Stewards and that it is part and parcel of every jockey's professional life. He explained that the weighing room is without television and there are no windows and so the jockeys were not aware of what was happening out on the track. They knew that horses and jockeys had been brought down, and they must have known that this was an unusual event but did not know the extent of any injuries. At the end of the Enquiry, Mr Cosgrave responded to the Stewards concern about the jockeys "*just pray to goodness that they are alright*" by saying "*They are OK. Thank you*". He did not know that, and he was wrong.

Approved Judgment

42. Mr Gibbons and Mr Cosgrave were shown footage of the race at the beginning of the Enquiry and Mr Cosgrave was then asked what he saw. The transcript of the proceedings record him saying:

“I just sat second to Mr Gibbons, you know basically, from when I left the gates basically. I would say Mr Gibbons horse is lugging a little bit all the way down the back-straight and he moved back in, nearly to the rail. He wasn't very far off the rail when Mr, and I'm not quite sure. He's being a bit ambitious I think, I'm not sure but ...

[he was asked by the Stipendiary Steward “who do you think is being ambitious”]

I thought Mr Tylicki. But it was, to be honest with you, he was chancing it on a bit, there probably was room there at some stage but we were going into a right-handed bend. The chances are the horse in front of him was going to go back to the right, he wasn't going to keep going left, he wasn't ... slightly lugging I thought and as I say, he ran out of room and he obviously clipped the heel and fell underneath me and after that, I ran my own race.

[after Mr Gibbons gave his account]

I think Mr Tylicki thought Mr Gibbons was going to stay, Sir, keep going away but chances are when you are going into a right-handed bend, the horses are going to drift back to the right ... I thought he was taking a chance going in there. But look, I was just riding my own race.”

43. Mr Gibbons was asked what he could tell the Stewards:

“Well, pretty much what Pat said. You can see my filly, she's down the back straight and on the bend, she's just doing “that” (*gestures with hand*) but she's never wandered more than half a horse width off the rail and I mean, I, all I heard was “Gibbo” and that was the first time I was aware that there was a horse's neck or even a head. In my opinion, it shouldn't have been in there. I wasn't expecting it to be there because there wasn't even room for him and I just heard “Gibbo” and that's what made me look. The last thing I heard was “Gibbo” and it was too late. When I looked, he was on the floor but in my opinion there was never room for him to go there in the first place.

[he was asked by the Stipendiary magistrate “OK, so you weren't aware of him at any stage until ...”]

Until he shouted me, I wasn't aware he was there, and like, and I only heard it just before he was on the floor. That's what made me look and I wasn't aware he was there and I was surprised that there was a horse there because there was not room for a horse

Approved Judgment

[Yes] His horse, I don't think he went there intentionally but mine had half a look, his horse half striding into half a gap that wasn't really there

[Mr Cosgrave interjected with his comment set out above about horses drifting back to the right]

[he was asked by the Stipendiary magistrate whether he felt his heels being clipped]

No, all I heard was "Gibbo" and when I looked, that's what made me look, because I didn't realise he was there. I thought, there couldn't possibly be one because I was, that far off the fence and when I heard "Gibbo" and I looked, he was going to the ground anyway, he was gone. That was my first look. [Yes] All I heard was "Gibbo" and he was gone. My first look to the right was when I heard him give a shout but I was completely surprised that there was a shout because I didn't expect a horse to be there. And I didn't think a horse should be there because there wasn't enough room for him there, in my opinion."

44. There was no challenge to the evidence of either Mr Gibbons or Mr Cosgrave from the Stewards, and Mr McGrath criticises them for that, saying that the footage simply does not support the account given by Mr Gibbons that Mr Tylicki "*shouldn't have been in there*" and that "*there was not room for a horse*". However, given the short length of the hearing and the lack of other witnesses, while the Stewards may have reached the wrong conclusion, it is not surprising that they did not challenge what they were being told.
45. The rules of racing provide that dangerous riding is where a rider causes serious interference by purposely interfering with another horse or rider (this is not alleged in this case); or by riding in a way that is far below that of a careful and competent rider and where it would be obvious to such a competent and careful rider that riding in that way was likely to endanger the safety of a horse or rider. Findings of dangerous riding by Stewards are extremely rare: estimated to be about one every ten years. Careless or improper riding is defined as being where a rider fails to take reasonable steps to avoid causing interference or causing interference by inattention or misjudgment. A rider is guilty of improper riding if he causes interference by making a manoeuvre when he knows or ought reasonably to have known that interference could occur.
46. Mr Moore concluded that the riding of Mr Gibbons was careless. Mr McGrath concluded that the riding of Mr Gibbons was dangerous. Mr Lane concluded in his report that the Stewards were correct to find that the incident was accidental and that no rider had transgressed the rules and that no-one was at fault. Mr Lane accepted that the additional evidence that has now been provided may well have made him reach a different conclusion depending upon which account was preferred.
47. Mr McGrath's report is a strongly worded attack on the conclusions of the Stewards: his opinion is that no competent Steward paying attention to the video footage of the race could have reasonably concluded that the interference was caused by anything other than Mr Gibson bringing his mount across Nellie Deen's racing lane and having

Approved Judgment

realised this, no reasonable steward could have concluded that the interference fell into any category other than dangerous riding on the basis that Mr Gibson had ridden *“in a way that is far below that of a competent and careful rider and where it would be obvious to such a competent and careful rider that riding in that way was likely to endanger the safety of a horse or rider”*.

48. The lack of questioning of Mr Cosgrave and Mr Gibbons supports a submission that the Stewards ought to have adjourned the Enquiry. While clearly highly experienced Stewards, they simply did not have sufficient evidence or time to come to a conclusion in the immediate aftermath of this incident. The only person who asked questions was the stipendiary Steward and, for entirely understandable reasons, there was no detailed analysis of the oral accounts and the video footage was only played once in the presence of the witnesses. Mr Lane, who is a Steward, said that the video evidence would have been reviewed by the Stewards and discussed amongst them from the time the race finished until the start of the Enquiry. Mr McGrath agreed with that opinion but, unfortunately, there was no evidence about what the time gap was between the finish of the race and Mr Gibbons and Mr Cosgrave being called into the Enquiry other than it was “a matter of minutes” after the riders and horses had come in. Mr Gibbons said after he and Mr Cosgrave had been spoken to, the Stewards deliberated for a “two, three, four minutes” until the jockeys were invited back in. It may well be that had the Stewards not received any oral testimony they would have come to a different conclusion. Instead, what they heard was a very partial account.
49. Mr Gibbons has maintained his position about what happened in the race with the information he provided to the Stewards minutes after the race on 31 October 2016. Mr Cosgrave has substantially altered his account of what happened. He has said in his witness statement that he did not want Mr Gibbons to receive a racing ban though he believed that his horse had caused the incident by moving across Nellie Deen’s racing line. He said that what he had not said to the Stewards, but believed to be the case, was that Nellie Deen was perfectly entitled to be alongside Madame Butterfly alongside the rail. He said he regrets what he said to the Stewards at the time and that he told the jockeys in the changing room on the day that he thought that the incident had been the fault of Graham Gibbons as that is what he truly believed. In his oral evidence, under cross examination, he agreed with a number of propositions put to him that he thought that Mr Tylicki may have been ambitious, but that he was riding a different horse and that it may have been ambitious, maybe it was not. In answer to direct questions of whether at the time he was doing his best to help the Stewards about what he said seen and whether it accurately and honestly reflected what he thought about the race, he said yes. The fact that he told the Stewards that the jockeys were OK when that was not the case, and at a time when he did not know the extent of the injuries to any of the jockeys (both Mr Crowley and Mr Tylicki were at that time being treated on the racecourse), is in my judgment an indication that Mr Cosgrave was endeavouring to take the heat out of the situation. Mr Cosgrave also gave evidence to the court that at a Stewards’ Enquiry the jockeys not directly involved in any incident try to stay neutral, which is why he said that he was running his own race. That evidence is supported by Mr Lane, who accepted that jockeys may not be forthcoming at Stewards’ Enquiries and may be aware that there are consequences if they criticise another jockey. Mr Cosgrave did not, however, remain completely neutral as he said that Mr Tylicki was “being a bit ambitious” and that he was “chancing it a bit”. Mr Tylicki was not present at the Stewards’ Enquiry as he was still being treated on the racetrack and was therefore

Approved Judgment

unable to put his side of what had happened or query what Mr Cosgrave said at the Stewards Enquiry and none of the other jockeys were present.

50. The evidence that Mr Cosgrave gave to the Stewards is obviously of significance as it was given very shortly after the incident. That evidence needs to be considered alongside the evidence that is now given by him, Mr Tylicki, Mr Crowley, and Mr Gibbons, as well as the expert evidence. The evidence of Mr Cosgrave to the Enquiry does not, however, have greater weight than the evidence he gives now. Mr Cosgrave has given what I consider to be an entirely understandable basis for the change in his evidence and it is accepted that a witness can change their view. There is no doubt that the court has a much broader and more detailed amount of evidence upon which to draw conclusions. The evidence to the Stewards merely forms one part of that evidence.
51. The Stewards themselves are highly experienced in determining the causes of racing incidents and interference and the particular Stewards who dealt with this Enquiry had years of experience. As Mr Moore put it, *“they get a hard time from trainers and jockeys and press, but by and large they do a good job”* although, like anyone, they can make mistakes, as was acknowledged by Mr Lane, himself a Steward.
52. Mr Gibbons thought that the Stewards Enquiry took no more than 5 minutes, which is consistent with the Stewards watching the footage of the race, which would have taken no more than 3 minutes maximum watching the different angles at the same time, and hearing the evidence from Mr Gibbons and Mr Cosgrave, which was very limited. According to Mr Gibbons they conferred for no more than two to four minutes before reaching their conclusion.
53. Given the evidence they received, it is in my judgment harsh for Mr McGrath to criticise severely the Stewards for coming to the conclusion that they did on the day. They had only limited evidence and the combination of the evidence of Mr Cosgrave and Mr Gibbons at that time was that there had been a misjudgment on the part of Mr Tylicki. They only watched the video evidence, with its various angles playing at the same time, once through in the presence of Mr Cosgrave and Mr Gibbons and for a few minutes before, and possibly after, the hearing. Despite their experience and high degree of understanding of horse racing, they did not have the benefit of looking at the various angles of the incident, many times and in freeze frame or at different speeds. The court, by way of contrast, has heard four days of lay and expert evidence, all of which underwent the scrutiny of highly skilled cross examination, with the footage of the race being shown and examined on numerous occasions and commented upon by the various lay and expert witnesses.
54. It is, in my judgment, very surprising that the Stewards did not decide to adjourn the Enquiry, which they had power to do, in order that they could carry out a more thorough investigation and, in particular, hear from the other jockeys. It is speculation as to why they did not do so, it may be that they felt it was clear cut on the evidence they had heard, it may have been that they were concerned about the seriousness of what had happened. Mr Lane agreed with Mr McGrath in their joint report that the Stewards will take whatever time they consider is required to satisfactorily conduct an enquiry and that if more time is needed then they can adjourn. Mr Lane took the view that the Stewards must have considered that they had sufficient evidence before them, mainly from the video footage, to come to their conclusion although he also accepted that the further evidence from the jockeys presented before the court would not have necessarily

Approved Judgment

resulted in him coming to the same conclusion as the Stewards. It was, he said, a matter for the court to determine.

55. Drawing these points together, the evidence received by the Stewards and the conclusion reached from their Enquiry, all form part of the evidence before this court. It is accepted that the finding of the Stewards Enquiry is not binding on this court. The Stewards are highly skilled and experienced and their determination after a short hearing is an important part of the matrix, but it would be wrong to give that finding a greater weight than it deserves, particularly given the significant limitations with respect to the evidence they received. The Stewards' finding is not binding, it is also not determinative.

The Incident

56. At the outset of this liability trial, there were several factual issues which were identified as being in dispute between the parties with respect to the incident that led to the fall of Nellie Deen and Mr Tylicki. Some of these issues are fundamental to the determination of whether Mr Gibbons was in breach of his duty of care to Mr Tylicki. Some have become of less significance during the trial and can be easily resolved now that all the evidence has been given.
57. As set out above, I have had the benefit of hearing evidence of four of the jockeys who took part in this race: Mr Tylicki, Mr Crowley, Mr Cosgrave and Mr Gibbons. I have also had the benefit of the expert evidence of Mr Moore, Mr McGrath and Mr Lane. I have also been able to consider the video footage from all available angles on innumerable occasions with the benefit of the commentary and evidence of those lay and expert witnesses.

“Running green”

58. The first of the issues in dispute is whether Madame Butterfly was “running green” on 31 October 2021 and the second, related to the first, was whether she changed her lead a few times, as was set out in Mr Gibbons' witness statement.
59. This race was the Maiden Fillies Stakes which means that the horses have not, even if they have raced before, previously won a race. This was Madame Butterfly's fifth race. Mr Lane recorded that she had been reasonably successful in low grade races, coming second in her previous four races and that her success indicated that she had taken to racing reasonably well or was at least reasonably fast. She was allowed to go early to post and be mounted in the chute which could be an indication that she was livelier and a more unpredictable horse than the average. Mr Gibbons gave evidence that Madame Butterfly was “very green” when he first rode her at Thirsk on 8 June 2015, meaning that she was inexperienced and inattentive to what the rider is asking the horse to do. He said that she was still showing herself as being inexperienced on 31 October 2016 and that she changed her lead a couple of times, suggesting uncertainty or indecision on her part. There was no evidence of Madame Butterfly running green in the three races between Thirsk and Kempton (namely the races at Newcastle in June 2015, Wolverhampton in April 2016 and Musselburgh on 9 May 2016). Mr Lane said in his report that as Madame Butterfly travels down the back straight she changes lead several times, but there was nothing on the video evidence that could be seen to show that Madame Butterfly changed her lead other than the single occasion at the start of the

Approved Judgment

bend at 15:27:45. Mr Moore's evidence, which I accept, is that there was no change of lead when Madame Butterfly jinks to the left at 15:27:40 and that the movement to the left is partly as a consequence of the horse being aware of the presence of the rail for the alternative course at Kempton and partly because of a racing tactic on the part of Mr Gibbons to push Cutty Sark further out.

60. Madame Butterfly's change of lead where the right-hand bend begins is consistent with Mr Gibbons' evidence that experienced horses tend to get themselves on to the correct leading leg when racing around a bend and Mr Moore's evidence was that Madame Butterfly changing her lead was a clear indication that this filly had learnt from her previous races. Mr Moore described how both Nellie Deen and Madame Butterfly had jumped nicely from the stalls and that Madame Butterfly was relaxed and running normally. Mr Moore's opinion, on viewing the race, was that Mr Gibbons had Madame Butterfly well under control, maintaining the lead for the whole of the back straight with the closest horse to her initially being Nellie Deen but then Cutty Sark. It was also Mr Moore's opinion that Mr Gibbons was happy to be at the front as he could control the race from there, including its pace. That opinion is supported by Mr Crowley's evidence of what he saw in the race. He was asked about Madame Butterfly running, not ultra-green, but as an inexperienced horse. He said that he thought she was being allowed to "float" or zig-zag by Mr Gibbons, and Mr Moore said that it was a perfectly reasonable tactic, if you are making the running, to stay a little bit off the fence and that you push other horses to the left out wide as, at the bend, they have to run faster to keep up as they have further to travel. While a horse out front with clearance may take up a position along the rail, Madame Butterfly was maintaining a course away from the rail.
61. Pulling these points together, I am satisfied from the evidence as a whole that Madame Butterfly was not "running green", that she was not changing her lead several times or indeed, at any time, other than when she goes into the right-hand bend at 15:27:45. Her change of lead at that point indicates a horse behaving entirely appropriately. I am satisfied that Mr Gibbons had control of his horse and that he was allowing her to "float" to the left, including the "jink" to the left at 15:27:40. Mr Gibbons was leading from the start with Madame Butterfly who took up the running, and that was, in my judgment, what he planned to do in order to be able to control the race.

The Video Footage

62. The video footage clearly shows that as the race starts, Nellie Deen drawn in the first stall exits slightly to her right and therefore towards the rail. Madame Butterfly exits the stalls moving towards the left and in front of the third stall. The horses are obliged under the rules of racing to stay in line with their stall for the first 100 yards. Both Madame Butterfly and Nellie Deen are being pushed forward at that early stage, but Madame Butterfly is quicker and she takes up the running. Nellie Deen was racing on the rail in third position with Cutty Sark in second out to the left of the field. The design of the course at Kempton means that the rail cuts away approximately 2 furlongs from the winning post and so being on the rail does not prohibit a horse from going forward on the home straight as the restriction of the rail goes. I am satisfied that Madame Butterfly could have been brought into the rail at approximately 15:27:19 as she was sufficiently clear of the other horses, including Nellie Deen, but she continues to be allowed to run off the rail. There is nothing in the video footage which indicates that Mr Gibbons was endeavouring to bring her in towards the rail at that time and Mr Lane

Approved Judgment

says that he cannot see Mr Gibbons taking any action to encourage Madame Butterfly to move closer to the rail and he kept the whip in his right hand (as Mr Gibbons favoured) so she would not have been encouraged to move closer to the rail by reason of the whip. I am satisfied that Madame Butterfly, while with an ungainly gait, was running as Mr Gibbons wished her to run, at the front and away from the rail.

63. As Madame Butterfly goes further down the back straight she moves further away from the rail. Nellie Deen is tracking her, and by 15:27:36 she appears to be approximately two horse widths from the rail. That is consistent with the evidence of Mr Moore and Mr Tylicki. Mr Lane considers Madame Butterfly to be about a half to one and half width off the rail throughout the back straight, and Mr Gibbons said that she was not running in a completely straight line and while she was generally between one half and one and half horse's width off the inside rail, that actual distance varied. At 15:27:40 Madame Butterfly "jinks" further to the left which has the effect of Cutty Sark moving out further. Mr Moore considers that Mr Gibbons was allowing this to happen in order to push Cutty Sark further out. Madame Butterfly was clearly some distance from the rail at this time.
64. At 15:27:45, approximately four furlongs into the race, the right-hand bend begins. It is at this point that Madame Butterfly changes her lead leg. The impact of that change of lead can be to move the horse further to the right or to the left or to make no change. The video footage from the various angles shows no discernible change in line for Madame Butterfly, and while Madame Butterfly has moved in from where she was furthest out at about 15:27:40, there is still clear distance between the rail and Madame Butterfly. Mr Tylicki recalls the gap widening at this point and that Madame Butterfly taking a move to the left. That is supported by Mr McGrath, but I cannot see any movement further away from the rail at this time, but I am satisfied that there was sufficient gap for Nellie Deen to be able to come up the inside on the rail.
65. In his report, Mr Moore thought the distance of Madame Butterfly from the rail was approximately a horse width and a half to two widths. During the course of cross-examination he said a width and a half. In his report, Mr Lane opines that the gap is no more than a horse width and possibly as little as half a horse width. That cannot be correct. The video footage shows Nellie Deen to move into the gap between the rail and Madame Butterfly from approximately one and a half lengths back from Madame Butterfly moving up to Madame Butterfly's stirrup, approximately half a length back, without any difficulty whatsoever and without any encouragement from Mr Tylicki.
66. It appears that a combination of the space between Madame Butterfly and the rail, and the slowing of the pace by Madame Butterfly, encouraged Nellie Deen into that space. This is entirely consistent with the evidence of Mr Gibbons, who says the following:

"On watching the race recording, my impression is that Madame Butterfly slowed fractionally as she entered the bend and then Nellie Deen's position moved further into the narrow gap between the rail and Madame Butterfly. I suspect this was not where Mr Tylicki had planned to be."

Mr Crowley said that he could see quite clearly that there was sufficient racing room to the inside of Madame Butterfly for Nellie Deen to move up and Mr Cosgrave said that there was sufficient room for Nellie Deen to go up the inside of Madame Butterfly and

Approved Judgment

that, in his view, Mr Tylicki was perfectly entitled to be there, alongside the rail, in the way that the race had unfolded. It appears that Madame Butterfly slowed at that point which enabled her to conserve energy and meant that Mr Gibbons was in control of the pace.

67. Mr Cosgrave did not say this at the Stewards' Enquiry, as he accepts, and says that he regrets what he said to the Stewards almost immediately. I accept that in the circumstances in which the Enquiry took place, when no-one knew about the seriousness of the incident, and Mr Cosgrave did not want to cause Mr Gibbons to receive a ban event, Mr Cosgrave was not giving a fully accurate account of what had happened which, on reflection, he knew to be wrong. Despite the three professional jockeys, Mr Moore, Mr Crowley and Mr Cosgrave being cross examined rigorously about the possibility of there being some sort of conspiracy where the professional jockeys were in some way coming together to assist Mr Tylicki, there was absolutely no evidence called to support such a conspiracy or agreement to mislead the court (which would be an extremely serious matter). All the jockeys were firm, clear and totally believable. I reject any suggestion that there was any agreement between the jockeys to assist Mr Tylicki by misrepresenting what in fact happened. As Mr Moore put it, this is a sad, lose/lose situation.
68. The video evidence, because of the effect of the angles foreshortening or lengthening distances can give potentially false perspectives. During the course of cross-examination, questions were put to witnesses to ask them to agree to certain propositions based upon video evidence which, if taken in isolation, did not necessarily give an accurate picture. I have come to my conclusions with the benefit of being able to view and review all the angles of the video evidence together with the evidence of the jockeys and the experts.
69. I am satisfied from the evidence of the jockeys in the race and the expert evidence available, together with the video evidence, that Nellie Deen entered a space which opened up in front of her between the rail and Madame Butterfly. That space is sufficiently wide for her to travel into without any encouragement from her rider, Mr Tylicki, and without any impediment from Madame Butterfly. She quickly gained ground from 15:27:47 and is, according to the agreed evidence of Mr Moore and Mr Lane, at the tail of Madame Butterfly by 15:27:48. She continued to move up the inside between the rail and Madame Butterfly without being impeded. I am satisfied that by 15:27:49 Nellie Deen is rapidly gaining ground on Madame Butterfly and by 15:27:49/15:27:51 she is half-length back from Madame Butterfly with her head at the stirrups of Madame Butterfly. Nellie Deen is not impeded during this time (the first collision being at the cusp of 15:27:53/15:27:54) and the distance of Madame Butterfly from the rail was clearly sufficient to allow Nellie Deen through so that her head is by Mr Gibbons' boot.
70. My viewing of the footage is that Nellie Deen moves up the flank quickly during this time. She was not being encouraged to be there by Mr Tylicki and he and Nellie Deen were, in my judgment, entitled to be in that position between Madame Butterfly and the rail. I do not accept the evidence of Mr Gibbons that the gap was too small, which evidence is contradicted by the other jockeys who have given evidence.
71. Mr Gibbons said that he had no knowledge of Nellie Deen being in the gap between Madame Butterfly and the rail. He says that Nellie Deen's head was "behind my elbow

Approved Judgment

at its closest” and that he was not aware of where she was other than along with the rest of the field she was somewhere behind his horse. He said that the first he knew of Mr Tylicki’s presence was when he heard him shout “Gibbo” and that is when he swung his head round over his right shoulder. On the basis of the evidence from Mr Tylicki, it appears that he shouted “Gibbo” after the first collision. Such a collision, between the flank of Madame Butterfly and the shoulder of Nellie Deen, must have been felt by Mr Gibbons but, on his evidence, he was only aware of Mr Tylicki being there when he heard the shout. I find that unlikely.

72. Of course, it is not possible to say for certain that Mr Gibbons was in fact aware of Mr Tylicki on Nellie Deen to his inside, but in my judgment it is more likely than not that he did know he was there. As has been highlighted throughout this trial, horse racing is a high intensity sport where jockeys need to be able to make split-second decisions and to *“assess and re-assess the constantly changing racing conditions, and to adjust their own riding and tactics accordingly”* (per Judge LJ in *Caldwell*). Jockeys need to have an awareness of where the other horses are and, while a rider at the front cannot be expected to know what is going on with all the horses behind, a rider should be aware of what is happening alongside. In this case, Nellie Deen was moving up Madame Butterfly from 15:27:48 and at her stirrups from 15:27:51 I am satisfied that Mr Gibbons would have known, or at the very least ought to have known, Mr Tylicki was coming up the inside from that time.
73. Mr Moore gave very clear evidence that jockeys are aware of what is going on around them, and that is to be expected. Racing could not take place if jockeys were riding unaware of their surroundings or which horses and riders were around them. As Mr Moore said, a jockey will be looking forward but will be aware of the breathing of the horses and the sound of the horses making contact with the ground, the sound of them galloping. At Kempton even the shadows created by the floodlights build up a picture: *“there are lots of little things, lots of little factors at play which get a whole understanding”*. Mr Moore’s opinion was that Mr Gibson would have been aware of Nellie Deen’s presence to his inside from the time Nellie Deen occupied the space between Madame Butterfly and the rail.
74. I am satisfied, therefore, that Nellie Deen was in a space that she was entitled to be in, and that Mr Gibbons was aware of her presence from, at the latest, 15:27:51 when Nellie Deen’s head was at Madame Butterfly’s stirrup. If Mr Gibbons was not aware of Nellie Deen’s presence he clearly should have been. He was considered to be a highly skilled and talented jockey and a jockey, particularly riding at this very high level, both needs to be, and is, able to assess and re-assess the constantly changing racing conditions, which includes the positioning of other horses that are nearby, in order to be able to adjust their own riding and tactics.

The Collision

75. The issue for the court is whether what then happened was just a “racing incident”, amounting to a very unfortunate accident with tragic consequences as Mr Lawrence contends on behalf of Mr Gibbons, or whether the actions of Mr Gibbons were such that he is liable for the injuries sustained. The threshold for liability is high and mere error of judgment or lapse in skill is not sufficient, taken in the context of this highly competitive and inherently risky sport. In effect, while recklessness has been expressly stated not to be the test for a finding of negligence, in effect the evidential burden is

Approved Judgment

such that requires a reckless disregard for the safety of others. Of course, in placing the threshold at that high level, regard is being had to all the circumstances of the sport, the inherent dangers and the high degree of competitiveness with a requirement on jockeys to win or be best placed. The fact that the threshold is high does not mean, however, that no duty of care is owed between jockeys.

76. I have, as would be expected, given very detailed consideration and close scrutiny to the evidence given by both the jockeys and the experts on this part of the race in order to be able to ascertain what happened, and why.
77. Mr Gibbons' evidence is straightforward. He says he did not know that Nellie Deen was inside Madame Butterfly against the rail and that the first he knew was when he heard Mr Tylicki shout "Gibbo" which was immediately after the first collision between Madame Tylicki and Nellie Deen.
78. Mr Tylicki's evidence was that Mr Gibbons ought to have been aware of him but that as they continued around the right hand bend he started to sense that Mr Gibbons was directing Madame Butterfly back towards the rail, with Nellie Deen about half the way alongside her. It was at this point that Mr Tylicki asked Nellie Deen to accelerate as he wanted to get clear of Madame Butterfly or at least be in a position not to be cut across. The efforts of Mr Tylicki to ride out of trouble can be seen on the video. At that time, Madame Butterfly also quickened as she was being moved towards the rail. Mr Tylicki said that he recalled Madame Butterfly's flank making contact with Nellie Deen's shoulder and his boot. After that collision Mr Tylicki said he shouted "Gibbo" and stood up and pulled hard on the reins to try to pull himself out of the situation. It appears that in doing so, the front feet of Nellie Deen clipped the heels of Madame Butterfly and so she came down.
79. Before the first collision Mr Tylicki could, when he started to realise that Madame Butterfly was being brought back into the rail, tried to slow Nellie Deen – that is, take a pull. That is a racing decision made in the heat of the moment, a split-second decision, whether you endeavour to go forwards or backwards. Either could have caused difficulties for Nellie Deen, Mr Tylicki was by then in a tight spot, and I do not consider that Mr Tylicki can in any way be held to have created his own problems by making the decision to move forward. The previous seconds had shown that Nellie Deen was making good ground on Madame Butterfly and taking a pull at that time would have been counter-intuitive. It is completely understandable that Mr Tylicki took the decision to push forwards, not to get ahead for the purpose of winning or getting a good position, but in order to prevent Mr Gibbons coming into him. At the time Mr Tylicki pushed forwards, Madame Butterfly was also being encouraged towards the rail. The effect of that was to cut across Nellie Deen on her racing line.
80. Mr Lane accepts in the joint report with Mr McGrath that
- "If GG manoeuvred MB across to the rail either at all or without checking for the presence of a horse on his inside then in my opinion he would have been in breach of the Rules which might fall within a range of Careless to Dangerous riding."

In my judgment, that is precisely what Mr Gibbons did.

Approved Judgment

81. Mr Cosgrave gave evidence that he saw Madame Butterfly move across Nellie Deen's racing line. This was not something he mentioned at the Stewards' Enquiry. Mr Crowley said he saw the same, and that after Nellie Deen and Madame Butterfly were alongside one another on their own racing lines for a few strides he became apprehensive as he could see that Madame Butterfly was moving to her right towards the inside rail and across Nellie Deen's racing line and that, unless Mr Gibbons moved Madame Butterfly, then Nellie Deen would be interfered with and that would potentially bring her down. Mr Crowley said that he therefore took some evasive action which he hoped would enable him to avoid his own mount, Electrify, being brought down. Unfortunately for him, the action he took was not sufficient to stop Electrify from coming down and for him to be somersaulted onto the track.
82. In considering the video evidence at this stage of the race (particularly the footage recorded at REM 1), it is apparent that pressure is put on the right-hand rein of Madame Butterfly at about 15:27:51. This is at the same time as Nellie Deen is within a half-length of Madame Butterfly and when Mr Tylicki begins to urge Nellie Deen forward. The effect of the applied pressure on the right rein is to cause Madame Butterfly to turn towards the inner rail and across Nellie Deen's racing line. At the same time Mr Gibbons is urging Madame Butterfly forward and in doing so he is cutting out Nellie Deen and "closing the door".
83. Mr Moore says in his report that Mr Gibbons did not need to do much more than lightly tighten the right-hand rein in order to persuade Madame Butterfly to go round the bend but *"instead he visibly exerts considerable tension on the right rein, and in my view he would only have done that in order to encourage MB across ND's racing line. If he believed that there was no horse to his inside he would not have needed to pull as hard as he did on the right-hand rein and he would not have needed to stand up in the stirrups as he did, nor to ask MB to accelerate as he did. I believe he is reacting to the fact that ND is coming up the inner and he wishes to close the gap, which he is not entitled to do as it's dangerous"*. Mr Lane's evidence with respect to this is that he *"would expect all the jockeys to be taking at least some sort of pull on the right rein to go round the right bend. If they did not do so this would increase the risk that their horse would move out/to the left on the bend, moving away from the inside rail. In any case, and this must be a matter for the Court, it appears to be GG's evidence that he was not intending to ride over to the rail but that he was going to try and hold his line round the bend. This would have been the correct thing to do"*.
84. In the joint report of Mr Moore and Mr Lane, Mr Moore provides the opinion that for the period from about 15:27:51 to 15:27:54 Mr Gibbons was aware of Nellie Deen on his inside, and it is from this point that he starts to put pressure on Madame Butterfly and is gaining leverage by moving Madame Butterfly back towards the rail [the names of the horses are inadvertently switched in this part of the joint report]. Mr Lane says that he sees no other action than the actions of a jockey who is riding/steering to ride Madame Butterfly around the bend.
85. From what Mr Moore saw of the race it was a lateral movement of Madame Butterfly towards the rail that resulted in Nellie Deen coming down. Mr Moore was challenged strongly about what he would do if he saw someone come up a gap on the inside who he thought was pushing into an area where he thought there wasn't sufficient room, and he said that he would not like it but he would leave more space: *"As riders we all have to understand that there are risks involved,; it's high risk, but we have to respect*

Approved Judgment

one another". It was put to Mr Moore that his evidence was "ridiculous" where he said in his report that "*What GG is clearly trying to do is to stop ND progressing into the space to MB's inside. That this was his purpose is emphasized by the way he asks MB to quicken by starting to ride her... A jockey who is taken by surprise by the presence of another horse, legitimately positioned to his inside, should understand immediately that the responsibility for avoiding a collision lies with him. Not only would he redirect his mount away from the horse to his inside, but he would also take steps to slow his horse down so as to allow the horse to his inside to get through. GG does not do this. Not only does he continue to direct his mount across GG's mount, he also asks his horse to accelerate to facilitate her ability to take ND's racing ground and to wedge ND backwards*".

86. The basis upon which it was suggested that his evidence on this point was ridiculous was because it was being said by Mr Lawrence that a champion jockey, such as Mr Moore, would never take a pull as his job was to get a win or be best placed as he could. Mr Moore was clear that he would take such a pull at this point in the race, with four furlongs left to run, and gave an example of when he did so. He did not alter his evidence, under rigorous challenge. Mr Moore's evidence was that the right thing to do was to take hold of the horse's head, that is take control, and avoid the danger. As he said, "*you have to take care with your surroundings, or you won't win any races*".
87. After careful consideration of the evidence of the jockeys in the race, the video evidence and the evidence of the three experts, I accept the evidence of Mr Moore with respect to what happened at this point. Mr Moore went further than saying that Mr Gibbons failed to take control of Madame Butterfly so that she could make way for Nellie Deen coming up the inside. Mr Moore's evidence was that from 15:27:51 until the collision at 15:27:53/15:27:54, Mr Gibbons had acted to encourage Madame Butterfly cross Nellie Deen's racing line by exerting tension on the right rein, beyond that which was necessary to bring Madame Butterfly around the bend, and in order to close the gap on Nellie Deen who was coming up the inside. That was why there was a collision and that was why Nellie Deen fell, by clipping the heels of Madame Butterfly. While, Mr Moore accepted that when the collision occurred, which I find to be at the cusp of 15:27:53/15:27:54, the consequence may have been to push Madame Butterfly so that her head was facing the rail, Madame Butterfly is clearly facing towards the rail before then and was directed to go in towards the rail across Nellie Deen's racing line by Mr Gibbons exerting pressure on the right rein beyond that which was necessary.
88. After that initial collision and the shout "Gibbo" from Mr Tylicki there was a further opportunity for Mr Gibbons to act in a way that may have avoided the second collision, namely by then moving out to the left away from Nellie Deen in order to give her the opportunity to progress safely. He didn't, but continued pulling across to the rail which gave Nellie Deen no space. Despite Mr Tylicki pulling hard to decelerate and bring Nellie Deen backwards as quickly as possible, the consequence of Mr Gibbons continuing with bringing Madame Butterfly into the rail, is that there was the second collision between the forelegs of Nellie Deen and the back heels of Madame Butterfly which brought down Nellie Deen and Mr Tylicki with her.
89. In my judgment, during this spell of riding between 15:27:51 through to 15:27:55, Mr Gibbons had a reckless disregard for Mr Tylicki's safety. Mr Gibbons knew, or at the very least ought to have known, that Mr Tylicki was inside on the rail and had moved up to within a half-length of Madame Butterfly. He did more than merely control

Approved Judgment

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

90. The actions from 15:27:51 were not mere lapses or errors of judgment. This was a course of action that carried over a number of seconds and while that might, in some circumstances, be considered a short period of time, in the heat of a horse race where jockeys are required to make split second decisions and to be able to constantly make assessments and adjustments to their own riding, this was a sufficient period of time for a skilled jockey to make decisions.

Conclusion

91. Horse racing is a sport which requires highly skilled professional jockeys to ride powerful animals, with minds of their own, to win or be best placed as they can. It is highly competitive, and riders require both mental and physical strength and courage. They need to be able to assess and reassess situations and make split second decisions as to what to do, based on skill, experience and intuition.
92. Risk of injury is part of a professional jockey's life and, while more unusual in flat racing, falls from horses is an inevitable concomitant of horse racing. Interference between horses and findings of carelessness are regular.
93. In this case, the actions of Mr Gibbons riding Madame Butterfly on 16 October 2016, colliding with Nellie Deen mounted by Mr Tylicki, were not mere lapses of concentration or inattentiveness. The actions of Mr Gibbons were, for the reasons I have found and based on the detailed evidence I have scrutinised, undertaken in reckless disregard for the safety of Mr Tylicki.
94. In the circumstances of this particular race, I have therefore found that liability has been made out.
95. In making that finding, I stress that the threshold of liability for negligence is a high one and has been determined as made out in this case, on its own particular facts. The finding does not set a precedent either within horse-racing or in sport generally.