Neutral Citation Number: [2004] EWCA Civ 1668

Case No: B3/2004/0561/QBENF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Birmingham District Registry
His Honour Judge Macduff QC
BM 116730

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th December 2004

Before :

LORD JUSTICE AULD
LORD JUSTICE MAY
and
LORD JUSTICE NEUBERGER

- -

Between :

JAMES DAVID ALLPORT	**Appellant**
- and -	
TIMOTHY WILBRAHAM	**Respondent**

- -
- -

Brian Langstaff Esq, QC & Bruce Silvester Esq
(instructed by **Irwin Mitchell**) for the **Appellant**
Neil Block Esq, QC
(instructed by **Beachcroft Wansboroughs**) for the **Respondent**

Hearing dates: 23rd November 2004

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Neuberger:

1. This is an appeal from a decision given on 18th December 2003 by His Honour Judge Macduff QC, sitting as a Deputy High Court Judge. He dismissed a claim for substantial damages arising from a severe injury suffered by the claimant, Mr James Allport, at a rugby match played on 3rd October 1998. The match was between Stourbridge third XV, for whom Mr Allport, then aged 21, played hooker, and Cheltenham third XV. The injury was suffered in what was probably the fourth scrum of the match, about 20 minutes after the start.

2. As the judge said:

> "The accident happened when the two packs came together at a scrummage. The precise mechanics of the accident are unclear. It may be that [Mr Allport] suffered some severe blow to the head or neck. It seems likely that, as the two packs engaged, his head was not in the correct position. What is clear is that there was not a safe engagement, and whether his injury was suffered as a result of a blow or possibly some form of twisting or torsional force which would have had to be extremely violent is not known."

3. The judge described the injury as "catastrophic". It was a spinal dislocation between the third and fourth cervical vertebrae with consequent tetraplegia. Bluntly, barring a miracle, the claimant will be paralysed from his neck downwards for the rest of his life.

4. The claim was brought by the claimant against Mr Timothy Wilbraham, the referee at the match. The issue before the judge was limited to the question of liability. As the judge put it:

> "In broad terms, it is alleged that the referee failed adequately or at all to control the scrimmaging, to enforce the law of the game, to manage the scrum in accordance with Law 20 and, as a result, the two front rows of the pack came together in an uncontrolled manner, such that this accident occurred."

5. A scrum (or scrummage, to give it its proper name) is called when one team infringes the laws of rugby. Three members of each team form a front row, which is supported by a number of other team members (normally five) who are in two back rows. The two outer members of the front row are called the head props, or simply "props", and the man in the middle is the hooker. The front rows of each team face each other, supported by the back two rows. What then should happen is best described by quoting Law 20 of the *Laws of Rugby*:

> "Before commencing engagement each front row must be in a crouched position with heads and shoulders no lower than their hips, and so that they are within one arm's length of the opponents' shoulders.

> In the interests of safety, each front row should engage in the sequence of crouch, then pause and only engage on the call "engage" given by the referee."

6. When the two packs meet in a scrum, the tight-head prop of each team is between the hooker and the loose-head prop of the opposing team. In other words, the loose-head prop of each team is on the outside of the scrum. Once the referee completes the required sequence by calling "wait" until the two packs are ready, and then calling "engage", the scrum is engaged and the ball is put into the scrum by the scrum-half of the team which did not infringe.

7. It is common ground that scrummaging carries, and is and was at all material times generally know to carry, an inherent risk of injury especially to members of the two front rows. Accordingly, Law 20 is, albeit in general terms, well known not only to referees, but also to players. Thus one of the most crucial, arguably the most crucial, of the functions of a referee at a rugby match is, again to quote from the judgment below:

> "to allow … the packs on each side to form and crouch and bind together and get into position and, only when that has been done, to allow them to engage by telling them to engage. The crucial part of the sequence is to tell the packs to 'wait, wait, wait', carefully ensuring at that time that all the relevant parts of Law 20 are in place before finally saying 'engage'."

8. In relation to the scrum which resulted in the claimant's injury ("the material scrum") the defendant, Mr Wilbraham, said he did just that. The claimant's case involved two allegations against the defendant, which can be said to be conceptually separate, but which were, in practice, and in terms of assessment of evidence, closely connected. The allegations were as follows. First, that the defendant failed to call "engage", and let the two front rows engage without controlling them. Secondly, that, even if he did control the material scrum, the defendant failed to notice that the Stourbridge front row was not in the position required by Law 20, and was consequently unsafe. The judge put the question he had to determine in these terms in his judgment:

> "First, did the referee … on the balance of probabilities, operate Law 20 by following what I have called the sequence? Secondly, at the time when the two packs were preparing to engage and were permitted to engage by the referee, was Mark Smith, the Stourbridge tight-head prop, in a proper position?"

9. The judge heard oral testimony from four individuals who were at the match. For the claimant, evidence was given by Simon Lawlor, the Stourbridge captain and scrum-half, and Mark Smith, the Stourbridge tight-head prop; they each produced two witness statements. Mr Wilbraham gave evidence on his own behalf, with additional testimony from Stephen Ratcliffe, the Cheltenham hooker, and

currently the President of Cheltenham Rugby Club; they each produced one witness statement.

10. The evidence in the witness statements of Mr Lawlor and Mr Smith was to the effect that Mr Wilbraham had not called "engage" in relation to the material scrum, and that the engagement at the material scrum was instigated by the Cheltenham pack whose front row engaged the Stourbridge front row before the latter were ready for engagement. In particular, it was said that Mr Smith was not in a crouched position at the moment the process of engagement started, and that he was standing or half-standing, or at least had his head up. The witness statements of the defendant and Mr Ratcliffe painted a very different picture of the material scrum. They each recorded the fact that the referee had called "engage", thereby causing the two packs to engage; they also said that both front rows were properly crouched at the moment "engage" was called, but that Mr Smith had raised his head by the time the two front rows actually engaged.

11. Thus, it was effectively common ground that the fact that Mr Smith's head was raised at the moment of engagement may have been causative of the injury to Mr Allport. It was also common ground, as I understand it, that, if Mr Wilbraham had failed to call "engage", or had done so when Mr Smith was not properly crouched, Mr Allport would have made out his case on liability.

12. After approximately two days of oral evidence from each of these four witnesses (as well as from two other witnesses to whom it is unnecessary to make further reference) the judge delivered an extemporary judgment running to some 23½ fairly closely typed pages. He found Mr Wilbraham to be "the most reliable and patently honest witness", who was "clearly, in my view, telling the truth and reliably so", and also said that there were no reasons why he should not believe him. He went on to say he

> "… found Mr Lawlor in particular, but also, I have to say, Mr Smith, to be unreliable in the extreme and, frankly, on the crucial issues as well as on others, I just do not accept their evidence."

13. As for Mr Ratcliffe, the judge concluded that, on the question of whether or not the referee gave the instruction to engage at the material scrum, his evidence was "undermined" and ultimately of no assistance, but that he was "an honest witness doing his best to help" and that he was unshaken in his evidence that Mr Smith was duly crouched when the material scrum started to engage, but had raised his head by the moment of actual engagement.

14. Mr Brian Langstaff QC (who did not appear below) and Mr Bruce Silvester (who did) argue that the judgment is unsatisfactory in a number of respects. Realistically, they do not contend that their arguments justify judgment being entered for Mr Allport, but they do say that the defects in the judgment are such that it would be right to order a retrial. Equally realistically, they accept that, looking at the evidence as a whole, it was open to the judge to reach the conclusions that he did, but, they say, looking at the reasons set out in his judgment for the conclusion he reached, the decision is not one which should stand. In summary terms, Mr Langstaff contends that the judge:

i) was not even handed in his approach;

ii) misunderstood some of the important evidence;

iii) failed in a material respect to explain his conclusions.

15. Given that the only issues between the parties involved disputes of fact, and that the primary evidence on those issues was in the form of oral testimony which was subject to cross-examination, any appeal, at least on the face of it, faces obvious difficulties, as again Mr Langstaff realistically accepts.

16. In *Watt or Thomas -v- Thomas* [1947] AC 484 at 487-8, Lord Thankerton said this:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case and, it may be, the individual case in question."

17. More recently, in *Flannery -v- Halifax Estate Agencies Limited* [2002] 1 WLR 377, Henry LJ, giving the judgment of this court, said at 382A-C about the duty of a judge to give reasons:

> "(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence)

> to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. …"

18. Paragraph (3) indicates that a judge in some cases involving a dispute of fact may not have to give reasons why he prefers one witness's account to that of another. However, it seems to me clear that in a case such as this, involving a potentially very large claim turning on fairly detailed evidence, it would not have been enough for the judge below simply to say whose evidence he preferred. It was his duty to give reasons, and there is no question but that he did so. Our function, as an appellate court, is to decide whether Mr Langstaff's attack on those reasons has force, and if so, how much force.

19. In order to appreciate the judge's assessment of the oral evidence, I think, in agreement with Mr Neil Block QC, who appears for the defendant, that it is convenient to examine the relevant factual history, so far as one can, as it unfolded after the material scrum.

20. All those involved in the match at once appreciated that the claimant may have suffered a serious injury, because it was quickly established that he could not move, and had no feeling in his arms or legs. It was also quickly appreciated that he needed urgently to be taken to hospital, where he was indeed conveyed by air ambulance.

21. After some discussion, both teams agreed to carry on playing the match under the control of the defendant, and the match was duly played out. At no time during the match did Mr Lawlor complain to Mr Wilbraham about his conduct as referee of the match. In this connection, it is right to mention that Mr Lawlor accepted in cross-examination that, as captain of Stourbridge, it was his duty "to draw to the attention to the referee any matter [he was] unhappy about regarding the safety of [his] players", and that not following the sequence described above in relation to a scrum was "about the most serious thing a referee can get wrong".

22. When the match ended, the two teams and (probably only for a short time) the referee had a drink at a bar. At no point during the drinks was there any criticism by any member of the Stourbridge XV to the referee, or about the referee.

23. Very shortly after the match, possibly while drinking at the bar, Mr Lawlor, as captain of the home team, had to fill up a referee assessment card, which he sent to the North Midlands Society of Rugby Referees. The card itself was not available as evidence, but there was plainly reliable documentary evidence as to its contents. That evidence showed that Mr Lawlor had awarded a mark to Mr Wilbraham in each of the nine categories set out on the card. He had awarded three B's, three C's and three D's, and, of these, the most important for present purposes was the "B" awarded against "scrummage", although it is right to mention that he was awarded "C" both for "general control" and for "ability to referee". The possible markings ranged from A, which was very good, to E, which was very bad.

24. When he returned home from the match, the defendant began to prepare a report to send to Don Hall of the RFU at Twickenham, which he duly completed the following day. (Mr Hall was responsible for assisting injured players). In his report, the defendant said this:

> "Description of Incident: a scrummage was being formed, and as usual I was calling out 'wait, wait, wait, wait' until the second and third back rows had bound in, and when this was so, I called 'engage'. The Stourbridge loose-head prop seemed not to be down in the correct position, and I told the players to 'stand up' (so as they could re-engage). I then noted that the Stourbridge hooker seemed limp, and as the front rows parted, he flopped to the ground."

Mr Wilbraham accepted in evidence that the reference to the "loose-head prop" should have been a reference to the "tight-head prop".

25. Shortly after the match, Mr Brown, the honorary secretary of Stourbridge Rugby Club, asked Mr Lawlor to provide a written report, which he did on 6th October, three days after the match. Mr Lawlor's report said this:

> "Having spoken to both my props, Mark Smith tight-head and Robin Bailey loose-head on Saturday and again on Tuesday I take this opportunity to recall the incident.
>
> The game in general was of a scrappy nature and the referee did little to control the game. Although the game was only in its early stages the scrums had been of a fairly poor standard, ie not tight and fairly frantic.
>
> The incident can only be described as of an extremely quick nature because as soon as the front rows had met I heard my tight-head prop shout 'No!!' and he then pushed the scrum away …
>
> The following statements are not based on hearsay but statements made by myself and Mark Smith.

> Mark Smith clearly recalls that their front drove in and there was a definite shudder from James.
>
> I, and again the two props, can definitely say that the next scrum after the incident their scrum again drove in and my first row had to physically loose their bindings and pull my replacement hooker back on his feet.
>
> I hope you accept this account as an honest and bearing no malice account of the incident."

26. As I have mentioned, the judge rejected the evidence of Mr Lawlor and Mr Smith as being unreliable. Mr Langstaff does not criticise the judge for concluding that Mr Lawlor was an unreliable witness. That is not surprising. Contrary to what was in his witness statement, he said in evidence that he had complained to the referee about his conduct during the match, but he then retracted that in cross-examination. Further, although he had said in his evidence in chief that he had not heard the referee instruct the packs to "engage", he stated in cross-examination that he had in fact heard the instruction, which, as he admitted, was inconsistent with what he had said in his witness statement and his evidence in chief. Furthermore, he was unable to explain why he had marked the referee with "B" in relation to scrummaging on the referee assessment card.

27. However, a number of criticisms are made of the judge's treatment of Mr Lawlor's evidence. First, it is said that he wrongly took the view that, when Mr Lawlor said in cross-examination that he had heard the referee instruct the packs to "engage", he was referring to the material scrum, whereas he was in fact referring to the three scrums before the material scrum.

28. I accept that it is by no means clear, from reading the relevant passage in the cross-examination of Mr Lawlor on its own whether he was saying that he had heard the instruction to engage in relation to the material scrum, or in relation to the earlier scrums. However, it does not seem to me that that can give rise to any criticism of the judge's treatment of that evidence as referring to the material scrum. First, the essential point is that the judge relied on this evidence in order to explain why he did not accept Mr Lawlor as a reliable witness. In that connection, as Mr Block points out, what Mr Lawlor said in cross-examination was, on his own unqualified admission, wholly inconsistent with what was in his witness statement. Secondly, reading the relevant part of the cross-examination together with the passage in his witness statement which Mr Lawlor expressly accepted was inconsistent with what he was saying in cross-examination, I believe that the judge was probably right in his conclusion that Mr Lawlor was indeed referring to the material scrum. The passage in his witness statement reads as follows:

> "In paragraph 15 [of his witness statement] the Referee describes what he said. I do not think that he did call 'engage' and I disagree with his paragraph 17 when he says there was no driving or 'boring' in. This is exactly what, in my opinion, caused the problem with James' accident, namely that the Cheltenham side drove in before our front row was ready. …"

29. It is right to say that, in paragraph 15 of his witness statement, Mr Wilbraham was referring to his general practice with regard to management of scrums when acting as a referee. However, it seems to me that, in the second and third sentences of the passage I have quoted, Mr Lawlor was referring to the material scrum, not least because, in the remainder of the paragraph, he went on to explain what, at least in his view, happened in the material scrum thereafter.

30. Next, it is said that the judge was not even-handed in his treatment of Mr Lawlor and Mr Ratcliffe. As I have mentioned, Mr Lawlor's evidence in chief that the referee had not said "engage" was undermined by what he said in cross-examination. By the same token, Mr Ratcliffe's evidence in his witness statement that the referee had said "engage" at the material scrum was undermined by his oral evidence that he could not remember him doing so. While each of these witnesses accordingly can fairly be said to have been inconsistent on the first issue, namely whether the referee called "engage", they were each consistent in their oral evidence on the second issue, namely (as Mr Lawlor said) that Mr Smith had his head raised, and was therefore not ready when the packs started to engage or (as Mr Ratcliffe said) that Mr Smith was ready, but raised his head after the packs started to engage.

31. Despite the fact that this (albeit rather summary) analysis of the evidence of these two witnesses can be said to show that their performances were mirror-images of each other, the judge drew different conclusions in respect of each witness. Mr Langstaff makes two particular complaints in this connection, which he says demonstrates lack of even-handedness. First, he contends that Mr Lawlor's lack of credibility on the first issue led the judge to reject his evidence on the second issue, whereas Mr Ratcliffe's lack of credibility on the first issue did not prevent the judge relying on his evidence on the second issue. Secondly, it is said that the judge treated Mr Lawlor's volte-face on the first issue as being of some support to the defendant on that issue, whereas he did not treat Mr Ratcliffe's volte-face as helpful to the claimant on the first issue.

32. I do not believe that there is anything in these complaints. First, as a matter of principle, it seems to me that it is open to a judge to conclude that one witness has changed his evidence on one issue in a way which does not call into question his honesty or reliability, whether generally or in relation to other issues, while concluding that another witness's change of evidence is demonstrative of his general unreliability. Indeed, it appears to me that that proposition is so obvious that it should almost go without saying. Sometimes a judge will be reduced to explaining why he has come to a particular conclusion in relation to a particular witness simply by reference to the impression the witness made in the witness-box. I accept that that can be said to be something of a "last refuge", but, at least in some cases, it is the only refuge.

33. In this case, however, there were other reasons, which can fairly be described as objectively more satisfactory, upon which the judge rested his conclusion. The unreliability of Mr Lawlor was not merely demonstrated by his change of evidence on the first issue, but also, as I have mentioned, by his unconvincing, inconsistent and ultimately withdrawn, evidence that he complained to the referee during the course of the match, and also by his "B" marking of Mr Wilbraham on the referee assessment card. (In this latter connection, Mr Langstaff argues that

there was evidence to show that team captains were rather lax about filling up referee assessment cards at the end of matches. There is nothing in that. First, the evidence merely showed that most captains ignored their duty to fill in the cards: that is no guide to the care employed by a captain who filled in a card. Secondly, it is plain from the different marks accorded by Mr Lawlor to Mr Wilbraham that a degree of thought must have been given to the markings.) There were no such criticisms which could be made of Mr Ratcliffe.

34. Furthermore, once he had admitted that the referee had called "engage", Mr Lawlor, other than retreating behind the statement that he could not really remember, said nothing inconsistent with that evidence. However, Mr Ratcliffe, having said that he could not in fact recall the referee having called "engage", nonetheless said on more than one occasion that he had no criticism of the way the referee had conducted himself, and, indeed, that he could not remember any referee in any previous match that season having called "engage". In other words, unlike Mr Lawlor's evidence on the first issue once it had changed, Mr Ratcliffe's evidence was distinctly equivocal.

35. Accordingly, it appears to me that the judge was quite entitled to conclude, as he did, that Mr Lawlor's overall performance as a witness on the first issue was such as to render him generally unreliable, and therefore of no assistance on the second issue, whereas Mr Ratcliffe's overall performance on the first issue was such as not to prevent his evidence on that issue being of value. Indeed, at the end of paragraph 25 of his judgment, the judge was at pains to emphasise that, although Mr Ratcliffe's evidence on the first issue was so "undermined" as to be of no real assistance on the first issue, "in many [other] respects … his evidence [was] acceptable".

36. In these circumstances, it appears to me that it would have been open to the judge also to conclude that, while Mr Ratcliffe's evidence was of no real assistance on the first issue either way, Mr Lawlor's evidence on the first issue, looked at a whole, was of some assistance to the defendant's case. In the event, having read the judgment with this point in mind, I am not convinced that the judge did in fact treat Mr Lawlor as a witness who helped the defendant on the first issue, but, if that is mistaken, it appears to me that, for the reasons I have given, the judge would have entitled to treat him as such.

37. I turn next to the next complaint, namely that the judge was wrong to take the view that the claimant's case, and Mr Lawlor's evidence in particular, was undermined by the absence from his 6th October report of any reference in relation to the material scrum of the fact that the referee failed to call "engage" or that the referee had permitted engagement to take place when the Stourbridge front row was not ready. In this connection, as the judge pointed out, the report was prepared for the specific purpose of dealing with the circumstances of the claimant's injury, fairly shortly after the match, but once Mr Lawlor had had time to discuss the details with the two other Stourbridge players who were most intimately concerned with the material scrum, namely Mr Smith and Mr Bailey, and at a time when Mr Lawlor (and indeed Mr Smith and Mr Bailey) appreciated that Mr Allport's injury was very serious indeed.

38. Further, the effect of the evidence of Mr Lawlor and Mr Smith was that "there is no more important law than Law 20 and the referee was simply not enforcing it" and that "this accident occurred because of a dereliction of duty by the referee".

39. In those circumstances, it appears to me that the judge was entitled to draw inferences adverse to the reliability of the evidence of those two witnesses, and therefore to the claimant's case, from the fact that, again to quote the judge, there was

> "… nothing in [Mr Lawlor's report] to say that the front row was ready, that a prop was in a standing or semi-standing position, nothing to say that he, as scrum-half, had seen that the prop was in a standing position, nothing to say that Mr Smith recalled, as he recalled something else, that he was in a semi-standing position, nothing … to say that the referee was not controlling the scrum or not enforcing the correct sequence."

The judge described these as "crucial omissions", and thought it "inconceivable" that, if Mr Lawlor or Mr Smith had really believed those represented the facts at the time of Mr Lawlor's report, he would not have said so.

40. This conclusion was one which the judge reached not merely by reference to the contents of the report and the objectively ascertained circumstances in which it was prepared, but also by reference to the evidence given by Mr Lawlor and Mr Smith, and, indeed, by reference to the way they gave that evidence. The more strongly they expressed their view about the incompetent way in which the referee had allegedly conducted the match, the more justified the judge would have been in commenting on the absence of specific criticisms in the report.

41. One specific point I should mention about Mr Lawlor's report is that it states that the Cheltenham pack "drove in", an expression which is said to carry with it a clear implication that the Stourbridge pack was not ready at the point of engagement. I do not consider that there is anything in that point. As Mr Smith accepted in his evidence, the expression "driving in" is ambiguous, in that it can mean an approach by one pack to the other which could be called "aggressive but fair" (to use Mr Smith's description of the match generally), or it can mean an unlawful move before the other pack is ready. The fact that it is an ambiguous expression appears to me, if anything, to support the judge's contrasting the relative innocuousness of Mr Lawlor's report with the strong criticisms of the referee articulated in his evidence by Mr Lawlor, and indeed by Mr Smith. Mr Langstaff placed weight on the fact that Mr Smith had said that he had used "driving in", and understood the expression in the report, in the unlawful sense. In the first place, Mr Smith did not write the report. Secondly, if, as the judge found, Mr Smith was an unreliable witness, his evidence on this point does not assist. Thirdly, even if, in the report, "drove in" had the meaning Mr Smith alleged, it was not the sort of clear complaint of the referee's conduct which the judge said he would have expected to see if the claimant's version of events was correct.

42. A somewhat different criticism of the judge in relation to Mr Lawlor's report is the alleged contrast between the critical attitude he adopted to it, and the more indulgent attitude he adopted to Mr Wilbraham's match report. If one refers to what the judge said about his approach to the two reports, this seems an unpromising point. When referring to Mr Wilbraham's report, the judge said that it "has to be looked at with the same care with which I look, and hope I have looked, at the report from Simon Lawlor". When dealing with Mr Wilbraham's report, the judge said that it was "not written by a lawyer" or "at a time when litigation [was] contemplated" and that it was not written "in the knowledge that it [was] going to be carefully scrutinised at a later stage". In relation to Mr Lawlor's report, the judge had said that it had "not been drafted by or with the assistance of a lawyer" and when it was made it would not have been "known that it would be carefully scrutinised, both for what it contained and what it omitted".

43. If one looks at how the judge actually approached the two reports, it is perfectly true that he concluded that, while Mr Wilbraham's report was consistent with the evidence the writer gave, Mr Lawlor's report was not. It is true that Mr Wilbraham made no express reference in his report to the Stourbridge front row being ready at the time he called "engage". However, the judge was entitled, particularly as Mr Wilbraham, who was an honest witness said so, to conclude that "it was implicit in the referee's report that, if he was calling 'wait, wait, wait' and waiting until the second and back rows had bound in, it was axiomatic that the front row was in the crouched position". Again, it appears to me that any criticisms which were made against Mr Wilbraham's report had to be assessed by judge not merely by reference to the contents of the report and the objective circumstances in which it was written, but also by reference to the judge's assessment of the writer of the report and what he said in his evidence, generally and in particular about the report.

44. The final criticism of the judge with which I should deal in any detail is that it is said that he gave no explanation for rejecting the evidence of Mr Smith, save by reference to Mr Lawlor's report, and that that was not an appropriate ground. I do not consider that there is anything in either limb of that contention. The judge had to look at the evidence as a whole, and it is frequently difficult to explain wholly satisfactorily why one rejects or accepts one particular piece of evidence, or the evidence given by one particular witness, while accepting another. Given that this was an extemporary judgment given at the end of a case which had included two full days of oral evidence, I consider that it was a fairly impressive piece of work. In particular, it appears to me that the judge was fully entitled to reject the evidence of Mr Smith. First, Mr Smith had had input into Mr Lawlor's report, as is clear from the first sentence of that report, and indeed from what Mr Lawlor and Mr Smith said. Although Mr Smith had not seen the report, I think the judge was entitled to draw an adverse conclusion, although not as clear an adverse conclusion from the perceived omissions from the report, in relation to Mr Smith's evidence, as he did in relation to that of Mr Lawlor. Secondly, the judge was able to observe the demeanour of Mr Smith in the witness-box. Thirdly, the Stourbridge team was quite prepared to continue playing with Mr Wilbraham as referee after the material scrum. Fourthly, there was the fact that Mr Smith did not complain to the referee, or indeed to his team mates, after the match, about the conduct of the referee in any way. Fifthly, Mr Smith's evidence was in conflict

with that of Mr Wilbraham, whom the judge regarded as a wholly reliable witness, and, on the second issue, with the evidence of Mr Ratcliffe, whom the judge regarded as honest and experienced (albeit confused and unhelpful on the first issue).

45. Anyone experienced in litigation will know that there are cases where there is an issue of fact upon which the evidence of two witnesses is diametrically opposed, and where the judge is faced with the task, often very difficult to discharge, of deciding which of the two witnesses is telling the truth. As was implied by this court in *Flannery*, a judge sometimes has no real alternative but to decide which version of events is inherently more likely, or which of the two witnesses appears to him to be inherently more believable. In the present case, the judge decided that Mr Wilbraham was easily the most impressive witness, and that he was supported, at least on the second issue, by the evidence of Mr Ratcliffe who was also honest. He was unimpressed by Mr Lawlor and Mr Smith. The judge also took into account, as I consider he was entitled to do, inherent probabilities, when he said:

> "Why, I ask, would [Mr Wilbraham] not have [controlled the scrummaging in accordance with Law 20], a qualified referee, albeit Grade C1, experienced in refereeing games at this level?"

46. In addition to the impression made by the witnesses, and the inherent probabilities as he saw them, the judge had the benefit of other evidence which he considered, rightly in my view, to be of significant assistance to this conclusion. I have in mind the fact that the two teams were content to continue with the match under the referee after the material scrum, the absence of any complaints to the referee by Mr Lawlor during the match, the absence of any complaint to or about the referee after the match, the marking accorded to the referee by Mr Lawlor (and in particular the "B" for scrummaging) immediately after the match, the referee's report immediately after the match, and the contrast between Mr Lawlor's report (prepared with the assistance of Mr Smith) and the evidence of Mr Lawlor and Mr Smith.

47. Mr Langstaff also raised, albeit briefly, the suggestion that Mr Ratcliffe's evidence that, between the packs starting to engage and actually engaging in the material scrum, he saw Mr Smith raise his head, was physically impossible, and also that it was inherently unlikely that Mr Smith would have raised his head. Those matters were explored in evidence before the judge, and it seems to me that, at least in the absence of expert evidence, there can be nothing in those points so far as an appellate court is concerned.

48. In all these circumstances, I am of the view that this appeal should be dismissed. I cannot end this judgment, however, without acknowledging that I am acutely conscious that this rather detached and cold analysis of the causes of the horrific injury suffered by Mr Allport must seem positively heartless to him and his family. Like the judge, I am very sorry to be piling further misery on them following the tragedy which occurred on 3rd October 1998. Nonetheless, I am satisfied that the judge reached the proper conclusion as a matter of law on the findings which he properly made and properly explained in his judgment.

Lord Justice May:

49. I agree that this appeal should be dismissed for the reasons given by Neuberger LJ.

Lord Justice Auld:

50. I also agree that the appeal should be dismissed for the reasons given by Neuberger LJ.