

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cox v. Miller*,
2024 BCCA 3

Date: 20240105
Docket: CA48970

Between:

Karl Cox

Appellant
(Defendant)

And

Jordan David Miller

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
March 9, 2023 (*Miller v. Cox*, 2023 BCSC 349, Vancouver Docket S1912654).

Counsel for the Appellant: S.W. Urquhart
M. Li

Counsel for the Respondent: S. Wheeldon
G.R. Cameron

Place and Date of Hearing: Vancouver, British Columbia
December 12, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 5, 2024

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

Summary:

The appellant was found liable in negligence for injuries he caused the respondent in executing a slide tackle during a recreational soccer game. The trial judge found the appellant's tackle to be dangerous and reckless, and outside the risks assumed by a reasonable competitor in the respondent's circumstances. The appellant argues that the judge erred in principle in her articulation and application of the requisite standard of care. The appellant also argues that the trial judge's reasons for judgment reflect palpable and overriding error. Held: Appeal dismissed. The trial judge did not err in law by misconceiving or misapplying the applicable standard of care. She did not resolve this case on a finding of carelessness in the context of a permitted defensive play. On her findings, the appellant committed a serious foul under the rules of play that would have warranted disqualification from the match. The trial judge committed no palpable and overriding error in her factual findings, which support her ultimate conclusion that the appellant's actions were dangerous and reckless, and outside the sort of conduct a player would reasonably expect in a recreational league consisting of players with a wide range of skill levels.

Reasons for Judgment of the Honourable Mr. Justice Fitch:**I. Introduction**

[1] The appellant was found liable in negligence for causing the respondent's shoulder injuries as he attempted to execute a slide tackle during a recreational soccer match. The match was governed by FIFA rules. Slide tackles were not prohibited by the rules of play.

[2] The trial judge found the manner in which the tackle was executed to be reckless and dangerous—something a reasonable competitor in the appellant's situation would not do. Relatedly, she found the appellant's actions to be outside the risks a player in the respondent's situation would reasonably be expected to assume in a recreational league soccer match made up of players of all different skill levels.

[3] The appellant appeals the finding of liability. He submits the judge erred in principle in her articulation and application of the standard of care. In addition, he argues that her reasons for judgment reflect palpable and overriding error.

[4] At the heart of the appellant's wide-ranging submission lies an assertion that, to hold the appellant liable in negligence for the respondent's injury, the judge was first required to find that the slide tackle violated the rules of play. In the absence of

such a finding, the appellant submits that mere carelessness in the execution of a permitted defensive play does not give rise to liability in negligence. He seeks an order allowing the appeal and dismissing the action or, in the alternative, an order for a new trial.

[5] For the reasons that follow, I would dismiss the appeal.

II. Background

[6] The match took place on May 22, 2018. The parties were on opposing teams. Both had considerable experience playing organized recreational soccer. Some of the players on both teams had less experience and lower skill levels.

[7] The match was officiated by a referee. During the game, the respondent approached the opposing goal inside the penalty area in possession of the ball. He was slide tackled by the appellant, who approached from behind and to the respondent's left. The tackle caused the respondent to fall forward and dislocate his right shoulder.

[8] At trial, the parties agreed that the appellant's slide tackle caused the respondent's injury. The only issue was whether the slide tackle reflected negligence on the appellant's part.

[9] A slide tackle is executed when a defending player slides (generally with one foot forward) to win or dislodge the ball from an opponent in possession. While slide tackles are permissible defensive manoeuvres under FIFA rules, where the tackle or challenge is executed in a manner considered by the referee to be careless, reckless, or involving the use of excessive force, it constitutes a foul or an "offence" against the rules of the game for which a free kick will be awarded. Pursuant to FIFA rules, a "reckless" tackle or challenge "is when a player acts with disregard to the danger to, or consequences for, an opponent." A player must be cautioned (yellow-carded) for tackling or challenging an opponent in a reckless manner. In addition, a player must be cautioned for unsporting behaviour where the player "denies an

opponent an obvious goal-scoring opportunity by an offence which was an attempt to play the ball and the referee awards a penalty kick.”

[10] Under FIFA rules, a player must be sent off (red-carded) when a tackle or challenge is undertaken with “excessive force ... and/or endangers the safety of an opponent.” A “serious foul play” is also a sending off offence. Serious foul play is defined under the rules to mean:

A tackle or challenge that endangers the safety of an opponent or uses excessive force or brutality must be sanctioned as serious foul play.

Any player who lunges at an opponent in challenging for the ball from the front, from the side or from behind using one or both legs, with excessive force or endangers the safety of an opponent is guilty of serious foul play.

[11] Both parties testified at trial, as did the referee and five other players. The thrust of the evidence was that although slide tackles are part of the game and were not prohibited in this recreational league, they can be dangerous. This is particularly so when the ball is not the primary point of contact, the tackle is executed from behind, and the sliding foot is raised higher than the ball.

[12] The respondent testified that he approached the opposing goal dribbling the ball in front of him on his right foot. As he was getting ready to shoot on goal, he felt both of the appellant’s legs contact him on his upper calf, behind his knee. The appellant approached him from behind on his left side. The respondent did not see him coming. As a consequence, he was unable to brace for impact. According to the respondent, the appellant was nowhere close to the ball when the tackle occurred. The respondent’s body was between the appellant and the ball. The respondent testified that the tackle was not a tackle he considered to fall within the scope of the risks he accepted by playing in this league.

[13] The respondent’s version of events was largely supported by evidence from the other players, some of whom made their observations from the field of play, and others from the sidelines.

[14] For example, Matthew Wright described the tackle as a violent slide tackle in which the appellant was not in control of his body and used both legs to take out the respondent from behind. Mr. Wright testified that, in executing this slide tackle, the appellant did not attempt to play the ball and did not come close to contacting the ball. In cross-examination, he testified there was “zero chance” the appellant could even see the ball when he attempted the tackle.

[15] Tyler Atkinson testified that the tackle performed by the appellant was overly aggressive, executed from behind the respondent, and unsafe.

[16] Alexander Robinson similarly testified that the tackle came from behind. He added that the appellant did not have a chance of winning the ball when he attempted the tackle.

[17] Paul Silny, a player on the appellant’s team, testified that the appellant seemed to be trying to play the ball as opposed to just taking out the respondent. He agreed, however, that the appellant had a much higher likelihood of hitting the respondent than getting the ball by executing the tackle. He acknowledged that the appellant was not successful in touching the ball. Mr. Silny also agreed that the appellant was in the respondent’s blind spot when he executed the tackle. Despite his evidence on these points, Mr. Silny testified that the appellant’s slide tackle was not outside his normal expectations for the game. While it was a foul involving hard contact, it was something he had seen take place many times before.

[18] The referee, a 71-year-old with a wealth of experience in playing, coaching and refereeing soccer matches, described a permissible slide tackle as occurring when a defender puts his feet to the ball, not contacting the other player. A safe slide tackle comes from the side and slides into the ball. A slide tackle from behind is very dangerous as the player in possession of the ball does not see it coming. A slide tackle where the sliding player’s feet are up around an opponent’s calf or knee is also dangerous, as executing such a tackle could break an opponent’s leg.

[19] The referee, who was 10–12 yards away from the tackle when it occurred, described it as “very reckless”. The appellant approached the respondent’s left side from behind and slid with both feet up, hitting the back of the respondent’s legs with his ankles. The referee believed the appellant “just took the man, not the ball”, and that the tackle was not within the rules of play. He testified that the appellant did not touch the ball, and that it was not possible for him to do so by sliding through the respondent’s legs. He did not, however, think that the appellant was intentionally trying to hurt the respondent. The referee felt that it was possible the appellant was not thinking about what he was doing or was attempting to play the ball. As a result, he decided to give the appellant the benefit of the doubt by issuing him a yellow card.

[20] The appellant testified that he approached the respondent from the respondent’s right side, on an angle from behind. He executed the tackle with one foot forward—sliding on his left leg with his right leg outstretched. He said he contacted the ball before his momentum caused him to slide into the respondent. He testified that both of his feet were on the ground during the tackle. The appellant agreed that slide tackles from behind were not allowed and that it was not acceptable to take out a player with a tackle when there is no chance a defender would be able to contact the ball.

III. Reasons for Judgment

[21] In reasons for judgment indexed as 2023 BCSC 349, the judge expressly adopted the standard of care set out in *Unruh (Guardian ad litem of) v. Webber* (1994), 88 B.C.L.R. (2d) 353, [1994] B.C.J. No. 467 and reiterated in *Zapf v. Muckalt* (1996), 26 B.C.L.R. (3d) 201, [1996] B.C.J. No. 2402. She said this:

[15] While injuries can and do occur when people play sports, players cannot be said to have consented to the risk of all injuries they may suffer merely by virtue of their participation in the sport. As summarized in *Forestieri v Urban Recreation Ltd.*, 2015 BCSC 249:

[42] The law recognizes that an athlete consents only to what is reasonable conduct from his or her opponent, as measured after all the relevant circumstances are taken into account. First among those circumstances will be the rules governing the game in which the injury

occurred. See, for example, *Colby v. Schmidt*, [1986] B.C.J. No. 3248 at para. 15 (S.C.); *Unruh (Guardian of) v. Webber* (1994), 88 B.C.L.R. (2d) 353 (C.A.) at paras. 29-30; *Zapf v. Muckalt* (1996), 26 B.C.L.R. (3d) 201 at para. 16 (C.A.).

[16] The element of risk, to the extent it is normally accepted as part of the game by reasonable players, is a circumstance to be taken into account. The British Columbia Court of Appeal in *Unruh (Guardian ad litem of) v. Webber*, 88 B.C.L.R. (2d) 353, 1994 CanLII 3272 (C.A.) at para. 29, adopted the following statement of the standard of care in sporting events:

The standard of care test is - what would a reasonable competitor, in his place, do or not do. The words “in his place” imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue.

[Emphasis in original.]

[17] In *Zapf v. Muckalt*, 26 B.C.L.R. (3d) 201, 1996 CanLII 3250 (C.A.) the British Columbia Court of Appeal addressed the appellant’s argument that liability could only be found if he exhibited a reckless disregard for the plaintiff’s safety or intended to cause him harm. Referencing *Unruh* and *Herok v. Wegrzanowski* (7 October 1985), Vancouver CA003074 (B.C.C.A.), the Court held:

[16] On the two occasions that this Court addressed the topic, it has rejected the narrow approach to the standard of care where only intentional or reckless infliction of harm will ground liability and left it to the trial judge, on his or her appreciation of the evidence, to decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case.

[22] The judge “entirely rejected” the appellant’s evidence. She made the following factual findings as to the mechanics of the tackle:

- the appellant executed the tackle from behind and to the left of the respondent;
- the respondent did not see the appellant approaching;
- the appellant lifted both of his legs off the ground in executing the tackle;
- the appellant’s left leg went in front of the respondent’s legs and his right leg came up behind the respondent’s legs, striking him slightly below his knees;
- there was no possibility of the appellant reaching the ball by executing the slide tackle;

- the effect of the tackle was that the respondent's legs were taken out from under him and he immediately fell to the ground, causing the shoulder injury;
- the execution of the appellant's slide tackle was outside the accepted rules of play;
- the appellant was well aware of the risk of injury to the respondent in undertaking the slide tackle as he did;
- the appellant's actions "were dangerous and reckless", and did not fall within the conduct a player would reasonably expect to encounter in a recreational league made up of players of all different skill levels; and
- while slide tackles are permitted and injuries are a part of the game, "the players in this league did not consent to dangerous and reckless conduct, such as that undertaken by Mr. Cox, which carries with it the risk of severe injury."

IV. Grounds of Appeal

[23] The appellant advances a number of grounds of appeal which I would restate as follows:

1. The trial judge erred in law by incorrectly articulating the standard of care;
2. The trial judge erred in law in her application of the standard of care; and
3. The trial judge committed palpable and overriding error in finding him liable in negligence.

[24] In what I understand to be the appellant's primary submission, he says the judge erroneously concluded that mere carelessness in the execution of an otherwise permissible play in a sporting competition is capable of grounding negligence. He notes that slide tackles were permitted under the rules that governed this recreational league.

[25] The appellant's submission places considerable reliance on the concurring reasons of Lambert J.A. in *Herok v. Wegrzanowski*, [1985] B.C.J. No. 1778 (C.A.), 1985 CarswellBC 2487. In that case, this Court rejected the proposition that only

intentional acts in the course of play that result in injury will attract liability.

Justice Lambert said this:

[18] The appellant puts his position this way: as long as the act is done unintentionally, and as long as the act is done in the course of the play in the hockey game, there is no liability. The risk of all careless conduct in the course of the play in the hockey game is assumed by the players.

[19] In my opinion those propositions are not universally correct. Of course, it is not every careless act causing injury that will give rise to liability. It is only careless acts quite outside the risks assumed that could be a foundation of such liability. But, that is a question of fact for each case.

[Emphasis added.]

[26] As I understand it, the appellant reads this passage as standing for the proposition that carelessness will only ground liability in a case of this kind where the offending conduct—the slide tackle—was impermissible in the first instance under the rules of play. Since slide tackles were permitted in the match, the appellant says that mere carelessness in the execution of a permissible defensive challenge could not ground civil liability. The appellant submits that the judge erred in concluding otherwise.

V. Analysis

Standard of review

[27] The standard of review applicable to the grounds of appeal raised in this case is settled and not controversial. As explained in *Housen v. Nikolaisen*, 2002 SCC 33:

[36] ... a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. The general rule ... is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[28] As noted earlier, the appellant argues that the judge committed extricable errors of law, including in her articulation of the applicable standard of care.

Ground #1: Error in the Articulation of the Standard of Care

[29] As I understand the appellant's submission, there are two prongs to his argument on this issue.

[30] First, the appellant submits that the judge accepted and acted on the proposition that, in a case of this kind, a plaintiff in British Columbia must only establish carelessness on the part of the defendant to establish liability. He submits this is evident from the judge's reference to and reliance on a passage from a text addressing civil liability arising from sports-related injuries:

Standard of care

[13] The plaintiff submits that there is a divide in Canada with respect to how different provinces assess the degree of carelessness and the state of mind of the defendant when determining legal fault in sports negligence claims. As summarized in Lorne Folick, Michael Libby, & Paul Dawson, *Sports and Recreation Liability Law in Canada* (Toronto: Thomson Reuters, 2017), at 285-286:

... the "west coast" approach considers whether the actions of the defendant comport with what a "reasonable competitor" would do in the circumstances. Put another way, a plaintiff need only establish carelessness on the part of the defendant to establish liability. However, courts in Manitoba, Ontario, and New Brunswick have taken a different approach.

This approach stems from the oft-cited hockey case of *Agar v. Canning*. There, the Manitoba Queen's Bench (affirmed by the Court of Appeal) found that although a person who engages in a sport like hockey must be assumed to accept some risk of accidental harm:

[I]t would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence. Similarly, the leave and license will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.

More recently, in the Ontario case of *Levita v. Crew*, the court concluded that the defendant player, although "clearly overly aggressive", had not acted maliciously or "out of the ordinary or beyond the bounds of fair or expected play" when he had checked from behind. The defendant had shown a lack of care, considering that the plaintiff was close to the boards, but in the court's view, "a

lack of carefulness falls short of the creation of an unreasonable risk of harm.”

The practical result of this difference in views between provinces means, quite simply, that an injured hockey player in British Columbia faces a much less substantial burden of proof of an actionable injury than does a similar player in other provinces. It will be sufficient in the former case to simply show a failure to adhere to the relevant standard of care, while in the latter, intentional conduct (or at least recklessness) is required.

[14] I accept this statement from the text as an accurate description of the difference between the development of the law in British Columbia as against other provinces. As a result, caselaw developed in provinces like Manitoba and Ontario, relied on heavily by Mr. Cox in this case, must be applied with caution in British Columbia.

[Emphasis added.]

[31] The appellant acknowledges that, while carelessness can ground a finding of negligence in this context, he submits it will only do so where the conduct that causes the injury is not permitted by the rules of play. Since slide tackles were permitted by the rules of play applicable to this match, the appellant submits that the judge erred in law in her articulation of the applicable standard of care by endorsing this commentary.

[32] I do not accept that reference to this passage demonstrates error in law on the part of the trial judge in her articulation of the standard of care. Reading the reasons as a whole, it is apparent that the judge adopted the standard of care set out in *Unruh*. She was, of course, obliged to do so. She expressly found the appellant’s conduct to be outside the risks a player in the league might reasonably be expected to take. She also found, at least impliedly, that a reasonable competitor in the appellant’s situation would not have attempted the slide tackle that underlies this action.

[33] Reading the reasons in context, I think it apparent that the judge, by including the above-noted excerpt in her reasons for judgment, was saying no more than this: differences in the way the jurisprudence has developed signal caution in applying cases decided in other provinces.

[34] It is noteworthy, as well, that the passage from the text the judge excerpted in her reasons is immediately preceded by the authors' reference to *Unruh* and the standard of care that applies in British Columbia.

[35] Finally, the judge did not resolve this case on a finding of carelessness in the context of a permitted play. Rather, she found liability having concluded that the appellant's actions were objectively "dangerous" and outside both the rules of play and the conduct a player in this recreational league could reasonably expect. For convenience, I reproduced in its entirety the judge's discussion of these issues:

[81] I find that Mr. Cox's actions were dangerous and reckless, and were outside the conduct a player would reasonably expect in this recreational league, made up of players of all different skill levels. While slide tackles were permitted, there is no question that the execution of this slide tackle was outside the accepted rules of play. All the witnesses before me acknowledged that slide tackles are permitted and injuries are a part of the game. However, I find that the players in this league did not consent to dangerous and reckless conduct, such as that undertaken by Mr. Cox, which carries with it the risk of severe injury.

[82] I find Mr. Cox was negligent when he attempted to execute the slide tackle in the manner that he did. He knew that slide tackles that take out both the legs of another player could result in injury to the other player. He agreed it was not acceptable to take out a player when there was no chance of getting the ball. He knew it was possible that he was in Mr. Miller's blind spot, and it was more dangerous if the player with the ball cannot see the defender coming in for a tackle. I find Mr. Cox was well aware of the risk of injury to Mr. Miller in undertaking the tackle as he did. He nevertheless decided to proceed with what Mr. Silny described as a "last-ditch tackle", striking Mr. Miller from behind, and taking out both of Mr. Miller's legs, with both of his own legs, when there was no possibility of him reaching the ball. His actions resulted in serious injury to Mr. Miller, for which he is liable.

[Emphasis added.]

[36] The appellant invites us to read the impugned portion of the judge's reasons in isolation. We cannot do so. Read in context, I am not persuaded that the judge erred in law by mischaracterizing the applicable standard of care.

[37] The second prong of the appellant's argument on this point—and his central complaint—is that the judge erred in principle by considering that liability in negligence flows from a permitted defensive manoeuvre carried out in a careless manner.

[38] In my view, there are a number of insurmountable problems with the appellant's submission on this issue.

[39] First, the judge concluded that the appellant's tackle was a dangerous and impermissible defensive challenge that was contrary to the rules of the game. The referee found the manner in which the appellant executed the slide tackle to be an "offence" or penalty under FIFA rules, which warranted the issuance of a yellow card. That the referee, perhaps charitably, decided not to issue the appellant a red card for the tackle is, at best, a non-decisive factor.

[40] While the referee was in charge of the match, the judge was in charge of the litigation. She was, in effect, the final referee. On her factual findings, the appellant's conduct amounted to serious foul play that would have justified the issuance of a red card disqualifying the appellant from further participation in the game. In short, the tackle was not, as the appellant suggests, permitted by the rules of the game, nor was it found by the judge merely to be careless. It was found to be dangerous.

[41] Respectfully, it appears to me that the appellant has advanced a straw-man argument, divorced from the judge's factual findings. Put bluntly, the issue he seeks to have resolved in this case—whether mere carelessness in the execution of a permissible defensive play made attracts liability in negligence—does not arise on the factual findings made by the judge.

[42] Second, I know of no authority for the broad proposition the appellant would have us endorse—that a play permitted by the rules of the game, no matter how dangerously executed and regardless of the context in which the game is being played (here, a game played in a recreational league involving participants with a wide range of skill and experience), can never give rise to liability in negligence.

[43] The appellant cites no direct authority for the proposition that a permissible play, executed dangerously, can never amount to negligence.

[44] In my view, the appellant can derive no comfort on this point from the remarks of Lambert J.A. in *Herok*, which merely affirm the proposition that careless acts

falling outside the risks assumed by players by participating in the game are capable of grounding liability in negligence. The case certainly does not support the broad proposition advanced by the appellant. Further, I am unpersuaded by the appellant's attempt to read into the governing authorities of this Court, including *Herok*, *Unruh* and *Zapf*, in support for his position.

[45] By analogy, open ice body checking is permitted in hockey. However, liability in negligence may flow if the body check is executed in a manner that exposes an opponent to an unreasonable risk of harm—a risk the opponent could not reasonably be expected to assume by participating in the game, having regard to contextual factors including the speed and level at which the game is played. A hockey player is no more immune from liability because body checking is permitted than is a driver who executes a lawful left turn in a manner heedless of the safety of others.

[46] Third, acceptance of the appellant's proposition would give the rules of play a near determinative role in the analysis. Again, I know of no authority that would elevate whether the play in issue was permitted by the rules of the game to such a lofty status. While the rules of the game are a factor to be considered along with other circumstances, the rules are by no means conclusive: *Unruh* at paras. 23–25, 29, 32–33; *Finnie v. Ropponen*, 1987 Carswell 659, [1987] B.C.J. No. 448 (S.C.) at paras. 12, 14; *Condon v. Basi*, [1985] 2 All E.R. 453 (C.A.), 1 W.L.R. 866—where, as here, a dangerously executed slide tackle grounded a negligence finding.

[47] The appellant also argues that the judge erred in law by conflating the meaning of “recklessness” as used in the FIFA rules of play with recklessness in law. I see no merit in this position. Nothing in the judge's reasons supports the appellant's position on this point. Further, as I will explain below, the judge found the appellant to have deliberately attempted a slide tackle that he knew, or ought to have known, created an unjustified risk of harm. Against these findings, she made no error in characterizing the appellant's conduct as reckless.

[48] Finally, the appellant submits that the factual findings of the judge support only a finding of carelessness. Again, I do not agree. The tackle came from behind the respondent, who did not see the challenge coming and had no opportunity to brace himself for impact. The appellant slid into the respondent with both of his legs off the ground, striking the respondent slightly below his knees. The trial judge found there was no possibility that the appellant would reach the ball in executing the tackle. In these circumstances, the judge's factual findings, when viewed in the context of the evidence as a whole, support her ultimate conclusion that the appellant's actions were reckless and dangerous.

Ground #2: Error in the Application of the Standard of Care

[49] The appellant says it is of significance in this case that the judge did not make a clear factual finding he was not attempting to play the ball when the slide tackle was executed. The appellant submits that a finding of liability in negligence could only be sustained here if the judge found that he knew or ought to have known that he had no possibility of reaching the ball in tackling the respondent. This, he says, would make the tackle an impermissible defensive manoeuvre from the outset, which would, whether performed carelessly or not, ground liability for negligence.

[50] In the result, the appellant submits that one of the central issues the judge was required to decide was whether the appellant intended to tackle the respondent or whether he was attempting to dislodge the ball from the respondent's possession. In short, he submits that the issue for the judge to decide was whether the appellant intended to "play the man", not the ball. Again, there are a number of problems with the appellant's submission on this point.

[51] First, I am disinclined to assign legal significance to the fine distinction the appellant seeks to draw in this case between a permissible defensive play undertaken in a manner that creates an unreasonable risk of harm, and an impermissible play. Whether the appellant was attempting to play the ball or not, the manner in which he executed the tackle was contrary to the rules of the game and properly attracted a penalty. The appellants' submission cannot survive this fact.

[52] More fundamentally, what the appellant was intending to do when he executed the tackle could not be the focus of the inquiry. The issue the judge was obliged to decide is not what the appellant was thinking (or not thinking) when he tackled the respondent from behind but, rather, what a reasonable competitor, in his place, would do or not do: *Unruh* at para. 29. The judge concluded there was no possibility of the appellant contacting the ball. It follows from the judge's factual findings that a reasonable competitor in the appellant's circumstances knew or ought to have known this. Accordingly, negligence was made out in this case on the appellant's formulation of the standard of care the judge was obliged to apply.

[53] To summarize, I would reject the appellant's proposition that a defending player in a soccer game is immune from liability for negligence if there is a possibility they will contact the ball in executing a slide tackle, no matter how remote that possibility is, or how dangerous execution of the tackle will be to an opposing player. That is not and could not be the law.

[54] Whether this ground of appeal is properly characterized as an extricable error in law or a question of mixed fact and law—the appellant was not clear on this point—makes no difference to the end result. I see no extricable error in law, nor have I been persuaded that the judge's analysis reflects palpable and overriding error.

Ground #3: Palpable and Overriding Errors

[55] The appellant says the judge committed a palpable and overriding error in finding that the tackle was outside the accepted rules of play. He also submits that the judge committed a palpable and overriding error in characterizing the tackle as reckless.

[56] I see no merit in either of these submissions. The judge understood that slide tackles were permitted in this league. She found, as did the referee at the time of the incident, that the tackle executed by the appellant amounted to an infraction of the rules. On her factual findings, which are entitled to deference, I do not see how she could have come to any other conclusion. Further, on her findings of fact, it was

open to the judge to conclude that the tackle was “dangerous and reckless”. Neither of the appellant’s submissions demonstrate palpable and overriding error in the reasons for judgment. I would not give effect to this ground of appeal.

VI. Conclusion

[57] I have found no extricable legal error in the judge’s articulation of the governing standard of care and no palpable and overriding error in the application of that standard of care to the factual findings she made. In the result, I would dismiss the appeal.

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Skolrood”