Browne Jacobson

Vicarious liability of amateur sports teams for player on player injuries

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In my article, Does Ossett United FC's decision open the floodgates for claims by injured sports players?, concerning Osset United FC and the claim brought against them by Rees Walsh following injuries he had sustained as a result of a negligent tackle from an Osset player I discussed the risk of sports clubs being found vicariously liable for the actions of players and suggested that, given the of expansion vicarious liability beyond the conventional employer-employee relationship, it was foreseeable that vicarious liability could be applied against governing bodies or amateur sporting organisations.

In the few years since making that comment, vicarious liability has continued to evolve and it seems appropriate, in light of that evolution, to reassess the application of vicarious liability in a sporting context, particularly in relation to claims against amateur sports teams as a result of player on player injuries.

There are relatively few cases concerning vicarious liability arising from the negligent actions of a competitor. In part, that is due to the high hurdle which must be overcome to establish negligence. It is accepted there is an inherent risk of injury from competitive sport and it is only when a competitor does something demonstrably beyond the actions expected that liability might be established. Whilst a claimant does not have to establish recklessness, there is no liability for errors of judgment, oversights or lapses in the context of a fast-moving contest. Something more serious is required. A good example of this is shown in the recent case of Fulham Football Club v Jones [2022] in which Mr Jones was subjected to a sliding tackle by a Fulham under 18s player causing an injury to his right ankle which ended his career. No foul was awarded or booking made but a finding of vicarious liability was made at first instance as the tackle was found to be a serious error of judgment on the basis the player could not be sure when making such a tackle what he might make contact with and with what force. Fulham appealed that decision with Browne Jacobson LLP acting for Fulham on appeal. The Court of Appeal overturned that finding on the basis the Claimant had failed to prove the tackle was sufficient to be a breach of the Rules of the Game. As the standard of civil liability is set at a materially higher level than a breach of the Rules of the Game, Mr Jones had failed to prove his case.

The evolution of vicarious liability

Vicarious liability is the principle that an injured party can claim compensation from the employer of a wrong doer. Where negligence is established, there are then further hurdles to be overcome to succeed with a vicarious liability claim. This is essentially a 2 stage process – firstly the claimant must establish there is a relationship between the wrong doer and the "employer" (and I use that term rather loosely so as to encompass quasi employment arrangements) which is capable of giving rise to vicarious liability and secondly that the wrongful act is sufficiently connected to that relationship and the acts the wrong doer is authorised to do in order to impose liability on the "employer". Historically case law said that a wrongful act would be deemed to have been committed in the course of employment if it was authorised by the employer or was a wrongful and unauthorised means of doing something authorised by the employer.

The case of *Lister v Hesley Hall Limited [2002]* which concerned sexual abuse by the warden of a school boarding house to boys in his care, was the first case to expand the application of vicarious liability in relation to cases of intentional wrong doing and introduced the concept of looking at the wrongful acts in question and the employment. This case established that the test for whether an employee was acting in the course of his employment was if the act causing the injury was so closely connected with the employment that it would be fair and just to hold the employer responsible. On the facts of Lister the role of the warden was to care for the boys and so the connection

between the abuse and his employment was close in the way that abuse of the boys by someone such as a gardener would not be. In a sporting context in the case of *Gravil v Carroll [2008]* a punch thrown by a semi-professional rugby player following the final whistle of the game was sufficiently closely connected with his employment as to find his club vicariously liable for his actions. The Court specifically stated in *Gravil* that although a finding of vicariously liability was made on the facts, a similar result would not be reached had there been no contract of employment.

Since Gravil, vicarious liability has developed further. In the case of *JGE v English Province of Our Lady of Charity [2011]* the abusive actions of a Catholic priest gave rise to a finding of vicarious liability against the Catholic church despite the absence of a contract of employment, on the basis the priest took instruction from the bishop, received benefits from the church and held a position in the community as an officer of the church. Similarly in *Various Claimants v Catholic Child Welfare Society [2012]* it was found that an unincorporated association could be found liable for the wrongful acts of a volunteer member if it's relationship with that member was sufficiently akin to an employment relationship even in the absence of an employment contract or payment. The Court identified a number of policy reasons why it was fair, just and reasonable to impose vicarious liability in an employment/akin to employment relationship:

1. The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
2. the wrongful act will have been committed as a result of activity being undertaken by the employee on behalf of the employer;
3. the employee's activity is likely to be part of the business activity of the employer;
4. the employer, by employing the employee to carry on the activity, will have created the risk of the wrongful act committed by the employee;
5. the employee will, to a greater or lesser degree, have been under the control of the employer.

Whilst this case law developed to respond to child sexual abuse cases, it was not limited to such cases and went on to be applied more widely. In the case of *Cox v Ministry of Justice [2016]* a prisoner who was working in a prison kitchen accidentally injured Mrs Cox who was the catering manager. Prison rules required prisoners to do useful work within the prison and they could be paid for that work. At first instance the trial judge found the prison service was not vicariously liable on the basis the relationship between the prisoner and the prison service was not akin to that of an employer and employee as the prisoners' work was a mater of discipline and was not furthering the business of the prison service. The Court of Appeal disagreed and found that the work carried out was essential and if not done by prisoners, would have to be done by someone else. It was therefore for the benefit of the prison service who should bear the burden of that work as well as the benefit. The prison service was vicariously liable. The Supreme Court agreed but suggested that the above 5 policy considerations in *Cox* were not of equal significance and that the key factor was that the employer should be liable for wrongful acts that may fairly be regarded as risks of his business activities. Lord Reed specifically said the defendant need not be carrying on activities of a commercial nature. It need not therefore be a business or enterprise in any ordinary sense. Nor must the benefit which it derives from the wrongdoer's activities take the form of a profit. It is sufficient that the defendant is carrying on activities in the furtherance of its own interests.

As stated in my aforementioned article, in the case of *Armes v Nottinghamshire County Council [2017]*, a local authority was found vicariously liable for the wrongful acts of foster carers, despite the absence of any negligence on the part of the local authority themselves but because the foster carers, in fostering children, were acting for the benefit of the local authority, the placement of the children by the local authority with the foster carer created a position of authority and trust, the local authority exercised powers of approval, inspection, supervision and removal and therefore exercised a significant degree of control over the foster carers and most foster carers had insufficient means to meet an award of damages.

Given the widening of the scope of vicarious liability in these cases to a relationship "akin to employment" and where there need not be any commercial purpose behind the "employer's" organisation beyond a furtherance of their own interests, one can see why amateur sporting organisations might be concerned there is a potential avenue for claimants to seek to establish vicarious liability for the negligent actions of amateur players. However, the march of vicarious liability did not halt there.

The case of *Barclays Bank v Various Claimants [2020]* concerned sexual assaults committed by a doctor who had been instructed by the bank to carry out medical assessments on prospective employees as part of the recruitment process. The doctor was paid a fee for each report. At first instance the Court found the bank was vicariously liable for the assaults because the wrongful acts occurred as a result of activities undertaken by the doctor on behalf of the bank, under its control, for its benefit and as an integral part of its business. It was therefore sufficiently closely connected to his quasi-employment as to be fair and just to hold the bank vicariously liable. The bank appealed to the Court of Appeal but the appeal was dismissed. The bank appealed to the Supreme Court, arguing that although recent decisions had expanded the categories of relationship that could give rise to vicarious liability beyond a contract of employment, it

remained the law that an employer of an independent contractor was not liable for wrongful acts committed by the independent contractor in the course of the carrying out of that work. The Supreme Court agreed and said the correct approach to determining whether there was a relationship giving rise to vicarious liability remained a question of whether the wrong doer was carrying on business on his own account or whether he was in a relationship akin to employment. When in doubt, the 5 policy reasons in *Various Claimants v Catholic Child Welfare Society* might be relevant in deciding if a wrong doer was actually self-employed or was in fact an employee or akin to an employee so as to make it fair, just and reasonable to impose vicarious liability.

Lady Hale who gave the judgment in *Barclays Bank* performed a thorough review of the case law leading up to this point and clarified that these cases were not in fact at odds and that *Catholic Child Welfare Society* and *Cox* did not present a new analytical framework but that the question was and always has been whether or not the wrong doer was carrying on business on his own account or whether he was in a relationship akin to employment with his "employer". The key, she tells us, will usually lie in understanding the details of the relationship and the Court should not try to align vicarious liability too closely with the statutory concept of "worker" from an employment law perspective as such a definition developed for quite a different set of reasons.

Where does that leave amateur sports teams?

Whilst the position is suitably clear in respect of those professional or semi-professional sports players who may negligently injure an opponent, where does it leave us in respect of amateur sports players who may seek to pursue a claim for vicarious liability against an amateur sports team?

Barclays doesn't really give us any guidance on that front. It is unlikely an amateur player in the context of a sporting match will be deemed to be a self-employed contractor and Barclays does not attempt to limit what might be considered to be "akin to employment" outside of a self-employed contractor. Therefore the argument is still open that vicarious liability could be extended to amateur sport in respect of player on player injuries. Whilst this may sound like a rather "lawyer-esque" response each case is likely to turn on its own facts with an examination of the factors which would establish if the relationship is one akin to employment. Factors such as the payment of a wage, the level of control exercised by the "employer", the extent to which the wrong doer was providing something integral to the "employer's" business activities, the provision of equipment by the employer and so on.

What is apparent is an absence of case law we can draw upon for guidance in terms of vicarious liability claims at an amateur level. The recent case of *Czernuszka v King [2023]* concerned an amateur female rugby player who was left paraplegic following a spinal injury sustained in a tackle. Following detailed consideration of the game in question, the Court found that Ms King had failed to exercise such degree of care as was appropriate in all the circumstances, that the tackle in question was obviously dangerous and liable to cause injury and was executed with reckless disregard for the Claimant's safety. Ms King was found liable for the injuries. The claim was only brought against Ms King however. No claim for vicarious liability was brought against Ms King's club. Whilst the unclear position concerning vicarious liability at an amateur level may have been a factor in this decision, it is more likely due to the fact the Rugby Football Union has a mandatory insurance scheme for all players at all levels which will pay the substantial damages and costs in this case. Were it not for this, we might have seen Ms King's club as a co-defendant in the claim, particularly as the Claimant was critical of not only Ms King but also the opposing team's coaching staff and the referee.

Considerations for amateur sporting teams

- The position generally in relation to amateur sports is unclear. If there were factors which suggest the relationship between the wrong-doer and their club is "akin to employment" vicarious liability could be found where the wrongful act complained of is sufficiently closely connected with their "employment" as to hold the club responsible
- The position concerning legal costs in personal injury claims means it is unlikely a Defendant will be awarded their costs of defending a claim save for in very limited circumstances. This means even if a claim is successfully defended, a Defendant will not be able to recover their own legal costs, so whilst an amateur club might defeat a claim for vicarious liability for player on player injuries, they will have to bear their own legal costs to do so
- Having appropriate insurance for clubs and players, whilst not avoiding the possibility of a vicarious liability claim as a result of player on player injuries, may negate the need for such a claim because, as in Czernuszka, it provides a means of compensating those players who do sustain injuries as a result of negligence without the risk of financial ruin for the opposing player or their club.

Key contact

Victoria Curran

Partner

victoria.curran@brownejacobson.com

+44 (0)115 976 6509

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