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## Player violence, or violent players?

### Vicarious liability for sports participants

Mark James\* and David McArdle\*\*

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*This article analyses two recent English cases concerning the law on vicarious liability for acts of violence and considers their significance in respect of on-field acts of violence in sports participation. It provides an overview of how the law of negligence has developed in the specific context of sports injuries (including application of the volenti principle) and critiques the application of vicarious liability to sports cases. This is followed by a consideration of the wider law on vicarious liability for violent employees through a review of *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and deeper consideration of *Mattis v Pollock* [2003] IRLR 603 (which has to date been the subject of little, if any, academic comment). The article continues with an analysis of how those decisions have changed the legal landscape in respect of violent sports participants, looking in particular at reported cases from three jurisdictions in which that issue has been raised.*

#### INTRODUCTION

Some of the cases that form the starting-point for this article, particularly *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (*Lister*), have already attracted their share of academic comment<sup>1</sup> and the authors hope to contribute to those discussions by considering the potential application of the laws on vicarious liability to situations in which their relevance may not be immediately apparent. This article therefore draws upon the authors' earlier work on liability for negligent acts on the sports field<sup>2</sup> and on vicarious liability generally<sup>3</sup> to consider the future of vicarious liability in the context of sports participation. The concern is not so much with liability for violent acts per se, but with liability in respect of injuries inflicted by individuals who may be regarded as having a propensity for acts of violence, by virtue of their behavior in sporting or in other contexts. As the title of the article infers, the concern is with violent people who are allowed to participate in professional sports, rather than with professional sports participants who commit acts of violence on the field of play. A propensity for violence could now result in sports employers being vicariously liable for acts that, prior to *Lister* and *Mattis v Pollock (t/as Flamingo's Nightclub)* [2003] IRLR 603 (*Mattis*), would have seen only personal liability arising on the ground that those acts were not committed "in the course of employment".

The House of Lords decision in *Lister* effectively redefined the scope of vicarious liability at common law. So far as tortious acts in sport are concerned, it has given new impetus to the truism that the law of the land does not stop

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<sup>1</sup>Loubser, M and Reid E, "Vicarious Liability for Intentional Wrongdoing After *Lister* and Dubai Aluminium in Scotland and South Africa" [2003] *Jurid Rev* 143; McBride N, "Vicarious Liability in England and Australia" [2003] *CLJ* 255.

<sup>2</sup>James M and Delley F, "The Standard of Care in Sports Negligence Cases" [2002] 1 *Entertainment Law* 104; James M, "Tort, Compensation and Alternative Dispute Resolution for Participant Violence" in Gardiner S et al, *Sports Law* (2<sup>nd</sup> ed, Cavendish Publishing, London, 2001) Ch 16.

<sup>3</sup>McArdle D, "His Master's Vice. Vicarious Liability for the Acts of Violent Employees after *Lister*" (2003) 1 *Journal of Obligations and Remedies* 41.

at the touchline. *Lister* shifts the boundaries of the potential liability of professional sports clubs for the injury-causing acts of their violent employees. This article examines not only the scope of a club's liability for negligently inflicted on-the-ball injuries but also its potential liability for deliberately inflicted harm and off-the-ball incidents, establishing the extent to which an employer club is vicariously liable for the acts of its violent players. That done, the "Roy Keane Affair" and decisions from courts in Australia, the United States and France are discussed in order to lend weight to the assertion that English law would not be out-of-step were it to extend liability for the on-field activities of violent sports employees to the employing organizations.

Before considering vicarious liability for the activities of violent participants it is appropriate to clarify the extent to which the defence of *volenti* is applicable in sports negligence cases. It is a truism that a risk of injury is inherent within most sports, the degree of risk being particularly high in collision sports such as rugby and boxing, less so in contact sports like netball and soccer, and less still in non-contact sports like tennis, bowls or archery. As Barwick CJ stated in *Rootes v Shelton* (1968) 116 CLR 383 at 385, "by engaging in a sport .... the participants may be held to have accepted risks which are inherent in that sport". The complications that arise for sports participants are the combined issues of consent and *volenti non fit injuria*, or the implied assumption of risks.<sup>4</sup> However, consent and *volenti* have had very little impact on the majority of sports cases. Consent operates as a defence only to the international tort of battery. In the sporting context, players consent to intentional acts that are an integral part of the playing of the game, for example a tackle in a game of rugby, or being punched in a boxing contest.<sup>5</sup> It has even been held that "a frequent or familiar infraction of the rules of a game can fall within the ordinary risks of the game accepted by all the participants."<sup>6</sup> It is, therefore, only deliberate contacts that have nothing to do with the playing of the game, such as fighting, that will fall outside of the scope of consent.

*Volenti non fit injuria* operates as defence to a claim of negligence only when a duty of care, its breach and consequent damage have all been established. As sports participants run the risk of, for example, being tackled in rugby or soccer games or charged in ice hockey, *volenti*, as the legal embodiment of risk taking, seems to be the appropriate defence. However, the majority of sports negligence cases turn on the issue of breach of duty rather than the need to establish a defence to a fully made out claim of negligence. Unless and until a claim of negligence is fully made out, the issue of *volenti* will not arise. To date, the reported cases have all turned on whether the act of the defendant fell below the standard of care expected of a reasonable player in that game. If a sports participant is found not to have acted negligently, no issue of *volenti* will arise. However in cases where a sports participant has been found to have acted negligently, it has been because such play was unreasonable and/or unexpected. Again, no issue of *volenti* has arisen because participants consent to, or are *volens* to, only such acts as can be reasonable expected from a player playing according to the reasonably accepted standard of play. Thus, *volenti* has had no impact on the vast majority of sports negligence cases.

## SPORTS, TORTS AND THE COURTS

*Condon v Basi* [1985] 1 WLR 866, based on a late tackle in a football game, was the first case on tortious liability for player-on-player acts of violence to be heard by the courts in the United Kingdom. Since this case was heard by the Court of Appeal in 1985, there has been a dramatic increase in the pool of potential defendants against whom an injured sports participant can bring a claim. Players can sue other players,<sup>7</sup> the referee,<sup>8</sup> coaches<sup>9</sup> and

<sup>4</sup> Adams M, "Volenti Non fit Injuria or Contributory Negligence? A Comparative Review of Three Football Cases" (1994) 2 E Rev PL 329. From a practical perspective, by participating in a sport, the injured individual can be said to have either impliedly consented to all contacts that are an integral part of the playing of the game or to have voluntarily run the ordinary risks that are an inherent part of the playing of that sport. This implied consent ensures that those who cause injury to other participants during the course of a lawful sport cannot be liable for the injuries that result from the contacts that are a necessary and inherent part of the playing of the game, or are within the accepted playing culture of the sport, as partially defined in *Caldwell v Maguire* [2001] EWCA Civ 1054 (discussed in the conclusion below).

<sup>5</sup> *Watson v British Boxing Board of Control* [2001] QB 1134.

<sup>6</sup> *Matteson v Governors of Dalhusey University and College* (1983) 57 NSR (2<sup>nd</sup>) 56, quoted in *Elliott v Saunders and Liverpool Football Club* (unreported, Eng High Ct, 10 June 1994), transcript p 7.

<sup>7</sup> *McCord v Carnforth and Swansea City AFC Ltd*, *The Times*, 11 February 1997.

<sup>8</sup> *Smolden v Whitworth* (1997) PIQR 133.

governing bodies.<sup>10</sup> However, from the perspective of the professional sports participant, the most important potential defendant is the club which employs the player who caused their injury. In English law, bringing an action against a club for an employee's act of negligence has been relatively uncontroversial and the advantage of a successful vicarious liability claim is that it enables the injured player to receive compensation from the defendant club's employer's liability insurance. By contrast, a successful personal claim against the defendant may simply result in damages being awarded against an archetypal "man of straw" against whom only a pyrrhic victory could be secured. In the main reported cases, there has been remarkably little discussion of vicarious liability, either because no employment relationship exists or, where professional players are concerned, because vicarious liability has not been contested by the defendant employer. On almost every occasion the club has accepted that the defendant player was in some way carrying out actions that were authorised by their employing club. Although the injuries were inflicted by acts of foul play, these have been considered to be acts authorised by the employer as an integral and accepted means of playing the game. At worst, they have been regarded as unauthorised means, foul tackles, of carrying out authorised acts, namely challenges for possession of the ball.

Only in the submissions relating to costs in *Elliott v Saunders and Liverpool Football Club* (unreported, English High Court, 10 June 1994) was the relationship between the defendant player and his club discussed any further. Here it was considered that separate representation would be required for player and club where they were either sued separately, as was the case here, or where there was an allegation of battery by the defendant club (transcript p 36). In other words, there was a contention in *Elliott* that if the injurious act of the defendant player were trespassory in nature, it would be regarded as an act unauthorised by the employer and vicarious liability would not therefore attach. It is this aspect of vicarious liability that is examined here, drawing upon the more recent decisions to consider the extent to which this contention has merit.

## SPORT AND NEGLIGENCE

The development and application of the law of negligence to sports injury cases is a relatively recent phenomenon. When *Condon v Basi* [1985] 1 WLR 866 reached the Court of Appeal, Lord Donaldson MR noted (at 867):

It is said that there is no authority as to what is the standard of care which covers the conduct of players [of] competitive sport[s] whose rules and general background contemplate .... physical contact between the players. This is somewhat surprising but appears to be the position.

The court determined that liability should be imposed upon the defendant footballer who had broken the leg of the claimant by means of a foul tackle for which he was sent off. The Court of Appeal based its judgment on the reasoning of Kitto J in *Rootes v Shelton* (1968) 116 CLR 383, holding that there was a general standard of care placing all sports participants under a duty to take all reasonable care to avoid causing injury to co-participants, taking account of the circumstances in which the acts take place. Lord Donaldson pointed out (at 867) that there are markedly different circumstances to be taken into account when considering liability arising from a football game and a walk in the countryside and approved of Kitto J's assertion in *Rootes* (at 390) that the rules, conventions and customs of a sport or game may be relevant circumstances to be taken into account. Unfortunately, Lord Donaldson did not make any attempt at defining further the standard of care to be applied in sports negligence cases. After nearly 10 years of debate over the precise nature of the test to be applied, the standard eventually settled on by the court was confirmed in *Caldwell v Maguire* [2001] EWCA Civ 1054, a case arising out of injuries caused by the careless riding of a professional jockey during a race, as that of negligence in all the circumstances.<sup>11</sup> Thus, all sports participants owe a duty to take all reasonable care not to cause injury to one another whilst playing their sport.

The main question for the court will be whether the duty to take care has been breached in the specific circumstances in which the injury occurred. The relevant circumstances derive from the specific game that was

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<sup>9</sup> *Canterbury Bankstown Rugby League Football Club Ltd v Rogers; Bugden v Rogers* [1993] Aust Tort Reports 81-246.

<sup>10</sup> *Watson v British Boxing Board of Control* [2001] QB 1134.

<sup>11</sup> See James and Deeley, n 2, and more detailed discussion in the conclusion.

being played.<sup>12</sup> In particular, both the rules and the playing culture of the sport are of paramount importance in determining the legality of the contract. If the contract is found to be acceptable, there is no breach of the duty and no liability; if it is unacceptable, then the defendant player is liable in negligence.

## APPLYING VICARIOUS LIABILITY TO SPORTS NEGLIGENCE CASES

Nine years after *Condon*, the English High Court in *Elliott v Saunders and Liverpool Football Club* (unreported, English High Court, 10 June 1994) accepted that in principle a professional football club could be vicariously liable for the acts of its employees who negligently caused injury to another player, although the case failed on the facts. Less than two years later, in *McCord v Cornforth and Swansea City Football Club* (*The Times*, 11 February 1997) the High Court finally found an employing club vicariously liable for the acts of an employee player and awarded damages to a professional footballer whose playing career had been ended by the negligent challenge of an opponent. Although there is a long and detailed discussion of the evidence and of the standard of care to be applied in sports negligence cases, no mention is made of the issue of vicarious liability in the judgment.

Since *McCord* there has been very little consideration of vicarious liability in the reported cases, all of which have involved foul challenges committed in circumstances where vicarious liability has undoubtedly attached. Indeed, the application of vicarious liability has been so clear-cut that defendant clubs have not even tried to argue to the contrary. In *Watson and Bradford City Football Club v Gray and Huddersfield Town Football Club* (*The Times*, 26 November 1998), the defendant club was found vicariously liable to the claimant for a career-interrupting, rather than a career-ending, injury while in *Vowles v Evans and Welsh Rugby Union* [2003] EWCA Civ 318, the Welsh Rugby Union was held to be vicariously liable for the negligent non-application of the safety rules of rugby by one of its appointed referees. These developments aside, so non-contentious have the reported cases been that in the most recent cases of this nature, *Pitcher v Huddersfield Town Football Club* (2001) WL 753397 and *Gaynor v Blackpool Football Club* [2002] CLY 3280; (2002) WL 1039724, the defendant player was not even joined as a party to the proceedings. The assumption has been that if negligence is found, the club alone would be liable in damages.

Taken as a whole, the cases are authority for the proposition either that the negligent, and usually foul, play of the defendant player will be considered to be authorised by the defendant club because of its integral connection with the player's employment by the club, or alternatively, that the injury-causing acts are an unauthorised means of performing an act authorised by the employing club as being a necessary part of the performance of the job. However, all these cases arise from foul play that either occurred on the ball or in such close connection to the play as to be considered by the court to be an integral part of the game. What has not yet been discussed in the courts of the United Kingdom is whether a club can be liable for the violent acts of its players in other circumstances, particularly those in which the link between the employment and the act of violence is not so clear-cut. In the wake of *Lister* it is arguable that violent acts which would have previously resulted in civil, and perhaps even criminal, liability,<sup>13</sup> attaching upon the violent player alone can now result in liability vicariously attaching to the employer as well.

## RECENT DEVELOPMENTS IN ENGLISH LAW

In order to consider the potential scope of a professional sports club's vicarious liability, it is necessary to consider the House of Lords decision in *Lister v Hesley Hall Ltd* and that of the Court of Appeal in *Mattis v Pollock*. *Lister* arose as a consequence of the paedophile activities of an employee (Grain) of Hesley Hall Ltd, a company that owned and ran a boys' residential care home. The employee acted as warden of the care home and was responsible for the day-to-day running of the premises and for maintaining discipline. Some of those abused by

<sup>12</sup> This should be contrasted with Cox N, "Civil Liability for Foul Play in Sport" (2003) 54 NILQ 351. Cox puts forward a contrary argument that a duty only arises where the injurious act is not consented to. In the light of *Caldwell*, this must be incorrect. A duty is imposed upon all players at all times; it is simply not breached unless the contract falls below the standard of care relevant to that sport and/or is not consented to.

<sup>13</sup> See further James M, "Sports Participation and the Criminal Law" in Lewis A and Taylor J (eds), *Sport: Law and Practice* (Butterworths, London 2003) Ch E6.

Grain sought damages for personal injury on the ground that the company was vicariously liable for the torts committed by him. The House of Lords, overruling the Court of Appeal's ruling in *Trotman v North Yorkshire Country Council* [1999] IRLR 98, noted that employers have an opportunity and, indeed, a responsibility to recruit, train, supervise and, if necessary, take disciplinary action. *Lister* affirms that employers who fail to discharge their responsibility cannot avoid liability simply because an employee is so violent that their actions cannot be brought within a narrow definition of "acting in the course of employment".

Of more obvious relevance, perhaps, to a scenario arising from the activities of violent sports participants is the Court of Appeal's decision in *Mattis v Pollock* [2003] IRLR 603. Here, the claimant argued that Pollock, the owner of a nightclub, was vicariously liable for knife injuries inflicted by Cranston, a bouncer in Pollock's employ. Cranston had attacked several customers over a series of weekends, culminating in him assaulting one customer with a cosh and physically attacking at least two others on the night that Mattis was stabbed. Shortly before his attack on Mattis, Cranston had himself been assaulted by several of the club's patrons. He escaped without sustaining serious injury, went home and armed himself with a kitchen knife, before returning to the club in order to exact revenge on those who had attacked him. The first person he encountered upon his return to the club was Mattis. Just before stabbing him, Cranston said to Mattis, "I'll teach you not to fuck with me", a comment that the court of Appeal regarded as a clear reference to the incidents at the club earlier that evening (and which are discussed in more detail below). Pollock was convicted of employing Cranston as an unregistered doorman,<sup>14</sup> while Cranston was convicted of causing grievous bodily harm with intent and sentenced to eight years' imprisonment.

The first instance judgment reveals that Pollock was certainly aware of Cranston's propensity for violence and was impressed by it. Rather than reining in Cranston, he had encouraged him to use his physical prowess on several occasions. On at least one occasion, a customer had tried to complain directly to Pollock, whom he knew and considered a friend, about Cranston's thuggery. Pollock had simply walked away. Throughout the currency of the employment relationship Pollock had encouraged Cranston to manufacture violent confrontations in order to reinforce his "hard man" status. The High Court transcript reveals that Pollock believed he needed someone with "a reputation" to compensate for a "weak door"; someone who could "sort out" "troublesome customers". His employment of Cranston was designed to generate a degree of fear on the part of the punters. In spite of the overwhelming evidence of Pollock's collusion in his employee's violence, however, the judge at first instance held Pollock was not vicariously liable for the stabbing of Mattis.<sup>15</sup>

In June 2003 that decision was overturned on appeal on the grounds that the judgment could not be reconciled with those of the House of Lords in *Lister* and *Dubai Aluminium v Salaam* [2003] IRLR 608, although the judgment in the latter had not been available when Mattis was heard at first instance. Giving the judgment of the court of Appeal, Judge LJ stated the "essence principle" to be derived from their Lordships' decisions in those two cases was that:

Mr Pollock's vicarious liability to Mr Mattis for Cranston's attack requires a deceptively simple question to be answered. Approaching the matter broadly, was the result so "closely connected" with what Mr Pollock authorised or expected of Cranston in the performance of his employment as doorman at his nightclub, that it would be fair and just to conclude that Mr Pollock is vicariously liable?<sup>16</sup>

In answering that question in the affirmative, the Court of Appeal placed great emphasis on two closely related aspects of the case that had received scant coverage at first instance. It was revealed that 40-year-old Mattis had actually played some role in the earlier disturbances. He had fleetingly attempted to grab Cranston, a 6ft 9in former boxer weighing in at 20 stone, round the waist and pull him off his victim. The Court of Appeal presciently noted that the "public humiliation" Cranston had sustained when he was attacked by several customers and forced to retreat had "wholly undermined his reputation and status as the doorman Pollock had expected him to be".<sup>17</sup> So

<sup>14</sup> An offence under the *London Local Authorities Act 1995* (UK), s 31.

<sup>15</sup> *Mattis v Pollock (t/as Flamingo's Nightclub)* [2002] EWHC 2177.

<sup>16</sup> *Mattis v Pollock (t/as Flamingo's Nightclub)* [2003] IRLR 603 at 605 per Judge LJ.

<sup>17</sup> *Mattis v Pollock (t/as Flamingo's Nightclub)* [2003] IRLR 603 at 607 per Judge LJ.

far as the Court of Appeal was concerned, Cranston was intent on avenging the damage to his reputation and re-establishing himself as Pollock's "enforcer", and it was this aspect of the affair that rendered the incident so "closely connected" to the employment that vicarious liability should attach. It is a judgment that accords perfectly with *Lister* and *Dubai Aluminium* and the court of Appeal's righting of the wrong that had been committed by the judge at first instance in *Mattis v Pollock* is to be welcomed. Although, as per Lord Clyde in *Lister*, it is possible that assaults resulting from "passion and resentment" or "personal spite" may still fall outside the scope of vicarious liability, it is a weak defence and one that the courts should be wary of affording to employers. This is especially so in cases involving men like Cranston, whose sheer physicality is what makes them attractive to the employer in the first place. As Hobbs et al illustrate, a bouncer who lacks the requisite physical capital<sup>18</sup> - who cannot "deliver" when the threat of violence becomes the reality and is thus a stranger to "the dynamics of interpersonal violence"<sup>19</sup> that is the bouncers' demesne - is a liability to his employer and destined for a short career in a profession where reputation, status and "face" are the defining characteristics. Not all bouncers are violent; but they must be able to use violence effectively when the occasion demands. What can be said with certainty is that after *Lister*, *Dubai Aluminium* and *Mattis* it is now more difficult than ever for an employer to avoid responsibility for the violent actions of an employee, and especially so if the employee has a history of violence.

## THE FUTURE OF VICARIOUS LIABILITY IN SPORT

As discussed above, the vicarious liability cases that have involved sports incidents have all involved acts that are without question an integral part of the employment of the defendant player. It would appear from the cases discussed hitherto that almost any act that could be claimed as being a part of the playing culture of a sport would be accepted as being an act in furtherance of the employment of the defendant, and one to which vicarious liability would accordingly attach. However, what is open to conjecture, in the wake of *Lister* and *Mattis*, is how far the law could be taken as holding the employing club liable for acts of a player that go beyond those which accord with this "playing culture".

The following scenarios examine how the English law on vicarious liability could apply to situations where sports participants rely upon their physical prowess to do their employer's bidding by resorting to excessive violence. First, one recent British incident is used as the basis for a hypothetical discussion of how the law could have been applied if the injured party had pursued legal action. Second, three cases from different jurisdictions are analysed to ascertain whether the vicarious liability that was imposed abroad could ever be imposed if a similar situation arose under English law.

## A FEW HARD CASES

### Roy Keane and Alf Inge Haaland

In the 2001 derby game between Manchester United Football Club and Manchester City Football Club at Old Trafford, the United captain, Roy Keane, made a challenge on City's Alf Inge Haaland.<sup>20</sup> The challenge, for which Keane was sent off and subsequently banned for four matches, seriously injured Haaland's right knee.<sup>21</sup> In the immediate aftermath of the match, rumours began to circulate that Keane had deliberately kicked Haaland, possibly even intending to injure him. It was alleged that the challenge was motivated by revenge for an incident that had occurred the previous season between the two players, when Haaland was playing for Leeds United Football Club.<sup>22</sup> On this previous occasion, Keane had stayed on the ground after the challenge because of damage

<sup>18</sup> On which see Shilling C, "Educating the Body: Physical Capital and the Production of Social Inequalities" [1991] *Sociology* 653.

<sup>19</sup> Hobbs D, Hadfield P, Lister S and Winlow S, *Bouncers. Violence and Governance in the Night-time Economy* (Oxford University Press, Oxford, 2003) p 3.

<sup>20</sup> See further M James, "The Trouble with Roy Keane" (2002) 1 *Entertainment Law* 72.

<sup>21</sup> The ban comprised three matches for the challenge on Haaland and an additional one match because this was his second sending-off of the season.

<sup>22</sup> Manchester United Football Club v Leeds United Football Club, FA Carling Premier League game, Old Trafford, 14 September 1999.

to his cruciate ligaments and was accused by Haaland of feigning injury in an attempt to get him (Keane) sent off. Despite some initial outcry at the time of the second challenge, the matter was considered closed when Keane was banned by the Football Association for the challenge.

In the summer of 2002, Keane published his autobiography.<sup>23</sup> In it, he gave a more detailed account of what occurred in the 2001 game:

I'd waited almost 180 minutes for Alfie, three years if you looked at it another way. Now he had the ball on the far touchline. Alfie was taking the piss, I'd waited long enough. I fucking hit him hard. The ball was there (I think). Take that you cunt. And don't ever stand over me again sneering about fake injuries. And tell your pal Wetherall there's some for him as well. I didn't wait for Mr Elleray to show the card. I turned and walked to the dressing room.<sup>24</sup>

Keane appeared to be admitting that the challenge on Haaland was deliberate, that it was intended to hurt Haaland and that it had been almost two years in the planning. He appeared to have confessed to assaulting a fellow-player intentionally during the course of a game, that he had not cared whether or not the ball was either played or playable and that he knew that his challenge was an automatic sending-off offence.<sup>25</sup>

Before this "confession", in terms of vicarious liability Keane's challenge would have been considered to be little more than a poorly executed but authorised act carried out in the course of his employment as a professional footballer. Had Haaland been in a position to sue, United, as Keane's employer would have been vicariously liable for the injuries caused through a simple application of *McCord*. Even though the specific challenge was a deliberate foul, it would have been simply an unauthorised mode, foul play, of carrying out an authorised act, a tackle. Challenges that are made with more force than is necessary are an integral part of the playing of most contact sports and are consented to by the players.<sup>26</sup> Deliberate foul play has also been accepted by the courts as inherent in the playing of sports such as football.<sup>27</sup> Thus, this would have been a relatively straightforward case of vicarious liability.

Once Keane appeared to confess to this being a deliberate and premeditated revenge attack, the issue of United's vicarious liability became much more complex. The judgment in *Deatons v Flew* (1949) 79 CLR 370 provided that "an act of passion and resentment" or "a spontaneous act of retributive justice" would be outside of the course of employment in such circumstances. To paraphrase Dixon J, the occasion for administering the retributive act and the form it took may have arisen from the fact that he was a footballer but retribution was not within the course of his employment as a footballer. In such circumstances, Manchester United would have had a strong argument that Keane was acting in a manner unconnected with his job as a professional footballer-employee and that it should not be vicariously liable for his actions in this case.

Conversely, it could be argued that Keane was picked by United, at least in part, because of his aggressive and confrontational style of play. This was one of the reasons why he was employed by the club: Roy Keane is one of football's "hard men". His style of play was encouraged by the club through its coaching staff and the act could, following *Lister*, be considered to be an integral part of his employment even if carried out with an improper ulterior motive. Manchester United have as much responsibility to recruit, train, supervise and, if necessary, take disciplinary action against its violent employees as did Hesley Hall Ltd. A failure to do so could be seen as at least tacit encouragement of a violent style of play and therefore as acquiescing in an unauthorised manner of carrying

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<sup>23</sup> Keane R and Dunphy E, *Keane: The Autobiography* (Michael Joseph, London 2002)

<sup>24</sup> Keane and Dunphy, n 25, p 281. The "Weatherall" referred to is David Wetherall, a team-mate of Haaland's at Leeds when the first incident occurred. "Mr Elleray" is David Elleray, the match referee. This passage has been removed from subsequent imprints of the book.

<sup>25</sup> Haaland has not played a competitive match since. Although the challenge injured his right knee, he claims that this exacerbated a pre-existing injury in his left knee. It is his left knee that has required corrective surgery.

<sup>26</sup> See further the discussions on this subject in Law Commission, *Consent in the Criminal Law*, Consultation Paper 139 (HMSO, London, 1995) at {12.7}-[12.31].

<sup>27</sup> *Elliott v Saunders and Liverpool Football Club* (unreported, Eng High Ct, 10 June 1994).



out acts authorised as part of Keane's professional duties. Following *Lister*, Manchester United could have been vicariously liable for Keane's actions. Furthermore, the arguments for the extension of vicarious liability to cover situations such as Keane's are perhaps strengthened by the fact that in at least three other jurisdictions, a similar chain of events has led to the imposition of liability upon the employer.

### **Canterbury Bankstown Rugby League Football Club Ltd v Rogers**

*Canterbury Bankstown Rugby Football League Club Ltd v Rogers; Bugden v Rogers* [1993] Aust Tort Reports 81-246 arose out of an incident in a professional rugby league match in Australia, when the defendant was found to have intentionally struck the claimant with an outstretched forearm, whilst ostensibly making a legitimate tackle. The challenge left the claimant with a broken jaw. At trial, the judge held that the club was vicariously liable for the act of Bugden as this type of challenge was within the scope of his employment: it was an improper mode of performing an authorised act. This was upheld on appeal.

The claimant put forward two further claims. First he argued that the club should be vicariously liable for his injuries as they were inflicted by a specifically authorised act of the defendant coach. This argument was based on a claim that the coach had deliberately "revved up" (sic) the players to such an extent that they were unable to control their aggression. Second, it was argued that the coach then drew his players' particular attention to three of the opposition players, including the claimant, who posed a particular threat to Canterbury's chances of victory and had to be "stopped". The claimant took this to mean that he had been deliberately targeted and injured by the defendant as part of a specific in-game strategy of Canterbury's.

The New South Wales Court of Appeal accepted the first claim on the basis that the coach had negligently performed his duties in preparing the team for the game by encouraging them to play too aggressively. However, the court rejected the latter claim on the basis of a lack of evidence. The court held that there was no evidence of such a "hit list" or of a strategy that included deliberately injuring the claimant. Instead, the court accepted that where the coach of a team had acted in the manner claimed here – that the players had been "psyched up" to such an extent that they had become violent – the club would be vicariously liable in negligence. The employer accepted the risk of a coach performing such acts as this; playing "mind games" with one's charges was an integral part of the coaching staff's job and the club would be liable in respect of a coach who went too far. The court went on to add that if there had been evidence of a deliberate plan to cause injury to the claimant and others, the club would not only have been vicariously liable, but also liable for exemplary damages in the region of A\$150,000. That sum was around two and a half times the amount awarded as special and general damages.

Should such a case be heard before a British court, it is extremely likely that a similar result would be reached. First, the club would be liable for the foul play of its player for the high tackle that caused the injury. Unless the club could prove that a player was acting solely out of retribution<sup>28</sup> (and a judge would be hard-pressed so to find on the facts), then this would again be an unauthorised mode, a foul high tackle, of conducting an authorised act, a tackle. However, even if revenge was the motive, then following *Lister*, it is still possible that the club would be vicariously liable for such an assault if it were considered integral to the tasks relevant to the employment. Likewise, the club would be vicariously liable for the actions of the coach when he made his incautious overtures to the players in the pre-match warm up. This can be considered to be merely an overly enthusiastic manner of carrying out the activity that he was employed to carry out – to prepare the side to play first-grade rugby league.

However, difficulties arise with this judgment because of the judge's comments that the club would have been vicariously liable for both player and coach had it been found that there was a "hit list" in place. Considering that the court held the player personally liable for A\$8,000 because of the deliberateness of his actions, it seems strange that the Court of Appeal would have held the club liable for the injuries caused had a hit list been found to have been in operation. There are two possible and alternative lines of argument here. First, that there can be no vicarious liability of the club as the acts of the player would be analogous to acts of retributive justice, as in *Deatons*. The pre-planned attack of another player is so unconnected, or perhaps should be so unconnected, with

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<sup>28</sup> See *Deatons v Flew* (1949) 79 CLR 370.

the normal playing of the game that no employer would ever countenance it as a legitimate or acceptable tactic. However, a strategy designed to cause injury to opposing star players is still in furtherance of the employer's goals, which can be stated simply as being to win matches, and such a scenario is not far removed from Pollock's rationale for employing the thuggish Cranston. This would make a tactic such as having a hit list of opposing players who should be taken out by physical play or intimidation an unauthorised mode of carrying out an unauthorised act. Such a claim would be extremely difficult to prove either way and would be entirely dependent on the evidence available. The action would require evidence from one of the defendant club's other employee-players who were aware of the existence of the hit list to enable the court to determine the legality of the particular strategy used. This is unlikely to be forthcoming, if for no other reason than players placed in such a situation are unlikely to give evidence against their own coach or team-mates – unless the player is an ex-player with a grudge of his own, and in that case the court would have to decide how much weight to give his evidence. However, where a club has a reputation for rough or intimidating physical play, under *Lister* there is a strong case for arguing that such acts are an integral part of the employment relationship.

### Tomjanovich v California Sports Inc

In the United States, it has proved possible to establish vicarious liability against a club for even the most extreme actions of the employee-player. *Tomjanovich v California Sports Inc* H-78-243 (SD Tx 1979) arose out of one of the most notorious acts of violence ever witnessed in the American National Basketball Association. The claimant was punched in the face whilst running at full speed by Kermit Washington, an employee-player of the Los Angeles Lakers, who were owned by the defendant company. Tomjanovich suffered fractures of the face and skull, a broken nose and separated upper jaw, a cerebral concussion and severe lacerations around his mouth. In effect, the bone structure of his face was knocked loose from his skull.<sup>29</sup>

The defendant employer was found vicariously liable for, inter alia, the negligent supervision of its employee-player by failing adequately to control, train and discipline him. As Washington had been specifically hired by the defendant/LA Lakers to fill the role of "enforcer" on the court, it was known to them in advance that he had a predisposition to this kind of violence. This was one of the reasons he had been hired by the club. Because of its knowledge of his style of play and his potential for violent conduct, when Washington assaulted Tomjanovich, the club was liable directly in negligence for the injuries caused and vicariously on the basis that his acts were authorised by the club as being part of its overall playing strategy. The claimant was awarded US\$3.2m in compensation, including US\$1.5m of punitive damages.

The distinction between *Rogers* and *Tomjanovich* appears to be in the degree of the employer's knowledge of the employee's behavior, or at least the potential for a specific type of behavior. Where the club knows of a player's propensity to violent or aggressive play, and either buys him for that reason or continues to pick him despite his playing in that manner, then vicarious liability should attach. However, where the employee is acting without the employer-club being aware of the dangerous nature of the strategies being developed, then perhaps the club may escape liability. This is an interpretation that falls squarely within the scope of the law on vicarious liability post-*Lister* but, again, one must emphasise the precarious position of an employer in the latter scenario even where there is no actual knowledge of the propensity for violence that is being displayed.

Applying *Lister* to the *Tomjanovich* scenario, the club would be liable for the violent acts of the defendant. This is despite claims in *R v Billinghamurst* [1978] Crim LR 553 that punching could not be consented to as being an integral or inherent part of participation in rugby union matches, making it even less likely that the courts would consider punching an opponent to be a part of professional basketball. The rationale for such a position would be based upon the act of punching an opponent being so intimately connected with the normal employment relationship between player and club, because the club is aware of the player's propensity for violence, that the punch is considered to be an authorised act. The act is authorised because the club knew of Washington's style of play in advance and employed him for that reason. It cannot then claim that his actions were unexpected or unwanted.

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<sup>29</sup> Kirkpatrick C, "Shattered and Shaken": see <http://sportsillustrated.cnn.com/features/flashback/cuw/washington> viewed 13 September 2004.

## X v Club Rugby de Aureilhan

In France, the law has been developing in a similar manner to English law. In *X v Club Rugby de Aureilhan* (Cour de Cassation 3/2/2000),<sup>30</sup> during a regional rugby union match, the claimant was punched, off the ball, by a member of the opposing Aureilhan ASCA club. The claimant brought an action in tort against ASCA on the basis of vicarious liability for the damage caused to his eye by the punch. The French Supreme Court, the Cour de Cassation, held that under Art 1384(1), the objective of a sporting association, such as a sports club was to organise, direct and supervise the actions of its members. If any of the club's members caused injury to another during a sporting competition, then the club would be liable for the injuries caused. Consequently, the Cour de Cassation upheld the Pau Cour d'Appel's judgment for the claimant.

This method of imposing liability has not been without controversy in France but the correctness of the outcome is not disputed. It has been argued that Art 1384(1) is not appropriate for imposing vicarious liability in situations like this but only for injury caused by "dangerous persons".<sup>31</sup> As the actions of sports participants were not envisaged by the legislature as being those of dangerous persons and because sports clubs do not have such a high degree of control over their playing members as found by the court, the cause of action should not have been grounded in Art 1384(1) but in Art 1384(5), which justifies a finding of vicarious liability of the employer club through the contract of employment. On this basis, the employer is responsible for the injury-causing actions of its employees. In French law, this theory can be extended to amateur players who are not employed to play by the club on the basis of their subordination to the rules and directives of the club through, for example, its coach. The concept of being responsible for a "dangerous person" under Art 1384(1) may instead be more relevant to cases where the defendant-player has a known reputation for violence, as in the examples above, instead of for a single act of violence by a player.

This case raises two interesting issues. First, if this case had occurred in England, vicarious liability could not have been raised as there was no contract of employment in place. In *Vowles*, the claimant had originally joined as defendants the captain, coach and directors of his club and the club itself. These claims were dropped variously because of the lack of a contractual nexus between the claimant and the club and on the basis of there not being a sufficient amount of control of any of the players' actions by the club's officers. French law would appear to allow a way around this problem by holding that amateur sports clubs have a degree of control over the on-field behavior of their player-members similar to that of a professional club.

Second the test used by the Cour de Cassation is strikingly similar to that used in English law. French law finds the club responsible because the club is under a duty to organise, control and supervise the actions of its players. English law imposes liability because the employer-club is under a duty to train, supervise and discipline its players. Perhaps the development that English law should be contemplating incorporating from French law is that an amateur club should be as responsible for the actions of its violent players as a professional club.

## CONCLUSIONS

Given the recent development of what may be called "sports torts", and the number of cases that have arisen since *Condon v Basi*, there is every likelihood that, in the fullness of time, the courts of England and Wales will be required to consider whether the law as it applies in non-sporting situations is to be applied without gloss to injury-causing incidents arising out of sport. The authors' contention is that it should be. Employers who expect and encourage their staff members to use their physicality to further their business interests should have no hiding-place in the event of such an employee going "over the top". If similar scenarios to those discussed above were to come before the courts of England and Wales, there is no reason why *Lister* would not be applied to the clubs or their respective holding companies and they would be found vicariously liable for the acts of their players.

<sup>30</sup> Decision reported in *La Semaine Juridique – Edition Generale* 22/3/2000 p 550; see also Cairns W, "Sports Law Current Survey" (2000) 8 *Sport and the Law Journal* 2 at 23.

<sup>31</sup> Denoix De Saint-Marc, "La responsabilite des clubs de rugby fondee sur l'article 1384, alinea 1 er, du code civil; le maintien d'une solution contestable" [2000] *Le Dalloz* 862; Cairns W, "Sports Law Current Survey" (2001) 9 *Sport and the Law Journal* 2 at 32.

The connection between the employment relationship and the injury-causing act is sufficiently close. So much so that unless the club could argue that the assaults formed part of a personal vendetta unconnected to the employment relationship (which may have been a viable defence in Keane's case), then the clubs would be liable for the extreme actions of players who have a history of violence.

Most professional sporting organizations would not want to, or even be able to, meet a vicarious liability claim such as those discussed above, where potentially many millions of pounds of damages are at stake.<sup>32</sup> On purely pragmatic grounds, clubs would be reluctant to blame their players in this way because few players would ever want to play for them again. Coupled with the obvious reluctance of team-mates to give evidence against one another, it is unlikely that clubs would want to argue cases along these lines too often. However, where insurance companies are involved, there will be competing concerns. Clubs may have little choice other than to disavow the acts of their players in the hope of avoiding a potentially crippling damages claim against them, particularly as insurance is unlikely to extend to cover deliberate acts such as those discussed.

An alternative scenario presents itself in the wake of *Caldwell v Maguire* (2002) PIQR 6. Here the Court of Appeal approved the use of particular criteria to determine whether liability in negligence ought to attach in a case arising out of a sporting activity. The Court of Appeal recommended (at 10) that a test based on the following five propositions be used when determining liability in sports negligence cases:

1. Each contestant in a lawful sporting contest owes a duty of care to each and all other contestants.
2. That duty is to exercise 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 include its object, the demands made upon its contestants, its inherent dangers, its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant.
4. Given the nature of the circumstances outlined above, the threshold for liability is in practice inevitably high – proof of a mere error of judgment or momentary lapse of skill and care will not be enough in itself to establish a breach of duty.
5. In practice, it may be difficult to prove a breach of duty unless there is proof of conduct amounting to reckless disregard for a fellow contestant's safety.

The third and fourth propositions above detail for the first time the specific circumstances that should be considered to be relevant when determining liability in sports negligence cases. By defining the playing culture of the sport in this way,<sup>33</sup> the court has ensured that liability will be determined in accordance with the game as it is actually played by participants of the sport at that level instead of by the absolute standard of the rules of the game, which are relegated to being of evidential value only. This test has the added advantage of removing from the scope of liability commonly occurring acts of foul play that are, for the most part, not injury-causing. Although, perhaps, this allows for an interpretation of the way that a sport is played that is not in accordance with old-fashioned notions of fair play, it is a pragmatic approach that allows governing bodies to maintain direct control over the dynamics of the way their sport is played but leaves the law with the role of ensuring that violence does not become endemic within them.

The Court of Appeal's support for this approach implicitly encourages the courts, when dealing with other aspects of sporting negligence in subsequent cases, to produce similar guidelines that may "assist" in the disposal of such cases. In the long term there may be cases in which the application of tort law to sports cases is constrained by guidance that, for example, limits the scope of vicarious liability or locates the application of *volenti* within a sport-specific framework. By developing the concept of playing culture in *Caldwell*, a further rule could be developed for vicarious liability cases. This would ensure that employer clubs are liable for any acts that are negligent according to the *Caldwell* criteria and would clarify which acts that are outside of the playing culture of a sport must still be considered to be acts that are authorised by the defendant club for the purposes of vicarious liability.

<sup>32</sup> By way of illustration, damages of £1.8 million were awarded against the Welsh Rugby Football Union in *Vowles*; their personal accident insurance only provided cover in the sum of £1 million.

<sup>33</sup> See further Gardiner S et al, *Sports Law* (3<sup>rd</sup> ed, Cavendish Publishing, London, 2004) Ch 16.

A further alternative presents itself in the form of a potential action against the governing body of a sport for injuries caused to participants playing the game that it oversees. By developing the *Caldwell* criteria and the discussions of liability from *Watson*, an action could be brought in negligence against a governing body for its failure to provide a reasonably safe system of work for those who play the game it governs. This could be based on either a failure of the governing body to apply or develop appropriate safety rules to protect the players from in-game injuries, or through a failure to operate a disciplinary process that punishes players sufficiently to act as a reasonable deterrent. This incremental extension of the reasoning in *Caldwell* and *Watson*, particularly the latter case where it was held that one of the reasons for having a governing body was to protect the safety of the participants, could provide a further opportunity for a claimant to recover damages for sports injuries. If either approach were to occur, one could truly say that “sports law” has emerged as a discrete area of English law.