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## DOCTOR OF PHILOSOPHY

### Modern sports coaching and the law

### Analysing, clarifying and minimising negligence liability

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# **Modern Sports Coaching and the Law: Analysing, Clarifying and Minimising Negligence Liability**

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BA(Ed) Hons, MSc., MLegSci

Submitted in completion of doctoral thesis under the supervision of Professor Jack Anderson and Dr David Capper, School of Law, Queen's University Belfast, 2016



## Preface

Little I'm hurt, but yet not slaine,  
I'll lye downe and bleede awhile,  
And then I'll rise and fight againe.<sup>1</sup>

This motivational passage may be regarded as symbolic of the character, commitment and desire sports coaches frequently demand of athletes. Having experienced its sentiments modelled and reinforced by highly successful coaches, it has undoubtedly influenced and shaped my own coaching philosophy. However, the ballad offers little by way of guidance when determining when it may be (un)reasonable to 'rise and fight againe'. Adopting a tort law perspective, this distinction may prove decisive in instances of alleged coach negligence. In the context of sport, decisions regarding 'how hard to "push"' athletes and teams are often left to individual coaches. This reveals a core curiosity underpinning this research: the boundary between forging champions and committing a tort. Applied more generally, when discharging the duties incumbent upon them, does the ordinary law of negligence adequately safeguard modern sports coaches from legal liability? These are questions that this thesis will attempt to address.

In reinforcing such considerations as important complexities of modern sports coaching, comments made by Coach Bill Sweetenham, when interviewed for BBC R5L's sportsworld on 1 May 2016, are worth recalling in full:

With any coaches, or a lot of coaches, they're gonna push boundaries and push them very hard and do things to motivate athletes that probably, on occasions, are gonna push the limits. ... When you're pushing boundaries and you're trying to get athletes to express their potential at the highest level it can happen [doing or saying something inappropriate]. It's very easy to go. Coaches don't know what the athlete's capabilities are. You're trying to push the boundaries and hope that you get the result that's best for the athlete. Remember,

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<sup>1</sup> Adapted from the ballad by Sir Andrew Barton, LXIV  
< <http://www.bartleby.com/243/130.html> > accessed 1 May 2016.

coaches are pushing boundaries all the time to try and achieve the athlete's potential, or actually get the athlete to rise above their talent. So, if you can coach an athlete above their level of talent, and you've always got to have a skill level in there that's beyond the athlete's talent. To do that, it's not easy and there will be times that you push the boundaries a bit too hard and you think -- na, I've gone too hard on that situation. ... I know that I've pushed the boundaries from time to time.

... I always insist that I have a person with me knowing what I'm gonna push and how I'm gonna push and the boundaries and the limits, how I'm gonna try and get every athlete to see their horizons and go beyond it and the coaching staff as well. I always have someone to work with me to pick up the pieces so to speak. They'll come, work with me, alongside me, and their job will be say: 'Bill, back off. It's time to stand away'. And sometimes you need that because in the heat of the moment, in the heat of the battle ... the world is changing, the world, the wide generation is a different group of people to coach and the next generation will be more different than it was and it is now. Each generation is gonna bring to the senior and older coach great challenges and more challenges and they will have to, they can't change the culture, the coach will have to change.<sup>2</sup>

In being mindful of the interaction between sports coaching and the law of negligence, the following pages critically analyse a number of issues alluded to by Coach Bill Sweetenham, not least: the boundary between reasonable and negligent coaching practice; the specificity of sports coaching; the mutually dependent coach-athlete relationship; the particular circumstances in which sports coaches perform their functions; defining regular and approved coaching practice that might be logically justifiable; the health and welfare of athletes; and, the emerging challenges posed by respective and ever-evolving legal and coaching contexts.

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<sup>2</sup> Interview with Bill Sweetenham, *Sportsworld*, BBC R5L (1 May 2016)  
<<http://www.bbc.co.uk/programmes/b078x676>> accessed 1 May 2016.



Chapter 1's overview of relevant case law, statutory provision and academic commentary reveals the intersection between the law of negligence and sports coaching to be an emerging issue warranting further detailed analysis. Next, this thesis' methodological framework is discussed and summarised in chapter 2. Chapter 3's analysis concentrates on the effectiveness of section 1 of the Compensation Act 2006 in protecting coaches from negligence liability. The interplay between statute and common law in this context is further considered in chapter 4, facilitating a detailed analysis of the requirements of suitable and sufficient risk assessment by coaches. Paradoxically, despite the majority of coaches in the UK being volunteers, when framing the legal test, or standard of care incumbent upon coaches, chapter 5 reveals coach negligence inquiries to potentially require courts to consider the 'professional liability of amateurs'. This creates significant implications for coach education, training, development and best practice. In chapters 6-8, the findings from qualitative empirical research deepens and extends analysis of the themes previously identified and scrutinised. Moreover, the perspective and detailed insight of practising coaches reveals contemporary risk management challenges, and some emerging trends in this area of the law, not least, sport-related hazing and sport-related concussion. Finally, in bringing this research to a conclusion, chapter 9 provides an overview of the findings from this thesis, identifies strategies to minimise coach negligence and, recommends further important consequential research.

## Acknowledgments

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## Table of Cases

### United Kingdom

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Affutu-Nartoy v Clarke, The Times, 9 February 1984 (QBD)

Allison v London Underground Limited [2008] EWCA Civ 71

Allport v Wilbraham [2004] EWCA Civ 1668

Anderson v Lyotier [2008] EWHC 2790 (QB)

Bacon v White and Chartered Associates Limited, 21 May 1998 (QBD)

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428 (QBD)

Bartlett v English Cricket Board Association of Cricket Officials, 27 August 2015 (County Court, Birmingham)

Berent v Family Mosaic Housing (incorporating Mosaic Housing Association) [2012] EWCA Civ 961

Blair-Ford v CRS Adventures Ltd [2012] EWHC 2360 (QB)

Blake v Galloway [2004] EWCA Civ 814

Blyth v Birmingham Waterworks (1856) 11 Ex 781

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (QB)

Bolitho (Deceased) v City of Hackney Health Authority [1998] AC 232 (HL)

Bolton v Stone [1951] AC 850 (HL)

Brady v Sunderland Association Football Club Ltd, 2 April 1998 (QBD)

Brady v Sunderland Association Football Club Ltd 17 November 1998 (CA)

Browning v Odyssey Trust Company Limited [2014] NIQB 39

Caldwell v Maguire [2001] EWCA Civ 1054

Caparo v Dickman [1990] 2 AC 605 (HL)

Cassidy v Manchester CC, 12 July 1995 (CA)

Catholic Child Welfare Society v Institute of the Brothers of the Christian Schools [2012] UKSC 56

Cockbill v Riley [2013] EWHC 656 (QB)

Cole v Davis-Gilbert [2007] EWCA Civ 396

Condon v Basi (1985) 2 All ER 453 (CA)

Corbett v Cumbria Kart Racing Club [2013] EWHC 1362 (QB)

Cox v Dundee CC [2014] CSOH 3

D v East Berkshire Community Health Authority [2005] 2 AC 373 (HL)

Davenport v Farrow [2010] EWHC 550 (QB)

Donoghue v Stevenson [1932] AC 562 (HL)

Eckersley v Binnie [1988] 18 ConLR 1 (CA)

Elliott v Saunders and Liverpool Football Club, 10 June 1994 (QBD)

Foskett v Mistry [1984] RTR 1 (CA)

Fowles v Bedfordshire CC [1996] ELR 51 (CA)

Froom v Butcher [1976] QB 286 (CA)

GB v Stoke City Football Club Limited [2015] EWHC 2862 (QB)

Gold v Haringey Health Authority [1988] QB 481 (CA)

Goldstein v Levy Gee (A Firm) [2003] EWHC 1574 (Ch)

Hall v Brooklands Auto-Racing Club [1933] 1 KB 205 (CA)

Hammersley-Gonsalves v Redcar and Cleveland BC [2012] EWCA Civ 1135

Hide v The Steeplechase Company (Cheltenham) Ltd [2013] EWCA Civ 545

Honnor v Lewis [2005] EWHC 747 (QB)

Hopps v Mott MacDonald Ltd [2009] EWHC 1881 (QB)



Humphrey v Aegis Defence Services Ltd [2014] EWHC 989 (QB)

Humphrey v Aegis Defence Services Ltd [2016] EWCA Civ 11

Jolley v Sutton London BC [2000] 1 WLR 1082 (HL)

Kennedy v Cordia (Services) LLP [2014] CSIH 76

Kennedy v Cordia (Services) LLP [2016] UKSC 6

Latimer v AEC Ltd [1953] AC 643 (HL)

Letang v Cooper [1965] 1 QB 232 (CA)

Lewis v Buckpool Golf Club 1993 SCT 43

MacIntyre v Ministry of Defence [2011] EWHC 1690 (QB)

McErlean v The Right Reverend Monsignor MacAuley [2014] NIQB 1

McMahon v Dear [2014] CSOH 100

Morrell v Owen, The Times, 14 December 1993 (QBD)

Morrow v Dungannon and South Tyrone BC [2012] NIQB 50

Mountford v Newlands School [2007] EWCA Civ 21

Mullin v Richards [1998] 1 WLR 1304 (CA)

Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School) [2016] NIQB 52

Nettleship v Weston [1971] 2 QB 691 (CA)

Orchard v Lee [2009] EWCA Civ 295

Overseas Tankship (UK) Ltd v The Miller Steamship Co (The Wagon Mound No 2) [1967] 1 AC 617

Overseas Tankship v Morts Docks & Engineering Co Ltd (The Wagon Mound No 1) [1961] AC 388

Paris v Stepney BC [1951] AC 367 (HL)

Perry v Harris [2008] EWCA Civ 907

Petrou v Bertoncello [2012] EWHC 2286 (QB)

Phee v Gordon [2013] CSIH 18

Phelps v Hillingdon London BC [2001] 2 AC 619 (HL)

Pinchbeck v Craggy Island Ltd [2012] EWHC 2745 (QB)

Pitcher v Huddersfield Town Football Club 17 July 2001 (QBD)

Poole v Wright [2013] EWHC 2375 (QB)

Poppleton v Trustees of the Portsmouth Youth Activities Committee [2008] EWCA Civ 646

Porter v Barking and Dagenham LBC, 23 March 1990 (QBD)

Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743 (HL)

Radclyffe v MoD [2009] EWCA Civ 635 (QB)

Red Sea Tankers Ltd v Papachristidis [1997] 2 Lloyd's Rep 547 (CC)

Regina (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (HL)

Reynolds v Strutt [2011] EWHC 2263 (QB)

Risk v Rose Bruford College [2013] EWHC 3869 (QB)

Scout Association v Barnes [2010] EWCA Civ 1476

Smolden v Whitworth [1997] PIQR P133 (CA)

Sutton v Syston Rugby Football Club Limited [2011] EWCA Civ 1182

Tomlinson v Congleton BC [2002] EWCA Civ 309

Tomlinson v Congleton BC [2003] UKHL 47

Uren v Corporate Leisure (UK) Ltd [2010] EWHC 46 (QB)

Uren v Corporate Leisure (UK) Ltd [2011] EWCA Civ 66

Uren v Corporate Leisure (UK) Ltd [2013] EWHC 353 (QB)

Van Oppen v Clerk to the Bedford Charity Trustees [1989] 1 All ER 273 (QB)

Van Oppen v Clerk to the Bedford Charity Trustees [1989] 3 All ER 389 (CA)

Vaughan v Menlove (1837) 3 Bing NC 468

Villella v North Bedfordshire BC, 25 October 1983 (QBD)

Vowles v Evans [2003] EWCA Civ 318

Watson v British Boxing Board of Control [2001] QB 1134 (CA)

Watt v Hertfordshire CC [1954] 1 WLR 835 (CA)

Wattleworth v Goodwood Road Racing Co Ltd [2004] EWHC 140 (QB)

Whippey v Jones [2009] EWCA Civ 452

Wilkin-Shaw v Fuller [2012] EWHC 1777 (QB)

Wilks v Cheltenham Car Club [1971] 2 All ER 369 (CA)

Williams v Eady (1893) 10 TLR 41

Wilsher v Essex Area Health Authority [1987] QB 730 (CA)

Wilson v G P Haden Trading as Clyne Farm Centre [2013] EWHC 229 (QB)

Woodbridge School v Chittock [2002] EWCA Civ 915

Woodland v Maxwell [2015] EWHC 273 (QB)

Woodland v Swimming Teachers Association [2013] UKSC 66

Woodroffe-Hedley v Cuthbertson, 20 June 1997 (QBD)

Wooldridge v Sumner [1963] 2 QB 43 (CA)

Wright v Cheshire CC [1952] 2 All ER 789 (CA)

Young v Kent CC [2005] EWHC 1342 (QB)

## **Australia**

Agar v Hyde (2000) 201 CLR 552

Canterbury Bankstown Rugby League Football Club Ltd v Rogers [1993] Aust. Torts Reports 81-246

Carter v NSW Netball Association [2004] NSWSC 737

Gowan v Windsor (1991) DCNSW (Shillington J, 9 August)

Neil v Fallon (1995) Aust. Torts Reports 81-821

Rootes v Shelton [1968] ALR 33

### **Canada**

Hamstra et al v British Columbia Rugby Union [1989] 1 CCLT (2d) 78

Henderson v Canadian Hockey Association [2010] 8 WWR 756, 184 ACWS (3d) 1159.

Hussack v School District no.33 (Chilliwack) (2009) BCSC 852

Matheson v Board of Governors of Dalhousie University and College (1983) 57 NSR (2nd) 56; 25 CCLT 91 (SC)

Myers v Peel County Board of Education [1981] 2 SCR 21

R v Cey (1989) 48 CCC (3d) 480

Thornton v School Dist. No. 57 (Prince George) Bd. Of School Trustees [1976] 5 WWR 240, 73 DLR (3d) 35 (BCCA)

### **Republic of Ireland**

The People (Attorney General) v Dunleavy [1948] IR 95

### **United States**

Kahn v East Side Union High School District 75 P3d 30 (Cal. 2003)

Lestina v W Bend Mutual Insurance Company (1993) 501 NW (2d) 28

Lund v Bally's Aerobic Plus, Inc. 93 Cal. Rptr 2d 169 (Cal. App. Ct. 2000)

McCarty v Pheasant Run Inc 826 F2d 1554, 1557 (1987)

US v Carroll Towing Co 159 F2d 169 (1947) 173



## Table of Legislation

### **United Kingdom**

Compensation Act 2006, ss 1 & 17

Consumer Rights Act 2015, s 65

Education Reform Act 1988, s 2(a)

Health and Safety at Work etc. Act 1974, s 3

Law Reform (Contributory Negligence) Act 1945, s 1

Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948, s 2

Management of Health and Safety at Work Regulations 1999, reg 3

Social Action, Responsibility and Heroism Act 2015

Unfair Contract Terms Act 1977, s 2

### **Australia**

Civil Liability Act 2003 (Queensland)

Commonwealth Volunteers Protection Act 2002

Sporting Injuries Insurance Act 1978 (NSW)

Trade Practices Amendment (Liability for Recreational Services) Act 2002

### **New Zealand**

Accident Compensation Act 2001

### **Republic of Ireland**

Civil Law (Miscellaneous Provisions) Act 2011 (Republic of Ireland)

### **United States**

Federal Volunteer Protection Act 1997

Illinois Sports Volunteer Immunity Act 2002

## **Government Bills, Draft Legislation, Debates, Reports etc**

### **United Kingdom**

Department for Work and Pensions, 'Common sense, common safety – progress report', (July 2011)

Explanatory Notes to the Compensation Act 2006

Explanatory Notes to the Social Action, Responsibility and Heroism Act 2015

Hansard HL, 'Social Action, Responsibility and Heroism Bill' (Second Reading), vol 756 cols 1545-1578, (4 November 2014)

House of Commons Constitutional Affairs Committee, Compensation Culture, Third Report (HC 754-1, 2005)

Lord Young of Graffham, Common Sense Common Safety, (October 2010)

Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Compensation Act 2006 (January 2012)

Ministry of Justice, Social Action, Responsibility and Heroism Bill: European Convention on Human Rights memorandum (13 June 2014)

Ministry of Justice, Social Action, Responsibility and Heroism Bill: impact assessment (13 June 2014)

Social Action, Responsibility and Heroism Bill [9] (2014-15)

UK Parliament, 'Social Action, Responsibility and Heroism Bill' (HC Library Research Paper s 14/38, 2014)

### **European Union**

European Commission, 'Erasmus+ Programme Guide' (1 January 2014)

European Commission, White Paper on Sport, COM (2007) 391

European Union Work Plan for Sport for 2011-2014 (OJ C 162, 01/06/2011)

Volunteering In The European Union (Summary): Educational, Audiovisual & Culture Executive Agency (EAC-EA) Directorate General Education and Culture (DG EAC) Final Report submitted by GHK (17 February 2010)

## **Republic of Ireland**

Law Reform Commission of Ireland, Civil Liability of Good Samaritans and Volunteers  
(LRC 93, 2009)

## Chapter 1: Review of Literature

They may beat us outcoaching me. But I resolved a long time ago that nobody would ever beat me by outworking me.

---Woody Hayes, College Football Coach<sup>1</sup>

### 1. Introduction

Coaches push boundaries, are innovative, and continuously search for an 'edge'. Working your team harder than opponents during preseason, strength and conditioning sessions, practices, and games, provides a perceived controllable 'edge'. Indeed, some coaches may regard intense physical and mental conditioning as customary practice and the difference between success and failure. The approach of modern sports coaches in seeking a physiological and psychological 'edge' would likely encapsulate advances in sports science to optimise the sporting performance of athletes and teams:<sup>2</sup> periodisation; sports nutrition; principles/types of training; biomechanics; and sport psychology to name but a few. In short, successful coaching is a complex process. Crucially, one such important and hitherto under analysed complexity of modern sports coaching in the UK is the emerging relationship between coaching and the law of negligence. For instance, should an athlete suffer serious personal injury when being pushed to her/his physiological and psychological limits to secure an 'edge', what might be regarded by the UK courts as objectively reasonable coaching in the circumstances? How is such a legal test fashioned and formulated in the UK to appropriately reflect the specificity of coaching? Problematically, careful doctrinal analysis and detailed consideration of academic commentary uncovers

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\*Some material from this chapter was published in N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232; and, N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016. DOI: 10.1080/21640629.2016.1180860.

<sup>1</sup> See, H Ferguson, *The Edge* (4th ed., Getting the Edge Company, 1991) 3-8.

<sup>2</sup> This thesis will adopt the European Union's definition of sport, established by the Council of Europe, which encompasses 'all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels' <sup>2</sup> < <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0391&from=EN> > accessed 5 May 2016. Similarly, the term 'athlete' will be used to cover all participants involved in sport and, at all levels of sporting performance.



serious potential legal vulnerabilities of coaches in the UK, this literature review revealing that coaches working at high school, amateur, and elite levels of performance may be unwittingly exposed to liability for negligence in this jurisdiction. Interestingly, possible litigation risk in this context will be submitted to also extend to national governing bodies (NGBs) of sport.

Accordingly, in an attempt to provide more legal certainty to this developing aspect of sports law, and crucially, better safeguard and inform coaches, this review of literature will attempt to critically scrutinise the standard of reasonable care expected of a sports coach in the UK and highlight a number of practical risk management implications. Following this introduction, Part 2 of this review of literature contextualises the emerging issue of coach negligence, reveals some discrepancies in judicial reasoning in this area of the law and, reinforces the requirement for the fashioning of a legal test to be entirely representative of the specificity of sports coaching. Having contextualised the issue in appropriate detail, the law of negligence's control devices of duty, breach, causation, and defences provide the analytical framework in Part 3 to examine the application of the law of negligence in the circumstances of sports coaching. It is argued that the lack of direct authority in the UK is problematic, the nebulous nature of objective reasonableness providing insufficient guidance when attempting to clarify and define the standard of care required of a sports coach in this jurisdiction. In an attempt to bridge this lacuna in the law, detailed examination of the potential legal liability of coaches reveals crucial material factors from the prevailing circumstances of coaching that are fundamental to the collaborative coach-performer relationship. Further, particular legal vulnerabilities and limitations are uncovered in Part 3 by reviewing the doctrine of *in loco parentis* and the justification of customary professional practice.

Part 4 summarises the ramifications that flow from this chapter's legal analysis, it being imperative that coaches and NGBs adopt a systematic, continuous and contemporary risk assessment lens. In submitting that the legal test for coach negligence in the UK needs to be more sophisticated and nuanced, Part 5 illustrates a

number of current legal limitations. Part 6 of this literature review employs a comparative law perspective in an attempt to address some of these discrepancies, with informed and reflective fusion of legal principle utilised to formulate additional provisional propositions that might extend and refine existing UK jurisprudence to furnish a more precise and definitive legal test. Part 7 highlights practical implications generated by this review of literature's critical analysis for coaches, NGBs and the courts. In acknowledging this as a highly contextualised and contemporary area of the law in the UK, Part 8 of this chapter prioritises further important consequential research. Fundamentally, this suggested further research informs and reveals the important unanswered research question this thesis will concentrate on, thereby responding to the gaps in previous research and academic commentary.

## 2. Context

### 2.1 Emerging Issue

Legal liability in negligence for athlete injury is a significant issue facing all coaches,<sup>3</sup> given the increasingly visible interface between law and sport in this area.<sup>4</sup> Clarifying the relationship between a coach and those under the coach's instruction represents a serious gap in both the case law and the academic literature relating to the UK.<sup>5</sup> The very narrow principles derived from judgments directly in point establishes that for instance, at the elite level, coaching that is 'robust' and 'fairly tough' would 'not begin

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<sup>3</sup> AS McCaskey and KW Biedzynski, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J. Sport L.* 7, 9. Importantly, since the law of negligence may be regarded as generally similarly everywhere (U Magnus, 'Tort law in general' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 725), and particularly in the context of the wider common law family, academic commentary from the US, Australia and Canada will be referred to throughout this thesis, in order to add force to the arguments developed. As revealed later in this section, reference to academic scholarship from different jurisdictions also proves necessary given the originality of this research.

<sup>4</sup> S Greenfield et al, 'Reconceptualising The Standard Of Care In Sport: The Case Of Youth Rugby In England And South Africa' (2015) 18(6) *Potchefstroom Elec. L.J.* 2183, 2186.

<sup>5</sup> See generally, M James, *Sports Law* (Palgrave-Macmillan, 2010) 93.



to amount to negligence'.<sup>6</sup> Of more universal application, is the recognition by the courts that overtraining, or training requiring an unreasonable level of intensity, may provide the basis for a cause of action<sup>7</sup> for a claim in negligence.<sup>8</sup> Nevertheless, the pivotal question of what constitutes reasonableness in the circumstances has yet to be fully scrutinised, allowing only speculative conclusions,<sup>9</sup> with academic commentary tending to address the issue more generally.<sup>10</sup> Often, the emphasis has been on school sport.<sup>11</sup> This compounds the age old problem of predicting conduct deemed 'negligent'.<sup>12</sup> Moreover, this absence of legal authority and guidelines concerning the standard of care required of sports coaches,<sup>13</sup> thereby defining the content of the

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<sup>6</sup> *Brady v Sunderland Association Football Club Ltd*, 17 November 1998 (CA). Importantly, in the 18 years since this judgment was delivered, coaching practices and methods (including the tracking and monitoring of performance and injuries) have developed considerably.

<sup>7</sup> A cause of action describes 'the various categories of factual situations which entitle[d] one person to obtain from the court a remedy against another': *Letang v Cooper* [1965] 1 QB 232 (CA) 242 (Diplock LJ). See further, CT Watson and R Hyde (eds), *Charlesworth & Percy on Negligence, First Supplement to the Thirteenth Edition* (Sweet and Maxwell, 2015) [2-05].

<sup>8</sup> *Davenport v Farrow* [2010] EWHC 550 (QB). The overtraining of elite young athletes may constitute a child protection issue, particularly in the context of elite international sport: see further, A Gray and A-M Blakeley, 'Child Protection' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008) 813.

<sup>9</sup> S Gardiner et al, *Sports Law* (3rd ed., Cavendish, 2006) 649. Nonetheless, cases concerning the instructing/guiding of amateur skiers/climbers remain instructive in highlighting a number of specific duties of sports instructors and the court's approach to determining if negligence might be established in the circumstances. See, for instance, *Woodroffe-Hedley v Cuthbertson* (QBD, 20 June 1997); *Anderson v Lyotier* [2008] EWHC 2790 (QB).

<sup>10</sup> E.g., J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 248; M James, *Sports Law* (2nd ed., Palgrave-Macmillan, 2013) 92-97; Greenfield et al (n 4). A number of authors in the US have considered the standard of care owed by coaches to performers, including the coaching of elite collegiate athletes. This provides the context for this thesis' qualitative research. See, for instance, WT Champion, 'The Evolution of a Standard of Care for Injured College Athletes: A Review of Kleinknecht and Progeny' (1999) 1 *Va. J. Sports & L.* 290, 294; RR Hekmat, 'Malpractice During Practice: Should NCAA Coaches be Liable for Negligence?' (2001-02) 22 *Loy. L.A. Ent. L. Rev.* 613, 614; MJ Dobberstein, "'Give Me the Ball Coach": A Scouting Report on the Liability of High Schools and Coaches for Injuries to High School Pitchers' Arms' (2007) 14 *Sports Law Journal* 49; T Davis, 'Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers' (2008) 76 *UMKC L. Rev.* 571, 574; MJ Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013) 215.

<sup>11</sup> E.g., D Griffith-Jones, 'Civil Liability Arising Out of Participation in Sport' in Lewis and Taylor (n 8) 737-42; E Grayson, *Sport and the Law* (3rd ed., Tottel, 1999) 190-99; N Cox and A Schuster, *Sport and the Law* (Firstlaw, 2004) 230-47; H Hartley, *Sport, Physical Recreation and the Law* (Routledge, 2009) 55-63; M Beloff et al, *Sports Law* (2nd ed., Hart, 2012) 146-48.

<sup>12</sup> A Morris, "'Common sense common safety": the compensation culture perspective' (2011) 27(2) *Professional Negligence* 82, 92-93.

<sup>13</sup> Necessary insurance coverage no doubt filters the number of cases litigated, parties also encouraged to reach settlement where appropriate, thereby limiting the number of court decisions. Nevertheless,



tort,<sup>14</sup> illustrates unacceptable confusion in the law of negligence in the UK, and demands careful doctrinal analysis in an attempt to formulate a legal test reflective of the specificity of sports coaching.

According to the National Council for Voluntary Organisations, it is estimated that in 2012-13, 12.7 million people were involved in volunteering activities in England once a month, and 19.2 million once a year, with the most recent statistics available suggesting volunteering is at peak levels.<sup>15</sup> In 2008/09 the sport/exercise sector was the most popular area for formal volunteers,<sup>16</sup> it being recognised that volunteers and coaches are vital to the existence and continuation of grassroots sport, since 'volunteers and coaches make sport happen'.<sup>17</sup> Importantly, the key to achieving the London Olympic 2012 legacy of participation and performance is coaching,<sup>18</sup> requiring the support, training and commitment of thousands of volunteers.<sup>19</sup> Obvious implications of this legacy include systematic coach education programmes to ensure coaches and volunteers are adequately prepared and safeguarded for their pivotal role. A less obvious consideration may be the potential civil liability these individuals may subsequently be exposed to since most claims brought against sports coaches for

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insurance provision does little to clarify the standard of reasonable care required of coaches, or inform best practice recommendations. Further, this does not alleviate the stress and anxiety endured by the named defendants in cases of alleged negligence. See, for instance, *Carter v NSW Netball Association* [2004] NSWSC 737, where a volunteer netball coach suffered a 'severe psychological reaction' following serious accusations including 'gross neglect of duty of care'. Paul Horvath and Penny Lording note that the court found that Ms Carter's conduct constituted no more than 'excessively enthusiastic coaching' <[http://www.ausport.gov.au/sportscoachmag/safety/coaches\\_rights\\_when\\_complaints\\_are\\_made](http://www.ausport.gov.au/sportscoachmag/safety/coaches_rights_when_complaints_are_made)> accessed 2 May, 2014.

<sup>14</sup> J Steele, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010) 115.

<sup>15</sup> <<http://data.ncvo.org.uk/a/almanac14/how-many-people-regularly-volunteer-in-the-uk-3/>> accessed 9 July 2014. See further, Social Action, Responsibility and Heroism Bill [9] (2014-15) Research Paper 14/38 (8 July 2014) 3-4 <<http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill>> accessed 20 April 2016.

<sup>16</sup> Institute for Volunteering Research <<http://www.ivr.org.uk/ivr-volunteering-stats/178-what-do-volunteers-do>> accessed 20 April 2016.

<sup>17</sup> Sport England < [http://archive.sportengland.org/support\\_\\_advice/volunteers.aspx](http://archive.sportengland.org/support__advice/volunteers.aspx) > accessed 20 April 2016.

<sup>18</sup> sports coach UK (20 July 2012) <<http://www.sportscoachuk.org/news/coaches-key-lasting-legacy>> accessed 20 April 2016.

<sup>19</sup> D Healey, *Sport and the Law* (4th ed., UNSW Press, 2009) 166.



sports-related injuries are for negligence,<sup>20</sup> with a likely future increase in such litigation.<sup>21</sup> In short, it would appear that the vast majority of coaching is delivered by volunteers,<sup>22</sup> often with limited training,<sup>23</sup> the latest four-year study of coaching in the UK revealing that approximately half of the coaches in this jurisdiction do not hold a coaching qualification.<sup>24</sup> Previous experience as players, and enthusiasm, are often regarded as sufficient prerequisites for volunteer coaches.<sup>25</sup> Throughout this thesis, these factors will be argued to potentially accentuate exposure to negligence liability.

The liability of coaches is arguably the least explored area of sports negligence,<sup>26</sup> with the courts yet to define the relationship between a coach and those under the coach's instruction in the majority of sporting activities.<sup>27</sup> It is asserted that without clarification of the scope and reach of the tort of negligence into the domain of sports coaching, there is a realistic prospect that some coaches might resort to defensive measures that would have a chilling effect on a wide range of activities, or worse still, abandon their involvement in sports coaching altogether, in order to negate potential exposure to perceived liability.<sup>28</sup> Indeed, the current (limited) jurisprudence questions why volunteers would be willing to become involved in sports coaching,<sup>29</sup> likely

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<sup>20</sup> MacCaskey and Biedzynski (n 3) 13; J Labuschagne and J Skea, 'The Liability of a Coach for a Sport Participant's Injury' (1999) 10 *Stellenbosch Law Review* 158, 159; J Spengler et al, *Introduction to Sport Law* (Human Kinetics, 2009) 14; Mitten (n 10) 215-16; Greenfield et al (n 4) 2184.

<sup>21</sup> T Kevan, 'Sports Personal Injury' (2005) 3 *International Sports Law Review* 61. See for instance, most recently: *Davenport* (n 8); *Petrou v Bertoncello* [2012] EWHC 2286; *Cox v Dundee CC* [2014] CSOH 3 (liability in delict); and *Sutton v Syston Rugby Football Club Limited* [2011] EWCA Civ 1182. In *Sutton*, although the ultimate focus was on the Club's common law duty of care, a cause of action in negligence may be established where a coach fails to conduct an adequate pitch inspection (at [13]).

<sup>21</sup> See generally, James (n 5) 93.

<sup>22</sup> sports coach UK, 'Coach Tracking Study: A four-year study of coaching in the UK' (2012) 17, the employment status of coaches in the UK classifying 76% as volunteers (unpaid) <<http://www.sportscoachuk.org/sites/default/files/Coach-tracking-study.pdf>> accessed 20 April 2016.

<sup>23</sup> G Nygaard and T Boone, *Coaches' guide to sport law* (Human Kinetics, 1985) 13.

<sup>24</sup> sports coach UK (n 22) 17, the national average of coaches holding a coaching qualification in 2012 being around 53%.

<sup>25</sup> Healey (n 19) 159.

<sup>26</sup> Gardiner et al (n 9) 649.

<sup>27</sup> James (n 5) 93.

<sup>28</sup> J Fulbrook, *Outdoor Activities, Negligence and the Law* (Ashgate, 2005) 105.

<sup>29</sup> Anderson (n 10) 249; R Heywood and P Charlish, 'Schoolmaster Tackled Hard Over Rugby Incident' (2007) 15 *Tort Law Review* 162, 171.

compounded by a perceived (more) litigious society and ‘compensation culture’,<sup>30</sup> potentially removing from sport its ‘most important and focal participant’.<sup>31</sup> As noted by Lord Falconer in 2005, ‘the idea of a compensation culture can impact on volunteers – by discouraging people to give their time or by organisations restricting the activities people can do for fear – often a misplaced fear – of a claim’.<sup>32</sup>

Subsequently, this literature review will scrutinise the protections and safeguards afforded to sports coaches by the courts, including the legal tests that have been fashioned in the area of sports negligence, revealing important limitations in the current law. This proceeding analysis will inform identification of this thesis’ research question. Paramount to this critical commentary is explanation of the concept of coach and the specificity of sports coaching.

## 2.2 Specificity of Sports Coaching

Given the contemporary awareness and appreciation of sporting involvement, performance and achievement, coaching is a term which appears widely and inherently understood -- you know it when you see it. According to the International Council for Coaching Excellence, ‘[c]oaching is a process of guided improvement and development in a single sport at identifiable stages of athlete development’.<sup>33</sup> Nonetheless, legal analysis requires a more sophisticated clarification and examination of the specific roles performed by sports coaches to enable the precise legal duties of coaches, including the scope of such duties, to be identified and defined.<sup>34</sup> The dearth of case

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<sup>30</sup> Steele (n 10) 16; *Wilkin-Shaw v Fuller* [2012] EWHC 1777 (QB) [42] (Owen J).

<sup>31</sup> MacCaskey and Biedzynski (n 3) 8.

<sup>32</sup> Lord Falconer, ‘Compensation Culture’, (Health and Safety Executive Event, 22 March 2005) 4 <<http://www.woodwardsolicitors.co.uk/lordfalconer.pdf>> accessed 20 April 2016.

<sup>33</sup> International Council for Coaching Excellence, ‘International Sport Coaching Framework’ (2012) 10 <[http://www.icce.ws/\\_assets/files/news/ISCF\\_1\\_aug\\_2012.pdf](http://www.icce.ws/_assets/files/news/ISCF_1_aug_2012.pdf)> accessed 16 February, 2016.

<sup>34</sup> As is discussed more fully in chapter 5, although terminology making reference to ‘specific duties’ may be regarded as technically misleading, since the precise degree and scope of responsibilities owed by coaches more accurately defines the standard of care, reference to the specific duties incumbent on sports coaches provides an illuminating and helpful conceptual framework by which the legal responsibilities of coaches can be unpacked and clarified. Importantly, Clerk and Lindsell on Torts note that formulating the standard of care in terms of a particular duty can be useful in a descriptive way: see, MA Jones and AM Dugdale (eds) *Clerk and Lindsell on Torts* (20th ed., Sweet and Maxwell, 2010) [8-137].



law categorically addressing the negligence of sports coaches,<sup>35</sup> as distinguished from teachers,<sup>36</sup> and instructors,<sup>37</sup> has required previous academic commentary on the issue of coach liability in negligence to consider the issue somewhat generally. Awkwardly, courts refrain from crystallising what amounts to reasonable care in the specific circumstances by means of more definite and discrete rules, the malleable test of reasonableness viewed as being adaptable to the circumstances of each individual case, and offering such flexibility that more definitive guidelines are regarded as unnecessary.<sup>38</sup> Clerk and Lindsell on Torts highlights the judiciary's avoidance of 'reducing to rules of law the question whether or not reasonable care has been taken',<sup>39</sup> with citation of authority discouraged as a means of clarifying reasonable care given the uniqueness of particular situations.<sup>40</sup> Despite individual cases providing little more than useful guides on what may comprise conduct that is regarded as reasonable or unreasonable,<sup>41</sup> in the context of the emerging and evolving relationship between modern sports coaching and the law, the significance of such legal guidelines should not be underestimated, and provides the foundation and scaffolding from which any attempt to clarify the operation of the law in this field must proceed. Problematically, given the considerable emphasis on the scrutiny of the sporting (coaching) context demanded by the law of negligence, despite analogous case law generally being illustrative of this developing aspect of sports law,<sup>42</sup> there would appear much scope

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<sup>35</sup> E.g., *Davenport* (n 8); *Brady* (n 6), where to be precise, the training sessions considered by the court were being delivered by the manager, inviting a more general application of the term coach when attempting to establish complex legal rules and principles that may be of future benefit when seeking to clarify the actual content of the duty owed by coaches to athletes.

<sup>36</sup> E.g., *Wright v Cheshire CC* [1952] 2 All ER 789 (CA); *Affutu-Nartoy v Clarke*, The Times, 9 February 1984 (QBD); *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA); *Mountford v Newlands School* [2007] EWCA Civ 21; *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135; *Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School)* [2016] NIQB 52.

<sup>37</sup> E.g., *Woodroffe-Hedley* (n 9); *Anderson* (n 9); *MacIntyre v Ministry of Defence* [2011] EWHC 1690 (QB).

<sup>38</sup> Jones and Dugdale (n 34) 517.

<sup>39</sup> *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 (HL).

<sup>40</sup> *Foskett v Mistry* [1984] RTR 1 (CA).

<sup>41</sup> Jones and Dugdale (n 34) 517. See, *Qualcast* (n 39) 755.

<sup>42</sup> James (n 10) 92.

for judges to distinguish tentative legal principle derived from seemingly comparable judgments.

The scope for a potentially narrow application of legal principle from analogous authority was revealed in *Anderson v Lyotier*,<sup>43</sup> Foskett J distinguishing *Woodbridge School v Chittock*,<sup>44</sup> by noting that '[i]t was conceded that the context of the present case is not identical since Chittock was concerned with a *schoolteacher, not a ski instructor*'.<sup>45</sup> Arguably, a legal rule that can be drawn from *Anderson v Lyotier*,<sup>46</sup> is that athletes must inform their coaches of any worries concerning their own competence to safely participate in a particular practice or activity,<sup>47</sup> notwithstanding that the application of this guideline may be seriously curtailed, in for instance, compulsory school sporting activities with children. Significantly, it remains unclear to what extent the legal principles developed and established in the specific circumstances of school sport can confidently be applied to contexts of voluntary participation in activities delivered by volunteers.<sup>48</sup> Nonetheless, it will be respectfully submitted that 'courts would be wise to recognise that there is a broad range of acceptable, non-negligent coaching and to allow a great deal of latitude',<sup>49</sup> thereby treading a cautious path

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<sup>43</sup> *Anderson* (n 9).

<sup>44</sup> *Woodbridge School v Chittock* [2002] EWCA Civ 915. Following *Chittock*, defence counsel argued that the decision by the ski instructor in *Anderson* to take the mixed ability adult ski group off-piste on the final day was 'within a reasonable range of options'. Importantly, Simon Paul Chittock was a sixth form student aged 17 ½ at the time of the serious accident, a relatively experienced skier for his age, with permission to ski unsupervised on all of the slopes at the resort. Nevertheless, the analogy submitted was denied by Foskett J.

<sup>45</sup> *Anderson* (n 9) (emphasis added). Interestingly, in *Chittock* itself (at 18) the Court of Appeal, when considering the standard of care required of the teacher responsible for the organisation of the school ski trip, cited with approval the rugby refereeing case of *Smolden v Whitworth* [1997] PIQR P133 (CA), when recognising the importance of consideration of any available appropriate guidance for the activity in question.

<sup>46</sup> Given the dearth of case law in this jurisdiction specifically regarding the liability of sports coaches in negligence, *Anderson* provides a significant judgment as the court's reasoning appears highly relevant to the specific duties for which coaches have responsibility, including supervision and instruction. Nevertheless, the jurisprudential value of this first instance decision is limited given leave to appeal was granted, the appeal eventually compromised before being heard: see W Norris, 'The duty of care owed by instructors in a sporting context' (2010) 4 *JPI Law* 183, 184.

<sup>47</sup> James (n 10) 110.

<sup>48</sup> J Barnes, *Sports and the Law in Canada* (3rd ed., Butterworths, 1996) 296.

<sup>49</sup> R VerSteeg, 'Negligence in the Air: Safety, Legal Liability, and the Pole Vault' (2003) 4 *Tex. Rev. Ent. & Sports L.* 109, 119.



through liability in this context,<sup>50</sup> such realist and purposive judicial reasoning displayed in *MacIntyre v Ministry of Defence*.<sup>51</sup>

The Oxford Dictionary of English defines the term coach as ‘an instructor or trainer in sport’,<sup>52</sup> the transferability of the terms coach, teacher and instructor providing strong intuitive appeal. A sports instructor, by concentrating on achievement of predetermined skills, is essentially directing the activities of performers by ‘giving clear, recipe-style instructions for the tasks to be carried out’, the *product* or performance providing the outcome goal, with less emphasis being placed on the *process* skills.<sup>53</sup> In contrast, although there may be a continued tendency for sports coaches to primarily focus on the psychomotor or physical aspects of athlete development and performance, more recently, as with the holistic approach predominantly displayed by teachers, sports coaches are encouraged to be more receptive to the cognitive (thinking), affective (feeling) and psychomotor development of athletes.<sup>54</sup> Reciprocally, in preparing for ‘academic’ assessment in schools, teachers utilise coaching methods to provide instruction or practice as a means of preparation,<sup>55</sup> with research indicating that effective direct instruction is a highly successful approach to teaching.<sup>56</sup> Unsurprisingly, there is often confusion and conceptual

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<sup>50</sup> Greenfield et al (n 4) 2203.

<sup>51</sup> *MacIntyre v Ministry of Defence* [2011] EWHC 1690 [120], Spencer J concluding: ‘I am satisfied that at all material stages there was proper appraisal and assessment of risk, and that this was kept under continuous review. ... I am satisfied that although the day's climbing was ambitious and challenging, it was not beyond the competence of the claimant and Lieutenant Champion who were thoroughly enjoying the experience. But for the claimant's accident they would both have benefited from it greatly’. James notes the considerable contrast in judicial reasoning with *Anderson* (n 9): James (n 7) 97. Also see, *Chittock* (n 44), and discussed later.

<sup>52</sup> *The Concise Oxford Dictionary of Current English*, 251 (9th ed., OUP, 1995).

<sup>53</sup> G Petty, *Teaching Today: A Practical Guide* (4th ed., Nelson Thornes, 2009) 135-36.

<sup>54</sup> S Drewe, ‘An Examination of the Relationship Between Coaching and Teaching’ (2000) 52 *Quest* 79, 86; T Cassidy et al, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009) 31-22.

<sup>55</sup> J Hattie, *Visible Learning: A Synthesis of Over 800 Meta-Analyses Relating to Achievement* (Routledge, 2009) 179.

<sup>56</sup> *Ibid* 204-07.

misunderstanding within the sports sector concerning terms such as coach, instructor, coach, leader, teacher and so forth.<sup>57</sup>

Indeed, the progressive shift from the 'expert' coach, stereotypically adopting an authoritarian coaching style,<sup>58</sup> to 'coaching as an educational or pedagogical exercise',<sup>59</sup> makes somewhat redundant any attempt to regard the terms of coach, instructor and teacher as being categorical, it being axiomatic that good coaching requires good teaching.<sup>60</sup> Clearly, '[c]oaches are teachers, and coaching, like teaching, takes skill, art, and knowledge',<sup>61</sup> there being much force to the assertion that coaches are educators.<sup>62</sup> Further, since instruction is a widely employed teaching method,<sup>63</sup> albeit sometimes an essentially didactic or command approach to teaching and learning, the distinctive roles of sports coach and sports instructor also display considerable overlap and sharing of complementary and interchangeable components and methodological approaches.<sup>64</sup> Simply applied, attempting to formulate discrete definitions of the roles 'coach', 'teacher' and 'instructor' appears unhelpful, contentious and potentially counter-productive. Such definitions are likely to oversimplify the complex contextualised dynamics of coaching<sup>65</sup> which is underpinned

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<sup>57</sup> B Taylor and D Garratt, 'The professionalization of sports coaching: definitions, challenges and critique' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010) 101.

<sup>58</sup> Cassidy et al (n 54) 30.

<sup>59</sup> Ibid 32.

<sup>60</sup> R Martens, *Successful Coaching* (3rd ed., Human Kinetics, 2004) 165; Drewe (n 54) 81, noting that distinctions between teaching and coaching may be a matter of degree.

<sup>61</sup> J Boxill, 'The Coach as Moral Exemplar' in Simon (n 10) 10.

<sup>62</sup> RL Simon, 'The Coach's Role: Conceptions of Coaching' in Simon (n 10); R Simon, 'The Ethical Coach: An Interpretive Account of the Ethics of Coaching' in Simon (n 10). Also see, I Martinková and J Parry, 'Coaching and performance enhancement' in AR Hardman and C Jones (eds), *The Ethics of Sports Coaching* (Routledge, 2011) 183.

<sup>63</sup> Teachers will use a range of varied teaching styles according to factors that comprise the nature and prevailing circumstances of the activity including: the degree of inherent dangers; the aims and learning objectives sought; the age, experience, maturity and ability of the performers; the teaching environment; the size of the class; the behaviour and motivation level of group members; the equipment being used; previous teaching knowledge and experience; teaching philosophy considerations; and, the preferred teaching style of the teacher/coach.

<sup>64</sup> See further, E Ryall and S Olivier, 'Ethical Issues in Coaching Dangerous Sports' in Hardman and Jones (n 62) 187-8.

<sup>65</sup> R Jones et al, *Sports Coaching Cultures: from Theory to Practice* (Routledge, 2004) 1.



by a 'mutually dependent relationship'.<sup>66</sup> Precariously, a search for legal principle and certainty appears to sometimes demand (artificial) definitional distinctions, whilst conversely, the dearth of case law supports consideration of the terms coach, instructor and teacher more widely, a loose application endorsed by educational and coaching research. Subsequently, the term 'coach' will be broadly applied in this thesis, it being necessary to be mindful and careful of the associated potential limitations this generates regarding suggested implications. This also backs the merits a comparative law perspective, facilitating the critical examination of case law directly in point, thereby providing much needed persuasive authority.

Although it may be trite law to recognise that establishing what may be regarded as acceptable risk taking by coaches will be incapable of definition,<sup>67</sup> coaches are nevertheless required to have a familiarity with the emerging case law relating to sports coaching and instructing,<sup>68</sup> since this awareness and knowledge provides necessary guidelines for reasonable practice.<sup>69</sup> Consideration of individual cases offers 'a barometer of acceptable behaviour',<sup>70</sup> by highlighting and identifying common situations that satisfy the criteria of negligence, promoting and developing a 'proactive risk assessment lens' that can be incorporated into the practices of coaches, physical education teachers, leaders and instructors.<sup>71</sup> Indeed, 'identification of the specific duties [incumbent upon coaches] is essential for understanding and evaluating what is required of coaches',<sup>72</sup> it being recognised that the sometimes impossible pressures and expectations placed upon some modern coaches forces the search for 'ever more extreme measures'.<sup>73</sup> It is comprehensible that coaches working in the context of elite

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<sup>66</sup> Ryall and Olivier (n 64) 187-88.

<sup>67</sup> Griffith-Jones (n 11) 717 & 725.

<sup>68</sup> In chapter 6, it is contended that discussion of scenarios derived from case law, as part of coach education and training, would be instructive in this regard. See further, N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016. DOI: 10.1080/21640629.2016.1180860.

<sup>69</sup> Nygaard and Boone (n 23) ix.

<sup>70</sup> Champion (n 10) 295.

<sup>71</sup> Hartley (n 11) 56.

<sup>72</sup> MacCaskey and Biedzynski (n 3) 15.

<sup>73</sup> P Craig and P Beedie (eds), *Sport Sociology* (2nd ed., Learning Matters, 2010) 119.

sport, seeking to optimise the performance levels of the athletes and performers being coached,<sup>74</sup> for instance by repeatedly pushing players to the limit of their physical and mental performance thresholds,<sup>75</sup> may be reluctant to take extra precautions in practice.<sup>76</sup> Nevertheless, such coaches must have regard to 'the likely boundary between coaches forging champions or committing a tort'.<sup>77</sup> Further, the absence of judgments having considered, ruled on, and articulated the scope of the duty of care required of sports coaches in the UK creates a further layer of uncertainty promoting unnecessary confusion should a coach be sued in negligence.<sup>78</sup> Put simply, the current law's effectiveness in adequately safeguarding coaches remains too elusive to determine with confidence, this vagueness in itself affording considerable support for further analysis and clarification of the law in this context.

In addition to the abovementioned legal ambiguities, some coaching practitioners may be reticent and resistant to acknowledge that litigation risk should be of some considerable importance when planning, delivering, and evaluating sessions, practices, and competitive fixtures and events. Interestingly, there is some evidence to indicate that soccer coaching behaviours can often be belligerent, reflective of the culture in professional soccer, preparation for the rigours of the game regarded as requiring young players to be exposed to such harsh and authoritarian approaches to

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<sup>74</sup> As will be discussed later, the athletes themselves would likely have a similar level of expectation in terms of the intensity in which training and practice sessions are conducted.

<sup>75</sup> Interestingly, the coaching style adopted in the circumstances would be a factor likely scrutinised by the court in claims brought against coaches in negligence: see, for example, *Davenport* (n 8), where Owen J considered in some depth the claimant's submission that the coach was 'a forceful and controlling personality who demanded a high level of control over the young athletes whom he coached' (at [27]). See further, Partington (n 68). Crucially, total and unquestioning compliance with the demands placed upon performers may be facilitated by reverence afforded to the perceived powerful and influential (and highly responsible) position of coach, resulting in athlete vulnerability: see Cassidy et al (n 54) 179; R Jones, N Glimtmeier and A McKenzie, 'Slim bodies, eating disorders and the coach-athlete relationship: A tale of identity creation and disruption' (2005) 40(3) *International Review for the Sociology of Sport* 377, 383-84; T Davis, 'The Coach and Athlete Recruitment: Ethical and Legal Dimensions' in Simon (n 10) 236-37, highlighting the 'power dynamic of the coach-athlete relationship'.

<sup>76</sup> K Lines, 'Thinking outside the box(-ing ring): the implications for sports governing bodies following Watson' (2007) 4 *International Sports Law Review* 67, 73.

<sup>77</sup> TR Hurst and JN Knight, 'Coaches' liability for athletes' injuries and deaths' (2003) 13 *Seton Hall J. Sports L.* 27, 29.

<sup>78</sup> Arguably, *Davenport* (n 8), presented a missed opportunity for clarification of the law in this area.



coaching.<sup>79</sup> It is further suggested that '[w]inning coaches often achieve results through techniques that could legally be considered "wanton" or "grossly negligent" in any other context'.<sup>80</sup> Clearly, should personal injury to an athlete be caused by coaching techniques evincing a reckless disregard for the wellbeing and safety of those under the coach's charge,<sup>81</sup> there would be strong and justifiable grounds for a finding of liability in negligence.

More generally, a lack of sensitivity to potential civil liability may be reflected in much coach education,<sup>82</sup> given the tendency to focus on the bioscientific aspects of sports science,<sup>83</sup> with facilitation of such a mechanistic approach a potential barrier to the appreciation of the complexities of coaching.<sup>84</sup> On this important issue of coach education and training, this emphasis on practical skills and knowledge<sup>85</sup> may be regarded as perpetuating 'an academic orthodoxy in sports coaching, often branded as "coaching science", that endorses a practice-based profession assumed at improving athletic performance'.<sup>86</sup> Whilst practice-based skills and knowledge are integral to effective coaching behaviour, an overemphasis on bio-scientific discourse focussed on improving athletic performance may fail to fully account for the complex and dynamic context in which modern sports coaches discharge their duty of care.

It is contended that the evolving intersection between the law of negligence and sports coaching represents one such significant and emerging complexity of coaching that appears less-often highlighted in both coach education and the extant

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<sup>79</sup> C Cushion and R Jones, 'Power, Discourse, and Symbolic Violence in Professional Youth Soccer: The Case of Albion Football Club' (2006) 23 *Sociology of Sport Journal* 142, 148.

<sup>80</sup> Hurst and Knight (n 77) 28.

<sup>81</sup> *Wooldridge v Sumner* [1963] 2 QB 43 (CA); *Caldwell v Maguire* [2001] EWCA Civ 1054. As noted by McArdle and James, as a standard of misbehavior, reckless disregard provides a sufficient, but not necessary, evidential guide: D McArdle and M James, 'Are you experienced? "Playing cultures", sporting rules and personal injury litigation after *Caldwell v Maguire*' (2005) 13(3) *Tort Law Review* 193, 207.

<sup>82</sup> Greenfield et al (n 4) 2201.

<sup>83</sup> D Kirk, 'Towards a socio-pedagogy of sports coaching' in Lyle and Cushion (n 57) 165. Kirk suggests that the reason why some NGB awards and degree programmes in sports coaching omit pedagogy may be partly because of 'the dominance of a bio-scientific discourse focussed on performance'.

<sup>84</sup> Cassidy et al (n 54) 93-94.

<sup>85</sup> J Lyle, 'Coaching philosophy and coaching behaviour' in N Cross and J Lyle (eds), *The Coaching Process: principles and practice for sport* (Butterworth-Heinemann, 1999) 31.

<sup>86</sup> Hardman and Jones (n 62) 1.

academic literature of 'coaching science'. Importantly, unlike the reactive development of child protection safeguarding procedures and legal provision,<sup>87</sup> a fundamental aim of this research is to heighten awareness of the scope of potential litigation, advocating a proactive approach to risk management to better protect and safeguard coaches from legal liability, and as a result, improve the health, safety and welfare of all athletes in structured and supervised coaching environments. Further, contextualisation of the potential civil liability of sports coaches emphasises the necessity for any legal test to be wholly reflective of the specificity of sports coaching, the fashioning of such a test likely to be enhanced by consideration of authority from other jurisdictions.

Having problematised a number of important legal ambiguities and concerns relating to the uniqueness of modern sports coaching, the law of negligence's control devices of duty, breach/fault, causation, and defences will next provide the analytical scaffolding for a detailed examination of the law in these special circumstances.

### 3. Law of Negligence

In the context of sport, it is clear that the ordinary principles of the law of negligence are applicable,<sup>88</sup> including the specific circumstances of sports coaching.<sup>89</sup> The leading authority in this area of sports law relates to the liability for injury caused by co-participants,<sup>90</sup> which establishes that the prevailing circumstances that the court would consider when applying ordinary principles of negligence may include: 'its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant'.<sup>91</sup> Crucially, this third proposition from *Caldwell v Maguire*, by identifying the indicative criteria constituting the prevalent circumstances

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<sup>87</sup> Gray and Blakeley (n 8) 779.

<sup>88</sup> E.g., *Smoldon* (n 45); *Vowles v Evans* [2003] EWCA Civ 318; see generally, Griffith-Jones (n 11) 715 & 740.

<sup>89</sup> E.g., *Davenport* (n 8).

<sup>90</sup> *Caldwell* (n 81). Also see, *Condon v Basi* (1985) 2 All ER 453 (CA).

<sup>91</sup> *Caldwell* (n 81) [11].



and enabling reasonableness to be defined, essentially formulates the legal test to be applied for injury caused by *fellow contestants*. Significantly, these circumstances will vary enormously the appropriate degree of care required of sports coaches.<sup>92</sup> For instance, when considering the standard of care expected of a rugby referee in *Smoldon v Whitworth*, Lord Bingham emphasised the significance of scrutiny of the full factual scenario in the court's deliberations, accepting that given the specific functions of a referee, there would not be negligence liability 'for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed'.<sup>93</sup> Whilst recognising from the outset that this research concerns a highly fact sensitive area of the law, a sports coach may be found liable in the UK where it can be established by the claimant that the coach:

- (i) Owed the claimant a duty of care;
- (ii) That this duty of care was breached;
- (iii) The breach in question caused foreseeable personal injury to the claimant; and
- (iv) The coach is unable to rely on an applicable defence(s).

### 3.1 Duty

Given the tort of negligence is underpinned by the 'neighbour principle',<sup>94</sup> requiring the exercise of reasonable care to avoid injuring anyone who ought reasonably to be considered as being affected by one's actions or omissions,<sup>95</sup> it is immediately apparent that coaches must display reasonable care when assuming such a role.<sup>96</sup> By analogy, it

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<sup>92</sup> Anderson (n 10) 248.

<sup>93</sup> *Smoldon* (n 45) P139; *Caldwell* (n 81) [11]. Also see *Allport v Wilbraham* [2004] EWCA Civ 1668, where a rugby referee was found not to have been negligent on the facts of the case. For a succinct description of the duty of care of a referee see *Vowles* (n 88) [22]-[25] (Lord Phillips MR).

<sup>94</sup> *Donoghue v Stevenson* [1932] AC 562 (HL).

<sup>95</sup> *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784; *Donoghue* (n 94) 580.

<sup>96</sup> Griffith-Jones (n 11) 737-38; Beloff et al (n 11) [5.52]; James (n 10) 93.



has previously been argued that imposing a duty of care on rugby union referees is harsh, unjust and would lead to undesirable 'defensive' refereeing.<sup>97</sup> Nonetheless, despite further arguments indicating that holding that an amateur referee owes a duty of care to the players under her/his charge would have a 'chilling effect', by discouraging volunteers from being prepared to serve as referees, the Court of Appeal has ruled otherwise.<sup>98</sup> Given the supervisory, instructional and safety functions of a coach, providing the foundation of the coach-athlete relationship, it is just, fair and reasonable<sup>99</sup> that coaches may be held liable for a breach in the standard of care that causes personal injury to athletes.

### 3.1.1 Content of Duty

It is the coach's responsibility to be up-to-date with sport-specific knowledge, sports medicine, and sports science, since techniques in sport can change remarkably over a couple of decades or so.<sup>100</sup> Should a claim be brought against a sports coach for alleged negligence, the most critical determining factor would generally be whether the coach fulfilled the duty to exercise reasonable care for the protection of the athlete.<sup>101</sup> Although the standard expected of sports coaches is fixed conceptually as the duty to take reasonable care,<sup>102</sup> specific duties required of coaches have evolved,<sup>103</sup> it being suggested that coaches are required to discharge responsibilities that may be classified under three main headings which include: facilities and organisation; instruction and

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<sup>97</sup> *Smoldon* (n 45) P122-23.

<sup>98</sup> *Vowles* (n 88) [49].

<sup>99</sup> *Caparo v Dickman* [1990] 2 AC 605 (HL) 617-618 (Lord Bridge).

<sup>100</sup> *Nygaard and Boone* (n 23) 24.

<sup>101</sup> *Labuschagne and Skea* (n 20) 159; W Norris, 'Perry v Harris – Case Comment Following the Ruling in the Court of Appeal' (2008) 4 *JPI Law* 258, 259; James (n 10) 94; N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232, 236; Greenfield et al (n 4) 2187. Since chapter 5 will reveal the test of coach negligence to essentially be an instance of professional negligence, also see: M Brazier and J Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8(1) *Medical Law Review* 85, 87. This reaffirms that the core disputed legal issue will centre on what might constitute ordinary competence in the particular circumstances.

<sup>102</sup> D Howarth, 'Many Duties of Care – Or a Duty of Care? Notes from the Underground' (2006) 26(3) *Oxford J Legal Studies* 449.

<sup>103</sup> *MacCaskey and Biedzynski* (n 3) 15.

supervision; and medical care.<sup>104</sup> Unpacking these categories reveals the need for coaches to deliver safe practices, with appropriate use of required protective equipment; avoidance of coaching practices that might aggravate lingering injury; and the need for supervision to reflect inherent risks that are foreseeable.<sup>105</sup> Simply applied, it appears generally well established that the specific duties of coaches when managing the risk of injury to athletes relate to: (i) supervision; (ii) training and instruction (including organisation); (iii) ensuring the proper use of safe equipment; (iv) providing competent and responsible personnel; (v) warning of latent dangers; (vi) providing prompt and proper medical care; (vii) preventing injured athletes from competing; and (viii) matching athletes of similar competitive levels.<sup>106</sup> Although beyond the scope of this present literature review, these criteria could be further elaborated upon, for instance, seven factors to be considered by coaches when matching performers include the athletes': (i) skill; (ii) experience; (iii) injuries; (iv) maturity: physical, emotional and mental; (v) height and weight;<sup>107</sup> (vi) age; and (vii) mental state.<sup>108</sup>

Traditionally, the assumption has been that the coach's 'primary duty' is the safety of the individual athlete,<sup>109</sup> which would appear to remain the case when coaching children.<sup>110</sup> However, given the diverse contexts in which coaches now operate, including the highly commercialised circumstances of some professional elite sport, might there be occasion whereby the 'primary duty' of the coach is winning?<sup>111</sup> Whilst accepting that the terminology of 'primary duty' may be regarded as facilitating

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<sup>104</sup> Barnes (n 48) 302.

<sup>105</sup> J Kessler, 'Dollar Signs on the Muscle... And the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes' (2001) 3 *Va. J Sports & L* 80, 99.

<sup>106</sup> MacCaskey and Biedzynski (n 3) 15-16.

<sup>107</sup> E.g., HAP Archbold et al, 'RISUS study: Rugby Injury Surveillance in Ulster Schools' (2015) *Br J Sports Med* 1, 6 Published Online First: 23 December 2015. DOI: 10.1136/bjsports-2015-095491, recognising that '[t]he trend for an increased risk of injury in higher level, older, heavier schoolboy players who regularly undertake weight training is worrying'.

<sup>108</sup> Labuschagne and Skea (n 20) 175-77. Further considerations include the fitness levels of athletes, athletes with disabilities and participants returning after recovering from injury: see further, Martens (n 60) 482.

<sup>109</sup> MacCaskey and Biedzynski (n 3) 15.

<sup>110</sup> Healey (n 19) 157.

<sup>111</sup> *Ibid* 156.



consideration of variable standards of care,<sup>112</sup> which have not been well received by the courts in the UK,<sup>113</sup> it concentrates attention on the highly fact sensitive and sometimes conflicting obligations faced by coaches in diverse contexts such as school sport, amateur sport and professional sport. Further, since a volunteer coach working independently is unlikely to be a medical expert or have access to specialist medical advice, balancing the duty of reasonable care to individual players with responsibilities to the entire team generates a difficult judgment call as coaches 'are forced to rely on imperfect information while upholding a series of competing obligations'.<sup>114</sup> Interestingly, further contentious issues concern the scope of the duty of coaches to protect athletes from themselves,<sup>115</sup> and determination of what constitutes reasonable encouragement when reintroducing previously injured athletes into activities and training,<sup>116</sup> with the scenario of an injured star athlete desperate to compete a challenging dilemma frequently encountered by coaches.<sup>117</sup>

Contextualisation of the duty of care of sports coaches in this jurisdiction recognises sport's social utility and public interest benefits which include physical and psychological well-being and civic participation,<sup>118</sup> with appreciation that PE and school sport promote the health and fitness, and the psychological and emotional development of participants.<sup>119</sup> In being conscious to avoid a chilling effect on vigorous athletic participation in the US, whilst balancing the tensions this may create with avoiding personal injury to athletes, it would appear that (some) courts endorse the view that promoting safety is subordinate to encouragement of vigorous

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<sup>112</sup> As noted above at (n 34), terminology making reference to 'specific duties' may be regarded as technically misleading. The duty incumbent upon coaches is to discharge their functions with reasonable skill and care. This may be regarded as a duty to avoid exposing athletes to unreasonable or unacceptable risk of personal injury.

<sup>113</sup> *Nettleship v Weston* [1971] 2 QB 691 (CA); *Beloff et al* (n 11) 143.

<sup>114</sup> *Kessler* (n 105) 100. This balancing exercise is integral to chapter 4's analysis of the process of risk assessment/risk-benefit assessment.

<sup>115</sup> *Hartley* (n 11) 89.

<sup>116</sup> AN Hecht, 'Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hodge story' (2002) 12 *Seton Hall J. Sports L.* 17, 40-41.

<sup>117</sup> *Healey* (n 19) 156.

<sup>118</sup> *Anderson* (n 10) 238.

<sup>119</sup> *Cox and Schuster* (n 11) 235.



participation.<sup>120</sup> Following *Smoldon v Whitworth*, it appears that in England and Wales the safety of players is of paramount importance, with the upholding of safety rules generally given precedence over other considerations,<sup>121</sup> although arguments recognising the specificity of sports coaching point to a possible distinction between the roles of referee and coach in the implementation of rules. Such analysis certainly reinforces the potentially narrow application of analogous case law authority, and importantly, the need for any legal test determining the necessary standard of care expected of sports coaches to be tailored to the specificity of coaching. Reasonableness is reflective of the circumstances at the material time,<sup>122</sup> with the standard of care being subject to variations in the prevailing 'social conditions and habits of life'.<sup>123</sup> This requires courts to be mindful of coaching as a dynamic social practice that is responsive to new information and knowledge, with the principles of coaching being constantly assessed and revised.<sup>124</sup>

For instance, using the analogy of sport managers, should the use of automated external defibrillators (AEDs) continue to become more commonplace, 'the bar will continue to be raised regarding the standard of care that organizations and facilities are expected to provide'.<sup>125</sup> With particular reference to coaching, as discussed in chapter 7, the management of sport-related concussion provides an instructive illustration of how the requirements of coaches are reflective of new information, knowledge and stipulated best practice protocols. Importantly, such advances may increase the scope and degree of the duty of care owed by progressively placing more

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<sup>120</sup> Davis (n 10) 576.

<sup>121</sup> Gardiner et al (n 9) 648.

<sup>122</sup> Griffith-Jones (n 11) 716.

<sup>123</sup> R Percy and C Walton (eds) *Charlesworth & Percy on Negligence* (9<sup>th</sup> ed., Sweet & Maxwell, 1997) [6-04].

<sup>124</sup> Cassidy et al (n 54) 130-31.

<sup>125</sup> J Spengler et al, *Risk Management in Sport and Recreation* (Human Kinetics, 2006) 64. As noted by Miles and Tong, though highly desirable, there is no requirement in the UK at present for coaches to have first aid or life-support training: A Miles and R Tong, 'Sports Medicine For Coaches' in RL Jones and K Kingston, *An Introduction To Sports Coaching: Connecting Theory To Practice* (2nd ed., Routledge, 2013) 189. In this scenario, it would be reasonable for the coach to have contingency plans in place for the management of foreseeable risk, and make appropriate and timely referral to a qualified medical practitioner or nominated first aider.

responsibilities on coaches.<sup>126</sup> In short, the specific duties of modern sports coaches, and the evidential threshold to establish liability in negligence, requires contemporary analysis, critical consideration of the doctrine of *in loco parentis* illustrative of developments in this area of the law.

### 3.1.2 *In loco parentis*

Since the test adopted in *Williams v Eady*,<sup>127</sup> that of a careful parent, the legal doctrine of *in loco parentis*, pronouncement of which varies with different age groups and generations,<sup>128</sup> has been recognised as providing a useful benchmark for the duty of care owed by teachers<sup>129</sup> and coaches.<sup>130</sup> Nonetheless, the predominate tendency by the courts to raise the general standard of care expected of school teachers,<sup>131</sup> with the responsibilities of teachers no longer compared to those of parents, but rather the benchmark appropriate to a competent professional person,<sup>132</sup> renders the application of the term *in loco parentis* problematic. This was succinctly articulated by Lord Justice Croom-Johnson when *Van Oppen v Clerk to the Bedford Charity Trustees* was considered by the Court of Appeal:

The background to the case is that the duty of care which the school owes to its pupils is not simply that of the prudent parent. In some respects it goes beyond mere parental duty, because it may have special knowledge about some matters which the parent does not or cannot have. The average parent cannot know of unusual dangers which may arise in the playing of certain sports, of which rugby football may be one. That is why the school undertakes to see that proper coaching and refereeing must be enforced. It might know that some types of equipment in, for example, gymnastics have their dangers. But this is

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<sup>126</sup> Labuschagne and Skea (n 20) 158

<sup>127</sup> *Williams v Eady* (1893) 10 TLR 41.

<sup>128</sup> Grayson (n 11) 191.

<sup>129</sup> E.g., *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273 (QB) 277 (Boreham J); *Wilkin-Shaw* (n 30) [39] (Owen J).

<sup>130</sup> Cassidy et al (n 54) 150.

<sup>131</sup> G Barrell, *Teachers and the Law* (5th ed., Methuen, 1978) 275.

<sup>132</sup> P Whitlam, *Safe Practice in Physical Education and Sport* (8th ed., The Association for Physical Education: Coachwise, 2012) 57. E.g., *Wilkin-Shaw* (n 30) [40].



all part of the duty placed on the school to take reasonable care of the safety of the person and property of each pupil.<sup>133</sup>

Consequently, due to the 'special skill or competence' required by the teaching and coaching 'professions',<sup>134</sup> and the potential hazardous circumstances in which these posts are performed,<sup>135</sup> it is clear that a PE teacher (and sports coach) would be judged by an 'enhanced standard of foresight'.<sup>136</sup> In Canada the careful parent test also provides a benchmark for gymnastics teachers,<sup>137</sup> but significantly, this standard of care is judicially modified 'to allow for the larger-than-family size of the physical education class and the supraparental expertise commanded of a gymnastics instructor'.<sup>138</sup> Although this specialist knowledge or expertise does not enlarge the duty of care owed, it brings into consideration factors concerning the scope and degree of that duty which may be essential in deciding whether or not the duty of care has been discharged.<sup>139</sup> Importantly, an inexperienced PE teacher, coach or volunteer may likely be judged at the same standard as more experienced colleagues,<sup>140</sup> which might prove particularly challenging in circumstances where non-specialist teachers and coaches with an interest and enthusiasm for sport provide instruction that may be inadequate.<sup>141</sup> Overall, it is suggested that the initial teacher training requirements and continuing professional development (CPD) of PE teachers, and arguably some coaches, combined

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<sup>133</sup> *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA) 414-15 (Croom-Johnson LJ). See further, N Partington, 'Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School)' (2016) 67(2) *NILQ* 251 (note).

<sup>134</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB) 586 (McNair J). The test for negligence being, 'the standard of the ordinary skilled man exercising and professing to have that special skill'. This test of professional negligence, as it applies to sports coaching, is critically considered in chapter 5.

<sup>135</sup> *Wilsher v Essex Area Health Authority* [1987] QB 730 (CA). See also, N Harris, *The Law Relating to Schools* (2nd ed., Tolley, 1995) 330.

<sup>136</sup> Whitlam (n 132) 58.

<sup>137</sup> Barnes (n 48) 299.

<sup>138</sup> *Thornton v School Dist. No. 57 (Prince George) Bd. Of School Trustees* [1976] 5 WWR 240, 73 DLR (3d) 35 (BCCA) [74] (Carrothers JA).

<sup>139</sup> *Van Oppen* (n 129) 287.

<sup>140</sup> *Wilsher* (n 135); *Nettleship* (n 113). See Whitlam (n 132) 57.

<sup>141</sup> Cox and Schuster (n 11) 235.



with curriculum developments,<sup>142</sup> has extended 'supraparental expertise' to such an extent that the judicial modification of the *in loco parentis* doctrine renders it somewhat artificial, restrictive and outdated.<sup>143</sup> Most recently, the Supreme Court in *Woodland v Swimming Teachers Association*,<sup>144</sup> reinforced the limitations of attempts to apply the notion of *in loco parentis* in the educational context,<sup>145</sup> the judgment imputing on schools 'a greater responsibility than any which the law presently recognises as being owed by parents'.<sup>146</sup> With regard to defining the content of the duty of care owed by modern sports coaches to their charges, it is submitted that reference to terminology embracing the concept of *in loco parentis* is best resisted.

### 3.2 Fault/Breach of Duty

To establish liability in negligence involves establishing that the sports coach's conduct has fallen below the required objective standard ascertained by the court,<sup>147</sup> in guarding against reasonably foreseeable risk,<sup>148</sup> in the specific circumstances.<sup>149</sup> Application of the law of negligence adopts similar principles to the 'Learned Hand' test

<sup>142</sup> For instance, following introduction of the former National Curriculum (Education Reform Act 1988), increased emphasis on outdoor and adventurous activities; athletics (e.g., javelin, shot put, discus and high jump); and swimming.

<sup>143</sup> Interestingly, although Owen J in *Wilkin-Shaw* (n 30) [39] accepts that the nature of the duty of the teacher responsible for the training of pupils for the Ten Tors Expedition was to show such care as would be exercised by a reasonably careful parent, in recognising the duty of the school, he continues (at [40]): 'the school was under a duty to ensure that the first defendant was competent to organise and to supervise the training, and that the team of adults assisting him in the training exercise had the appropriate level of experience and appropriate level of competence to discharge any role required of them'. Such a level of competence and expertise would appear to extend beyond that of the reasonably careful parent. Consequently, it is respectfully submitted that reference to the reasonably careful parent is somewhat superfluous to the court's reasoning.

<sup>144</sup> *Woodland v Swimming Teachers Association* [2013] UKSC 66.

<sup>145</sup> *Ibid* [41], Lady Hale Deputy President stating 'it is not particularly helpful to plead that the school is *in loco parentis*. The school clearly does owe its pupils at least the duty of care which a reasonable parent owes to her children. But it may owe them more than that'. Also see, *Van Oppen* (n 133) 414-415 (Croom-Johnson LJ). The appellate judges refrained from the use of the terminology of *in loco parentis*, despite this having been adopted at first instance.

<sup>146</sup> *Woodland* (n 144) [25].

<sup>147</sup> *Vaughan v Menlove* (1837) 3 Bing NC 468; *Nettlehip* (n 113).

<sup>148</sup> *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound No 2)* [1967] 1 AC 617.

<sup>149</sup> E.g., see *Bolton v Stone* [1951] AC 850 (HL); *Paris v Stepney BC* [1951] AC 367 (HL); *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA); Compensation Act 2006, s 1; Social Action, Responsibility and Heroism (SARAH) Act 2015, ss 2 & 3.

in the US.<sup>150</sup> This recognises that a certain level of accidents will be tolerated by society,<sup>151</sup> approaching issues of a breach in the duty of care by determining if the burden of avoidance or precautions (B) was less than the injury (L) multiplied by the probability (P).<sup>152</sup> Although courts in the UK do not engage with such a mathematical or purely economic analysis, it being difficult to equate an economic value with the risk of personal injury,<sup>153</sup> with judges also mindful of sport's social utility and public interest benefits,<sup>154</sup> these elements remain important considerations in judicial reasoning.<sup>155</sup> Essentially, for there to be liability in negligence in the context of sports coaching, the risks of injury would be regarded as unreasonable, unnecessary and 'sufficiently substantial'.<sup>156</sup> Further, for a breach of duty to be established, there should be sufficient probability of injury to lead a reasonable coach to anticipate it.<sup>157</sup> This reinforces the fact that when courts employ a calculus of risk in order to define reasonableness, the nature of the foreseeable harm must be a factor taken into account when deciding if a coach may have been in breach of a duty of care.<sup>158</sup>

<sup>150</sup> *US v Carroll Towing Co* 159 F2d 169 (1947) 173. See, Steele (n 14) 138; S Deakin et al, *Markesinis and Deakin's Tort Law* (7th ed., OUP, 2013) 200.

<sup>151</sup> Deakin et al (n 150) 199.

<sup>152</sup> Liability being established where  $B < PL$ .

<sup>153</sup> Deakin et al (n 150) 209. In *McCarty v Pheasant Run Inc* 826 F2d 1554, 1557 (1987), Posner J highlighted that the Hand formula has greater analytical than operational utility. See further, W Rogers, *Winfield and Jolowicz: Tort* (18th ed., Sweet & Maxwell, 2010) 296.

<sup>154</sup> E.g., *Uren v Corporate Leisure (UK) Ltd* [2010] EWHC 46 (QB) [59], Field J stating '[t]his means that a balance has to be struck between the level of risk involved and the benefits the activity confers on the participants and thereby on society generally'. In this context, the significance of sport being regarded as a socially desirable activity, thereby likely to engage s 1 of the Compensation Act 2006, and s 2 of the SARAH Act 2015, is examined in detail in chapter 3.

<sup>155</sup> Steele (n 14) 138. In the UK, the 'calculus of risk' is a phrase sometimes adopted by courts to reflect the balancing of the magnitude of risk (likelihood and severity of injury) against the cost of preventative measures and the social utility of the activity giving rise to the risk. See, for instance: *McMahon v Dear* [2014] CSOH 100 [196] (Lord Jones); *Phee v Gordon* [2013] CSIH 18.

<sup>156</sup> Deakin et al (n 150) 210.

<sup>157</sup> *Whipsey v Jones* [2009] EWCA Civ 452 [16]; *MacIntyre* (n 37) [70].

<sup>158</sup> *Humphrey v Aegis Defence Services Ltd* [2016] EWCA Civ 11[14]. Also see, *Perry v Harris* [2008] EWCA Civ 907 [38], Lord Phillips highlighting that, '[a] reasonable parent could foresee that if children indulged in boisterous behaviour on a bouncy castle, there would be a risk that, sooner or later, one child might collide with another and cause that child some physical injury of a type that can be an incident of some contact sports. We do not consider that it was reasonably foreseeable that such injury would be likely to be serious, let alone as severe as the injury sustained by the claimant'.



Support for the social utility of desirable activities can be found in the drafting of section 1 of the Compensation Act of 2006, Lord Young's report, 'Common Sense, Common Safety',<sup>159</sup> and more recently, the Social Action, Responsibility and Heroism (SARAH) Act 2015. This facilitates policy based reasoning 'by reference to policy already inherent in the law'.<sup>160</sup> Support for such reasoning was echoed by Jackson LJ in *Scout Association v Barnes*,<sup>161</sup> stating, '[i]t is not the function of the law of tort to eliminate every iota of risk or to stamp out socially desirable activities',<sup>162</sup> Significantly, considerable weight should be afforded to the specific contribution of volunteer coaches when determining the reasonable standard of care in order to: (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way; or (b) discourage persons from undertaking functions in connection with a desirable activity.<sup>163</sup> This reinforces the necessity for courts to appreciate the sometimes slender distinction between negligent and non-negligent coaching,<sup>164</sup> affording coaches considerable latitude and leeway in their discretionary decision making practices, this being in accordance with the will of Parliament in order to ensure that the standard of care is set at a realistic and appropriate level.<sup>165</sup>

Although courts have recognised that 'it is preferable that there should be a reasonably certain and reasonably ascertainable standard of care',<sup>166</sup> the nebulous and woolly nature of reasonableness as a legal test fails to provide much by way of

<sup>159</sup> Lord Young, *Common Sense Common Safety* (October 2010)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60905/402906\\_CommonSense\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf)> accessed 3 May 2016.

<sup>160</sup> C Witting, 'Tort Law, Policy and the High Court of Australia' (2007) 31 *Melbourne University Law Review* 569, 590. Promotion of such policy based reasoning is scrutinised in detail in chapter 3.

<sup>161</sup> *Scout Association v Barnes* [2010] EWCA Civ 1476.

<sup>162</sup> *Ibid* [34] (Jackson LJ) (dissenting).

<sup>163</sup> Compensation Act 2006, s 1.

<sup>164</sup> Dobberstein (n 10) 69.

<sup>165</sup> Since the law of negligence is predominantly judge made (J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-089]), and thereby generally governed by common law principles, the impact of legislation on this area of the law is more fully considered in chapters 3 and 4.

<sup>166</sup> *Nettleship* (n 113) 709 (Megaw LJ).



guidance when attempts are made to define the standard of care.<sup>167</sup> This is compounded by a lack of strong authority with reference to the liability of sports coaches, essentially requiring coaches to act in accordance with 'informed common sense'.<sup>168</sup> Paradoxically, the tort of negligence's emphasis on the application of common sense principles<sup>169</sup> potentially reinforces and perpetuates the tendency for coaches to adopt negligent entrenched practice, since common sense may be regarded as 'to a large extent a shorthand for dominant cultural values, the ideology – or sets of ideologies – into which we are socialised from an early age'.<sup>170</sup> Put simply, an informative legal announcement of the content of the duty of care owed by a sports coach, and equally importantly, clarification of what may amount to a breach of this duty, is lacking.<sup>171</sup>

The decisive factor, or core disputed issue, on which cases of negligence brought against coaches will generally be decided concerns the standard of care,<sup>172</sup> this being informed and moulded by the full factual context and circumstances in which sports coaches are operating.<sup>173</sup> Judicial clarification of the scope or standard of care required of coaches would present a transparent illustration of the level of due care necessary to avoid breaching the duty of care owed to athletes.<sup>174</sup> At first glance, such an observation appears to merit little serious consideration since it is trite law to recognise that the standard of care is incapable of lending itself to being defined, not least because '[i]n law context is everything'.<sup>175</sup> The standard of care is 'always

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<sup>167</sup> R Clancy, 'Judo Mats, Climbing Walls, Trampolines and Pole Vaulters' (1995) 3(1) *Sport and the Law Journal* 28.

<sup>168</sup> Cox and Schuster (n 11) 235.

<sup>169</sup> E.g., *Perry* (n 158) [47], their Lordships adopting an instinctive approach to principles of common sense and fairness recognising that 'to a large extent a case of this nature properly turns on first impressions'.

<sup>170</sup> N Thompson, *Theory and Practice in Human Services* (OUP, 2003) 97. See further, Cassidy et al (n 54) 164.

<sup>171</sup> James (n 10) 75.

<sup>172</sup> See (n 101).

<sup>173</sup> D Griffith-Jones, *Law and the Business of Sport* (Tottel, 2007) 23.

<sup>174</sup> Fulbrook (n 28) 142.

<sup>175</sup> *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) [28] (Lord Steyn).

extremely fact sensitive'.<sup>176</sup> Indeed, as noted by Judge LJ in *Caldwell*, 'the issue of negligence cannot be resolved in a vacuum. It is fact specific'.<sup>177</sup> For instance, anticipating the likelihood of foreseeable risks will depend upon the unique circumstances of the sporting activity in question,<sup>178</sup> a heightened standard of care being demanded in circumstances where injury is more foreseeable.<sup>179</sup> These prevalent circumstances informing the standard expected of the reasonable, competent and prudent coach include factors such as the nature and inherent risks of the particular sport and the skill level, age, size and experience of the participants.<sup>180</sup> For example, *Morrell v Owen*<sup>181</sup> illustrates that a higher standard of care may be owed by coaches to disabled athletes than non-disabled athletes. It is also eminently sensible and appropriate that the 'level of qualification, training and experience of the coach' should be taken into account,<sup>182</sup> not least because 'one of the chief hazards of inexperience is that one [sic] does not always know the risks which exist'.<sup>183</sup>

Following *Vowles v Evans*,<sup>184</sup> it certainly appears the case that there may be scope for argument as to the extent to which the degree of skill to be expected of a referee (coach) depends upon the qualifications of the coach and the level of performers that s/he has agreed to work with.<sup>185</sup> Interestingly, the individualised skill level of golfers, with regard to the foreseeability of personal injury, has been

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<sup>176</sup> W Norris, 'The duty of care to prevent personal injury' (2009) 2 *JPI Law* 126.

<sup>177</sup> *Caldwell* (n 81) [30].

<sup>178</sup> Kessler (n 86) 100.

<sup>179</sup> *Champion* (n 10) 295.

<sup>180</sup> *Cox and Schuster* (n 11) 233; *James* (n 10) 94.

<sup>181</sup> *Morrell v Owen*, *The Times*, 14 December 1993 (QBD).

<sup>182</sup> *James* (n 10) 94. For a similar submission regarding the relevance of the level of qualification held for the standard of care required of Sport and Exercise Medicine treatment providers see M James and M Gillett, 'Immediate treatment for on-field injuries' (2009) *Jun. Sports Law Administration and Practice* 1, 2-3.

<sup>183</sup> *Wilsher* (n 135) 777.

<sup>184</sup> *Vowles* (n 88).

<sup>185</sup> *Ibid* [28]; N Partington, "'It's just not cricket". Or is it? *Bartlett v English Cricket Board Association of Cricket Officials*' (2016) 32(1) *Professional Negligence* 75 (note). Also see, *Pitcher v Huddersfield Town Football Club*, 17 July 2001 (QBD), Hallett J citing with approval *Wilsher* for authority that the level of performance (in this instance, a Nationwide Division 1 professional footballer) is a factor to be taken into account in assessing all the circumstances when determining the standard of care and skill expected.



considered relevant.<sup>186</sup> By analogy, it is submitted that determination of coaching competence must address both formal qualifications *and/or* experience held by a coach,<sup>187</sup> providing an important benchmark in facilitating the objective determination of what risks would be reasonably foreseeable in the specific circumstances. Simply applied, there is much force to the argument that a coach holding an advanced coaching qualification, and operating at a corresponding level, may reasonably be expected to have enhanced foresight of unacceptable risk to personal injury when coaching.<sup>188</sup> Accordingly, it is submitted that the level of qualifications and experience of the coach ought to become a proposition expressly stipulated in the court's required reasoning when formulating the standard of care required of sports coaches -- akin to the criteria outlined in *Caldwell v Maguire*, for participant liability.<sup>189</sup> This would provide some much needed legal certainty to the area and be of some reassurance to coaches and volunteers operating at levels of sporting performance consistent with the training, skill level, experience and qualifications mastered and achieved.

Enhancing or optimising the level of performance is a common goal for coaches working in a broad range of environments within the sports development pyramid or continuum, be the focus on enjoyment and basic fundamental skills, advancement of foundational movement proficiencies, long term athlete development and participation, or peak performance at particular events. As athletes progress to elite and excellence levels the required emphasis on more specialised training programmes creates new risks requiring coaches to ensure that they possess the necessary competence and expertise to operate safely in these amended circumstances.<sup>190</sup> For

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<sup>186</sup> Beloff et al (n 11) 143; *Lewis v Buckpool Golf Club* 1993 SCT 43.

<sup>187</sup> *Wilkin-Shaw* (n 30) [56]-[58]. Since the majority of coaching is delivered by volunteers, financial and time restrictions may prevent attendance on formal coaching courses, it not necessarily being the case that the coaching award held is commensurate with the level of coaching competency.

<sup>188</sup> See *Davenport* (n 8) [59], the court taking account of the fact that David Farrow was a level 4 coach (the highest athletics award available at the time of the alleged breach of duty in 2004).

<sup>189</sup> Also of interest and relevant to the establishment of a similar set of criteria and framework in the context of potential criminal liability in sport, are the objective factors initially fashioned by the Saskatchewan Court of Appeal in *R v Cey* (1989) 48 CCC (3d) 480. See further, Anderson (n 10) 189-94.

<sup>190</sup> Labuschagne and Skea (n 20) 166. Chapter 4 considers what might amount to a suitable and sufficient risk assessment in the context of sports coaching.



instance, since the scope of a coach's duty of care is reflective of the unique circumstances involved, the coaching of Olympic gymnasts may require coaches to have a 'working knowledge of anatomy and of injuries common in gymnastics, and to know when to call in a specialist for an injury'.<sup>191</sup>

Although the distinctions of school, amateur and professional (elite) sport are undoubtedly important considerations when contextualising coaching and teaching,<sup>192</sup> these categories may deceptively oversimplify the multidimensional roles performed by coaches, with Academies, Centres of Excellence, and Specialist Sports Colleges in the UK providing some instances of educational sporting provision, both curricular and extra-curricular, where sporting excellence may, on occasion, be the objective.<sup>193</sup> Similarly, amateur sporting provision encapsulates an extremely wide spectrum of sporting ability and aspiration levels, groupings frequently labelled beginner, improver, intermediate, and advanced,<sup>194</sup> the predominantly voluntary nature of sports coaching suggesting that it does not necessarily follow that there would be a correlation between the classification of athlete performance level and the qualification award held by the coach.<sup>195</sup> Consequently, scrutiny of the actual post held by the coach,<sup>196</sup> and the corresponding level at which the coaching is conducted,<sup>197</sup> provides a crucial material factor to support the court in accurately uncovering and unpacking the full factual matrix of each individual case. For instance, returning to the context of school or college sport, a coach appointed to the post of Director of Rugby and first XV coach is likely to have different aims and objectives than those of a fellow coaching colleague

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<sup>191</sup> Healey (n 19) 155.

<sup>192</sup> Drewe (n 54) 81.

<sup>193</sup> In Ireland, some schools employ professional coaches and/or strength and conditioning specialists. Interestingly, Archbold et al (n 107) highlight that should this result in a significant development of athlete physique and power (i.e., by a combination of intense training and nutritional supplementation) this may perhaps be an important contributory factor towards the risk of injury.

<sup>194</sup> Interestingly, this may reveal little in terms of the athlete's expectations and aspirations, an 'ambitious' intermediate athlete perhaps desiring to be challenged more than a 'comfortable/settled' advanced athlete.

<sup>195</sup> For instance, the demand/availability of coaches may result in performance coaches (level 3 or above) also being involved in the delivery of sessions for beginners.

<sup>196</sup> *Wilsher* (n 135).

<sup>197</sup> *Pitcher* (n 185).

fulfilling the role of school sport coordinator, the emphasis for the latter focusing on increased sporting opportunities for all pupils. Nevertheless, whether varying standards of care are applicable depending on whether the context in which the sport is being conducted is professional or amateur would appear to remain an issue of controversy, certainly with reference to participant liability for sporting injury.<sup>198</sup>

Analysis of performance differentials also presents the important issue of whether there may be occasion where (elite) athletes assume responsibility for enhanced risks involved, it being likely that high performing and experienced athletes have a greater appreciation of foreseeable dangers.<sup>199</sup> Support for such a submission recognises that the awareness and foreseeability of risks on a golf course, and specifically the duty to warn fellow players of such potential dangers, may be related to the level of skill possessed by an individual golfer.<sup>200</sup> Straightforwardly, highly proficient and trained athletes, more experienced in performing challenging skills and techniques safely, and taking evasive action to prevent injury to themselves and opponents, may be able to take greater risks.<sup>201</sup> Consequently, a relevant consideration in establishing the necessary standard of care required of coaches includes 'the reasonable expectations of the *victim* of injury'.<sup>202</sup> This establishes a further imperative proposition to be addressed when fashioning a legal test to ascertain the standard of care required of a sports coach -- the demands, competence, confidence and

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<sup>198</sup> Beloff et al (n 11) 143. Nonetheless, as noted by McArdle and James, following *Caldwell*, for injury caused by co-participants, 'the court is directed specifically to take into account the level of participation of the participants in determining liability, particularly whether or not they are professionals': see, McArdle and James (n 81) 12.

<sup>199</sup> Davis (n 10) 580.

<sup>200</sup> J Kircher, 'Golf and Torts: An Interesting Twosome' (2001) 12 *Marq. Sports L. Rev* 347, 352. Also see (n 186).

<sup>201</sup> Nygaard and Boone (n 23) 27; James (n 5) 75.

<sup>202</sup> Deakin et al (n 150) 202; *Wooldridge* (n 81) 67, Diplock LJ stating that '[t]he matter has to be looked at from the point of view of the reasonable spectator as well as the reasonable participant; not because of the maxim *volenti non fit injuria*, but because what a reasonable spectator would expect a participant to do without regarding it as blameworthy is as relevant to what is reasonable care as what a reasonable participant would think was blameworthy conduct in himself'. By analogy, participants may often know, and presumably desire, that a reasonable coach will, on occasions, concentrate her/his attention upon maximising learning and performance, potentially creating additional risk of injury.



motivations of the athlete.<sup>203</sup> Clearly, when performing a balancing exercise to determine what risks are reasonable and necessary in the circumstances coaches must be mindful of athlete aspirations and expectations, this being foundational to the interdependent and collaborative coach-athlete relationship.

Since the law of negligence does not operate in a social vacuum, the prevalent 'policy lens at the time' will also shape determination of the standard of care.<sup>204</sup> The duties required of coaches have evolved, and as a result of advances brought about by factors including those in the field of sports science, technical developments in certain sports, and societal expectations, such legal duties appear to be broadening.<sup>205</sup> Evidence of the tendency to heighten the standard of care barometer was articulated in *Hamstra et al v British Columbia Rugby Union*, the court stating that 'the standard of care as it relates to the risk of serious debilitating cervical spine injury in British Columbia in May 1986 is ... a lower one than the Court would apply in British Columbia were the same injury to occur today in similar circumstances'.<sup>206</sup> Returning to this jurisdiction, recent judicial reasoning endorsing the social utility of sport has been reflected in a number of decisions by the Court of Appeal,<sup>207</sup> a common sense approach appearing to offer some reassurance to coaches. Similarly, Lord Hoffmann appears

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<sup>203</sup> *Anderson* (n 9) [142], Foskett J stating, '[i]n my judgment, it would be wrong to hold that a skier, even in the case of a relatively inexperienced skier who is under the supervision of a ski instructor, abdicates all personal responsibility for deciding whether to do or not to do something the instructor suggests. ... The process involving adults must be a *collaborative one*. I do not think that the law requires (and, if it did, for my part I would say that it would be adopting the wrong policy) that the instructor takes total responsibility in a situation such as that which obtained in this case. In my judgment, if an instructor does suggest something to a skier under his supervision that the skier believes to be beyond what it is reasonable for him to attempt, there is an onus on the skier to say so. There may be cases where further discussion will resolve the concerns of the skier - or the instructor will agree that what he has suggested is too risky' (emphasis added). Also see *Davenport* (n 8) [59].

<sup>204</sup> Hartley (n 11) 56.

<sup>205</sup> VerSteeg (n 49) 113. Also see (n 126). This is an issue discussed in subsequent chapters, and perhaps most explicitly, in chapter 8.

<sup>206</sup> *Hamstra et al v British Columbia Rugby Union* [1989] 1 CCLT (2d) 78; see, 'The Standard of Care of Coaches Towards Athletes', 16 June 1995 <<http://www.sportlaw.ca/1995/06/the-standard-of-care-of-coaches-towards-athletes/>> accessed 1 May 2014. Also see, *Browning v Odyssey Trust Company Limited* [2014] NIQB 39 [23] (Gillen J).

<sup>207</sup> E.g., *Hammersley-Gonsalves* [2012] EWCA Civ 1135; *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646.

mindful of balancing the foreseeable risks with the socially desirable aspects of certain physical activities when stating:

[T]he question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.<sup>208</sup>

As previously highlighted, more contemporary support for the social utility of desirable activities, emphasising circumstances where personal responsibility for risks may have been taken,<sup>209</sup> can be found in section 1 of the Compensation Act of 2006.<sup>210</sup> Nevertheless, the weight afforded to 'desirable activities' is largely a value judgement based upon 'fact, degree and judgment, which must be decided on an individual basis and not by a broad brush approach'.<sup>211</sup> Such a subjective determination of what may satisfy the test of socially desirable activity has already revealed discrepancies in the case law.<sup>212</sup> Further, since most judges are unlikely to be trained coaches, a resulting limited understanding of the pressures and demands placed on coaches may prove problematic<sup>213</sup> when determining the standard of care owed in the circumstances, further analysis of the (potential) impact of the Compensation Act 2006 on the juridification of modern sports coaching being necessary.<sup>214</sup>

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<sup>208</sup> *Tomlinson v Congleton BC* [2004] 1 AC 46 (HL) [34] (Lord Hoffmann). Also see (n 155).

<sup>209</sup> James (n 10) 92.

<sup>210</sup> E.g., *Sutton* (n 21); *Wilkin-Shaw* (n 30); *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; *Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360 (QB).

<sup>211</sup> *Cole v Davis-Gilbert* [2007] EWCA Civ 396 [49] (Smith LJ).

<sup>212</sup> *Uren* (n 210) [69], Smith LJ confessing that 'I personally would not have assessed the social value of this game in quite such glowing terms ...'.

<sup>213</sup> Nygaard and Boone (n 23) 3.

<sup>214</sup> James (n 10) 70. Analysing and clarifying the impact of s 1 of the Compensation Act 2006 on this area of the law is the focus of chapter 3.



### 3.3 Causation

Establishing both causation in fact,<sup>215</sup> and legal causation,<sup>216</sup> is generally straightforward for participant liability.<sup>217</sup> An interesting and informative insight into judicial consideration of causation, following alleged negligent coaching, was provided by Owen J in *Davenport v Farrow* and is worth recalling in full. The judge concluded,

[s]econdly his case was advanced upon the basis that the probable cause of an acute spondyloyses was a marked increase in the intensity of his training from September 2004. There was an increase in the number of sessions as the Claimant had begun training on a full time basis; but I accept the evidence of the Defendant, given by reference to his training programmes for the Claimant, that it was a moderate increase from the same period in the previous year, and was not therefore significantly more than he had done in the past. It is also to be noted that in this context that in their joint statement, the coaching experts whose reports were before the court, agreed that the regime undertaken in 2004-2005, based on the Defendant's training log, was within the range of acceptable coaching (level 4) for an athlete of his ability and aspirations. I am not persuaded that there was a change in the level and intensity of training in September 2004 such as to provide an explanation for the development of spondyloyses.<sup>218</sup>

Significantly, in finding that the increased level of intensity of training was reasonable according to the joint statement of the expert (responsible) witnesses, Owen J ruling the coaching to be 'within a reasonable range of options',<sup>219</sup> the court's reasoning is mindful of the level of coaching qualification held by Coach David Farrow and the athlete's ability and aspirations.

Whilst accepting in the main that causation inquiries for coach negligence should also be relatively uncomplicated,<sup>220</sup> the Court of Appeal in *Mountford v Newlands School* appeared to apply a lowered standard of causation, whereas at first

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<sup>215</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QBD).

<sup>216</sup> *Overseas Tankship v Morts Docks & Engineering Co Ltd (Wagon Mound No 1)* [1961] AC 388.

<sup>217</sup> James (n 10) 80.

<sup>218</sup> *Davenport* (n 8) [59].

<sup>219</sup> *Chittock* (n 44).

<sup>220</sup> E.g., *Woodroffe-Hedley* (n 9); *Anderson* (n 9); *Cox* (n 21).

instance the judge may have overlooked this fundamental requirement of the tort of negligence by equating a breach of duty of the PE teacher with a finding of negligence.<sup>221</sup> Similarly, the trial judge in *Hammersley-Gonsalves v Redcar and Cleveland BC*<sup>222</sup> appears to have made the same omission, Pill LJ on appeal emphasising that:

Even if Mr Fowle's failure to observe the swing was negligent, it would have been *necessary* for the respondent also to establish that the failure was causative of the accident that actually happened. With respect, the judge has not adequately addressed that question in the paragraph cited. There is no finding that on a balance of probabilities, action by Mr Fowle would have prevented the accident.<sup>223</sup>

Despite the control device of causation generally appearing to pose few difficulties in this context,<sup>224</sup> evidence that the breach of duty was causative of the injury suffered is an essential component of any negligence claim brought against coaches. Unless this evidential threshold is considered, and on the balance of probabilities satisfied, there ought to be no finding of liability. This would certainly appear from the case law, a tort of negligence control mechanism, when being applied to cases brought against coaches and PE teachers, which must be fully considered and established to afford coaches the fairness and protection they are legally entitled to.<sup>225</sup>

### 3.4 Defences

#### 3.4.1 *Volenti non fit injuria*

The defence of *volenti non fit injuria*, or voluntary assumption of risk, is premised upon the notion of consent, and since it is reflected in the scope of the practical

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<sup>221</sup> Heywood and Charlish (n 29) 166-67.

<sup>222</sup> *Hammersley-Gonsalves* (n 207).

<sup>223</sup> *Ibid* [13] (Pill LJ) (emphasis added).

<sup>224</sup> Sport-related concussion would appear to represent an exception to this submission and is considered in detail in chapter 8.

<sup>225</sup> Beyond this jurisdiction, for a detailed consideration of the issue of causation in the context of the liability of a PE teacher in negligence see *Hussack v School District no.33 (Chilliwack)* (2009) BCSC 852.



content of the identified standard of care in all of the circumstances,<sup>226</sup> its application in this particular area of the law appears somewhat redundant.<sup>227</sup> Put simply, *volenti* will not operate as a defence in the vast majority of sports negligence cases in the UK since the determinative issue will typically be breach of duty.<sup>228</sup> Accordingly, as noted by McArdle and James, for a sports tort, the only legally sustainable defence appears to be establishing that the duty of care has not been breached.<sup>229</sup> This further reinforces the significance and centrality of the law of negligence's control device of breach to the issue of coach negligence.

In *Wooldridge v Sumner*, Diplock LJ approached *volenti* in terms of a breach of duty stating, 'the consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk'.<sup>230</sup> Clearly, the relevant consent in this context is to the negligence itself,<sup>231</sup> not to the general risk of injury,<sup>232</sup> the doctrine of *volenti* now seldom applied.<sup>233</sup> For instance, Lord Bingham in *Smoldon v Whitworth* noted that:

The plaintiff had of course consented to the ordinary incidents of a game of rugby football of the kind in which he was taking part. Given, however, that the rules were framed for the protection of him and other players in the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure so far as possible that they were observed. If the plaintiff were identified as a prime culprit in causing the collapse of the scrums, then this defence (and contributory negligence) might call for consideration.<sup>234</sup>

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<sup>226</sup> Griffith-Jones (n 11) 748; Caldwell (n 81).

<sup>227</sup> Gardiner et al (n 9) 643.

<sup>228</sup> M James and D McArdle, 'Player violence, or violent players? Vicarious liability for sports participants' (2004) 12(3) *Tort Law Review* 131, 133.

<sup>229</sup> McArdle and James (n 81) 200-01.

<sup>230</sup> *Wooldridge* (n 81) 69.

<sup>231</sup> *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB) [174] (Davis J).

<sup>232</sup> Steele (n 14) 290.

<sup>233</sup> R Kidner, 'The variable standard of care, contributory negligence and *volenti*' (1991) 11(1) *Legal Studies* 1, 17.

<sup>234</sup> *Smoldon* (n 45) P147.

Nevertheless, the defence may be applicable in circumstances where a coach is utilising novel and innovative training techniques and coaching methods, not endorsed by a responsible body such as a NGB, the athlete having specifically accepted the risk of injury.<sup>235</sup> Interestingly, there may be other circumstances where participants have explicitly consented to a breach of duty by the coach and where the application of *volenti* may have some merit given the interrelated and collaborative relationship between coach and performer.<sup>236</sup>

### 3.4.2 Contributory Negligence

The issue of contributory negligence poses the question of what the hypothetical 'reasonable person' would have done in the circumstances for her/his own safety.<sup>237</sup> Although not technically varying the standard of care, the application of contributory negligence,<sup>238</sup> by reflecting the relationship between the parties, performs a similar function.<sup>239</sup> In the context of sports coaching and instructing,<sup>240</sup> where the coaching of children is commonplace, it is important to note that children as young as 11-years-old,<sup>241</sup> and 12-years-old,<sup>242</sup> have been found contributory negligent. However, since children will be judged by the actions considered to be reasonable for a child of the same age,<sup>243</sup> it is clear that very young children would be unlikely to be regarded as partly responsible for injury suffered.

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<sup>235</sup> James (n 10) 96.

<sup>236</sup> As revealed in chapter 8, in the context of sport-related concussion, the application of the *volenti* defence may warrant fuller consideration by courts in the future.

<sup>237</sup> Anderson (n 9) [141]. As expressed by Lord Denning in *Froom v Butcher* [1976] QB 286 (CA) 291: 'Contributory negligence is a man's carelessness in looking after *his own safety*'.

<sup>238</sup> Law Reform (Contributory Negligence) Act 1945, s 1; Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948, s 2. Contributory negligence is further discussed in chapter 8.

<sup>239</sup> Kidner (n 233) 22.

<sup>240</sup> E.g., *Fowles v Bedfordshire CC* [1996] ELR 51 (CA).

<sup>241</sup> *Honnor v Lewis* [2005] EWHC 747 (QB).

<sup>242</sup> *Young v Kent CC* [2005] EWHC 1342 (QB).

<sup>243</sup> *Mullin v Richards* [1998] 1 WLR 1304 (CA); *Blake v Galloway* [2004] EWCA Civ 814; *Orchard v Lee* [2009] EWCA Civ 295.



### 3.5 Vicarious Liability

Vicarious liability may be regarded as a type of secondary liability,<sup>244</sup> shifting liability to the employer, in circumstances where the coach is acting in the capacity of employee.<sup>245</sup> Since the majority of sports coaches in the UK are unpaid volunteers, this doctrine may be of limited application when coaches are sued in negligence.<sup>246</sup> Nonetheless, there may be situations in which coaches employed, or appointed centrally by NGBs, satisfy the necessary requirements for the doctrine of vicarious liability to be applicable. For instance, following acceptance by the Welsh Rugby Union that they would be vicariously liable for the negligence of their appointed amateur referee in *Vowles v Evans*,<sup>247</sup> the English Cricket Board Association of Officials,<sup>248</sup> and the Scout Association,<sup>249</sup> have similarly agreed in principle to potentially being vicariously liable in respect of the tortious acts or omissions committed by their agents/members in certain circumstances. More specifically, in regard to volunteer coaches, in *Petrou v Bertoucello*<sup>250</sup> Griffith Williams J ruled that on paper there appeared strong grounds for possibly finding the membership and/or the committee of Dunstable Hang-gliding and Paragliding Club (an unincorporated members' club<sup>251</sup>) vicariously liable for the negligence of its coach(es) when performing an 'Airspace' test.<sup>252</sup>

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<sup>244</sup> Steele (n 14) 572.

<sup>245</sup> James (n 10) 81. See generally, Anderson (n 10) 242-45.

<sup>246</sup> Gardiner et al (n 9) 646.

<sup>247</sup> *Vowles* (n 88) [1].

<sup>248</sup> *Bartlett v English Cricket Board Association of Cricket Officials*, County Court (Birmingham), 27 August 2015 [31].

<sup>249</sup> *Scout Association* (n 161) [13].

<sup>250</sup> *Petrou* (n 21).

<sup>251</sup> It being possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members: see further, *Catholic Child Welfare Society v Institute of the Brothers of the Christian Schools* [2012] UKSC 56. Importantly, this highlights important considerations and implications for insurance provision and coverage for sports clubs more generally.

<sup>252</sup> This case is analysed more fully in chapter 5.

Certainly, for claimants injured by the carelessness of formal volunteers who may not be worth pursuing personally for financial reasons,<sup>253</sup> suing the defendant club or recognised body may appear attractive since a successful vicarious liability claim may provide compensation underwritten by an insurance company.<sup>254</sup> However, although there may appear scope for the shifting of liability for some formal volunteers attached to a recognised organisation or club, the doctrine of vicarious liability is likely to be of much more limited application when coaches are informal volunteers and/or attached to clubs not affiliated to relevant regional or national bodies.<sup>255</sup> At the professional level, a club may be vicariously liable for the tactics or training methods employed by its coach,<sup>256</sup> which may include the targeting of opposing athletes,<sup>257</sup> instructing a player to fight or injure opponents,<sup>258</sup> and the over arousal/‘psyching-up’ of performers.<sup>259</sup> More fundamentally, despite the possible advantages for some coaches of this type of secondary liability in certain circumstances, it does not in any way interfere with a coach’s legal obligation to discharge their functions with reasonable care. Put bluntly, in the majority of cases concerning coach negligence, arguments will remain focused on the issue of whether or not the duty of care had been breached by the coach’s conduct.<sup>260</sup>

Before exploring the implications of this foregoing legal analysis of the tort of negligence, given the strong likelihood that coaches may attempt to rely upon

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<sup>253</sup> See generally, K Horsey and E Rackley, *Tort Law* (3rd ed., OUP, 2013) 326. Interestingly, this thesis will suggest that in future there may be an increase in negligence claims where defendants may be pursued for compensation individually. This issue is discussed in the concluding chapter.

<sup>254</sup> See further, James and McArdle (n 228) 133.

<sup>255</sup> Importantly, in *Petrou* (n 21), Dunstable Hang-gliding and Paragliding Club was a member of the British Hang-Gliding and Paragliding Association, the governing body of the sport, and therefore more likely to have appropriate insurance provision (‘deep pockets’) for members acting on its behalf.

<sup>256</sup> Gardiner et al (n 9) 629.

<sup>257</sup> A Epstein, *Sports Law* (Cengage Learning, 2013) 137. An illustration of potential vicarious liability for a coach, in either battery or negligence, concerned the Temple University basketball coach John Chaney who ordered a player substituted in to the game to ‘send a message’ to the opposition by committing hard fouls, one of which resulted in a broken arm for an opposing player.

<sup>258</sup> G Wong, *Essentials of Sports Law* (4th ed., Praeger, 2010) 123.

<sup>259</sup> *Canterbury Bankstown Rugby League Football Club Ltd. v Rogers* [1993] Aust. Torts Reports 81-246.

<sup>260</sup> James (n 10) 92-94.



customary practice as a forceful justification for the coaching practices adopted, the *Bolam* test<sup>261</sup> warrants particular consideration.

### 3.6 Customary Practice

When teachers face a claim of alleged negligence a common argument is that the act causing the harm was in accordance with general and approved practice in the circumstances, often referred to as the custom of the trade,<sup>262</sup> or *Bolam* test.<sup>263</sup> This advocates the use of regular and approved practices that are logically justifiable,<sup>264</sup> and operates as a strong justification for teachers and coaches,<sup>265</sup> provided strict supervision has been implemented.<sup>266</sup> *Bolitho* judicial scrutiny may be regarded as having ““considerable force” in the non-medical professional context”,<sup>267</sup> the specificity of sports coaching establishing that the professional negligence tests, and legal principles, developed from *Bolam* and *Bolitho* (and *Wilsher*), would be applicable to cases of coach negligence.<sup>268</sup> Simply applied, if the coach has used a reasonable technique, approved by a body of informed opinion, there will be no liability,<sup>269</sup> with discretionary decision making accepted ‘within a range of reasonable options’.<sup>270</sup> Regular and approved practice is regarded as that conducted nationally rather than locally, and may be evident in the publications of NGBs and the schemes of work produced by local education authorities.<sup>271</sup> In short, customary practice may safeguard coaches by means of a ‘partial immunity rule’.<sup>272</sup>

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<sup>261</sup> *Bolam* (n 134).

<sup>262</sup> Barrell (n 131) 289.

<sup>263</sup> *Bolam* (n 134).

<sup>264</sup> *Bolitho v City of Hackney Health Authority* [1998] AC 232 (HL).

<sup>265</sup> E.g., *Wright* (n 36); *Chittock* (n 44).

<sup>266</sup> D Glendenning, *Education and the Law* (Butterworths, 1999) 310.

<sup>267</sup> R Mulheron, ‘Trumping Bolam: A Critical Legal Analysis of *Bolitho*’s Gloss’ (2010) 69 *Cambridge Law Journal* 609, 613.

<sup>268</sup> James (n 10) 94; VerSteeg (n 49) 132 & 145.

<sup>269</sup> Barnes (n 48) 303.

<sup>270</sup> *Woodbridge* (n 44) [18] (Auld LJ). See also, Whitlam (n 132) 57.

<sup>271</sup> P Whitlam, *Case Law in Physical Education and School Sport* (BAALPE, 2005) 26.

<sup>272</sup> D Howarth, ‘Negligence After Murphy: Time to Re-think’ (1991) *Cambridge Law Journal* 58, 96; see further, D Nolan, ‘Varying the Standard of Care in Negligence’ (2013) 72 *Cambridge Law Journal* 651, 653.

Consequently, it appears the case that to avail of the *Bolam* proposition, the coach should always be advised to balance the benefits of the activity with the reasonably foreseeable harm, this acknowledged as being routine good practice. This would ensure that the practice adopted by the coach is not only recognised and approved, but is capable of being justified and withstanding logical analysis. Effectively, this requires a two stage test, the second limb of 'justifiable' requiring coaches to operate as critical and reflective practitioners, and being potentially difficult to satisfy for coaches failing to keep up-to-date with their own CPD in order to keep abreast of the latest coach education. Whilst this ensures that negligent entrenched practice should be prevented,<sup>273</sup> this modern statement of the *Bolam* principle demands a more rigorous analysis than the coach merely following routine practice. It is entirely appropriate and necessary that this legal test or standard would scrutinise 'customary coaching practices unduly emphasiz[ing] winning or athletic performance and expos[ing] young athletes to the risk of serious injuries'.<sup>274</sup> Problematically, since many coaches are inclined to reproduce and model coaching methods and discourse reflective of their experience of coaching as players,<sup>275</sup> it is hypothesised that a significant number of coaches may unwittingly be exposed to liability in negligence, where entrenched practice (previously regarded as routine practice) creates an unreasonable risk resulting in athlete injury. As revealed in chapter 5, this is certainly an aspect of potential liability in negligence that warrants critical consideration and further consequential research.

Being mindful of the preceding analysis conducted with regard to potential liability in negligence of coaches in the UK, the next challenge for this review of literature is to emphasise and probe the most pressing and significant implications that transpire for coaches and NGBs.

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<sup>273</sup> James (n 5) 91.

<sup>274</sup> Mitten (n 10) 222.

<sup>275</sup> Cassidy et al (n 54) 4.



#### 4. Ramifications of Legal Analysis

Usually, the most decisive factor of legal liability in coach negligence cases is the standard of care. This objectively determined standard of ordinary competence is that of the reasonable coach in the same circumstances as the defendant, with coaches expected to take all reasonable care to avoid foreseeable risks. Since it is not possible to do any kind of sport without some inherent risk, or 'consequential foreseeable hazard',<sup>276</sup> reasonable coaches will take acceptable risks in circumstances where such foreseeable risk is regarded as necessary, worthwhile and beneficial. This is indicative of the balancing exercise inherent in law of negligence in the UK. Consequently, effective teaching and coaching will be conducted in an environment where the activity is delivered 'as safe as necessary', crucially, distinguished from 'as safe as possible',<sup>277</sup> to ensure that the benefits of the activity outweigh the cost of preventative measures and the magnitude of risk. In these circumstances, conscientious application of the calculus of risk by coaches should endorse the particular coaching practice or conduct adopted. This reinforces the requirement of a more sophisticated analysis of risk, or as discussed in chapter 4, a process of risk-benefit assessment, challenging the widely held presumption that a coach's responsibility is always to minimise risk.

As highlighted, the characteristics (and reasonable expectations) of athletes also shape the standard of care expected in the specific circumstances,<sup>278</sup> with assumption of risk by participants likely only to be of relevance to reasonable risks that are inherent to the specific activity. Further, since determination of whether foreseeable and sufficiently substantial risks taken by coaches might be deemed reasonable in the circumstances is highly fact sensitive -- further contextualised by the specificity of sports coaching; the prevailing tendency for courts to raise the general standard of care demanded of coaches over time; the symbiotic and interrelated relationship between coach and performer; and, by the rapidly advancing environment in which coaches

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<sup>276</sup> *Hide v The Steeplechase Company (Cheltenham) Ltd.* [2013] EWCA Civ 545 [36] (Davis LJ).

<sup>277</sup> *Whitlam* (n 132) 18 & 20.

<sup>278</sup> *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 2360 (QB) [47] (Globe J).

perform -- it is clear that the relationship between a coach and those under the coach's instruction is reflective of the emerging relationship between sport and the law. In short, this is a developing area of sports law that cannot be effectively considered in a social or historical vacuum, it being imperative that modern coaches maintain an up-to-date and informed awareness of evolving legal issues. Appreciation of this legal complexity would enable the modelling of best practice to protect and safeguard coaches from potential exposure to civil liability without compromising the core legitimate objective of enhancing performance.

Encouragingly, it would appear that the threshold of legal liability of a sports coach in the UK would be a high one, with coaches not likely to be liable for errors of judgement, oversights, or lapses of skill in the context of a fast moving training session, practice or game.<sup>279</sup> An error of judgement resulting in a sports injury should not be grounds for liability, unless, this error created a significant additional risk of injury. In short, an evidential threshold of 'reckless disregard' for the safety of the claimant would appear likely grounds for a finding of negligence in this jurisdiction.<sup>280</sup> Further, the social utility and socially desirable qualities promoted and inculcated through sporting involvement, endorse and represent policy considerations designed to ensure that the standard of care demanded of coaches is set at a realistic and sensible level. In particular, the Compensation Act 2006, and SARAH Act 2015, appear crafted to encourage and safeguard amateur coaches and volunteers.

More problematically, the elusive nature of reasonableness as a legal test is limited in providing guidance when attempts are made to define the standard of care. Further, the weight to be afforded to the social utility and socially desirable aspects of sporting activities is predominantly subjectively determined by the individual trial judge, common sense judicial reasoning not necessarily the most effective benchmark

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<sup>279</sup> Conversely, there will also be circumstances in which coaching will be executed in a controlled, supervised and tightly monitored environment whereby the coach may manipulate and determine the level of intensity, degree of competition and physical demands placed upon athletes.

<sup>280</sup> Anderson (n 10) 232; *Wooldridge* (n 81) 68; *Wilks v Cheltenham Car Club* [1971] 2 All ER 369 (CA) 371, Lord Denning MR equating conduct that evinces reckless disregard as 'foolhardy'.



on which coaches might ascertain what constitutes reasonable coaching. Moreover, whilst acknowledging that successful coaches will be creative and innovative in the coaching practices they adopt, the law is clear: changing established and approved practice should only be implemented following careful evaluation, with approval by a more experienced colleague(s), and completion of a risk assessment. Interestingly, judicial scrutiny of the significance to be attached to both static and dynamic risk assessments that are regarded as sufficient and suitable in individual cases represents another emerging area requiring further detailed examination.<sup>281</sup>

Following *Watson v British Boxing Board of Control*,<sup>282</sup> since NGBs are associations with specialist knowledge giving advice to coaches and volunteers on the understanding that this information will be relied upon, reasonable care ought to be exercised by NGBs in order to protect and safeguard coaches from loss or damage. Consequently, it is strongly contended that NGBs have a duty to warn and make coaches aware of recognised and approved coaching methods that would withstand logical analysis, best practice risk management policies and procedures, and ultimately, realistic appraisal and appreciation of litigation risk.<sup>283</sup> Since prospective risk analysis would alert NGBs and other awarding bodies to the emerging scope of legal liability for coaches and volunteers, the dearth of case law or availability of endorsed insurance provision is unlikely justification for NGBs omitting to appropriately address this developing issue of potential civil liability. Adopting a contemporary risk assessment lens, this exposure is plainly foreseeable given the reliance and recruitment of coaches and volunteers for fulfilment of the London Olympic legacy and the evolving relationship between sports coaching and the law. Further, the public interest and sporting benefits generated by coaching and volunteering, which might be jeopardised or 'chilled' by anxieties facilitated by a lack of accurate information or guidance associated with concerns about being sued, appear to far outweigh the relatively low

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<sup>281</sup> For instance, *Uren* (n 210) [41]–[42]. The issue of assessing risk is considered in detail in chapter 4.

<sup>282</sup> *Watson v British Boxing Board of Control* [2001] QB 1134 (CA).

<sup>283</sup> James notes that the precise scope of the duty of care owed by NGBs is yet to be fully tested or established by the UK courts: *James* (n 10) 101.

burden or cost of precautions involved in proactively clarifying and minimising the scope for negligence liability of coaches. Put simply, whilst recognising that conscientious and progressive bodies may have procedures already in place to effectively protect and safeguard coaches from some of the legal vulnerabilities highlighted in this literature review, this evaluative determination does not conclusively warrant the ignoring of risks that some NGBs may perceive as having a very low probability of occurring.<sup>284</sup> Moreover, as mentioned above, in circumstances where coaches are directly employed, appointed or sanctioned by NGBs, claims based on vicarious liability would also appear possible. Accordingly, it is entirely appropriate that all NGBs consider conducting a comprehensive risk assessment covering all facets of coach negligence, to ensure that their legal duty of care is successfully discharged.

Fundamentally, a main limitation of the current law for both coaches and NGBs concerns the uncertainty in how the standard of care of a sports coach in the UK would be formulated, and in particular, clarification of the important propositions that a court might be obliged to consider in order that judicial reasoning is fully appreciative of the specificity of coaching. Such clarification would be of immense benefit to coaching and legal practitioners, NGBs, and the courts, providing this review of literature's next important issue for analysis and discussion.

## **5. Legal Test**

Critical analysis of the above constituent components falling to be considered in claims of negligence reveals serious possible limitations in the application of a legal test premised on reasonableness. It is not satisfactory to merely accept that the standard of care is objectively determined, particularly when there is a paucity of case law to inform what those objective criteria are, given that the concept of the standard of care protects both athletes and coaches alike.<sup>285</sup> Following the fashioning of the legal test

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<sup>284</sup> See generally, Steele (n 14) 138.

<sup>285</sup> Kidner (n 233) 23.



derived from the propositions concerning participant liability in *Caldwell*;<sup>286</sup> judgments providing insights regarding the scope of the duties owed by athletes to spectators;<sup>287</sup> and the content of the duty of care of referees;<sup>288</sup> identifying specific legal principles tailored to the special circumstances of sports coaching highlights a significant void in the case law and academic literature. Indeed, the Court of Appeal's approach in *Caldwell* would appear to implicitly encourage the identification of specific guidelines that may be of assistance in the disposal of subsequent sports negligence cases.<sup>289</sup> Although in the US 'courts have borrowed from the principles developed in litigation between co-participants' when considering the liability in negligence of coaches,<sup>290</sup> it is suggested that such principles must be moulded to reflect the specific circumstances at issue, ensuring a more sophisticated analysis to determine what constitutes the necessary standard of care.

In the UK, *Morrow v Dungannon and South Tyrone BC*<sup>291</sup> is illustrative of the importance of scrutinising the transferability and effectiveness of the application of the *Caldwell* propositions to the specific (and fundamentally different) circumstances of a consideration of liability in negligence, not of a participant, but crucially, a coach or instructor. In *Morrow v Dungannon*, Gillen J framed the determination of the standard of care required by the instructor in the circumstances as follows:

In arriving at the standard appropriate in any given case the court will take into account the prevailing circumstances including the sporting object, the demands made upon the participant, the inherent dangers of the exercise, its rules, conventions and customs, the standard skills and judgment reasonably to be expected of a participant and the standards, skills and judgment reasonably

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<sup>286</sup> *Caldwell* (n 81) [11] (Tuckey LJ): 'The prevailing circumstances are all such properly attendant upon the contest and include its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant'.

<sup>287</sup> *Wooldridge* (n 81); *Wilks* (n 282); *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 (CA).

<sup>288</sup> *Smoldon* (n 45); *Vowles* (n 88); *Allport v Wilbraham* [2004] EWCA Civ 1668.

<sup>289</sup> *James and McArdle* (n 228) 145.

<sup>290</sup> *Davis* (n 10) 573.

<sup>291</sup> *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50 (QBD). Little account being taken in the court's judgment of the qualifications held by the fitness instructor with eight years' experience, despite expert witness evidence for the plaintiff submitting that Mr Taffee had only reached a limited level of proficiency.

to be expected of someone such as the defendant and Mr Taffee in instructing monitoring and supervising the plaintiff.<sup>292</sup>

Consequently, it is arguable whether the correct legal test was applied by the court since the circumstances in which the *Caldwell* propositions were fashioned relate to the negligence of a competitive jockey, in the context of professional (elite) sport. The law recognises that,

[t]he position of a referee vis-à-vis the players is not the same as that of a participant in a contest vis-à-vis a spectator. One of his responsibilities is to safeguard the safety of players. So, although the legal duty is the same in the two cases, *the practical content of the duty differs according to the quite different circumstances.*<sup>293</sup>

Curiously, given the practical content of the duty required of sports coaches is also specialised, it is suggested that it may not be sufficient for the courts to simply apply considerations framed in the circumstances of participant liability to those of coach negligence.<sup>294</sup> It is respectfully submitted that a more nuanced and sophisticated legal test ought to be fashioned that is uniquely tailored to the specificity of sports coaching. This would assist courts in focussing on the crucial material factors when scrutinising the totality of circumstances, thereby reflecting the special interrelated relationship between coach and performer.<sup>295</sup> Consequently, this literature review will seek to draw from the foregoing analysis, and a number of important judgments from different jurisdictions, to provisionally formulate a particular legal test that is more

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<sup>292</sup> Ibid [20], adopting the identical propositions as those endorsed in *Caldwell* when formulating the standard of reasonable care. See above (n 91).

<sup>293</sup> *Smoldon* (n 45) P139 (emphasis added).

<sup>294</sup> Further support for this distinction is provided in *Henderson v Canadian Hockey Association* [2010] MBQB 20 [30]. This case concerned an injury sustained by the referee, it being alleged that the coach had breached his duty of care, with the court establishing that '[a] court may well apply a different legal test with respect to officials who come into the game with a different set of expectations and likely a different level of acceptance of risk'. Interestingly, this also reinforces the importance of scrutinising the claimant's expectations and conduct in cases brought against sports coaches.

<sup>295</sup> Given the individualised and interpersonal coach-athlete relationship, a particular circumstantial consideration ought to be the degree of influence exercised over the athlete by the coach: see generally, *Davis* (n 75) 236-37. More specifically, see above (n 75).



reflective and representative of the precise and symbiotic relationship between coach and athlete.

## 6. Comparative Law and Reformulation of Legal Test

When seeking to determine the standard of reasonable care expected in the circumstances of teaching gymnastics in schools in the seminal judgment<sup>296</sup> of *Thornton v School Dist. No. 57 Bd. Of School Trustees*,<sup>297</sup> the British Columbia Court of Appeal provided some definitive guidelines, crystallising an informative, transparent and extremely helpful legal test. In fashioning four important propositions that the court ought to address, Carrothers JA stated:

In my view of the factually relevant cases, what it does mean is that it is not negligence or breach of the duty of care on the part of the school authorities to permit a pupil to undertake to perform an aerial front somersault off a springboard: (a) if it is suitable to his age and condition (mental and physical); (b) if he is progressively trained and coached to do it properly and avoid the danger; (c) if the equipment is adequate and suitably arranged; and (d) if the performance, having regard to its inherently dangerous nature, is properly supervised. These are the component criteria constituting the appropriate duty or standard of care which is saddled upon the school authorities in a case of this kind and upon which we are to judge whether there has been observance sufficient for the school authorities to avoid a finding of negligence and its consequential liability.<sup>298</sup>

The Supreme Court of Canada in *Myers v Peel County Board of Education*,<sup>299</sup> in approving *Thornton*, recognised that the standard of care demanded, although varying from case to case, will also be reflective of: (i) the number of students being supervised at any given time; (ii) the nature of the activity or exercise in progress; (iii) the age and the degree of skill and training which the students may have received in connection with such activity; (iv) the nature and condition of the equipment in use at the time; (v) the competency and capacity of the students involved; and (vi) a host of

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<sup>296</sup> See generally Barnes (n 48) 299-300.

<sup>297</sup> *Thornton* (n 138).

<sup>298</sup> *Ibid* [74].

<sup>299</sup> *Myers v Peel County Board of Education* [1981] 2 SCR 21. See generally, Barnes (n 48) 300-01.

other matters affecting the application of the prudent parent-standard (to the conduct of the school authority) in the circumstances.<sup>300</sup>

A further legal test that remains instructive, and may inform judicial reasoning in the UK, was formulated by the Supreme Court of Wisconsin in *Lestina v W Bend Mutual Insurance Company*,<sup>301</sup> which for participant liability in recreational team contact sport includes consideration of the following material factors: (i) the sport involved; (ii) the rules and regulations governing the sport; (iii) the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); (iv) the risks inherent in the game and those that are outside the realm of anticipation; (v) the presence of protective equipment or uniforms; and, (vi) the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants' respective skills at the game, and the participants' knowledge of the rules and customs.<sup>302</sup>

Although the underpinning rationale of these tests is entirely consistent with the propositions articulated in *Caldwell*, careful synthesis of the judgments through a lens that is sensitive to the specificity of sports coaching enables further development and refinement of the criteria judicially endorsed in England and Wales for participant liability, whilst maintaining the flexibility and fluidity of the test of reasonableness. Further, these propositions facilitate and encourage the striking of a reasonable and just balance between the personal autonomy, acceptance of risk and responsibility of the claimant, and the duty of a coach to demonstrate due care. Specifically, it is respectfully submitted that consideration of the constituent components listed below would be likely to provide much needed clarity and consistency to this area of the law, whilst also providing additional potential reassurance to practitioners. These proposed criteria also incorporate legal principles discussed above, including consideration of the

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<sup>300</sup> *Myers* (n 299) [32] (McIntyre J).

<sup>301</sup> *Lestina v W Bend Mutual Insurance Company* (1993) 501 NW (2d) 28.

<sup>302</sup> *Ibid* [33].



defendant's own conduct<sup>303</sup> and aspirations,<sup>304</sup> the coaching post held,<sup>305</sup> as well as the experience and coaching qualifications held by the defendant coach.<sup>306</sup> Consequently, in refining and further developing the third proposition from *Caldwell*, thereby ensuring that determination of the standard of reasonable care is fully reflective of the specificity of sports coaching, the court would be advised to also consider:

- (i) the aspirations, expectations, confidence and conduct of the athlete
- (ii) the level of qualifications and/or experience of the coach
- (iii) the post held by the coach and the performance level of the athlete
- (iv) the suitability of the activity to the athlete's age, competence and capacity (mental and physical)
- (v) whether the athlete was progressively and sequentially trained, instructed and coached to do the exercise or activity properly and safely
- (vi) if the equipment being used is adequate, sufficiently maintained and suitably arranged; and
- (vii) if the performance, having regard to its inherently dangerous nature, is properly supervised

Further critical reflection and examination of these provisional propositions is absolutely necessary, since a more comprehensive and detailed comparative legal analysis may highlight additional relevant criteria that may be beneficial in fashioning a legal test reflective of the component criteria encompassing the appropriate standard of care required of sports coaches. Nonetheless, consideration of these three seminal judgments provides an important and foundational extension of the test for participant liability, offering expressly stipulated criteria that more accurately reflect the specific

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<sup>303</sup> *Anderson* (n 9) [142].

<sup>304</sup> *Davenport* (n 8) [59].

<sup>305</sup> *Wilsher* (n 135).

<sup>306</sup> *Vowles* (n 88) [28]; *Davenport* (n 8) [59]; *Wilkin-Shaw* (n 30) [56]-[58].

circumstances of sports coaching. Significantly, whilst recognising these provisional propositions require further scrutiny and refinement, it is respectfully suggested that they may have been of some assistance to the court's reasoning in *Morrow v Dungannon*.

## 7. Practical Implications

The previous analysis of the potential negligence liability concerning sports coaches reveals important suggested practical implications for further reflection and contemplation by coaches, the courts, and NGBs. These recommendations are by no means intended to be exhaustive, designed rather to supplement and possibly further develop existing risk management procedures, practices, and judicial reasoning, by attempting to prioritise emerging issues in a contemporary context.

### 7.1 Coaches

Consideration of the above analogous case law and academic commentary reveals a number of realistic and sensible guidelines for coaches. Although recognising that the following recommendations may possibly be viewed with reservation and reluctance by some practising coaches,<sup>307</sup> it is imperative that modern sports coaches are aware of legal developments affecting sports participation and continuously reflect upon their own coaching practices and methods through a proactive risk assessment lens. This is a hallmark of best practice since '[s]uccessful coaches are those who can learn new skills, who are flexible enough to change old ways when change is needed, who can accept constructive criticism, and who can critically evaluate themselves'.<sup>308</sup> Indeed, effective risk management is apposite to good practice,<sup>309</sup> it being expected that coaches will be familiar, and comply with, risk assessment guidelines and safety checklists provided by NGBs, sports clubs and facility providers. Awareness, knowledge and familiarity with the emerging case law should provide coaches with the necessary

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<sup>307</sup> Unsurprising given Prime Minister David Cameron's observation that 'instead of being valued, the standing of health and safety in the eyes of the public has never been lower': see Lord Young (n 159) 5.

<sup>308</sup> Martens (n 60) vii.

<sup>309</sup> Whitlam (n 132) 18.



guidance of what constitutes reasonable practice. Importantly, an informed approach to risk management embraces simple and effective risk appraisal strategies as part of the normal practices of coaches. This may include the sharing of examples of near misses, and lessons to be learnt, with other club coaches in an effort to maximise preventative strategies.<sup>310</sup> It is recognised that this may require somewhat of a change in sub-culture, affording the legal aspects of coaching the same importance and consideration as other advancements, including those related to technical, tactical or sports science developments.

Crucially, the need for coaches to avoid negligent entrenched practice, by ensuring that their practices are recognised, approved and can withstand logical analysis, cannot be overstated.<sup>311</sup> The prevailing tendency of courts to raise the necessary standard of care barometer, intensified by advances in sports science and coaching techniques, indicates that what may have been accepted practice up until quite recently may no longer withstand logical analysis and scrutiny today. Arguably, this may very much be the case for talented and experienced coaches, perhaps even former professional players themselves, working in isolation or unreceptive to the latest developments in coaching and the law. Despite a logical touchstone of acceptable practice often being informed common sense, judicial scrutiny requires a more robust consideration of reasonableness, perhaps challenging preconceived and stereotypical notions internalised by coaches about standardised practices. This progressively heightened standard of care would be best satisfied by coaches maximising coach education opportunities, seeking to share good practice with peers and mentors whenever possible and, operating as critical and reflective practitioners. Such self-scrutiny requires coaches to analyse their own performance through a lens that recognises the dangers associated with negligent entrenched practice, with a commitment to CPD to ensure that they keep abreast of the latest information regarding their sport, common injuries and, appropriate developments in technique

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<sup>310</sup> Whitlam (n 271) 125.

<sup>311</sup> As revealed in chapter 5, satisfying these requirements would enable coaches to rely on a common practice or *Bolam* 'defence'.

and equipment.<sup>312</sup> Good practice also requires coaches to continuously evaluate sessions to ensure that they are always delivered as safely as necessary, with fulfilment of the legal duty of discharging reasonable care regarded as consistent with the ethical obligation not to expose performers to unreasonable risks of injury.<sup>313</sup>

Further, coaches should be advised to promote a culture in all sessions which requires athletes to likewise take responsibility for their own safety. This approach is consistent with that advocated by Coaching Ireland, sports coach UK, Sport and Recreation New Zealand and the Australian Institute of Sport, the expectation being that athletes should be recognised in the coaching process as active participants.<sup>314</sup> For instance, basic safety inspections of equipment and facilities by competent and experienced athletes would supplement these same inspections conducted by coaches.<sup>315</sup> More generally, in addition to the intended objective of protecting and safeguarding coaches, a systematic and informed appraisal of litigation risk, by enhancing the safety and welfare of athletes, would coincidentally minimise the loss of opportunity and availability of athletes for sports participation.<sup>316</sup>

## 7.2 National Governing Bodies

This literature review's preceding analysis highlights important risk management considerations for NGBs. The scope of the duty of NGBs to warn and make modern coaches aware of the relevance of recognised and approved coaching methods, best practice risk management policies and procedures, and realistic appraisal and appreciation of potential civil liability, is accentuated by policy considerations, not least of which is fulfilment of the Olympic legacy. This is a

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<sup>312</sup> D Healey, 'Risk Management for Coaches' in S Pyke, *Better Coaching: Advanced Coach's Manual* (2nd ed., Human Kinetics, 2001) 41.

<sup>313</sup> Mitten (n 10) 216. This important overlap between the legal and ethical obligations of coaches is returned to in chapter 6.

<sup>314</sup> T Cassidy, 'Understanding athlete learning and coaching practice: utilising "practice theories" and "theories of practice"' in Lyle and Cushion (n 57) 183.

<sup>315</sup> Spengler et al (n 125) 84. For this to be most effective, athletes would generally need to be taught how to conduct such inspections.

<sup>316</sup> Mitten (n 10) 227.



responsibility of some magnitude. NGBs, and those organisations providing training and support for coaches, must ensure that the delivery and provision of guidance and CPD is reflective of the dynamic and emerging relationship between modern sports coaching and the law. Coach education and accreditation must reflect and account for evolving legal issues, as a complexity of coaching, in a proactive manner. Consequently, there is a necessary requirement for NGBs to keep informed of the latest legal developments and disseminate such information in a timely, effective and appropriate manner.

In recognising that traditionally the technical and bioscientific aspects of coaching may have been held in higher regard by some coaches and coach educators, a particular challenge facing NGBs would appear to be in implementing manageable educative provision and resources that are engaging, relevant and necessary. At first glance, risk assessment proformas, mentoring schemes, and the codes of ethics and conduct endorsed and promoted by NGBs, may afford valuable platforms and opportunities to promote risk management dialogue.<sup>317</sup> Consideration and discussion of scenarios informed by contemporary case law would also provide further sensible, concrete, and informative illustrations of this somewhat hidden complexity of

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<sup>317</sup> For instance, the England Basketball Code of Ethics and Conduct, an integral part of the England Basketball Coach Education Programme, recognises that all affiliated coaches agree to principles that include: Considering the safety and wellbeing of all individuals in their charge; Ensuring that all training and playing demands are not detrimental to the wellbeing of the players and are reasonable dependent upon the age, maturity, experience and ability of the players; Ensuring their competence and ability is sufficient so that the safety of players is not compromised; Encouraging players to accept responsibility for their own behaviour and performance; Being appropriately qualified as per the requirements of the England Basketball Coach Education Programme and regularly seeking opportunities for continued professional development; Respecting the rights of players to choose to decline to participate within coaching or playing situations; Ensuring they hold England Basketball recognised qualifications; Being receptive to employing systems of evaluation that include self-evaluation and also external evaluation in an effort to assess the effectiveness of your work; Promoting prevention and education regarding the misuse of performance enhancing drugs and illegal substances; Not attempting to exert undue influences and pressures in order to obtain personal benefit or reward; Communicating and co-ordinating with medical practitioners in the diagnosis, treatment and management of a players' medical/psychological problems

<<http://www.englandbasketball.co.uk/uploads/Child%20Protection/Code%20of%20ethics%20and%20conduct%202009.pdf>> accessed 1 May 2014.

coaching,<sup>318</sup> encouraging coaches to critically reflect on their own coaching practices.<sup>319</sup> These suggestions are examined in detail in chapter 6. Nevertheless, recognising the full potential of the negligence liability of coaches, by acknowledging the law as an integral and emerging aspect of coaching, in a similar fashion to tactical, technical and sports science driven developments, appears to require somewhat of a shift in culture and emphasis.<sup>320</sup> Interestingly, it is contended that being proactive in addressing legal risk may ultimately enhance the sporting performance of athletes, by improving all levels of coaching and enhancing the safety and welfare of performers. Whether or not NGBs are fulfilling this duty to sensibly inform coaches of the potential for exposure of liability in negligence in the UK warrants further research.

### 7.3 Courts

Sport is a socially desirable activity, with public policy endorsement of the health and fitness, psychological and emotional development opportunities promoted through PE and sporting involvement appearing to encourage common sense and realistic judicial reasoning. Courts are not unaware of the concerns behind 'compensation culture' and its threat to forms of recreation because of the risk of liability.<sup>321</sup> Although the dearth of case law concerning the potential liability of sports coaches means that the weight to be afforded to the wider public interest may be

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<sup>318</sup> For instance, texts geared toward undergraduate sports management/coaching type courses, and the highlighted moot cases/scenarios may have much to offer e.g., Spengler et al (n 20); Hartley (n 11). There appears further scope for tailored coach education resources and materials relating to the legal and ethical issues facing modern coaches balancing their responsibility for the safety of performers with often conflicting legitimate objectives. This issue is considered more fully in chapter 6. See further, Partington (n 68).

<sup>319</sup> For example, the coach's approach to punishment type drills or practices (e.g., 'suicides' or shuttle sprints), and the intensity of pre-season conditioning sessions and training, must be capable of withstanding logical analysis. Wong notes that coaches must be careful when considering the use of punishment type drills ((n 258) 111). These issues are explored in further detail in chapters 6 and 7.

<sup>320</sup> By analogy, it has been suggested that a number of professional organisations in the US, including national athletic associations, have failed to pay sufficient attention to issues of legal liability of sports contest officials, there being a need for more proactive guidance and leadership in protecting officials from unnecessary exposure to legal liability. See, for instance, R Hunter, 'An 'Insider's' Guide to the Legal Liability of Sports Contest Officials' (2005) 15(2) *Marq. Sports L. Rev.* 369, 411.

<sup>321</sup> Steele (n 14) 126.



unclear,<sup>322</sup> the success of the London Olympics may very well act as a catalyst to the appreciation of the importance and specificity of sports coaching, further supporting common sense approaches to alleged negligence in this area. The main considerations for the judiciary suggested by this literature review regards the factors or circumstantial ingredients to be considered when establishing the requisite standard of care, thereby formulating the legal test to be applied in the individual circumstances in a manner that it is entirely reflective of the specificity of coaching. In short, it is submitted that the propositions that ought to be considered by courts when determining the standard of care demanded of sports coaches in the circumstances should *include*: the aspirations, expectations, confidence and conduct of the performer; the level of qualifications and/or experience of the coach; the post held by the coach and the performance level of the athlete; and, the suitability of the activity to the performer's age, competence and capacity (mental and physical).<sup>323</sup> This would more effectively encourage and support determination of the necessary standard of care in individual cases at a realistic and sensible level. Given the sometimes fine line between negligent and non-negligent coaching, considerable latitude and leeway ought to be afforded to the discretion of coaches, consistent with the ethos of section 1 of the Compensation Act of 2006, with a general recognition of the overlapping roles and functions of modern coaches, teachers and instructors. Given the paucity of case law directly in point in the UK, this would allow practitioners to look to analogous authority for guidelines on acceptable coaching practices with greater confidence and certainty without compromising legal principle.

## 8. Further Consequential Research

As suggested by Anderson, there appears much force to the submission that coaches may be adequately protected and safeguarded from liability in negligence

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<sup>322</sup> It could be argued that even in areas with established authority this remains the case. Given the highly fact sensitive nature of negligence claims, and the weight to be afforded to wider policy based issues, further complicated by possible and associated judicial reasoning backwards to achieve a fair and reasonable judgment, it appears inevitable that some uncertainty will remain.

<sup>323</sup> These factors contextualise, further extend and refine the *Caldwell* propositions.

given the emphasis on the fact specific nature of sports-related litigation; the tort of negligence's inherent 'control devices' of duty, breach, causation and damage; and judicial tenderness reflecting policy issues embodied in section 1 Compensation Act of 2006.<sup>324</sup> This chapter's doctrinal analysis and scrutiny of academic commentary, whilst generally supporting this observation, reveals a number of significant and somewhat hidden potential limitations and restrictions to the scope of such protections. Illustrative of policy issues encouraging the delivery and facilitation of socially desirable activities, and potentially restricting coaches' exposure to liability, is the notion of individual responsibility<sup>325</sup> and the recognition that there is no absolute duty to warn against obvious risks.<sup>326</sup> Nevertheless, the weight afforded to 'desirable activities' is largely a matter of discretion for the trial judge, with additional analysis of the (potential) impact of the Compensation Act 2006 on the juridification of modern sports coaching necessary. Further, it has previously been established that a legal duty required of sports coaches is to warn against latent or obvious dangers, it being recognised by analogy that in the school context, a teacher that can prove that s/he has warned a pupil of the dangerous consequences which may follow from a particular act is in a much stronger position when sued for negligence.<sup>327</sup>

Since it is not possible to do any kind of sport without some risk, coaches will take acceptable and reasonable risks in circumstances where such foreseeable risk is regarded as necessary, worthwhile and beneficial. In attempting to ensure that the appropriate balance is struck between the policy issues and tensions created by the promotion of involvement in sport and physical activity, against the need to ensure that athletes are not exposed to unreasonable risk taking, some states in the US have

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<sup>324</sup> Anderson (n 10) 251-53.

<sup>325</sup> E.g., *Tomlinson* (n 208).

<sup>326</sup> E.g., *Poppleton* (n 207) [1], May LJ stating, '[a]dults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured'. Also see, *Poole v Wright* [2013] EWHC 2375 (QB). Importantly, where children are involved, the ordinary duty of care is increased: *Jolley v Sutton London BC* [2000] 1 WLR 1082; *Healey* (n 19) 157; *James* (n 10) 92.

<sup>327</sup> *Barrell* (n 131) 292. Also see *Hussack* (n 225) [74], Boyd J noting that given the 'lowered sensitivity to the risk' of the pupil during field hockey, a single safety recap was not sufficient.



concluded 'that requiring a standard of care that exceeds negligence comports with the social desire not to chill vigorous participation in competitive sports'.<sup>328</sup> In the US, the overall trend appears to safeguard and encourage volunteer coaching by restricting the risk of liability whilst coaching for mere negligent acts.<sup>329</sup> Further, legislative steps have established that those providing instruction for certain inherently dangerous activities will not be exposed to liability unless such instruction is grossly negligent,<sup>330</sup> with civil liability immunity legislation reasoned to address coaches' and volunteers' fear of being sued by its proponents.<sup>331</sup> Interestingly, in Australia<sup>332</sup> legislation has been enacted enabling individuals to sign waivers or disclaimers,<sup>333</sup> based on the contractual relationship between the parties concerned, for instance a fitness instructor and athlete,<sup>334</sup> with claimants assumed to be aware and in acceptance of the inherent sporting risks<sup>335</sup> that are considered obvious.<sup>336</sup> Following the Civil Liability Acts, it appears plain that there will be some sporting circumstances where courts in Australia will now be willing to uphold exclusion of liability clauses and waivers.<sup>337</sup> Closer to

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<sup>328</sup> Davis (n 10) 575.

<sup>329</sup> Hurst and Knight (n 77) 48.

<sup>330</sup> VerSteeg (n 49) 175-76.

<sup>331</sup> Wong (n 258) 127, the federal Volunteer Protection Act becoming law in 1997.

<sup>332</sup> See generally, D Thorpe et al, *Sports Law* (OUP, 2009) 129-59.

<sup>333</sup> E.g., Trade Practices Amendment (Liability for Recreational Services) Act 2002.

<sup>334</sup> *Neil v Fallon* (1995) Aust. Torts Reports 81-821. As noted by Thorpe et al (n 332) 139, the exclusion clause being upheld, thereby preventing liability for negligent instructing. Similarly, in the US, Wong (n 258) 151, highlights how a waiver and release of liability was upheld in *Lund v Bally's Aerobic Plus, Inc.* 93 Cal. Rptr 2d 169 (Cal. App. Ct. 2000), a case concerning alleged negligence by a personal trainer. Cf *Morrow* (n 291), there being no such grounds in the UK, following s 2 of the Unfair Contract Terms Act 1977, and more recently s 65 of the Consumer Rights Act 2015, since all exclusions of negligence liability causing death or physical injury are unenforceable in the course of a business. This was most recently reiterated in *Pinchbeck v Craggy Island Ltd* [2012] EWHC 2745 (QB) [41].

<sup>335</sup> Civil Liability Act 2003 (Queensland), s 16(2) defines an inherent risk as 'a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill'.

<sup>336</sup> Civil Liability Act 2003 (Queensland); Commonwealth Volunteers Protection Act 2002. Importantly, there remains some limitations on the application of such immunity, for instance, where alternative provision applies (e.g., Sporting Injuries Insurance Act 1978 (NSW)), a detailed examination of the various Civil Liability Acts being beyond the scope of this thesis. For a US perspective on catastrophic injury protection for high school and university (NCAA) activities, see Wong (n 258) 99-103 & 151.

<sup>337</sup> Healey (n 19) 140; *Gowan v Windsor* (1991) DCNSW (Shillington J, 9 August). Cf *Bacon v White and Chartered Associates Limited*, 21 May 1998 (QBD), where following s 2 of the Unfair Contract Terms Act 1977 a claim for damages against a scuba diving instructor arising from the death of one of his charges was not defeated by the pupil's signature to a contractual exemption clause: see Griffith-Jones (n 11) 749.



home, consideration of Part 3 of the Civil Law (Miscellaneous Provisions) Act of 2011 in the Republic of Ireland,<sup>338</sup> based on a detailed report produced by the Law Reform Commission,<sup>339</sup> with provision of some civil liability immunity for volunteers, further supports the need for critical analysis of safeguards in the UK.

Consequently, this literature review's critical examination of whether coaches and volunteers performing a socially desirable activity are adequately safeguarded by the ordinary law of negligence generates important consequential research priorities warranting robust analysis. Whilst acknowledging that a necessary evidential threshold of recklessness was essentially disapproved in *Caldwell and Smoldon*,<sup>340</sup> in the context of sports coaching, might the unique, interrelated and symbiotic relationship between a coach and a performer justify a more heightened threshold of liability than mere carelessness?<sup>341</sup> For instance, do the special circumstances of sports coaching justify varying the standard of care in negligence to safeguard defendant coaches by premising legal liability on a necessary evidential threshold of gross negligence?<sup>342</sup> Similarly, should statutory provision be extended to better safeguard coaches and volunteers, beyond the scope of the Compensation Act 2006, to mirror legislation enacted in Australia, the US or the Republic of Ireland? At present, given the adoption of a generally non-interventionist approach by the UK government to sport, with the potential civil liability of sports coaches not presently appearing to be prioritised as a 'pressing public interest requirement',<sup>343</sup> it is likely that legislation providing civil liability immunity for coaches and volunteers in this jurisdiction would be particularly

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<sup>338</sup> Inserting a new Part IVA (sections 51A to 51G) into the Civil Liability Act 1961, applying to volunteers carrying out activities for the purpose of sport and recreation, with a volunteer not to be personally liable for negligence for any act done when carrying out voluntary work.

<sup>339</sup> Civil Liability of Good Samaritans and Volunteers (LRC 93-2009)  
<[http://www.lawreform.ie/\\_fileupload/Reports/Report%20Good%20Samaritan.pdf](http://www.lawreform.ie/_fileupload/Reports/Report%20Good%20Samaritan.pdf)> accessed 3 May 2016.

<sup>340</sup> Though as an evidential guideline it remains most useful in cases of participant liability. See further, J Anderson 'Personal Injury Liability in Sport: Emerging Trends' (2008) 16 *Tort Law Review* 95, 101.

<sup>341</sup> As in a number of US states, see for instance, *Kahn v East Side Union High School District* 75 P3d 30 (Cal. 2003). The requirement of such a heightened evidential threshold, and potential pitfalls, is cogently critiqued and questioned by Mitten (n 10) 215-33. Also see, Davis (n 10) 572 & 574.

<sup>342</sup> See further, Nolan (n 272) 651-88.

<sup>343</sup> J Taylor and T Payton, 'Government Intervention in the Sports Sector' in Lewis and Taylor (n 8) 6.



challenging to achieve.<sup>344</sup> Pressingly, this reinforces the importance of ensuring that the legal test fashioned within the confines of the ordinary principles of the law of negligence is accurately reflective and representative of the specificity of sports coaching forthwith.

Finally, a particular hypothesis yet to be addressed in previous literature is the assertion that many coaches are not sensitised to the emerging relationship between the law and sports coaching and sometimes fail to afford consideration of possible legal liability the importance it merits, with insufficient initial training and CPD focused on this emerging affiliation.<sup>345</sup> To this end, empirical research should include scrutiny of qualitative findings from interviews with coaches to explore whether coaches are fully conversant with an awareness and appreciation of the criteria of the tort of negligence, the potential reach and grasp of the law, and how such information about potential legal liability may be maximised by coaches to develop a proactive risk assessment lens. Fundamentally, some volunteers may regard insurance as conflicting with the very essence and principle of volunteering to coach,<sup>346</sup> it additionally being submitted that the stress,<sup>347</sup> stigma, 'ridicule' in court,<sup>348</sup> and negative labelling<sup>349</sup> often associated with a finding of negligence may not be negated through public liability insurance coverage, indicating that insurance may be necessary but not always sufficient in safeguarding volunteers. Further, in failing to address the core issues of avoiding unreasonable risk, sharing best practice, and arguably raising the standard of volunteering and coaching, insurance is certainly not the complete answer. Nevertheless, seeking to ascertain whether coaches generally have appropriate

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<sup>344</sup> In 2004, introduction of a Private Members' Bill entitled the "Promotion of Volunteering Bill" was unsuccessful. See further, Anderson (n 10) 249. Recent enactment of the SARA Act 2015 appears to concur with this view. See, for instance, N. Partington, 'What Does The Social Action, Responsibility & Heroism Act 2015 Mean For Sports Volunteers And NGBs?' *LawInSport*, 3 April 2015 <<http://www.lawinsport.com/articles/item/what-the-new-social-action-responsibility-heroism-act-2015-means-for-sports-volunteers-and-ngbs>> accessed 3 May 2016.

<sup>345</sup> See generally, Greenfield et al (n 4) 2201.

<sup>346</sup> J Brown, 'Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune From Tort Liability' (1997) 7 *Seton Hall J. Sports L.* 559, 579.

<sup>347</sup> Spengler et al (n 125) 49.

<sup>348</sup> Epstein (n 257) 117.

<sup>349</sup> E.g., Carter (n 13).

insurance coverage certainly also warrants further investigation. In short, there is much scope for the utilisation of best practice recommendations to safeguard coaches from potential negligence liability, and thereby likely improve the quality of coaching at all levels by means of realistic, effective and achievable risk management proposals.

## **9. Conclusion**

Although coaches will not be liable for sporting injury resulting from the ordinary and inherent risks of physical activities, providing reasonable care has been taken in the circumstances, such an affirmation is somewhat nebulous and may fail to provide the necessary assurances to coaches and volunteers mindful of their potential exposure to negligence liability. Significantly, this literature review's critical analysis of case law and academic commentary reveals important, and to some extent somewhat concealed, potential legal vulnerabilities of sports coaches in the UK.

The pivotal issue when coaches are sued in negligence is usually the court's objective determination of the standard of reasonable care required in the circumstances. Problematically, this literature review uncovers considerable uncertainty regarding formulation of this standard, arguing that transference of a legal test fashioned in the circumstances of participant liability lacks the sophistication to encapsulate and reflect the specificity of sports coaching. In calling for a more nuanced approach, it has been submitted that the material factors from the prevailing circumstances which courts should routinely and necessarily consider include: the qualifications and experience of the coach; the coaching post held and the performance level of the athlete; the expectations and aspirations of the performer; and the suitability of the activity to the performer's age, competence and capacity. By extending and further refining present UK jurisprudence emanating from cases of sports negligence, these propositions would be instructive to courts by emphasising foundational components from the particular situation that are fundamental to the interdependent and collaborative coach-athlete relationship. In short, when required to scrutinise the broad totality of circumstances of individual cases, these material



factors should be of guidance and support to courts. It is asserted that affording sufficient weight in judicial reasoning to these transparent criteria would help to ensure that the standard of care demanded of coaches is set at a sensible and realistic level, whilst also providing some much needed clarity and legal certainty to this hitherto under analysed area of sports law.

More specifically, this literature review's forgoing analysis reveals an important unanswered research question that thesis will address.

## 10. Research Question

In broadly reflecting the highlighted limitations of previous research in this area, this thesis will aim to analyse, clarify and minimise the negligence liability of sports coaches in the UK. More precisely, this review of literature posits the following unanswered core research question:

- Does the ordinary law of negligence, and more specifically, the control mechanism of *breach*, afford sufficient and reasonable protection to coaches and volunteers performing a socially desirable activity?

Since the intersection between the law of negligence and sports coaching has not been fully analysed in the UK, this specific research question has yet to be considered and answered. Importantly, in further underscoring the originality of this thesis, and potentially reinforcing its intended beneficial impact, this research will critically consider this question from the perspective of the coach, with careful synthesis of evidence and commentary from the distinct academic disciplines of law and sports coaching. It is contended that such rigorous interdisciplinary research is best suited to effectively addressing and contextualising this important research question. The selected methodological design and theoretical framework of this thesis is outlined, explained, and justified in the next chapter.

A necessary prerequisite for a detailed evaluation of the reasonableness of the current law in this context will be an attempt to clarify the standard of care presently

incumbent on modern sports coaches in the UK. This will require a detailed scrutiny of case law in order to endeavor, as far as might be possible, to unpack 'objective reasonableness' in the specific (and varying) circumstances of sports coaching. For instance, chapter 3 will assess the impact of statutory provision in this context, most prominently, section 1 of the Compensation Act 2006, with the likely effect of the recently enacted SARAH Act 2015 also calling for provisional consideration. Further, in chapter 4, contemporary jurisprudence regarding what might amount to a suitable and sufficient assessment of risk will be examined in detail in order to glean instructive insights regarding the scope and content of a coach's duty of care. Significantly, chapter 5's doctrinal analysis reveals the negligence liability of coaches as essentially being governed by the principles of professional negligence. This will be argued to represent a curious, and potentially problematic, instance of professional liability. Also, by exploring this research question through a detailed interdisciplinary lens, and employing empirical legal scholarship, the findings of chapters 6, 7 and 8 advocate best practice recommendations designed to better safeguard coaches from the emerging risk of negligence liability. Ultimately, this thesis' analysis of the dynamic relationship between the tort of negligence and sports coaching crystallises further important consequential research for this highly contextualised and contemporary field of the law.



## Chapter 2: Methodology

### 1. Doctrinal Research

Doctrinal methods still necessarily forms the basis for most legal projects,<sup>1</sup> with careful analysis of case law and academic commentary generating the initial original research question that this thesis will attempt to address. Consistent with much legal research, the legal system itself provides the overarching theoretical framework,<sup>2</sup> facilitating what may be regarded as 'an internal viewpoint' when scrutinising legal doctrine.<sup>3</sup> Simply applied, the initial research method ('how') and the research aims ('what') are essentially merged.<sup>4</sup> As noted by Westerman, when adopting a doctrinal approach,

the law is not only the object of research, but also the theoretical perspective from which that object is studied. Its concepts and categories are not only concepts used by the officials who make, interpret and apply the law, but are at the same time the conceptual tools to be used by the legal scholar.<sup>5</sup>

Doctrinal legal scholarship does not necessarily require its practitioners to know additional fields of learning since it is largely autonomous.<sup>6</sup> In short, a 'doctrinal' or 'black letter' approach demands a forensic analysis of statutory provision and the judgments made by courts.<sup>7</sup> Crucially, having a comprehensive and detailed understanding of the tort of negligence, and sports negligence jurisprudence in England and Wales in particular, was essential before further contextualising its application with

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<sup>1</sup> T Hutchinson 'Doctrinal research: researching the jury' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, 2013) 7. Also see, R Posner, 'The Present Situation in Legal Scholarship' (1980) 90 *Yale Law Journal* 1113.

<sup>2</sup> P Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in M Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) 87.

<sup>3</sup> C McCrudden, 'Legal research and the social sciences', (2006) 122 *Law Quarterly Review* 632, 633.

<sup>4</sup> Westerman (n 2) 90.

<sup>5</sup> Ibid.

<sup>6</sup> Posner (n 1) 1114.

<sup>7</sup> J Anderson, 'Methodology in Sports History: Learning from Legal Scholarship?' 32(15) *The International Journal of the History of Sport* 1764, 1765.

regard to sports coaching.<sup>8</sup> Indeed, doctrinal research involves ‘creative synthesis’ in context,<sup>9</sup> a method used in the literature review to propose a more sophisticated and nuanced legal test for coach negligence,<sup>10</sup> and justify the original research question identified.

Nevertheless, the internal viewpoint provided by doctrinal analysis ‘is inescapably fettered by the ideological lumber of the legal system itself’.<sup>11</sup> More specifically, critical examination of case law, statute and academic commentary as a form of qualitative research only gets us so far, a multi-method approach,<sup>12</sup> including socio-legal, interdisciplinary and qualitative empirical research,<sup>13</sup> necessary to more fully attempt to analyse, clarify and minimise the potential of negligence liability of coaches in this jurisdiction. Socio-legal and interdisciplinary scholarship, by drawing upon theoretical frameworks not formed entirely by the legal system,<sup>14</sup> broadens the scope of analysis and more effectively uncovers the practical implications being scrutinised in this study.

For instance, adopting a purely doctrinal approach in chapter 1 would have been limited in uncovering the somewhat concealed legal vulnerabilities to which coaches may unwittingly be exposed. Accurate appreciation of the scope of potential litigation risk, flowing from a legal test premised on the principles of professional negligence, required an interdisciplinary analysis,<sup>15</sup> thereby allowing critical scrutiny

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<sup>8</sup> Hutchinson (n 1) 17.

<sup>9</sup> Ibid 12.

<sup>10</sup> For instance, further developing the propositions articulated in *Caldwell v Maguire* [2001] EWCA Civ 1054, by careful synthesis of judgments from the wider common law family including: *Thornton v School Dist. No. 57 (Prince George) Bd. Of School Trustees* [1976] 5 WWR 240, 73 DLR (3d) 35 (BCCA); *Myers v Peel County Board of Education* [1981] 2 SCR 21; and *Lestina v W Bend Mutual Insurance Company* (1993) 501 NW (2d) 28.

<sup>11</sup> D Feldman, ‘The Nature of Legal Scholarship’ (1989) 52(4) *Modern Law Review* 498, 499. For instance, repeated reference will be made in the following pages to a perceived ‘compensation culture’ in the UK, an issue which both Parliament and the courts appear, at times, acutely mindful of. The concept of a ‘compensation culture’ was introduced in chapter 1.

<sup>12</sup> L Nielsen ‘The Need for Multi-Method Approaches in Empirical Legal Research’ in P Cane and H Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP, 2010) 952.

<sup>13</sup> L Webley ‘Qualitative Approaches to Empirical Legal Research’ in Cane and Kritzer (n 12) 927.

<sup>14</sup> Westerman (n 2) 95.

<sup>15</sup> See generally, Hutchinson (n 1) 8.



and synthesis of both the law of negligence and the specificity of sports coaching. This included consideration and implications of definitional distinctions between coach, instructor, and PE teacher; an informed awareness of the complexity of modern sports coaching; the special, unique and varying circumstances in which coaches discharge their functions; a detailed consideration of the precise (and emerging) duties incumbent upon sports coaches; and, most crucially, research from sports coaching scholars which when integrated with findings from traditional doctrinal methods, indicated a possible propensity for some existing coach education, training and practice to perpetuate negligent entrenched practice. Interestingly, further development of this multi-method approach in chapter 5 allows critique of what is submitted to amount to 'the professional liability of amateurs' and, the possible utilisation of a *Bolam* 'defence' in this context. Additionally, incorporating qualitative empirical research into the research design of this thesis,<sup>16</sup> further contextualising the internal viewpoint provided by doctrinal methods, is both legitimate and beneficial.<sup>17</sup> Put bluntly, since chapter 1 revealed the negligence liability of sports coaches to be an evolving and dynamic legal issue, with a paucity of UK case law directly in point, reliance on a purely doctrinal research methodology appears peculiarly flawed in addressing this thesis' research question.<sup>18</sup>

## 2. Socio-Legal Studies

According to the Socio-Legal Studies Association:

Socio-legal studies embraces disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions. Socio-legal research is diverse, covering a range of

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<sup>16</sup> Discussed below.

<sup>17</sup> J Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Van Hoecke (n 2) 159. This makes reference to the work of McCrudden (n 3).

<sup>18</sup> See generally, Posner (n 1) 1120; JR Davis, *Interdisciplinary Courses and Team Teaching* (American Council on Education and The Oryx Press, 1995) 6.

theoretical perspectives and a wide variety of empirical research and methodologies.<sup>19</sup>

A socio-legal perspective, or 'law in context',<sup>20</sup> speaks to 'an interface with a context within which law exists',<sup>21</sup> in this research, the legal focus being the tort of negligence, with the interface or context being that of sports coaching. Specifically, this thesis concerns the awareness, understanding and (non)reflexivity of coaches to the potential of negligence liability since '[l]egal rules are not self-enforcing ... they must be mobilised'.<sup>22</sup> It is asserted that coaches must be responsive to the developing scope of legal liability since '[t]he reflexivity of modern social life consists in the fact that social practices are constantly examined and reformed in the light of incoming information about those very practices, thus constitutively altering their character'.<sup>23</sup> This has particular relevance to this emerging aspect of sports law, and specifically, the evolving standard of care required of modern sports coaches. Accordingly, in adopting the perspective of the coach, socio-legal scholarship facilitates critique of the law from a 'consumer perspective'.<sup>24</sup> Moreover, since coaching is a complex and highly context specific process and practice, this thesis' socio-legal scholarship provides fertile ground for rigorous interdisciplinary research.<sup>25</sup> Simply applied, critical and detailed exploration of the interaction between the law of negligence and sports coaching necessitates a broad methodological design.

Consequently, adopting an interactionist paradigm within the framework of socio-legal scholarship ought to also prove 'especially illuminating', since '[t]he

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<sup>19</sup> Statement of Principles of Ethical Research Practice (January 2009), Principles 1.21 & 1.22 <[http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20\\_final\\_%5B1%5D.pdf](http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf)> accessed 3 May 2016.

<sup>20</sup> F Cownie and A Bradney 'Socio-legal studies: a challenge to the doctrinal approach' in Watkins and Burton (n 1) 35.

<sup>21</sup> S Wheeler and P Thomas, 'Socio-Legal Studies' in D Hayton (ed), *Law's Future(s)* (Hart, 2002) 271. See further, R Banakar and M Travers, *Theory and Method in Socio-Legal Research* (Hart, 2005) xii.

<sup>22</sup> McCrudden (n 3) 637.

<sup>23</sup> A Giddens, *The Consequences of Modernity* (Polity Press, 1990) 38. See further, P Jarvis, *The Practitioner-Researcher: Developing Theory from Practice* (Jossey-Bass, 1999) 25-26.

<sup>24</sup> R Kagan, 'What Socio-Legal Scholars Should Do When There Is Too Much Law' (1995) 22(1) *Journal of Law and Society* 140, 144.

<sup>25</sup> See generally, Anderson (n 7) 1766. Interdisciplinary research is discussed more fully below.



interactionist tradition has proved particularly suited to the examination of the law in action. This sociological tradition is specifically concerned with *subjective meanings* and experiences as constructed by participants in social situations'.<sup>26</sup> Gaining an effective and informative insight into the perception, sensitivity and awareness of coaches to legal liability supports empirical socio-legal research that is curiosity-driven,<sup>27</sup> with real world significance or impact,<sup>28</sup> in an attempt to analyse and clarify this area of sports law. This empirical socio-legal research, by ultimately facilitating 'evidence based' recommendations,<sup>29</sup> should identify best practice risk management strategies for sports coaches. Seeking to provide such guidance and recommendations for non-law specialists, as the later discussion reveals, may be regarded as a hallmark of the level of disciplinary integration likely to underpin effective interdisciplinarity.<sup>30</sup>

### 3. Wider Common Law Family

In considering case law and statutory provision from the wider common law family, the intention is to lend weight to the submissions made by this thesis,<sup>31</sup> and uncover a more detailed insight into coach negligence through enhanced knowledge of the issue.<sup>32</sup> Such an approach seems eminently sensible given the well-established and extensive cross-pollination of tortious principles between countries including the UK

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<sup>26</sup> B Hotter and S Lloyd Bostok 'Law's Relationship with Social Science: The interdependence of theory, empirical work and social relevance in sociological studies' in D Cowan et al (eds), *Law And Society* (Routledge, 2014) Vol I, 272 (emphasis added). This pointing to the richness of responses that may be generated by in-depth interviewing (discussed later), with the intention of revealing and critically exploring the subjective meanings attributed by coaches to the emerging association between sports coaching and the law.

<sup>27</sup> Cownie and Bradney (n 20) 48.

<sup>28</sup> Kagan (n 24) 145. In paraphrasing Kagan's assertions, by embracing an 'impact agenda' it is intended that this socio-legal research should be of significant practical importance.

<sup>29</sup> Cownie and Bradney (n 20) 42.

<sup>30</sup> See generally, L Lattuca, *Creating Interdisciplinary* (Vanderbilt University Press, 2001) 263 citing EL Boyer, *Scholarship reconsidered: Priorities of the professoriate* (Princeton: The Carnegie Foundation for the Advancement of Teaching, 1990); Davis (n 18) 4.

<sup>31</sup> See generally, M James and D McArdle, 'Player violence, or violent players? Vicarious liability for sports participants' (2004) 12(3) *Tort Law Review* 131, 132.

<sup>32</sup> HP Glenn, 'Aims of Comparative Law' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar, 2006) 58; Hutchinson (n 1) 14.

and Australia.<sup>33</sup> More specifically, as revealed in chapter 1, scrutiny and consideration of cases directly in point<sup>34</sup> 'critically illuminate[s]'<sup>35</sup> the legal test for coach negligence in England and Wales. As a means of support and fundamental technique, comparative law is frequently becoming integrated into domestic law,<sup>36</sup> with the contribution of persuasive authority from other common law jurisdictions recognised as assisting the development of case law at home.<sup>37</sup> This thesis will primarily focus on common law jurisprudence from the US, Canada and Australia. Although the legal focus of this thesis, the law of negligence, may be regarded as generally similar everywhere,<sup>38</sup> effective consideration of overseas case law demands that due regard be afforded to the cultural paradigm and jurisdictional context from which the legal principle being considered appears embedded.<sup>39</sup> In the context of sports negligence, this is illustrated by the suggestion that, for instance, the individual would appear prioritised above community interests more so in the US than other legal systems.<sup>40</sup> A cautionary message regarding the importance of cultural factors is further echoed by Griffith-Jones, concerning *Agar v Hyde*,<sup>41</sup> when he states:

The judgments of the court are replete with the kind of statements of policy which may owe much to an Australian view that sport is good for you and rugby union is a sport played by men who delight in stretching themselves to meet the

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<sup>33</sup> R Caddell, 'The Referee's Liability for Catastrophic Sports Injuries – A UK Perspective' (2005) 15 *Marq. Sports L. Rev.* 415, 424. See (n 45) below.

<sup>34</sup> G Dannemann, 'Comparative Law: Study of Similarities or Differences' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP, 2006) 417, Dannemann recognising the importance of comparative scholarship in looking 'abroad in order to solve a problem at home'. The standard of care required of sports coaches and the formulation of the legal test to be applied in cases of coach negligence constituting a 'problem' in this jurisdiction.

<sup>35</sup> G Samuel 'Comparative law and its methodology' in Watkins and Burton (n 1) 100. Also see, P Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern Law Review* 262, 264.

<sup>36</sup> Glenn (n 32) 57.

<sup>37</sup> Ibid 61. E.g., *Condon v Basi* (1985) 2 All ER 453, citing with approval *Rootes v Shelton* [1968] ALR 33.

<sup>38</sup> U Magnus, 'Tort law in general' in Smits (n 32) 725.

<sup>39</sup> R Cotterrell, 'Comparative Law and Legal Culture' in M Reimann and R Zimmermann (n 34) 710. Also see, Samuel (n 35) 102.

<sup>40</sup> R Michaels 'American law (United States)' in Smits (n 32) 68.

<sup>41</sup> *Agar v Hyde* (2000) 201 CLR 552.



physical challenges which it poses and are prepared to run the risk of injury in order to do so.<sup>42</sup>

In employing a broad multi-method approach, it is acknowledged from the outset that the rigorous demands of robust comparative scholarship, not least, by means of full and informed appreciation of the cultural paradigm and jurisdictional context from which the legal principle being considered appears embedded,<sup>43</sup> is beyond the scope of this thesis. Indeed, it is recognised that effective utilisation of comparative method requires moving 'beyond any functionally-driven dialectical process in which the objective is to induce a higher level solution'.<sup>44</sup> Accordingly, the force gleaned for the assertions made from judgments from different jurisdictions will be cautiously presented and, where necessary, appropriately qualified. Nonetheless, given the recognition and approval of sports law jurisprudence from other common law countries by the English courts,<sup>45</sup> a comparative law perspective highlights persuasive authority likely to prove instructive when addressing this thesis' research question. This is especially notable given chapter 1's confirmation that the negligence liability of coaches in the UK is an emerging issue with, at present, a paucity of domestic case law directly in point.

#### 4. Theoretical Assumptions

The theoretical perspective underpinning this thesis makes a number of important theoretical and legal assumptions. Firstly, given the emerging relationship between the law and sports coaching, the standard of care expected of coaches is not a static benchmark (in the specific circumstances), but more a standard that has a

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<sup>42</sup> D Griffith-Jones, 'Civil Liability Arising Out of Participation in Sport' in A Lewis and J Taylor *Sport: Law and Practice* (2nd ed., Tottel, 2008) 745.

<sup>43</sup> Also see, Feldman (11) 501.

<sup>44</sup> Samuel (n 35) 183.

<sup>45</sup> E.g., *Rootes* (n 37) (referred to in *Condon* (n 37) and *Caldwell* (n 10); *Agar* (n 41) (referred to in *Vowles v Evans* [2003] EWCA Civ 318); and, *Mattheson v The Governors of Dalhusey University and College* (1983) 57 NSR (2nd) 56; 25 CCLT 91 (SC) (referred to in *Elliott v Saunders and Liverpool Football Club*, 10 June 1994 (QBD)).

tendency to be heightened over generations, making it ever more challenging and demanding to successfully be discharged by coaches, teachers and instructors. Secondly, although coaches often speak to sport being 'a simple game complicated by coaches', coaching itself is a complex process, the relationship between the law and coaching indicative of this complexity. Arguably, prioritisation of these complexities to date may have led some coaches to somewhat disregard related legal implications, this being a particular hypothesis that this research aims to test. Thirdly, the social utility and health benefits of sport, as endorsed by the Compensation Act 2006, will be accepted without further critique. Fourthly, the similarities and overlap between the roles of coach, teacher, and instructor will be emphasised where appropriate, in the hope of maximising the impact of this research. Finally, although the importance of the context and full factual matrix of individual cases is of paramount importance when analysing sports negligence, this thesis will seek to conduct such scrutiny with the intention of protecting and safeguarding coaches generally. Whilst recognising that there will no doubt be cases of coach negligence where deserving claimants ought to be awarded appropriate compensation, the primary focus here will be on clarification of the law in order to highlight best practice risk management proposals. In short, the perspective of the coach, and coaching practice more broadly, provides the 'theoretical lens' or framework for this thesis,<sup>46</sup> enabling the author, as a practitioner-researcher, to uncover what may otherwise remain as somewhat concealed legal vulnerabilities.<sup>47</sup>

## **5. Practitioner-Researcher and Interdisciplinary Study**

This curiosity driven thesis, with the fundamental aim of clarifying the issue of coach negligence, and better safeguarding coaches from civil liability, was initially conceived during the Torts module of a Masters in Legal Science degree at Queen's University Belfast. Reading, analysing and reflecting on case law from the perspective

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<sup>46</sup> M Burton 'Doing empirical research: exploring the decision-making of magistrates and juries' in Watkins and Burton (n 1) 55.

<sup>47</sup> See generally, Jarvis (n 23) 84.



of a coach,<sup>48</sup> most strikingly *Anderson v Lyotier*,<sup>49</sup> made the author acutely aware of the scope for possible limitations in judicial reasoning, and how experienced, conscientious,<sup>50</sup> and well-intentioned coaches<sup>51</sup> may be found liable in negligence for momentarily taking their 'eye off the ball'.<sup>52</sup> Consequently, it is hoped that the opportunity to draw from the disciplines of Law, Sports Coaching, Sports Studies/Science, and PE,<sup>53</sup> will facilitate insightful interdisciplinary research that might provide accurate, robust, authentic and informative conclusions. In short, interdisciplinary study will more effectively contextualise and deepen the analysis of the research questions.

The concept of interdisciplinarity may be regarded as implying 'an integration or synthesis – an interconnection between different academic disciplines'.<sup>54</sup> Applied in a narrow sense, "interdisciplinary" can be used to refer to the body of knowledge that emerges from the productive synthesis of scholarship in two related disciplines',<sup>55</sup> with a mere 'critique of disciplinary knowledge' regarded by some scholars as interdisciplinary research (IDR).<sup>56</sup> More substantively, as highlighted by Porter et al:

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<sup>48</sup> The author being a qualified and experienced coach and coach educator.

<sup>49</sup> *Anderson v Lyotier* [2008] EWHC 2790 (QB). The rugby refereeing cases of *Smoldon v Whitworth* [1997] PIQR P133 (CA) and *Vowles* (n 45) also a source of initial curiosity.

<sup>50</sup> *Anderson* (n 49) [119], Foskett J referring to M. Portejovie as 'a very experienced ski instructor and, I am more than happy to accept, a generally conscientious one who is concerned for the safety and well-being of his students'.

<sup>51</sup> See for instance, *Hussack v School District no.33 (Chilliwack)* (2009) BCSC 852. Mr MacPhee, the claimant's PE teacher and home room teacher, believing that 'field hockey would possibly be the "carrot" to lure Devon back to PE class', a pass in PE being essential for promotion to the next grade level ([53] – [54]).

<sup>52</sup> *Anderson* (n 49) [120].

<sup>53</sup> The author having achieved postgraduate Law and Sport Studies degrees and an undergraduate PE degree.

<sup>54</sup> D Vick 'Interdisciplinarity And The Discipline Of Law' in Cowan et al (n 26) 314. It being clear (314-18) that the discourse, specific language, and particular social conventions of disciplines including law, sports coaching, PE and sports studies/science represent different such academic disciplines with direct relevance to this thesis. For further discussions on what might be regarded as a 'discipline' and, distinctions between interdisciplinary, multidisciplinary, cross-disciplinary and transdisciplinary, see: MH Stober, *Interdisciplinary Conversations: Challenging Habits of Thought* (Stanford University Press, 2011) 12-18.

<sup>55</sup> Davis (n 18) 5.

<sup>56</sup> E.g., L Lattuca, *Creating Interdisciplinarity* (Vanderbilt University Press, 2001) 14.

Interdisciplinary research (IDR) is a mode of research by teams or individuals that integrates

- perspectives/concepts/theories and/or
- tools/techniques and/or
- information/data

from two or more bodies of specialized knowledge or research practice. Its purpose is to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single field of research practice.<sup>57</sup>

In corresponding with this definition of IDR, the individual author of this thesis intends to integrate different perspectives, not least, encompassing legal concepts/laws and sports coaching scholarship, in order to analyse, clarify and minimise the negligence liability of sports coaches. By also adopting some focused and detailed qualitative empirical research,<sup>58</sup> this IDR is designed 'to create [or contribute to] a [more] holistic view or common understanding of a complex issue, question, or problem'.<sup>59</sup> It is hoped that this common understanding may be of relevance to legal practitioners, sports coaches and NGBs. Adopting a single conceptual frame or discipline would 'delimit the range of research questions that are asked, the kinds of methods that are used to investigate phenomena and the types of answers that are considered legitimate'.<sup>60</sup> It is contended that a single field of research practice would restrict a fuller and more searching analysis of the emerging intersection between the law of negligence and modern sports coaching.

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<sup>57</sup> AL Porter et al, 'Interdisciplinary research: Meaning, metrics, nurture' (2006) 15(3) *Research Evaluation* 187, 189. Also see, J Thompson Klein, *Humanities, Culture and Interdisciplinarity: The Changing American Academy* (State University of New York Press, 2005) 55; JG Gaff and JL Ratcliff (eds) *Handbook of the Undergraduate Curriculum: A Comprehensive Guide to Purposes, Structures, Practices and Change* (Jossey Bass, 1997) 393-415.

<sup>58</sup> Discussed later.

<sup>59</sup> Thompson Klein (n 57) 55. See further, Gaff and Ratcliff (n 57).

<sup>60</sup> Davis (n 18) 2. Also see, TR Miller et al, 'Epistemological Pluralism: Reorganizing Interdisciplinary Research' (2008) 13(2) *Ecology and Society* 46.



Also, as previously mentioned, it is little wonder that socio-legal research is conducive to IDR since it may be regarded as 'fruitless to talk about the process of doing interdisciplinary work without discussing the influence of the context in which it is done'.<sup>61</sup> A further requirement of effective IDR is high levels of integration of scholarship in two or more related disciplines.<sup>62</sup> Finally, and of particular relevance to this thesis' aim of being of beneficial impact for practising sports coaches and legal practitioners alike, IDR generally has an applied orientation<sup>63</sup> that is accessible to non-specialists.<sup>64</sup>

## 6. Qualitative Empirical Research

This research will attempt to examine and clarify the opinion, knowledge, awareness, appreciation, perception and understanding held by a sample of coaches concerning the relationship between modern sports coaching and the tort of negligence. In such exploratory and curiosity driven research with real-world significance, qualitative empirical research is particularly useful, since this form of research is well suited to gathering data related to the aims of this thesis.<sup>65</sup> For the purposes of this study, empirical legal research encompasses 'the study of law, legal processes and legal phenomena using social research methods, such as interviews'.<sup>66</sup> Indeed, in attempting to gain a detailed insight and critical understanding of the views held by coaches about the scope for legal liability, the (possibly negative) attitudes and beliefs underlying their responses, and relevant experiences of individual coaches, interviewing appears to be the most effective approach to qualitative research.<sup>67</sup>

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<sup>61</sup> Lattuca (n 56) 20.

<sup>62</sup> Davis (n 18) 4; Miller et al (n 60) 48.

<sup>63</sup> Miller et al (n 60) 48.

<sup>64</sup> See generally, Lattuca (n 56) 263 citing EL Boyer, *Scholarship reconsidered: Priorities of the professoriate* (Princeton: The Carnegie Foundation for the Advancement of Teaching, 1990); Davis (n 18) 4.

<sup>65</sup> Webley (n 13) 928 & 933.

<sup>66</sup> Burton (n 46) 55.

<sup>67</sup> Webley (n 13) 937. Thereby allowing critical scrutiny within an interactionist paradigm, recognising that coaches are innovative and push boundaries.

A fundamental objective of this research is to reveal and prioritise the perspective of the coach. Unpacking and exploring internalised values, ideological notions, potential ignorance, and other pertinent views held by coaches about negligence liability is unlikely to be gleaned from other qualitative methods such as surveys or texts.<sup>68</sup> In short, '[i]nterviews yield direct quotations from people about their experiences, opinions, feelings, and knowledge'.<sup>69</sup> Consequently, it is suggested that interviewing affords the most appropriate data-collection technique for this study,<sup>70</sup> in order to uncover and highlight the perspective of the coach.<sup>71</sup>

Further, as a researcher-practitioner, the author appears ideally placed to fully engage with sports coaches and overcome possible barriers that may include: access to expert coaches; specialised terminology; a likely perceived scepticism;<sup>72</sup> and associated lack of credibility. Indeed, technical knowledge and previous experiences ought to bring valuable experiential data to this research.<sup>73</sup> Essentially, the author's background should enable a connection with interviewees, provide a greater sensitivity of the issues being discussed, and facilitate what may be termed 'insider' or 'semi-insider' research.<sup>74</sup> Drawing on shared experiences and interests may be expected to stimulate rapport and interviewer-interviewee interaction, with coaches expected to be more likely to be responsive and candid.<sup>75</sup> Whilst being mindful of arguments suggesting that the background and identity of the researcher may be regarded as bias, it will be maximised in this thesis as a valuable component of the research design providing a 'major source of insights, hypotheses, and validity checks'.<sup>76</sup>

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<sup>68</sup> J Maxwell, *Qualitative Research Design: An Interactive Approach* (3rd ed., Sage, 2013) 119.

<sup>69</sup> M Patton, *Qualitative Research and Evaluation Methods* (3rd ed., Sage, 2002) 4. Scrutiny of coaches' experiences, opinions, feelings, and knowledge of coach negligence being at the core of this study.

<sup>70</sup> Webley (n 13) 936.

<sup>71</sup> Patton (n 69) 341.

<sup>72</sup> Discussed later.

<sup>73</sup> Maxwell (n 68) 45.

<sup>74</sup> H Arksey and P Knight *Interviewing for Social Scientists* (Sage, 1999) 40.

<sup>75</sup> Ibid 67.

<sup>76</sup> Maxwell (n 68) 44-45.



Nonetheless, scrutiny of recorded interviews was afforded as a means of addressing validity threat.<sup>77</sup> More generally, a perspective of 'critical subjectivity' was adopted and maintained throughout the study, thereby being conscious to ensure that assumptions and values are not uncritically incorporated into the research design.<sup>78</sup> For instance, in being cautious to ensure that preconceived expectations do not adversely interfere with the collection and analysis of qualitative data,<sup>79</sup> potential sources of bias and error are made explicit,<sup>80</sup> carefully reflected upon, and addressed throughout.<sup>81</sup> In short, the vantage point of researcher-practitioner was optimised through a perspective of 'emphatic neutrality',<sup>82</sup> recognising that 'there is a middle ground between becoming too involved, which can cloud judgement, and remaining too distant, which can reduce understanding'.<sup>83</sup>

Given the need for a specialised sample of sports coaches, a 'purposeful sampling' design strategy was implemented to ascertain qualitative data that could be subsequently analysed.<sup>84</sup> Utilising a method of qualitative purposeful sampling is expected to promote an 'in depth' and 'information rich' response to the research question objectives,<sup>85</sup> and specifically, illuminate the awareness, appreciation and experiences of sports coaches to the emerging and evolving nature of this aspect of tort law. Purposeful selection of the participants is necessary to ascertain the specific information necessary to address the focus of this thesis,<sup>86</sup> the identified sports coaches representing a 'panel' of experts in this area,<sup>87</sup> thereby providing the best data for the study.<sup>88</sup> More specifically, it is anticipated that looking to the US may provide

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<sup>77</sup> Ibid 118 & 124.

<sup>78</sup> Ibid 45.

<sup>79</sup> Arksey and Knight (n 74) 39.

<sup>80</sup> For instance, drawing attention to the theoretical assumptions underpinning this research.

<sup>81</sup> Patton (n 69) 51.

<sup>82</sup> Ibid 49-51.

<sup>83</sup> Ibid 50.

<sup>84</sup> Ibid 40.

<sup>85</sup> Ibid 45-46.

<sup>86</sup> Maxwell (n 68) 97.

<sup>87</sup> RS Weiss, *Learning from strangers: The art and method of qualitative interviewing* (Free Press, 1994) 24-29 cited in J Maxwell (n 68) 97.

<sup>88</sup> Maxwell (n 68) 99.

some indication of likely future directions in this area of the law,<sup>89</sup> a view echoed by the (more) extensive academic commentary engaging with the issue of coach negligence in that jurisdiction, as highlighted in chapter 1. Ideally, a sufficient number of US participants<sup>90</sup> might allow for a spectrum of viewpoints and experiences to be captured that go beyond a narrow perspective.<sup>91</sup>

However, given the heavily circumstance specific application of the law of negligence, with this aspect of sports law hitherto lacking detailed scrutiny, seeking to over-generalise findings may prove problematic. Consequently, in seeking to ascertain rich informative data, the small<sup>92</sup> 'sample size [was] designed to facilitate deep and detailed exploration of individual experiences and practices',<sup>93</sup> thereby maximising 'opportunities for informed interpretation and critical reflection'.<sup>94</sup> With this in mind, the original intention was to interview a purposeful sample of between 6-8 coaches, the sample of interviewees ideally being representative of both employed and volunteer coaches from a range of sports including American football, soccer and ice hockey. Following ethics approval from the School of Law, and an internet search of a pre-selected US city, direct email contact providing an initial overview of this research was forwarded to prospective interviewees. Given the intended richness of the responses anticipated, a particular challenge in analysing the data generated from the interviews was attempts to identify collective insights and more generic best practice risk management strategies.<sup>95</sup>

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<sup>89</sup> See generally, J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 362.

<sup>90</sup> Interviewing coaches from the US was made possible by the award of a County Antrim Grand Jury Bursary in 2014.

<sup>91</sup> Webley (n 13) 933.

<sup>92</sup> Anonymised profiles of the individual coaches are available in the Appendix . Although six coaches initially agreed to take part in this study, since one of the coaches failed to approve the transcript of their interview, the findings from this particular interview have not been included in this research. See further (n 102) below.

<sup>93</sup> Arksey and Knight (n 74) 32.

<sup>94</sup> L Smith, *The Problem of Parenting in Lesbian Families and Family Law* (Unpublished PhD Thesis, Queen's University, 2007) 102.

<sup>95</sup> Ibid 106. Future research might involve triangulation with NGB Coach Education and training provision.



## 7. Interviews

The research question being critically explored, the small and purposeful sample of expert coaches, and the background of the researcher, supported a research design utilising focused in-depth interviewing. This should enable a thorough exploration of the issue of coach negligence in context, from the perspective of the coach, the prior knowledge and experiences of interviewer and interviewees facilitating loosely, semi-structured<sup>96</sup> and 'conversational' interviewing.<sup>97</sup> In allowing recognition and access to the specific dynamics of coaching, interviewing is the most appropriate qualitative empirical research method when seeking knowledge and understanding of the intricacies of contextualised coaching behaviour.<sup>98</sup> The opportunity for dialogue which further explores or (gently) probes important and relevant issues,<sup>99</sup> allowing questions to be clarified, adapted and new ones improvised, was intended to generate a 'richness of response'.<sup>100</sup> This richness of data will be further intensified in 'a framework within which people can respond comfortably, accurately, and honestly',<sup>101</sup> consideration of the interview environment, and the structure and content of questions to be posed, extremely important. Accordingly, to refine interview technique, protocols, themes and presentation of questions, and possible barriers, a number of pilot interviews were conducted with experienced coaches not included in the final sample.<sup>102</sup> Feedback from these practitioners was incorporated into the final research design and framing of questions.

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<sup>96</sup> Webley (n 13) 934.

<sup>97</sup> Patton (n 69) 45.

<sup>98</sup> I Seidman *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (2nd ed., Teachers College Press, 1998) 4. Contextualisation in this instance will include a number of factors including: the specific sport; the level at which the athletes are performing; the post, qualifications and experience of the interviewee/coach; and the aspirations of performers.

<sup>99</sup> Ibid 68, making the distinction and preference for 'exploring' as opposed to 'probing'.

<sup>100</sup> Arksey and Knight (n 74) 34.

<sup>101</sup> Patton (n 69) 341.

<sup>102</sup> C Marshall and G Rossman *Designing Qualitative Research* (5th ed., Sage, 2011) 96. Importantly, a mistrust or scepticism of the interviewer's research agenda may pose a particular barrier to overcome. To this end, coaches interviewed were offered the opportunity to approve final transcripts and withdraw from the study at any stage. In view of this stipulation, since one of the coaches interviewed failed to approve his transcript, quotations and data from this interview have not been included in this thesis. This limitation is discussed further in chapter 9.

The approach adopted to the conducting of the interviews was the general interview guide style, with broad and thematic preliminary questions identified in advance, this interview framework enabling the researcher 'to build a conversation within a particular subject area, to word questions spontaneously, and to establish a conversational style but with the focus on a particular subject that has been predetermined'.<sup>103</sup> This systematic approach to interviewing was preferred to the completely informal conversational interview since there was only limited time available to interview these expert coaches from a different jurisdiction, and query and explore issues that may not have been anticipated prior to the interview.<sup>104</sup> Use of this semi-structured and conversational interview strategy allowed for a standardised interview framework to be utilised at the start of interviews and then refined and developed throughout the interview to enable the interviewer to pursue particular issues of interest in greater detail.<sup>105</sup> Irrespective of the method of interviewing adopted, questions were open-ended since '[t]he purpose of qualitative interviewing is to capture how those being interviewed view their world, to learn *their* terminology and judgments, and to capture the complexities of *their* individual perceptions and experiences'.<sup>106</sup> Uncovering the appreciation and awareness of the complexity of coaching relating to legal liability is central to this thesis, requiring active and critical listening.<sup>107</sup> By gaining agreement from interviewees that the interviews could be recorded, in addition to enhancing the scope for active and critical listening during the interviews, careful scrutiny of transcripts provided more robust, in-depth, and on-going analysis.

More specifically, the pivotal aim of these interviews was to enter the perspective of the coach,<sup>108</sup> the interviewer committed to uncovering the 'inner voice' of the interviewee by moving beyond the 'outer, or public voice' that 'always reflects

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<sup>103</sup> Patton (n 69) 343.

<sup>104</sup> Ibid 342-47.

<sup>105</sup> Ibid 347.

<sup>106</sup> Ibid 348.

<sup>107</sup> Arksey and Knight (n 74) 100.

<sup>108</sup> Patton (n 69) 341.



an awareness of the audience'.<sup>109</sup> This was particularly important given the issue being investigated is an emerging and developing one; one that is hypothesised not to be given the importance it merits in coaching practices adopted;<sup>110</sup> an issue which some coaches may be hesitant to acknowledge a possible ignorance of, due to perceived negative connotations; one that coaches may be aware of generally, but not necessarily account for in training sessions and practices; and finally, given the obvious significance of the need to safeguard the health, safety, and well-being of athletes,<sup>111</sup> impression management considerations may also shape the nature of answers made. Nonetheless, these semi-structured interviews were designed and intended to illuminate matters that cannot be directly observed.<sup>112</sup> Ultimately, by seriously engaging with these expert coaches, whilst making every effort to reassure interviewees and prevent them adopting a defensive stance,<sup>113</sup> it was hoped to 'encourage a level of thoughtfulness more characteristic of the inner voice'.<sup>114</sup> Structurally, the format of the interviews represented a 'guided conversation',<sup>115</sup> sequentially frameworked to encompass an opening; introductory questions; transitional questions; approximately 5 key substantive questions; and concluding

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<sup>109</sup> Seidman (n 98) 81.

<sup>110</sup> Crucially, such an assumption in no way necessarily indicates or attributes 'blame' for this to individual coaches. As critically explored in the literature review, factors underpinning such a hypothesis include: the emerging relationship between the law and sports coaching; a possible 'complete blindness' (discussed later) or ignorance to the issue of negligence liability; negative assumptions generally about health and safety requirements and a perceived 'compensation culture'; a reluctance to accept and recognise the dynamic intersection between sports coaching and the law; NGBs possibly failing to adequately address the issue of negligence liability in coach education and training; NGBs perhaps not being as proactive as necessary in raising awareness of potential legal liability; and barriers (e.g., financial and time constraints) to CPD and up-to-date coach education and training.

<sup>111</sup> Given the completely different dynamics and environment of the interview setting, compared to, for instance, an intense practice session, there may be a tendency for coaches to (over)emphasise safety considerations and the health and well-being of athletes.

<sup>112</sup> Arksey and Knight (n 74) 32.

<sup>113</sup> The fundamental aim of safeguarding and protecting coaches from negligence liability, championing the perspective of the coach whenever possible and, this study's commitment to identifying and sharing best practice recommendations in order to minimise future litigation risk, will be emphasised to interviewees.

<sup>114</sup> Seidman (n 98) 64.

<sup>115</sup> Arksey and Knight (n 74) 98.

questions which provided an insurance mechanism for important points that may, up to that point in the interview, have been missed.<sup>116</sup>

## 8. Analysis of Data

The taped interview transcripts generated from the purposeful sample were analysed using content analysis, this means of qualitatively reducing the data intended to enhance understanding by identifying 'core consistencies and meanings'.<sup>117</sup> This first step in systematically making the data more manageable and most effective, and an initial opportunity for analysis, involved listening carefully to the interview recordings in full before transcription.<sup>118</sup> Throughout both of these stages of scrutinising the data, namely provisional critical listening and transcribing the responses, 'memoing' was utilised as a means of structured note-taking,<sup>119</sup> thematic memos systematically evidencing the researcher's thoughts and initial emerging issues from accumulation of the data.<sup>120</sup> When identifying core consistencies or themes through 'thematic analysis',<sup>121</sup> codes or short phrases were used to 'symbolically assign[s] a summative, salient, essence-capturing and/or evocative attribute'<sup>122</sup> from the recorded interviews. Classifying or coding the data into categories, and then associated themes, enables analytic thinking to be formally represented,<sup>123</sup> allowing

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<sup>116</sup> R Krueger and M Casey, *Focus Groups: A Practical Guide for Applied Research* (3rd ed., Sage, 2009) 41; see generally, M Dean and M Spence 'Qualitative Thematic Analysis Training', Postgraduate Researcher Development Programme, Queen's University (25 November, 2013). Also, see below for generalised format and framing of questions. Clearly, specific questions devised and presented must be reflective of the individual coach, including the particular sport and level at which the coach is practising.

<sup>117</sup> Patton (n 69) 453.

<sup>118</sup> Maxwell (n 68) 105.

<sup>119</sup> Webley (n 13) 944.

<sup>120</sup> Marshall and Rossman (n 102) 213.

<sup>121</sup> The systematic approach adopted to thematic analysis of the captured data, and specifically, utilising codes, categories and themes to cluster the responses from the interviews, draws considerably from a research seminar: see Dean and Spence (n 116).

<sup>122</sup> J Saldana, *The coding manual for qualitative researchers* (Sage, 2009) 3.

<sup>123</sup> Marshall and Rossman (n 102) 212.



critical examination of the particular material of upmost relevance to the questions that this thesis aims to address.<sup>124</sup>

Importantly, content analysis is 'not a precise science; it is an interpretive act',<sup>125</sup> and as highlighted when articulating the theoretical assumptions underpinning this research, this interpretive act was executed through an analytical lens seeking to safeguard and protect coaches from legal liability. Nonetheless, in attempting to counter any potential research limitations this may give rise to, extensive use of illustrative quotations is maximised in the write-up of findings as evidence of the perceptions and observations of coaches.<sup>126</sup> This provides 'detailed empirical evidence to accompany the analysis'.<sup>127</sup> Such presentation of raw data is designed and intended to enhance the study's authenticity, and improve the rigour and robustness of the analysis undertaken. Further, manually transcribing the interviews in full personally, although labour intensive and time-consuming, was preferred to data analysis software, 'immersion in the data'<sup>128</sup> intended to most fully utilise and represent the interviewee's perspective of potential coach negligence.<sup>129</sup>

## 9. Summary

The emphasis on the actual operation of the law in practice, and by investigating the knowledge, impact on coaching methods, perceptions, awareness, and experiences of coaches, locates this thesis in the broad paradigm of socio-legal, interdisciplinary and comparative scholarship. Contextualisation of the research questions is of paramount importance since issues relating to negligence cannot be resolved in a (social or legal) vacuum. A socio-legal perspective, adopting an

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<sup>124</sup> R Bogdan and S Biklen *Qualitative Research for Education: An introduction to Theories and Methods* (4th edition, Pearson, 2003) 161; Maxwell (n 68) 107.

<sup>125</sup> Saldana (n 122) 4.

<sup>126</sup> Webley (n 13) 946.

<sup>127</sup> Cownie and Bradley (n 20) 48.

<sup>128</sup> Marshall and Rossman (n 102) 210, it being noted that 'there is no substitute for intimate engagement with your data'.

<sup>129</sup> Smith (n 94) 110.

interactionist paradigm is integral to this research,<sup>130</sup> and takes this area of sports law into hitherto unexplored territory. Consequently, this theoretical framework, and the design of the qualitative empirical research to be undertaken, whilst broad and challenging, allows critical examination of an issue not previously analysed in detail in this jurisdiction.<sup>131</sup> Interestingly, McCrudden points to the ‘puzzling’ and seemingly ‘complete blindness to the potential relevance of legal issues in much social science research’,<sup>132</sup> it being contended in this thesis, that by analogy, there may also be a danger of sports coaches regarding the law as essentially unimportant.

Consistent with the outlined methodological design of this thesis, the next chapter concentrates on doctrinal scholarship, and a comparative law perspective, in order to critically analyse the effectiveness of section 1 of the Compensation Act 2006 in affording sports coaches sufficient and reasonable protection from liability in negligence.

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<sup>130</sup> McCrudden (n 3) 650.

<sup>131</sup> Wheeler and Thomas (n 21) 273. See further, Dannemann (n 34) 417.

<sup>132</sup> McCrudden (n 3) 646.



## Chapter 3: Beyond the ‘Tomlinson trap’: Analysing the Effectiveness of Section 1 of the Compensation Act 2006

### 1. Introduction

It is the function of the law of tort to deter negligent conduct and to compensate those who are the victims of such conduct. It is not the function of the law of tort to eliminate every iota of risk or to stamp out socially desirable activities ... This principle is now enshrined in section 1 of the Compensation Act 2006. ... However, the principle has always been part of the common law.<sup>1</sup>

Introduction of section 1 of the Compensation Act 2006 (the Act) in England and Wales has been the subject of considerable judicial and academic criticism,<sup>2</sup> it being widely regarded as ‘an unnecessary solution to a non-existent problem’.<sup>3</sup> Significantly, critical scrutiny of the emerging jurisprudence, whereby section 1 has been engaged, lends some support to the alternative view that section 1, in practice, affords an enhanced level of protection and safeguarding for individuals undertaking functions in connection with a desirable activity. By explicitly concentrating the court’s attention on the necessary *Tomlinson* balancing exercise when assessing reasonableness in the specific circumstances,<sup>4</sup> section 1 minimises the danger of courts succumbing to the ‘*Tomlinson* trap’, this representing a failure to fully account for ‘the social value of the activity giving rise to the risk and the cost of the preventative measures’.<sup>5</sup> Nonetheless, the idiosyncratic judicial interpretation of the weight to be afforded to ‘desirable activity’, and tort law’s sometimes blunt and unpredictable assessment of breach,

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<sup>1</sup> *Scout Association v Barnes* [2010] EWCA Civ 1476 [34] (Jackson LJ).

<sup>2</sup> See, for example, *Wilkin-Shaw v Fuller* [2012] EWHC 1777(QB) [42], [43], [46] (Owen J); A Morris, ‘Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury’ (2007) 70 *Modern Law Review* 349, 368.

<sup>3</sup> K Williams, ‘Legislating in the echo chamber?’ (2005) 155 *New Law Journal* 1938.

<sup>4</sup> *Tomlinson v Congleton BC* [2003] UKHL 47. Also see, SF Deakin et al, *Markesinis and Deakin’s Tort Law* (7<sup>th</sup> ed., OUP, 2013) 273.

<sup>5</sup> *Scout Association* (n 1) [59] (Ward LJ). Also see, *Tomlinson* (n 4) [42] (Lord Hoffmann).

remain problematic, thereby reinforcing the essentially limited scope of section 1. In critically considering the application of section 1 in the specific context of sports coaching, this chapter endorses the meaningfulness of a gross negligence standard, a modified standard of care appearing desirable in circumstances where volunteers are operating to promote socially valuable activities.<sup>6</sup> In short, this chapter submits that the general tenor of section 1, despite safeguarding against the '*Tomlinson* trap', might more effectively be achieved through complementary civil liability immunity legislation. Further, recent enactment of the Social Action, Responsibility and Heroism Act 2015 (SARAH Act) by the UK Parliament will be contended to signify a missed opportunity to provide meaningful reassurance to persons acting for the benefit of society.

The chapter begins by considering the scope of section 1 of the Act. Fundamentally, to avail of this provision, defendants must be functioning to promote a desirable activity, the developing case law clarifying what might be regarded as a desirable activity by the English courts. Having addressed these preliminary issues, this chapter next analyses the limitations of section 1, critical scrutiny of the emerging jurisprudence revealing important discrepancies in judicial reasoning when section 1 has been engaged. Section 1's capacity to erode the legal principle of objective reasonableness, by facilitating variable standards of care, is then exposed. Following this general analysis, a detailed examination of *Scout Association v Barnes*<sup>7</sup> proves decidedly illuminating. Careful review and reflection of Ward LJ's judgment heightens appreciation and awareness of the '*Tomlinson* trap'. This will be argued to be the predominant benefit of section 1, with recent first instance judgments seemingly more mindful of the need to recognise and explicitly account for the social value of the activity giving rise to the risk.<sup>8</sup> Ultimately, the special circumstances of sports coaching

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<sup>6</sup> See generally, D Nolan, 'Varying The Standard Of Care In Negligence' (2013) 73(3) *Cambridge Law Journal* 651, 673.

<sup>7</sup> *Scout Association* (n 1).

<sup>8</sup> See, for example, *Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360 (QB) [45], [52], [56], [60]; *Wilkin-Shaw* (n 2) [41]–[46].



provides a quintessential context in which to assess the usefulness of section 1, indicating the combined effectiveness of section 1 with a gross negligence standard.

## 2. Section 1 of the Compensation Act 2006

The principal purpose of section 1 of the Act is to incorporate the significant dicta expressed in the House of Lords' judgments in *Tomlinson v Congleton BC*<sup>9</sup> into statute,<sup>10</sup> thereby drawing attention to, and expounding, this common law principle.<sup>11</sup> Section 1, in attempting to address risk-averse behaviour fueled by a perceived 'compensation culture',<sup>12</sup> stipulates under the pertinent head of 'Deterrent effect of potential liability' that:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

discourage persons from undertaking functions in connection with a desirable activity.<sup>13</sup>

Further, in order to assist a better understanding of the Act, the accompanying Explanatory Notes prepared by the Department for Constitutional Affairs provide that section 1:

[I]s intended to contribute to improving awareness of this aspect of the law; providing reassurance to the people and organisations who are concerned

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<sup>9</sup> See *Tomlinson* (n 4) [34], [47], [48] (Lord Hoffmann); [81] (Lord Hobhouse); [94] (Lord Scott).

<sup>10</sup> R Herbert, 'The Compensation Act 2006' (2006) 4 *JPI Law* 337; UK Parliament, 'Social Action, Responsibility and Heroism Bill' (HC Library Research Paper s 14/38, 2014) 8 <<http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill>> last accessed 12 February 2016.

<sup>11</sup> *Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB) [92] (Clarke J).

<sup>12</sup> See *Morris* (n 2) 350; R Lewis et al, 'Tort personal injury claims statistics: is there a compensation culture in the United Kingdom?' (2006) 2 *JPI Law* 87, 102. Also see, chapter 1, pp. 6-7.

<sup>13</sup> Compensation Act 2006, s 1.

about possible litigation; and to ensuring that normal activities are not prevented because of the fear of litigation and excessively risk-averse behaviour.

[I]s not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is solely concerned with the court's assessment of what constitutes reasonable care in the case before it.

[R]eflects the existing law and approach of the courts as expressed in recent judgments of the higher courts.<sup>14</sup>

Intuitively, the individuals stereotypically associated with facilitating, organising and delivering desirable activities are unpaid volunteers. Indeed, a particular intention of the Labour Government when introducing section 1 was to reassure voluntary organisations.<sup>15</sup> More recently, this assumption may have been reinforced by Lord Young's report, 'Common Sense, Common Safety',<sup>16</sup> specific reference to promoting and encouraging 'Voluntary activities' being more pronounced, the intention being to prevent 'an overcautious approach when assessing risk, which sometimes results in the curtailment of worthwhile activities'.<sup>17</sup> Legislation restricting civil liability in other jurisdictions specifically recognises and safeguards the volunteer.<sup>18</sup> Nonetheless, in England and Wales, the Act's provision, although perhaps ultimately affording enhanced judicial leniency towards the functions of volunteers,<sup>19</sup> is not so restricted in its application. Although somewhat of a preliminary issue, this observation is one of

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<sup>14</sup> Explanatory Notes to the Compensation Act 2006, [10], [11], [17]

<<http://www.legislation.gov.uk/ukpga/2006/29/notes>> accessed 19 May 2016.

<sup>15</sup> A Morris, "'Common sense common safety': the compensation culture perspective' (2011) 27(2) *Professional Negligence* 82, 92.

<sup>16</sup> Lord Young of Graffham, *Common Sense Common Safety* (October 2010)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60905/402906\\_CommonSense\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf)> accessed 5 May 2016.

<sup>17</sup> *Ibid* 29.

<sup>18</sup> See, for example, Civil Law (Miscellaneous Provisions) Act 2011 (Republic of Ireland); Volunteer Protection Act 1997 (USA); Civil Liability Act 2003 (Queensland, Australia).

<sup>19</sup> Discussed later.



some importance, it possibly offering some insight into instances where section 1 was surprisingly not mentioned by defendants.<sup>20</sup> Significantly, section 1 has been engaged in a number of recent Court of Appeal,<sup>21</sup> and High Court judgments,<sup>22</sup> enabling critical scrutiny of its impact to date, and dismissing any possible assumption that this provision is intended to protect solely volunteers. Nevertheless, this chapter will primarily analyse section 1's applicability to socially desirable activities delivered by volunteers, the likely impact of section 1 on the emerging juridification of sports coaching and instructing<sup>23</sup> being of particular emphasis.<sup>24</sup>

### 3. What is a 'Desirable Activity'?

Since the Act offers no definition of what constitutes a 'desirable activity', as a statutory restatement of the common law position following *Tomlinson*, it may be presumed to be the same as Lord Hoffmann's reference to 'social utility'.<sup>25</sup> Nonetheless, arguments indicating that the meaning of socially desirable activity would potentially be wider than social utility<sup>26</sup> have been confirmed by the emerging jurisprudence. Indeed, initial academic commentary expecting most recognised sports to be regarded as desirable activities have been affirmed.<sup>27</sup> From the outset, in drawing attention to, and expounding, the *Tomlinson* principle in *Hopps v Mott MacDonald Ltd*,<sup>28</sup> Clarke J adopted a wide interpretation, regarding the 'reconstruction

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<sup>20</sup> E.g., *Anderson v Lyotier* [2008] EWHC 2790 (QB); *Radclyffe v MoD* [2009] EWCA Civ 635 (QB); *MacIntyre v MoD* [2011] EWHC 1690 (QB); *Wilson v Haden* [2013] EWHC 229 (QB); see further, K O'Sullivan, 'Climb every mountain...' (2011) 161 *New Law Journal* 1095.

<sup>21</sup> *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; *Scout Association* (n 1); *Sutton v Syston RFC Limited* [2011] EWCA Civ 1182; *Humphrey v Aegis Defence Services Ltd* [2016] EWCA Civ 11.

<sup>22</sup> *Hopps*, (n 11); *Uren v Corporate Leisure (UK) Limited* [2010] EWHC 46; *Uren v Corporate Leisure (UK) Limited* [2013] EWHC 353 (QB); *Wilkin-Shaw* (n 2); *Blair-Ford* (n 8); *Humphrey v Aegis Defence Services Ltd* [2014] EWHC 989 (QB).

<sup>23</sup> See generally, M James, *Sports Law* (2nd ed., Palgrave Macmillan, 2013) 69-70.

<sup>24</sup> See, for example, the recent cases of *Anderson* (n 20); *Davenport v Farrow* [2010] EWHC 550 (QB); *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50; *Cox v Dundee CC* [2014] CSOH 3. As discussed in chapter 1, cases involving PE teachers are also indicative of this emerging juridification e.g., *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135. See further, N. Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232.

<sup>25</sup> MA Jones and AM Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed., Sweet & Maxwell, 2010) [8-161].

<sup>26</sup> *Ibid.*

<sup>27</sup> See, for example, B. Gardiner, 'Liability for sporting injuries' (2008) 1 *JPI Law* 16, 19.

<sup>28</sup> *Hopps* (n 11).

of a shattered infrastructure after a war in a territory occupied by HM forces' as a desirable activity.<sup>29</sup> Subsequently, many physical recreations, including, for example, rugby, cricket or skiing, have been endorsed by the judiciary as having a recognised social value,<sup>30</sup> with games 'obviously desirable activities within the meaning of section 1 of the Compensation Act 2006'.<sup>31</sup>

More generally, RAF Health and Fun Days, with 'It's a Knock-Out' style games;<sup>32</sup> fun activities organised as part of an away day (afternoon) by employers for employees;<sup>33</sup> the activities of the scout movement;<sup>34</sup> the challenges of an efficient and professionally run outdoor pursuits centre;<sup>35</sup> practising for a nativity play or taking part in choir practice;<sup>36</sup> and the training of school children, aged between 14 and 19, for the Ten Tors Expedition on Dartmoor,<sup>37</sup> have all engaged section 1 of the Act by being recognised as socially desirable activities in the case law. By engaging section 1, persons functioning in connection with these types of activities, if sued, might expect the court to be mindful of the wider implications of judgments. Specifically, determination of the standard of care required in the circumstances of individual cases may be shaped by judicial reluctance to discourage other persons from undertaking similar functions or prevent/limit the undertaking of the same desirable activity. For instance, should a sports coach be sued in negligence for participant/athlete injury, a developing issue<sup>38</sup> and concern<sup>39</sup> facing modern coaches, since the functions of the coach would likely be regarded as being connected with the promotion of a desirable activity, section 1 should be applicable. Subsequently, this chapter will critically

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<sup>29</sup> Ibid [92]-[93]. Also see, *Humphrey* (n 22) [113].

<sup>30</sup> *Scout Association* (n 1) [29].

<sup>31</sup> *Sutton* (n 21) [13] (Longmore LJ).

<sup>32</sup> See, for example, *Uren v Corporate Leisure (UK) Limited* [2013] EWHC 353 (QB).

<sup>33</sup> *Reynolds v Strutt* [2011] EWHC 2263 (QB).

<sup>34</sup> *Scout Association* (n 1).

<sup>35</sup> *Blair-Ford* (n 8).

<sup>36</sup> *McErlean v MacAuley* [2014] NIQB 1.

<sup>37</sup> *Wilkin-Shaw* (n 2).

<sup>38</sup> See Partington (n 24); AS McCaskey and KW Biedzynski, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J Sport L* 7.

<sup>39</sup> S Greenfield, 'Law's impact on youth sport: should coaches be "concerned about litigation"?' (2013) 2(2) *Sports Coaching Review* 114, 121.



consider if section 1 may be of assistance to defendants in this context. To more effectively facilitate this detailed analysis, the implications of section 1 of the Act must first be examined more generally.

#### 4. Limitations of Section 1

Since section 1 merely reflects the existing common law,<sup>40</sup> as rehearsed in *Tomlinson*, there appears much force to the contention that the well-established components of the negligence calculus render section 1's provision redundant.<sup>41</sup> Accordingly, '[a]lthough s.1 purports to enable the courts to shift the balance of the assessment of negligence towards defendants, the reality is that it adds nothing of substance to the way in which the courts have, for many years, determined whether a defendant is in breach of duty'.<sup>42</sup> More fundamentally, Charlesworth and Percy on Negligence question the merits of interference by Parliament 'into an area of the common law with several hundred years of development and decided cases'.<sup>43</sup> Indeed, superficially, section 1 appears to be a somewhat blunt and ineffective means of reinforcing the government's message that good risk taking is desirable.<sup>44</sup> Interestingly, the SARAH Act, since its provisions do not change the overarching framework of the law of negligence,<sup>45</sup> appears peculiarly exposed to these same distinctive reservations.<sup>46</sup>

Challenging perceptions about what constitutes negligence, and improving society's awareness and understanding of the tort of negligence, the issue that section

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<sup>40</sup> Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Compensation Act 2006 (January 2012) [62].

<sup>41</sup> K Williams, 'Politics, the media and refining the notion of fault: section 1 of the Compensation Act 2006' (2006) 4 *JPI Law* 347, 351-52.

<sup>42</sup> Jones and Dugdale (n 25) [8-162].

<sup>43</sup> C Walton (ed), *Charlesworth & Percy on Negligence* (12th ed, Sweet & Maxwell, 2010) [7.37]. Also see *Wilkin-Shaw* (n 2) [43] (Owen J).

<sup>44</sup> J Steele, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010) 139.

<sup>45</sup> Explanatory Notes to the Social Action, Responsibility and Heroism Act 2015, [5].

<sup>46</sup> N Partington, 'What Does The Social Action, Responsibility & Heroism Act 2015 Mean For Sports Volunteers And NGBs?' *LawInSport*, 3 April 2015 <<http://www.lawinsport.com/articles/item/what-the-new-social-action-responsibility-heroism-act-2015-means-for-sports-volunteers-and-ngbs>> accessed 11 February 2016.

1 is intended to address,<sup>47</sup> would be more effectively tackled through educating individuals involved in managing risk.<sup>48</sup> For instance, clarification of what may be regarded as a suitable and sufficient assessment of risk,<sup>49</sup> given the increased judicial scrutiny of this aspect of risk management,<sup>50</sup> would be of assistance in defining 'acceptable' risk when undertaking particular activities in the specific circumstances.<sup>51</sup> Enhancing competence and confidence levels in conducting sensible risk assessments, through effective training designed to reassure individuals, would likely encourage the organisation of more desirable activities.<sup>52</sup> Nonetheless, despite section 1 being crafted to encourage and safeguard persons functioning to promote desirable activities, by seeking to challenge excessive risk-averse behaviour, it is doubtful that the unusual legislative strategy of codifying the existing common law will result in any changing of attitudes.<sup>53</sup> The provision appears inadequate to combat excessively cautious or defensive actions, the so-called overkill argument, which may lead to a chilling effect whereby potential defendants curtail their activities altogether.<sup>54</sup> In short, section 1 seems ill-equipped to address misperceptions and excessive risk aversion since it fails to respond to the insufficient awareness or understanding of negligence law by organisers of local events and activities.<sup>55</sup> Although it would appear that section 1 may be regarded as having no real substance, the developing case law in

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<sup>47</sup> Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Compensation Act 2006 (January 2012) [61].

<sup>48</sup> D Kitchener, 'The Compensation Bill, clause 1- an undesirable deterrent?' (2005) 155 *New Law Journal* 1793.

<sup>49</sup> Given its importance in the context of sports coaching, risk assessment is the focus of the next chapter.

<sup>50</sup> See, for example, *Uren* (n 21) [41] – [42], Smith LJ stating '[s]ometimes the failure to undertake a proper risk assessment can affect or even determine the outcome of a claim and judges must be alive to that and not sweep it aside. ... In any event, risk assessments are an important feature of the health and safety landscape. At their best, they can provide an opportunity for intelligent and well-informed appraisal of risk and can form a blueprint for action leading to improved safety standards'.

<sup>51</sup> *Ibid* [76] (Aikens LJ).

<sup>52</sup> Kitchener (n 48).

<sup>53</sup> Williams (n 41) 351.

<sup>54</sup> Nolan (n 6) 686.

<sup>55</sup> Morris (n 2) 368.



which section 1 has been engaged allows critical scrutiny of whether in practice it may actually be regarded as a tacit invitation for courts to heighten the breach barrier.<sup>56</sup>

## 5. Contemporary Jurisprudence

Reservations concerning the utility and appropriateness of section 1 have been convincingly articulated in *Wilkin-Shaw v Fuller* by Owen J:

This section appears to have been introduced as a response to the perception of the growth of a ‘compensation culture’. The draft bill was produced by the Department of Constitutional Affairs, and was accompanied by explanatory notes that asserted that section 1 did no more than “reflect the existing law”. In that case it is somewhat difficult to see why it was felt necessary to enact it, and why, as enacted, it was couched in discretionary terms.<sup>57</sup>

Simply applied, a permissive, not mandatory, provision that restates the existing common law position would appear to have little scope for safeguarding and protecting individuals and associations,<sup>58</sup> thereby ensuring that persons are not discouraged from undertaking functions in connection with a desirable activity. Similar sentiments endorsing the view that section 1 does not alter or extend the common law position in any way have been echoed by a number of Court of Appeal and High Court judges in several recent judgments,<sup>59</sup> most notably Smith LJ.<sup>60</sup> Indeed, her Ladyship further clarified and refined the legal test of balancing the social value of an activity giving rise to a risk and the cost of preventative measures, or *Tomlinson* inquiry, when stating:

Of course, the law of tort must not interfere with activities just because they carry some risk. Of course, the law of tort must not stamp out socially desirable activities. But whether the social benefit of an activity is such that the degree of risk it entails is acceptable is a question of fact, degree and judgment, which must be decided on an individual basis and not by a broad brush approach.<sup>61</sup>

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<sup>56</sup> Williams (n 41) 352-53.

<sup>57</sup> *Wilkin-Shaw* (n 2) [42]. Also see [46].

<sup>58</sup> Deakin et al (n 4) 214.

<sup>59</sup> *Scout Association* (n 1) [34]–[35] (Jackson LJ); *Sutton* (n 21) [13] (Longmore LJ); *Uren v Corporate Leisure (UK) Limited* [2010] EWHC 46 (QB) [19] (Field J); *McErlean* (n 36) [12] (Horner J); *Humphrey* (n 22) [112] (HHJ Bidder). The approach of the Court of Appeal in *Humphrey* (n 21) also supports this view.

<sup>60</sup> *Uren* (n 22) [13]; *Scout Association* (n 1) [36], [49].

<sup>61</sup> *Scout Association* (n 1) [49], cited with approval in *Wilkin-Shaw* (n 2) [46] (Owen J).

Arguably, this further dilutes the impact and reach of section 1 by creating an additional degree of uncertainty. Even once an activity may be regarded as 'desirable' and thereby engage section 1, determining whether the social benefit of any activity is such that the degree of risk that it entails is acceptable remains dependent on the individual case. Consequently, application of section 1 appears reliant on the trial judge's subjective notion of acceptable risk taking.<sup>62</sup> Since what determines whether the social benefits of an activity justify the associated degree of risk created by the defendant's conduct is a question of fact, degree and judgment, the idiosyncratic judicial sensitivity and tenderness afforded to socially desirable activities is likely to prove inconsistent and problematic, discrepancies having already been revealed in the case law.

When *Uren v Corporate Leisure (UK) Limited*<sup>63</sup> was initially heard at first instance, the 'It's a Knockout' type relay race in which the claimant was seriously injured, involving an inflatable pool and, part of an RAF Health and Fun day, was described by Field J as 'an enjoyable game, in part because of the physical challenges it posed to contestants. The risk of serious injury was small. In my judgement, neither CL nor the MOD, was obliged to neuter the game of much of its enjoyable challenge by prohibiting head first entry'.<sup>64</sup> In contrast, when considered by the Court of Appeal, Smith LJ made clear that she 'personally would not have assessed the social value of this game in quite such glowing terms as did the judge'.<sup>65</sup> Conversely, when conducting the re-trial, Foskett J's sensitivity and regard for the socially desirable merits of the particular activity, and importantly, an awareness and appreciation of the wider implications for activities that may be regarded as socially valuable, generated a more

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<sup>62</sup> As recently noted by Lord Dyson MR, the behaviour of judges can be unpredictable, see: 'Magna Carta and Compensation Culture', The High Sheriff of Oxfordshire's Annual Law Lecture, 13 October 2015, [39] <<https://www.judiciary.gov.uk/wp-content/uploads/2015/10/high-sheriffs-speech.pdf>> accessed 12 February 2016.

<sup>63</sup> *Uren* (n 22).

<sup>64</sup> *Ibid* [59].

<sup>65</sup> *Uren* (n 21) [69] (Smith LJ).



glowing assessment of the social value of the game than Field J. Foskett J highlighted that:

The focus of the question is upon the particular game in which the Claimant was injured. I will, of course, address that, but it does seem to me that the issue needs to be seen in a slightly *wider context*. As to that wider context, I would think that there would be no disagreement from any quarter: it is that an event such as the event in which this tragic accident occurred is of *great social value*, not just in a Services setting, as this one was, but in other settings too. Whilst not every individual might enjoy every aspect of a “Fun day”, there is undoubtedly an opportunity on such an occasion for fun and laughter, often at the expense of others, for letting go and losing inhibitions and bonding with other colleagues, friends and possibly strangers in a light-hearted, but competitive setting. Since the day with which this case is concerned was in a Services setting, the value is enhanced in a number of ways.<sup>66</sup>

In short, the setting of the standard of care for defendants delivering or organising an activity of ‘great social value’, ‘immense social value’,<sup>67</sup> or viewed as ‘obviously desirable’,<sup>68</sup> may justifiably be less demanding than an equivalent activity regarded by the court as merely ‘a source of fun’.<sup>69</sup> This seems reasonable. Nonetheless, there appears considerable difficulty and uncertainty in the weight attached to desirable activities by the courts. Arguably, some judges may be responding to section 1’s tacit invitation to heighten the breach barrier in the affirmative. Others in the negative. This distinctive judicial interpretation is problematic.

## 6. Variable Standards of Care

Fundamentally, it is submitted that the application of section 1 may result in variable standards of care, which have not been well received in this jurisdiction,<sup>70</sup>

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<sup>66</sup> *Uren* (n 32) [195] (emphasis added).

<sup>67</sup> *Blair-Ford* (n 8) [60] (Globe J).

<sup>68</sup> *Sutton* (n 21) [13] (Longmore LJ).

<sup>69</sup> *Risk v Rose Bruford College* [2013] EWHC 3869 (QB) [66] (Jay J), addressing the social utility issue raised in *Tomlinson*.

<sup>70</sup> *Nettleship v Weston* [1971] 2 QB 691 (CA); MJ Beloff et al, *Sports Law* (2nd ed., Hart, 2012) 143.

further eroding the reasonable person standard.<sup>71</sup> A simple illustration of the scope for this shift away from the benchmark of objective reasonableness can be drawn from consideration of a leading authority for co-participant liability in sport, *Condon v Basi*.<sup>72</sup> In delivering the Court of Appeal's judgment in *Condon*, Sir John Donaldson MR stated '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'.<sup>73</sup> By analogy, it appears feasible that in a cup match between, for instance, a professional team and an amateur team, should the coaches advocate the targeting of opposing players,<sup>74</sup> or psychologically over-arouse athletes,<sup>75</sup> in determining whether either coach may have breached their duty of care, the social utility of their respective roles may result in variable standards of care in the same circumstances. Should the coach of the amateur team be an unpaid volunteer, the enhanced social desirability of such volunteering would likely encourage more judicial tenderness in defining reasonable care in the circumstances than what might be afforded to the opposing professional coach.<sup>76</sup> Put simply, in light of section 1,<sup>77</sup> the altruistic behaviour of the volunteer coach is a material consideration. This poses the significant issue of whether there may be a

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<sup>71</sup> Nolan (n 6) 652.

<sup>72</sup> (1985) 2 All ER 453. Also see, *Caldwell v Maguire* [2001] EWCA Civ 1054. Importantly, consideration of the prevailing circumstances enables the court to distinguish between the expression of legal principle (objective reasonableness) and the practicalities of the evidential burden of 'reckless disregard'. See further, D McArdle and M James, 'Are you experienced? "Playing cultures", sporting rules and personal injury litigation after *Caldwell v Maguire*' (2005) 13(3) *Tort Law Review* 193.

<sup>73</sup> *Condon* (n 72) 454.

<sup>74</sup> See, for example, A Epstein, *Sports Law* (South-Western Cengage Learning, 2013) 137; G Wong, *Essentials of Sports Law* (4th ed., Praeger, 2010) 123.

<sup>75</sup> *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* [1993] Aust Torts Reports 81-246. Interestingly, with reference to sport psychology, the distinction between optimal arousal and over-arousal can be highly individualistic and finely balanced. Potential coach negligence arising from such conduct, and coaching methods deliberately targeting opposing athletes, was discussed in chapter 1, p. 38.

<sup>76</sup> The assumption in this scenario being that but for the volunteer coach, amateur players from the (local) community may have reduced opportunities for sporting involvement. Conversely, the objectives of the professional coach would be unlikely to prioritise 'grassroots' participation to the same extent.

<sup>77</sup> Perceived exposure to negligence liability would appear to be considerably less likely to interfere with, and discourage, the functions of an employed coach. For instance, a professional coach would be expected to have appropriate insurance indemnity and also be able to shift liability to the employer (vicarious liability), in circumstances where the coach is acting in the capacity of employee: see, James (n 23) 81. See further, J Anderson, 'Personal Injury Liability in Sport: Emerging Trends' (2008) 16 *Tort Law Review* 95, 112-13.



more principled and effective means of safeguarding volunteers from civil liability than section 1 of the Act, by more clearly establishing 'the nature and scope of the duty of care and the precautions a person must take to meet the standard of care required by the law as it stands'.<sup>78</sup> Since determining the required standard of care in all of the circumstances is far from predictable,<sup>79</sup> section 1 remains ineffective in addressing the age old problem of predicting conduct deemed 'negligent'.<sup>80</sup> Further important limitations of the application of section 1 have recently been uncovered in *Scout Association v Barnes*.

### **7. Scout Association v Barnes**

Section 1's serious limitations in achieving the intended objective of safeguarding, reassuring, and ultimately encouraging volunteers to undertake functions in connection with a desirable activity were exposed in *Scout Association v Barnes*.<sup>81</sup> In *Scout Association v Barnes*, the claimant was aged 13 at the time of the accident, which happened during a game of 'Objects in the Dark'<sup>82</sup> at a Castle Bromwich scout meeting. For present purposes, the determining legal issue was whether the supervising scout leaders had breached the duty of care owed to the claimant by playing the game with the lights off in circumstances which involved a competitive game involving 13-year old boys running around in an enclosed space. At first instance, Judge Worster, in finding the Scout Association vicariously liable for the actions of its agents, ruled that 'in all the circumstances it seems to me there is a breach here; the game played in the dark is dangerous – dangerous to the extent that there is a breach of the duty to take reasonable care. That breach of duty caused the injury in this case, an injury for which I

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<sup>78</sup> Law Reform Commission of Ireland, *Civil Liability of Good Samaritans and Volunteers* (LRC 93, 2009) [3.106].

<sup>79</sup> N Dobson, 'Accidents do happen' (2008) 4 *JPI Law* 258, 259.

<sup>80</sup> Morris (n 15) 92-93. The SARAH Act, despite being couched in mandatory terms, will be argued to appear equally ineffective in this regard.

<sup>81</sup> *Scout Association* (n 1).

<sup>82</sup> *Ibid* [7]. When the lights were turned out completely, the scouts jogging around the outside of the hall had to rush to grab a block from the centre of the hall. In each round there would be one less block than participant. Whichever boy failed to grab a block would be eliminated until there would eventually be one winner. When the main lights were turned off, the hall was not in pitch darkness.

find the Defendant is liable'.<sup>83</sup> Given the potentially wider implications of this decision for an association with 500,000 members aged between six and eighteen, and 100,000 voluntary scout leaders, the Scout Association appealed this judgment.

The Court of Appeal recognised that the law of tort must not interfere with activities just because they carry some risk,<sup>84</sup> and importantly, the valuable contribution made to society by the Scouting Association.<sup>85</sup> Section 1 of the Act was firmly engaged. Nonetheless, Smith and Ward LJ endorsed the approach of Judge Worster, when balancing the risk with the social value of the activity and the cost of the preventative measures, finding that playing the activity in 'darkness did not add any other social or educative value but it did significantly increase the risk of injury'.<sup>86</sup> In his strong dissenting judgment, Jackson LJ stated:

Obviously the risks of this particular game were increased by turning off the main lights. But I do not see how it could possibly be said that these increased risks outweighed the social benefits of the activity. Children and teenagers have played games with an element of risk, including games in the dark, since time immemorial. The game played by the claimant and his fellow scouts on 14th February 2001 was much safer than many games which children might play, if left to their own devices. It was properly supervised by three experienced adults. It was structured. It was a game which has been played on many occasions before and since that date without mishap. It is the sort of activity which attracts young people to join or remain in the scouts. In my view, it cannot possibly be said that there was a failure to exercise reasonable care by the scout leader and the assistant leaders.<sup>87</sup>

This reasoning seems difficult to fault. A socially desirable activity: structured; supervised; much safer than many games that children might play if left unoccupied; played previously on many occasions without injury; and a means of recruiting and retaining scout members. Nonetheless, consideration of the wider social context seems

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<sup>83</sup> Ibid [18].

<sup>84</sup> Ibid [34] (Jackson LJ); [49] (Smith LJ); [50] (Ward LJ).

<sup>85</sup> Ibid [46] (Smith LJ).

<sup>86</sup> Ibid [46] (Smith LJ). Further, Ward LJ at [55] cited with approval the trial judge's finding that turning off the lights failed to add an additional educative or instructive element to the game.

<sup>87</sup> *Scout Association (n 1)* [32].



somewhat rhetorical, the force of Jackson LJ's entirely sensible dissenting opinion essentially tempered and nullified by the law of negligence's necessity to focus on the social value of the particular activity, rather than the social value of scouting activities as a whole.<sup>88</sup> As the Explanatory Notes make clear, section 1 is exclusively concerned with the court's assessment of what represents reasonable care in the specific case before it.<sup>89</sup> By discounting a more 'broad brush approach',<sup>90</sup> the decision of the majority in *Scout Association v Barnes* appears to be underpinned by a primarily 'marginal analysis' of precaution-taking,<sup>91</sup> ultimately focusing on the particular mitigation of risk to the exclusion of more general considerations.<sup>92</sup> In this instance, a more expansive or 'aggregate' inquiry, arguably encouraged by section 1, is affirmed as being notably uncertain in its application and effect.<sup>93</sup> Paradoxically, despite the scale of the beneficial activities of the wider Scout Association, section 1 offered little substance in safeguarding the scout leaders in *Scout Association v Barnes*. Interestingly, academic commentary has both endorsed<sup>94</sup> and challenged<sup>95</sup> Jackson LJ's minority reasoning.

More critically, as alluded to by Ward LJ, the law of tort appears to be a particularly blunt instrument in such circumstances, defendant volunteers either negligent or non-negligent, there being no band of reasonable choices open to judges.<sup>96</sup> If indeed it is not the function of the law of tort to eliminate every iota of risk

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<sup>88</sup> Ibid [46] (Smith LJ).

<sup>89</sup> Explanatory Notes to the Compensation Act 2006, [11].

<sup>90</sup> *Scout Association* (n 1) [49].

<sup>91</sup> C Witting, 'The Hand and Shirt tests of breach and the Civil Liability Acts' (2009) 17 *Torts Law Journal* 242, 242-43. The dissenting opinion of Jackson LJ, by affording greater weight to the wider context when establishing the required standard of care of the scout master, appears more reflective of an 'aggregate analysis' of acceptable risk.

<sup>92</sup> Ibid, 259. Interestingly, s 3 of the SARAH Act is drafted to require courts to consider whether the defendant's approach to the activity as a whole, as against a single act or omission in the course of a particular activity, was predominantly responsible. Nevertheless, it is submitted that Jackson LJ's reasoning in *Scout Association v Barnes* is illustrative of s 1's scope to achieve this same broader view or aggregative approach.

<sup>93</sup> M Lee, 'Safety, regulation and Tort: Fault in Context' (2011) 74(4) *Modern Law Review* 555, 558.

<sup>94</sup> K Lines and J Heshka, 'Bump in the night' (2011) 155 *Sol Jo* (no 2) 8-9.

<sup>95</sup> N Tomkins, 'Liability: personal injury – negligence – games' (2011) 1 *JPI Law* C1, C3.

<sup>96</sup> *Scout Association* (n 1) [60] (Ward LJ).

or to stamp out socially desirable activities, a principle enshrined in section 1 of the Act, it is respectfully submitted that an evidential threshold of negligence may fail to adequately safeguard volunteers in this context. Finely balanced future cases will likely expose more volunteers to civil litigation and negligence liability.<sup>97</sup> In short, it is asserted that although the scout leaders in *Scout Association v Barnes* were arguably careless by turning off the main lights, in all the circumstances, it is contended that such carelessness should not necessarily be actionable in law.<sup>98</sup>

Accordingly, it is submitted that a more transparent and effective means of preventing the deterrent effect on volunteers undertaking functions in connection with a desirable activity might be the adoption of a gross negligence standard in this jurisdiction. Such statutory provision might more appropriately balance the considerable social utility of volunteering activities, and the safeguarding of volunteers, with the public's legitimate right to seek redress for injury or harm.<sup>99</sup> *Scout Association v Barnes* highlights the limitations of section 1 in encouraging desirable activities, and more specifically, fails to reassure well intentioned and committed volunteers that they will be protected from (unreasonable) negligence liability. In this context, a heightened evidential threshold of gross negligence appears to have considerable practical utility,<sup>100</sup> arguably more precisely encapsulating and reflecting the general tenor of section 1,<sup>101</sup> it thereby being necessary for claimants to demonstrate a very high degree of careless conduct on the part of volunteers before legal liability is established.<sup>102</sup> Though found to be legally negligent, the scout leaders' conduct was not manifestly or obviously at fault, it being unlikely to be regarded as amounting to

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<sup>97</sup> E.g., *Bartlett v English Cricket Board Association of Cricket Officials*, 27 August 2015 (County Court, Birmingham).

<sup>98</sup> See generally, Walton (n 43) [1-07].

<sup>99</sup> See, for example, LRC Ireland (n 78).

<sup>100</sup> *Ibid* [4.81].

<sup>101</sup> And more recently, Lord Young's report, *Common Sense Common Safety* (n 16) and, the SARAH Act.

<sup>102</sup> See, for example, *Blake v Galloway* [2004] EWCA Civ 814 [25] (Dyson LJ). This proposition is also considered in the concluding chapter of this thesis.



gross negligence.<sup>103</sup> Nevertheless, before turning to a more detailed consideration of potentially restricting the liability of volunteers for negligent conduct, there is considerable, and somewhat concealed, merit to section 1 worthy of recognition and further discussion.

## 8. Avoidance of the 'Tomlinson Trap'

The 'Tomlinson trap', by failing to balance the cost of the preventative measures and the social value of the activity, against the risk the activity generates, may be regarded as requiring that a volunteer would be under a duty to do whatever is necessary to prevent a foreseeable risk of serious injury. At first glance, this may appear reasonable, an unfamiliarity with the law of negligence likely to discourage the taking of any foreseeable risks, for instance, by encouraging individuals to deliver activities as safely as possible. However, taking such unreasonable measures to prevent legal liability, by minimising the risk of serious injury to participants, goes beyond what is reasonable.<sup>104</sup> Simply applied, this puts the matter too high. Problematically, this notion of a heightened standard of care may be internalised by volunteers since the perceived compensation culture 'creates a climate of fear and encourages organisations to attempt to eliminate all risk, even though this is an unobtainable goal'.<sup>105</sup> Although of limited assistance to volunteers that lack this awareness, '[t]he question of whether a person has acted negligently is not answered simply by analysing what he did or did not do in the circumstances that prevailed at the time in question and then testing it against an objective standard of "reasonable behaviour"'.<sup>106</sup> The social value of the activity giving rise to the risk also falls to be considered.<sup>107</sup>

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<sup>103</sup> See, Nolan (n 6) 663. Nolan argues that a test of manifest or obvious fault may essentially equate to a gross negligence standard.

<sup>104</sup> NJ McBride and R Bagshaw, *Tort Law* (4th ed., Pearson, 2012) 31.

<sup>105</sup> Lord Young (n 16) 19.

<sup>106</sup> *Whippey v Jones* [2009] EWCA Civ 452 [16] (Aikens LJ).

<sup>107</sup> *Berent v Family Mosaic Housing (incorporating Mosaic Housing Association)* [2012] EWCA Civ 961 [20] (Tomlinson LJ).

Jackson LJ's powerful dissenting judgment in *Scout Association v Barnes* reiterates and endorses the necessity of this balancing exercise, his Lordship of the view that Judge Worster, in the County Court, had indeed failed to conduct a suitable and sufficient *Tomlinson* inquiry.<sup>108</sup> Despite Smith and Ward LJJ not concurring with this view, such an observation by a distinguished and highly experienced member of the judiciary is acknowledgement that it remains feasible for judges at first instance to still succumb to the '*Tomlinson* trap'. In short, engagement of section 1 of the Act by defendants should necessitate an explicit and transparent *Tomlinson* balancing exercise. By raising and reinforcing the importance of the profile of socially desirable activities, section 1 essentially puts the court on notice, thereby reducing the possibility of the *Tomlinson* control mechanism from being overlooked.<sup>109</sup> Accordingly, to ensure that the standard of reasonable care required of volunteers is set at a realistic and sensible level for the activity concerned, it is imperative that the social value of that same activity is carefully considered and accounted for in the court's judgment. The emerging case law appears to indicate that section 1 has indeed added some force to the nature of *Tomlinson* inquiries, arguably endorsing this legislative intervention. The Court of Appeal's decision to direct a re-trial on the issue of whether the degree of risk was acceptable in the light of the social value of the game in *Uren v Corporate Leisure (UK) Ltd*<sup>110</sup> seems to be illustrative of this enhanced profile. Also, following *Scout Association v Barnes*, first instance judgments appear to be more mindful of the need to recognise and explicitly account for the social value of the activity giving rise to the risk.<sup>111</sup> Interestingly, the ramifications of this contemporary emphasis of the *Tomlinson* balancing exercise seem to extend beyond the jurisdictional boundaries of the Act.<sup>112</sup>

<sup>108</sup> *Scout Association* (n 1) [30] (Jackson LJ).

<sup>109</sup> Although this chapter will later argue that the SARAH Act 2015 essentially appears to mirror section 1 in this context, technically speaking, since the SARAH Act is mandatory, there would appear to be an even greater onus on courts to adopt more of an aggregate analysis of acceptable risk.

<sup>110</sup> *Uren* (n 21).

<sup>111</sup> See, for example, *Blair-Ford* (n 8) [45], [52], [56], [60]; *Wilkin-Shaw* (n 2) [41]–[46]. Cf *Bartlett* (n 97). See further, N Partington, "'It's just not cricket". Or is it? *Bartlett v English Cricket Board Association of Cricket Officials*' (2016) 32(1) *Professional Negligence* 75 (note).

<sup>112</sup> *McErlean* (n 36) [12]. Technically, section 17 of the Act stipulates that s 1 only extends to England and Wales. Of course, as a matter of application of legal principle, this distinction is purely academic.



Section 1 certainly appears to have the scope to function as a control mechanism by essentially heightening the breach barrier, despite the accompanying Explanatory Notes prepared by the Department for Constitutional Affairs indicating otherwise.<sup>113</sup>

The preceding analysis centres on the legal framework in cases of alleged negligence when section 1 has been engaged. Since it is questionable whether the implications of such legal judgments are disseminated effectively, the intended and consequential reassurance afforded from section 1 for persons undertaking functions in connection with a desirable activity is likely to be limited.<sup>114</sup> If this is indeed the case, an instrumental opportunity to raise awareness and educate individuals about acceptable risk taking, whilst simultaneously discouraging disproportionate risk-averse behaviour, is being missed. Potentially, effective dissemination might do much to reassure volunteers. In short, the emerging jurisprudence generally reveals a more pronounced endorsement and sensitivity of socially valuable activities by courts. In this context, judicial reasoning appears to recognise that effective volunteering, for instance sports coaching, is conducted in an environment where the activity is delivered 'as safe as necessary', importantly, distinguished from 'as safe as possible', the likelihood of serious injury created by the activity being outweighed by its benefits.<sup>115</sup>

## 9. Liability of Sports Coaches

The context of sports coaching provides ideal circumstances in which to consider the potential merits of section 1 and/or adoption of a gross negligence standard when leaders of socially desirable activities are sued in negligence. As revealed in chapter 1, fundamental to achievement of the London Olympic 2012 legacy

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Nonetheless, *McErlean* appears to add force to the submission that s 1 does indeed act as a reminder to courts.

<sup>113</sup> Explanatory Notes to the Compensation Act 2006, [11].

<sup>114</sup> See, for example, R Heywood and P Charlish, 'Schoolmaster tackled hard over rugby incident' (2007) 15 *Tort Law Review* 162, 171. Also see, Morris (n 2) 368.

<sup>115</sup> P Whitlam, *Safe Practice in Physical Education and Sport* (8th ed., Association for Physical Education, 2012) 18-20. Also see, House of Commons Constitutional Affairs Committee, *Compensation Culture*, Third Report (HC 754-1, 2005) [51].

of participation and performance is coaching,<sup>116</sup> requiring the support, training and commitment of thousands of volunteers.<sup>117</sup> Most claims brought against sports coaches for sports related injuries are for negligence,<sup>118</sup> with an anticipated increase in such litigation.<sup>119</sup> The vast majority of coaching is delivered by volunteers,<sup>120</sup> often with limited training,<sup>121</sup> with approximately half of the coaches in this jurisdiction not holding a coaching qualification.<sup>122</sup> Previous experience as players and enthusiasm for the role are often regarded as sufficient.<sup>123</sup> Consequently, since most sporting activities would be regarded as socially desirable activities,<sup>124</sup> section 1 of the Act would likely be engaged should a volunteer coach be sued in negligence. Similarly, following recent enactment of the SARAH Act, in determining what was necessary for a sports coach to meet the applicable standard of care in the circumstances, courts must have regard to whether:

the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members;

the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.<sup>125</sup>

These provisions appear to be a further reiteration of the existing common law position, and arguably, little more than another restatement of section 1.<sup>126</sup> Although

<sup>116</sup> sports coach UK, 'Coaches key to a lasting legacy' (20 July 2012)

<<http://www.sportscoachuk.org/news/coaches-key-lasting-legacy>> accessed 12 February 2016.

<sup>117</sup> D Healey, *Sport and the Law* (4th ed., UNSW Press, 2009) 166.

<sup>118</sup> MJ Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal* (Westview Press, 2013) 215, 215-16.

<sup>119</sup> Partington (n 24) and (n 111). As noted by Lyons, the liability of coaches is 'never far from the news': M Lyons, 'Editorial' (2015) 4 *JPI Law* 5.

<sup>120</sup> *Coach Tracking Study: A four-year study of coaching in the UK* (sports coach UK, 2012) 17.

<sup>121</sup> C Nash, 'Volunteering in Sports Coaching – A Tayside Study' in M Graham and M Foley (eds), *Volunteering in Leisure: Marginal or Inclusive?* (LSA, 2001) 50.

<sup>122</sup> sports coach UK (n 120) 17.

<sup>123</sup> Healey (n 117) 159.

<sup>124</sup> Sutton (n 21) [13] (Longmore LJ).

<sup>125</sup> Social Action, Responsibility and Heroism Act 2015, ss 2 & 3.

<sup>126</sup> See further, Partington (n 46).



courts must take into account the SARAH Act when considering claims of alleged negligence, whereas section 1 is framed in discretionary terms, the SARAH Act could be construed as a not entirely subtle, and more explicit, reframing of section 1's tacit invitation to the courts to heighten the breach barrier. If engaged, this may further erode the test of objective reasonableness. More generally, given the judiciary's aforementioned reservations regarding section 1, with the *Tomlinson* balancing exercise having only recently been explicitly signposted for the courts, the utility of the SARAH Act in this context seems questionable. At its highest, the SARAH Act may be regarded as seeking to crystallise a more 'aggregate analysis' of precaution taking. The Government contends that requiring the court to have regard to whether the person sued demonstrated a predominantly responsible approach towards protecting the safety or other interests of others, represents an actual (albeit 'modest') change in the law.<sup>127</sup> Nonetheless, adopting a prospective analysis, it appears difficult to ignore the robust assertion of Lord Lloyd of Berwick during the Bill's passage through the House of Lords, when stating, '[t]his Bill is indeed exceptional--not because it is of any importance but because it is of no importance at all. It is useless'.<sup>128</sup> Simply applied, in safeguarding persons functioning in connection with desirable activities, the SARAH Act appears to essentially duplicate the previously highlighted predominant benefit of section 1, namely concentrating the court's reasoning on wider aspects of the defendant's conduct. Indeed, since section 3 will not change the court's overall approach,<sup>129</sup> it seems difficult to establish how 'it may be the case that the requirement to consider this wider context will change the court's analysis'.<sup>130</sup> Significantly, the

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<sup>127</sup> Hansard HL vol 756 col 1573, (4 November 2014) (Lord Faulks) <<http://www.publications.parliament.uk/pa/ld201415/ldhansrd/lhan51.pdf>> accessed 31 July 2015.

<sup>128</sup> Hansard HL vol 756 col 1549 (4 November 2014).

<sup>129</sup> Explanatory Notes to the Social Action, Responsibility and Heroism Act 2015, [5].

<sup>130</sup> Ministry of Justice, Social Action, Responsibility and Heroism Bill: European Convention on Human Rights memorandum (13 June 2014) [7] <<https://www.gov.uk/government/publications/social-action-responsibility-and-heroism-bill-european-convention-on-human-rights-memorandum>> accessed 30 July 2015.

Impact Assessment prepared by the Ministry of Justice for scrutiny of the SARAH Bill,<sup>131</sup> failed to evaluate or consider the usefulness of appropriate civil liability immunity in order to reassure individual volunteers providing and leading activities which benefit society.<sup>132</sup> The Minister of State for Justice, Lord Faulks, subsequently reaffirmed that 'the Bill does not seek to confer immunity from civil liability on anyone whose actions fall within its scope'.<sup>133</sup> The contended limitations of section 1 in safeguarding and reassuring sports coaches will, therefore, likely remain problematic.

Accordingly, adopting a comparative law perspective proves particularly insightful and instructive. For instance, in attempting to ensure that the appropriate balance is struck between the policy issues and tensions created by the promotion of involvement in sport and physical activity, against the need to ensure that performers are not exposed to unreasonable risk taking, some states in the US have concluded 'that requiring a standard of care that exceeds negligence comports with the social desire not to chill vigorous participation in competitive sports'.<sup>134</sup> In the US, the overall trend appears to safeguard and encourage volunteer coaches by restricting the risk of liability whilst coaching for mere negligent acts.<sup>135</sup> Legislative steps have established that those providing instruction for certain inherently dangerous activities will not be exposed to liability unless such instruction is grossly negligent,<sup>136</sup> with civil liability

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<sup>131</sup> Ministry of Justice, Social Action, Responsibility and Heroism Bill: impact assessment (13 June 2014): <<https://www.gov.uk/government/publications/social-action-responsibility-and-heroism-bill-impact-assessment>> accessed 31 July 2015.

<sup>132</sup> Arguably, reinforcing Morris's assertion that the lack of interest in (more extensive) tort reform in the UK is somewhat inexplicable: see A Morris, "'The Compensation Culture" and the Politics of Tort' in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law Statute and the Dynamics of Legal Change* (Hart, 2013) 78. This submission is further developed in chapter 9.

<sup>133</sup> Hansard HL vol 756 col 1547 (4 November 2014).

<sup>134</sup> T Davis, 'Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers' (2008) 76 *UMKC L Rev* 571, 575.

<sup>135</sup> TR Hurst and JN Knight, 'Coaches' liability for athletes' injuries and deaths' (2003) 13 *Seton Hall J Sports L* 27, 48.

<sup>136</sup> R VerSteege, 'Negligence in the Air: Safety, Legal Liability, and the Pole Vault' (2003) 4 *Tex Rev Ent & Sports L* 109, 175-76.



immunity legislation reasoned to address coaches' and volunteers' fear of being sued by its proponents.<sup>137</sup>

Nonetheless, the UK Government need not look so far afield as North America, or Australia, for legislation more effectively constructed to address the mischief to which section 1 is designed to tackle, not least in the context of sports coaching. Much closer to home, Part 3 of the Civil Law (Miscellaneous Provisions) Act of 2011 in the Republic of Ireland (ROI),<sup>138</sup> based on a detailed report produced by the Law Reform Commission, provides necessary and sufficient civil liability immunity for volunteers. According to the Law Reform Commission:

[T]he enactment of legislation in this area would be beneficial in that it would establish clearly the nature and scope of the duty of care and the precautions a person must take to meet the standard of care required by the law as it stands. The Commission considers that people who come to the aid of others or who voluntarily give their time to assist community organisations should be able to do so with a clear knowledge of the precise scope of any legal liability. The Commission therefore recommends that the legal duty of care of Good Samaritans, voluntary rescuers and voluntary service providers, should be set out in legislation. The Commission also recommends that the legislation should take account of the high social utility of Good Samaritan acts and volunteering activities ....<sup>139</sup>

In recommending legal liability premised on a gross negligence standard for individual volunteers the Commission also considered that:

[T]he imposition of a gross negligence test succeeds in striking a balance between the policy of encouraging altruistic behaviour with the public's right to seek redress. With regard to encouraging altruistic behaviour, the leniency of the gross negligence test may be understood as a reward for good behaviour. Furthermore, it militates against the deterrent effect that the fear of litigation may cause. The Commission is of the view that this is an appropriate approach regarding Good Samaritans and individual volunteers, whether formal or

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<sup>137</sup> Wong (n 74) 127.

<sup>138</sup> Inserting a new Part IVA (sections 51A to 51G) into the Civil Liability Act of 1961, applying to volunteers carrying out activities for the purpose of sport and recreation, with a volunteer not to be personally liable for negligence for any act done when carrying out voluntary work.

<sup>139</sup> Law Reform Commission of Ireland (n 78) [3.106].

informal, taking into account the benefits that flow from their activities and the sacrifices that they have made, from their own pocket and time, in conferring them. The application of the ordinary negligence test, on the other hand, would be to impose too heavy a burden that would threaten the continuation of such benevolent activities.<sup>140</sup>

Given the serious limitations of section 1 highlighted above, the UK Government is encouraged to consider following the ROI's lead in better safeguarding and protecting volunteers organising and delivering socially desirable activities. Although the full effectiveness and impact of this excellent legislative response in the ROI will require due evaluation and review,<sup>141</sup> by developing, extending and refining the existing common law position, it appears to achieve the aspirations of section 1 without falling foul of the limitations of both the Compensation Act 2006 and SARAH Act 2015. In the specific circumstances of sports coaching, this reinforces the requirement for courts to appreciate the sometimes slender distinction between negligent and non-negligent coaching,<sup>142</sup> affording coaches and instructors appropriate latitude and leeway in their discretionary decision making practices.<sup>143</sup> This would ensure that the standard of care is set at a realistic and sensible level.

In view of the predominant reliance in the UK on volunteer coaching, the acknowledged benefits to society derived from sporting activities,<sup>144</sup> and the UK's unwavering aspiration for continued sporting success,<sup>145</sup> it is submitted that the better

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<sup>140</sup> Ibid, [4.81]. Also see, Nolan (n 6) 653-54.

<sup>141</sup> T O'Connor, 'How the perceived risk of litigation affects the rules of rugby' *LawInSport*, 18 December 2013 <<http://www.lawinsport.com/articles/regulation-a-governance/item/how-the-perceived-risk-of-litigation-affects-the-rules-of-rugby>> accessed 30 July 2015.

<sup>142</sup> MJ Dobberstein, "'Give Me the Ball Coach": A Scouting Report on the Liability of High Schools and Coaches for Injuries to High School Pitchers' Arms' (2007) 14 *Sports Law Journal* 49, 69.

<sup>143</sup> For instance, *Woodbridge School v Chittock* [2002] EWCA Civ 915, the Court of Appeal recognising that acceptable decisions can be made 'within a reasonable range of options'.

<sup>144</sup> For instance, social values, in particular health, social inclusion, education and volunteering. See, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a European Union Work Plan for Sport for 2011-2014 (OJ C 162, 01/06/2011) <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42011Y0601\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42011Y0601(01)&from=EN)> accessed 5 May 2016.

<sup>145</sup> See, for example, J Stone, 'Tory manifesto pledges more Olympic medals for British athletes', *The Independent* (14 April, 2015, London) <<http://www.independent.co.uk/news/uk/politics/tory-manifesto-pledges-more-olympic-medals-for-british-athletes-10176474.html>> accessed 11 February 2016.



safeguarding of volunteer sports coaches may warrant statutory provision extending beyond the scope of section 1 of the Act, and the corresponding SARAH Act. To address overkill concerns that would likely discourage volunteers from organising or leading beneficial activities, varying the standard of care in these special circumstances appears peculiarly appropriate.<sup>146</sup> This would appear to more sensibly balance the social value of the activity, together with the cost of the preventative measures, against the risks generated by that same activity, by holding volunteers legally accountable for a very high degree of carelessness.

## 10. Beyond the 'Tomlinson Trap'

If the UK Parliament were to follow other jurisdictions in passing legislation to reassure and better protect volunteers, by introducing a liability threshold of gross negligence, this would complement the safeguards provided for by section 1 (and by definition the existing common law), by bridging the lacuna that might be created where sports coaches or instructors receive 'reward' that goes beyond reasonable reimbursement for expenses.<sup>147</sup> Although paid coaches sued in negligence may not avail of any statutory provision restricting civil liability for volunteers, the socially desirable nature of most sporting activities would still concentrate the court's attention on the social utility and value of the activity giving rise to the risk and the cost of the preventative measures. Testing the practical effect of such correlative provision on the facts of *Mountford v Newlands School*<sup>148</sup> proves particularly instructive, endorsing the combined effectiveness of section 1 with a gross negligence standard in this context.

Simply put, in *Mountford* the schoolmaster in charge of the under-15 Newlands Manor School rugby team was found to be in breach of a duty of care by selecting an over-age player, in accordance with the England Rugby Football Schools' Union guidelines, who's subsequent tackle during an inter school seven-a-side match resulted

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<sup>146</sup> See generally, Nolan (n 6) 686.

<sup>147</sup> For instance, Civil Law (Miscellaneous Provisions) Act 2011 (ROI), section 51A (1)(c).

<sup>148</sup> [2007] EWCA Civ 21. Although the distinction between schoolmaster and coach may be a material consideration, for present purposes, this analogous authority is both relevant and informative.

in a broken elbow for the claimant. For present purposes, this analysis centres on the legal issues of standard of care and breach.<sup>149</sup> Importantly, in jurisdictions with a gross negligence standard for the civil liability of volunteers, parents or volunteer coaches organising and leading sporting activities and teams, without payment, would unlikely be too alarmed by this judgment. Indeed, there was little suggestion that the teacher had displayed a very high degree of carelessness, a breach of a (less onerous) standard of care by the schoolmaster, premised on a gross negligence standard, improbable.

The teacher selecting the team (and refereeing the fixture) was employed by Newlands Manor School, the school ultimately being vicariously liable. Any potential civil liability immunity for volunteers would have therefore been inapplicable on the facts of the case. Nonetheless, engagement of section 1 may be regarded as accounting for this void, since playing rugby is a socially desirable activity.<sup>150</sup> Arguably, the English Court of Appeal should have been more mindful of the desirable effects of widening participation in *Mountford*, by on appropriate occasion,<sup>151</sup> allowing coaches to exercise discretion in playing players 'up/down' age groups,<sup>152</sup> as opposed to interpreting national governing body guidelines restrictively.<sup>153</sup> An enhanced judicial sensitivity and regard for the socially desirable merits of this specific activity, and importantly, an awareness and appreciation of the wider implications for competitive games generally,<sup>154</sup> and the development of individuals in particular,<sup>155</sup> ought to have been factors of considerable weight in the court's reasoning. Problematically, by failing to expressly recognise the social value of the activity giving rise to the risk, and the cost of the preventative measures, the Court of Appeal may once again have fallen into the '*Tomlinson* trap'. Of course, determination of whether the social benefit of playing this

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<sup>149</sup> For a more detailed critical analysis of this judgment, and particularly the issue of causation, see Heywood and Charlish (n 114).

<sup>150</sup> *Sutton* (n 21) [13] (Longmore LJ); *Scout Association* (n 1) [29] (Jackson LJ).

<sup>151</sup> Most notably, where any consequential risk is acceptable.

<sup>152</sup> *Mountford* (n 148) [6] highlighting that there may be 'educational reasons' for this flexibility. Interestingly, following *Scout Association* (n 1), an 'educative or instructive element' clearly intensifies the desirability of activities: [40], [43] (Smith LJ); [55] (Ward LJ). Also see (n 86).

<sup>153</sup> Heywood and Charlish (n 114) 171.

<sup>154</sup> *Uren* (n 32) [195] (Foskett J).

<sup>155</sup> Heywood and Charlish (n 114) 171.



over-age player was such that the degree of risk it entailed was acceptable would remain a question of fact, degree and judgment, decided on an individual basis. In the specific circumstances, there was no special reason justifying selection of the older player, with an interrelated failure by the schoolmaster to complete a risk assessment or allow the player to play on a trial basis.<sup>156</sup> Conversely, since the physical disparity between the over-age player and other players was not objectionable,<sup>157</sup> following *Whippey v Jones*,<sup>158</sup> it could be argued to have been unreasonable to expect the schoolmaster to contemplate that injury was likely to follow from his acts or omissions, there not appearing to be a sufficient probability of injury for him to anticipate it.

This absence of a *Tomlinson* balancing exercise would appear to endorse Jackson LJ's recognition in *Scout Association v Barnes* of the rare failure of some judges to occasionally overlook this fundamental requirement of the tort of negligence. Indeed, with the benefit of hindsight,<sup>159</sup> and in light of the potential (overkill) ramifications of the court's decision for teachers and coaches, it would have been entirely sensible, particularly following the same court's awareness of wider implications in *Vowles v Evans*,<sup>160</sup> to directly confront such possible anxiety.<sup>161</sup> A more explicit and transparent *Tomlinson* inquiry would certainly have been beneficial in *Mountford*, demanding consideration and acknowledgement of the important broader context. Accordingly, the contemporary application of section 1, and corresponding pronounced profile attributed to *Tomlinson* inquiries, should be of some reassurance to both volunteer and paid sports coaches delivering socially valuable activities in the UK.

## 11. Conclusion

Should the alternative view that section 1 affords an enhanced level of protection and safeguarding for individuals undertaking functions in connection with a

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<sup>156</sup> *Mountford* (n 148) [7], [9], [10].

<sup>157</sup> *Ibid* [10].

<sup>158</sup> *Whippey* (n 106).

<sup>159</sup> It always being easy to be wise after the event: *Overseas Tankship v Morts Docks & Engineering Co Ltd (Wagon Mound No 1)* [1961] AC 388, 424; see generally, Walton (n 43) [7.49].

<sup>160</sup> [2003] 1 WLR 1607 [49] (Lord Phillips MR). Similarly, see *Anderson* (n 20) [149]-[150] (Foskett J).

<sup>161</sup> To be fair to their Lordships, unlike in *Vowles*, *Mountford* was not argued in such terms.

desirable activity be accepted, the nebulous nature of the law of negligence is nonetheless likely to remain a hindrance in reassuring volunteers. Whilst minimising the danger of courts succumbing to the '*Tomlinson trap*', section 1 does not appear to go far enough, the idiosyncratic judicial sensitivity and tenderness afforded to socially desirable activities a significant obstacle to challenging perceptions concerning exposure to litigation risk. Application of tort law principles is particularly problematic in circumstances whereby there might be a narrow distinction between negligent and non-negligent conduct, with no band of reasonable choices open to judges. This chapter's critical consideration of the essentially limited scope of section 1, should a volunteer sports coach be sued in negligence, appears to support the practical utility of a heightened evidential threshold of gross negligence. Arguably, this might more effectively reflect the general tenor of section 1, and the SARAH Act, by substantively addressing misperceptions and excessive risk aversion. In short, if indeed it is not the function of the law of tort to eliminate every iota of risk or to stamp out socially desirable activities, much might be gained by the UK Parliament following the ROI's lead in better safeguarding and protecting volunteers organising and delivering socially desirable activities through enactment of civil liability immunity legislation.

This chapter has discussed the interplay between statutory provision directly related to the law of negligence's control device of breach and judicial determination of the required standard of care in the particular circumstances. It has been argued that the ordinary law of negligence appears somewhat limited in affording sufficient and reasonable protection to coaches and volunteers performing a socially desirable activity. Further legislation relevant to defining reasonableness in the context of sports coaching, most particularly with regard to risk management, would appear to be the Health and Safety at Work etc. Act 1974. The next chapter, in critically considering what might amount to a suitable and sufficient assessment of risk, reveals further synonymity between statutory requirements and a test premised on objective reasonableness at common law. Simply applied, and despite analysis of the intersection between sports coaching and the tort of negligence demanding full



analysis of relevant legislation, the following pages recognise the law of negligence as being essentially judge-made.<sup>162</sup>

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<sup>162</sup> J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-089].

## Chapter 4: Suitable and Sufficient Risk Assessment

The last chapter carefully considered the role of section 1 of the Compensation Act 2006, in shaping judicial determination of the standard of care required of modern sports coaches when discharging their duty of care. This chapter begins by continuing to concentrate on statutory provision, that relating to the workplace and the duty of employers with regard to reasonably managing risk. More precisely, the following pages analyse the legal requirement to conduct suitable and sufficient risk assessments. Detailed scrutiny of relevant legislation in this area reveals its influence on the common law of negligence. Since most claims brought against sports coaches for sports-related injuries are brought in negligence, with the tort of negligence essentially being judge-made law,<sup>1</sup> appreciation of the interaction between statute and common law practice in this context proves necessary, instructive and informative. This allows for a fuller and deeper examination of the effectiveness of the ordinary law of negligence in reasonably protecting coaches and volunteers from legal liability, not least, because varying degrees of risk are inherent in almost all sporting activity.

### 1. Introduction

Since a wide range of sporting activity carries with it risks,<sup>2</sup> it may be both necessary and beneficial for coaches and instructors to expose performers to reasonable and worthwhile risks.<sup>3</sup> Risk can be socially desirable, it is harm that should be avoided.<sup>4</sup> As the costs associated with risk avoidance may outweigh the benefits generated from activities when reducing risk, sport would appear to be a context in which a certain level of accidents will be tolerated by society.<sup>5</sup> Nonetheless, this

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<sup>1</sup> J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-089].

<sup>2</sup> *Scout Association v Barnes* [2010] EWCA Civ 1476 [22] (Jackson LJ).

<sup>3</sup> E.g., *MacIntyre v Ministry of Defence* [2011] EWHC 1690 (QB).

<sup>4</sup> T Kaye, 'Law and risk: an introduction' in G Woodman and D Klippel (eds) *Risk and the Law* (Routledge-Cavendish, 2009) 8.

<sup>5</sup> S Deakin et al, *Markesinis and Deakin's Tort Law* (7th edition, OUP, 2013) 199, making reference to the 'Hand formula', discussed later. Cf F Furedi, *Culture of Fear* (Continuum, 2002) 4, stating that a defining characteristic of contemporary society is the evaluation of everything from the perspective of safety.



responsible balancing of risks against benefits to ascertain 'acceptable risk' can be highly problematic.<sup>6</sup> Fundamental to determination of acceptable levels of risk is completion of a risk assessment by the coach.<sup>7</sup> Crucially, the heightened judicial scrutiny of risk assessments, with acknowledgement that 'the failure to undertake a proper risk assessment can affect or even determine the outcome of a claim',<sup>8</sup> reinforces the necessity for coaches to display intelligent, conscientious, and informed practice when appraising risk. Put simply, risk management represents an important and evolving complexity of modern sports coaching. This chapter critically analyses what might amount to an adequate risk assessment, suggesting important implications integral to effective risk management, coaching best practice, and ultimately, the safeguarding of coaches from legal liability.

The chapter begins with a detailed scrutiny of relevant statutory provision, highlighting significant discrepancies and limitations should workplace ideologies, premised on risk eradication and minimisation, become tacitly adopted and prevalent in sport. However, since the 'so far as is reasonably practicable' standard underpinning the Health and Safety at Work etc Act 1974 will be argued to essentially be synonymous and coextensive with the test premised on objective reasonableness at common law, it remains instructive and may continue to shape good practice in this area.<sup>9</sup> Nonetheless, with most claims brought against sports coaches for sports-related injuries being in negligence, this chapter centres on a detailed examination of the emerging case law. This critical scrutiny of contemporary jurisprudence reveals four essential ingredients that would be likely to amount to a suitable and sufficient risk

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<sup>6</sup> E.g., *Furedi* (n 5) 18, claiming that the traditional weighing up of positive and negative outcomes when thinking about risk now involves a situation where only danger enters into the equation.

<sup>7</sup> E.g., *Anderson v Lyotier* [2008] EWHC 2790 (QB) [54], [145], [112], where although Foskett J accepted it was necessary to move 'outside one's comfort zone to progress', the off-piste slope on which the defendant was injured was found to be 'beyond his ability'. In short, a prospective and conscientious risk assessment was lacking. Also see *Cox v Dundee CC* [2014] CSOH 3; and, in a school sport context, *Mountford v Newlands School* [2007] EWCA Civ 21.

<sup>8</sup> *Uren v Corporate Leisure (UK) Ltd Ministry of Defence* [2011] EWCA Civ 66 [41] (Smith LJ).

<sup>9</sup> M Lee, 'Safety, regulation and Tort: Fault in Context' (2011) 74(4) *Modern Law Review* 555, 572, recognising that, 'whilst "fault" does not in all cases track regulation, regulation does contribute to the construction of fault'.

assessment in the particular circumstances. In short, instrumental to adequate assessment of risk by coaches would be: (i) a thoughtful and intelligent appraisal of risk; (ii) appropriate use of both static and dynamic risk assessments which are responsive to the particular sporting environment; (iii) utilisation of regular and approved risk assessment methodologies, capable of being justified and withstanding logical scrutiny; and, (iv) strategies and techniques designed to challenge predominantly subjective and idiosyncratic notions of risk likely to compromise the risk assessment process. Each of these four core considerations is carefully analysed, establishing important implications and principles that are indicative of best practice in risk assessment. More generally, in advocating a greater emphasis and account of the benefits that flow from involvement in sport, when defining acceptable risk, this chapter endorses a more distinctive and precise approach embracing a risk-benefit assessment. It is submitted that careful implementation of a risk-benefit assessment methodology would improve the effectiveness of coaching by maximising the full utility of sport, without compromising on the legitimate safety interests of athletes.

## 2. Statutory Provision

At first glance, with an increasing tendency for 'workplace ideologies and approaches to safety to invade public life',<sup>10</sup> the Health and Safety at Work etc Act 1974 (the Act)<sup>11</sup> and the Management of Health and Safety at Work Regulations 1999,<sup>12</sup>

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<sup>10</sup> D Ball and L Ball-King, *Public Safety and Risk Assessment: Improving Decision Making* (earthscan from Routledge, 2011) 165.

<sup>11</sup> Health and Safety at Work etc. Act 1974, s 3 states: (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety; (2) It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety. Clearly, coaches classified as self-employed have a statutory duty when coaching to take reasonably practicable measures to avoid exposing athletes (not being her/his employees) to unnecessary risks to their health and safety. Importantly, in the context of sports coaching, this chapter will affirm that this legislative provision does not appear to extend the duty to take reasonable care that exists at common law.

<sup>12</sup> Management of Health and Safety at Work Regulations 1999, reg 3 states: (1) Every employer shall make a suitable and sufficient assessment of— (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and, (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking ...; (2) Every



would appear to have significant direct implications for sports coaches.<sup>13</sup> For instance, sports coach UK observes that '[i]f, as a lead coach, you are working with an assistant coach and therefore directing what the assistant does and how it should be delivered for reward (wages, fee or benefit in kind), you could be classed an employer, in that you are responsible for the care and actions of the assistant coach'.<sup>14</sup> In the context of, for example, outdoor and adventurous activities, this would likely involve employers (lead coaches) providing employees (assistant coaches, leaders or instructors) with suitable personal protection equipment appropriate to the risks involved in the particular conditions.<sup>15</sup> More generally, conscientious and proactive coaches seeking to independently research the requirements of health and safety regulations and best practice, but lacking an informed understanding of statutory health and safety legislation and accompanying judicial authority, may be frustrated with the challenge of deciphering legislation that is of direct relevance to their own individual circumstances.<sup>16</sup> Conversely, coach education provision prioritising the technical, tactical and bioscientific aspects of performance,<sup>17</sup> or more general coach apathy

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self-employed person shall make a suitable and sufficient assessment of (a) the risks to his own health and safety to which he is exposed whilst he is at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking. As discussed above, in the context of sports coaching, this regulation makes clear that self-employed coaches must conduct a suitable and sufficient assessment of the risks to the health and safety of athletes under their charge. Crucially, detailed analysis of the emerging jurisprudence in this area is required in order to clarify what might be regarded as a suitable and sufficient risk assessment.

<sup>13</sup> As noted by Fuller, the management of health and safety issues at work is dominated by these two major pieces of legislation: C Fuller, 'Implications of health and safety legislation for the professional sportsperson' (1995) 29 *Br J Sp Med* 5.

<sup>14</sup> sports coach UK, Minimum Standards for Active Coaches – Core Guidance for Organisations (2013) 4 <[http://www.sportscoachuk.org/sites/default/files/90675\\_21%20MSD%20Guidance%20Document%20for%20Organisations.pdf](http://www.sportscoachuk.org/sites/default/files/90675_21%20MSD%20Guidance%20Document%20for%20Organisations.pdf)> accessed 4 September 2014.

<sup>15</sup> Personal Protection Equipment at Work Regulations 1992, reg 4.

<sup>16</sup> For instance, academic commentary focused more generally on sports law, quite rightly, may make reference to the Workplace (Health Safety and Welfare) Regulations 1992; Control of Substances Hazardous to Health Regulations 2002; and Health and Safety (First Aid) Regulations 1981: see generally, H Hartley, *Sport, Physical Recreation and the Law* (Routledge, 2009) 158-68. Nonetheless, these regulations appear to be of little direct relevance to the majority of volunteer coaches in the UK, this chapter being centred on the perspective of the sports coach.

<sup>17</sup> T Cassidy et al, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009) 93-94. See further, chapter 1, pp. 14-15.

towards the issue of health and safety,<sup>18</sup> may result in coaches failing to fully engage with risk management considerations. Indeed, the media has increasingly ridiculed 'health and safety',<sup>19</sup> perpetuating and promulgating 'regulatory myths' which misrepresent the laudable objectives sought,<sup>20</sup> potentially fueling the notion of a 'compensation culture'.<sup>21</sup> Nonetheless, in discharging their legal duty of care, all coaches must ensure that athletes are not exposed to unacceptable, unreasonable or unnecessary risks.

Curiously, industry focused risk assessments fail to effectively consider the benefits that are generated by activities,<sup>22</sup> the emphasis being on eliminating or minimising risk, which when implemented in a sports context, tends to generate an accepted presumption that the coach's 'primary duty' is always the safety of the individual athletes.<sup>23</sup> Indeed, to prevent exposure to legal liability, this may understandably become the default position of coaches, thereby subconsciously facilitating the adoption of risk-averse and defensive approaches to coaching. Should this indeed be the case, by negating the celebrated *Tomlinson* balancing exercise discussed in chapter 3, coaches would be victims of the 'Tomlinson trap', this signifying a failure to fully recognise the 'the social value of the activity giving rise to the risk and the cost of the preventative measures'.<sup>24</sup> This creates considerable tension and discrepancies when attempts are made to transplant and apply perceived requirements of statutory provision designed for the workplace to the special circumstances of sport.

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<sup>18</sup> See, for instance, Lord Young's report, *Common Sense Common Safety* (October 2010) 5. Also see, chapter 1, pp. 25 & 50.

<sup>19</sup> R Löfstedt 'Reclaiming Health and Safety for all: An independent review of health and safety legislation' (November 2011) 16  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/66790/lofstedt-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf)> accessed 16 October 2014.

<sup>20</sup> P Almond, 'The Dangers of Hanging Baskets: "Regulatory Myths" and Media Representations of Health and Safety Regulations' (2009) 36 *Journal of Law and Society* 352, 356 & 360.

<sup>21</sup> A Morris, "'Common sense common safety": the compensation culture perspective' (2011) 27(2) *Professional Negligence* 82, 94. See further, chapter 1, pp. 6-7.

<sup>22</sup> Ball and Ball-King (n 10) 64.

<sup>23</sup> A McCaskey and K Biedzynski, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J. Sport L.* 7, 15.

<sup>24</sup> *Scout Association* (n 2) [59] (Ward LJ). Also see, *Tomlinson v Congleton BC* [2003] UKHL 47 [42] (Lord Hoffmann).



Problematically, such an ideological notion which assumes that safety is always of paramount importance may become hegemonic, internalised by coaches to the extent of being accepted without question. This may be perpetuated and reinforced by deep-rooted negative views about 'health and safety'. This misses the point. Much stands to be gained from appropriate risk – it is harm that should be avoided -- with management of risk, not eradication of risk, being the statutory requirement.<sup>25</sup>

Proposals made by the Department for Education in the 'Common sense, common safety – progress report',<sup>26</sup> suggested reviewing the Act to separate out play and leisure from workplace contexts.<sup>27</sup> This should be welcomed. Further, the report advocated a shift from a system of risk assessment to a system of risk-benefit assessment.<sup>28</sup> This distinguishes the unique environment and circumstances of sport, where exposure to reasonable and inherent risk taking is legitimately to be endorsed and encouraged, thereby necessarily challenging the limitations of objectives couched in work place ideologies. These differing principles and approaches to risk assessment are context specific, this chapter's detailed examination of their transferability highlighting fundamental inconsistencies. In short, it is contended that the perceived implications of legislative provision, when manifested in the context of sport, may go beyond what might legally be considered reasonable, promoting an unnecessary and unrealistic objective of risk elimination and risk minimisation. This will be argued to be to the potential detriment of coaches and participants alike.

Statutory provision requiring employers to make adequate and suitable risk assessments does not appear to add anything to the duty owed at common law,<sup>29</sup> with the stipulated terminology of 'reasonably practicable' in the Act essentially reflective of

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<sup>25</sup> See generally, Kaye (n 4) 7-8.

<sup>26</sup> Department for Work and Pensions, 'Common sense, common safety – progress report', (July 2011) 14 <[www.dwp.gov.uk/docs/cscs-progress-july-11.pdf](http://www.dwp.gov.uk/docs/cscs-progress-july-11.pdf)> accessed 11 May 2016.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> *Uren* (n 8) [12] (Smith LJ); *Reynolds v Strutt* [2011] EWHC 2740 (QB) [41] (HHJ Oliver-Jones); *McErlean v The Right Reverend Monsignor MacAuley* [2014] NIQB 1 [19] (Horner J).

a negligence standard.<sup>30</sup> Perhaps attractively, this reinforces the test of objective reasonableness, it being likely that provided coaches approach the health and safety of athletes with due care, statutory breaches would be unlikely. Indeed, the Health and Safety Executive notes that '[t]he law does not expect you to remove all risks, but to protect people by putting in place measures to control those risks, so far as reasonably practicable'.<sup>31</sup> In advocating a sensible, proportionate and simple approach to risk management,<sup>32</sup> the Health and Safety Executive recommends five steps to assessing risk (in the workplace): (i) Identify the hazards<sup>33</sup>; (ii) Decide who might be harmed and how; (iii) Evaluate the risks and decide on precautions;<sup>34</sup> (iv) Record your findings and implement them; (v) Review your assessment and update if necessary.<sup>35</sup> This appears straightforward. Nonetheless, the content, detail and scope of this methodology is clearly shaped and premised on a reasonableness standard. Consequently, it could be argued that the elusive, vague and nebulous concept of reasonably practicable fails to get us very far.<sup>36</sup>

Somewhat conveniently, it will be argued that satisfying the test of objective reasonableness would be likely to protect coaches from both a breach of statutory provision and a breach of the common law duty of care. In short, since determining

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<sup>30</sup> G Applebey, "'The butcher's cart and the postman's bicycle': risk and employers' liability' in Woodman and Klippel (n 4) 175. As noted by Lee, '[r]egulation will rarely aim for the highest possible levels of protection, but for an "optimum", or in the UK more often an "acceptable" level of risk': Lee (n 9) 577.

<sup>31</sup> <<http://www.hse.gov.uk/simple-health-safety/manage.htm>> accessed 4 September 2014. This key principle of 'so far as is reasonably practicable' provides the foundation of Great Britain's health and safety legislation: see Löfstedt (n 19) 52.

<sup>32</sup> Such an approach endorsed in *Uren* (n 8) [42] (Smith LJ).

<sup>33</sup> Hazards may be regarded as anything that may cause harm. In a coaching context, this may include, for example, unattended equipment or balls. Importantly, as noted by Furedi, what may constitute and be defined as a hazard changes over time: Furedi (n 5) 7. So, for example, twenty years ago repeatedly heading a football from a young age may not have been regarded as a hazard but, in light of the emerging evidence concerning SRC discussed in chapter 8, a contemporary risk assessment lens may perhaps question such an assumption.

<sup>34</sup> Risk being the likelihood of somebody being harmed by hazards and the extent of such harm. See for instance, *Bolton v Stone* [1951] AC 850 (HL) and s 1 of the Compensation Act 2006, reinforcing the point that identifying acceptable risk in the particular circumstances requires a balancing exercise.

<sup>35</sup> <<http://www.hse.gov.uk/pubns/indg163.pdf>> accessed 4 September 2014.

<sup>36</sup> See for instance, Löfstedt (n 19) 3. Löfstedt notes that although the 'so far as is reasonably practicable' qualification enables risks to be addressed in a proportionate manner, there is 'general confusion over what it means in practice'.



acceptable levels of risk in the particular circumstances will be highly fact sensitive, it appears plain that conducting reasonable risk assessments is fundamental to successful and effective coaching. However, and less conveniently, unpacking and clarifying objective reasonableness may be far from straightforward in this context.<sup>37</sup> This requires detailed analysis and critical scrutiny of the emerging jurisprudence since defining what might be regarded as a suitable and sufficient risk assessment would provide a transparent illustration of the level of due care expected by coaches when assessing risk. Furthermore, in distinguishing between the suitability of methodologies derived from the workplace, as opposed to risk assessment procedures suitable and reflective of the specificity of sport, this chapter highlights the integral role of a cost-benefit analysis when managing risk in this context.

### 3. Common Law

At common law, a finding of liability in negligence would involve establishing that the sports coach's conduct had fallen below the required objective standard ascertained by the court,<sup>38</sup> in guarding against reasonably foreseeable risk,<sup>39</sup> in the specific circumstances.<sup>40</sup> For a coach to be liable in negligence for personal injury sustained by an athlete during supervised physical activity, the additional risk of injury, beyond that inherent to the activity, must be reasonably foreseeable.<sup>41</sup> Even then, the benefits generated from exposure to this additional risk of injury may, on occasion, outweigh the costs of preventative measures.<sup>42</sup> Conversely, as revealed in *Mountford v Newlands School*, the inherent risks of playing rugby may be extended, for instance, should a coach decide to select players for involvement with older/younger age

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<sup>37</sup> As revealed in chapter 1. Also see, N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232.

<sup>38</sup> *Nettleship v Weston* [1971] 2 QB 691 (CA).

<sup>39</sup> *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (Wagon Mound No 2)* [1967] 1 AC 617.

<sup>40</sup> E.g., see *Bolton* (n 34); *Paris v Stepney BC* [1951] AC 367 (HL); *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA); s 1 of the Compensation Act 2006; Social Action, Responsibility and Heroism Act 2015.

<sup>41</sup> *Corbett v Cumbria Kart Racing Club* [2013] EWHC 1362 (QB) [7] (King J); W Norris, 'The duty of care owed by instructors in a sporting context' (2010) 4 *JPI Law* 183, 191.

<sup>42</sup> E.g., *Latimer v AEC Ltd* [1953] AC 643 (HL) 659.

groups.<sup>43</sup> Nonetheless, this involvement may be justified on a number of grounds, not least should the player be particularly talented/physically mature and require heightened levels of competition for continued personal development,<sup>44</sup> providing the 'degree of risk' remains reasonable.<sup>45</sup> Further, it may be unreasonable to expect the coach to contemplate that injury may be likely to follow from this decision, perhaps in circumstances where there may be little or no question of physical disparity between players, there not appearing on the particular facts to be a sufficient probability of injury for the coach to anticipate it.<sup>46</sup>

Accordingly, cases of alleged negligence brought against sports coaches will turn on whether 'the risk was *sufficiently* substantial', this being a matter of degree, and requiring examination of the gravity of the injury caused and the cost of prevention.<sup>47</sup> Coaching good practice must involve a consideration, assessment and determination of the reasonable and necessary risks to be taken in the specific circumstances in which the coaching is being delivered.<sup>48</sup> In this context, measurement of the degree of risk for a given activity will be based on factors including the previous experience of the coach, common knowledge, injury statistics and a record of previous

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<sup>43</sup> *Mountford* (n 7). Crucially, the PE teacher would presumably have escaped liability if he had completed a risk assessed that had indicated no greater danger was to be created by inclusion of the over-age player: see R Heywood and P Charlsh 'Schoolmaster tackled hard over rugby incident' (2007) 15 *Tort Law Review* 162, 164. See further, chapter 3, pp. 107-09.

<sup>44</sup> See for instance, 'Are You Ready to Play Rugby?' Scottish rugby's player safety initiative season 2012/13 report, 2 <[http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr\\_report\\_2012-13\\_final.pdf](http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr_report_2012-13_final.pdf)> accessed 16 October 2014. Scottish Rugby recognises that there may sometimes be exceptional cases where it may be safe and appropriate for players who combine increased technical ability and early physical maturity to play up an age band. Crucially, this demands carefully considered, informed and responsible decision making by the coach/NGB. This scheme is discussed in more detail later in this chapter.

<sup>45</sup> *Uren v Corporate Leisure (UK) Limited, Ministry of Defence* [2013] EWHC 353 (QB) [79] (Foskett J). The degree or magnitude of risk being a product of the likelihood and severity of injury.

<sup>46</sup> *Whippey v Jones* [2009] EWCA Civ 452 [16] (Aikens LJ).

<sup>47</sup> *Deakin et al* (n 5) 210.

<sup>48</sup> For instance, in *Mountford* (n 7), there was a failure by the schoolmaster to complete a risk assessment or allow the player to play on a trial basis (at [7], [9], [10]). More recently, in *Corbett* (n 41) King J ruled that 'whether the layout or the barriers could have been "safer" or whether another layout or barrier is "safer" is not the question but whether the layout, barriers and organisation were unsafe in the sense that they exposed drivers to an *unnecessary risk* of injury', was a material consideration (at [7]) (emphasis added).



incidents.<sup>49</sup> This evaluative determination does not warrant the ignoring of risks with a very low probability<sup>50</sup> and requires coaches to conduct a balancing exercise to ensure that the benefits of the activity or 'end to be achieved',<sup>51</sup> outweigh the likelihood of foreseeable serious injury, thereby justifying reasonable risk taking, even when risks are plainly foreseeable.

As highlighted by Lord Brodie in *Kennedy v Cordia (Services) LLP*, completion of a risk assessment is an integral component of this risk management exercise, providing the mechanism whereby foreseeable risks can be identified and appropriately addressed.<sup>52</sup> Simply applied, the real objective of a suitable and sufficient risk assessment in the context of sport is to avoid sufficiently substantial dangers.<sup>53</sup> Framed differently, and with non-law specialists in mind, the aim of an effective risk assessment is to eliminate harm, not necessarily risk, by means of sensible and informed risk management. As such, in the context of sports coaching, a risk assessment should ensure reasonable evaluation and management of risk.

The law of negligence requires the magnitude of risk to be balanced against the cost of preventative measures, and the social value of the activity, when establishing the expected standard of care in the particular circumstances.<sup>54</sup> In the UK, judicial and legislative recognition of the inherent risks of sporting involvement is underscored by

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<sup>49</sup> J Spengler et al, *Risk Management in Sport and Recreation* (Human Kinetics, 2006) 9. The importance of an injury surveillance system, with effective collection, monitoring, evaluation and dissemination of data will be revealed to be a crucial component of effective risk assessment.

<sup>50</sup> J Steele, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010) 138.

<sup>51</sup> *Watt* (n 40) 838 (Denning LJ).

<sup>52</sup> *Kennedy v Cordia (Services) LLP* [2014] CSIH 76 [19] (Lord Brodie). An appeal of this decision ultimately being allowed by the Supreme Court: *Kennedy v Cordia (Services) LLP* [2016] UKSC 6.

<sup>53</sup> See generally, *Uren* (n 8) [45] (Smith LJ).

<sup>54</sup> E.g., *McErlean* (n 29) [11] (Horner J): 'A frequent complaint is made that the present risk averse culture makes it difficult for schools and other institutions to carry out many activities that they had carried out in the past. Reasonable care does not guarantee there will never be a risk of injury or that every risk will be avoided or that there will never be an accident. Matters other than foreseeability have to be weighed in the balance, including the magnitude of the risk, its obviousness, the previous experience of running that risk. It is what is reasonable "in all the circumstances". All activities necessarily carry a risk and it is important that institutions such as schools do not abandon a worthwhile activity simply because there is a risk of injury'.

similar principles endorsed by the Hand formula in the US.<sup>55</sup> Thereby, issues of a breach in the duty of care are approached by determining if the burden of avoidance or precautions (B) was less than the injury (L) multiplied by the probability (P).<sup>56</sup> This is reflective of the calculus of risk discussed in chapter 1 and, the modest aspiration of tort law in providing 'a certain degree of physical safety to ensure that transactions between persons can be undertaken according to minimal standards of conduct'.<sup>57</sup> Of course, as discussed in detail in the next chapter, since issues of coach negligence appear to be governed by the principles of professional liability, these minimal standards of conduct would tend to be heightened in order to reflect the specialist skill required of the ordinarily competent coach in the same circumstances.<sup>58</sup>

Crucially, in this jurisdiction, there appears to be a tendency for greater judicial scrutiny of the approach, framework and methodology adopted by defendants to evidence that the risks to which claimants were exposed might be regarded as reasonable.<sup>59</sup> Put bluntly, when coaches are sued in negligence for personal injury suffered by athletes, much may turn on whether or not the coach conducted a suitable and sufficient risk assessment.

#### 4. Suitable and Sufficient Risk Assessment

Judicial scrutiny of what might be deemed a suitable and sufficient assessment of risk is likely to be critically rigorous following recent judgments of the appellate courts.<sup>60</sup> Most notably, Smith LJ in *Allison v London Underground Ltd* alerted the judiciary to the insufficient attention afforded to risk assessments since,

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<sup>55</sup> *US v Carroll Towing Co* 159 F 2d 169 (1947) 173, cited in Steel (n 50) 138; Deakin et al (n 5) 200.

<sup>56</sup> Liability being established where  $B < PL$ . Also see, chapter 1, p. 24.

<sup>57</sup> C Witting, 'The Hand and Shirt tests of breach and the Civil Liability Acts' (2009) 17 *Torts Law Journal* 242, 251.

<sup>58</sup> Interestingly, since the standard of skill and care demanded of coaches would be no more than that expected of the 'reasonable average' coach in the same circumstances, relatively speaking, this may be argued to remain somewhat of a minimal standard of conduct. See further, N Partington, 'Professional liability of amateurs: The context of sports coaching' (2015) 4 *JPI Law* 232.

<sup>59</sup> E.g., *Uren* (n 8), cited with approval in a number of recent first instance judgments, including, *Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360 [46] (Globe J).

<sup>60</sup> E.g., *Allison v London Underground Limited* [2008] EWCA Civ 71; *Uren* (n 8).



judges recognise that a failure to carry out a sufficient and suitable risk assessment is never the direct cause of an injury. The inadequacy of a risk assessment can only ever be an *indirect* cause. Understandably judicial decisions have tended to focus on the breach of duty which has led directly to the injury.<sup>61</sup>

Nevertheless, as highlighted in the same court in *Uren v Corporate Leisure (UK) Ltd*, completion of a suitable and sufficient risk assessment is fundamental to safeguarding coaches from legal liability since:

[s]ometimes the failure to undertake a proper risk assessment can affect or even determine the outcome of a claim and judges must be alive to that and not sweep it aside. ... In any event, risk assessments are an important feature of the health and safety landscape. At their best, they can provide an opportunity for intelligent and well-informed appraisal of risk and can form a blueprint for action leading to improved safety standards.<sup>62</sup>

These are significant dicta with important implications for the risk management of sporting activities by coaches. More specifically, they reinforce the considerable force likely to be attributed by the judiciary to a test premised on suitability and sufficiency. Simply applied, a reasonable, proper and adequate risk assessment appears equivalent to one regarded as suitable and sufficient. An inadequate risk assessment, by falling short of this required standard, may very well determine the outcome of a claim brought against a sports coach in negligence. Importantly, detailed analysis of recent case law reveals five crucial components of the risk assessment process pertaining to the coaching of sport. Firstly, courts will be searching for evidence to confirm that the risk assessment process was underpinned by a thoughtful, intelligent and informed appraisal of risk by the coach. Secondly, given the varying circumstances in which vigorous physical activity may be conducted, courts will be mindful of the distinctions, and appropriateness, of both formal and dynamic risk

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<sup>61</sup> *Allison* (n 60) [58] (Smith LJ) (emphasis added). For a recent illustration of inadequate risk assessment by defendants not being determinative of negligence, see: *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50 [21].

<sup>62</sup> *Uren* (n 8) [41]–[42]. Viewed differently, since completion of a risk assessment does not necessarily demand implementation of any particular safety precaution, failure to complete a suitable and sufficient risk assessment cannot be regarded as the direct cause of injury. Also see, chapter 1, p. 42.

assessments. Thirdly, and by no means necessarily discrete from the first two considerations, as an issue of professional negligence, customary practice will likely be viewed as instructive by judges when defining what might satisfy the test of suitable and sufficient. Fourthly, since the law of negligence is premised on the benchmark of objective reasonableness, courts will be acutely aware of the limitations of subjective and idiosyncratic notions of risk management. Finally, following *Tomlinson*, the judiciary would be required to balance the benefits of the particular sporting activity and the costs of safety measures, against the magnitude of risk generated by the activity, when determining acceptable risk. This is an integral aspect of effective risk assessment which, it is contended, may be afforded insufficient weight and importance by the courts and coaches alike. Accordingly, an in-depth analysis of emerging case law will be applied to each of these important constituent components of risk assessment methodology in order to unpack, critically consider, and ultimately clarify the implications for sports coaches.

#### 4.1 Thoughtful Appraisal of Risk

Detailed examination of recent case law reveals sensible and realistic judicial reasoning and expectations when establishing what might be regarded as suitable and sufficient assessment of risks in the particular circumstances.<sup>63</sup> For instance, as in *Blair-Ford v CRS Adventures Limited*, this includes recognition that it may not always be necessary to complete a formal risk assessment for all activities,<sup>64</sup> with dynamic risk assessments, in certain situations, being regarded as suitable and sufficient.<sup>65</sup> In

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<sup>63</sup> E.g., *Cockbill v Riley* [2013] EWHC 656 (QB) [55] (Bean J). The submission by counsel for the claimant that allowing the use of a paddling pool at a party attended by 16-year-old friends of the occupier's/defendant's children of itself creates a foreseeable risk of significant injury or, justifies a formal risk assessment, was sensibly regarded by the court as 'quite unrealistic'.

<sup>64</sup> E.g., *Blair-Ford* (n 59) [62] (Globe J), recognising that 'although there was a formal risk assessment of the Mini-Olympics as a whole, there was no formal risk assessment and no advance plan as to the method of handicapping for the teachers before the welly-wanging event was about to begin. That, though, is not decisive'. Also see, *Wilkin-Shaw v Fuller* [2012] EWHC 1777 [70] (Owen J); *Risk v Rose Bruford College* [2013] EWHC 3869 (QB) [53] (Jay J); *Uren* (n 45) [181] (Foskett J).

<sup>65</sup> *Uren* (n 8) [42] (Smith LJ); *Macintyre* (n 3) [120] (Spencer J); *Blair-Ford* (n 59) [62] (Globe J). The distinction and appropriateness of both formal and dynamic risk assessments is scrutinised in the next section of this chapter.



*Macintyre v Ministry of Defence*, the High Court reinforced the importance of regarding risk assessment as ‘a dynamic process which must be subject to continuous review’.<sup>66</sup> This requires a thoughtful appraisal of risk, as opposed to a document which might be completed in a tick-box fashion.<sup>67</sup> As further highlighted by Jay J in *Risk v Rose Bruford College*, risk assessment ‘is part and parcel of a comprehensive system for the identification and management of hazards and risks, and scarcely ends with the perfunctory compilation of a sheaf of papers’.<sup>68</sup> Accordingly, the heightened judicial scrutiny of risk assessments demands that they must be rigorous and robust.

Although focussing on completion of a formal risk assessment using a standardised template,<sup>69</sup> Smith LJ in *Uren v Corporate Leisure (UK) Ltd* has drawn attention to potential inherent, and possibly entrenched, limitations when conducting risk assessments:

I would like to think that the careful use of such a template will produce a sensible result. However, I do see a danger that, by carrying out the template exercise, an employer or other responsible person may lose sight of the real objective of identifying dangers which should be avoided. I would not like it to be thought that the performance of such an exercise with a reasonable degree of competence and compliance with its results will necessarily provide a complete answer to liability. It seems to me that the use of a template can never fully replace the reasoning processes of an intelligent and well-informed mind. I hope that is not too much to hope for.<sup>70</sup>

When scrutinising whether a suitable and sufficient assessment of risk has been achieved in the particular circumstances, the court would afford considerable force to the expected requirement of intelligent and well-informed reasoning when effectively managing risk. Completion of an approved template may be necessary but insufficient.

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<sup>66</sup> *Macintyre* (n 3) [82] (Spencer J).

<sup>67</sup> *Uren* (n 8) [44] (Smith LJ), her Ladyship drawing attention to the limitations of sometimes blunt risk assessment proformas that encourage a ‘mechanistic or “tick-box” approach’ to risk assessment. Further, identifying a fixed threshold for acceptability may fail to appropriately account for a ‘very unlikely’ risk of catastrophic injury.

<sup>68</sup> *Risk* (n 64) [82] (Jay J).

<sup>69</sup> Discussed in detail later.

<sup>70</sup> *Uren* (n 8) [45].

Evidence of intelligent and well-informed reasoning, or lack thereof, would appear to be the pivotal issue when coaches seek to identify acceptable risk. Clearly, adequate risk assessment extends far beyond a purely back-covering, evidence generating, tick-box type paper exercise. This reinforces the importance of a proactive approach to effective risk management by coaches since it should not be necessary to await a sufficiently substantial or significant incident before the likelihood of its occurrence is envisaged.<sup>71</sup> Curiously, in *Cox v Dundee City Council*,<sup>72</sup> although Lady Scott did not find the defendant coach at all reliable or credible, his vagueness about when he received risk assessment training, or (to a lesser degree) where and exactly how he carried out his risk assessment on the day of the incident,<sup>73</sup> may be insightful in revealing the somewhat diminished importance that may be afforded to risk assessments by some coaches. This possible absence of reflective and thoughtful practice is problematic.

Coaches sued in negligence should expect detailed scrutiny of their risk assessment processes. For instance, in achieving the real objective of identifying dangers which should be managed, the court would be mindful of the potential limitations of procedures heavily reliant on completion of a template type exercise when assessing risk. An intelligent and well-informed appraisal of risk in the context of sport recognises that though often necessary, formal risk assessment may not be entirely suitable or sufficient in particular circumstances.

## 4.2 Formal v Dynamic Risk Assessment

The starting point of any risk assessment may be regarded as identification of all reasonably foreseeable risks.<sup>74</sup> This involves appraisal of the potential risks associated with the particular activity before its commencement,<sup>75</sup> by conducting what has been

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<sup>71</sup> *Uren* (n 45) [179] (Foskett J).

<sup>72</sup> *Cox* (n 7).

<sup>73</sup> *Ibid* [19], [26].

<sup>74</sup> *Uren* (n 45) [181] (Foskett J). Technically speaking, before determining risks, the hazards need to be identified. See above (n 33) & (n 34).

<sup>75</sup> *Kennedy* [2016] (n 52) [110], highlighting that the duty to carry out a risk assessment should be regarded as 'logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care'.



termed an *ex ante* assessment of risk.<sup>76</sup> This is fundamental to establishing the risk of serious injury that ought to be foreseen.<sup>77</sup> Although strictly speaking there is no legal requirement for risk assessments to be confined to writing,

there must be a systematic process which leads to their creation before the hazard is engendered and not afterwards. A proper system of assessing risk and generating the necessary documents well in advance is more likely to be a system in which the necessary control mechanisms are also properly implemented, rather than addressed haphazardly and adventitiously on the day.<sup>78</sup>

A typical methodology adopted when completing formal risk assessments was considered by the Court of Appeal in *Uren v Corporate Leisure (UK) Limited, Ministry of Defence*.<sup>79</sup> Despite the degree of artificiality inherent in such an approach, since this methodology is 'advanced by reputable bodies ... anxious to give guidance which can be applied by a wide range of people to a wide range of circumstances', their Lordships were reluctant to criticise this frequently used procedure.<sup>80</sup> This reasoning endorses a sensible, proportionate and simple approach to risk management, which should not be overbearing for coaches, providing completion of risk assessments is underpinned by an accompanying thoughtful appraisal of risk. Scrutiny of the template used in this general method of formal risk assessment by the Court of Appeal recognised its particular suitability to activities conducted in a static environment in a routine manner.<sup>81</sup> Conversely, the limitations of formal risk assessments in dynamic conditions

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<sup>76</sup> *Uren* (n 45) [69] (Foskett J).

<sup>77</sup> *Ibid* [70].

<sup>78</sup> *Risk* (n 64) [53] (Jay J).

<sup>79</sup> *Uren* (n 8) [43]. For instance, an approved method considered by the Court of Appeal required the assessment of the likelihood of the eventuation of a risk (points ranging from 1 to 4: 4 points for a risk that is very likely, 3 for likely, 2 for possible but unlikely and 1 for very unlikely), with subsequent assessment of the severity of the resultant injury (4 points are awarded to a very serious injury, 3 for less serious, 2 for moderate and 1 for trivial injury). The overall risk assessment is then calculated by multiplying the two numbers together, it having been (subjectively) decided in advance what figure is acceptable and what the threshold is for demanding additional controls or precautions to be applied.

<sup>80</sup> *Uren v* (n 8) [43]-[44] (Smith LJ). Interestingly, this endorses the assertion that risk assessments, whenever possible, should be in accordance with regular and approved methods that are capable of withstanding logical scrutiny. This is discussed later.

<sup>81</sup> *Uren* (n 8) [42] (Smith LJ).

where many variables need to be considered was also highlighted in this judgment.<sup>82</sup> Indeed, too much attention may be focused on the written record when assessing risk.<sup>83</sup> Clearly, the process of risk assessment involves a degree of uncertainty, the challenge of managing this natural unpredictability being of particular importance and relevance to coaches.<sup>84</sup> Put simply, in the context of sport, the changeable circumstances in which physical activity is conducted may render a formal risk assessment inadequate, a dynamic risk assessment perhaps more suitable in particular circumstances.

A dynamic risk assessment may be regarded as:

a risk assessment that takes place during the operation or event in question rather than one carried out exclusively before ... [involving] those responsible for providing the game considering the game as it was played and intervening if it appeared to have become dangerous.<sup>85</sup>

Put simply, a dynamic risk assessment involves continuous monitoring and observation of activities, both before and during the event, whilst conducting the supervisory function of coach.<sup>86</sup> This requires coaching expertise developed and refined over time.<sup>87</sup> Most recently, in the absence of a formal risk assessment for a specific activity resulting in injury to the claimant in *Blair-Ford v CRS Adventures Limited*, Globe J found that such was the extent of the changeable variables falling to be considered by the instructors, that a dynamic risk assessment was acceptable in the circumstances.<sup>88</sup> This

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<sup>82</sup> Ibid. As noted by McArdle, a dynamic risk assessment recognises factors including the attitudes and maturity of participants, changing weather conditions and the confidence of instructors/coaches in their own competence in an open environment: see, D McArdle, 'The views from the hills: fatal accidents, child safety and licensing adventure activities' (2011) 31(3) *Legal Studies* 372, 383.

<sup>83</sup> Löfstedt (n 19) 53.

<sup>84</sup> See generally, *Macintyre* (n 3) [98] (Spencer J).

<sup>85</sup> *Uren* (n 45) [69] (Foskett J).

<sup>86</sup> P Whitlam, *Safe Practice in Physical Education and Sport* (association for Physical Education, Coachwise, 2012) 155.

<sup>87</sup> Ibid.

<sup>88</sup> *Blair-Ford* (n 59) [62]. In the circumstances, failure to complete a formal risk assessment for the method of handicapping the teachers before the 'welly-wanging' event was not found to be a valid criticism. Importantly, there was a formal risk assessment of the Mini-Olympics as a whole, indicative of a systematic process in which the necessary control mechanisms are likely to be properly implemented: see *Risk* (n 64) [53].



provides contemporary judicial acknowledgement that, on occasions, coaches will be acting reasonably by conducting a risk assessment mentally,<sup>89</sup> since there is a limit to the amount of information that can be captured in a proportionate and sensible formal risk assessment.<sup>90</sup> The instructor in *Blair-Ford v CRS Adventures Limited* conducted a risk assessment in his head when watching a teacher demonstrate the technique of throwing a wellington boot through his legs backwards. Significantly, it was agreed by the instructor that throwing in this fashion was such a change that it required a further risk assessment. In this context, conducting a further dynamic risk assessment was found to be reasonable. It is submitted that in circumstances where coaches are essentially following regular and approved practice,<sup>91</sup> in situations where only minor injury (e.g., a cut or graze<sup>92</sup>), or moderate injury (e.g., a fractured limb<sup>93</sup>) is foreseeable, this method of dynamic risk assessment would generally be regarded as suitable and sufficient. This recognises the varying conditions and environment in which physical activity is experienced, the 'professional' judgment of coaches being integral to effective and continuous risk management. Adequate supervision and an appropriate warning of the relevant risks to athletes in these circumstances would appear reasonable,<sup>94</sup> providing a generic formal risk assessment had previously been completed.

Nonetheless, should a particular activity give rise to a foreseeable risk of serious injury (e.g., a fractured spine or serious head injury<sup>95</sup>), appraisal of the potential risks associated with the particular activity, by means of a more detailed formal risk assessment, would be strongly advised before its commencement.<sup>96</sup> Since suitable and sufficient assessment of risk is a process not a document, an informed and well-considered formal risk assessment provides a critical and robust foundation from which

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<sup>89</sup> *Blair-Ford* (n 59) [34].

<sup>90</sup> *Ibid* [27].

<sup>91</sup> Which by definition, ought to have been subject to a prior written generic risk assessment.

<sup>92</sup> See generally, *Uren* (n 45) [87].

<sup>93</sup> *Uren* (n 8) [47].

<sup>94</sup> *Uren* (n 45) [208], [211] (Foskett J).

<sup>95</sup> *Uren* (n 8) [47].

<sup>96</sup> E.g., see *Macintyre* (n 3) [78]-[79].

a proper and continuous re-assessment of risk can be effected.<sup>97</sup> Indeed, a flawed initial formal risk assessment somewhat negates the identification of what might be regarded as acceptable risk in the particular circumstances, since the necessary balancing exercise (i.e., a risk-benefit assessment<sup>98</sup>) is compromised.<sup>99</sup> A further significant factor potentially compromising the effectiveness of risk assessment is a possible insufficient understanding by coaches of the risks of injury.<sup>100</sup>

Best practice in assessing risk clearly warrants completion of a formal risk assessment before amending regular and approved practice, or adopting innovative training methods, with accompanying dynamic assessment of risk during the initial performances and acquisition of skill also being recommended. Coaches make frequent and extensive use of demonstrations to model and facilitate learning, and improve performance levels, no doubt honing their highly proficient skills of observational analysis to simultaneously complete a continuous assessment of risk. Generally speaking, this is routine practice. In these circumstances, corrective and instructive concurrent feedback, or appropriate intervention, can normally be provided by the coach in a timely and effective manner to ensure that athletes are not exposed to unacceptable or unreasonable risk. This is a hallmark of dynamic risk assessment. In

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<sup>97</sup> *Macintyre* (n 3) [82], [92] (Spencer J). Interestingly, there appears scope for argument whether, despite any shortcomings in the initial written risk assessment, a dynamic risk assessment may be regarded as adequate in specific circumstances. On the particular facts in this case, the court (at [120](4)) was 'satisfied that at all material stages there was proper appraisal and assessment of risk, and that this was kept under continuous review'. Nonetheless, a flawed initial static risk assessment makes completion of a suitable and sufficient dynamic risk assessment later problematic.

<sup>98</sup> Discussed later.

<sup>99</sup> MA Jones and AM Dugdale (eds), *Clerk & Lindsell on Torts: Second Supplement to the Twentieth Edition* (Sweet & Maxwell, 2012) [8-145]. Recognition of such potentially erroneous reasoning in *Uren v Corporate Leisure (UK) Limited* [2010] EWHC 46 (QB) providing grounds for a successful appeal. As noted by Jones and Dugdale, '[i]f the risk assessment was flawed that threw into question whether the appropriate balance between the degree of risk and the social value of the game had been reached'. Curiously, attaching too much/little weight to the social desirability of activities would appear to have a similar impact. See, for instance, *Scout Association* (n 2). This case was previously discussed in detail in chapter 3, pp. 95-99.

<sup>100</sup> N Parekh et al, 'Communicating the risk of injury in schoolboy rugby: using Poisson probability as an alternative presentation of the epidemiology' (2011) 46(8) *Br J Sports Med* 611. Correspondingly, according to Löfstedt, there appears to be a need to stimulate a debate about risk in society more generally to ensure that everyone has a much better understanding of risk and its management: Löfstedt (n 19) 6.



this context, as noted in *Blair-Ford v CRS Adventures Limited*, 'spur of the moment' decisions may be necessary due to factors including the weather and the individual needs of participants.<sup>101</sup> Crucially, the suitability and sufficiency of dynamic risk assessments in such circumstances is more likely to be acceptable when coaches have been trained to use their knowledge, experience, initiative and common sense when continuously assessing risk.<sup>102</sup>

The heightened judicial scrutiny and importance afforded to the evaluation of what might satisfy the test of suitable and sufficient assessment of risk would clearly distinguish a thoughtful appraisal underpinning effective dynamic risk assessment with more haphazard and adventitious approaches. This would suggest that courts would be alive to any possible attempt by coaches to justify random and disorganised assessment of risk by seeking to present and package this as dynamic risk assessment. In short, a reasonable approach to dynamic risk assessment should be capable of withstanding logical scrutiny, thereby preventing possible negligent entrenched approaches to risk management that are devoid of a proactive and thoughtful evaluation of risk. This would appear potentially problematic should coaches adopt a somewhat blasé approach to conducting risk assessments, both formal and dynamic, supporting the need for coaches to fully engage with this evolving complexity of coaching. More fundamentally, should an initial formal risk assessment be inadequate,

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<sup>101</sup> *Blair-Ford* (n 59) [27]. Also see *McArdle* (n 82). Nonetheless, the careful forethought evidenced in a suitable and sufficient written risk assessment should minimise the need for spur of the moment decisions. As far as practicably possible, such decisions should be avoided.

<sup>102</sup> *Ibid.* By analogy, also see *Uren* (n 99) [52]. Professor Ball, as an expert witness, explained that when he assesses the risks of an activity he extrapolates from his technical knowledge, experience of life and comparable activities. Similar such intelligent and informed reasoning is no doubt frequently employed by coaches, teachers and instructors. Common sense in this context may be regarded as 'the natural ability of a person, absent study, investigation, or research, to recognise a hazard': see J Spengler et al, *Introduction to Sport Law* (Human Kinetics, 2009) 53. Importantly, the expert skills of observational analysis, developed and improved by effective coaches by means of experiential learning, are an indispensable tool in this context. Indeed, it is highly likely that many coaches conduct suitable and sufficient dynamic risk assessments automatically, without apparent conscious thought. This is not a blasé or haphazard approach to risk assessment. Nonetheless, explicit analysis, recognition and awareness of such inherent and dynamic techniques would enable coaches to refine them further, and ultimately, apply them with greater confidence and effectiveness when ascertaining acceptable risk in the circumstances.

there may not be 'a subsequent opportunity for a proper dynamic risk assessment to inform and improve upon the earlier risk assessment'.<sup>103</sup> This is a serious potential pitfall which coaches must guard against.

#### 4.3 Customary Practice

Since coach negligence should be regarded as an instance of professional liability,<sup>104</sup> detailed examination of the emerging jurisprudence in this general area reveals the application of legal principles resembling those adopted in cases of medical negligence. This analogy appears to provide a useful framework when gauging when a risk assessment might satisfy the test of suitable and sufficient. This submission is premised on three important points that emerge from careful analysis of recent case law. Firstly, in *Uren v Corporate Leisure (UK) Limited, Ministry of Defence*, although the Court of Appeal expressed concerns about the limitations of the risk assessment methodology at issue, importantly, since this approach was recommended by reputable bodies, the appellate court was reluctant to criticise or interfere with this design.<sup>105</sup> Essentially, it appears their Lordships were invoking the *Bolam* test, the task of completing a risk assessment by a sports coach requiring a special skill or competence.<sup>106</sup> Secondly, the clear expectation that coaches would employ a 'thoughtful appraisal of risk' when completing risk assessments,<sup>107</sup> speaks to the requirement of the approach adopted being justifiable and reasonable, this appearing

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<sup>103</sup> *Uren* (n 45) [165] (Foskett J).

<sup>104</sup> Partington (n 58). This is the detailed focus of the next chapter.

<sup>105</sup> *Uren* (n 8) [43]–[44] (Smith LJ). Also see above (n 80).

<sup>106</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB). Significantly, a *Bolam* analysis centres on the issue of breach of duty of care. Similarly, the failure to undertake a proper risk assessment can *sometimes* prove pivotal in determining the outcome of a claim. Nonetheless, although coaches are strongly advised to adopt approaches to risk assessment endorsed by a responsible body (e.g., NGBs), failure to do so would *not necessarily* be indicative of negligent coaching. Technically, although this distinction is an important one, the heightened weight afforded to risk assessment methodology in judicial reasoning supports adoption of this common practice benchmark, based on justifiable approved practice.

<sup>107</sup> *Uren* (n 8) [44] (Smith LJ).



analogous to risk assessments that are capable of withstanding logical scrutiny.<sup>108</sup> Thirdly, although alternative methods may on occasion prove more effective, should the approach adopted be advanced by a reputable body, it is not usually the court's role in this context to conduct a superiority analysis.<sup>109</sup> In short, whenever possible, coaches would be advised to adopt regular and approved approaches to risk management that they have thought carefully about. This assertion is entirely consistent with the emerging jurisprudence in this area.<sup>110</sup>

#### 4.4 Limitations of Subjectivity

A coach's idiosyncratic interpretation and classification of what may be regarded as a real risk<sup>111</sup> may be highly ambiguous, potentially resulting in varying notions of risk.<sup>112</sup> This subjectivity may have serious implications for a coach's judgement and approach to risk management.<sup>113</sup> For instance, perceptions of risk may not always be consistent,<sup>114</sup> with some coaches likely to be more prone to risk habituation or complacency,<sup>115</sup> when considering risk assessments. As revealed in chapter 1, fundamental to judicial application of a calculus of risk, when defining reasonableness, is the nature of the foreseeable harm. The nature of foreseeable harm must be a factor taken into account when deciding if a coach may have been in breach

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<sup>108</sup> *Bolitho (Deceased) v City of Hackney Health Authority* [1998] AC 232 (HL) 242, Lord Browne-Wilkinson noting that 'in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter'.

<sup>109</sup> R Mulheron, 'Trumping Bolam: A Critical Legal Analysis of Bolitho's "Gloss"' (2010) 69 *Cambridge Law Journal* 609, 613-14. For instance, in *Uren* (n 8), although the adopted methodology may have been regarded as a 'rather blunt instrument', ultimately, with careful use, such a template was regarded as being capable of producing a sensible result ([44]-[45] (Smith LJ)).

<sup>110</sup> *Macintyre* (n 3) [79], [120], [122]; *Blair-Ford* (n 59) [61], [62], [65].

<sup>111</sup> *Wagon Mound No 2* (n 39) 643, Lord Reid making plain that a real risk is one that would be recognised as such by a reasonable man in the same circumstances. In short, it is objectively measured. Also see, Health and Safety Executive 'School trips and outdoor learning activities: Tackling the health and safety myths' (6 June 2011) 2 <<http://www.hse.gov.uk/services/education/school-trips.pdf>> accessed 15 October 2014. The HSE distinguish real risk from risks regarded as 'trivial and fanciful'.

<sup>112</sup> *Kaye* (n 4) 13.

<sup>113</sup> See generally, *Ball and Ball-King* (n 10) 28.

<sup>114</sup> *Kaye* (n 4) 13.

<sup>115</sup> *Ibid* 15.

of a duty of care.<sup>116</sup> Accordingly, in the context of risk management, the observations of Cane regarding foreseeability are particularly insightful:

Part of the reason why foreseeability is relative is that people vary in their attitudes to risk. Some people are 'risk averse', others are 'risk preferrers' and yet others are 'risk neutral'. The more risk averse a person is the more likely they are to foresee remote risks of harm and to take precautions. By contrast, the more 'risk preferring' a person is, the less likely are they to foresee or guard against risks of harm in their activities. The courts have never explicitly considered the relationship between attitudes to risk and the legal concept of foreseeability. What is the 'reasonable person's' attitude to risk? Perhaps it is neutrality. The point is that one person might foresee a risk which would not occur to another. The law must, even if only implicitly, adopt some standard attitude to risk in applying the concept of foreseeability.<sup>117</sup>

In regarding the approved methodology adopted when conducting risk assessments in *Uren* as a 'rather blunt instrument', Smith LJ echoed reservations concerning the limitations of this approach, and specifically, its heavy dependence on personal impression.<sup>118</sup> Insufficient understanding by coaches of the risks of injury may intensify the likely subjectivity of risk perception.<sup>119</sup> Consequently, for risk assessments to be completed effectively, coaches must address and account for a number of important issues including: the limitations of individualised subjective notions of perceived risk; possible heightened levels of risk habituation potentially internalised by experienced coaches; limitations in coach education and training addressing risk management considerations; and, a suggested insufficient knowledge and understanding of the risks of injury prevalent in the context of sport. Otherwise, any attempt to conduct a suitable and sufficient risk assessment, or more precisely, a risk-benefit assessment, will be flawed. For instance, confirmation at retrial of the

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<sup>116</sup> *Humphrey v Aegis Defence Services Ltd* [2016] EWCA Civ 11 [14]; *Perry v Harris* [2008] EWCA Civ 907 [38].

<sup>117</sup> P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed., Butterworths, 1999) 39. It is contended that the approach of courts, in applying the test of reasonable foreseeability in the particular circumstances, appears to be consistent with a 'neutral' approach to risk. Interestingly, in and of itself, this remains a nebulous and vague benchmark.

<sup>118</sup> *Uren* (n 8) [44].

<sup>119</sup> Parekh et al (n 100).



‘defective’ or ‘fatally flawed’ risk assessments conducted by the defendants in *Uren*,<sup>120</sup> nullified any attempt to effectively balance the degree/magnitude of risk with the social utility or benefits of the game in question.<sup>121</sup>

Clearly, past experience will be an important factor shaping a coach’s view of risk, with other influencers and influences typically including colleagues, friends, family, the media, and importantly, training.<sup>122</sup> Since suitable and sufficient risk assessments are premised on a sensible and essentially objective weighing of risks and benefits (reasonableness), it appears plain that should a coach’s subjective calculation of the degree of risk to which athletes are exposed be unreasonable, the balancing of risks and benefits may be seriously compromised. Ultimately, a flawed balancing exercise of this type may expose athletes to unreasonable and unacceptable levels of risk, thereby heightening the coach’s vulnerability to negligence liability. To better inform this process of appraising risk to ensure that it is capable of withstanding logical scrutiny, the collection, monitoring and dissemination of meaningful sports injury statistics would be of considerable practical utility to coaches.<sup>123</sup>

Despite individualised notions of risk, courts would generally expect the control measures identified as part of a suitable and sufficient formal risk assessment to be implemented and followed by coaches and instructors. The recent case of *Wilson v G P Haden Trading as Clyne Farm Centre*<sup>124</sup> is particularly instructive in cautioning against an essentially idiosyncratic, blasé or complacent approach to risk assessment. The risk assessments and training notes considered in *Wilson* showed a clear intention that the technique to be adopted by participants, when completing particular sections of a cross

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<sup>120</sup> *Uren* (n 45) [179] (Foskett J).

<sup>121</sup> Jones and Dugdale (n 99). Though made in relation to the initial trial, the relevance of this observation was not disturbed at retrial.

<sup>122</sup> Spengler et al (n 102) 52.

<sup>123</sup> See generally, A Pollock, *Tackling Rugby: What Every Parent Should Know About Rugby* (Verso, 2014). Given this suggestion relates to the education, training and CPD of coaches, it will be discussed more fully in this chapter’s subsequent section focusing on the responsibilities of NGBs.

<sup>124</sup> *Wilson v G P Haden Trading as Clyne Farm Centre* [2013] EWHC 229 (QB).

country assault course, were to be carefully explained and demonstrated by the instructor.<sup>125</sup> Significantly, as found by Swift J:

A departure from the risk assessment and/or the Training Notes would not of itself constitute a breach of duty. The documents are, however, significant in that they show a recognition of the risk of injury associated with using the fireman's pole and set out the measures which had been identified as being necessary to reduce or minimise that risk. Taking those matters and all the other circumstances into account, I must form my own view as to whether Ms Haines failed to exercise the standard of care required of a reasonably competent instructor in her position.<sup>126</sup>

In general, courts will afford considerable force to the safety measures identified in risk assessments and regarded as being necessary to appropriately manage risk. Should a coach fail to adhere to such control mechanisms, or display a tendency for unreasonable risk habituation in the coaching practices adopted, this would lend support to a possible finding of negligence.<sup>127</sup> Accordingly, in *Wilson*, Swift J concluded that 'by disregarding the contents of the defendant's documents and reaching her own conclusion that the technique was so "obvious" that no demonstration was necessary, Ms Haines failed to exercise proper care for the safety of participants, in particular the safety of the claimant'.<sup>128</sup> Interestingly, there may also be a somewhat related danger of a more systemic complacency when a team of coaches are involved in the delivery of a particular activity. For instance, on occasion, there may be a tacit assumption by everyone concerned that all relevant risk assessments may have been carried out properly, when this may, in fact, not always be the case.<sup>129</sup>

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<sup>125</sup> Ibid [134].

<sup>126</sup> Ibid [138].

<sup>127</sup> E.g., *Pinchbeck v Craggy Island Ltd* [2012] EWHC 2745 (QB) [35], the instructors breaching the duty owed to the claimant by failing to adequately demonstrate, supervise or provide practical guidance with regard to climbing down an indoor bouldering wall. Prior to the accident on the bouldering wall, the previous one and three-quarter hours spent on the 'competitive wall' was the subject of 'careful and conscientious training and supervision', evidenced by 'thoroughness and care' taken by the instructors (at [6]). However, the approach for the final ten minutes or so on the bouldering wall was treated by the instructors with a 'significantly more relaxed attitude' (at [34]).

<sup>128</sup> *Wilson* (n 124) [143].

<sup>129</sup> E.g., *Uren* (n 45) [219] (Foskett J).



As highlighted in chapter 1, as performers progress to elite and excellence levels the required emphasis on more specialised training programmes creates new risks requiring coaches to ensure that they possess the necessary competence and expertise to operate safely in these amended circumstances.<sup>130</sup> For instance, since the scope of a coach's duty of care is reflective of the unique circumstances involved, the coaching of Olympic athletes may require coaches to have specialist anatomical knowledge and a familiarity of specific injuries common at performance levels of the particular sport and activity, enabling timely referral for specialist treatment when necessary.<sup>131</sup> Subsequently, coaches working beyond their level of competence or expertise, and not fully conversant and appreciative of these somewhat precise but reasonably foreseeable risks, would appear susceptible to inadequate and flawed risk assessment analyses. Coaches must be mindful of this significant barrier to appropriate assessment of risk.

A simple and proportionate means of countering the serious limitations of subjectivity highlighted above when conducting risk assessments is to adopt a conscientious team approach whenever possible,<sup>132</sup> or alternatively, for coaches working independently to discuss risk management issues with more experienced coaches and mentors. The collective expertise of a team of coaches, with a detailed appreciation of the context in which the particular activity is to be completed, and having due regard to existing documentation, procedures and practice,<sup>133</sup> would facilitate a suitable and sufficient approach to risk assessment. Indeed, the benefits to be derived from a conversation between two or more reasonably competent and experienced risk assessors, or more specifically, coaches with experience of providing and delivering the activity in question, has received recent judicial endorsement.<sup>134</sup>

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<sup>130</sup> J Labuschagne and J Skea, 'The Liability of a Coach for a Sport Participant's Injury' (1999) 10 *Stellenbosch Law Review* 158, 166.

<sup>131</sup> D Healey, *Sport and the Law* (4th ed., UNSW Press, 2009) 155.

<sup>132</sup> To avoid the potential scope for systemic complacency discussed above, this approach may require clearly defined responsibilities i.e., a nominated individual for completion of the written formal risk assessment following the team's discussion and appraisal of risk.

<sup>133</sup> Whitlam (n 86) 156.

<sup>134</sup> *Uren* (n 45) [185] (Foskett J).

This would be further complemented by coaches critically reflecting upon their own risk assessment lens, or self-evaluation,<sup>135</sup> and appropriate coach education and continuing professional development (CPD). In short, critical scrutiny of the inherent subjectivity underpinning the risk assessment process reinforces the importance of coaches adopting a thoughtful, proactive, informed and analytical approach to risk assessments. Superficially, this may appear as a somewhat unattractive proposition to coaches likely to have well-established routine practices and coaching philosophies. Indeed, at first glance, any suggestion to raise the prominence and prioritisation of risk management considerations, and the accompanying investment of limited resources,<sup>136</sup> may not be universally approved by coaches. Nonetheless, a more in-depth analysis of this proposition reveals considerable advantages for coaches fully engaging with a risk-benefit assessment methodology. The starting point for the submission that risk-benefit assessments should become a more integral and pronounced aspect of coaching practice is explicit acknowledgment of some of the benefits that flow from active involvement in practical sport.<sup>137</sup>

## 5. Social utility of Sport

In this jurisdiction, many physical recreations, including, for example, rugby, cricket or skiing, have been endorsed by the judiciary as having a recognised social value,<sup>138</sup> with games 'obviously desirable activities within the meaning of section 1 of the Compensation Act 2006'.<sup>139</sup> Sport's social utility and public interest benefits

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<sup>135</sup> Spengler et al (n 49).

<sup>136</sup> Although (re)allocation of time may be the obvious requirement of an intelligent and well-informed risk-benefit assessment, as previously highlighted, there are also important on-going training implications.

<sup>137</sup> As noted in chapter 2, a theoretical assumption of this thesis is recognition that the social utility and health benefits of sport, as endorsed by the Compensation Act 2006, be accepted without detailed critique. Accordingly, the next section on the benefits of sport is not intended to be an exhaustive review of the full extent of the social utility of sport, which would be highly context and sport specific. Rather, the next paragraphs provide a brief and general overview of some of the main benefits derived from sporting involvement.

<sup>138</sup> *Scout Association* (n 2) [29].

<sup>139</sup> *Sutton v Syston RFC Limited* [2011] EWCA Civ 1182 [13] (Longmore LJ). Also see, Social Action, Responsibility and Heroism HC Bill (2014-15) [9].



include physical and psychological well-being and civic participation.<sup>140</sup> For instance, public policy considerations recognise the health and fitness, psychological and emotional development opportunities promoted through Physical Education (PE).<sup>141</sup> Indeed, the considerable social value provided by sporting activities,<sup>142</sup> may be regarded as incorporating the physical, lifestyle, affective, social and cognitive development of youngsters.<sup>143</sup> Further, the public health advantages from encouraging youngsters to have a lifelong involvement in sport include a reduction in anti-social behaviour, exposure to future possible career pathways, potential benefits for mental health and self-esteem, and addressing concerns about obesity by reducing sedentary lifestyles.<sup>144</sup> Additionally, there is converging scientific evidence to indicate that aerobic exercise may also improve cognition processes and academic achievement.<sup>145</sup>

More generally, sport is progressively seen in the EU as a medium to achieving social policy objectives,<sup>146</sup> the specificity of the role sport plays in enhancing health, education, social integration, and culture being acknowledged.<sup>147</sup> For instance, a priority of the Erasmus+ Programme includes the promotion of healthy behaviours through grassroots sports as a means to promote healthy lifestyles, social inclusion and the active participation in society of young people.<sup>148</sup> Although not all of these benefits associated with involvement in sporting activity will be material considerations

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<sup>140</sup> J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 238.

<sup>141</sup> N Cox and A Schuster, *Sport and the Law* (Firstlaw, 2004) 235.

<sup>142</sup> For instance, social values, in particular health, social inclusion, education and volunteering: see European Union Work Plan for Sport for 2011-2014 (OJ C 162, 01/06/2011).

<sup>143</sup> See R Bailey 'Physical Education and Sport in Schools: A Review of Benefits and Outcomes' (2006) 76(8) *Journal of School Health* 397.

<sup>144</sup> I Male, 'Safeguarding children in sport: a paediatrician's perspective' in C Brackenridge et al (eds), *Sport: Children's Rights and Violence Prevention: A Sourcebook on Global Issues and Local Programmes* (Brunel University Press, 2012) 40.

<sup>145</sup> See for instance, C Hillman et al, 'Be Smart, exercise your heart: exercise effects on brain and cognition' (2008) 9 *Science and Society* 58.

<sup>146</sup> Volunteering In The European Union (Summary): Educational, Audiovisual & Culture Executive Agency (EAC-EA) Directorate General Education and Culture (DG EAC) Final Report submitted by GHK (17 February 2010) 197 <[http://ec.europa.eu/citizenship/pdf/doc1018\\_en.pdf](http://ec.europa.eu/citizenship/pdf/doc1018_en.pdf)> accessed 1 August 2014.

<sup>147</sup> White Paper on Sport, COM (2007) 391, 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0391&from=EN>> accessed 1 August, 2014.

<sup>148</sup> Erasmus+ Programme Guide (European Commission, 1 January 2014) 29 <[http://ec.europa.eu/programmes/erasmus-plus/documents/erasmus-plus-programme-guide\\_en.pdf](http://ec.europa.eu/programmes/erasmus-plus/documents/erasmus-plus-programme-guide_en.pdf)> accessed 1 August 2014. See further, Partington (n 37).

in all instances,<sup>149</sup> viewed both discretely and holistically, they should afford considerable leeway and justification for coaches defining acceptable risk at a sufficiently high and demanding level.<sup>150</sup> In sum, and as advocated by Calderwood et al, 'everyone can win through sport, which improves health and well-being, yielding benefits to at least 40 chronic diseases. However, these unquestioned benefits must always be balanced against risks through participation.'<sup>151</sup>

## 6. Risk-Benefit Assessment

A fundamental limitation when completing risk assessments may be a failure by coaches to carefully and appropriately balance the cost of measures to reduce the risk of personal injury to athletes against some of the aforementioned benefits derived from the activity. Although utilisation of a risk-benefit approach to risk assessment may not be a new concept,<sup>152</sup> including in a PE teaching context,<sup>153</sup> it is asserted that its profile is largely understated.<sup>154</sup> In the context of sports coaching, it is submitted that a risk-benefit assessment is apposite to a thoughtful and informed appraisal of risk, thereby more likely to be both suitable and sufficient, and importantly, also reflective of best practice.

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<sup>149</sup> Given the law of negligence's necessity to focus on the social value of the particular activity, rather than the social value of sporting activities as a whole, as revealed in chapter 3. See for instance, *Scout Association* (n 2) [46] (Smith LJ).

<sup>150</sup> Failing this, as noted by Furedi, in exchange for enhanced safety the trade-off may be a prevention of experimentation and change, a lowering of expectations and, a limiting of growth: Furedi (n 5) 9. Innovation, demanding expectations, and high aspirations are fundamental aspects of sports coaching, most notably, at the performance level.

<sup>151</sup> C Calderwood et al, 'Turning people into couch potatoes is not the cure for sports concussion' (2015) *Br J Sports Med*, Published Online First: 24 September 2015. DOI: 10.1136/bjsports-2015-095393.

<sup>152</sup> Lord Young (n 18) 16. See generally, Ball and Ball-King (n 10).

<sup>153</sup> Whitlam (n 86) 17. Importantly, a risk-benefit analysis by teachers and coaches would enable the pitching of challenging activities to be at the cusp of acceptable risk. In borrowing a phrase from Furedi, instead of focusing solely on the danger of an adverse outcome, a risk-benefit assessment should allow evaluative determination of what might be termed a 'good risk': Furedi (n 5) 18.

<sup>154</sup> Furedi (n 5) 18. This may be reflective of the more widespread negativity towards issues of health and safety discussed above. Becoming competent, efficient and effective when conducting a risk-benefit assessment requires considerable investment by coaches in terms of training, time and resources (i.e., informed discussions with fellow coaches).



In order to protect the legitimate right of athletes to seek redress for personal injury, it is entirely right that coaches and instructors should be legally accountable for negligent practice when appropriate. Nonetheless, the foregoing legal analysis makes clear that when determining the reasonable standard of care in all of the circumstances, courts must have regard to the benefits of the activity giving rise to the risk. This demands a risk-benefit assessment. Simply applied, the costs of preventative measures may include not only expense in terms of time and finance, but more generally, corresponding difficulty and disadvantage(s) for the coach and athlete.<sup>155</sup> Should reducing the risks to which athletes are exposed involve only limited interference with the benefits that flow from the sporting activity, a failure by coaches to incorporate such proportionate safety measures would represent evidence of a lack of due care. In short, a failure to take such simple precautions would likely be regarded as exposing athletes to unreasonable and unnecessary risk.<sup>156</sup> Nonetheless, seldom is the appraisal of risk in the context of physical activity and sport so blunt,<sup>157</sup> there frequently being a need for coaches to carefully reflect on the costs created by modifying and conditioning activities in an attempt to make them safer.

Problematically, as discussed above, there may be a hidden and accepted tendency for coaches to frequently have a bias in favour of safety when evaluating risks. Such an assertion, encouraging defensive, risk-averse and overly cautious approaches to coaching, appears to have widespread support. Firstly, a perceived 'compensation culture',<sup>158</sup> with some evidence to indicate that in the UK being worried

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<sup>155</sup> *Wagon Mound No 2* (n 39) 644 (Lord Reid).

<sup>156</sup> Interestingly, this appears to reflect the reasoning of the majority in *Scout Association* (n 2) [46], [65] (Smith and Ward LJ), since playing a game in darkness significantly increased the risk of injury without adding any other social or educative value. Viewed from a risk-benefit perspective, the safety measure of leaving the lights on posed little cost, difficulty or disadvantage, since it was found to have little detrimental impact on the benefits being sought.

<sup>157</sup> Significantly, the dissenting opinion of Jackson LJ in *Scout Association* (n 2) is illustrative of this assertion.

<sup>158</sup> Morris (n 21).

about risk and liability is a significant reason for not volunteering,<sup>159</sup> likely perpetuates an overemphasis on risk avoidance. Secondly, the assumption that minimising risk may be the primary duty of all coaches,<sup>160</sup> has strong intuitive appeal. Thirdly, application of health and safety guidelines are frequently heavily focussed on 'safety' considerations, and the corresponding avoidance of 'ill health' from exposure to hazards, thereby marginalising the potential 'health gains'.<sup>161</sup> Finally, coaches may lack the expertise, training, experience, confidence and inclination to challenge the assumed paramountcy of safety.

Viewed in this manner, risk assessment has the scope to merge risk minimisation with reasonableness. This narrow focus on minimising risk may disregard the benefits of new and exciting activities that contribute to the development and learning of athletes.<sup>162</sup> As a result, this may artificially heighten the perceived standard of care, by failing to recognise that the health benefits promoted through sporting involvement may outweigh the health and injury risks.<sup>163</sup> This sentiment is succinctly expressed by Furedi when stating:

when we speak of risk, what we have in mind is the danger of an adverse outcome. We describe less and less the decision we are likely to take as a 'good risk'. Not surprisingly, as risks become more and more equated with danger, there is a tendency to adopt strategies that are self-consciously about risk avoidance.<sup>164</sup>

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<sup>159</sup> N Low et al., 'Helping out: a national survey of volunteering and charitable giving' (2007) 64 <[http://www.ivr.org.uk/images/stories/Instituteof-Volunteering-Research/Migrated-Resources/Documents/H/OTS\\_Helping\\_Out.pdf](http://www.ivr.org.uk/images/stories/Instituteof-Volunteering-Research/Migrated-Resources/Documents/H/OTS_Helping_Out.pdf)> accessed 28 October 2014. See further, UK Parliament, Social Action, Responsibility and Heroism Bill (HC Library Research Paper s 14/38, 2014) 8 <<http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill>> accessed 1 August 2014.

<sup>160</sup> McCaskey and Biedzynski (n 23) 15.

<sup>161</sup> Ball and Ball-King (n 10) 98-99.

<sup>162</sup> See generally, Furedi (n 5); Löfstedt (n 19) 40-41, specific regard being made to the school context although disproportionate health and safety measures are acknowledged as being found in all sectors.

<sup>163</sup> Ball and Ball-King (n 10) 98-99. This results in a tendency to undervalue or disregard important benefits.

<sup>164</sup> Furedi (n 5) 18.



In reaffirming the necessity for coaches to act as thoughtful and critical practitioners when assessing risk, with cases typically highly circumstance specific, it will always be the case that 'whether the social benefit of an activity is such that the degree of risk it entails is acceptable is a question of fact, degree and judgment, which must be decided on an individual basis and not by a broad brush approach'.<sup>165</sup> Consequently, a presumptive bias in favour of safety is not always necessarily legitimate.<sup>166</sup> In a business context, there is evidence to indicate that the prospect of legal liability may be a 'key driver' for duty holders going beyond what the law requires.<sup>167</sup> More specifically, there may be a reluctance for coaches to fully engage with, critically reflect upon, and challenge, established approaches to risk assessment due to other priorities and resource and time management restrictions.

Should this scenario posited be of merit, risk-averse coaching practices may be negating and restricting the full utility of sport, since everyone benefits when risk is managed well.<sup>168</sup> In this context, it would appear that coaches are peculiarly exposed to the '*Tomlinson* trap' since a perceived duty to 'ensure' athletes do not suffer harm may manifest itself in more conservative coaching practice.<sup>169</sup> By analogy, since it is foreseeable that judges may succumb to the *Tomlinson* trap,<sup>170</sup> the probability of coaches failing to carefully account for the cost of preventative measures, when managing risk, must be considerable. Accordingly, it appears imperative that coaches become (more) explicit in articulating and accounting for the extensive benefits of physical activity and sport when conducting risk assessments.<sup>171</sup>

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<sup>165</sup> *Scout Association* (n 2) [49], cited with approval in *Wilkin-Shaw* (n 64) [46] (Owen J).

<sup>166</sup> Ball and Ball-King (n 10) 98-99.

<sup>167</sup> Löfstedt (n 19) 6.

<sup>168</sup> Spengler et al (n 49) 2.

<sup>169</sup> H Telfer, 'Coaching practice and practice ethics' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* (Churchill Livingstone Elsevier, 2010) 215.

<sup>170</sup> *Tomlinson v Congleton BC* [2002] EWCA Civ 309. See also, the comments of Jackson LJ in *Scout Association* (n 2) [30], suggesting that it remains feasible for judges at first instance to still succumb to the *Tomlinson* trap. This issue was discussed in detail in the previous chapter.

<sup>171</sup> See generally, Ball and Ball-King (n 10) 24.

Given the possible significant change in emphasis, and to ensure that this approach is properly understood and responsibly implemented, incorporation of a more pronounced risk-benefit assessment should be preceded by appropriate training,<sup>172</sup> 'piloting' and group/team discussion.<sup>173</sup> Indeed, the collective expertise generated from a team approach, grounded in a clear understanding and awareness of the specific sporting context, appears ideally suited to an informed determination of the precautions necessary to ensure that the level of risk remains objectively reasonable.<sup>174</sup> Further, a risk-benefit assessment methodology incorporating a team exercise may also ensure that the level of detail provided in the risk assessment is commensurate to the foreseeable risks.<sup>175</sup>

Successful and effective coaching requires coaches, instructors and teachers to meet the individual needs and requirements of athletes with a wide range of ability and experience levels,<sup>176</sup> often from different age groups,<sup>177</sup> and with varying reasons and aspirations underpinning continued involvement in sport.<sup>178</sup> Further considerations to be addressed by the coach when delivering sessions may include: the nature of the activity;<sup>179</sup> the maturity of the athletes;<sup>180</sup> the number of athletes in the group;<sup>181</sup> the behaviour and necessary standard of discipline required to conduct the activity safely;<sup>182</sup> previous teaching and learning;<sup>183</sup> and the experience, qualifications and

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<sup>172</sup> A systematic review of the approved risk assessment methodologies advanced in particular sports by NGBs should inform this training.

<sup>173</sup> See further, play safety forum, 'Risk-Benefit Assessment Form: Worked Example' (2014) 4 <<http://www.playboard.org/?s=risk+benefit+assessment+form>> accessed 12 May 2016.

<sup>174</sup> Whitlam (n 86) 156.

<sup>175</sup> See generally, 'Health and Safety Made Simple, The Basics for your Business' <<http://www.hse.gov.uk/simple-health-safety/index.htm>> accessed 31 October 2014.

<sup>176</sup> E.g., *Anderson* (n 7); *Morrell v Owen*, 14 December 1993 (QBD).

<sup>177</sup> E.g., *Mountford* (n 7); *Blair-Ford* (n 59).

<sup>178</sup> See for instance, the claimants in: *Davenport v Farrow* [2010] EWHC 550 (QB) (performance athlete); *Sutton* (n 139) (16 ½ year-old amateur rugby player); *Petrou v Bertonecello* [2012] EWHC 2286 (QB) (recreational paraglider); and, *Cox* (n 7) (attendee on coach education course).

<sup>179</sup> E.g., *Macintyre* (n 3).

<sup>180</sup> E.g. *Porter v Barking and Dagenham LBC*, 23 March 1990 (QBD). No liability was found from a failure to supervise two 14 year-old pupils practising shot putt.

<sup>181</sup> *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135.

<sup>182</sup> *Ibid.* *Van Oppen v Clerk to the Bedford Charity Trustees* [1988] 1 All ER 273 (QB).

<sup>183</sup> *Van Oppen* (n 182).



preferred coaching style of the coach.<sup>184</sup> Accordingly, coaches will seek to differentiate activities, and outcomes, to ensure that sessions are enjoyable, stimulating and inclusive. Coaches will also be mindful of appropriately stretching and challenging each individual athlete. Indeed, in *Anderson v Lyotier*, Foskett J recognised that 'it is necessary to move outside one's "comfort zone" in order to be able to progress',<sup>185</sup> it being suggested that the comfort zones and expectations of athletes vary significantly, with coaches often expected to differentiate coaching activities to cater for a wide spectrum of ages, abilities and confidence levels. In short, pitching the level of difficulty within the session, and the pace in which learning activities and practices should be delivered to enthuse and motivate athletes, is a key consideration for coaches. These decisions frequently demand a careful risk-benefit analysis by the coach since failing to properly address these considerations may require athletes to do something beyond their ability, potentially exposing coaches to liability in negligence.<sup>186</sup> Interestingly, in *Macintyre v Ministry of Defence*, the approved formal risk assessment process and documentation adopted by the climbing instructors included a comprehensive code accompanying the risk assessment form. This required the leaders to explicitly assess a number of significant factors including: instructor ability, environmental conditions, local weather, instructor familiarity, student ability and activity choice.<sup>187</sup> In illustrating the complexity of coaching, a notion frequently referred to throughout this thesis, these factors highlight the necessity for the risk assessment process to be fit for purpose and fully reflective of the specific circumstances of each individual activity.

Fundamentally, should coaches effectively utilise a risk-benefit approach to assessing risk, the likely advantages would be considerable. Firstly, whilst ensuring due

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<sup>184</sup> E.g., *Davenport* (n 178) [59], where based on the defendant's training log, the intensity of training expected of the claimant was found to be within the range of acceptable coaching (level 4) for an athlete of his ability and aspirations.

<sup>185</sup> *Anderson* (n 7) [54].

<sup>186</sup> E.g., *Anderson* (n 7) [123], it being found that the instructor failed to weigh up the risks and benefits of what he asked the group to do.

<sup>187</sup> *Macintyre* (n 3) [78]-[79].

regard for the safety of athletes, a risk-benefit assessment would encourage reasonable risk taking which should enhance the sporting experience. By more effectively meeting the differentiated aspirations of individuals, the intrinsic motivation and extrinsic rewards derived from sporting participation would be optimised. Secondly, taking more 'ownership' of risk management considerations, by avoiding entrenched approaches couched in terms of risk minimisation, would likely further empower coaches. This is by no means a clichéd or glib assertion. The more coaches invest in a detailed and thoughtful appraisal of risk, the more likely benefits will be explicitly highlighted, thereby providing the substantive foundation and framework for a more effective risk assessment process. Attractively, this may justify the pushing of boundaries, and better promote creative and innovative practice in appropriate circumstances, by effectively challenging preconceived and entrenched attitudes placing a disproportionate emphasis on safety. Ultimately, this approach would be likely to make coaches more effective at all levels of the sports performance pyramid. Finally, looking more generally, ensuring careful consideration of the social value of the activity giving rise to the risk should ensure that measures taken to ameliorate risk are sensible, realistic and proportionate. This would better preserve and maximise the social utility of sport. Enhanced awareness and understanding by coaches of what may be regarded as suitable and sufficient assessment of risk would be of immense assistance in defining acceptable risk when undertaking particular activities in the specific circumstances. Improving competence and confidence levels in conducting adequate risk assessments, through effective training designed to reassure coaches, would likely encourage the organisation of more desirable activities.<sup>188</sup> Consequently, the substantial gains likely to be generated from a more pronounced and informed focus on risk management generally, and risk-benefit assessments in particular, should be reflected in modern coaching practices and the opportunities for coach education and development provided by NGBs.

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<sup>188</sup> D Kitchener, "The Compensation Bill, clause 1- an undesirable deterrent?" (2005) 155 *NLJ* 1793.



## 7. National Governing Bodies

The regular and approved risk assessment methodologies set forth by NGBs are expected to be illustrative of best practice standards, guidelines and recommendations, including measures being put into practice by similar organisations.<sup>189</sup> Accordingly, coaches would be well advised to conduct risk assessments in accordance with recommended practice,<sup>190</sup> paying close attention to the risk assessment guidelines and safety checklists provided by NGBs.<sup>191</sup> Consistent with the suggestion in chapter 1 that NGBs are associations with specialist knowledge giving advice to coaches and volunteers on the understanding that this information will be relied upon, NGBs have a responsibility to provide education, training and CPD for coaches reflecting the latest best practice procedures in risk assessment and risk management. Analysis of sports injury data by NGBs could be used to inform coach education and training in order to better safeguard both coaches and athletes,<sup>192</sup> it being suggested that a community-based monitoring of sports injuries in this jurisdiction would be both feasible and relatively straightforward to implement.<sup>193</sup> For instance, as noted by Archbold et al, '[i]dentifying modifiable risk factors is central to injury surveillance and prevention initiatives; yet these are largely unknown in youth rugby'.<sup>194</sup>

Interestingly, *RugbySmart* in New Zealand represents an injury prevention programme that is compulsory for all coaches (and referees).<sup>195</sup> The New Zealand

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<sup>189</sup> Spengler et al (n 49) 4-5.

<sup>190</sup> Cox (n 7) [27], [32] (Lady Scott). In this instance, the NGB risk assessment form was not used in the recommended way, as a checklist when conducting the assessment, and further, it was not completed before commencement of the training session. Consequently, the risk assessment undertaken by the coach was regarded by the court as 'inaccurate or inadequately conducted', his employer being found vicariously liable.

<sup>191</sup> E.g., *Sutton* (n 139) [9] (Longmore LJ).

<sup>192</sup> S Greenfield et al, 'Reconceptualising The Standard Of Care In Sport: The Case Of Youth Rugby In England And South Africa' (2015) 18(6) *Potchefstroom Elec. L.J.* 2183, 2205.

<sup>193</sup> Pollock (n 123) 18. This important issue is considered more fully in the context of sport-related concussion in chapter 8.

<sup>194</sup> HAP Archbold et al (2015) RISUS study: Rugby Injury Surveillance in Ulster Schools' *Br J Sports Med* Published online 23 December 2015. DOI: 10.1136/bjsports-2015-095491.

<sup>195</sup> S Gianotti et al, 'Evaluation of RugbySmart: A rugby union community injury prevention programme' (2009) 12 *Journal of Science and Medicine in Sport* 371. *RugbySmart* is a joint venture between the Accident Compensation Corporation and NZ Rugby.

Rugby Union's contribution to this injury surveillance system provides coaches with evidence-based information concerning injury risks.<sup>196</sup> This programme has resulted in an observed decrease in the types of injury claims by players specifically targeted by *RugbySmart*.<sup>197</sup> Similarly, in the UK, Scottish Rugby sponsors the *Are You Ready to Play Rugby?* initiative. The four main priorities of *Are You Ready to Play Rugby?* include age banding; age grade law variations; minimum standards for coaches, trainers and referees; and, injury management. This Scottish Rugby initiative is underpinned by medical research which strongly indicates the increased risk of injury when boys play up an age group (i.e., under-16 players playing under-18 rugby; under-18 players playing adult rugby).<sup>198</sup> Consequently, before an 'exceptional player' is granted dispensation to play up by the NGB, suitably qualified medical personnel conduct physical maturity assessments at assessment centres organised by Scottish Rugby. In Scotland, it is a minimum requirement for all coaches, teachers and referees to have completed the online IRB *RugbyReady* qualification,<sup>199</sup> and as of 2010, a new *RugbyReady* Practical update course at the start of every season.<sup>200</sup>

To support effective implementation of this scheme, Scottish Rugby conducts a compliance exercise to monitor clubs' and schools' *RugbyReady* status.<sup>201</sup> With specific regard to the recording, tracking and monitoring of injuries, Scottish Rugby has introduced an online injury reporting system, enabling an injury report form to be completed for any rugby injury requiring hospital treatment.<sup>202</sup> This information allows

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<sup>196</sup> Ibid. The *RugbySmart* programme also provides information on injury prevention strategies to coaches and referees through video presentations, active participation in workshops, printed materials and Internet resources. *RugbySmart* has been delivered to approximately 10,000 coaches nationwide.

<sup>197</sup> Ibid 375. The targeted injury sites showing a decline included the neck/spine, shoulder, knee, leg and ankle.

<sup>198</sup> Scottish Rugby, 'Are You Ready to Play Rugby? Scottish rugby's player safety initiative season 2012/13 report' 4 <[http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr\\_report\\_2012-13\\_final.pdf](http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr_report_2012-13_final.pdf)> accessed 12 May 2016.

<sup>199</sup> The IRB Rugby Ready programme is intended to raise awareness of good practice and help stakeholders manage the inherent risks of a contact sport by putting appropriate safeguards in place <<http://www.irbrugbyready.com/?language=EN>> accessed 21 October 2014.

<sup>200</sup> Scottish Rugby (n 198) 4. In season 2012/13 over 4,150 people attended one of 242 local Rugby Ready Practical courses.

<sup>201</sup> In June 2012, 55 clubs were recorded as non-compliant.

<sup>202</sup> Scottish Rugby (n 198) 4.



Scottish Rugby to evaluate injury trends and inform the next series of *RugbyReady* Practical courses in order to help reduce the risk of future injury.<sup>203</sup> Although criticism has been made about the effectiveness of the injury surveillance systems adopted by Scottish Rugby,<sup>204</sup> the *Are You Ready to Play Rugby?* programme certainly has the scope to raise awareness of good practice and assist coaches in making evidence based judgements on the likelihood and seriousness (magnitude or degree of risk) of injury in particular circumstances (i.e., injury trends based on player ages; phase of play; and position). Importantly, timely and appropriate dissemination of this objective information to coaches would facilitate a more robust, accurate and thoughtful appraisal of risk, enhancing the suitability and effectiveness of risk assessments. Analysis of standardised injury data by means of an injury surveillance system could be further refined and extended,<sup>205</sup> cascading information to coaches on whether injuries were significantly higher in games than in practice sessions; the injury rates for pre-season, in-season and postseason activities; incidents of injury for specific age groups; and the most commonly occurring injuries, including emerging trends.<sup>206</sup> In terms of safeguarding coaches from litigation risk, and improving all levels of coaching, this appears to be a sensible, manageable and necessary component of coach education and development.

## 8. Best Practice Recommendations

The individual circumstances in which coaches are operating will shape significantly what might amount to a suitable and sufficient risk assessment, making it 'impossible to generalise as to the standard of risk assessment which will be required' in a specific

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<sup>203</sup> Ibid. The main injury findings identified from Scottish Rugby's analysis of the 2012-13 reports are: (i) Total number of serious injury reports received = 294; (ii) Most common injury ages = 14-17 years old; (iii) Most common phase of play resulting in injury = being tackled: 87; tackling: 70; and (iv) Most common position when injured = back row: 53

<sup>204</sup> Pollock (n 123) 79-80. In particular, criticism is made of the collection, monitoring and evaluation of data, preventing effective dissemination of appropriate findings.

<sup>205</sup> Where appropriate, these injury rates might also stipulate the specific sport; activity; level of performance; and the age/gender of the athletes.

<sup>206</sup> E.g., J Hootman et al, 'Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives' (2007) 42(2) *J Athl Train*. 311. E.g., rates of concussion injuries, which perhaps may be reflective of improvements in its identification.

context.<sup>207</sup> Nonetheless, this chapter's detailed analysis of the emerging jurisprudence, accompanied by careful consideration of relevant academic commentary, allows important implications and principles to be highlighted in order to better safeguard coaches from legal liability as an indirect result of inadequately assessing risk. These guidelines are designed to further develop existing good practice, by providing a framework which can be moulded and refined to meet the specific, individualised and diverse environments in which the coaching of sport is conducted. More fundamentally, these suggested recommendations are intended to be realistic, proportionate and of considerable practical utility. Should this aim be achieved, an effective contribution will have been made in making coaches more aware of, and increasingly inclined to engage with, the evolving demands of contemporary risk management. The benefits of such a cultural shift would be likely to transcend legal stipulations by improving all levels of coaching and, significantly, optimise the efficacy of sport for all athletes. Accordingly, the necessary and corresponding coach education and training requirements to address these best practice recommendations ought to be strategically addressed by NGBs.

- i. In the context of sport, the law does not necessarily require risk to be minimised or removed by coaches. Effective coaching demands exposing participants to acceptable risk in the particular circumstances. Providing coaches discharge their duties reasonably, and importantly, in accordance with a suitable and sufficient risk assessment, they will be safeguarded from liability in negligence.
- ii. By conducting suitable and sufficient risk assessments coaches would be protecting the legitimate interests of athletes to be protected from unacceptable risk whilst also shielding themselves from potential negligence liability. Nonetheless, in determining whether risk assessments might be regarded as adequate or suitable and sufficient, judicial scrutiny is becoming

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<sup>207</sup> *Uren* (n 8) [72] (Smith LJ).



increasingly robust. Accordingly, to keep abreast of this heightened inquiry, as well as the developing intersection between the law of negligence and coaching more generally, unpacking and clarifying objective reasonableness would be of considerable support to coaches. Importantly, the reasonable coach is expected to regard risk assessment as a continuous process underpinned by an informed, intelligent and thoughtful appraisal of risk.

- iii. Both formal and dynamic risk assessments, when conducted appropriately, will amount to a suitable and sufficient assessment of risk.
- iv. Risk assessments designed to be 'signed off' in an essentially bureaucratic back covering type exercise are inadequate and will not withstand judicial scrutiny.
- v. Should an initial formal risk assessment be inadequate, it appears likely that any subsequent dynamic risk assessment may be flawed since the balancing of risks and benefits is negated from the outset. Further, courts will be acutely aware of attempts to justify haphazard and adventitious risk assessment under the guise of dynamic risk assessment. Indeed, even decisions necessarily requiring spur of the moment decisions should be premised on a previously completed adequate and generic formal risk assessment, previous experience, common sense and relevant training. With careful foresight, the need for agony of the moment risk management decisions may be appropriately managed and minimised.
- vi. Risk assessments should most generally be completed in accordance with regular and approved practice. Further, the coach must be able to justify this usual methodology to ensure that the procedure adopted would satisfy logical scrutiny. In short, coaches adopting out-dated and entrenched approaches to risk assessment, regardless of whether such methods may previously have been regarded as reasonable, would be more vulnerable to civil liability should an athlete under their charge suffer personal injury.

- vii. Coaches must have a sensitivity and awareness of the limitations of their own subjective risk assessment lens. Coaches with a tendency for risk habituation or complacency must effectively address this discrepancy since the adequacy of risk assessments would be compromised should the identification of foreseeable risk be significantly interfered with by idiosyncratic notions of risk. Put simply, suitable and sufficient assessment of risk is premised on objective, not subjective, reasonableness.
- viii. A further significant factor potentially compromising the efficacy of risk assessments is a possible insufficient understanding by coaches of the risks of injury. Although the primary responsibility for effective dissemination of evidence based recommendations in this area appears to lie with the NGB, coaches should engage in on-going professional dialogue with colleagues to help address this discrepancy. For instance, discussing examples of near misses, and lessons to be learnt,<sup>208</sup> and the latest findings from coach education and training, would be a simple and straightforward starting point. Further, effective reporting, monitoring and evaluation of injuries by coaches and clubs should be regarded as routine good practice. Interestingly, within clubs, this would appear to be a very worthy responsibility for individuals tasked with coordinating/leading other coaches and liaising with NGBs. In short, strategies to encourage coaches to have conversations about, and engage more fully with, risk management considerations, given the scope for this to improve coaching practice at all levels, should be fostered and promoted.
- ix. Many of the pitfalls associated with inadequate risk assessments may be overcome by a conscientious team approach to assessing risk. This best practice recommendation may include regular team meetings during which risk assessment might be a standing item. More generally, the informed and

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<sup>208</sup> P Whitlam, *Case Law in Physical Education and School Sport: A Guide to Good Practice* (BAALPE, 2005) 125.



collective expertise of a team of coaches would be more likely to prevent a considerable number of potential limitations including: inadequate entrenched methods; an overly cautious and disproportionate view of risk management; discrepancies created by an overly subjective approach by individual coaches; risk habituation or complacency; unrealistic and unnecessary expectations, reflective of risk elimination or minimisation objectives; and a limited awareness and appreciation of the actual and emerging injury risks.

- x. The level of detail in a risk assessment should be reflective of the full circumstances in which the activity is conducted, including the experience and competence of the coach, and importantly, be commensurate to the risks involved.
- xi. Should reducing the risks to which athletes are exposed involve limited interference with the benefits that flow from the sporting activity, incorporation of such proportionate safety measures by coaches would be expected by the courts. Put simply, athletes should not be exposed to unreasonable or unnecessary risk.
- xii. Crucially, defining acceptable risk in this context is best achieved by means of a conscientious risk-benefit assessment. This cannot be approached in a broad brush fashion and requires careful evaluation of the risks and benefits of the individual activity in the particular circumstances. Crucially, should this advocated shift in risk assessment methodology be fully achieved, the gains would be compelling.

Despite the perspective of the coach being central to this thesis' analysis, there are important implications for NGBs also revealed from critical scrutiny of the recent case law. These could perhaps be appropriately addressed by means of carefully planned coach education and development focused on safeguarding coaches from professional

liability.<sup>209</sup> Nonetheless, since such training must be informative, a particular priority that would be of considerable practical utility to coaches performing risk-benefit assessments on a daily basis would be timely dissemination of findings from effective injury surveillance systems. This could be instructive in modelling best practice risk-benefit assessment methodologies by delivery of interesting, relevant and accessible courses and workshops for coaches. Indeed, as the intersection between sports coaching and the law of negligence continues to evolve, NGBs, as associations with specialist knowledge giving advice to coaches on the expectation that this information will be relied upon, also have a responsibility to adapt and respond to the heightened judicial scrutiny of risk assessments.

## 9. Conclusion

As a crucial feature of health and safety provision, judicial scrutiny and consideration of risk assessments is likely to become even more rigorous and pronounced when coaches are sued in negligence. Accordingly, coaches must be prepared for a more searching and concentrated inquiry of risk management procedures. The somewhat traditional narrow focus on risk assessments, since an inadequate risk assessment will never be directly causative of personal injury, appears outdated and redundant. This represents a significant change in emphasis. The legal landscape regarding risk assessments appears to be shifting since:

It is obvious that the failure to carry out a proper risk assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a proper risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment.<sup>210</sup>

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<sup>209</sup> Partington (n 37) 239. The issue of meaningful and impactful coach education is an important theme returned to in all of the remaining chapters.

<sup>210</sup> *Uren* (n 8) (Smith LJ).



Nonetheless, providing coaches conduct suitable and sufficient risk assessments they will be better safeguarded from exposure to negligence liability. In this context, the test of suitable and sufficient appears synonymous with objective reasonableness. Attractively, meeting this reasonableness standard would prevent a breach in statutory provision and a breach of the common law duty of care. This chapter's detailed analysis of the emerging jurisprudence, and accompanying academic commentary, has unpacked and clarified what might amount to a suitable and sufficient assessment of risk. In particular, the essential components and themes that emerge from the critical consideration of recent case law establishes that coaches should approach the risk assessment process in an intelligent, informed and thoughtful manner; utilising both static and dynamic risk assessments as appropriate; adopting regular and approved risk assessment methodologies capable of being justified and withstanding logical scrutiny whenever possible; whilst also being mindful to avoid the dangers that flow from subjective and idiosyncratic notions of risk.

More fundamentally, this chapter strongly endorses an explicit and pronounced emphasis on a risk-benefit analysis when assessing risk. This makes sense for all concerned. Should coaches have the knowledge, understanding, expertise and confidence to conduct risk-benefit assessments, defining acceptable risk would become a more thoughtful and informed exercise. Further, a responsible and careful evaluation of the risks and benefits of the particular activity would promote a proportionate, sensible and realistic management of risk in the circumstances. This is entirely consistent and representative of legal requirements. More bluntly, identifying what might be regarded as reasonable and acceptable risk in this rigorous and systematic manner creates a win-win scenario. In addition to safeguarding coaches from liability in negligence, a suitable and sufficient risk-benefit analysis potentially heightens the considerable gains to be achieved through sporting involvement without compromising the legitimate safety interests of athletes. Indeed, a carefully implemented risk-benefit assessment methodology appears crucial in improving the effectiveness of coaching by maximising the full utility of sport. Ultimately, framing risk assessments in this fashion

may encourage more coaches to fully embrace, and effectively take ownership of, risk management in a manner that is reflective of this dynamic legal landscape.

Though by no means determinative of legal liability, this chapter demonstrates that the ordinary law of negligence generally requires coaches to abide by the aforementioned best practice risk management recommendations when engaging in the risk assessment process. These would appear to be reasonable expectations but, given the potential scope for inadequate and entrenched approaches to risk assessment methods revealed above, there would appear to be a need to develop and tighten the education, training and CPD of coaches in this area. In short, coaches employing customary risk assessment practices, that are capable of withstanding robust judicial scrutiny, appear best placed to be safeguarded from liability in negligence. Accordingly, in broadening this thesis' analysis to encompass coaching practices and behaviours more generally, the next chapter turns to consider what might be termed a common practice, or *Bolam* 'defence'. In so doing, it considers in detail the issue of coach negligence as a somewhat novel and curious instance of professional negligence. With regard to this thesis' research question, this poses further difficult, searching and challenging questions regarding the effectiveness of the law of negligence's control mechanism of breach in the context of sports coaching.



## Chapter 5: Professional Liability of Amateurs

The previous chapters have highlighted the necessity of, wherever possible, coaches following regular, approved and logically justifiable coaching practices in order to be protected from liability in negligence. In doing so, considerable emphasis has been placed on coaches discharging their duty of care with specialist skill reflective of the ordinary level of competence expected in the same circumstances. Since coach negligence represents, an albeit unusual, instance of professional liability, this is what defining the legal standard of care required of coaches entails. Critical scrutiny of this legal test drills to the core of this thesis and, is integral to detailed consideration of whether the control mechanism of breach affords sufficient and reasonable protection to coaches and volunteers performing a socially desirable activity. As this chapter reveals, the developing intersection between the law of negligence and sports coaching in the UK provides a profoundly distinctive context, as compared to that of the more traditional learned professions, in which to critically examine the issue of professional liability and identify important implications.

### 1. Introduction

[W]here you get the situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.<sup>1</sup>

In situations where a person undertakes a task requiring some special skill, this legal statement is repeatedly applied.<sup>2</sup> As a foundational component of the *Bolam* test, it represents a basic threshold measurement of reasonableness in claims of

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\* Some material from this chapter was published in N Partington, 'Professional liability of amateurs: The context of sports coaching' (2015) 4 *JPI Law* 232.

<sup>1</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB) 586 (McNair J).

<sup>2</sup> *Vowles v Evans* [2003] EWCA Civ 318 [27].

professional liability.<sup>3</sup> Sports coaching requires the exercise of some special skill or competence and aspires to be classified as a 'profession'.<sup>4</sup> Careful scrutiny of the emerging jurisprudence in this field confirms the negligence liability of coaches as being governed by the legal principles of professional liability. Paradoxically, sports coaching is primarily dependent on volunteers, revealing the emerging 'profession' of sports coaching as an intriguing and novel context in which to critically analyse the characteristics of professional liability. This careful and detailed interdisciplinary analysis reveals some serious concerns relating to the emerging issue of the negligence liability of coaches, with suggested best practice recommendations highlighted in order to better safeguard coaches from professional liability.

The chapter begins with a general introduction to this ever-evolving aspect of the law of negligence which 'must be viewed against a background of constant change'.<sup>5</sup> Given the centrality and emphasis of the particular circumstances in which assessments of breach of duty must be conducted, the specific context of sports coaching is next critiqued in appropriate detail. This uncovers sports coaching as a somewhat unique, peculiar and contemporary illustration of a 'profession', thereby facilitating a rigorous technical analysis of the legal principles of professional liability in an unconventional setting. Accordingly, the *Bolam* test, the celebrated benchmark of the standard of skill and care incumbent upon ordinarily competent and average professionals, is examined in considerable detail. This reinforces the necessary function of this well established legal control mechanism to protect the legitimate and genuine interests of *both* claimants and defendants alike.<sup>6</sup> Following clarification of the relevant jurisprudence in this field, and being mindful of the applicability of this

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<sup>3</sup> M Jones, 'The Bolam Test and the Responsible Expert' (1999) 7 *Tort Law Review* 226.

<sup>4</sup> See generally, P Duffy et al., 'Sport coaching as a "profession": challenges and future directions' (2011) 5(2) *International Journal of Coaching Science* 93; B Taylor and D Garratt, 'The Professionalisation of Sports Coaching: Relations of Power, Resistance and Compliance' (2010) 15(1) *Sport, Education and Society* 121.

<sup>5</sup> R Jackson, 'The professions: power, privilege and legal liability' (2015) 31(3) *Professional Negligence* 122, 122-23.

<sup>6</sup> R Kidner, 'The variable standard of care, contributory negligence and volenti' (1991) 11(1) *Legal Studies* 1, 23.



chapter's analysis for practitioners, the discussion next concentrates on scrutinising the specific case law relating to the negligence liability of sports coaches and instructors. This reveals significant implications for the education, training and continuing professional development (CPD) of modern sports coaches with regard to legal and ethical issues. More generally, since professional liability is confirmed as a developing and fluid aspect of the law of negligence, this chapter's focus on a 'profession' profoundly distinctive in relation to the more traditional learned professions, provides a critical commentary that should be of wider interest and, consistent with the methodological design of this thesis.

## 2. Professional Liability

Professionals by most conventional interpretations are regarded as 'knowledgeable others' -- they 'profess'.<sup>7</sup> Nevertheless, the definition of profession remains a contested concept,<sup>8</sup> and is inconclusive.<sup>9</sup> Accordingly, perceptions about what might constitute a 'professional', or profession, are 'indistinct, subjective, and continually changing'.<sup>10</sup> As a result, there is a contemporary widened catchment of 'profession',<sup>11</sup> with sports coaching appearing determined to satisfy this designation.<sup>12</sup> General endorsement of sports coaching being classified as a profession may include: the moral aspect of coaching, reflected in codes of conduct and ethics produced by national governing bodies of sport (NGBs), and additionally, by the 'community' context in which much coaching is delivered; opportunities (or requirements) for membership of professional associations (e.g., for coach accreditation/CPD/insurance);

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<sup>7</sup> B Taylor and D Garratt, 'The professionalization of sports coaching: definitions, challenges and critique' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010) 104.

<sup>8</sup> K Armour, 'The learning coach ... the learning approach: professional development for sports coach professionals' in Lyle and Cushion (n 7) 154.

<sup>9</sup> MA Jones and AM Dugdale (eds) *Clerk and Lindsell on Torts* (20th ed., Sweet and Maxwell, 2010) [10-01].

<sup>10</sup> J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-002].

<sup>11</sup> D Mangan, 'The Curiosity of Professional Status' (2014) 30(2) *Professional Negligence* 74, 74-75.

<sup>12</sup> Duffy et al (n 4) 93; Taylor and Garratt (n 4) 121.

and the apparent enhanced status of sports coaches in modern society.<sup>13</sup> The following pages will critically consider each of these factors, or indicators, revealing important ramifications linked to professional liability. For instance, despite publication of ethical guiding principles being integral to all professions,<sup>14</sup> mere production of a code of ethics is certainly not sufficient for sports coaching to be regarded as a profession.<sup>15</sup>

Fundamentally, as highlighted by Clerk and Lindsell on Torts, 'the rules governing a professional person's liability for negligence are no different from those governing the liability of anyone else who undertakes a specific task and professes some special skill in carrying out that task'.<sup>16</sup> Since success and safety cannot be guaranteed, this seems entirely sensible, demanding a certain minimum degree of competence from professional persons discharging their duties.<sup>17</sup> Subsequently, the pivotal issue in cases of negligence liability brought against coaches would be determination by the court of the objective standard of skill and care required in the particular circumstances. This would reflect, and be shaped by, the special skill or competence expected of the ordinary coach, with the imposition of this responsibility or duty of care often regarded as 'a badge of professional status'.<sup>18</sup> Determination of the legal standard of care incumbent on different professionals in particular circumstances, and more specifically, the weight to be attributed to guidelines and standards published by NGBs in individual cases, is instrumental to the thriving area of professional liability.<sup>19</sup> This intersection between professional liability and sports coaching is contextualised by the varied, and somewhat unique, categorisation of coaches as volunteers, professionals and 'professional volunteers'.<sup>20</sup> These distinctions

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<sup>13</sup> See generally, Powell and Stewart (n 10) [1-005]–[1-006].

<sup>14</sup> H Telfer, 'Coaching practice and practice ethics' in Lyle and Cushion (n 7) 210.

<sup>15</sup> Duffy et al (n 4) 104.

<sup>16</sup> Jones and Dugdale (n 9) [10-03].

<sup>17</sup> Powell and Stewart (n 10) [1-004].

<sup>18</sup> *D v East Berkshire Community Health Authority* [2005] 2 AC 373 (HL) [40] (Lord Bingham).

<sup>19</sup> M Lunney and K Oliphant, *Tort Law: Text and Materials* (5th ed., OUP, 2013) 199.

<sup>20</sup> Duffy et al (n 4) 110. For instance, professional volunteers may represent amateur coaches with Senior/Master levels of coaching awards.



may be further complicated and intensified by the particular coaching domains in which coaches operate, for instance 'participation', 'development' and 'performance' pathways. In short, the negligence liability of coaches represents an important, evolving and fascinating instance of professional liability in a unique context.

### 3. Sports Coaching

#### 3.1 Context

Volunteering is commonplace and generally 'expected' in the provision of community and recreational sport.<sup>21</sup> The vast majority of sports coaches in the UK are volunteers,<sup>22</sup> this being reflective of the bulk of countries in the world.<sup>23</sup> Coaches often receive limited training,<sup>24</sup> it being estimated that approximately half of the coaches in this jurisdiction do not hold a coaching qualification.<sup>25</sup> As discussed in earlier chapters, previous experience as players and enthusiasm are often regarded as sufficient prerequisites for volunteer coaches.<sup>26</sup> For instance, there is evidence to suggest that some parents volunteer as coaches to assist their children, thereby ensuring that opportunities to participate continue.<sup>27</sup> This commitment and desire to help by former athletes and parents at the entry level is representative of the motivations widely held in voluntary activity.<sup>28</sup> Further, in contrast to traditional professions including law and medicine, instead of required extended academic study and professional assimilation being requirements and markers of professional status, prime candidates for coaching positions may have acquired valued experience in the unique environment of elite

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<sup>21</sup> C Nash, 'Volunteering in Sports Coaching – A Tayside Study' in M Graham and M Foley (eds), *Volunteering in Leisure: Marginal or Inclusive?* (LSA, 2001) 44.

<sup>22</sup> sports coach UK, 'Coach Tracking Study: A four-year study of coaching in the UK' (2012) 17.

<sup>23</sup> Duffy et al (n 4) 94.

<sup>24</sup> See for instance, Nash (n 21) 50: 57.8% of the sample of coaches surveyed having never participated in a National Coaching Foundation/sports coach UK Coach Education Course. Also see, G Nygaard and T Boone, *Coaches Guide to Sport Law* (Human Kinetics, 1985) 13.

<sup>25</sup> sports coach UK (n 22).

<sup>26</sup> D Healey, *Sport and the Law* (4th ed., UNSW Press, 2009) 159.

<sup>27</sup> Nash (n 21) 51. Also see, R Groom et al, 'Volunteering Insight: Report for Sport England' (Manchester Metropolitan University, 2014) 6. In addition to child involvement, other motivating factors for volunteers (not necessarily coaches), included: love of sport, giving something back to sport, social connection, career aspirations, and education/employment based volunteering.

<sup>28</sup> A Lynn and J Lyle, 'Coaching workforce development' in Lyle and Cushion (n 7) 206.

sport.<sup>29</sup> This signifies an important distinction between formal qualifications and practical experience as admission requirements for professional practice.<sup>30</sup>

Notably, coaching practitioners often operate in isolation,<sup>31</sup> likely restricting opportunities for professional discussion, dialogue and the sharing of best practice. This limitation may be compounded by the diverse performance spectrum of sport, requiring coaches to operate across an increasingly challenging range of performance levels and stages.<sup>32</sup> Telfer notes that:

Identifying appropriate ethical decisions and behaviours at each stage of the performance spectrum can be problematic, both for the individual practitioner and also the coaching profession. The implication is that coaching practice, in relation to ethical judgement, is complex, situationally dependent, and offers a dynamic set of practice catalysts.<sup>33</sup>

For instance, at the elite level, coaches are exposed to increasing demands to deliver 'cutting edge' guidance and advice to athletes,<sup>34</sup> potentially challenging the fine line between harm and reasonable endeavor when pushing the human body to its physical and emotional limits within training and performance.<sup>35</sup> This provides a clear illustration of the need for coaches to have regard to 'the likely boundary between coaches forging champions or committing a tort'.<sup>36</sup> An interrelated debate concerns the distinctiveness of coaching as a concept or classification, as compared, for instance,

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<sup>29</sup> Duffy et al (n 4) 110.

<sup>30</sup> Ibid.

<sup>31</sup> P Trudel et al, 'Coach education and effectiveness' in Lyle and Cushion (n 7) 141.

<sup>32</sup> Telfer (n 14) 210.

<sup>33</sup> Ibid.

<sup>34</sup> C Mallett, 'Becoming a high performing coach: pathways and communities' in Lyle and Cushion (n 7) 119.

<sup>35</sup> Telfer (n 14) 214. As noted by Telfer, this is certainly an enduring debate, particularly in relation to the coaching of young performers.

<sup>36</sup> T Hurst and J Knight, 'Coaches' liability for athletes' injuries and deaths' (2003) 13 *Seton Hall J. Sports L.* 27, 29.



to sports teaching, instructing and leading, the assumed genericism of sports coaching arguably problematic.<sup>37</sup>

In short, the sports coaching 'workforce' may be regarded as largely unregulated and absent of a 'validated threshold level of expertise or a commonality of occupational practice and expectations'.<sup>38</sup> Subsequently, the somewhat distinctive aspects of coaching when presented as a 'profession' include: the predominant reliance on volunteers; a lack of necessary formal accreditation and qualification; varying and flexible indicators of competence; seemingly reduced opportunities for professional dialogue, discussion, collaboration and the sharing of best practice; and, the differentiated sporting contexts of participation, development and performance in which coaches work. Collectively, these factors represent a stark contrast with other professions, arguably problematising application of the legal principles fundamental to professional liability.

Whilst accepting the presumption that in terms of responsibility, passion and commitment, the majority of volunteer coaches would quite justifiably defend their practice as being intrinsically 'professional',<sup>39</sup> should a coach be sued in negligence, the dynamic intersection between modern sports coaching and the law creates some uncertainty and doubt for practitioners coaching in the field.<sup>40</sup> Indeed, despite the majority of personal injury claims being settled before reaching the courts,<sup>41</sup> there is an increasing body of recent related case law.<sup>42</sup> More than ever, it would appear that

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<sup>37</sup> J Lyle and C Cushion, 'Narrowing the field: some key questions about sports coaching' in Lyle and Cushion (n 7) 246. See further, Chapter 1, pp. 7-12; N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232, 235-36.

<sup>38</sup> Lynn and Lyle (n 28) 205. As further noted by Lynn and Lyle, '[t]his absence of cohesion and the lack of clear "markers" of what being a coach means are limitations that the professionalisation process has yet to overcome'.

<sup>39</sup> Taylor and Garratt (n 7) 111.

<sup>40</sup> S Greenfield, 'Law's impact on youth sport: should coaches be "concerned about litigation"?' (2013) 2(2) *Sports Coaching Review* 114, 117; Partington (n 37) 235-36.

<sup>41</sup> Lord Dyson MR, 'Compensation Culture: Fact or Fantasy?' Holdsworth Lecture (15 March 2013) [34] <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>> accessed 9 May 2016.

<sup>42</sup> See for instance, most recently: *Davenport v Farrow* [2010] EWHC 550 (QB); *Petrou v Bertoncello* [2012] EWHC 2286 (QB); *Cox v Dundee CC* [2014] CSOH 3. See further, chapter 1, which includes a fuller

coaches are concerned and mindful about the prospect of legal liability.<sup>43</sup> For instance, since coaches at grassroots levels may be regarded as less confident and more vulnerable,<sup>44</sup> fears of perceived professional malpractice may be having a particular impact in displacing considerations of coaching pedagogy.<sup>45</sup> Put simply, contemporary jurisprudence questions why volunteers would be willing to become involved in sports coaching,<sup>46</sup> likely compounded by a perceived (more) litigious society and 'compensation culture',<sup>47</sup> potentially removing from sport its most influential participant.<sup>48</sup> Accordingly, careful analysis of the professional liability of coaches is necessary in an attempt to both clarify this interaction between the law of negligence and sports coaching and, identify suggested recommendations that might limit the scope of legal liability.

### 3.2 Professionalisation of Coaching

Creation of the ICCE (International Council for Coaching Excellence) in 1997 has provided a catalyst for a stronger focus on the position of sports coaching as a 'profession', this being further consolidated by the adoption of the Magglingen Declaration.<sup>49</sup> Twenty nine countries at a general assembly meeting approved this Declaration which emphasised the importance of central challenges including those

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consideration of recent cases brought against sports instructors (e.g., *Anderson v Lyotier* [2008] EWHC 2790 (QB); *MacIntyre v Ministry of Defence* [2011] EWHC 1690 (QB); *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50); and PE teachers (e.g., *Mountford v Newlands School* [2007] EWCA Civ 21; *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135).

<sup>43</sup> Greenfield (n 40) 121.

<sup>44</sup> For instance, a professional coach would be expected to have appropriate insurance indemnity and also be able to shift liability to the employer (vicarious liability), in circumstances where the coach is acting in the capacity of employee: M James, *Sports Law* (2nd ed., Palgrave Macmillan, 2013) 81. See further, J Anderson, 'Personal Injury Liability in Sport: Emerging Trends' (2008) 16 *Tort Law Review* 95, 112-13

<sup>45</sup> D Garratt et al, "'Safeguarding" sports coaching: Foucault, geneology and critique' (2012) 18(5) *Sport, Education and Society* 615, 626.

<sup>46</sup> J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 249; R Heywood and P Charlsh, 'Schoolmaster Tackled Hard Over Rugby Incident' (2007) 15 *Tort Law Review* 162, 171.

<sup>47</sup> J Steele, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010) 16; *Wilkin-Shaw v Fuller* [2012] EWHC 1777 (QB) [42] (Owen J).

<sup>48</sup> A McCaskey and K Biedzynski, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J. Sport L.* 7, 8.

<sup>49</sup> Duffy et al (n 4). The Magglingen Declaration is available online <[http://www.icce.ws/\\_assets/files/documents/Magglingen.pdf](http://www.icce.ws/_assets/files/documents/Magglingen.pdf)> accessed 2 February 2015.



related to: (i) coach education; (ii) clarity in the identification of coaching competencies; and (iii) the need to promote standards of ethical behaviour and the need for mechanisms for monitoring compliance.<sup>50</sup> Curiously, this shift towards professionalisation may be construed as an attack on the very ethos of community based volunteerism by some coaches,<sup>51</sup> there appearing to be some justification to the suggestion that the true nature of professionalism remains somewhat confused.<sup>52</sup> Indeed, there appears to be considerable force in Lyle's assertion that:

Coaching is not yet a formal profession; access/gateway requirements, a professional body with specific requirements for membership, self-regulation, the need for a licence to operate, and career structures and training are not yet in place. There are codes of ethics and conduct but, in the absence of a professional body, these are not implemented in any universally systematic fashion.<sup>53</sup>

It is hoped that this chapter's analysis of professional liability should prove instructive in contributing to discussions centred on coach education, coaching competencies, and the promotion of ethical behaviour, since fulfilment of the legal duty of discharging reasonable care may be regarded as consistent with the ethical obligation not to expose athletes to unreasonable risks of injury.<sup>54</sup> From the outset, this reinforces the necessity for coaches to be able to articulate what constitutes ethical practice, with concepts such as duty and obligations being fundamental to an understanding of ethical practice.<sup>55</sup>

The professional development and training of coaches must appropriately address the implications of relevant ethical considerations on coaching principles and

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<sup>50</sup> Duffy et al (n 4).

<sup>51</sup> Taylor and Garratt (n 4) 132.

<sup>52</sup> Taylor and Garratt (n 7) 101.

<sup>53</sup> J Lyle, 'Coaching philosophy and coaching behaviour' in N Cross and J Lyle (eds), *The Coaching Process: principles and practice for sport* (Butterworth-Heinemann, 1999) 44.

<sup>54</sup> M Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in R Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013) 216.

<sup>55</sup> Telfer (n 14) 211.

practice,<sup>56</sup> and more specifically, given the emerging relationship between the law of negligence and sports coaching, familiarise coaches with the legal duty of care owed to athletes. Problematically, such important considerations appear all too often to be relegated to a somewhat superficial mention within codes of conduct, the assumption seeming to be that ethical considerations will be understood and grasped intuitively.<sup>57</sup> As a result, the extent to which codes of conduct, codes of ethics and other similar corporate statements impact and shape the day-to-day practices of coaches is open to conjecture and debate.<sup>58</sup> However, when establishing the appropriateness of actions and decisions of sports practitioners, given the interconnectedness between ethics, law and prudence,<sup>59</sup> the concept of ethical practice demands more robust and systematic scrutiny. Advantageously, this would prove instructive in defining and informing reasonable and acceptable coaching practice. Duffy et al. have recognised the importance of the need for the legal and ethical aspects of sport coaching to become more enhanced topics within the CPD provision of coaches.<sup>60</sup> There is also corresponding evidence to indicate a demand from coaches for more training on health and safety issues, including risk management and (ir)responsible coaching.<sup>61</sup> In short, there appears strong endorsement for an increased awareness, knowledge and familiarity of the related developing case law by practitioners, since this would provide coaches with useful illustrations of what would likely constitute responsible and ethical coaching practice.

### 3.3 Coach Education, Training and Development

Somewhat reassuringly, it is suggested that greater emphasis is now being placed on the duty of care required by law during coach education courses.<sup>62</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid 210-11.

<sup>58</sup> Taylor and Garratt (n 7) 109.

<sup>59</sup> Telfer (n 14) 218.

<sup>60</sup> Duffy et al (n 4) 118.

<sup>61</sup> A Stirling et al, 'An Evaluation of Canada's National Coaching Certification Program's Make Ethical Decisions Coach Education Module (2012) 6(2) *International Journal of Coaching Science* 45, 46.

<sup>62</sup> Telfer (n 14) 210.



Notwithstanding such progressive developments, questions remain over the value of introductory coaching qualifications, often of between four and six hours duration, with successful certification frequently dependent on an attendance only basis.<sup>63</sup> Indeed, this general tendency to deliver coach education training programmes over short periods of time results in coaching certificates representing the minimum level of expertise at a specific level.<sup>64</sup> Additionally, in order to stay up-to-date, there are demands placed on coaches to avail of learning opportunities since the science of coaching continues to expand.<sup>65</sup> These factors appear probable obstacles to the achievement and maintenance of a level of specialist skill reflective of the ordinarily competent coach. In further elaborating on some of these very considerable limitations of coach education, training and accreditation Telfer indicates that:

Dealing with performers who are on the whole young and impressionable and led by coaches whose education and training may be limited to a mere handful of hours over a few weekends demonstrates a clear need for greater investment in the way in which sport seeks to develop expertise in their coaches. Expertise takes time to develop and there is certainly an argument that novice coaches should be made more aware of the limitations of coaching individuals or teams armed only with the most basic coaching level award. Although governing bodies of sport generally try to emphasise that an early coaching role should be that of supporting more qualified coaches, this is poorly regulated.<sup>66</sup>

These observations speak to the legitimate safeguarding of both athletes, often young and impressionable, and coaches, whose expertise must be commensurate to the level of coaching being delivered. Further, coaches must have an awareness and appreciation of their own limitations and developmental needs and priorities. Problematically, there is evidence to indicate that volunteers are less prepared to commit themselves to CPD opportunities than those in employment.<sup>67</sup> Further, whilst

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<sup>63</sup> Nash (n 21) 54.

<sup>64</sup> Trudel et al (n 31) 149.

<sup>65</sup> Ibid 149.

<sup>66</sup> Telfer (n 14) 211.

<sup>67</sup> H Campbell, 'Work with us', Presentation by Scottish Council for Voluntary Organisations (1999) cited in Nash (n 21) 50.

it has been recognised that required attendance at training courses may boost the confidence of some volunteers, 'this was countered by the belief that the additional burden in terms of time and cost would deter others'.<sup>68</sup> Research conducted with nineteen Scottish Governing Bodies of Sport revealed some widespread concern of a possible 'skills gap', whereby coaches discharge a function beyond that for which they are qualified.<sup>69</sup> Critically, Lyle and Cushion are also mindful of situations whereby coaches may operate in circumstances for which they do not possess the appropriate qualifications or experience.<sup>70</sup> Indeed, unqualified coaches working unsupervised with children represents a substantive ethical [and legal] issue.<sup>71</sup> In this situation, should an athlete suffer personal injury, the potential negligence liability of coaches is accentuated since the coach may lack the competence to discharge the standard of specialised skill and care required by law in the particular circumstances.

Intuitively, although the altruistic motives of volunteer coaches may encourage reluctance to politely refuse requests to coach in contexts extending beyond the coach's level of professional expertise, or competence, this must be resisted. Put bluntly, the law of negligence is premised on objective reasonableness. By analogy, although relating to the contributory negligence of an adult skier,<sup>72</sup> it appears plain that: '[t]he human reaction not to want to appear awkward, difficult or ... "faint-hearted" is quite understandable from a subjective viewpoint; but objective analysis does suggest that serious concerns must be ventilated'.<sup>73</sup> Accordingly, objective analysis of professional liability, in circumstances where coaches are exercising a specialist skill, demands that when coaches assume a particular coaching task there is a duty of care to discharge it properly.<sup>74</sup> As revealed in chapter 3, this would appear to

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<sup>68</sup> Groom et al (n 27) 58. The report recognising that in order for effective practical recommendations to be made, there is a need for further research into the training and support of volunteers (p. 71).

<sup>69</sup> Lynn and Lyle (n 28) 199.

<sup>70</sup> Lyle and Cushion (n 37) 247.

<sup>71</sup> Nash (n 21) 44.

<sup>72</sup> *Anderson* (n 42).

<sup>73</sup> *Ibid* [142]. Consequently, the claimant was found one third responsible for the accident.

<sup>74</sup> See for instance, *Fowles v Bedfordshire CC* [1996] ELR 51 (CA) P390. Discussed later.



remain the case despite engagement of s 1 of the Compensation Act 2006 and/or the Social Action, Responsibility and Heroism Act 2015.<sup>75</sup>

### 3.4 Ethical Practice

There is evidence to suggest that coaches develop some of their preliminary notions and conceptions of how to coach from experience as athletes.<sup>76</sup> Socialisation of coaches within respective sports is likely to shape perceptions of ethically correct approaches to coaching.<sup>77</sup> Nonetheless, relying on idiosyncratic, subjective and perhaps ill-considered judgements of acceptable practice, given the apparent lacuna in training focused on ethical issues, appears problematic.<sup>78</sup> Further, as pressures grow to optimise levels of performance, associated tensions relating to ethical and legal considerations are amplified.<sup>79</sup> Broadly speaking, as the principles of coaching are constantly assessed and revised,<sup>80</sup> so too is the legal standard of care required of coaches.<sup>81</sup> Arguably, this may prove precarious for talented and experienced coaches, perhaps even former professional athletes themselves, working in isolation or unreceptive to the latest developments in coaching and the law. This is likely compounded by practice ethics appearing to be an undervalued aspect of the 'craft' of coaching, perhaps indicative of a somewhat 'underdeveloped awareness, or understanding, of duties associated with professional practice'.<sup>82</sup> Accordingly, this chapter's critical examination of the issue of negligent coaching should inform coach education by: enabling the modelling and sharing of best practice; unpacking important legal and ethical concerns; and, further informing the classification of coaching as a

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<sup>75</sup> E.g., *Scout Association v Barnes* [2010] EWCA Civ 1476; *Uren v Corporate Leisure (UK) Limited* [2013] EWHC 353 (QB).

<sup>76</sup> Mallett (n 34) 122. See further, C Cushion et al, 'Coach education and continuing professional development: experience and learning to coach' (2003) 55 *Quest* 215; G Bloom, N Durand-Bush et al, 'The importance of mentoring in the development of coaches and athletes' (1998) 33 *International Journal of Sports Psychology* 410.

<sup>77</sup> Telfer (n 14) 216.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 217.

<sup>80</sup> T Cassidy et al, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009) 130-31; Taylor and Garratt (n 4) 124.

<sup>81</sup> See generally, Powell and Stewart (n 10) [2-135].

<sup>82</sup> Telfer (n 14) 211.

'profession'. These priorities are echoed by Duffy et al, reinforcing the necessity for coach education, training and systematic CPD to more fully embrace legal and ethical considerations in order to further enhance the professionalisation of coaching.<sup>83</sup>

Having contextualised and problematised sports coaching in relation to the law of negligence, the legal principles governing professional liability will next be critically analysed.

## 4. *Bolam* Test

### 4.1 General

The *Bolam* test may be regarded as a control device designed to set the limits of liability.<sup>84</sup> As a crucial preliminary issue, it should be noted that when courts inquire whether a defendant may have been careless and in breach of duty, ascertaining the standard of care required in law in the particular circumstances protects *both* claimants and defendants.<sup>85</sup> This benchmark of objective reasonableness is defined to safeguard the legitimate and genuine right of claimants (athletes) not to be exposed to unreasonable risks, but crucially, providing defendants (coaches) discharge and meet this standard of skill and care, there can be no liability in negligence. Nonetheless, since the law of tort's primary goal may be regarded as compensation,<sup>86</sup> operating in a contemporary social context mindful of a perceived 'compensation culture',<sup>87</sup> it is arguable whether the full significance of the standard of care's dual function and

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<sup>83</sup> Duffy et al (n 4) 104.

<sup>84</sup> P de Prez, 'Something "old" something "new", something borrowed ...The continued evolution of *Bolam*' (2001) 17 *Professional Negligence* 75; R Jackson, 'The professions: power, privilege and legal liability' (2015) 31(3) *Professional Negligence* 122, 133.

<sup>85</sup> Kidner (n 6) 23.

<sup>86</sup> de Prez (n 84) 84; P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed., Butterworths, 1999) 40; Lord Justice Jackson, 'Concurrent Liability: Where Have Things Gone Wrong?', Lecture to the Technology & Construction Bar Association and the Society of Construction Law, (30 October 2014) 11 <<https://www.judiciary.gov.uk/wp-content/uploads/2014/10/tecbarpaper.pdf>> accessed 20 August 2015. In this regard, tort law may be regarded as distributing loss, increasingly by means of insurance provision. Further, tort law can prove instrumental in setting acceptable minimum standards and practices by defining what might constitute reasonable skill and care in particular circumstances.

<sup>87</sup> A Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349, 350. See further, chapter 1, pp. 6-7.



capacity is always fully articulated or emphasised. To somewhat bluntly borrow a maxim from contract law, the standard of care may be regarded as a sword for claimants in seeking to establish breach, but correspondingly, a protective shield for defendants providing conduct and practices are essentially reasonable. At first glance, this may appear trite law. However, in emphasising the perspective of coaches, and this chapter's objective in seeking to be of practical utility and beneficial impact, considerable reassurance may be acquired from this knowledge and awareness. In short, providing coaches satisfy this threshold of regular, approved, responsible and justifiable practice, they should be protected and shielded from civil liability.

In this context, although the *Bolam* test may not formally be regarded as a 'defence',<sup>88</sup> successful satisfaction of the *Bolam* test by professionals essentially shields and defends practitioners from professional liability. On a purely technical analysis of the law of negligence, the court's scrutiny of the *Bolam* test relates to the control mechanisms of standard and care and breach, not partial or absolute defences, including contributory negligence and *volenti non fit injuria* respectively. However, adopting the viewpoint of coaches facing a professional liability action, reference to the *Bolam* test as a quasi-defence appears likely to be a source of readily understood encouragement, without fundamentally misrepresenting judicial reasoning or compromising the final judgments made by courts.<sup>89</sup> Simply applied, framing the *Bolam* test as a 'defence' encompasses the intricacies of contextualised factors informing determination of the applicable standard of care (e.g., when coaching children; coaching more hazardous activities). It also accounts for additional discrepancies between the legal principle of objective reasonableness and the sports torts related evidential threshold of 'reckless disregard',<sup>90</sup> without over-complicating

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<sup>88</sup> D Mangan, 'The Curiosity of Professional Status' (2014) 30(2) *Professional Negligence* 74, 85.

<sup>89</sup> A similar argument could be made in terms of addressing possible concerns held by coaches about legal liability more generally.

<sup>90</sup> *Caldwell v Maguire* [2001] EWCA Civ 1054 [11]; *Morrow* (n 42) [20]. See further, D McArdle, 'The Enduring Legacy of "Reckless Disregard"' (2005) 34(4) *Common Law World Review* 316; D McArdle and M James, 'Are you experienced? "Playing cultures", sporting rules and personal injury litigation after *Caldwell v Maguire*' (2005) 13(3) *Tort Law Review* 193.

matters for defendants. This is because reasonable and responsible coaching would be reflective of the full factual matrix of individual cases. In short, a detailed examination of the case law confirms adoption of practice found to be universal, approved and justifiable by professionals as affording conclusive and absolute protection from liability in negligence. As such, there appears some merit and usefulness in referring to the *Bolam* test as a 'defence' in appropriate circumstances, including the education, training and CPD of coaches.

The *Bolam* test is not confined to cases of medical negligence,<sup>91</sup> it being of general application when defendants exercise or profess to have a particular skill.<sup>92</sup> Despite attempts to define profession appearing inconclusive, should a coach be sued in negligence, the required standard of skill and care would be determined by reference to other members of the coaching 'profession', not the objective reasonable man on top of the 'Clapham omnibus'.<sup>93</sup> Simply applied, any profession requiring special skill, knowledge, or experience, including the coaching of sport,<sup>94</sup> requires a higher standard of care to be displayed than would be expected of the ordinary reasonable person.<sup>95</sup> This recognises the enhanced difficulty and skill in the working practices of professionals.<sup>96</sup> Crucially, the *Bolam* test would also appear to be applicable to individuals not regarded as being members of a profession but whose functions demand the exercise of a special skill.<sup>97</sup> This may include some volunteer coaches. Further, whether or not the coach may have some formal recognition of their specialisation would appear immaterial,<sup>98</sup> as would classification as amateur or professional,<sup>99</sup> the standard required remaining appropriate to specialists in that designated field. Accordingly, the core dispute in professional negligence cases tends

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<sup>91</sup> Lunney and Oliphant (n 19) 198.

<sup>92</sup> *Gold v Haringey Health Authority* [1988] QB 481 (CA) 489 (Lloyd LJ); *Adams v Rhymney Valley DC* (2001) 33 HLR 41 (CA) [57] (Morritt LJ); *Phelps v Hillingdon London BC* [2001] 2 AC 619 (HL).

<sup>93</sup> Powell and Stewart (n 10) [2-128]. Discussed later.

<sup>94</sup> E.g., *Fowles* (n 74); *Davenport* (n 42).

<sup>95</sup> Lunney and Oliphant (n 19) 198; Jones and Dugdale (n 9) [10-03].

<sup>96</sup> Mangan (n 88) 85.

<sup>97</sup> Lunney and Oliphant (n 19) 198.

<sup>98</sup> Powell and Stewart (n 10) [2-130].

<sup>99</sup> J Gardiner, 'Should Coaches Take Care?' (1993) 143 *NLJ* 1598.



to concentrate on determining what might constitute 'proper practice' or 'ordinary competence' with reference to the particular practices being contested.<sup>100</sup>

#### 4.2 'Reasonable Average'

Enunciation of the *Bolam* test over 25 years ago by Bingham LJ is highly informative and worth recalling in full:

a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average.<sup>101</sup>

Whilst reinforcing the fundamental barometer of the 'reasonable average', it is revealing that Bingham LJ's paragon of professionalism is committed to their own continuous improvement and ongoing (professional) development necessitated by relevant developments in their area of expertise. Further, this reasonably average person is ordinarily aware of deficiencies in their knowledge and the limitations on their skill. In a coaching context, this translates to the reasonable expectation that coaches will be committed to coach education, CPD and perform only at a level consistent with their competence, experience and qualifications.<sup>102</sup> Interestingly, as

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<sup>100</sup> M Brazier and J Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8(1) *Medical Law Review* 85, 87.

<sup>101</sup> *Eckersley v Binnie* [1988] 18 ConLR 1 (CA) 80 (Bingham LJ).

<sup>102</sup> Scrutiny of the actual post held by the coach, and the corresponding level at which the coaching is conducted, provides a crucial material factor to support the court in accurately defining the required standard of care in the circumstances. See, for instance, *Pitcher v Huddersfield Town Football Club* 17 July 2001 (QBD), Hallet J citing with approval *Wilsher v Essex Area Health Authority* [1987] QB 730 (CA) for authority that the level of performance (in this instance, a Nationwide Division 1 professional footballer) is a factor to be taken into account in assessing all the circumstances when determining the standard of care and skill expected.

performers progress to elite and excellence levels the required emphasis on more specialised training programmes creates new risks requiring coaches to ensure that they possess the necessary competence and expertise to operate safely in these amended circumstances.<sup>103</sup> For instance, determination of the range of acceptable increases in the intensity of training programmes for athletes of international potential may be best satisfied by a coach with the highest level of formal qualification.<sup>104</sup> Simply applied, the personified reasonably average professional would be sensitive to, and effectively account for, such a possible skills gap.

Further, in modern parlance, this reasonably average practitioner creates the impression of being an ordinarily alert and reflective practitioner, endorsing the assertion that the *Bolam* doctrine 'is not a licence for professionals to take obvious risks which can be guarded against'.<sup>105</sup> Put simply, as emphasised by *Bolitho v City of Hackney Health Authority*, the practices of this hypothetical reasonably average professional would no doubt be logically justifiable.<sup>106</sup> Correspondingly, there now appears an increasingly general trend for courts to more closely question the practices of the professions.<sup>107</sup> Although evidence of general and approved practice remains of significant importance, it is not automatically conclusive evidence of the exercise of due skill and care.<sup>108</sup> Indeed, although the law accounts for the considerable mechanisms of professional self-regulation,<sup>109</sup> courts may not be as hesitant to declare a widespread practice to be negligent as with cases (previously) brought against medical practitioners.<sup>110</sup> Following *Bolitho*, peer professional opinion which purportedly represents evidence of responsible practice can be discounted by the court

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<sup>103</sup> J Labuschagne and J Skea, 'The Liability of a Coach for a Sport Participant's Injury' (1999) 10 *Stellenbosch Law Review* 158, 166.

<sup>104</sup> See generally, *Davenport* (n 42) [59] (Owen J).

<sup>105</sup> *Adams* (n 92) [40] (Sir Christopher Staughton).

<sup>106</sup> *Bolitho (Deceased) v City of Hackney Health Authority* [1998] AC 232 (HL).

<sup>107</sup> *Powell and Stewart* (n 10) [2-128]; *Jackson* (n 5) 137.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Jones and Dugdale* (n 9) [10-03]. This lack of professional self-regulation appears to remain a major obstacle to the legitimate classification of sports coaching as a profession: see, J Lyle, *Sports Coaching Concepts: A Framework for Coaches' Behaviour* (Routledge, 2002) 203-05.

<sup>110</sup> *Jones and Dugdale* (n 9) [10-03].



in instances where that opinion is determined by the judge to be incapable of withstanding logical analysis, or is otherwise unreasonable or irresponsible. This may be of particular relevance to 'new' professions, including sports coaching, with validation of regular and ethical practices a key hallmark of professionalisation.<sup>111</sup> As a result, the outcome may be a more searching and rigorous judicial scrutiny of practice submitted to be proper or approved by coaches. More generally, an informed appreciation of this legal requirement for the practices of modern sports coaches to be reflective of ordinarily evolving and contemporary standards, should inform the shift towards professionalisation in coaching.

#### 4.3 Common practice

A coach would not be 'guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of (medical) men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view'.<sup>112</sup> Modern coaching methods and domains are often varied and complex, requiring 'structured improvisation' by coaches.<sup>113</sup> As in the related field of education, there will be occasions where substantiating a case of fault against coaches will be set against a backdrop of a variety of professional practices.<sup>114</sup> Put differently, in light of the dynamic environment in which coaches operate, it must always be appreciated that there may be a number of perfectly proper standards.<sup>115</sup> Accordingly, the discretionary professional judgement of coaches must be acknowledged and respected when defining a standard of skill and care representative of the prevailing standards of this particular 'art'.<sup>116</sup>

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<sup>111</sup> Telfer (n 14) 219.

<sup>112</sup> *Bolam* (n 1) 587 (McNair J).

<sup>113</sup> See generally, C Cushion and J Lyle, 'Conceptual development in sports coaching' Lyle and Cushion (n 7) 4.

<sup>114</sup> *Phelps* (n 92) 672 (Lord Clyde).

<sup>115</sup> J Montrose, 'Is Negligence an Ethical or a Sociological Concept?' (1958) 21 *Modern Law Review* 259, 262.

<sup>116</sup> See generally, de Prez (n 84) 84.

Despite these flexible parameters, or latitude afforded towards professional judgement, in *Woodroffe-Hedley v Cuthbertson*<sup>117</sup> the court had little difficulty in finding a professional mountain guide negligent for failure to take adequate safety precautions, leading to the death of another climber. Dyson J came to the clear conclusion that the guide owed a duty of care to the fellow climber,<sup>118</sup> and further:

[I]n deciding to dispense with the second screw, Mr Cuthbertson fell below the standard to be expected of a reasonably competent and careful alpine guide. He was also negligent when he compounded that error by his decision not to use a running belay. ... It is for the very reason that the consequences of a fall in such circumstances are so catastrophic that it is universally recognised good practice that two screws should be used in making a belay, and that running belays should be used.<sup>119</sup>

In crystallising a finding of negligence by benchmarking the acts or omissions of Mr Cuthbertson against that objectively expected of a reasonably competent mountain guide, the court acknowledged that a potentially catastrophic accident was plainly foreseeable. In other words, an ordinarily competent coach or instructor in the same circumstances, being aware of the importance of adopting recognised and approved practice, would have been expected to contemplate and anticipate that their acts or omissions were likely to result in very serious personal injury. Given the precise facts of *Woodroffe-Hedley v Cuthbertson*, and in particular, a failure to adopt regular and approved practice in the circumstances, establishing a breach of duty by the mountain guide appears somewhat straightforward. However, since the majority of cases that litigate may not be so clear cut,<sup>120</sup> a fuller analysis of the *Bolam* test is necessary in order to further clarify its application and the approach taken by courts when there may be a range of perfectly proper standards.

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<sup>117</sup> *Woodroffe-Hedley v Cuthbertson*, 20 June 1997 (QBD).

<sup>118</sup> *Ibid* 3.

<sup>119</sup> *Ibid* 7-8.

<sup>120</sup> R Heywood, 'The Logic of Bolitho' (2006) 22 *Professional Negligence* 225, 228.



#### 4.4 Analysis of *Bolam* Test

Two significant and interesting considerations revealed following a detailed examination of the *Bolam* test relate to, firstly, the approach of courts to the scope or latitude of discretionary professional judgement as approved in *Woodbridge School v Chittock*.<sup>121</sup> Secondly, and of considerable practical importance and merit in facilitating the use of the *Bolam* doctrine as a shield for defendants, concerns the issues of whether there is a necessary requirement for defendants to: (i) possess a recognised formal qualification; and, (ii) conduct a prospective conscientious analysis of the risks and benefits of a range of potential options or practices before making the decision or choice leading to the personal injury of the claimant. Critical scrutiny of case law determines whether failure to satisfy these preliminary requirements may in effect negate engagement of the *Bolam* 'defence'. These matters would likely be of crucial significance should coaches or instructors be sued in negligence. Accordingly, before conducting a detailed examination of the application of the *Bolam* test in the specific context of sports coaching, it is necessary to analyse the relevant legal principles established by the higher courts more generally.

The Court of Appeal's decision in *Woodbridge School v Chittock*, in recognising that the teacher's decisions when dealing with a sixth form student who had failed to follow instructions on a school ski trip were 'within a reasonable range of options',<sup>122</sup> appears to indicate that judges should afford appreciable leeway towards the professional judgement of teachers (and coaches). This was certainly the view advanced by counsel for the defendant ski instructor in *Anderson v Lyotier*.<sup>123</sup> A corresponding argument submitted in *Anderson* was that the decision, as to the suitability of the slope in relation to the ability and competence of the claimant, was 'not negligent within the well-known *Bolam* principle'.<sup>124</sup> This forced the court to address the fundamental issue of whether reliance on the *Bolam* test can be made in

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<sup>121</sup> *Woodbridge School v Chittock* [2002] EWCA Civ 915.

<sup>122</sup> *Ibid* [21].

<sup>123</sup> *Anderson* (n 42) [121]. Discussed later.

<sup>124</sup> *Ibid*.

circumstances where defendants may not have embarked upon a responsible decision-making process. This aspect of the *Bolam* test, or 'Rule',<sup>125</sup> led to a strong dissenting opinion in the Court of Appeal by Sedley LJ in *Adams v Rhymney Valley District Council*.<sup>126</sup> His Lordship was of the view that the *Bolam* test should have no relevance in a case where the defendant has failed altogether to exercise her/his professional skill, since a requirement of the *Bolam* test is that the defendant 'should have considered and reflected upon the alternative courses available and made a conscious choice between them'.<sup>127</sup> Nonetheless, in representing the majority view, Sir Christopher Staughton's judgment addresses both application of the 'Rule', and further, whether relevant professional qualifications are a precondition of the *Bolam* 'defence':

The key question is whether the *Bolam* test still applies, although the particular defendant did not in fact have the qualifications of a professional in the relevant field of activity, and although he did not go through the process of reasoning which a qualified professional would consider before making a choice. I know of no authority that the benefit of the *Bolam* test should be refused in either of those cases. Nor do I think that it should be refused.<sup>128</sup>

In concurring with this view, Morritt LJ continued:

If his action satisfies the *Bolam* test he is not liable: if it does not then he is liable however long and carefully he thought in advance about what to do. So in this case, the council is to be judged according to the standards of the reasonably skilful window designer and installer. Such a person would be entitled to the benefit of the *Bolam* test whether or not he had sat down and considered exactly which sort of lock to provide. The council is not to be made liable for selecting the same lock just because it did not make a reasoned choice.<sup>129</sup>

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<sup>125</sup> H Evans, *Negligence and process* (2013) 29(4) *Professional Negligence* 212, 222.

<sup>126</sup> Also authority for the 'Rule': *Goldstein v Levy Gee (A Firm)* [2003] EWHC 1574 (Ch). See further, Evans (n 125) 213.

<sup>127</sup> *Adams* (n 92) [19].

<sup>128</sup> *Ibid* [42]. This assumption was endorsed by Morritt LJ at [59].

<sup>129</sup> *Ibid* [65].



It has been suggested that utilisation of the 'Rule' promotes too lenient an operation of the *Bolam* test by failing to more firmly reflect the reasonable expectations of claimants, this being to the detriment of the applicable tort standard of professional liability.<sup>130</sup> Further, it can be argued that by concentrating on the outcome of the defendant's decision making process, as opposed to the reasonableness of this thinking, departs from 'common sense' notions of carelessness.<sup>131</sup> In this context, perhaps the principles of professional liability should be capable of regarding subjective carelessness, or flawed decision making, as a 'wrong', thereby establishing negligence if damage can be proved.<sup>132</sup> Indeed, there appears some merit to the submission that:

Whilst the defendant may have made no effort to comply with accepted standards of practice or to evaluate the proper course of action, the *Bolam* defence can be used as an escape route from liability if their conduct 'coincidentally' matches that of a responsible body of professional opinion. It is distasteful for negligence litigation, on facts where lives have been lost, to be successfully defended on the basis of 'coincidence' rather than 'competence'.<sup>133</sup>

Certainly, ordinarily competent coaches should not routinely seek to rely on the *Bolam* 'defence' on the basis of 'coincidence', it previously having been highlighted that empowering coaches to become critical, reflective and ethical practitioners should become more of a priority for coach education and CPD. This would ensure that the practices adopted were responsible and capable of withstanding logical scrutiny. Nonetheless, as a matter of legal principle and coherence, the *Bolam* test is a control device designed to protect the legitimate interests of both claimants and defendants.

Accordingly, whilst insisting that the particular conduct resulting in personal injury is ultimately responsible and consistent with that of the reasonably competent professional, the majority reasoning in *Adams v Rhymney Valley District Council* appears preferable. In practice, the 'Rule' is widely applicable and not confined to

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<sup>130</sup> Mangan (n 88) 86.

<sup>131</sup> de Prez (n 84) 88.

<sup>132</sup> See generally, de Prez (n 84) 89.

<sup>133</sup> Ibid 83.

particular professions,<sup>134</sup> affording some certainty and consistency to this aspect of professional liability. Indeed, in the main, it does not appear obviously unjust to adopt the 'Rule'.<sup>135</sup> Further, permitting reliance on the *Bolam* 'defence', despite the possibility that the thought processes of defendants may be regarded as inadequate or mistaken, represents a realistic and efficient approach by courts to this issue, thereby negating associated evidential difficulties in order to ascertain what might amount to diligent consideration.<sup>136</sup> Simply applied, the alternative approach, requiring inquiry into varying degrees of conscientious reasoning,<sup>137</sup> may be regarded as somewhat flawed by preferring 'form to substance'.<sup>138</sup> Consequently, and of considerable significance to defendant coaches and legal practitioners, application of the *Bolam* test should not be dependent on the actual possession of the relevant formal qualification, nor indeed is completion of reasoned and responsible decision-making a prerequisite of proper and approved practice.

At present, legal authority determines the following important implications regarding application of the *Bolam* test in cases of professional negligence: (i) the principles of professional liability apply to all individuals exercising a special skill, including volunteers; (ii) the *Bolam* test remains the applicable legal control mechanism for determination of the appropriate standard of care demanded in the circumstances, irrespective of whether or not the defendant possesses formal qualifications; (iii) common or universal practice *may*, essentially, provide a conclusive and absolute 'defence' in cases of professional negligence; and finally (iv) as in all instances of negligence liability, the specific context and particular facts of individual cases are of utmost importance. Having clarified these legal principles of the law in England and Wales, this chapter next analyses these presumptions in light of the developing jurisprudence regarding the professional liability of sports coaches and instructors.

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<sup>134</sup> Evans (n 125) 213.

<sup>135</sup> Ibid 217.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Adams (n 92) [50] (Sir Christopher Staughton). Interestingly, His Lordship also noted that such a temptation was sometimes apparent in the world of health and safety.



## 5. Case Law Analysis

### 5.1 Principles of Professional Liability Applied to Volunteers

It has previously been argued that imposing a duty of care on rugby union referees is harsh, unjust and would lead to undesirable 'defensive' refereeing.<sup>139</sup> Nonetheless, despite further arguments indicating that holding that an amateur referee owes a duty of care to the players under his charge would have a 'chilling effect', by discouraging volunteers from being prepared to serve as referees, the Court of Appeal has ruled otherwise.<sup>140</sup> As highlighted in chapter 1, it is now well established that the ordinary principles of the law of negligence are applicable in the context of sport,<sup>141</sup> including claims brought against volunteer<sup>142</sup> and employed coaches and instructors.<sup>143</sup> Interestingly, *Scout Association v Barnes*<sup>144</sup> provides a further recent Court of Appeal decision concerning the negligent conduct of volunteer scout masters. The determining matter in these cases is not whether the coach, referee or leader sued may be a volunteer, 'professional amateur', or professional, but rather whether reasonable skill and care was exercised in the particular circumstances. In short, the legal principles of professional liability would apply should a volunteer coach be sued in negligence, the incumbent standard of skill and care being that of the reasonably average competent and responsible coach operating at that level. *Fowles v Bedfordshire CC*<sup>145</sup> and *Petrou v Bertoncello*<sup>146</sup> are illustrative of how the usual principles of professional negligence would be applicable in circumstances where defendant coaches are coincidentally volunteers.

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<sup>139</sup> *Smoldon v Whitworth* [1997] ELR 115 (CA) P122-P123.

<sup>140</sup> *Vowles* (n 2) [49].

<sup>141</sup> E.g., *Caldwell* (n 90); *Condon v Basi* (1985) 2 All ER 453 (CA). See generally D Griffith-Jones, 'Civil Liability Arising Out of Participation in Sport' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008) 715 & 740.

<sup>142</sup> E.g., *Petrou* (n 42); *Fowles* (n 74). Interestingly, in *Petrou*, *Fowles* was cited as authority for the fact a volunteer can owe a duty of care arising out of his or her voluntary assumption of a responsibility within a club. Whilst a close reading of *Fowles* reveals that the defendant trainee youth worker was technically employed by Bedfordshire CC, the legal principle advocated remains valid.

<sup>143</sup> E.g., *Davenport* (n 42); *Cox* (n 42).

<sup>144</sup> (n 75).

<sup>145</sup> *Fowles* (n 74).

<sup>146</sup> *Petrou* (n 42).

In finding a breach of duty in *Fowles v Bedfordshire CC*, the Court of Appeal identified inadequate supervision, defective teaching and a failure to stress the safety requirements of the forward somersault by the defendant trainee youth worker and the Bedford Youth House. Their Lordships placed considerable force on the fact that the defendant was not qualified to teach gymnastics,<sup>147</sup> particularly to ‘the level required and *recognised by independent bodies* for the teaching of the forward somersault’.<sup>148</sup> More specifically, Millett LJ stated:

He [the defendant] was not qualified to teach the forward somersault, and he did not warn Mr Fowles of the risks or impress upon him that he must never attempt the manoeuvre except in the presence of a qualified supervisor. Having assumed the task of teaching Mr Fowles how to perform the forward somersault, the defendants voluntarily assumed *a duty to teach him properly* and to make him aware of the dangers. ... Anyone who assumes the task of teaching the forward somersault is under a duty not only to teach the technique involved in the exercise and to explain the dangers associated with its performance but to *teach the steps* which must be taken to prepare for it, including the laying of the crash mat, and to explain the dangers of performing the exercise in an inappropriate environment.<sup>149</sup>

As noted by the claimant’s expert witness, the requirements to take the coaching award which covers the forward somersault as part of its syllabus are highly specialised and very specific.<sup>150</sup> The court recognised that the forward somersault is the most dangerous of the common gymnastic manoeuvres with a clearly foreseeable risk of serious injury. Accordingly, teaching the somersault properly and following the necessary preparatory steps requires: careful sequential and progressive learning; qualified supervision; the presence of ‘spotters’ who can intervene to provide additional immediate support; and, recommended and approved use of equipment, including mats.<sup>151</sup> This demands the exercise of special skill and a degree of competence not ordinarily possessed by the man on the top of the ‘Clapham omnibus’.

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<sup>147</sup> *Fowles* (n 74) P382. Otton LJ describing this as a ‘significant’ fact.

<sup>148</sup> *Ibid* P385 (emphasis added).

<sup>149</sup> *Ibid* P390 (emphasis added).

<sup>150</sup> *Ibid* P382.

<sup>151</sup> *Ibid* P383; P385; P390.



Crucially, the standard of care expected of the defendant youth worker in discharging his duty of care, irrespective of whether he was employed or acting as a volunteer, was that of the ordinarily competent gymnastics coach professing to have the necessary special skill. Entirely consistent with the *Bolam* test, the court's emphasis on the standard of skill required, and approved by independent bodies, confirms this as an interesting instance of professional liability.

Despite it being generally well settled that application of the ordinary principles of the law of negligence operate in the context of sport, *Petrou v Bertoncello*<sup>152</sup> provides a highly intriguing illustration of the emerging issue of negligent coaching. More specifically, it provides stark clarification that negligence actions brought against volunteer coaches would most probably be approached, and framed, in terms of professional liability. Both the claimant and defendants in *Petrou v Bertoncello* were members of the Dunstable Hang-gliding and Paragliding Club, an unincorporated members' club. On 10 October 2009, the claimant suffered catastrophic personal injury when he collided with the wing of the first defendant's paraglider. The first defendant was completing an 'Airspace' test, as required by the Club's rules, this familiarisation flight being conducted by the second defendant, the Club Chairman and qualified club coach. The third defendant was at all material times the Club's Safety Officer and also a qualified coach. The coaching awards held by the second and third defendants were granted by the British Hang-Gliding and Paragliding Association (BHPA).

Curiously, defence counsel in *Petrou v Bertoncello* applied for the judge to strike out the case, or for the court to award summary judgment, submitting that no duty of care is owed by the members of an unincorporated association to each other.<sup>153</sup> This appears somewhat surprising following the propositions outlined by Morland J, at first instance in *Vowles v Evans*, including:

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<sup>152</sup> *Petrou* (n 42).

<sup>153</sup> *Ibid* [18].

(i) At common law an unincorporated members club or its officers or committee members owe no duty to individual members except as provided by the Rules of the organisation.

(ii) An individual member of a members club may assume a duty of care to another or be found to owe such a duty according to ordinary principles of law and in those circumstances the fact of common membership of the association will not confer immunity from liability upon the member sued.

(iii) Whether or not such a duty is held to exist would depend upon all the circumstances of the case.<sup>154</sup>

As in *Fowles v Bedfordshire CC*, it appears plain that in assuming the duty to conduct the 'Airspace' test, it was incumbent on the second defendant coach to complete this duty properly. Accordingly, it appears eminently sensible that counsel for the claimant submitted three strands to the claimant's case on liability:

- (i) the personal claim against the first defendant;
- (ii) the personal claims against the 2nd and 3rd defendants who were alleged to have failed to properly brief, assist, observe and/or supervise the 1st defendant and so being in breach of their duty of care arising from their roles as both Club coaches and Club office holders;
- (iii) what is called the 'organisational' claim against the 2nd and 3rd defendants – it being alleged that the club acting through its officers, negligently failed to operate and/or enforce separately landing and take-off area and so created a danger of collision such as that which occurred in this case; it is alleged that as officers of the club the 2nd and 3rd defendants were responsible for ensuring that the paragliding was organised in a safe way.<sup>155</sup>

Of particular interest for present purposes is the second strand to the claimant's submissions, this being a straightforward issue of alleged professional negligence. This professional liability is premised on the fact 'that by volunteering to act as BHPA Club

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<sup>154</sup> *Vowles v Evans* [2002] EWHC 2612 [86] (Morland J).

<sup>155</sup> *Petrou* (n 42) [22].



coaches and as officers of the club, the 2nd and 3rd defendants voluntarily assumed a responsibility to carry out duties which included briefing, assessing, coaching, supervising, observing and guiding new members with reasonable care and skill'.<sup>156</sup> This reasoning appears convincing, and unsurprisingly, in ruling that the case for the 2nd and 3rd defendants on vicarious liability appeared to be a strong one on paper,<sup>157</sup> Griffith Williams J concluded that there were indeed reasonable grounds for believing the case required a full investigation into the facts to avoid the risk of summary injustice.<sup>158</sup> Interestingly, this case ultimately settled on very favourable terms for the claimant at a mediation about two weeks before the trial date.<sup>159</sup>

Although cases such as *Petrou v Bertoncello* may ultimately turn on the actions of the first defendant, and despite this judgment solely concentrating on preliminary issues, the scope for negligence liability suits being brought against volunteer coaches should not be underestimated. This is particularly the case when the vast majority of negligence claims settle before proceedings are issued or going to court,<sup>160</sup> with contested and reported cases providing only a small insight of the extent of claims brought against coaches for athlete injury.<sup>161</sup> Correspondingly, the stress and trauma endured by defendants in similar circumstances is likely to be considerable, with perhaps the most ignored injury of a claim in negligence being the emotional injury caused to the defendant(s).<sup>162</sup> In these circumstances, insurance appears necessary but not always sufficient in safeguarding coaches and instructors.<sup>163</sup> *Petrou v Bertoncello* provides a modern and important reminder that for both amateur and professional coaches, the benchmark of reasonableness against which their conduct would be measured is premised on the standard of skill and care of the ordinarily

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<sup>156</sup> Ibid [27].

<sup>157</sup> See further, chapter 1, pp. 37-38.

<sup>158</sup> *Petrou* (n 42) [35]-[36].

<sup>159</sup> The author wishes to thank Mr John Kimbell, counsel for the claimant, for providing this information by email correspondence of 20 January 2015. The case was settled by insurance companies.

<sup>160</sup> Lord Dyson (n 41).

<sup>161</sup> Greenfield (n 40) 117.

<sup>162</sup> C Harris et al, 'Professional Negligence: When Practice Goes Wrong' (2006) 40 *The Annals of Pharmacotherapy* 1377, 1381.

<sup>163</sup> Partington (n 37) 240.

competent coach exercising a specialist skill, regardless of whether or not they might be amateur. The proceeding analysis indicates that for some coaches, most typically those functioning as volunteers, satisfying this heightened standard of care may prove problematic.

## 5.2 Distinctions Between Formal Qualifications and Experience

Due to the provision of sporting opportunities in the UK being heavily dependent upon the involvement and commitment of volunteer coaches, coaching remains largely unregulated and lacks a commonality of occupational practice. This is illustrated by the fact that around seventy six percent of coaches are volunteers, including some parents, with approximately half of the coaches in this jurisdiction not holding a coaching qualification. Importantly, attainment of a formal coaching qualification, delivered by a responsible and recognised body such as a NGB, is a strong indicator of relevant competence and specialist skill. This was made plain when the Court of Appeal was required to consider the teaching of a gymnastics forward somersault in *Fowles v Bedfordshire CC*. Nonetheless, not all cases will be so clear cut, there being a wide range of reasons why experienced and highly proficient coaches may not always become formally accredited at all, or alternatively, at a level reflective of their expertise. Similarly, the typically unregulated nature of coaching appears somewhat deficient in preventing coaches, perhaps with entry level type qualifications, operating at levels beyond their level of recognised competence. In the unfortunate circumstances whereby an athlete may suffer serious personal injury, and legitimately seek redress through the courts, determining the relevance of the coach's previous experience(s), and the possible existence of a skills gap, requires careful scrutiny of the full factual circumstances. Although judges will often be equipped with the opinions of experts in the relevant field regarding what constitutes safe practice,<sup>164</sup> this poses a difficult challenge for courts, often compounded by the specificity of sport. Importantly, despite coaching being regarded as a 'new' profession, in applying the

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<sup>164</sup> Brazier and Miola (n 100) 87.



principles of professional liability, as with architects, solicitors and doctors, a coach should not be viewed as incompetent just because the judge fancied 'playing' coach.<sup>165</sup> As with other learned professions, judges lack the required qualifications and expertise to appropriately define proper coaching practice,<sup>166</sup> a particularly pertinent issue in the absence of formal accreditation.

On this matter, the Court of Appeal in *Smoldon v Whitworth* was faced with conflicting arguments about whether the required competence of a rugby union referee should be determined by the qualification held or the level of sporting performance at which the special skill was being employed:

The plaintiff submitted that the level of skill required was determined by the function a referee was performing and not by his grade: accordingly, it was suggested that the level of skill required was that reasonably to be expected of a referee refereeing an Under 19 Colts match in October 1991, irrespective of the grade of the referee. In the present case, this difference of approach is academic, since the grade which the second defendant held (C1) was entirely appropriate to the match which he was refereeing. This is not a case of a referee taking charge of a match above his professed level of competence. We prefer the plaintiff's formulation, but we do not think it matters.<sup>167</sup>

In delivering the court's judgment, the Lord Chief Justice disregarded the case as being an instance of a possible skills gap. The qualification held by the referee was entirely commensurate to the level of match he was officiating. Nonetheless, and although obiter dictum, the Court of Appeal endorsed the view that the level of skill required in the circumstances is to be determined by the function a referee was performing and not by her/his grade.<sup>168</sup> Following *Wilsher v Essex Area Health Authority*,<sup>169</sup> this reasoning seems correct.<sup>170</sup> Applying this formulation in a coaching context enables

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> *Smoldon* (n 139) P139.

<sup>168</sup> This same reasoning was recently adopted by Judge Lopez in *Bartlett v English Cricket Board Association of Cricket Officials*, 27 August 2015, (County Court (Birmingham)).

<sup>169</sup> *Wilsher* (n 102).

<sup>170</sup> See further, N Partington, "It's just not cricket". Or is it? *Bartlett v English Cricket Board Association of Cricket Officials* (2016) 32(1) *Professional Negligence* 75 (note), 79.

account to be taken of both formal qualifications and the level of performance at which the specialist skill is employed.<sup>171</sup> The diverse composition of the coaching 'workforce', and lack of commonality of occupational practice, also endorses this approach. Further, and as previously highlighted, volunteers may not always be in a position to fully engage with education and training opportunities,<sup>172</sup> with the balance between formal qualifications and practical experiences in this area unlikely to resemble more traditional and established professions.<sup>173</sup>

In appearing to further develop this theme in *Vowles v Evans*,<sup>174</sup> the Court of Appeal regarded the discussion in *Smoldon v Whitworth*, as to whether the level of skill to be expected of a referee depended upon the grade of the referee, or upon the level of match s/he was refereeing, as being inconclusive.<sup>175</sup> In delivering the court's judgment, Lord Phillips MR stated:

There is scope for argument as to the extent to which the degree of skill to be expected of a referee depends upon the grade of the referee or of the match that he has agreed to referee. In the course of argument it was pointed out that sometimes in the case of amateur sport, the referee fails to turn up, or is injured in the course of the game, and a volunteer referee is called for from the spectators. In such circumstances the volunteer cannot reasonably be expected to show the skill of one who holds himself out as referee, or perhaps even to be fully conversant with the laws of the game.<sup>176</sup>

The first limb to this statement, referring to the necessary degree of skill in the particular circumstances, appears to be a restatement of the same court's observations in *Smoldon v Whitworth*, without expressing a preference. For the reasons outlined above, it is asserted that the correct approach is to focus on the level of performance, competition or match. More problematically, though perhaps intended to provide

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<sup>171</sup> For instance, see *Davenport* (n 42) [59], the court taking account of the athlete's ability and aspirations and the fact that David Farrow was a level 4 coach (the highest athletics award available at the time of the alleged breach of duty in 2004).

<sup>172</sup> *Campbell* (n 67) 50.

<sup>173</sup> *Duffy et al* (n 4) 110.

<sup>174</sup> *Vowles* (n 2).

<sup>175</sup> *Ibid* [27].

<sup>176</sup> *Ibid* [28].



reassurance to volunteers involved in the provision and delivery of sporting activities, the second limb of this statement, concerning volunteers in amateur sport, cannot be correct. Simply applied, this submission by Lord Phillips appears to conceal the fact that an individual assuming a duty requiring the exercise of a special skill would be subject to the ordinary principles of the law of negligence if sued.<sup>177</sup> In short, an individual volunteering to step in at short notice to referee, in an effort to prevent cancellation of a fixture, is under a duty to do so *properly*. As such, this becomes an (albeit unusual) issue of professional liability. Since parents often volunteer to become involved in sport to support involvement of their children, it is forcefully submitted that they should only be prepared to coach (or referee) should they possess the skill of the ordinarily competent coach (or referee). In protecting the legitimate safety and welfare interests of both athletes and volunteer coaches, this is entirely reasonable and an accurate representation of legal expectations. Subjectively speaking, there will no doubt be highly committed and enthusiastic volunteers prepared to step in at a moment's notice in order to unselfishly prevent cancellation of matches and practice sessions. Nonetheless, in objectively determining if the standard of skill or care has fallen below that expected in the particular circumstances, it appears that courts may place limited weight on the positive intentions of highly committed volunteers.<sup>178</sup> In short, it is imperative that all coaches are fully aware of their limitations and only operate at levels entirely commensurate with their expertise and competence. Although formal qualification and accreditation remains the ideal indicator of this skill, *Wilkin-Shaw v Fuller*<sup>179</sup> provides a recent illustration of the approach taken by courts when competence is not readily demonstrable by means of formal qualifications.

The first defendant teacher in the tragic case of *Wilkin-Shaw v Fuller* was responsible for the training of pupils for the Ten Tors Expedition on Dartmoor. Since the Kingsley School Bideford Trustee Co. Ltd., as employer, would be vicariously liable

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<sup>177</sup> Partington (n 170) 79-80.

<sup>178</sup> E.g., *Scout Association* (n 75).

<sup>179</sup> *Wilkin-Shaw* (n 47).

for the negligent acts or omissions on the part of the first defendant, Owen J at first instance determined that:

the school was under a duty to ensure that the first defendant was competent to organise and to supervise the training, and that the team of adults assisting him in the training exercise had the appropriate level of experience and appropriate level of competence to discharge any role required of them.<sup>180</sup>

Problematically, although the experts agreed that formal qualifications, including for instance, the Walking Group Leader Award, was reflective of the standard against which the defendants should be judged, the first defendant did not hold any formal qualifications relevant to such activities.<sup>181</sup> Significantly, although recognising that formal qualifications represent the easiest way to demonstrate competence, the High Court acknowledged that qualifications were not the only means to do so.<sup>182</sup> The competence of the first defendant to act as a team leader was ultimately based on his experience and the measures taken to prepare the group for the Ten Tors.<sup>183</sup> Consideration of the full factual circumstances of negligence claims brought against coaches would likewise be expected to account for the experience levels of the coach. This is entirely consistent with Lord Bingham's observations in *Smoldon v Whitworth*, it clearly being feasible that highly competent and proficient coaches, though possessing experience commensurate to the coaching being conducted, may lack official qualifications relevant to this same level. Although this logical and common-sense approach by the judiciary should provide some reassurance to coaches, formal qualification remains the 'gold standard' in evidencing competence and every effort should be made to promote formal accreditation of all coaches. Consequently, before a person can be referred to as a coach, every reasonable attempt must be made to ensure the achievement of appropriate minimum criteria, with the monitoring of such

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<sup>180</sup> Ibid [40].

<sup>181</sup> Ibid [56].

<sup>182</sup> Ibid [57].

<sup>183</sup> Ibid [59].



compliance, and removal of related barriers and obstacles, an important priority for NGBs and scUK (sports coach UK).<sup>184</sup>

### 5.3 Common Practice ‘Defence’

The approaches and methods adopted by ordinarily competent professionals exercising specialist skill is underpinned by regular, approved and responsible practice. Since this common practice would be logically justifiable, should an athlete suffer personal injury whilst under the coach’s charge, customary practice, so defined, would provide a strong indication of reasonable coaching and instructing.<sup>185</sup> In such circumstances, it would be extremely difficult for claimants to establish that the coach had failed to exercise reasonable skill and care. As revealed in chapter 1, the fashioning of the legal test for negligence in the particular circumstances of sports instructing (and coaching) was constructed in *Morrow v Dungannon and South Tyrone BC* as follows:

In arriving at the standard appropriate in any given case the court will take into account the prevailing circumstances including the sporting object, the demands made upon the participant, the inherent dangers of the exercise, its rules, conventions and customs, the standard skills and judgment reasonably to be expected of a participant and the *standards, skills and judgment reasonably to be expected of someone such as the defendant* and Mr Taffee in instructing monitoring and supervising the plaintiff.<sup>186</sup>

Put simply, providing the standards, skills and judgement expected of the sports instructor were reasonable, there would be no breach of duty. Viewed somewhat differently, in *MacIntyre v MoD*, the actions of the climbing leaders were to be ‘judged by the standards of the reasonable climbing leader in such circumstances. It is not sufficient to show that a different decision might have been better. Rather the test is whether no reasonable climbing leader would have done what they did’.<sup>187</sup> Subsequently, the threshold of reasonable coaching should only be breached in

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<sup>184</sup> See generally, Nash (n 21) 54.

<sup>185</sup> E.g., *Davenport* (n 42) [59]; *Morrow* (n 42) [27]-[30].

<sup>186</sup> *Morrow* (n 42) [20] (Gillen J) (emphasis added).

<sup>187</sup> *MacIntyre* (n 42) [70].

circumstances where no other reasonable coach would have done what the defendant did.<sup>188</sup> Also, given the courts' recognition of the professional judgement of expert practitioners, with this margin of appreciation endorsing decision making 'within a reasonable range of options', at first glance, satisfying this benchmark of the reasonably average coach does not appear particularly onerous. Indeed, as with cases of medical negligence pre-*Bolitho*, this creates the impression that providing a coach might be able to find an expert from the field to endorse her/his actions or omissions, negligence liability would be prevented. However, and unsurprisingly, this represents a dangerous oversimplification of the approach taken by the judiciary. Since the shift towards the professionalisation of sports coaching continues to be a work in progress, unlike evaluations of due care and skill exercised by medical practitioners, judges may not be so hesitant to declare a widespread practice employed by some coaches to be negligent.<sup>189</sup> Three cases are critically examined to illustrate this important point, whilst interestingly, fuller analysis of the most recent, *Anderson v Lyotier*, also uncovers consideration of application of the 'Rule' in the circumstances of sports instructing.

In *Cassidy v Manchester CC*<sup>190</sup> the claimant suffered a fracture to her left elbow during a game of indoor hockey in a PE lesson. The personal injury was found to be caused by the inappropriate positioning of a bench, being used as a goal, since the bench was not placed close enough to the gymnasium wall. The *Bolam* proposition was submitted on behalf of the teacher (and school) claiming use of a bench in this way was the normal and common practice in PE classes throughout the country, and further, this practice had been taught at the training college of the teacher in charge of PE at the school, and was not unsafe. Simply applied, by taking a medical analogy, defence counsel suggested that the propriety of such practice was endorsed by a respected body of opinion, thereby cementing this as an instance of an unfortunate accident during responsible and approved practice. In emphasising a crucial distinction between practice universally adopted, and regular practice that may not be logically justifiable,

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<sup>188</sup> Also see, *Woodbridge School v Chittock* (n 121) [21].

<sup>189</sup> See generally, Jones and Dugdale (n 9) [10-03].

<sup>190</sup> *Cassidy v Manchester CC*, 12 July 1995 (CA).



Hutchison LJ noted that it was of particular significance that there was not 'evidence that the use of the bench in this way was *universal* throughout the country. Had there been, the judge would have been faced with a different picture'.<sup>191</sup> Correspondingly, in *Villella v North Bedfordshire BC*,<sup>192</sup> a trampoline coach was found negligent for allowing a performer who was 9 ½ years of age to trampoline in bare feet, despite expert and credible evidence from the Secretary and Coaching Development Officer of the British Trampoline Federation, a previous senior national coach, endorsing such practice.

More recently, in *Anderson v Lyotier* the actions of the ski instructor, in light of the joint statement of the expert witnesses, was argued to be 'within a range of reasonable options'. When considering the suitability of this off-piste section of terrain for the claimant, the experts' joint statement concluded that:

We are agreed that for at least some of the group members the slope was indeed a suitable choice. However ... the instructor's judgement must always take into account the needs of the weakest member of the class. It is the opinion of Mr Exall that it was more likely than not that the slope was beyond the capabilities of the Claimant (and his wife) under the circumstances of the day. Mr Foxon and Mr Shedden on the other hand believe that it is more likely than not that at the time of the accident, the slope was suitable for the Claimant, albeit towards the upper end of what he would have been capable of descending.<sup>193</sup>

This statement by the expert witnesses suggests that a reasonable instructor in the same circumstances may indeed have acted consistently with what the defendant instructor had done. Accordingly, the core dispute in this case of professional liability centred on just what constituted proper practice or ordinary competence in relation to the suitability of this off-piste skiing for the claimant.<sup>194</sup> In the particular circumstances of this individual sporting activity, a technical analysis of what might amount to accepted practice appears problematic, it being difficult to satisfy the

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<sup>191</sup> Ibid (emphasis added).

<sup>192</sup> *Villella v North Bedfordshire BC*, 25 October 1983 (QBD).

<sup>193</sup> *Anderson* (n 42) [90].

<sup>194</sup> See generally, Brazier and Miola (n 100) 87.

implication that the procedure adopted by the ski instructor was (or ought to have been) widely followed.<sup>195</sup> The particular off piste slope; the snow conditions on the day of the accident; the previous experience of the claimant; the ability of the claimant; the previous sequential and progressive learning achieved in preparation for this attempt; and, the previous experience (and knowledge) of the instructor gained from taking other groups on this particular run, represent a non-exhaustive list of factors, or external variables indicative of many sporting activities, consideration of which would suggest that it may not always be possible to define approved practice which is widely followed.<sup>196</sup> Nonetheless, this does not signify an opportunity for the judge to 'play' at being an instructor or coach. Although the court remains the final arbiter, due regard and critical scrutiny must be made of the expert witness testimony. Accordingly, a form of risk-benefit analysis is employed by the court to weigh expert evidence.<sup>197</sup> Ultimately, in finding the ski instructor liable in negligence for the catastrophic personal injury suffered by the claimant when he collided with a tree, Foskett J held that the particular slope in question was a 'step too far', being beyond the capability of the defendant (and other members of the adult group), thereby creating a foreseeable risk of serious injury.<sup>198</sup> In short, the judge was not convinced that this particular practice of the instructor was reasonable, despite the joint statement of the experts indicating that the conduct of the instructor was not illogical, having focused on a type of risk-benefit analysis of the experts.<sup>199</sup>

This rigorous judicial scrutiny of expert evidence would be expected in instances where the defendant's conduct is not criticised by any expert evidence.<sup>200</sup> Put simply, the uniqueness and specificity of the particular sporting activity, combined with a lack

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<sup>195</sup> See generally, Jones (n 3) 240.

<sup>196</sup> This reinforces the merits of the proposition that the decisions of coaches should be regarded as responsible when they fall within a reasonable range of options.

<sup>197</sup> Jones (n 3) 239.

<sup>198</sup> Anderson (n 42) [118].

<sup>199</sup> Ibid [72], [77], [81], [85]-[96], [113], [117] concluding at [123]: 'Mr Shedden [the expert instructed on behalf of the ski instructor's insurers] said that he continued to support the view that the slope was suitable for the Claimant, but for the reasons I have given I do not consider that that view can survive the emergence of the oral evidence in the case'.

<sup>200</sup> Jones (n 3) 239.



of uniform standards for coaches, may on occasions, narrow reliance on the *Bolam* test in the context of sports coaching. Nonetheless, there remain activities, particularly those involving the teaching of hazardous activities, when a universal practice is recommended by a responsible body as in, for instance, *Woodroffe-Hedley v Cuthbertson* and *Fowles v Bedfordshire CC*. Further, the strong justification that the coach's decisions in the particular circumstances were 'within a reasonable range of options', represents a fluid and malleable variant of the *Bolam* test which is well suited to the specific circumstances of sports coaching. Crucially, for this to bite, other responsible and respected coaches would be required to endorse the practice utilised. It is submitted that in circumstances where coaches adopt universal and responsible practice, the *Bolam* test should operate as an absolute justification. Conversely, engagement of the more subjective *Woodbridge* principle appears more reliant on judicial discretion, and as such, may be potentially more difficult for coaches to avail of.

Consistent with this chapter's foregoing analysis, Buckley indicates that even if a coach had failed to balance the risks involved with a particular activity, s/he would still be able to invoke the *Bolam* principle in her/his defence.<sup>201</sup> Curiously, in *Anderson v Lyotier*, Foskett J highlighted how this may be problematic when stating, 'I do not see that enunciation of the [*Bolam*] test as having much application in a situation such as this where ... the evidence does not permit me to find that M. Portejoie did weigh up the risks and benefits of what he asked the group to do'.<sup>202</sup> Following *Adams v Rhymney Valley District Council*, it is respectfully submitted that this reasoning seems flawed. It is not a requirement of the *Bolam* test that the reasoning of a coach or instructor, in arriving at a decision as to what amounts to proper practice in the circumstances, must be adequate. The court's inquiry should centre on the ultimate conclusion and not the decision-making process underpinning this.<sup>203</sup> Although on the

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<sup>201</sup> R Buckley, *The Law of Negligence* (4th ed., Butterworths, 2005) 45.

<sup>202</sup> *Anderson* (n 42) [123] (Foskett J). This argument by counsel for the defendant instructor to some extent based on *Woodbridge School v Chittock* (n 121) [18].

<sup>203</sup> In *Anderson* (n 42), for the *Bolam* defence to have had any chance of succeeding, the ski instructor was expected to have conducted a 'prospective conscientious analysis of [the athlete's] capacity to undertake' the physical activity (at [112]), this evidential threshold not being met on the facts.

facts of *Anderson v Lyotier* this would not appear to have been the pivotal issue, the slope determined by the judge to be beyond the capability of the claimant, prematurely discounting the *Bolam* doctrine signifies a disservice to the application of the principles of professional liability. Whilst this chapter contends that the *Bolam* test remains an instructive and valuable tool in protecting defendant coaches from liability in negligence,<sup>204</sup> in instances where coaches may be regarded as having made an error of judgement, further detailed analysis of whether the injury suffered by the claimant was reasonably foreseeable may prove necessary.<sup>205</sup>

Pragmatically, to maximise opportunities to avail of the *Bolam* 'defence', coaches should always be advised to balance the benefits of the activity with the reasonably foreseeable harm, this acknowledged as being routine good practice. This would ensure that the practice adopted by the coach is not only recognised and approved, but is capable of being justified and withstanding logical analysis. Effectively, this requires a two stage test, the second limb of 'justifiable' requiring coaches to operate as critical and reflective practitioners, and being potentially difficult to satisfy for coaches failing to keep up-to-date with their own CPD in order to keep abreast of the latest coach education and training. Significantly, such an approach would ensure that negligent entrenched practice should be prevented.<sup>206</sup>

#### 5.4 Specific Context of Sports Coaching

According to Lord Steyn, '[i]n law context is everything'.<sup>207</sup> Certainly, the context of sport presents special circumstances in which to apply the ordinary principles of the law of negligence and professional liability. In *Smoldon v Whitworth*, Lord Bingham emphasised the significance of accounting for the full factual scenario in the court's deliberations, accepting that given the specific functions of a rugby referee, there

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<sup>204</sup> W Norris, 'The duty of care owed by instructors in a sporting context' (2010) 4 *JPI Law* 183, 186. See for instance, *Davenport* (n 42) [59] (Owen J).

<sup>205</sup> Norris (n 204) 187-90. Importantly, the standards expected of ordinarily competent coaches, and informed by expert witness testimony, should have regard for the necessary precondition of foreseeability when defining the negligence standard in the particular circumstances.

<sup>206</sup> James (n 44) 91.

<sup>207</sup> *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) [28].



would not be negligence liability 'for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed'.<sup>208</sup> More specifically, the peculiar danger of failing to realistically account for the sometimes immediate responses required by coaching practitioners, when conduct is scrutinised in the more measured environment and hindsight of the courtroom,<sup>209</sup> amounts to a serious concern. Conversely, there may be circumstances in which coaching will be executed in a controlled, supervised and tightly monitored environment whereby the coach may manipulate and determine the level of intensity, degree of competition and physical demands placed upon athletes. Consequently, a potentially very important distinguishing factor in the circumstances of sports coaching may relate to special allowance for errors of judgment made in the preparation for competition,<sup>210</sup> as opposed to during competition. Preparation for matches and competitions by coaches would appear more analogous with *Harrison v Vincent*,<sup>211</sup> where failure to maintain a motor cycle before a race led to a finding of negligence. Given the significance of context, there may be scope for the argument that in the circumstances of a competitive match, the standard of skill and care may differ from that required during a practice session, a circumstance in which the coach can control environmental factors, including the level of intensity and pace of activities. However, application of such a principle may become somewhat limited with some experienced and advanced coaches seeking to replicate, if not surpass, the physical and psychological pressures of competition, the widely held view being that 'perfect practice makes perfect'.

In *Vowles v Evans* the Court of Appeal stressed that scrutiny of the referee's decision, ultimately found to amount to a breach of duty, was taken during a stoppage in play, thereby enabling time for considered thought.<sup>212</sup> Significantly, the judgment continued, '[v]ery different considerations would be likely to apply in a case in which it

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<sup>208</sup> *Smoldon* (n 139) P139.

<sup>209</sup> *Jones* (n 3) 250.

<sup>210</sup> See generally, *Jones and Dugdale* (n 9) [8-145].

<sup>211</sup> [1982] RTR 8.

<sup>212</sup> *Vowles* (n 2) [38]. Also see, *Bartlett* (n 168); *Partington* (n 170).

was alleged that the referee was negligent because of a decision made during play'.<sup>213</sup> Sports coaching involves both rapid and intuitive decision making in the environments of training and competition,<sup>214</sup> with associated and necessary structured improvisation.<sup>215</sup> Nonetheless, whilst consideration of the specific context of sport may enable the court to distinguish between the expression of objective reasonableness and the practicalities of the evidential burden of 'reckless disregard' when considering the issue of breach,<sup>216</sup> as with other professionals, it does not necessarily follow that a coach would be exonerated from liability for a mere 'error of judgment'.<sup>217</sup> As already discussed, in *Anderson v Lyotier* the defendant ski instructor was found to be in breach of duty since 'he took his eye off the ball on this particular occasion'.<sup>218</sup>

More generally, the standard of skill and care incumbent on coaches continues to evolve since it is the responsibility of coaches to be up-to-date with sport-specific knowledge, sports medicine, and sports science, with techniques in sport subject to remarkable change over a couple of decades or so.<sup>219</sup> The focus of chapter 8, concussion management, represents a contemporary example of advances in knowledge leading to the publication of best practice protocols by governing bodies of sport.<sup>220</sup> However, there may also be general improvements in the standards of skill and care provided by particular professions, regardless of associated advances in knowledge, similarly heightening the standard of the reasonably competent practitioner.<sup>221</sup> In this situation, practice previously viewed as tolerable may come to be regarded as negligent,<sup>222</sup> reinforcing the need for coaches to be familiar with the publication of written recommendations by NGBs, including approved codes reflecting

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<sup>213</sup> *Vowles* (n 2) [38]. See further, McArdle and James (n 90).

<sup>214</sup> Telfer (n 14) 214.

<sup>215</sup> See generally, Cushion and Lyle (n 113).

<sup>216</sup> E.g., *Caldwell* (n 90) [11].

<sup>217</sup> *Jones and Dugdale* (n 9) [10-03].

<sup>218</sup> *Anderson* (n 42) [120].

<sup>219</sup> *Nygaard and Boone* (n 24) 24. Also see, *Gardiner* (n 99).

<sup>220</sup> As noted by Meakin, this may be the case despite inconclusive medical evidence regarding the issue of causation: T Meakin, 'The evolving legal issues on Rugby Neuro-trauma?' (2013) 21(3) *Sport and the Law Journal* 34.

<sup>221</sup> *Powell and Stewart* (n 10) [2-135].

<sup>222</sup> *Ibid.*



the best practices of the profession.<sup>223</sup> Nonetheless, the standards observed by the ordinarily skilled and competent coach would be judged by the standards prevailing at the time of her/his acts or omissions, this relevant yardstick not to be affected by the wisdom of hindsight.<sup>224</sup> This was succinctly articulated in *Villella v North Bedfordshire BC*,<sup>225</sup> Otton J recognising a need to be careful when determining reasonable coaching practice not to 'import into 1980 standards which may have evolved at a later stage with the wisdom of hindsight and the increased sophistication of this particular sport'.

## 6. Conclusion

This chapter's interdisciplinary analysis of the interesting and somewhat novel issue of the professional liability of (predominantly) volunteer coaches uncovers significant implications for practitioners exercising the specialised 'art' of coaching. Most notably, established jurisprudence confirms that coaches would be judged according to the benchmark of the ordinarily average competent coach if sued in negligence, regardless of being categorised as amateur, professional, 'professional amateur', qualified, (in)experienced or accredited by a NGB. Further, as a 'new' and emerging profession, rigorous and searching judicial scrutiny of what might amount to proper or approved practice, or *Bolam* 'defence', emphasises the requirement for coaches to adopt universal good practice whenever possible. Failing this, practices employed by coaches must be responsible and robustly justifiable. Whether application of the ordinary principles of professional liability in the context of voluntary sports coaching is just, fair and reasonable, or whether this establishes unrealistic expectations,<sup>226</sup> appears open to further conjecture and debate. Nonetheless, as the law currently stands, coaches must be aware and informed of this developing and potentially serious litigation risk. This chapter's technical analysis of the legal obligations of professionals, derived from the law of tort, reinforces the urgency of

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<sup>223</sup> Ibid.

<sup>224</sup> *Eckersley* (n 101).

<sup>225</sup> *Villella* (n 192).

<sup>226</sup> See generally, G Nichols and P Taylor, 'The Balance of Benefit and Burden? The Impact of Child Protection Legislation on Volunteers in Scottish Sports Clubs' (2010) 10(1) *European Sport Management Quarterly* 31, 46.

coach education and CPD affording considerably more importance to legal and ethical issues likely to be encountered by ordinary coaches. This must become a priority. Ultimately, in the same manner in which ‘the contemporary coach needs to be “professional” in terms of the acquisition of new forms of knowledge’,<sup>227</sup> the contemporary coach must also be further sensitised to the emerging issue of professional liability.

This chapter advanced this thesis’ analysis of the intersection between the law of negligence and sports coaching by critically scrutinising the somewhat paradoxical issue of the professional liability of (volunteer) coaches. In seeking to reveal a more comprehensive and precise appreciation of the law in this context, including possible future trends, the ever-evolving circumstances in which sports coaches act is the focus of the next three chapters. This discussion is intended to further explore and probe the efficacy of ordinary tort law principles in safeguarding coaches from negligence liability and, critically consider whether the law in this area might establish unrealistic expectations for coaches.

As outlined in chapter 2, to inform this exploratory and curiosity driven research, with real-world significance, qualitative empirical research was employed. In short, thematic analysis, following the focused in-depth semi-structured interviews conducted with the small purposeful sample of US coaches, uncovered three specific core consistencies repeatedly highlighted by interviewees. These can appropriately and conveniently be classified under the three categories of: (i) coaching behaviour and practice; (ii) hazing; and, (iii) sport-related concussion. Respectively, these provide the focus of the following chapters. Whilst the expert panel of coaches taking part in this research is not suggested to be representative of coaches more generally, and the issues emerging from the information rich data by no means exhaustive of potential issues on which causes of action might be founded by claimant athletes, it illuminates

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<sup>227</sup> Taylor and Garratt (n 4) 124.



the understanding and experiences of these coaches with regard to this emerging aspect of sports law. These original responses are contended be insightful, instructive and engaging. Moreover, in incrementally extending the scope of this thesis' analysis, and embracing interdisciplinarity and its interrelated commitment to provide a more holistic view, the findings of this research are designed to be of applied orientation. Given the instrumental role of context in this area of the law, this appears pertinent to effective consideration of the stipulated research question. Further, in order to present responses from the qualitative research in a coherent fashion, detailed quotations will be continuously integrated with findings from relevant case law and academic commentary. This extends the recognition of the legal vulnerabilities mentioned and, the associated implications for coaching best practice.

## Chapter 6: Coaching Practice, the Law of Negligence and Some Emerging Trends: The Perspective of Practitioners

### 1. Introduction

Critical analysis of statutory provision, case law, and academic commentary has underpinned the theoretical perspective and conceptual tools primarily utilised in the previous chapters. Important issues have been uncovered and, the reasonableness of the ordinary law of negligence in safeguarding sports coaches from negligence liability challenged. These methods will remain integral to the remaining chapters but, as outlined in chapter 2, may only get us so far in uncovering complex legal issues. A specific question posed by this research concerns the possible disconnect between the ordinary level of competence; education; training; qualifications; and, continuing professional development (CPD) of the 'reasonably average' coach in the UK, when contrasted with the expectations of a legal test, as revealed in chapter 5, fashioned from the principles of professional liability. Central to this debate is coaching behaviour, conduct and practice, combined with the perception and awareness of coaches to legal liability. Semi-structured interviews, with a purposeful sample of 'expert' coaches, was identified in chapter 2 as the most effective approach to qualitative research when testing these propositions. Further, by conducting these interviews in the US, it is hoped to provide a more proactive vantage point,<sup>1</sup> thereby potentially indicating some of the likely future directions in this area of sports law.<sup>2</sup>

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\* Some material in this chapter was published in N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016. DOI: 10.1080/21640629.2016.1180860.

<sup>1</sup> Intuitively, the US is commonly regarded as a more litigious jurisdiction than the UK. In and of itself, this would appear more likely to heighten the awareness of coaches to the emerging scope of legal liability. The transcripts from the interviews offer some support for this assumption, Coach B stating early in the interview when outlining local provision for recreational soccer that 'you've got everything from ex-college soccer players that just want to get involved to parents, to older brothers and sisters that want to get involved ... but these kids still have to be insured, still have to be back ground checked. I think a lot of it is from ... America is a where there's a blame there's a claim kinda culture over here'. Also, prior to this fieldwork, the author's research had not fully drawn attention to the issue of sports initiations or hazing (an emerging theme from the transcripts), and the associated litigation risk for coaches, since this concern appears less often highlighted in the extant literature in the UK.



## 2. Context

As the principal supervisors of organised sporting activities, coaches must appreciate that participation in sport frequently leads to injury.<sup>3</sup> Accidents can and do happen without fault. However, in circumstances where sporting injury was caused by negligent coaching, as the previous chapters reveal, negligence liability may increasingly eventuate. The interpersonal relationship between coaches and athletes creates the capacity for a lack of 'empathy with or care and concern for the wellbeing of the other person'.<sup>4</sup> Some coaches may seek to gain any 'edge' possible when conforming to the 'win at all costs' mentality frequently prevalent in a range of competitive sports.<sup>5</sup> The interviewees appeared acutely aware of the contemporary pressures placed on coaches, and the tensions this may create with the welfare of athletes, Coach A (Women's Basketball NCAA Division 1) noting that:

I think with the new age of coaching people are so pressured to win. It's all about win, win, win ... because you could have a great year and then the next year if you don't do so well you could be fired so a lot of these coaches are really just pressured to win so I think they've lost track of ... it's more about the students. Sometimes I've been seeing that and hearing that from other coaches I know across the country.

Such expectations and pressures may promote what might be termed the 'sport ethic', with over-conformity to this ideology reinforcing the acceptance of unreasonable risks by both coaches and athletes, as evidenced by an over-emphasis on

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Nonetheless, following *GB v Stoke City Football Club Limited* [2015] EWHC 2862 (QB), adopting a prospective conscientious risk analysis, this appears an issue of which modern sports coaches in this jurisdiction must be mindful of. Nonetheless, even if this posited intuitive assumption is questionable (see for instance: Lord Dyson MR, Compensation culture: Fact or fantasy? Holdsworth Club Lecture, (15 March 2013) [8]-[11] <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>> accessed 27 April 2016), chapter 8 on sport-related concussion makes plain that there are important lessons to be learned in this area of sports law by looking to the US.

<sup>2</sup> See generally, J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 362.

<sup>3</sup> A Miles and R Tong, 'Sports Medicine For Coaches' in RL Jones and K Kingston (eds) *An Introduction to Sports Coaching: Connecting Theory to Practice* (2nd ed., Routledge, 2013) 178.

<sup>4</sup> J Lyle, 'Coaching philosophy and coaching behaviour' in N Cross and J Lyle (eds), *The Coaching Process: principles and practice for sport* (Butterworth-Heinemann, 1999) 43.

<sup>5</sup> L Jamieson and T Orr, *Sport and Violence: A Critical Examination of Sport* (Elsevier, 2009) 95.

the pursuit of winning and a refusal to accept appropriate and necessary limitations.<sup>6</sup> Many admired and respected coaches are arguably held in such high regard because of this notable commitment and insistence on an excessive 'win-at-all-costs' ethos.<sup>7</sup> Alexander, Stafford and Lewis indicate that young athletes in the UK may 'accept a culture where training through discomfort, injury and exhaustion is seen as normal',<sup>8</sup> it being suggested that some coaches encourage athletes, or 'guilt' them, into continuing to participate in these same circumstances in order to avoid letting teammates down. Accordingly, Coakley and Pike suggest that coaches may:

take great care to control deviant underconformity, but they often ignore or encourage overconformity, even though it may lead to injuries and have long-term negative implications for the health and well-being of athletes. Therefore, in the culture of high-performance sports, these norms are accepted uncritically, without question or qualification, and often followed without recognizing limits or thinking about the boundaries that separate normal from deviant.<sup>9</sup>

Excesses of coaching behaviour may not be confined to high level competitive sport since a culture of control and authoritarianism appears deeply embedded, even at the lower levels of the sports performance pyramid.<sup>10</sup> For instance, reputation and kudos at the amateur level may facilitate adoption by coaches of high-risk practices with the potential to cause physical harm,<sup>11</sup> it being assumed that some coaches at the non-professional level appear unsympathetic to athletes complaining of being

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<sup>6</sup> Ibid 80-81.

<sup>7</sup> K Young, 'From Violence in Sport to Sports-Related Violence' in B Houlihan (ed) *Sport and Society: A Student Introduction* (2nd ed., Sage Publications, 2008) 189; K Young, *Sport, Violence and Society* (Routledge, 2012) 81-82; J Ryan, *Little Girls In Pretty Boxes: The Making And Breaking Of Elite Gymnasts And Figure Skaters* (Warner Books Edition, 1995) 220-21.

<sup>8</sup> K Alexander et al, 'The Experiences of Children Participating in Organised Sport in the UK', October 2011, University of Edinburgh/NSPCC Child Protection Research Centre, 14 <<http://www.nspcc.org.uk/globalassets/documents/research-reports/experiences-children-participating-organised-sport-uk-summary-report.pdf>> accessed 27 April 2016.

<sup>9</sup> J Coakley and E Pike, *Sports in Society: Issues and Controversies* (2nd ed., McGraw-Hill Education, 2014) 160.

<sup>10</sup> T Cassidy et al, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009) 32.

<sup>11</sup> K Young, 'The Role of the Courts in Sports Injury' in K Young (ed) *Sporting Bodies, Damaged Selves: Sociological Studies of Sports-Related Injury* (Elsevier, 2004) 343.



injured.<sup>12</sup> In short, contextualisation of modern sports coaching clearly illustrates the sometimes nebulous boundary between coaches optimising performance or acting negligently,<sup>13</sup> this definition integral to this thesis' research question.

### 3. Optimising Performance v Committing a Tort

Defining the boundary between optimising performance or committing a tort for the purposeful sample of coaches interviewed involved heavy reliance on qualified athletic trainers (physiotherapists) and, 'being willing and open to other people in your stuff'. When approaching decisions about how 'hard to "push"' athletes in order to optimise performance and gain a competitive 'edge', Coach C (Women's Soccer NCAA Division 1) elaborated:

So finding that balance I think is just being willing and open to other people in your stuff. I mean, they wanna know what your training program looks like, how long are you training? How often are you training? You know, we have to submit training logs that say we practiced this many hours this week, we played this many hours this week, we had this many off days this week and we can't go over a certain threshold unless we lie. Unless we get the kids up there. But, the checks and balances is what I submit, or what we submit as a staff, it was 10 hours this week, the players see it and they have to actually go in to confirm it. And they can anonymously say that we did not have an off day this week and then it will come back to us and then we'll be like under the watchful eye, 'are you giving your players enough rest time? Are they gaining an off day like they're supposed to get?'. And so there's a lot of open, like I say, transparency that the players know, the coaches know, the staff know and I don't really think that you can get away with too much.

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<sup>12</sup> K Young and P White, 'Threats to Sport Careers: Elite athletes talk about injury and pain' in J Coakley and P Donnelly (eds) *Inside Sports* (Routledge, 1999) 208; H Charlesworth and K Young, 'Why English Female University Athletes Play with Pain' in K Young (n 11) 167; ECJ Pike and A Scott, 'Safeguarding, injuries and athlete choice' in M Long and M Hartill (eds) *Safeguarding, Child Protection and Abuse in Sport: International perspectives in research, policy and practice* (Routledge, 2015) 174. Similarly, at the professional level, some coaches would also appear unsympathetic to athletes complaining of being injured. See, for instance, D McRae, 'Alex Corbisiero: "Even now people will frown if you need a rest"' *The Guardian* (London, 5 May 2016) <[https://www.theguardian.com/sport/2016/may/05/alex-corbisiero-rugby-union-england-lions?CMP=share\\_btn\\_tw](https://www.theguardian.com/sport/2016/may/05/alex-corbisiero-rugby-union-england-lions?CMP=share_btn_tw)> accessed 11 May 2016.

<sup>13</sup> TR Hurst and JN Knight, 'Coaches' liability for athletes' injuries and deaths' (2003) 13 *Seton Hall J. Sports L.* 27, 29.

These checks, balances, transparency and accountability, no doubt, encourage reasonable and logically justifiable coaching practices. However, this may appear far removed from some volunteer coaching in the UK, as insightfully articulated by Coach B (Men's Soccer, NCAA Division 1):

It is a fine line. There is a lot of power to the [US] student athlete because they are so protected and these Millennial kids that are coming through now are so informed of the rules and so informed with, how many hours they're supposed to be training, how many hours they're not supposed to be training. Again, they've paid for a product coming through the youth system of America, to where the parents have a little bit more power. Again, being in the youth sports system over here ... I remember when I was in England, I know my coach was a volunteer and I paid my £2-a-week club fees, and if I wasn't playing, it was my fault. If there was something wrong, it was the player's fault, and it was all on you, and the coach was always right. That was it, end of story. And my dad, my dad wasn't happy with some of the decisions my coach made, but he never would have dreamt of going up to confront the guy. And if you didn't like it you'd go to another club, you'd play at a lower level, a bit more playing time, whatever it was. But for the most part, that was your team, you're stuck with it, you deal with it, you're an athlete.

This portrayal of autonomous volunteer coaching in the UK may be reflective of evidence to indicate that soccer coaching behaviours can often be belligerent, resulting in young players being exposed to harsh and authoritarian approaches to coaching.<sup>14</sup> If so, in contrast to the comments by Coach C, given the possible widespread void of checks and balances in this jurisdiction, this might appear fertile ground for possible claims brought in negligence against some coaches due to unreasonable coaching methods.

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<sup>14</sup> C Cushion and R Jones, 'Power, Discourse, and Symbolic Violence in Professional Youth Soccer: The Case of Albion Football Club' (2006) 23 *Sociology of Sport Journal* 142, 148; AM Williams and NJ Hodges, 'Practice, instruction and skill acquisition in soccer: Challenging tradition' (2005) 23(6) *Journal of sports sciences* 637, 645-46. Also see, S Kelly and I Waddington, 'Abuse, Intimidation and Violence as aspects of Managerial Control in Professional Soccer in Britain and Ireland' (2006) 4(1-2) *International Review for the Sociology of Sport* 147, 161; P Kellett, 'Football-as-War, Coach-as-General: Analogy, Metaphor and Management Implications' (2002) 5 *Football Studies* 60, 69.



#### 4. Coaching Practice

Much contemporary coaching practice appears to be underpinned by emulation, intuition and tradition, or 'uncritical inertia'.<sup>15</sup> This may 'authenticate certain types of collective knowledge with the resulting discourse giving certain practices an entrenched legitimacy'.<sup>16</sup> Problematically, in circumstances where this entrenched legitimacy exposes athletes to unreasonable risk of injury, as chapters 1, 4, and 5 make plain, coaches may be exposed to negligence liability. This illustrates the need for coaches to have the prerequisite self-awareness to understand both the positive and negative implications of their behaviour.<sup>17</sup> Recognising that coaching behaviour may be premised on intuition or having a 'feel' for the game, structured improvisation, and reading your players by drawing from previous coaching and playing experiences, Coach D (Women's Basketball, NCAA Division 2) stated:

Well I think, you should know your athletes and okay, this is probably gonna sound bad but it's okay, it's my opinion ... erm, I think that coaches that have never played college athletics struggle with that more than coaches that played because you know what you did, right. So I don't think that I would ever ask my athletes to do something that I didn't do. So I think that's how you ensure that [avoid pushing athletes too hard]. And you read your athletes and know your athletes. You know what I mean? So like this kid over here, she's kinda of a baby so she's not really tired, she's drama, right. While this kid over here is my horse, and so if she's tired I know everybody else is tired right. So you have to know your athletes.

I'm not saying you have to play college athletics to be a good coach. That's not what I'm saying. I just think there are some people out there that they don't know what it was like so they think that they can go through the wall and back.

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<sup>15</sup> M Partington and C Cushion, 'An investigation of the practice activities and coaching behaviors of professional top-level youth soccer coaches' (2013) 23 *Scand J Med Sci Sports* 374; Williams and Hodges (n 14) 637; J Ehrmann, *InSideOut Coaching: How Sports Can Transform Lives* (Simon & Schuster, 2011) 80.

<sup>16</sup> C Cushion and M Partington, 'A critical analysis of the conceptualisation of "coaching philosophy"' (2014) *Sport, Education and Society* 7. DOI: 10.1080/13573322.2014.958817.

<sup>17</sup> C Cushion, 'Coach behaviour' in J Lyle and C Cushion (eds.), *Sports coaching: Professionalisation and practice* (Churchill Livingstone Elsevier, 2010) 53.

These observations appear to have some resonance with research indicating that coaches may demonstrate low self-awareness about their coaching practice and behaviour.<sup>18</sup> Accordingly, the reasonableness of demands made of athletes by coaches may not always be sufficiently appraised, evaluated and reflected upon. The fact coaching practitioners often operate in isolation,<sup>19</sup> likely restricting opportunities for critically constructive and informed discussion, and the sharing of best practice, probably also compounds the capacity for negligent entrenched coaching methods to be incorporated into coaching practice inadvertently and without question. These restrictions appear significant barriers in safeguarding coaches from a finding of liability in negligence, for instance, by reliance on the *Bolam* 'defence' outlined in chapter 5.

Drawing from his previous American football playing and coaching experiences (NCAA Division 1), Coach E's insightful comments regarding some of the possible limitations of volunteer coaches working individually and, conforming to the 'sport ethic', are worth recalling in full:

Say there's a youth level coach and they haven't been taught in the same manner of concussion protocol from a high level, say that protocol is not there, it's not as intricate in terms of having a training staff. So hypothetically you have a coach in charge of a sixth grade [11-12 years old] football team, he's in charge of everything. He's in charge of equipment, he's in charge of taping ankles if they need to be taped, he's in charge of calling the plays, whereas all that stuff is delegated at a higher level of football. So then it becomes ... there could be issues where the coach is trying to wear multiple hats and he's not really qualified for it. So, student athlete sixth grade John has an ankle issue, maybe he (the coach) doesn't know the difference between a sprained ankle and a broken ankle and he encourages this student to keep playing, but he's not really qualified because he's an insurance salesman and he coaches sixth grade football during the afternoons and night. Those are issues I think you can run into. People at certain levels that don't have the help around them. There might be certain things that they would be accountable for and certain things that they wouldn't. Obviously, a sport injury say, they're not going to be held liable for a middle school student breaking their leg in an accident in a practice

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<sup>18</sup> Partington and Cushion (n 15) 381; S Harvey et al, 'A season long investigation into coaching behaviours as a function of practice state: the case of three collegiate coaches' (2013) 2(1) *Sports Coaching Review* 13, 14. Also see, Cushion (n 17) 44.

<sup>19</sup> P Trudel et al, 'Coach education and effectiveness' in Lyle and Cushion (n 17) 141.



or a game. But, things like concussions, if someone could prove that a student probably had a concussion and they didn't do anything about it, those kinda issues could probably turn into liability.

I think there needs to be some checks and balances for these coaches so that people over the top of them don't just let the coach run completely what he thinks is right because you never know what the motives of that coach are. Maybe he's trying to win the championship at all costs in the sixth grade football league. But what's more important, is it his kids' health, physical and mental and emotional health, or is it really more important for him that he has a sixth grade team that goes undefeated? Obviously there'll be coaches at both ends of the spectrum and that's one of those things that you might not have a whole lot of control over whereas if you're a parent in that region, you can't really control who the coach is and your son wants to play football. Or you could be getting polar opposite coaches in terms of philosophies.

This posited scenario unpacks a number of complexities highlighted by chapter 1's contextualisation of sports coaching in the UK, and scrutinised more fully throughout the previous pages, including the possibility of unqualified volunteer coaches, sometimes unwittingly, potentially adopting negligent practice. These similarities, and associated concealed legal vulnerabilities, may be compounded when there is a void of accountability, appropriate support and specialist guidance. This is effectively illustrated by considering the situation when coaches make decisions regarding the training demands to be made of athletes.

## 5. Training Intensity Levels

A significant ethical (and potentially legal) dilemma facing modern sports coaches, not least when working with young athletes, concerns determination of training intensity levels.<sup>20</sup> This is generally a judgment call left to the discretion of

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<sup>20</sup> See, for instance, Miles and Tong (n 3) 188-89; J Lyle, *Sports Coaching Concepts: A Framework for Coaches' Behaviour* (Routledge, 2002) 240; J Oliver and R Lloyd, 'Physical training as a potential form of abuse' in Long and Hartill (n 12) 163.

individual coaches based on the specific circumstances. In short, this is an area where coaches have to be trusted to make the right (or reasonable) decisions.<sup>21</sup>

According to Martínková and Parry:

The dangers of over-training and inappropriate methods have long been recognized, as have the duties of the coach to be knowledgeable and well informed, to take care over the appropriate design of training session schedules, and to monitor athletes for signs of weariness and distress.<sup>22</sup>

In terms of appropriate coaching practice, Cross and Lyle continue:

coaches have a responsibility to implement a coaching process, especially with elite and high-level performance athletes, which is comprehensively planned, adequately and frequently monitored and in which, through careful regulation of the training loading factors, the athlete's progress and wellbeing are constantly emphasised in order to avoid 'overtraining'.<sup>23</sup>

Yet, despite this suggested long recognition of the risks posed to athletes by overtraining and inappropriate training methods and practices, research would indicate that excessive training, both in terms of the intensity and duration of sessions, remains a concern.<sup>24</sup> This is a factor acknowledged by Coach B who was acutely aware of developments in stipulated protocols and progressive best practices in risk management:

I've been in college sports, kids vomit. I vomited, it's happened to me sometimes. But now, these days when a kid vomits, it's not he was on the piss the night before, or he's not fit, it's ... there's something wrong ... he needs to stop, just because of all these red flags, risk management we've been told about. A kid vomits here, he's done, 'cos if anything like that happens my career is over. That's what I'm thinking about. My wheels are turning when that happens.

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<sup>21</sup> Cassidy et al (n 10) 154-55.

<sup>22</sup> I Martínková and J Parry, 'Coaching and the Ethics of Performance Enhancement' in AR Hardman and C Jones, *The Ethics of Sports Coaching* (Routledge, 2011) 177-78.

<sup>23</sup> Cross and Lyle (n 4) 192.

<sup>24</sup> Alexander et al (n 8); Oliver and Lloyd (n 20) 163.



I've seen kids throw up and say, 'I'm all right, it's a bad stomach'. But, he could pass out and die, you never know. It's a massive responsibility we have, and I do know at the lower coaching levels for example, at \_\_\_\_\_ when I was coaching, there was the Head Coach, we had a volunteer assistant coach, but most of the time it was him with 25 athletes and that happened all the time ... that people threw up, people felt dizzy. In \_\_\_\_\_, it's 95 degrees most days, there's \_\_\_\_\_ English lads on the team, and we weren't used to that heat pre-season. We had guys on the field with drips in their arms, I mean it happened. But nowadays, because it's so strict, because it's become forefront in the media, you just wouldn't do that.

A related discretionary judgement call, particularly for volunteer coaches, may concern the management of players returning from injury. When interviewed, in recognition of the delegated responsibilities of athletic trainers, and the specialised support they provide to the coaching staff, Coach D made short shrift of this complexity of coaching when noting:

I think if the trainer clears them they're clear. The trainers are gonna tell you what they can and can't do. So if you don't abide by that then yeah, that's a risk management issue ... stupidity issue really ... but, I think you have to do things the right way. That's the bottom line, you just have to do things the right way and then I don't think you have a lot of risk management.

In echoing the limited scope of a coach's responsibility in this scenario Coach A reiterated:

players returning from injury too soon is a big issue. ... I think you could definitely be sued if those players were returning back from injury too soon and got injured again. Your trainer is the one that should be making that decision. The trainer is the one qualified in those areas. ... I think it's really big to first off ... start if you're a Head Coach building a staff that you trust. I think that's the biggest key because whether it's the trainer and the strength and conditioning coach, you gotta trust that they're qualified to get your players back healthy and not too soon.

This may indeed be the case for professional coaches working in conjunction with appropriately qualified specialists. As recognised by Coach C, in seeking to gain a

competitive 'edge' and prioritise the health and welfare of athletes, this support team may be extensive:

Luckily, at most collegiate programs you have a staff of people and that staff altogether possesses the knowledge in order to make sure that we are all doing what we need to do. So athletic trainers, strength and conditioning coaches, are educated in how the body functions, works, moves, reacts. They know the body from the standpoint of physical exertion. Then you can throw into the mix ... then there are nutritionists, someone for that education because not all coaches have that knowledge. Some do. Some look into it, want to educate themselves on nutrition, strength and conditioning, or athletic training. Just knowing how injuries occur, what happens to the body when this happens, or what it takes to recover right. And so the balance comes with those types of people in your environment, observing what you are doing.

Nonetheless, since it is frequently the coach who is the first person to attend to an injured athlete,<sup>25</sup> given the predominant reliance on amateur coaches in the UK, this issue of specialist support will be explored more fully in the context of sport-related concussion in chapter 8.

The above themes that emerged from the qualitative research provide a valuable and important snapshot of some of the contemporary risk management considerations facing modern sports coaches. Consistent with case law from this jurisdiction, overtraining, or training requiring an unreasonable level of intensity, may provide the foundation for a cause of action in negligence.<sup>26</sup> Further, coaches must be mindful to avoid exerting undue pressure or influence on players returning from injury, in addition to discharging responsibilities regarding appropriate medical care of athletes, including pertinent referral to relevant specialist medical practitioners and adherence to stipulated protocols.<sup>27</sup> Interestingly, in recognising the emerging scope of

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<sup>25</sup> See, for instance, SP Broglio et al, 'Concussion occurrence and knowledge in Italian football (soccer)' (2010) 9 *Journal of Sports Science and Medicine* 418, 419-20.

<sup>26</sup> N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Journal* 232, 235. See, for instance, *Davenport v Farrow* [2010] EWHC 550.

<sup>27</sup> N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016. DOI: 10.1080/21640629.2016.1180860. See, for instance, *Brady v Sunderland Association Football Club Ltd*, 2 April 1998 (QBD).



some of the specific responsibilities incumbent on coaches, during his interview Coach B paused, recalling:

So just to recap, this is more than what I thought ... dehydration, concussion, sex offenders, goal post safety and then lightning ... they're the ones that I would definitely say are the most that we have to deal with on a regular basis in a youth set up and even in a college set up.

Despite this chapter's essentially narrow focus on some of the complexities of coaching, the ever-evolving issues highlighted above reinforce the requirements of coaches following regular and approved coaching practices capable of withstanding logical scrutiny; the limitations of coaches working in isolation; the importance of coaches remaining up-to-date with coach education, training and CPD; the necessity of following stipulated protocols; coaches being mindful of their limitations and not assuming a duty for which they might not be qualified; and further, the considerable advantages of having the support of other relevant specialist practitioners. The previous chapters of this thesis would suggest that satisfying these requirements may be problematic for some UK coaches, it appearing that NGBs may assume coaching codes of conduct adequately prepare coaches for some of these aforementioned complexities of coaching.

## 6. Codes of Conduct

As discussed in chapter 5, in attempting to address many of the ethical (and potentially legal) dilemmas encountered by coaches, there would appear to be an unexamined and superficial reliance by coaching organisations on codes of conduct.<sup>28</sup> Since the assumption seems to be that ethical considerations regarding coaching practice will be understood and grasped intuitively by coaches,<sup>29</sup> the extent to which codes of conduct impact and shape coaching behaviour appears open to conjecture

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<sup>28</sup> A Hardman and C Jones, 'Ethics For Coaches' in Jones and Kingston (n 3) 126. See further, M McNamee, 'Celebrating trust: virtues and rules in the ethical conduct of sports coaches' in M McNamee and S Parry (eds), *Ethics & Sport* (E & FN Spon, 1998) 165.

<sup>29</sup> H Telfer, 'Coaching practice and practice ethics' in Lyle and Cushion (n 17) 210-11.

and debate.<sup>30</sup> With specific regard to the emerging interface between the law of negligence and sports coaching, this represents a significant missed opportunity given the qualified overlap between legal and ethical obligations.<sup>31</sup> In short, the utility and beneficial impact of codes of conduct for coaches, in developing a more informed awareness of their legal duty of care, seems limited.<sup>32</sup>

## 7. Conclusion

The responsibility of coaches to adopt objectively reasonable practices when interacting with athletes would appear to be becoming more pronounced. It has previously been argued that the legal test of reasonableness may be regarded as vague, nebulous and uncertain, endorsing the view that there is no 'transparent, fixed and universally accepted boundary [exists] between appropriate and inappropriate coaching conduct'.<sup>33</sup> Nonetheless, coaches' definitions of appropriate or reasonable coaching practice must be capable of being logically justified and withstanding searching and robust scrutiny. Whilst regular and approved coaching practice remains integral to defining reasonableness in this context, there appears strong support for further discussions concerning legal and ethical dilemmas drawn from practical coaching scenarios in order to support coaches in developing appropriate and effective coaching practices.<sup>34</sup> This appears particularly crucial in circumstances where coaching practice is not transparent or exposed to necessary checks, balances and appropriate accountability.

Unexamined and superficial reliance on coaching codes of conduct fails to sufficiently account for the evolving legal context in which coaches discharge the duties

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<sup>30</sup> B Taylor and D Garratt, 'The professionalization of sports coaching: definitions, challenges and critique' in Lyle and Cushion (n 17) 109; T Cassidy, 'Exploring ethics: Reflections of a university coach educator' in S Harvey and RL Light (eds) *Ethics in Youth Sport: Policy and pedagogical applications* (Routledge, 2013) 153. Also see, McNamee (n 28) 155.

<sup>31</sup> M Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in R Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013) 216.

<sup>32</sup> Partington (n 27) 16.

<sup>33</sup> AR Hardman and CR Jones, 'Sports coaching and virtue ethics' in Hardman and Jones (n 22) 78.

<sup>34</sup> Cassidy et al (n 10) 169.



incumbent upon them. Since an aim of relevant and engaging coach education courses should be to assist coaches in constructing (context specific) knowledge, rather than merely receiving it,<sup>35</sup> it is contended that instructive scenarios derived from relevant case law should be designed to stimulate critical reflection of legal and ethical issues. In transcending some of the present limitations of codes of conduct, this would more effectively guide coaches in establishing an awareness and understanding of the dynamic relationship between sports coaching and the law of negligence. In short, coaches with the developed self-awareness to continuously evaluate the appropriateness of their coaching practice, and thereby successfully satisfy the propositions indicative of reasonable coaching, in addition to better protecting the safety and welfare of athletes, would be more likely to be shielded from negligence liability.

In concentrating on issues including the boundary between optimising performance and committing a tort, training intensity levels, and the management of athletes returning from injury, this chapter has focused on themes that emerged from the qualitative empirical research that, in paraphrasing Martínková and Parry, may be regarded as being long recognised in the UK. The next chapter turns to an apparent emerging contemporary coaching issue less well recognised in this jurisdiction, but a potential source of legal vulnerability for coaches,<sup>36</sup> the important concern of sport-related hazing.<sup>37</sup>

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<sup>35</sup> RL Jones, 'Toward a Sociology of Coaching' in RL Jones & KM Armour, *Sociology of Sport: Theory and Practice* (London: Pearson, 2000) 34; C Nash, 'How coaches learn and develop' in C Nash (ed), *Practical Sports Coaching* (Routledge, 2015) 182.

<sup>36</sup> GB (n 1). See further, C McGlone, 'Hazing' in H Appenzeller, *Ethical Behavior in Sport* (Carolina Academic Press, 2011) 173.

<sup>37</sup> As noted by Carroll et al, US case law provides instances where coaches have been named as defendants in cases of hazing: M Carroll et al, 'Case Law Analysis Regarding High School and Collegiate Liability for Hazing' (2009) 9(4) *European Sport Management Quarterly* 389, 404

## Chapter 7: Sport-Related Hazing

### 1. Introduction

As mentioned in the previous chapter, interviews conducted for this research suggest that hazing should be regarded as a serious and emerging legal and ethical concern facing modern sports coaches. Recent UK case law and academic commentary lends some support to this submission,<sup>1</sup> with Judge Butler in *GB v Stoke City Football Club Limited* stating:

Suggestions made in evidence and in submissions of a culture of bullying and/or punishment rituals at this or other clubs in the past may be matters to be considered or determined in other proceedings involving other claimants against this or other clubs in other courts.<sup>2</sup>

Hazing is arguably one of the worst kept secrets in all of sport, often involving the required performance of traumatic initiation rituals by neophyte athletes as part of their induction into a new team setting.<sup>3</sup> Due to the secrecy involved in hazing, and the negative publicity surrounding it, researchers and legal experts agree that hazing is greatly under-reported and, as such, determining the prevalence of hazing can be difficult.<sup>4</sup> In short, hazing may be regarded as the harassment experienced by athletes

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<sup>1</sup> *GB v Stoke City Football Club Limited* [2015] EWHC 2862 (QB). As noted by Anderson, following *GB v Stoke City Football Club* there are likely to be future developments in this area of sports law: see S Cottrell, 'Key sports law cases and legal developments of 2015', *LawInSport* (12 January 2016) <[http://www.lawinsport.com/articles/item/key-sports-law-cases-and-legal-developments-of-2015?category\\_id=112](http://www.lawinsport.com/articles/item/key-sports-law-cases-and-legal-developments-of-2015?category_id=112)> accessed 10 March 2016.

<sup>2</sup> *GB* (n 1) [12].

<sup>3</sup> K Young, *Sport, Violence and Society* (Routledge, 2012) 75. See for instance, E Anderson et al, 'Male Team Sport Hazing Initiations in a Culture of Decreasing Homophobia' (2012) 27(4) *Journal of Adolescent Research* 427.

<sup>4</sup> M Finkel, 'Traumatic injuries caused by hazing' in H Nuwer (ed), *The hazing reader* (Indiana University, 2004) cited in M Carroll et al, 'Case Law Analysis Regarding High School and Collegiate Liability for Hazing' (2009) 9(4) *European Sport Management Quarterly* 389, 392.



when they join a new squad, team or organisation.<sup>5</sup> Applied more broadly, hazing may encompass a range of activities and actions, including the promotion of ritualised punishment type practices by coaches,<sup>6</sup> that it is necessary for athletes to tolerate in order to become an accepted part of the group or team.<sup>7</sup> As highlighted in chapter 6, overconformity to the 'sport ethic' and, coaching behaviour encouraging or 'guilting' athletes in to taking unreasonable risks, would appear to resonate with this more expansive notion of hazing. Problematically, and as revealed from the following descriptive quotations from interviewees, there does not appear to be a universally accepted definition of hazing.<sup>8</sup> Despite participation in initiation rituals frequently contended to be 'voluntary', it is an underlying myth to presume that such apparent consent to an initiation process prevents associated activities from being classified as hazing.<sup>9</sup> Since coaches may be in a vulnerable position in regard to hazing,<sup>10</sup> this broader conceptual categorization of hazing will provide the context and background for the following detailed analysis of precisely how coaches may be legally liable in negligence for hazing.

## 2. Context

Coach B (Men's Soccer, NCAA Division 1) emphasised the significance presented by hazing as a contemporary legal and ethical behaviour problem for coaches,<sup>11</sup> when stating:

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<sup>5</sup> L Jamieson and T Orr, *Sport and Violence: A Critical Examination of Sport* (Elsevier, 2009) 171. See more generally, E Allan and M Madden, 'Hazing in View: College Students at Risk. Initial Findings from the National Study of Student Hazing' (2008), 25

<[http://www.stophazing.org/wpcontent/uploads/2014/06/hazing\\_in\\_view\\_web1.pdf](http://www.stophazing.org/wpcontent/uploads/2014/06/hazing_in_view_web1.pdf)> accessed 1 September 2015.

<sup>6</sup> This issue is discussed later and, in view of the previous chapter's analysis, may represent an illustration of coaching practice underpinned by 'uncritical inertia' and 'entrenched legitimacy'. See further, N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016. DOI: 10.1080/21640629.2016.1180860.

<sup>7</sup> C McGlone, 'Hazing' in H Appenzeller, *Ethical Behavior in Sport* (Carolina Academic Press, 2011) 166-67.

<sup>8</sup> Ibid 167.

<sup>9</sup> Ibid.

<sup>10</sup> See generally, McGlone (n 7) 173.

<sup>11</sup> McGlone (n 7) 165.

There are so many situations now in colleges and universities where coaches are being fired. Hazing is becoming very big in America. I think it's the number one reason for coaches being removed from positions, other than poor performance or results, it's the players. At the end of every year we have an exit interview with all of our seniors. So as the player finishes his 4 year degree, he goes up to the big boss' office, and they sit there and he asks questions. Was the training environment safe? Was the coach looking out for your needs? All these questions. This is with the AD (Athletic Director).

This scrutiny and monitoring of reasonable coaching conduct by administrators responsible for the organisation of athletic programmes, and encompassing questions regarding possible hazing activities, is unsurprising. From 1970-1999 in the US, there were at least fifty-six fraternity and sorority deaths caused by hazing and pledging activities.<sup>12</sup> US case law provides clear evidence whereby coaches have been named as defendants in cases of hazing, in addition to the individuals who directly conducted and participated in the hazing, with negligence providing the primary cause of action.<sup>13</sup> The following further comments by Coach B provide an insightful commentary of the significance of player exit interviews at the collegiate level when probing evidence of potential hazing activities:

Obviously, that's [the exit interview] purely anonymous to us, we don't know who said what, who said this or that. Obviously, since my time here, we've had glowing reviews. We've never had instances ... but I have got a lot of friends in the college world. I have heard stories of players saying after games we got pizza and we should have had pasta. In training we probably went more than 20 hours some weeks. It was too hot this day, or we didn't have enough water, or I should have got more playing time is an obvious one. But in terms of risk management, that's the time for the student to vent to our bosses ... which from our standpoint, coming from a professional background, I can only imagine if the youth team players that got released at 'Y' (UK Premier League Club) had a chance to now to go speak to the Chairman at 'Y', and the Chairman would say ... okay 'A' (interviewee), 'B' who's now the under 18 soccer coach just told you you're not going to be a professional soccer player ... you can only imagine the answer they'd get to the questions they ask a student

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<sup>12</sup> H Nuwer, *High School Hazing: When Rites Become Wrongs* (Franklin Watts, 2000) 16.

<sup>13</sup> Carroll et al (n 4) 404.



athlete. Was it a safe environment? ... I remember that time the goals were not down, the bags were off ... So these things start to creep in again.

Coaching in the US at the Division 1 collegiate level is a high profile professional career and attracts extensive media coverage. All of the coaches that took part in this research appeared conscious of the serious ramifications of negative coverage of their programmes by the media. On this issue, Coach B continued:

Again, it's never happened here, but I've known of it happening ... a player going to the administration about you saying this is not a good environment. I'm being bullied, I'm being hazed and I don't feel like I'm being respected and this, that and the other. From the administration standpoint, they have to follow up on that. There's no 'you're the 20<sup>th</sup> player on the roster, you've walked on, you're not on a scholarship, you're lucky to be on that team, keep your head down or leave now'. No, this now is an HR thing. Their parents go to the press, it might blow up, and that's where this hazing thing's come out in America.

The pivotal role of Athletic Departments in assuring the quality and appropriateness of coaching activities, by means of student-athlete evaluations, was also alluded to by Coach D (Women's Basketball NCAA Division 2). This managerial function was regarded by Coach D as having the dual function of both obtaining qualitative feedback from athletes on their sporting experiences and, importantly, safeguarding coaches by means of administrative recognition of the specific complexities presented by the uniqueness of the coaching context:

I think you have to have a good administration to be safe in what you are doing. But, I also think that a lot of times ... like evaluations ... the kids evaluate you, which is fine, I think that's great. But I also think the administration needs to know who they hired. You know what I mean? And so in order for your job to be safe you have to work for a really good administration that knows who you are and that cares, and comes to practices and things like that. Because, I think that if you have administrators that don't particularly want to be involved in your practices and things like that then if you get a bad evaluation they just have no idea.

I think that at the Division 3 level it's even worse because they're (the players) not on scholarship. So I think at the Division 3 level at some institutions, I can speak to that because I was at an institution that was like that, the kids run the show. It's all about what they want and so can you really be the coach you want to be or are? Can you push them to that limit? I don't know that you can at that level. At this level your stakes are higher. Now they're on scholarship. You know what I mean? So I dunnow, it's an interesting question ... You can't be the coach you wanna be if the kids are running the show. And the administration is letting that happen. You've gotta feel like you've got backup.

Although on occasion, this may be an apparent source of some frustration for coaches, student evaluations of athletic programmes, and in particular, meaningful exit interviews, would appear to be conducive to a shift towards more progressive coaching practices by addressing negligent practices. In highlighting this move away from what might be termed 'old school' coaching methods and conduct, including hazing or bullying type activities, Coach E (American football, NCAA Division 1) noted:

Those days are phasing out because the coaches that would act like that know the consequences of those actions and then there's, I feel like, probably less coaches that act like that in general, just a shift away from that. I would consider that 'old school' mentality where hazing is just pretty much not tolerated anywhere now at any level so you hear about it some but when it happens now it becomes a huge media deal where maybe 30 years ago it wasn't in the media. So coaches could get away with that or they felt like I was treated this way so I need to treat people that way. That's kinda phasing out I think, which is a good thing. There's just more respect for everyone involved with your athletic team so I see definitely a shift away from that because I think one of the main things is the social punishment that would come from being considered you know, that's how you act, what's proven, this was on tape, the social ramifications of getting fired or humiliated. I think you'll see less and less of that. There'll still be isolated cases of it but it's not gonna happen as much I wouldn't think.

While student evaluations would be expected to broach the issue of hazing, the foregoing commentary touches on a number of important and recurring themes central to this thesis. Firstly, with the majority of coaches in the UK being volunteers,<sup>14</sup> often

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<sup>14</sup> sports coach UK, 'Coach Tracking Study: A four-year study of coaching in the UK' (2012) 17.



working in isolation,<sup>15</sup> the appreciation, awareness and monitoring of the particular issue of hazing might not always be effectively addressed in this jurisdiction. To do so, would appear to require adoption of similar proactive, systematic and extensive procedures as those alluded to by the interviewees.<sup>16</sup> More specifically, the following comments by Coach C (Women's Soccer, NCAA Division 1 and Youth Soccer Club Coach) problematises some of the limitations of coaches functioning entirely independently, by highlighting some of the benefits of a more collective or team approach to coaching:

I mean you are always out on the field with other coaches and so oftentimes you're gonna get caught on the fence before you cross over to doing something wrong. Another coach will observe and say something maybe to the Executive Director, and say coach \_\_\_\_\_ was doing some weird stuff at practice. You might wanna go watch. Well, then my very next practice that guy's out watching me train and if in fact there is an issue, you know, their gonna say something right then, two practices later. I'm not gonna be able to get away with things or inappropriate practicing and behavior for very long because there are too many people around. So I don't know other club's environments, but from what I understand at any given practice night you're gonna have 2-4 [coaches], sometimes 6-8, all on one field at the same time. So, that's a lot of people to be on board with activities that would be deemed, you know, inappropriate or risky as far as injury.

Secondly, since many coaches appear inclined to reproduce and model coaching practice on their experience of coaching as players,<sup>17</sup> it is concerning to recognise that some athletes who haze may themselves become coaching practitioners.<sup>18</sup> As noted by Coach D, coaches may perpetuate hazing activities by adopting the stance 'I was treated this way so I need to treat people that way'. Further, since much coaching

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<sup>15</sup> P Trudel et al, 'Coach education and effectiveness' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010) 141.

<sup>16</sup> In the UK, for organised sports organisations and clubs, the designated role of Child Protection/Welfare Officer provides an opportunity for similar such concerns to be raised. Interestingly, this role is often assumed by volunteers.

<sup>17</sup> C Mallett, 'Becoming a high performing coach: pathways and communities' in Lyle and Cushion (n 15) 122.

<sup>18</sup> Nuwer (n 12) 56.

practice appears to be underpinned by culture and tradition, or 'uncritical inertia',<sup>19</sup> it does not necessarily follow that coaches will challenge, and critically reflect upon, the foreseeable risks of hazing. Thirdly, as with decisions such as determination of acceptable intensity levels in training considered in chapter 6, and looking beyond the purposeful sample of coaches interviewed for this research, it remains likely that coaches' attitudes toward hazing vary from the many who forbid such initiation ceremonies and activities, to other coaches who might view them as a means of fostering enhanced team unity or as 'humorous boys-will-be-boys stunts'.<sup>20</sup> Fourthly, as employed coaches, the professional context in which these coaches were operating appeared to endorse and recognise a general trend away from more 'old school' coaching methods, towards more progressive coaching practices. Since the values underpinning such a methodological shift appear reflective of a more ethical coaching culture, although isolated instances of hazing practice are likely to remain, in general, modern progressive coaches should regard hazing as a potentially damaging and divisive force, and not, instances of harmless fun.<sup>21</sup> Finally, the coaches interviewed, given the high profile of US collegiate sports, were acutely aware of the potential (negative) media scrutiny, and stigma or 'social punishment', that a reported case of hazing may generate for individual coaches, the particular sports programme, Athletic Department and University. This is succinctly articulated by Coach B when making reference to a widely reported instance of alleged hazing at a NCAA Division 1 school:<sup>22</sup>

It's all in the news. Like an initiation for the new players. I guess they put bags over their heads, put them in the back of cars, took them to the game field, made them spin around a baseball bat and run, and one of the girls runs into the wall. She hit her head and now the family's claiming that she has memory loss. She has psychological issues and now the school's in a massive turmoil.

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<sup>19</sup> M Partington and C Cushion, 'An investigation of the practice activities and coaching behaviors of professional top-level youth soccer coaches' (2013) 23 *Scandinavian Journal of Medicine & Science in Sports* 374, 375.

<sup>20</sup> Nuwer (n 12) 75.

<sup>21</sup> Jamieson and Orr (n 5) 173, making specific reference to the then Minnesota Vikings rookie head coach, Brad Childress, who established a policy against hazing.

<sup>22</sup> R Barnett, 'New defendant added to Clemson soccer-hazing case', *GreenvilleOnline* (25 April 2015) <<http://www.greenvilleonline.com/story/news/local/2015/04/24/new-defendants-added-clemson-soccer-hazing-case/26326417/>> accessed 1 September 2015.



Now again, now everyone's looking at the coach. Did you know that was going on? Did your assistant know it was going on? Did your trainer know that was going on? That issue is massive in college sport 'cos we're not dealing with professionals.

Problematically, the scrutiny and accountability afforded by the media microscope, student evaluations, exit interviews and administrative appraisal of coaches in the US is, generally, unlikely to be mirrored in the context of much coaching in the UK. Although perhaps viewed as a nuisance by some coaches, these checks and balances appear useful mechanisms in the promotion of acceptable coaching practice, thereby safeguarding coaches from some of the acts or omissions in coaching conduct that might be construed as negligent.

### 3. Modern Coaching Practice

There is evidence to indicate that many coaches conveniently ignore instances when athletes haze members of their teams,<sup>23</sup> or fail to adequately intervene to prevent it,<sup>24</sup> revealing an increasing concern with the complicity of coaches in condoning, or facilitating, hazing.<sup>25</sup> At the elite level of UK youth sport, recent research suggests that coaches may actually be the main perpetrators of physical harm suffered by athletes, either by means of direct involvement, or alternatively, by tacitly endorsing it.<sup>26</sup> More specifically, the potential legal vulnerability of coaches following alleged hazing, or initiation ceremony abuses, was reinforced in this jurisdiction in 2013 when a former professional footballer sought to bring a landmark case.<sup>27</sup> The claimant, a young trainee at the time of the alleged incident(s), brought a civil action accusing the

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<sup>23</sup> McGlone (n 7) 176.

<sup>24</sup> Ibid 172; K Alexander et al, 'The Experiences of Children Participating in Organised Sport in the UK', October 2011, University of Edinburgh/NSPCC Child Protection Research Centre, 17 <<http://www.nspcc.org.uk/globalassets/documents/research-reports/experiences-children-participating-organised-sport-uk-summary-report.pdf>> accessed 25 May 2015.

<sup>25</sup> Young (n 3) 76.

<sup>26</sup> Alexander et al (n 24) 17. This study suggests that coaches were the second most common perpetrators of all forms of harm, but as young athletes advanced through the competitive ranks, the coach's role in harm increased.

<sup>27</sup> GB (n 1).

then Club manager/coach of turning 'a blind eye' to an initiation ceremony known as 'the Glove'.<sup>28</sup> Despite this claim ultimately being unsuccessful, in finding that the full truth was not revealed in court, Judge Butler's judgment lends some support to suggestions that there may indeed be likely future developments in this area of sports law:

I have the uncomfortable feeling that neither the claimant nor the second defendant have given a fully accurate account and that both they and others may have been economical with the truth. There is both a legal and a moral difference between the telling of a lie in answer to a direct allegation and keeping silent when the correct allegation has not been made. Whilst I am unable to find the facts necessary for me to conclude that the claimant has proved that the alleged assaults on him happened or happened in the way he alleges or that "the glove" was used in the manner he alleges, I am equally unable to find positively that they did not and it was not. I confess to a lurking suspicion ... that some form of prank may lie at the root of this case.<sup>29</sup>

Although some coaches may be of the view that the fostering of team discipline (and team cohesion and unity) will be enhanced by means of initiation ceremonies and rituals, this potentially confuses (over) conformity with discipline.<sup>30</sup> Similarly, initiation rituals may be dismissed as merely 'banter' and a traditional rite of passage.<sup>31</sup> This

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<sup>28</sup> J Newton, 'Ex-apprentice footballer to sue Stoke City over claims he was physically abused by players in 1980s, leaving him "destroyed as a person"', *Mail Online* (6 July 2015, London) <<http://www.dailymail.co.uk/news/article-3151357/Ex-apprentice-footballer-suing-Stoke-City-claiming-destroyed-person-physically-abused-players-1980s.html>> accessed 2 September 2015; D Taylor, 'Ex-England captain Mick Mills denies turning blind eye to Stoke "abuse"', *The Guardian* (Tuesday 10 December 2013, London) <<http://www.theguardian.com/football/2013/dec/10/mick-mills-denies-stoke-sexual-assault-claims-george-blackstock>> accessed 2 September 2015. This alleged punishment ritual was also known as 'the Finger', whereby a goalkeeper's glove was smeared with heat cream and used in a sexual assault. The civil case for damages against the club, and coach, was for a breach of duty, the claimant alleging that he was left with post-traumatic stress because the first-team goalkeeper perpetrated the act upon him in the first-team dressing room. Interestingly, Nicholas Fewtrell, the barrister representing Stoke City FC, is quoted as stating, '[i]f one is taking the lid off Pandora's box, it is not likely to be an isolated event. ... This practice of punishments, pranks and initiations will have been common at clubs in all sports'. This language and terminology, and in particular, the phrase 'pranks', might be construed as regarding such conduct as an acceptable and reasonable way to achieve team unity or, what Nuwer refers to as 'humorous boys-will-be-boys stunts' (see, Nuwer (n 12) 75).

<sup>29</sup> *GB* (n 1) [141].

<sup>30</sup> Nuwer (n 12) 55.

<sup>31</sup> J Thorne, 'When do sport teams' initiation ceremonies cross legal boundaries? Part 1', *LawInSport*, 17 July 2014 <<http://www.lawinsport.com/blog/squire-patton-boggs/item/when-do-sport-teams-initiation->



does not, however, negate the fact that seemingly 'harmless' rituals 'could constitute tortious and even criminal acts, including sexual assault and sexual harassment, battery or actual bodily harm'<sup>32</sup> Nonetheless, and consistent with the primary research question of this thesis, it would appear that negligence constitutes the predominant cause of action in hazing cases.<sup>33</sup> Put simply, since hazing may be argued to represent a reasonably foreseeable danger for athletes,<sup>34</sup> it is immediately apparent that a possible 'deliberate indifference' of some coaches to hazing activities,<sup>35</sup> in an increasingly litigious society, may expose coaches (and clubs/administrators and educational institutions) to legal liability resulting from hazing incidents.<sup>36</sup> Accordingly, as noted by Anderson, since it seems likely that there will be future legal developments in this area,<sup>37</sup> this appears to be a further potential complexity of coaching requiring informed awareness, careful reflection and sensible and proportionate risk management implications.

Hazing is a world-wide issue, with the well documented dangers of hazing ranging from sport burnout to death.<sup>38</sup> Three common hazing themes used to 'teach' young athletes respect include nakedness, alcohol and pain.<sup>39</sup> Accordingly, the

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ceremonies-cross-legal-boundaries-part-1> accessed 25 May 2015. Certainly, in the British documentary film, 'The Class of "92"', none of Beckham, Scholes or Neville appear to bear any lasting physical/psychological damage or ill-feeling.

<sup>32</sup> Ibid. Thorne also notes that, under English law, it is well established that employers have a duty to take reasonable care of the health and safety of their employees and to provide a safe workplace and safe system of work. This statutory requirement (s 2 of the Health and Safety at Work etc. Act 1974 and the Management of Health and Safety at Work Regulations 1999) was discussed in chapter 4 on risk assessments and, will also be considered in chapter 8 in the context of sport-related concussion. Consequently, where an initiation leads to a player suffering an injury, the outcome of a possible investigation by the Health and Safety Executive may be the club facing a prosecution or fine, for failure to ensure adequate health and safety in the workplace.

<sup>33</sup> Carroll et al (n 4) 403-04. The most common allegation involved some form of negligent supervision and/or negligent failure on the part of the institution to protect the injured person against hazing behaviour, especially in cases involving prior acts of hazing at the institution. An employer would be vicariously liable for the negligence of its employees in instances where this breach of duty was in the course of employment.

<sup>34</sup> Ibid 407.

<sup>35</sup> McGlone (n 7) 187.

<sup>36</sup> Carroll et al (n 4) 407.

<sup>37</sup> Anderson (n 1).

<sup>38</sup> Carroll et al (n 4) 405-06.

<sup>39</sup> Jamieson and Orr (n 5) 171.

International Olympic Committee's (IOC) press release of 8 February 2007, announcing adoption of a Consensus Statement on 'Sexual Harassment and Abuse in Sport', acknowledged that:

Research indicates that sexual harassment and abuse happen in all sports and at all levels, with a greater prevalence in elite sport. Members of the athlete's entourage [including coaches] who are in positions of power and authority appear to be the primary perpetrators. Research also demonstrates that sexual harassment and abuse in sport seriously and negatively impact athletes' physical and psychological health. They can damage performance and lead to athlete drop-out.<sup>40</sup>

With particular reference to hazing, the Consensus Statement states:

Gender harassment, hazing and homophobia are all aspects of the sexual harassment and abuse continuum in sport ... *Hazing* involves abusive initiation rituals that often have sexual components and in which newcomers are targeted.<sup>41</sup>

Although anti-hazing policy and education campaigns, such as the IOC Consensus Statement on 'Sexual Harassment and Abuse in Sport', should have warned some possible offenders, including coaches, to the dangers and inappropriateness of risky and degrading initiation practices, there are no signs of hazing 'going away'.<sup>42</sup> In fact, increased emphasis towards policing and anti-hazing policy may result in the unintended consequence of consolidating codes of silence around the practice.<sup>43</sup> Certainly, there would appear to remain an acceptance by many of hazing as a traditional rite of passage and team membership requirement.<sup>44</sup> For instance, in *GB v Stoke City Football Club* the court highlighted that:

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<sup>40</sup> International Olympic Committee, Consensus Statement: Sexual harassment and abuse in sport (2007) <[http://www.olympic.org/documents/reports/en/en\\_report\\_1125.pdf](http://www.olympic.org/documents/reports/en/en_report_1125.pdf)> accessed 11 May 2015.

<sup>41</sup> Ibid. Also see, Carroll et al (n 4) 390.

<sup>42</sup> Young (n 3) 135.

<sup>43</sup> Ibid 76.

<sup>44</sup> McGlone (n 7) 165.



it was the claimant's witness PL who described it [hazing] as being 'just what happened' or 'the accepted punishment' which the apprentices 'normalised' and his witness BD who described it as 'just what happened in those days' and as 'part and parcel of getting a contract'.<sup>45</sup>

This, in and of itself is highly problematic, since attempts to 'out do' previous traditions and initiation ceremonies may result in exposure to ever more dangerous hazing activities for newcomers.<sup>46</sup>

When referring to the issue of hazing, the interviewees tended to also include bullying type conduct by coaches as representative of hazing (e.g., 'I'm being bullied, I'm being hazed'), or, sub-culturally, what was termed an "'old school" mentality where hazing is just pretty much not tolerated anywhere now at any level'. This 'old school' approach to coaching would likely involve punishment type drills and practices which arguably, may be indicative of the harsh and authoritative approaches adopted by some soccer coaches in the UK, as highlighted in previous chapters. The potential interconnectedness between some of the inappropriate coaching practices considered in chapter 6, and bullying/hazing type behaviours by coaches, was articulated by Coach A (Women's Basketball, NCAA Division 1). Interestingly, and of particular relevance for modern sports coaches, Coach A also reinforced the significant role of technology and the media as mechanisms increasingly engaged to contemporaneously scrutinise the conduct of coaches:

I think that coaching styles have changed over time just with technology everything's recorded now and everything is ... you're constantly being watched and so you might not be able to do the Bobby Knight thing where he's throwing chairs and you can't do that nowadays because I think kids are so sensitive on those types of issues. They will come out and they will have video evidence of it and so I think coaches do need to be careful of it [bullying and hazing] nowadays and maybe change their coaching style to be maybe more of a co-operative coach. ... I just think that the kids are more sensitive nowadays. ... They're not going to take crap from anybody, sorry for my language, but they're not gonna. They're not going to let some coaches push 'em around. Is it

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<sup>45</sup> GB (n 1) [24].

<sup>46</sup> McGlone (n 7) 168.

because they're raised differently? But in my family I was always raised to respect everybody and so if a coach is sitting there yelling at me I'm gonna take it and I'm going to do what he says 'cos it's best for the team.

Yeah ... I think that those days are over. I don't think coaches can be that way anymore. You never know when a kid is holding up his 'phone taping. Even in the locker room. Because everything's so accessible now and everyone has it even if it's just a like a voice recording or anything.

Research conducted by Sabo and Panepinto, consisting of in-depth semi-structured interviews with a convenient sample of former football players, provides a critical insight into the scope for ritualised punishment drills to become normalised and entrenched in sport:

Interviewees enthusiastically shared stories of coaching techniques that 'drove us to the limits.' Coaches assured players that pain is an inevitable part of the game, and interviewees seemed to have bought the axiom 'jock, stock, and knee brace.' Athletes reported participating in many pain-inducing activities that were organized (i.e., ritualized) by coaches as part of the training regimen or as a form of punishment.

Coaches de-emphasized the degree of physical suffering and probability of serious injury. Players were taught to deny pain. Coaches encouraged boys to 'toughen up,' to 'learn to take your knocks,' and 'to sacrifice your body.' Boys were expected to 'run until you puke' and 'push until it aches.' Permanent injury and debilitation sometimes resulted. Coaches' responses to players' pains and injuries varied between mild empathy to studied indifference.<sup>47</sup>

Arguably, authoritative and oppressive interaction between coaches and players, and possible implementation of punishment type drills and practices, may become regarded as routine and acceptable in certain circumstances.<sup>48</sup> Take for

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<sup>47</sup> D Sabo and J Panepinto, 'Football Ritual and the Social Reproduction of Masculinity' in M Messner and D Sabo (eds), *Sport, Men, and the Gender Order: Critical Feminist Perspectives* (Human Kinetics, 1990) 115, 122-23.

<sup>48</sup> P Kellett, 'Football-as-War, Coach-as-General: Analogy, Metaphor and Management Implications' (2002) 5 *Football Studies* 60, 70; J Ehrmann, *InSideOut Coaching: How Sports Can Transform Lives* (Simon & Schuster, 2011) 80.



example, some of the conditioning/punishment type drills modelled and reinforced, and portrayed as necessary and effective coaching practice, in contemporary films including *Coach Carter*, *Remember the Titans* and *Best Shot*. This includes a high intensity shuttle-sprint training drill, commonly referred to as 'suicides'. While many coaches will, no doubt, utilise such methods reasonably, as this thesis' legal analysis reveals, coaches must be cautious when using exercise drills as a form of punishment.<sup>49</sup> In advocating the avoidance of such terminology as 'suicide' drill by coaches, Appenzeller notes that this and similar such terms 'could come back to haunt you in court should an injury occur'.<sup>50</sup> Put bluntly, it may be particularly challenging for coaches engaging in such coaching methods as a matter of habit, routine, or uncritical inertia, to justify such practice as being objectively reasonable. As alluded to in chapter 6, this appears a possible scenario with the potential for possible negligent entrenched practice to be 'accepted uncritically, without question or qualification, and often followed without recognizing limits or thinking about the boundaries that separate normal from deviant'.<sup>51</sup>

#### 4. Conclusion

The above critical analysis of the issue of sport-related hazing generates a number of suggested recommendations for coaches seeking to adopt good practice or a proactive risk assessment lens. In recognising that the exercise of sensible and reasonable care by coaches (and athletes/administrators) would prevent many incidents of sport-related hazing,<sup>52</sup> the list of suggested risk management guidelines by Carroll et al includes:<sup>53</sup>

- i. Institutions establishing a clear anti-hazing policy;

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<sup>49</sup> G Wong, *Essentials of Sports Law* (4th ed., Praeger, 2010) 111.

<sup>50</sup> Appenzeller (n 7) 153.

<sup>51</sup> J Coakley and E Pike, *Sports in Society: Issues and Controversies* (2nd ed., McGraw-Hill Education, 2014) 160. Also see chapter 6, p. 204.

<sup>52</sup> Carroll et al (n 4) 391.

<sup>53</sup> Ibid 406-07.

- ii. Creating a contract for athletes and participants to sign stating that they have read the anti-hazing policy and agree to refrain from engaging in any hazing behavior;
- iii. Adopting strong disciplinary and corrective measures for known cases of hazing;
- iv. On-going education for athletes, coaches and administrators regarding the dangers of hazing and how to spot warning signs of potential hazing activities;
- v. Anonymous reporting system(s).

Similarly, in also attempting to create a safer environment for athletes, and correspondingly, safeguard coaches from liability for sport-related hazing, the recommendations of the IOC's Consensus Statement on 'Sexual Harassment and Abuse in Sport' for all sport organisations are to:<sup>54</sup>

- i. Develop policies and procedures for the prevention of sexual harassment and abuse;
- ii. Monitor the implementation of these policies and procedures;
- iii. Evaluate the impact of these policies in identifying and reducing sexual harassment and abuse;
- iv. Develop an education and training program on sexual harassment and abuse in their sport(s);
- v. Promote and exemplify equitable, respectful and ethical leadership;
- vi. Foster strong partnerships with parents/carers in the prevention of sexual harassment and abuse; and;

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<sup>54</sup> International Olympic Committee (n 40).



vii. Promote and support scientific research on these issues.

Consistent with these implications and suggested recommendations, the appropriate implementation of (anonymous) athlete interviews, evaluations, surveys and focus groups would appear sensible best practice proposals designed to address the dangers of sports-related hazing. In supporting individual sports clubs and organisations in adopting these and similar other realistic measures, NGBs have an important role to play.<sup>55</sup> More specifically, and consistent with the propositions outlined at the end of the previous chapter with regard to coach education and training, instructive scenarios appear peculiarly well suited to stimulating critical reflection of some of the highlighted dangers of sport-related hazing. Moreover, promoting such debate and dialogue appears necessary to transcend possible limitations regarding the beneficial impact of codes of conduct in this context and, assist coaches in explicitly defining the boundary between reasonable and unreasonable coaching practice.

Thematic analysis of the interview transcripts from the small purposeful sample of US coaches uncovered the issues examined in detail in this and the previous chapter. Importantly, the most prevalent contemporary risk management concern facing modern sports coaches that emerged from this thesis' qualitative research, and which is analysed more fully in the next chapter, is the subject of sport-related concussion.

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<sup>55</sup> Also see, Child Protection in Sport Unit, Resource library <<https://thecpsu.org.uk/resource-library/>> accessed 5 August 2016.

## Chapter 8: Sport-Related Concussion

In bringing to a conclusion analysis of the findings from the interviews conducted for this research, this chapter critically scrutinises the issue of sport-related concussion from the perspective of the coach. This was a recurring and consistent risk management consideration frequently highlighted by all of the coaches included in the purposeful sample of interviewees. This reinforces the key preventative role of coaches with regard to concussion. Accordingly, the question of whether or not the ordinary law of negligence might afford sufficient and reasonable protection to coaches in this context, or whether current risk awareness systems on concussion in sport are placing too much of a burden on (volunteer) coaches, provides the backdrop for this detailed discussion.

### 1. Introduction

In recent years, sport-related concussion (SRC) has received significant popular and scientific attention,<sup>1</sup> with an associated explosion in interest in the long-term effects of sports-related brain injury.<sup>2</sup> This has included considerable focus on brain trauma related concussive injuries in the field of sports law,<sup>3</sup> most notably relating to the sport of American football,<sup>4</sup> with settlement in this high profile concussion lawsuit estimated to cost the National Football League (NFL) more than \$1 billion over 65 years.<sup>5</sup> Given the prominent challenges posed regarding appropriate management of

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<sup>1</sup> M Kirkwood et al, 'Sport-Related Concussion: A Call for Evidence and Perspective Amidst the Alarms' (2012) 22(5) *Clin J Sport Med* 383, 383-84.

<sup>2</sup> W Stewart et al, 'Chronic traumatic encephalopathy: a potential late and under recognized consequence of rugby union?' (2015) *QJM: An International Journal of Medicine* 1.

<sup>3</sup> T Meakin, 'The evolving legal issues on Rugby Neuro-trauma' (2013) 21(3) *British Association for Sport and Law Journal* 34.

<sup>4</sup> E.g., K Belson, 'Judge approves deal in N.F.L. Concussion Suit', *The New York Times*, (22 April 2015) <[http://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html?\\_r=0](http://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html?_r=0)> accessed 20 September 2015.

<sup>5</sup> R Wison, 'Judge approves concussion settlement, could cost NFL \$1 billion', *CBSSports.com*, (22 April 2015) <<http://www.cbssports.com/nfl/eye-on-football/25159518/judge-approves-concussion-settlement-could-cost-nfl-1-billion>> accessed 20 September 2015.



SRC,<sup>6</sup> it is unsurprising that the content analysis of the taped interview transcripts revealed concussion as a significant present-day risk management issue faced by coaches. Concerns about SRC does not represent a problem just for the NFL, this is a much greater global issue affecting a wide range of sports and age groups.<sup>7</sup> In short, concussion is one of the most pronounced issues facing modern sport.<sup>8</sup> In addition to the potential immediate and acute effects of concussion, there is an increased sensitivity to possible long-term sequelae of repetitive traumatic brain injury by sporting communities.<sup>9</sup> Since most sports injuries might be sustained during training rather than competition,<sup>10</sup> with the majority of concussions in sport occurring without a loss of consciousness (LOC),<sup>11</sup> the responsibilities of modern sports coaches, in effectively managing possible SRC, are compelling. As noted by England Rugby:

Coaches probably have the most important role in the prevention and management of concussion. Research has shown that young players in particular rely on their coach to provide information on concussion and are influenced most in their behaviour towards concussion by their coach. All coaches should be able to recognise suspected concussion and are in the best position to remove the player from play.<sup>12</sup>

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<sup>6</sup> S Greenfield et al, 'Reconceptualising The Standard Of Care In Sport: The Case Of Youth Rugby In England And South Africa' (2005) 18(6) *Potchefstroom Elec. L.J.* 2183, 2204.

<sup>7</sup> Acquired Brain Injury Ireland, 'Implications of Concussion in Sport', Joint Committee on Health and Children, (2014) 2, citing C Nowinski, CoFounder of Sports Legacy Institute, Boston <[http://www.abiireland.ie/docs/Concussion\\_Submisison\\_Oct\\_2014.pdf](http://www.abiireland.ie/docs/Concussion_Submisison_Oct_2014.pdf)> accessed 20 September 2015.

<sup>8</sup> C Calderwood et al, 'Turning people into couch potatoes is not the cure for sports concussion' (2015) *Br J Sports Med*, 1. Published online 24 September 2015. DOI: 10.1136/bjsports-2015-095393.

<sup>9</sup> J Patricios and M Makdissi, 'Fifty shades of grey: concussion complexities and constructive conclusions' (2015) 49 *Br J Sports Med* 492. Also see, A McKee et al., 'Chronic traumatic encephalopathy in athletes: progressive tauopathy after repetitive head injury' (2009) 68 *J Neuropathol Exp Neurol*. 709.

<sup>10</sup> A Miles and R Tong, 'Sports Medicine For Coaches' in RL Jones and K Kingston (eds) *An Introduction to Sports Coaching: Connecting Theory to Practice* (2nd ed., Routledge, 2013) 189. Cf HAP Archbold et al, 'RISUS study: Rugby Injury Surveillance in Ulster Schools' *Br J Sports Med*. Published online 23 December 2015. DOI: 10.1136/bjsports-2015-095491, finding 25% of injuries occurred during training.

<sup>11</sup> P McCrory et al., 'Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich, November 2012', (2013) 47 *Br J Sports Med* 250, 256. Less than 10% of concussions are actual knock-outs, which depending upon the context, appears to leave a significant number of concussions to be detected by the coach or reported by the player.

<sup>12</sup> England Rugby, 'Concussion – Headcase' <<http://www.englandrugby.com/my-rugby/players/player-health/concussion-headcase/coaches/>> accessed 21 September 2015.

Put simply, since the science of concussion is evolving,<sup>13</sup> the specific legal duties incumbent upon coaches, in the circumstances where a player may have suffered a concussion, merits careful contemporary scrutiny. At first glance, effective discharge of these duties by coaches includes providing adequate and reasonable: medical care; training and instruction; supervision; and, prevention of injured athletes from competing.<sup>14</sup> Breach of these duties may include: allowing a concussed player to continue to play; and/or return to play (e.g., without following stipulated graduated return to play (G RTP) protocols); and/or instructing a player to return to competition, or training, in the knowledge that the player is concussed or when the coach knows s/he is at risk of injury.<sup>15</sup> Alarmingly, research conducted by Valovich Mcleod et al found that over a quarter of the sample of youth sport coaches surveyed would allow return to play of an athlete exhibiting symptoms of concussion.<sup>16</sup> By drawing extensively from the interviews conducted for this thesis, the following analysis is intended to provide a greater awareness and appreciation of best practice in the management of SRC, in order to better safeguard coaches against potential legal vulnerabilities that may arise as a result of a failure to discharge coaching responsibilities with reasonable care. The suggested implications and recommendations are also designed to better protect the health, safety and welfare of athletes.

## 2. Context

Historically, the term concussion has been used to represent 'low-velocity injuries that cause brain "shaking" resulting in clinical symptoms and that are not

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<sup>13</sup> McCrory et al (n 11) 250.

<sup>14</sup> A McCaskey and K Biedzynski, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J. Sport L.* 7, 15-16; J Barnes, *Sports and the Law in Canada* (3rd ed., Butterworths, 1996) 302.

<sup>15</sup> Meakin (n 3) 37. Also see, J Anderson, 'Concussion, Sport and the Law', *LawInSport*, (7 May 2013) <<http://www.lawinsport.com/blog/jack-anderson/item/concussion-sport-and-the-law>> accessed 20 September 2015.

<sup>16</sup> TC Valovich Mcleod et al, 'Sport-related concussion misunderstandings among youth coaches' (2007) 17 *Clinical Journal of Sports Medicine* 140, 141. Importantly, completion of coach education was predictive of improved symptom recognition for this sample of 156 active youth sports coaches.



necessarily related to a pathological injury'.<sup>17</sup> Simply applied, '[c]oncussion is a brain injury caused by trauma that is transmitted to the brain, either directly or indirectly, and results in impairment of brain function. Concussion is a hidden injury and so misunderstood by players' coaches, parents and volunteers'.<sup>18</sup> This misunderstanding may accentuate the exposure of some coaches to the prospect of legal liability due to ineffective management of SRC.<sup>19</sup> In accordance with the law of negligence, both unreasonable acts (e.g., inadequate instruction) and omissions (e.g., deficient intervention/correction of inappropriate techniques) may be grounds for a finding of coach negligence, it being suggested that a failure to appropriately adopt emerging, and approved, SRC preventative measures may be indicative of a breach of duty by coaches.<sup>20</sup> Further, and consistent with comments made in chapters 4 and 7, in the context of injuries suffered by professional athletes in the 'workplace', condoning unsafe practice amounts to a breach of statutory health and safety legislation and so may provide additional scope for employers' liability.<sup>21</sup>

The unprecedented media attention, and public debate, focused on concussion and the potential threat of associated chronic traumatic encephalopathy (CTE)<sup>22</sup> due to head injuries in sport, may be regarded as emotive as well as distracting.<sup>23</sup> This is

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<sup>17</sup> McCrory et al (n 11) 250. Although the terms concussion and mild traumatic brain injury (mTBI) are frequently used interchangeably in the sporting context, concussion is a subset of TBI.

<sup>18</sup> ABI Ireland (n 7) 2.

<sup>19</sup> See, for instance, SP Broglio et al, 'Concussion occurrence and knowledge in Italian football (soccer)' (2010) 9 *Journal of Sports Science and Medicine* 418.

<sup>20</sup> See generally, J Anderson, 'Concussion, Sport and the Law', *Sports Integrity Initiative* (11 February 2016) <<http://www.sportsintegrityinitiative.com/concussion-sport-and-the-law/>> accessed 14 April 2016.

<sup>21</sup> C Fuller and R Hawkins, 'Developing a health surveillance strategy for professional footballers in compliance with UK health and safety legislation' (1997) 31 *Br J Sports Med* 148, 149; Anderson (n 20).

<sup>22</sup> M Saulle and BD Greenwald, 'Chronic Traumatic Encephalopathy: A Review' (2012) *Rehabilitation Research and Practice*, 1. DOI: 10.1155/2012/816069: 'Chronic traumatic encephalopathy (CTE) is a progressive neurodegenerative disease that is a long-term consequence of single or repetitive closed head injuries for which there is no treatment and no definitive pre mortem diagnosis. It has been closely tied to athletes who participate in contact sports like boxing, American football, soccer, professional wrestling and hockey'.

<sup>23</sup> M Rafferty, 'Concussion and chronic traumatic encephalopathy: International Rugby Board's response' (2014) 48(2) *Br J Sports Med* 79.

succinctly articulated by Coach B (Men's Soccer), noting the connotations associated with use of what he refers to as the 'C word':

Concussion is massive over here [in the US] now. The doctors are very, very ... I mean I remember getting hit over the head when I was a kid and I remember all my mates when concussion was kinda, like a scar you know. Like, 'oh, I felt a bit dizzy yesterday ... argh, you're good to play'. And now, because of the research that's done, you're seeing a lot of kids now wearing these kinda soft helmets. Again, parents are very 'helicopter parents' and there's different types to it. I mean, if a doctor told me, 'hey your daughter needs a helmet on', I'm putting a helmet on her, 'cos he's my doctor.<sup>24</sup> But back in the day, I don't think that would have happened. But nowadays they're so hands on with concussion.

There's a massive liability in the situation there. So that 'C word' is ... you can't throw that 'C word' around because even if some coaching staff member or trainer says he might have a concussion, it's done. Now if he now goes back on the field and passes out ... you're now liable ... it's very, very ... so now when anyone's hit on the head, whenever anything happens, it's up to the trainer, it's up to the doctor, we [the coaches] stay out of it. I'm not going to go over there and go 'Oh, you're all right ... get back on'. I'm never going to put myself in that situation. If anything happens to where we think a player has a concussion, he's immediately pulled from the event and the next day he goes and takes that screening test.

These sentiments were acutely reiterated by Coach E (American football), highlighting the apparent strong correlation between the previously critiqued aspects of coaching practice and over-conformity to the 'sport ethic' discussed in chapters 6 and 7:

Concussion has become a huge issue, particularly in the sport of football where the 'old school' train of thought from 20-25 years ago was just play through anything. Play through any pain, any discomfort, just keep playing. Just be tough. Be a man. Be masculine and keep playing. Now, you really hear about the consequences of concussions and CTE, brain trauma, and there's high profile cases of guys that have played in the NFL, like Junior Seau, that can lead

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<sup>24</sup> Interestingly, there would appear to be no conclusive clinical evidence confirming a reduction in concussion incidence due to wearing protective equipment. Further, possible behavioural changes (i.e., adoption of more dangerous playing techniques) may result in a paradoxical increase in injury rates as a result of 'risk compensation'. See, McCrory et al (n 11) 255.



to catastrophic events so obviously the protocols keep getting better and better for concussions. The training staff, they do concussion tests, like a baseline test. If they think an athlete has suffered a concussion, they have them go back and take their tests and compare the results to a normal brain functioning compared to a concussion functioning. So coaches are becoming more and more educated. Whereas 'old school' coaches of 30 years ago might just not have known as much about it and might have just encouraged a different type of behavior. But now the training staff, they have the final say of whether a player can play or not over coaches. Coaches are not the ones that clear players to play health wise. Knowing their place. They're not the experts on brain trauma, there are other people that do that and so they don't feel a need to answer for people.

By raising public awareness of concussion, the intense contemporary media focus and alertness has undoubtedly been positive.<sup>25</sup> However, this same media focus may unwittingly result in negative consequences by: reducing participation in sports and disrupting the health benefits of exercise;<sup>26</sup> and, compelling sports to select hastily designed and evidence deficient approaches towards risk management.<sup>27</sup> It has been argued that there is no conclusive evidence of a cause and effect relationship between CTE and concussions or exposure to contact sports yet, the challenge of addressing the media fuelled anxiety of parents/athletes (and coaches) regarding the possibility of CTE remains.<sup>28</sup> Conversely, in reflecting the emerging and unsettled state of medical knowledge in this area,<sup>29</sup> there is some contradictory research suggestive of an association between contact sports and a range of health problems, including concussion and CTE.<sup>30</sup> This lack of scientific consensus on the longer-term dangers of

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<sup>25</sup> Rafferty (n 23) 79.

<sup>26</sup> Ibid; Calderwood et al (n 8) 1.

<sup>27</sup> Rafferty (n 23) 79.

<sup>28</sup> McCrory et al (n 11) 254. Also see, Stewart et al (n 2) 3. The understanding of the incidence of CTE remains strikingly limited.

<sup>29</sup> Meakin (n 3) 34. This prevents the issuing of definitive guidance for potential defendants (and claimants). Also see, MJ McNamee et al, 'Concussion in Sport: Conceptual and Ethical issues' (2015) 4 *Kinesiology Review* 190, 190-91.

<sup>30</sup> G Kirkwood et al, 'Concussion in youth rugby union and rugby league: a systematic review' (2015) 49 *Br J Sports Med* 506, 509.

SRC, given this is a highly sensitive and emotive issue, may arguably result in the unintended repercussion of an overemphasis on risk-averse behaviour.<sup>31</sup>

Should coaches be increasingly concerned about the prospects of legal liability,<sup>32</sup> the pronounced responsibilities in effectively managing SRC issues may certainly inhibit coaching practice by tacitly encouraging 'defensive' coaching, with a possible consequential 'chill effect', and the likely disengagement of some coaches. For instance, Wolin and Lang suggest that concussion protocols could have the effect of placing referees (and coaches) at greater risk of legal liability should there be a failure of reasonable adherence to stipulated procedures, potentially drawing those with supervisory responsibilities 'directly into the line of fire'.<sup>33</sup> Moreover, as noted by the YMCA of Central Ohio, this exposure to litigation may be compounded in amateur sport where coaches sometimes change from game to game and so may be unaware of an injury sustained by a child in a previous match.<sup>34</sup> Since medical assistance at the lower levels of the sport performance pyramid is often sought outside of the team environment, the subsequent dissemination of the results of tests, scans, and specialist medical advice to coaches may also be problematic.<sup>35</sup> This would suggest that it may be relatively straightforward for some athletes to withhold information and continue to play when it would be potentially more harmful to do so.<sup>36</sup> As will be contended, this reinforces the need for more medical data to be generated and shared, for instance,

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<sup>31</sup> K Sellgren, 'Doctors urge schools to ban tackling in rugby', *BBC News* (2 March 2016) <<http://www.bbc.co.uk/news/education-35696238>> accessed 7 May 2016. Cf R Tucker, 'Banning the tackle in rugby: A lesson in A vs Z', 3 March 2016 <<http://sportsscientists.com/2016/03/banning-tackle-rugby-lesson-vs-z/>> accessed 7 April 2016; M Syed, 'Like life, rugby is boring if it's not dangerous', *The Times*, (30 September 2015, London); Also see, for instance, Calderwood et al (n 8).

<sup>32</sup> S Greenfield, 'Law's impact on youth sport: should coaches be "concerned about litigation"? (2013) 2(2) *Sports Coaching Review* 114.

<sup>33</sup> MT Wolin and RD Lang, 'Legal Liability for Sports Referees in Today's Litigious World – If You Can't Kill The Ump Then Sue Him' (2013) 15 *U. Denv. Sports & Ent. L.J.* 83, 86-87.

<sup>34</sup> YMCA of Central Ohio, 'YMCA Expresses Concern with Ohio Concussion Bill', (April 21, 2012) <[http://www.ymcacolumbus.org/news-media/news/ymcalfightscconcussion bill governing coaches refs](http://www.ymcacolumbus.org/news-media/news/ymcalfightscconcussion%20bill%20governing%20coaches%20refs)> accessed 14 April 2016.

<sup>35</sup> McNamee et al (n 29) 199.

<sup>36</sup> *Ibid.*



through referees' reports and greater communication between schools and clubs, particularly in rugby.<sup>37</sup>

### 3. Coaching Practice and Education

The perceived risk of SRC has required sports governing bodies, including World Rugby, to introduce programmes to better manage concussion injuries and to evaluate the future possible introduction of measures intended to reduce its incidence.<sup>38</sup> Since completion of coach education appears predictive of better symptom recognition, this signifies a welcome and necessary development.<sup>39</sup> In this context, the 'Zurich Consensus'<sup>40</sup> provides the most recognisable initiative to improve concussion management.<sup>41</sup> However, since rigid adherence to a particular protocol appears less useful than conducting an individualised analysis of an athlete's welfare on case-by-case basis, there may be a threat of coaches becoming frustrated and disillusioned with return-to-play (RTP) decisions that may not yet be evidence based.<sup>42</sup> That said, individualised management of SRC is not without criticism since the 'tension between a cautious or conservative stance to remove the athlete from the field of play and the deference to individual clinical judgment is one that has confused medico-scientific guidance on concussion throughout the period of the last 15 years'.<sup>43</sup> This reinforces the requirement for concussion assessment tools to achieve acceptable test specificity, thereby maintaining stakeholder credibility given the potential detrimental consequences from excluding non-concussed players.<sup>44</sup> Some hesitancy and

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<sup>37</sup> See for instance: P Cullen, 'Doctors want mandatory reporting for sports injuries at school', *Irish Times*, (31 March 2016, Dublin) <<http://www.irishtimes.com/news/health/doctors-want-mandatory-reporting-for-sports-injuries-at-school-1.2592857>> accessed 14 April 2016.

<sup>38</sup> Rafferty (n 23) 79–80. See further, Stewart et al (n 2) 3.

<sup>39</sup> Valovich Mcleod et al (n 16) 141. Also see, EM O'Donoghue et al, 'Assessment of High School Coaches' Knowledge of Sport-Related Concussions' (2009) 1(3) *Athletic Training & Sports Health Care* 120.

<sup>40</sup> McCrory et al (n 11).

<sup>41</sup> Calderwood et al (n 8) 1; McNamee et al (n 29) 192.

<sup>42</sup> M Kirkwood et al, 'Sport-Related Concussion: A Call for Evidence and Perspective Amidst the Alarms' (2012) 22(5) *Clin J Sport Med* 383–84.

<sup>43</sup> McNamee et al (n 29) 192.

<sup>44</sup> G Fuller et al, 'The International Rugby Board (IRB) Pitch Side Concussion Assessment trial: a pilot test accuracy study' (2015) 49 *Br J Sports Med* 529, 533. This would include the Pocket Concussion

reservations regarding the efficacy of present concussion recognition strategies, in the context of elite sport, were alluded to by Coach B:

We had a player miss a game this year because he got hit on the head with a ball and he went down on the field, doctor came on ... we have a doctor at every single game on the sideline with our trainer ... and err, he went on to the field and he (the player) got hit on the head with a ball and he was lying down, he was kinda getting his head together. He was just a bit woozy and the doctor was asking him questions ... he was just trying, getting himself together, and he was just deemed with concussion there and then, which was obviously a little bit of a false practice. All of our players are baseline tested in pre-season. They've all clicked (the computer), taking about half an hour reaction times, questions, and they're trying to do that at the High School level as well now in \_\_\_\_\_. But in a College it's mandated ... NCAA do that. They make sure that every single person has it. And that next day he took the test, he was fine but 'cos the doctor had deemed it, now the doctor was ... now if he did have a concussion he can't clear him ... even if he doesn't have a concussion he already said he had a concussion. Does that make sense?

The fact that similar, possibly more deep-rooted views and frustrations, may be widely held by other coaches appears to be recognised, for instance, by England Rugby's Concussion Campaign which identifies the culture of the sport (i.e., what might be termed the 'sport ethic') as being potentially problematic when addressing concerns of SRC. 'Old school' or traditional approaches to coaching practice, possibly reflective of coaching methods underpinned by the concept of hegemonic masculinity (e.g., 'Just be tough. Be a man. Be masculine and keep playing'), unquestioningly, have the scope to accentuate the potential for negligent entrenched coaching. For instance, unreasonable male tolerance of risk and injury may become redefined as meaningful and masculinising, thereby becoming something of a status marker and standard for aspiring athletes to try to model and, ultimately replicate.<sup>45</sup> Coaches promoting and endorsing such a sports environment may find themselves facing a more difficult challenge, if required to defend an allegation of negligence, than coaches adopting a

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Recognition Tool and, use by suitably qualified medical personnel of the Pitch Side Concussion Assessment tool (PSCA), and other possible suitable assessments, such as the SCAT3 and Child Scat 3.

<sup>45</sup> K Young, *Sport, Violence and Society* (Routledge, 2012) 104.



more athlete-centred coaching philosophy. Put bluntly, the negligence standard is premised on objective reasonableness and would not be lowered to account for the subjective and idiosyncratic opinions held by coaches about what might constitute a 'serious' concussion, the efficacy of particular head injury assessment tools and procedures, or even, over-conformity to the 'sport ethic'. Further, a failure to remain up-to-date with the latest education, training and advice on best practice concussion management may compound associated legal vulnerability.

Significantly, despite these particular tensions and uncertainties, it appears plain that:

Poor knowledge of concussion recognition and management by players, coaches, parents and even clinicians has played a large role in the mismanagement (sic) of concussion to date. This became evident and a harsh reality when 14 year old schoolboy Ben Robinson died from second impact syndrome after continuing to play with a concussion in a rugby match in 2011. Ben played roughly a full half of rugby with signs of concussion resulting in him developing second impact syndrome due to the first concussion not having time to heal. Second impact syndrome causes rapid and severe brain swelling resulting in a severe brain injury and often death as in Ben's case.<sup>46</sup>

In terms of sports medicine, concussion may be considered to be amongst the most complex of injuries to diagnose, assess and manage.<sup>47</sup> This reinforces the need for coaches to be absolutely clear on their role in effective concussion management, no doubt, requiring increased education for coaches to ensure that they are equipped with the necessary tools to recognise the signs and symptoms of a concussed athlete to ensure prompt and immediate removal of athletes from all physical activity when necessary.<sup>48</sup> While accepting that coaches have a fundamental role to fulfil in protecting athletes from unreasonable risk as a result of SRC, final decisions concerning

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<sup>46</sup> ABI Ireland (n 7) 3. Also see, 'Ben Robinson's rugby death is first of its kind in Northern Ireland', *BBC News* (3 September 2013) <<http://www.bbc.co.uk/news/uk-northern-ireland-23943642>> accessed 20 September 2015.

<sup>47</sup> McCrory et al (n 11) 256.

<sup>48</sup> ABI Ireland (n 7) 3.

concussion diagnosis and/or fitness to play must be based on clinical judgement and made by a medical practitioner, not least, because the science of concussion is evolving.<sup>49</sup> Should there be any suspicion that an athlete may have suffered a SRC, it is important that coaches lean on the side of caution. Although standardised assessment tools may prove of use in the immediate assessment of athletes with suspected concussion,<sup>50</sup> they must not take the place of the clinician's judgement.<sup>51</sup> This is a situation where coaches, crucially, must be mindful of their limitations and, as emphasised in chapters 5 and 6, resist making decisions that they are not ordinarily competent to do so properly. Perhaps unsurprising given the profile of the issue of concussion in American football, and consistent with elite and professional sport, where it would be expected that specialist medical staff would be on hand to support athletes and coaches, Coach E candidly (and sensibly) notes that in terms of concussion management:

I don't have the qualifications to be an athletic trainer. I didn't go to school for that. I don't understand that at an extremely intricate level. That's what's nice about coaching at the college level, where you have a full time staff that's there to take care of your student athletes and protect them and also help coaches to make the best decisions as far as who to count on for this certain game competition. At the end of the day that's not my job, I have to do my job as a coach.

#### **4. Potential Legal Vulnerabilities for Coaches**

In seeking to critically examine some of the potential legal vulnerabilities that coaches may be exposed to as a result of SRC injuries suffered by athletes under their charge, the key coach responsibilities identified by England Rugby's Concussion Awareness campaign provides an excellent general starting point. These responsibilities, or duties, include:

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<sup>49</sup> McCrory et al (n 11) 251.

<sup>50</sup> For instance, the Pocket Concussion Recognition Tool. See, 'Pocket CRT' (2013) 47 *Br J Sports Med* 267.

<sup>51</sup> McCrory et al (n 11) 256.



- Setting the culture within the team regarding head injury and concussion
- Instilling techniques and behaviours in players that reduce the risk of head impacts
- Taking concussion seriously and educating their players on the issue
- Recognising that head injury and concussion needs to be viewed differently to other injuries
- Understanding the processes to be followed
- Encouraging players following a head injury to report all symptoms honestly without fear of negative consequences
- Allowing the medical staff to do their jobs without interference.<sup>52</sup>

For present purposes, these obligations will be analysed under three main heads relating to: (i) culture; (ii) instruction and supervision; and, (iii) establishing negligent coaching.

#### 4.1 Culture

This section will seek to highlight issues regarding the necessity for coaches to foster an appropriate culture within sports programmes, and teams, regarding head injury and concussion. This includes the need for coaches to take concussion seriously, educating their athletes on the issue and, more specifically, encouraging athletes following a head injury to report all symptoms honestly without fear of negative consequences.<sup>53</sup> Presenting anecdotal evidence to indicate a potential lack of reasonable care in discharging these specific responsibilities, by some coaches, is not

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<sup>52</sup> England Rugby, 'Concussion Awareness' <<http://www.englandrugbyfiles.com/medical/concussion-awareness/coaches/>> accessed 7 May 2016.

<sup>53</sup> For instance, there is recent evidence to suggest that concussion may be under-reported in youth rugby: Archbold et al (n 10). This research found that one in five injuries suffered by players competing in the Ulster Schools Rugby Senior Cup 2014/15 was a concussion. Further, 19% of these reported concussive injuries occurred during training.

difficult. For instance, a participant in research carried out by ABI Ireland and the Gaelic Players Association in 2012 was of the opinion that '[m]ost coaches are believers of "play on it's only a few minutes left, you'll be grand"'.<sup>54</sup> Worryingly, this same research found that over forty percent of GAA players who sustained a concussion reported that they played on regardless and, that they could not recall the rest of the game.<sup>55</sup> Even with suitably qualified medical practitioners present in professional sport, this failure of athletes, following a head injury, to appreciate the dangers and report all symptoms earnestly would seem prevalent. For instance, retired Welsh professional rugby player Gareth Thomas revealed:

I've played in games where I know I've been concussed, yet if the doctor asked me if I was OK then I'd just say: 'Yes.' ... Because it's a relatively new kind of injury that we're looking at and seeing the dangerous effects of it, it's going to take a while for players to understand why they shouldn't cheat baseline tests.<sup>56</sup>

This appears to strongly resonate with the comments previously highlighted by Coach B, when reflecting upon his own playing experiences, and recalling that 'when I was a kid and I remember all my mates when concussion was kinda, like a scar you know. Like, "oh, I felt a bit dizzy yesterday ... argh, you're good to play"'. In this context, the clearance of athletes to return to play, as might often have been (and perhaps sometimes remains) the case in amateur and youth sport, was a decision made by the coach.<sup>57</sup> In reinforcing the need for coaches to be mindful of their limitations, follow stipulated and recommended protocols, and manage SRC issues conservatively (i.e., 'If in doubt, sit them out'),<sup>58</sup> Coach C (Women's soccer) acknowledged that:

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<sup>54</sup> ABI Ireland (n 7) 3-4.

<sup>55</sup> Ibid 3. Also see, Broglio et al (n 19), suggesting that a significant number of sport-related concussive injuries go unreported, many of the youth soccer athletes taking part in the survey believing the injury not to be serious and a routine part of the game.

<sup>56</sup> G Thomas, 'Six Nations 2015: I've played when concussed says Gareth Thomas', *BBC Sport* (13 February 2015) <<http://www.bbc.co.uk/sport/0/rugby-union/31441188>> accessed 7 May 2016.

<sup>57</sup> See, for instance, Broglio et al (n 19) 421. Since coaches are present throughout all practices and games, they are typically the lead authority figure to which injuries are reported, with evaluation and treatment of concussive injuries often falling on their shoulders.

<sup>58</sup> Discussed later.



Concussion is a big part of, I think, sport in general. Any kind of injury or forced decisions in order to get a kid on the field, you know, when it comes to the medical world they understand that coaches want their top athletes back on the field asap. So are we convincing kids to maybe not say something to an athletic trainer in order that so they don't get in that, you know, 6 day, 10 day ... now I say I have a concussion, I've shown symptoms and the athletic trainer says they can't play for 10 days until they are clear. And we as coaches, are we trying to influence them behind the scenes and say, you know, if you have a little bit of a headache don't say anything? That might come back to bite you really bad! From our program, our standpoint, I mean our athletic trainer is on staff all of the time. Now she's not in private one-on-one meetings with coaching staff and players about their performance but I think that's probably something that is going to become an issue because of concussion prevention and injury prevention, especially, like women, and ACL tears and stuff.

These comments are insightful in three main aspects. Firstly, coaches must avoid forcing injured athletes to perform and, avoid any attempts to pressure health professionals in order to attempt to secure the premature return to play of athletes with the possibility of a SRC.<sup>59</sup> Reassuringly, there is some evidence to indicate that coaches do not pressure health professionals to sanction the return of athletes to competitive play,<sup>60</sup> arguably, in part as a result of recent awareness campaigns, although deference to the professional decision making of team doctors and physiotherapists is by no means to be presumed.<sup>61</sup> As was submitted in *Brady v Sunderland Association Football Club*,<sup>62</sup> and *Davenport v Farrow*,<sup>63</sup> inadequate referral of athletes by coaches to appropriate specialists for medical attention may be grounds for a finding of liability in negligence in the medico-legal context. A fortiori should a coach make an appropriate referral and then ignore or contravene medical opinion

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<sup>59</sup> See generally, L Anderson, 'Bloodgate: were the punishments fair?' (2011) 45(12) *Br J Sports Med* 948, 949.

<sup>60</sup> Fuller et al (n 44) 533. Cf Broglio et al (n 19) 421.

<sup>61</sup> See, for instance, D Fifield, 'Chelsea's former doctor Eva Carneiro wants public apology from Mourinho', *The Guardian*, (7 March 2016, London) <<http://www.theguardian.com/football/2016/mar/07/eva-carneiro-chelsea-doctor-jose-mourinho-constructive-dismissal-public-apology>> accessed 7 May 2016.

<sup>62</sup> *Brady v Sunderland Association Football Club Ltd* (2 April 1998, QBD).

<sup>63</sup> *Davenport v Farrow* [2010] EWHC 550 (QB).

there would appear to be strong evidence to indicate a possible breach of duty by the coach.

Secondly, advocating and promoting a coaching culture with an overemphasis on the 'sport ethic', or 'the ends justifies the means' approach, would appear unlikely to be consistent with the coach's duty to avoid exposing athletes to unreasonable risks by discharging their coaching responsibilities with due diligence. It has previously been submitted that in order to ensure that coaches can robustly justify their coaching practice they ought to engage in critical and reflective practice. Consistent with the insight provided by Coach C, a particular question regarding appropriate concussion management for coaches to reflect upon, perhaps as an aspect of CPD, should be 'are we trying to influence them [the athlete] behind the scenes and say, you know, if you have a little bit of a headache don't say anything?'. If so, this might amount to a reckless disregard for the health and safety of athletes, thereby accentuating a coach's exposure to negligence liability.

Thirdly, Coach C's suspicion that trainers (medical staff) will increasingly have a greater input and influence over the decisions made by coaches, in order to better safeguard athlete welfare, reinforces the importance of coaches being mindful of protocols, procedures and approved practices that are likely to evolve. The introduction of rule changes by NGBs<sup>64</sup> which, once ratified, coaches might reasonably be expected to implement in organised practice sessions,<sup>65</sup> may similarly be anticipated.<sup>66</sup> With specific reference to managing SRC, it is contended that the required standard of care incumbent upon coaches in this area, and as alluded to in general terms by Coach B, is likely to heighten.<sup>67</sup> Coach B stated that, 'back in the day, I

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<sup>64</sup> See, for instance, H Oppie, 'Medico-Legal Issues In Sport: The View From The Grandstand', (2001) 23 *Sydney L. Rev.* 375, 379, noting that the routine review of rules by NGBs often results in changes designed to better protect the health and safety of athletes.

<sup>65</sup> By analogy, see *Smoldon v Whitworth* [1997] ELR 249. It is contended that coaching practices premised on outdated rules might represent an instance of negligent entrenched practice.

<sup>66</sup> See, for instance, Z Kmietowic, 'World Rugby must review rules on tackling, says public health expert' (2015) *BMJ*. Published online 22 September 2015. DOI: <http://dx.doi.org/10.1136/bmj.h5049>.

<sup>67</sup> See generally, N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232, 237. Also see, chapter 1, p. 31.



don't think that [an instance of concussion management] would have happened. But nowadays they're so hands on with concussion'. Taking a moment to carefully reflect on this statement, the coach's responsibility to be up-to-date with sport-specific knowledge, sports medicine, and sports science, since techniques in sport can change remarkably over a couple of decades or so,<sup>68</sup> is striking. Although this specialist knowledge or expertise does not enlarge the duty of care owed, it brings into consideration factors concerning the scope and degree of that duty (standard of care) which may be essential in deciding whether or not the duty of care has been suitably discharged.<sup>69</sup> Clearly, the intense contemporary focus on SRC, and associated enhanced awareness, coach education and stipulated protocols, (re)defines this more demanding standard of reasonable care required of modern coaches. This reinforces the urgency for coaches (and NGBs) to be especially mindful of the potential scope of negligent entrenched practice.

#### 4.2 Instruction and supervision

The duty of coaches to provide adequate and reasonable instruction and supervision in all organised sports activities is well established.<sup>70</sup> More specifically, in *Van Oppen v Clerk to the Bedford Charity Trustees*<sup>71</sup> the Court of Appeal has previously presided over a case concerning the requirement of coaches and teachers to effectively teach the correct tackling technique in rugby. At first instance, Boreham J considered whether the school was negligent in its teaching or coaching of rugby, and specifically, whether it had failed 'to take reasonable care for the plaintiff's safety on the rugby field by failing to coach or instruct the plaintiff in proper tackling techniques and in particular in the technique of the head-on tackle'.<sup>72</sup> Analysed in the context of the emerging issue of SRC, and possible negligent coaching, the teaching of tackling technique is directly in point. The High Court found that the technique executed by the

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<sup>68</sup> G Nygaard and T Boone, *Coaches Guide to Sport Law* (Human Kinetics, 1985) 24.

<sup>69</sup> *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273 (QB) 287 (Boreham J).

<sup>70</sup> McCaskey and Biedzynski (n 14); Barnes (n 14). For example, *Fowles v Bedfordshire County Council* [1996] ELR 51 (CA).

<sup>71</sup> *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA).

<sup>72</sup> *Van Oppen* (n 69) 276.

pupil was 'correct' resulting in 'no more and no less than a tragic accident'.<sup>73</sup> Importantly, in delivering his judgment, Boreham J made clear that all of the circumstances in which the injury is sustained will be considered:

I am satisfied that the defendants, through the staff 'taking' rugby, were well aware of the inherent risks in playing rugby football and of the need for the application of correct techniques and the correction of potentially dangerous errors and lapses. I am also satisfied that the standard of supervision was high, that the refereeing was vigilant and strict and that, as one of the plaintiff's contemporaries put it, there was at the school an emphasis on discipline, which meant playing the game correctly. There is therefore no substance in the allegations of negligence so far as they relate to the playing of rugby football at Bedford School.<sup>74</sup>

Following *Van Oppen*, application of incorrect techniques; a failure to correct potentially dangerous techniques and errors; inadequate supervision; careless refereeing; and a general culture and environment which would prevent the game being played correctly, would appear indicative of a likely breach of duty by (rugby) coaches. As recognised by O'Donoghue et al:

[C]oaches have the unique benefit of being able to translate their knowledge of concussion to the athletic field ... by teaching proper technique, ensuring athletes consistently use properly fitted safety equipment, and reinforcing that athletes follow sport safety rules and engage in good sportsmanship.<sup>75</sup>

With specific regard to SRC, a number of potential legal vulnerabilities for coaches that may be a consequence of an inappropriate coaching culture, and inadequate refereeing, have previously been highlighted. Perhaps even more significantly, in rugby, for instance, the tackle remains the most common match event associated with injury,<sup>76</sup> with recent research indicating that over fifty percent of all injuries occur in

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid 277.

<sup>75</sup> O'Donoghue et al (n 39) 130 citing RJ Sawyer et al, 'High school coaches' assessments, intentions to use, and use of a concussion prevention toolkit: Centers for Disease Control and Prevention's heads up: concussion in high school sports' (2010) 11(1) *Health Promot Pract.* 34.

<sup>76</sup> Archbold et al (n 10); England Professional Rugby Injury Surveillance Project, 2013-2014 Season Report, (February 2015), 11



the tackle situation or during collisions.<sup>77</sup> Also, it is estimated that around seventy percent of concussions are sustained in the tackle.<sup>78</sup> Dissemination of such findings from injury surveillance projects by NGBs, by means of coach education and awareness programmes, explicitly reinforces the clear foreseeability of serious concussive injuries that might result from inadequate tackling instruction, deficient supervision and, more generally, inappropriate concussion management.

Since coaches may be regarded as the most 'significant other' shaping and influencing the behaviour of athletes towards concussion,<sup>79</sup> and frequently find themselves in the position of 'frontline caregiver',<sup>80</sup> these constitute increasingly important duties. Accordingly, should a future claimant, having suffered a SRC that allegedly would have been prevented by reasonable tackling instruction, timely corrective intervention, and/or effective concussion management, sue a coach in negligence, it can sensibly be envisaged how a heightened level of skill and care (when teaching tackling technique) *may* be required of modern coaches than may have been required by the court in *Van Oppen*.<sup>81</sup> Of course, this is something of an oversimplification, with individual cases always being highly fact sensitive since 'the issue of negligence cannot be resolved in a vacuum. It is fact specific'.<sup>82</sup> Nonetheless, it appears plain that the increased prominence and awareness of effective concussion management in coach education, training and CPD, places a greater responsibility on modern coaches to effectively recognise, minimise and manage SRC. This would appear to include a greater emphasis on immediate coach intervention to ensure

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<[http://www.englandrugby.com/mm/Document/General/General/01/30/80/08/EnglandProfessionalRugbyInjurySurveillanceProjectReport2013\\_2014\\_Neutral.pdf](http://www.englandrugby.com/mm/Document/General/General/01/30/80/08/EnglandProfessionalRugbyInjurySurveillanceProjectReport2013_2014_Neutral.pdf)> accessed 20 September 2015.

<sup>77</sup> Archbold et al (n 10).

<sup>78</sup> England Rugby (n 52).

<sup>79</sup> England Rugby (n 12). Also see, Broglio et al (n 19).

<sup>80</sup> O'Donoghue et al (n 39) 128.

<sup>81</sup> *Van Oppen* did not specifically concern SRC. The plaintiff's forehead and nose came into contact with the left hip or thigh of an opposing three-quarter, with the result that he sustained injury to the cervical spine, causing an incomplete tetraplegia. Nonetheless, it was submitted by the plaintiff that his injuries were a result of a failure by the school to coach or instruct him in proper tackling technique.

<sup>82</sup> *Caldwell v Maguire* [2001] EWCA Civ 1054 [30].

execution of consistent and correct tackle technique,<sup>83</sup> and technical assessment of players returning to play after suffering a concussion.<sup>84</sup> In accordance with dissemination of this updated approved practice by a responsible body (e.g., NGBs), defining what might amount to the reasonable 'application of correct techniques and the correction of potentially dangerous errors and lapses' by courts would correspondingly appear susceptible to amendment.

As summarised by Jonathan Davies, former dual code rugby international, '[i]f you get proper tackle technique you put your head in the right place'.<sup>85</sup> Put simply, correct tackle technique is vital to prevent concussion,<sup>86</sup> the tackle being central to modern styles of play and the phase of play in which a large proportion of injuries occur.<sup>87</sup> Nonetheless, it has been suggested that:

Too often players throw their torso and head in front of runners, especially big ones. They are not tackling the ball carriers, but are instead using themselves as human obstacles. *Some coaches are encouraging players to employ such a technique.* Players are also tackling with their heads up and their body upright, trying to hold the attacker from the ground and affect the turnover. Head collisions become far more likely in this instance.<sup>88</sup>

In view of the preceding analysis, coaches encouraging players to deliberately lead with their head into contact may, quite understandably, find defending a negligence action extremely difficult. This is irresponsible and careless coaching.

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<sup>83</sup> England Rugby (n 12). Coaches should also explain the dangers of high, tip and spear tackles, and immediately penalise them should they occur. Similarly, and particularly when coaching young players, close supervision and monitoring is necessary when players are jumping to catch the ball from kicks or lineouts and tackling players in the air.

<sup>84</sup> England Rugby's Concussion Awareness video training for coaches reinforces the importance of coaches insisting on correct tackle techniques, with the head kept out of the impact area, and the need for coaches to 'correct the behaviour of players who deliberately put themselves at risk of concussion by leading with their head into contact'.

<sup>85</sup> 'Leigh Halfpenny concussion: Tackling worries Jonathan Davies', *BBC Sport*, 23 March 2015 <<http://www.bbc.co.uk/sport/0/rugby-union/32013309>> accessed 9 May 2016.

<sup>86</sup> England Rugby (n 52).

<sup>87</sup> Archbold et al (n 10).

<sup>88</sup> S Barnes, 'Concussion is rugby's biggest headache but we can cut the risks', *Skysports.com*, (30 March 2015), (emphasis added) <<http://www.skysports.com/rugby-union/news/12062/9782056/stuart-barnes-concussion-is-rugbys-biggest-headache-but-we-can-cut-the-risks>> accessed 6 October 2015.



Straightforwardly, such coaching practice is not regular and approved,<sup>89</sup> regardless of the age or performance level of the players,<sup>90</sup> and in light of awareness campaigns undertaken by NGBs, stipulating the dangers and necessary protocols regarding SRC, is logically unjustifiable.<sup>91</sup> In short, in these circumstances, coaches would be unable to avail of the 'Bolam defence' discussed in chapter 5.

### 4.3 Establishing Negligent Coaching

#### 4.3.1 Breach of duty/Fault

As alluded to in the foregoing discussion, the hallmarks of reasonable practice are underpinned by regular and approved coaching methods, that are logically justifiable and, suitable for the post or position of the coach.<sup>92</sup> Importantly, evolving concussion protocols would appear to often be sport specific,<sup>93</sup> with, for instance, different possible GRTP protocols for adults compared to younger players,<sup>94</sup> and a 'zero tolerance' of certain dangers when coaching children.<sup>95</sup> With particular relevance to grassroots sport, where crucially, pitch-side sports and exercise medicine specialists, or general health professionals, may not be in attendance,<sup>96</sup> it is encouraging to note the emergence of guidance intended for application across all sports (i.e., 'If in doubt, sit them out').<sup>97</sup> Nonetheless,

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<sup>89</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).

<sup>90</sup> *Wilsher v Essex Area Health Authority* [1987] QB 730 (CA).

<sup>91</sup> *Bolitho v City of Hackney Health Authority* [1998] AC 232 (HL).

<sup>92</sup> Partington (n 67) 237.

<sup>93</sup> See for instance, J Cohen and S Cottrell, 'An Overview of Concussion Protocols Across Professional Sports League', *LawInSport*, (5 November 2014) <<http://www.lawinsport.com/features/item/an-overview-of-concussion-protocols-across-professional-sports-leagues>> accessed 19 September 2015.

<sup>94</sup> England Rugby, 'Return to Play After Concussion' <[http://www.englandrugby.com/mm/Document/MyRugby/Headcase/01/30/49/22/returntoplayafterconcussion\\_Neutral.pdf](http://www.englandrugby.com/mm/Document/MyRugby/Headcase/01/30/49/22/returntoplayafterconcussion_Neutral.pdf)> accessed 2 October 2015.

<sup>95</sup> England Rugby, 'Coaches General Information' <<http://www.englandrugby.com/mm/Document/General/General/01/30/27/76/Coachesgeneralinfo.pdf>> accessed 25 September 2015: referring to the particular risk of concussion and neck injuries for young players when falling from height.

<sup>96</sup> Calderwood et al (n 8) 1. Also see, McNamee et al (n 29) 199.

<sup>97</sup> sportscotland, 'If in doubt, sit them out - Scottish Sports Concussion Guidance' <<http://www.sportscotland.org.uk/news/sportscotland/2015/if-in-doubt,-sit-them-out-scottish-sports-concussion-guidance/>> accessed 25 September 2015.

closer examination of the concussion protocols across sport reveals that, while 'in line with Zurich', details on management vary considerably between and within sports. Further, in many instances an individual sport's concussion management policy appears directed purely at elite level participants, and overlooks the overwhelming majority participating at grass roots or amateur level.<sup>98</sup>

This uncertainty and lack of definitive, robust and informed guidance is problematic, particularly for (mainly volunteer) coaches working at the entry level of sport, and is likely to further compound anxiety and confusion over the infrequent but, nonetheless, significant consequences of SRC.<sup>99</sup> Notwithstanding an apparent dearth of definitive guidance, it remains necessary for specialist coaches to remain up-to-date with the current recommendations from the responsible body governing the particular sport in question to ensure that the latest best practice risk management guidance is always followed and incorporated into coaching practices. In addition to most effectively protecting the health and welfare of athletes, this would correspondingly ensure that coaches are best placed to resist accusations of negligent coaching arising from the mismanagement of SRC.

It has been suggested that the most apparent areas in which a coach might be in breach of the duty owed to those under their charge, for SRC, relates to inadequate instruction and supervision. This is certainly the case in rugby and, since most sports injuries might tend to occur in organised practice and training sessions, this would seem likely to be replicated in other sports. Nonetheless, as highlighted in chapter 1, sports injuries, including SRC, may also result from the implementation of dangerous tactics in competition,<sup>100</sup> which may include the targeting of opposing players,<sup>101</sup> instructing a player to fight or injure opponents,<sup>102</sup> and the over arousal/'psyching-up'

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<sup>98</sup> Calderwood et al (n 8) 1. In global sports, World Rugby is a notable exception, with an acknowledged development of specific concussion management protocols targeted to each level of rugby, from grassroots level to elite level.

<sup>99</sup> Ibid.

<sup>100</sup> See generally, S Gardiner et al, *Sports Law* (3rd ed., Cavendish, 2006) 629.

<sup>101</sup> A Epstein, *Sports Law* (Cengage Learning, 2013) 137.

<sup>102</sup> G Wong, *Essentials of Sports Law* (4<sup>th</sup> ed., Oxford: Praeger, 2010) 123.



of athletes.<sup>103</sup> These additional instances which may give rise to a breach of duty by coaches, applied in a context where the science of concussion is evolving, reveals an emerging legal landscape.

For present purposes, an interesting illustration of the potential development of the intersection between the law of negligence, SRC, and sports coaching, is revealed in circumstances where coaches might devise tactics which unreasonably attempt to 'set the tone', or 'lay down a marker', from the outset of a game. For instance, in ice hockey, this represents a time when players are typically 'maximally energized with strategies to initiate body contact', with approximately one half of concussions in the NHL occurring during this first period.<sup>104</sup> Intuitively, this may appear consistent with the 'fighting culture' prevalent in such a contact sport,<sup>105</sup> but which, in view of the previously emphasised necessity for coaches to foster an appropriate culture within teams, should not be positively reinforced. However, it would appear that coaches routinely attempt to channel this inordinate intensity and physicality of players to gain an 'edge' over opponents at the beginning of games. Should this be the case, the boundary between legitimate coaching practices intended to gain an early competitive advantage, and negligent coaching resulting in a serious injury to an opponent, would appear to be a fine one. Should the foreseeability and likelihood of SRC injuries at the start of matches be further corroborated by injury surveillance data, and other relevant evidence, prompting, for instance, the possible greater emphasis/introduction of specific rules by NGBs, then arguably, the boundary may become even finer still. As the science and understanding of concussion in sport develops, coaching methods will likewise be subject to continuous improvement and refinement. Yet again, this would

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<sup>103</sup> *Canterbury Bankstown Rugby League Football Club Ltd. v Rogers* [1993] Aust. Torts Reports 81-246.

<sup>104</sup> M Hutchison et al, 'A systematic video analysis of National Hockey League (NHL) concussions, part 1: who, when, where and what?' (2015) 49 *Br J Sports Med* 547, 550.

<sup>105</sup> NT Pappas et al, 'Athlete Aggression on the Rink and Off the Ice' (2004) 6(3) *Men and Masculinities* 291. See further, R Lake, 'The effects of fighting in ice hockey: an overview of the ongoing NHL concussion litigation' *LawInSport*, (19 April 2016) < [http://www.lawinsport.com/blog/ryan-lake-blog/item/the-effects-of-fighting-in-ice-hockey-an-overview-of-the-ongoing-nhl-concussion-litigation?utm\\_content=buffer98f45&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.lawinsport.com/blog/ryan-lake-blog/item/the-effects-of-fighting-in-ice-hockey-an-overview-of-the-ongoing-nhl-concussion-litigation?utm_content=buffer98f45&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) > accessed 20 April 2016.

appear to shine the spotlight on the specific legal vulnerabilities that may flow from outdated, redundant and deficient coaching behaviours.

For instance, with explicit reference to SRC, and in particular: (i) greater awareness and appreciation of the dangers of SRC; (ii) evolving evidence based sport specific guidance; and, (iii) the potential scope for rule amendments by some NGBs, formulation of the negligence threshold in this context appears peculiarly susceptible to modification. Coaching practice, education and training must be reflective of future (likely) developments. Following *Watson v British Boxing Board of Control*,<sup>106</sup> since NGBs are responsible for disseminating guidance on approved coaching practice, it is strongly contended that NGBs have a duty to warn and make coaches aware of implications regarding the emerging issue of SRC in an appropriate and timely manner.

#### 4.3.2 Causation

Since establishing both causation in fact,<sup>107</sup> and legal causation,<sup>108</sup> is generally unambiguous for athlete liability,<sup>109</sup> it was contended in chapter 1 that causation inquiries would typically appear to be straightforwardly satisfied in most coach negligence cases. Conversely, given the evolving scientific knowledge and understanding of concussion, even in circumstances where a coach's negligent conduct may have exposed athletes to unreasonable risk, establishing proof of causation in a 'concussion' case appears precarious.<sup>110</sup> Evidence that the breach of duty was causative of the injury suffered is an essential component of any negligence claim brought against coaches. Problematically, chapter 1 also highlighted the possibility of the causation control device not always being appropriately applied in the context of sports coaching/PE teaching.<sup>111</sup>

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<sup>106</sup> *Watson v British Boxing Board of Control* [2001] QB 1134 (CA).

<sup>107</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QBD).

<sup>108</sup> *Overseas Tankship v Morts Docks & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388.

<sup>109</sup> M James, *Sports Law* (2nd ed., Palgrave-Macmillan, 2013) 80.

<sup>110</sup> Meakin (n 3) 39.

<sup>111</sup> See chapter 1, pp. 33-34.



This chapter has suggested that the most pronounced areas in which a coach might be negligent, for SRC, relates to inadequate instruction, supervision and appropriate intervention. Fundamental to effective discharge of a coach's duty of care is the teaching of approved techniques, correction of potentially dangerous errors, reasonable levels of supervision and, implementation of SRC procedures and protocols disseminated by NGBs. Coaches should have the prudence, experience and qualifications to satisfy the standard of care reasonably to be expected when fulfilling these responsibilities. Nonetheless, and as alluded to in *Hammersley-Gonsalves*:<sup>112</sup> careless teaching; a failure to correct dangerous technique; inadequate supervision; or adoption of unsuitable SRC procedures and protocol, would not necessarily amount to liability in negligence. It would be necessary for claimants to also establish that the breach was causative of the accident that actually happened. In a case concerning SRC, establishing this causality may prove particularly challenging, not least, because determining whether coach negligence caused the brain injury, or whether it was caused by a particular episode, or whether it was cumulative, may represent a fundamental difficulty for claimants.<sup>113</sup> Whereas the majority of cases brought in negligence against coaches tend to turn on the issue of breach/fault, should a case be brought against a coach for a SRC injury in this jurisdiction in the future, it would appear that much would also turn on the issue of causation. This would likely require specialist evidence, including neuro-radiological.<sup>114</sup>

## 5. Defences

### 5.1 *Bolam* 'Defence'

Successful satisfaction of the *Bolam* test by coaches should negate professional liability. In short, adoption of practice found to be universal, approved and logically justifiable by coaches should afford conclusive and absolute protection from liability in

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<sup>112</sup> *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135 [13].

<sup>113</sup> Meakin (n 3) 39

<sup>114</sup> *Ibid* 41.

negligence.<sup>115</sup> In order to avail of this 'defence', coaches must remain up-to-date with the dissemination of best practice SRC management recommendations by NGBs. Where this might not be forthcoming, or as appears frequent, may be designed and directed solely at elite athletes, coaches would seemingly be required to act in accordance with 'informed common sense'.<sup>116</sup> Importantly, this common sense judgement must be robustly justifiable.<sup>117</sup> At present, and subject to more specific concussion management protocols and guidance advocated by individual NGBs, the maxim "If in doubt, sit them out" would appear informed, recognised and defensible.

## 5.2 *Volenti non fit injuria*

The defence of *volenti non fit injuria*, or voluntary assumption of risk, is premised upon the notion of consent, and since it is reflected in the scope of the practical content of the identified standard of care in all the circumstances,<sup>118</sup> its application in cases of alleged coach negligence appears somewhat redundant.<sup>119</sup> Indeed, *volenti* has been of limited application in the vast majority of sports negligence cases, the determining legal issue tending to be breach of duty.<sup>120</sup> Further, without competent and full advice, or in circumstances where athletes are coerced into performing, claimant athletes could not be regarded as *volens*.<sup>121</sup> An ingrained sports culture, where athletes, due to the pressure or expectations of coaches, may fail to report the signs and symptoms of concussion,<sup>122</sup> would appear to negate a reliance on the maxim of *volenti*.<sup>123</sup> In this context, it would appear that a finding of an assumption of legal risk; an agreement to waive any claim for injury; a consent to coach negligence;

<sup>115</sup> The *Bolam* 'defence' was discussed in detail in chapter 5. Also see, N Partington, 'Professional liability of amateurs: The context of sports coaching' (2015) 4 *JPI Law* 232.

<sup>116</sup> N Cox and A Schuster, *Sport and the Law* (Firstlaw, 2004) 235.

<sup>117</sup> *Bolitho* (n 91).

<sup>118</sup> D Griffith-Jones, 'Civil Liability Arising Out of Participation in Sport' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008) 748; *Caldwell* (n 82).

<sup>119</sup> Gardiner et al (n 100) 643.

<sup>120</sup> M James and D McArdle, 'Player violence, or violent players? Vicarious liability for sports participants' (2004) 12(3) *Tort Law Review* 131, 133.

<sup>121</sup> Meakin (n 3) 39. Importantly, the issue of *volenti* on children in sport, for SRC, would be of limited application since children would be regarded as too young to consent to run the risk of significant injury.

<sup>122</sup> See comments by Coach C discussed above.

<sup>123</sup> Arguments of contributory negligence may still apply. This is discussed below.



and a deliberate agreement to accept the risks (of SRC) by athletes,<sup>124</sup> does not appear sustainable. Nonetheless, it will be argued that there may be somewhat unique and, exceptional circumstances in which athletes may be found to have willingly assumed the risks of SRC. Certainly, despite the legal doctrine of *volenti* now being seldom applied,<sup>125</sup> it notably being regarded as 'otiose' in the context of sports negligence,<sup>126</sup> its application may warrant fuller consideration by courts in future when/if determining cases where claimants may have suffered a SRC injury.

Where the athlete has expressly or impliedly agreed to accept the legal risk associated with the negligence of the defendant coach voluntarily, the defence of *volenti* would prevent liability,<sup>127</sup> by providing an absolute defence. Crucially, the willingness to take the risk of injury is not sufficient grounds for the application of the defence of *volenti*, Lord Denning stating:

Knowledge of the risk of injury is not enough. Nor is the willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.<sup>128</sup>

The standard of care that the law requires of coaches is to discharge their functions with reasonable skill and care to ensure that athletes are not exposed to an unacceptable risk of injury. An instance of a breach of this duty might be a failure by a coach to adopt the GRTP protocols stipulated by an appropriate NGB. Although in elite sport, this should be a decision for a specialist medical practitioner, at the grassroots level, this might well fall within the remit of a (volunteer) coach. Should this be the

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<sup>124</sup> See, J Steele, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010) 287-93.

<sup>125</sup> R Kidner, 'The variable standard of care, contributory negligence and *volenti*' (1991) 11(1) *Legal Studies* 1, 17.

<sup>126</sup> D McArdle and M James, 'Are You Experienced? "Playing Cultures", Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*' (2005) *Tort L Rev* 193, 210.

<sup>127</sup> Steele (n 124) 287.

<sup>128</sup> *Nettleship v Weston* [1971] 2 QB 691 (CA) 701.

case, suppose an adult player, following deliberate collusion with her/his coach, insists on a premature return to competition in order to be available for selection for an important upcoming fixture. The athlete, despite (let us assume) competent and full advice of the associated dangers of SRC,<sup>129</sup> and in collaboration with the coach, impliedly agrees to the unreasonable decision by the coach to override and ignore approved RTP procedures and protocols. Adopting the approach of Lord Bingham in *Smoldon v Whitworth*, given the athlete might be regarded as a 'prime culprit' in causing her/his own subsequent SRC injury,<sup>130</sup> the defence of *volenti* might call for consideration.<sup>131</sup> Importantly, this posited scenario would appear to be distinguishable from a pitch-side decision, made in the 'heat of the moment', where should an athlete have suffered a possible concussion, her/his judgment may be impaired, it thereby being questionable whether the athlete had the requisite mental capacity to make an informed choice.<sup>132</sup> Though unconventional, the factual matrix of a 'concussion' case may potentially resurrect the defence of *volenti* in the sports negligence context.

Nonetheless, the partial defence of contributory negligence, since there might typically be significant overlap between conduct categorised as *volenti* and contributory negligence, may arguably result in a fairer apportioning of responsibility<sup>133</sup> between athlete(s) and coach(es) in cases concerning SRC.

### 5.3 Contributory Negligence

The issue of contributory negligence poses the question of what the hypothetical reasonable person, or more precisely, reasonable athlete, would have

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<sup>129</sup> See, MA Jones and AM Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed., Sweet & Maxwell, 2010) [3-101]. The coach (defendant) would be required to demonstrate that the athlete had full knowledge of the nature and extent of the danger allegedly assumed. Arguably, in Northern Ireland, for instance, certainly in relation to second impact syndrome, this should increasingly be the case. See, for example, R Meredith, 'Northern Ireland children learn of concussion dangers', BBC News, (30 September 2015) <<http://www.bbc.co.uk/news/uk-northern-ireland-34403358>> accessed 1 October 2015.

<sup>130</sup> *Smoldon v Whitworth* [1997] PIQR P133 (CA) P147.

<sup>131</sup> Consideration of a possible second impact syndrome in this scenario provides a harrowing illustration of a catastrophic personal injury for which the claimant's conduct may nullify legitimate legal redress.

<sup>132</sup> Jones and Dugdale (n 129) [3-99].

<sup>133</sup> *Ibid* [3-91].



done in the same circumstances for their own safety.<sup>134</sup> Contributory negligence was specifically considered in the sports case of *Anderson v Lyotier*,<sup>135</sup> where a ski instructor was found liable in negligence for the catastrophic personal injury suffered by the claimant when he collided with a tree when skiing off piste. For present purposes, the finding of Foskett J, on the particular issue of contributory negligence, is instructive:

In my judgment, it would be wrong to hold that a skier, even in the case of a relatively inexperienced skier who is under the supervision of a ski instructor, abdicates all personal responsibility for deciding whether to do or not to do something the instructor suggests. The consensus of all the witnesses who spoke on the matter during the trial was that there is a strong element of trust placed by a skier in the instructor. That is plainly so. However, it is not the same as a child placing total reliance on his or her parent or teacher. The process involving adults must be a collaborative one. I do not think that the law requires (and, if it did, for my part I would say that it would be adopting the wrong policy) that the instructor takes total responsibility in a situation such as that which obtained in this case.<sup>136</sup>

Coaching is a mutually-dependent and collaborative exercise. While coaches must assume their duties with due care and diligence, athletes do not abdicate all personal responsibility for decisions regarding concussion management to coaches. Coaches have an obligation to encourage athletes, following a head injury, to report all symptoms honestly and without fear of negative consequences. Importantly, a failure for athletes to do so may constitute contributory negligence. The previously highlighted comments by Gareth Thomas, and Coach B when reminiscing about his playing career, may amount to the same. Inquiries into contributory negligence will be very circumstance specific, not least, because in instances where athletes may have been asked to RTP by coaches, should there be evidence to indicate that the claimant

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<sup>134</sup> *Anderson v Lyotier* [2008] EWHC 2790 (QB) [141].

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid* [142]. In this instance, the claimant submitted that the particular slope in question, and selected by the supervising instructor, was beyond his capability. Also see, chapter 1, p. 31.

may have been concussed, s/he would be unlikely to have full capacity.<sup>137</sup> Nonetheless, a deliberate manipulation by athletes of pre-season baseline assessments may also be grounds for a finding of contributory negligence.<sup>138</sup>

## 6. Conclusion

Evolving concerns about SRC should be regarded as being of relevance and importance to all athletes participating in all sports. Consequently, this is an issue affecting all coaches. More specifically, given the uniqueness of the symbiotic coach-athlete relationship, analysis of the apparent emerging intersection between SRC, the law of negligence, and coaching, highlights the fundamental responsibilities of coaches in effectively managing issues in this field. Given the influence coaches have over their charges, not least in creating the sports (sub)culture and environment which underpins the socialisation of athletes into sporting activity and performance, it is imperative that coaches have an informed and up-to-date awareness and knowledge of the latest NGB recommendations. For instance, coaches have a pivotal role to play in modelling and promoting ethical values, including fair play and respect for opponents, which should be implemented in all sports activities.<sup>139</sup> Game plans, technical proficiencies, styles of play, and other preparatory methods encouraged by coaches, and often intended to gain a competitive 'edge', must be reasonable and appropriate to the specific context and level of performance. Simply applied, in view of the dissemination of protocols and regulations intended to improve the management of SRC by responsible bodies, coaches may need to (re)appraise routine practices. In short, best practice concussion measures must be incorporated into contemporary coaching methods.

These approved procedures will inform the content of the duty of care incumbent on modern sports coaches. As argued, whilst the duty of coaches to provide reasonable instruction and supervision in organised sports activities may be regarded

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<sup>137</sup> I Christian and S Nye, 'Concussion: An Issue of Negligence in Sport?', *LawInSport*, (24 September 2015) <<http://www.lawinsport.com/articles/item/concussion-an-issue-of-negligence-in-sport>> accessed 28 September 2015.

<sup>138</sup> *Ibid.*

<sup>139</sup> McCrory et al (n 11) 255.



as indisputable, in view of developing coach education and training focused on effective management of SRC, this duty appears more pronounced. Accordingly, discharging and meeting this apparent heightening standard of care may prove problematic for coaches working in isolation and failing to keep abreast of the latest CPD requirements. This lacuna may be accentuated in sports where categorical guidelines, particularly at grassroots level, may not be transparent or forthcoming, making increased awareness of SRC very salient to coaches.<sup>140</sup> Adopting a more proactive approach to risk management, and again reinforcing the centrality of coaches,<sup>141</sup> since it is frequently the coach who is the first person to attend to an injured athlete,<sup>142</sup> though not essential, possession of a relevant first aid qualification would, no doubt, be highly desirable.<sup>143</sup> Comments made by Coach B provide an important insight regarding progressive and proactive best practice in risk management procedures:

We are all AED (Automated External Defibrillator) qualified, first aid qualified. That happens once a year. The upper school do that, they mandate that, concussion screening and all that. Coaches have to do that. And when we're out there, we obviously have to have a trainer there at every single training session. He has to be there but if we're out there and a player drops and it happens we are qualified for that. We have our first aid training, so we can provide first aid ... campus has also got full time police and you know as well from being in America, Public Safety they're called, but they're fully armed police officers on campus anything happens. You know, every home game there's an ambulance there, a policeman there, anything happens there's no calling an ambulance, it's right there, right on the corner of the pitch. They just drive on, a brake, concussion, or anything. So they're very covered over here, there's somebody covering somebody, covering somebody. But it's not a case of hey he's not qualified so they bring somebody qualified in, they're going to want to qualify anyone touching the athlete. If he's dealing with the athlete, he needs to be qualified because their well-being is paramount.

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<sup>140</sup> Miles and Tong (n 10) 191.

<sup>141</sup> Archbold et al (n 10) 21.4% of injury diagnoses for this study were made by coaches, with 61% made by qualified health professionals.

<sup>142</sup> Broglio et al (n 19) 419-20. In this study, when athletes reported concussions, it was most commonly to coaches (38.9%) who were found not to be fully aware of concussive signs and symptoms. Also see, EM O'Donoghue et al (n 39) 128.

<sup>143</sup> Miles and Tong (n 10) 189.

In rugby, for instance, it would appear sensible and favourable for UK school and club matches involving children to have first aiders with a knowledge and full awareness of SRC, and current related protocols, available at pitch side.<sup>144</sup> This best practice approach should be contemplated by all sporting organisations.<sup>145</sup> Indeed, all NGBs should likewise consider providing sensible, proportionate and realistic proposals, focused on the effective management of SRC, for grassroots activities in particular, for the individual sports that they oversee. Timely dissemination of these approved propositions to all coaches should be a priority. Notwithstanding these recommendations, and the foundational requirement for coaches to discharge duties with reasonable skill and care, coaches should not assume medical responsibilities for which they are not ordinarily competent. The emphasis must remain on managing concussion conservatively, and particularly in situations where coaches have limited resources (e.g., non-elite sport), athletes should not return to sport until fully recovered.<sup>146</sup> Indeed, although standardised tools for assessing concussion may be of some provisional use to coaches in the assessment of the athlete with suspected concussion, this does not replace the judgement of a suitably qualified medical expert. Put simply, coaches must be especially mindful of their own limitations in this developing context.

These suggested best practice SRC risk management recommendations should better shield, reassure, and protect coaches from litigation risk, whilst also affording enhanced safeguarding of the health and safety of athletes. Nonetheless, in terms of the application of legal principles, should a UK court be tasked with considering a SRC case, a number of the tort of negligence's control mechanisms appear potentially problematic. The most obvious, given the present state of medical knowledge, will be establishing causation by claimants.<sup>147</sup> Of further interest, might be attempts by defendants to rely of the defence of contributory negligence, and curiously, for this

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<sup>144</sup> Kirkwood et al (n 30) 509.

<sup>145</sup> Valovich Mcleod et al (n 16) 142.

<sup>146</sup> McCrory et al (n 11) 257.

<sup>147</sup> Meakin (n 3) 39.



area of sports negligence to perhaps provide the factual matrix whereby the otiose defence of *volenti* is resurrected. As discussed in the concluding pages of this thesis, this reveals areas beyond the scope of this present analysis that merit further consequential research.

## Chapter 9: Conclusions

### 1. Introduction

The primary research question of this thesis is whether the ordinary law of negligence, and more specifically the control device of breach, affords sufficient and reasonable protection to coaches performing a socially desirable activity. In short, this thesis' detailed doctrinal analysis, examination of relevant academic commentary and, focused qualitative research, on balance, offers the deceptively simple answer *no* to this question. This remains the fact despite application of the well-established control mechanisms inherent to the law of negligence considered, most explicitly, in chapters 1, 3, 4 and 5. Logically, in adopting the perspective of practising coaches, and attempting to safeguard these coaches from negligence liability, whilst acknowledging the merits of the law in this area, it is the suggested limitations and somewhat concealed legal vulnerabilities uncovered throughout this thesis that call for more detailed final critical comment in this concluding chapter. This is consistent with the originality of this research, in employing an interdisciplinary approach to a hitherto seldom analysed area of the law, through the lens of (potential) defendant coaches.

Given the highly fact sensitive nature of the law in this area, the conclusion begins by very briefly revisiting the special and specific context in which the law of negligence and sports coaching interact. Following this, in offering a final critique of whether the present law of negligence affords suitable and sufficient protection to coaches, both the benefits and limitations of its existing control devices are summarised. Simply applied, this analytical overview of the findings of this thesis supports the view that the ordinary law of negligence, on occasions, appears to impose too heavy a burden on coaches. Consequently, in seeking to refine and strengthen arguments initially submitted in chapter 1, and more fully developed in chapter 3, this conclusion supports further serious consideration of the possible adoption of a gross negligence standard in order to strike a more reasonable and fair balance between the legitimate interests of both injured athletes, and coaches, in this area of the law. This



respectively affords the opportunity to tentatively acknowledge some of the possible merits of first party insurance. In examining these provisional propositions in necessary detail, revisiting analogous authority and academic commentary concerning the negligence liability of sports officials provides instructive guidance, realistic insights, and effective comparisons for the subsequent concluding discussions. Importantly, in seeking to test and challenge the findings and suggestions of this thesis, in order to proactively safeguard coaches from liability in negligence, some of the potential criticisms of a gross negligence standard are exposed to interesting and searching examination.

Having argued for a serious and informed debate concerning the potential merits of affording volunteer coaches some limited civil liability immunity in the UK, the likely future impact of 'negligence's slippery slope' in this context is next considered. This is fundamental to appraisal of the efficacy of the control device of breach when applied to the developing intersection between the tort of negligence and sports coaching. Moreover, this further underscores the contention, particularly when exposed to an interdisciplinary analysis, that modern coaches do not appear to be afforded just, fair and reasonable protection by the ordinary law of negligence. Curiously, as most notably uncovered in chapters 5-8, this emerging litigation risk may be assumed unwittingly and in good faith by some coaches. In being mindful of some of the legal vulnerabilities uncovered by this thesis, the conclusion next summarises the strategies and approaches that might better inform and safeguard coaches from negligence liability. These best practice recommendations are reflective of the full ambit of previous chapters. Next, the conclusion turns to consider the limitations of this thesis and, in seeking to provide areas for important further consequential research, provides some initial substantive arguments in favour of greater promotion of first party insurance in this context. Ultimately, the final remarks of this thesis suggest that without meaningful intervention in this area of the law, should sports coaching be left exposed and unguarded against 'negligence's slippery slope', there would appear to be a danger of a shift towards eliminating every iota of sporting risk

and, more specifically, reducing the provision of desirable sporting activities in this jurisdiction.

## 2. Context

The previous chapters reveal a number of important and specific considerations that are integral to an analysis of the interaction between the law of negligence and sports coaching. Put simply, the social utility of sport would be significantly undermined but for the altruistic actions and commitment of thousands of sports coaches. The majority of these coaches are amateur, largely unqualified and, may regard remaining up-to-date with their training and CPD elusive and challenging. Further, coaches appear to be concerned about the prospect of legal liability. Since this thesis confirms the negligence liability of coaches as an emerging and evolving issue, unless this legal vulnerability is addressed in a proactive and proportionate manner, not only might coaches be unreasonably exposed to litigation risk, but correspondingly, achievement of the Olympic legacy, the fundamental role that sport plays in enhancing health, education, social integration, and culture,<sup>1</sup> and indeed the provision of UK grassroots sport generally, may be jeopardised. Contextualised in this fashion, it is interesting to note the observations of Cane when stating, '[t]he more valuable an activity, the more uncompensated harm we might be prepared to accept as a cost of the continuance of that activity'.<sup>2</sup> Uncompensated harm, particularly when caused by the lack of due care of another, is an unpalatable notion. Nonetheless, framed somewhat differently, it is posited that continuance of socially desirable sporting activities, given the heavy dependence and premium placed on volunteer sports coaches in the UK, questions whether the present application of ordinary tort law principles in this context strikes a suitable balance.

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<sup>1</sup> White Paper on Sport, COM (2007) 391, 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0391&from=EN>> accessed 12 May 2016.

<sup>2</sup> P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed., Butterworths, 1999) 36.



### 3. Suitable and Sufficient Safeguarding

The tort of negligence's inherent ability to account for the specificity of sport, when defining reasonableness in the particular circumstances is, generally speaking, to be commended. Overall, this thesis' doctrinal analysis recognises some of the advantages afforded by the fluidity, malleability and flexibility of the common law in being able to reflect the special circumstances of sports coaching, whilst at the same time adapting to changing social circumstances. Indeed, without fuller consideration and searching analysis and scrutiny, this would appear to endorse and perpetuate the view that the law in this area is both largely suitable and sufficient. Superficially, this appears to deny a call for substantive change. Nonetheless, such fluidity remains a double-edged sword since it prevents production of definitive and absolute guidelines for coaches. More fundamentally, the parameters of this fluidity are sometimes narrowly drawn, with the liability threshold 'capped' at the standard of carelessness or a lack of due care (ordinary negligence). In finely balanced (future) cases brought in negligence against sports coaches, and as submitted in chapter 3, this is likely to prove problematic. Essentially, this thesis contends that the malleability of the law of negligence might be more effectively applied to the context of sports coaching by raising the liability threshold and extending the spectrum of choices (i.e., explicitly recognising that a very high degree of carelessness may strike a more proportionate balance in this area of the law) open to judges. This can be achieved without compromising the adaptability of the ordinary law of negligence, by largely continuing to reflect the existing law and recognising the previous several hundred years of development of this aspect of the common law.

The existing control devices, not least, the celebrated *Tomlinson* balancing exercise<sup>3</sup> and the aforementioned common practice or *Bolam* defence,<sup>4</sup> when engaged alongside recent statutory provision intended to encourage and buttress judicial tenderness when applying the law in this area, provide a strong argument to indicate

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<sup>3</sup> See chapter 3, pp. 99-100.

<sup>4</sup> See chapter 5, pp. 170-72.

that coaches are adequately safeguarded from negligence liability. More specifically, as argued in chapter 3, despite academic commentary on section 1 of the Compensation Act 2006 largely regarding the provision as unnecessary and doing little more than restating existing common law practice, this thesis argues otherwise. On critically reviewing the emerging jurisprudence, it is argued that section 1, in practice, affords an enhanced level of protection for individuals undertaking functions in connection with a desirable activity. Simply applied, it would appear that section 1 has added some force to the nature of *Tomlinson* inquiries, arguably endorsing this (unusual) legislative intervention. By raising and reinforcing the importance of the profile of socially desirable activities, section 1 essentially puts the court on notice, thereby reducing the possibility of judges succumbing to the *Tomlinson* trap.

However, although existing control mechanisms and devices seem to afford a strong defence of the law of negligence, the passing of the Social Action, Responsibility and Heroism (SARAH) Act 2015 only nine years after section 1 of the Compensation Act 2006, provides considerable force to the argument that more needs to be done. Put bluntly, this thesis uncovers instances where sports coaches, sometimes through no (blameworthy) fault of their own, for instance, due to a lack of awareness, training or education, appear inadequately protected from negligence liability. This submission, when considered in light of the somewhat hidden and concealed legal vulnerabilities uncovered in chapter 1, the corresponding dangers of the *Tomlinson* trap espoused in chapter 3, and a paradoxical legal test (often) amounting to the professional liability of amateurs critiqued in chapter 5, is contended to be convincing. Moreover, when viewed through a robust interdisciplinary lens, since research would suggest that much coaching practice is underpinned by ‘uncritical inertia’ and ‘entrenched legitimacy’, it appears plain that many coaches are unwittingly exposed to legal liability. For instance, in addition to the scope for potential negligent entrenched practice highlighted throughout this thesis, chapter 4 specifically draws attention to the possibility of the risk assessment process being inherently limited and inadequate. This raises important



implications for the education, training and CPD of coaches, not least, in order to protect the health, safety and welfare of athletes.<sup>5</sup>

This thesis, most notably in chapters 1, 5, 6, and 8, has championed the call for coach education and training to place a greater emphasis on developing a coach's awareness and understanding of the evolving legal context in which they discharge the duty of care incumbent upon them. Nonetheless, with precise reference to this PhD's primary research question, application of the ordinary law of negligence, on occasions, appears to impose too heavy a burden on coaches. Problematically, left unchecked, the developing interaction between the tort of negligence and sports coaching may ultimately threaten the provision and continuation of some socially desirable sporting activities. Accordingly, given the apparent lack of interest in significant substantive change to the law of negligence in this jurisdiction,<sup>6</sup> and in recognising and pragmatically developing a number of arguments made by Burrows when defending the law of tort,<sup>7</sup> this thesis advocates potential enhancement of the current law by both serious consideration of adoption of a gross negligence standard and, a corresponding greater emphasis on first party insurance in the UK.

#### **4. Revisiting Analogous (higher) Authority**

In analysing the legal liability of sports coaches, scrutiny of the issue of the negligence liability of referees and officials in previous chapters has appeared generally illustrative of the developing interface between the tort of negligence and sports coaching. Notably, both defendant officials and defendant coaches are discharging their functions in the special circumstances of sport, have a duty to ensure that

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<sup>5</sup> Also, appropriate insurance coverage for coaches remains axiomatic. However, as revealed in chapter 1, and further reinforced in this conclusion, insurance provision is absolutely necessary but, in many regards, insufficient protection against exposure to liability in negligence.

<sup>6</sup> This was discussed in chapter 3, p. 104. Also see, A Morris, "The Compensation Culture" and the Politics of Tort' in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law Statute and the Dynamics of Legal Change* (Hart, 2013) 78; Cane (n 2) 396-97. Interestingly, given the predominantly codifying nature of both the SARA Act 2015, and s 1 of the Compensation Act 2006, such limited statutory provision might best be regarded as little more than instances of 'occasional tinkering'.

<sup>7</sup> A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart, 1998).

athletes are not exposed to unreasonable risk of injury,<sup>8</sup> and if sued in negligence, would face a legal test premised on the principles of professional liability. This analogous authority provides useful guidelines and insights regarding the judicial determination of reasonableness in the specific context of sports negligence. Advantageously, at the time of writing this conclusion, there is contemporaneous detailed case law regarding the negligence liability of (amateur) sports officials in this jurisdiction,<sup>9</sup> with this cogent judgment citing earlier Court of Appeal authority from two highly relevant and informative cases.<sup>10</sup> Indeed, consistent with thesis' submission that the exposure of coaches to negligence liability appears to be evolving, for quite some time the greater frequency of cases of alleged negligent officiating has been regarded as 'inevitable'.<sup>11</sup> As with sports coaching, the officiating of sporting competitions appears heavily reliant on volunteers,<sup>12</sup> and since this also involves the facilitation and promotion of a desirable activity for the benefit of members of society, could no doubt potentially engage both section 1 of the Compensation Act 2006 and the SARAH Act 2015. Subsequently, further detailed consideration of the legal liability of officials should allow additional critical scrutiny of this thesis' contention that much might be gained by enactment of legislation affording limited civil liability immunity in the UK. Simply applied, revisiting the analogous jurisprudence and academic commentary regarding the negligence liability of officials throughout this final chapter should support the robustness of the identified conclusions. Further, in view of the lack of judgments made concerning coach negligence by the higher courts in the UK, it

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<sup>8</sup> As emphasised and developed in chapter 1, when advocating the necessity of a legal test of reasonableness in this context to be fully reflective of the specific circumstances of coaching, the practical content of the duty of a coach and referee, though in important aspects similar, differ according to the quite contrasting functions of the respective roles.

<sup>9</sup> *Bartlett v English Cricket Board Association of Cricket Officials*, 27 August 2015 (County Court (Birmingham)). See further, N Partington, "'It's just not cricket". Or is it? *Bartlett v English Cricket Board Association of Cricket Officials*' (2016) 32(1) *Journal of Professional Negligence* 77 (note).

<sup>10</sup> *Smoldon v Whitworth* [1997] PIQR P133 (CA); *Vowles v Evans* [2003] EWCA Civ 318.

<sup>11</sup> KW Biedzynski, 'Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?' (1994) 11 *U. Miami Ent. & Sports L. Rev.* 375, 407.

<sup>12</sup> See for instance, *Bartlett* (n 9) [179] and *Vowles* (n 10) [13]. Most recently, The Football Association's recruitment target is 10,000 referees a year, in order that in future, every football match has a qualified official receiving regular training and support by means of an FA mentor programme <<http://www.amateur-fa.com/referees#VWQGdM395iG3ldlR.99>> accessed 3 February 2016.



proves instructive when highlighting practices to minimise the negligence liability of coaches and, importantly, the possible future trends of the law in this area.

Nonetheless, given the opportunity for coaches to plan and continuously amend sessions, including the incorporation of breaks during sessions by means of distributed practice, thereby affording coaches time for considered thought and reflection,<sup>13</sup> it must be appreciated that there remains much scope for judges to distinguish legal principle derived from seemingly comparable judgments. As ever, given the centrality of the circumstances in individual cases of sports negligence, although efforts to identify coherent and transferable legal principle are both important and advantageous, it remains necessary to avoid oversimplifying this fact sensitive area of the law. With these provisos in mind, the theme of negligent officiating will be frequently revisited in the following pages in order to deepen and cement the conclusions made

## 5. Gross Negligence

Throughout the United States, the recent trend has been to enact statutes that limit the liability of volunteers, acting within the scope of their duties, by shifting the required standard of care in the circumstances toward gross negligence.<sup>14</sup> Interestingly, and perhaps addressing Ward LJ's recognition that the ordinary law of negligence in the UK prevents judges from exercising 'discretion where there is a band of reasonable choice to be made',<sup>15</sup> some US states provide immunity to volunteer coaches providing the defendant's actions do not fall 'substantially below' the expected standard of reasonable conduct in the circumstances.<sup>16</sup> For instance, New Mexico's

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<sup>13</sup> See chapter 5, pp. 197-98.

<sup>14</sup> JA Kuiper, 'Sports Volunteer Protection Statutes: Moving Toward Uniformity and Providing Volunteer Referees with Medical Training' (2005) 16 *Marq. Sports L. Rev.* 157, 158-60. For instance, the Federal Volunteer Protection Act 1997 is one law limiting the liability of volunteers in the US and was intended to combat the fear of liability experienced by volunteers. Whilst this Act was designed to cover all volunteers, individual states have further enacted sport-specific volunteer protection statutes.

<sup>15</sup> *Scout Association v Barnes* [2010] EWCA Civ 1476 [60] (Ward LJ).

<sup>16</sup> Kuiper (n 14) 160. E.g., Illinois' Sports Volunteer Immunity Act 2002. Interestingly, as contended in chapter 3, p. 98-99, should such a standard have been applied in *Scout Association* (n 15), it appears likely (this was a split judgment) that the volunteer scout masters would not have been found negligent.

volunteer protection statute defines 'substantially below' as exceeding mere negligence but not quite amounting to gross negligence,<sup>17</sup> with Prosser and Keeton classifying gross negligence as amounting to conduct that falls between 'ordinary inadvertence or inattention' and 'conscious indifference'.<sup>18</sup>

It has been suggested that a gross negligence or recklessness standard should be applied for sports officials in the US.<sup>19</sup> This standard still holds officials (and coaches) to account for a very high degree of carelessness whilst taking account of the high social utility of volunteering activities. In advocating this stance, Biedzynski notes that demanding an ordinary reasonable duty of care of officials is 'troubling in itself' and 'offers sports officials too low a threshold of liability'.<sup>20</sup> This is a view endorsed by Wolin and Lang when stating:

It is in everyone's interests that referees and umpires may fully focus on the actions on the field, without having their attention and concentration diverted by concerns over future lawsuits. For the most part, service as a referee is more a labor of love than a full time profession. ... This can best be done by protecting referees by permitting liability only for intentional or gross wanton actions; negligence in refereeing a sporting event should not be allowed to give rise to legal liability.<sup>21</sup>

However, when defining gross negligence, the approach of the US judiciary does not always appear consistent.<sup>22</sup> Some US courts regard gross negligence as amounting to a failure to exercise the care that even a careless person would be expected to demonstrate in the circumstances.<sup>23</sup> Alternatively, gross negligence has sometimes

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<sup>17</sup> Kuiper (n 14) 160-61.

<sup>18</sup> Ibid 161-2 citing WP Keeton et al, *Prosser and Keeton on the Law of Torts* (5th ed., West Publishing, 1984) 212. With general regard to recognition of 'degrees of negligence' by courts in this jurisdiction, see CT Walton (ed), *Charlesworth & Percy on Negligence* (13th ed., Sweet & Maxwell, 2014) [1-15].

<sup>19</sup> E.g., Biedzynski (n 11); J Rains, 'Sports Violence: A Matter of Societal Concern' (1980) 55 *Notre Dame Law* 796; Kuiper (n 14).

<sup>20</sup> Biedzynski (n 11) 411.

<sup>21</sup> MT Wolin and RD Lang, 'Legal Liability for Sports Referees in Today's Litigious World – If You Can't Kill The Ump Then Sue Him' (2013) 15 *U. Denv. Sports & Ent. L.J.* 83, 109-10.

<sup>22</sup> This supports the need for further and fuller comparative scholarship when attempts are made to define gross negligence in a specific jurisdiction.

<sup>23</sup> J Spengler et al, *Introduction to Sport Law* (Human Kinetics, 2009) 23 citing Keeton et al (n 18).



been interpreted as being founded upon willful, wanton, or reckless misconduct.<sup>24</sup> Curiously, whilst Spengler et al contend that most US jurisdictions distinguish between acts that are willful, wanton, or reckless, and those that involve gross negligence,<sup>25</sup> Kuiper suggests that it appears generally accepted that a gross negligence standard and a willful, wanton or reckless standard, are virtually identical.<sup>26</sup> Despite these (unhelpful) definitional distinctions regarding the degree of departure of gross negligence from ordinary negligence, it would appear that the determination is subjective.<sup>27</sup> Clearly, since this thesis calls for further debate and serious consideration of the merits of a possible introduction of a gross negligence standard in the UK, these definitional discrepancies would need to be resolved.

Perhaps more straightforwardly, as highlighted in chapter 3, the Law Reform Commission of Ireland,<sup>28</sup> for the purposes of Part 3 of the Civil Law (Miscellaneous Provisions) Act of 2011 in the Republic of Ireland (ROI), states that the gross negligence standard requires that:

- a) The individual (coach) was, by ordinary standards, negligent;
- b) The negligence caused the injury at issue;
- c) The negligence was of a very high degree;
- d) The negligence involved a high degree of risk or likelihood of substantial personal injury to others (athlete(s)); and
- e) The individual was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence.<sup>29</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Kuiper (n 14) 163.

<sup>27</sup> Spengler et al (n 23).

<sup>28</sup> Law Reform Commission of Ireland, *Civil Liability of Good Samaritans and Volunteers* (LRC 93, 2009). Also see, chapter 3, p 105-06.

<sup>29</sup> Ibid [4.85].

These propositions have been informed by the criminal case of *The People (Attorney General) v Dunleavy*,<sup>30</sup> the Law Commission noting that:

gross negligence is to be determined by the degree of departure from the expected standard and that the test is objective. The individual need not, therefore, be actually aware that he or she had taken an unjustifiable risk. The task of distinguishing whether the departure from the expected standard of care constitutes ordinary negligence or gross negligence is for the court.<sup>31</sup>

In highlighting that the *Dunleavy* case involved the application of the criminal standard of gross negligence the Commission continued:

it is suitable to apply that [criminal law] concept in the civil context of the tort of negligence where it is clear that it is being used to describe a high degree of careless conduct which, although not intended, was something which ought to have been foreseen.<sup>32</sup>

Importantly, the key elements of the *Dunleavy* test of gross negligence have been slightly amended by taking account of the capacity of the individual to advert to risk or to attain the expected standard.<sup>33</sup> Although the test of gross negligence in the ROI is essentially objective, this recognition of individual capacities to meet the required standard introduces a subjective element. This reasoning appears somewhat consistent with UK jurisprudence expressed in *Blake v Galloway*.<sup>34</sup> In paraphrasing Dyson LJ, in a slightly amended form to reflect the context of sports coaching, as opposed to the 'horseplay' of teenagers, a gross negligence threshold would mean that there would be 'a breach of the duty of care owed by [coach] A to participant B only where A's conduct amounts to recklessness or a very high degree of carelessness'.<sup>35</sup> Whilst recognising that the practical content of the duty of a coach differs, according to

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<sup>30</sup> [1948] IR 95.

<sup>31</sup> LRC Ireland (n 28) [4.82].

<sup>32</sup> LRC Ireland (n 28) [4.83], citing *Charlesworth & Percy on Negligence* (11th ed., Sweet & Maxwell, 2006) [1.15]-[1.17].

<sup>33</sup> LRC Ireland (n 28) [4.82].

<sup>34</sup> *Blake v Galloway* [2004] EWCA Civ 814.

<sup>35</sup> *Ibid* [16] (Dyson LJ). Also see, *Orchard v Lee* [2009] EWCA Civ 295 [11], Waller LJ stating that, 'for a child to be held culpable the conduct must be careless to a very high degree'.



the quite different circumstances, from that of a teenager engaged in a consensual game, it is clear that English judges have been prepared to exercise some discretion by allowing a degree of departure from the ordinary negligence standard when children have been defendants. By incremental extension,<sup>36</sup> the case for affording volunteer coaches such leeway appears at first glance to be both sensible and persuasive. Nonetheless, given some of the distinct nuances alluded to above, should momentum gather for serious consideration of the utility of a gross negligence standard in the UK, it is clear that an informed debate would need to be premised on further, and more detailed, comparative scholarship.

This further consequential research might consider: (i) a more detailed analysis of the legislation of other common law jurisdictions where volunteers are afforded some statutory immunity from ordinary negligence; (ii) whether a test of gross negligence should be primarily objective or subjective, with accompanying explanatory notes for clarification purposes; (iii) a fuller review of relevant academic commentary on this specific issue; and ultimately, (iv) a detailed Law Commission Report along the lines of that produced by The Law Reform Commission (ROI) in 2009. This would allow for a more informed and considered analysis of both the merits and limitations of this particular proposition of this thesis. However, for present purposes, the definition offered by Dyson LJ in *Blake v Galloway*<sup>37</sup> provides an excellent and instructive illustration of how a gross negligence standard could be directly incorporated into the existing law of negligence in the UK since it appears 'quite natural, when considering alleged gross negligence, to consider first whether there was negligence and then to consider whether it was gross'.<sup>38</sup>

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<sup>36</sup> Though, of course, following s 1 of the Compensation Act 2006, the SARAH Act 2015, and existing jurisprudence in this area of the common law, further legislation would be necessary.

<sup>37</sup> [2004] EWCA Civ 814.

<sup>38</sup> *Red Sea Tankers Ltd. v Papachristidis* [1997] 2 Lloyd's Rep 547 (CC) (Mance J). Although beyond the scope of this present thesis focused on civil liability, deaths resulting from instructor or coach gross negligence may very occasionally have the potential to lead to criminal proceedings for gross negligence manslaughter. See, for instance, D McArdle, 'The views from the hills: fatal accidents, child safety and licensing adventure activities' (2011) 31(3) *Legal Studies* 372, 376-77. See further, Walton (n 18) [1-16]-[1-18].

### 5.1 Resistance to a Gross Negligence Standard

As discussed in chapters 1 and 3, the long tradition of common law development and decided cases may be regarded as questioning the merits of (further) interference by Parliament in this area,<sup>39</sup> reinforcing the apparent lack of interest in substantive tort reform in the UK.<sup>40</sup> In forcefully reinforcing what might be regarded as the more traditional view, Fraser Whitehead of the Law Society of England and Wales, during the Committee stage of the SARAH Bill stated:

The purpose of the law of statutory duty and negligence is primarily a deterrent. It creates responsibilities of two different types. One is the common law right, an ancient tradition of the law of England and Wales, where there is fluidity and discretion built into the law to enable it to develop and evolve as society itself develops and evolves. The other is the legislative provision—Parliament-made law—which is the statutory duty, which has the same effect. It creates duties and responsibilities, but does so in a way that is rigid and without discretion, and it does that because parliamentarians have perceived that these are areas of sufficient importance that, within the framework of deterrents in which the two duties coexist, the areas that these particularly statutory duties attack are simply too important to be left to fluidity and discretion, because the consequences of breaches of them are more serious. ... I believe that, within the fluidity of the common law, they [the judges] have sufficient discretion to cover everything in this Bill.<sup>41</sup>

This passage echoes the previously highlighted merits regarding the fluidity and discretion integral to this aspect of judge-made law,<sup>42</sup> not least, enabling the law to adapt to, and reflect, changing social and economic circumstances.<sup>43</sup> These comments, however, also recognise that there may be areas of the law where the fluidity and

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<sup>39</sup> C Walton (ed), *Charlesworth & Percy on Negligence* (12th ed., Sweet & Maxwell, 2010) [7.37]. Also see, *Wilkin-Shaw v Fuller* [2012] EWHC 1777 (QB) [43] (Owen J).

<sup>40</sup> Morris (n 6) 78; Cane (n 2) 396-97.

<sup>41</sup> Social Action, Responsibility, and Heroism Bill Committee Debate: 1<sup>st</sup> sitting (4 September 2014 (morning)), 10

<<http://www.publications.parliament.uk/pa/cm201415/cmpublic/socialaction/140904/am/140904s01.pdf>> accessed 28 October 2015.

<sup>42</sup> See generally, J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-089].

<sup>43</sup> Lord Dyson MR, 'Magna Carta and Compensation Culture', The High Sheriff of Oxfordshire's Annual Law Lecture (13 October 2015) [10] <<https://www.judiciary.gov.uk/wp-content/uploads/2015/10/high-sheriffs-speech.pdf>> accessed 27 October 2015.



discretion of the common law may be regarded as insufficient, or capable of being improved by an Act of Parliament. In analysing the effectiveness of the ordinary law of negligence in protecting sports coaches from legal liability, this thesis contends that the emerging intersection between the tort of negligence and sports coaching represents one such area that might be better served by complementary statutory provision.

In addition to an understandable general reluctance towards change, a most convincing submission for the undesirability of a gross negligence standard may be the acknowledgement that deserving claimants lose the legitimate right to be compensated for personal injury suffered as a result of negligence.<sup>44</sup> At its highest, and arguably most emotive, in the case of youth sport, this might be regarded as asking parents/guardians to condone the potential negligence actions of coaches (and referees) working with their children. This may, most regrettably, sometimes include catastrophic accidents. Importantly, this will be argued to represent an apparently flawed submission, incapable of withstanding critical scrutiny.

Nonetheless, this poses a difficult question that, viewed narrowly and in isolation with regard to the context of sports coaching (and officiating), tacitly assumes that it may be preferable to pin legal responsibility on negligent (amateur) coaches,<sup>45</sup> regardless of any moral culpability, should athletes suffer personal injury. In calling for a broader and more searching consideration of how best to balance the interests of defendant coaches and the injured athletes under their charge, this thesis questions this traditionally held assumption. Put simply, as uncovered in the previous pages of this research, the potential exposure of coaches to liability in negligence in the UK appears unreasonable.

An acute and informed appreciation of the potential tension created by placing too high a burden on amateur officials (coaches), in terms of discharging their

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<sup>44</sup> R Corbett et al, *Legal Issues in Sport: Tools and Techniques for the Sport Manager* (Emond Montgomery Publications, 2010) 31. Corbett et al make specific reference to waivers, or so termed 'onerous contract[s]', since it is suggested that signing a waiver of liability for negligence may be regarded as similar to asking athletes to condone negligence. Also see, Burrows (n 7) 123; Kuiper (n 14) 163.

<sup>45</sup> See generally, Burrows (n 7) 123.

(evolving) functions with reasonable care, perhaps underpinned the comments of Lord Phillips MR in *Vowles v Evans* when stating:

There is scope for argument as to the extent to which the degree of skill to be expected of a referee depends upon the grade of the referee or of the match that he has agreed to referee. In the course of argument it was pointed out that sometimes in the case of amateur sport, the referee fails to turn up, or is injured in the course of the game, and a volunteer referee is called for from the spectators. In such circumstances the volunteer cannot reasonably be expected to show the skill of one who holds himself out as referee, or perhaps even to be fully conversant with the laws of the game.<sup>46</sup>

Arguably intended to provide reassurance to volunteers involved in the provision and delivery of sporting activities, the above statement, concerning volunteers in amateur sport, appears problematic.<sup>47</sup> Though perhaps well intentioned, it seems to conceal the fact that as revealed in chapter 5, an individual assuming a duty requiring the exercise of a special skill would, in fact, be subject to the ordinary principles of the law of negligence if sued. In short, an individual volunteering to step in at short notice to referee, in an effort to prevent cancellation of a fixture, would appear to be under a duty to do so properly.<sup>48</sup> As such, the principles of professional liability would essentially be engaged, regardless of whether or not the defendant may be an amateur volunteer or professional. Put bluntly, this burden, or standard of care, remains premised on objective reasonableness. This highlights the occasional disconnect, and some of the associated hidden legal vulnerabilities, between a legal test premised on professional negligence and, the largely amateur and unqualified status of many coaches in the UK. This lacuna has been a theme of this thesis and, as revealed, is compounded by a range of additional contextualised factors, not least, including the

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<sup>46</sup> *Vowles* (n 10) [28]. Also see, chapter 5, pp. 188-89.

<sup>47</sup> Partington (n 9).

<sup>48</sup> *Fowles v Bedfordshire CC* [1996] ELR 51 (CA).



sometimes limited and prohibitive cost of CPD and training,<sup>49</sup> as discussed in chapters 1, 5 and 6.

## 5.2 Gross Negligence in All But Name?

A reluctance to consider meaningful change to the law of negligence, premised on some of the aforementioned understandable objections, though superficially attractive, and apparently underpinned by common-sense notions of fairness, may in reality amount to a somewhat deceptive misrepresentation of the application of legal principles in this field of the law. This reinforces the relevance of challenging perceptions about what constitutes negligence, and improving society's awareness and understanding of the tort of negligence, as discussed in chapter 3. For instance, without a more detailed and nuanced appreciation of the interaction between the law of negligence and sport, it appears highly unlikely that the ordinary reasonable parent (or athlete) would possess the specialist knowledge required to distinguish between the expression of legal principle (reasonableness) and the practicalities of an evidential burden that might be reflective of the prevailing circumstances (e.g., in some competitive instances, an evidential threshold of 'reckless disregard').<sup>50</sup> Put simply, there would appear to be somewhat of a void between what non-lawyers might perceive to be the prevailing negligence standard and that objectively determined by the court after carefully accounting for the full factual matrix of individual cases. Arguably, this thesis reveals the scope for both section 1 of the Compensation Act, and in due course the SARAH Act 2015, to intensify and exaggerate this confusion by tacitly inviting judge's to heighten the breach barrier when individuals undertake desirable social activity in a predominantly responsible fashion.

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<sup>49</sup> For instance, see, The Football Association, 'Results revealed after FA's largest-ever grassroots survey' (10 December 2015) <<http://www.thefa.com/news/2015/dec/grassroots-survey-results-101215>> accessed 16 December 2015. This survey found some dissatisfaction around the cost of coaching courses and the FA's new grassroots coaching package will see a drive to get more top level grassroots coaches into the game.

<sup>50</sup> E.g., *Caldwell v Maguire* [2001] EWCA Civ 1054 [11]. Also see, chapter 5, 171.

Drawing from the further analogy of injury caused by fellow participants, it might be argued that the current law may already sometimes require parents/guardians to condone the potential negligence actions of opponents when their children compete, since the reckless disregard evidential standard, should it be applicable on the facts of the individual case before the court, would likely amount to a higher level of carelessness than ordinary negligence.<sup>51</sup> This, as alluded to above, is by no means necessarily contended to be a criticism of the ordinary law of negligence. Nevertheless, framed in this manner, adoption of a gross negligence test appears somewhat consistent (in specific circumstances) with conduct amounting to a reckless disregard evidential standard, or a very high degree of carelessness, as approved in particular cases including *Caldwell v Maguire* and *Blake v Galloway* respectively. In short, it is submitted that arguments against adoption of a gross negligence standard, on the facile rationale that this amounts to a condoning and acceptance of negligent conduct by coaches, may actually represent a deceptive misnomer.

In the case of decisions made by coaches in the context of a fast moving game, the negligence standard in the particular circumstances might arguably, and no doubt to the surprise of some parents, amount to coaching conduct substantially below what might otherwise have been ordinarily expected in different circumstances (i.e., when teaching a skill in isolation). These amended circumstances, reflective of highly competitive, committed and intense sporting participation, may sometimes provide judges (albeit somewhat tacitly and narrowly) with more latitude when determining issues of breach.<sup>52</sup> This judicial discretion, or flexible and malleable legal test, appears pronounced in judgments made by the Court of Appeal when considering the negligence liability of referees. For instance, in recalling *Smoldon v Whitworth*, a case

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<sup>51</sup> Clearly, this will be highly fact specific and perhaps of greater likelihood with older children competing in prevailing circumstances indicative of a fast-moving and vigorous invasion game.

<sup>52</sup> Although, as argued in chapter 3, this is potentially subject to idiosyncratic judicial reasoning. Moreover, since the ordinary negligence standard applies, a more transparent, explicit and (arguably) consistent pronouncement appears beneficial. Further, as is subsequently discussed, coaches will often fail to avail of this heightened evidential threshold since much coaching practice allows some time for considered thought and is removed from the 'the context of a fast-moving and vigorous contest'.



concerning the negligent refereeing of an Under 19 Colts rugby union match, Lord Bingham emphasised the significance of scrutiny of the full factual scenario in the court's deliberations, accepting that given the specific functions of a referee:

The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed.<sup>53</sup>

Developing this theme in a critique of *Smoldon*, with an acute awareness of the perspective of volunteers, Caddell suggests that:

the test for breach of this duty has been sufficiently well formulated to discourage frivolous litigation, and claims for injuries sustained in circumstances over which it is near impossible for even the most diligent referee to have exercised any degree of preventative control will rightly be rejected. ... Such an 'arm's length' approach to liability should not pose any major disincentive for volunteers to come forward to act as match officials, while ensuring that dangerously substandard refereeing will attract the appropriate civil sanctions, given the serious injuries that may occur as a result.<sup>54</sup>

In the circumstances of a fast-moving and vigorous contest, establishing liability in negligence of a referee is not easily satisfied by claimants and might necessarily constitute: a high liability threshold that will not easily be crossed; a 'near impossible' finding of negligence liability in typical circumstances; and, 'dangerously substandard' refereeing. These pronounced legal parameters are potentially intensified by statutory provision that might be regarded as tacitly inviting courts to raise the breach barrier.<sup>55</sup> For instance, during passage of the SARAH Bill, the Government made plain that it would welcome if the court's consideration of the Act's provisions tipped the balance in

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<sup>53</sup> *Smoldon* (n 10) P139. Also see chapter 1, p. 16.

<sup>54</sup> R Caddell, 'The Referee's Liability for Catastrophic Sports Injuries – A UK Perspective' (2005) 15 *Marq. Sports L. Rev.* 415, 424.

<sup>55</sup> This issue was considered more fully in chapter 3.

favour of a defendant in a finely balanced case.<sup>56</sup> Reassuring as these pronouncements may appear, *Bartlett v English Cricket Board Association of Cricket Officials* provides a stark reminder that volunteer officials (and coaches) remain exposed to what might be argued to be frivolous litigation.<sup>57</sup> This thesis has revealed that application of legal principles in the specific interface between the law of negligence and sports coaching may involve a complex, distinct and sometimes inconsistent fusion of common law practice, statute law and ideally, common sense judicial reasoning. Accordingly, this appears fertile ground for promulgation of a more transparent, coherent and principled approach to the issue of coach negligence. Put simply, whilst objectives intended to better safeguard volunteers from negligence liability are regarded as necessary, laudable and commendable, there appears to be a strong case for such measures to be more pronounced. In addition to the potential for a more transparent and readily understood provision to provide greater reassurance to volunteer coaches, a more explicit and substantive intervention by Parliament should help to minimise the limitations uncovered in this area of the law.

## 6. Future Trends: Negligence's Slippery Slope

Despite the striking similarities in the scope of both section 1 of the Compensation Act 2006 and the SARAH Act 2015, introduced respectively by successive governments of different political persuasions, a period of less than ten years between these statutes underscores a forceful recognition that the ordinary law of negligence appears deficient in reassuring and safeguarding volunteers mindful of negligence liability. In addressing notions of a perceived compensation culture, Lord Falconer's comments from 2005 would appear to have continued contemporary relevance: 'the idea of a compensation culture can impact on volunteers – by discouraging people to give their time or by organisations restricting the activities people can do for fear –

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<sup>56</sup> Hansard HL vol 756 col 1573 (4 November 2014) Lord Faulks

<<http://www.publications.parliament.uk/pa/ld201415/ldhansrd/lhan51.pdf>> accessed 17 March 2015.

<sup>57</sup> In *Bartlett* (n 9) the agreed measure of general damages was £2,500 if the claimant succeeded in his action. In view of the ruling that the claimant had to pay the defendant's costs, with counsel representation required on three separate dates in July 2015, this action would appear ill-considered.



often a misplaced fear – of a claim’.<sup>58</sup> Correspondingly, in cases of sports negligence, judgments by the Court of Appeal have sought to combat the effects of what might be termed ‘negligence’s slippery slope’.<sup>59</sup> Lord Chief Justice Bingham in *Smoldon v Whitworth* stressed:

The judge was at pains to emphasise that his judgment in favour of the plaintiff was reached on the very special facts of this case, having regard in particular to the rule designed to afford protection to players aged under 19 and to the evidence that the number of collapsed scrums which were permitted to occur in the course of this match was well in excess of what any informed observer considered to be acceptable. He did not intend to open the door to a plethora of claims by players against referees, and it would be deplorable if that were the result. In our view that result should not follow provided all concerned appreciate how difficult it is for any plaintiff to establish that a referee failed to exercise such care and skill as was reasonably to be expected in the circumstances of a hotly-contested game of rugby football.<sup>60</sup>

Similarly, over six years later in delivering the Court of Appeal’s decision in *Vowles v Evans*, Lord Phillips reiterated:

Mr Leighton Williams [counsel for the defendant referee] suggested that, if we upheld the judge’s finding that an amateur referee owed a duty of care to the players under his charge, volunteers would no longer be prepared to serve as referees. We do not believe that this result will, or should, follow. Liability has been established in this case because the injury resulted from a failure to implement a law designed to minimise the risk of just the kind of accident which subsequently occurred. We believe that such a failure is itself likely to be very rare. Much rarer will be the case where there are grounds for alleging that it has caused a serious injury. Serious injuries are happily rare, but they are an inherent risk of the game. That risk is one which those who play rugby believe is worth taking, having regard to the satisfaction that they get from the game. We would not expect the much more remote risk of facing a claim in negligence to discourage those who take their pleasure in the game by acting as referees.<sup>61</sup>

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<sup>58</sup> Lord Falconer, ‘Compensation Culture’, (Health and Safety Executive Event, 22 March 2005) 4. Also see, chapter 1, p. 7.

<sup>59</sup> H Opie, ‘Referee liability in sport: negligent rule enforcement and *Smoldon v Whitworth*’ (1997) 5 *Torts Law Journal* 1, 7.

<sup>60</sup> *Smoldon* (n 10) P147.

<sup>61</sup> *Vowles* (n 10) [49].

These confident predictions by the Court of Appeal concerning the scope for future claims being brought against referees in negligence, and by analogy coaches, because of the difficulty in establishing breach, more than ever, appear to remain open to considerable doubt.<sup>62</sup> Since these higher court judgments, claimants suffering personal injury caused by the carelessness of defendants have brought an action in negligence where the alleged breach of duty was committed by both professional coaches<sup>63</sup> and instructors.<sup>64</sup> Perhaps more worryingly, as the previous pages of this thesis reveal, the reasonableness of the conduct of amateurs, or volunteers, seems to be an emerging legal issue, with recent cases involving a sports coach,<sup>65</sup> scout leaders,<sup>66</sup> rugby referees,<sup>67</sup> and most recently, cricket umpires.<sup>68</sup> This is despite the majority of claims being settled before trial. In convincing recognition of the potential detrimental impact of negligence's slippery slope on volunteering in sport, the perceived 'compensation culture' a likely catalyst in its contemporary manifestation, shortly after the Court of Appeal judgment in *Smoldon v Whitworth*, Opie insightfully articulated:

While there is probably little prospect of the courts being flooded with claims against referees in the immediate future, one wonders whether the Court of Appeal is deluding itself to some degree in saying that protection will be provided by the difficulty in establishing breach. Reference need only be made to the standards today required of drivers, manufacturers, doctors and employers to realise that what was initially seen as limited scope for liability became much greater over time once placed on negligence's slippery slope.<sup>69</sup>

In short, in echoing this view, this thesis contends that neither the common law, section 1 of the Compensation Act 2006, or the SARAH Act 2015, whether applied

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<sup>62</sup> See generally, Opie (n 59) 1-2.

<sup>63</sup> E.g., *Davenport v Farrow* [2010] EWHC 550 (QB); *Cox v Dundee CC* [2014] CSOH 3.

<sup>64</sup> E.g., *Anderson v Lyotier* [2008] EWHC 2790 (QB); *MacIntyre v Ministry of Defence* [2011] EWHC 1690 (QB); *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50.

<sup>65</sup> *Petrou v Bertoncello* [2012] EWHC 2286 (QB).

<sup>66</sup> *Scout Association* (n 15).

<sup>67</sup> E.g., *Allport v Wilbraham* [2004] EWCA Civ 1668.

<sup>68</sup> *Bartlett* (n 9).

<sup>69</sup> Opie (n 59) 7.



discretely or engaged collectively, amount to a suitable and/or sufficient barrier designed to curb negligence's slippery slope in the context of sports coaching. More than ever, given the predominate reliance on amateur coaches and referees in sport,<sup>70</sup> and the emerging prospect of being sued, the general tenor of the point raised by Mr Leighton Williams QC, when instructed by the defendant referee in *Vowles v Evans*, appears absolutely in point: 'It is not fair, just or reasonable to [unreasonably] expose those prepared to offer their services for nothing to the risk of ruinous legal liability'.<sup>71</sup> More recently, in reiterating a further issue raised by Mr Williams, suggesting that the supply of volunteer referees will be in danger of drying up due to fears of legal liability,<sup>72</sup> in *Bartlett v English Cricket Board Association of Cricket Officials*, the Senior Executive Officer called on behalf of the Defendant highlighted that, '[t]he amateur game is short of officials with many games *not served by qualified officials* and so those who officiate are to be treasured and not pilloried'.<sup>73</sup> Unless the issue of coach negligence is grasped in a sensible, proportionate and proactive manner, the findings of this PhD would suggest that similar arguments may become more prevalent in the circumstances of sports coaching in the future.

## 7. A More Just, Fair and Reasonable Balance?

Since concerns about liability in negligence might operate as a major disincentive to volunteering, striking a reasonable balance between the rights of those injured to receive compensation and the need to protect volunteers (coaches) from legal liability provides a contemporary challenge for (all) governments.<sup>74</sup> The findings

<sup>70</sup> See for instance, P Tracey, 'Sports injury – should the referee be blamed?' (2000) 1 *JPI Law* 10.

<sup>71</sup> *Vowles* (n 10) [13]. This point is further reinforced in this conclusion's Final Remarks section.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Bartlett* (n 9) [179] (emphasis added). As previously mentioned, satisfying the standard of the ordinarily competent official appears potentially problematic for unqualified volunteers. In view of the comments made by this Senior Executive Officer, this would appear circumstances in which those individuals prepared to volunteer to officiate might be exposed to an unreasonable risk of negligence liability.

<sup>74</sup> See for instance, M McGregor-Lowndes, 'Volunteer Protection in Queensland' in D Muir et al, *Civil Liability Reform and Volunteer Protection in Queensland*, Working Paper No. CPNS 18, Centre of Philanthropy and Nonprofit Studies (Queensland University of Technology, June 2003) 15 <<http://eprints.qut.edu.au/4551/1/4551.pdf>> accessed 3 November 2015.

of this thesis indicate, perhaps unwittingly, that coaches are being unacceptably exposed to negligence liability. It is abundantly clear that some dedicated, committed and well-intentioned volunteer coaches may not possess the qualifications, experience, training and competence to discharge the legal duty of care incumbent upon them in certain circumstances.<sup>75</sup> Appreciating the reasoning of a court when tasked with defining reasonableness, viewed objectively and dispassionately, in these scenarios, coaches should be advised to (simply) refuse to assume a duty which they are unable to discharge properly. Interestingly, at a national sports law conference in December 2015 focused on SRC, a panel member who was a successful solicitor and active coach of a high performing county squad, made plain that he would not be prepared to assume coaching duties without the presence of a qualified medical practitioner. More specifically, he highlighted how coaching can be a 'lonely place' when coaches are working in 'isolation',<sup>76</sup> and without immediate access to the services of a doctor or physiotherapist, a common situation in amateur sport.<sup>77</sup> This coach, with a detailed knowledge and understanding of the law, and more specifically, the evolving scope of the duty of care incumbent upon modern sports coaches, whilst prioritising the health and welfare of the players under his charge, was also undeniably mindful of possible limitations in his expertise and associated potential legal vulnerabilities. It is submitted that this informed and expert view, and associated stance, is unlikely to be ordinarily articulated or adopted by the 'reasonably average' volunteer coach.

Coaching does not occur in a social vacuum. This entirely sensible refusal, preventing assumption of a perceived unduly onerous (and in some instances unrealistic) responsibility, might appear to be in conflict with the very notion of the volunteer ethic. Inevitably, at the lower stages of the sports performance pyramid, it would probably result in cancellation of a whole range of grassroots sporting provision. Moreover, at the macro level, the seemingly hegemonic and insatiable appetite of

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<sup>75</sup> This issue was explored in detail in chapter 5, pp. 161-70. NGBs have a responsibility to address these important matters. Also see (n 73) above.

<sup>76</sup> F Logan, Northern Ireland Sports Law Conference, Panel Discussion (6 November 2015, Belfast).

<sup>77</sup> MJ McNamee et al, 'Concussion in Sport: Conceptual and Ethical issues' (2015) 4 *Kinesiology Review* 190, 199.



governments to fully maximise the social utility of sport appears unabating. For instance, as revealed in chapter 1, successful realisation of the European dimension in sport will ultimately depend to a considerable extent on mobilising amateur sports coaches working at grassroots level. Whilst this appears entirely appropriate, the fact such coaches may be unknowingly exposing themselves to an unreasonable litigation risk is objectionable. Although arguments have been made to suggest that a greater awareness and understanding of the law of negligence, and in particular the approach of courts when addressing the issues of breach,<sup>78</sup> would reassure volunteers,<sup>79</sup> this thesis questions such an assertion. Simply applied, the tort of negligence's inherent balancing exercise when determining the required standard of care in the particular circumstances appears to potentially place too much of a burden on coaches. The assumption appears to be that coaches are responsible for safeguarding athletes from personal injury and associated loss,<sup>80</sup> and yet, it remains questionable whether the same level of due care is applied to the adequate safeguarding of coaches from the prospect of negligence liability.

## 8. Minimising Negligence Liability

Although this thesis' analysis has adopted the perspective of the coach, in identifying strategies and approaches that might limit the exposure of coaches to legal liability, the reasons for coaches being committed to effective and reasonable coaching practices will transcend issues regarding potential negligence liability.<sup>81</sup> By adopting an interdisciplinary analysis, this research has uncovered some of these wider considerations, including a number of ethical challenges facing modern sports coaches,

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<sup>78</sup> E.g., Lord Dyson (n 43) [37]-[38].

<sup>79</sup> D Kitchener, 'The Compensation Bill, clause 1- an undesirable deterrent?' (2005) 155 *New Law Journal* 1793.

<sup>80</sup> See generally, PS Atiyah, *The Damages Lottery* (Hart Publishing, 1997) 138-39; F Furedi, *Culture of Fear* (Continuum, 2002) 11. Interestingly, Atiyah claims that creation of this 'blame culture' and the stretching of legal liability, in part, has diverted attention from the benefits and utility of first party insurance. First party insurance is an important issue discussed later in this concluding chapter.

<sup>81</sup> MJ Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues', in R Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013) 277. As succinctly noted by Kagan, 'law is not the only factor influencing behaviour': R Kagan, 'What Socio-Legal Scholars Should Do When There Is Too Much Law' (1995) 22(1) *Journal of Law and Society* 140, 144.

reflecting the qualified overlap between legal and ethical obligations discussed in chapter 6. Nonetheless, the legal duties and obligations incumbent upon coaches are undoubtedly an evolving core complexity of modern sports coaching. Since these responsibilities appear to becoming extended and more pronounced,<sup>82</sup> as considered in the case of the management of SRC discussed in chapter 8, the standard of care required of coaches appears destined to rise over time. Given coach education has been presented in chapters 1 and 5 as largely focused on the dissemination of practical skills and knowledge, with an emphasis on bioscientific aspects of sports science, fuller appreciation of the requirements of the evolving legal context in which coaches perform their functions would appear to require somewhat of a shift in culture. For instance, as argued in chapter 6, the legal and ethical aspects of sports coaching should become more enhanced topics within the CPD provision of coaches and, the utility and beneficial impact of codes of conduct for coaches, in developing a more informed awareness of their legal duty of care, should be critically assessed. These present two important propositions that might go some way to challenging negligent entrenched coaching practices that may be underpinned by ‘uncritical inertia’ and a deep-rooted ‘entrenched legitimacy’.

More specifically, in discharging the heightened standard of care required of them, this research acknowledges that coaches must ensure that the coaching practices adopted are consistently regular, approved, and capable of withstanding robust and logical scrutiny. For instance, this thesis’ detailed consideration of the *Bolam* test in the context of sports coaching, where the majority of coaches are volunteers, reinforces the *Bolam* doctrine as a control mechanism capable of being engaged a quasi-defence, thereby safeguarding coaches from negligence liability. For this to be the case, however, it is axiomatic that coaches who routinely critically evaluate and reflect on their coaching practices will be best placed to rigorously justify their behaviour and coaching methods.

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<sup>82</sup> J Labuschagne and J Skea, ‘The Liability of a Coach for a Sport Participant’s Injury’ (1999) 10 *Stellenbosch Law Review* 158.



By raising the awareness of the implications derived from the developing interaction between the law of negligence and sports coaching, coaches should be better positioned to: (i) refrain from assuming functions beyond their competence, qualifications, experience and/or qualifications; (ii) be more mindful of their potential limitations or a possible skills gap; (iii) better appreciate the necessity of relevant education, qualifications, training and CPD; (iv) more confidently establish what might amount to objectively reasonable coaching practice in different and specific circumstances; (v) be sensitised to the dangers of negligent entrenched practice and coaching practices premised on 'uncritical inertia' and 'entrenched legitimacy'; (vi) incorporate best practices when assessing risk and maintaining other relevant records, including instances of accidents and near misses; (vii) appreciate the necessity of appropriate insurance provision; and more generally, (viii) be aware of the implications of the dynamic shifting legal landscape in which they operate.

For instance, chapter 4 reinforced and clarified the requirement for coaches to conduct suitable and sufficient risk assessments to ensure that they will be better safeguarded from exposure to civil liability. In the context of assessing risk, the test of suitable and sufficient was revealed to appear synonymous with objective reasonableness. Simply applied, in approaching the risk assessment process reasonably, as is consistent with all aspects of coaching practice, coaches should be encouraged to adopt an intelligent, informed and thoughtful approach. This further advocates the adoption of regular and approved risk assessment methodologies, capable of being justified and withstanding logical scrutiny, whilst also being mindful to avoid the dangers that flow from subjective and idiosyncratic notions of risk. Problematically, in view of chapter 6's critical scrutiny of coaching practice, it would appear that much coaching may fail to embrace such best practice recommendations. Appropriate education, training, discussion and informed debate would facilitate awareness and adoption of these best practice propositions, not only when managing risk, but in terms of coaching behaviour more generally.

Using chapter 4 for illustrative purposes once again, should coaches have the knowledge, understanding, expertise and confidence to conduct risk-benefit assessments, defining acceptable risk would become a more thoughtful and informed exercise. Endorsing an explicit and pronounced emphasis on a risk-benefit analysis when assessing risk promotes a proportionate, sensible and realistic management of risk in the circumstances. As revealed, identifying what might be regarded as reasonable and acceptable risk in this rigorous and systematic manner: better safeguards coaches from liability in negligence; more effectively maximises the full utility of sport; and, explicitly recognises the legitimate safety interests of athletes. Applying these proposals more generally, by encouraging coaches to fully embrace, and take ownership of, the evolving context in which they discharge their duty of care, creates benefits extending well beyond the desired objective of restricting litigation risk. Instructive scenarios designed to stimulate critical reflection of legal and ethical issues appear particularly well designed to achieve these worthwhile and important objectives.

## 9. First-Party Insurance

First-party insurance provides protection for individuals (e.g., athletes) against the risk of other people's negligence (e.g., coaches), their own negligence, and the risk of a pure accident.<sup>83</sup> Generally speaking, first-party insurance may be regarded as 'no-fault' insurance,<sup>84</sup> and since predicting conduct deemed negligent remains an uncertain and age old problem,<sup>85</sup> given the vague and elusive notion of objective

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<sup>83</sup> Cane (n 2) 192. Interestingly, although beyond the scope of this thesis, and of much more profound substantive change than that being suggested here, regards a no-fault, state sponsored, general accident compensation scheme, as adopted in New Zealand in 1972. The 1972 Accident Compensation Act has since been amended and replaced by the Accident Compensation Act 2001. Cane notes that the New Zealand Accident Compensation Scheme may be regarded as a model for the reform of compensatory damages for personal injury (p. 400). See further, Ministry of Justice (New Zealand), Accident Compensation Corporation, <<http://www.justice.govt.nz/publications/global-publications/d/directory-of-official-information-archive/directory-of-official-information-december-2011/alphabetical-list-of-entries-1/a/accident-compensation-corporation>> accessed 8 December 2015.

<sup>84</sup> Atiyah (n 80) 120.

<sup>85</sup> A Morris, "'Common sense common safety': the compensation culture perspective" (2011) 27(2) *Professional Negligence* 82, 92-93.



reasonableness, may arguably be more effective than legal liability as a means of covering risk.<sup>86</sup> Further, even in circumstances where there may be strong grounds for a claim in negligence, the expense and trauma of legal proceedings for claimants can be avoided.<sup>87</sup> Even in situations where coaches (and officials) have insurance indemnity,<sup>88</sup> by potentially preventing coaches from becoming embroiled in an unpleasant and taxing litigation process, and thereby discouraging the volunteer ethic, first-party insurance has much to offer.<sup>89</sup> Similarly, given the probable reluctance of injured athletes with first-party insurance provision to also seek legal redress through the courts,<sup>90</sup> the stress and trauma of coaches accused of alleged negligence should be diminished.

Moreover, in addition to removing the requirement to establish a breach of legal duty, a convincing additional benefit afforded by first-party insurance includes the fact that claims are likely to be resolved much more promptly and efficiently.<sup>91</sup> This would ensure that the injured athlete receives the payment to which they are entitled without delays that may amount to around ten years in some instances.<sup>92</sup> In short, regardless of who is to blame, for instance, either the coach/official or athlete, as a means of 'no-fault' insurance, first-party insurance should: afford damages to claimants without the requirement of satisfying the control device of breach;<sup>93</sup> negate possible judicial inquiries into issues of contributory negligence; reduce the stress, trauma and possible 'reputational' damage for all concerned should legal proceedings be commenced;<sup>94</sup> and crucially, resolve matters in a timely and efficient fashion for both

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<sup>86</sup> Atiyah (n 80) 158.

<sup>87</sup> Opie (n 59) 10.

<sup>88</sup> Most typically public liability and professional indemnity insurance.

<sup>89</sup> Opie (n 59) 10.

<sup>90</sup> Ibid.

<sup>91</sup> Atiyah (n 80) 151.

<sup>92</sup> E.g., *Mountford v Newlands School* [2007] EWCA Civ 21. Discussed below.

<sup>93</sup> Atiyah (n 80) 120-21. Albeit, the amount awarded would likely be wider in scope should negligence be proven through the courts.

<sup>94</sup> Although the reputation of individuals exercising a special skill may be clearly undermined by an accusation of negligence, given the collaborative coach-athlete relationship, the community context of much sporting provision, and the heavy reliance on volunteers, claimants may likewise be mindful of the negative connotations associated with suing a coach. See further, Partington (n 9) 77.

claimants and defendants alike. Simply applied, first-party insurance should ensure that claimants receive guaranteed and early payment of compensation.<sup>95</sup> Given the centrality of these propositions to the interaction between sports coaching and the law of negligence, these issues merit fuller scrutiny.

The present legal system, problematically, provides a strong and enticing financial incentive to blame others when personal injury is suffered, thereby creating a 'blame culture',<sup>96</sup> which no-doubt promotes perceptions of a 'compensation culture', and may accentuate the emerging legal vulnerability of coaches. In this scenario, a shift towards a culture which encourages individuals to become more accustomed and responsible for their own decisions and behaviour seems sensible.<sup>97</sup> Thus, in view of the apparent general reluctance of the UK government to advocate significant change to the law of torts in this area, private insurance schemes may be regarded as a more effective mechanism for rendering financial assistance to individuals seriously injured, rather than a requirement for claimant athletes to establish coach negligence.<sup>98</sup> As succinctly articulated by Burrows:

there is a good case for encouraging the taking out of first-party insurance to cover the pecuniary and non-pecuniary losses of injury and illness. If more people were covered by personal accident or illness insurance policies, the expensive tort system would tend to be relied on less often ... While the tort system of individual responsibility would remain intact, encouragement would be given to individuals to make their own provision for injury and illness which could take precedence in the event of an overlap with tort. Of course, in many situations – and this ought to be a primary selling feature of personal accident or illness insurance – the injured or ill would be covered by insurance where there would be no possibility of compensation under the tort system; for example, where a person is injured in an accident that is no-one's fault.<sup>99</sup>

In addition to the aforementioned benefits of first party-insurance policies, a further compelling attraction and selling feature would be the prompt and efficient

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<sup>95</sup> Burrows (n 7) 131.

<sup>96</sup> Atiyah (n 80) 138.

<sup>97</sup> Ibid 140.

<sup>98</sup> See generally, Opie (n 59) 10.

<sup>99</sup> Burrows (n 7) 131.



resolution of matters regarding compensatory payments. For instance, returning to the thematic analogy of negligent officiating, in the unreported case of *Reay v Hudson*, the defendant rugby referee Mr Hudson, a retired lecturer, was alleged to have been negligent in failing to control a match in which a punch thrown by an opposing player resulted in the claimant (Mr Reay) suffering serious damage to his right eye.<sup>100</sup> Of particular interest for present purposes, was the fact that the claim was commenced just prior to the end of the limitation period and was litigated for almost two years before ultimately being discontinued around three weeks prior to trial. Mr Hudson was forced to endure this claim for approximately five years.<sup>101</sup> Similarly, in another unreported case concerning the alleged negligence of a rugby referee, *Mandry v Barnard*, the claimant suffered a serious injury to his neck when a scrum collapsed towards the end of the game. Interestingly, and reinforcing the need for officials and coaches to adequately inspect playing surfaces,<sup>102</sup> the court ruled in favour of the referee on all issues, finding that there were only two collapsed scrums and although the conditions were wet, windy and cold, the pitch was nonetheless certainly playable.<sup>103</sup> When delivering judgment, the judge stated, 'no one could have anything but profound sympathy for the predicament in which Mr Barnard finds himself ... he has had this claim over him for over five years'.<sup>104</sup>

This is indeed a predicament likely to generate considerable stress and anxiety for coaches sued in negligence and signifies a particular aspect of legal liability that warrants more than 'profound sympathy' if coaches are to be reasonably and appropriately safeguarded from litigation risk. Examination of specific cases analysed in the preceding chapters strongly reinforces this point. For instance, in *Mountford v Newlands School*,<sup>105</sup> the accident suffered by the claimant when representing his school in an under-15 seven-a-side inter school rugby match, was on 19 February 1997, the

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<sup>100</sup> Tracey (n 70) 10-11.

<sup>101</sup> Ibid 11.

<sup>102</sup> E.g., *Sutton v Syston Rugby Football Club Limited* [2011] EWCA Civ 1182; *Bartlett* (n 9).

<sup>103</sup> Tracey (n 70) 12.

<sup>104</sup> Ibid.

<sup>105</sup> *Mountford* (n 92).

case finally being decided by the Court of Appeal on 24 January 2007. In recognising this unacceptable delay, Waller LJ noted:

I am extremely sympathetic both with the judge and the witnesses who were seeking to describe an incident which occurred some eight or more years previously and we have had no real explanation as to why it took so long for this comparatively straightforward case to come to trial.<sup>106</sup>

In the specific contexts of sports instructing and coaching respectively, M. Jerome Portejoie, the defendant ski instructor in *Anderson v Lyotier*,<sup>107</sup> and Mr David Farrow, the defendant athletics coach in *Davenport v Farrow*,<sup>108</sup> no doubt endured considerable stress and anxiety as a result of the litigation process. In the instance of Jerome Portejoie, the claimant sustained injuries that rendered him tetraplegic on 7 February 2004 and, following six hearing dates in October 2008, Foskett J finally reached judgment on 14 November 2008, some four years and nine months after the devastating accident. In *Davenport*, the claimant alleged that injury (stress fractures) was sustained in October/November 2004, the subsequent claim being issued by the claimant on 26 October 2007 and, following five hearing dates in February 2010, Owen J handed down judgment on 18 March 2010 (some six years following the alleged date of injury). Notwithstanding perceived reputational damage, the effort and distraction of, for example, providing witness statements, attending trial hearings, meeting with solicitors and barrister(s), and preparing for trial more generally, appears ominous.<sup>109</sup>

Paradoxically, contextualised in this fashion, this would appear to be an occasion whereby a greater understanding and appreciation of the tort of negligence would do little to reassure volunteer coaches mindful of being sued. Further, it

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<sup>106</sup> Ibid [25] (Waller LJ (V-P)). Importantly, the limitation period only begins when a claimant reaches the age of 18 years.

<sup>107</sup> *Anderson* (n 64).

<sup>108</sup> *Davenport* (n 63). The claimant's case was that the stress fractures were sustained in October/November 2004 ([13]).

<sup>109</sup> Although this thesis champions the perspective of the defendant coach, there is the potential for delays in legal proceedings to be even more traumatic and unacceptable for deserving claimants. See for instance, *Woodland v Maxwell* [2015] EWHC 273 (QB) [5], the complex procedural history amounting to nearly fifteen years.



signifies a not insignificant limitation and inadequacy of the ordinary law of negligence in safeguarding coaches from unreasonable exposure to a somewhat concealed facet of negligence liability. More specifically, in view of the developing intersection between the tort of negligence and sports coaching, it further questions the proposition that potential litigation risk should be of little concern for youth coaches,<sup>110</sup> not least, because even when cases are compromised before going to court, defendant coaches would likely remain embroiled in the meticulous preparations made by legal practitioners, designed to settle cases on the most favourable terms possible for clients. In short, arguments endorsing and encouraging the taking out of first-party insurance, designed to better protect athletes against sport-related injury risks, appear difficult to contradict. Providing appropriate levels of coverage are arranged and maintained, in terms of strictly ensuring necessary and sufficient compensation for personal injury suffered during participation in sport,<sup>111</sup> at first glance, greater reliance on first-party insurance does not appear too objectionable. Its role in contemporary sport certainly represents a (further) debate worth having.

Nonetheless, should the UK adopt a gross negligence standard for volunteer sports coaches, since first-party insurance coverage is voluntary, it appears possible that the poor, ill-educated and vulnerable members of society might be the individuals least likely to be adequately insured.<sup>112</sup> Assuming that athletes and parents/guardians are expected to make their own arrangements or insurance coverage for accidents caused by ordinary negligence, since volunteers often deal with underprivileged members of society, these arrangements might prove inadequate.<sup>113</sup> Although this by no means appears to be a socially desirable outcome,<sup>114</sup> it is not a justification for

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<sup>110</sup> S Greenfield, 'Law's impact on youth sport: should coaches be "concerned about litigation"?' (2013) 2(2) *Sports Coaching Review* 114, 118.

<sup>111</sup> Of course, arguments could be made about negating some of the wider functions of tort law, not least, the so-termed deterrent effect and the setting of acceptable minimum standards and practices by defining what might constitute reasonable skill and care in particular circumstances.

<sup>112</sup> Cane (n 2) 423.

<sup>113</sup> McGregor-Lowndes (n 74) 29.

<sup>114</sup> *Ibid.*

placing too much of a legal burden on the shoulders of volunteer coaches. As a starting point,

there is good reason, in order to make more efficient use of resources, why the state should encourage the voluntary taking out of first party insurance. Such encouragement might be fostered by a national advertising campaign and by giving insurance companies financial incentives to develop and sell first party insurance.<sup>115</sup>

Moreover, in instances where this potentially mutually beneficial proposition might prove deficient, this thesis maintains that in proportionately shifting some of the legal burden away from coaches, and in some instances, inevitably towards athletes and/or parents/guardians, a progressive and coordinated approach is required by government. Such are the huge benefits derived from participation in sport that a proactive approach is necessary. Interestingly, almost twenty years ago, the Court of Appeal recognised the merits of first-party insurance provision for those individuals involved in organised and competitive rugby:

We are caused to wonder whether it would not be beneficial if all players were, as a matter of general practice, to be insured not against negligence but against risk of catastrophic injury, but that is no doubt a matter to which those responsible for the administration of rugby football have given anxious attention.<sup>116</sup>

Given the contemporary context in which sports coaches now operate, it is strongly contended that those stakeholders connected with the promotion and provision of all levels of sporting activities,<sup>117</sup> give anxious attention to the possible usefulness of first-party insurance.

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<sup>115</sup> Burrows (n 7) 132.

<sup>116</sup> *Smoldon* (n 10) P147.

<sup>117</sup> For instance, NGBs; UK Sport; sports coach UK; the national Sports Councils (Sport England; sportscotland; Sport NI; and Sport Wales); local Sports Councils; the Sport and Recreation Alliance and, ultimately, the Department for Culture, Media and Sport. Such provision would ideally cover activities delivered by both formal and informal volunteer coaches.



## 10. Limitations and Further Consequential Research

The most obvious limitations of this research include, firstly, a somewhat narrow scrutiny of case law from different common law jurisdictions, the scope of this research preventing a more searching or robust comparative legal analysis. Given the relative paucity of cases directly in point in the UK; few higher court judgments explicitly considering the issue of coach negligence; the possible limitations of analogous authority; and, the inherent limitations of objective reasonableness when defining the standard of care required in the circumstances, a number of suggestions that flow from this research are both necessarily provisional and qualified. For instance, a more thorough comparative analysis would assist in further refining chapter 1's suggested propositions underpinning a more nuanced and precise legal test for coach negligence, not least, given the previously established 'extensive cross-pollination of tortious principles' between some common law jurisdictions.<sup>118</sup> Whilst this thesis does consider persuasive authority from the more traditional common law family, as stated by Watkins and Burton:

There is a great deal more expected of the comparative lawyer than an abstract analysis of the respective functions of two similar laws in two different countries. The researcher must appreciate that the law operates within the distinctive legal culture of each jurisdiction, a culture that the researcher will need to fully engage with in the course of her project.<sup>119</sup>

In addressing some of these potential short-comings, more meaningful comparisons would be facilitated by future research which extensively and actively engaged with the respective and contrasting legal environment(s) utilised.<sup>120</sup> For example, in the context of US legislation and jurisprudence, this would provide greater insights regarding the background and policy considerations prioritised by different states when deciding whether to hold coaches legally liable for gross negligence,

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<sup>118</sup> Caddell (n 54) 424.

<sup>119</sup> D Watkins and M Burton (eds), *Research Methods in Law* (Routledge, 2013) 5.

<sup>120</sup> M Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in M Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) 231.

ordinary negligence,<sup>121</sup> or a standard 'substantially below' the expected standard of reasonable conduct in the circumstances.

A second methodological limitation of this thesis concerns the degree and depth of its interdisciplinarity. According to Aboelela et al:

The mere addition of researchers from various disciplines or with different academic and professional credentials is not sufficient to make a research effort interdisciplinary. Analysis of the conceptual framework, study design and execution, data analysis, and conclusions can be used to establish the true degree of interdisciplinarity.<sup>122</sup>

Whilst it is submitted that the conceptual framework, study design (and execution) and data analysis methods presented in chapter 2 are consistent with rigorous IDR, due to the scope of this thesis, the IDR methods employed may be regarded as being somewhat narrowly applied. For instance, it is suggested that future research in this field would benefit from greater amounts of collaborative research. Given that '[i]n law context is everything',<sup>123</sup> a deeper sociological perspective would likely prove instructive in perhaps uncovering some of the possible inherent factors of negligent entrenched practice (e.g., those potentially accentuated by the 'sport ethic'). Moreover, since fulfilment of the legal duty of discharging reasonable care may be regarded as consistent with the ethical obligation not to expose athletes to unreasonable risks of injury,<sup>124</sup> this area of research appears fertile ground for further integration of sports ethics scholarship.<sup>125</sup> Although not entirely necessary in addressing the core stipulated research question of this thesis, a broader approach to IDR would, no doubt, heighten its analytical detail and potential impact.

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<sup>121</sup> See further, Mitten (n 81).

<sup>122</sup> SW Aboelela et al, 'Defining Interdisciplinary Research: Conclusions from a Critical Review of the Literature' (2007) 42(1) *Health Ser Res* 329, 342.

<sup>123</sup> *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) [28] (Lord Steyn).

<sup>124</sup> Mitten (n 81) 216.

<sup>125</sup> In light of chapter 6's assertions concerning the possible (in)effectiveness of coach education and codes of conduct in making coaches aware of the evolving legal context in which they discharge their duty of care, a review of coach education courses, training and CPD from a range of NGBs would also be beneficial.



Thirdly, by necessarily focusing on the law of negligence's control device of breach, the scope of this research denied a more searching examination of related legal issues, for instance, a fuller analysis of the control mechanism of causation. More specifically, in terms of future consequential research, Chapter 8's detailed consideration of the potential scope of liability in negligence stemming from SRC highlights the probable complexity in establishing proof of causation, raises questions about the possible resurrection of the *volenti* defence and, may also have implications regarding the secondary liability of clubs and NGBs. At first glance, NGBs would not appear directly related to this thesis' research question regarding whether or not the control mechanism of breach affords sufficient and reasonable protection to coaches and volunteers performing a socially desirable activity. Nonetheless, NGBs have an instrumental role in this context, not least: the training, accreditation and educating of coaches; ensuring that coaches remain up-to-date with necessary CPD; and, identifying and disseminating best practice guidelines and protocols relating to coaching practice generally and, health and safety requirements in particular. Given the emerging legal landscape in which NGBs perform these responsibilities, it appears plain that NGBs must adopt informed, proactive and progressive practices and procedures. In view of some of the possible limitations regarding, for instance, coach education provision and the utility of codes of conduct discussed in chapters 1, 5 and 6, a further research question warranting fuller serious consideration concerns the effectiveness of specific NGBs in safeguarding coaches from negligence liability.

Fourthly, the deliberately designed small purposeful sample of interviewees, although providing extremely rich and insightful qualitative data, somewhat limited the spectrum of viewpoints and experiences captured. A larger sample size would also have allowed for representation of a broader range of sports, thereby including a number of individual sports. More specifically, withdrawal of the one volunteer coach for no specified reason was a further significant restriction,<sup>126</sup> further narrowing the

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<sup>126</sup> In accordance with the ethics approval received from the School of Law for this research, once transcribed, all interviewees were provided with a copy of the transcript for their approval. All but one

scope of the empirical qualitative research. Ultimately, although interviewing coaches of both female and male sports teams of varying levels, and covering a selection of different sports, all of the coaches taking part in this study were coaching at the US collegiate level. Since much of this thesis centres on the particular legal vulnerabilities of volunteer coaches, particularly in light of the distinct jurisdictional safeguards afforded by statutory provision, this highlights an important area warranting further investigation. Fifthly, and in also addressing the issue of representation of volunteer coaches, interviewing a representative sample of coaches in the UK (as opposed to the US) would allow more thorough analysis of the awareness, and associated implications, for coaches regarding the emerging intersection between the law of negligence and UK sports coaching. The findings from a more wide ranging empirical survey would further inform strategies designed to highlight and disseminate best practice in risk management, safeguard all coaches from negligence liability, and enhance the health, safety and welfare of athletes. Moreover, such qualitative research may provide valuable insights concerning the previously mentioned responsibilities of NGBs.

More generally, since this research centres on an analysis of an area of the law less often covered in the extant literature, and more specifically, by applying interdisciplinary scholarship to a novel research question, the conclusions drawn have been carefully and cautiously presented. This includes the tentative and provisional suggestions regarding both gross negligence and first-party insurance. Put bluntly, given the originality of this thesis, it is realistically intended and hoped to initiate further and fuller informed debate. Finally, this curiosity driven research was underpinned by a theoretical lens or framework designed to utilise the author's background as a practitioner-researcher. Whilst it remains the contention that this assisted in uncovering what may otherwise remain as somewhat concealed legal

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of the coaches involved in the study approved these. However, following some initial suggested minor editing of the transcript, and despite numerous further emails, 'Coach F' did not approve the transcript of his interview. Interestingly, it had provisionally been arranged for the author to also interview a group of 4-6 volunteer YMCA coaches but, some 6 weeks prior to leaving for the US, the Association Director of Program Development/Risk cancelled these following discussions with the Risk Manager. This perhaps reinforces some of the barriers to such fieldwork, as highlighted in chapter 2, pp. 77-79.



vulnerabilities, sight has never been lost of the fact that arguments might be advanced suggesting that the background and identity of the researcher may be regarded as bias. In explicitly addressing this possible limitation from the outset, previously discussed methods of 'critical subjectivity' and 'emphatic neutrality' have been maintained throughout this research.

### 13. Final Remarks

More than ever, despite radical reform of the law of negligence appearing to be off the political agenda, this thesis contends that careful consideration of future appropriate developments,<sup>127</sup> designed to better safeguard coaches from negligence liability, is necessary. This should be an open, informed and proactive debate, involving as many stakeholders as possible. In hopefully contributing to these important future deliberations, by adopting an interdisciplinary analysis championing the perspective of the coach, the findings of this thesis should provide for a more objective and balanced analysis since in cases brought in negligence, 'sympathy for the defendant is very rarely as great as sympathy for the plaintiff [claimant]'.<sup>128</sup> Presented with a seriously injured claimant, and a defendant coach generally expected to be covered by appropriate insurance provision, the temptation for courts to pin legal responsibility on coaches for negligence in finely balanced cases, by reasoning backwards, may arguably, appear strong. Nonetheless, rather than calling for more (tacit) sympathy for defendant coaches, this thesis advocates the striking of a transparent, principled and more equitable balance between the rights of those injured to receive compensation and the need to protect coaches from negligence liability. Crucially, should this be realised by means of a gross negligence standard, as in other jurisdictions, the difficult policy issue

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<sup>127</sup> See generally, Cane (n 2) 398.

<sup>128</sup> Atiyah (n 80) 36.

of how to best resolve the requirement to financially support those suffering serious personal injury would need to be answered.<sup>129</sup> This is a nettle worth grasping.

Given the symbiotic relationship between coach and athlete, no doubt, for many athletes suing a coach may be regarded as 'an aggressive act out of place in close relationships'.<sup>130</sup> Despite such sentiments, and whatever the actual motivations may be, the fact remains that there is an emerging body of UK case law listing coaches as defendants. Should looking to the US provide some indication of likely future directions in this area of the law,<sup>131</sup> it is alarming to note that individuals may increasingly be called upon to settle negligence claims by means of personal wealth.<sup>132</sup> Indeed, despite it generally being the case that seldom do individual tortfeasors provide tort damages from personal resources,<sup>133</sup> it was recently reinforced by Blake J in *Woodland v Maxwell* that:

The third defendant's personal responsibility to the claimant should not be passed on entirely to another just because there is an insurance company standing behind them. If Ms Burlinson had been insured *or had substantial assets of her own*, there is no reason why the third defendant could not have sought a contribution from her as well as Ms Maxwell in that eventuality the just and equitable exercise would be undertaken having regard to the comparative assessment responsibility and causative impact between them.<sup>134</sup>

Finally, in calling for a greater awareness and appreciation of the legal duties and obligations owed to athletes by coaches, this thesis' analysis and clarification of the intersection between sports coaches and the law of negligence should support coaches in refraining from potential negligent conduct.<sup>135</sup> However, whether in reality this might better reassure both professional and volunteer coaches mindful of legal liability appears questionable, not least, given the heightened and heightening scope of the

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<sup>129</sup> See generally, McGregor-Lowndes (n 74) 29. Although attractive in attempting to promote a more equitable balancing of risk between coaches and athletes, first-party insurance is by no means suggested to be the complete answer to this difficult policy issue.

<sup>130</sup> Cane (n 2) 172.

<sup>131</sup> See generally, J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 362.

<sup>132</sup> G Wong, *Essentials of Sports Law* (4th ed., Praeger, 2010) 110.

<sup>133</sup> Cane (n 2) 186.

<sup>134</sup> *Woodland v Maxwell* [2015] EWHC 820 (QB) [9] (emphasis added).

<sup>135</sup> Labuschagne and Skea (n 82) 183.



duties incumbent upon the modern sports coach. Put bluntly, if as a society we are genuinely of the view that the function of the law of tort is not to eliminate every iota of risk or to stamp out socially desirable activities, this thesis suggests that we may have taken our eye off the ball by failing to adopt a predominantly responsible approach to the reasonable safeguarding of coaches from negligence liability. Without meaningful intervention, and whilst further exposed to negligence's slippery slope, this author is of the view that, on the balance of probabilities, this will likely amount to a very high degree of carelessness. In remaining true to the application of legal principles in this area, this contended judgement is underpinned by a prospective conscientious analysis and, importantly, without the benefit of hindsight.

## **Appendix: Profiles of Interviewees**

### **Coach A**

Coach A was a member of the women's basketball coaching staff at an NCAA (National Collegiate Athletic Association) Division 1 university. He had four years' coaching experience at this level of collegiate sport.

### **Coach B**

Coach B was a member of the men's soccer coaching team at an NCAA Division 1 institution. In addition to over six years of coaching experience at this level of intercollegiate athletics, he had been heavily involved in youth soccer in the US. Originally from the UK, Coach B had professional playing experience.

### **Coach C**

Coach C was a member of the women's soccer coaching staff at an NCAA Division 1 university. She had over five years' coaching experience at the collegiate level. Coach C also possessed high school coaching experience and was actively involved in youth soccer.

### **Coach D**

Coach D was a member of the women's basketball coaching team at an NCAA Division II school. She had over five years' coaching experience at this level. As a player, she experienced multiple NCAA Tournament appearances.

### **Coach E**

Coach E was in his second year of coaching American football at the Division 1 NCAA level. He played American football at this same level for four years.



## Bibliography

Aboelela SW, Larson E, Bakken S, Carrasquillo O, Formicola A, Glied SA, Haas J, and Gebbie KM, 'Defining Interdisciplinary Research: Conclusions from a Critical Review of the Literature' (2007) 42(1) *Health Ser Res* 329

Acquired Brain Injury Ireland, 'Implications of Concussion in Sport', Joint Committee on Health and Children, (2014)

Adams M, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in M Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011)

Alexander K, Stafford A, and Lewis R, 'The Experiences of Children Participating in Organised Sport in the UK', October 2011, University of Edinburgh/NSPCC Child Protection Research Centre  
<<http://www.nspcc.org.uk/globalassets/documents/research-reports/experiences-children-participating-organised-sport-uk-summary-report.pdf>> accessed 27 April 2016

Allan E, and Madden M, 'Hazing in View: College Students at Risk. Initial Findings from the National Study of Student Hazing' (2008)  
<[http://www.stophazing.org/wpcontent/uploads/2014/06/hazing\\_in\\_view\\_web1.pdf](http://www.stophazing.org/wpcontent/uploads/2014/06/hazing_in_view_web1.pdf)> accessed 1 September 2015

Almond P, 'The Dangers of Hanging Baskets: 'Regulatory Myths' and Media Representations of Health and Safety Regulations' (2009) 36 *Journal of Law and Society* 352

Amateur-FA.com, 'Referees' <<http://www.amateur-fa.com/referees#VWQGdM395iG3ldIR.99>> accessed 3 February 2016

Anderson E, McCormack M, and Lee H, 'Male Team Sport Hazing Initiations in a Culture of Decreasing Homophobia' (2012) 27(4) *Journal of Adolescent Research* 427

Anderson J, 'Personal Injury Liability in Sport: Emerging Trends' (2008) 16 *Tort Law Review* 95

Anderson J, *Modern Sports Law: A Textbook* (Hart, 2010)

Anderson J, 'Concussion, Sport and the Law', *LawInSport*, (7 May 2013)  
<<http://www.lawinsport.com/blog/jack-anderson/item/concussion-sport-and-the-law>> accessed 20 September 2015

- Anderson J, 'Methodology in Sports History: Learning from Legal Scholarship?' (2015) 32(15) *The International Journal of the History of Sport*, 1764
- Anderson J, 'Concussion, Sport and the Law', *Sports Integrity Initiative* (11 February 2016) <<http://www.sportsintegrityinitiative.com/concussion-sport-and-the-law/>> accessed 14 April 2016
- Anderson L, 'Bloodgate: were the punishments fair?' (2011) 45(12) *Br J Sports Med* 948
- Applebey G, "'The butcher's cart and the postman's bicycle": risk and employers' liability' in G Woodman and D Klippel (eds) *Risk and the Law* (Routledge-Cavendish, 2009)
- Archbold HAP, Rankin AT and Webb M, Nicholas R, Eames NWA, Wilson RK, Henderson LA, Heyes GJ, and Bleakley CM, 'RISUS study: Rugby Injury Surveillance in Ulster Schools' *Br J Sports Med* Published Online 23 December 2015. DOI:10.1136/bjsports-2015-095491
- Arksey H, and Knight P, *Interviewing for Social Scientists* (Sage, 1999)
- Armour K, 'The learning coach ... the learning approach: professional development for sports coach professionals' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)
- Atiyah PS, *The Damages Lottery* (Hart Publishing, 1997)
- Bailey R, 'Physical Education and Sport in Schools: A Review of Benefits and Outcomes' (2006) 76(8) *Journal of School Health* 397
- Ball D, and Ball-King L, *Public Safety and Risk Assessment: Improving Decision Making* (earthscan from Routledge, 2011)
- Banakar R, and Travers M, *Theory and Method in Socio-Legal Research* (Hart, 2005)
- Barnes J, *Sports and the Law in Canada* (3rd ed., Butterworths, 1996)
- Barnes S, 'Concussion is rugby's biggest headache but we can cut the risks', *Skysports.com*, (30 March 2015) <<http://www.skysports.com/rugby-union/news/12062/9782056/stuart-barnes-concussion-is-rugbys-biggest-headache-but-we-can-cut-the-risks>> accessed 6 October 2015



Barnett R, 'New defendant added to Clemson soccer-hazing case', *GreenvilleOnline* (25 April 2015) <<http://www.greenvilleonline.com/story/news/local/2015/04/24/new-defendants-added-clemson-soccer-hazing-case/26326417/>> accessed 1 September 2015

Barrell G, *Teachers and the Law* (5<sup>th</sup> ed., Methuen, 1978)

BBC News NI, 'Ben Robinson's rugby death is first of its kind in Northern Ireland', *BBC News* (3 September 2013) <<http://www.bbc.co.uk/news/uk-northern-ireland-23943642>> accessed 20 September 2015

BBC Sport, 'Leigh Halfpenny concussion: Tackling worries Jonathan Davies', 23 March 2015 <<http://www.bbc.co.uk/sport/0/rugby-union/32013309>> accessed 9 May 2016

Bell J, 'Legal Research and the Distinctiveness of Comparative Law' in M Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011)

Beloff M, Kerr T, Demetriou M, and Beloff R, *Sports Law* (2nd ed., Hart, 2012)

Belson K, 'Judge approves deal in N.F.L. Concussion Suit', *The New York Times*, (22 April 2015) <[http://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html?\\_r=0](http://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html?_r=0)> accessed 20 September 2015

Biedzynski KW, 'Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?' (1994) 11 *U. Miami Ent. & Sports L. Rev.* 375

Bloom G, Durand-Bush N, Schinke R, and Salmela JH, 'The importance of mentoring in the development of coaches and athletes' (1998) 33 *International Journal of Sports Psychology* 410

Bogdan R, and Biklen S, *Qualitative Research for Education: An introduction to Theories and Methods* (4th edition, Pearson, 2003)

Boxill J, 'The Coach as Moral Exemplar' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013)

Brazier M, and Miola J, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8(1) *Medical Law Review* 85

Broglio SP, Vagnozzi R, Sabin M, Signoretti S, Tavazzi B, and Lazzarino G, 'Concussion occurrence and knowledge in Italian football (soccer)' (2010) 9 *Journal of Sports Science and Medicine* 418

Brown J, 'Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune From Tort Liability' (1997) 7 *Seton Hall J. Sports L.* 559

Buckley R, *The Law of Negligence* (4th ed., Butterworths, 2005)

Burrows A, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart, 1998)

Burton M, 'Doing empirical research: exploring the decision-making of magistrates and juries' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, 2013)

Caddell R, 'The Referee's Liability for Catastrophic Sports Injuries – A UK Perspective' (2005) 15 *Marq. Sports L. Rev.* 415

Calderwood C, Murray AD, and Stewart W, 'Turning people into couch potatoes is not the cure for sports concussion' (2015) *Br J Sports Med*, Published Online 24 September 2015. DOI: 10.1136/bjsports-2015-095393

Cane P, *Atiyah's Accidents, Compensation and the Law* (6th ed., Butterworths, 1999)

Carroll M, Connaughton D, Spengler J, and Zhang J, 'Case Law Analysis Regarding High School and Collegiate Liability for Hazing' (2009) 9(4) *European Sport Management Quarterly* 389

Cassidy T, 'Understanding athlete learning and coaching practice: utilising "practice theories" and "theories of practice"' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* (Churchill Livingstone Elsevier, 2010)

Cassidy T, 'Exploring ethics: Reflections of a university coach educator' in S Harvey and RL Light (eds) *Ethics in Youth Sport: Policy and pedagogical applications* (Routledge, 2013)

Cassidy T, Jones R, and Potrac P, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009)

Champion WT, 'The Evolution of a Standard of Care for Injured College Athletes: A Review of Kleinknecht and Progeny' (1999) 1 *Va. J. Sports & L.* 290



Charlesworth H, and Young K, 'Why English Female University Athletes Play with Pain' in K Young (ed) *Sporting Bodies, Damaged Selves: Sociological Studies of Sports-Related Injury* (Elsevier, 2004)

Christian I, and Nye S, 'Concussion: An Issue of Negligence in Sport?', *LawInSport*, (24 September 2015) <<http://www.lawinsport.com/articles/item/concussion-an-issue-of-negligence-in-sport>> accessed 28 September 2015

Clancy R, 'Judo Mats, Climbing Walls, Trampolines and Pole Vaulters' (1995) 3(1) *Sport and the Law Journal* 28

Coakley J, and Pike E, *Sports in Society: Issues and Controversies* (2nd ed., McGraw-Hill Education, 2014)

Cohen J, and Cottrell S, 'An Overview of Concussion Protocols Across Professional Sports League', *LawInSport*, (5 November 2014) <<http://www.lawinsport.com/features/item/an-overview-of-concussion-protocols-across-professional-sports-leagues>> accessed 19 September 2015

Corbett R, 'The Standard of Care of Coaches Towards Athletes', 16 June 1995 <<http://www.sportlaw.ca/1995/06/the-standard-of-care-of-coaches-towards-athletes/>> accessed 1 May, 2014

Corbett R, Findlay H, and Lech D, *Legal Issues in Sport: Tools and Techniques for the Sport Manager* (Emond Montgomery Publications, 2010)

Cotterrell R, 'Comparative Law and Legal Culture' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP, 2006)

Cottrell S, 'Key sports law cases and legal developments of 2015', *LawInSport* (12 January 2016) <[http://www.lawinsport.com/articles/item/key-sports-law-cases-and-legal-developments-of-2015?category\\_id=112](http://www.lawinsport.com/articles/item/key-sports-law-cases-and-legal-developments-of-2015?category_id=112)> accessed 10 March 2016

Cownie F, and Bradney A, 'Socio-legal studies: a challenge to the doctrinal approach' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, 2013)

Cox N, and Schuster A, *Sport and the Law* (Firstlaw, 2004)

Craig P, and Beedie P (eds), *Sport Sociology* (2nd ed., Learning Matters, 2010)

Cross N, and Lyle J, *The Coaching Process: principles and practice for sport* (Butterworth-Heinemann, 1999)

- Cullen P, 'Doctors want mandatory reporting for sports injuries at school', *Irish Times*, (31 March 2016, Dublin) <<http://www.irishtimes.com/news/health/doctors-want-mandatory-reporting-for-sports-injuries-at-school-1.2592857>> accessed 14 April 2016
- Cushion C, 'Coach behaviour' in J Lyle and C Cushion (eds.), *Sports coaching: Professionalisation and practice* (Churchill Livingstone Elsevier, 2010)
- Cushion C, Armour K, and Jones R, 'Coach education and continuing professional development: experience and learning to coach' (2003) 55 *Quest* 215
- Cushion C, and Jones R, 'Power, Discourse, and Symbolic Violence in Professional Youth Soccer: The Case of Albion Football Club' (2006) 23 *Sociology of Sport Journal* 142
- Cushion C, and Lyle J, 'Conceptual development in sports coaching' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)
- Cushion C, and Partington M, 'A critical analysis of the conceptualisation of "coaching philosophy"' (2014) *Sport, Education and Society* 7. DOI: 10.1080/13573322.2014.958817
- Dannemann G, 'Comparative Law: Study of Similarities or Differences' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP, 2006)
- Davis JR, *Interdisciplinary Courses and Team Teaching* (American Council on Education and The Oryx Press, 1995)
- Davis T, 'Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers' (2008) 76 *UMKC L Rev* 571
- Davis T, 'The Coach and Athlete Recruitment: Ethical and Legal Dimensions' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013)
- De Prez P, 'Something "old" something "new", something borrowed ...The continued evolution of *Bolam*' (2001) 17 *Professional Negligence* 75
- Deakin S, Johnston A, and Markesinis B, *Markesinis and Deakin's Tort Law* (7th ed., OUP, 2013)
- Dobberstein MJ, "'Give Me the Ball Coach": A Scouting Report on the Liability of High Schools and Coaches for Injuries to High School Pitchers' Arms' (2007) 14 *Sports Law Journal* 49



Dobson N, 'Accidents do happen' (2008) 4 *JPI Law* 258

Drewe S, 'An Examination of the Relationship Between Coaching and Teaching' (2000) 52 *Quest* 79

Duffy P, Hartley H, Bales J, Crespo M, Dick F, Vardhan D, Nordmann L, and Curado J, 'Sport coaching as a "profession": challenges and future directions' (2011) 5(2) *International Journal of Coaching Science* 93

Dyson MR Lord, 'Compensation Culture: Fact or Fantasy?' Holdsworth Lecture (15 March 2013) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>> accessed 9 May 2016

Dyson MR Lord, 'Magna Carta and Compensation Culture', The High Sheriff of Oxfordshire's Annual Law Lecture, 13 October 2015 <<https://www.judiciary.gov.uk/wp-content/uploads/2015/10/high-sheriffs-speech.pdf>> accessed 12 February 2016

Ehrmann J, *InSideOut Coaching: How Sports Can Transform Lives* (Simon & Schuster, 2011)

England Rugby, 'Coaches General Information' <<http://www.englandrugby.com/mm/Document/General/General/01/30/27/76/Coach-esgeneralinfo.pdf>> accessed 25 September 2015

England Rugby, 'Concussion – Headcase' <<http://www.englandrugby.com/my-rugby/players/player-health/concussion-headcase/coaches/>> accessed 21 September 2015

England Rugby, 'Concussion Awareness' <<http://www.englandrugbyfiles.com/medical/concussion-awareness/coaches/>> accessed 7 May 2016

England Rugby, 'Return to Play After Concussion' <[http://www.englandrugby.com/mm/Document/MyRugby/Headcase/01/30/49/22/returntoplayafterconcussion\\_Neutral.pdf](http://www.englandrugby.com/mm/Document/MyRugby/Headcase/01/30/49/22/returntoplayafterconcussion_Neutral.pdf)> accessed 2 October 2015

Epstein A, *Sports Law* (South-Western Cengage Learning, 2013)

Evans H, Negligence and process (2013) 29(4) *Professional Negligence* 212

Falconer Lord, 'Compensation Culture' (Health and Safety Executive Event, 22 March 2005)

Feldman D, 'The Nature of Legal Scholarship' (1989) 52(4) *Modern Law Review* 498

Ferguson H, *The Edge* (4th ed., Getting the Edge Company, 1991)

Fifield D, 'Chelsea's former doctor Eva Carneiro wants public apology from Mourinho', *The Guardian*, (7 March 2016, London)  
<<http://www.theguardian.com/football/2016/mar/07/eva-carneiro-chelsea-doctor-jose-mourinho-constructive-dismissal-public-apology>> accessed 7 May 2016

Fulbrook J, *Outdoor Activities, Negligence and the Law* (Ashgate, 2005)

Fuller C, 'Implications of health and safety legislation for the professional sportsperson' (1995) 29 *Br J Sp Med* 5

Fuller C, and Hawkins R, 'Developing a health surveillance strategy for professional footballers in compliance with UK health and safety legislation' (1997) 31 *Br J Sports Med* 148

Fuller G, Kemp S, and Decq P, 'The International Rugby Board (IRB) Pitch Side Concussion Assessment trial: a pilot test accuracy study' (2015) 49 *Br J Sports Med* 529

Furedi F, *Culture of Fear* (Continuum, 2002)

Gaff JG, and Ratcliff JL (eds), *Handbook of the Undergraduate Curriculum: A Comprehensive Guide to Purposes, Structures, Practices and Change* (Jossey Bass, 1997)

Gardiner B, 'Liability for sporting injuries' (2008) 1 *JPI Law* 16

Gardiner J, 'Should Coaches Take Care?' (1993) 143 *New Law Journal* 1598

Gardiner S, James M, O'Leary J, and Welch R, *Sports Law* (3rd ed., Cavendish, 2006)

Garratt D, Piper H, and Taylor B, "'Safeguarding" sports coaching: Foucault, genealogy and critique' (2012) 18(5) *Sport, Education and Society* 615

Gianotti S, Quarrie K, and Hume P, 'Evaluation of RugbySmart: A rugby union community injury prevention programme' (2009) 12 *Journal of Science and Medicine in Sport* 371



Giddens A, *The Consequences of Modernity* (Polity Press, 1990)

Glendenning D, *Education and the Law* (Butterworths, 1999)

Glenn HP, 'Aims of Comparative Law' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar, 2006)

Gray A, and Blakeley A-M, 'Child Protection' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008)

Grayson E, *Sport and the Law* (3rd ed., Tottel, 1999)

Greenfield S, 'Law's impact on youth sport: should coaches be "concerned about litigation"?' (2013) 2(2) *Sports Coaching Review* 114

Greenfield S, Karstens K, Osborn G, and Rossouw JP, 'Reconceptualising The Standard Of Care In Sport: The Case Of Youth Rugby In England And South Africa' (2015) 18(6) *Potchefstroom Elec. L.J.* 2183

Griffith-Jones D, *Law and the Business of Sport* (Tottel, 2007)

Griffith-Jones D, 'Civil Liability Arising Out of Participation in Sport' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008)

Groom R, Taylor W, and Nelson L, 'Volunteering Insight: Report for Sport England' (Manchester Metropolitan University, 2014)

Hardman AR, and Jones CR, 'Sports coaching and virtue ethics' in A Hardman and C Jones, *The Ethics of Sports Coaching* (Routledge, 2011)

Hardman A and Jones C, 'Ethics For Coaches' in RL Jones and K Kingston (eds) *An Introduction to Sports Coaching: Connecting Theory to Practice* (2nd ed., Routledge, 2013)

Harris C, Richards W, and Fincham J, 'Professional Negligence: When Practice Goes Wrong' (2006) 40 *The Annals of Pharmacotherapy* 1377

Harris N, *The Law Relating to Schools* (2nd ed., Tolley, 1995)

Hartley H, *Sport, Physical Recreation and the Law* (Routledge, 2009)

Harvey S, Cushion C, Cope E, and Muir B, 'A season long investigation into coaching behaviours as a function of practice state: the case of three collegiate coaches' (2013) 2(1) *Sports Coaching Review* 13

Hattie J, *Visible Learning: A Synthesis of Over 800 Meta-Analyses Relating to Achievement* (Routledge, 2009)

Healey D, 'Risk Management for Coaches' in S Pyke, *Better Coaching: Advanced Coach's Manual* (2nd ed., Human Kinetics, 2001)

Healey D, *Sport and the Law* (4th ed., UNSW Press, 2009)

Health and Safety Executive, 'Health and Safety Made Simple, The Basics for your Business' <<http://www.hse.gov.uk/simple-health-safety/index.htm>> accessed 31 October 2014

Health and Safety Executive, 'School trips and outdoor learning activities: Tackling the health and safety myths' (6 June 2011) <<http://www.hse.gov.uk/services/education/school-trips.pdf>> accessed 15 October 2014

Health and Safety Executive, 'Risk Assessment: A brief guide to controlling risks in the workplace' (August 2014) < <http://www.hse.gov.uk/pubns/indg163.pdf>> accessed 7 June 2016

Hecht AN, 'Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hodge story' (2002) 12 *Seton Hall J. Sports L.* 17

Hekmat RR, 'Malpractice During Practice: Should NCAA Coaches be Liable for Negligence?' (2001-02) 22 *Loy. L.A. Ent. L. Rev.* 613

Herbert R, 'The Compensation Act 2006' (2006) 4 *JPI Law* 337

Heywood R, 'The Logic of Bolitho' (2006) 22 *Professional Negligence* 225

Heywood R, and Charlish P, 'Schoolmaster Tackled Hard Over Rugby Incident' (2007) 15 *Tort Law Review* 162

Hillman C, Erickson K, and Kramer A, 'Be Smart, exercise your heart: exercise effects on brain and cognition' (2008) 9 *Science and Society* 58



Hootman J, Dick R, and Agel J, 'Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives' (2007) 42(2) *J Athl Train*. 311

Horsey K, and Rackley E, *Tort Law* (3rd ed., OUP, 2013)

Hotter B, and Lloyd Bostok S, 'Law's Relationship with Social Science: The interdependence of theory, empirical work and social relevance in sociological studies' in D Cowan, L Mulcahy and S Wheeler (eds) *Law And Society* (Routledge, 2014) Vol I

Howarth D, 'Negligence After Murphy: Time to Re-think' (1991) *Cambridge Law Journal* 58

Howarth D, 'Many Duties of Care – Or a Duty of Care? Notes from the Underground' (2006) 26(3) *Oxford J Legal Studies* 449

Hunter R, 'An 'Insider's' Guide to the Legal Liability of Sports Contest Officials' (2005) 15(2) *Marq. Sports L. Rev.* 369

Hurst TR, and Knight JN, 'Coaches' liability for athletes' injuries and deaths' (2003) 13 *Seton Hall J. Sports L.* 27

Hutchinson T, 'Doctrinal research: researching the jury' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, 2013)

Hutchison M, Comper P, Meeuwisse W, and Echemendia R, 'A systematic video analysis of National Hockey League (NHL) concussions, part 1: who, when, where and what?' (2015) 49 *Br J Sports Med* 547

International Council for Coaching Excellence, 'The Magglingen Declaration' <[http://www.icce.ws/\\_assets/files/documents/Magglingen.pdf](http://www.icce.ws/_assets/files/documents/Magglingen.pdf)> accessed 2 February 2015

International Council for Coaching Excellence, 'International Sport Coaching Framework' (2012) < [http://www.icce.ws/\\_assets/files/news/ISCF\\_1\\_aug\\_2012.pdf](http://www.icce.ws/_assets/files/news/ISCF_1_aug_2012.pdf)> accessed 7 June 2016

International Olympic Committee , 'Consensus Statement: Sexual harassment and abuse in sport' (2007) <[http://www.olympic.org/documents/reports/en/en\\_report\\_1125.pdf](http://www.olympic.org/documents/reports/en/en_report_1125.pdf)> accessed 11 May 2015

Jackson LJ, 'Concurrent Liability: Where Have Things Gone Wrong?', Lecture to the Technology & Construction Bar Association and the Society of Construction Law, (30 October 2014) <<https://www.judiciary.gov.uk/wp-content/uploads/2014/10/tecbarpaper.pdf>> accessed 20 August 2015

Jackson R, 'The professions: power, privilege and legal liability' (2015) 31(3) *Professional Negligence* 122

James M, *Sports Law* (Palgrave-Macmillan, 2010)

James M, *Sports Law* (2nd ed., Palgrave-Macmillan, 2013)

James M, and McArdle D, 'Player violence, or violent players? Vicarious liability for sports participants' (2004) 12(3) *Tort Law Review* 131

James M, and M Gillett, 'Immediate treatment for on-field injuries' (2009) Jun. *Sports Law Administration and Practice* 1

Jamieson L, and Orr T, *Sport and Violence: A Critical Examination of Sport* (Elsevier, 2009)

Jarvis P, *The Practitioner-Researcher: Developing Theory from Practice* (Jossey-Bass, 1999)

Jones M, 'The Bolam Test and the Responsible Expert' (1999) 7 *Tort Law Review* 226

Jones MA, and Dugdale AM (eds), *Clerk & Lindsell on Torts* (20th ed., Sweet & Maxwell, 2010)

Jones MA, and Dugdale AM (eds), *Clerk & Lindsell on Torts: Second Supplement to the Twentieth Edition* (Sweet & Maxwell, 2012)

Jones RL, 'Toward a Sociology of Coaching' in RL Jones and KM Armour, *Sociology of Sport: Theory and Practice* (London: Pearson, 2000)

Jones R, Armour K, and Potrac P, *Sports Coaching Cultures: from Theory to Practice* (Routledge, 2004)

Jones R, Glimtmeier N, and McKenzie A, 'Slim bodies, eating disorders and the coach-athlete relationship: A tale of identity creation and disruption' (2005) 40(3) *International Review for the Sociology of Sport* 377

Kagan R, 'What Socio-Legal Scholars Should Do When There Is Too Much Law' (1995) 22(1) *Journal of Law and Society* 140



- Kaye T, 'Law and risk: an introduction' in G Woodman and D Klippel (eds) *Risk and the Law* (Routledge-Cavendish, 2009)
- Kellett P, 'Football-as-War, Coach-as-General: Analogy, Metaphor and Management Implications' (2002) 5 *Football Studies* 60
- Kelly S, and Waddington I, 'Abuse, Intimidation and Violence as aspects of Managerial Control in Professional Soccer in Britain and Ireland' (2006) 4(1-2) *International Review for the Sociology of Sport* 147
- Kessler J, 'Dollar Signs on the Muscle... And the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes' (2001) 3 *Va. J Sports & L* 80
- Kevan T, 'Sports Personal Injury' (2005) 3 *International Sports Law Review* 61
- Kidner R, 'The variable standard of care, contributory negligence and volenti' (1991) 11(1) *Legal Studies* 1
- Kircher J, 'Golf and Torts: An Interesting Twosome' (2001) 12 *Marq. Sports L. Rev* 347
- Kirk D, 'Towards a socio-pedagogy of sports coaching' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* (Churchill Livingstone Elsevier, 2010)
- Kirkwood G, Parekh N, Ofori-Asenso R, and Pollock A, 'Concussion in youth rugby union and rugby league: a systematic review' (2015) 49 *Br J Sports Med* 506
- Kirkwood M, Randolph C, and Yeates K, 'Sport-Related Concussion: A Call for Evidence and Perspective Amidst the Alarms' (2012) 22(5) *Clin J Sport Med* 383
- Kitchener D, 'The Compensation Bill, clause 1- an undesirable deterrent?' (2005) 155 *New Law Journal* 1793
- Kmietowicz Z, 'World Rugby must review rules on tackling, says public health expert' (2015) *BMJ* Published 22 September 2015. DOI: <http://dx.doi.org/10.1136/bmj.h5049>
- Krueger R, and Casey M, *Focus Groups: A Practical Guide for Applied Research* (3rd ed., Sage, 2009)
- Kuiper JA, 'Sports Volunteer Protection Statutes: Moving Toward Uniformity and Providing Volunteer Referees with Medical Training' (2005) 16 *Marq. Sports L. Rev.* 157

Labuschagne J, and Skea J, 'The Liability of a Coach for a Sport Participant's Injury' (1999) 10 *Stellenbosch Law Review* 158

Lake R, 'The effects of fighting in ice hockey: an overview of the ongoing NHL concussion litigation' *LawInSport*, (19 April 2016) <[http://www.lawinsport.com/blog/ryan-lake-blog/item/the-effects-of-fighting-in-ice-hockey-an-overview-of-the-ongoing-nhl-concussion-litigation?utm\\_content=buffer98f45&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.lawinsport.com/blog/ryan-lake-blog/item/the-effects-of-fighting-in-ice-hockey-an-overview-of-the-ongoing-nhl-concussion-litigation?utm_content=buffer98f45&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)> accessed 20 April 2016

Lattuca L, *Creating Interdisciplinarity* (Vanderbilt University Press, 2001)

Lee M, 'Safety, regulation and Tort: Fault in Context' (2011) 74(4) *Modern Law Review* 555

Legrand P, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern Law Review* 262

Lewis R, Morris A, and Oliphant K, 'Tort personal injury claims statistics: is there a compensation culture in the United Kingdom?' (2006) 2 *JPI Law* 87

Lines K, 'Thinking outside the box(-ing ring): the implications for sports governing bodies following Watson' (2007) 4 *International Sports Law Review* 67

Lines K, and Heshka J, 'Bump in the night' (2011) 155 *Sol Jo* (no 2) 8

Löfstedt R, 'Reclaiming Health and Safety for all: An independent review of health and safety legislation' (November 2011) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/66790/lofstedt-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf)> accessed 16 October 2014

Low N, Butt S, Ellis Paine A, and Davis Smith J, 'Helping out: a national survey of volunteering and charitable giving' (National Centre for Social Research and the Institute for Volunteering Research, 2007)

Lunney M, and Oliphant K, *Tort Law: Text and Materials* (5th ed., OUP, 2013)

Lyle J, 'Coaching philosophy and coaching behaviour' in N Cross and J Lyle (eds), *The Coaching Process: principles and practice for sport* (Butterworth-Heinemann, 1999)

Lyle J, *Sports Coaching Concepts: A Framework for Coaches' Behaviour* (Routledge, 2002)



Lyle J, and Cushion C, 'Narrowing the field: some key questions about sports coaching' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)

Lynn A, and Lyle J, 'Coaching workforce development' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)

Lyons M, 'Editorial' (2015) 4 *JPI Law* 5

Magnus U, 'Tort law in general' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006)

Male I, 'Safeguarding children in sport: a paediatrician's perspective' in C Brackenridge, T Kay and D Rhind (eds) *Sport: Children's Rights and Violence Prevention: A Sourcebook on Global Issues and Local Programmes* (Brunel University Press, 2012)

Mallett C, 'Becoming a high performing coach: pathways and communities', in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)

Mangan D, 'The Curiosity of Professional Status' (2014) 30(2) *Professional Negligence* 74

Marshall C, and Rossman G, *Designing Qualitative Research* (5th ed., Sage, 2011)

Martens R, *Successful Coaching* (3rd ed., Human Kinetics, 2004)

Martínková I, and Parry J, 'Coaching and performance enhancement' in AR Hardman and C Jones (eds), *The Ethics of Sports Coaching* (Routledge, 2011)

Maxwell J, *Qualitative Research Design: An Interactive Approach* (3rd ed., Sage, 2013)

McArdle D, 'The Enduring Legacy of "Reckless Disregard"' (2005) 34(4) *Common Law World Review* 316

McArdle D, 'The views from the hills: fatal accidents, child safety and licensing adventure activities' (2011) 31(3) *Legal Studies* 372

McArdle D and James M, 'Are you experienced? "Playing cultures", sporting rules and personal injury litigation after *Caldwell v Maguire*' (2005) 13(3) *Tort Law Review* 193

McBride NJ, and Bagshaw R, *Tort Law* (4th ed., Pearson, 2012)

McCaskey AS, and Biedzynski KW, 'A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries' (1996) 6 *Seton Hall J. Sport L.* 7

McCrory P, Meeuwisse WH, Aubry M, Cantu B, Dvořák J, Echemendia RJ, Engebretsen L, Johnston K, Kutcher JS, Raftery M, Sills A, Benson BW, Davis GA, Ellenbogen RG, Guskiewicz K, Herring SA, Iverson GL, Jordan BD, Kissick J, McCrea M, McIntosh AS, Maddocks D, Makdissi M, Purcell L, Putukian M, Schneider K, Tator CH, and Turner M, 'Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich, November 2012' (2013) 47 *Br J Sports Med* 250

McCrudden C, 'Legal research and the social sciences', (2006) 122 *Law Quarterly Review* 632

McGlone C, 'Hazing' in H Appenzeller, *Ethical Behavior in Sport* (Carolina Academic Press, 2011)

McGregor-Lowndes M, 'Volunteer Protection in Queensland' in D Muir, J Devereux, P Telford and M McGregor-Lowndes, *Civil Liability Reform and Volunteer Protection in Queensland*, Working Paper No. CPNS 18, Centre of Philanthropy and Nonprofit Studies (Queensland University of Technology, June 2003)

McKee A, Cantu R, Nowinski C, Hedley-Whyte ET, Gavett BE, Budson AE, Santini VE, Lee HS, Kubilus CA, and Stern RA, 'Chronic traumatic encephalopathy in athletes: progressive tauopathy after repetitive head injury' (2009) 68 *J Neuropathol Exp Neurol.* 709

McNamee M, 'Celebrating trust: virtues and rules in the ethical conduct of sports coaches' in M McNamee and S Parry (eds), *Ethics & Sport* (E & FN Spon, 1998)

McNamee MJ, Partridge B, and Anderson L, 'Concussion in Sport: Conceptual and Ethical issues' (2015) 4 *Kinesiology Review* 190

McRae D, 'Alex Corbisiero: "Even now people will frown if you need a rest"' *The Guardian* (London, 5 May 2016) <[https://www.theguardian.com/sport/2016/may/05/alex-corbisiero-rugby-union-england-lions?CMP=share\\_btn\\_tw](https://www.theguardian.com/sport/2016/may/05/alex-corbisiero-rugby-union-england-lions?CMP=share_btn_tw)> accessed 11 May 2016

Meakin T, 'The evolving legal issues on Rugby Neuro-trauma' (2013) 21(3) *British Association for Sport and Law Journal* 34



Meredith R, 'Northern Ireland children learn of concussion dangers', *BBC News*, (30 September 2015) <<http://www.bbc.co.uk/news/uk-northern-ireland-34403358>> accessed 1 October 2015

Michaels R, 'American law (United States)' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar, 2006)

Miles A, and Tong R, 'Sports Medicine For Coaches' in RL Jones and K Kingston (eds) *An Introduction to Sports Coaching: Connecting Theory to Practice* (2nd ed., Routledge, 2013)

Miller TR, Baird TD, Littlefield CM, Kofinas G, Chapin III FS, and Redman CL, 'Epistemological Pluralism: Reorganizing Interdisciplinary Research' (2008) 13(2) *Ecology and Society* 46

Mitten MJ, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013)

Montrose J, 'Is Negligence an Ethical or a Sociological Concept?' (1958) 21 *Mod Law Review* 259

Morris A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349

Morris A, "'Common sense common safety": the compensation culture perspective' (2011) 27(2) *Professional Negligence* 82

Morris A, "'The Compensation Culture" and the Politics of Tort' in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law Statute and the Dynamics of Legal Change* (Hart, 2013)

Mulheron R, 'Trumping Bolam: A Critical Legal Analysis of Bolitho's "Gloss"' (2010) 69 *Cambridge Law Journal* 609

Nash C, 'Volunteering in Sports Coaching – A Tayside Study' in M Graham and M Foley (eds), *Volunteering in Leisure: Marginal or Inclusive?* (LSA, 2001)

Nash C, 'How coaches learn and develop' in C Nash (ed), *Practical Sports Coaching* (Routledge, 2015)

Newton J, 'Ex-apprentice footballer to sue Stoke City over claims he was physically abused by players in 1980s, leaving him "destroyed as a person"', *Mail Online* (6 July

2015, London) <<http://www.dailymail.co.uk/news/article-3151357/Ex-apprentice-footballer-suing-Stoke-City-claiming-destroyed-person-physically-abused-players-1980s.html>> accessed 2 September 2015

Nichols G, and Taylor P, 'The Balance of Benefit and Burden? The Impact of Child Protection Legislation on Volunteers in Scottish Sports Clubs' (2010) 10(1) *European Sport Management Quarterly* 31

Nielsen L, 'The Need for Multi-Method Approaches in Empirical Legal Research' in P Cane and H Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP, 2010)

Nolan D, 'Varying the Standard of Care in Negligence' (2013) 72 *Cambridge Law Journal* 651

Norris W, 'Perry v Harris – Case Comment Following the Ruling in the Court of Appeal' (2008) 4 *JPI Law* 258

Norris W, 'The duty of care to prevent personal injury' (2009) 2 *JPI Law* 126

Norris W, 'The duty of care owed by instructors in a sporting context' (2010) 4 *JPI Law* 183

Nuwer H, *High School Hazing: When Rites Become Wrongs* (Franklin Watts, 2000)

Nygaard G, and Boone T, *Coaches Guide to Sport Law* (Human Kinetics, 1985)

O'Connor T, 'How the perceived risk of litigation affects the rules of rugby' *LawInSport*, 18 December 2013 <<http://www.lawinsport.com/articles/regulation-a-governance/item/how-the-perceived-risk-of-litigation-affects-the-rules-of-rugby>> accessed 30 July 2015

O'Donoghue EM, Onate JA, Van Lunen B, and Peterson CL, 'Assessment of High School Coaches' Knowledge of Sport-Related Concussions' (2009) 1(3) *Athletic Training & Sports Health Care* 120

O'Sullivan K, 'Climb every mountain... .' (2011) 161 *New Law Journal* 1095

Oliver J, and Lloyd R, 'Physical training as a potential form of abuse' in M Long and M Hartill (eds) *Safeguarding, Child Protection and Abuse in Sport: International perspectives in research, policy and practice* (Routledge, 2015)

Opie H, 'Referee liability in sport: negligent rule enforcement and *Smoldon v Whitworth*' (1997) 5 *Torts Law Journal* 1



- Oppie H, 'Medico-Legal Issues In Sport: The View From The Grandstand', (2001) 23 *Sydney L. Rev.* 375
- Pappas NT, McKenry PC, and Skilken Catlett B, (2004) 'Athlete Aggression on the Rink and Off the Ice' 6(3) *Men and Masculinities* 291
- Parekh N, Hodges S, Pollock A, and Kirkwood G, 'Communicating the risk of injury in schoolboy rugby: using Poisson probability as an alternative presentation of the epidemiology' (2011) 46(8) *Br J Sports Med* 611
- Partington M, and Cushion C, 'An investigation of the practice activities and coaching behaviors of professional top-level youth soccer coaches' (2013) 23 *Scand J Med Sci Sports* 374
- Partington N, 'Modern Sports Coaching and the Law: Analysing, Clarifying and Minimising the Potential of Negligence Liability' (Unpublished MLegSci Dissertation, Queen's University Belfast, 2013)
- Partington N, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232
- Partington N, 'What Does The Social Action, Responsibility & Heroism Act 2015 Mean For Sports Volunteers And NGBs?' *LawInSport*, 3 April 2015 <<http://www.lawinsport.com/articles/item/what-the-new-social-action-responsibility-heroism-act-2015-means-for-sports-volunteers-and-ngbs>> accessed 3 May 2016
- Partington N, 'Professional liability of amateurs: The context of sports coaching' (2015) 4 *JPI Law* 232
- Partington N, "'It's just not cricket". Or is it? *Bartlett v English Cricket Board Association of Cricket Officials*' (2016) 32(1) *Professional Negligence* 75 (note)
- Partington N, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) *Sports Coaching Review*. Published online 19 May 2016: DOI: 10.1080/21640629.2016.1180860
- Partington N, 'Beyond the "Tomlinson trap": analysing the effectiveness of section 1 of the Compensation Act 2006' (2016) *Liverpool Law Review*. DOI: DOI: 10.1007/s10991-016-9180-4
- Partington N, '*Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School)*' (2016) 67(2) *NILQ* 251 (note)

- Patricios J, and Makdissi M, 'Fifty shades of grey: concussion complexities and constructive conclusions' (2015) 49 *Br J Sports Med* 492
- Patton M, *Qualitative Research and Evaluation Methods* (3rd ed., Sage, 2002)
- Percy R, and Walton C (eds), *Charlesworth & Percy on Negligence* (9<sup>th</sup> ed., Sweet & Maxwell, 1997)
- Petty G, *Teaching Today; A Practical Guide* (4th ed., Nelson Thornes, 2009)
- Pike ECJ, and Scott A, 'Safeguarding, injuries and athlete choice' in M Long and M Hartill (eds) *Safeguarding, Child Protection and Abuse in Sport: International perspectives in research, policy and practice* (Routledge, 2015)
- Play safety forum, 'Risk-Benefit Assessment Form: Worked Example' (2014) <<http://www.playboard.org/?s=risk+benefit+assessment+form>> accessed 12 May 2016
- Pollock A, *Tackling Rugby: What Every Parent Should Know About Rugby* (Verso, 2014)
- Porter AL, Roessner JD, Cohen AS, and Perreault M, 'Interdisciplinary research: Meaning, metrics, nurture' (2006) 15(3) *Research Evaluation* 187
- Posner R, 'The Present Situation in Legal Scholarship' (1980) 90 *Yale Law Journal* 1113
- Powell J, and Stewart R, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012)
- Rafferty M, 'Concussion and chronic traumatic encephalopathy: International Rugby Board's response' (2014) 48(2) *Br J Sports Med* 79
- Rains J, 'Sports Violence: A Matter of Societal Concern' (1980) 55 *Notre Dame Law* 796
- Rogers W, *Winfield and Jolowicz: Tort* (18th ed., Sweet & Maxwell, 2010)
- Rugby Football Union, 'England Professional Rugby Injury Surveillance Project, 2013-2014 Season Report', (February 2015) <[http://www.englandrugby.com/mm/Document/General/General/01/30/80/08/EnglandProfessionalRugbyInjurySurveillanceProjectReport2013\\_2014\\_Neutral.pdf](http://www.englandrugby.com/mm/Document/General/General/01/30/80/08/EnglandProfessionalRugbyInjurySurveillanceProjectReport2013_2014_Neutral.pdf)> accessed 20 September 2015
- Ryall E, and Olivier S, 'Ethical Issues in Coaching Dangerous Sports' in AR Hardman and C Jones (eds), *The Ethics of Sports Coaching* (Routledge, 2011)



Ryan J, *Little Girls In Pretty Boxes: The Making And Breaking Of Elite Gymnasts And Figure Skaters* (Warner Books Edition, 1995)

Sabo D, and Panepinto J, 'Football Ritual and the Social Reproduction of Masculinity' in M Messner and D Sabo (eds), *Sport, Men, and the Gender Order: Critical Feminist Perspectives* (Human Kinetics, 1990)

Saldana J, *The coding manual for qualitative researchers* (Sage, 2009)

Samuel G, 'Comparative law and its methodology' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge, 2013)

Saulle M, and Greenwald BD, 'Chronic Traumatic Encephalopathy: A Review', (2012) *Rehabilitation Research and Practice*. DOI:10.1155/2012/816069

Scottish Rugby, 'Are You Ready to Play Rugby? Scottish rugby's player safety initiative season 2012/13 report'  
<[http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr\\_report\\_2012-13\\_final.pdf](http://www.scottishrugby.org/sites/default/files/editor/docs/atrtpr_report_2012-13_final.pdf)> accessed 16 October 2014

Seidman I, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (2nd ed., Teachers College Press, 1998)

Sellgren K, 'Doctors urge schools to ban tackling in rugby', *BBC News* (2 March 2016)  
<<http://www.bbc.co.uk/news/education-35696238>> accessed 7 May 2016

Simon RL, 'The Coach's Role: Conceptions of Coaching' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013)

Simon RL, 'The Ethical Coach: An Interpretive Account of the Ethics of Coaching' in RL Simon (ed), *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013)

Smith L, 'The Problem of Parenting in Lesbian Families and Family Law' (Unpublished PhD Thesis, Queen's University Belfast, 2007)

Socio-Legal Studies Association, 'Statement of Principles of Ethical Research Practice' (January 2009)

Spengler J, Connaughton D, and Pittman A, *Risk Management in Sport and Recreation* (Human Kinetics, 2006)

Spengler J, Anderson P, Connaughton D, and Baker T, *Introduction to Sport Law* (Human Kinetics, 2009)

sports coach UK, 'Coach Tracking Study: A four-year study of coaching in the UK' (2012)

sports coach UK, 'Coaches key to a lasting legacy' (20 July 2012) <<http://www.sportscoachuk.org/news/coaches-key-lasting-legacy>> accessed 12 February 2016

sports coach UK, Minimum Standards for Active Coaches – Core Guidance for Organisations (2013)

sportscotland, 'If in doubt, sit them out - Scottish Sports Concussion Guidance' <<http://www.sportscotland.org.uk/news/sportscotland/2015/if-in-doubt,-sit-them-out-scottish-sports-concussion-guidance/>> accessed 25 September 2015

Steele J, *Tort Law: Text, Cases and Materials* (2nd ed., OUP, 2010)

Stewart W, McNamara P, Lawlor B, Hutchinson S, and Farrell M, 'Chronic traumatic encephalopathy: a potential late and under recognized consequence of rugby union?' (2015) *QJM: An International Journal of Medicine* 1

Stirling A, Kerr G, and Cruz L, 'An Evaluation of Canada's National Coaching Certification Program's Make Ethical Decisions Coach Education Module (2012) 6(2) *International Journal of Coaching Science* 45

Stober MH, *Interdisciplinary Conversations: Challenging Habits of Thought* (Stanford University Press, 2011)

Stone J, 'Tory manifesto pledges more Olympic medals for British athletes', *The Independent* (London, 14 April, 2015) <<http://www.independent.co.uk/news/uk/politics/tory-manifesto-pledges-more-olympic-medals-for-british-athletes-10176474.html>> accessed 11 February 2016

Syed M, 'Like life, rugby is boring if it's not dangerous', *The Times*, (30 September 2015, London) <<http://www.thetimes.co.uk/tto/sport/columnists/matthewsyed/article4571357.ece>> accessed 6 June 2016

Taylor B, and Garratt D, 'The Professionalisation of Sports Coaching: Relations of Power, Resistance and Compliance' (2010) 15(1) *Sport, Education and Society* 121



Taylor B, and Garratt D, 'The professionalization of sports coaching: definitions, challenges and critique' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice pages* (Churchill Livingstone Elsevier, 2010)

Taylor D, 'Ex-England captain Mick Mills denies turning blind eye to Stoke "abuse"', *The Guardian* (Tuesday 10 December 2013, London) <<http://www.theguardian.com/football/2013/dec/10/mick-mills-denies-stoke-sexual-assault-claims-george-blackstock>> accessed 2 September 2015

Taylor J, and Payton T, 'Government Intervention in the Sports Sector' in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008)

Telfer H, 'Coaching practice and practice ethics' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* (Churchill Livingstone Elsevier, 2010)

*The Concise Oxford Dictionary of Current English* (9th ed., OUP, 1995)

The Football Association, 'Results revealed after FA's largest-ever grassroots survey' (10 December 2015) <<http://www.thefa.com/news/2015/dec/grassroots-survey-results-101215>> accessed 16 December 2015

Thomas G, 'Six Nations 2015: I've played when concussed says Gareth Thomas', *BBC Sport* (13 February 2015) <<http://www.bbc.co.uk/sport/0/rugby-union/31441188>> accessed 7 May 2016

Thompson Klein J, *Humanities, Culture and Interdisciplinarity: The Changing American Academy* (State University of New York Press, 2005)

Thompson N, *Theory and Practice in Human Services* (Open University Press, 2003)

Thorne J, 'When do sport teams' initiation ceremonies cross legal boundaries? Part 1', *LawInSport*, 17 July 2014 <<http://www.lawinsport.com/blog/squire-patton-boggs/item/when-do-sport-teams-initiation-ceremonies-cross-legal-boundaries-part-1>> accessed 25 May 2015

Thorpe D, Buti A, Davies C, Fridman S, and Johnson P, *Sports Law* (OUP, 2009)

Tomkins N, 'Liability: personal injury – negligence – games' (2011) 1 *JPI Law* C1

Tracey P, 'Sports injury – should the referee be blamed?' (2000) 1 *JPI Law* 10

Trudel P, Gilbert W, and Werthner P, 'Coach education and effectiveness' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010)

Tucker R, 'Banning the tackle in rugby: A lesson in A vs Z', 3 March 2016 <<http://sportsscientists.com/2016/03/banning-tackle-rugby-lesson-vs-z/>> accessed 7 April 2016

Valovich Mcleod TC, Schwartz C, and Bay RC, 'Sport-related concussion misunderstandings among youth coaches' (2007) 17 *Clinical Journal of Sports Medicine* 140

VerSteeg R, 'Negligence in the Air: Safety, Legal Liability, and the Pole Vault' (2003) 4 *Tex. Rev. Ent. & Sports L.* 109

Vick D, 'Interdisciplinarity And The Discipline Of Law' in D Cowan, L Mulcahy and S Wheeler (eds) *Law And Society* (Routledge, 2014) Vol I

Walton CT (ed), *Charlesworth & Percy on Negligence* (12th ed., Sweet & Maxwell, 2010)

Walton CT (ed), *Charlesworth & Percy on Negligence* (13th ed., Sweet & Maxwell, 2014)

Watson CT, and Hyde R (eds), *Charlesworth & Percy on Negligence, First Supplement to the Thirteenth Edition* (Sweet and Maxwell, 2015)

Webley L, 'Qualitative Approaches to Empirical Legal Research' in P Cane and H Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP, 2010)

Westerman P, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in M Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011)

Wheeler S, and Thomas P, 'Socio-Legal Studies' in D Hayton (ed), *Law's Future(s)* (Hart, 2002)

Whitlam P, *Case Law in Physical Education and School Sport* (British Association of Advisers and Lecturers in Physical Education, 2005)

Whitlam P, *Safe Practice in Physical Education and Sport* (8th ed., *The Association for Physical Education: Coachwise*, 2012)

Williams AM, and Hodges NJ, 'Practice, instruction and skill acquisition in soccer: Challenging tradition (2005) 23(6) *Journal of sports sciences* 637



Williams K, 'Legislating in the echo chamber?' (2005) 155 *New Law Journal* 1938

Williams K, 'Politics, the media and refining the notion of fault: section 1 of the Compensation Act 2006' (2006) 4 *JPI Law* 347

Wison R, 'Judge approves concussion settlement, could cost NFL \$1 billion', *CBSSports.com*, (22 April 2015) <<http://www.cbssports.com/nfl/eye-on-football/25159518/judge-approves-concussion-settlement-could-cost-nfl-1-billion>> accessed 20 September 2015

Witting C, 'Tort Law, Policy and the High Court of Australia' (2007) 31 *Melbourne University Law Review* 569

Witting C, 'The Hand and Shirt tests of breach and the Civil Liability Acts' (2009) 17 *Torts Law Journal* 242

Wolin MT, and Lang RD, 'Legal Liability for Sports Referees in Today's Litigious World – If You Can't Kill The Ump Then Sue Him' (2013) 15 *U. Denv. Sports & Ent. L.J.* 83

Wong G, *Essentials of Sports Law* (4th ed., Praeger, 2010)

World Rugby, 'Rugby Ready programme' <<http://www.irbrugbyready.com/?language=EN>> accessed 21 October 2014.

YMCA of Central Ohio, 'YMCA Expresses Concern with Ohio Concussion Bill', (April 21, 2012) <[http://www.ymcacolumbus.org/news-media/news/ymcalfightskoncussion\\_bill\\_governing\\_coaches\\_refs](http://www.ymcacolumbus.org/news-media/news/ymcalfightskoncussion_bill_governing_coaches_refs)> accessed 14 April 2016

Young K, 'The Role of the Courts in Sports Injury' in K Young (ed) *Sporting Bodies, Damaged Selves: Sociological Studies of Sports-Related Injury* (Elsevier, 2004)

Young K, 'From Violence in Sport to Sports-Related Violence' in B Houlihan (ed) *Sport and Society: A Student Introduction* (2nd ed., Sage Publications, 2008)

Young K, *Sport, Violence and Society* (Routledge, 2012)

Young K, and White P, 'Threats to Sport Careers: Elite athletes talk about injury and pain' in J Coakley and P Donnelly (eds) *Inside Sports* (Routledge, 1999)

