

RESEARCH ARTICLE

Vicarious liability and the beautiful game – liability for professional and amateur footballers?

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Abstract

Vicarious liability has a greater reach within both professional and amateur football than previously thought. The newly-expanded doctrine has opened up vicarious liability for amateur players, and within grassroots teams. A greater range of torts may also now trigger vicarious liability, such as acts of on and off-pitch violence. The Football Association will need to review the scope of the National Game Insurance Scheme, which significantly lags behind this expanded exposure to vicarious liability.

Examining vicarious liability in the context of football also reveals significant problems with the current approach to vicarious liability within unincorporated associations. This category developed in the context of institutional abuse within highly-organised religious institutions; it does not mean that this category of vicarious liability should be applied to grassroots sporting organisations in the same way. For instance there is scope to apply a different test at stage two. It is argued that the courts will need to tighten up this category so as not to unnecessarily expose members of grass roots organisations to vicarious liability which is able to be executed against their personal assets. Both amateur and professional clubs may also wish to carefully consider their selection of players.

Keywords: sports law; vicarious liability; tort

Introduction

Football is the UK's most popular sport, with an estimated one in five adults in England (8.2 million adults) participating.¹ There are over 119,000 teams (1.8 million players) playing in over 1200 leagues, within the remit of the Football Association,² with the top tier of Premier League teams at one end, and informal, local grassroots clubs, many of whom are affiliated with a local pub, at the other. Football, as well as providing exercise, and entertainment for many, has been compared with a religion.³ Many people derive part of their identity through participation in the game, or support of a team. It is a game of great rivalries. Sadly football-related injuries are not uncommon.⁴ Many will result from accidents, others as a result of negligence, and deliberate conduct with intent to injure. This ranges from poorly-timed hard tackles, to on-pitch head-butts. Such conduct and injuries may

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¹Figures taken from <http://www.thefa.com/news/2015/jan/29/football-participation-on-rise> (last accessed 23 May 2018).

²Football Association 'The FA national game, state of the game in numbers 2015' at 1–5.

³R Coles 'Football as a surrogate religion' in M Hill (ed) *A Sociological Yearbook of Religion in Britain* (London: SCM, 1975) p 3.

⁴Eg J Ekstrand, M Häggglund and M Waldén 'Injury incidence and injury patterns in professional football' (2009) 45 *British Journal of Sports Medicine* 553.

occur at all levels of the game, both professional and amateur. This conduct may also occur off-pitch; player violence does not stop at the touch line. The beautiful game may also have an ugly face.

Much of this conduct will result in a compensable tort. However, in many cases the tortfeasor will be a person of straw with insufficient assets to pay damages and legal costs. Vicarious liability offers claimants an opportunity to make claims against solvent defendants. It is important to review how the doctrine meets the challenges of football-related torts, within both the professional and amateur game, and its impact upon the game.⁵

Vicarious liability for football players has been given little detailed treatment,⁶ and the treatment that it has received is now ripe for review given significant recent changes to the law of vicarious liability.⁷ It is commonly used in claims concerning professional footballer tortfeasors, but so far it has not been thought to be applicable to amateur players.⁸ This article sets out to demonstrate that the reach of vicarious liability is expanding within both the professional and amateur games, and is greater than previously thought. The expansion of vicarious liability at both the first and second stages significantly broadens its role in dealing with on- and off-pitch acts of both amateur and professional players.

In the context of this expansion it is clear that there is a need for the Football Association to review the National Game Insurance Scheme. There appear to be significant omissions in the coverage provided. This is of particular concern in the context of unincorporated grassroots clubs where members may be sued in a personal capacity. Amateur clubs should consider incorporation, to reduce the exposure of their members to claims, and asset protection to protect the assets necessary for their survival.

More generally, we may also learn much about vicarious liability by applying it within the context of football. The context of small grassroots unincorporated amateur clubs is also used to demonstrate how the expanded doctrine of vicarious liability has gone too far, and now significantly exposes amateur players to liability for the torts of their fellow players. The category of vicarious liability within unincorporated associations needs to be restricted.

Tort and sport

It is often stated that the first English reported personal injury claim brought by one sporting participant against another was *Condon v Basi*,⁹ which occurred in the context of an amateur football match. This is, however, not correct; whilst personal injury claims arising out of injuries sustained through sporting activities were not unknown prior to 1985,¹⁰ claims between fellow participants were exceedingly rare – they were the exception rather than the rule.¹¹ *Condon v Basi*, however, is the first English authority which sets out the standard of care applicable between participants.¹² Since this landmark

⁵For an introduction to a contextual approach see W Twining *Law in Context, Enlarging A Discipline* (Oxford: Clarendon Press, 1997) ch 3; P Selznick 'Law in context revisited' (2003) 30 JLS 177; R Cranston 'Law and society: a different approach to legal education' (1978–79) 5 MULR 54.

⁶What has been written generally occurs within broader chapters on sports law/torts: eg N Cox 'Civil liability for foul play in sport' (2003) 54 NILQ 351 at 366–367; M James *Sports Law* (Basingstoke: Palgrave, 2nd edn, 2013) pp 81–83; S Gardiner et al *Sports Law* (Abingdon: Routledge, 4th edn, 2012) pp 505–506; S Gardiner *Sports Law in the United Kingdom* (Netherlands: Wolters Kluwer, 2014) pp 34–35. For a notable exception see M James and D McArdle 'Player violence, or violent players? Vicarious liability for sports participants' (2004) 12 TLR 131. Note that non-player employee liability is already dealt with in much of the vicarious liability literature, and (non-player) volunteer liability has been dealt with elsewhere.

⁷*Ibid*, James and McArdle, predates the application of the *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215 jurisprudence to the sports field and also many significant changes to the law of vicarious liability.

⁸*Gravil v Carroll* [2008] EWCA Civ 689, [2008] ICR 1222; James, above n 6, p 81.

⁹[1985] 1 WLR 866 at 867 per Lord Donaldson MR; James, above n 6, p 69.

¹⁰*Simms v Leigh Rugby Football Club Ltd* [1969] 2 All ER 923; *Wright v Cheshire County Council* [1952] 2 All ER 789; *Cleghorn v Oldham* (1927) 43 TLR 465; *Wooldridge v Sumner* [1963] 2 QB 43; *Wilks v Cheltenham Homeguard Motor Cycle & Light Car* [1971] 1 WLR 668; *Bolton v Stone* [1951] AC 850.

¹¹*Brewer v Delo* [1967] 1 Lloyd's Rep 488; *Lewis v Brookshaw* [1970] 120 NLJ 413; there is also an Irish case: *McComiskey v McDermott* [1974] IR 75.

¹²[1985] 1 WLR 866 at 867 per Lord Donaldson MR.

case thousands of claims have been brought for personal injuries sustained through sporting activities, across a wide range of sports and at all levels of participation.¹³ Sports personal injury litigation has subsequently been seen as a significant field of legal practice.¹⁴

Not all sporting injuries caused by another player will ground a successful claim in tort. Risk is an inherent part of many sports, including football.¹⁵ It cannot be completely eliminated, and ‘it can be part of the fundamental attraction to that sport in the first place’.¹⁶ Within contact sports players assume the risk of a range of contact injuries which occur in the absence of negligence.¹⁷ As stated by Dyson LJ in *Blake v Galloway*: ‘the participants are taken impliedly to consent to those contacts which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts ... But they do not assume “the risk of a savage blow out of all proportion to the occasion”’.¹⁸ Thus a football player consents to a tackle within the rules of the game, and also to some foul tackles, but does not consent to a head-butt, or a deliberately violent tackle with intent to injure. Further, this consent is not the same as consent to a breach of a duty of care. A sporting participant accepts the inherent risks of the sport, but does not consent to negligence.¹⁹

In determining whether a sporting participant is negligent courts take into consideration the fast paced nature of sport, and that decisions may have to be made very quickly.²⁰ The utility of the sporting activity is also considered at the breach of duty stage.²¹ Negligence is not the same as foul play or breaches of the rules of the game; not all injuries that result from foul play will found a cause of action in tort.²² Nevertheless, there is an established body of case law in which negligence has been found in the context of football injuries. These commonly occur in the context of poorly-timed tackles.²³

Whether the sporting injuries result from negligence or deliberate wrongs determines the cause of action. The claims are typically brought either in negligence or trespass to the person. However, given that generally one cannot insure oneself for an intentional tort,²⁴ and since the insurance of clubs might not include coverage for deliberately inflicted injuries,²⁵ negligence is usually the preferred cause of action.²⁶ This preference towards framing cases in negligence is reinforced by difficulties in proving the intent required for a successful action in trespass to the person.²⁷ However, given the recent abuse scandal in football, increasing attention is also being paid to off-pitch conduct and intentional torts. A player who assaults or sexually abuses another is personally liable for trespass to the person.

Whilst many claims in a football context are brought against the tortfeasor, given the need to find a solvent or insured defendant, increasing attention is being paid to bringing in other defendants. This is a particularly important in the context of amateur football where participants may be

¹³James, above n 6, p 69.

¹⁴Eg T Kevan, D Adamson and S Cottrell *Sports Personal Injury: Law and Practice* (London: Sweet and Maxwell, 2002).

¹⁵Cox, above n 6, at 354.

¹⁶Baroness Grey-Thompson ‘Duty of care in sport: independent report to government’ (April 2017) at 26.

¹⁷M Jones (ed) *Clerk and Lindsell on Torts* (London: Sweet and Maxwell, 21st edn, 2014) paras [3-119]–[3-120].

¹⁸[2004] EWCA Civ 814, [2004] 1 WLR 2844 at [21].

¹⁹*Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB), [2004] PIQR P25.

²⁰*Caldwell v Maguire* [2001] EWCA Civ 1054, [2002] PIQR P6.

²¹*Bolton v Stone* [1951] AC 850; Compensation Act 2006, s 1; Social Action, Responsibility and Heroism Act 2015, s 2; cf R Mulheron ‘Legislating dangerously: bad samaritans, good society, and the Heroism Act 2015’ (2017) 80 MLR 88; J Goudkamp ‘Restating the common law? The Social Action, Responsibility and Heroism Act 2015’ (2017) 37 LS 577.

²²*Caldwell v Maguire* [2001] EWCA Civ 1054, [2002] PIQR P6; *Condon v Basi* [1985] 1 WLR 866; D Griffith-Jones and N Randall ‘Civil liability arising out of participation in sport’, ch H7 in A Lewis and J Taylor *Sport: Law and Practice* (Haywards Heath: Bloomsbury, 3rd edn, 2014) para [H7.48].

²³Eg *McCord v Cornforth and Swansea City Football Club* (1997) Times, 11 February; *Watson and Bradford City Football Club v Gray and Huddersfield Town Football Club* (1998) Times, 26 November.

²⁴Eg *KR v Royal Sun Alliance* [2006] EWCA Civ 1454, [2007] Lloyd’s Rep IR 368; *Beresford v Royal Exchange Assurance* [1938] AC 586.

²⁵M Beloff et al *Sports Law* (Oxford: Hart, 2nd edn, 2012) para [5.82].

²⁶Note *Elliott v Saunders and Liverpool Football Club* (10 June 1994, unreported) High Court.

²⁷Griffith-Jones and Randall, above n 22, para [H7.2].

more likely to be persons of straw who have insufficient assets or insurance to meet claims, although some players may have their sporting negligence covered by their home insurance policy. Further, insurance may not cover the full damages in the case of serious life changing injuries; for example in *Vowles v Evans and Welsh Rugby Union*²⁸ the defendant's insurance covered only £1 million of the £1.8 million damages.²⁹ As we will see below, with the standard policy of insurance involved in the amateur game, most player to player injuries will lead to an insurance shortfall.

Vicarious liability offers an opportunity for a claimant to reach a solvent or insured defendant other than the impecunious tortfeasor.³⁰ However, it should be noted that where B commits a tort against C, vicarious liability is not the only way of claiming against a third party (A). B's tort may place A in breach of a direct duty of care to C to select, train, and monitor B,³¹ or A may have a non-delegable duty to the victim, the performance of which A cannot delegate to another. The latter is becoming increasingly important for injuries arising in the context of school sports.³² In attempts to find solvent defendants claims have also been brought against match officials,³³ vicariously against governing bodies for the acts of match officials,³⁴ coaches (and their employers),³⁵ and against sports governing bodies.³⁶

On the move

Vicarious liability is a doctrine 'on the move'³⁷ which 'has not yet come to a stop'.³⁸ The doctrine makes one party, A, strictly liable for the torts of another, B. There are two stages to establishing vicarious liability. First, there must be a relationship between A and B which is sufficient to trigger the doctrine; secondly, the tort committed by B must be sufficiently connected with that relationship to render A vicariously liable for the tort.³⁹ The classic relationship that triggers vicarious liability is that of employment, however some other relationships are also sufficient.

Stage two in the football context

In recent years, driven by cases concerning institutional abuse, vicarious liability has significantly expanded in scope. The first wave of vicarious liability abuse cases occurred in an employment context and concerned the sufficiency of connection stage (the second stage). What acts could an employer be vicariously liable for? Influenced by the Canadian jurisprudence,⁴⁰ particularly enterprise liability, the House of Lords in *Lister v Hesley Hall*⁴¹ and *Dubai Aluminium Co Ltd v Salaam*⁴² expanded the remit

²⁸[2003] EWCA Civ 318, [2003] 1 WLR 1607.

²⁹James and McArdle, above n 6, at 144, fn 32.

³⁰P Cane *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 7th edn, 2006) p 230.

³¹*Eg Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158; *MM v Newlands Manor School* [2007] EWCA Civ 21, [2007] ELR 256 (junior rugby: overage, oversize player selected for team).

³²*Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537. See generally R Stevens 'Non-delegable duties and vicarious liability' in J Neyers, E Chamberlain and S Pitel (eds) *Emerging Issues in Tort Law* (Oxford: Hart, 2007) ch 13; J Morgan 'Vicarious liability for independent contractors?' (2015) 31 PN 235.

³³*Smoldon v Whitworth & Nolan*, [1997] ELR 249; *Allport v Wilbraham* [2004] EWCA Civ 1668.

³⁴*Vowles v Evans and Welsh Rugby Union* [2003] EWCA Civ 318, [2003] 1 WLR 1607.

³⁵*Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 WLR 235

³⁶*Watson v British Boxing Board of Control Ltd* [2001] QB 1134; *Wattleworth v Goodwood Road Racing Co Ltd*, above n 19; *Agar v Hyde* [2000] HCA 41, 201 CLR 552. Note also the *Charleroi* litigation concerning a claim by a Belgian club against FIFA in relation to player injury during an international match; this led to FIFA and UEFA making provision for compensation to clubs in future international competitions.

³⁷*Various Claimants v Catholic Child Welfare Society* ('CCWS') [2012] UKSC 56, [2013] 2 AC 1 at [19] per Lord Phillips.

³⁸*Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 at [1] per Lord Reed.

³⁹P Morgan 'Vicarious liability on the move' (2013) 129 LQR 139, approved by *Allen & Others v The Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967 at [17] per Gross LJ.

⁴⁰Particularly *Bazley v Curry* [1999] 2 SCR 534.

⁴¹[2001] UKHL 22, [2002] 1 AC 215.

⁴²[2002] UKHL 48, [2003] 2 AC 366 at [23] per Lord Nicholls.

of vicarious liability by introducing the ‘close connection’ test. The starting point for this second stage is now the speech of Lord Steyn in *Lister* as developed by Lord Nicholls in *Dubai Aluminium*:

the wrongful conduct must be so closely connected with acts the ... employee was authorised to do that, for the purpose of the liability of the ... employer to third parties, the wrongful conduct may fairly and properly be regarded as done ... while acting in the ordinary course of ... the employee’s employment.⁴³

This test has been repeatedly upheld by the Supreme Court.⁴⁴ Prior to *Lister*, cases concerning vicarious liability for sexual abuse had failed on the Salmond test.⁴⁵ Cases concerning vicarious liability for deliberate acts of violence also typically failed on this test.⁴⁶ From *Lister* onwards sexual abuse could fulfil this second stage. The expanded approach also catches some deliberate acts of employee violence committed in the workplace, or outside.⁴⁷

It is important to note that this expansion is not confined to sexual abuse cases. Where abuse cases lead, other cases soon follow.⁴⁸ *Lister*, a case concerning abuse in a residential school setting, was soon followed by *Dubai Aluminium*⁴⁹ a case concerning commercial fraud. The abuse case of *Maga v Birmingham Roman Catholic Archdiocese Trustees*⁵⁰ was followed seven months later by the commercial case of *Brink’s Global Services Inc v Igrox Ltd*.⁵¹ This is also the case with the first stage of vicarious liability, *JGE v English Province of Our Lady of Charity*⁵² and *Various Claimants v Catholic Child Welfare Society*, (CCWS),⁵³ both abuse cases, have subsequently been followed in a non-abuse context in *Cox v Ministry of Justice*.⁵⁴

On- and off-pitch negligence

It is well established that there is vicarious liability on the part of a club for a professional footballer’s on-pitch negligence, for instance for poorly-timed tackles that cause serious injuries.⁵⁵ As a consequence clubs do not contest the potential application of vicarious liability in this context, and it is not uncommon for the tortfeasor player not to be listed as a defendant.⁵⁶ Instead clubs typically contest the claims on the basis that the employee player was not negligent. The same should be the case if

⁴³Ibid.

⁴⁴CCWS; *Cox*, above n 38; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11, [2016] AC 677.

⁴⁵*ST v North Yorkshire County Council* [1999] LGR 584.

⁴⁶*Eg Keppel Bus Company v Sa’ad bin Ahmad* [1974] 1 WLR 1082; *Daniels v Whetstone Entertainments* [1962] 2 Lloyd’s Rep 1; *Warren v Henlys Ltd* [1948] 2 All ER 935; F Rose ‘Liability for an employee’s assaults’ (1977) 40 MLR 420. There were, however, some rare exceptions to this rule: *Fennelly v Connex South Eastern Ltd* [2001] IRLR 390; *Vasey v Surrey Free Inns Plc* [1996] PIQR P373; *Pettersson v Royal Oak Hotel* [1948] NZLR 136.

⁴⁷*Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158; *Bernard v The Attorney General of Jamaica* [2004] UKPC 47, [2005] IRLR 398; *Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25, [2012] IRLR 307; *Yeung Mei Hoi v Tam Cheuk Shing* [2015] 2 HKLRD 483, [2015] HKEC 403; *Brown v Robinson* [2004] UKPC 56; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11, [2016] AC 677.

⁴⁸P Morgan ‘Revising vicarious liability: a commercial perspective’ [2012] LMCLQ 175, accepted in *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 at [56] per Ward LJ.

⁴⁹[2002] UKHL 48, [2003] 2 AC 366,

⁵⁰[2010] EWCA Civ 256, [2010] 1 WLR 1441.

⁵¹[2010] EWCA Civ 1207, [2011] IRLR 343.

⁵²[2012] EWCA Civ 938, [2013] QB 722.

⁵³[2012] UKSC 56, [2013] 2 AC 1.

⁵⁴*Cox*, above n 38.

⁵⁵*Elliott v Saunders and Liverpool Football Club*, above n 26; *McCord v Cornforth and Swansea City Football Club* (1997) Times, 11 February; *Watson and Bradford City Football Club v Gray and Huddersfield Town Football Club* (1998) Times, 26 November; *Pitcher v Huddersfield Town Football Club* (2001) WL 753397; *Gaynor v Blackpool Football Club* [2002] CLY 3280.

⁵⁶Ibid, *Pitcher v Huddersfield Town Football Club* and *Gaynor v Blackpool Football Club*.

an employer of a professional footballer asks them to act as the referee or as a linesman in a training match, and the alleged negligence is committed in that capacity.

The employer may be vicariously liable for on-pitch negligence where the employee is not a professional footballer, but nevertheless the match is part of an employee's duties, or associated with them, for instance where football forms part of an extracurricular element of training which the employee is undertaking,⁵⁷ or where the employer has organised the tournament.⁵⁸

It is also clear that vicarious liability applies where the off-pitch negligence relates to the player's employment, for instance negligence occurring during off-pitch training, or negligently leaving kit in a dangerous place in the changing rooms, which causes injury to a teammate.

On-pitch deliberate acts

There are a number of infamous instances of on-pitch deliberate violence.⁵⁹ On-pitch deliberate acts may vary from deliberately violent tackles, to punches with intent to injure whilst the ball is not in play. A wide range of on-pitch deliberate acts will trigger vicarious liability.

Beloff et al state that if a (rugby) player deliberately inflicts an injury on another player, he will have committed an assault and the club will be unlikely to be held vicariously liable.⁶⁰ This, as we will see below, is not correct. First, for this proposition they rely on pre-*Lister* authority,⁶¹ when the second stage of vicarious liability was substantially different. Prior to *Lister* vicarious liability for violent acts was very rare,⁶² although vicarious liability for on-pitch violence was not unheard of.⁶³ Secondly, Beloff fails to take into account recent vicarious liability authorities concerning violent employees, and sporting violence, such as *Gravil v Carroll*.⁶⁴

In *Gravil v Carroll*⁶⁵ the Court of Appeal held that Redruth RFC was vicariously liable for an on-pitch punch thrown during an altercation following a scrum, after the whistle had been blown. The punch was thrown by a semi-professional rugby player, who was employed by the club. Whilst the tortfeasor's primary employment was outside the club, and the contracts were entered into primarily to stop players from being poached by other clubs, the tortfeasor was treated as an employee for the purposes of vicarious liability.

The Court of Appeal noted that when the tortfeasor punched the claimant, although he was in breach of his contract of employment, he was taking part in a melee of kind common in rugby matches, notwithstanding the fact that the whistle had gone. They considered that it was part of the game, and that the throwing of punches is not uncommon. They thus held that there was a very close connection between the punch and the employment. They further held that it would be fair and just for club to be held liable.

Whilst the decision was in a rugby context, it would equally apply in a football context. Whilst violence may be more prevalent on-pitch with rugby, when compared with football, on-pitch violence in football is not unheard of. As with rugby, on-pitch violence in football is a 'reasonably incidental risk'.

⁵⁷*Sharp v Highland and Islands Fire Board* [2005] SLT 855.

⁵⁸*Leebody v Ministry of Defence* [2001] CLY 4544.

⁵⁹Well known examples include: Rangers' Duncan Ferguson's head-butt of Raith Rovers' John McStay, which resulted in a three-month prison sentence ('Soccer player jailed for foul play' *The Independent*, 11 October 1995); Nottingham Forest's Kenny Burns' deliberate head-butt of Arsenal's Richie Powling Burns (<http://www.dailymail.co.uk/sport/football/article-3272919/Nottingham-Forest-legend-film-star-Kenny-Burns-reveals-tricks-trade-d-hacksaw-studs-stuck-better-skin-nowadays-physical-contact-shop-Asda.html#ixzz4gm83DLix> (last accessed 23 May 2018)); Wimbledon's Vinnie Jones' famous testicle squeeze of Newcastle's Paul Gascoigne; Manchester United's Roy Keane's infamous tackle of Manchester City's Alf Inge Haaland (Keane claims that he intended to hurt Haaland, but not to injure him) (<https://www.theguardian.com/football/2014/oct/06/roy-keane-alf-inge-haaland-book> (last accessed 23 May 2018)).

⁶⁰Beloff et al, above n 25, para [5.81].

⁶¹*Racz v Home Office* [1994] 2 AC 45; *Makanjuola v Commissioner of Police for the Metropolis* [1989] 2 Admin LR 214.

⁶²See above n 46.

⁶³*Rogers v Bugden and Canterbury Bankston Club* [1993] Aust Torts Rep 181.

⁶⁴[2008] EWCA Civ 689, [2008] ICR 1222.

⁶⁵*Ibid.*

Further, the justifications provided by the Court of Appeal would equally apply to football. The Court of Appeal considered that liability would provide for an adequate and just remedy for the claimant, alongside providing for deterrence on the club to prevent or minimise future risks of foul play. They further noted that it would encourage clubs to be proactive in reducing foul play, and to avoid the temptation to turn a blind eye to it. They also noted that clubs may benefit from playing hard in order to win, and that the line between this and playing dirty is a fine one.⁶⁶ These are all references to classic justifications for vicarious liability: deep pockets and loss spreading, deterrence, and enterprise liability.⁶⁷

From the tenor of the judgment, if the conduct had extended as far as Luis Suárez's on-pitch biting of opponents,⁶⁸ that vicarious liability would have been held to be present is not certain, however, the justifications for liability advanced by the Court would point towards vicarious liability in such a case. Further, in the light of more recent case law (see below), this article suggests that there would appear to be vicarious liability for such acts.

In the light of recent case law concerning violence against authority figures in the context of receiving instructions in the workplace,⁶⁹ it is likely that on-pitch violence against a referee in reaction to an unfavourable ruling would also trigger vicarious liability. This is reinforced by the tension and pressure inherent in the competitive match environment. Likewise if a club encourages aggressive behaviour in a player outside of the rules of the game, for instance by instructing them to act as an on-pitch 'enforcer' (a role traditionally found in ice hockey, and basketball) who uses violence or the threat of violence to discourage violence against their teammates, or instructs players to implement a policy of simultaneous retaliation if violence is displayed towards any of their teammates, vicarious liability for their on-pitch acts of violence is likely.⁷⁰

Off-pitch deliberate acts

It is important to also deal with off-pitch acts, since vicarious liability does not stop at the touchline, or when the final whistle is blown. This category of wrongs contains a wide variety of potential acts and torts, ranging from changing room violence towards teammates immediately after a match, to post-match car park brawls against the opposing team's players, to the sexual abuse of youth players or fans. Not all such acts will trigger vicarious liability.

There is no vicarious liability where, for instance, an 'off duty' player assaults a fan in a nightclub who has just insulted them for poor play, even though players are encouraged to be role models on and off the pitch, and the insult was triggered by the poor performance of the player's job.

The existing authorities suggest that vicarious liability would not be present in the situation where a player uses his status to place himself in a position where he is able to rape or sexually abuse a member of the public, who he has not met in the context of club activities, unless the player was tasked with engaging with members of the public for the purposes of the club.⁷¹ However, in the light of recent case law exactly where the line is drawn is increasingly unclear. We must now turn to the only decision that deals with vicarious liability for off-pitch acts in a football context.

⁶⁶Ibid, at 1231–1232.

⁶⁷For discussion of these justifications see R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007) pp 258–259; D Brodie 'Enterprise liability: justifying vicarious liability' (2007) 27 OJLS 493; D Brodie *Enterprise Liability and the Common Law* (Cambridge: Cambridge University Press, 2010); P Giliker 'Making the right connection: vicarious liability and institutional responsibility' [2009] TLJ 76; P Giliker *Vicarious Liability in Tort, A Comparative Perspective* (Cambridge: Cambridge University Press, 2010); P Atiyah *Vicarious Liability in the Law of Torts* (Butterworths: London, 1967); P Morgan 'Recasting vicarious liability' (2012) 71 CLJ 615; J Neyers 'A theory of vicarious liability' (2005–2006) 43 Alta L Rev 287.

⁶⁸<http://www.bbc.co.uk/sport/football/28023882> (last accessed 23 May 2018).

⁶⁹*Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25, [2012] IRLR 307; *Yeung Mei Hoi v Tam Cheuk Shing* [2015] 2 HKLRD 483, [2015] HKEC 403.

⁷⁰*Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158.

⁷¹*Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256, [2010] 1 WLR 1441; *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB); P Morgan 'Distorting vicarious liability' (2011) 74 MLR 932.

*GB v Stoke City Football Club Ltd*⁷² concerned allegations as to inappropriate methods that professional footballers had used to ‘discipline’ apprentice footballers. The apprentices carried out menial tasks for the players. The claimant alleged that he had been disciplined on two occasions with ‘the glove’ due to a failure to make the tea hot enough for the professional players, and secondly due to having given an erroneous line call when acting as a linesman. The glove involved a player putting on a goalkeeper’s glove, and applying deep heat to the victim’s backside and inserting a finger into the victim’s anus. Judge Butler had to decide whether the claimant was ‘gloved’, and secondly, if so, whether the club was vicariously liable. The club correctly conceded that the relationship between employer club and employee player satisfied stage one of vicarious liability.

Judge Butler considered that given the long passage of time that the picture was so obscured that he was unable to find that the assaults took place. However, he was keen to stress that the Court did not find that the assaults did not take place,⁷³ and that the full truth was not revealed by the trial. Given that the allegations were not proven the treatment of vicarious liability in this case is obiter.

Judge Butler applied *Lister* and *CCWS*. He noted that the second defendant was president of the club’s youth fan club, and that if he had assaulted a youth supporter in the course of performing this role, vicarious liability would be present.⁷⁴

The judge noted that the players, including the club captain, did not have express or implied authority to train, discipline, or chastise the apprentices. Guided by the decision of the Court of Appeal in *Mohamud v Wm Morrisons Supermarkets plc*,⁷⁵ which refused to hold an employer vicariously liable for an unprovoked attack by a petrol station employee upon the claimant, Judge Butler⁷⁶ drew upon Treacy LJ’s position in *Mohamud* that:

[t]he mere fact that the employment provided the opportunity, setting, time and place for the tort to occur is not necessarily sufficient ... [S]ome factor or feature going beyond interaction between the employee and the victim is required ... such as the granting of authority, the furtherance of an employer’s aims, the inherence of friction or confrontation in the employment and the additional risk of the kind of wrong occurring.⁷⁷

Judge Butler noted that it was not possible to distinguish *Mohamud* on the ground that the person assaulted was a member of the public, rather than a fellow employee, since it is the connection between the tort and the employment relationship that is key, rather than the victim’s status.⁷⁸

He also examined the decisions in *Wallbank v Wallbank Fox Designs Ltd* and *Weddell v Barchester Healthcare Ltd*,⁷⁹ both of which concern vicarious liability for employee violence, and he followed the interpretation taken by the Court of Appeal in *Mohamud*⁸⁰ which rationalised the two decisions that vicarious liability could be present where one employee assaults another where the tortfeasor has been ‘given duties involving the clear possibility of confrontation’.⁸¹

Whilst the apprentices performed menial duties for the professional players, Judge Butler refused to find vicarious liability, since to do otherwise would be to expand the boundaries of the doctrine. The judge considered that if vicarious liability were found in the present case ‘such a finding would be little

⁷²[2015] EWHC 2862 (QB).

⁷³At [136]–[141].

⁷⁴At [148].

⁷⁵[2014] EWCA Civ 116, [2014] 2 All ER 990.

⁷⁶[2015] EWHC 2862 (QB) at [149].

⁷⁷At [46].

⁷⁸At [150].

⁷⁹[2012] EWCA Civ 25, [2012] IRLR 307.

⁸⁰At [35].

⁸¹*Mohamud* at [35] per Treacy LJ.

short of holding that any employer should be vicariously liable for any assault on any apprentice or trainee by a full-time employee in all circumstances'.⁸²

Judge Butler acknowledged that the position would be different if formal duties or powers were granted to the player, over the apprentices.⁸³ This suggests that if the acts had been committed by the apprentice's coach there would be liability. This produces an authority approach to acts of discipline or abuse, meaning that there is vicarious liability where there is authority over the victim, and no vicarious liability where there is not.

However, the reliance in *Stoke* on the now overruled decision of the Court of Appeal in *Mohamud* leaves this part of the decision in *Stoke* in doubt. The Supreme Court in *Mohamud* imposed liability on the employer and embraced an expansionary approach to vicarious liability. The decision of the Supreme Court does not require a position of authority or duties that involve the clear possibility of confrontation, for vicarious liability to be present.

Post-Mohamud?

In *Mohamud v Wm Morrison Supermarkets Plc*⁸⁴ the tortfeasor (K) was a petrol station employee. The claimant went into the kiosk and asked K if it was possible to print documents. K racially abused him and ordered him to leave. The claimant returned to his car, and K followed him out. Before the claimant could drive off, K subjected the claimant to a vicious assault, ignoring his supervisor's instructions to stop. The Supreme Court expanded the scope of the close connection test, holding that the assault was closely connected with K's employment.

Lord Toulson, giving the lead judgment, stated that the Court should consider what functions were entrusted to the employee which 'must be addressed broadly', and secondly whether 'there was sufficient connection between the position ... and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice'.⁸⁵ He held that attending to customers and responding to inquiries was part of K's job. K's answer and telling the claimant to leave were within 'the field of activities' assigned to K. The events that followed were an 'unbroken sequence of events', a 'seamless event'.⁸⁶ K did not 'take off his uniform' in following the claimant onto the forecourt; he ordered the claimant not to return to his employer's premises, and reinforced this with violence.⁸⁷ Although K was motivated by racism, the Court considered it fair and just that the defendant be held liable for his acts.

Mohamud appears to replace close connection with a test of causal connection, provided there is an unbroken causal chain between the role and the tort. It seems that little is left of the mere opportunity qualification in *Lister*. The Supreme Court has been criticised in academic writing,⁸⁸ and by the High Court of Australia for doing so.⁸⁹ Whilst there has been an attempt by a first instance court to restrict the approach taken in *Mohamud*,⁹⁰ post-*Mohamud* it is likely that there will be broader liability for on-pitch acts. This will not just be for foul play, but also where for instance a player has an altercation with a spectator, for example the famous kung-fu kick incident where Eric Cantona attacked a taunting fan, after he had been sent off. The player plays for the team, and for the enjoyment of spectators,

⁸²At [161].

⁸³At [161].

⁸⁴[2016] UKSC 11, [2016] AC 677.

⁸⁵At [44]–[46].

⁸⁶At [47].

⁸⁷*Ibid.*

⁸⁸J Plunkett 'Taking stock of vicarious liability' (2016) 132 LQR 556; P Morgan 'Certainty in vicarious liability: a quest for a chimaera?' (2016) 75 CLJ 202; D Ryan "'Close connection" and "akin to employment": perspectives on 50 years of radical developments in vicarious liability' (2016) 56 IJ 239; S Chan 'Hidden departure from the *Lister* close connection test' [2016] LMCLQ 352.

⁸⁹*Prince Alfred College Incorporated v ADC* [2016] HCA 37.

⁹⁰*Bellman v Northampton* [2016] EWHC 3104 (QB).

during which time he may be vocally praised or damned by spectators. A match is a highly charged atmosphere. It is part of his job to continue playing to the best of his ability, and to ignore the taunts of the crowd. A violent response to a taunt received in the course of his duties is much more closely linked to his employment than the incident of racism which occurred in *Mohamud*, and is likely to be considered an unbroken sequence of events from play.

After *Mohamud* there is also likely to be much broader liability for off-pitch acts. Informal post-match discipline administered by teammates, for instance against a player who refused to pass the ball, or who stole another's goal, is now likely to be within the scope of vicarious liability.

Applying the approach taken by the Supreme Court in *Mohamud* to the facts of *Stoke*, rather than the approach of the Court of Appeal, would produce a different outcome. The apprentices played alongside the professional players in training matches and also carried out menial tasks for the players, such as cleaning their boots, or making their tea. Occasionally the players also played in training matches alongside the apprentices, or in which an apprentice would stand in as a linesman. Being the recipients of the menial services of the apprentices would be part of a player's job. Suggesting improvements to the apprentices when they make mistakes in their play or the delivering of these services would be within the field of activities assigned to a player, or if not, they would be likely to derive from an unbroken sequence of events which flows from the player's assigned activities. If, instead of a friendly word, this is done through harsh discipline, in the light of *Mohamud* this would appear to be a situation in which vicarious liability would be appropriate. It would be an unbroken sequence of events from the players receiving the apprentice's services, or playing alongside the apprentice.

There are still boundaries to the post-*Mohamud* approach to vicarious liability. The Supreme Court foresaw limits to the causal chain, stating that vicarious liability would not be present in the facts of *Warren v Henlys Ltd*.⁹¹ In *Warren v Henlys Ltd* a customer returned to a petrol station with a police officer to complain about the attendant's conduct. When the policeman said it was not a police matter, the customer said that he would report the attendant to his employer. The attendant hit the customer in response. The employer was held not to be vicariously liable. In the light of the Supreme Court's approval in *Mohamud* of the result in *Warren v Henlys Ltd* assaulting an abusive fan who one meets in a nightclub would be outside the scope of vicarious liability. Nevertheless the scope of the application of vicarious liability for both on- and off-pitch acts is extensive. Improvements in training, discipline, and safeguarding will be required from clubs in response. It is also recommended that clubs revisit their insurance policies and ensure that they cover the broad range of on- and off-pitch torts that its players (and employees) may commit which may trigger vicarious liability on the part of the club.

Stage one and liability for amateurs?

All of the vicarious liability cases that we have examined in detail so far have involved professional players, or employees taking part in a match as part of their employment. They fulfilled the requirements of stage one of vicarious liability. Employment is the classic category of relationship that triggers the application of vicarious liability. Given that amateur players may be less likely to be able to satisfy judgment when compared to professionals, whether or not vicarious liability applies to amateurs is significant.

Amateur players are not employees. However, what is employment for the purposes of vicarious liability is not necessarily the same as the meaning given to employment in other areas of law.⁹² In vicarious liability for instance, as demonstrated by the cases concerning borrowed employees and dual vicarious liability, an 'employer' does not need to have a contract of employment with their

⁹¹[1948] 2 All ER 935.

⁹²E McKendrick 'Vicarious liability and independent contractors – a re-examination' (1990) 53 MLR 770 at 784; R Kidner 'Vicarious liability: for whom should the "employer" be liable?' (1995) 15 LS 47; S Deakin, A Johnston and B Markesinis *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 6th edn, 2007) p 698; T Weir *An Introduction to Tort Law* (Oxford: Oxford University Press, 2nd edn, 2006) pp 107–108; Stevens, above n 67, p 268; *JGE* at [59] per Ward LJ. Cf Atiyah, above n 67, p 33.

‘employee’.⁹³ In one first instance Australian case the Court held that a club was vicariously liable for an amateur player, on the basis that an unpaid volunteer player was an ‘employee’ for the purposes of vicarious liability.⁹⁴ It is unlikely that an English court would follow this decision, and consider an amateur player an employee by overlooking the distinctions between this relationship and that of employment.⁹⁵ This is further reinforced by the fact that new categories of vicarious liability have arisen in English law which are more apt for such relationships (see below).

In *Gravil*⁹⁶ the player was a semi-professional playing for a non-profit club. The club was previously an amateur club, and the fees had been introduced to stop the poaching of players. Whilst the Court made it clear that their judgment only concerned the playing of a game under a contract of employment,⁹⁷ Sir Anthony Clarke MR considered that vicarious liability would not apply to amateur players and stated, obiter: ‘[i]t was only some ten years ago that clubs like Halifax and Redruth began to employ their players. We agree with the trial judge that until then no question of vicarious liability on the part of such clubs could have arisen’. Harris takes the position that *Gravil* generates a de facto immunity for clubs from vicarious liability for amateur players.⁹⁸ This would, however, produce the oddity that a club which had both semi-professional and amateur players would have vicarious liability for the former, but not the latter, even though they wear the same kit, play on the same team, in the same way, and are subject to the same chain of command. However, it is submitted that recent changes to the law of vicarious liability at stage one open up vicarious liability for the torts of at least some amateur players. We must now examine the categories of relationship which may trigger the operation of vicarious liability for amateur players.

Agency

Even prior to the recent abuse litigation, vicarious liability was not limited to employment. Vicarious liability may occur in ‘principal’ and ‘agent’ relationships. This is not agency in the sense meant by commercial lawyers, but rather a different concept.⁹⁹ It does not require the existence of any contract between the parties, and is typically found in cases of lending motor vehicles.¹⁰⁰

The category of vicarious liability for ‘agents’ is simply shorthand for a relationship sufficient to trigger vicarious liability.¹⁰¹ There is widespread criticism of the category.¹⁰² It appears to be a conclusion rather than a characteristic which triggers vicarious liability, and it is thus an unsatisfactory basis on which to base vicarious liability for amateur sportspersons. Nevertheless agency has been used to generate vicarious liability for amateur sportspersons in rowing. In *‘Thelma’ (Owners)*

⁹³Eg *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510.

⁹⁴*Kennedy v Pender & Narooma Rugby League Football Club* (2002, unreported) NSW District Court (cited by Kevan, Adamson, and Cottrell, above n 14, pp 16–17).

⁹⁵Whilst in *Vowles v Evans* the Welsh Rugby Union accepted that they would be vicariously liable for an amateur referee’s torts, such a tactical litigation concession (as similarly made in *Maga* in the context of a priest/bishop relationship) is not the same as accepting that this is an employment relationship, but rather that the relationship *may* be sufficient to trigger vicarious liability. In the light of the subsequent case of *Gravil* this concession made in *Vowles* may have been open to question at the time of the case as a matter of law, but this concession may have been necessary to maintain the goodwill of amateur referees, and their continued volunteering.

⁹⁶Above n 64.

⁹⁷At [41].

⁹⁸J Harris ‘A sporting chance’ (2012) 162 NLJ 1248 at 1249.

⁹⁹P Watts and F Reynolds (eds) *Bowstead and Reynolds on Agency* (London: Sweet and Maxwell, 20th edn, 2016) para [8-176].

¹⁰⁰Eg *Ormrod v Crossville* [1953] 1 WLR 1120; and *Launchbury v Morgans* [1973] AC 127, but not exclusively, see for instance *League Against Cruel Sports Ltd v Scott and Others* [1986] QB 240; *Moores v Bude-Stratton Town Council* [2001] ICR 271; and *S v Attorney General* [2003] NZCA 149.

¹⁰¹*Launchbury v Morgans* [1973] AC 127 at 135 per Lord Wilberforce.

¹⁰²Giliker *Vicarious Liability in Tort*, above n 67, p 110.

*v University College School*¹⁰³ school governors were held vicariously liable for the negligent act of a pupil who was acting as the cox of the school VIII. However, the court may have been influenced by the fact that agency has been used in vehicular cases. It is further distinguishable on the basis that the boat was owned by the school governors, and being used for their purposes.¹⁰⁴

However, a resort to agency is not representative of modern English vicarious liability case law. It is very unlikely that a modern court would resort to this category when considering the position of amateur players.

Akin to employment

The development of a new category of relationship sufficient to trigger vicarious liability, ‘akin to employment’, offers a promising route for claimants who wish to establish vicarious liability for amateur players.¹⁰⁵

There is a degree of uncertainty as to which relationships may trigger vicarious liability.¹⁰⁶ Vicarious liability can plainly now exist outside employment.¹⁰⁷ Prior to *JGE*¹⁰⁸ such forms of vicarious liability could only be described as residual. In *JGE* the Court of Appeal in the context of a relationship of Priest/Diocesan Bishop of the Roman Catholic Church chose to extend vicarious liability to relationships ‘akin to employment’. In *CCWS*¹⁰⁹ the Supreme Court, again in the context of an abuse case, confirmed the existence of this category of vicarious liability, and applied it to the Institute of the Brothers of the Christian Schools, holding the Institute liable for its brothers. The Institute is headed by a Superior General, and divided into provinces headed by a ‘Provincial’. The Institute is a Roman Catholic ‘lay community of teachers’, who swear lifelong vows of poverty, chastity, and obedience, live under a strict and detailed rule of conduct and wear habits. Members are addressed as ‘Brother’. A brother is a ‘lay’ religious and cannot be ordained as a priest; his ministry is to educate his students as Christians in secular subjects as well as in religion. Within provinces brothers live in communities headed by a director. The vow of obedience taken by a brother carries the obligation to obey their superiors, including the Provincial and their communities’ director. It was an agreed fact that ‘if a brother was sent to a school managed by a third party, the institute’s control over his life remained complete’.¹¹⁰

Lord Phillips, giving the sole judgment of the Court, accepted, following *JGE*, that vicarious liability is present in relationships ‘akin to employment’, where although a contract of employment is absent the relationship has the ‘same incidents’ as employment.¹¹¹ He considered that control is an important factor, although not the ‘touchstone’. In addition, whether the tortfeasor works on his own, or on the principal’s behalf, the centrality of his activities to the ‘employer’, and whether or not they are integrated into the ‘employer’s’ enterprise, should be considered in making the determination.¹¹²

The Supreme Court again applied the ‘akin to employment’ category, this time outside the context of abuse litigation in *Cox*;¹¹³ however, in this case the Court distilled the essence of the category in such a way that it will encompass some amateur sportspersons. In *Cox*, the claimant was a prison catering manager. A prisoner working in the prison kitchen negligently injured her in the course

¹⁰³[1953] 2 Lloyd’s Rep 613.

¹⁰⁴Note Judge Thomas, at 618.

¹⁰⁵The author is not alone in suggesting that this category may generate vicarious liability for amateur sportspersons, see Griffith-Jones and Randall, above n 22, para [H7.17].

¹⁰⁶*Cox*, above n 38; *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [2016] QB 739; *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB).

¹⁰⁷See Morgan, above n 67, at 625–640.

¹⁰⁸[2012] EWCA Civ 938, [2013] QB 722.

¹⁰⁹[2012] UKSC 56, [2013] 2 AC 1.

¹¹⁰At [18].

¹¹¹At [47].

¹¹²At [49]; note Kidner, above n 92.

¹¹³*Cox*, above n 38.

of his work. Kitchen workers were selected from amongst prisoners who applied. They were given training, worked alongside civilian catering staff as part of the catering department, were supervised by catering staff, and were accountable to the catering manager. Whilst they were paid for their work, this was not subject to the minimum wage. The Supreme Court held that the Ministry of Justice was vicariously liable for the prisoners working in the kitchen. Lord Reed distilled the justifications for vicarious liability in *CCWS* to three main factors: (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant; (2) the tortfeasor's activity is likely to be part of the business activity of the defendant; and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed.¹¹⁴ Lord Reed stated that a relationship other than employment may trigger vicarious liability:

where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit ... where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual.¹¹⁵

He stressed that, despite the language of 'business' or 'enterprise', the defendant's activities need not be commercial or profit-making, an organisation that acts in the public interest does not negate such liability. This is further illustrated in a sporting context by *Gravil*, where the not for profit club was held liable by the Court of Appeal.

The literature on voluntary sector law (though not tort law) has previously assumed the existence of vicarious liability for unpaid actors, including volunteers,¹¹⁶ and its non-existence would render their tortious acts committed when acting for the club externalities.¹¹⁷ Garton, prior to these recent decisions, argued that given the modern justifications for the doctrine, vicarious liability for unpaid volunteers is already present.¹¹⁸

In opening the door for vicarious liability for unpaid actors,¹¹⁹ the development of vicarious liability in England and Wales is not out of step with other common law jurisdictions.¹²⁰ As noted by Walsh J in the Supreme Court of Ireland decision in *Moynihan v Moynihan*:¹²¹ 'even if the doctrine of vicarious liability depends upon the existence of service, the service does not have to be one in respect of which wages or salary is paid but may be a gratuitous service or may simply be a de facto service'.

The category of 'akin to employment' will not include all amateur players. Each relationship will need to be examined in detail. Following *Cox*, where the tort is committed during activities which are integral to the club's activities and for its benefit, and where assigning the activities to the player creates the risk, liability may be present. Where an amateur player plays alongside a paid professional, is indistinguishable from them to members of the public, wears the same kit as the professional, and is

¹¹⁴At [22].

¹¹⁵At [24].

¹¹⁶S Moody 'Policing the voluntary sector: legal issues and volunteer vetting' in A Dunn (ed) *The Voluntary Sector, The States and the Law* (Oxford: Hart, 2000) pp 53–54; J Garton *The Regulation of Organised Civil Society* (Oxford: Hart, 2009) p 100; Charity Commission 'Charities and Insurance' (CC49, 2012) 5.

¹¹⁷*Ibid*, Garton, p 100.

¹¹⁸Garton, above n 116, states that given the present justifications for vicarious liability: risk creation or enhancement, there can be vicarious liability for volunteers. cf D Brodie *Enterprise Liability and the Common Law*, above n 67, p 12, who also writing prior to these decisions states 'the acts of volunteers who are not employees do not give rise to vicarious liability'. No reasons are given for this statement.

¹¹⁹Note Morgan, above n 67.

¹²⁰United States Restatement (Third) of Agency, 2006, § 7.07 (3), 82 ALR 3d 1213. See for instance *Scottsdales Jaycees v Superior Court of Maricopa County* (1972) 17 Ariz App 571, 499 P2d 185; *Garcia v Herald Tribune Fresh Air Fund* (1976) 51 App Div 2d 987, 380 NYS2d 676; *Baxter v Morningside Inc* (1974) 10 Wash App 893, 521 P2d 946; *Trinity Lutheran Church Inc v Miller* (1983) Ind App 451, NE2d 1099; South Australia Volunteers Protection Act 2001, s 5(1).

¹²¹[1975] IR 192. Note also *Hickey v McGowan* [2017] IESC 6.

trained and managed in the same way, it would be difficult to argue that vicarious liability is not present. However, vicarious liability on the ‘akin to employment’ model is least likely to be present in the case of a small, informal, grassroots football club, such as a Sunday League club informally linked to a pub.

Unincorporated associations

Unincorporated associations do not have legal personality.¹²² Many amateur clubs will be unincorporated associations. In *R v L Hughes* LJ stated: ‘[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’.¹²³ This means a further category of vicarious liability may be applicable to many amateur players, that of vicarious liability within an unincorporated association. It is submitted that courts should approach this form of liability in a similar manner to the ‘akin to employment’ form of vicarious liability, however, it would appear that this category of vicarious liability is currently applied more loosely, and thus has the potential to generate significant exposure to vicarious liability for player torts, but only for the grassroots end of football.

In *CCWS* the Institute of the Brothers of the Christian Schools was an unincorporated association. The Supreme Court established vicarious liability through two different means, first through ‘akin to employment’, and secondly through the category of vicarious liability within unincorporated associations. Lord Phillips referred to *Heatons Transport (St Helens) Ltd v Transport and General Workers’ Union*;¹²⁴ *Thomas v National Union of Mineworkers (South Wales Area)*;¹²⁵ and *Dubai Aluminium*¹²⁶ for the proposition that an unincorporated association may be vicariously liable for one or more of its members. Mere membership of an unincorporated association should not be enough to trigger vicarious liability, however, this is what the most recent vicarious liability authorities appear to suggest. It is argued that here Lord Phillips erred. The Supreme Court was incorrect to draw on those particular instances of vicarious liability as evidence of an existing general category of vicarious liability in this area. Instead it is a new development that was introduced by the Court of Appeal in *CCWS*, and followed by the Supreme Court.

In *Heatons*, as in *Thomas*, the category of vicarious liability discussed, and the authorities referred to, concerned vicarious liability in the category of ‘principal’ and ‘agent’, there being no invocation of a separate category of vicarious liability within unincorporated associations. *Dubai Aluminium* too did not refer to a separate category of vicarious liability of unincorporated associations, but rather statutory vicarious liability under s 10 of the Partnership Act 1890. Whilst the 1890 Act is codifying, and liability for partners predated it,¹²⁷ it is not evidence of a separate established general category of vicarious liability within unincorporated associations. Instead, as *Hamlyn v John Houston & Co*¹²⁸ shows, this category prior to codification was based on the ‘principal’ and ‘agent’ form of vicarious liability. For Atiyah there was ‘no doubt that [vicarious liability for partners] is based on the principles of agency. The doctrine that each partner is the agent of the firm and of his co-partners is at the root of partnership law’.¹²⁹ The novelty of *CCWS* in the Court of Appeal was that it introduced a separate category of vicarious liability within unincorporated associations.

¹²²Scottish Law Commission *Unincorporated Associations* Scot Law Com No 217 (Edinburgh: SLC, 2009) paras [1.4], [2.2]; N Stewart, N Campbell, and S Baughan *The Law of Unincorporated Associations* (Oxford: Oxford University Press, 2011) para [1.09].

¹²³[2008] EWCA Crim 1970, [2009] PTSR 119 at [11].

¹²⁴[1973] AC 15.

¹²⁵[1986] Ch 20.

¹²⁶[2003] 2 AC 366.

¹²⁷*Ashworth v Stanwix* 121 ER 606, (1860) 3 El & El 701.

¹²⁸[1903] 1 KB 81.

¹²⁹Atiyah, above n 67, p 117.

Atiyah, in his classic book on vicarious liability, stated that '[i]n the modern law there are three and only three relationships' which may trigger vicarious liability: employment (in all circumstances); and in some particular situations agency, and employer/independent contractor.¹³⁰ Atiyah was certainly aware of vicarious liability for partners, indeed he devoted an entire chapter to the topic.¹³¹ Likewise Giliker's thorough book on vicarious liability, whilst noting partnership,¹³² also does not mention a general category of vicarious liability within unincorporated associations. It is unlikely that both Atiyah and Giliker would have missed an existing general category of vicarious liability, which again points to the fact that vicarious liability within an unincorporated association as a general class of vicarious liability is a more recent development.

Vicarious liability within unincorporated associations, as a category of vicarious liability, has been used to deal with abuse occurring within the context of hierarchical religious institutions. Courts have resorted to this new category of vicarious liability to deal with a quirk of English law, which does not recognise legal institutions which exist as a matter of Roman Catholic Canon law. Thus an institution such as a Roman Catholic Diocese, Parish, or religious institute, is treated in English law as an unincorporated association.

The Supreme Court of Ireland in *Hickey v McGowan*¹³³ on the other hand, has accepted the present author's previous criticisms of CCWS.¹³⁴ It questioned the appropriateness of the approach taken in England of essentially treating unincorporated associations as if they were corporate bodies for the purposes of vicarious liability. Whilst it appears that the approach to vicarious liability within unincorporated associations is narrower in Ireland, the Supreme Court of Ireland accepted vicarious liability was present in *Hickey*. The Court faced up to the issue of who is liable in such cases, holding that all member of the Marist Order (an unincorporated association) who were members at the time of the tort were liable. This is an issue which has been glossed over in England. The Supreme Court of Ireland correctly recognised that this form of vicarious liability makes liable the members of the unincorporated association at the time of the tort, not the organisation. This directly flows from the nature of an unincorporated association, since the organisation is not a legal person.

For many informal sporting groups and teams, fulfilling the requirements of incorporation will be too onerous. An unincorporated structure might be chosen due to reduced regulatory requirements, or to provide democratic control.¹³⁵ However, with an unincorporated structure the organisation is not a legal person, and does not have limited liability. This may expose members, and officers to significant liabilities. This is demonstrated by the litigation relating to Ynysyawl Rugby Club, an unincorporated association, where to secure a judgment for £85,000 relating to an employee's unfair dismissal claim, the club treasurer had a charge registered against his house.¹³⁶ This means that through the application of vicarious liability within an unincorporated association, players at the grassroots level, unlike members of professional clubs, or more developed amateur clubs, are placed in the position of insurer for the torts of their fellow players.

It is suggested that the courts will need to tighten up the requirements for vicarious liability within this category of unincorporated associations.

Not all unincorporated associations will be similar to the Institute in CCWS. Many will be informal groups with fluctuating membership, and may lack records as to who was a member, and when. Many will lack authority or control over their members, unlike an organisation such as a religious community. Mere membership of an unincorporated association should not be enough to make one

¹³⁰Atiyah, above n 67, p 3.

¹³¹Chapter 11.

¹³²Giliker *Vicarious Liability in Tort*, above n 67, p 104.

¹³³[2017] IESC 6.

¹³⁴*Ibid*, at [46] per O'Donnell J; Morgan, above n 39.

¹³⁵D Bawtree and K Kirkland *Charity Administration Handbook* (London: Bloomsbury, 5th edn, 2013) para [2.14].

¹³⁶See <http://www.walesonline.co.uk/news/local-news/rugby-clubs-60k-appeal-crippling-2496284> (last accessed 23 May 2018); <http://www.sportandrecreation.org.uk/blog/mlarsen/25-03-2014/governance-why-getting-right-legal-structure-your-club-so-important> (last accessed 23 May 2018).

vicariously liable for one's fellow members. Just as Catholics who attend a particular parish church (the parish is an unincorporated association) should not be per se liable for the torts of the parish priest, it is distinctly odd that in an unincorporated village football team, 10 players may be vicariously liable for the one tortfeasor player.

The application of vicarious liability to the most informal unincorporated associations fits oddly with the theory of vicarious liability which has been most recently advanced by the courts. In *CCWS* Lord Phillips sought to set out the policy arguments and justifications for vicarious liability, stating that 'the policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.'¹³⁷ He invoked insurance and loss spreading, a deep pockets argument, acting on behalf of employer, enterprise and risk creation, and control justifications, for the doctrine,¹³⁸ all of which are versions of some of the justifications put forward by Atiyah.¹³⁹ In considering the relevant connection required to the tort (the second stage of vicarious liability), Lord Phillips appeared to focus on enterprise risk liability. It is questionable whether these theories would point towards vicarious liability within an informal village five-a-side football team. It is advanced that unincorporated associations are not alike, and that the category of vicarious liability within unincorporated associations should be narrowed. A large religious institution should not be treated in the same way as an informal team.

One potential solution to this problem may be creatively extracted from the dicta in *CCWS*. Whilst the Supreme Court held that the ordinary close connection test applied to the facts of the case, (quite rightly given the highly structured institutional control exercised over the brothers), they did not rule out the fact that other tests may apply to different relationships. Lord Phillips considered that vicarious liability is a 'synthesis' of the two stages: '[w]hat is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1'.¹⁴⁰

In *CCWS* Hughes LJ in the Court of Appeal¹⁴¹ held that vicarious liability could apply to unincorporated associations, however, he treated the position differently to employment, appearing to propose that the test for establishing sufficient connection to the tort is different. Hughes LJ appeared to suggest that the connective test could vary with the relationship. He noted that the position of an agent is not the same as an employee,¹⁴² and that the relationships should be treated differently: '[t]hey are clearly not all treated the same. They do not all create the same connection between the tort of D1 and his relationship with D2'.¹⁴³ Whilst this was not applicable in *CCWS*, and the decision of the Court of Appeal was overruled by the Supreme Court, this part of the judgment was not disapproved of by the Supreme Court.

It is submitted that since the link is to the relationship, as the nature of the relationship changes the nature of the connection required may differ. There is a need to accommodate the breadth of application of vicarious liability at stage one by varying the test at stage two in the case of some categories of relationship. The ordinary close connection test, as extended in *Mohamud*, may not be the appropriate test at stage two for all unincorporated associations, given how wide the category of unincorporated associations is.¹⁴⁴ Thus the connection required to link the tort to a large institutional religious unincorporated association may be different to the connection required to link the tort to the village football team. Significantly greater connection of the relationship to the tort may be required for some

¹³⁷At [34].

¹³⁸At [34]–[35].

¹³⁹Atiyah, above n 67, pp 12–28. For further discussion of vicarious liability theory see Stevens, pp 257–259; Nevers; Giliker *Vicarious Liability in Tort* pp 227–254; Brodie, all above n 67.

¹⁴⁰At [21].

¹⁴¹*Various Claimants v Institute of the Brothers of the Christian Schools* [2010] EWCA Civ 1106.

¹⁴²At [42].

¹⁴³*Ibid.*

¹⁴⁴The author briefly advanced this point in Morgan, above n 39, which has received extrajudicial support from Lord Hope in 'Tailoring the law on vicarious liability' (2013) 129 LQR 514 at 526.

unincorporated associations, instead of the version of ‘close connection’ which is applied in the employment context, for example with an informal five-a-side football team.

However, in the meantime it is recommended that amateur clubs consider incorporation. This will protect their members from personal vicarious liability for the acts of their teammates. Based on the present authorities it also appears that it is harder to impose vicarious liability through the ‘akin to employment’ category of vicarious liability, when compared to the category of vicarious liability within an unincorporated association.

Impact on the game?

Vicarious liability is an expanding doctrine. The reach of vicarious liability within football, for both on-pitch and off-pitch incidents is broader than previously thought. Clubs will need to review their policies of insurance so as to ensure coverage for the increased range of torts which a player may expose them to, particularly intentional torts.

There is fierce debate as to whether insurance should have any influence over tort doctrine,¹⁴⁵ however, it has to be recognised that much of tort operates within the parameters of what insurance will fund,¹⁴⁶ and that tort would not look the same without insurance.¹⁴⁷ Whilst loss spreading, particularly in the context of insurance, has been invoked as one of the justifications for vicarious liability, including in *Lister* and *CCWS*,¹⁴⁸ lack of insurance does not prevent a court from imposing vicarious liability. Nevertheless, from a practical perspective it is important to examine the insurance coverage available to grassroots clubs.

A 2012 review by the Football Association of insurance at grassroots levels led to the adoption of minimum standards, and introduction of the National Game Insurance Scheme (NGIS). The FA has a mandatory insurance requirement for all adult 11-a-side teams. All clubs must have public liability insurance of at least £10 million. In addition clubs must be members of a Player’s Personal Accident Scheme.¹⁴⁹ In 2017 a mandatory insurance requirement was introduced for all age groups and formats of youth football.¹⁵⁰ However, the most informal five-a-side team, perhaps an informal unincorporated association made up of regulars at a pub, which does not compete in organised competitions, may not have coverage.

The FA appointed Bluefin Sport as the approved insurance broker to deliver the NGIS. The scheme covers more than 14,000 adult teams, a larger number of youth teams, and approximately 200,000 players.¹⁵¹ In the period July 2012–April 2017 the scheme has paid £1.5 million in claims.¹⁵²

¹⁴⁵J Stapleton ‘Tort, insurance and ideology’ (1995) 58 MLR 820; J Morgan ‘Tort, insurance and incoherence’ (2004) 67 MLR 384; cf R Merkin ‘Tort, insurance and ideology: further thoughts’ (2012) 75 MLR 301. For discussion see R Merkin and J Steele *Insurance and the Law of Obligations* (Oxford: Oxford University Press, 2013) ch 8.

¹⁴⁶T Baker ‘Liability insurance as tort regulation: six ways that liability insurance shapes tort law in action’ (2005) 12 Conn Ins LJ 1.

¹⁴⁷Eg R Lewis ‘Insurance and the tort system’ (2005) 25 LS 85.

¹⁴⁸For criticisms of loss spreading justifications see Stevens, pp 258–259 and Neyers, 296–297, both above n 67. Note that vicarious liability as a modern doctrine pre-dates (non-marine) liability insurance (D Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 2006) pp 69–70; J Baker *An Introduction to English Legal History* (London: Butterworths, 4th ed, 2002) p 410, and the acceptance of loss spreading (J Witt *The Accidental Republic* (Cambridge, MA: Harvard University Press, 2004)).

¹⁴⁹Football Association ‘Standard Code of Rules 2016–17’ Rule 22. The Rules are mandatory for all Competitions at Step 7 of the National League System and below, and the FA Women’s Pyramid excluding the FA Women’s Super League.

¹⁵⁰Football Association ‘Standard Code of Rules for Youth Competitions 2016–17’ Rule 22.

¹⁵¹See <https://www.theguardian.com/football/2016/feb/17/mandatory-insurance-amateur-footballers-fa-grassroots-ngis> (last accessed 23 May 2018).

¹⁵²Bluefin, NGIS, ‘Group Personal Accident Insurance’ available at http://assets.bluefingroup.co.uk/media/filer_public/e5/c6/e5c628fa-4633-4a68-b3cf-29fec30bd946/1692-0217_ngis_adult_basic_and_youth_basic_pa_brochure_2017to18_final.pdf (last accessed 23 May 2018); Lancashire FA News, <http://www.lancashirefa.com/news/2017/apr/mandatory-personal-accident-insurance-in-youth-football-from-201718> (last accessed 23 May 2018).

The Player's Personal Accident Scheme is 'non-negligence' cover, which pays players a set amount for injuries. Unlike a liability based policy there is no need for someone to be at fault for the injured player to receive compensation. It is partly designed to reduce football related litigation.¹⁵³ The cover is available at Basic, Intermediate, and Superior levels. The first level only covers death and permanent total disablement, and does not cover short-term injuries such as broken bones.

The Scheme does not eliminate personal injury claims from the game. Not all injuries are covered. Further, the sums paid to injured players are significantly lower than would be awarded in a personal injury action. In addition, in none of the policy levels does the cover provide for income replacement, although small monthly sums are available if additional coverage is purchased, for instance for Temporary Total Disablement. This may leave players significantly out of pocket, especially where the injury prevents them from working for a period of time and where they only receive statutory sick pay, or where they are self-employed, or on a zero-hours contract. A player may also have to shoulder their own rehabilitation costs, such as physiotherapy, unless additional coverage is purchased. It is thus clear why an injured player may still be attracted to bringing a claim in tort. Stephen Nye, a partner at Irwin Mitchell, has stated that 300 players a year make inquiries to his firm seeking compensation from the individual who injured them.¹⁵⁴

The second element of NGIS is legal liability insurance. The NGIS 'Countycover' policy is designed for amateur and semi-professional clubs. The public and products liability element of the coverage covers up to £10 million, as required by the FA. However, it is important to note that many claims that may be brought via the expanded notion of vicarious liability against the club, or against its members in the case of an unincorporated club, are not covered.

The first significant exclusion in the policy is 'player to player liability cover'. The policy states:

'Player to Player' is a term used to define a situation where a claim arises from one player injuring another whilst participating in a game or training. Countycover does not cover 'Player to Player' incidents. However, the policy may pay up to £200,000 towards legal defence costs to defend an action brought by a player from another club, subject to the terms, conditions and exclusions of the policy, and provided that the insurer believes there is a strong possibility of successfully defending the allegation. The provision of legal defence cover is designed to protect the innocent party. It is important to note that this will not provide cover for any damages legally awarded.¹⁵⁵

This means that on-pitch negligence, for instance a poor tackle, which results in injury to another player, will not be covered, save for legal defence costs. Whilst the policy does provide for 'member to member liability', where one member makes a claim against another for liability whilst engaged in club activities, such activities specifically exclude 'active participation in the sport'.

However, this does not mean that all on-pitch claims are excluded. A claim would be covered where a player is injured due to the condition of the ground, as for instance in *Simms v Leigh Rugby Football Club Ltd*,¹⁵⁶ where the injuries were sustained by a player due to the presence of a concrete wall close to the pitch. This is because this is not a player to player injury.

Liability for '[a]ssault, battery or any intentional or pre-meditated or malicious or deliberate violence, criminal act or acts or intent to cause harm or gross negligence'¹⁵⁷ is also excluded. This means that both on- and off-pitch violence is excluded. Whilst player to player violence is firstly excluded under the player to player exclusion, this exclusion would further exclude claims arising out of violence against officials and spectators. The exclusion of gross negligence is an additional

¹⁵³Ibid, 'Group Personal Accident Insurance', Summary of Benefits.

¹⁵⁴Above n 151.

¹⁵⁵Bluefin, NGIS 'Legal Liability Insurance' Countycover Policy Summary at 4, 8, see http://assets.bluefingroup.co.uk/media/filer_public/b4/f8/b4f8fa1a-27a8-49f8-9d93-28603acb6ab1/1725-0217_ngis_countycover_brochure_2017-18.pdf (last accessed 23 May 2018).

¹⁵⁶[1969] 2 All ER 923.

¹⁵⁷Bluefin, NGIS, 'Legal Liability Insurance' Countycover Policy Summary, Exclusions, p 6.

exclusion (in addition to the player to player exclusion) that would operate in relation to claims arising out of an exceptionally poor tackle.

The policy provides for abuse cover, although its interface with the exclusion of liability arising out of criminal acts is unclear. Abuse cover is ‘only available for all persons involved in an official capacity (eg managers, coaches, members and officials) who are involved with football activities for youth and/or vulnerable adults’.¹⁵⁸ Abuse cover excludes any liability arising from an act of any person who has not been checked by the Disclosure & Barring Service (DBS) and does not hold evidence of current clear DBS status. This means that if the facts of *Stoke* were made out, and occurred now, the claim would not be covered unless the player in question held DBS status. Further, the court would need to find that the player’s interaction with apprentices was in an official capacity.

The policy also provides an additional element of coverage for officers and committee members (although not ordinary members in the case of an unincorporated association). The coverage includes ‘[c]laims brought against officers, committee members, directors and trustees for wrongful acts’.¹⁵⁹ However, this coverage excludes claims for ‘bodily injury’. This exclusion prevents this provision from being used to generate coverage for personal injury claims brought via vicarious liability against the officers and committee members for player to player incidents, or violence.

Bluefin also provide an enhanced policy, ‘Countycover Plus’. This policy, unlike the ordinary ‘Countycover’ policy provides for player to player legal defence costs and awards, up to £10 million. It is prudent for local football associations to encourage purchase of such cover in place of the ordinary ‘Countycover’, and some have successfully used group purchasing to reduce the costs. Nevertheless, this policy too excludes both on- and off-pitch violence, as well as gross negligence.

In the light of the expanded doctrine of vicarious liability, it is clear that there is a need for the FA to review the NGIS, since there would appear to be significant omissions in the coverage provided. This is of particular concern in the context of grassroots clubs which are unincorporated associations, where members may be sued vicariously in a personal capacity. It is, however, unlikely that a legal industry of claiming against members of unincorporated associations for uninsured losses will develop. This is because there may be some reticence to sue uninsured individuals, perhaps due to moral qualms, the likelihood of resistance to the claim by the defendants, or the enhanced costs for such a claim, particularly at the enforcement stage.¹⁶⁰ This does not, however, mean that such claims will not be brought, particularly by aggrieved parties who have been the victim of serious injuries, egregious wrongs, or intentional torts, and/or who are significantly out of pocket due to their injuries – for instance due to an inability to work for a significant period of time.

In the light of increased exposure to liability for deliberate acts, clubs may also wish to reconsider selecting players with hard or violent reputations. They may also wish to think carefully about selecting players who commonly engage in fouls, or reckless play. This does not mean that such players will be eliminated from football. Both amateur and professional clubs will need to decide whether a player’s ability outweighs the risk. For a professional club this will be a commercial decision. One would not want to keep a highly talented player on the bench if there was a small risk that he might tackle a long-term rival particularly hard. However, it may reduce the playing opportunities for players of lesser talent (when compared to their teammates) whose primary role is to be the hard man on the team.

Clubs should also encourage players and other members to report their concerns, and put mechanisms in place so that such concerns may be dealt with swiftly.¹⁶¹ Clubs should also note that safeguarding matters do not just concern children under 18; they should consider putting similar mechanisms

¹⁵⁸Ibid.

¹⁵⁹Ibid, p 7.

¹⁶⁰R Heidt ‘The unappreciated importance, for small business defendants, of the duty to settle’ (2010) 62 Me L Rev 75 at 92; T Baker ‘Blood money, new money, and the moral economy of tort law in action’ (2001) 35 Law and Soc’y Rev 275; Cane, above n 30, pp 224–225.

¹⁶¹See generally Grey-Thompson, above n 16, at 26.

in place for those dealing with younger adults, who may be more vulnerable than experienced and older adult players.

With a professional club, increased exposure to vicarious liability is unlikely to endanger their future – they are likely to be able to absorb the loss. However, with the amateur game, where the litigation concerns uninsured torts, the club's future may be endangered. Where the club is unincorporated it may also result in significant liability on the part of its members. Amateur clubs should therefore consider incorporating to lessen their member's exposure to liability. This will also remove the club from the purview of the category of vicarious liability within an unincorporated association, a category of vicarious liability which appears at least on current authorities easier to trigger than other categories. Amateur clubs, in particular, should also 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). This will protect the assets from judgment creditors, since only the liability-generating entity's assets are exposed to claims.¹⁶²

Conclusion

Vicarious liability has been shown to have a greater reach within both the professional and amateur game than previously thought. In particular, the expanded doctrine has opened up vicarious liability for amateur players and within grassroots teams. A greater range of torts may also now trigger vicarious liability, such as acts of on-pitch and off-pitch violence.

Whilst the impact of these developments within the law of vicarious liability on well-funded professional teams may be minimal, in that they may be able to absorb the additional exposure to loss, amateur sides will need to urgently review their insurance policies. Further, the FA will need to review the scope of the NGIS, which significantly lags behind this expanded exposure to vicarious liability. Both amateur and professional clubs may also wish to carefully consider their selection of players, particularly players who have a reputation for being hard men, or reckless tacklers.

Examining the law of vicarious liability in the context of football has also revealed significant problems with the current approach to vicarious liability within unincorporated associations. This category of vicarious liability seems currently easier to trigger than the other forms of vicarious liability, and places members of grassroots clubs at significant personal risk of vicarious liability for the torts of their fellow club members. It is submitted that the courts will need to review this category of vicarious liability. The category developed in the context of institutional abuse committed within a highly organised religious institution, which happened to be an unincorporated association as a matter of legal history or quirk. It does not mean that this category of vicarious liability should be applied to grassroots sporting organisations in the same way. For instance, there is scope to apply a different test at stage two when dealing with such groups or clubs. The courts will need to tighten up this category so as not to unnecessarily expose members of grassroots organisations to liability which is able to be executed against their personal assets. In the meantime grassroots clubs will need to consider taking steps to minimise the exposure of their members to liability, by incorporating, and also consider strategies of asset protection where the club owns assets such as its clubhouse and pitch.

This article focuses on football, the UK's most popular team sport. The focus allows both the impact of vicarious liability in context, and the insurance position to be examined in detail.

¹⁶²For judgment proofing see L LoPucki 'The death of liability' (1996–1997) 106 Yale LJ 1; J White 'Corporate judgment proofing: a response to Lynn LoPucki's "the death of liability"' (1997–1998) 107 Yale LJ 1363; L LoPucki 'Virtual judgment proofing: a rejoinder' (1997–1998) 107 Yale LJ 1413; L LoPucki 'The essential structure of judgment proofing' (1998–1999) 51 Stan L Rev 147; S Schwarcz 'The inherent irrationality of judgment proofing' (1999–2000) 52 Stan L Rev 1; S Schwarcz 'Judgment proofing: a rejoinder' (1999–2000) 52 Stan L Rev 77.

However, the development of vicarious liability may lead to similar issues in other sports. The detailed examination of football in this article will hopefully prompt other sporting bodies to also review their own insurance provisions.