# Vicarious liability for on-loan sports participants

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## Abstract:

This article assesses the appropriate scope of vicarious liability for sports participants who are sent out on loan. It suggests that we ought to adopt a contextual and fact-sensitive approach to this issue. In many instances, dual vicarious liability between the permanent and temporary sporting employer will be a logical and sensible outcome. This is illustrated by drawing on two particular types of sporting transfers: temporary loans to international teams, and loan deals that are designed to nurture and improve young talent. The article concludes by assessing the appropriate division of responsibility between two employers who have been held dually liable for the tortious on-field behaviour of an athlete.

## Introduction

The doctrine of vicarious liability operates in various common law and civil law legal systems, and it is used to hold one party (usually an employer) strictly liable for the tortious conduct of another (usually an employee). In the sporting context, the vicarious liability of clubs for on-field negligence has now reached an almost "presumptive, uncontested status",[1] with the result that many later cases have not even listed the tortfeasing athlete as a defendant in the proceedings.[2] Beneath this surface of simplicity, however, lies a rather complex question that has previously been posed (but not answered) by Summerhayes: which employer ought to be liable when two teams arrange for an athlete to go out on loan?[3]

This article attempts to answer this question by critically assessing the current law on vicarious liability for borrowed employees. It argues that we must avoid unhelpful presumptions that suggest the general (or permanent) employer ought to retain responsibility, and instead adopt a contextual and fact-sensitive approach that examines each

[1] *Jack Anderson, Modern Sports Law* (*Oxford, Hart Publishing, 2010), p.243*. See also *Simon Gardiner et al, Sports Law (4th edn, Abingdon, Routledge, 2012), p.505*; *Michael Beloff et al, Sports Law (2nd edn, Oxford, Hart, 2012), p.157*.

[2] *Fulham Football Club v Mr Jordan Levi Jones [2022] EWHC 1108 (QB)*; *Pitcher v Huddersfield Town Football Club Ltd [2001] All ER (D) 223*; *Gaynor v Blackpool Football Club [2002] CLY 3280*. One notable exception is that of *Gravil v Carroll and Redruth Rugby Football Club [2008] EWCA Civ 689*, where the wrongdoing act concerned a deliberate off-the-ball punch by the tortfeasor.

[3] Julian Summerhayes, "Injury Liability: Off-the-Ball Player Attacks: Club Liability" (2008) 6 World Sports Law Report.

case on its merits. In making this argument, the article maintains that dual vicarious liability between both the general and temporary employer will often be a more appropriate response. This is demonstrated in the sporting context by assessing the justification for dual vicarious liability in two important scenarios: torts committed by players on international duty, and torts committed by young stars who are sent out on loan to develop their skills. The article concludes by examining the apportionment of responsibility between two sports employers that are held dually liable. It calls for the adoption of the more flexible Canadian approach to apportionment in order to help us better respond to the wealth inequality that currently exists in many professional sports.

## Setting the context: the prevalence of loan transfers in sport

Loan transfers are now rife in many professional sports. For instance, whilst loan deals in Europe's "Big Five" professional football leagues – England, Spain, Germany, Italy and France – constituted just 6% of all transfers in 1992, that figure has sky-rocketed to 29% in 2019.[4] In fact, the rise has been so dramatic that some international governing bodies have even sought to curb the amount of loan deals clubs can enter into, with FIFA endorsing a move to limit the number of international loans of players aged 22 and over.[5] This was seemingly a response to those concerns that the wealthiest clubs were stockpiling young talent and upsetting the competitive balance of professional football.[6] As a result, we might say that employment relations in sport have, much like developments in other workplaces, somewhat "fissured" in the past three decades.[7] Perhaps the reason for this dramatic rise in loan deals lies in the ever-growing purposes for which such transfers might be used. For instance, whilst loans were previously primarily used to assist clubs during an injury crisis or to support the development of fringe players, they are now used in a more sophisticated manner as a "business strategy involving strategic alliances and value generation."[8] One example relates to the advent of so-called "loan-with-an-option-to-buy" deals, whereby the temporary employing club are granted the first option to purchase the player at a fixed price at the end of a loan.[9]

Aside from these "try before you buy" deals, other types of loan agreements include those intended to circumvent professional football's Financial Fair Play (FFP) rules, an initiative designed to improve the "overall financial health of European club football" by

[4] Murad Ahmed and John Burn-Murdoch, "How Player Loans are Reshaping European Football's Transfer Market" (*Financial Times*, 30 August 2019), https://www.ft.com/content/9bd82b30-caf2-11e9-a1f4-3669401ba76f [Accessed 15 July 2022].

[5] BBC, "Clubs Face Loan Restrictions after FIFA Announces New Regulations" (*BBC News*, 27 February 2020), https://www.bbc.co.uk/sport/football/51665904 [Accessed 20 July 2022]. Teams such as Chelsea FC – who had over 28 players out on loan during the 2019/20 season – will be significantly affected.

[6] FIFA, "FIFA to Introduce New Loan Regulations" (*FIFA*, 20 January 2022), https://www.fifa.com/about-fifa/organisation/media-releases/fifa-to-introduce-new-loan-regulations [Accessed 14 July 2022].

[7] *David Weil, The Fissured Workplace (Cambridge, Harvard University Press, 2014), p.7*.

[8] Alexander Bond, Paul Widdop and Daniel Parnell, "Topological Network Properties of the European Football Loan System" (2020) 20 European Sport Management Quarterly 655, 657.

[9] Ahmed and Burn-Murdoch (fn.4 above), highlighting that, in 2009, there were 28 loans leading to a later purchase from the temporary employer. In 2019, there were "at least 101 loan-to-buy deals within the big five leagues").

preventing clubs from overspending.[10] Perhaps the most infamous recent example of such a deal is Kylian Mbappe's move from Monaco to Paris Saint-Germain in 2017.[11] Having already bought Neymar in the same transfer window, PSG were seemingly aware that an outright purchase of Mbappe would, in all likelihood, breach FFP regulations. Therefore, they instead opted to loan Mbappe for a season, with the added obligation that if PSG were not relegated from the first division (a highly unlikely scenario given their recent dominance of French football), they would be obliged to pay Monaco €180 million to acquire Mbappe's permanent services. Consequently, given that the motivation of the loan was simply to skirt around FFP rules, we might say that PSG were, in all but name, Mbappe's sole employer.

A similar phenomenon might also be identified in professional rugby union. It has been reported that over half of the Gallagher Premiership Rugby teams are exploiting a "loophole" that allows clubs to 'loan' out players who can then be recalled to act as injury cover without breaching the league's salary cap.[12] Consequently, many of these loaned athletes only play one or two games for their temporary club before being sent back to their permanent employer. One example here is that of Bath forward Mike Williams, who was sent out on a "season-long loan" to Yorkshire Carnegie. However, Williams made only one appearance (as a substitute) for the latter club, and was later recalled to Bath. When he returned to his parent club, his wages were, as per RFU regulations, excluded from the salary cap imposed on every Gallagher Premiership team.[13]

## Identifying the responsible employer

This proliferation in the number and complexity of sporting loan transfers raises an interesting line of enquiry for our purposes: which employer ought to be held vicariously liable for the tortious acts of a loaned athlete? The starting point for such an analysis is perhaps still that of *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd*.[14] In this case, the defendant harbour authority hired out a crane, along with its driver, to a firm of stevedores (the temporary employer). When the driver negligently injured the claimant, the House of Lords decided that the harbour board (as the general employer) bore responsibility for the harm, as they paid the driver and retained the overriding power to dismiss him. In reaching this conclusion, various judges suggested that, in most cases, the general employer would bear a "heavy" burden of showing that control has been fully vested in the temporary employer so as to make them liable for the harm.[15] Despite this approach finding favour in

[10] UEFA, "Financial Fair Play: All You Need to Know" (*UEFA*, 30 June 2015), https://www.uefa.com/news/0253-0d7f34cc6783-5ebf120a4764-1000--financial-fair-play-all-you-need-to-know/ [Accessed 14 July 2022].

[11] For an excellent summary of the saga – as well as additional examples such as Tottenham Hotspur's "loan-with-an-obligation-to-buy" deal for Real Betis' Giovani Lo Celso – see Rory Smith, "Play Now, Pay Later: How Loans Became Soccer's Favored Accounting Tool" (*New York Times*, 26 August 2019), https://www.nytimes.com/2019/08/24/sports/soccer-loans.html [Accessed 10 July 2022].

[12] Tom Morgan, "Exclusive: More Than Half of Premiership Rugby Clubs Exploiting Loan Loophole to Move Players Off Wage Bill" (*The Telegraph*, 20 January 2020), https://www.telegraph.co.uk/rugby-union/2020/01/20/exclusive-half-premiership-rugby-clubs-exploiting-loan-loophole/?WT.mc_id=tmg_share_tw [Accessed 19 July 2022].

[13] See, e.g., John Evely, "Bath Rugby Defend the Use of Salary Cap Permitted Season-Long Loans" (*Somerset Live*, 23 January 2020), https://www.somersetlive.co.uk/sport/other-sport/bath-rugby-defend-salary-cap-3769451 [Accessed 24 July 2022].

[14] *[1947] AC 1*.

[15] *[1947] AC 1,* at 10 (per Viscount Simon); 13 (per Lord Macmillan); 21 (per Lord Uthwatt).

more recent case law,[16] it is suggested that this burden is a rather unhelpful and unnecessary one. Indeed, and as Brodie hints at, this presumption in *Mersey Docks* might have obscured the fact that, functionally, the borrowed crane driver in this case was actually "engaged in the conduct of the temporary employer's enterprise."[17]

In light of the various different motivations for sporting loans, it may be better to do away with this misconceived presumption about where liability ought to lie, and instead look at each scenario as the legal pragmatist does: by treating each set of circumstances as individual and requiring its own, fresh, consideration of the best course of action.[18] This would simply require a contextualised and fact-based appreciation of the realities of the relationship which takes into account factors such as: who exercises control over the tortfeasor; who pays their wages; who retains power of dismissal; the length of the loan; the intentions of the parties; and whether there is a right to recall the player.[19] Of course, such an approach might be criticised for its uncertainty and inherent indeterminacy, but it is suggested that it may also provide two apparent benefits.

First, and from a doctrinal point of view, it is largely consistent with the guidance offered by Lady Hale in the recent Supreme Court judgment in *Barclays Bank v Various Claimants*.[20] She suggested that, in deciding whether an employment relationship existed for the purposes of vicarious liability, judges ought to focus on "understanding the details of the relationship."[21] Second, and from a more theoretical perspective, it must be recognised that an analysis of the above factors may provide scope for an assessment of many of the underlying rationales for vicarious liability. Theories such as enterprise liability, control, loss spreading, deep pockets and deterrence have all greatly influenced the scope of the doctrine in recent years,[22] and it may be that an application of the aforementioned factual pointers allows us to further refine the parameters of these theoretical justifications. By way of example, and as I explore below, an analysis of both control and the payment of wages could go a long way towards assessing which employer receives the most benefit from a loan transfer. In turn, this would hopefully shed some light on the extent to which the tortfeasor was integrated into the two particular organisations for the purposes of enterprise liability. In short, then, the argument posited here is that theory, fact sensitivity and doctrinal coherence ought to be prioritised over any broad-brushed presumption of liability.

With this in mind, it is worth pondering how this approach might apply to the context of professional sport. In the rugby union "loophole" scenario referred to above, it might be said that the general employer should be held responsible for any tortious conduct

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[16] *Natwest Markets Plc v Bilta [2021] EWCA Civ 680,* at [187] (the Court of Appeal maintaining that the "circumstances in which such a complete shift from the actual employer to the organization to which the employee is loaned will arise, must be very rare"). Note also a similar position in other Commonwealth courts: *McKee v Dumas (1976) 70 DLR (3d) 70,* at 75 (per Dubin JA) (Canada)*; Kondis v State Transport Authority [1984] 154 CLR 672,* at [11] (per Mason J) (Australia).

[17] Douglas Brodie, "Enterprise Liability: Justifying Vicarious Liability" (2007) 27 Oxford Journal of Legal Studies 493, 502.

[18] For an excellent overview of legal pragmatism, see *Michael Sullivan, Legal Pragmatism: Community, Rights, and Democracy (Bloomington, Indiana University Press, 2007)*.

[19] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [7] (per May LJ).

[20] *[2020] UKSC 13*.

[21] *[2020] UKSC 13*, at [27].

[22] See, e.g., *JGE v English Province of Our Lady of Charity [2013] QB 722*, at [54] (Ward LJ positing that "one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development"); *Various Claimants v Catholic Child Welfare Society [2012] UKSC 56*, at [35] (per Lord Phillips).

committed by a loanee. By lifting the veil on this transaction, we can see that the purpose of the loan was solely designed to benefit the permanent employer, as reinforced by their ability to recall the player after a very short period of time.[23] Likewise, in cases where players are loaned only for a matter of weeks, as is sometimes the case in professional football and rugby,[24] we might also argue that the parent club remains the employer (although this analysis will, of course, need to be supplemented by a close scrutiny of the contractual provisions of the loan in order to identify the true motivations of the parties). In contrast, and perhaps more usually, the temporary employer will be vicariously liable where the terms of the agreement highlight that the loaned athlete is sufficiently embedded into their organisation. This would be the case in the aforementioned Mbappe scenario where the loan was masquerading as a permanent transfer, as well as in more prolonged loan deals, such as James Rodriguez's unusually lengthy two-year loan move from Real Madrid to Bayern Munich in 2017. As Peel and Goudkamp observe, where "A's services are supplied to X on a long-term basis subject to the entire control of X, that is likely to result in X alone being liable."[25] Sport, it seems, provides a perfect example of highlighting the need for a truly contextual approach to the "borrowed servant" problem, rather than beginning with unhelpful general assumptions about where responsibility ought to lie.

A more recent case law example that appears consistent with this analysis is *Hawley v Luminar Leisure Ltd*.[26] Here, a bouncer at a nightclub deliberately punched the claimant in an act that led to the latter suffering severe brain damage. The issue for the Court of Appeal was whether vicarious liability for the doorman's actions rested with the tortfeasor's general employer (ASE, an agency firm supplying bouncers to nightclubs) or temporary employer (Luminar, an operator of nightclubs, who had employed the bouncer for over two years). In highlighting that the doorman was so far "embedded in Luminar's organisation" that he "was no longer recognisable as an employee of ASE",[27] the court held that the temporary employer was solely responsible. Despite still paying his wages, ASE had "no immediate or effective control" over the bouncer's activities during the two years he worked at Luminar's club.[28] Rather, it was the nightclub manager who "told the doormen where to stand and when to move."[29] Hallett LJ notably stated that:

> "The question of control may not be wholly determinative, but, for as long as *Mersey Docks* remains the authoritative decision on when responsibility for an employee's tortious acts may pass from a general employer to a 'temporary deemed employer', the question of control remains at the heart of the test to be applied."[30]

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[23] Interestingly, and as noted by *Paula Giliker, Vicarious Liability in Tort: A Comparative Perspective (Cambridge, Cambridge University Press, 2010), p.88*, in German law, the right to recall the employee suggests that the general employer should bear at least some of the responsibility for the employee's negligent conduct.

[24] Section 58 of the English Football League regulations permits clubs to sign goalkeepers on week-long emergency loans under certain conditions. See English Football League, "Section 6 – Players", https://www.efl.com/-more/governance/efl-rules--regulations/efl-regulations/section-6---players/ [Accessed 26 July 2022].

[25] *Edwin Peel and James Goudkamp, Winfield and Jolowicz on Tort (19th edn, London, Sweet and Maxwell, 2014), para [21]-[016].*

[26] *[2006] EWCA Civ 18*.

[27] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [85].

[28] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [84].

[29] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [77].

[30] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [82].

One of the more interesting facets of this case is the Court of Appeal's refusal to find dual vicarious liability, a fact which Lord Phillips was later critical of in *Various Claimants v Catholic Child Welfare Society*.[31] The following section examines this alternative method of apportioning liability between the general and temporary sporting employer, and it suggests that dual vicarious liability may often be an appropriate response when an on-loan athlete is found to have committed an actionable tort on the field of play.

## Dual vicarious liability in sport

In advocating a rethink of the age-old proposition that "[n]o man can serve two masters" at once,[32] Atiyah was one of the earliest supporters of the dual liability approach. In his view, it was "strange" that courts had not yet "countenanced what might be thought the obvious solution to the problem, namely to hold *both* employers liable to the plaintiff", and "leave them to dispute among themselves who should bear the burden."[33] In more recent times, both Fleming[34] and Prassl have championed this view, with the latter highlighting that employer functions "can be exercised jointly by several parties, or parcelled out between different *loci* of control".[35] In his words, the nature of the control test "often instinctively leads to a multilateral analysis of complex work arrangements."[36] One of the few cases in which this reasoning was accepted is *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*.[37] Here, the installation of air conditioning on the claimant's property was sub-contracted from the first defendant to the second defendant, who then contracted with the third defendant to provide labour for the work. One such worker, Mr Strang, negligently caused a flood whilst working on the claimant's premises. The Court of Appeal was tasked with answering who should be liable for Strang's negligence; the third defendant (given that Strang had been acting under the instructions of their fitter) or the second defendant (given that their foreman supervised the entire operation)?

In highlighting that the perceived unitary notion of employer liability rested on "slender authority",[38] the Court unanimously determined that dual liability existed on these facts so as to hold both the second and third defendants vicariously liable. However, both judges adopted somewhat different reasoning in arriving at this conclusion. May LJ preferred to focus on the "employers' right (and theoretical obligation) to control the relevant activity of the employee",[39] an argument that was received favourably in the later case of *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*.[40] According to his Lordship, "a proper

[31] *Various Claimants v Catholic Child Welfare Society [2012] UKSC 56* at [46].
[32] *Laugher v Pointer* (*1826) 5 B&C 547,* at 558 (per Littledale J). For a more recent Australian case that also subscribes to this view, see *Day v The Ocean Beach Hotel Shell Harbour Pty Ltd [2013] NSWCA 250*.
[33] *Patrick Atiyah, Vicarious Liability in the Law of Torts (London: Butterworths, 1967), pp.156, 163.*
[34] *John Fleming, The Law of Torts (9th edn, Sydney, LBC Information Services, 1998), p.45* (arguing that, '[s]ince in most cases control is divided between lender and borrower, the most obvious conclusion would perhaps have been to impose joint liability').
[35] Jeremias Prassl, "The Notion of the Employer" (2013) 129 Law Quarterly Review 380, 389.
[36] *Jeremias Prassl, The Concept of the Employer (Oxford, Oxford University Press, 2015), p.28.*
[37] *[2005] EWCA Civ 1151*.
[38] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [20].
[39] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [52].
[40] *[2009] QB 775*.

application" of the *Mersey Docks* principles will rarely lead to dual liability.[41] In contrast, Rix LJ adopted a broader integration-based approach, and he doubted whether the doctrine of dual vicarious liability should be "wholly equated with the question of control".[42] Instead, he suggested, we should examine whether the employee in question is "so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence."[43] Which approach, we might therefore ask, is to be preferred?

According to Barron, May LJ's control test is more likely to be correct, because Rix LJ "seems to confuse the tests he considers".[44] In Barron's view, an assessment of integration is more relevant to the issue of whether an employment relationship exists in the first place, rather than with the question of which employer ought to be held responsible for the harm. He attempts to support this statement by referencing *Hawley*,[45] but it is here that his argument seems to run into trouble. Indeed, Hallett LJ in *Hawley* actually highlighted that the "extent to which an organisation can control another's employee will obviously be relevant to the question of how much the employee has become embedded in that organisation".[46] Consequently, if we accept that control and integration are two very closely related concepts, it makes little sense to support May LJ's formulation whilst simultaneously downplaying Rix LJ's test. Contrary to Barron's view, Rix LJ "did not say that the degree of control was irrelevant."[47] Rather, he treated control as one pertinent consideration (amongst others) in determining whether an employee was sufficiently embedded into a particular organisation.

The correctness of Rix LJ's approach has now seemingly been confirmed by the recent case of *Natwest Markets Plc v Bilta*,[48] where the Court of Appeal found dual liability between two parties in relation to fraudulent banking activities. This finding was based primarily on a test of integration, and the judge at first instance was clearly persuaded by the further guidance offered by His Lordship in *Viasystems* (which, it is suggested, could also be useful for an application of dual vicarious liability to the sporting context).[49] In short, Rix LJ observed that the general employer would remain liable where the tortfeasor is used for a limited time in the general employer's "own sphere of operations" and using their equipment; in contrast, where the tortfeasor is "seconded for a substantial period of time" to the temporary employer to perform a role embedded in that organisation, the temporary employer should be solely liable. Dual vicarious liability will be found, according to Rix LJ, where the employee is:

> "selected and possibly trained by his general employer… but employed at the temporary employer's site… using the temporary employer's equipment, and subject to the temporary employer's directions."[50]

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[41] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [46].
[42] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [79].
[43] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [79].
[44] Alan Barron, "Vicarious Liability for Employees and Agents" (2006) Scots Law Times 79, 81.
[45] Alan Barron, "The Impact of Post-*Lister* Vicarious Liability on the Licensed Trade in the United Kingdom" (2007) 4 Entertainment and Sports Law Journal 1, 6.
[46] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [82].
[47] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18*, at [82].
[48] *[2021] EWCA Civ 680*.
[49] *Bilta v Natwest Markets Plc [2020] EWHC 546 (Ch)*, at [214] (per Snowden J). This guidance was also relied upon by Hallett LJ in *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18*, at [85].
[50] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [80].

Let us consider two common sporting examples to demonstrate how this guidance might work in practice.

### *International duty*

The first relates to injury caused by athletes whilst out on international duty. In many sports, players are released by their clubs to their respective governing bodies in order to partake in international representative fixtures.[51] Where this is the case, we might question whether it is appropriate to impose dual liability on both the tortfeasor's club and governing body when negligence is committed on international duty. One of the only cases to test this assumption arose in 2009, when the former professional footballer Dean Ashton sued both Chelsea FC and the Football Association (FA) for an injury he suffered during an England training session in 2006.[52] The perpetrator of the injury, Shaun Wright-Phillips, was, at the time, contracted to Chelsea. On the basis of Rix LJ's guidance, might it have been arguable that, if the negligence of Wright-Phillips had been established, both the FA and Chelsea could have been dually liable? Possibly. Wright-Phillips was trained primarily by Chelsea, and given the sporadic nature of international breaks in professional football, it could hardly be said that he was "seconded for a substantial period of time" to the FA. Conversely, it could be argued that England also provided training, and that Chelsea's general lack of control over such actions meant that Wright-Phillips was solely embedded into the FA's organisation for that harm. The fact that the case was eventually settled in 2011 – with the FA alone paying out compensation – seems to accord with this analysis.[53]

Nevertheless, if we are cognisant of the importance of context and fact-sensitivity, it must be recognised that, under slightly different facts, the governing body may not have been so quick to concede sole liability. Consider, for example, the altercation between Raheem Sterling and Joe Gomez whilst both were on international duty for England in 2019.[54] Sterling's assault on Gomez was fuelled by a previous clash between the two when they were playing for their respective clubs, Manchester City and Liverpool, a few days prior. Given that the friction between the players arose as a result of their integration into their own clubs (where both players were also subject to the control of their respective general employers), it is suggested that dual liability between the FA and Manchester City would have been a sensible outcome had Gomez had sought recourse to the civil courts.

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[51] *Mark James, Sports Law (3rd edn, London, Palgrave, 2017) p.90*. Cf Simon Boyes, "Caught Behind or Following-On? Cricket, the European Union and the 'Bosman Effect'" (2005) 3 Entertainment and Sports Law Journal 1. He highlights the position in English cricket, whereby a system of 'central contracts' are used. This entails the governing body directly employing athletes, who are then effectively leased back to clubs to participate in county competitions.

[52] Jamie Jackson, "Dean Ashton Brings Compensation Claim for Career-Ending Injury" (*The Guardian*, 16 February 2010), https://www.theguardian.com/football/2010/feb/16/dean-ashton-compensation-ankle-injury [Accessed 22 July 2022]; Jason Burt, "PFA Hope Dean Ashton Does Not Sue Former Chelsea Winger Shaun Wright-Phillips" (*The Telegraph*, 11 December 2009), https://www.telegraph.co.uk/sport/football/teams/west-ham/6787188/PFA-hope-Dean-Ashton-does-not-sue-former-Chelsea-winger-Shaun-Wright-Phillips.html [Accessed 22 July 2022].

[53] BBC, "FA Agree Compensation with Dean Ashton Over Injury" (*BBC News*, 02 February 2011), http://news.bbc.co.uk/sport1/hi/football/teams/w/west_ham_utd/9385690.stm [Accessed 22 July 2022].

[54] BBC, "Raheem Sterling Dropped by England after Joe Gomez Clash Before Euro 2020 Qualifier" (*BBC News*, 12 November 2019), https://www.bbc.co.uk/sport/football/50383693 [Accessed 18 July 2022].

### *Developmental loans*

A second type of temporary sporting transfer that seems particularly apt for dual vicarious liability are those developmental loans that are designed to nurture and improve young upcoming talent. Such deals, which usually involve one large club and one smaller club, provide a benefit to both parties in that they boost the resource value of the (typically larger) general employer's assets,[55] whilst simultaneously providing an immediate injection of talent at a relatively low cost for the (typically smaller) temporary employer. In light of the Premier League's recent push for developing young British talent on loan at lower league clubs,[56] these types of deals are likely to occur with ever more frequency. Notably, in many cases, a larger club is content to continue paying the full wages of the loanee, provided that the athlete is gaining important experience in playing competitive professional matches.[57] Of course, just because some general employers continue to pay the wages of a developmental player does not necessarily mean that they ought to automatically bear any responsibility for harm committed by such a player whilst out on loan. As we saw in *Hawley*, for instance, ASE paid the errant doorman, but it was Luminar who were held solely liable for his conduct. It is suggested, however, that there may be good normative reasons to distinguish a sporting developmental loan from the facts of *Hawley*. These reasons are primarily based on the notion that the loaned athlete is often treated "as if they were in the building" of their permanent employer.[58]

For instance, in the modern era, it is now common practice for representatives from the general employer to regularly visit the loaned athlete at training and to debrief them after every game, as well as to compile detailed GPS and performance data on the player.[59] Additionally, many loan agreements for youth players also often entail penalty clauses of six-figure sums for the borrowing team if the loaned player does not participate in a certain number of games.[60] Where this is the case, it is reasonable to conclude that the lending club still retain some degree of control over (and benefit from) the player's activity, so much so that Geey questions whether the general employer's "material influence over the selection and recruitment policies of another" is in fact compatible with FIFA's regulations.[61] Moreover, it is often the case that the permanent employer retains the power to dismiss or punish the loaned athlete for any wrongful behaviour. By way of example, when Burnley FC loanee Danny Drinkwater was involved in a nightclub incident in 2019, it was reported that his parent

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[55] In fact, many large clubs have even been accused of abusing the loan system by "stockpiling" younger talent. See Alistair Magowan, "Premier League: Is the Loan System Being Abused by Clubs?" (*BBC News*, 08 September 2015), https://www.bbc.co.uk/sport/football/34125476 [Accessed 18 July 2022].

[56] Paul MacInnes, "Premier League wants Championship to House Loan Players in New Finance Deal" (*The Guardian*, 26 July 2022), https://www.theguardian.com/football/2022/jul/26/premier-league-wants-championship-to-house-loan-players-in-new-finance-deal [Accessed 27 July 2022].

[57] Gregor Robertson, "How Managing Loan Players Has Become A Scientific Process" (*The Times*, 07 October 2019), https://www.thetimes.co.uk/article/how-managing-loan-players-has-become-a-scientific-process-dx99zv8cl [Accessed 18 July 2022]. Robertson outlines that, "in August 2018, Crystal Palace wrote to EFL clubs offering their players on loan for free – provided they play").

[58] Robertson (fn.57 above).

[59] Robertson (fn.57 above).

[60] Robertson (fn.57 above). In some instances, these penalties are so significant that 'some clubs would rather send a player to a club that can afford to pay a penalty, than send him to a club who can't afford a penalty, but might develop him better.'

[61] Ahmed and Burn-Murdoch (fn.4 above); *Daniel Geey, Done Deal: An Insider's Guide to Football Contracts, Multi-Million Pound Transfers and Premier League Big Business (London, Bloomsbury Sport, 2019) pp.39-41*.

club, Chelsea, "allowed" Burnley to "deal with the incident and decide on any punishment."[62] In this regard, it might be said that Chelsea, much like Luminar in *Hawley*, had the "last word" on the control exercised over the athlete.[63]

Taken together, an in-depth examination of the contractual provisions in many loan agreements indicates that a finding of dual vicarious liability will often be a sensible and logical outcome in the sporting context. This is reinforced by the theoretical underpinnings of vicarious liability, with factors such as control and enterprise liability indicating that a bright-line test rendering either the general or temporary employer wholly liable will, in many scenarios, be far too simplistic.

## Apportionment of responsibility

If, as I have suggested, dual liability is to be invoked with more frequency in the borrowed servant context, the final question to ask is what the division of responsibility ought to be between the two employers. Perhaps the starting point for such an assessment should be an examination of any contractual provisions agreed by the parties. This might prove a particularly pragmatic solution in the sporting context, particularly as Bond, Widdop and Parnell note that, due to the level of trust required by the two parties entering into a loan arrangement, clubs usually prefer to enter into loan deals with a small number of "interconnected" clubs in "closed triads".[64] According to their recent empirical study, each Premier League club has, on average, three loan partner clubs.[65] These regular transactions are perhaps conducive to a situation whereby agreements as to the division of liability can be worked out *ex ante* between two parties already exhibiting an established pre-existing level of trust. Consequently, it is suggested that, if clubs do not already negotiate agreements about indemnification for vicarious liability, they perhaps ought to start doing so in light of the potential for dual liability outlined in this article.

In the absence of such an agreement, however, judges will, following the guidance laid down in *Viasystems*, apportion liability jointly and severally on a 50/50 basis. According to May LJ, it is a "logical necessity" that, because the court is not concerned with an assessment of the personal responsibility of an employer, the division of contributory responsibility under the Civil Liability (Contribution) Act 1978 should be equal.[66] On this basis, both judges in *Viasystems* were eager to stress that dual vicarious liability should only be imposed where the right of control is equally shared.[67] This should be contrasted with the Supreme Court of

[62] Matt Law, "Danny Drinkwater to Hold Talks with Burnley Manager Sean Dyche Today after Injury in Assault Outside Manchester Nightclub" (*The Telegraph*, 08 September 2019), https://www.telegraph.co.uk/football/2019/09/08/danny-drinkwater-hold-talks-burnley-boss-sean-dyche-injury-assault/ [Accessed 18 July 2022].

[63] *Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18,* at [85].

[64] Bond, Widdop and Parnell (fn.8 above), p.671.

[65] Bond, Widdop and Parnell (fn.8 above), p.665. These transactions are often conducted by what sporting parlance would refer to as 'parent' and 'feeder' clubs. Notable examples of such relationships include: Liverpool and KRC Genk, Manchester United and Royal Antwerp and Chelsea and Vitesse Arnhem.

[66] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [52]. See also the comments of Rix LJ at [85].

[67] *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd [2005] EWCA Civ 1151,* at [52] (May LJ maintaining that '[i]f the relationships yield dual control, it is highly likely at least that the measure of control will be equal, for otherwise the court would be unlikely to find dual control'); at [78] (Rix LJ suggesting that 'it will only be where the right of control is shared that vicarious liability can be dual').

Canada's division of dual liability in *Blackwater v Plint*.[68] In holding that both the Canadian government and the United Church were responsible for a dormitory supervisor's sexual assault of a student at a boarding school, McLachlin CJ concluded that liability should be apportioned 75/25 between Canada and the Church. This was because, as between the two defendants, Canada was the "more senior of the two" and was in a better position to control and supervise the situation.[69] The Supreme Court rejected Canada's argument - later resurrected and buttressed by Neyers - which suggested that it was illogical that "someone who has held liable without fault, could be more at fault than another person who was held liable without fault."[70]

I too reject this argument. One must remember that vicarious liability is a species of strict liability, and as such it does not depend on the existence of any fault on behalf of the employer.[71] Consequently, we would not say that an employer held solely liable was wholly "at fault" for the tortfeasor's harm. In this regard, by allowing unequal apportionment of responsibility, we are not necessarily suggesting that a party who bears the greater brunt of the burden is more at fault. After all, and as Case highlights, responsibility is a "neutral term", and it is not axiomatic that it ought always to be conflated with culpability or fault.[72] Rather, it may simply suggest - perhaps for any number of theoretical, contextual or public policy reasons - that it is fairer that one party bear a greater share of responsibility than the other. This view is seemingly also supported by Brodie's work on dual liability, as he outlines that *Viasystems* fails to recognise the "variety of forms of control", and that, in a borrowed employee scenario, different employers may well possess "different levels of responsibility".[73]

In addition, the Canadian approach in *Blackwater*, which seems more in line with Atiyah's seminal work, also provides a much more flexible method of imposing dual vicarious liability. As outlined by Neyers, this is largely because unequal apportionment appears to herald a shift towards the use of judicial notions of "just and equitable" in each case.[74] In this light, and in contrast to the non-interventionist approach in the UK, the Canadian model is open to the influence of value judgments in determining each employer's share of responsibility. In the context of professional sport, greater judicial sensitivity to fairness is to be welcomed. Indeed, the wealth discrepancy in many professional sports is well known, and it seems that the *Blackwater* approach allows us to be cognisant of such concerns. To take one example in the context of football, the thirteenth edition of UEFA's "Club Footballing Landscape" benchmark report illustrates that the English Premier League's twenty clubs generated almost as much income between them as the 617 clubs who participated in fifty of Europe's top-flight leagues outside of the "Big Five".[75] The startling financial gap is further

[68] *(2005) 258 DLR (4th) 275*.
[69] *Blackwater v Plint (2005) 258 DLR (4th) 275* at [65].
[70] Jason Neyers, "Joint Vicarious Liability in the Supreme Court of Canada" (2006) 122 Law Quarterly Review 195, 199.
[71] In this regard, both scholars and judges have recognised that vicarious liability sits rather uneasily alongside a fault-based conception of tort law. See, e.g., Giliker (fn.23 above), p.19; *Majrowski v Guy's and St Thomas's NHS Trust [2006] UKHL 34*, at [8] (per Lord Nicholls).
[72] Paula Case, "Developments in Vicarious Liability: Shifting Sands and Slippery Slopes" (2006) 22 Journal of Professional Negligence 161, 165.
[73] Douglas Brodie, "The Enterprise and the Borrowed Worker" (2006) 35 Industrial Law Journal 87, 89.
[74] Neyers (fn.70 above), p.199.
[75] UEFA, "The European Club Footballing Landscape: Club Licensing Benchmark Report" (13th edn, 2022) p.81, https://editorial.uefa.com/resources/0272-145b03c04a9e-26dc16d0c545-1000/master_bm_high_res_20220203104923.pdf [Accessed 02 August 2022].

highlighted by the fact that English football clubs accounted for 34% of global transfer spending in 2021, with 42% of all transfer deals by value involving at least one English club.[76] Notably, a significant majority of the wealth appears to be concentrated in the hands of the so-called "Big Six" English clubs (namely, the culprits behind the highly controversial Super League proposals in 2021: Manchester United, Liverpool, Arsenal, Chelsea, Manchester City and Tottenham Hotspur). As Plumley, Serbera and Wilson note, such clubs are clearly in a more "financially sound" position than the rest of the league.[77]

Once again, it seems that a sporting application of vicarious liability neatly highlights the fundamental changes that ought to be considered if we are to produce a more normatively desirable set of rules in this area of law. By freeing ourselves from the shackles of equal apportionment imposed by *Viasystems*, the Canadian approach to dual vicarious liability paves the way for a more distributively just and egalitarian method of allocating responsibility between two employers. This could provide one modest tool in helping to narrow the financial (and competitive) gap that seems to exist in many elite sports.

## Conclusion

An application of vicarious liability to loan deals in sport has revealed a number of issues with the current law on borrowed employees. Contrary to the comments of the House of Lords in *Mersey Docks*, this article has suggested that we ought to adopt a contextual and fact-sensitive approach when determining whether the general or temporary employer is to be held strictly liable for the torts of an on-loan player. In this regard, I have also proposed that dual vicarious liability should be invoked more frequently, and I have highlighted two scenarios – international duty and developmental loans – in which such liability might be appropriate. This suggestion also coincides nicely with my preference for Rix LJ's integration-based approach in *Viasystems*, as various scholars have highlighted that the adoption of his Lordship's approach is likely to lead to more frequent findings of dual vicarious liability in the future.[78] Finally, it was also maintained that, if liability is to be apportioned between both a general and temporary employer, we should not feel compelled to apportion it jointly and severally on a 50/50 basis. Instead, we should seek guidance from the more flexible model of dual vicarious liability adopted in Canada. This approach, it is suggested, allows judges to take into account the wider social implications of any apportionment, and this may arguably go some way to closing the significant financial gap that continues to exist in many professional sports.

[76] UEFA, "Club Footballing Landscape" (fn.75 above) p.64. Importantly, this is not a consequence of English clubs simply signing a higher number of players. In fact, English clubs appear to engage in minimal transfer activity compared to clubs in other leagues. For context, and as outlined on p.66, whilst English clubs signed 5.3 players on average during the summer of 2021, Serie A clubs signed 10.3

[77] Daniel Plumley, Jean-Philippe Serbera and Rob Wilson, "Too Big to Fail? Accounting for Predictions of Financial Distress in English Professional Football Clubs" (2020) 22 Journal of Applied Accounting Research 93.

[78] Phillip Morgan, "Vicarious Liability on the Move" (2013) 129 Law Quarterly Review 139, 141-2; Paula Giliker, "Vicarious Liability 'On the Move': The English Supreme Court and Enterprise Liability" (2013) 4 Journal of European Tort Law 306, 310; Claire McIvor, "Vicarious Liability and Child Abuse" (2013) 29 Professional Negligence 62, 65.