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Sport, Safety and Participation – Annual Review 2023/24

Friday, 22 March 2024 Author: [Dr James Brown](#), [Prof Mark James](#)

The 2023/24 LawInSport Annual Review will examine the key UK case law and potential developments affecting sports safety and participation over the past year. It will also highlight emerging and ongoing themes to watch going forwards, including in particular:

- [Developments in the civil law applying to sports participants](#)
- [Sports participation and the criminal law](#)
- [Developments in the law on vicarious liability](#)
- [Developments in the law applying to sports spectators](#)

In the last 12 months, we have once again seen significant developments and clarifications in the law relating to sports injuries. Cases in the areas of negligence and vicarious liability continue to influence sports-related litigation, and the evolution of the law on ‘sports torts’ shows no sign of stopping. This year has also seen incidents where the criminal law and the law on contempt of court may be relevant when discussing the safety of both participants and spectators at sports events.

Developments in the civil law applying to sports participants

Following on from the High Court’s findings in [Tylicki v Gibbons](#)^[1] and [Fulham Football Club v Jones](#),^[2] discussed in [the last year’s review](#),^[3] and in [LawInSport](#),^[4] the courts have again revisited sports negligence in [Czernuszka v King](#).^[5] This case concerned an amateur women’s rugby player who was left paralysed after a dangerous tackle by an opposition player. The incident occurred at the back of a ruck when the claimant, who was positioned as the acting scrum half, bent down to pick up the ball. The defendant emerged from the side of the ruck and threw her full weight on top of the claimant, ‘parcelling up’ the claimant by wrapping her arms around the claimant’s thighs. The claimant’s bent body was driven to the ground and she ultimately suffered a serious spinal cord injury that left her paralysed from the waist down. Other players described hearing a ‘crack’ as the claimant was driven to the ground by the defendant’s dangerous manoeuvre.

In reiterating that ‘*sport is not exempt from the law of negligence*,’^[6] Spencer J found in favour of the claimant, holding that the defendant’s tackle was a ‘reckless and dangerous act and fell below an acceptable standard of fair play.’^[7] With one eye on the case of [Condon v Basi](#),^[8] it was reaffirmed that the correct test for sports-related negligence is whether the defendant exercised a degree of care that was appropriate in all the circumstances: a finding of recklessness is sufficient, but not necessary to prove negligence.^[9] Spencer J also reaffirmed that, in analysing whether a defendant exercised an appropriate degree of care, any breach of the laws of the game are only ever instructive as regards a finding of negligence; they are not automatically determinative of liability. Accordingly, the fact that the defendant’s tackle was a breach of the Laws of Rugby did not automatically mean that she ought to be liable. Rather, it was ‘simply one of the factors to be taken into account in deciding whether the defendant’s conduct was negligent.’^[10]

In contrast to *Czernuszka*, the claimant in *Koetsier v Thomas and LJP Owen Ltd t/a Nolton Stables*^[11] was unable to establish negligence as the cause of his injuries. The claimant was an accomplished horse-rider who was taking part in a beach horse ride that he had booked with the second defendant. During this ride, a dog owned by the first defendant ran towards the claimant, causing his horse to buck violently. The claimant was thrown from the horse and suffered serious spinal injuries when he landed on the sand.

After concluding that the first defendant was not liable in negligence, the judge also held that the second defendant was not negligent either.^[12] In HHJ Harrison's words, '[t]o require riders, including trek leaders, to assume a threat of sufficient magnitude is to make riding at a canter on beaches of this sort virtually impossible.'^[13] It would place too great of a burden on ride leaders and other organisers to weigh to a nicety the exact distance between a group of horses and every loose dog on a beach, particularly when the dog in this case was not acting in a threatening way. Horses responding unpredictably to people, objects and other animals is, to borrow from the language of the trial judge in *Caldwell v Maguire and Fitzgerald*, 'something that is bound to occur from time to time.'^[14] This case provides a useful reminder that the bar for establishing negligence in the sports and leisure context is relatively high in practice.

Sports participation and the criminal law

In October 2023, Nottingham Panthers' player Adam Johnson died after his neck was slashed by an opposition player's skate during an ice hockey match in Sheffield. At the time of writing, it is known that one man has been arrested on suspicion of manslaughter.^[15]

Whilst convictions for manslaughter in sport are not unheard of,^[16] it must be recognised that they are very rare in practice. The Court of Appeal in *R v Barnes*,^[17] the leading case on criminal violence in sport, held that only in cases where the injury-causing act was sufficiently grave would a prosecution be appropriate (the legal test is explained in more detail in [this previous article](#)).^[18] In determining whether an act is 'sufficiently grave' the court will address the following factors: the type of sport; the level at which it was being played; the nature of the act; the degree of force used; the extent of the risk of injury; and the defendant's state of mind when making contact with the victim.

A decision on whether to prosecute in Johnson's case will focus on the playing culture of professional ice hockey and the mens rea of any potential defendant. Although ice hockey is a full-contact sport where a high degree of physicality is both expected and accepted as an inherent part of the game, the use of the skate to injure another is not acceptable, and would not be considered to be so by any court. If it is determined that the potential defendant's leg was raised deliberately to kick at Johnson, a prosecution will likely follow. A decision from the CPS is expected in the first half of 2024.

In addition to prosecution, Johnson's estate may also consider the possibility of bringing a civil claim against his opponent, and through him against Sheffield Steelers, who could be vicariously liable for the death.^[19] There is also the possibility of a claim against the Elite Ice Hockey League as the competition organiser for its failure to require players to wear appropriate personal protective equipment, here a neck guard, following the reasoning of *Murray v McCullough*.^[20]

In the immediate aftermath of this incident, the International Ice Hockey Federation has declared that it will be making neck guards mandatory for all competitions that it oversees, including at the Olympics.^[21] This is reminiscent of Cricket Australia's response to the fatal injury sustained by Phillip Hughes during a cricket match in 2014. Whilst Cricket Australia had previously recommended that players wear neck protectors, it was subsequently announced in September 2023 that neck protectors on helmets are now mandatory in Australian cricket.^[22] Where sports participation and safety are concerned, the potential for appropriate protective equipment to protect players from harm, and others from legal action, should not be under-estimated.

Developments in the law on vicarious liability

Although it is fair to say that developments in the law on vicarious liability have slowed in comparison to the previous few years, the important cases of *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*^[23] and *MXX v A Secondary School*^[24] illustrate that the evolution of the doctrine has not come to a complete halt. In *BXB*, the Supreme Court refused to impose vicarious liability on a Jehovah's Witness organisation for a rape committed by one of its elders. Likewise, the Court of Appeal in *MXX* held that a co-educational secondary school was not vicariously liable for the sexual assault of a 13-year old schoolgirl by one of their former pupils who was undertaking a one-week work experience placement at the school.

These two cases raise an important practical issue; whilst stage one of the test for vicarious liability (the identification of a necessary relationship) was satisfied in both instances, it was the stage two 'close connection test' that led to a finding of no vicarious liability in both *BXB* and *MXX*. It is likely that the focus of future cases of historic sexual abuse, in sport and elsewhere, will focus on whether the individual defendant can be established to have a sufficiently close relationship with the corporate defendant for vicarious liability to attach to the behaviour. This could be particularly important for amateur sports clubs, as recently outlined in [this LawInSport article](#), which could be found to satisfy the first stage of vicarious liability,^[25] but where claimants may find it more difficult to satisfy the close connection test at stage two.

In *C v Shaw and Live Action Leisure Ltd*,^[26] it was found that a leisure company was not vicariously liable for their head caretaker sexually abusing two boys during the mid-1980s. The judge held that the caretaker's abuse was '*done in a private capacity*' and was '*not perpetrated within the [leisure company's] field of activities*'.^[27] In conjunction with the decisions handed down in *Blackpool Football Club Ltd v DSN* and *TVZ v Manchester City Football Club Ltd* (discussed in last year's review), *C v Shaw* seems to restrict further the capacity for victims to rely on vicarious liability to claim damages for historic sexual abuse. It is, however, worth keeping an eye on developments in this area of law, as Celtic FC have recently suggested that they may settle the claims brought against them by several former youth players who were sexually abused by coaches and officials at Celtic Boys Club.^[28]

Developments in the law applying to sports spectators

Jockey Club Racecourses Ltd v Kidby & others saw an animal rights activist attempt to disrupt the Epsom Derby horse racing festival on 3 June 2023.^[29] Just over a week before the event, the

applicant was granted an injunction to prevent named individuals and ‘persons unknown’ from entering the racetrack.[30] The protester in question, Mr Benjamin Newman, was not a named individual to the injunction application, but he was clearly well aware of its existence, as he had appeared in a radio interview the day before the incident outlining his plans to ignore the injunction and disrupt the race. Newman ran onto the racetrack shortly after the race had begun and remained on the track for nearly half a minute before being removed by the police. He declared that his purpose was not to create a dangerous situation for the horses or their riders, and the presiding judge in this case, Miles J, accepted that the protester’s actions were *‘motivated by a profound concern for the welfare of animals and the planet more generally.’*[31]

In assessing the appropriate sanction to be imposed on the defendant following his admitted contempt of court, it was decided that a two-month custodial sentence, suspended for 18 months, was an appropriate and proportionate. In light of similar recent examples of protests at other major sporting events this year – such as several Just Stop Oil activists disrupting the Wimbledon Tennis Championship[32], the World Snooker Championship[33] and the second Ashes Test at Lord’s[34] – we should expect to see further developments in this area of law in the not-too-distant future.

Looking to the future

2023 also saw several hundred Liverpool fans joining a group action against UEFA in relation to the poorly managed Champions League final between Liverpool and Real Madrid in May 2022. The final was overshadowed by failures from both the French authorities, including the police, and UEFA, with many Liverpool fans reporting being assaulted, crushed, and exposed to tear gas. Whilst the governing body has admitted that they bore ‘primary responsibility’ for the chaotic organisation of the final,[35] UEFA has been accused of presenting ‘completely untrue’ evidence to its own independent inquiry into the incident.[36] The Liverpool fans bringing the group claim are seeking compensation for the physical and psychological injuries caused by UEFA’s failure to provide a secure environment at the Stade de France, and provides a timely reminder that ensuring the safety of sports spectators is just as important as ensuring the safety of participants.

Finally, Kevin Brennan MP has introduced before Parliament the [Unauthorised Entry to Football Matches Bill](#) as a Private Members’ Bill. This proposal seeks to create an offence of unauthorised entry at football matches, to criminalise the practise of ‘tailgating’ where ticketless fans gain access to a stadium by following a person with a legitimate ticket through the turnstiles and into the stadium. The Bill’s second reading will take place on 23 February 2024.

References

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[3] Mark James, 'Sport, Safety and Participation – Annual Review 2022/23', LawInSport.com, 03 March 2023, available at: <https://www.lawinsport.com/topics/item/sport-safety-and-participation-the-year-in-review-2022>.

[4] David Sharpe and Megan Griffiths, 'How Courts Assess Negligence in Sports Injury Cases: Lessons from Rugby, Football and Horseracing', LawInSport.com, 07 July 2023, available at: <https://www.lawinsport.com/topics/item/how-courts-assess-negligence-in-sports-injury-cases-lessons-from-rugby-football-and-horseracing>.

[5] *Czernuszka v King* [2023] EWHC 380 (KB) available at <https://www.bailii.org/ew/cases/EWHC/KB/2023/380.html>.

[6] *Ibid*, para [1].

[7] *Ibid*, para [59].

[8] *Condon v Basi* [1985] 1 WLR 866 available at <https://www.bailii.org/ew/cases/EWCA/Civ/1985/12.html>.

[9] In any case, Spencer J did highlight that, even if recklessness was required, he would still have found for the claimant in *Czernuszka*, because the 'defendant was indeed reckless' and clearly satisfied 'the higher, more stringent, test.' See *Czernuszka* (n 5) para [60].

[10] *Ibid*, para [43].

[11] [2023] EWHC 2483 (KB).

[12] The claimant also brought a claim under s.2(2) of the Animals Act 1971 for damage caused by an animal that does not belong to a dangerous species. However, this claim failed under s.5(2) of the 1971 Act, as it was found that the claimant had voluntarily accepted the risk of a horse reacting to external stimuli.

[13] *Ibid*, para [81].

[14] *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054, para [12] available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2001/1054.html>.

[15] BBC, 'Adam Johnson: Manslaughter Arrest Over Ice Hockey Player's Death' (BBC, 14 November 2023), available at: <https://www.bbc.co.uk/news/uk-england-nottinghamshire-67419951>.

[16] *R v Moore* (1898) 14 TLR 229. For a Canadian example, see *R v CC* [2009] ONCJ 249.

[17] *R v Barnes* [2004] EWCA Crim 3246 available at <https://www.bailii.org/ew/cases/EWCA/Crim/2004/3246.html>.

[18] Gavin Brogan, 'The Role and Extent of Criminal Sanctions in Sport', LawInSport.com, 15 July 2019, available at: <https://www.lawinsport.com/topics/item/the-role-and-extent-of-criminal-sanctions-in-sport>.

[19] See, e.g., *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689 available at <https://www.bailii.org/ew/cases/EWCA/Civ/2008/689.html>.

[20] *Murray v McCullough* [2016] NIQB 52 available at: [https://www.judiciaryni.uk/sites/judiciary/files/decisions/Murray%20\(Megan\)%20v%20McCullough%20\(Mark\)%20as%20Nominee%20on%20Behalf%20of%20the%20Trustees%20and.pdf](https://www.judiciaryni.uk/sites/judiciary/files/decisions/Murray%20(Megan)%20v%20McCullough%20(Mark)%20as%20Nominee%20on%20Behalf%20of%20the%20Trustees%20and.pdf).

[21] Associated Press, 'Neck Guards will be Mandatory at Olympics after Adam Johnson's Death' (The Guardian, 04 December 2023), available at: <https://www.theguardian.com/sport/2023/dec/04/neck-guards-to-be-mandatory-at-olympics-after-johnsons-skate-cut-death>.

[22] Jack Paynter, 'CA Mandates Neck Guards for Aussie Players' (Cricket.com, 14 September 2023), available at: <https://www.cricket.com.au/news/3682025/cricket-australia-playing-conditions-changes-2023-24-season-neck-guard-mandatory-covid-sub-third-umpire-over-rates>.

[23] *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15 available at: <https://www.bailii.org/uk/cases/UKSC/2023/15.html>.

[24] *MXX v A Secondary School* [2023] EWCA Civ 996 available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2023/996.html>.

[25] James Brown, 'Vicarious Liability in Amateur Sport: The Problem with Unincorporated Associations', LawInSport.com, 29 June 2023, available at: <https://www.lawinsport.com/topics/item/vicarious-liability-in-amateur-sport-the-problem-with-unincorporated-associations>.

[26] [2023] CSOH 11, confirmed in [2023] CSIH 36.

[27] *Ibid*, para [32].

[28] Mark Daly and Calum McKay, 'Celtic FC Seeking to Settle Boys Club Sex Abuse Cases' (BBC, 19 September 2023), available at: <https://www.bbc.co.uk/news/uk-scotland-66853131>.

[29] *Jockey Club Racecourses Ltd v Kidby & others* [2023] EWHC 2643 (Ch) available at: <https://www.bailii.org/ew/cases/EWHC/Ch/2023/2643.html>.

[30] The only individual who was specifically named in the application was Dan Kidby, one of the founders of the Animal Rising protest group.

[31] *Ibid*, para [16].

[32] BBC, 'Just Stop Oil: Three Charged after Wimbledon Matches Disrupted' (BBC, 07 July 2023), available at: <https://www.bbc.co.uk/news/uk-england-london-66135254>.

[33] Sean Ingle, 'World Snooker Championship Disrupted by Just Stop Oil Protesters in Sheffield' (The Guardian, 17 April 2023), available at: <https://www.theguardian.com/sport/2023/apr/17/world-snooker-championship-disrupted-just-stop-oil-protesters-crucible-theatre-sheffield>.

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