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Liability for Professional Athletes' Injuries: a comparative analysis of where the risk lies.

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Summary

Over the past 20 years, there has been an unprecedented increase in sports labour migration, international competition and litigation arising from sports injuries. As athletes move between jurisdictions and play abroad more frequently, the legal norms that they encounter are often radically different from those with which they may be familiar in their home country. This paper examines the similarities and differences in approach to cases of sporting negligence in England and Wales and France. In particular, it focuses on the substantive law applicable to such sports torts and the problems that are faced by an injured professional athlete who is seeking compensation because of the different approach to the burden of risk in these jurisdictions. The paper begins by outlining this increased internationalisation of sports employment before comparing the applicable law of England and Wales with that of France. It concludes by examining whether these fundamental differences in the burden of risk should lead to a more sports-specific approach to this field of dispute resolution.

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Introduction

The rapid commercialisation and commodification of sport in recent years, particularly of professional sport, has been matched by the concomitant phenomenon of the juridification of sport (Gardiner et al 2005, p 84 and Foster 2003). In the space of little more than 20 years, sport has moved from a position where it operated almost unhindered by legal regulation to a situation where almost any decision of a governing body, or any action of a player, can result in the threat of, if not actual, litigation. Challenges to the primacy of governing bodies' decision making powers are made regularly. The most famous is still the successful challenge to football's transfer system in *Union Royale Belge des Sociétés de Football Associations ASBL v Jean-Marc Bosman C-415/93* [1996] 1 CMLR 645 (*Bosman*). The next is likely to be *Sporting Club Royal Charleroi v Federation of International Football Associations (FIFA)*, currently awaiting a hearing on an Article 234 reference to the European Court of Justice. This case involves a claim by the Belgian football club, Royal Charleroi, that FIFA should pay compensation of €1.25million for the injuries caused to its star player, Abdelmajid Oulmers. Despite Royal Charleroi's claim that Oulmers was injured and should be rested, FIFA ordered that he play in a non-competitive friendly match between Morocco and Burkina Faso, during which his injuries were exacerbated. Oulmers was uninsured whilst on this compulsory international duty leaving Charleroi to pay the costs of his being out of the game for seven months and compensation for having lost an opportunity to play in the Union of European Football Associations' (UEFA) lucrative Champions League competition.

This resort to legal fora for dispute resolution has been highly controversial and often lacking sufficient theoretical underpinning and cultural support (Gardiner et al 2005, Ch 16). This position can be best summed up by the comments of Lord Donaldson MR in *Condon v Basi* [1985] 1 WLR 866, the first reported English case involving participator violence, when he stated that,

“It is said that there is no authority as to what is the standard of care which covers the conduct of players in competitive sports generally and, above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players but that appears to be the position...It is not for me in this court to define exhaustively the duty of care between players in a football game.”

Not only was there no sports specific precedent on which the court could rely, the appellate judges did not see any need to create one at that time. Although the law of the land does not stop at the touchline, its acceptance as a mechanism for the

resolution of sports disputes has not been universal (Gardiner 1993 and 2005). This in turn has led to much confusion over whether recourse to the law is appropriate in such cases and if it is, how should that law be defined. There are further difficulties concerning the appropriate person or body that an injured athlete can pursue. Potential defendants can include the player who caused the injuries, *Condon*, the employing club, *McCord v Cornforth and Swansea City Football Club*, unreported 19 December 1996, High Court, the referee, *Vowles v Evans and Welsh Rugby Union* [2003] EWCA 318, [2003] 1 WLR 1607, and the governing body of the sport, *Watson v British Boxing Board of Control* [2001] QB 1134. These issues are particularly well documented in the UK, as will be seen below.

With the increasing internationalisation of professional sport (Maguire and Bale 1994, Lawrence 2005, Morrow 2003), however, it is important to look beyond a player's home jurisdiction and examine how foreign legal systems would approach similar issues of liability. Focusing on the law of tort and how it is used to by athletes to recover damages for sports injuries, this paper begins by outlining how sport has become more international in its outlook in recent years, highlighting specifically the increased opportunity that some players have to play, and be injured, whilst playing abroad. It then moves on to explain how during this period there has been a massive increase in the use of the law by players seeking to regulate their various sporting relationships, including the clarification of their contractual and employment status and their ability to recover damages from a variety of sources for injuries sustained whilst playing sport.

The main part of the paper then analyses the similarities and differences of approach to such cases that can be found between two of the major European legal cultures; the common law as applied in England and Wales and the Code Civil as applied in France. The similarities include the examination by the courts of both jurisdictions of each injurious act and whether such is one of the inherent risks that must be run by all participants in that sport. The differences spring from the contrasting regulatory and compensatory regimes in place in both jurisdictions. In the UK, sporting relationships and tortious compensation claims are matters of a purely private nature. In France, both sport and compensation for injuries have a significant public aspect to them. The analysis of this public versus private approach to compensation leads to an examination of on whom the risk for sports injuries ought to lie. Finally, it is proposed that in the current climate of increased regulation and standardisation of sporting relationships, as can be seen in the field of contractual and employment relations, it is time for a greater degree of harmonisation of the compensation mechanisms available to injured athletes.

The Internationalisation of Sport and Player Migration

Labour migration has become an integral part of the commodification of modern sports (Maguire and Bale 1994, Maguire and Pearton 2000). With professional athletes being recognised as workers, instead of simply players *Walrave and Koch v Association Union Cycliste Internationale* 36/74 [1974] 1 CMLR 320, sport has seen similar patterns of labour migration as other industries, where the top performers follow the money and prestige to the most lucrative markets. This process of sports labour migration is not a new phenomenon but is one, particularly in the post-*Bosman* era, that is becoming more prevalent and more widespread both in terms of

geographical scope and the range of sports affected. Interconnected with this process are general trends of globalization and the globalization of sports in particular.

For sport, this process of globalization is evidenced by the proliferation of international competition, whether in the form of major tournaments such as the IAAF World Athletic Championships, or the expansion of existing competitions, such as UEFA's Champions' League, has seen increased opportunities for professional sports participants to ply their trade abroad. For example, when Liverpool Football Club won the UEFA Champions Cup in 1983, they played a total of nine matches in the competition. To win the same competition in 2005, now renamed the UEFA Champions League, Liverpool played 15 games.

Rugby union has seen an even bigger increase in the volume of international competition since the sport turned professional in 1995. The intervening 10 years have seen the introduction at club level of two European competitions, the European Rugby Cup starting in 1995 and the European Challenge Cup in 1996 (ERC Rugby 2005), and the establishment of the cross-border Celtic League in 2001 for the leading teams from Scotland, Wales and Ireland (Celtic League 2005). At international level, the 5 Nations Championship became the 6 Nations Championship in 2000 (6Nations 2005) and November sees the southern hemisphere nations touring Europe with reciprocal matches occurring at the end of the European season (RFU 2005a).

With every additional game played abroad, players need to be aware not only of the tortious and insurance rules in their home jurisdiction, but also those of the foreign jurisdictions in which they are playing. The different laws, compensation systems and, at times, interpretations of the applicable playing norms can mean that a different, or unexpected, outcome could follow a player being injured, or their injuring of a co-participant. The main area of concern is not about sports labour migrants who settle and are treated as workers in a new jurisdiction, but about those who perform in a different jurisdiction for the duration of a single game or tournament or who are 'sporting nomads', such as professional golfers and tennis players, who have no fixed playing base (Maguire and Bale 1994).

The Juridification of Sport

Alongside, and perhaps symbiotically linked to, the internationalisation and commercialisation of sport is its increasing juridification (Gardiner et al 2005, Foster 2003, Parrish 2003, Ch 1 and Lewis and Taylor 2003, Ch A1). To date, the most high profile cases have involved disputes over the application of Article 39 of the European Community Treaty, which guarantees the free movement of workers, to sporting relationships. From the early 1970s, EU law has been used to uphold the principle that rules of a purely sporting nature would not be subject to EU regulation, whilst those having an economic impact would be expected to conform to the provisions on free movement and competition law, (Walrave).

The most famous of this line of cases is still *Bosman* (Blanpain and Blanpain 1996). At the end of his fixed-term playing contract with the Belgian football club RC Liege, and with negotiations over a new deal faltering, *Bosman* arranged to move to France to play for US Dunkerque. RC Liege would only allow the transfer to proceed on payment of a transfer fee, despite the fact that *Bosman* was, in effect, no longer

employed by them. *Bosman*'s claim that the ability of a former employer to demand a transfer fee after the end date of the employment contract was a breach of his right as a worker to move freely around the European Union to take up offers of employment was upheld by the European Court of Justice.¹

The impact of this case has been much more far-reaching than was first contemplated by either the European Commission or football's world and European governing bodies, FIFA and UEFA respectively. The ruling has not only led to the end of the ability of a former employing club being able to demand a transfer fee, or compensation, when one of its former employees moves to a new club after the end of their fixed term playing contract. It has subsequently seen the complete overhaul of the transfer system, the standard playing contract and the regulation of the employment relationship between a player and the employing club (FIFA 2005a).

Despite the high profile nature of *Bosman* and its progeny, its relatively limited application to professional sports has meant that the most commonly reported cases in the UK continue to concern sports injuries (Grayson 1999, p 24). Where injury was once considered to be an inherent part of playing sport, it is now often seen as the setting for litigation. The pace at which the law has developed in this area has been dramatic. Whereas in 1985 the Master of the Rolls was able to observe that there was no available authority on which to rely in reaching judgment in *Condon*, there is now authority from either the Court of Appeal or the High Court to cover almost all causes of action against any defendant who has caused injury to an athlete (Gardiner et al 2005, Ch 16). As will be seen below, a similar development of the law has occurred in France.

As the law of negligence continues to evolve throughout the courts of Europe, it has become important to determine whether a common approach to compensation for sports injuries should be developed. At a basic level, this may help the players to have a greater knowledge of their legal and insurance rights and responsibilities when they take to the field of play. Alternatively, it would enable the employing clubs, officials and governing bodies to plan appropriate contingencies. Perhaps more importantly, it may also ensure that the turmoil created by *Bosman* is not repeated in another field of sports litigation.

Negligence Actions for Sports Injuries in England and Wales

The application of the law of negligence to cases involving sports injuries has developed rapidly in England over the past 20 years (Gardiner et al 2002, Ch 16). The initial failure of the Master of the Rolls in *Condon* to provide a sound theoretical basis for future decisions has led to some unnecessary confusion in this area. Although the law has now achieved a level of stability, problems continue with the definition of the applicable standard of care and the amount of evidence required to prove fault in cases of sports negligence. Further, in contrast to the position in France, the lack of a state-sponsored insurance and compensation scheme for non-criminal injuries and the often inadequate levels of private insurance amongst English sports participants, often

¹ A fee can still be claimed, following negotiation by the clubs, if a player is still under contract to the original employing club. A further point made by the Court was that nationality quotas restricting the number of foreign players that could be fielded by a team were also illegal.

means that an injured player's only option is to resort to an action in negligence. This too has fuelled developments in this area.

The law of negligence as applied to sports torts is, prima facie, the same as is applied to determine negligence in any other field of activity and is based on Lord Atkin's 'neighbourhood test', *Donoghue v Stevenson* [1932] AC 562. Thus the defendant must owe to the claimant a duty to take reasonable care not to cause him harm; the defendant must have breached that duty by falling below the standards of behaviour acceptable for that particular activity and that reasonably foreseeable harm must have been caused as a result of the breach of duty. In *Condon*, it was established that participants in a sporting contest owe a duty to all other participants to take reasonable care not to cause them harm. The existence of this duty has not been challenged since. The problems that have arisen are in respect of the degree of carelessness that is required of a defendant in order to establish negligence. On this point, the court in *Condon* failed to give any guidance.

The difficulty faced by a claimant is in proving that the acts of the defendant fell below the standard of the reasonable sportsman. Not all injury-causing acts are negligent per se, particularly in contact sports such as football and rugby and high risk activities such as equestrian events, where serious injuries occur even when all players are playing within the rules of the particular sport. Thus, the question that needed to be decided by the courts post-*Condon* was whether a breach of the constitutive rules of a sport should be determinative of liability or whether some other standard should be applied.

All sports are played according not just to their formal constitutive rules but also in accordance with the informal and interpretative norms adhered to by players and officials. Conduct that is technically unacceptable according to a strict interpretation of the constitutive rules may be considered to be the normal and accepted way of playing the sport by those who actually play it (Williams 1962). This internal 'playing culture' of a sport often reflects more accurately the way that a sport is played than do the rules of the game, if only because a lack of perfection in players' abilities is natural in any sport (Gardiner et al 2002, p 606-612 and 630-638).

It is this standard that was developed by the Court of Appeal in *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054, (2002) PIQR 6, and which has been applied by the English courts in their more recent decisions. In reviewing the law as it applies to sports cases, the Court of Appeal upheld several common themes whilst finally providing the detail that was missing in *Condon*. At paragraph 37, Judge LJ held that each participant in a lawful sporting contest owes a duty of care to all other participants. Secondly, that the duty was defined as being to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to other participants. Thirdly, that the prevailing circumstances should include the sport's objectives, the demands it makes upon the contestants, its inherent dangers, its rules, conventions and customs and the standards, skill and judgement that may be reasonably expected of a participant. Fourthly, it was noted that bearing in mind the nature of sport and of the test as outlined, the threshold of liability will be high and should amount to proof of something more than a mere error of judgement or a lapse of skill or care. Finally, it was held by the Court that, in practice, it may be difficult to prove a breach of duty unless the claimant can prove that the defendant's actions

amounted to a reckless disregard for the claimant's safety, although as explained below, this should not be mistaken for an assertion that 'reckless disregard' is the appropriate standard of care in sports injury cases.

The third, fourth and fifth points are of particular interest here. The third point made by the Court introduces the idea of the playing culture of a sport into English law and explains how subsequent courts can define this concept. The Court provides a test that is generally applicable to sport but provides sufficient detail that it can be, and has been, applied to a range of sports across a range of playing abilities. Trial courts can now determine whether a particular act was acceptable to, and expected by, those who play the sport at that level. If it is beyond that which is acceptable to players of that sport, then negligence is established. If it is considered to be acceptable conduct and, therefore, an integral part of the playing of the game carrying the normal, inherent risks of participation, then the action will fail. This is, of course, subject to the court having the overriding power to declare any act unacceptable should it feel the need to do so.

The fourth and fifth points can be taken together. Something more than an error of judgement or lapse of skill is required. The reasoning inherent within this is that no sports participant is capable of perfection at all times, regardless of how hard they may strive for it. Errors, misjudgements and mistimings are an integral part of all sports. In order to protect the dynamism and excitement inherent in sport, the degree of carelessness required by the court goes beyond simple mistakes. The reference to reckless disregard stems from *Wooldridge v Sumner* [1963] QB 43, a case involving an injury to a spectator (McArdle 2005). The Court in Caldwell made it clear that there is no separate test, or new tort, of acting with reckless disregard towards another person. Instead, by linking this statement to the fourth point they are again highlighting that behaviour in sport is based on a different understanding of normative behaviour and that courts should not be recompensing the unfortunate accidents that can occur in fast, physically combative, dynamic sports. What the Caldwell restatement of the law does clarify is that it is only behaviour that goes beyond the norm, beyond the playing culture of a sport, that should be found to be negligent.

Once it has been proved that the defendant-player has acted negligently, the vicarious liability of the employing club will be relatively straightforward to establish. Professional players will have a contract of employment with the club for which they play. As long as the injuries are caused during the course of the player's employment, in other words during the game, the club will be vicariously liable, *McCord, Pitcher v Huddersfield Town FC* unreported 17 July 2001, QBD and *Gaynor v Blackpool FC* [2002] CLY 3280. Where the line is to be drawn between actions that are within the course of the employment and those that are outwith it is unclear (James and McArdle 2004). It is likely, however, that any injury-causing act except fighting at some distance from the play will be considered to be within the course of a player's employment. This will include acts of deliberate foul play and perhaps even some acts of dangerous play (James 2001).

Injured players have also brought actions against a number of other defendants where the damage has not been caused, in legal terms, by an opponent player. In *Vowles and Watson*, successful claims were brought against a referee who was found negligent for failing to control adequately the setting of scrummages in a game of rugby union and

a governing body for the inadequacy of the safety guidelines provided to boxing promoters respectively. Those actions that have failed on the evidence include *Wattleworth v Goodwood Road Racing Company Ltd* [2004] EWHC 140, [2004] PIQR P25, involving a claim that the owner, national governing body and international federation had in place defective procedures for checking the safety of a motor racing circuit. Although the action failed, the Court did not dispute the availability to a claimant of the opportunity to bring an action against such diverse parties.

After some years of confusion, the law applicable to sports torts is now relatively stable. The Caldwell criteria have added a degree of pragmatism into the law that was previously lacking. The lack of a state-sponsored compensation scheme, however, ensures that the risk of sports injuries lies with private parties. In the first instance, the risk of injury falls squarely on the injured player, who will need to identify an insurance policy against which to claim, or a culpable party against whom to commence proceedings. This is tempered by a claimant's ability to sue almost anyone connected with the game when searching for an appropriate defendant. There are no limits on who can be sued (in *Vowles* there were seven separate defendants in the initial pleadings), nor on the level of formality of the game where the injury was sustained, including training sessions *Day v High Performance Sports Ltd* [2003] EWHC 197, nor on the type of sport that is being played, *Lyon v Maidment* [2002] EWHC 1227, involving a skiing accident. The main problems for a claimant are in producing sufficient evidence of negligence in the face of the vagaries of the adversarial system of litigation that requires a finding of fault before compensation can be paid.

Negligence Actions for Sports Injuries in France

The basic law of negligence that is applicable to sports torts in France is strikingly similar to that which is applicable in England. As will be seen below, French litigation, as in England, is based on the vicarious liability of the defendant-player's employing club. The most complex element of each case is the court's need to determine which actions of a defendant-player are an integral part of the playing of the game and give rise to certain and specific inherent risks of injury, and which are not. Again, this is a problem common to both jurisdictions.

French actions for sports injuries, however, differ in one very important contextual aspect. Every person who is either a French national, or who is officially resident in France, or who works or studies in France and holds a valid 'carte de séjour', will have a personal social security number. According to the Code de la Sécurité Sociale Article L454-1, this entitles the holder to claim from the state free or subsidised medical treatment and at least a basic level of compensation for their injuries. This includes injuries that are caused whilst playing sport. This state-sponsored medical and personal injury insurance scheme is administered by each Département, or regional government, through its Caisse Primaire d'Assurance Maladie (CPAM).

Private actions against defendant-players and their employing clubs are brought only for enhanced payouts for specific complex treatments or to claim the shortfall where a treatment is only subsidised rather than free. As the payment from an injured player's home Département's CPAM is guaranteed, regardless of the degree of culpability of

the defendant-player, the courts in France have developed a much stricter interpretation of what is and what is not an inherent risk of playing sport compared with that applied in England.

Thus, unlike in England, the question is not whether a claimant should receive compensation for the injuries caused by the negligent act of the defendant, but instead who should pay for those injuries and how much should they pay. As the state is always there to provide some degree of compensation to the claimant, the need to find personal fault is less marked than it is in England. This in turn has led to a less flexible interpretation of whether or not a particular act of the defendant-player is an inherent risk of playing the game. The focus of the actions is, therefore, less on the quality of the defendant's play and more on the appropriateness of where the risk should lie; with the state or with the private club and its insurance policy.

The applicable law for sports torts of this kind is found in Articles 1382-4 Code Civil:

1382 Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

1383 Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.

1384 (1) A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.

(5) Masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed.

The basis of any claim of negligence brought by an injured player is, therefore, Article 1384(1), which provides that a person is liable for the damage caused by his own actions. This is supplemented by the specific vicarious liability provision at 1384(5) that employers are liable for the injurious actions of their employees that occur during the course of their employment. Actions should be brought under 1384(5) specifically and not simply under Article 1384(1) for a finding of vicarious liability, *X v Club Rugby de Aureilhan*, *La Semaine Juridique – Edition Générale* 22/03/2000 p50. If the defendant-player is negligent according to Article 1382, the employing club will be responsible under Article 1384(5) if the incident occurred in the course of the player's employment or during an event organised by the employer.

Actions against an individual player alone are unheard of. All sports participants must sign up to their club's insurance cover before they are allowed to participate. The clubs themselves are not allowed entry to a competition unless they have adequate insurance in place and the competition organisers must also have insurance in place (Cass. Civ. I, 16 juin 1998, No 173 D). Thus, an injured sports participant will first of all look to his own Département's CPAM for medical cover and compensation. If enhanced damages or payment to indemnify the injured player for a shortfall in the CPAM award are sought, the claimant can bring an action in vicarious liability against the defendant-club. If this action fails, the claimant will still receive the CPAM payment.

The action against a defendant-club, brought under Art 1384(5), is very similar to the claim of vicarious liability in English law. There must be a valid contract of employment in existence between the employer-club and employee-player (see FFF 2005). Once the contract's existence has been established, Article 1384(5) can be applied. Yet the scope of Article 1384(5) has been reduced dramatically in its application to sports torts. Originally, an employer-club was automatically liable for any injury caused by an employee-player during the course of a sporting competition, JCP 1995, II, 22550: Case *UAP & autres v Rendeygues*, Case *USPEG v Fédération Française de Rugby*. This was, in effect, a form of strict liability as the fault of the defendant-player did not have to be proven. This has now been made more similar to the English position where the claimant can only succeed against the defendant-club on proof that the defendant-player was in some way at fault for the injuries caused, D 2005, 40: Case *Association Bleuets Labatutois v Destizon*. Thus, it is at this stage that the French courts must begin to examine the playing culture of the sport and to determine whether or not the injury-causing contact was one of the inherent risks of the particular game (James and McArdle, 2004). It is also at this stage that French law begins to depart from English law.

Firstly, it appears from the judgments of Cour de Cassation that a club cannot be vicariously liable for the actions of its players if the injuries that they cause are inflicted during the course of a non-competitive game, or friendly, or during a training session, Cass. Civ II, 13 janvier 2005, No 03-18617 and Cass. Civ. II, 13 janvier 2005, No 03-12884. This is a substantial difference to English law which takes into account the nature of the game or whether it was a training ground incident as one of the 'relevant circumstances' of the negligent conduct, Day.

Secondly, when reviewing the operation of 'la théorie de l'acceptation des risques', or voluntary assumption of risk, the Cour de Cassation has held that players not only agree to run the risk of injuries being caused to them during non-competitive friendly games and training sessions, but also to injuries caused from foreseeable risks and to injuries caused from risks inherent in the normal playing of the game. Thus, in Cass. Civ. II, 13 janvier 2005, No 03-12884, a claimant's action failed despite the fact that the court held that the defendant-player, the opposing goalkeeper in a football game, had deliberately thrown the ball at the claimant's head with such force that he suffered a sub-dural haemorrhage. The throwing of the ball was an integral part of the game and being hit on the head an inherent risk, despite the deliberateness of the goalkeeper's actions.

In each of these situations, it is likely that an English court would have reached the opposite conclusion. In the first case, the fact that the game was a friendly would not be a bar to a claim, but a relevant circumstance to be taken into account. There are no automatic bars of this kind in the English cases. The court will simply ask itself whether the injury-causing act was within the playing culture of the sport and therefore an inherent risk of participation, or whether it was far enough below the expected standard of play to constitute negligence.

In the second, the deliberateness of the goalkeeper's act would have been taken into account and is likely to be seen as negligent play rather than an inherent risk to be accepted and guarded against. Although a goalkeeper must distribute the ball to other

members of his team in accordance with Law 12 of the Laws of Football (FIFA 2005b), it is at least arguable that it is falling below the standard of play of the reasonable goalkeeper to throw the ball deliberately and with such violent force at the claimant's head. It would appear that, as in *X v Aureilhan*, a defendant-player must have to be acting way beyond accepted playing norms, for example fighting, for a French claimant to succeed.

Once again, however, the French cases must be seen in the light of the ability of the French player to make a claim under the CPAM scheme, whereas an English player's only recourse is against the person who caused their injuries and/or their employer. This legal and cultural difference of approach to the distribution of the risk has played a significant role in the development of the tests for liability in England and France.

Finally, it was held in Cass. Civ. II, 8 avril 2004, No 03-11653 that where an injured player has chosen only to claim from his Département's CPAM, the CPAM cannot claim a reimbursement from the player who caused the injuries, nor from that player's employing club. As most of the reported cases in England have been funded by insurance companies seeking to establish which of them will bear the burden of paying compensation to the injured party,² it again becomes apparent that the fundamental difference between how the French and English legal systems approach such cases is based on different notions of where the risk should lie (see also McArdle and James 2005).

Thus, the basic approaches are the same in both French and English law. First, the claimant must establish the fault of the defendant-player by identifying the negligent injury-causing act. Secondly, a contract of employment must be identified to enable the claimant to proceed on the basis of vicarious liability against the defendant-club in order to make a claim against the club's insurance policy. The public policy underpinning the French courts' decisions, however, makes the operation of the test to determine whether an act is an integral part of the playing of the game that gives rise to inherent, voluntarily run risks, differ significantly in its strictness to that of the English courts.

In France the primary risk for compensating injured athletes rests with the state. As the claimant will always receive at least a basic level of compensation from the state, the courts have interpreted the law such that the defendant-player's behaviour must be well beyond the rules and playing culture of the sport in question to result in liability attaching to the employing club. In England, however, the primary risk for compensation lies with private entities. The claimant must still prove that the defendant acted with a high degree of negligence towards him to establish his claim, however, the lack of a guaranteed payout from a state-sponsored scheme seems to have led to a more lenient interpretation of 'playing culture' and inherent risk. This in turn is likely to have seen many of the French claimants succeeding had their cases been heard in England.

² For a case where there was no available insurance to claim against, see *Maloy v Ellison*, unreported County Court decision, (2003) Dorset Echo 4th March.

The Need for a Harmonisation of approach to Sports Negligence?

With the chances of a negligence case of pan-European *Bosman*-type impact becoming increasingly likely, it is important to examine whether there should be a move towards a more harmonised approach to sports torts. By identifying where the risk of compensating sports injuries ought to lie, the private bodies that run modern sport may be able to pre-empt the enforced changes that the European Court of Justice's decision in *Oulmers* may impose on the future framework of regulation for sports injuries litigation.

The movement towards a more harmonised private law in general, and tort law in particular, has been put succinctly by Banakas (2002). Such harmonisation would form an integral part of the closer political union of the EU and is, therefore, one of the major political arguments both for and against its development. Although harmonisation has been achieved in some specific spheres, for example, liability for defective products under Council Directive 85/364/EEC of 25 July 1985, there has been little movement towards a common compensatory system for injurious conduct.

The recent publication of the European Group on Tort Law's 'Principles of European Tort Law', reinforces the findings of this paper that there are already significant similarities in the substantive law of negligence that is applicable in the major European legal jurisdictions (EGTL 2005). The differences are instead at the more fundamental level of determining where the risk of compensating injuries ought to lie; with the state or with a private entity. Thus, the main barrier to further harmonisation may lie in the many disparate legal cultures and the many politico-cultural factors that impact upon the development of private law, tort law and both state-sponsored and private insurance, rather than in the need to harmonise the substantive law of tort.

These differences are compounded by different schemes of taxation, medical cover, incapacity benefits and compensation packages that are available in each Member State. If the state is going to bear the risk of compensating injured citizens, as is the case in France, then the need for a set of harmonised principles covering sports negligence is reduced significantly. Further, there is unlikely to be support for such increased juridification of sports injuries cases from the governing bodies of sport. In the post-*Bosman* discussions between FIFA, UEFA and the European Commission, the football authorities canvassed extensively for an exemption from the operation of EU law, not an extension of its application to the way that it regulates the game.³

Conclusion

The social, cultural and legal differences between how cases involving sports injuries proceed in England and France demonstrate that some degree of harmonisation of approach is required to ensure an equitable outcome involving parties from more than one jurisdiction. The most significant difference between the applicable substantive laws is in the interpretation of what is, and what is not, normative conduct in a particular sport. The real reason why outcomes vary in the two jurisdictions appears to

³ For the background to these discussions and the development of the arguments on both sides see, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/824&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 26/08/05.

be because of the involvement of the state in France and the guarantee of compensation that this provides. Thus, any harmonisation of approach needs to take place at a more fundamental level than amending the substantive law. This could, perhaps, be achieved by following the public-private approach of the State of New South Wales in Australia (NSW), or the purely private approach of the Rugby Football Union (RFU) in England.

The Sporting Injuries Insurance Act 1978 established the Sporting Injuries Committee, which administers a state sponsored scheme to make payments to those who suffer permanent disabling injuries or death whilst playing sport (SIIA 1978). Organisations, such as state or district governing bodies or individual sports clubs, join the scheme and pay premiums based on the number of affiliated members that play under the organisation's auspices. The scheme covers both professional and amateur players, provided that the organisation that is a member of the scheme has predominantly amateur players. It also covers referees and other officials. Payments are made according to a tariff system and compensation is guaranteed to those who fulfil the criteria. In 1984, a separate Supplementary Sporting Injury Benefits Scheme was introduced for those injured whilst playing school sports.

The RFU has implemented a similar, though privately run, scheme for catastrophic injuries, however, by concentrating on more serious injuries the pay awards are generally higher than under the NSW scheme (RFU 2005b). It is compulsory for all clubs competing in competitions sanctioned by the RFU, or its affiliated county associations, to join the scheme on behalf of all teams that the club fields. The clubs collect membership or match fees from the players from which they pay the appropriate premium. The sum of these then acts as one giant premium payment to the insurer. Through this scheme, all rugby players are covered for injuries received in connection with playing the game.

The drawback of both schemes, especially when compared to the state-sponsored compensation scheme currently in place in France, is that they only cover the most serious injuries. However, it is claims for catastrophic injuries that attract the highest quantum of damages and as such are unlikely to be capable of being met by individual sports players. To ensure that all injured players are able to receive some compensation, the RFU recommends that all players take out additional insurance for minor injuries and for payment protection where the player is employed (RFU 2005b). A failure to take out this additional insurance means that under either the NSW or RFU scheme, the only way to receive full compensation is legal action.

These two schemes highlight two very different approaches to risk apportionment. The RFU scheme follows the traditional English private law approach to compensation and is presumably a pragmatic response to the decisions in *Smoldon v Whitworth and Nolan* [1996] EWCA Civ 1225, [1997] ELR 249 and *Vowles*. The burden of risk is borne by the private governing body to provide the scheme and the individual player or club to provide the necessary top-up policy for complete insurance coverage. The NSW scheme introduces a hybrid public-private scheme. The public element under the Act guarantees payouts for serious injuries whilst the risk for less serious injuries is still borne by the individual player.

If there is to be a greater degree of harmonisation of approach to sports injuries cases throughout the EU, then making either of these schemes compulsory would be appropriate. Placing the burden of risk on the governing bodies or international federations should ensure that a sport-specific scheme is provided for the participants. This may, however, place too great a financial and administrative burden on some smaller, less financially secure governing bodies or those whose sports are particularly risky.

Placing the entire burden on the state should guarantee payouts to injured athletes but is likely to be too expensive if all sports injuries are covered without a radical overhaul of benefits provision throughout the Member States. Therefore, a hybrid version similar to that applied in NSW, but backed up with compulsory insurance administered by the relevant governing body to cover minor injuries may be the most appropriate. This ensures that those most seriously injured receive payouts sufficient to meet their needs whilst all other injuries are covered by schemes administered by the governing bodies.

Reform of this area of dispute resolution will require concerted action on the part of the various international federations that govern sport. They will need to work more closely with their members, the national governing bodies, and with the European Commission to create a better framework for the regulation of sports injuries. The bodies that govern sport are not as freely self-regulating as they claim to be. The European Commission interpreted the Amsterdam Declaration by claiming it would preserve the traditional values of sport whilst at the same time assimilating a changing economic and legal environment (Parrish 2002). This form of 'supervised autonomy' (Foster 2000a) allows the governing bodies of sport to self-regulate only to a limited extent. It will only be if recourse to the law can be rendered largely unnecessary by the actions of those that run sport that further and more complex litigation and enforced change can be avoided. Without a dedicated framework governing liability for sports injuries, the current position will continue and the risk of cross-border litigation highlighting the discrepancies of approach in various jurisdictions will continue. Whether *Oulmers* does to negligence what *Bosman* did to contractual relationships and freedom of movement is yet to be seen.

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