Liability for sporting injuries

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This paper examines the potential liability in negligence of persons and organisations engaged in sporting activities for injuries suffered by participants in such activities.

The fact that someone is injured in the course of a sporting contest, surprising at it may seem to laymen, creates no problem for the law. As early as 1967 Kitto J. in *Rootes v Shelton*[1] anticipated the developing trend of the law in the context of sporting injuries.

I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or game. Their kind is older by far than the common law itself. And though water skiing may be slightly faster than chariot racing it is, like every other sport, simply an activity in which participants place themselves in a special relation or succession of relations to other participants, so that adjudication under the common law upon a claim by one participant against another for damages for negligence in respect of injuries sustained in the course of the activity requires only that the Tribunal of Fact apply itself to the same kind of questions of fact as arise in other cases of personal injury by negligence.

General Principles

In *Jaensch v Coffey* Deane J[2] laid down the now accepted test for establishing a claim in negligence.

"the components of an action in negligence ... can be stated, in a form appropriate to the circumstances of the present case as being:

(i) the relevant duty owed by the defendant to the plaintiff to take reasonable care resulting from the combination of
  a) the reasonable foreseeability of a real risk that injury of the kind sustained by the plaintiff would be sustained either by the plaintiff as an identified individual or by a member of a class which included the plaintiff,
  b) existence of the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injury sustained, and
  c) absence of any statutory provision or other common law rule which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case;

(ii) a breach of that duty of care in that the doing of the relevant act or the doing of it in the manner in which it was done was, in the light of all relevant factors, inconsistent with what a reasonable man would do by way of response to the foreseeable risk; and

(iii) injury (of a kind which the law recognises has a sounding in damages) which was caused by the defendant's carelessness and which was within the limits of reasonable foreseeability."

The High Court reaffirmed this analysis in *Burnie Port Authority v General Jones P/L*[3] (*See also Stevens v Brodribb Sawmilling Co. Pty Ltd*[4]; *Hawkins v Clayton*[5]; *Wyong Shire Council v Shirt*[6]; *JJaensch v Coffey*[7]).

In the most recent revisiting of these principles in *Bryan v Maloney*[8] the High Court held:

"The cases in this Court establish that a duty of care arises under the common law of negligence of this country only where there exists a relationship of proximity between the parties with respect to both the relevant class of act or omission and the relevant kind of damage. In more settled areas of the law of negligence concerned with ordinary physical injury to the person or property of a plaintiff caused by some act of the defendant, reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognised as involving a relationship of proximity between the parties with respect to such an act and such damage and as attracting a duty of care, the scope of which is settled.

"As was pointed out in the recent majority judgement in **Burnie Port Authority v General Jones IPty. Ltd.**[9]*, The overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. ...Ultimately, however, it is a question of law which must be resolved by the ordinary processes of legal reasoning in the context of the existence or absence of the requisite element of proximity in comparable relationships or with respect to comparable acts and/or damage. Accordingly, it is appropriate to approach the question through a consideration of some related situations."*

Therefore a plaintiff must, in any claim, prove: -

(i) Proximity
That there is a relationship of proximity between the plaintiff and the prospective defendant which would give rise to a cause of action;

(ii) Foreseeability of risk
That the defendant ought to have foreseen that there was a real risk (not being fanciful or remote) of injury being suffered by the plaintiff.

(iii) Breach
That the defendant failed to respond as a reasonable person or organisation would respond in respect of the risk identified in (b).

(iv) Public Policy
That there is no statutory prohibition or rule of public policy which would prohibit recovery by the plaintiff against the defendant.

(v) Causation
That the plaintiff's loss was causally related to the defendant's lack of care and was reasonably foreseeable.

(vi) Defences
That no recognised defence will defeat or reduce the claim.

These principles, therefore, are applicable to any claim in negligence involving a sporting injury and the potential responsibility of any other person.

There is no now doubt, given the development of Australian law, that the proposition advanced by Kitto J. was correct:

"Accordingly, in a case such as the pre-

sent it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the plaintiff was implied by the act of the plaintiff in joining the activity. Unless the activity partakes of the nature of a war or of something else in which all else is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of common law, upon reasonableness in relation to the special circumstances, of the conduct which caused the plaintiff's injury."

Individual participants

An application of the general principles demonstrates that a duty of care is normally owed by one participant in a sporting contest to another. The existence of this duty was highlighted in *Johnston v Frazer*[11]. The legendary Malcolm Johnston had incurred another suspension by skittling another jockey's mount and causing serious injury to the other jockey. It was urged upon both the trial judge and the Court of Appeal than in the context of a sporting event the duty of care could only be breached if there was reckless disregard for the safety of another competitor.[11] After an analysis of the Australian cases the Court concluded:

"Any formulation which involves an ingredient of recklessness or attempting to cause harm, seems to me to be to be inconsistent with the question the tribunal is bound to deal with in such cases, whether in all the circumstances in which he found himself the defendant had done what was reasonable."

The application of this general principle in relation to sporting events is not confined to activities such as horse racing. Indeed it is surprising that in this country, few claims in negligence (as opposed to assault) have been reported. Just as a jockey may owe a duty of care to another jockey, so will a footballer to a fellow footballer, a basketballer to a fellow basketballer, and a cricketer to a fellow cricketer. Despite the decisions in Wilks and Woolridge it is not surprising that in England a dangerous tackle in a soccer match resulted in a plaintiff successfully recovering damages from the defendant member of the opposing team: *Condon v Basi.*[12] In that case Donaldson J concluded:

"For my part I would prefer the approach of Kitto J, but I do not think it makes the slightest difference in the end if it is found by the Tribunal of Fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event there is liability."

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"A tackle, which is legitimate and not proscribed by the rules... would not be in breach of the duty of care."

The only real issue in the player v player scenario, as I analyse it, is not whether a duty is owed but whether there has been a breach of a duty owed by one participant to the other. Part of the answer will, undoubtedly, turn upon the rules of the particular competition. A tackle, which is legitimate and not proscribed by the rules, although resulting in a devastating injury, would not be in breach of the duty of care. On the other hand, a tackle which resulted in the suspension of a participant from a particular competition may be so outside the rules as to constitute a breach of the duty. The rules will not determine the issue of breach but will clearly be relevant in determining whether such a breach has occurred. The paramount question is the reasonableness of the particular action. No doubt a judge or jury would take into account the heat of the moment, the sporting contest and the nature of the action, and the rules themselves, in determining whether the action of the player amounted to a breach of duty. In *Rootes* both Barwick J. and Kitto J. emphasised that the rules of the games are one of the matters to be taken into account in determining the reasonableness of a defendant's actions.

It can be safely concluded that the more blatantly obvious the breach of the rules and the resulting injury, the more likely the finding of breach of duty.

The question then arises as to the potential liability of the club for whom the defendant may be playing. The central question will be the relationship of the club to the player. Does the relationship create a vicarious liability on the part of the club for the infringing player's actions? In amateur sport it is highly unlikely. There is no relationship of employment, and almost certainly no relation of agency principal as between the club and player. On the other hand, a professional footballer or basketballer is normally employed pursuant to a contract of employment and the employer would normally be liable for the negligent actions of an employee in the course of his employment.

The fact that a player has acted outside the rules will not necessarily vitiate the liability of the employer. Vicarious liability for the acts of an employee will not exist where, to use the words of the High Court in *Deatons Pty. Ltd. v Flew*[13]

"The act (of the employee) was not expressly authorised, it was not so connected with any authorised act as to be a mode of doing it, but it was an independent personal act which was not connected with or incidental in any manner to the work which the (employee) was employed to perform."[14]

In my view most breaches of the rules within the general flow of a game would still have sufficient connection with the player's employment to render the club vicariously liable for the player's actions. On the other hand an assault completely removed from the field of play would not be so incidental.

So a club would not be liable for a player who deliberately king hit another player outside the field of play. On the other hand, a player guilty of a reckless illegal tackle may be acting within the scope of his employment.

Employer/Employee

The relationship of employer/employee often exists in the context of ▶

sporting activities. Like any other employer, it owes a duty of care to its employee.

In most cases, the relationship of employer/employee exists as between the particular club and its player. Such a relationship depends upon the existence of a contract for services : see *Stevens v Brodribb Sawmilling Co Pty Ltd.*(supra). It would be highly unusual in the context of sporting organisations in this country, for there to be a relationship of employer/employee between the sporting participant and an organisation responsible for the event itself. Such a relationship will not exist in the context of amateur sport, as there is no payment for the services of the player although the general duty of care still stands. However, in any professional competition it is almost inevitable that the player is an employee of the club, and is owed a duty of care.

The basic statement of an employer's duty is that postulated by the High Court in *Ferraloro v Preston Timbers Pty. Ltd.*[15]:

"The employer's duty to whomever it falls to discharge it, is to take reasonable care to avoid exposing his employee to an unnecessary risk of injury and the employer is bound to have regard to a risk that injury may occur because of some unintentional misjudgment by the employee in performing his allotted task."

The duty of care was further refined by the High Court in *McLean v Tedman*[16]:

"The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer: see ***Fleming Law of Torts***[17] *and in deciding whether an employee has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands."*

The duty is non delegable, in other words, it cannot be passed off to someone else. See *Kondis v State Transport Authority.*[18]

The relationship of employer/employee and the fact of injury will inevitably give rise to the existence of a duty of care. The issue will be whether the employer club has adequately responded to a perceived risk of injury (if that can be proved).

In determining whether a duty of care has been breached the Court must determine, as we have seen, whether the happening of the particular injury (not necessarily the precise circumstances) was foreseeable. This concept is not as predictable as this simple expression might indicate. The High Court has established that the risk is one which "may constitute a foreseeable risk even though it is unlikely to occur. It is enough that the risk is not far fetched or fanciful."

See also *Wyong Shire Council v Shirt*[19]

To translate this into a practical situation the reports of the AFL Medical Officers Association for 1994, 1995 and 1996 make interesting reading. In the conclusions and recommendations of the 1994 report, the doctors concluded:

"lower limb muscle strain injuries (particularly hamstrings) are very common and prevalent in the AFL competition, and are potentially preventable, therefore they are the injuries which should be given most attention in club preventative programs and must urgently require further study into risk factors, outcomes and prevention.."

Whilst it is unlikely that a player with a simple hamstring injury would sue his club, if that player was injured as a result of a training routine (as opposed to a freak injury in a match, as a result of a game itself) there is a strong argument that the club as his employer had breached its duty of care. Clearly the report establishes that the injury was foreseeable. If it be that the injury was occasioned in circumstances in which its risk could have been reduced or eliminated, then the plaintiff will succeed. Whilst this type of injury would seem an unlikely injury upon which to found a claim, there may well be a case in which a player with a chronic injury caused by overtraining could launch a claim against the club. It is no defence for a club to assert that "all the boy wanted to do was to play footy". The reality is that he should be encouraged to play footy in the most reasonably safe fashion.

Potential problems may also arise for clubs where players carrying an injury are required to play and aggravate the injury. Again, in those circumstances, the argument that the player wanted to play will not displace the potential breach of duty. If there is a foreseeable risk of injury to the player and he is then played when it is known or ought to be known that he may suffer further injury as a result of playing there would not seem to be any valid defence for the club. It may, of course, be argued that the player is guilty of contributory negligence insofar as he has agreed to play when he also knew or ought to have known that he was likely to aggravate his injury. Similarly there may be situations in which no liability is found on the part of the club or a player has hidden an injury or misled the club as to the type of injury.

Similarly a club requiring a player to play on a ground which in the circumstances of the competition in which the club is engaged, poses the risk of injury to a player, may constitute a valid cause of action. Again, a Court would look at all the circumstances surrounding the injury. There is little doubt that a Court would differentiate between the duty owed by the Mt. Wycheproof Football Club and that owed by the Carlton Football Club. It would look at all the circumstances surrounding the injury.

All the above factors demonstrate the potential legal pitfalls for sporting clubs, which appear to have only been exploited on odd occasions. For the sake of completeness it ought to be stated that amateur clubs clearly owe a duty of care to their players although the duty may not be measured at the same high level as that owed by employer to employee.

I am reliably informed that a number of employment contracts entered into by professional footballers include clauses which purport to exempt a club and/or an organisation from liability for negligence. Such a clause in an employment contract is extraordinary. It raises many questions outside the scope of this paper, not the least of which are the various statutory schemes directed towards unconsciounability eg. the *Contracts Review Act* 1980 of NSW, the *Trade Practices Act*, as well as the Court's interpretation of such clause.[20] Whether such a clause can provide an effective exclusion for the organiser of the competition (or its employees) is also one open to considerable debate.[21]

Officials

Again the general principles apply equally to umpires and referees. The most striking example in recent times is that of *Smoldon v Whitworth.*[22] In that case a paraplegic rugby union player sued the referee and a match opponent for damages. The trial judge concluded that the referee was liable in negligence. In the light of what has been said about the general principles of duty of care it seems surprising that there was the media outcry that subsequently occurred.

The Court of Appeal was again asked to adopt the Woolridge and Wilks approach to sporting negligence ie. reckless disregard of the safety of others. It rejected the recklessness test and followed the Court of Appeals approach in *Condon v Basi* again demonstrating to the validity of Kitto J's approach in *Rootes v Shelton*.

The Court was, nevertheless, concerned about questions of policy and endeavoured to deter those who might sue referees for any injury:

"The judge was at pains to emphasise that his judgment in favour of the plaintiff was reached in the very special facts of this case ...He did not intend to open the door a plethora of claims by players against referees and it would be deplorable if that were the result. In our view that result should not follow provided all concerned appreciate how difficult it is for any plaintiff to establish that a referee failed to exercise such care and skill as was reasonably to be expected in the circumstances of a hotly contested game of rugby football."

Indeed there is good reason to think that the reservations of the Court of Appeal in England in respect of such liability would not be encouraged in Australia.

The facts of *Smoldon* bear interesting reading for any sporting organisation. Smoldon was a hooker playing for the Sutton Coldfield Colts. His neck was broken when a scrum collapsed. The evidence before the Court demonstrated that there had been an alarming increase in spinal cord injuries in rugby in the 1970's and the 1980's. By 1991 a special rule had evolved in junior competition that required a phased engagement of the two sides of the scrum known as the CTPE rule (crouch/touch (your opposite number)/pause/engage). The specific purpose of introducing the rule was to prevent a scrum collapse and, one assumes, reduce the likelihood of injury. The trial judge concluded that the scrum engaged without enforcing the rule and, indeed, the rule had not been complied with on at least 20 scrums prior to the tragic injury being suffered by Smoldon. The trial judge concluded that the referee "did not understand fully nor enforce the CTPE as the game demanded".

The decision in *Smoldon* is a practical demonstration of the potential liability of a referee or umpire.

In most instances a referee or umpire will be the employee of an organising body. That organisation which employs the umpire will, by reason of vicarious liability, be liable for the actions of the umpire.

An organising body which engages umpires may also be liable to an injured player independent of its vicarious liability. For instance if a player could demonstrate that his injury was a result of an inadequate umpire (such as in *Smoldon*) and that particular brand of umpiring directly related to lack of training or instruction by the supervising organisation then there is a realistic prospect that such an organisation would be found liable in negligence.

The occupier of the ground

The occupier of a sporting ground is the person or organisation which has control over the ground. In many instances there may be a number of organisations which have a degree of control over a particular sporting venue. Each of those potentially may be classified as an occupier.

An occupier's duty of care has been spelt out in cases such as *Zaluzna v Safeway Stores* and *Hackshaw v Shaw.*[23] The general duty of care which has been discussed previously will apply. In some States specific Acts deal with the duty of care of an occupier.[24] Thus a competition organiser or club which manages and controls a stadium or ground will potentially be liable for any injury which occurs to a participant as a result of the condition of the premises. One of the best known examples of such injuries are footballers striking inground sprinklers. One often sees players, particularly in the AFL and also in NBA exit the playing area. There would, on basic principles, seem to be a potential liability on the part of an occupier (or, for that matter, an organiser,) if the boundary line or playing field is so close to the potential threat of injury that a reasonable occupier or organiser would take steps to reduce that risk of injury. One only has to watch matches at the SCG or, for those who are older, at Glenferrie Oval, to know the type of risks that seem to be involved. I suspect that a player who suffers serious injury at the SCG as a result of joining the crowd may well contemplate proceedings against the SCG Trust. In such a case it could be anticipated that the player would also sue his employer (the club which required him to play on the ground) and the organiser of the competition which permitted the game to played on an inappropriate ground.

There are many examples of occupiers being sued for sporting injuries. In Victoria there are at least two cases presently on foot in relation to AFL players being injured as a result of the unsatisfactory condition of a ground. In racing there have been a number of cases in which jockeys have suffered serious injuries and have alleged that the conditions were unsafe or, alternatively, that a fixed object such as a steeplechase has been incorrectly positioned.

Competition organiser

By virtue of a competition organiser's relationship with a player (ie. in providing the rules, officials and structure by which the game is played) a duty of care will be owed to the player independent of any duty of care owed by reason of occupation of the ground or other factors.

The liability of a competition organiser is well demonstrated in *Watson v Haines.*[25] This was another rugby case in which the plaintiff, a State school student, had suffered a dreadful injury (quadriplegia). He was injured playing for his school's first grade rugby team. Again, there was considerable evidence available as to the risks of spinal cord injury and playing rugby. Indeed, the medical director of the Royal North Shore Hospital had put out a poster and audio/visual publication which the trial ▶

judge found clearly conveyed the message that a person whose physique was such that he had a long, thin, neck should not play in the front or second row of the scrum. These kits were distributed to schools throughout New South Wales. The trial judge found that the message never got to the teachers. The trial judge concluded that the State of New South Wales, which conducted the school, had been manifestly inadequate in discharging its duty of care. In that case the plaintiff was able to establish that the school owed him a non-delegable duty of care.[26] The trial judge concluded:

"It suffices for his case that the selection and playing of the player in the inappropriate position of hooker in a match in which he was injured exposed him to unreasonable risk of serious spinal cord injury and that the State was negligent in not having devised and instituted a system which did not expose schoolboys such as he, with long necks, to such a risk of injury, or if I have been wrong as to that, at the very least, in not having taken reasonable steps to devise and implement such a system ... In essence, what I have decided is that having regard to the warning which the State had from Dr. Yeo steps should have been taken to ensure (or at least reasonable steps should have been taken to ensure) that boys with long, thin necks did not play in the first or second row of the scrum in Rugby League in years 10, 11 or 12 under the existing rules of the game."

There is nothing magical in this decision; it simply reflects the application of general principles of duty of care to sporting organisations.

The obligations of sporting organisations may well extend wider than is currently perceived. For instance, if an organisation which controlled a football competition became aware that players were suffering injuries as a result of a particular form of tackle or the condition of a particular ground. Clearly, there would be an awareness of a risk of injury. It could be strongly argued that in the light of such knowledge it may be argued that an obligation lay upon the organisation to implement a change in the rules or alteration to the fixture if such a change could be introduced without unduly impeding the playing of the match. If it could be shown that such a measure would have reduced the risk of injury then liability may be established.

Defences

Volenti non fit injuria

This defence, in the modern context, seems to have little application. Although it received some approval by Barwick CJ in *Rootes* the decision of Kitto is that which has received far wider acceptance. He expressed the view that it was not to the point to confine attention to whether a plaintiff had participated in a sport and accepted the risk; rather, was the defendant negligent in its conduct, taking into account the plaintiff's participation in the event at that time.[27]

The end result, as has been observed by judges considering this issue, is whether, in all the circumstances, the defendant has been negligent. This necessarily takes into account, as we have observed, the rules of the game and the players' participation in an event which has the potential to cause injury. As we have seen throughout attention focuses on the nature of the action which produces the injury in the context of the game being played.

Contributory negligence

In the context of a number of sporting injuries contributory negligence may be available to the defendant. For instance, the player who continues to play carrying an injury; the jockey incorrectly approaching a jump. In each case the test will be whether, in the circumstances that prevailed that participant has exercised reasonable care for his or her safety.

Future trends

It is surprising to many that there have been so few cases of sporting injuries which have reached the Superior Courts. In many respects sporting bodies have been lucky when compared to claims which other organisations have faced over the past 10 years.

Given the ongoing reduction of access to common law in other areas (eg. transport accidents and industrial accidents) it is inevitable that litigation in relation to sporting injuries will increase rather than decrease. The general principles of negligence, as we have seen, will be readily applied whatever the sporting public or journalists might think. The reality is that sporting injuries will, undoubtedly become a greater area for litigation. The solution for any sporting organisation is a combination of appropriate accident prevention measures and, essentially, adequate insurance cover. ■

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Notes:

1. Roots v Shelton (1967) 116 CIR 383 @ 387 and 389
2. Jaensch v Coffey (1984) 155 CLR 549
3. Burnie Port Authority v General Jones P/L (1994) 179 CLR 520
4. Stevens v Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR 16
5. Hawkins v Clayton (1988) 164 CLR 539
6. Wyong Shire Council v Shirt (1980) 146 CLR 40 @ 44
7. Jaensch v Coffey (1984) 155 CLR 549
8. Bryan v Maloney (1995) 182 CIR 609 @ 617-8
9. Burnie Port Authority v General Jones P/L (1994) 179 CIR 520
10. Johnston v Frazer (1990) 21 NSW LR 89 (1990) Aust Torts Report 81-056
11. The appellant relied upon the English Court of Appeal decisions in Wooldridge v Sumner (1963) 2 QB 43 and Wilks v Cheltenham Home Guard Motorcycle and Like Car Club (1971) 1 WLR 688.
12. Condon v Basi (1985) 2 All ER 453 @454
13. Deatons Pty Ltd. V Flew (1949 79 CLR @ 387 and 389
14. Commonwealthof Australia v Connell (1986) Aust Torts Reports 80-036
15. Ferraloro v Preston Timbers Pty Ltd. (1982) 56 ALJR 872 @ 873
16. McLean v Tedman (1984) 155 CIR 356 @ 313
17. Fleming Law of Torts 6th Ed (1983) pp.480-481
18. Kondis v State Transport Authority (1985) 154 CLR 672 @ 686
19. Wyong Shire Council v Shirt (1980) 146 CLR 40 @ 48
20. See Darlington Future Ltd v Delco Aust. Pty Ltd (1986) 161 CLR 481 and the Council of the City of Sydney v West (1965) 114 CLR 481
21. See Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Aust) Pty Ltd (1977-1978) 139 CLR 231 ("The New York Star")
22. Smoldon v Whitworth (English Court of Appeal 17 December 1996 unreported)
23. Hackshaw v Shaw (1984) 155 CLR 614
24. e.g. Victoria Ocuupiers Liability Act 1983
25. Watson v Haines (1987) Aust Torts Reports 80-094
26. See the Commonwealth of Australia v Introvigne (1981) 150 CIR 258
27. Roots v Shelton (supra) @ 390. See also Condon v Basi (supra) @ 454