Sports Injuries and the Right to Damages

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Abstract

This article examines the availability of damages at common law for injured sportspersons and the potential liability of employers, organisers, and facility providers in the sporting industry. The article discusses the common law action of the torts of negligence and trespass are considered. Cases discussed include: *Agar v Hyde; Rogers v Budgen*; *Noak* v *Waverley Municipal Council; Bartels v Bankstown City Council;* and *McNamara v Duncan.*

Introduction

Chief Justice Gleeson of the High Court of Australia recently observed that:

> People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public money and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also the public benefit of sport. Sporting injuries that result in physical injury are not only permitted: they are encouraged.[1]

With damages awards for personal injury running into millions of dollars, liability for injuries sustained during the playing of competitive sport has serious implications for the sports industry.[2] This article examines the liability of employers, organisers and facility providers for payment of compensation for injuries that occur to sportspersons, whether professional or amateur, whilst participating in competitive sport. It examines the common law tort actions of trespass and negligence.

Negligence and Trespass in Sport

Injuries in sport may arise through a multitude of circumstances. Sportspeople are injured through the actions of other players, their own failure to take care, poor facilities, poor techniques in training or playing, or simple inattention. Where the injury sustained is due the carelessness or intentional act of another person the common law may provide a remedy. There may be a number of options available for the injured person and there may be a variety of defendants against whom the action can be brought. Often it is a competitor who causes the injury, particularly in contact sports. In such cases legal action may be taken

[1] *Agar v Hyde* [2000] HCA 41 (3 August 2000) Per Gleeson CJ. para 15.

[2] A second article in this journal by the same authors discusses the effect of availability of workers compensation for sports injuries with specific reference to the Western Australian legislation. It also discusses

against that competitor. Sometimes, because of the manner in which the injury is inflicted, the action may be taken against not just the competitor, but the opposing team or club.[3] In other circumstances the organiser of an event may be liable for failure to provide proper facilities, safe premises or adequate sporting equipment. Such organisers may represent a better defendant because they have deeper pockets.[4]

Alternatively, where the sportsperson injured is an employee and the injury occurred in the course of employment, they might have rights against their employer. An employer may also be liable for careless actions of employees that cause injury to co-workers/sportspersons or others. A preliminary question, therefore, is whether a sportsperson is an employee and therefore entitled to a range of protections which the common law and statute provides. There seems little doubt, following a number of court decisions, that sportspeople can be employees despite the apparent lack of control over their performance by those who engage them.[5]

The Elements of a Negligence Action

Where and injury occurs through the carelessness of another competitor, team, organiser or employer the injured person (the plaintiff) may have an action in negligence. To be successful in a claim for negligence they must prove all the following elements:

1. that the defendant, (the organiser, competitor or employer), owes the plaintiff a duty to take reasonable care of the plaintiffs safety (the duty of care);
2. that the defendant has failed to conform to the required standard of care (the standard of care);
3. that there has been damage to the plaintiff (damage), caused by the defendant's conduct which is not too remote.

The Duty of Care in Sport

Fleming defines the duty of care as 'an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.'[6] In essence this means that the plaintiff must establish that there was a relationship between him/herself that required the defendant to take reasonable care not to cause injury to the plaintiff. The courts recognise that an employer owes a duty of care to employees.[7] It has also been recognised that sportspeople owe a duty of care to each other, because of the close physical proximity in which sport is often played.[8] The High Court has recently observed however that, even where a game may involve obvious dangers, there is no duty on the rule makers of that sport to change the rules to prevent injury. This is particularly so where the rule making body is a group of individuals and where the power to change the rules does not vest in any one person.[9] The courts have held that occupiers of land, such as councils and organisations that provide sporting facilities have a duty to take care of those who use the land and facilities and this duty may also require the occupier to warn others of any risks in using the land

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the compensation alternatives where damages are not available.

[3] *Rogers v Budgen* (unreported, 14 February 1990 Supreme Court of New South Wales) and on appeal at (1993) Aust Torts Reports 81-246, discussed in *Gregory v Beecraft* [1998] SCACT 1.

[4] One reason why they would be a deeper pocket is because of the existence of comprehensive insurance policies which these type of organisers typically have in place.

[5] *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561-Trapeze artist held to be an employee. A number of recent cases have established that professional footballers and cricketers are entitled to claim the benefit of various statutory protections for restrictive trade practices by employers, see *Buckley v Tutty* (1971) 125 CLR 353, *Adamson v West Perth Football Club Inc* (1979) 27 ALR 475- Footballers held to be employees. *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10-Cricketer held to be an employee.

[6] J. Fleming, *The Law of Torts* (1998) Sydney, p.149.

[7] *Kondis v State Transport Authority* (1984) 154 CLR 672 is one of numerous authorities to this effect.

[8] See cases in footnotes 17-23.

or facilities.[10] In *Noak* v *Waverley Municipal Council*[11] it was held that a rugby league player was owed a duty of care both by the League and the Club in relation to an injury he sustained during a fixture when he fell over a sprinkler protruding from the playing surface. This was so even though the player had been warned of the danger.

The Standard of Care in Sport

The standard of care required or expected of a defendant is reasonable care. Reasonable care is determined by objective standards, having regard to the particular circumstance of the case. The inexperience or professionalism of the participants is therefore a factor to take into account. For example in the English case of *Condon* v *Basi*[12] the plaintiff's leg was broken as the result of a 'foul' sliding tackle applied by the defendant during a soccer match. The defendant, Basi, was found liable, and damages of £4,900 were awarded against him. Sir John Donaldson said in that case, in relation to the standard of care required:

> The standard is objective, but objective in a different set of circumstances. Thus there will of course be a higher degree of care required of a player in a First Division football match than of a player in a local league football match.[13]

In the more recent Australian case of *Bartels v Bankstown City Council*[14] the plaintiff was not successful in an action for damages when she fell over due to hole in a soccer field used by the Canterbury & District Soccer Football Association Inc and maintained by the local Council. She was unable to establish that the Council had not put in place an adequate system to inspect a sporting field used for multiple purposes. The Court also held that the (amateur) Association was entitled to rely of the system of field maintenance implemented by the Council. Blanch J said (at para. 47-48):

> The duty of the Council in the present case is not an absolute one. The council does not warrant or guarantee the state of the surface. It must act reasonably in all the circumstances. But no standard of perfection is imposed upon it. It one were to impose such a standard on it, it would probably bring an end to the use of grounds such as the one here for club soccer and other club football games played in the Councils area. …On reflection I have come to the conclusion that the Associations acted reasonably in relying on the Council and the referees to find any problems with the grounds upon which games were played.

It can be observed that *Bartels* differs from *Noak* noted earlier in that *Noak* involved the failure to warn of a danger created by the occupiers of the round. In *Bartels* the injury occurred because of a hole developed through the natural use of the ground. In addition, a higher standard of care may be due from a professional sports ground occupier and higher league Association.

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[9] *Agar v Hyde* [2000] HCA 41 (3 August 2000) Per Gleeson CJ at para 21, with whom the rest of the court agreed.

[10] *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. See also the tragic case involving an impromptu game of football on the defendant's front law, which ended in serious injuries to the plaintiff who fell over a concealed garden border and was impaled on the trunk of a shrub. The defendant was held liable for failure to warn the plaintiff of the border. *Forrester v Hall* (unreported Supreme Court of New South Wales 4 July 1997).

[11] *Noak* v *Waverley Municipal Council* (1984) Aust Torts Reports 80-200.

[12] *Condon* v *Basi* [1985] 2 All ER 453.

[13] *Condon* v *Basi* [1985] 2 All ER 453, per Sir John Donaldson MR 454.

[14] [1999] NSWCA 129.

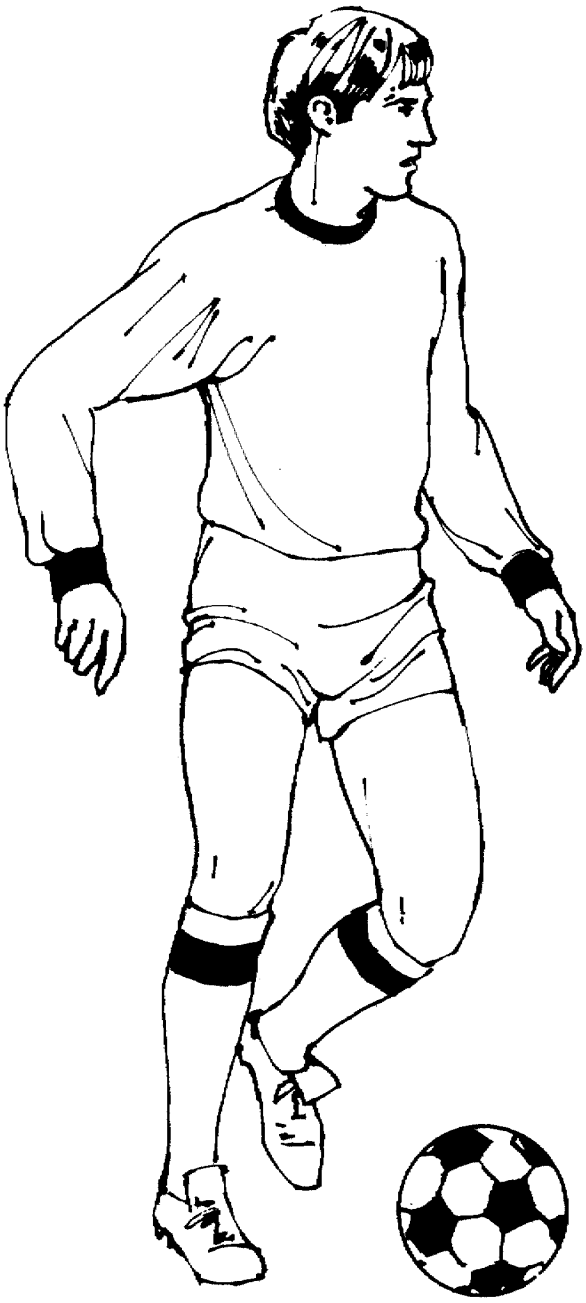
Damage for Injuries in Sport

The third element the plaintiff has to prove is that he/she has suffered damage, which, in most cases will be the physical injury arising from the sporting incident. The plaintiff must show that the defendant's negligence caused, or materially contributed to, the plaintiff's loss (injury). One method used is the 'but for' test: namely; 'Would the plaintiff's loss have occurred "but for" the defendant's negligence?'[15] If the loss would have occurred even if the defendant had not been negligent, the defendant is not liable.

Where the defendant's negligence has caused the plaintiff's injury, the plaintiff is only entitled to claim where the damage caused by the defendant was reasonably foreseeable. This means the damages are the result of the occurrence of an event which the reasonable person would describe as a 'real' rather than 'far fetched' risk.[16] Physical injury sustained during competitive sport would usually be well within the test of remoteness. Any claim for mental injury that occurred as a sequel to a physical injury would need to establish a connection between the mental injury and defendant's carelessness.

Defences to an Action in Negligence

There are two possible defences to a claim in negligence. Firstly, there is the voluntary assumption of risk. This may be equated to consenting to the risk of injury. If the court finds that voluntary assumption of risk applies, the plaintiff loses the case. In effect this defence provides that the plaintiff has waived his/her rights to complain of the damage suffered and as a result the defendant owes no duty of care to the plaintiff. The normal rough and tumble of contact sports, for example, is something to which participants consent. If the act causing the injury is



within the rules of the game then defendant is not liable for any loss suffered as a result. The rules of the game or event may therefore be an important factor in deciding whether the plaintiff has consented to the risk of injury.[17] In *Johnston v Fraser* a jockey was liable for injuries caused to another rider when he rode his horse dangerously close to two other horses in contravention of riding rules. In that case the defendant was unable to establish that the plaintiff had

[15] *March* v *E & MH Stramare Pty Ltd* (1991) 171 CLR 506, per McHugh J, 533-534.

[16] Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd [1967] 1 AC 617, 643.

[17] *Rootes v Shelton* (1967) 116 CLR 383.

consented to the form of riding practices engaged in by the defendant.[18] This defence is examined again in the context of an action in trespass.

Secondly, the partial defence of contributory negligence allows the court to apportion damages by reducing the damages by however much the plaintiff is deemed to have contributed to his/her own injury. Contributory negligence occurs where there is a failure by the plaintiff to meet the standard of care for his/her own protection. It is the plaintiff's own lack of care that together with the defendant's negligent act contributes to the injury. For example, failure to wear a crash helmet in sports car racing may amount to contributory negligence where an injury results. A similar result might eventuate where a head injury results from a failure to wear protective sporting equipment such as a cricket helmet.

Trespass to the Sportsperson

Trespass to the person, commonly known as assault, is another tort that may be available to a plaintiff who has suffered a sporting injury. Trespass requires a voluntary (intentional) act by the defendant. There must be a positive act. An omission or inaction will not amount to trespass, but it is not necessary that the act be forcible, or hostile, or that the defendant intended injury to result. If, for example, a player's arm injures another player, it is a trespass if the offending arm is swung deliberately, regardless of whether there is any intention to injure. If, however, the motion of the arm is involuntary, perhaps because of a tackle, this does not give rise to trespass because the act is unintentional.[19]

In relation to negligence, not only may the offending competitor be liable for an assault but also that competitor's club may be liable, even where the assault was committed by an act which was outside the rules of the game. This was graphically illustrated in *Rogers v Budgen*,[20] where Budgen assaulted Rogers in a rugby match. Budgen was held liable for the assault, which was occasioned by a deliberate blow to Rogers' head with a forearm contrary to the rules of the game. The Canterbury Bankstown Rugby League Football Club, who employed Budgen, was held liable for Budgen's act because as was explained by Mahoney JA (at 62,544):

> If the employee, (Budgen) in seeking to win uses means which are legitimate in one area but not in another, and the employer, by his attitude to winning and his motivation of or instructions to the employee, creates a real risk that the employee will act illegitimately, that may assist the finding that the employer is liable for what happened.

As a consequence of the *Rogers* case, sporting clubs who employed sportspeople, noted the potential liability for damages against them and many clubs sought insurance to cover this eventuality.[21] The court observed in *Rogers* that there may be a cause for exemplary damages (damages in the form of punishment to the wrong doer) where coaches and clubs deliberately encouraged rough play.[22]

Defences to an Action in Trespass

There is only one defence to a trespass action and that is consent. How the defence works is not straightforward. One might think that compliance with the rules of the particular game would be a good indicator of whether or not the plaintiff 'consented' to

[18] [1990] Aust Torts Reports 81-056.
[19] See commentary in the Australian Torts Reporter, 18,501.
[20] *Rogers v Budgen* (unreported, 14 February 1990 Supreme Court of New South Wales) and on appeal at (1993) Aust Torts Reports 81-246.
[21] *Gregory v Beecraft* [1998] SCACT 1.

the invasion of his/her person by the defendant. If the defendant 'intends to cause bodily harm or knows, or ought to know, that such harm is the likely result of his actions', the defence does not apply.[23] Fox J in *McNamara v Duncan*[24] put these matters succinctly:

> I do not think it can be reasonably held that the plaintiff consented to receiving a blow such as he received in the present case. It was contrary to the rules and was deliberate. Forcible bodily contact is of course part of Australian Rules football, as it is with some other codes football, but such contact finds justification in the rules and usages of the game. Winfield (op cit) says (at 748) in relation to a non-prize fight, 'a boxer may consent to accidental fouls, but not to deliberate ones'. Street on Torts (4th ed p 75) deals with the presumed ambit of consent in cases of accidental injury 'A footballer consents to those tackles which the rules permit, and, it is thought to be those tackles contravening the rules where the rule infringed is framed to maintain skill of the game: but otherwise if his opponent gouges out an eye or perhaps even tackles against the rules and dangerously.' Prosser Law of Torts (3rd ed p 103) says, 'One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the rules of the game' *[References omitted]*.

[22] *Rogers v Budgen* (unreported, 14 February 1990 Supreme Court of New South Wales) and on appeal at (1993) Aust Torts Reports 81-246 at page 62-545.

[23] *Giumelli* v *Johnston* (1991) Aust Torts Reports 81-085, per King CJ, at 68,709.

Assessment of damages – Trespass and Negligence

Where negligence or trespass is established damages award may include medical expenses, loss of earnings, past and future, disfigurement, pain and suffering (covering physical pain, worry, frustration and anxiety) and loss of amenities. The latter head of damage allows additional payment for the loss of a superior skill, such as a sporting skill. The amount of common law damages that may be awarded is subject to assessment by the court, the intention being that the plaintiff will receive damages that closely approximate, in monetary terms, his or her actual loss. Not surprisingly an award of damages to a professional sportsperson has the potential to be significant.

It should be observed that unless a plaintiff can establish all of the elements of negligence or trespass, the common law provides no remedy. In these circumstances Parliament sometimes legislates to provide benefits in the form of statutory compensation to certain persons who sustain injury. This aspect is discussed in another article published by the authors.[25]

[24] (1976) 26 ALR 584 at 588, followed in *Sibley v Milutinovic* [1990] ACTC 6. assault by blow to the face during a 'friendly' soccer game and *Smith v Emerson* [1986] ACTSC 36 assault by blow to the jaw during a tackle in a Australian Rules football game.

[25] See the article in this issue on 'Sports Injuries and the Right to Compensation'.