Vicarious liability in amateur sport: The problem with unincorporated associations

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Vicarious liability is a rule of responsibility that holds one party strictly liable for the torts (where someone has committed a wrongful act against or infringement) of another. A typical example in the sporting context is that of a club being held liable for a negligent on-field tackle committed by one of its players.[1] As the doctrine of vicarious liability predominantly operates in employment relationships, the general legal orthodoxy appears to suggest that amateur sports clubs cannot be held vicariously liable for the tortious behaviour of their athletes. Amateur athletes lack both the necessary contract of employment and remuneration that is typically evident in a contract of service, and they cannot, therefore, "*earn their daily bread as athletes.*"[2] Of course, it may still be possible to argue that amateur sports participants occupy a position "*akin to employees"*, but this looks to be an increasingly unlikely outcome in light of Lady Hale's more restrictive approach to vicarious liability in Barclays Bank v Plc v Various Claimants.[3] As such, amateur clubs may justifiably believe that they possess a "*de facto immunity*" from vicarious liability.[4]

Beneath this surface of simplicity, however, lies a rather complex and somewhat concerning reality: many amateur sports clubs could be held vicariously liable simply because they are currently operating as an unincorporated association. This article examines this claim, and looks at the following issues:

- The definition of an unincorporated association.
- How the vicarious liability of unincorporated associations has developed in the case law.
- How this category of liability works in practice (and why this may be a problem for members of many recreational sports clubs).
- What can be done – from both a practical and judicial perspective – to help respond to this problem.

Amateur Sports Clubs as Unincorporated Associations

According to Lawton LJ in Conservative and Unionist Central Office v Burrell, an unincorporated association can be defined as "*two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations*".[5] Although the bond between the members must be contractual in nature, courts will often find the existence of a contract if an "*implicit but sufficiently clear understanding is reached by two or more people*".[6] As such, many voluntary and non-profit organisations – such as amateur sports clubs - will be classed as unincorporated associations.

Although there are no available statistics on the number of amateur clubs that are structured as unincorporated associations, it is safe to assume that the figure will be high. Sport England have highlighted, for instance, that an unincorporated association is the "*most common type of structure for an amateur club*".[7] This is similarly reflected in online documents produced by the Rugby Football Union, as they observe that "*[m]any rugby clubs are set up as unincorporated associations*".[8] Of course, it is not just rugby clubs that are formed as unincorporated associations. Hughes LJ in R v L observed that a *"village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association*".[9] Likewise, some scholars explain that the vicarious liability of unincorporated associations is the category one would "*wish to examine if during a village cricket match a club member of a visiting team negligently hits a six into a playground and injures a child*."[10]

The Vicarious Liability of Unincorporated Associations

In Various Claimants v Catholic Child Welfare Society ('CCWS'), the defendant institute (the Institute of the Brothers of the Christian Schools) was held vicariously liable for the physical and sexual abuse perpetrated by some of its brothers against several boys at a boarding school.[11] Although vicarious liability was imposed here on the basis that the members of this institute were akin to employees, Lord Phillips' leading judgment in this case contains an interesting – and often overlooked – point about unincorporated associations. His Lordship asserted that, even if the 'akin to employment' test had not been satisfied in this case, the defendant institute could still have been held strictly liable on the basis that they were an unincorporated association.[12]

In Lord Phillips' view, provided that a tortfeasor (the person the claim is being brought against) is "*acting for the common purpose*" of the other members of the unincorporated association, it will be justifiable to impose vicarious liability.[13] Similar sentiments were also expressed by Hughes LJ in the Court of Appeal in CCWS,[14] and there is seemingly nothing in the more recent judgment of The Trustees of the Barry Congregation of Jehovah's Witnesses v BXB to cast doubt upon this proposition.[15] Given that Barry Congregation also concerned the vicarious liability of an unincorporated association, one would assume that the judges in this case would have

raised this as an issue had they disagreed with Lord Phillips. Their silence on this point suggests that the vicarious liability of unincorporated associations is still very much good law in England and Wales.

To assess how this form of liability might impact amateur sport, it is important to understand precisely how it works in practice. Given that unincorporated associations do not possess legal personality,[16] it is the members of the group – rather than the group itself – that are held vicariously liable for the tort.[17] This means that members are jointly and severally liable for any harm, and one individual could be forced to bear the whole burden if the other members are unable to pay. This was clearly an issue that was glossed over by the Supreme Court in CCWS in their attempt to respond to the specific facts of that case. In sum, Lord Phillips was arguably far more concerned with accessing the funds held by the Institute than he was with providing a legally neat category of vicarious liability.[18] However, whilst Pill LJ in the Court of Appeal judgment in CCWS is probably correct to maintain that we should have no qualms in spreading the cost of harm throughout thousands of world-wide members of the Institute,[19] the same perhaps cannot be said when we apply this logic to the context of amateur sport.

Indeed, the extension of vicarious liability to unincorporated associations could expose stakeholders in recreational sports to crushing liability. For instance, Morgan outlines how the club treasurer of one unincorporated Welsh rugby club had to register a charge against his house in order to meet an £85,000 compensation award for the unfair dismissal of an employee.[20] Even if vicarious liability in amateur sport was desirable (and many would likely dispute this point), it should only really be imposed in such a manner that holds the harm-causing organisation itself accountable, and not its very small group of individual sporting members.

Lessons for the Future: What Now for Unincorporated Amateur Sports Clubs?

With the previous sections in mind, it is worth reflecting on the possible steps that could be taken to help amateur sports teams avoid vicarious liability. The first – and perhaps most obvious – solution is for amateur clubs to consider incorporation. This was recommended by Morgan, and he also added that recreational sports teams should:

"consider protecting their key assets, such as their clubhouse and pitch, from risks of execution of judgment, which are increased by the expanding exposure to liability generated by the recent advances in vicarious liability. This may be achieved through using separate charitable purpose trusts in which to shelter assets, or through a strategy of utilising a corporate structure which involves a symbiotic relationship between an incorporated entity that generates liability risks (the club), and another which holds the assets (the club's parent company)."[21]

However, whilst incorporating appears to be a rather sensible suggestion, there are a host of practical reasons that may limit the effectiveness of this remedy:

Some informal clubs may not wish to incur the increased costs and additional administrative responsibilities that are associated with incorporation. More information about the additional costs and responsibilities associated with incorporation is available in this publication on LawInSport here. [22]

A perhaps more pressing concern is rooted in the field of research known as legal consciousness studies: that is, how law is perceived in everyday life. In particular, it is

debatable whether many amateur sports participants are aware of the consequences of operating as an unincorporated association. It is likely that many participants will not be fully informed of the repercussions of failing to incorporate until it is too late. If this is indeed the case, merely calling for amateur clubs to incorporate simply will not do.

As such, perhaps a better alternative is to rely on judicial discretion to ensure that recreational athletes are not unduly burdened with extensive liability. In this light, we must trust that judges – who are experts in legal reasoning and deduction – possess the necessary subtlety to distinguish between the liability of different types of unincorporated associations. Indeed, whilst the vicarious liability of an unincorporated association may have been appropriate in CCWS, courts ought to demonstrate a greater degree of nuance when applying this law to an amateur sports club that comprises of only a few members. In fact, the seeds for a more context-specific approach to this area of law were planted by Hughes LJ in R v L. In that case, His Lordship correctly highlighted that some unincorporated associations "*may be solid and permanent; others may be fleeting, and/or without assets*".[23] It is also interesting to note that, in the Court of Appeal judgment in CCWS, Pill LJ was keen to emphasise the "*particular circumstances*" of the case.[24]

There are seemingly two good reasons to believe that judicial discretion is the preferable (and most likely) solution to this issue.

First, it is worth noting that Lord Phillips' extension of vicarious liability to unincorporated associations in CCWS has been critiqued. Indeed, whilst Lord Phillips thought that the three cases of Heatons Transport (St Helens) Ltd v Transport and General Workers' Union,[25] Thomas v National Union of Mineworkers[26] and Dubai Aluminium Co Ltd v Salaam[27] justified the extension of the doctrine, other commentators are more sceptical. McIvor notes, for instance, that none of these precedents establish a distinct category of vicarious liability for unincorporated associations.[28] As such, there is arguably ample scope for a judge to divert from Lord Phillips' judgment in order to ensure that amateur sports participants are not routinely exposed to crushing liability.

The second reason for believing that judges can adequately respond to this issue is based on a comparative assessment of the Supreme Court of Ireland's approach in Hickey v McGowan.[29] Much like CCWS, this case concerned the sexual abuse of children by various members of a religious organisation. However, the court in this case appeared to adopt a more contextualised approach to the vicarious liability of unincorporated associations, and it may be that courts in England and Wales could look towards O'Donnell J's leading judgment in this case for inspiration. Here, O'Donnell J opined that "*the mere fact of voluntary association may not create the type of intense relationship that justifies imposing vicarious liability in the case of a religious order*".[30] This context-specific approach is to be welcomed, as it would provide one way of carefully distinguishing the liability of a community-based amateur sports club from the liability of a global organisation (as in CCWS).

Concluding Thoughts

Under the current law in the UK, it is entirely possible that many amateur sports clubs could be held vicariously liable for on-field negligence committed by one of their players. As an unincorporated association, this would mean that the individual members would be held jointly and severally liable for all the ensuing harm. To avoid this possibility, amateur sports clubs

could consider incorporation. However, in line with legal consciousness studies, it is unclear whether many participants are aware of the implications of failing to incorporate. Considering this apparent lack of awareness, it is hoped that a judicial approach based on context and pragmatism will help to resolve this issue. As Clerk once suggested, in cases involving amateur sports clubs, courts must be "*prepared to exercise their supervisory jurisdiction [to ensure] that individual members' rights are robustly protected*".[31] Perhaps a glance towards the contextualised approach in Ireland may pave the way for a more satisfactory method of robustly protecting the financial welfare of amateur sports players in England and Wales.

References

[1] See, e.g., McCord v Cornforth and Swansea City AFC (1997) The Times, 11 February. In some instances, clubs may also be held vicariously liable for intentional on-field conduct too (such as a player punching an opponent off-the-ball): see Gravil v Carroll and Redruth Rugby Football Club [2008] EWCA Civ 689.

[2]Gasser v Stinson, Unreported, Queen's Bench Division 15 June 1998 (per Scott J).

[3][2020] UKSC 12.

[4]Jack Harris, 'A Sporting Chance' (2012) 162 New Law Journal 1248, p.1249.

[5][1982] 1 WLR 522, p.525.

[6]Nicholas Stewart, Natalie Campbell and Simon Baughen, The Law of Unincorporated Associations (OUP 2011) p.12.

[7]See here: https://www.sportenglandclubmatters.com/governance/getting-the-right-structure/unincorporated-organisations/

[8]See here: https://www.englandrugby.com/dxdam/52/52b51b7e-8228-4894-b01f-1bad589b1045/Why_Incorporate.pdf

[9][2008] EWCA Crim 1970, para [11].

[10]Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 Cambridge Law Journal 615, p.632.

[11][2012] UKSC 56.

[12]ibid, para [20].

[13]ibid, para [61].

[14] [2010] EWCA Civ 1106, para [41].

[15] [2021] EWCA Civ 356, para [81].

[16] Richard Clements and Ademola Abass, Complete Equity and Trusts: Text, Cases, and Materials (5th edn, OUP 2018) p.196-7.

[17]Jacobi v Griffiths [1999] 2 SCR 570, para [75] (per Binnie J).

[18] CCWS (n 11), para [32]. See also Paula Giliker, 'Vicarious Liability 'On the Move': The English Supreme Court and Enterprise Liability' (2013) 4 Journal of European Tort Law 306, p.310.

[19]CCWS (n 14), para [76] (per Pill LJ).

[20] Phillip Morgan, 'Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?' (2018) 38 Legal Studies 242, p.256.

[21] ibid, p.261.

[22] An overview of the additional costs and responsibilities associated with incorporation is available here: Charles Russell Speechlys & LawInSport, 'A Guide To Club Structures For Semi-Professional And Amateur Sports Clubs 2015", LawInSport, published on 27 July 2015, https://www.lawinsport.com/topics/features/item/a-guide-to-club-structures-for-semi-professional-and-amateur-sports-clubs-2.

[23] *R v L* (n 9), para [11].

[24] *CCWS* (n 14), para [76].

[25] [1973] AC 15.

[26] [1986] Ch 20.

[27] [2002] UKHL 48.

[28] Claire McIvor, 'Vicarious Liability and Child Abuse' (2013) 29 Professional Negligence 62, p.64.

[29] [2017] IESC 6.

[30] ibid, para [39].

[31] William Clerk, 'How to Claim Against an Unincorporated Amateur Sports Club in England and Wales' (LawInSport, 18 March 2016), https://www.lawinsport.com/topics/contract-law/item/how-to-claim-against-an-unincorporated-amateur-sports-club-in-england-and-wales?category_id=117.