

NEGLIGENCE AND RISK MANAGEMENT AND SPORT

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1. Introduction

The law of negligence requires any party one is considered by law to owe another party a duty of care, to take reasonable steps to prevent the other party from getting injured. If there is a breach of that duty and the other party suffers harm, then the first party may be liable in a negligence claim. Within sport, it is the implementation of a suitable risk management scheme that will usually take care of the duty of care requirements. This paper will therefore examine the application of the law of negligence to the sporting context, and what is involved with a risk management scheme.

2. The Law of Negligence and Its Impact on Sport

Injuries suffered during a sporting contest can result in a negligence claim by the injured party. Negligence is a defined tort with three elements:

1. The defendant must owe the plaintiff a duty of care;
2. There must be a breach of that duty; and,
3. This breach must have caused damage to the plaintiff.

Within sport a duty of care may, and usually does, arise between the following groups:

1. Competitors to competitors.
2. Competitors to spectators.
3. Owners/occupiers/organisers to spectators.
4. Owners/occupiers/organiser to competitors.
5. Organisers to strangers.
6. Coach to competitors.
7. Schools.

If a duty of care exists then to fulfil that duty the party needs to do what is reasonable to prevent injury from happening. As the cases indicate, this will depend on the resources of the party who owes the duty of care, and how easy it is to remedy the potential problem of what is known as a foreseeable risk.

(a) *Competitors to Competitors*

Competitors in sport owe a duty of care to avoid a foreseeable risk of injury to other competitors, with the liability being dependent on whether the conduct was reasonable in the circumstances. In *Ollier v Magnetic Island Country Club* [2004] Aust Tort Reports 81,743, for instance, a golfer was held to be in breach of his duty of care when he hit another golfer with his tee shot. The incident that occurred during a charity golf day at the Magnetic Island Country Club, Townsville in North Queensland when the plaintiff, Glenn Ollier, had been in the process of playing a ball onto the eighth green at a time when the defendant was hitting off the eighth tee. After being hit on the head Ollier immediately collapsed to the ground. He was able to complete the second nine holes, but later in the day severe symptoms became

apparent. He was subsequently taken to hospital where a CT scan revealed a left sided subdural haematoma, and a left sided cerebral oedema. As a result of the injuries he needed to spend three years in the Mossman Hall Special Hospital in Charters Towers, and at the time of the trial, was in the Acquired Brain Injury Unit at Kirwan. He later died as a result of these injuries.

In determining the liability of the second defendant the trial judge referred to the rules of golf, specifically Section 1 entitled 'Etiquette', which contains the statement that 'no player should play until the players in front are out of range.' It was held that the plaintiff was in a position on the golf course where he ought to have been seen by the defendant, and was in a position where the defendant might have been expected to look prior to hitting off. The trial judge then rejected the assumed risk argument stating that being struck by a ball while being in range was not a risk inherent in the game of golf, and that the rules of golf expressly sought to prevent it from happening. A duty of care was held to exist and there had been a breach of this duty because the defendant was defective in his lookout which resulted in the plaintiff sustaining serious injury. The decision in *Ollier* is consistent with the decision in *Pearson v Lightning* (1998) 95 (20) LSG 33 where a golfer struck another player on the fairway after hitting from the tee, and was subsequently held to be in breach of the rules.

However, the decision was different to that decided in *Ellison v Rogers* (1967) 67 DLR (2d) 21 though that involved a mishit shot that hit someone on an adjacent fairway. Although *Ellison* is a relatively old Canadian case it still provides an insight as to what the law is in regard to this type of hit on a golf course. In *Ellison* the defendant had hit off from the first tee after first checking that the fairway was vacant, but mishit his shot and struck the plaintiff on the adjacent fourth fairway. As he normally hit the ball slightly to the left, the defendant had lined up his ball on the left hand side of the tee, but on this occasion had hooked the ball to the right, and had hit the plaintiff, who was some 100 metres away on the left eye. The judge referred to the rule of golf that a player must not drive off the tee until the fairway is clear, but it was accepted that the plaintiff was wholly within the limits of another fairway. Expert evidence was accepted that 75-80 per cent of golfers slice the ball and that, as the defendant was a consistent slicer of the ball, he had no reason to expect that he would hook the ball on this particular occasion. The defendant's correction of his shot was therefore held to be a pure accident as it was not willed, intentional, or foreseeable, nor was there any reason why it should have been foreseen. As it was not unusual to have a ball stray accidentally from one fairway to another during a game of golf, this was therefore a normal risk of the game, one that was assumed by all golfers. These same principles would apply to golf in Australia.

(ii) Competitors to Spectators

As well as owing a duty of care to other competitors, a competitor also owes a duty of care to the spectators, though it is accepted that spectators assume certain risks when attending sports events. This voluntary assumption of risk can therefore be a defence against a claim for being hit by a golf ball while watching a professional tournament, or being hit by a cricket ball while attending a game of cricket. It should be noted that a ground like the Sydney Cricket Ground still takes the precaution of sending messages via the scoreboard and ground announcer of the fact that cricket balls may be hit into the crowd. There is a limit to this liability, however, and in *Cleghorn v Oldham* (1927) 43 TLR 465, for instance, it was held that a plaintiff who was struck

by a golf club during a demonstration shot did not assume the risk of such an accident as spectator.

(iii) Occupiers/Organisers to Spectators

Spectators are also owed a duty of care by the occupier, or organiser of a sporting event. In *Langham v Connell Point Rovers Soccer Club* [2005] NSWCA 461, for instance, a spectator was awarded \$233, 758 in damages after tripping over rope in a car park when attending a soccer match. An important aspect of the case was that the rope was similar in colour to the dirt in the car park and therefore hard to see, and the club may well have been able to fulfil its duty of care by making sure the rope stood out by being a different colour, by attaching coloured flags to it, or, as was done after the incident, by attaching a plastic bag to it. Note that in *Haris v Bulldogs Rugby League Club* [2006] NSWCA 53 the club was not held liable when a spectator was injured by a fire cracker while attending a rugby league game. This was because they had carried out sufficient searches and had satisfactory security arrangements in place. Therefore, while there was a duty of care owed by the club to the spectators, this duty had been fulfilled.

(iv) Organiser to Competitors:

In *Nowak v Waverley Council* (1984) Aust Torts Reports 80-200 the plaintiff was successful in being awarded damages from the local council after suffering a broken leg, and other injuries, when he tripped over a protruding water sprinkler on a council owned sporting field. Thus an organiser, or an owner, may be liable to competitors ensure that the field is safe, and must take active steps to make sure that the premises are fit and safe for the competition. There is also a more general duty to ensure that reasonable steps have been made to plan and organise the event. However, note that in *Ollier v Magnetic Island Country Club* the club was not held to be liable for the injury suffered by the player, there being no duty to ensure that the players knew about the rule of not hitting until the group in front were out of range.

(v) Organisers to Strangers

While an organiser can be held liable if a stranger is injured from an incident in a sporting competition, this is unlikely. In *Bolton v Stone* [1951] AC 850, for instance, a person in the street was hit by a cricket ball that had been hit out of the nearby ground, with the cricket club being held not to be liable because the injury had arisen from a risk that was so unlikely to occur that it did not warrant any precautions.

(vi) Coach to Competitors

Foscolos v Footscray Youth Club [2002] VSC 148 meanwhile illustrates the fact that a coach can also be held liable for injuries sustained by competitors. In this case an experienced wrestler was allowed to have a bout against an inexperienced wrestler, and then used a type of throw that is only allowed to be used against experienced wrestlers. As a consequence of the throw, Foscolos was left a quadriplegic and was awarded \$5.7m in damages, with the coach being held to be in breach of his duty of care. Another aspect of the case was that the coach was only covered by insurance for \$5m, and therefore was personally liable for the other \$700, 000. Fortunately for the coach, the plaintiff indicated that he was only interested in the insurance money, and would not pursue the coach for the \$700, 000 that he was personally liable for. The case does however indicate that even with insurance cover an individual could still find themselves liable for considerable financial payments.

(vii) Schools

Anyone involved with school sport should be aware that schools are liable for injuries sustained in organised school activities, with this being based on the recognised duty of care owed by a school and teachers to the pupils. In *Watson v Haines* (1987) Aust Tort Reports 80-094, for instance, a student with an unusually long and thin neck was able to recover damages after being paralysed when a scrum collapsed in school rugby league match. In *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2005] NSWCA 457 the occupier was held liable when a player injured his ankle after stepping into a pothole on a school playing field as a weekly check of the area would only have taken a few hours.

(viii) Vicarious Liability

Employers are liable for actions of employees, though an important restriction on this is that they must be an employee, not an individual contractor, and the actions in question must be in the course of their employment. The test for being an employee is a control test, that is, how much control does the employer have over the employees. In most professional sports, the players are contracted to the club and therefore there is was no question of them being employees, and the clubs are therefore liable for all actions that occur in the course of their employment. In *McCracken v Melbourne Storm* [2005] NSWCA 107 for instance the club was held liable for the injuries inflicted in an illegal tackle by two Melbourne Storm players during an NRL game.

3. Risk Management

Risk management involves actions that will reduce the risk of an incident happening, such as ensuring that good safety mechanisms are in place, with this being a legal requirement where a duty of care exists. Often an incident that leads to a negligence claim will have a degree of freak accident about it in that a number of unlikely events have had to occur together, or in sequence, in order for in the incident to occur. However, even if the chances of such a combination of events occurring are remote what needs to be kept in mind is that they do happen, even if the probability against it is high. Taking the right precautions to further reduce the risk is therefore essential, and what the law requires is that reasonable steps be taken, taking into consideration the resources that are available to the organisers. Thus, risk management involves lessening the risk of potential hazards and it is suggested that organisers of sporting events should take the following steps:

1. Identify any potential hazards.
2. Decide who may be harmed.
3. Evaluate the risks and decide on precautions.
4. Allocate responsibility for management of those risks by means of delegation.
5. Ensure those with delegated responsibilities are managed properly.
6. Review and assess the risk management strategies and update if necessary.

What also needs to be considered is the likelihood of the incident happening, that is, unlikely, likely or very likely, and also its potential impact, that is, low, medium or high impact. Thus, while the law requires risk management strategies be implemented, these involve management and leadership practices rather than legal

measures. It should also be noted that what can be done from a legal perspective is to transfer the risk by means of exclusion clauses in a contract, and the taking out of adequate and appropriate insurance. Mitigating potential losses is therefore the other aspect of risk management, one that has a legal basis to it.

4. Conclusion

The law of negligence is an important one to ensure that those parties who owe a duty of care take the reasonable steps necessary to take care of those to whom a duty of care is owed. This applies in the sport context in the same that it applies in non-sporting contexts, and it is good risk management strategies that are the key to this.