

Fourth Edition

# SPORTS LAW!

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members said that it made no difference and they would not let him onto the jetty no matter what. Letice decides to sue for breach of the rules. He does not know if the club is unincorporated or incorporated.

a Advise on Letice's prospects in court.

The following week, while bowling at the Club Championship, Salaad is approached by Sport Integrity Australia officials and required to supply a sample of urine for dope testing. The test comes back positive for a beta-blocker, an anti-hypertensive drug which, as it turns out, is also good for steadying the arm when bowling. A positive test for doping is against rule 27 of the Club Rules. Salaad is required to appear before the Lakes Bowling Club Anti-Doping Committee. Salaad receives a written notice that states the charge as: 'Use of an *anti-hypotensive* drug [rather than anti-hypertensive drug] as against rule 27' The three-person committee is chaired by Letice. Salaad complains that Letice is biased against him and wants Letice disqualified. Letice refuses. The day before the hearing, Salaad runs into another committee member, Pesoop, who tells him: 'I am going to give you a fair hearing and then give you a harsh, but not too harsh, penalty.' At the hearing, Salaad turns up with witnesses, including his medical doctor, his chemist and his accountant. The committee says it will only hear from the accountant as it wants to know if Salaad can afford to pay any legal fees, should that be necessary. The committee tells Salaad that even though it is not in the rules, if he pays a fine of \$1000 to the club it will probably not give him more than six months suspension. Salaad pays the fine.

The committee, however, renders a verdict of guilty and imposes a five-year ban. Salaad wishes to challenge the finding and the length of the ban for breaches of natural justice in the Bowls Appeals Tribunal. He states that if he is unsuccessful in the Appeals Tribunal, he will then appeal further to the CAS. He wishes to subpoena the three witnesses to appear before the Appeals Tribunal and, if unsuccessful, before the CAS.

b Advise Salaad fully on the possible outcome of his various legal challenges.

## CHAPTER 4

### VIOLENCE

#### OVERVIEW

- › Introduction: Violence in sport
- › Crimes of violence common to the sporting field
- › Defences to charges of sports violence
- › Liability and circumstantial factors
- › Nature of the sport
- › Safety rules and rules designed to prevent injury
- › Where harm exceeds limit permissible in criminal law
- › Targeted harm
- › Prosecuting sporting assaults

#### INTRODUCTION: VIOLENCE IN SPORT

This chapter examines acts of violence perpetrated on a sporting field of play. Cases concerning both crime and tort are discussed at length. The chapter also considers the defences of consent and self-defence, which are relevant to both criminal and tortious charges. In addition, circumstantial factors common to both defences, which bear upon the likelihood or success of criminal prosecution or tortious liability, are discussed.<sup>1</sup>

Despite their potential to cause substantial injury or even death, many physical contacts in sport are perfectly legal; indeed, many players and spectators appear to applaud aggression and violence. Courts and commentators often emphasise that 'the playing field is not a law-free zone'; nonetheless, while 'the legal analysis of whether a crime has been committed on the playing field is the same as it is on the street, ... contact sports present a unique factual context for that analysis'.<sup>2</sup> A fine line separates the legal from the illegal in acts of sporting

<sup>1</sup> See, for example, *Lewandowski v Medrzycki* [2003] VSC 277, [23]–[28] (Ashley J).

<sup>2</sup> *R v C(C)*, 2009 ONCJ 249, [6]. See also Jack Anderson, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' (2008) *Criminal Law Review* 10 at 751–3.

violence. Where this line is crossed, athletes have been prosecuted, convicted and, at times, jailed. It is difficult to determine at what precise point violent contact in sport exposes the athlete to criminal liability—not least due to the apparent inability of the criminal law to define exactly what is and is not, despite the consent of the victim, a permissible level of harm. The decision to prosecute for assault in sport is based upon a range of circumstances, irrespective of the fact that a physical contact may indeed describe the elements of a criminal act. In addition to criminal prosecution, an athlete may, in committing acts of non-consensual violence, be exposed to tortious liability arising from a claim of trespass to the person.

The existence of sporting violence presents a wider concern than simply that of the perpetrator and victim. Some commentators fear sports violence has a negative impact upon society that necessitates its elimination through prosecution.<sup>3</sup> Others claim that the courts of law are not suited to the task of punishing and deterring sporting violence, and that prosecution is better handled within the sport itself through, for example, a domestic tribunal.<sup>4</sup> The utilisation of internal tribunals has, though, also been questioned. For example, concerns of long-term cognitive harm through violent contact to the head are argued to 'provide a sufficient evidence base upon which to at least question whether the current self-regulated system remains fit for purpose'.<sup>5</sup> The fact remains that athletes, as victims, are threatened with career- or recreation-ending injuries from on-field assaults that will at times invite criminal and tortious liability.

### A note on jurisdiction and standard of proof

Some cases examined in this chapter are those of foreign jurisdictions. While illustrative, relevant and possibly persuasive, these cases are not binding upon Australian courts.

### Criminal and civil liability

An athlete who assaults another on the field of play may face criminal and civil liability or, if not found guilty of a crime, may nonetheless be liable in civil assault: 'The circumstances in which criminal and civil remedies are available can and do overlap.'<sup>6</sup> Tortious liability, in cases such as trespass to the person, is provable 'on the balance of probabilities', while the criminal standard is that of 'beyond a reasonable doubt'. As such, a plea of consent to assault that succeeded in a criminal matter would not necessarily be successful in repelling a claim in tort on the same facts.

<sup>3</sup> B C Nielson, 'Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick' (1989) 74 *Lowie Law Review* 681.

<sup>4</sup> S Gardiner and A Felix, 'Juridification of the Football Field: Strategies for Giving Law the Elbow' (1994–95) 5 *Marquette Sports Law Journal* 189. For further discussion, see Chapter 3 'Sport Tribunals'.

<sup>5</sup> Annette Greenhow and Matthew Raj, 'Regulating Unsanctioned Violence in Australian Sport: Time for a Vamplew 2.0?' (2019) 23(1) *Sport in Society* 1 at 15.

<sup>6</sup> *R v Barnes* [2005] 2 All ER 113, [5].

### Different standards of proof; different liability

A criminal conviction for an on-field assault will expose the perpetrator to several possible punishments including imprisonment, financial penalty, bond or a community service order. Liability for the civil wrong of assault or trespass to the person may result in an award of ordinary damages and, depending on the circumstances of the assault, aggravated damages or exemplary damages.

The High Court of Australia in *Bradshaw v McEwans Pty Ltd* explained the difference in proof required to sustain liability as between a criminal and civil wrong:<sup>7</sup>

[T]his is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.

### CASE EXAMPLE

#### *Graves v West*<sup>8</sup>

A 'punch from behind' by Richard West to the face of James Graves, during a rugby union match between the North Sydney Club and the Manly Club in Sydney, resulted in unconsciousness, a broken jaw, lost teeth, serious injury to the face and mouth, and psychological impairment, causing Graves to retire from rugby. Immediately after the assault, West hurried from the ground. West was charged under s 35(2) of the *Crimes Act 1900* (NSW) with inflicting 'reckless grievous bodily harm', which carries a maximum penalty of 10 years' imprisonment. West was convicted and placed on a two-year good behaviour bond.<sup>9</sup> A few days after his trial, he left Australia for the United Kingdom and did not return.

<sup>7</sup> (1951) 217 ALR 1, 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ); approved by Dixon, Fullagar and Kitto JJ of the High Court of Australia in *Luxton v Vines* (1952) 85 CLR 352, 358.

<sup>8</sup> [2013] NSWSC 641.

<sup>9</sup> *R v West* (Unreported, Manly Local Court, 19 December 2011). For comparison, see below, *R v Stanley* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Levine J, 7 April 1995) where the perpetrator was imprisoned for the reckless infliction of grievous bodily harm.

Graves sued West in tortious assault.<sup>10</sup> Following West's criminal conviction, 'a reasonable doubt', there was little prospect of a successful defence on the 'balance of probabilities' standard. Davies J entered summary judgment for Graves, stating:

There are facts set out in the affidavit which prima facie demonstrate the assault by the Defendant on the Plaintiff and there is a statement of belief by the solicitor for the Plaintiff that the Defendant has no defence in the matter of liability in respect of the claim.<sup>11</sup>

...  
In my opinion, there was no reasonable basis on which the Defendant could have resisted the judgment. There was simply no defence to the liability claim.

When assessing damages, Button J stated similarly:

the documentary evidence of the plaintiff and his friend Mr Seabourne, and the extensive injuries themselves, establishes well beyond the balance of probabilities that the act causing injury (the punch to the face) was an intentional tort committed with an intent on the part of the defendant to cause injury to the plaintiff.

Button J assessed general damages at \$75,000 finding Graves to have suffered physical, but also psychological trauma. His Honour stated in summary:

I accept that the plaintiff suffered serious physical injuries. They were inflicted publicly and in the course of an activity that the plaintiff loved and has since been denied. The plaintiff was also subjected to the indignity of publicity about the matter, including about the fact that the plaintiff had not left what occurred on the rugby field there, but rather pursued it in the courts ...

... [T]he plaintiff suffered a not insignificant psychological injury that led him to suffer from PTSD and repeated intrusive panic attacks. Quite apart from that, he no doubt suffered for a time from a very real concern about the prognosis for his teeth. As one would expect, his libido suffered for a time as well.<sup>14</sup>

Suffering insult, embarrassment and humiliation, the high level of media interest and a belief that he, as an athlete, was tarnished in taking 'an on-field incident off the court, Graves also claimed \$50,000 in aggravated damages. Aggravated damages in the circumstances and manner of the wrongdoing of the defendant' to compensate the plaintiff for injury resulting from 'the circumstances and manner of the wrongdoing'. Button J rejected this claim.

<sup>10</sup> *Graves v West* [2013] NSWSC 641.

<sup>11</sup> [2013] NSWSC 641, [7].

<sup>12</sup> [2013] NSWSC 641, [20].

<sup>13</sup> *Graves v West (No 2)* [2015] NSWSC 306, [52]. As the assault was intentional, no defence under the *Liability Act 2002* (NSW) was available. See s 3B(1)(ii).

<sup>14</sup> [2015] 306, [64]–[65].

<sup>15</sup> *New South Wales v Ibbett* (2006) 229 CLR 638, [31].

Graves also claimed \$50,000 in exemplary damages, an award made where the defendant exhibits 'a conscious and contumelious disregard for the plaintiff's rights'.<sup>16</sup> Button J recognised that over recent decades the community had come to disapprove of sports violence. His Honour weighed up that a criminal conviction may follow West through his life, against the imposition of a good behaviour bond 'that did not impose any practical punishment'. He awarded Graves \$4000 and an additional \$33,000 for future out-of-pocket expenses, such as ongoing periodontal treatment.

## CRIMES OF VIOLENCE COMMON TO THE SPORTING FIELD<sup>17</sup>

Engaging in sport 'is not to enter a forum to which the criminal law does not extend'.<sup>18</sup> Athletes may be criminally liable where:

- › the sport is illegal
- › a particular act of violence exceeds the victim's consent,<sup>19</sup> or
- › a particular act of violence exceeds the legally permissible limit, notwithstanding any consent of the victim.<sup>20</sup>

Offences of violence applicable to the sporting context include:

- › sports that are illegal
- › common assault
- › offences of actual bodily harm
- › offences of grievous bodily harm
- › manslaughter.

### Sports that are illegal

Some sports, recreational activities or pastimes are impermissible under law. Where the sport is illegal, the participants risk criminal prosecution and the consent of the victim will be unavailable as a defence to any criminal charge.<sup>21</sup>

<sup>16</sup> *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129.

<sup>17</sup> The relevant state and territory criminal legislation is *Criminal Code 2002* (ACT); *Crimes Act 1900* (NSW); *Criminal Code Act 1983* (NT); *Criminal Code 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Act 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act 1913* (WA). All references in this chapter are to this legislation unless otherwise indicated.

<sup>18</sup> *R v Watson* (1975) 26 CCC (2d) 150, quoted in *R v Bertuzzi* (2004) 26 CR (6th) 71; 2004 BCPC 0472, [36] (Weitzel J).

<sup>19</sup> Discussed later in this chapter. See 'Consent and Sporting Violence'.

<sup>20</sup> Discussed later in this chapter. See 'Where Harm Exceeds Limit Permissible in Criminal Law'.

<sup>21</sup> *R v Donovan* [1934] 2 KB 498.

Sports such as professional boxing, although legal when conducted under control, are deemed illegal where the statutory requirements, such as registration, are lacking.<sup>22</sup> Some violent sports may be illegal to proscribed persons.<sup>23</sup>

Where sports are 'seriously dangerous to life and limb', the consent of the victim preclude a conviction for criminal assault.<sup>24</sup> Additionally, some sports may be deemed illegal where they tend to promote the commission of a separate crime, such as a breach of the peace.

## The offence of common assault<sup>26</sup>

Common assault (battery) results from an accused intentionally or recklessly making contact with the victim, and without physical harm resulting. 'The offence of battery ... involves the actual infliction of unlawful force on another, "be it ever so slight" ...

In contact and semi-contact sports there is little prospect of sustaining a common assault. The Canadian case of *R v Green*<sup>29</sup> involved the defendant, Green, striking his opponent, Maki, a 'half chop' to the shoulder with his ice-hockey stick, and also striking him with a glove to the face. Green was charged with common assault. The court found that Maki had previously received hundreds of facial hits, and because the assault was extremely ordinary happening in a hockey game and the players really think nothing of it, a conviction was not warranted.<sup>30</sup> Commenting further, His Honour stated:

There is no doubt that the players who enter the hockey arena consent to a great number of assaults on their person. ...

... given the permissiveness of the game and the risks that the players willingly undertake, I find it difficult to envision a circumstance where an offence of common assault could readily stand on facts produced from a hockey game occurring in the course of a hockey game played at that level. I am not talking about unprovoked savage attacks in which serious injury results.<sup>31</sup>

<sup>22</sup> See, for example, the *Combat Sports Act 2008* (NSW), s 5 of which makes illegal participation in a 'combat sport contest' if the person is not registered 'as a combatant'. Other sections focus on the registration of participants. Section 39, for example, makes it illegal for a combatant to enter a combat sport contest without a medical examination by a medical practitioner within 24 hours before the contest.

<sup>23</sup> For example, prior to the introduction of the *Combat Sports Act 2008* (NSW), females were excluded from engaging in boxing contests in New South Wales under ss 8(1) and 15 of the *Boxing and Wrestling Act 1986* (NSW). For discussion of this legislation, see *Ferneley v Boxing Authority of NSW* [2001] FCR 100.

<sup>24</sup> *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331, 339.

<sup>25</sup> See, for example, 'prize-fighting', as described in *R v Coney* (1882) 8 QBD 534.

<sup>26</sup> NT: s 187; Qld: s 245(1); Tas: s 182; Vic: s 31(2), 31(3); WA: s 222. Common law assault applies in the Australian Capital Territory, New South Wales and South Australia.

<sup>27</sup> *Fagan v Commissioner of Police* [1969] 1 QB 439.

<sup>28</sup> *DPP v JWH* (Unreported, Supreme Court of New South Wales, Hulme J, 17 October 1997).

<sup>29</sup> (1970) 16 DLR (3d) 137, [13].

<sup>30</sup> (1970) 16 DLR (3d) 137, [13]. Maki also struck Green to the groin with his hockey stick and was charged with assault causing bodily harm: *R v Maki* (1971) 14 DLR (3d) 164.

<sup>31</sup> (1970) 16 DLR (3d) 137, [12], [21]. See also *R v Gray* (1981) 24 CR (3d) 109.

Common assault includes a 'psychological' or 'apprehended' form, the gist of which is 'the creation of a fear in the mind of the person assailed that unlawful force is about to be used against him'.<sup>32</sup> Where the sport in question involves no bodily contact, a charge of apprehended assault could, in theory, be sustained against an athlete threatening, rather than touching, an opponent—for example, where a golfer or tennis player advances upon an opponent with club or racquet raised as if to strike.

## Offences of actual bodily harm

This section considers offences of actual bodily harm, whether inflicted incidentally to an assault or deliberately.

### Assault occasioning or inflicting actual bodily harm<sup>33</sup>

Assault occasioning actual bodily harm, or 'bodily harm' as it is also known, is:

given its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim but such hurt or injury need not be permanent but must be more than merely transient and trifling.<sup>34</sup>

Actual bodily harm includes injuries such as a broken nose<sup>35</sup> or 'unconsciousness, hysteria, pain and any substantial impairment of bodily function'.<sup>36</sup> It is not necessary for the prosecution to prove a specific intent to cause actual bodily harm; it is sufficient that the perpetrator possess the mens rea<sup>37</sup> for common assault.

### 'Intentionally' inflicting actual bodily harm

There is no crime known as the 'intentional infliction of actual bodily harm'. Nevertheless, a number of judgments suggest that a victim athlete will not be deemed to have consented to the deliberate infliction of actual bodily harm upon his or her person, as opposed to the incidental occasioning of harm.<sup>38</sup> In addition to 'impermissible contact', the concept finds application in the deliberate harming of a victim through a lawful contact of the game, such as a tackle. Under this wider proposition (if accepted), where actual bodily harm is intentionally

<sup>32</sup> *Rozsa v Samuels* [1969] SASR 205, 207 (Hogarth J). See also *Fagan v Commissioner of Police* [1969] 1 QB 439, 444.

<sup>33</sup> ACT: ss 23, 24; NSW: s 59; NT: s 186, Qld: ss 328, 339; SA: s 40; Vic: s 18; WA: ss 306, 317.

<sup>34</sup> *R v Donovan* [1934] 2 KB 498, 509.

<sup>35</sup> See *Watherston v Woolven* (Unreported, Supreme Court of South Australia, Johnston J, 21 October 1987).

<sup>36</sup> Vic: s 15.

<sup>37</sup> Mens rea: a guilty mind; the mental element of an offence. This may include, depending on the offence, intention, recklessness or criminal negligence.

<sup>38</sup> *Re Jewell* [1987] 1 VAR 370, 372 (Vic AAT), No. 860613, General Division Melbourne (Unreported, Rollands J, 16 January 1987), approved in *McAvaney v Quigley* (Unreported, Supreme Court of South Australia, Legoe J, 24 January 1991 and 24 January 1992) and in *Watherston v Woolven* (Unreported, Supreme Court of South Australia, Johnston J, 21 October 1987). See, in addition, *McNamara v Duncan* [1971] 45 FLR 152; *R v Leclerc* (1991) 4OR (3d) 788 (CA).

inflicted, the consent of the victim is irrelevant and a criminal offence would be committed.<sup>39</sup> Intentional harm may also constitute a tortious assault: 'in a battery there must be an intentional touching [which] must be proved to be a hostile touching'.<sup>40</sup> Moreover, 'consent cannot be taken to include physical violence ... in contravention of the rules of the game by an opposing player who intends to cause bodily harm or knows, or ought to know, that such harm is the likely result of his actions'.<sup>41</sup>

## Offences of grievous bodily harm

Grievous bodily harm is defined as 'really serious bodily harm'.<sup>42</sup> It is thought undesirable to attempt a further, or expanded, definition.<sup>43</sup> Nevertheless, grievous bodily harm has been found to include substantial loss of vision following a blow,<sup>44</sup> a broken leg, a fractured skull and a broken jaw,<sup>45</sup> or 'any permanent or serious disfiguring of the person'.<sup>46</sup> Two forms of grievous bodily harm are applicable to sport: reckless infliction of grievous bodily harm and intentional infliction of grievous bodily harm.

### Recklessly wounding or inflicting grievous bodily harm<sup>47</sup>

Sports involving body contact and collision may, through the nature of the sport or even simple physical zealotry, expose players to charges of criminal recklessness. Wounding occurs when the inner layer of the skin, the dermis, is broken.<sup>48</sup>

The fault element of 'recklessness' arises where the perpetrator realises their act may possibly cause harm to an opponent and, irrespective of that realisation, proceeds to do the act in question<sup>49</sup> or, to use a common law descriptor, the accused is mindful that harm may result but does not care whether harm 'happened or not'.<sup>50</sup> The perpetrator must have intended to perform the act that leads to injury,<sup>51</sup> although they need not have foreseen injury to the level of grievous bodily harm resulting; it is sufficient that the perpetrator realises that actual bodily harm may result. Where an accused, due to stupidity or lack of imagination,

<sup>39</sup> See discussion in 'Where Harm Exceeds Limit Permissible in Criminal Law' and 'Targeted Harm' below.  
<sup>40</sup> *Wilson v Pringle* [1987] QB 237, 252. Note that 'hostility' is not necessary to ground an assault: *Boughhey v The Queen* (1986) 161 CRL 10, 25.

<sup>41</sup> *Giumelli v Johnston* (1991) Aust Torts Rep 81-085, 68, 710.

<sup>42</sup> *DPP v Smith* [1961] AC 290, 334-5.

<sup>43</sup> See *DPP v Smith* [1960] 3 All ER 161, *R v Brown* [1993] 2 All ER 75, 78.

<sup>44</sup> *R v Salisbury* [1976] VR 425.

<sup>45</sup> *R v Gingell* [1980] Crim LR 661.

<sup>46</sup> NSW s 4.

<sup>47</sup> NSW s 35 was amended in 2007 to exclude 'malicious' and to include 'reckless'. Related provisions: ACT s 20, NT s 181, Qld s 320, SA s 23, Tas s 172, Vic s 17, WA s 297.

<sup>48</sup> *R v Smith* (1837) 8 Carrington & Payne 173.

<sup>49</sup> ACT s 19, 20, NSW s 35, SA s 23.

<sup>50</sup> *R v Stones* (1955) 56 SR (NSW) 25, 34.

<sup>51</sup> As opposed, say, to injury by accident, such as stumbling.

does not perceive this level of harm as a possible result of their act, there can be no criminal charge.<sup>52</sup> Of course, the testimony of the accused, should it be given, will be subject to cross-examination and scrutiny as to credit.

In *R v Stanley*,<sup>53</sup> Levine J determined that 'players are not to be taken as consenting to the malicious use of violence intended or recklessly to cause grievous bodily injury'. The term 'malice', which includes acts done 'recklessly' or 'wantonly', was applied by his Honour to the context of sport.<sup>54</sup> 'Malice' has been excised from s 35 of the *Crimes Act 1900* (NSW), which now requires that the accused 'is reckless as to causing actual bodily harm' and, from that contact, grievous bodily harm results. Nonetheless, the definition of 'recklessness', which is defined according to the common law, remains pertinent in respect to the word 'might', used by Hunt J in *R v Coleman*.<sup>55</sup> In considering the requirements necessary to establish statutory malice, Hunt J stated:

the degree of recklessness required in order to establish that an act was done maliciously was a realisation on the part of the accused that the particular kind of harm in fact done (that is, some physical harm—but not necessarily the degree of harm in fact so done) might be inflicted (that is, may possibly be inflicted) yet he went ahead and acted.<sup>56</sup>

## CASE EXAMPLE

### *R v Stanley*<sup>57</sup>

The appellant, Tyrone Stanley, played rugby league for Yanco in a match against Narrandera. The victim, Stephen Turner, was turning to his left to pass the ball when Stanley struck him to the right side of his head with his elbow, fracturing the jaw. Stanley, on his evidence, did not intend to inflict grievous bodily harm upon Turner, although he did intend the act of striking. He claimed he was attempting a shoulder charge. The referee and a number of witnesses gave evidence that this was not so. The term 'malice' does not require 'intention' to be present as an element of the offence; malice includes acts done 'recklessly' or 'wantonly'.<sup>58</sup> The breadth of the definition of 'malice' was, however, sufficient to ground the mens rea element of the crime and Stanley was convicted of maliciously inflicting grievous bodily harm.<sup>59</sup>

<sup>52</sup> *R v Majewski* (1976) 62 Cr App Rep 262, [1977] AC 443.

<sup>53</sup> (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Levine J, 7 April 1995).

<sup>54</sup> NSW s 5.

<sup>55</sup> (1990) 19 NSWLR 467, 475.

<sup>56</sup> Given the similarity between 'particular kind of harm' and 'actual bodily harm' in *R v Stanley* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Levine J, 7 April 1995), that case is unlikely to have been decided differently even if it had been heard under the later form of s 35.

<sup>57</sup> (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Levine J, 7 April 1995).

<sup>58</sup> NSW s 5, amended 2007.

<sup>59</sup> NSW s 35.



10 Consider the following hypothetical scenario:

Wigan, the coach of the Stumbo rugby team, revved up his players before the final against the Mallstars: 'Get out there and do whatever it takes to stop those blokes running with the ball. Won't anyone rid me of that bothersome Mounders? Give it to him so he can't stand up. And do the same to Mamacan!' Ten minutes into the game, Max from the Mallstars reached up above his head to gather a high ball. As Max jumped to catch the ball, a Stumbo player, Stathis, put his shoulder into Max's chest, breaking three ribs. The referee, Copperwokside, ordered Stathis from the field saying: 'You can't use just the shoulder in a tackle. It's against the laws of the game and dangerous.'

Twenty minutes into the game, Stumbo half-back, Sims, had a verbal altercation with Cianciolo, the Mallstars half, who was about to put the ball into the scrum. After the ball cleared the scrum, Sims and Cianciolo began to trade punches and wrestle on the ground. Sims received a black eye. Sims ripped Cianciolo's scrotum.

Thirty minutes into the game, the ball was passed to Mallstars player Mounders. Stumbo player Hunkin, who was Coach Wigan's best mate, remembered his instructions. Hunkin lined Mounders up and swung wildly with his arm. He collected Mounders on the side of the head and broke his jaw.

Thirty-five minutes into the game, Mallstars player Mamacan received the ball and as he kicked it into touch, Stumbo player Mickmick dived at Mamacan's supporting leg, rupturing the knee joint—a career-ending injury. The Mallstars captain complained to Referee Copperwokside that the tackle was deliberately designed to force Mamacan from the field. Copperwokside took no action. 'Legal tackle!' he shouted as play moved on. Slow-motion video revealed that Mickmick angled his shoulder down at the knee joint of Mamacan, with his arms positioned back alongside his body.

As the players left the field at the end of the game, Stathis, who had changed into his street clothes, confronted Mallstars player Barwarratson in the tunnel, saying 'Here's fair warning. I'm going to smash your ears.' Barwarratson glared into Stathis' face. Stathis hit him in the ear and Barwarratson fell backwards, striking his head on an Esky. Barwarratson is suffering life-threatening injuries.

Consider any liability of Stathis, Sims, Hunkin, Cianciolo and Mickmick in criminal law and tort law. Does Coach Wigan face any liability?

# CHAPTER 5

## NEGLIGENCE AND CIVIL LIABILITY

### OVERVIEW

- › Introduction
- › Negligence: Duty of care, breach and causation
- › Causation of harm
- › Removal and mitigation of negligent liability in sport
- › Dangerous recreational activities: No liability
- › Dangerous recreational activities and professional sport
- › The materialisation of an inherent risk
- › Presumption of awareness of obvious risks (and *volenti non fit injuria*)
- › Removing duty of care in recreational activities through risk warnings
- › Waiver of contractual duty of care in recreational activities
- › Contributory negligence
- › Protection for volunteers
- › Sport and the standard of care of professionals
- › No relief for intentional torts
- › Are employers in professional sport obligated to minimise the risk of harm?
- › Negligence, concussion and chronic traumatic encephalopathy

### INTRODUCTION

This chapter introduces duty of care, standard of care and causation under state civil liability legislation. It then considers provisions mitigating or removing liability for negligence under state civil liability legislation. It should be read in conjunction with Chapter 6 'Intentional Torts, Insurance and Risk Management', which considers tort under common law before reviewing insurance and risk management.

As a matter of convenience, in this chapter the various forms of tort legislation are referred to as Civil Liability Acts (CLA).<sup>1</sup> Given that a larger number of cases are in the New South Wales, the legislation of that state ('the NSW Act') is used generally to refer to the relevant provisions of all state civil liability statutes.

A number of provisions within the CLA are relevant to negligence in sport. This series of questions offers a general guide to applying the provisions in the context of negligence:

- 1 Is the defendant in breach of a duty of care to the plaintiff (s 5B(1) of the NSW Act (informed by the common law)?
  - 2 Has the defendant breached the standard of care (s 5B(2) of the NSW Act (informed by the common law)?
  - 3 Is the defendant's conduct the legal cause of harm to the plaintiff (s 5I of the NSW Act)?
- Where duty, breach and causation are established, the following questions arise in relation to relieving or limiting the defendant's liability under the CLA:

- › Is the harm an obvious risk of a dangerous recreational activity (s 5L of the NSW Act)?
- › Is the risk of harm that materialises inherent (s 5I of the NSW Act)?
- › Is the harm the result of an obvious risk (s 5G of the NSW Act)?
- › Has a risk warning been given in respect to the recreational activity (s 5M of the NSW Act)?
- › Has a contractual term excluded, restricted or modified liability (s 5N of the NSW Act)?
- › Has the plaintiff been contributorily negligent (s 5R of the NSW Act)?

## NEGLIGENCE: DUTY OF CARE, BREACH AND CAUSATION

Liability in the tort of negligence was, until 2002, largely the province of the common law. Concerns of increasing and, arguably, unreasonable negligence claims were expressed within the judiciary throughout the 1990s and early 2000s.<sup>2</sup> During the so-called 'insurance crisis' of the early 2000s, fears of further insurance company collapses led the Premier of New South Wales, Bob Carr, announcing steps to 'restore sense and order in the law of negligence'.<sup>3</sup> A 'Panel of Eminent Persons', the 'Ipp Committee', headed by Justice David Ipp, was formed by the federal and state governments in 2002 to conduct a 'Principles-based Review of the Law of Negligence'. Its brief stated: 'It is to examine a method for the reform of the common law with the objective of limiting the amount and quantum of damages arising from personal death and injury.'<sup>4</sup> The Ipp Committee

1 See *Civil Law (Wrongs) Act 2002 (ACT)*; *Civil Liability Act 2002 (NSW)*; *Personal Injuries (Liabilities and Damages) Act 2003 (NT)*; *Civil Liability Act 2003 (Qld)*; *Civil Liability Act 1936 (SA)*; *Civil Liability Act 2002 (Tas)*; *Wrongs Act 1958 (Vic)*; *Civil Liability Act 2002 (WA)*.

2 See, for example, *Tame v New South Wales* (2002) 211 CLR 317 (McHugh J).

3 New South Wales, *Parliamentary Debates (Hansard)*, Legislative Council, 8 May 2002, 1763 (185).

4 Law of Negligence Review Panel, Parliament of Australia, *Review of the Law of Negligence*, Report (the 'Ipp Report').

61 recommendations to reform the law of negligence.<sup>5</sup> From 2002 onwards, the states of Australia, initially New South Wales, introduced tort reform legislation.<sup>6</sup>

The implementation of the liability reforms, according to Professor E W Wright, appears to have 'caused a substantial decline in personal injury litigation rates in most jurisdictions. The "corrections" in the three largest states, New South Wales, Queensland and Victoria, have been particularly dramatic.'<sup>7</sup> In the same report, Professor Wright concluded that data on litigation rates provided 'no empirical foundation for the premises underlying tort law reform as a strategy for addressing the insurance crisis of 2002'.<sup>8</sup>

Although all Australian jurisdictions have introduced civil liability legislation, the common law continues to inform as to the application of certain provisions. This is especially so in regard to establishing a duty of care and whether the standard of care has been breached. Some provisions, in particular those dealing with 'dangerous recreational activity' and 'obvious risk', have unique applications extending beyond the common law.

It should be noted, however, that despite a basis in statute, the 'correct' application of the CLA may be discerned only through a preponderance of case law over time; a point made by Bryson JA in 2006, which, nonetheless, remains relevant:

It would be a difficult exercise to deal comprehensively with the provisions of Pt 1A Negligence ... of the *Civil Liability Act 2002* ... There is no general statement of purposes or of objectives [in the Act]. Some of the provisions may have been intended to restate or declare parts of the law of negligence while others change parts of that law. I have not observed any overall purpose or scheme of the amendments which can be brought to bear on the construction of any particular provision. The application of each particular provision should be considered in its statutory context and in relation to the facts of each particular case in which a litigant claims to rely on it. Broad views and insights based on them should be deferred until there has been a significant accumulation of judicial experience on the operation of these provisions.<sup>9</sup>

### Duty of care and standard of care

Section 5B of the NSW Act, similar to the civil liability legislation of other states, 'substantially reproduces the [common law] test for breach of duty',<sup>10</sup> and the common law test for 'standard of care' in *Wyong Shire Council v Shirt*.<sup>11</sup>

5 Ipp Report, [1.3].

6 *Civil Law (Wrongs) Act 2002 (ACT)*; *Civil Liability Act 2002 (NSW)*; *Personal Injuries (Liabilities and Damages) Act 2003 (NT)*; *Civil Liability Act 2003 (Qld)*; *Civil Liability Act 1936 (SA)*; *Civil Liability Act 2002 (Tas)*; *Wrongs Act 1958 (Vic)*; *Civil Liability Act 2002 (WA)*.

7 E W Wright, *National Trends in Personal Injury Litigation: Before and After 'Ipp'*, commissioned by the Law Council of Australia (26 May 2006) 3.

8 E W Wright, *National Trends in Personal Injury Litigation: Before and After 'Ipp'*, commissioned by the Law Council of Australia (26 May 2006) 3.

9 *C G Maloney Pty Ltd v Hutton-Pots* [2006] NSWCA 136, [177].

10 *Simmons v Rockdale City Council* [2013] NSWSC 1431, [454].

11 (1980) 146 CLR 40.

## Section 5B(1): Duty of care

Section 5B(1) provides:

- A person is not negligent in failing to take precautions against a risk of harm if:
- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
  - the risk was not insignificant, and
  - in the circumstances, a reasonable person in the person's position would not have taken those precautions.

A 'not insignificant' risk does not of course mean a 'significant' risk; it is the circularly, a risk that is more than insignificant. The wording, nonetheless, sets a demanding threshold for plaintiffs than the common law standard of 'not fanciful'.<sup>12</sup>

There is no need in law to take steps to minimise a risk unless it is first established that the defendant was under a duty of care to the injured party. In *Streller v Albany*,<sup>13</sup> a 16-year-old boy, who was an accomplished competitive diver, suffered quadriplegia after being swung from a rope on a tree overhanging the Murray River and performed a backflip into the water, striking his head on the sandy bottom. On the basis that the defendant had regularly removed ropes used for such purposes from trees along the riverbank, the plaintiff stood on land occupied by the defendant, and that steps had been worn into the ground at the site of the tree, the plaintiff claimed 'an assumption of responsibility on the part of the defendant for those who enjoyed the defendant's parklands, of which the trees and ropes were natural extensions'.<sup>14</sup> Latham J found that although the Council had a duty to exercise reasonable care to persons accessing its land, entrants were also obliged to 'exercise reasonable care for their own safety'.<sup>15</sup> Contrary to the plaintiff's claims, his Honour determined that the Council had not encouraged recreational use of the subject tree and, by removing ropes as soon as possible after their discovery, it had in fact discouraged such activity.

Determining the precautions to be taken by a 'reasonable person' requires 'starting from known events and asking, in a prospective, objective way, what a reasonable person would have done in the circumstances. The reasonable precautions of which s 5B(1) speaks must be assessed prospectively', not with hindsight.<sup>16</sup> As an overarching maxim, it has been observed: 'If negligence law is to serve any useful social purpose, it must ordinarily be applied with the foresight, reactions and conduct of ordinary members of the community, not the expertise, of the experts in that particular community'.<sup>18</sup>

<sup>12</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40, [13].

<sup>13</sup> [2012] NSWSC 729. See also *Shaw v Thomas* [2010] NSWCA 169, [44].

<sup>14</sup> [2012] NSWSC 729, [40].

<sup>15</sup> [2012] NSWSC 729, [48].

<sup>16</sup> Although no duty was found, Latham J also concluded that the plaintiff had engaged in a recreational activity under s 5L of the NSW Act.

<sup>17</sup> *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263, [53].

<sup>18</sup> *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, [2003] HCA 51, [34] (McHugh J).

## A common law foundation remains

Although the various state civil liability statutes guide much of the law of negligence, the common law continues to influence the application of s 5B(1).

As civil liability legislation does not define when a duty of care is owed, a number of judgments indicate that the common law 'neighbour principle' espoused by Lord Atkin in *Donoghue v Stevenson*<sup>19</sup> continues to apply: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' Ipp J remarked in *Waverley Council v Ferreira*:<sup>20</sup>

At common law, the court is required to identify what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk ... This is consistent with s 5B(1) of the *Civil Liability Act* ...<sup>21</sup>

In *Sheehan v State Rail Authority*<sup>22</sup> Beazley JA stated that determination of a duty of care 'remains subject to the common law'. In a different case Buss JA commented similarly:

I am satisfied on my own analysis that s 5B of the CLA relates to breach of a duty of care and does not modify or supplant the common law principles which determine whether a duty of care exists or not.<sup>23</sup>

Nonetheless, in considering a claim in negligence:

[E]ven though there are few, if any, differences between the common law and the CL Act regarding breach of duty, the proper approach is to commence ... by having regard to the CL Act first.<sup>24</sup>

## Section 5B(2): Standard of care

Section 5B(2) addresses the precautions to be taken by a reasonable person in respect to a risk of harm:

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

- the probability that the harm would occur if care were not taken,
- the likely seriousness of the harm,
- the burden of taking precautions to avoid the risk of harm,
- the social utility of the activity that creates the risk of harm.

<sup>19</sup> [1932] AC 562, 599. See also Chapter 6 'Intentional Torts, Insurance and Risk Management'.

<sup>20</sup> [2005] NSWCA 418.

<sup>21</sup> [2005] NSWCA 418, [27]. His Honour's comment would seem also applicable to s 5B(2).

<sup>22</sup> [2009] NSWCA 261, [55].

<sup>23</sup> *Department of Housing and Works v Smith (No 2)* [2010] WASCA 25, [77].

<sup>24</sup> *Dodge v Snell* [2011] TASSC 19, [12] (referring to *Adeels Palace Pty Ltd v Mourbarak*; [2009] HCA 48).

A common law foundation remains

The identifiers of the need for precaution are reflective of the 'calculus of negligence' described by Mason J in *Wyong Shire Council v Shirt*<sup>25</sup>—a case where a water-skier misread an ambiguous warning sign describing 'deep water' and was rendered paraplegic after coming off his skis in shallow water. Once foreseeability of harm is established, 'the tribunal of fact [is] to determine what a reasonable man would do by way of response to the risk'.<sup>26</sup> It is 'only when' the identifiers listed above 'are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position'.<sup>27</sup> As such, 'notwithstanding the significant magnitude of risk of harm', in some cases 'the degree of probability of its occurrence cannot be said to justify ... difficulty, expensive and inconvenient alleviating actions'.<sup>28</sup> Section 5B (2) also requires that the plaintiff show there was a reasonable, practicable precaution that could have been taken to avoid the risk of harm.<sup>29</sup>

The case of *Bolton v Stone*<sup>30</sup> has been described as a classic source of the calculus of negligence.<sup>31</sup> Stone was injured when a cricket ball, hit 70 yards to clear a 17-foot fence, struck her on the head as she was waiting on the footpath at the front of her garden. Was the cricket club negligent? The court, in finding for the club, considered the infrequency with which balls were hit over the fence and, in particular, the impracticality of taking precautions to prevent such an occurrence. The loss of social utility should certain sports be extinguished was also a relevant matter.

Although the club had a duty of care not to injure, not all foreseeable harm would be actionable. Lord Oaksey commented that while the standard of care is that of the ordinary careful man ... an ordinary careful man does not take precautions against every foreseeable risk'.<sup>32</sup> In short, the risk of injury to Stone was extremely small.

The relevance of the 'calculus of negligence' extends to those engaging in a sport that is not a 'dangerous recreational activity'. Ironically, the 'serious risk' component under the CLA calculus of negligence is redundant where a negligent athlete injures another competitor while engaged in a dangerous recreational activity.<sup>33</sup>

### Applying the components of the 'calculus of negligence'

In considering s 5B as a whole, 'it is necessary to weigh the factors set out in s 5B(1) against those in s 5B(2) (to the extent, of course, to each being applicable to the particular circumstances of

25 (1980) 146 CLR 40. In *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, [2], Gleeson CJ and Kirby J rejected the use of the word 'calculus': 'What is involved in the process ... is not a calculation, it is a judgment'.

26 (1980) 146 CLR 40, 47.

27 (1980) 146 CLR 40, 48.

28 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, [202].

29 *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316.

30 [1951] AC 850.

31 F Trindade, P Cane and M Lunney, *The Law of Torts in Australia* (4th edn, Melbourne: OUP, 2007) 432.

32 *Bolton v Stone* [1951] AC 850, 863.

33 See extensive discussion below.

the case'.<sup>34</sup> All components of s 5B(2) are to be considered together and in conjunction with 'other relevant things'. In *Dodge v Snell*,<sup>35</sup> Wood J noted that the purpose of the calculus was to 'ensure a balancing exercise be undertaken and that considerations that weigh against the taking of precautions be considered'. The purpose of s 5B(2) was stated in *Waverley Council v Ferreira*:<sup>36</sup> 'to avoid conflation of the concept of foreseeability of risk with the conclusion that a reasonable person would have taken precautions against it.' Importantly, it can be noted that:

[a] limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid.<sup>37</sup>

To illustrate, in *Wilson v Nilepac Pty Ltd*<sup>38</sup> the plaintiff, Wilson, a 40-year-old barrister, suffered a prolapsed disc and nerve compression to the right side of his lumbar spine when following the exercise instructions of a personal trainer. The trainer was assigned to Wilson by the owner of the gym, was 20 years old and had only recently completed qualifications as a fitness instructor. The injury occurred when Wilson performed a 'horizontal leg press' followed by a 'medicine ball exercise' that required him to do a sit-up (or perhaps a 'crunch'), catch a medicine ball thrown to him by the instructor, and rotate from side to side holding the ball and touching it to the floor, alternating between his right and left. McCallum J at trial found there was no breach of duty. Her Honour determined, in accordance with s 5B(2)(d) of the NSW Act, that personal training studios provide an activity of high social utility (citing such functions as a 'meeting place' and 'promoting longevity'), and stated that 'the legislation appears to assume that it might be reasonable to take fewer precautions against the risk of harm'.<sup>39</sup> Tobias JA (Beazley JA concurring) in the Court of Appeal disagreed, applying a narrow definition of social utility:

[T]he Act makes no such assumption ... what the subsection requires to be taken into consideration is the social utility of 'the activity that creates the risk of harm.' In the present case that activity was the medicine ball exercise. Of itself it had no relevant social utility let alone a high social utility—quite the contrary.<sup>40</sup>

His Honour went on to state: 'In any event the social utility of the relevant activity is but one factor which s 5B(2) requires to be taken into account ... as the subsection makes clear, each of the four subparagraphs is to be considered "amongst other relevant things".<sup>41</sup> Importantly, Tobias JA explained that s 5B does not suggest that 'the standard of reasonable care requires the taking of fewer precautions against an acknowledged risk of harm simply because the activity which creates that risk has some social utility'.<sup>42</sup>

34 *Simmons v Rockdale City Council* [2013] NSWSC 1431, [468].

35 [2011] TASSC 19, [17].

36 [2005] NSWCA 418, [47].

37 *Wallace v Kam* [2013] HCA 19, [24].

38 [2009] NSWSC 1365.

39 [2009] NSWSC 1365, [94].

40 *Wilson v Nilepac Pty Ltd* [2011] NSWCA 63, [129].

41 [2011] NSWCA 63, [130]. Emphasis in original.

42 [2011] NSWCA 63, [130].