CIVIL LIABILITY FOR FOUL PLAY IN SPORT

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INTRODUCTION

In the summer of 2002 the autobiography of Roy Keane, the captain of Manchester United Football Club and formerly of the Republic of Ireland soccer team, was published.[1] The book was ghost written by controversial soccer pundit and journalist Eamonn Dunphy, and had been eagerly awaited, not least because it was anticipated that it would contain comments about the events of May and June 2002 which saw Keane sent home from the World Cup in Japan following a major argument with Irish soccer manager Mick McCarthy.[2]

When extracts from the book were serialized in *The News Of The World*, however, public and media focus centred on comments made by Keane about a soccer match between Manchester United and arch-rivals Manchester City in April 2001. Late in that game, Keane had committed what was by common consensus a horrific foul on Manchester City player Alfe Inge Haaland (against whom he had had something of a vendetta for a number of years), for which he was immediately dismissed from the field of play by referee David Elleray, and as a result of which he served the prescribed period of suspension (four matches) under English Football Association Rules. In his autobiography, Keane referred to the Haaland incident in the following terms:

> "Alfie Haaland has been mouthing off…[prior to an earlier game between the two teams] I hadn't forgotten Alfie. Bryan Robson told me to take my time. You'll get your chance Roy. Wait.
>
> Another crap performance. They're up for it. We're not . . . I'd waited almost 180 minutes for Alfie, three years if you looked at it another way. Now he had the ball on the far touchline. Alfie was taking the piss. I'd waited long enough. I fucking hit him hard. The ball was there (I think). Take that you cunt. And don't ever stand over me again sneering about fake injuries…I didn't wait for Mr. Elleray to show the card. I turned and walked to the dressing room.[3]"

The controversy generated by this statement (which was considerably starker when presented as the exclusive focus of one serialization than it was in the overall context of the book) was enormous, because of the inference that Keane had deliberately and calculatingly set out to assault and to injure

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1 *Keane, The Autobiography*, (Michael Joseph, Penguin Books, 2002).

2 See Humphries, "Only one Certainty; We're the poorer without Roy", *Irish Times*, 27 May 2002, and "Keane to Depart from Saipan", *Irish Times*, 24 April 2002.

3 *Keane, The Autobiography*, p 231.

Haaland. This was compounded by the fact that Haaland had played very little competitive soccer since the incident, and according to some, was on the verge of a premature retirement brought about by injury (although there was considerable doubt as to whether the injury which was ending his career had been caused by Keane's tackle). As a result, in October 2002 Roy Keane was banned for five matches by the FA and fined £150,000, after being found guilty on two charges of bringing the game into disrepute by publishing the impugned comments in the book, a decision which incidentally sits uneasily with the protection afforded to freedom of expression under the Human Rights Act, 1998.[4]

Two responses of the many that were forthcoming are of particular note. In the first, Mr. Bob Russell MP, Liberal Democrat representative for Colchester, announced that he had written to the Greater Manchester Police calling on them to institute a criminal prosecution for assault against Roy Keane. Mr. Russell argued that the fact that a particular action occurred on a sports field should not of itself afford it immunity from the operation of the criminal law.[5] Secondly, Mr. Haaland and his employer Manchester City FC announced that they would be bringing civil proceedings against Mr. Keane and his employer Manchester United FC, claiming damages both for the impact on Mr. Haaland's career and, from the club's perspective, for the loss of his services.[6] In February 2003, however, the club announced that it would not be pursuing such legal action because of problems in proving that Mr. Haaland's career threatening injuries were the result of the tackle in question.[7]

Nonetheless, the incident does raise the interesting legal questions of the extent to which violent 'on field' behaviour by one participant towards another *will* and *should* generate both criminal and civil liability. The question of criminal liability for foul play has been addressed elsewhere.[8] We will now consider the circumstances in which one participant in a contact sport can and should be held civilly liable for injury caused to a co-participant as a result of foul play, focusing both on the conceptual issues

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[4] See Hannigan, "FA Find Keane Guilty on Two Charges of Disrepute", and Humphries, "A Victim of the Machine", both in *Irish Times*, 16 October 2002.

[5] See Brennan, "Keane's Book Tackles First Day Sales Record", *Irish Examiner*, 28 August 2002, and "Keane May Face Criminal Enquiry Over Tackle", *Times*, 14 August 2002. In fact it emerged that police had already questioned Keane in respect of the incident at the time but decided that there was not strong enough evidence to prosecute him. See "New Questions For Keane", *Times*, 28 August 2002.

[6] See "Haaland to sue Keane over Tackle as Clubs Square Up", *Times*, 17 August 2002, and "Keane may face legal action over book", *Irish Times*, 13 August 2002.

[7] Taylor, "Game over for Haaland", *Irish Times*, 14 February, 2003.

[8] See McCutcheon "Sports Violence, Consent and the Criminal Law" (1994) 45 *NILQ* 267 (hereafter McCutcheon), at 269; Trichka, "Violence in Sport: Criminal Assault or Part of the Game" (1993) 3(2) *Journal of Legal Aspects of Sport* 88; Gardiner, "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1994-95) 5 *Marquette University Law Review* 188; Hanson and Dernis, "Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?" (1996) 6 *Seton Hall Journal of Sports Law* 127, at 136; Gardiner, "Not Playing the Game; Is It a Crime?" (1993) *Solicitors Journal* 628.

surrounding the question and also on the contemporary approach of the courts in England and Ireland thereto.

CIVIL LIABILITY FOR ON FIELD VIOLENCE

When one considers the number of incidents of violent foul play causing serious injury that occur on a weekly basis, it is perhaps surprising that the criminal law is not used to regulate behaviour on the field of play more often, although this may be explained both by a rooted view within sport that what happens on the sports field should be dealt with by sports governing bodies, and also by the fact that there are significant practical obstacles to taking criminal actions, notably in garnering evidence and proving the requisite *mens rea*.[9] It is arguably even more surprising, given the excessively litigious nature of western society, that there are not more civil actions taken in respect of injuries occasioned on the field of play (although it should be remembered that a great many such actions settle before trial).[10] Sport provides an array of potential parties to a tort action, from players,[11] to clubs,[12] to referees,[13] to spectators,[14] to coaches or sports teachers,[15] to

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[9] See "Prosecuting Sports Field Violence, a British Perspective" (1997) 7(2) *Journal of Legal Aspects of Sport* 81; and James, "The Prosecutor's Dilemma" (1995) 3(3) *Sport and The Law Journal* 60.

[10] See, *inter alia*, *Cleghorn* v *Oldham* (1927) 43 TLR 465. Generally see Beloff, Kerr and Demitrou, *Sports Law* (1998, Hart Publishing), p 111ff; Gardiner & Felix, "*Elliot* v *Saunders*: Drama in Court 14" (1994) 2(2) *Sport and the Law Journal* 1; Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639; McCutcheon, 283; McArdle, *From Boot Money to Bosman; Football, Society and the Law* (2001, Cavendish) (hereafter McArdle), 260-270; Griffith Jones, *Law and The Business of Sport* (1996, Butterworths), chapter 1; Barnes, *Sports and the Law in Canada*, (3rd ed, 1996, Butterworths, Toronto and Vancouver) (hereafter Barnes), pp 269ff; Gardiner *et al*, *Sports Law*, (2nd ed., 2001,Cavendish, London,), pp 693ff; Moore, *Sports Law and Litigation*, (1997, CLT Professional Publishing), chap 5.

[11] See *Brewer* v *Delo* [1967] 1 Lloyd's Rep 488; *Cleghorn* v *Oldham* (1927) 43 TLR 465; *Wooldridge* v *Sumner* [1963] 2 QB 43; *McComiskey* v *McDermott* [1974] IR 75; *Condon* v *Basi* [1985] 2 All ER 453; *Caldwell* v *Maguire* [2001] EWCA Civ 1054, [2001] ISLR 224; *Pitcher* v *Huddersfield Town FC*, unreported, Queen's Bench, 17 July, 2001. For American analysis see Laing, "Liability of Contact Sports Participants" (1994) 66 *Wisconsin Law Review* 12, and Lazaroff, "Tort and Sports; Participant Liability for Injuries Sustained During Competition" (1990) 7 *University of Miami Entertainment and Sports Law Review* 191.

[12] *Watson & Bradford City FC* v *Gray & Huddersfield Town*, unreported, Queen's Bench, 26 October 1998; *McCord* v *Swansea City FC*, unreported, Queen's Bench, 19 December 1996.

[13] *Smoldon* v *Whitworth*, unreported, Court of Appeal, 17 December 1996.

[14] *Callaghan* v *Killarney Race Company Limited* [1958] IR 366; *Wooldridge* v *Sumner* [1963] 2 QB 43; *Wilks* v *Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369; *Payne & Payne* v *Maple Leaf Gardens* [1949] 1 DLR 369; *Karpow* v *Shave* [1975] 2 WWR 159.

[15] *Woodroffe-Hedley* v *Cuthbertson*, unreported, Queen's Bench, 20 June 1997; *Morrell* v *Owen* (see 1 (2) *Sport and the Law Journal* p 5); *Brady* v *Sunderland Association FC*, unreported, Court of Appeal, 17 November 1998; *Kane* v *Kennedy*, unreported, High Court, 25 March 1999; *Ralph* v *London County Council*, unreported, King's Bench, 11 February 1947; *Van Oppen* v *Clerk to the*

governing bodies[16] – although this article is purely concerned with inter-participant liability. Moreover, the extent of liability in such cases may potentially be enormous in that apart from typical damages for pain and suffering and loss of earnings, a plaintiff may well seek to claim damages for 'loss of chance' – where, for example, a young athlete with huge potential whose career has been ended by the negligence of another seeks to recover damages on the grounds of the possibility that had he not been so injured he might have gone on to become a world champion in his sport, with all the glory and financial reward that that would entail.[17]

Obviously, a blunt application of tort law without regard to specific circumstances would sound a death knell for the future of competitive contact sport, in that every rugby tackle or every punch in a boxing match could ground an action in assault, every tackle in a soccer match which caused the opponent to suffer even a minor injury could ground an action in negligence and frankly, every sporting event at which spectators, participants and referees were present could be a breeding ground for a host of interesting defamation actions![18] Thus as in all areas of tort law, in deciding whether a particular action on the sports field should attract civil liability, the courts will ask whether it was reasonable in the circumstances, and the nature of sport means that what would normally be unreasonable – running into someone and knocking him to the ground for instance – will be deemed to be perfectly reasonable when committed in the context of a fast moving competitive contact sport like rugby.[19]

Equally the courts, cognizant of the interests of severely injured plaintiffs have insisted that this does not mean that anything goes in sport. Just as the criminal law will be used to deal with those assaults which exceed the limits of toleration,[20] so also the civil law will step in where there have been

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Bedford Charity Trustees [1989] 3 All ER 389; *A (a minor)* v *Leeds City Council*, unreported, Queen's Bench, 2 March 1999 (see 2 (3) *Sports Law Bulletin*, p 5).

16 *Callaghan* v *Killarney Race Company Limited* [1958] IR 366; *Watson* v *BBBC* [2001] 2 WLR 1256; *Murray* v *Harringay Arena* [1951] 2 All ER 320; *Hall* v *Brooklands Auto Racing Club* [1932] All ER 208.

17 Beloff, Kerr and Demitrou, *Sports Law* (1998, Hart Publishing) (hereafter Beloff), pp 127-128. See also *Chaplin* v *Hicks* [1911] 2 KB 786. Thus in *Watson* v *Gray*, *supra* n 12, the player successfully claimed damages on the grounds that his injury prevented him from fulfilling his playing and earning potential by playing in the English Premiership. See 2(3) *Sports Law Bulletin*, p 5. See also Moore, "Assessing Damages for Professional Footballer's Blighted Career" (1999) 7(2) *Sport and the Law Journal* 41. Similarly in *Mulvaine* v *Joseph* (1968) 112 *SJ* 927, an American golf professional whose hand was injured as a result of the defendant's negligence recovered damages for loss of the opportunity to compete in golf tournaments, win prize money and gain prestige and experience.

18 See for example Lewis, "Defamation of Sports Officials" (1999) 38 *Washburn Law Journal* 780.

19 See Griffith-Jones, *Law and the Business of Sport* (1997, Butterworths) (hereafter Griffith-Jones) at pp 3-4. Thus in the Canadian case *Agar* v *Canning* (1965) 54 WWR 302 (at 304) it was concluded that "The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite intercourse."

20 See Beloff at p 130; Gardiner and James, "Touchlines and Guidelines: The Lord Advocate's Response to Sports Field Violence" [1997] *Criminal Law Review* 41; Miller, "Criminal Law and Sport in Scotland: The Lord Advocate's Instructions

trespasses to the person, or acts of negligence or nuisance leading to significant harm.[21] Very few cases are taken on a trespass basis, largely because of the interpretation of the rules of trespass given in *Letang v Cooper*[22] that a trespass must be intentional, and the consequent evidentiary problems that this rule poses for a plaintiff in a sports case.[23] For present purposes, therefore the most important tort governing sports injuries is that of negligence.

NEGLIGENCE AND CIVIL LIABILITY ON THE FIELD OF PLAY

Analysis on a negligence model throws up three important primary questions.

- First, in a sporting situation what duties of care arise, and what is the scope of these duties?
- Secondly, and perhaps most controversially, what is the standard of care to be expected in any such situation?
- Thirdly, what defences will apply, and particularly what is the impact of the consent of the participants to engage in sporting activity?

Duty Of Care On The Sports Field

As any student of law will know, the dominant common law statement of principle in the construction of duty of care was given by Lord Atkin in *Donoghue* v *Stevenson*:[24]

> "The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who then in law is my neighbour? The answer seems to be –

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of 10 July 1996 to Chief Constables" (1996) 4(2) *Sport and the Law* Journal at p 40 and "Prosecuting Sports Field Violence, a British Perspective" (1997) 7(2) *Journal of Legal Aspects of Sport* 81; Anderson, "Violence, Sport and the Law: An Application to Gaelic Games" (1999) 7(2) *Sport and the Law Journal* 51.

21 Felix, "Sports Injuries and Civil Liability" 1(1) *Sports Law Bulletin*, p 8.

22 [1965] 1 QB 232.

23 See Kevan, "Sports Injury cases: Footballers, Referees and Schools" (2001) *Journal of Personal Injury Litigation* 138, at 140. See however, *Lewis* v *Brookshaw*, (1970) 120 *NLJ* 413. See McMahon & Binchy, *The Irish Law of Torts*, (3rd ed, Butterworths, 2000) (hereafter McMahon & Binchy), chap 22; McArdle at p 163; and Felix, "Sports Injuries and Civil Liability" 1(1) *Sports Law Bulletin*, 8. In Ireland, on the other hand, the rule has generally been that a trespass may be committed either intentionally or negligently, although the principle in *Letang* v *Cooper* recently received some degree of judicial endorsement in the Irish High and Supreme Courts. See *Devlin* v *Roche* [2002] 2 ILRM 192. For analysis see Byrne & Binchy, *Annual Review of Irish Law 2001* (Roundhall, 2002), at p 435.

24 [1932] AC 562. For analysis see Jones, *Textbook on Torts*, (8th ed, Blackstone Press, 2002) pp 31ff; McMahon & Binchy, chap 6; Lunney & Oliphant, *Tort Law*, (Oxford University Press, 2000) chap 3.

> persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In England, the tendency to approach questions of duty of care by reference to broad conceptual statements of principle[25] has been eschewed in favour of a more pragmatic incrementalist approach, whereby new categories of duty are assessed by analogy with existing categories.[26] In Ireland, on the other hand, the courts have traditionally preferred a 'general principle' approach,[27] focusing on broad concepts of proximity and forseeability as the building blocks of duty of care - although recent developments may have altered this trend.[28] In both jurisdictions, and indeed throughout the common law world, however, the concept of duty of care is ultimately a device for limiting the scope of one person's liability for his or her action, both in terms of the category of persons to whom a duty is owed, and also in terms of what is required to be done in the fulfilment of that duty.[29]

On this basis, whereas virtually all persons connected with sport – participants, supporters, referees, governing bodies, coaches, doctors and so on – are capable of owing and being owed duties of care, the scope of such duties will necessarily be restricted. For example, if in the course of a cricket match, the batsman hits the ball and in doing so (accidentally) injures a fielder, there would be no question of his being sued.[30] He is after all merely competing in a lawfully organised sport and operating within the normal rules and practices thereof. Hence he is under no duty of care not to

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[25] *Anns* v *Merton London Borough Council* [1978] AC 728; *Junior Books* v *Veitchi* [1983] 1 AC 520.

[26] *Governor of the Peabody Donation Fund* v *Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Leigh & Sullivan* v *Aliakmon Shipping Co Ltd* [1986] AC 785; *Yuen Kun-Yeu* v *AG of Hong Kong* [1987] 2 All ER 705; *Caparo Industries plc* v *Dickman* [1990] 2 AC 605; *Murphy* v *Brentwood District Council* [1991] 1 AC 398. Generally see Jones, *Textbook on Torts*, (8th ed, 2002, Oxford University Press), at pp 31ff.

[27] The judgment that has provided the lead for virtually all subsequent case law in this area is that of McCarthy J in the Supreme Court in *Ward* v *McMaster* [1988] IR 337.

[28] In *Glencar Exploration plc & Andaman Resources plc* v *Mayo County Council* [2002] 1 ILRM 481; Keane CJ held that the judgement of McCarthy J in *Ward* v *McMaster* did not represent the position in respect of duty of care at Irish law, and suggested that an incrementalist approach of the kind favoured in the English courts should be adopted in Ireland. See Byrne & Binchy, *Annual Review of Irish Law 2001* (Roundhall, 2002), at pp 554ff. This approach was given some degree of support in *Fletcher* v *Commissioner of Public Works* [2003] IESC 8.

[29] *McMahon* & *Binchy*, at p 115.

[30] See for example *Feeney* v *Lyall* [1991] SLT 151, for the view that a golfer who drove the ball straight down the fairway was not in breach of duty to another golfer who had wandered onto the wrong fairway and was invisible to the defendant when playing his shot. On the other hand, a golfer who hits another participant with his ball may possibly be in breach of a duty of care to that other, despite having acted within the rules of his sport. See for example *Pearson* v *Lightening*, CA, 1 April 1998, noted in 1(3) *Sports Law Bulletin*, p 3. Golf is an exception to the general rule that actions within the rules of the game will not attract liability.

hit the opposing fielder. Any suggestion that he *does* owe such a duty of care in the above scenario is defeated by the twin arguments that he is engaging in routine behaviour consistent with the playing of a lawful sport, and also that by consenting to stand in a notoriously dangerous fielding position, the fielder has voluntarily assumed the normal risks inherent therein. Importantly, this is not to say that the injured fielder's voluntary participation in the activity is a defence on which the batsman may rely if he is found to be in breach of a duty owed to the fielder (although this may become relevant in other cases). Rather it is one of the reasons why the batsman owes the fielder no duty to avoid causing him harm in that manner in the first place.[31] It is for the same reason that a cause of action does not necessarily arise every time someone gets struck by a ball on a golf course.[32] Conversely in a situation where for example, there has been a particularly violent foul on a soccer field, the court may impose liability on the participant who causes harm, on the grounds that the other participant cannot be taken to have assumed the risk that his opponent will act in a negligent or reckless manner, and therefore, that that opponent has a duty not to cause harm by reason of such a violation.[33]

Participation and consent to injury

The precise level of assumption of risk attributable to a player by his voluntary participation in a fast moving contact sport is uncertain; neither is there any particularly satisfactory rule for determining the same. Thus some writers have recommended that the question be resolved by the application of nothing more than a common sense based analysis of the facts of any particular case, focusing on factors like the nature of the game, the nature of the act and the surrounding circumstances, the degree of force used, the degree of risk of injury and the state of mind of the defendant.[34]

In attempting to find a more general rule for determining the extent of player consent, some have suggested that one assumes the risks inherent merely in the playing of the game within its rules – which activity is in practice immune from both criminal prosecution and civil actions anyway. This approach creates problems, however, because in theory activity within the

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[31] See Griffith-Jones, at p 7; and from an Australian perspective, Yeo, "Accepted Inherent Risks Among Sporting Participants" (2001) 9 *Tort Law Review* 114. See also *Murphy* v *Steeplechase Amusement Co. Inc.*, 166 NE 173 (1929).

[32] See for example Williamson, "Some Legal Aspects of Golf" (1995) 3(1) *Sports Law Journal* 9; and Lunney, "A golfer is not a gentleman" (1998) 6(2) *Sport and the Law Journal* 4; Vieira, "Fore may be Just Par for the Course" (1994) 4 *Seton Hall Journal of Sports Law* 181; Tonner, Sawyer & Hypes, "Legal Issues in Golf; a 25 year litigation history" (1999) 9(2) *Journal of Legal Aspects of Sport* 125; Lang, "Lawsuits on the Links" (2000) 72(6) *New York State Bar Association Journal*.

[33] McEwan, "Playing the Game: Negligence in Sport" (1986) 130 *SJ* 581.

[34] See Beloff, p 130; McArdle, p 156; Williams, "Consent and Public Policy" [1962] *Criminal Law Review* 74, at 81. This is not unlike the approach followed in the Canadian case of *R* v *Cey* (1989) 48 CCC (3d) 480. For criticism see Gardiner and James, "Touchlines and Guidelines: The Lord Advocate's Response to Sports Field Violence" [1997] *Criminal Law Review* 41; Gardiner, "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1994-95) 5 *Marquette University Law Review* 188, at 204.

rules of the game *may* be subject to both criminal prosecution and civil liability.[35] Moreover, allowing a private body, by creating the rules of sport, thereby to determine the legality of an action, would fly in the face of the rule of law.[36] Finally, it is difficult to ignore the reality that in practice, players *do* consent to more than merely contact within the rules of the game; it is simply unclear how much more.

As such, a second approach is to say that a player voluntarily assumes risks inherent in activity within both the rules and the 'playing culture' of the sport, (defined in *Rootes* v *Shelton*[37] as the 'rules, customs or conventions' thereof)[38] – an approach that has the undoubted advantage of fitting in with what is probably the injured player's perception of the situation.[39] In an assessment of the role of the criminal law in sport, Simon Gardiner has argued that those actions which violate the rules of sport, while keeping within its playing culture, should be met by penalties both within the game and by the relevant sports governing body, but should not attract criminal sanction.[40] It is only when an action violates both the rules and the playing culture of the game, such that there is no question of consent on the part of the injured party[41] – typically a violent off-the-ball incident – that the criminal law should be used.[42] In this light, Canadian courts have concluded that by reason of the traditional violence in ice-hockey, one may be taken to have consented to being hit in the face during a match,[43] but not to being subject to attacks which are unprovoked and violent and not related to the play.[44]

While this approach has obvious merits, the lack of concrete definition of the playing culture of sport will pose problems for the courts as they seek to

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[35] *R* v *Bradshaw* (1878) 14 Cox CC 83. See "Prosecuting Sports Field Violence: A British Perspective" (1997) 7(2) *Journal of Legal Aspects of Sport* 81.

[36] McCutcheon, p 273.

[37] [1968] ALR 33.

[38] The playing culture is also defined in *Elliot* v *Saunders* (unreported, 10 June 1994) as ". . . a frequent or familiar infraction of the rules of a game that can fall within the ordinary risks of the game accepted by all the participants."

[39] See Hanson and Dernis, "Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?" (1996) 6 *Seton Hall Journal of Sports Law* 127, at 134; Forman, "Boxing in the Legal Arena" (1996) 3 *Sports Lawyers Journal* 75, at 83.

[40] Gardiner and James, "Touchlines and Guidelines: The Lord Advocate's Response to Sports Field Violence" [1997] *Criminal Law Review* 41.

[41] Forman, "Boxing in the Legal Arena" (1996) 3 *Sports Lawyers Journal* 75.

[42] See also Gardiner, "Not Playing the Game; is it a Crime?" (1993) *SJ* 68; Gardiner, "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1994-95) 5 *Marquette University Law Review* 188, at 200ff; Gardiner, "The Law and the Sports Field" [1994] *Criminal Law Review* 513; McArdle, at 156.

[43] *R* v *Maki* [1970] 14 DLR (3d) 164; *R* v *Green* [1970] 16 DLR (3d) 137. Generally see Barnes, pp 255-269.

[44] *R* v *Aussem* (1997) Ont. C.J.P. Lexis, 136, 1997 WCBJ 424117, 36 WCB (2d) 453; *R* v *Leyte* (1973) 13 CCC (2d) 458; *R* v *Watson* (1975) 26 CCC (2d) 150, *R* v *Maloney* (1976) 28 CCC (2d) 3232; *R* v *St Croix* (1979) 7 CCC (2d) 122. See reports at 1 (4) *Sport and the Law Bulletin* 14. Generally see McCutcheon, at p 274ff.

determine the extent of the implicit consent of the participants.[45] As with the view that one consents to actions within the rules of the game, this approach is also at variance with legal principle in that it enables those persons who play sport and hence who determine its playing culture, thereby to decide on the legality of an action. It should be further asked why the playing culture of a particularly violent sport (like for instance ice-hockey in the USA or Canada[46]) should be able to afford legal immunity to something, which, however regularly it occurs, is fundamentally illegal and uncivilised and may lead to public disturbances – like for instance a mass brawl of players.[47]

As far as civil liability is concerned, the courts have tended to adopt a variant of the 'playing culture' approach to the assumption of risk issue. Thus in *Elliott* v *Saunders*,[48] the court concluded that frequent or familiar infractions of the rules of a game could fall within the ordinary risks of the game accepted by all the participants, and hence that players did not owe each other a duty not to cause such infractions,[49] but that a player could not be taken to have consented to harmful actions from an opponent that are reckless or intentional,[50] nor indeed those that are simply negligent in the face of a particularly obvious risk. Importantly as we shall see, 'negligence' in this context entails negligence as to the risk of causing harm, and not merely negligence as to the risk of committing a foul. The difficulty, as we shall see below, lies in putting this theoretical analysis into practice.

An individuated duty of care for sportspeople?

In Ireland, the Supreme Court went even further in *McComiskey* v *McDermott*,[51] taking the unusual step of creating an individuated duty of care for participants in sporting events.[52] At issue in this case was the question of whether a rally driver owed a duty of care to a co-participating passenger in

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[45] Thus the Central Council for Physical Recreation, in its submission to the Law Commission, commented that "If the courts are to decide whether an activity is lawful by means of objective criteria and not by means of the rules of a particular game then there is also a danger that the offending player would not be tried by reference to what was acceptable to his sport, but by reference to the opinions on the sport in question by a judge and a jury who may never have played the sport." See Anderson, at 102.

[46] *State* v *Forbes* (No. 6328, District Court Mann, July 19 1975), discussed by Trichka, "Violence in Sport" (1993) 3(2) *Journal of Legal Aspects of Sport* 88. This can be compared, however, to the Canadian case *R* v *Assam* (1997) Ont. C.J.P. Lexis 136, 1997 WCBJ 424117, 36 WCB (2d) 453. Generally see Barnes, at 251-319.

[47] See *Consent and Offences Against the Person*, Law Commission Consultation Paper 134, at 66.

[48] Unreported, Queen's Bench 10 June 1994.

[49] McArdle, at p 156.

[50] See *Bourque* v *Duplechin*, 334 So. 2d 210 (1976) LA, for the view that "A participant does not assume the risk from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating." See also Drowatzky, "Assumption of Risk in Sport" (1992) 2(1) *Journal of Legal Aspects of Sport* 92.

[51] [1974] IR 75.

[52] McMahon & Binchy, pp 136-137. A similar test was created by Edmund Davies LJ in *Wilks* v *Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369, when he referred to "a reasonable man of the sporting world."

the car, following an accident in which the latter was injured. Here the driver had been driving in difficult circumstances consistent with a rally driving competition, along a muddy and narrow course – admittedly on a public road – at an average speed of thirty-five miles per hour. He turned a corner at speed and spotted an obstruction on the laneway ahead and downhill from where he then was. Realising that he could not stop he drove his car into a ditch, where it overturned causing injury to the plaintiff (the navigator). The plaintiff's claim (accepted by Walsh J) was that the driver owed the same duty to the plaintiff navigator as to any other driver on the road, and whereas the consent to participation of the plaintiff in this case might be a defence to the claim, it could not affect the scope of the duty in the case.[53] The majority (Griffin and Henchy JJ), however, accepted the defendant's claim that, in all the circumstances of the event, this was not the correct test to apply but rather that:[54]

> ". . . The duty of care owed by the defendant to the plaintiff was to drive as carefully as a reasonably careful competitive rally-driver would be expected to drive in the prevailing circumstances."

It is not clear whether this analysis was peculiar to the sport in question, or whether a similarly tailored duty of care would in any future case be deemed to apply for participants in all sports, or possibly all fast moving sports.

Standard Of Care

In their assessment of civil liability for sports field violence, English courts have tended to focus less on questions of *duty* of care, and more on questions of *standard* of care. Thus the relevant question is not "was the defendant's behaviour sufficiently reasonable that he did not owe a duty of care not to engage in it?" but rather, "was his behaviour sufficiently reasonable that there was no question of him violating the standard of care that he owed to another person?" In Irish law, the standard of care[55] for the purposes of the tort of negligence requires one to act as would a reasonable person *in the circumstances* of the particular case.[56] Plainly this is a rather general standard, and in seeking to apply it to specific cases, the courts have isolated a number of factors that are relevant, namely:[57]

– The probability of an accident – with the courts concluding that the higher the risk of an accident, the higher the standard of care that would be required.

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[53] [1974] IR 75, at 82. This appears to be the case in English law. See *Nettleship* v *Weston* [1971] 2 QB 691.

[54] *Ibid* at 89.

[55] See Felix, "The Standard of Care in Sport" (1996) 4(1) *Sport and the Law Journal* 32.

[56] Thus the court in *McComiskey* held (*per* Henchy J at 89) that, "the law of negligence lays down that the standard of care is that which is to be expected from a reasonably careful man in the circumstances. Because the particular circumstances dictate the degree of care required, decisions in other cases are frequently of little guidance."

[57] See McMahon & Binchy, pp 154ff.

- The gravity of the threatened injury.
- The social utility of the defendant's behaviour.
- The cost of eliminating the risk. Thus if a situation is reasonably socially useful and the cost of eliminating the risk would be prohibitive, the courts will favour the action.

Application of these factors to the sporting situation provides no clear answer to the question of when a tackle on a soccer field, for instance, will be regarded as negligent at law. Plainly the activity *is* one (particularly where we are dealing with a contact sport) where the probability of an accident – indeed of a serious accident leading to grave injury – is high. On the other hand, the activity has undoubted social utility, and the unpredictable nature of competitive sport where there are inherent risks means that the cost of eliminating such risks would be enormous in social terms, for it would involve the complete dismantling of all contact sports and some non-contact sports.[58]

Accordingly, in sports related cases the courts focus on whether in all the circumstances in which the specific incident occurred, the behaviour of the person causing the harm was reasonable. In Canada[59] (or, uniquely in the USA in Wisconsin), where a similar approach is followed, the courts in practice have regard to a range of relevant circumstances including:[60]

- The sport involved – including the question of whether it is a contact or a non contact sport.
- The rules and regulations of that sport.
- The generally accepted customs and practices of the sport, including types of contact and level of violence generally accepted.
- The risks inherent in the game.
- The presence of protective equipment or uniforms.
- The facts and circumstances of the particular case, including the ages and physical attributes of the participants, as well as whether the accident is caused in the heat of the moment or in a quiet passage of play.

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[58] Gardiner and Felix, "*Elliott* v *Saunders*: Drama in Court 14" (1994) 2(2) *Sport and the Law Journal* 1, at 3 for the view that "[T]he appeal of contact sports . . . comes from their unrestrained qualities, unpredictability, exploitation and sheer physicality. The involvement of the law and courts put these all at risk and would create a climate where players would shy away from physical contact."

[59] *Agar* v *Canning* (1965) 54 WWR 302; *Unruh* v *Webber* (1992) 98 DLR 4th 294 (Supreme Court) where the court said that the standard of care involved asking "what would a reasonable competitor in his place do or not do?" In *Zapf* v *Muscat* 11 BCLR 3d 296, the defendant was found liable in circumstances where he was deemed to be "at best careless and at worst reckless". See Moore, "Has Hockey been checked from Behind North of the Border" (1998) 5 *Sports Lawyers' Journal* 1, at 20 for the view that the standard of care in these cases is deliberately set at a low level because of the presence of mandatory insurance but that such decisions represent a major threat to the future of Canadian amateur ice hockey.

[60] See also Beloff, at p 114; Moore, *ibid* 1.

- The participants' respective skills.
- The participants' knowledge of the rules and customs of the game.
- The costs and availability of precautions.[61]

In England, the first application of this general tort standard to an inter-participant litigation occurred in *Condon v. Basi*.[62] Here the plaintiff and defendant were on opposing teams in a soccer match. After 62 minutes the defendant attempted to tackle the plaintiff by sliding in from a distance of about three or four yards with his boot studs showing about 12-18 inches off the ground. This slide tackle was late, that is to say after the plaintiff had passed the ball, and as a result of it the plaintiff's leg was broken, and he sued the defendant for negligence. In a short judgement for the plaintiff the Court of Appeal concluded that the appropriate standard of care to be applied in sporting cases was that of the reasonable man in all the circumstances, which circumstances would include the passion, speed, intensity and unpredictability of competitive contact sport.[63] Furthermore, the court stressed that in assessing whether civil liability should lie in respect of an action on the sports field, regard should be paid to the question of how egregious a breach of the rules of sport (if any) was involved. Thus as Beloff notes:[64]

> "The clear implication from *Condon* v *Basi* is . . . that a breach of the rules is virtually a necessary albeit not a sufficient requirement for liability to attach . . . Not every foul will constitute a tort; but something short of a foul will not do so."

Finally, the court also concluded that the standard of care expected of sportsmen would differ depending on the level at which the game was played, with ". . . 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."[65] It is unclear why this should be the case, given that the difference between the two types of player relates to their playing ability and not their appreciation of the safety concerns of sport. This distinction has been rejected in subsequent case law.[66]

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[61] Moore argues, *ibid* at 24, that the drawbacks of this test include excessive verdicts, increased litigation and a chilling effect on participation in sport.

[62] [1985] 2 All ER 453, [1985] 1 WLR 866. For analysis see McEwan, "Playing the Game; Negligence in Sport" (1986) 130 *SJ* 581.

[63] Interestingly, the court did not do as the Irish Supreme Court had done in *McComiskey* v *McDermott* and tailor the standard specifically to the "reasonable *soccer player* in all the circumstances" (although it may convincingly be argued that such tailoring will inevitably occur if *all* the circumstances are taken into account).

[64] See Beloff, at 114, and Griffith-Jones, at 11. See also *Gilsenan* v *Gunning* (1982) 137 DLR (3d) 252 for a conclusion in a skiing case that there was no negligence in the circumstances because the action was within what was deemed to be the 'Customs of the Slopes'.

[65] Alistair Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44.

[66] Beloff, at 116, suggests that whereas the standard of care should remain the same in all cases and as a matter of principle, equally the level at which the sport is

It has been suggested that a more appropriate approach to the question of standard of care in 'sports cases' would be to reformulate the general standard totally and impose liability only where one player acts with reckless disregard for the safety of another – an approach favoured for example in all but one American states.[67] It is argued that such a test draws a more satisfactory balance between the legitimate claim of the severely injured plaintiff and the needs of competitive contact sport, which is fast and furious and often replete with split second acts of negligence.[68] Given, however, that in order to prove negligence in the circumstances of a competitive and fast moving sport, a plaintiff will, as a matter of evidence, necessarily have to show that the defendant's conduct amounted to recklessness,[69] it is arguable that such a change in approach would make little difference to the law in practice, but rather might constitute a somewhat unpalatable acceptance by the courts that sport is somehow above the law. Equally as shall be discussed later, a more fundamental question may have to be asked as to whether the tort of negligence itself has any role to play where one player has injured another while engaged in a bona fide attempt to play the game.

Whichever test is used, the courts have tended to impose liability only in the most exceptional circumstances - and with considerable concession to the needs and nature of sport and especially to the fact that decisions made on the field of play tend to be split second in nature and not conducive to rational underpinning. On the other hand, the courts are rather more prepared to find negligence on the part of *governing bodies of sport*, in respect of their advance planning for events or for the running of sport – essentially on the basis that such organisations can make their plans in the calm of a boardroom and with due time for consideration thereof.[70]

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being played will be one of the circumstances of the event from which standard of care will be deduced.

67 Felix, "The Standard of Care in Sport" (1996) 4(1) *Sport and the Law Journal* 32; Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44; Duff, "Reasonable care v Reckless Disregard Revisited" (2002) 10(2) *Sport and the Law Journal* 156; Narol, "Sports Participation Litigation; the Emerging Reckless Disregard Standard" (1991) 1 *Seton Hall Journal of Sports Law* 29; McArdle, at 162; Felix, "Sports Injuries and Civil Liability" 1 (1) *Sports Law Bulletin* 8. This standard was also applied in English cases involving liability of participants for injuries to spectators. See *Wooldridge* v *Sumner* [1963] 2 QB 43; *Wilks* v *Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369.

68 See *Oswald* v *Township High School District*, 84 Ill App. 3d 723, 406 N.E. 2d, 157.

69 This was the approach taken in *Caldwell* v *Maguire & Fitzgerald* [2001] EWCA Civ 1054, [2001] ISLR 224. See generally Narol, "Sports Participant's Litigation; The Emerging Reckless Disregard Standard" (1991) 1 *Seton Hall Journal of Sports Law* 29.

70 See *Watson* v *BBBC* [2001] 2 WLR 1256; *Agar* v *Hyde* (2000) 201 CLR 552; *Cowan* v *O'Freaghaile* [1991] 1 IR 389. In March 2003, the Court of Appeal imposed liability for negligence on a rugby referee in respect of a decision taken during a break in play, while saying that very different considerations would have arisen had the decision been taken during the course of play; see *Vowles* v *Evans* [2003] EWCA Civ 318, [2003] All ER (D) 134.

This article is about inter-participant liability, and in summary we may say that under both Irish and English law, the duty of one sporting participant to another is limited *inter alia* by the fact that s/he is engaged in a lawful if dangerous activity and by the fact that his or her opponent is voluntarily taking part in an activity with foreseeable risks. Whatever the limit and scope of such duty, however, s/he is required to fulfil that duty by acting reasonably in all the circumstances of the sport in which s/he is engaging – which in practice will mean not acting with reckless disregard for the well being of a fellow participant.[71] Moreover, the fact that s/he is playing within the rules or customs of the game (including for example the custom in golf that if your golf ball is heading for another player you warn them through shouting out 'Fore!'[72]) will be strongly persuasive – if not conclusive - evidence either that s/he owed no duty to fellow participants not to engage in that particular action or else that s/he was not in breach of any duty that might arise.[73] Finally, if s/he is so in breach, then the related question of whether there are any defences that might apply arises – an issue that will be dealt with now.

Defences

The two primary defences to a negligence action are contributory negligence and voluntary assumption of risk. From an Irish perspective the impact on the sports field of the revised doctrine of contributory negligence (more accurately comparative negligence – whereby damages are reduced proportionately to the plaintiff's responsibility for his own harm) under section 34 of the Civil Liability Act 1961, is as yet somewhat untested in the sporting context.[74] Equally, as the English Court of Appeal noted in *Smoldon v. Whitworth*,[75] the mere fact that someone consents to playing in a dangerous sport (and indeed in a dangerous position on the field – the front row of the rugby scrum for example) will not mean that contributory negligence can be successfully pleaded against him, if he is harmed by the negligence or recklessness of another. It is only where he himself helped to bring about the injury that the defence will work. Thus the fact that a golfer is voluntarily present on a golf course will not constitute contributory negligence where another player negligently drives his ball and injures him. However, had the injured party been standing on the wrong fairway/in the line of play or not paid due attention to what was going on around him, contributory negligence could be deemed to exist.[76]

The defence of *volenti non fit injuria* – essentially a claim that the plaintiff consented to the infliction of the harm that he suffered - also underwent fundamental reconstruction in Ireland under the terms of the Civil Liability Act 1961, such that it may now be of virtually no value in a sporting context.

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71 See Beloff, p 113.

72 Lunney, "A golfer is not a gentleman" (1998) 6(2) *Sport and the Law Journal* 4.

73 In *Rootes* v *Shelton*, (at p 34) Berwick CJ argued that adherence to the rules would be merely one circumstance in which the general question of whether a duty existed and the standard of care breached would be inferred.

74 See McCaskey & Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 *Seton Hall Journal of Sports Law* 7, at 52.

75 (1997) ELR 249; [1997] PIQR 133.

76 *Feeney* v *Lyall* (1991) SLT 156, at 159. See Beloff, p 122.

Under section 34(1)(b) *volenti* only applies where the defendant can show that before the impugned act the plaintiff agreed to waive his legal rights in respect of it. Moreover according to Walsh J in *O'Hanlon v. ESB*,[77] such agreement involves:

> "Some sort of intercourse or communication between the plaintiff and the defendants from which it could reasonably be inferred that the plaintiff had assured the defendants that he waived any right of action he might have in respect of the negligence of the defendants."

Absent such agreement, the plaintiff's consensual participation in, for example, a violent game of rugby, would not activate the defence of *volenti* where he is seriously injured by reason of a foul by an opponent, in that he has not consented to negligence or recklessness from an opponent. A mechanism that has been used in the United States as a result, is to require players to sign releases (surrender for consideration of a right to sue), disclaimers (disavowance of future responsibility of the defendant) or other exculpatory agreements (where one party expressly agrees to accept a risk of harm arising from another's conduct). Equally such clauses have inevitably attracted suspicion on the part of those asked to sign them.[78]

In *McComiskey* v *McDermott*, the car in which the parties were driving had a notice in its window which read 'all passengers travel at their own risk'. It was claimed that, because the plaintiff had voluntarily become a passenger in the car aware of this notice, the doctrine of *volenti non fit injuria* should apply. This suggestion was, however, rejected on the basis that the plaintiff was aware that when the car had been bought the sign was already in it.[79] Nonetheless Griffin J intimated that in an appropriate case, getting into a car where there was such a sign on the dashboard might invoke the *volenti* exception.[80]

It may be argued that under the formula in *O'Hanlon* v *ESB*, it is legitimate to see the requisite 'intercourse or communication' as occurring implicitly – as for example where one player signs up to play for a team in the knowledge that he will be playing against another team in the context of a contact sport. In practice, however, even if such an argument were accepted, parties could be taken to consent only to the risks inherent in playing a game within its rules or at best within its playing culture,[81] and in practice no duty of care arises in respect of activity within such parameters anyway.[82] Accordingly

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77 [1969] IR 75, at 91-2.

78 See McCaskey & Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 *Seton Hall Journal of Sports Law* 7, at 54; McArdle, p 165.

79 [1974] IR 75, at 87.

80 *Ibid*, at 94.

81 See Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44.

82 For the view that the general reluctance of injured players to litigate may stem from a misunderstanding of the volenti doctrine see Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639; Grayson, at p 30. See from a US viewpoint Drowatzky, "Assumption of Risk in Sport" (1992) 2(1) *Journal of Legal Aspects of Sport*, p 92.

the impact of the *volenti* doctrine on the sports field will be very limited,[83] both in Ireland and also in England, where the courts have consistently pointed out that whereas one may consent to actions that are part and parcel of the game, there is no question of one consenting to negligence on the part of another participant, or indeed a referee.[84]

Vicarious Liability

Finally as we assess the general principles that are relevant to the question of civil liability for foul play on the sports field, the potential impact of vicarious liability should be noted.[85] Because clubs, or governing bodies or schools, for example, will tend to have more resources than players or teachers or coaches, and will in all probability have insurance policies covering such situations, they may be the more appropriate defendants in any action of this nature.[86] However, vicarious liability only applies in situations where the employee acts in the furtherance of his employment,[87] and it is likely that this will not cover instances where injury is intentionally inflicted in a manner that bears no relation to the playing of the sport (and hence to the employment of the sportsman), for instance where one player in a soccer match punches another in an off the ball incident.[88]

The Roy Keane saga is indicative of the tactical problems that arise for clubs in this respect. As we have seen, Alfe Inge Haaland and Manchester City FC were at one stage considering litigation against Roy Keane and Manchester United. Had the matter gone to trial, and had the latter club decided to stand loyally behind its captain, and argued that there was no intentional infliction of injury, then it would have opened itself up to a vicarious liability claim. If it wished to avoid such a claim, it would have had to argue that Keane's tackle on Haaland was neither negligent nor reckless in respect of causing injury, or alternatively to have claimed that the injury inflicted was *intentional* (and therefore the action was not one that could properly be regarded as arising in the course of his employment), thereby leaving Roy Keane facing a serious bill for damages, considerable stigma within the sporting world, and a real chance of criminal prosecution.[89] Indeed it would also leave Manchester United FC facing pressure to sack its captain and arguably its most important player for gross misconduct on the field of play. In practice because a club's insurance policy will tend to cover legal

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[83] Beloff, at 122-124; Gardiner and Felix, "*Elliott* v *Saunders*: Drama in court 14", (1994) 2(2) *Sport and the Law Journal* 1; Duff "Reasonable Care versus Reckless Disregard" (1999) 7(1) S*port and the Law Journal* 44; McCaskey & Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 *Seton Hall Journal of Sports Law* 7.

[84] *Smoldon* v *Whitworth* (1997) ELR 249, at 267. See generally *Nettleship* v *Weston* [1971] 2 QB 691 for the view that in England the volenti defence will only be activated in circumstances where there is a clear agreement to waive rights.

[85] Gardiner and Felix, "*Elliott* v *Saunders*: Drama in court 14" 2(2) *Sport and the Law Journal* 1.

[86] Beloff, pp 128-129.

[87] *McCready* v *Securicor* [1991] NI 229.

[88] *Watson & Bradford City FC* v *Gray and Huddersfield Town*, unreported, Queens Bench 26 October 1998. Generally see Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639, at 640.

[89] Beloff, p 129

expenses connected with negligent (though not intentional) harm caused by employees, it is likely that a club like Manchester United would take the former of the actions outlined above.

Similarly it may well be the case that in the professional context, one participant may owe a duty of care not just to his opponent but also to that opponent's club. Thus in *Watson* v *Gray*,[90] the defendant was sued not only by the player whose career was interrupted but also by his club, who claimed a violation of the tort of unlawful interference with contract. Equally in this case the plaintiff club accepted that in order to make out this particular tort, it would have to establish recklessness on the part of the defendant rather than mere negligence and its failure to do so resulted in its case being lost.[91]

INTER-PARTICIPANT LITIGATION

It will be remembered that in *Condon* v *Basi*, the Court of Appeal had concluded that the duty/standard of care required of one participant *viz a viz* another was to act reasonably in the circumstances,[92] and that a higher standard of care might be required of a player competing at a high level of the game, than would be of a normal run of the mill Sunday league player.[93] The next major English case in this area was that of *Elliot* v *Saunders*.[94] Here, during a major English soccer match, Paul Elliott of Chelsea FC, and Dean Saunders of Liverpool FC, were challenging for a fifty-fifty ball on the halfway line. Elliott dived in with a flying tackle, hoping to divert the ball away, and a split second later, Saunders, in his attempt to intercept the ball, caught Elliott on the side of his knee, severing his cruciate ligaments and ending his career. Elliott claimed that Saunders deliberately stamped on him, and Saunders claimed that it was Elliott's tackle that was dangerous and that he was merely acting in self defence.

The case is illustrative of the difficulty in establishing liability in respect of a split second incident occurring during the playing of a fast moving sport. A great deal of video evidence (rejected by Drake J as being too two dimensional) and competing expert testimony was presented to the court. However, as far as the judge was concerned, the determining factor was that the match referee had responded to the incident by giving a free kick *against Elliott*. Drake J was simply unprepared to override the referee's decision on the basis of the additional evidence presented before him in the court. Equally, he did reject the proposition, suggested in *Condon v. Basi*, that the standard of care would be different at different levels of sport, concluding

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[90] Unreported, Queen's Bench 26 October 1998. See case notes at 1(6) *Sports Law Bulletin*, p 3 and also 2 (1) *Sports Law Bulletin*, p 5.

[91] See Kevan, "Sports Injury cases: Footballers, Referees and Schools" (2001) *Journal of Personal Injury Litigation* 13, at 142-143.

[92] See Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639, at 640.

[93] For criticism of both these conclusions see Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal*; McEwan, "Playing the Game; Negligence in Sport" (1986) 130 *SJ* 581.

[94] Unreported, Queens Bench, 10 June 1994. See Gardiner *et al*, *Sports Law*, (2nd ed, Cavendish, London, 2001), at p 699; Gardiner & Felix, "*Eliot* v *Saunders*: Drama in Court 14" (1994) 2(2) *Sports Law Journal* 1; Felix, "The Standard of Care in Sport" (1996) 4(1) *Sport and the Law Journal* 32.

that the question of whether a particular foul gave rise to liability was a matter to be decided in all the circumstances of a particular case.[95] Most importantly, the court stressed that a simple mistake by a player, even one that caused serious injury, would not ground liability. Rather the action would have to be so outrageously negligent (even, it may be suggested, reckless) that it blatantly exposed the opponent to the risk of injury. One way of approaching the issue is to say that the negligence must go not to the question of whether a foul was committed, but as to the question of whether injury, of the type that *did* occur, would likely occur. As we shall see these two questions may be indivisible.

The courts seemed to depart from this approach - which is key if sport is to be able to proceed without being stifled by fears of litigation – in immediately subsequent case law. In *McCord v. Swansea Football Club*,[96] a professional footballer recovered damages (for the first time in an English court) in respect of injury sustained in an 'on-the-ball' incident. Here the plaintiff (a 24 year old professional soccer player with Stockport County) and the second named defendant were involved in a fifty-fifty ball situation; the plaintiff got to the ball a fraction sooner than the second named defendant (measured at one fiftieth of a second) and struck it, whereupon the second defendant's right foot struck the plaintiff's right calf breaking both his bones, causing him considerable pain and ending his career. Like Drake J in *Elliott* v *Saunders*, Kennedy J studied a video tape of the incident but felt that it was of little evidential value. Moreover, the court was once again subjected to a good deal of conflicting testimony from experts, players, and other witnesses, including former Welsh soccer manager Bobby Gould, who described the tackle as 'disgraceful', and felt that it was intended to injure the plaintiff. On the basis of this testimony Kennedy J found that the plaintiff had been guilty of a "serious mistake or misjudgement,"[97] and that even making allowances for the speed at which this contact sport was played, the tackle was ". . . inconsistent and unmistakably inconsistent with [the second defendant's] taking reasonable care towards the plaintiff." Kennedy J was keen to point out that this was an exceptional case and that most injuries caused by foul play on a sports field would not be the subject of successful litigation. Moreover, lest any other player assume moral superiority over the defendant, he stressed that "[T]here are very few professional footballers who will assert that they have never fallen below the high standards rightly expected of them."[98] Whether or not Kennedy J intended to open up the possibility of increased litigation in this area, the real significance of the case lies in the fact that the court was prepared to find liability on the basis merely of a 'serious mistake or misjudgement' – a significant change in approach from that adopted in *Condon* v *Basi* and *Elliot* v *Saunders*.[99]

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[95] Unreported, Queens Bench, 10 June 1994, at p 5 of the transcript.

[96] Unreported, Queen's Bench, 19 December 1996. For analysis see note at (1997) 5(1) *Sport and the Law Journal* 5; *Sports Law Administration and Practice* (March/April 1997) p 7.

[97] *Ibid*, at p 10 of the transcript.

[98] *Ibid*.

[99] This principle was carried through in *Riddle* v *Thaler* 1(1) *Sports Law Bulletin* 3, where the defendant – a former Great Britain rugby league scrum half – was ordered to pay in excess of £4,000 in damages and £20,000 in costs for breaking

This change was continued in the next major case, *Watson* v *Gray*,[100] where the High Court, *per* Hooper J, in a judgement upheld by the Court of Appeal, again imposed liability for a late tackle during a soccer match. Here the plaintiff had been tackled by the defendant and had suffered a 'career interrupting' though not a 'career ending' injury. The tackle in question was a split second late, but was nonetheless seen as dangerous because 'forceful and high'. As a result of the tackle the defendant was 'yellow carded', but giving testimony afterwards, the referee in the game accepted that he should have been sent off. Once again the plaintiff succeeded on the basis both of the testimony of witnesses and of video evidence, to which the court in this case was far more amenable than had been the case in the *Elliott* and *McCord* cases. What is significant is that, in dismissing the action brought against the defendant by the plaintiff's employers, the court had concluded that whereas the action by the defendant was negligent, it was not excessively so – and particularly, it could not be regarded as having been reckless.

Liability was also imposed in *Leatherland* v *Edwards*,[101] a case involving uni-hockey (a game played on a small tarmac pitch at a very fast pace, and with a fundamental rule that the ball should not rise above the ground and that sticks should not go above waist height). In this case the plaintiff was hit in the eye by the defendant's stick when the latter raised it dangerously high. The defence admitted that the action was a violation of the rules of the game but claimed that it did not amount to negligence in the legal sense. The court disagreed and found that there had been a serious and dangerous breach of a safety rule of the sport, in a situation where it was reasonably foreseeable that such breach would cause serious injury.

More recently, however, the courts appear to have moved back to a less intrusive position. In *Caldwell* v *Maguire & Fitzgerald*,[102] the appellant was former professional jockey Peter Caldwell who had been injured while riding in a two mile novice hurdle race at Hexham. The two defendants plus a fourth jockey, Derek Byrne, had been leading the field after the second last hurdle of the race. Approaching a left hand bend, the two defendants took a line that allowed no room for Mr. Byrne's horse – behaviour that would typically constitute careless racing. In order to avoid a collision, Mr. Byrne's horse veered sharply to the right and into the line taken by Peter Caldwell's horse. As a result, Mr. Caldwell was brought to the ground and suffered a career ending injury.

The Court of Appeal accepted that the activities of the defendants constituted careless riding[103] – indeed they had been suspended for three days following a stewards' inquiry. It refused to conclude, however, that such carelessness

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the jaw of an opponent while tackling him in a manner which would not be particularly unusual in rugby matches (he had been acquitted on a criminal charge).

[100] Unreported, Queens Bench, 26 October 1998. See Jan Levinson, "Foul! Tackling the Problem of Violence in Sport" *Sports Law Administration and Practice* (November/December 1998) 7.

[101] Unreported, Queens Bench, 28 November 1998. See 2 (1) *Sports Law Bulletin* 5.

[102] [2001] EWCA Civ 1054; [2001] ISLR 224.

[103] *Ibid*, at para. 33.

could of itself generate legal liability, approving the conclusion of the High Court judge that in order to establish breach of duty, the plaintiff would essentially have to show reckless disregard on the part of the defendants, (with *reckless* disregard in this context representing merely an indication of the practicalities of the evidential burden in the case).[104]

The Court of Appeal took a contrary view to that adopted in the *McCord* and *Watson* cases, concluding that it was not possible to characterise as negligence, "momentary carelessness", "error of judgement", "oversight" or "a lapse which any participant might be guilty of in the context of a race of this kind." Indeed the court saw this as indicating that such incidents were a constituent element of "all the circumstances of the case" from which both the duty and the standard of care might be judged. Thus Judge LJ concluded that "accidents and the risk of injury, sometimes catastrophic, both to horses and jockeys are an inevitable concomitant of every horse race"[105] and the mere fact that a horse is ridden in the breach of the rules of racing does not *per se* establish liability.

A similar line of reasoning was adopted by the court in *Pitcher v. Huddersfield Town Football Club*.[106] Here, during a professional soccer match, the plaintiff and the second named defendant were running together for a ball, towards the first named defendants team goal, with the plaintiff slightly in front of and to the left of the defendant. The plaintiff passed the ball and a split second later (measured at 0.2 of a second) the defendant 'lunged' at him with his left leg and struck him on the outside of his right knee, causing an injury so serious that he could no longer play professional football. Once again, the court heard evidence from a wide range of expert witnesses, but here it refused to find the defendant liable, concluding that:[107]

> "Mistimed tackles do occur; players do make contact with other players without reaching the ball. If they do and the referee sees it, it will lead to a free kick. The rules are designed to discourage late tackles. They are, however, a common feature of the game and they do not lead automatically to a sending off. There must be something more [to generate legal liability]…I am satisfied this was not something more; this was a misjudged attempt to get to the ball…I am not prepared to say on the balance of probabilities that this tackle was anything more than an error of judgement nor am I prepared to find that [the defendant] was guilty of negligence."

This passage seems to encapsulate the current position in England,[108] and in light of the approach in *McComiskey* v *McDermott*, in all probability it also

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104 *Ibid*, at para. 11.
105 *Ibid*, at para 32.
106 Unreported, Queens Bench, 17 July 2001.
107 *Ibid*, at p 22 of the transcript.
108 In *Gaynor* v *Blackpool FC* [2002] 7 CL 432, a county court imposed liability on a player for a reckless tackle that broke the plaintiff's leg. The court expressly followed the precedent in *Caldwell* v *Maguire*, but it is submitted that its decision sits uneasily with that precedent, and may be of limited legal authority. See Ryan, "Winner all Right? Liability in Tort for Injury in Sport" (2003) 6 *Trinity College Law Review* 155.

represents the position which an Irish court would take should an appropriate case arise. The judicial differentiation between a tackle that in playing terms constitutes even serious foul play, and a tackle that in legal terms activates the tort is of pivotal importance. Breach of the standard of care generally, after all, involves a person acting unreasonably *in all the circumstances*. Yet in *Watson* and indeed in *McCord*, the court in giving judgement against a tackle which was only a split second late in the context of a fast moving game, ignored the circumstances and seemed to be heading towards a negligence *simpliciter* standard. Despite Kennedy J's protestations in *Watson* that his decision would not open floodgates, this is precisely what it might have done. Misjudged and mistimed tackles occur routinely within contact sport, and it is a matter of extreme good fortune for those involved in such incidents when serious injuries do not occur as a result. Yet all persons competing in such sport are aware of these facts, and such awareness combined with the social utility of such activities *must* impact on the creation and operation of duties therein.

DISTINGUISHING FOUL PLAY AND INTENTIONAL FOUL PLAY – FROM NEGLIGENCE TO TRESPASS.

The move away from the approach in *McCord* v *Swansea* and *Watson* v *Gray*, as witnessed in decisions like *Caldwell* v *Maguire & Fitzgerald* does, however, carry a broader implication, namely that apart from the situation where one player injures another by his failure to know or understand and hence to apply the safety rules of sport, the tort of negligence has simply no application to contact sports, although it may be relevant in the context of non-contact sports.

As has been noted, if a player who fouls an opponent is to be found liable under the tort of negligence, his conduct must be unreasonable in that it creates a risk not just that the safety rules of the game will be violated, but also that serious injury will occur. Yet the reality of contact sport is such that where safety rules are at issue, the two types of risk are indivisible. After all, the nature of safety rules – created to protect sports participants from injuries – is such that their violation generates an inevitable risk of injury to a fellow participant. It is also true that every time a contact sport player interacts with an opponent, there is a risk that he may violate such a safety rule, in that however skilled he is, there remains the risk, given all the circumstances, that he will make a fractional misjudgment of timing and commit, for example, a foul tackle. Thus in cases like *Pitcher* v *Huddersfield Town*, and *Watson* v *Gray* the foul tackle that was the subject of the litigation was estimated to be late by only 0.2 of a second.

A combination of these two factors leads to an inexorable conclusion, namely that wholehearted participation in all of the dimensions of a contact sport carries a foreseeable risk, however slight, of causing serious injury. So for example, every time one participant in a contact sport takes the decision to effect a challenge on another there is a risk that he will make an error and commit a foul, and a further risk that this will lead to injury. Moreover, this conclusion is sufficiently obvious that all participants in contact sports can be taken to be aware of it – even if it is not something that is at the forefront of their minds during the game.

From the standpoint of the tort of negligence, however, this is hugely significant. As we have seen the standard of care required of participants in sport is that they act reasonably in the circumstances. The circumstances of contact sport include, however, not only its fast moving and often hyper-competitive nature, but also the awareness on the part of participants that in principle every challenge or tackle that they make carries with it a risk of causing serious injury. Hence it is not excessively dogmatic to conclude that by engaging in such an action, (and thereby ignoring such a known risk) a player is acting unreasonably and indeed with reckless disregard for the safety of his opponent. In other words in principle *every* tackle in a contact sport – even one that does not cause harm – is a negligent action because the player knows that it *might* have resulted in a foul that caused harm. And in principle, every time such a negligent act does cause harm, then it should be capable of being the basis of a successful action in negligence.

Of course were the courts to adopt such an approach, this would kill contact sport, and that would be a bad thing as far as public policy is concerned. To avoid deeming the playing of contact sport to be by definition a negligent action, however, then the law must accept that by definition it is *not* a negligent action – irrespective of the fact that it inevitably creates the risk of injury. What this entails as far as the question of civil liability for on field violence is concerned, is that whenever one player (for example) challenges for a ball in the context of a *bona fide* playing of the game (*i.e.* with the exclusive aim of successfully tackling his opponent while not violating the safety rules of the game) and by accident he commits a foul and causes injury, he should be deemed not to have acted negligently, no matter how clumsy or ill advised the (foul) tackle was, because even grievous mistakes of this kind are part and parcel of the game.[109] A player should instead only be held civilly liable where he intentionally fouls (as distinct from intentionally injures) another player, and does so for reasons outside the objectives and spirit of the game – be it the desire to soften up an opponent, to exact revenge, to commit a professional foul, to prevent another player scoring, or simply to occasion injury. This was the case for example in *Parry* v *McGuckin*,[110] in which a footballer was held liable for the commission of a foul tackle in which, according to the weight of evidence he had deliberately 'gone for man and ball' and had set out to cause injury.[111]

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[109] In similar vein, from a duty of care analysis, we may conclude either that a contact sport participant owes a clear duty to all other participants not to engage in any on the ball challenges, because the (foreseeable) risk of causing injury is sufficiently high that this should be the case, or alternatively that the fact that players consensually engage in an activity aware that they may suffer injury as a result of wholehearted participation by another player, means that that other player owes no duty not to cause injury by such wholehearted participation.

[110] Unreported, High Court, 22 March 1990.

[111] In *Brady* v *McMahon* (decision of the Master of the High Court, 12 December 2002) in the context of an application for discovery in a civil action for an injury occasioned on the field of play, the Master appeared to endorse this approach holding that:
"In cases involving sporting injuries, I would suggest that the man in the street would judge that all players know and accept the risk of sporting injuries up to and including so-called professional fouls. . . The same cannot be said of an on pitch *assault* (emphasis added). Of course the assaulter is liable."

Approaching the issue from this perspective also provides a satisfactory answer to the question of the limits of assumption of risk in contact sports. We have seen earlier that an approach that says that a player only assumes the risks of activity within the rules of the game is unrealistic and could seriously chill the playing of sport, whereas an approach that says that he assumes the risks of and indeed consents to activity within both the rules and the playing culture of the game may legitimise unsavoury and anti-social actions that occur within a sport with a notoriously violent playing culture. If the civil law concerns itself only with an intentional violation of the safety rules of sport that is underpinned by a motivation unconnected to the playing objectives or spirit of the game, then the approach to assumption of risk that this would foster would satisfy both of these policy centred concerns. A player would be deemed to consent to and assume the risks inherent in all activity on the field of play other than that which:

- is intentionally outside the safety rules of the game;
- is underpinned by a motivation unrelated to the playing of the game; and
- involves the intentional or reckless infliction of physical harm on an opponent – as all foul play inevitably does.[112]

This approach gives a good deal of leeway to sport, in the sense that it does not allow for routine violations of the rules of the game to be seen as torts, yet it also makes an important concession to public policy by prohibiting acts that are wrongful, in the sense of being intentionally and maliciously caused. Therefore, to take the example of a 'high tackle' in rugby football, such an action would not generate civil liability where the perpetrator simply (and however negligently) made a mistake in his attempt to effect a lawful tackle, but would do so where the tackler knowingly tackled high, in an attempt to injure or intimidate his opponent.

This understanding of the role of tort law on the field of play spawns one further inevitable consequence, namely that inter-participant claims of this nature should be brought not under the heading of negligence, but rather under the heading of trespass to the person – and specifically the tort of battery.[113] The difference between the two torts, and the reason why trespass is more suited to the sports field than negligence is perhaps best explained by a brief statement of the elements of the latter. In theory, a trespass involves a wrongful act[114] causing direct harm to the plaintiff, whereas an act of

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The precise impact of this decision remains uncertain, especially as the Master did not refer to any decided case law in making his decision. For analysis see Cox, "Sports law" in Byrne & Binchy, *Annual Review of Irish Law 2002* (Round Hall, 2003).

[112] Obviously an exception to this rule arises in the case of boxing but this presents concerns beyond the scope of this article.

[113] Generally see Jones, *Textbook on Torts* (8th ed, 2002, Oxford University Press), 507; McMahon & Binchy, *The Irish Law of Torts*, chap 22; Lunney & Oliphant, *Tort Law: Text and Materials* (Oxford University Press, 2000), 29.

[114] See Gregory, "Trespass to Negligence to Absolute Liability" (1951) 37 *Va LR* 459.

negligence involves a wrongful act that creates a risk of harm to another.[115] From the sporting perspective this is a most important distinction. As we have seen the playing of *all* contact sport creates a *risk* of injury to an opponent. In order for liability to be imposed the action of the player should extend beyond the creation of a risk, to the direct occasioning of harm.

Moreover, whereas the tort of trespass is actionable *per se*,[116] nonetheless it requires a contact with the plaintiff that extends beyond the normal sort of jostling that one might expect on a busy street.[117] There is no completely sound explanation as to why this should be the case beyond the obvious demands of public policy,[118] but it is certainly arguable that the victim of a trespass may not consent to the same, and that by voluntarily walking in a busy street, one implicitly consents to the inevitable resulting jostling.[119] Similarly, of course, it might be argued that, for example, every rugby tackle is a trespass to the person, being an intentional and direct contact. But it has been concluded that players can not be seen as consenting to the type of foul play that should be capable of generating civil liability – namely direct contact with another person intentionally in violation of the safety rules of the game, which is underpinned by a motivation unrelated to the simple playing of the game.

Finally, in England and probably in Ireland the act must be intentional (albeit probably not necessarily hostile),[120] although the trespasser need only intend to commit the trespass, and not necessarily to cause any particular harm as a result.[121] As was mentioned earlier, the intentional element of the tort of trespass is the principal reason why in practice, sports related cases are almost always brought under the heading of negligence. It has been submitted, however, that intention to breach the rules should be seen as an essential element of any sports field action that will generate civil (or indeed criminal) liability. Accordingly trespass may be the appropriate heading under which to bring such a claim. Apart from the fact that such a rule and such an approach would accord more fully with the reality of the situation from the perspective of the player, it also has the advantage of stressing the

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115 See McMahon & Binchy, at p 619; Jones, at p 507. Thus if I throw a log onto the road and it hits someone thereby causing direct injury there is a trespass to the person, whereas if I throw the same log onto the road and it obstructs the highway and injures someone, I have caused no direct harm to the person and hence an action against me should be taken in negligence. *Reynolds* v *Clarke* (1725) 1 Str 634, 636.

116 McMahon & Binchy, at 616; Jones, at 507.

117 *Cole* v *Turner* (1704) 6 Mod 149; *Wilson* v *Pringle* [1987] QB 237 (CA); *F* v *West Berkshire Health Authority* [1990] 2 AC 1; *R* v *Brown* [1994] 1 AC 212; *R* v *Broadmoor Special Hospital Authority*, *Times*, 5 November 1997.

118 In *Collins* v *Wilcock* [1984] 3 All ER 374, it was suggested that trespasses to the person would not include those contacts that could be seen as ". . . falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life."

119 *Wilson* v *Pringle* [1987] QB 237 (CA); *Hegarty* v *Shine* (1878) 4 LR IR 288.

120 *Fowler* v *Lanning* [1959] 1 QB 426; *Wilson* v *Pringle* [1986] 2 All ER 440; *Letang* v *Cooper* [1965] 1 QB 232; *Stubbings* v *Webb* [1993] AC 498; *Devlin* v *Roche* [2002] 2 ILRM 192. For analysis see Byrne & Binchy, *Annual Review of Irish Law 2001*, 435.

121 *O'Conghaile* v *Wallace* [1938] IR 526. See McMahon & Binchy, 615.

objective of the law as far as sport is concerned, namely to combat intentionally violent play rather than to curb the legitimate competitive instincts of players by targeting errors of judgement.[122]

CONCLUSION – *HAALAND* V *KEANE*

This then is the backdrop against which Alfe Inge Haaland may attempt to sue Roy Keane – although all the indications are that such an action (which will definitely not be taken by Manchester City FC) is unlikely to be taken by Mr. Haaland, largely because of the fact that however bad Keane's tackle was, it was not the cause of the injury that looks to have ended Mr. Haaland's career.

Had such causation been present and an action taken, then it is submitted that the case may well have been too close to call. Many people talking about Keane's autobiography were under the impression that he had admitted attempting to injure Haaland, or indeed attempting to end his career. In fact he did neither. He admitted:

(a) to having had a vendetta against Haaland – something that was well known anyway;

(b) to having hit him hard – which carries a particular colloquial meaning within sport – such that it is quite possible in a tackle in soccer to 'hit someone hard' while keeping within the rules of the game;

(c) to having been less than sorry about the injury – something that is plainly not in violation of any law.

None of these things by themselves could support a legal action of the kind threatened – especially in view of the fact that Mr. Keane's ghost writer had maintained that he had used considerable poetic license in writing that part of the chapter – an admission that would carry more weight in a courtroom than it did at the FA disciplinary hearing in respect of the publication of the book (as distinct from the tackle itself). Indeed in a courtroom, Keane himself could claim that the comments were just bravado, and that in fact he had not intended to anything more than effect a legitimate tackle. The point is that the book would certainly not of itself prove the argument that Mr. Haaland was trying to make and hence that the case would have to focus primarily on the tackle and only secondarily on the comments made therein.

In this respect, the tackle was plainly a bad one. Keane was immediately sent off (admittedly by a referee who was not averse to sending Keane off!) and commentators were united in their view of its rashness – especially as most such commentators were all too aware of the fact that there was bad blood between Keane and Haaland. On the other hand, in Keane's favour, it can be pointed out that this *was* an on the ball incident which was not much worse than many tackles witnessed annually on playing fields up and down the country, and, whatever he said in the book, the ball *was* there when Keane went for the tackle - which was only fractionally late. It is submitted that whether the case was taken in negligence (by reference to the decision in

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[122] See Gearty, "Tort Liability for Injuries Incurred during Sports and Pastimes" (1985) 44 *CLJ* 371, at 372.

Caldwell v *Maguire*) or in trespass as outlined in the last section, the case would turn on the question of Roy Keane's intentions as he tackled Haaland – and specifically whether he intended to make contact with the latter, or whether his exclusive objective was winning the ball and he simply made a mis-judged challenge. In this respect the comments in the book would obviously be used in evidence against him. Whether they would be sufficient to persuade a court that the foul committed by Keane was in fact intentional – and that his objective was to get man and ball – is a matter for conjecture.

As has been mentioned, it seems unlikely at the time of writing that such an action will now be taken and certainly it is virtually inconceivable that Keane will face criminal prosecution. He is perhaps somewhat fortunate in this regard. All of the above analysis is indicative of the fact that players of sport at all levels, as well as coaches, referees and organizers must exercise an appropriate level of care if they are to avoid unwanted litigation. Sport, like any other area of social activity is within the jurisdiction of the law, and a moment's response to the onset of a 'red mist'[123] might have unforeseen and deeply unfortunate consequences.

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[123] In his column in the *Daily Telegraph* (22 September 2001) Roy Keane admitted that in hitting out at Newcastle United captain Alan Shearer, for which he was sent off, he had acted foolishly. He said that he was trying to control himself but that on occasion "the red mist descended," at which point "50,000 people would not be able to stop me bursting into a fit of rage."