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Précis Paper

Negligence and Sports

An interesting discussion about recent trends in sports-related negligence.

Discussion Includes

- History of negligence claims in sports
- The current legal framework
- Players' assumption of risk
- Amateur versus professional bodies
- Vicarious liability of clubs
- Insurance schemes available to players
- Advice for practitioners

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Negligence and Sports

1. In this edition of BenchTV, John de Mestre (Partner, John de Mestre & Co, Sydney) and Mary-Ann de Mestre (Solicitor, John de Mestre & Co, Sydney) discuss recent developments in sports law.

The Legal Framework

2. Historically, negligence claims in relation to sports injuries have not been commonplace, and where claims have been made, injured players have largely been unsuccessful. This is primarily because the courts have tried to protect sporting bodies, but also there is a principle that has evolved that where people play a sport, they assume a risk.

3. Nevertheless, in recent times, litigation has become more prevalent in this area. A few factors have led to this proliferation of litigation. First, there is significant media attention around the area of concussion, which has encouraged people to bring actions. Second, the time limits for people to bring actions are coming to an end, making people think that they need to take action soon. Third, popular culture, including the recent movie *Concussion*, has educated the public and brought further attention to the liability of sporting bodies for player injuries. Finally, in the USA, there has been a $1 billion settlement for concussion claims, which has made players and lawyers think that it is worthwhile investigating claims further.

4. Some issues that might arise when players try to bring a claim against a club include that they may have played for several clubs, and some clubs that existed at the time that the injury was incurred may no longer exist.

5. The current framework indicates that if an individual plays sport, they assume a certain level of risk. This means that if a person plays a dangerous sport, such as football, boxing or equestrianism, the participant assumes the risky nature of the business, and it is difficult to bring a claim. This is also made clear under the *Civil Liability Act 2002* (NSW). Nonetheless, professional codes are starting to put in place rules to try to protect themselves, such as rules around concussion.

Examples of Actions Brought Against Clubs

6. Historically, there have been several rugby league players who have been successful in claiming against clubs for their injuries. One player, Jarrod McCracken, was successful in bringing an action against his club for a broken neck. The distinguishing feature of that case

was that he was spear-tackled, and so the Court found that he did not consent to that level of danger and to a breach of the rules: *McCracken v Melbourne Storm Rugby League Football Club* [2007] NSWCA 353.

7. Similarly, in *Bugden v Rodgers* (1993) Aust. Tort Reports 81-246, Bugden was assaulted and had his jaw broken. The Court found that he did not consent to having his jaw broken and Bugden was therefore successful in his claim.

8. However, there have been many cases where players have been unsuccessful, including cases where damages would have been significant had the player been successful. These include cases in relation to the management of scrums, and a case where the player argued that he was too skinny and small and that the club should not have allowed him to play (see *Green v Country Rugby Football League NSW* [2008] NSWSC 26). In that case, the Court found that the player had assumed the risk and found against him.

9. One key case is the High Court's decision in *Agar v Hyde* [2000] HCA 41; 201 CLR 552. There, a boy broke his neck and sued the governing body, arguing that they should have taken more care with the rules. The High Court clearly established that the boy had assumed the risk and found against him. Other cases where the courts have found that the players have assumed the risk of injury include:

    - *Maroubra Rugby League Football Club Inc v Malo* [2007] NSWCA 39: The Court denied the player's claim that the club was negligent for fielding an insufficient number of players.
    - *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320: The Court found that a 12 year old girl, who was badly injured when she dived into the shallow end of a pool while training for elite swimming, had assumed the risk of injury.

10. Cases where the Court has found that the risk of the particular injury has not been assumed include:

    - *Fallas v Mourlas* [2006] NSWCA 32: The Court of Appeal found that the risk that the plaintiff would have been shot by his friend when kangaroo shooting was not an obvious risk, and so he had not assumed that risk.
    - *Ollier v Magnetic Island Country Club Inc* [2004] QCA 137: In this case, the injured party was playing golf with his friend when the friend teed off and hit him with his golf ball. The defendant, his friend, was found to be liable because he did not properly look or check whether someone was in front of him.

Factors Considered by the Courts

11. In all cases, the Court will consider the individual facts and circumstances when determining whether a breach of the duty arises. The starting point will be that a player assumes the risk of injury, but distinguishing features may include a breach of the rules or improper supervision.

12. In some decisions, the Court has distinguished between amateur and professional bodies, and has suggested that there might be a higher burden on professional bodies: see *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

Vicarious Liability of Clubs

13. Clubs can be held vicariously liable for injuries suffered by players, however there are not many examples of where this has occurred. One case that is currently receiving significant attention relates to the administration of banned substances. A group of players are attempting to bring action against their Club, arguing that the Club is vicariously liable for the actions of the sports scientists who administered banned substances to them. This matter is yet to be litigated to finality.

Insurance Schemes for Players

14. Players are excluded from bringing workers compensation claims, and cannot claim under Medicare for their injuries. There is a sports' insurance scheme in NSW, but this has a limited cap for claims. In addition, rugby league and a number of other sports have introduced "career ending insurance", however there have not been many claims on this insurance and it is limited in who can access it.

15. The presenters noted that there is a gap in the current insurance schemes, and the NSW sporting injury scheme only covers major injuries. This means that it is reliant on individual players to have private insurance. One recent example is the spinal injury suffered by Newcastle forward Alex McKinnon. Recent media reports suggest that the adjustments that he requires to his home in the wake of this injury will cost several millions of dollars, and there is no insurance to cover this.

Considerations for Practitioners

16. If advising a sporting group, the first step to practitioners is to look at the structure of the body. In NSW, a body can incorporate as an association, which provides some level of protection to the officials by limiting the scope of their potential liability. Second, make sure

that the group is affiliated with an association, because this should give the group the benefit of the association's insurance policy. Third, ensure that players sign a contract or a waiver, which clearly indicates that the player is aware that there is a risk and that they have accepted that it is a risky venture. Finally, sporting groups should try to ensure that first aid is available, and the organisation should keep up-to-date in the latest trends in concussion management.

17. Players, on the other hand, should try to participate in sport with a recognised body, so that there is a proper insurance policy and rules in place.

BIOGRAPHY

John de Mestre

Partner, John de Mestre & Co, Sydney

John has practiced as a solicitor in Sydney since 1984. John established John de Mestre & Co Pty Ltd 25 years ago in 1992. His firm has been involved in many and varied areas of general practice. John has a particular interest in sports law.

Mary-Ann de Mestre

Solicitor, John de Mestre & Co, Sydney

Mary-Ann was admitted as a solicitor in New South Wales in 2015 and has been a member of John de Mestre & Co, Sydney since her admission. Previously, Mary-Ann was a Tipstaff to the Honourable Justice Geoff Lindsay of the Supreme Court of New South Wales. Mary-Ann is currently an Adjunct Fellow in the School of Law at Western Sydney University. Mary-Ann has acted in a number of matters in varied areas of law with a special interest in civil litigation in relation to sports law and estates.

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Cases

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Legislation

Civil Liability Act 2002 (NSW)