

**Leaving it all on the Field? Analysing the Appropriate Scope of Vicarious Liability for Athletes in the Sports Industry**

James Brown

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**Abstract**

This research seeks to address the existing uncertainty surrounding the appropriate theoretical justification for vicarious liability, and it does so by developing and deploying a contextual-pluralist model of employer liability. In recognising that none of the purported rationales for the doctrine are entirely satisfactory on their own, this thesis presents a novel framework of vicarious liability that is sensitive to context, factual nuance and empirical insight.

In order to test how this model works in practice, this study examines how it might be applied to the eclectic and ever-developing context of sport. This is the first work to provide an in-depth analysis of vicarious liability in the sporting industry, and it draws upon a variety of different sports at numerous levels of expertise. As such, it explores how a more theoretically informed model of vicarious liability might lead to some amateur sports clubs being held strictly liable for the torts of their players. Similarly, it also demonstrates how other entities in professional sport – such as national governing bodies and competition organisers – may also be held vicariously liable for the wrongful behaviour of athletes that compete under their auspices. Furthermore, and in assessing what functions are inherent in an athlete’s employment, this thesis additionally analyses the extent to which sporting employers should be held liable for a variety of personal and non-personal on-the-field injuries. In recognising the broader off-the-field responsibilities of many professional athletes, this study also discusses whether clubs and governing bodies ought to be held vicariously liable for sexual violence committed by their star athletes.

In applying my theoretical and socio-legal model of liability to these various contexts, this thesis aims to illustrate what broader lessons we might learn about vicarious liability from a sport-specific analysis. It also seeks to highlight some practical recommendations for sporting stakeholders to implement.

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Race Relations Act 1976

Road Traffic Act 1988

Sexual Offences Act 2003

Social Action, Responsibility and Heroism Act 2015

**List of Abbreviations**

|  |  |
| --- | --- |
| APA | Athlete Performance Award |
| ATP | Association of Tennis Professionals |
| CAS | Court of Arbitration for Sport |
| CPAM | Caisse Primaire d’Assurance Maladie |
| EAT | Employment Appeal Tribunal |
| ET | Employment Tribunal |
| FA | Football Association |
| FFP | Financial Fair Play |
| FIFA | Fédération Internationale de Football Association |
| GSB | Grand Slam Board |
| ITF | International Tennis Federation |
| LPGA | Ladies Professional Golf Association |
| MLB | Major League Baseball |
| NBA | National Basketball Association |
| NFL | National Football League |
| NGB | National Governing Body |
| NGIS | National Game Insurance Scheme |
| NHL | National Hockey League |
| NRL | National Rugby League |
| PAA | Performance Athlete Agreement |
| PCA | Professional Cricketers’ Association |
| PGA | Professional Golfers’ Association |
| RFU | Rugby Football Union |
| WCPP | World Class Performance Programme |
| WDF | World Darts Federation |
| WRU | Welsh Rugby Union |
| WTA | Women’s Tennis Association |
| YCCC | Yorkshire County Cricket Club |

**Declaration**

I, the author, confirm that the Thesis is my own work. I am aware of the University’s Guidance on the Use of Unfair Means ([www.sheffield.ac.uk/ssid/unfair-means](http://www.sheffield.ac.uk/ssid/unfair-means)). This work has not been previously presented for an award at this, or any other, university.

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**CHAPTER 1**

**Introduction**

*“Running a football team is no different than running any other kind of organisation.” – Vince Lombardi*.[[1]](#footnote-1)

When the prominent American football coach Vince Lombardi uttered this remark at the tail-end of his illustrious career, it was highly unlikely that he had the law on vicarious liability in mind. However, just as with any organisation that employs or utilises the services of another, professional and amateur sports clubs run the risk of being held liable for a wide variety of on-the-field and off-the-field acts. The doctrine of vicarious liability is one that is entrenched in the law of tort, and it stands for the proposition that one party (usually an employer) will be strictly liable for the tortious behaviour of another (usually an employee), so long as there is a close connection between the harm and the wrongdoer’s relationship with the defendant. The concept of liability for the actions of another appears to possess its roots in Roman law, and in particular the notion that the head of the family (the paterfamilias) ought to be responsible for the delicts of their children and slaves.[[2]](#footnote-2) Today, the doctrine of vicarious liability is most commonly applied to hold large-scale (oftentimes global) institutions responsible for harm that is intrinsically linked to their enterprise. This was an inevitable by-product of the commercial and industrial developments that occurred in the seventeenth century, as well as the rise in corporate power that materialised as a result of the nineteenth century Industrial Revolution.[[3]](#footnote-3)

**1.1 Aims and Significance of the Research**

Despite having a long-standing history dating back to medieval times, scholars have yet to identify a coherent theoretical rationale that is able to fully explain the many contours of vicarious liability. It is this omission that informs the three research questions that this study seeks to address. The first is whether a new theoretical model might be developed in order to help us justify and explain the application of vicarious liability. The second is to investigate how such a model might be applied in practice to different contexts. In this regard, I examine how the various theoretical rationales that underpin vicarious liability might be applied to the largely unexplored terrain of the sports industry. The third and final aim of the research is to assess, on the basis of this analysis, what broader lessons we might learn about vicarious liability by applying it to the sporting sector. With these purported aims in mind, we might ask the following questions: why focus on vicarious liability? And why focus on sport? In providing an answer to these questions, it is hoped that I will be able to shed some light on the significance and originality of this thesis.

**1.1.1 Why Vicarious Liability?**

As we will see later in the thesis, the law on vicarious liability has generated an unprecedented amount of judicial activity in recent years. This may be because, as various scholars have opined, it is an area of law that is ‘muddled doctrinally’ and ‘desperately in need of reform and rationalisation’.[[4]](#footnote-4) As Gray further elucidates, ‘the Achilles heel [of vicarious liability] has been the long-running failure of courts and academics to satisfactorily rationalise and justify the imposition of such liability’.[[5]](#footnote-5) At least until the 2020 Supreme Court decisions in *Barclays Bank v Various Claimants*[[6]](#footnote-6)and *WM Morrison Supermarkets v Various Claimants*,[[7]](#footnote-7) the raging debate on the appropriate scope of the doctrine has largely – if not exclusively – been centred around the application of the various theoretical rationales for the doctrine. Much of this discussion stems from the judgment of Lord Phillips in *Various Claimants v Catholic Child Welfare Society*, a case that perhaps marks the zenith of the explicit articulation of theoretical principles in the law on vicarious liability. Here, his Lordship set out five ‘policy reasons’ that make it:

‘fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.’[[8]](#footnote-8)

As I explore in Chapter 2, none of these theories can justifiably explain the many permutations of vicarious liability. In this light, and in order to respond to the first research question, I explore the possibility of introducing what I term a ‘contextual-pluralist model’ of vicarious liability. It is suggested that this model may finally provide a suitable justification for the existence of the doctrine, as well as helping to explain why it applies to such a varied array of contexts and scenarios. In sum, it recognises that many of the justifications referred to by Lord Phillips in *CCWS* often overlap in practice, and it may be that a *combination* of these theories provides a more satisfactory rationale for vicarious liability. In acknowledging the benefits of a pluralistic methodology, I also claim that we may be able to identify which theory is most relevant in each case according to the particular context of those proceedings. In developing this model, I do not shy away from my preference for an inter-disciplinary and socio-legal conception of the law, and this is reflected in my support for legal realism, legal pragmatism and empiricism throughout the thesis. In this light, whilst I intend, of course, to contribute to the current scholarship on vicarious liability, it must be recognised that my analysis in this study is also fundamentally concerned with *what* the purpose of the law is, and *how* judges apply it. As such, much of my discussion here may also have wider implications for the use of theory in other areas of law, such as private law (and beyond).

In making these claims, it is perhaps also worth briefly mentioning how this thesis contributes to the growing scholarly debate on the importance of theory to vicarious liability. As part of the development of my contextual-pluralist model of liability, I reject the so-called incremental approach that is emphasised in cases such as *Barclays* and *Morrison*. Perhaps in contrast to some of the leading scholars in this area of law,[[9]](#footnote-9) this work calls for a more consistent and comprehensive analysis of theory than is evident in the current case law. Many commentators appeared to suggest that, prior to the Supreme Court judgments in *Barclays* and *Morrison*, the doctrine of vicarious liability had spiralled out of control.[[10]](#footnote-10) In this light, a call was made for a more cautious and principled approach in order to respond to the concern that the doctrine was ‘on the move’.[[11]](#footnote-11) The purpose of this thesis is to challenge this retreat and to highlight that, whilst an in-depth analysis of theory is likely (in many instances) to lead to a wider scope of vicarious liability than we currently possess, a continuing expansion of the doctrine is both defensible and normatively desirable. Importantly, such an expansion may still be possible even in the aftermath of both *Barclays* and *Morrison*. As I illustrate in Chapter 3, the vague and rather unhelpful language utilised by the Supreme Court in these two “landmark” judgments likely means that little will change in regard to the use of theory, and we may still continue to see judges referring to the various theoretical rationales for the doctrine. In this light, there is arguably ample scope for my contextual-pluralist model of liability to influence the way that cases are decided in this area of law.

**1.1.2 Why Sport?**

With respect to the ‘why sport’ question, the answer is perhaps less obvious. One might question, for instance, why I did not decide to focus on any other industry in which the principles of vicarious liability might similarly be applicable. The response is two-fold and can perhaps be answered from both a narrow and broad perspective. From the narrow point of view, it is evident that the sports sector contains a number of divergent contexts and scenarios, ranging from, for instance, amateur to professional sport, team sports to individual sports, personal to non-personal injuries and on-field to off-field harms. Consequently, it is an industry that provides plenty of scope for assessing how the more intricate nuances of my contextual-pluralist model might work in practice. Given that it is equally a global enterprise watched (and played) in every corner of the world, a focus on sport also provides ample opportunity to demonstrate the international significance of my suggested model of liability (particularly as many of the theories that underpin it are of ubiquitous appeal).

Furthermore, it must be noted that there has been very little scholarly work on the scope of vicarious liability in sport, so this thesis will be the first to provide an in-depth analysis of this issue. Whilst the topic has been sporadically touched upon by some commentators, the treatment that it has received is either not comprehensive enough,[[12]](#footnote-12) lacking in theoretical vigour[[13]](#footnote-13) or outdated in light of developments in the law.[[14]](#footnote-14) In some instances, it is a case of all three.[[15]](#footnote-15) Even the most recent – and arguably the most thorough – examination of sporting vicarious liability by Morgan focusses only on one sport, and it appears to skirt over numerous theoretical justifications and important issues (such as, for instance, the potential liability of sports governing bodies).[[16]](#footnote-16) As such, my work attempts to fill in this gap, as well as hopefully demonstrating how some of the sustained theoretical and socio-legal analysis in this thesis can be translated into concrete practical guidance. Consequently, whilst the discussion here will be of obvious interest to those involved in private law and tort law theory, the conclusions formulated in this study may also be of wider appeal to sport sociologists, sport philosophers, feminist scholars, legal practitioners and various other stakeholders in the sporting industry.

Moreover, there may also be an additional broader justification for my focus on sport in this work. In particular, it is hoped that the analysis in this thesis will help to contribute to, and advance knowledge in, the nascent area of sports law. After all, Anderson has previously referred to the ‘under-theorisation’ of sports law,[[17]](#footnote-17) and it may be that casting a wider theoretical lens over this field of study is precisely what is needed in order to further develop this growing body of research. Indeed, and as Parrish notes, without greater theoretical underpinning of sports law, ‘this rich area of socio-legal study will become stunted’.[[18]](#footnote-18) Furthermore, and in light of some of my recommendations later in the thesis – such as the discussion in Chapter 7 which suggests that we ought to differentiate between professional athletes and other famous individuals – this thesis provides a modest example of how (and why) the law ought to treat sporting activities as different from other activities. Again, this adoption of a contextual, sport-specific approach can only help to further substantiate the claim that sports law has, in fact, arrived as a distinct body of law.

**1.2 Scope**

Despite the analysis in this thesis having widespread theoretical and practical appeal, it is worth highlighting here a number of clarificatory points on the parameters of this study. The first, and perhaps most notable, point is that the discussion here is limited to vicarious liability for the actions of *athletes*. Now, this is not to say that liability for other parties in the sports industry – such as referees, managers, coaches, medical staff, nutritionists, scouts etc. – is an insignificant issue. Indeed, recent case law such as *Blackpool Football Club Ltd v DSN* and *TVZ & others v Manchester City Football Club Ltd* illustrates that vicarious liability for scouts and coaches is very much a live issue.[[19]](#footnote-19) However, for purposes of brevity, the focus here will solely be on athletes. Nevertheless, it may be that my discussion in this thesis provokes a more theoretically nuanced discussion of vicarious liability for those individuals who are part of a club’s ‘extended family’,[[20]](#footnote-20) as it is suggested that this is an area ripe for greater socio-legal research.

Second, and in contrast to Morgan’s work on this topic, this study endeavours to incorporate analysis of a wide variety of sports. Whilst I do, of course, regularly draw upon insights from the most popular and so-called ‘national game’ of football,[[21]](#footnote-21) it would be a disservice to my contextual-pluralist model to focus entirely on this sport. As such, whilst I often use the terms ‘on-the-field’ and ‘off-the-field’ throughout this study, these should not be read as limited to those games played on grass. They also include, for instance, sports such as cycling, basketball, darts and ice hockey. Third, and relatedly, it may be that the analysis in this thesis is oftentimes somewhat eclectic, in that it draws upon a diverse array of different legal issues in numerous sports. However, given the various factual nuances in each type of sport – which, as we must remember, is played at an amateur, semi-professional and professional level – it would perhaps be rather artificial to attempt to present the work in a more holistic manner.[[22]](#footnote-22) This only serves to further reinforce, however, the necessarily contextual and fact-sensitive approach to vicarious liability that is advocated in this work.

Fourth, and on a similar note, I also liberally refer to (and apply) case law from a number of jurisdictions outside of the UK, such as Canada, Australia and the US. This is primarily because the theories of vicarious liability that underpin my contextual-pluralist model possess universal appeal, but also because case law from such jurisdictions (and in particular Canada) have been influential in determining the appropriate scope of the doctrine in the UK. In this regard, and in Chapter 4, I utilise comparative methodology to contrast the vicarious liability of amateur clubs in France with the position in the UK. Fifth, and finally, it is worth noting that the primary focus here is on vicarious liability in tort. As such, I will not make reference to statutory vicarious liability in determining the appropriate scope of vicarious liability in sport.

**1.3 Structure**

Having outlined the aims and scope of this research, it may be helpful to note that this thesis is best viewed as comprising three (largely overlapping) parts. Part I involves directly tackling the first research question proposed by this study, in that it outlines both the need for, and content of, my so-called contextual-pluralist model of vicarious liability. After all, before assessing *how* vicarious liability might be applied to a particular sector, it is surely necessary to first ask *why* we have the doctrine in the first place, and *what* the normative and desirable scope of such liability ought to be. Only then can we truly assess *where* the doctrine is headed, and *who* in sport might be affected by it. As such, Chapter 2 outlines that none of the purported rationales for vicarious liability – namely, fault; enterprise liability; loss spreading; deep pockets; control; and deterrence – can adequately explain the various manifestations of the doctrine. However, given the not insignificant overlap between many of these theories, it is argued that an amalgamation of these justifications could provide a more logical explanation for the existence of employer liability. In this regard, I suggest that we ought to consider developing a contextual-pluralist model of vicarious liability that is sensitive to both context and factual nuance. Although this is not necessarily a perfect solution in light of the potential clashes and uncertainties that it might generate, it still provides a rather innovative and original contribution to the rich literature that already exists on the theoretical basis of vicarious liability.[[23]](#footnote-23)

In building upon this argument, Chapter 3 then analyses the normative justifications and benefits of a more theoretical approach. In particular, it suggests that, in line with other areas of law, the adoption of my contextual-pluralist model will lead to a more meaningful, adaptable and transparent law on employer liability. Thereafter, I analyse various developments and additions to the law on vicarious liability that scholars and judges may wish to consider if we are to effectively implement my suggested model of liability. These include, for instance: the adoption of a so-called ‘thick’ approach to the theoretical rationales for vicarious liability; reference to a wider range of interdisciplinary theories (such as gender studies); and the utilisation of empirical data. The chapter concludes by examining the potential criticisms that might be levied against my model. This includes an assessment of whether my model is too unprincipled in light of the system of precedent that is used in the common law, and well as whether it is too uncertain to be useful in practice.

With my contextual-pluralist model sufficiently explained and defended, I then attempt to demonstrate how it might apply in practice to the sports industry. As such, in Part II of the thesis, I explain how the relationship requirement at stage one of vicarious liability might be applied to numerous different sporting scenarios. Chapter 4, for instance, investigates whether amateur sports clubs ought to be held vicariously liable for the tortious behaviour of their players. Given the inadequate first-party insurance cover that exists in many recreational sports, there is a distinct possibility that an amateur sports club could, in the near future, be added as a defendant in a vicarious liability claim. If this prospect came to pass, it is likely that, under the current legal framework, the ‘akin to employment’ test and the law on unincorporated associations would assume prominence. This chapter demonstrates, however, that neither of these two relationship categories are particularly helpful, and it may be more useful to adopt my contextual-pluralist model to help respond to this issue. In calling for the primacy of loss spreading in this context, it is suggested – from a practical, analytical and comparative point of view - that the focus here ought to be on whether a recreational sports club is able to adequately spread the costs of any damages award. The chapter concludes by assessing the current third-party liability insurance cover available in amateur sport, as well as the wider practical implications of this analysis.

Chapter 5 moves away from the amateur context and looks towards the relationship requirement in professional sport. Two issues are dealt with here. The first is whether a sports governing body could be – and perhaps most importantly, *ought* to be - construed as an employer of those individual athletes that compete under their auspices. Although this possibility has not yet been raised in the literature, an application of the numerous theories of vicarious liability suggests that it is an eminently desirable development in relation to both funded and non-funded athletes. In analysing various sports – such as cycling, tennis and golf – it will also be demonstrated, with one eye on the third research question of this thesis, what broader lessons we might learn about vicarious liability (and indeed non-delegable duties) from this application. Following on from this, I also explore how the sporting context illustrates the need for a truly fact-sensitive approach to the issue of vicarious liability for borrowed employees. The argument made here is that dual vicarious liability ought to be imposed by the courts more frequently in this context. In this light, I evaluate the various theoretical justifications that might be raised in assessing the apportionment of liability between two (or more) employers.

Part III of the thesis then moves away from the relationship requirement, and instead assesses how the close connection test for vicarious liability might be applied to the sports industry. Accordingly, Chapter 6 analyses how my contextual-pluralist framework might be mapped on to the various tortious acts that are often committed by players on the field of play. In this regard, I provide an in-depth theoretical examination of the only UK case that has previously dealt with vicarious liability for on-field injury: *Gravil v Carroll and Redruth Rugby Football Club*.[[24]](#footnote-24) Despite the Court of Appeal in this case employing both a deterrence and enterprise risk rationale to justify the liability of the semi-professional rugby club, I argue here that the concept of deterrence, whilst still relevant, perhaps ought to be subsidiary to the notion of enterprise liability in this context. In this regard, I assess how an empirical analysis of the risk-related formulation of enterprise liability may help us to avoid a potential clash with the assessment of a sport’s so-called playing culture at the standard of care stage. Notably, I also make the point that courts ought to give sufficient weight to benefit enterprise liability when assessing the scope of vicarious liability for on-field torts committed by their players.

Finally, in Chapter 7, I explore the potential for vicarious liability to be extended to a variety of off-the-field sexual offences. In light of the recent #MeToo movement, victims of sexual abuse are now, perhaps more than ever, willing to speak out publicly about such harm.[[25]](#footnote-25) As such, this chapter explores whether clubs and governing bodies ought to be held vicariously liable for a number of off-field sexual offences committed by their employees. This includes, for instance, harm caused during initiation rituals and hazing, as well as the sexual abuse of women away from the locker room. In adopting an enterprise liability-based approach, I demonstrate how one’s employment as a professional athlete might make a material contribution to this type of harm. The chapter also analyses how the somewhat unique role model and celebrity status of such employees may provide a further fairness justification for liability in this context. This is based on an assessment of so-called disrepute clauses that are now prevalent in many professional sporting contracts. I conclude by outlining six guiding normative considerations that judges may want to weigh up in deciding whether or not to impose vicarious liability for various off-field harms.

**CHAPTER 2**

**A New Theoretical Approach to Vicarious Liability?**

**2.1 Introduction**

This chapter explores whether we can identify one single rationale that is able to fully explain the various – and oftentimes competing – contours of the law on vicarious liability. This is an issue that has long taxed commentators writing on this topic,[[26]](#footnote-26) and it is not a particularly controversial stance to claim that we continue to lack a unifying theory to the somewhat convoluted law governing an employer’s liability. For instance, Macduff J (writing at first instance) in *JGE v English Province of Our Lady of Charity* correctly highlighted that there is ‘no precise unanimity between judges (or between academics) about the rationale [for vicarious liability]; no single accepted truth’.[[27]](#footnote-27) Similar comments were also evident in Lord Clyde’s judgment in *Lister v Hesley Hall Ltd*, when he admitted that he is not convinced that ‘there is any reason of principle or policy which can be of substantial guidance in the resolution of the problem of applying the rule in any particular case’.[[28]](#footnote-28) Courts in other jurisdictions have expressed similar sentiments, with Gaudron J in *New South Wales v Lepore* referring to the ‘absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others.’[[29]](#footnote-29) Such views are also evident in the surrounding literature. Baty argued, for instance, that attempts to justify the doctrine were nothing more than ‘hopeless groping’,[[30]](#footnote-30) and in later years, Williams lamented that vicarious liability was the ‘creation of many judges who have had different ideas of its justification or social policy, or no idea at all… yet the rationale, if we can discover it, will remain valid so far as it extends’.[[31]](#footnote-31)

In responding to these claims, the purpose of this chapter is three-fold. First, it seeks to describe precisely what each theoretical rationale entails, and how each justification interacts and overlaps with one another in various ways. This is a particularly important task given my heavy reliance on these theoretical rationales in later chapters to help shape the appropriate role of vicarious liability in the sports industry. After all, and as Smith remarks, ‘the way in which a rule is applied depends more or less upon what the particular court conceives to be the reason for the rule’.[[32]](#footnote-32) Second, this chapter also seeks to highlight, in accordance with the views of the aforementioned judges and scholars, that none of the traditional theories of vicarious liability can ever hope to fully explain the doctrine when viewed in isolation. This is predominantly due to the countless factual matrices to which vicarious liability might apply, and in particular the differing strength of the various theoretical justifications when employed in each unique context. As such, in section 2.2, I demonstrate that the notion of corrective justice cannot rationalise the doctrine of employer liability, and nor can any related concept of fault or blame that is imputed upon the employer. Likewise, and as highlighted in section 2.3, neither enterprise liability, loss spreading or deep pockets – all of which might be said to be manifestations of distributive justice – can fully explain the many various facets of vicarious liability. Section 2.4 also demonstrates that deterrence and control similarly fall short as the sole rationale for the doctrine.

With these points established, the third and final purpose of this chapter is to call for a more contextualised and pluralistic model of vicarious liability that is sensitive to factual nuance and which upholds an ‘all things considered’ approach. The argument here, as outlined in section 2.5, is that a combination of the theoretical justifications (which could helpfully be predicated on the recent emergence of the ‘fair, just and reasonable’ test in this area of law) might be able to provide a more acceptable rationale for the doctrine of vicarious liability. This should be supported by a circumstantial approach that seeks to highlight which theories are most relevant according to the context of the immediate dispute. This contextual-pluralist framework sets the discussion for what is to come in later chapters.

Before delving into the relevant theories, it is worth mentioning two brief points here. First, and as was discussed in the previous chapter, because the theories of vicarious liability have been widely examined in a number of cases from other jurisdictions (most notably Canada and Australia), I do not shy away from referring to case law outside of the UK to help outline and critically assess each justification. Second, and for purposes of consistency, I must stress that I use the term ‘theories’ throughout this chapter (and indeed other chapters) when referring to the justifications for vicarious liability. This is in line with some recent case law and scholarly literature on the issue,[[33]](#footnote-33) although it must be recognised that others have referred to these rationales as ‘policy reasons’ or ‘policy goals’.[[34]](#footnote-34) Perhaps even more confusingly, some scholars even interchangeably refer to individual justifications as both a theory *and* a policy.[[35]](#footnote-35) This is best avoided. In my view, a theory of vicarious liability is a normative justification for the doctrine; in contrast, a policy goal is a broader objective that we seek to achieve as a result of imposing (or perhaps even refusing to impose) vicarious liability. By way of example, we might say that we can utilise the theories of deep pockets and loss spreading in order to achieve the policy goal of adequate compensation for a deserving victim. With this in mind, let us now examine in detail what the relevant theories of vicarious liability entail.

**2.2. Corrective Justice**

As outlined historically by Aristotle, corrective justice assumes that wrongdoers should be made to repair any wrongful loss inflicted on an injured party.[[36]](#footnote-36) Scholars who subscribe to this school of thought maintain that the law should exclude instrumentalist considerations and instead focus solely on the ‘equities of the particular transaction’ between the two parties.[[37]](#footnote-37) As such, the common orthodoxy is that this relationally-structured theory is most at home under a fault-based conception of tort law. Clearly, and as Lord Nicholls points out in *Majrowski v Guy’s and St Thomas’s NHS Trust*, vicarious liability is:

‘at odds with the general approach of the common law. Normally, common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.’[[38]](#footnote-38)

However, whilst Giliker has correctly observed that the doctrine of vicarious liability remains a ‘cuckoo in the next of corrective justice’,[[39]](#footnote-39) other commentators have refused to accept the incongruence of strict liability with corrective justice. The debate is a well-rehearsed one that has largely rested on the distinction between the so-called ‘servant’s tort theory’ and master’s tort theory’ of vicarious liability. The former, which is now generally perceived as the common wisdom,[[40]](#footnote-40) views the doctrine as imposing liability on one party (typically an employer) for the wrongful acts of another (typically an employee). In other words, and as Lord Millett in *Dubai Aluminium Co Ltd v Salaam* explains, the employer is ‘personally innocent, but he is liable because his employee is guilty’.[[41]](#footnote-41) In contrast, the master’s tort theory, which is encapsulated in the Latin maxim *qui facit per alium facit per se* (‘he who acts through another does the act himself’), views the wrongful act as being committed by the master (or employer) himself. On this basis, if an employee assaults someone during the course of their employment, the act is attributed to the employer, such that the employer himself is deemed to have assaulted the claimant.

Despite enjoying strong support in the historical case law,[[42]](#footnote-42) the master’s tort theory is now considered somewhat unfashionable. It is often intertwined with an outdated fault-based view of vicarious liability that seeks to hold an employer liable on the spurious grounds that they are somehow to blame due to the poor choice, or supervision, of an employee. As Baron Rolfe asserted in *Reedie v London and North Western Railway Company*:

‘the person employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or the want of care of the person employed.’[[43]](#footnote-43)

It is perhaps unsurprising, then, that some corrective justice theorists have sought to adopt the master’s tort theory of vicarious liability.[[44]](#footnote-44) Stevens is one such proponent who offers an interesting, and topically relevant, sports-related example in an attempt to highlight that we ‘commonly attribute one person’s actions to another outside of the law without considering it to be fictitious’.[[45]](#footnote-45) He suggests that:

‘[a] close analogy is with the rules of games. In the 1966 World Cup Final, the person whose physical actions caused the last goal to be scored was Geoff Hurst. However, the rules of the game also attribute his physical actions to his team, England. Both Geoff Hurst and England scored the goal… If the words or actions of another person are attributed to the defendant, and those actions infringe the claimant’s rights, the defendant will be liable. The law, like the game of football, has rules for determining this.’[[46]](#footnote-46)

One suspects, however, that Stevens was not overly influenced by the importance of fact sensitivity when making this example. Whilst it might very well be acceptable to attribute the scoring of a goal to both the individual and his employing team, it may not necessarily be correct to do so for every other act. When Eric Cantona famously breached the rules of play by assaulting a Crystal Palace fan in 1995, it does not make much sense to say that Manchester United also kung-fu kicked the unfortunate spectator. Likewise, in the context of cricket, if Alastair Cook was bowled for a duck,[[47]](#footnote-47) it would not be logical to concurrently maintain that “England were out for a duck” too. The truth is that dual attribution is heavily dependent on both the context and purpose of an act. Just because it is acceptable to attribute certain actions in football does not necessarily mean that it is similarly legitimate to do so in every other context (and not least the law, where it is arguable that legal rules must possess a greater degree of conceptual precision than in most, if not all, other areas).

Indeed, and as Giliker outlines, the adoption of the master’s tort theory is likely to blur the distinction between primary and secondary liability, and in so doing undermine ‘the clarity of tort law in general’.[[48]](#footnote-48) Nevertheless, the fault rationale remains of residual importance to this study beyond the parameters of theoretical neatness, particularly when we come to analyse, in later chapters, the non-delegable duty (section 5.4) and the primary-vicarious dichotomy in relation to violent on-field acts (section 6.3). For now, however, it is worth heeding Schwartz’s warning that, ‘insofar as a legal rule does rest on a fiction, the rule itself obviously calls for normative justification.’[[49]](#footnote-49) Given the aforementioned weaknesses with this fault-based theory, it is suggested that a better explanation for the continued existence of vicarious liability may be found outside of the dominant corrective justice model.

**2.3 Distributive Justice**

As suggested by both judges and scholars, one alternative is to conclude that vicarious liability is justified on the basis of distributive justice.[[50]](#footnote-50) In its simplest form, this theory of justice is concerned with the fair distribution of benefits and burdens in society, and (unlike corrective justice) looks past the immediate needs of the two parties to the transaction.[[51]](#footnote-51) As Shmueli colourfully describes, distributive justice is typically ‘concerned with allocating “slices of the cake” that make up the aggregate welfare of society’.[[52]](#footnote-52) Whilst the criteria for distribution may vary, it is often based on some abstract value such as merit, need, equality or virtue.[[53]](#footnote-53) In fact, the precise criteria upon which a certain good is to be distributed has generated the most discussion among distributive justice theorists. For instance, whilst Nozick has proposed a libertarian-based entitlement theory (which suggests that individuals are entitled to what they acquire in a just manner),[[54]](#footnote-54) others have proposed a needs-based or desert-based notion of distributive justice.[[55]](#footnote-55) The focus in this study, however, is on the body of literature that adopts a contextual and pluralistic approach to the theory. According to this version, Keren-Paz explains that ‘the exact weight that should be given to distributive concerns should be left to a contextual examination of the circumstances of each relevant case.’[[56]](#footnote-56) This work seeks to unpack this assertion in relation to vicarious liability by analysing various distributive justice-inspired theories that are generally thought to underpin the doctrine: enterprise liability, loss spreading and deep pockets.

It should also be noted that a focus on distributive justice is particularly important to this study on two other grounds. First, it may be able to shed some light on the reasons behind many of the more recent - and indeed controversial - expansions to the doctrine of vicarious liability. For example, as Bell highlights, in our effort to understand, and respond to, the numerous child sexual abuse scandals that have plagued this area of law in recent years, ‘compensatory impulses and distributive justice concerns’ have assumed prominence.[[57]](#footnote-57) Giliker offers a similar view when she stated that the doctrine has been ‘moulded to respond to the horrendous sexual abuse cases’, and she questions whether vicarious liability has now evolved into an ‘uncontrolled instrument of distributive justice undermining the certainty and structure of the common law of torts’.[[58]](#footnote-58) This is a debate that has also been played out in the courts. Whilst Binnie J in *Jacobi v Griffiths* warned that the judiciary have ‘no jurisdiction *ex aequo bono* to practise distributive justice’,[[59]](#footnote-59) Longmore LJ in *Maga v Birmingham Roman Catholic Archdiocese Trustees* conversely maintained that vicarious liability may simply be a ‘weapon of distributive justice’.[[60]](#footnote-60) As argued below in section 2.5 (where my contextual-pluralist model of employer liability is outlined), I strive to contribute to this debate by illustrating my normative preference for Longmore LJ’s conception of the doctrine of vicarious liability.

The second – and perhaps more tangential - way in which a distributive justice angle might contribute to this project is in its potential to further conceptualise the developing area of sports law. As Andoh et al have highlighted, distributive justice (and its distinction from corrective justice) is ‘not too apparent’ in the realm of sports law, yet it ‘could provide much impetus’ for a greater theoretical analysis of this growing area of scholarship.[[61]](#footnote-61) Consequently, it is hoped that the discussion throughout many of the following chapters could fuel a greater resort to the competing principles of corrective and distributive justice to help explain some of the more complex sports-related legal rules (and particularly those in the area that many scholars refer to as ‘sports torts’). After all, Cane is correct to conclude that ‘tort law has distributive effects that need to be justified if tort law is to be judged an acceptable legal and social institution.’[[62]](#footnote-62) With this in mind, let us now examine three particular justifications for vicarious liability that are rooted in the principles of distributive justice.

**2.3.1 Enterprise Liability**

According to Rabin, enterprise liability demonstrates a shift ‘from a *corrective* justice perspective on responsibility in tort law to a *collective* justice approach’.[[63]](#footnote-63) In this, the contention is that enterprise liability prioritises the social justice implications of a decision, rather than fixating on notions of interpersonal justice.[[64]](#footnote-64) It is generally thought that this theory of liability came to prominence following the rise of industrialisation in the nineteenth century, and in particular the belief that certain activities (or enterprises) created inevitable and characteristic risks.[[65]](#footnote-65) Although Keating notes that enterprise liability owes its origins to the introduction of workers’ compensation statutes, this theory has been notably influential in a number of tort-related areas, such as products liability, the rule in *Rylands v Fletcher* and (most importantly for our purposes) the law on vicarious liability.[[66]](#footnote-66) As Neyers explains, enterprise liability is often depicted in two different forms.[[67]](#footnote-67) The first, which is based on the principle of fairness, suggests that if the employer seeks to benefit from engaging in a particular activity, then it is only fair that they equally bear the burden by providing compensation for any loss caused by such activity.[[68]](#footnote-68) The second is concerned with the causal creation of risk, and it suggests that an employer should accept responsibility for any risks which are said to be ‘inextricably interwoven’ with their enterprise.[[69]](#footnote-69) According to McLachlin J in *Bazley v Curry*, this ‘accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm’.[[70]](#footnote-70) Whilst Lord Phillips’ five-factor test in *Various Claimants v Catholic Child Welfare Society* confirms that these are two separate justifications,[[71]](#footnote-71) I discuss in sections 5.2.3 and 7.3.2 how these two theories ought to work harmoniously together if we are to produce the strongest (and most logically consistent) version of enterprise liability.

Unfortunately for advocates of this theory, however, enterprise liability seems unable to fully justify the many contours of vicarious liability, despite comments from Lord Reed in *Armes v Nottinghamshire County Council* that suggest that it is the ‘most influential idea in modern times’.[[72]](#footnote-72) In relation to the benefit/burden model, various scholars have argued that this theory is incompatible with the imposition of liability upon non-profit organisations, as such bodies often operate with altruistic intentions and do not seek any form of financial benefit for themselves.[[73]](#footnote-73) Now, there might be several ways around this. First, and as I explore in section 4.4.1, a benefit may not be limited only to a pecuniary interest. This point was made clearly by Lord Reed in *Cox v Ministry of Justice*.[[74]](#footnote-74) Second, it could be said that imposing liability on a non-profit organisation is still fair because the cost is still rolled upon the true beneficiaries (perhaps, for example, by a charity’s reduced level of care due to lowered finances). Since the non-profit activity was designed to benefit all participants, it is fair that they all cumulatively bear this burden through reduced services, rather than leaving the individual victim uncompensated. This was the logic behind the majority’s view in *Mary M v City of Los Angeles*,[[75]](#footnote-75) a case in which a public entity was found vicariously liable for a police officer raping a woman. In their view, the ‘cost resulting from misuse’ of the police officer’s power ‘should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power’.[[76]](#footnote-76) What appears to be inherent in this statement is the importance of loss spreading to the benefit/burden principle (at least in the context of the vicarious liability of non-profit organisations).[[77]](#footnote-77) The more a burden can adequately be spread, the more justifiable it appears to be to roll the costs upon the beneficiaries. As such, and as demonstrated in Chapter 4, we can see that even if the benefit formulation does help to justify vicarious liability in the context of amateur sport, it should ideally still be informed by the very relevant (and closely related) theory of loss spreading.

The third (and arguably most popular[[78]](#footnote-78)) method that could be used to impose liability upon charitable institutions is to simply adopt the risk-based version of enterprise liability. After all, these organisations can create just as harmful risks as financially motivated corporations, so a risk-based approach has been a particularly useful tool for those looking to expand the doctrine to non-profit organisations.[[79]](#footnote-79) Nevertheless, the enterprise risk theory also runs into various barriers in its attempt to rationalise vicarious liability, and it is important to note that many of these issues are equally applicable to the benefit/burden formulation too. For instance, Kidner questions why, if the focus is solely on the losses emanating from the risks of the enterprise, vicarious liability is limited to the conduct of employees (and not also extended to the acts of independent contractors).[[80]](#footnote-80) In the same vein, other commentators ponder why vicarious liability is restricted to tortious conduct (as opposed to all risky, yet legitimate, activities which flow from an enterprise),[[81]](#footnote-81) and a risk-based approach similarly casts doubt on the legitimacy of the employers’ indemnity.[[82]](#footnote-82) Finally, and as demonstrated by Priest’s seminal work, enterprise risk might also be criticised for its illimitable nature, as risk is arguably an inherent by-product of all human interaction.[[83]](#footnote-83) Of course, it would be easy to respond to this criticism by highlighting that courts will only impose vicarious liability for ‘substantial’,[[84]](#footnote-84) ‘inherent’[[85]](#footnote-85) or ‘reasonably incidental’[[86]](#footnote-86) risks, but these are just merely empty tags that are often rhetorically invoked by judges to justify their own view on a defendants’ liability in a particular case. Despite Yap’s unconvincing claims to the contrary,[[87]](#footnote-87) I can discern no obvious distinction between an ‘inherent’ and a ‘reasonably incidental’ risk. As I touch upon in Chapter 7, the truth is that no-one really has any idea how connected a particular risk must be to a business before vicarious liability is justified under this theory.

As a result, and due to these perceived shortcomings in the theory of enterprise liability, Steele is correct to opine that risk should not ‘be treated as short-hand for easy solutions to problems of responsibility’.[[88]](#footnote-88) In this light, I must disagree with McLachlin J’s argument in *Bazley* when she intimated that a risk-based approach was ‘capable of standing alone’ as the justification for employer liability.[[89]](#footnote-89) The weight to be afforded to enterprise liability in each case should depend on both the context and the relevance of other theories to the factual matrix, and risk should rarely, if ever, be the sole determinant of liability. This is a conclusion that accords with the views of other scholars. Giliker, for example, has maintained that relying solely on risk alone ‘runs the danger of proving too much’,[[90]](#footnote-90) whilst Morgan has similarly suggested that enterprise liability ‘by itself cannot be decisive. Instead, it is merely one of the policy factors to be considered.’[[91]](#footnote-91) As we now further explore in the context of loss spreading, this is a view that is arguably applicable to *all* of the theoretical rationales underpinning vicarious liability.

**2.3.2 Loss Spreading**

As noted by Tan, one effect of risk internalisation is the spreading of loss.[[92]](#footnote-92) Other scholars make a similar claim, with Spafford and Feldthusen both suggesting that an enterprise ought to own any losses that flow from its risk-creating behaviour so that it can ‘take them into account rationally in pricing and output decisions’.[[93]](#footnote-93) Consequently, it is perhaps unsurprising that one of the leading cases on enterprise liability – that of *Escola v Coca-Cola Bottling Co.* – provides an apt description of what the theory of loss spreading entails. As Traynor J explains, ‘the cost of an injury and the loss of time or health may be… a needless one, for the risk of injury can be insured by the [employer] and distributed among the public as a cost of doing business.’[[94]](#footnote-94) Various scholars note that the existence of loss spreading is grounded in notions of both social expedience and economic efficiency,[[95]](#footnote-95) such that it is better for losses to be cast amongst the many than be borne by the few. For many employers, they are often able to distribute the costs of risky activity through the medium of insurance, and some are even able to pass the loss down to others (e.g. to consumers by raising the price of products, or to employees by reducing their wages).[[96]](#footnote-96) Importantly, Calabresi outlines that the extent to which employers can spread loss is dependent on a number of considerations, some of which may include: elasticity of demand, substitutability of products and the number of competitors.[[97]](#footnote-97) Accordingly, the legitimacy of considering the theory of loss spreading may ultimately depend on the unique contextual matrix of each case.

Nevertheless, various judges have been keen to emphasise the importance of this theory to the doctrine of vicarious liability. Lord Millet in *Lister* has observed that vicarious liability is ‘best understood as a loss-distribution device’,[[98]](#footnote-98) and McLachlin J was seemingly persuaded by the work of Calabresi when she argued that an employer’s ability to spread the loss minimises ‘the dislocative effect of the tort within society.’[[99]](#footnote-99) Likewise, Rix LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* contended that:

‘Liability is extended to the employer on the practical assumption that, *inter alia* because he can spread the risk through pricing and insurance, he is better organised and able to bear that risk than the employee, even if the latter himself of course remains responsible.’[[100]](#footnote-100)

Other judges have taken issue with the normative dimension of the loss spreading claim. In particular, Lord Reed in *Cox* rejected the idea that this theory offered a ‘principled justification for imposing vicarious liability’ and concluded that ‘employers insure themselves because they are liable: they are not liable because they have insured themselves.’[[101]](#footnote-101) Such comments can be situated alongside the work of scholars who suggest that loss spreading is an ‘incoherent’ theory of justice that is ‘not self-justifying’.[[102]](#footnote-102) Indeed, it might be questioned why the theory is confined only to tortious acts committed within the course of employment (and not simply to all losses). On a related point, and taken to its extreme, if loss spreading is simply concerned with searching for an entity that is best able to distribute the costs of an activity, then it must be recognised that state liability is the logical conclusion. The obvious example here is the Accident Compensation Corporation currently operating in New Zealand.

However, whilst these points may ring true if loss spreading is viewed as the sole stand-alone justification for vicarious liability, they are far less persuasive if we reconceptualise loss spreading as simply one consideration, amongst many others, that must be considered in determining the scope of employer liability. Although it is correct that vicarious liability ‘represents more than the pursuit of insurance cover’,[[103]](#footnote-103) it must equally be recognised that, without the existence of insurance, the ‘very nature of the tort system would have to change’.[[104]](#footnote-104) Much like with the other theories outlined in this chapter, the relevant role for loss spreading is both a contextual and pluralistic one. Simply because a solvent defendant has the capacity to easily spread loss does not necessarily mean that vicarious liability should be imposed, nor does the fact that an employer is uninsured automatically mean that vicarious liability is inappropriate. But such factors are, undoubtedly, relevant considerations in the determination of liability. In this regard, my view is broadly in line with Merkin and Steele’s thoughts on the relevance of insurance to tort law. As they conclude:

‘[T]he role of insurance is complex and context-dependent, and not reducible to one sweeping proposition… In our view, just as insurance does not offer a single knock-down source of rational answers to tort questions, neither should it be excluded from the doctrinal picture… in practice the relationship [between tort and insurance] is symbiotic.’[[105]](#footnote-105)

Of course, and as Stapleton highlights, the issue may still remain that some judges invoke loss spreading concerns in a haphazard and piecemeal fashion, with no thought as to when (and how) the issue of insurability is relevant.[[106]](#footnote-106) It is hoped that the development of my contextual-pluralist model of vicarious liability later in this chapter may help to sufficiently respond to this criticism.

**2.3.3 Deep Pockets**

A final distributive justice theory, and one which has been described by Ataner as a less ‘sophisticated’ version of loss spreading,[[107]](#footnote-107) is the concept of deep pockets. The argument here is based upon the assumption that if the employer *can* pay out damages to compensate the victim, then it is fair that they *should* pay. As Lord Phillips illustrated in *CCWS*, ‘the policy objective underlying vicarious liability is to ensure… that liability for tortious wrongs is borne by a defendant with a means to compensate the victim’.[[108]](#footnote-108) Lord Nicholls in *Majrowski* was also seemingly persuaded by such reasoning when he suggested that the theory of deep pockets allows the injured party to ‘look for recompense to a source better placed financially than the individual wrongdoing employees.’[[109]](#footnote-109) As we can see from these passages, reference to the deeper pockets of an employer is often one strategy that courts employ in order to achieve the broader goal of adequate compensation for a wronged party. In fact, Feldthusen suggests that victim compensation is one of the ‘most important social goals’ served by employer liability,[[110]](#footnote-110) and we must remember that, ultimately, the doctrine of vicarious liability would be a rather pointless one were it not for the greater wealth of most employers.[[111]](#footnote-111)

Nevertheless, and as with all of the theories perused in this chapter, various commentators have not been shy in voicing their dissatisfaction with the deep pockets rationale. Williams refers to it as a ‘purely cynical theory’ and suggests that, if vicarious liability is imposed on the grounds that the employer is rich and insured, then a burglar could similarly utilise this logic to justify his own thefts.[[112]](#footnote-112) Likewise, Pollock criticises the deep pockets justification as ‘too crude and formless to be a starting point’ in explaining the existence of vicarious liability.[[113]](#footnote-113) More recently, and perhaps influenced by the work of Atiyah, Lord Reed similarlyargued that ‘the mere possession of wealth is not in itself any ground for imposing liability’.[[114]](#footnote-114) The key phrase here, it is suggested, is ‘*in itself*’. Obviously, if the wherewithal of a certain entity is the *only* relevant concern in deciding whether to impose vicarious liability, then we should expect to see the likes of Bill Gates and Jeff Bezos inundated with a plethora of claims. As such, any plausible interpretation of the deep pockets argument must, by its very nature, operate on a pluralistic basis that relies on some other external factor or theory. But to suggest that it is altogether irrelevant is, in my opinion, a step too far.

However, even with this in mind, Gray still condemns the theory of deep pockets as overly nebulous and lacking in any precedential value. He ponders whether ‘the decision of today, premised on the deep pockets of the employer, [will] apply tomorrow, to an employer whose pockets are much shallower’.[[115]](#footnote-115) In addition, he also questions just how deep an employer’s pockets must be before the rationale is triggered as a justification for imposing vicarious liability.[[116]](#footnote-116) Perhaps predictably in light of my earlier comments, the answer to these questions surely depends on a contextual examination of the particular circumstances. To take a brief sporting example, if an employee of a League Two football club commits a tortious act within the course of his employment, few of us would take issue with classifying his employer as an entity with deep pockets. However, if the same club was embroiled in a legal battle as to who should bear responsibility for the tortious actions of a loaned player from a Premier League club,[[117]](#footnote-117) then it might be said that the League Two team in this scenario has relatively shallow pockets. Atiyah offered a similar distinction in his work when he differentiated between a ‘large and wealthy contractor’ doing work for an entity of modest means, with a ‘round the corner’ contractor operating a much smaller enterprise.[[118]](#footnote-118) It seemed to be his view that liability was more justifiable for the former than the latter.

Moreover, and to illustrate the contextualised nature of the deep pockets rationale even further, it might also be said that this theory is heavily dependent on the level of abstraction that we adopt. In this regard, it is maintained that Ripstein is correct to argue that, ‘[i]n deciding whether someone is responsible for some deed, we need to consider both fairness to that person and fairness to others.’[[119]](#footnote-119) As is touched upon in Chapter 5 in the context of vicarious liability for individual athletes, the relevant question for the deep pockets rationale might instead be the employer’s ability to pay vis-à-vis the employee. To the extent that this is the case, this theory will seemingly be relevant in most vicarious liability cases (as the party held strictly liable for a tort is almost always in a more powerful financial position than the wrongdoer himself).[[120]](#footnote-120)

**2.4. Better Placement or Effective Preventative Position**

The final two justifications for vicarious liability – specifically, deterrence and control - do not appear to fit neatly into either a corrective justice or distributive justice framework of vicarious liability. In fact, both theories share a similar focal point, in that they are both concerned with the unique placement of the employer and their concomitant ability to prevent harm. As Voyiakis explains, proponents of these theories ‘appeal to placement when they note that A may be in a position to affect how B behaves, or that A may be able to take measures to avoid B causing an accident or to minimise its costs.’[[121]](#footnote-121) Other scholars make a similar point, with Bomball also highlighting an intrinsic link between control and deterrence.[[122]](#footnote-122) Let us now briefly assess both of these theories in order to once again reaffirm the proposition that, whilst neither rationale can fully justify the imposition of vicarious liability on their own, they may be able to do so when viewed alongside the many other theoretical rationales that underpin the doctrine.

**2.4.1 Deterrence**

As outlined by Fleming, the basic premise of the deterrence rationale is that, by holding the employer vicariously liable, ‘the law furnishes an incentive to discipline servants guilty of wrongdoing’.[[123]](#footnote-123) This logic was explicitly utilised in the sporting context by the Court of Appeal in *Gravil v Carroll and Redruth Rugby Football Club*, where Clarke MR held that:

‘[t]he line between playing hard and playing dirty may be seen as a fine one. The temptation for players to cross the line in the scrum may be considerable unless active steps are taken by clubs to deter them from doing so… It is perhaps striking that here the club did not take any disciplinary action against the first defendant. Perhaps it would have done if it had appreciated that there was a risk of liability in such cases in the future.’[[124]](#footnote-124)

It is notable that various sports law scholars who have touched upon the issue of vicarious liability in sport have been persuaded by such reasoning. As Anderson writes, ‘on pain of vicarious liability, clubs will be motivated to materially decrease the risk of their employee-players misbehaving on the field of play’.[[125]](#footnote-125) This is perhaps an understandable intuition given that numerous judges in other jurisdictions have seemingly been convinced by the theory of deterrence.[[126]](#footnote-126) Kirby J in *New South Wales v Lepore*, for example, argued that the ‘only truly effective way’ of motivating enterprises to reduce the risk of sexual harm was to impose financial penalties on employers.[[127]](#footnote-127) Importantly for our pluralistic purposes, he also recognised that deterrence was ‘neither the main nor only factor to consider in judging whether vicarious liability is imposed by the law’, and he (sensibly) recommended that courts should additionally apply both an enterprise risk and loss spreading analysis to each applicable case.[[128]](#footnote-128)

Despite this suggested modest role for deterrence, many scholars still remain unconvinced as to whether this theory provides a satisfactory rationale for vicarious liability. Indeed, McBride and Bagshaw suggest that the reasoning adopted in *Gravil* is somewhat curious given that even prudent disciplinary action by the rugby club would not have barred the operation of vicarious liability.[[129]](#footnote-129) As other scholars have explained, strict liability is unconcerned with the steps taken by a defendant to prevent harm, so it might be said that vicarious liability provides no incentive for employers to deter injury-causing behaviour.[[130]](#footnote-130) In their view, fault-based liability is better suited to the achievement of deterrence, because an employer under this form of liability can avoid a damages award if they can show that they took all reasonable care. This was the argument outlined by McPeak when she observed that ‘deterrence goals are not furthered when the actor’s conduct results in liability regardless of the level of care used’.[[131]](#footnote-131) However, whilst these arguments may at first glance be intuitive, they do not necessarily mean that the theory of deterrence is completely irrelevant to the doctrine of vicarious liability. Strict liability might still be able to achieve optimal deterrence because it may encourage defendants to engage in research and development in order to identify more effective ways of reducing their accident costs (and the omission of these provisions may well fall outside the purview of negligence law).[[132]](#footnote-132) Likewise, an employer could still be at fault for failing to take preventative action, but this sometimes may be difficult to prove or detect. In such cases, ‘strict-vicarious liability has an edge over direct employer negligence liability in terms of optimal deterrence’.[[133]](#footnote-133)

For such reasons, and as I explore in more detail in section 6.3, I do not necessarily believe that the deterrence rationale needs to be based upon some fault-related conception of the law before it is of any use. Nor do I share the views of Gummow and Hayne JJ in *Lepore* when they argued that ‘[i]f the criminal law will not deter the wrongdoer, [then] there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed’.[[134]](#footnote-134) This view has often been cited by scholars when shaping the debate on the relevance of deterrence to vicarious liability,[[135]](#footnote-135) but it seems to me to conflate the deterrence of the employee with the deterrence of the employer. It may be true that the risk of dismissal or discipline will not deter an employee who has not already been deterred by the criminal law, but vicarious liability could perhaps set in place a more efficient system of employment to further reduce the chances of a certain harm occurring in the future.

Now, even if one was unconvinced by this analysis of deterrence, it still arguably remains a relevant consideration if we adopt Gray’s broader view of the theory which looks to what activities or servicesmight be deterred by vicarious liability. As he further explains, ‘the imposition of strict liability upon an enterprise may indeed provide a deterrent effect, but the deterrence may be to operating the organisation at all’.[[136]](#footnote-136) The discontinuation of certain activities has been a prominent concern in some vicarious liability cases,[[137]](#footnote-137) and it is suggested that it could helpfully be reconceptualised as an issue of deterrence. In this light, and in line with Neyers who similarly outlines two distinct forms of deterrence in his work,[[138]](#footnote-138) it may be useful to distinguish between two different types of deterrence that are utilised in this thesis. The first is what I call ‘*individual deterrence*’, and this refers to the conventional form of the theory that was discussed above in relation to *Gravil*: that is, deterring potential defendants from committing torts. This version of deterrence is the more prominent consideration in the context of Chapter 6.

In contrast, Gray’s broader view of deterrence – which analyses whether liability might deter potential defendants from engaging in socially useful activities – is referred to here as ‘*social deterrence*’. This version of deterrence is the more prominent consideration in Chapter 4. Interestingly, this form of deterrence could also be mapped on to an economic analysis of law, a school of thought that suggests that tort law ought to operate as a tool for minimising the costs of socially beneficial activities.[[139]](#footnote-139) Neyers and Stevens appear to be advocates of such an argument, and they have suggested that the imposition of vicarious liability on altruistic bodies might place potential victims of abuse in an even more vulnerable environment than the institution itself – namely, the street.[[140]](#footnote-140) This line of reasoning is considered in more detail in section 4.4.1, although it is perhaps worth mentioning here a notable inconsistency in their analysis. If, as I suspect, their reasoning is based on the wider conception of Gray’s formulation of social deterrence, then it seems incongruous to reject the deterrence rationale for vicarious liability (as they do in the immediate article and elsewhere[[141]](#footnote-141)) whilst simultaneously also seeking to justify their view on liability on deterrence-based grounds. We must not cherry pick when theory is, and is not, relevant to a particular case. In this light, I must agree with Gallen when he suggested that, if we are to ‘speculate on policy questions, [we] should not do so selectively’.[[142]](#footnote-142)

As a final point, it might also be suggested that, without some evidence as to whether tort law (and vicarious liability in particular) really deters harmful acts, the deterrence rationale (in either of its forms) should not be utilised.[[143]](#footnote-143) After all, I could quite easily refute Neyers and Stevens’ assertion by simply stating that more people do *not* end up on the street as a result of vicarious liability, but this would just be one speculative claim against another, and it is likely to only produce many moot arguments. However, as outlined in section 3.3.3, I utilise an empirical-based model of vicarious liability that may operate to avoid such ‘bald assertions’.[[144]](#footnote-144) As a result, we might say that the theory of deterrence is most relevant whenever there is sufficient empirical evidence that either supports or rejects the imposition of vicarious liability in a particular case.

**2.4.2 Control**

Finally, it must be recognised that one of the more traditional rationales for the existence of vicarious liability lies in the notion of control.[[145]](#footnote-145) The logic here is that, because employers are able to control their employees’ behaviour, they are ‘in the best position to implement systems and processes within their workplaces that mitigate the risk of harm’.[[146]](#footnote-146) It is perhaps worth highlighting a number of clarifications in regards to this theory. First, and as evidenced by the judgment of Bramwell LJ in *Yewens v Noakes*,[[147]](#footnote-147) one should be aware that earlier authorities focussed heavily on whether the employer could control *how* the work was to be done, rather than *what* work was to be done.[[148]](#footnote-148) Accordingly, in *Performing Rights Society Ltd v Mitchell & Booker*, the employee status of a dance hall band was predicated on the defendant’s ability to exercise the ‘right of continuous, dominant and detailed control on every point, including the nature of the music to be played.’[[149]](#footnote-149) It was also emphasised by Lord Porter in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* that the relevant point was whether control could be exercised, not whether it actually was exercised.[[150]](#footnote-150)

However, as changes to work environments led to more highly skilled workers, it became increasingly futile to ask whether the employer could control how the employee performed his job. We would not expect to see, for instance, the owner of the Los Angeles Lakers basketball team instructing LeBron James when to pass or shoot the ball. Similar judicial examples highlight the impracticality of the owners of a ship attempting to instruct the master how to navigate the vessel.[[151]](#footnote-151) For such reasons, and in order to respond to those arguments which suggested that the theory was a mere anachronism divorced from any contemporary practical relevance,[[152]](#footnote-152) the concept of control was forced to undergo some refinement. As such, the UK Supreme Court in *CCWS* has now confirmed that ‘the significance of control today is that the employer can direct *what* the employee does, not how he does it’.[[153]](#footnote-153) By accepting this fact, it is outlined in Chapter 5 that this potentially opens up the possibility of holding various governing bodies vicariously liable for professional athletes in a number of individual sports. This point is arguably reinforced by the Australian authority of *Zuijs v Wirth Brothers Pty Ltd*.[[154]](#footnote-154) In acknowledging that ‘what matters is lawful authority to command’, irrespective of ‘special skill or knowledge’,[[155]](#footnote-155) Dixon CJ in this case had little trouble in finding that acrobats at a circus were employees.

The second point of clarification relates to the implicit assumption that control only assumes any degree of relevance when dealing with the first stage of vicarious liability (and in particular to the distinction between employees and independent contractors).[[156]](#footnote-156) As evidenced by the analysis of contractual disrepute clauses in Chapter 7, however, this is arguably an erroneous assumption to make. The concept of control is relevant to *both* stages of vicarious liability, and this is perhaps largely because it is intrinsically linked to many of the other theories that we have previously discussed in this chapter. Giliker, for instance, demonstrates an overlap between control and corrective justice when she states that fault may be ‘presumed when an actor controlled by the defendant harms the victim’.[[157]](#footnote-157) Gray makes a similar observation when he links the theory of control to the notion of ‘moral blameworthiness’ leading to liability.[[158]](#footnote-158) By the same token, however, control is also closely interrelated with aspects of distributive justice, and most notably the theory of enterprise liability. This link between control and integration is explored in more detail in Chapter 5, although it is perhaps worth briefly mentioning here Flannigan’s view that ‘control is of fundamental importance in identifying a separate enterprise’. He further explains that ‘risk-taking is implemented through control. A person cannot take risks in doing work if he does not have control over all or part of the performance of the work’.[[159]](#footnote-159) In this light, it is somewhat surprising – and indeed a little confusing – that some judges have sought to prioritise enterprise liability whilst simultaneously downplaying the theory of control.

One example is that of Lord Reed in *Armes* who, as we might recall, suggested that enterprise liability was the most influential contemporary rationale for vicarious liability. However, he was seemingly also supportive of the waning significance of control when he held that it is ‘not necessary for there to be micro-management, or any high degree of control, in order for vicarious liability to be imposed.’[[160]](#footnote-160) His Lordship also expressed similar sentiments in *Cox* when he noted that this theory ‘no longer has the significance that it was sometimes considered to have in the past’.[[161]](#footnote-161) Whilst Morgan has been critical of this downplaying of control in recent times,[[162]](#footnote-162) it must be noted that Lord Reed’s comments follow a judicial trend of dismissing control as an all-important criterion. For instance, Lord Phillips in *CCWS* maintained that control should no longer be seen as the ‘critical touchstone of employment’,[[163]](#footnote-163) and even those judges who applied a control analysis – such as May LJ in *Viasystems* – have similarly concluded that ‘entire and absolute control’ is no longer ‘a necessary precondition of vicarious liability’.[[164]](#footnote-164) This is a popular view in the surrounding scholarly literature on the topic, with Atiyah suggesting that ‘the absence of control… is today not a serious obstacle’ to vicarious liability’.[[165]](#footnote-165) Voyiakis offers a similar (yet more recent) view when he remarked that, if control really were the central factor in determining the relationship requirement, we should expect to see vicarious liability in scenarios such as those of *Nettleship v Weston*.[[166]](#footnote-166)

However, I do not think that the absence of any court seriously entertaining the proposition of vicarious liability in the driving instructor-learner relationship is necessarily indicative of the fact that control is no longer relevant or significant. Rather, to my mind, it simply serves to once again reinforce the argument outlined in this chapter that the role and importance of each theory is highly dependent upon both the context of the case, and its interaction with other (potentially overlapping) rationales. This is something that Voyiakis himself appears to recognise when he notes that the legitimacy of holding A responsible for B’s action ‘depends not only on the degree of direction that A exercises over B’s conduct, but also on the context or the purpose for which that direction is exercised.’[[167]](#footnote-167) Indeed, he observes that the pedagogical nature of the relationship in *Nettleship* is sufficiently distinct from the traditional employment context so as absolve the instructor from liability.[[168]](#footnote-168) Likewise, and from a pluralistic point of view, there is also the additional element of loss spreading in the learner driving scenario, a theory which we might conclude assumes a greater degree of significance in this context. As I discuss in more detail in section 4.4.2 (in the context of motor vehicles and agency law), there is perhaps little practical motivation to hold a driving instructor vicariously liable when the tortfeasor herself is adequately covered by third-party motor insurance under s.143 of the Road Traffic Act 1988. Such a context-sensitive approach also probably helps to explain why parents are not currently held vicariously liable for torts committed by their children, despite the fact that such relationships exhibit an unusually high level of control between the two parties.[[169]](#footnote-169)

**2.5 A Contextual-Pluralist Model of Vicarious Liability**

What may be apparent from much of the preceding discussion is that no solitary theory can hope to fully explain the numerous (and oftentimes competing) contours of the law on vicarious liability. This argument is further reinforced when we consider the multifarious contexts in which employer liability might be applicable. As such, the purpose of this final section is to outline my normative preference for what I term a contextual-pluralist model of vicarious liability. This entails two overlapping claims. The first is that an ensembleof the aforementioned theories – which could perhaps be helpfully predicated on a ‘fair, just and reasonable’ assessment in each case - might be able to provide a more satisfactory rationale for the doctrine. The second is that we should shun a case-by-case approach in favour of a more circumstantial model that seeks to delineate which theories are most relevant by context. The identification of when each theory is most relevant may be a particularly important development here in light of Keating’s assertion that cases invoking some theories (such as enterprise liability) tend to interpret strict liability doctrines more expansively than those cases that utilise other corrective justice-based theories (such as fault).[[170]](#footnote-170)

Before examining the two constituent elements of my contextual-pluralist model in more detail, it is perhaps worth saying a few words on how both elements of my framework might inform each other. In short, my focus on legal pragmatism (as outlined in the following chapter) appears to illustrate that a commitment to pluralism is harmonious with my contextual focus. Indeed, both contextualism and pluralism have been correctly identified as fundamental ‘themes’ of pragmatism,[[171]](#footnote-171) and this is reflected in the work of various scholars.[[172]](#footnote-172) Lekan, for example, suggests that legal pragmatists are ‘decidedly contextualist and pluralist about normative questions’,[[173]](#footnote-173) and this appears to coincide nicely with my analysis of legal realism in section 3.4.1. Indeed, we will see there a further exploration of Lekan’s point that, under a ‘contextualist and pluralist account of moral values, pragmatism eschews a-contextual principles in favour of sensitive attention to the concrete particular features of moral problems’.[[174]](#footnote-174) Furthermore, I am not the only private law scholar to recognise a close association (or overlap) between both contextualism and pluralism. For instance, in his argument that tort law ought to show more sensitivity to egalitarianism, Keren-Paz makes the point that ‘the relative weight that should be given to the goal of promoting equality changes with the context, as is the extent to which tension exists between the goal of promoting equality and other goals.’[[175]](#footnote-175) As such, the model that I outline in the following sections seeks to build upon the ‘naturally complementary’ positions of contextualism and pluralism to explore how the theoretical basis of vicarious liability might be better rationalised.[[176]](#footnote-176)

Now, what is clearly apparent in this suggestion is that my contextual-pluralist model necessarily calls for a significant degree of judicial activism. This, of course, is likely to be rejected by certain judges. Lord Sumption, for instance, has recently critiqued the idea of judges engaging with policy issues, and he instead suggested that many political issues ought to be left instead to the legislature.[[177]](#footnote-177) For Sumption, the rule of law does not necessarily mean that ‘every human problem and every moral dilemma calls for a legal solution’.[[178]](#footnote-178) With this in mind, it might be questioned whether my model is a satisfactory solution if only some judges are willing to adopt it. Indeed, if certain members of the judiciary believe that judges should not trespass into certain political areas, is it overly presumptuous to think that my contextual-pluralist model will lead to any support from the judiciary? Three points may help respond to this concern.

First, the view advocated by Lord Sumption fails to recognise that a decision to not intervene may be just as political as a decision *to* intervene. As such, any judicial rejection of my contextual-pluralist model could equally be seen as a political decision in itself, and also open to the same line of criticism. Second, I do not believe that it is necessarily fatal to my model if certain judges are less inclined to adopt it. After all, many judicial panels often contain judges with differing views as to the importance of theory. Seemingly in contrast to her views in *Barclays*, Lady Hale, for instance, has recently remarked that ‘courts are as well qualified to judge as is the legislature’.[[179]](#footnote-179) In some cases, she suggests, they are ‘better qualified, because they are able to weigh the evidence, the legal materials, and the argument in a dispassionate manner, without the external pressures to which legislators may be subject’.[[180]](#footnote-180) We will also see in section 3.3.1 that certain judges who adopt a ‘thick’ approach to theory – such as Lord Reed in *Armes* and Irwin LJ in *Barclays* – may also be open to the idea of the law supplanting politics. The fact that some judges might reject my contextual-pluralist model should not, therefore, mean that it automatically ought to be dismissed. If any new model or suggestion was to be rejected on the basis that *some* judges *might* disagree with it, then the law would be a very stagnant concept indeed.[[181]](#footnote-181)

The third point to note is that Lord Sumption’s view also has some scholarly support. Various commentators have argued, for instance, that fundamental change to the doctrine of vicarious liability should only be enacted by Parliament.[[182]](#footnote-182) This is indicative of Lord Sumption’s view, as he suggests that Parliamentary intervention is the only way of ensuring that judgments in this area of law are not ‘wholly political’.[[183]](#footnote-183) However, I do question the feasibility of Sumption’s argument here, particularly given the practical and financial limitations faced by the legislature.[[184]](#footnote-184) It is unlikely that Parliament will ever devote any precious time to analysing the theoretical basis of vicarious liability, and I believe there is much to commend in Kirby J’s insightful remark that waiting for Parliament to modify the law is akin to ‘waiting for the Greek Kalends. It will not happen’.[[185]](#footnote-185) If reform in this area of law is to occur, it is much more likely to come from within the judiciary. In this light, we must trust that judges – who are experts in providing reasoned and intelligent responses to complex disputes – are able to shoulder the responsibility for this task. My support in the following chapter for Llewellyn’s so-called ‘grand style’ of adjudication – which he suggested would allow even mediocre judges to achieve greatness[[186]](#footnote-186) – appears to also help facilitate this argument.

As such, and with this in mind, it is perhaps worth briefly mentioning here that this point about the need for judicial activism also feeds nicely into the later discussion in section 3.4.1. There, I argue that my model – and indeed vicarious liability more generally – owes its origins more to the school of thought known as legal realism (rather than legal formalism). Indeed, and as Shapiro outlines, the role of the judge under a formalist conception of the law is ‘highly restrictive’.[[187]](#footnote-187) As he further elucidates, formalism explicitly rejects the notion that judges can ‘disregard or correct the rules in favour of their conception of morality or social policy’; rather, the ability to change the law lies solely with the legislature.[[188]](#footnote-188) In this regard, the development of my contextual-pluralist model in the following sections perhaps provides the first glimpse into the realist jurisprudence that informs much of the analysis in this thesis.

**2.5.1 Pluralism – A Matter of ‘Fair, Just and Reasonable’?**

The first element of my suggested model is its necessarily pluralistic nature. Given the aforementioned limitations in each of the traditional rationales for vicarious liability, it is suggested here that a more theoretically adept law on vicarious liability can be achieved by allowing judges to openly balance a multitude of theories to arrive at a socially justifiable outcome. This claim builds upon the work of Burton who has persuasively highlighted that such ‘[p]luralist balancing would contribute more than monism to the legal system’s legitimacy.’[[189]](#footnote-189) This is seemingly because, as Schwartz points out in relation to combining both deterrence and corrective justice rationales in the law of negligence, the ability to ‘affirmatively deploy two rationales rather than one in defence of certain portions of the tort system may well play a crucial role in the evaluation of those portions’ overall value’.[[190]](#footnote-190) In perhaps more simplistic terms, a finding based on multiple converging theories is undoubtedly more justifiable and legitimate than a finding based only on one theory. What we are looking for under a contextual-pluralist model, then, is a common theoretical solution to a particular case or issue. As discussed in the following chapter, both the Court of Appeal in *Barclays Bank v Various Claimants* and the Supreme Court in *Armes* appeared to utilise a similar approach.

Moreover, it is worth highlighting that my suggested model also provides several other benefits. In line with Dagan’s view, it is argued here that a pluralistic model might also open up adjudicative ‘options for choice rather than channelling everyone to the one possibility privileged by law.’[[191]](#footnote-191) Consider, for example, the contrasting judgments of May LJ and Rix LJ on the issue of dual vicarious liability in *Viasystems*.[[192]](#footnote-192) As we touched upon in section 2.4.2, the former adopted a monistic approach and preferred to focus on the ‘employers' right (and theoretical obligation) to control the relevant activity of the employee’.[[193]](#footnote-193) In contrast, the latter doubted whether the doctrine of dual vicarious liability should be ‘wholly equated with the question of control’, and instead suggested that we should examine whether the tortfeasor was ‘so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.’[[194]](#footnote-194) By recognising that no single theory should be ‘wholly determinative’,[[195]](#footnote-195) Rix LJ’s broader pluralistic approach leads to two important developments. First, and following Lord Phillips’ approval of this more pluralistic approach,[[196]](#footnote-196) various commentators have recognised that Rix LJ’s test might lead to more frequent findings of dual vicarious liability.[[197]](#footnote-197) This appears consistent with my analysis in the following chapter where I highlight how my pluralistic model will usually lead to a wider scope of vicarious liability than was advocated by the Supreme Court in *Barclays*.[[198]](#footnote-198)

Second, it also allows us to gain a deeper understanding of how each theory interacts with one another in the juridical process. Indeed, by probing Rix LJ’s approach in more detail, Hallett LJ in the later case of *Hawley v Luminar Leisure Ltd* was able to clarify that the concept of control is also relevant to ‘the question of how much the employee has become embedded in that organisation’ for the purposes of enterprise liability.[[199]](#footnote-199) The identification of overlaps between the various theoretical rationales is an important point, and it is one that I have been eager to stress throughout this chapter. This is because the more interconnected the theories are, the easier it arguably becomes to implement a pluralistic model of vicarious liability. We have already seen, for instance, some overlap between many of the following justifications: fault and control; control and enterprise liability; loss spreading and enterprise liability; and deterrence and control. Other commentators have likewise outlined a link between enterprise liability and deterrence,[[200]](#footnote-200) and Lord Macnaghten in *Lloyd v Grace, Smith & Co* even recognised that there may be some overlap between the loss spreading and fault rationales for vicarious liability.[[201]](#footnote-201) The similarities between deep pockets and loss spreading are also notable, particularly as the logic behind both theories is that it is preferable to cast the loss upon an entity that is better able to pay out compensation (either because it has larger financial assets or better insurance cover than an individual).[[202]](#footnote-202) Furthermore, even those theories that are generally considered to be completely at odds with each other – the most notable example here being loss spreading and deterrence[[203]](#footnote-203) – might occasionally, in certain contexts, be able to work harmoniously with each other. As Merkin and Steele illustrate, insurance can sometimes be a ‘powerful regulator’ because ‘an uninsured person who has nothing to lose if he or she faces liability has less incentive to take care than an insured person who cannot continue their activities without insurance’.[[204]](#footnote-204) Consequently, it might be tentatively stated that loss spreading’s so-called ‘cushioning effect’ on deterrence is somewhat overstated.[[205]](#footnote-205)

Whilst many of the justifications for vicarious liability are largely inter-related, it must be recognised that each individual theory still emphasises a slightly different normative intuition. This is reinforced by my analysis of the link between control and enterprise liability in section 5.2.3, where I highlight that they will not *always* point to the same conclusion on liability. The key for judges under my contextual-pluralist model, then, will be in highlighting which normative intuitions they want to emphasise at the cost of (or perhaps in tandem with) other theoretical rationales. It is suggested here that we might be able to accommodate this pluralistic balancing exercise in the context of vicarious liability by predicating it on the relatively recent emergence of the ‘fair, just and reasonable’ test in this area of law. To be clear, I do not suggest, as other scholars have implicitly done,[[206]](#footnote-206) that a ‘fair, just and reasonable’ assessment is necessarily a *theory*; rather, it is merely a rhetorical label that is invoked to encompass numerous other non-doctrinal considerations. Indeed, and as Robertson rightly points out in the duty of care context, reference to the language of ‘fair, just and reasonable’ may be useful in identifying and weighing the individual justice and community welfare concerns in each dispute.[[207]](#footnote-207) Interestingly, and largely in stark contrast to those cases dealing with the existence of a duty of care (which now demonstrate a greater trend for incrementality in novel negligence cases),[[208]](#footnote-208) judges refer with alacrity to notions of what is ‘fair and just’[[209]](#footnote-209) or ‘fair, just and reasonable’[[210]](#footnote-210) when determining the extent of an employer’s liability. It is suggested here (and considered in more detail in section 3.2.1) that a contextual-pluralist application of this ‘fair, just and reasonable’ assessment – which stresses the importance of theory and fact-sensitivity – could provide a more meaningful and transparent conception of this nebulous test. This might allow us to see the ‘fair, just and reasonable’ enquiry in its ‘best light’,[[211]](#footnote-211) and this could prove of use to both vicarious liability and to other areas of tort law that utilise this test.

These suggestions are not, however, without criticism. The first is noted by Gray when he questions why a ‘principle used to determine whether a duty of care is owed in terms of negligence law should be applied in the context of vicarious liability, where typically the defendant is not actually accused of any wrongdoing.’[[212]](#footnote-212) Beuermann makes a similar accusation, forcefully arguing that it is ‘nonsensical’ to consider whether a strict liability case is ‘fair, just and reasonable’ because it is imposed ‘regardless of personal wrongdoing by the defendant’.[[213]](#footnote-213) Whilst it is true that the language of ‘fair, just and reasonable’ in torts stems from the seminal judgment of *Caparo v Dickman*,[[214]](#footnote-214) these arguments are difficult to accept. Insofar as the ‘fair, just and reasonable’ test is simply ‘code for policy’[[215]](#footnote-215) – and not a free-standing theoretical concept *per se* – the argument that these commentators seem to be making is that socio-legal concerns are only relevant to fault-based liability, and *not* strict liability. Quite why this should be the case is not entirely clear.

The second criticism is raised by Stevens, and it is perhaps a more pressing issue that goes to the heart of my pluralistic stance. In taking a more restrictive approach to the scope of the doctrine, he opines that vicarious liability is not a ‘vegetable soup’ in which we can assimilate a number of theories that do not fully explain the doctrine, and mash them together to provide a satisfactory rationale.[[216]](#footnote-216) Stevens attempts to buttress this argument by highlighting that the various normative justifications for vicarious liability often ‘point in different directions’.[[217]](#footnote-217) As we have already discussed, this is not necessarily true, and there appears to be a significant degree of overlap between many of the theories. To the extent that this is the case, Stevens’ argument is considerably weakened. However, even if I am wrong to suggest that many of the rationales for vicarious liability possess a degree of interconnectedness, it still does not seem to me that this necessarily dictates that a pluralistic ‘fair, just and reasonable’ enquiry is unworkable. Rather, it is simply a recognition that there is an inevitable tension between some theories that will require balancing out by a prudent judge having regard to the unique contextual matrix of each case. Just because something is difficult to achieve does not make it unattainable. Perhaps the better question is whether it would be a worthwhile exercise to attempt to balance theories that point in different directions. As I argue in more detail in section 3.2, I believe it is.

**2.5.2 Sketching a Context-Oriented Approach**

By drawing on the work of Robinette,[[218]](#footnote-218) the second element of my proposed model suggests that we may be able to attain a vantage point of theoretical relevance in vicarious liability by determining *ex ante* the weight to be afforded to a particular theory in certain contexts. On this basis, I reject a literal case-by-case approach to liability (championed most prominently by James),[[219]](#footnote-219) and would prefer instead to ‘disaggregate’ vicarious liability by framing which theoretical principles are most relevant in certain circumstances.[[220]](#footnote-220) This is perhaps the factor which most distinguishes my suggested model from the preferences of some judges – such as Lord Phillips in *CCWS* - who already seem wedded to a pluralistic approach that considers multiple different theories. Indeed, and as we saw in the previous section, a mixed theory approach has also already been considered (and subsequently rejected) by various scholars. However, no judge or scholar has yet to offer any guidance as to which theory (or theories) ought to be afforded the most importance in any given scenario. This, it is suggested, is where the importance of context really comes to light in helping us to identify a common theoretical solution to a particular issue. As Llewellyn explains, an examination of ‘concrete instances’ is ‘necessary in order to make any general proposition, be it a rule of law or any other, *mean* anything at all.’[[221]](#footnote-221) In this respect, and as I explore in more detail in the following chapter, my model of liability is thus heavily tilted towards a legal realist conception of the law, in that it seeks to prevent legal discourse descending into an ‘orgy of overgeneralisation’.[[222]](#footnote-222) As Paz-Fuchs further elaborates, transitioning a concept or theory from ‘one context to another is not only legitimate, but serves to buttress the (formalist) myth of coherence and consistency’.[[223]](#footnote-223) For now, however, it is worth taking a few brief examples to illustrate how this context-sensitive approach might work in practice.

Perhaps the most important example for our present purposes is that of the sporting industry itself, and in particular the distinction between the amateur and professional game. In the amateur context, where it is often maintained that participants play for the ‘love of the game’, loss spreading, social deterrence and deep pockets are perhaps the most important theoretical considerations. In the absence of any effective mechanism to spread loss, an amateur sports club might be forced to cease operations, and a deserving victim may not be able to attain adequate compensation if their only cause of action is directly against the tortfeasor himself (who is likely to be a man of straw). In contrast, these particular theoretical concerns are not quite as pressing in the professional sports industry. Most professional clubs (and indeed most other non-sporting multi-national commercial companies) will be able to easily absorb any losses, and there is perhaps very little threat of such a wealthy employer being forced to cease operations due to the imposition of vicarious liability. As such, it may be that enterprise liability is a more pertinent theoretical issue in this context. As Weatherill succinctly notes, ‘there is merit in distinguishing between amateur and recreational sport, where the profit-making motive is absent and participation is of greater significance than winning or losing, and professional sport, where the partisan element is greatly heightened.’[[224]](#footnote-224)

This need for context-specificity in sport already appears to have been recognised (albeit in the standard of care context) by Partington, when he discusses the fictional example of a coach “psyching up” his players in an attempt to cause injury to the opposition.[[225]](#footnote-225) In his view, were the coach to be an unpaid volunteer leading an amateur team, the ‘enhanced social desirability of such volunteering would likely encourage more judicial tenderness in defining reasonable care in the circumstances than what might be afforded to [an] opposing professional coach.’[[226]](#footnote-226) This is primarily due to the orthodox economic analysis of law assumption that, ‘but for the volunteer coach, amateur players from the (local) community may have reduced opportunities for sporting involvement’.[[227]](#footnote-227) Of course, this is not to suggest that enterprise liability is completely irrelevant to the amateur context, nor do I make the argument that loss spreading and deterrence serve no purpose whatsoever in the professional sphere. What I do maintain, however, is that the importance and weight of each theory are directly correlated to the specific context under consideration.

Countless other non-sporting examples could be included here, and some have already been touched upon earlier in this chapter. Consider, for instance, Voyiakis’ previous analysis of *Nettleship*. Although control in this scenario clearly points to vicarious liability for learner-drivers, it must be recognised that loss spreading is arguably the weightiest theory to consider in the context of road traffic accidents. As discussed above, there is perhaps little practical need to resort to the fictitious language of agency – as was the case in *Morgans v Launchbury*[[228]](#footnote-228) – to hold a driving instructor vicariously liable, particularly when the tortfeasor is already covered by insurance. Likewise, in cases where family members are involved, the importance accorded to each theory may change once more. Take the facts of *Lister v Romford Ice and Cold Storage Ltd*,[[229]](#footnote-229) a case in which an employee negligently injured his own father whilst driving a lorry. The father successfully sued his son’s employers under the doctrine of vicarious liability. In such scenarios where family members are involved, we might conclude that the deterrence rationale should be downplayed because, as Keren-Paz astutely explains, the employee in this context already has sufficiently strong incentives to exercise caution.[[230]](#footnote-230) The truth is that there is no theoretical justification that can purport to claim a monopoly on the endless scenarios to which vicarious liability might attach, and it may be that, if my model is accepted, we could in time come to develop a law on vicarious liabilitie*s* (with different theoretical justifications for different factual matrixes), rather than *a* law of vicarious liability.

Now, it is abundantly clear that this heavily contextualised model can only go so far without some further refinement as to what many of the contexts actually are (and indeed which theories are most relevant to each of them). In fact, Robinette has correctly conveyed that the disaggregation of various contexts will be a ‘difficult and painstaking task full of nuance’.[[231]](#footnote-231) In *Mohamud v WM Morrison Supermarkets plc*,[[232]](#footnote-232) for instance, the context could be construed as either ‘petrol station’, ‘supermarket’ or (broader still) ‘retail’. However, three points may suffice to respond to this criticism. First, just as the type of context may influence which theories are most relevant, it may also be the case that theory could influence how a certain context is to be defined. In this manner, we might identify a symbiotic relationship between theory and context under my model of liability. By way of example, consider once again the distinction between amateur and professional sports teams. Recent reports indicate that some lower league professional football clubs are currently facing significant economic difficulties,[[233]](#footnote-233) and it could be that both loss spreading and deep pockets justify placing these teams into a different context than other more financially healthy Premier League clubs. For those lower-end professional clubs with less money, it might be worthwhile to consider their ability to spread loss on a more equal footing with enterprise liability, such that neither theory is bestowed with a dominant role in this scenario. Of course, we should be wary of encouraging an overly narrow interpretation of each context, lest it render such an approach meaningless. In the end, however, a judge will have to make an appropriate classification of the context based on both theory and the factual matrix of the case.

Second, the legal question being asked could also influence how the context of a case is to be defined. In this regard, the context of a case could differ depending on whether we are dealing with the relationship (stage one) or connection (stage two) test for vicarious liability. Let us illustrate this point with reference to a fictional example based on the facts of *Gravil*. Suppose that an amateur rugby player headbutts an opposition player off-the-ball during a match. Under the model outlined in this chapter, it is suggested that the context for stage one ought to be ‘amateur sport’, whereas it is more appropriate to classify the context for stage two as ‘rugby’. The reason for this difference lies in the different questions asked by the two tests. For the first stage, we are concerned with what range of individuals a defendant ought to be responsible for, so the issue of whether a player is an amateur or professional is the most normatively important consideration in light of the different financial and organisational structures between amateur and professional clubs. In contrast, stage two is more concerned with what particular acts are closely associated with an enterprise, such that it would be better to focus on the *type* of sport rather than the level at which it is played. The rules and informal norms of rugby do not really differ depending on whether it is played at an amateur or professional level; an off-the-ball headbutt is as much a flagrant breach of the rules in amateur rugby as it is in professional rugby. As such, for our fictional example it seems better to classify the context for the second stage as the sport itself (i.e. ‘rugby’) rather than the level at which it is played (i.e. ‘amateur sport’). Once the different normative objectives of both stages of vicarious liability are highlighted in such a way, it becomes reasonable to conclude that one incident could be segregated into two different contexts, depending on the legal question being asked.

Third, and finally, it may also be said that a contextualised approach could be consistent with recent developments in the law on vicarious liability in the UK. The case in point here is that of *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB*, a case in which an elder was found to have sexually assaulted a Jehovah’s Witness.[[234]](#footnote-234) In finding that both stages of vicarious liability were satisfied in this instance, the Court of Appeal suggested – perhaps rather unconvincingly[[235]](#footnote-235) – that the ‘tailored’ test for sexual abuse cases (which is considered in more detail in section 7.2.1) should apply equally to both children *and* adults.[[236]](#footnote-236)Whilst this might seem somewhat antithetical to a contextual approach, the clarification on this point offered by Males LJ may indicate that there is some judicial support in the UK for prioritising certain normative considerations in certain contexts:

‘[an application of the tailored test] will need to take account of the differences between children and adults. Children, for example, will typically be more susceptible to grooming… and will lack the maturity and independence of adults. An adult, on the other hand, may generally be expected to be able to recognise inappropriate behaviour and to decide to have nothing more to do with an individual whose behaviour is unacceptable. In such a case the relationship is less likely to be a relationship in which the tortfeasor exercises power over the victim and the victim is dependent on or subservient to the tortfeasor. Whether such a relationship exists, however, will be a question of fact in each case.’[[237]](#footnote-237)

In addition to this example, it must also be noted that the Supreme Court of Ireland has rejected the relevance of *Bazley* (which concerned the sexual abuse of a child) in a case relating to the sexual assault of an adult.[[238]](#footnote-238) What these examples seem to indicate, then, is that there is some judicial receptivity to a contextual approach to vicarious liability. Of course, a significant degree of judicial craft will still be inevitable in determining the context of any particular dispute,[[239]](#footnote-239) and this is seemingly reflected in Males LJ’s view that the identification of a relationship will undoubtedly be a ‘question of fact in each case’. It is hoped, however, that a broader analysis of both theory and the particular stage of vicarious liability under consideration could help to rein in overly broad judicial discretion.

This could be supplemented, I suggest, by looking at how judges in previous cases (such as *Barry Congregation*) have attempted to classify the context of a case, and it may be that these existing examples could provide some insightful guidance for judges in future cases. It is for such reasons that I later argue (in section 3.4.1) that previous cases can sometimes prove instructive – though rarely ever determinative – in future disputes. In addition, this approach could also be buttressed by the following proposition: in cases where there is still some doubt as to the appropriate context of any given scenario, it may be wise to adopt Dagan’s approach and err on the side of narrowness. As Dagan elaborates, ‘[i]f law is to serve life, it should tailor its categories narrowly, and in accordance with these patterns of human conduct and interaction, so that it can gradually capture and respond to the characteristics of each type of case.’[[240]](#footnote-240) Viewed in this way, it might be said that there are ample cases and scholarly research that could be relied upon by judges in order to help them adequately define the context of any given scenario.

This point, however, may lead us to a further criticism. In fact, it might be said that, in those hard cases where various theoretical factors are in tension with one another, my model of liability offers little guidance on what weightto offer to the respective theories. As Shmueli contends, a contextual-pluralist approach might require an ‘unrealistically cumbersome’ examination when various goals clash.[[241]](#footnote-241) Consider, for instance, the difficulties in determining liability where we have numerically similar groups of theories pulling in opposite directions. To complicate things further, let us examine another possibility in which it might be said that we can identify a common theoretical solution to a particular topic. By way of example, consider the issue of vicarious liability for punitive damages, which has been identified by various scholars as inconsistent with the theories of fault and deterrence.[[242]](#footnote-242) Morris has similarly suggested that such liability for punitive damages would also run contrary to both enterprise risk and deep pockets, in that it ‘gives the plaintiff an undeserved windfall that has nothing to do’ with the ‘risk-shifting’ or ‘reparative’ function of enterprise liability, something which is already ‘duly served… by the allowance of compensatory damages’.[[243]](#footnote-243) All things considered, then, we would expect this to be the end of the discussion. However, we might believe that a solitary theory running against the grain of the other rationales - in the punitive damages example, this might be loss spreading[[244]](#footnote-244) - carries a much stronger argument than the others in their individual capacity. Yet, we cannot be sure whether this singular theory is as strong as the other rationales combined. How does a judge deal with this trade-off?

One (rather frank) answer is provided by the famous pragmatist John Dewey: we simply need to ‘develop the ability (and the disposition) to look for particular kinds of solutions by particular methods for particular problems which arise on particular occasions.’[[245]](#footnote-245) As such, Dewey takes the view that it is undesirable to promote any form of hierarchy amongst competing principles. This is an argument that could equally apply to the use of theory under my contextual-pluralist model, and it may be instructive to end this chapter with the following two comments.

First, Dewey’s contributions to liberal theory – and in particular his development of the ‘social intelligence’ concept – are of importance to my contextual-pluralist model. In sum, Dewey suggested that individuals possess ‘democratic habits of thought and action’,[[246]](#footnote-246) and as such he treats the individual as indistinguishable from the social. As Kauppi, Holma and Kontinen further explain, Dewey ‘conceptualizes intelligence as a fundamentally social phenomenon, gained through individual experience in social relationships, practices and interdependencies, having value and operating within this social frame.’[[247]](#footnote-247) Importantly, this view seems to coincide nicely with my discussion in section 3.3.3 when I refer to Dagan’s explanation of law as ‘craft’. Moreover, in framing the analysis of ‘social intelligence’ in this way, Dewey’s liberal theory leads to a number of observations that are consistent with the analysis in this thesis. For instance, my discussion on adaptability (in section 3.2.2) appears to echo Dewey’s thoughts when he suggests that, because 'intelligence develops within the sphere of action for the sake of possibilities not yet given', we ought to analyse whether new problems and contexts require new solutions. In other words, and to apply this to the vicarious liability context, we might say that novel types of working relationships (such as those discussed in Chapter 5 in relation to individual sports stars) demand ‘the constant remaking of old habits and old ways of thinking’.[[248]](#footnote-248) Likewise, Dewey also highlights the need for more empirical knowledge. In a similar vein to the argument I make in section 3.3.3, he highlights that the ‘combined observations of a number cover more ground than those of a single person’.[[249]](#footnote-249) For Dewey, judges may be too far ‘removed from common interests’, such that their own private knowledge of social issues is ‘not knowledge at all’.[[250]](#footnote-250) As such, Dewey’s liberal theory perhaps provides a further justification for my focus on empirical statistics throughout this thesis.

Secondly, the fact that there is no clear-cut way of refereeing clashes between incommensurable theories does not necessarily pose an insurmountable problem for adjudication. Raz notes that the law ‘characteristically includes only incomplete indications’ as to the relative weight of many legal principles, and ‘leaves much to judicial discretion to be exercised in particular cases.’[[251]](#footnote-251) He further outlines that the scope of such discretion is ‘doubly extended’, since ‘not only must the relative importance of principles be determined, but also the importance relative to each principle of deviating from it or of following it on particular occasions.’[[252]](#footnote-252) In fact, and as critical legal scholars would likely attest to, ‘the law is infused with irresolvably opposed principles and ideals.’[[253]](#footnote-253) The candid comments of Cooke J in *Market Investigations v Minister of Social Security* are testament to this fact. In perusing the various factors that might give rise to an employment contract, his Honour observed that:

[n]o exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant… nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.[[254]](#footnote-254)

As we can see, judges in vicarious liability cases have long grappled with the indeterminacy of legal rules and trade-offs between competing considerations, so it does not seem to me that this critique is fatal to the implementation of a contextual-pluralist model. The reality is that the relative importance of each theory is ‘always and necessarily contextual’.[[255]](#footnote-255)

This concession seems eminently preferable to any attempt to offer a descriptive or normative hierarchy of theoretical principles. Giliker attempted the former in 2010 when she suggested that leading case law highlighted three ‘primary policy factors’ (loss spreading, enterprise risk and victim compensation) and three ‘secondary policy factors’ (deterrence, fault and the negligence-intentional divide).[[256]](#footnote-256) Such a broad-brushed approach, however, could be at risk of losing focus, over-generalizing or surrendering fact-sensitivity if applied in a blanket manner. As such, whilst Giliker must be commended for her attempt to provide some theoretical structure to the law on vicarious liability, I do question the cogency of formulating any sort of pecking order that objectively ranks the importance of each theory across all cases and scenarios. Indeed, and as Crowder observes, without reference to context, such values cannot be ‘ranked for decisive reason in the abstract’.[[257]](#footnote-257) Dewey also makes a similar point in his contributions to liberal theory, as he has similarly accused scholars of ‘treating social issues in a way that seeks to present general and universal answers to specific and detailed problems’.[[258]](#footnote-258) As a result of these comments, I am aware that such an approach exposes my model to the critique that it is too uncertain to be useful in practice. This is a legitimate concern, and it is one to which I will return to in the following chapter in section 3.4.2.

**2.6 Conclusion**

For many, the theoretical justification for the existence of vicarious liability remains something of a mystery. As discussed above, corrective justice theorists run into a significant stumbling block when attempting to explain a strict liability doctrine on the grounds of either fault or the so-called ‘master’s tort theory’. Although I have suggested that vicarious liability is better conceptualised as an instrument of distributive justice, it has also been highlighted that none of the distributive justice-based theories (most notably, enterprise liability, loss spreading and deep pockets) can operate as the sole rationale for the doctrine. In a similar vein, neither deterrence nor control can provide an all-encompassing answer to explain the many contours of vicarious liability. What we have seen instead is that, whilst all of these theories are potentially relevant considerations, the importance of context and factual nuance means that none of them are, on their own, a determinant factor in the imposition of vicarious liability in all cases.

It has thus been argued that this state of affairs is conducive to the implementation of a contextual-pluralist framework. This model suggests that, in many instances, a better justification for vicarious liability may be found by combining a number of relevant rationales that are said to underpin the doctrine. Given the not insignificant overlap between many of these theories, it is maintained that a pluralistic approach predicated on a ‘fair, just and reasonable’ assessment may constitute a viable solution to the continuing lack of any unifying rationale for the doctrine. This should be supported by a fact-sensitive approach which proposes that, in determining a common theoretical solution to a particular case or issue, the relevant weight afforded to each theory should differ depending on the surrounding context of the dispute. Of course, there are many obvious difficulties associated with this suggested contextual-pluralist model, and it is ultimately recognised that, without further exploration, it constitutes a somewhat abstract framework for determining vicarious liability cases. As such, in the next chapter I tackle three particular issues that may be raised in regards to my contextual-pluralist model of liability: (i) why it would be a good idea to implement it; (ii) what particular developments for vicarious liability we might consider as a consequence of adopting this model; and (iii) what objections might be made against it. In the following chapters thereafter, I then apply this model to various sporting contexts to see how a more theoretically informed doctrine of vicarious liability might work in practice.

**CHAPTER 3**

**DEVELOPING MY CONTEXTUAL-PLURALIST MODEL OF VICARIOUS LIABILITY**

**3.1 Introduction**

This chapter builds upon the claim made in Chapter 2 that we should adopt a contextual-pluralist approach to vicarious liability that seeks to identify a common theoretical solution to each context. In particular, and from a normative standpoint, it is examined in section 3.2 how the implementation of my model is likely to lead to a more meaningful, adaptable and transparent law on employer liability. Because the analysis in this chapter is largely concerned with the broader issues of the proper role of a judge and the purpose of law in society, various other areas of law are considered here when discussing these three benefits. Following this, section 3.3 then surveys three key developments that we ought to consider implementing if we are to successfully apply my contextual-pluralist model. As part of these changes, I call for the adoption of a so-called ‘thick’ approach to the use of theory (as opposed to a ‘thin’ or ‘exclusionist’ conception). This requires a sustained and detailed application of the underlying rationales of vicarious liability to *both* stages of the traditional two-step test. Ideally, and when necessary, this should also be buttressed by gleaning insight from other interdisciplinary and socio-legal sources, as well as by the utilisation of relevant empirical data to support judicial decisions. As was touched upon in the previous chapter, this is likely to lead to an ‘all-things-considered’ approach under my contextual-pluralist framework.

Finally, in section 3.4, I address the potential criticisms that might be made against my model. Specifically, I suggest that the emergence of a ‘principled’ incremental approach in the recent law – as depicted in the Supreme Court’s rulings in *Barclays Bank v Various Claimants*[[259]](#footnote-259) and *WM Morrison Supermarkets v Various Claimants*[[260]](#footnote-260) – is not necessarily a superior suggestion to my more policy-inspired contextual-pluralist proposal. This is particularly so in light of the fact that vicarious liability arguably has closer ties with legal realism than it does with legal formalism. This discussion also allows me to not only differentiate between different strands of legal realism, but also to sharpen the appropriate role of precedent under my model. As such, I suggest that previous case law, if relevant at all, should only ever be an instructive consideration (rather than a determinative one). In addition, and to conclude the chapter, I also attempt to respond to those concerns that my model is too uncertain to be used in practice by highlighting both: (i) the unpredictability that persists in other areas of tort law; and (ii) the fact that a doctrinal approach is not necessarily more conducive to certainty.

**3.2 Benefits of a Contextual-Pluralist Approach**

In the previous chapter, I suggested that judges should have the ‘courage of their convictions’ to simply ask what the relevant theoretical considerations are in each vicarious liability context, and balance these accordingly to arrive at a sensible and socially desirable outcome.[[261]](#footnote-261) The purpose of this following section, then, is to outline *why* the use of theory is a necessary ingredient in determining the extent of an employers’ liability. Giliker has briefly touched upon this point in some of her earlier work, when she observed that ‘theoretical analysis would aid clarity and provide a means of justifying liability’.[[262]](#footnote-262) Since then, however, it has been quite common for many scholars to simply align the theories of employer liability with either their immediate subject[[263]](#footnote-263) or their model of liability,[[264]](#footnote-264) without actually exploring why theoretical appraisal is important in the first place. Consequently, by examining in detail three key benefits of a more theoretically informed approach to vicarious liability, this section hopes to fill in this gap in the literature, as well as further sharpening how my contextual-pluralist model might work in practice.

**3.2.1 Meaningfulness**

The first benefit of my contextual-pluralist approach is that it helps to somewhat nullify the tautological nature of the ‘fair, just and reasonable’ enquiry that is currently conducted in a number of leading vicarious liability cases. A good example of the potential circularity of such an assessment is provided by Lord Nicholls’ enunciation of the close connection principle in *Dubai Aluminium Co Ltd v Salaam*.[[265]](#footnote-265) Here, he stated that ‘the wrongful conduct must be so closely connected with the acts the partner or employee was authorised to do that… [it] may fairly and properly be regarded as done… while acting in the ordinary course of the firm's business.’[[266]](#footnote-266) Notably, he conceded that the test afforded ‘no guidance on the type or degree of connection’ that is required to establish liability.[[267]](#footnote-267) Similar comments can also be identified in the surrounding literature, with Stanton referring to the ‘fair, just and reasonable’ assessment as an ‘ultimately vague test’[[268]](#footnote-268) that provides judges with ‘limited concrete guidance and considerable discretion’.[[269]](#footnote-269) This, he suggests, is likely to lead to ‘pockets of liability’.[[270]](#footnote-270) However, bearing in mind the contextualised nature of my approach to vicarious liability, this is not necessarily undesirable. As Dagan explains, we should welcome ‘localized’ coherence that strives to ‘sustain pockets of coherence that reflect clusters of cases sufficiently similar in terms of the pertinent normative principles that should guide their regulation’.[[271]](#footnote-271) Furthermore, and to respond to those concerns that the language of ‘fair, just and reasonable’ is too circular or empty,[[272]](#footnote-272) it is suggested that a pluralistic balancing of the relevant theories may provide some underlying guidance by adding a little flesh to the bones of this somewhat nebulous test.

Such an approach might be reconciled with similar methods in other areas of law. For example, in *Quintavalle v Human Fertilisation and Embryology Authority*,[[273]](#footnote-273) Lord Hoffmann suggested that the word ‘suitable’ in the context of Schedule 2 of the Human Fertilisation and Embryology Act 1990 was an ‘empty vessel which is filled with meaning by context and background.’[[274]](#footnote-274) By adopting such an approach to vicarious liability – that is to say, by utilising theoretical principles as the driving forces behind the ‘fair, just and reasonable’ test – we could perhaps appease some of the criticism regarding the emptiness of this formula. As Keating explains, ‘[w]hen judges are confident that certain decisions are correct *because* they are fair, but are unable to explain precisely *why* those decisions are fair, scholars have their work cut out for them.’[[275]](#footnote-275) McIvor makes a broadly similar point when she argues that fairness is an inherently subjective term that is ‘only capable of taking on any real meaning when applied against the backdrop of an articulated set of core values.’[[276]](#footnote-276) As such, it is notable that even those scholars who reject a more theoretical evaluation of vicarious liability have commended the ‘actual articulation of the real basis or bases behind generic phrases like fair, just and reasonable’.[[277]](#footnote-277) In this regard, it is suggested that my contextual-pluralist approach could turn what is a rather empty (and unhelpful) formula into a more useful, enlightening one.

Consequently, Lord Reed is correct to maintain that, where the five-factor test outlined by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* (‘*CCWS*’) is satisfied, it is ‘unnecessarily duplicative’ to then re-assess the fairness of the result.[[278]](#footnote-278) This appears to be a clear direction to avoid a whimsical use of the fair, just and reasonable test to overturn a result that is justified by theory. As Lord Reed later clarified in *WM Morrison Supermarkets Plc v Various Claimants*, concepts such as ‘fairness’ are not ‘intended as an invitation to judges to decide cases according to their personal sense of justice’.[[279]](#footnote-279) This is a sensible safeguard against unbridled judicial activism. Normatively, whilst I am generally reluctant to accept that the formalities of law should be afforded greater importance than the equities of liability, I also recognise that there must be *some* limits imposed on the fair, just and reasonable test. My limit is reached whenever it is used as an empty criterion to shield a judge’s personal beliefs without regard to the underlying theories of vicarious liability. Indeed, if fairness were the *only* criterion for establishing liability, it is likely that the doctrine would descend into a ‘set of more or less arbitrary rules’.[[280]](#footnote-280) In this regard, I can do little more than to paraphrase the comments of McLachlin J in *Bazley v Curry* when she suggested that courts should examine the purposes of vicarious liability, and ask whether the imposition of liability in future disputes would serve those purposes.[[281]](#footnote-281)

Although not every judge in the UK has seemingly subscribed to this point of view,[[282]](#footnote-282) it must be recognised that some have paid heed to McLachlin J’s advice. In *JGE v English Province of Our Lady of Charity*, for example, Ward LJ posited that ‘one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development.’[[283]](#footnote-283) Such thoughts also appear to echo the sentiments of the (ostensible[[284]](#footnote-284)) legal realist Oliver Wendell Holmes, when he presciently observed that ‘a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated.’[[285]](#footnote-285) In this light, and in a revealing statement that is in tune with the broader argument set out in this chapter, he concludes that we have ‘too little theory in the law rather than too much’.[[286]](#footnote-286) If, as is suggested here, a more meaningful law on vicarious liability is needed, then it may be preferable to adopt Karl Popper’s approach by utilising the doctrine’s underlying theoretical principles as ‘nets cast to catch what we call the world’.[[287]](#footnote-287)

Popper’s point can be neatly illustrated – and somewhat sharpened – with reference to Llewellyn’s distinction between the ‘formal style’ and ‘grand style’ of legal reasoning.[[288]](#footnote-288) As will become apparent, this is a distinction that informs much of the discussion in this chapter. In sum, the essence of the grand style method is that judges should implement law ‘in accordance with [its] purpose and reason’.[[289]](#footnote-289) In calling for an ‘open, reasoned, extension… or reshaping of the relevant rules’, it is clear that Llewellyn thinks that a ‘conscious and overt concern about policy’ lies at the heart of the grand style.[[290]](#footnote-290) In contrast, under the formal style (which Llewellyn disapproves of),[[291]](#footnote-291) judges ignore the consideration of broader social facts and instead focus on the ‘rules of law alone’.[[292]](#footnote-292) As Mayo later clarifies, ‘a formal style judge tends to emphasise bare legal precepts and blackletter law’.[[293]](#footnote-293) To be clear, Llewellyn was not suggesting that malleable terms such as ‘fairness’ were necessarily absent from the formal style of legal reasoning. In fact, and as we will see in section 3.3.1, the Supreme Court judgment in *Barclays* is arguably an example of the formal style, yet this was still a case in which Lady Hale was content to assess whether the imposition of liability was ‘fair, just and reasonable’ on the facts.[[294]](#footnote-294) Instead, Llewellyn simply suggested that considerations such as ‘fairness, rightness and decency’ were not explained in an ‘open and regular manner’ in these types of judgments.[[295]](#footnote-295)

Consequently, it may accurately be stated that my contextual-pluralist model – and in particular its desire for a more meaningful law on vicarious liability – is an instantiation of the grand style of legal reasoning. In contrast, those judges who invoke the ‘fair, just and reasonable’ test without further elaborating on the theory that underpins it may be said to be engaging in the formal style of legal reasoning. In line with Llewellyn’s critique of the formal style, I believe that judges ought to better explain the ideas that inform their decisions when they invoke policy concerns under the ‘fair, just and reasonable’ test. By explicitly referring to the underlying purposes and justifications for the doctrine of vicarious liability, Tamanaha is correct to argue that judicial opinions can show a greater degree of sensitivity to ‘social factors and considerations’.[[296]](#footnote-296) In this light, my preference for Llewellyn’s grand style of legal reasoning provides a fine building block for exploring (and defending) the concept of legal realism in section 3.4.1. In addition, it perhaps also provides a useful response to those judges and scholars who oppose the use of theory and policy.[[297]](#footnote-297)

**3.2.2 Adaptability**

A second benefit of my contextual-pluralist model is that it provides a more adaptable basis upon which to determine an employer’s liability. As McHugh J recognised in *Hollis v Vabu*, reference to theory ‘has the great advantage of ensuring that the doctrine of vicarious liability remains relevant in a world of rapidly changing work practices’.[[298]](#footnote-298) This statement is seemingly applicable to both stages of vicarious liability. On the relationship requirement, for instance, Dickens is correct to identify the ‘growing nomenclature of “atypical” or “non-standard” work’,[[299]](#footnote-299) and the rise in the so-called gig economy - a working culture generally associated with short-term and freelance work – has undoubtedly complexified the task of determining an employee for the purposes of vicarious liability. As District Judge Vince Chhabria bemoaned in the United States case of *Cotter v Lyft Inc*, using the legal tests developed in the 20th century to address employment issues in the 21st century is akin to being ‘handed a square peg and asked to choose between two round holes’.[[300]](#footnote-300) By way of example, Bell has observed that companies such as Uber and Deliveroo are ‘unsettling the waters in even mundane and everyday transactions’.[[301]](#footnote-301) Likewise, and as explored in section 5.2, the tax-free grants provided by UK Sport to various elite athletes have started to pose some thorny issues in relation to the employment status of many participants in individualised sports. Consequently, and given that some judges have in fact already been tailoring vicarious liability when applying the doctrine to cases of child sexual abuse and fraud,[[302]](#footnote-302) it does not seem to me that the adoption of a more malleable contextual-pluralist approach would be out of line with recent developments in this area of law.

In similar fashion, the need for adaptability is also particularly important when analysing the second test that one must establish before the imposition of vicarious liability is justified: the ‘course of employment’ enquiry. A more flexible theoretical approach to this test may allow us to respond more effectively to perceived gaps or inconsistencies in the protection currently afforded to some victims under the doctrine of vicarious liability. A fine example here can be found in the previously leading Salmond test, which suggested that an employee’s unauthorised mode of doing an authorised act would lead to liability.[[303]](#footnote-303) Ma identifies that the primary shortcoming of this semantic test was its rigidity, and in particular its inability to impose vicarious liability for intentional acts committed by employees.[[304]](#footnote-304) After all, we cannot really maintain, in the interests of logic, that sexual abuse by an employee is in any way an act “authorised” by his employer. As such, the House of Lords in *Lister v Hesley Hall Ltd* moved us away from the Salmond enquiry by introducing a more flexible ‘close connection’ test that was better able to accommodate many of the relevant theories of vicarious liability. In so doing, some judges in *Lister* derived great assistance from the ‘luminous and illuminating’ Canadian authorities of *Bazley* and *Jacobi v Griffiths*[[305]](#footnote-305) – two of the first cases to explicitly recognise and apply the theoretical foundations of vicarious liability in any detail.[[306]](#footnote-306)

With these points in mind, it may be fair to conclude that a theoretical approach to vicarious liability is often conducive to a more adaptable doctrine. This flexibility may be a particularly important requirement given Staughton J’s pronouncement at first instance in *McDermid v Nash Dredging* *& Reclamation Co Ltd*, where he heldthat the ‘common law would become obsolete if it did not develop to meet new situations.’[[307]](#footnote-307) Lord Nicholls made a similar point in his dissenting judgment in *Gregg v Scott*.[[308]](#footnote-308) In this light, it is perhaps noteworthy to mention that my contextual-pluralist model has much in common here with the school of thought known as legal pragmatism. This movement, originally championed by scholars such as Dewey and Peirce, emphasises a contextual and instrumental approach to law, and shares many of the same features as legal realism (which is discussed in detail in section 3.4.1).[[309]](#footnote-309) More specifically, and as Sullivan outlines, pragmatism is a ‘forward-looking’ concept that ‘recognises that social conditions are continually changing’.[[310]](#footnote-310) By calling for a theoretical approach to help respond to such developments in current working practices, my contextual-pluralist model is sensitive to this pragmatic insight, in that it recognises that law is a ‘social process, [and] not something that can be done or happen at a certain date’.[[311]](#footnote-311) It is also for such reasons that I make the argument (below) that precedent cannot, by itself, be a decisive factor in the determination of vicarious liability. For now, however, it is worth saying a few words on the third and final benefit of my contextual-pluralist framework.

**3.2.3 Transparency**

The argument outlined in this section is that a more explicit contextual-pluralist appreciation of the doctrine of employer liability could perhaps lead us to a more honest and transparent body of rules in this area of law. Given my support for Llewellyn’s conception of the ‘grand style’ of legal reasoning, this is perhaps an unsurprising suggestion. Indeed, a focus on transparency could also be reconciled, I believe, with a greater trend for frankness in other areas of private law. On the issue of illegality, for example, Lord Toulson in *Patel v Mirza* – citing with approval a passage he made in the earlier case of *ParkingEye v Somerfield Stores Ltd*[[312]](#footnote-312) – contended that ‘[r]ather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it.’[[313]](#footnote-313) Interestingly, Lord Toulson also appeared to maintain that a contextual-pluralist approach might prove to be the most felicitous route to implementing a more transparent and sincere body of legal rules. He stated, seemingly in agreement with Lord Kerr,[[314]](#footnote-314) that the ‘best result in terms of policy’ is achieved by granting judges the ‘flexibility to consider and weigh a range of factors in the light of the facts of the particular case before them.’[[315]](#footnote-315) In adopting a more formalist approach that foreshadows the discussion on uncertainty presented later in section 3.4.2, Lord Sumption forcefully rejected Lord Toulson’s suggestion on this basis of its vagueness and arbitrariness.[[316]](#footnote-316)

It is interesting, however, that the more candid approach from *Patel* does not stand alone in this regard. Similar viewpoints might be also identified in Lord Wilson’s judgment in *Hounga v Allen*,[[317]](#footnote-317) as well as in *Les Laboratoires Servier v Apotex*.[[318]](#footnote-318) In the latter, Lord Toulson had ‘no criticism’ of the Court of Appeal’s quasi-contextual-pluralist approach to illegality which sought to ‘take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it.’[[319]](#footnote-319) Again, however, we might identify an underlying tension between the approaches of Lord Toulson and Lord Sumption in this case. Writing for what might be considered the dominant view, the latter was keen to stress the uncertainty of giving effect to the underlying theories of a doctrine, adding (somewhat dubiously) that it would make it ‘difficult for [courts] to acknowledge openly what they are doing.[[320]](#footnote-320) Consequently, we can see that the extent to which theory can be utilised to determine the appropriate scope of vicarious liability will often depend, to a considerable degree, on *which* judges are presiding over a certain case. In perhaps cruder terms, it might also depend on other extraneous factors such as what a judge ‘had for breakfast’.[[321]](#footnote-321) This is to recognise that the debate on the relevance of theory here is part of the broader issue – both in tort law[[322]](#footnote-322) and law in general[[323]](#footnote-323) – of the proper role of the judge. It is for this reason that I consider the competing visions of legal realism and formalism later in this chapter. For now, it is enough to note that I am much in favour of Lord Toulson’s approach, and I would agree with those commentators such as Jane Stapleton who colourfully assert that an open judicial consideration of theory is the key to letting ‘daylight in on magic’.[[324]](#footnote-324)

Indeed, it is surmised that such ‘daylight’ would cast a particularly useful glow over the somewhat murky grounds of vicarious liability. Commenting extra-judicially, Australian Chief Justice Susan Kiefel has observed the phenomenon of ‘unexpressed social policy’ in this area of law,[[325]](#footnote-325) and Gaudron J in *New South Wales v* *Lepore* has referred to the likelihood of many judges being swayed by clandestine policy choices.[[326]](#footnote-326) In *Bazley*, McLachlin J opined that a ‘meaningful articulation’ of vicarious liability is fortified by theory ‘rather than by artificial and semantic distinctions’.[[327]](#footnote-327) In the UK, it has been suggested that the imposition of liability in *Limpus v London General Omnibus Co*[[328]](#footnote-328) (which concerned a bus driver obstructing a rival bus, contrary to his employer’s express instructions), may have been animated by the fact that the French-controlled defendant company was regarded as a ‘foreign invader’.[[329]](#footnote-329) To similar effect, Denning LJ in *Cassidy v Ministry of Health* acknowledged that the previous general unwillingness to impose vicarious liability on hospitals – usually predicated on the assertion that no employment relationship existed between the doctor/surgeon and the hospital[[330]](#footnote-330) – perhaps stemmed from a judicial ‘desire to relieve the charitable hospitals from liabilities which they could not afford.’[[331]](#footnote-331) A similar furtive approach has also been recognised in other areas of tort law too – most notably in relation to psychiatric injury, with Williams suggesting that the historic limitations placed on recovery for this type of harm were rooted in ‘conceptions of policy… even if the language of foreseeability [was] used to justify it.’[[332]](#footnote-332) Accordingly, and to quote Smillie, such surreptitious reasoning does little except to ‘obscure the fact that decisions in hard cases are based on controversial value judgments by the courts, and to preserve the appearance of value-free adjudication by reference to a fundamental pre-existing legal principle.”[[333]](#footnote-333)

If, as we have seen in Chapter 2, judges are utilising a purposive approach to vicarious liability in order to ‘do justice’ for victims of sexual abuse, then it is eminently preferable that they expressly articulate this fact in their judgments. Although some scholars have suggested that cognitive biases, time constraints and insufficient information may hinder the ability of judges to transparently discuss values,[[334]](#footnote-334) I believe there are three key reasons for calling for a more candid judicial approach to the use of theory in this area of law. First, it allows future judges and scholars to subject this reasoning to honest scrutiny that could go some way to providing at least a semblance of clarity to the eclectic array of rules and normative justifications that are generally at play in most vicarious liability disputes. To fail to offer this transparency is to fundamentally betray the value judgments that judges are necessitated to make in their adjudicative responsibilities. Barker makes a similar point in relation to economic loss, when he suggests that concerns regarding the Delphic nature of concepts such as ‘proximity’ and ‘fairness’ can often be overcome by ‘judges being more explicit about the policy priorities which generate their conclusions’.[[335]](#footnote-335) Second, it may be that a more honest and candid approach to the role of theory and context could lead us closer to the excavation of ‘moral truth’ in the law. According to historian Yuval Noah Harari, legal concepts are inter-subjective in that they only exist within the shared consciousness of humanity.[[336]](#footnote-336) As such, if enough people believe that this ‘imagined order’ of legal rules are defective or unfair, the law can – and should - be changed. Priel makes a similarly insightful point:

‘Truths about the world are not themselves ‘legal’, ‘chemical’, ‘economic’, or ‘psychological’: These are human categories imposed upon reality that itself does not contain them… the content of our law should be based on truths. If a truth is *relevant* to making a better decision, it matters little whether they have been arrived at using ‘lawyers’ methods’ or by other means.’[[337]](#footnote-337)

Third, and finally, my call for a more transparent model of vicarious liability is broadly in line with the underlying ethos of Dagan’s legal realist model of adjudication. Unlike other legal realists who favoured opacity,[[338]](#footnote-338) Dagan’s version of realism favours both a transparent and open discussion of the values that lie behind the law.[[339]](#footnote-339) The similarities between my contextual-pluralist model and Dagan’s formulation of legal realism are considered in more detail in section 3.4.1. However, it is perhaps also worth briefly mentioning here that Priel’s recent criticism of Dagan’s work is not as convincing in relation to the model of vicarious liability that I develop.[[340]](#footnote-340) This is made clearer in section 3.4.2 once the distinction between ‘traditional’ legal realism and ‘scientific’ legal realism has been elaborated on more fully.

**3.3 Key Developments Under a Contextual-Pluralist Model of Vicarious Liability**

So far, I have made two significant arguments. The first is that, because no single rationale can fully explain the law on vicarious liability, it may be wise to implement a contextual-pluralist approach that is sensitive to both theory and factual nuance. The second argument is that embracing such a model is likely to lead to a more meaningful, adaptable and transparent doctrine of employer liability. With these points in mind, the discussion in this section outlines what developments to the law on vicarious liability ought to transpire from the adoption of such an approach. To be clear, whilst they are all arguably logical consequences flowing from the implementation of a contextual-pluralist framework, I do not suggest that they will in factarise (and nor do I suggest that they are strictly necessary before we can adopt my model). Rather, I simply seek to highlight what normative developments *should* transpire as a result of applying my contextual-pluralist approach. The more of these suggestions that are followed, the more effective I believe a contextual-pluralist model will be in helping to determine the scope of vicarious liability.

**3.3.1 Adopt a ‘Thick’ Approach to the Use of Theory**

As discussed in the previous chapter, my contextual-pluralist model calls for judges to consider the appropriate context of a particular case, and then apply the relevant theoretical justifications to this context in order to arrive at a sensible and socially justifiable decision. As such, the effectiveness of my model will undoubtedly be enhanced if judges are required to adopt what I call a ‘thick’ approach to the use of theory. In sum, this suggestion entails judges actually *applying* the rationales for employer liability to the relevant contexts at hand in order to help shape decisions, rather than merely paying lip-service to the idea. To illustrate this point, it is helpful to categorise some recent vicarious liability decisions into three broad groups of cases: theory exclusionists, thin versions, and thick versions of theory.[[341]](#footnote-341) In so doing, the discussion here highlights a concerning lack of consistency in the way that many judges are utilising and applying the theories of vicarious liability. It may also, as we will see shortly in relation to *Barclays*, help to further clarify how Llewellyn’s distinction between the so-called ‘grand style’ and ‘formal style’ of legal reasoning maps on to my contextual-pluralist model of liability.

*(i) Theory Exclusionist Cases*

The first group of cases have either completely ignored, or made minimal reference to, the theoretical underpinnings of the doctrine. In light of Lord Phillips’ enunciation in *CCWS* of his five indicia of liability, it is both surprising and disappointing that such a body of cases exist. Here, we might find judgments from the UK Supreme Court in *Morrison*[[342]](#footnote-342) and *Mohamud v WM Morrison Supermarkets plc*.[[343]](#footnote-343) The Court of Appeal decisions in *Bellman v Northampton Recruitment Ltd*,[[344]](#footnote-344) *Various Claimants v WM Morrison Supermarkets plc*[[345]](#footnote-345) and *London Borough of Haringey v FZO*[[346]](#footnote-346) also appear to fall into this category. Instead of referring to (and applying) the theoretical rationales underlying vicarious liability, many of these judgments instead focused on refining established tests by asking whether the employee’s act could be classed as a ‘seamless episode’.[[347]](#footnote-347) However, without some guidance propping these legal tests up, we risk vicarious liability descending into ‘doctrinaire legalism’ which masks the real reasons for decisions.[[348]](#footnote-348) With reference to the ‘seamless episode’ test, for example, Lee persuasively notes that ‘time itself is a seamless and continuous sequence of events: any story can be told in a way that meets this test’.[[349]](#footnote-349)

It is also noticeable that there is no general trend of liability in these cases. Although many were keen to impose liability on employers (such as *Mohamud*, *Bellman* and *FZO*), others (most notably the Supreme Court in *Morrison*) were not. Whilst I have previously made the point that an in-depth analysis of theory will, in many scenarios, lead to an increased scope of vicarious liability, it is worth pointing out that this will not necessarily be true in *every* case. As such, I do not necessarily believe that the rejection of a theory exclusionist stance is tantamount to advocating for a limitless scope of vicarious liability. In fact, in some cases, a theoretically informed contextual-pluralist approach might make no difference to the end result. This can be illustrated by briefly sketching out how my model might be applied to the facts of *Morrison*. For instance, by analysing the theory of enterprise liability in this case, it is difficult to envision how the supermarket was receiving any benefit from a disgruntled employee leaking personal data on the internet; in fact, the rogue tortfeasor was specifically trying to harm his employer because he was subject to their disciplinary proceedings, so it seems illogical that Morrisons should be tasked with simultaneously bearing the burden. While it is possible to argue that the supermarket created the risk of the misuse of private information and breach of confidence, it is not a risk, as Langstaff J noted at first instance, that was a ‘mainstream’ one.[[350]](#footnote-350) Moreover, I query whether the imposition of vicarious liability would have been consistent with the theory of individual deterrence, particularly as it might be said to have deterred companies from adequately sanctioning errant employees in the future. Given that Lord Reed suggested we should identify the relevant ‘factors or principles which point towards or away from vicarious liability in the case before the court’,[[351]](#footnote-351) it is disappointing that he did not then go on to conduct a pluralistic balancing approach that was sensitive to this very unique factual matrix.

Plunkett notes that the court in *Mohamud* equally failed to grasp this opportunity.[[352]](#footnote-352) In fact, Giliker questions whether a more thorough examination of risk in *Mohamud* might have led to a different result in this case. She ponders whether we can really say that ‘a kiosk attendant in a petrol station with a duty to interact with customers has such authority, power or control over the customer to give rise to vicarious liability’.[[353]](#footnote-353) Treacy LJ in the Court of Appeal in *Mohamud* also made a similar point when he observed that the tortfeasor’s duties in this case did not place him in a situation whereby he was likely to ‘engage in any form of confrontation with a customer, even an angry one’.[[354]](#footnote-354) Consequently, and perhaps more unusually, we might conclude that a focus on balancing the theoretical factors in each case under my contextual-pluralist model might actually *limit* the scope of vicarious liability in some rare scenarios. If I am correct on this point, even those scholars who called for a narrower scope of vicarious liability (as outlined in section 1.1.1) may find that the adoption of my model is desirable in certain cases.

*(ii) Thin Versions of Theory*

The second category of cases represent an improvement upon the theory-exclusionist cases. These cases are more explicit in their recognition of the underlying theories of vicarious liability. Here, we might find various judgments such as the Supreme Court rulings in *Barclays*[[355]](#footnote-355) and *Cox v Ministry of Justice*.[[356]](#footnote-356) Other cases might include the Court of Appeal judgments in *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB*,[[357]](#footnote-357) *Graham v Commercial Bodyworks*[[358]](#footnote-358) and *Kafagi v JBW Group Ltd*,[[359]](#footnote-359) as well as the High Court rulings in both *GB v Stoke City Football Club Ltd*[[360]](#footnote-360) and *Brayshaw v Partners of Apsley Surgery*.[[361]](#footnote-361) However, these cases are only considered a ‘thin’ version of a contextual-pluralist approach simply because the recognition of theoretical factors did not generally translate into a detailed *application* of such theories to the facts of each case. We might only identify one or two sparse paragraphs where theory is considered in light of the factual matrix of each case,[[362]](#footnote-362) and no attempt is seemingly made to explain the omission of those theories that are not. For example, it would seem to me that, in the context of *Brayshaw*, the theory of (social) deterrence might be relevant to the vicarious liability of a doctor’s surgery, particularly as liability might lead to more defensive practices. Similarly, given that the employer in *Graham* was not a large multinational company, it is surprising that the court did not consider the employer’s ability to spread loss alongside enterprise liability.

In order to fully reap the benefits of meaningfulness, adaptability and transparency associated with a contextual-pluralist approach, it is suggested that judges must do more than simply rehearse the basic parameters and contents of each theory. They must explain what theories are relevant to each context, and then embed them throughout their decision in a comprehensive and explicit manner, making sure to adequately apply them to the facts of the case. While it is recognised that this might be a somewhat idealistic view, it is not, as we now discuss, one without some supporting precedent.

*(iii) Thick Versions of Theory*

Under this third category of cases – which includes the Supreme Court ruling in *Armes v Nottinghamshire County Council*[[363]](#footnote-363) and the Court of Appeal judgment in *Barclays Bank plc v Various Claimants*[[364]](#footnote-364) – we can identify a much more prominent application of theory to the facts. Delivering the leadingjudgment in *Armes*, Lord Reed applied a strong fairness argument predicated on risk when he arguedthat the local authority’s placement of children in the care of foster parents created a ‘relationship ofauthority and trust between the foster parents and the children’.[[365]](#footnote-365) Consequently, when the (inherent) risk of abuse materialised, it was fair for the authority to compensate that victim. Lord Reed alsofound the control theory applicable here because – by virtue of their ‘powers of approval, inspection,supervision and removal’ – the local authority ‘exercised a significant degree of control over both whatthe foster parents did and how they did it’.[[366]](#footnote-366) The theories of loss spreading and deep pockets were alsoapplied, with his Lordship outlining that the local authority were in a much better position than mostfoster parents to insure against the loss.[[367]](#footnote-367) Lastly, Lord Reed also considered the deterrence rationale ofvicarious liability.[[368]](#footnote-368) He took a dim view of the idea that imposing vicarious liability would discourageauthorities from placing children in the care of foster parents, presumably because the alternative wasto place the children in residential care homes (where local authorities would still have to bear theloss).[[369]](#footnote-369) Interestingly, Lord Reed argued that, if there was merit inthis floodgates argument, then ‘there is every reason why the law should expose’ such a ‘widespreadproblem of child abuse by foster parents’.[[370]](#footnote-370) This perhaps reinforces how a more theoretical approach to the doctrine of vicarious liability could serve the ideals of transparency and openness in this area of law.

I am wary, however, that the discussion so far may expose me to the critique that I am a “theory fetishist”, in that my argument perhaps boils down to the circular proposition that theory-heavy decisions are better simply *because* they balance theory. To help avoid this criticism, much of the discussion in later chapters attempts to demonstrate how a ‘thick’ approach can lead to more normatively attractive results in practice. To highlight a few examples here, Chapter 4 demonstrates that a more sustained analysis of loss spreading in the recreational sports context gives rise to a more determinate method of ascertaining liability than the (more semantic) akin to employment test. Likewise, Chapter 5 also attempts to illustrate how a more nuanced sensitivity to theory leads to the more desirable solution of dual vicarious liability in many cases involving borrowed employees. Finally, Chapter 7 also neatly illustrates how the outcome in the ‘thin’ case of *GB* could be improved when we adopt a ‘thick’ approach to the reasoning in that decision. For now, however, it is perhaps worth briefly contrasting the ‘thin’ approach to theory used by the Supreme Court in *Barclays* (which rejected liability) with the ‘thick’ approach adopted by the Court of Appeal in *Barclays* (which led to liability). This will hopefully reinforce how the use of theory can lead to better results in practice.

In the Supreme Court judgment, Lady Hale simply asserted that the tortfeasor, Dr Bates, was ‘clearly’ an independent contractor carrying on his own business, and that he was not ‘part and parcel’ of Barclays Bank.[[371]](#footnote-371) It is suggested that her Ladyship’s focus on such semantic tests obscured the real focus in this context: that of control. As was made clear by Irwin LJ in the Court of Appeal, Barclays explicitly controlled the nature of the physical examinations required as part of their recruitment process, and, in mandating an overly intrusive examination that gave the young applicants no choice in the matter, it was fair to conclude that the tortious activity was being taken on behalf of the bank for the purposes of enterprise liability.[[372]](#footnote-372) Now, it might be countered that the Supreme Court *did* in fact also analyse control by highlighting that Dr Bates was not paid a retainer and that he was able to refuse an examination (and it is for such reasons that I describe this case as a ‘thin’ approach to theory).[[373]](#footnote-373) However, this seems problematic from both ends of the spectrum. If we accept this reasoning, then this seems to run counter to Lady Hale’s warning that theory should only be considered in ‘doubtful cases’.[[374]](#footnote-374) In contrast, if such findings *did not* go towards analysing control, then the Supreme Court arguably missed a trick by erroneously equating the present scenario with a general health examination.[[375]](#footnote-375)

Reservations must also be expressed in relation to Lady Hale’s use of the term ‘doubtful’, a further factor which suggests that the more theory-heavy approach of the Court of Appeal is preferable to the Supreme Court’s more doctrinal method. In particular, I am sceptical as to whether this vague test is workable in practice; what I consider to be doubtful might be very different from what someone else considers to be doubtful. Furthermore, if a certain result was so clearly obvious, why would the expected loser to the dispute waste precious time and resources in litigating the matter? In this regard, we might contend that the vast majority of disputes that wind up in court are in fact those hard cases that truly cast a spotlight on the inherent indeterminacy of law. On this basis, almost all litigated cases attempting to grapple with the employment status of certain workers might be said to be ‘doubtful’ and thus deserving of theoretical appraisal. Giliker has recently made a similar point, and she questioned whether sexual abuse cases might be more likely to be regarded as ‘doubtful’ in light of the ‘sensitivity of such claims’.[[376]](#footnote-376) In fact, it is noteworthy to mention that, in some of the later vicarious liability cases following *Barclays*, we see barristers continuing to submit (and judges subsequently accepting) that a particular case is ‘doubtful’,[[377]](#footnote-377) and many judges still seem keen to refer to Lord Phillips’ five-factor test in order to justify their conclusions.[[378]](#footnote-378)

In this light, it is perhaps instructive to outline two particular points here. The first point is that I am far less convinced than other scholars that *Barclays* and *Morrison* put an end to the runaway train of vicarious liability.[[379]](#footnote-379) As such, it may be wise to instead treat these two decisions with a healthy dose of scepticism going forward. As I discuss in more detail in section 3.4.1, I also question the purported legacy created by *Barclays* and *Morrison* that suggests that cases should proceed incrementally and with reference to precedent. This was the method adopted by Lady Hale herself in *Barclays* when she ‘eschewed normative analysis’ in favour of the consideration of prior case law.[[380]](#footnote-380) I must agree, however, with Irwin LJ’s assessment that, in light of the context-sensitive nature of vicarious liability, such a doctrinal exercise is inherently ‘otiose’.[[381]](#footnote-381) Feldthusen made a similarly scathing accusation of the House of Lords’ judgments in *Lister*, when he said that ‘[b]eyond the result… there is nothing else in the speeches of much interest. The reasoning consists largely of case review and parsing, artfully done but unenlightening’.[[382]](#footnote-382) This is perhaps a somewhat harsh analysis of the *Lister* judgment, and it is one that is seemingly more applicable to *Barclays* given that Lady Hale dedicated a vast majority of her judgment to analysing previous precedent (and only one paragraph to the facts of the immediate case). As a result, and with the greatest of respect, I must conclude that Lady Hale’s more doctrinal analysis lacks the necessary meaningfulness, adaptability and transparency that was evident in the Court of Appeal’s more contextual-pluralist decision.

The second point is that it may be useful to situate the Supreme Court’s judgment in *Barclays* in relation to the distinction between the ‘grand style’ and ‘formal style’ of legal reasoning. As Llewellyn noted, under the ‘formal style’:

‘The rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability’.[[383]](#footnote-383)

This is arguably an apt description of the Supreme Court judgment in *Barclays*, as Lady Hale was content to outline her analysis in one succinct paragraph: Dr Bates was ‘clearly’ an independent contractor because he was ‘in business on his own account’.[[384]](#footnote-384) As Becht highlights, however, the ‘clarity and certainty which appear on the face of the opinion in the formal style actually create confusion and uncertainty, because they conceal the necessary creative work of the judges.’[[385]](#footnote-385) By failing to adequately explain what lies behind these vague, semantic tests, it might be said that the Supreme Court judgment instantiates the formal style of legal reasoning, whereas the more theoretically explicit and ‘thick’ judgment of Irwin LJ in the Court of Appeal instantiates the grand style of legal reasoning. Given my support for Llewellyn’s grand style in section 3.2.1, it is perhaps little surprise that I also favour the Court of Appeal judgment in *Barclays* here.

*(iv) Concluding Observations on the Use of Theory*

On the basis of the above three categories, we might make a number of observations regarding the use of theory. First, the ‘thick’ version of theoretical analysis provides a fine example of how the pluralistic aspect of my contextual-pluralist model of vicarious liability should operate in practice. In this light, it is suggested that both *Armes* and the Court of Appeal judgment in *Barclays* are a useful benchmark for any future court wishing to implement such a model of vicarious liability, as both cases exhibit an open consideration of various theories in order to arrive at a common theoretical solution. To further improve these decisions, however, the judges in each case could have more closely examined what the most relevant and weighty theories in each of the respective contexts were. Some semblance of this is evident in *Barclays*,[[386]](#footnote-386) but *Armes* reads as if all of the cited theories are to be afforded equal weight in the foster care context. If this is indeed the case, more should have been done to explain why this is so.

Second, the current use of theory in the case law is applied in an alarmingly haphazard manner. Such concerns are amplified when even individual judges are adopting inconsistent stances. For example, while Lord Reed delivered the commendable leading judgment in *Armes*, he also did so in the theoretically vacuous Supreme Court decision in *Morrison* three years later. Irwin LJ also sat on both of the theoretically distinct Court of Appeal decisions in *Barclays* and *Bellman*.[[387]](#footnote-387) More broadly, it is also noticeable that, whilst Lord Toulson was a strong advocate of explicitly weighing policy factors in *Patel*, he was also the originator of the highly opaque ‘seamless episode’ test from *Mohamud*. Perhaps contrary to my previous comments in section 3.2.3, then, such inconsistency makes it rather difficult to predict the extent to which any judge will utilise and apply theory in any given case. Of course, and as Beuermann observes, it might be possible to explain this state of affairs with reference to the pleadings of the parties.[[388]](#footnote-388) As is discussed in more detail in Chapter 7 in the context of *GB*, the court is arguably more likely to apply theory if the pleadings of one (or both) of the parties refer to the theoretical justifications for vicarious liability. This can be evidenced by contrasting two 2016 cases decided on the same day: *Mohamud* and *Cox*. The pleadings in the former (a theory exclusionist case) made no reference to theory, and instead focussed on notions of agency and a ‘social shift towards an extended concept of corporate responsibility’.[[389]](#footnote-389) In contrast, the pleadings in the latter made specific reference to enterprise liability, control and deterrence,[[390]](#footnote-390) and the judges were accordingly more open to a discussion of theory (albeit still a ‘thin’ discussion). To the extent that theory often leads to a wider scope of vicarious liability than is evident under a doctrinal approach,[[391]](#footnote-391) claimants seeking compensation in this area of law might well be best advised to explicitly refer to the theoretical underpinnings of vicarious liability in their pleadings (and vice versa for defendants).

A final observation – and one which might also partially explain this second point - is that all of the theory exclusionist cases are focused primarily on the course of employment enquiry. In contrast, and barring *Graham* and *GB* which deal with this second stage, all of the cases under the ‘thin’ or ‘thick’ categories are concerned with the identification of the necessary relationship for vicarious liability (the first stage).[[392]](#footnote-392) This is curious. Prior to the early 2010s, it might be recognised that theoretical discussion was largely confined to cases dealing with the second course of employment criterion.[[393]](#footnote-393) So why the sudden change? The answer perhaps lies in the fact that the high-water mark of theoretical analysis in the context of vicarious liability arrived in two 2012 cases that both dealt with the first stage: *JGE* and *CCWS*. Indeed, Lord Phillips even explicitly linked his five-step formula in the latter to the employer–employee relationship.[[394]](#footnote-394) Subsequent courts seem to have treated this as meaning that theoretical balancing is *only* relevant at the first stage. It is suggested that the law has taken a wrong turn here. It makes little sense to say that the benefits of meaningfulness, adaptability and transparency are only applicable to the first stage, especially when (until the early 2010s) very little theoretical attention was paid to this test. What is needed under a contextual-pluralist approach is to recognise that the use and application of theory is relevant to *both* stages of vicarious liability. This point brings us nicely to a second recommendation that ought to be heeded if my model of liability is to be implemented effectively.

**3.3.2 Keep the Traditional Two-Stage Test, But Widen the Criteria Used to Analyse It**

It might be thought desirable - and indeed even somewhat logical - that under my contextual-pluralist model of vicarious liability, it is inevitable that the traditional two-stage test for liability will be collapsed into one overarching question: is it theoretically justifiable in each particular context to impose vicarious liability? At present, and before we can impose liability on an employer, we are inclined to ask: (i) whether there is a sufficient relationship between the wrongdoer and the defendant; and (ii) whether there is a close connection between this relationship and the resulting tortious harm. However, numerous judges have hinted towards an elision of these two tests. In *JGE*, for example, MacDuff J (at first instance) posited that ‘the two stages of the test are not to be determined in isolation; the overall test is a synthesis of the two stages.’[[395]](#footnote-395) Hughes LJ in the Court of Appeal in *CCWS* appeared to support a similar view,[[396]](#footnote-396) whilst Lord Phillips in the same proceedings referred favourably to MacDuff J’s judgment as a ‘lucid and bold’ one.[[397]](#footnote-397) In light of these comments, perhaps the obvious next step is to simply collapse the two distinct tests into one. Even those who are generally opposed to the widespread use of theory in this area of law have freely admitted that they would not object to a merging of the two traditional tests.[[398]](#footnote-398)

It is suggested, however, that this is not the most prudent course of action. I am unable to identify any scholarly literature that opposes the collapse of these two tests, but this is perhaps only because it is a rather radical and wholly unnecessary recommendation. There is nothing to be gained from this development (bar the upsetting of the foundational bedrock of vicarious liability), and I see no merit in an argument that suggests that amalgamating the two tests will improve the adaptability or transparency of the doctrine. Consequently, and although we might be asking very similar questions under an all-encompassing singular enquiry, we run the risk of losing focus of the fundamental requirements behind the doctrine if we merge the two tests. To borrow from the language used by the Singaporean Court of Appeal in *Ng Huat Seng v Mohammad*,[[399]](#footnote-399) the aim of a contextual-pluralist approach should be to ‘fine-tune the existing framework underlying the doctrine’ – not to *replace* the existing framework. Indeed, if Lord Phillips had truly desired his five-step theoretical *CCWS* formula to replace the traditional two stage test of vicarious liability, it is unlikely that he would have then gone on to consider the relationship and course of employment requirements in such detail later on in his judgment.[[400]](#footnote-400) For such reasons, later chapters applying vicarious liability to the sporting context will be structured around these two elementary tests.

With this in mind, it may be useful to highlight an important distinction made by Dagan under his ‘reconstructed realist conception’.[[401]](#footnote-401) He perceives law as being fuelled by (amongst other things) a tension between tradition and progress.[[402]](#footnote-402) In his view, the ‘realist approach seeks to open up space for a forward-looking perspective within law’s respect for tradition’.[[403]](#footnote-403) This is broadly in line with my view posited in this section: whilst I wish to respect and maintain the more traditional tests for vicarious liability – that of a sufficient relationship and the need for a close connection – I equally recognise that my contextual-pluralist model may be able to refine our application of the current law, and produce better results in practice. In other words, and to borrow from the language used by Llewellyn, my contextual-pluralist model may be conducive to a ‘re-examination and reworking of the heritage’ in order to fulfil its quest for ‘better and best law’.[[404]](#footnote-404)

This quest for progress is also evidenced by my belief that there is room to somewhat modify the application of these more traditional tests of vicarious liability. First, if what is needed is a more holistic approach to the two requirements (the relationship and close connection tests), then this should be done by recognising that a particular conclusion at one stage couldinfluence a conclusion made in the other. This was a suggestion made by Morgan,[[405]](#footnote-405) and his view is briefly touched upon again in sections 4.3.2 and 6.4.3. Second, and under my contextual-pluralist model, it is suggested that we should not be afraid to examine how other (less conventional) theories and concepts could be utilised to help provide an answer to the two discrete tests for vicarious liability. By way of example, I examine in Chapter 6 how the notion of the sporting playing culture interacts with enterprise liability. Similarly, in Chapter 7, I discuss how insights from masculinities studies and feminist theory could enrich an enterprise risk-based approach to the issue of liability for off-the-field acts. Indeed, if (as I maintain) truth and transparency are two of the main benefits of a contextual-pluralist model, it would be illogical for me to then simultaneously reject a particular theoretical perspective simply because it is not an orthodox or traditional rationale for vicarious liability. As Priel claims, there ought to be ‘no limitation on lawyers or judges relying on relevant information, from whatever “knowledge discipline”, for the sake of maintaining law as an academic discipline.’[[406]](#footnote-406)

**3.3.3 Utilise Empirical Data Where Possible**

As part of the suggested trend for more application of theory in this area of law, it is proposed that judicial resort to empirical data could provide some interesting epistemological insights into the normative question of how to apply my contextual-pluralist framework. At present, and as Lord Kerr suggests in *Crawford Adjusters v Sagicor Insurance*, judicial reference to policy is ‘not usually the product of empirical research’, but rather an impulsive act that constitutes, ‘at most, informed guesswork about the impact that the selection of a particular policy course will have’.[[407]](#footnote-407) This criticism seemingly lies at the heart of Priel’s disapproval of Dagan’s updated version of legal realism: in Priel’s view, the call for a more transparent consideration of legal theory is undermined by the fact that judges ‘are armed with little more than vague verbal formulas and appeals to open ended values, backed up by speculations rather than empirical evidence, to provide answers to policy questions’.[[408]](#footnote-408) This is seemingly evident in the case law on vicarious liability, as judges often resort to speculative, informed guesswork when applying the theoretical justifications for the doctrine in a particular case. As Brodie observes, ‘the identification of enterprise risks has… been regarded as very much a value judgment; it is a matter of what “experience shows”’.[[409]](#footnote-409) By way of example, consider the following passage in Lord Millett’s judgment in *Lister*:

‘[e]xperience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust.’[[410]](#footnote-410)

With respect, ‘experience’ is not the best tool to tell us this. Instead, his Lordship’s argument would have been a far more legitimate one had he utilised relevant empirical data that allowed us to see the true extent of the risk of abuse in such scenarios. For instance, and in retrospect, a recent report by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse concluded that boarding schools gave rise to a ‘very high’ situational risk of child abuse.[[411]](#footnote-411) This is likely because these total institutions engender a ‘strong hierarchy of power and authority’ between staff and children, and they frequently provide adults ‘with both the opportunity to be alone with a child, and to develop an emotional relationship with the child’.[[412]](#footnote-412) Now, given that Lord Millett arrived at this same conclusion from his own ‘experience’, one might wonder whether an empirically-referenced judgment is in any way superior to an empirically-uninformed judgment. Indeed, one might even question whether my suggestion here is not just unnecessarily increasing judicial workload and litigation costs. However, I would urge readers to revisit Lord Millett’s quoted passage once again. His Lordship refers to boarding schools as an umbrella term, and does not differentiate between different types of schools. In fact, the Royal Commission report actually highlights that, in contrast to a boys’ boarding school, the risk of abuse in a girls’ boarding school is ‘much lower’ (primarily because staff in such institutions are predominantly women, and there is a much lower ratio of female perpetrators of child sexual abuse).[[413]](#footnote-413) What we see from an ‘experience’-based approach, then, is the potential subversion of a contextual assessment that is seemingly oblivious to more nuanced factual scenarios. As Brodie outlines, without deference to empirical data, we run the risk that ‘all manner of unwarranted assumptions will come into play.’[[414]](#footnote-414)

Of course, there are countless other examples of how empirical data might have been used to improve previous vicarious liability cases. Consider, for instance, the role it should have played in Auld LJ’s Court of Appeal judgment in *Majrowski v Guy’s and St Thomas’s NHS Trust*. Here, his Lordship was simply content to blindly state, without a shred of evidence, that harassment is ‘often likely to be a risk incidental to employment’.[[415]](#footnote-415) Likewise, the concept of risk creation is not the only theory that provides fertile ground for such empirical insight. Loss spreading is also conducive to such data, as we will see in Chapter 4. There, I provide an empirical assessment of the relevant insurance provisions in amateur sport to assess both the need for vicarious liability and its relevant scope in that context. Likewise, deterrence could also be closely aligned with an empirical assessment. As an example, it is surmised that, in the interests of openness, empirical evidence should have been utilised to support Clarke MR’s proposition in *Gravil v Carroll and Redruth Rugby Football Club* that holding a rugby club vicariously liable would have encouraged the club to take pre-emptive disciplinary action against foul play.[[416]](#footnote-416) Similarly, and as explained in section 6.4.2, a more empirically-informed assessment of *Gravil* could provide one unique way around the so-called ‘double-edged sword’ problem that seems to arise from this case.

This perhaps leads us to another relevant point: the inclusion of empirical facts in vicarious liability case law is likely to provide a number of benefits that are consistent with my contextual-pluralist approach. First, and as Blackham highlights, it helps to ‘cultivate connections between judicial decision-making and social ‘truths’, such that law and society reflect each other.’[[417]](#footnote-417) Burns has suggested that the law on negligence provides a particularly apt ground for exploring the use of empirical data because it is, by nature, ‘intimately concerned with the behaviour of people and institutions, and the nature of the world and society’.[[418]](#footnote-418) The same might equally be said about vicarious liability, particularly as I demonstrate below (in section 3.4.1) that the doctrine is seemingly rooted in principles of social justice. Second, Chaneson has posited that the utilisation of empirical evidence to highlight social truths could help to ‘spark more candour and more transparency’ in judicial decisions.[[419]](#footnote-419) This is perhaps because, as Redding postulates, empirical data can help to ‘ground the normativity of law in empirical reality rather than in the prejudices and self-interests of the lawmakers.’[[420]](#footnote-420) Finally, and on a related point, empirical evidence may also add meaning and substance to the decisions of judges. When Lord Millett in *Lister* talks about ‘experience’, for example, we might ask: whose experience, exactly? The experience of the ‘middle-aged and usually middle class male judge’?[[421]](#footnote-421) If so, Burns may be correct to state that empirical reasoning could assist judges in appreciating the realities of the lives of others.[[422]](#footnote-422)

Now, I am under no illusion that an attempt to include reference to empirical facts in vicarious liability case law will encounter some serious obstacles. However, I do not believe that any of them are necessarily insurmountable. Some might question, for instance, how empirical data is to be brought to the judge’s attention. One answer might be that judges could undertake their own research, or perhaps even ‘force the parties to gather and present appropriate evidence’.[[423]](#footnote-423) This is consistent with my analysis in section 6.4.3, where I highlight that injured sports claimants may need to produce their own evidence as to the relative frequency of a particular on-field act before vicarious liability is deemed appropriate in that context. Others may likewise ask when it is appropriate to rely on empirical facts. In this regard, McIvor offers a useful solution when she says that weak or irrelevant empirical evidence could be filtered out by introducing a ‘pre-trial admissibility test for scientific evidence’.[[424]](#footnote-424) This might hopefully also help to reduce wasteful litigation costs by preventing hopeless claims from reaching the court. Similarly, the concern that judges have no competency to rely on such data – as was suggested by Weinrib[[425]](#footnote-425) - is a rather dubious one given that they already do so in other types of cases (such as in factual causation and medical malpractice cases, for instance). Lastly, one might also be inclined to ask what should be done when reliable or relevant empirical data on a particular issue does not exist at all. This is perhaps the most pertinent concern, and it is suggested that the answer is two-fold.

First, we must at least be candid about the lack of empirical data on a particular issue. This was seemingly the approach of Lord Reed in *Armes* when he admitted the absence of any evidence to support the deterrence rationale in this case.[[426]](#footnote-426) By adopting this stance, we are then able to pinpoint empirical gaps in the current literature which can hopefully be filled in by future work. To a certain extent, this is evident in Chapter 7 when it is highlighted that a large portion of the empirical data on hazing and sexual abuse in sport is conducted in a US-based collegiate setting. Second, it may not be the case that empirical data completely displaces a judge’s normative instincts. In fact, and depending on the availability of such evidence, both could be relevant to the determination of liability. This is evident in Baroness Hale’s judgment in *Sienkiewicz v Greif*:

‘Finding facts is a difficult and under-studied exercise. But I would guess that it is not conducted on wholly scientific lines. Most judges will put everything into the mix before deciding which account is more likely than not. As long as they correctly direct themselves that statistical probabilities do not prove a case, any more than their own views about the overall probabilities will do so, their findings will be safe.’[[427]](#footnote-427)

With this in mind, it is perhaps instructive to sketch out here the suggested role for empirical data under my contextual-pluralist model of vicarious liability. In sum, I suggest that the use of empirical data ought to be the primary method of adjudication. This is largely in accordance with Cohen’s view, when he says that the so-called ‘hunch’ theory of law ignores the ‘significant, predictable, social determinants that govern the course of judicial decision[s].’[[428]](#footnote-428) Indeed, it would be somewhat incongruent to suggest that feminist legal theory can influence the scope of vicarious liability, whilst also supporting the notion of judges relying on their hunches: after all, the ‘hunch’ theory of law provides scope for subjective preferences and cognitive biases to influence the outcome of a case,[[429]](#footnote-429) and this is likely to be something that feminist legal scholars are highly critical of. That said, however, I also recognise that empirical data is sometimes unavailable or inadequate, and that ‘judges will have to continue to rely on intuition, practical wisdom, pragmatic judgment (or any similar expression) to decide the case.’[[430]](#footnote-430) In scenarios where judges inevitably have to rely on their own normative instincts to decide a case, I do not believe that my contextual-pluralist model is necessarily invalidated. Rather, it must simply just be recognised that any decision made without reference to empirical data is less satisfactory, and arguably open to a greater degree of scrutiny. As I highlighted in the introduction to section 3.3, it is not mandatory for this empirical suggestion (or indeed any of the other suggestions perused in section 3.3) to be implemented before we adopt my model; instead, the adoption of this recommendation will simply make my contextual-pluralist framework ‘more effective’.

In this light, it is perhaps instructive to end this section by returning to another so-called ‘constitutive tension’ of law highlighted by Dagan: that is, the distinction between ‘law as science’ and ‘law as craft’.[[431]](#footnote-431) Dagan notes that these two perspectives offer two different ways of ‘constraining the discretion of those who direct the evolution of law’: firstly, ‘science, or, more precisely, scientific insights, both empirical and normative’. The second is ‘craft, or, more precisely, certain conventional features of adjudication, notably its contextual focus and its dialogic character’.[[432]](#footnote-432) Although some scholars view these two devices as competing perspectives,[[433]](#footnote-433) Dagan – along with other legal realist scholars, such as Llewellyn and Cohen – view science and craft as ‘complementary rather than incompatible’.[[434]](#footnote-434) I too adopt this approach. The scientific elements of my suggestion for more empirical data coincide nicely with commitment to contextualism (which is evidenced not just by model itself, but also by my assertion in section 6.3.1 that judges ought not to be unduly constrained by the conceptual coherence of the law). In this way, it might also be said that my contextual-pluralist model responds to one of the fundamental criticisms aimed at legal realism. Posner outlines that the empirical projects of the realists ‘gave empirical research rather a bad name among legal academics’, because it illustrated ‘the futility of empirical investigation severed from a theoretical framework’.[[435]](#footnote-435) By situating the use of empirical statistics within my contextual-pluralist framework, I not only respond to this broader criticism of legal realism, but I also demonstrate that it is possible – and indeed normatively desirable – to strike an appropriate balance between science and craft.

**3.4 Criticisms of my Contextual-Pluralist Model**

**3.4.1 It Constitutes an ‘Unprincipled’ Approach to Vicarious Liability**

The first possible criticism of my contextual-pluralist model might be that it runs counter to a ‘principled’ application of vicarious liability. Advocates of this view would reject an open and detailed consideration of Lord Phillips’ five ‘policy reasons’ from *CCWS*, and would, by association, also likely dismiss the implementation of my theoretical framework. By way of example, one need only look at the call for a more principled approach that was advanced most recently by the Supreme Court in *Morrison* and *Barclays*, with Giliker highlighting that ‘principle is emphasised over policy in both cases’.[[436]](#footnote-436) Of course, these two decisions were not the first vicarious liability cases to consider the tension between a principle and a policy, and nor are they likely to be the last. In fact, Burnett notes that a distinction between these two elusive terms appears to ‘bedevil this area of law’,[[437]](#footnote-437) and much of the debate on this issue is evident in some of the earlier authorities on vicarious liability. Lord Steyn in *Lister*, for instance, opined that ‘our allegiance must be to legal principle’,[[438]](#footnote-438) whilst Binnie J in *Jacobi v Griffiths* similarly remarked that ‘judicial policy must yield to legal principle’.[[439]](#footnote-439) Such views can be contrasted with McLachlin J’s sentiments in *Bazley* when she suggested that ‘the best route to enduring principle may well lie through policy.’[[440]](#footnote-440) One of the more candid proponents of this latter approach is Ipp JA who, in the New South Wales Court of Appeal, confidently stated that ‘[i]n the end, the only explanation [for vicarious liability] that is satisfactory is that of policy, and judicial policy at that’.[[441]](#footnote-441)

Now, what is clear from the above remarks is just how undefined the judicial dichotomy between principle and policy really is. Somewhat incredulously, no attempt is made by judges to unpack these two terms, despite the fact that both phrases are criticised in the scholarly literature as being ‘hideously inexact’ and baking in ‘much uncertainty’.[[442]](#footnote-442) This is particularly damning in light of the fragility of the principle-policy divide, as various commentators have suggested that there is no identifiable distinction between the two.[[443]](#footnote-443) Indeed, Waddams has even suggested that principles and policies are not contradictory but rather ‘mutually interdependent’.[[444]](#footnote-444) To take an example for our current purposes, we might say that it is a *principle* of vicarious liability that an employer should not be liable for harmful acts that were not committed in the course of employment. However, we might equally reformulate this as a *policy* choice (e.g. it is an economic and social goal of society that an employer should not be liable for harmful conduct committed outside of their employment). Consequently, without more concrete definitions as to what each term entails, one would be relying on a desperately thin basis if they were to reject my contextual-pluralist model for its ‘unprincipled’ nature. Instead, and as Plunkett describes, we should ‘consider *all* relevant arguments, and focus on whether they are good or bad, and not on whether… they are labelled principle or policy.’[[445]](#footnote-445)

One counter-argument to this conclusion is that judges already *have* unpacked these terms, and that when judicial reference is made to a ‘principled’ law on vicarious liability, this is simply shorthand for a more incremental approach based on prior precedent. This appears to be a plausible interpretation, as indicated by a number of relevant passages. For instance, Ward LJ in *JGE* appeared to conflate a principled approach with reference to previous decisions when he argued that ‘a coherent development of the law should proceed incrementally in a principled way, not as an expedient reaction to the problem confronting the court’.[[446]](#footnote-446) Similarly, in *Woodland v Swimming Teachers Association*, Baroness Hale appeared to tie such an approach with legal principle when she stated that the law ‘must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle.’[[447]](#footnote-447) Lord Reed, seemingly influenced by the comments of Lord Nicholls in *Dubai Aluminium*,[[448]](#footnote-448) also touched upon the relationship between the two in *Morrison* when he intimated that a ‘principled and consistent’ law on vicarious liability can be achieved by deriving assistance from ‘previous court decisions’.[[449]](#footnote-449) Despite the fact that numerous scholars have voiced their support for such an approach,[[450]](#footnote-450) three reasons lead me to doubt the utility of this reformulation.

First, I am still not wholly convinced that judges are referring to the notion of a ‘principled’ law in a consistent manner. To the extent that this is the case, I would resist any attempt to reject my model on the basis that it is unprincipled. To illustrate this point, consider the Australian authority of *Prince Alfred College v ADC*, where the High Court of Australia (in obiter dicta) roundly criticised the close connection test on the basis that it does not ‘proceed on any principled basis *or* by reference to previous decisions’.[[451]](#footnote-451) The conjunction ‘or’ here is particularly revealing, in that it seems to suggest that a principled law is somehow separate from an approach that proceeds by reference to previous court decisions. A similar passage is also implicit in Lord Sumption’s judgment in *Woodland*, when he refers to ‘[b]oth principle *and* authority’.[[452]](#footnote-452) Given that ‘principle’ seems to mean different things to different people, could it not be that such judges were simply calling for a more certain or coherent law, and not necessarily reference to an incremental development? If we are to take arguments that prioritise principle over policy seriously, then it stands to reason that its advocates must firstly define with sufficient clarity what it is they are referring to when they talk about a ‘principle’. In the absence of such clarity, I do not think it is appropriate to even entertain the idea that my contextual-pluralist model could be rejected on the basis of its lack of principle.

Second, and even if we *do* assume that judges consistently refer to a ‘principled’ law as a code-word for an incremental approach, I still do not believe that an approach based predominantly on precedent is superior to my contextual-pluralist model. In order to highlight the pitfalls of an incremental approach, let us consider the case of *Century Insurance v Northern Ireland Road Transport Board*.[[453]](#footnote-453) Here, the defendant was held vicariously liable for one of their employees causing property damage after he negligently disposed of a lighted match, which he had used to light his cigarette. Giliker rightly questions, however, whether this case would be decided the same today given that smoking is now more uncommon (and generally banned in the workplace).[[454]](#footnote-454) After all, and as Justice Souter describes in the US case of *Faragher v City of Boca Raton*, ‘we simply understand smoking differently now and [we must revise] the old judgments about what ought to be done about it.’[[455]](#footnote-455) As such, if even identical factual scenarios may be decided differently according to the social and historical context of the case, I am highly sceptical that an incremental approach is of great use when cases are merely only similar or broadly analogous.[[456]](#footnote-456) Furthermore, and because analogy is surely a matter of degree, I am also unconvinced as to whether such an approach really is based on principle, as the extent to which one deems a certain extension to be incremental is perhaps in itself a discretionary policy choice. Consequently, it is suggested that McLachlin J’s two-step formulation in *Bazley* – which recommends that judges should only consider theory whenever there is no precedent which ‘unambiguously determines’ the question of liability – is largely redundant.[[457]](#footnote-457) Much like with the formulation of ‘doubtfulness’ employed by Lady Hale in *Barclays*, it is questionable whether any prior case can really ‘unambiguously determine’ a future dispute.

The third (and final) reason for rejecting a principled approach is an altogether broader one, and it relates to the school of legal thought that appears to underpin it. In particular, this principled approach seems to espouse a formalist conception of vicarious liability that seeks to uphold the ‘internally valid, autonomous, and self-justifying’ nature of legal reasoning.[[458]](#footnote-458) On this basis, and as was briefly touched upon in section 2.5, law is deemed to be a closed legal world that is immune from the influence of societal factors and other disciplines. As such, and as Weinrib succinctly highlights, formalism contends that the law ought to be ‘grasped only from within and not as the juridical manifestation of a set of extrinsic purposes’.[[459]](#footnote-459) Formalists, then, in an attempt to curb an epistemological and instrumental analysis of legal issues, are keen to recognise (and enforce) what Samuel terms the ‘authority paradigm’ of law.[[460]](#footnote-460) Posner suggests that the tools of analysis for this approach are ‘[l]ogic, analogy, judicial decisions, a handful of principles such as stare decisis, and common sense’.[[461]](#footnote-461)

At first glance, it may be tempting to conflate formalism entirely with a doctrinal, black-letter approach. This is evident in Jimenez’s work, when he refers to formalism as ‘unashamedly doctrinal’ in its need for an incremental development of the law.[[462]](#footnote-462) As he further elaborates, formalism ‘coheres with the more traditional, bread-and-butter approach of the doctrinal lawyer, who aspires to achieve systematicity and coherence at a much lower level of abstraction, and whose tools are… found in… precedents, doctrines and treatises’.[[463]](#footnote-463) However, this temptation to wholly conflate doctrinal approaches with legal formalism perhaps ought to be avoided. Troop has noted, for instance, that ‘many modern-day doctrinal lawyers rarely identify themselves as formalist’,[[464]](#footnote-464) and similar comments have recently also been made by Sherwin.[[465]](#footnote-465) Indeed, it may also be possible for formalists to incorporate theoretical insights too. By way of example, Weinrib has famously offered a clear theoretical analysis of a formalist approach to private law, primarily by drawing upon the work of Kant and Aristotle.[[466]](#footnote-466) Importantly, formalists can also use this theory to assess the normativity of law.[[467]](#footnote-467) Consequently, even though we have seen that scholars such as Giliker appear to support an incremental approach to vicarious liability, it may not be entirely accurate to describe such scholars as legal formalists.[[468]](#footnote-468)

Nevertheless, it is clear that the argument outlined in this work – and in particular my contextual-pluralist model – is firmly at odds with the unyielding shackles imposed by a formalist interpretation of the law. Instead, my model appears to find its home under a legal realist conception of the law. This movement – which formed in the US in the first half of the twentieth century as part of the ‘revolt against formalism’[[469]](#footnote-469) – supports a ‘close examination of reported cases in order to understand how judicial “personality”, understood in testable ways, influence legal outcomes, and how legal institutions constrain or unleash these influences.’[[470]](#footnote-470) Llewellyn, regarded by many as the pioneer of legal realism, suggested that subscribers of this school of thought have a ‘distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing’.[[471]](#footnote-471) In sum, realists are result-oriented and seek to implement, with alacrity, a form of ‘social consciousness’ into legal judgments.[[472]](#footnote-472) This reflects the instrumentalist agenda of many legal realists, as they tend to view law in ‘functional terms’ as a means to an end.[[473]](#footnote-473) As Weinrib writes, proponents of this approach see law as an ‘instrument for forwarding some independently desirable purpose given to it from the outside’.[[474]](#footnote-474)

With this in mind, it might be arguable that a principled, non-instrumental approach to vicarious liability is, in fact, largely inconsistent with the nature of the doctrine itself. According to Lord Pearce in *Imperial Chemical Industries Ltd v Shatwell*, vicarious liability did not grow ‘from any very clear, logical or legal principle but from social convenience and rough justice’.[[475]](#footnote-475) Similar sentiments are expressed by Lord Toulson in *Mohamud* when he asked whether, in the context of the course of employment enquiry, it was ‘right for the employer to be held liable under the principle of social justice’.[[476]](#footnote-476) Various commentators - such as Laski[[477]](#footnote-477) and Lewis - also make the same point, with the latter arguing that vicarious liability is based on ‘sound necessity rather than deduction from legal principle’.[[478]](#footnote-478) Seemingly unaware of the comments in *Shatwell*, Priel also suggests that the opposite of formalism is ‘rough justice’.[[479]](#footnote-479) As a result, we might logically conclude that the adoption of a principled approach to vicarious liability is out of step with the existential reason for the doctrine in the first place: the attainment of social justice. In contrast, and to the extent that many of the pioneers of legal realism saw judicial decisions as ‘social events’ or ‘social realities’,[[480]](#footnote-480) we may logically conclude that this conception of law has many shared interests with vicarious liability. Indeed, Regan notes that realists are concerned with securing a connection between the ‘practical world’ and the meeting of ‘human needs and concerns’,[[481]](#footnote-481) and Landes and Posner argue that most realists will seek to achieve this through the guise of strict liability.[[482]](#footnote-482) Furthermore, Chamallas and Wriggins also point out that ‘context is all important’ to legal realism,[[483]](#footnote-483) so this suggests a certain degree of harmony between vicarious liability and my suggested model of liability.

Of course, it is also worth pointing out that legal realism shares many of the same purported benefits as my contextual-pluralist model. On the issue of transparency, for instance, realists are not afraid to admit that it is sometimes acceptable to form a conclusion about a particular scenario, and then work backwards *from* that conclusion to find defensible legal arguments justifying that interpretation.[[484]](#footnote-484) In this light, the legal realist is honest enough to concede that, on many occasions, an attempt to outline the *ratio decidendi* of a case is simply ‘judicial window dressing’.[[485]](#footnote-485) Feldthusen also made this point in regards to *Lister*, when he opined that the facts of this case shouted vicarious liability so loudly the outcome was obvious the moment the Lords freed themselves from the wooden reading of the Salmond test’.[[486]](#footnote-486) Similarly, legal realist values are also conducive to a more meaningful law on employer liability. Because it is ‘easy enough to hack the doctrinalist method’ by disguising the implementation of politics into judicial decisions, Priel is correct to observe that formalism gives the law ‘a semblance of neutrality… that it does not deserve’.[[487]](#footnote-487) In this light, to suggest (as Lord Nicholls does in *Dubai Aluminium*) that precedent is the most valuable commodity in the assessment of vicarious liability is simply ‘transcendental nonsense’.[[488]](#footnote-488) Likewise, and perhaps echoing my earlier argument that the doctrine of vicarious liability should remain an adaptable one, the realists also contend that formalism is an unduly rigid theory that may lead to potentially unfair results in practice.[[489]](#footnote-489) To again quote Priel, he suggests that:

‘For a single individual to act without considering the consequences of her actions is usually the mark of irrationality… Yet somehow, in the domain of private law, ignoring the consequences of decisions that potentially apply to millions is the mark of moral uprightness and legal rigour.’[[490]](#footnote-490)

As a final point, I also believe that legal realism provides a useful riposte to those who may suggest that my contextual-pluralist model strays too far from the system of precedent that we might come to expect under our common law. In particular, and as Dagan explains in relation to his conception of legal realism, doctrinal analysis can still be a useful addition to the judicial armoury, so long as it does not thwart the potential for judges to ‘revisit a doctrine’s normative viability and re-examine its categories’ adequacy.’[[491]](#footnote-491) In perhaps simpler terms, and with one eye on the prior analysis of *Century Insurance*, my view is that whilst previous precedent can sometimes be instructive, it can rarely (if ever) be determinative. This is also in line with the pragmatists’ view on this issue. Contrary to Dworkin’s misguided claims, pragmatism is open to studying the comparisons between past and present cases, because it is only through such insight that contemporary decisions can be improved.[[492]](#footnote-492) As such, if a smoking-related case were to come before the courts today,[[493]](#footnote-493) I certainly think that it would be appropriate for a judge to at least consider *Century Insurance*, as situating this case in its correct historical and social context could highlight the need for a divergent interpretation of enterprise risk (which may demonstrate that, because smoking is now less common, it is less of an intrinsic risk to a certain profession than it might previously have been). Accordingly, I disagree with Neyers and Stevens’ comment that advocates of theory-based approaches tend to let the theoretical justifications do ‘all the normative work’ before dropping the precedents as ‘superfluous’.[[494]](#footnote-494) Instead, I must express my support for the view of the (realist) majority in the US case of *Clark v Southview Hospital*, where the court found a hospital vicariously liable for the negligent - and later fatal - actions of a physician. They stated:

‘[W]e are not unmindful of the doctrine of *stare decisis* which dictates adherence to judicial decisions. *Stare decisis,* however, was not intended "to effect a 'petrifying rigidity', but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.”’[[495]](#footnote-495)

This quote is seemingly an example of Dagan’s so-called ‘midway position’ on the relevance of legal doctrine, a position that I find convincing.[[496]](#footnote-496) As we have seen, Dagan thinks that precedent can be useful as a trigger ‘for rethinking the doctrine’s conventional understanding’.[[497]](#footnote-497) In this light, it could be said that my contextual-pluralist model upholds some of the values associated with ‘traditional legal realism’. According to Priel, this form of realism (which was best evidenced by Llewellyn’s seminal work), is ‘far less radical than is commonly thought’.[[498]](#footnote-498) It does not completely dismiss doctrinal methods, and nor does it suggest that the common law is entirely irrelevant. This is not to say, however, that certain aspects of my model do not also align with the second dialectic of realism outlined by Priel: that of ‘scientific legal realism’. This is found most clearly in the work of Cohen,[[499]](#footnote-499) and it suggests that law is a ‘proper subject for social scientific study, itself ideally conceived of and practiced by extending the methods of natural science’.[[500]](#footnote-500)

Given that traditional legal realists are often unconvinced by the importance of social science to the law,[[501]](#footnote-501) it would be inaccurate to suggest that my contextual-pluralist framework falls wholly into either of these two forms of legal realism. Instead, and much like Dagan’s more pluralistic conception of realism, it can fairly be said that my model incorporates insights from both traditional *and* scientific realism. However, whilst Priel notes that Dagan is ‘unquestionably closer to traditional legal realism’,[[502]](#footnote-502) it is maintained that my analysis of vicarious liability in this thesis perhaps errs more on the side of scientific legal realism. An explanation for why this is the case – as well as an analysis of why formulating a distinction between these two aspects of realism matters at all – becomes apparent when we assess the second potential criticism that might be aimed at my contextual-pluralist model: that it is too uncertain to be of any use in practice.

**3.4.2 It is too Uncertain to be Useful in Practice**

A second – and perhaps more damning – criticism of my contextual-pluralist model is that it is simply too uncertain to be of any use in determining the liability of an employer. There is, admittedly, some force in the argument that my suggested model of vicarious liability is reminiscent of ‘palm tree justice’, in that it invites ad hoc judicial decision-making.[[503]](#footnote-503) As was discussed in the previous chapter, there are no easy answers as to how a judge should specifically define a particular context, and nor can concrete guidance be offered as to the relevant weight that we should afford to each theory when seeking to identify a common theoretical solution. The purpose of this final section, then, is not to embark on a futile quest to persuade opponents of my approach that my model is somehow conducive to predictability. I have no qualms in admitting that it is not, and it would be somewhat incongruent for me to argue that my contextual-pluralist framework is a highly adaptable and equitable one, but then also go on to suggest that it facilitates certainty in the law. As Mummery P contended in *Buchan v Secretary of State for Employment*:

‘it is impossible to devise a single foolproof test to accommodate both (a) the principle of certainty, which requires predictability of result and consistency of conclusion, and (b) the principle of justice, which requires space for the operation of circumstances in individual cases’.[[504]](#footnote-504)

Rather, my aim here is simply to highlight that the uncertainty objection to my contextual-pluralist approach is *not as strong* as many might initially think, and that it should not, therefore, be used as a reason to reject my model. In this regard, two particular points are worth mentioning here.

First, it is clear from this analysis that I depart from Dagan in relation to the purported certainty of realistic jurisprudence. I disagree with Dagan’s suggestion that, ‘[a]t least relative to the hopeless indeterminacy of pure doctrinal analysis, a contextual normative inquiry can secure a much more stable, and thus predictable, legal equilibrium.’[[505]](#footnote-505) On this basis, Priel’s criticism of Dagan is arguably inapplicable (or at least weaker) when applied to my contextual-pluralist model. Priel concedes Dagan's point that ‘doctrine is undoubtedly often vague’,[[506]](#footnote-506) but he suggests that the values Dagan invokes under his version of legal realism – such as, for instance, autonomy, labour and distributive justice – are vaguer still.[[507]](#footnote-507) Given that I do not believe that my contextual-pluralist framework will produce a *more* determinate law than the current principled, incremental approach, this criticism of Dagan’s jurisprudential stance largely falls away when viewed in relation to my suggested model of liability.

Secondly, and insofar as I concede that my contextual-pluralist model is hardly conducive to certainty, it might be thought that I am veering away from a realistic jurisprudence here. After all, legal realists such as Llewellyn have suggested that this style of legal reasoning would help to improve the ‘reckonability’ (i.e. predictability) of the law.[[508]](#footnote-508) This argument revolves around the assumption that the legal rules – or as they have otherwise been termed, the ‘paper rules’ – are incapable of providing guidance, and that the ‘real rules’ (i.e. predictions as to what judges will do in practice) will ‘serve as more reliable prediction-instruments’.[[509]](#footnote-509) However, it is worth bearing in mind, of course, that this argument was promulgated primarily by those scholars that are best described as ‘traditional’ legal realists (such as Llewellyn and, to a certain degree, Frank).[[510]](#footnote-510) In contrast, some scientific legal realists appear to be far less convinced that realism will provide any degree of predictability to the law. As Oliphant and Hewitt highlight:

‘[I]t must be clear that, for any case wherein there is a clash of two groups having conflicting interests, two conflicting major premises can always be formulated, one embodying one set of interests, the other embodying the other… That two such conflicting major premises can always be found is but the result of the fundamental futility of this approach as a method of determining how cases should be decided.’[[511]](#footnote-511)

As such, and as highlighted earlier, it might be said that my contextual-pluralist model resonates more closely with the scientific model of legal realism, which does not seem to place as much importance on the need for ‘reckonability’ in the law. In this respect, both Llewellyn and Dagan may have somewhat overstated the predictability that arises from a legal realist approach, and I have no problem in conceding that my contextual-pluralist model does not improve the reckonability of vicarious liability case law. Equally, however, I do not think that it *hampers* reckonability any more than the current incremental approach,[[512]](#footnote-512) and this is the argument that I seek to make in this section. In making this claim, it may be useful to summarise my reasoning along two distinct lines of enquiry: the ‘where else?’ argument and the ‘how else?’ argument. The first is primarily applicable to the contextual aspect of my model, whereas the latter is focussed more on the pluralistic nature of my suggested framework.

The ‘where else?’ argument suggests that it would be erroneous to reject my contextual-pluralist model for its uncertainty when a similar level of ambiguity exists in other areas of vicarious liability and tort law. In relation to the former, it is instructive to consider *Barry Congregation*, a case in which the Court of Appeal found a religious group vicariously liable for the rape committed by one of its leaders. Perhaps influenced by the policy intuition that the victim here was deserving of compensation, Davies LJ was able to make use of the tailored approach to sexual abuse - which is considered in more detail in section 7.2.1 – to reject a distinction between ‘adult’ and ‘child’ sexual abuse in this case.[[513]](#footnote-513) In this regard, if a judge has the capacity to delineate the type of *act* they are dealing with, is it really much more of a stretch to grant them discretion under my model of liability to also decide the type of *context*? If not, then the concerns outlined in the previous chapter (about the uncertainty inherent in demarcating the appropriate context of a case) are further weakened.

More broadly, we might also ask where else in the law of tort that we find such certainty. Lord Neuberger, speaking extra-judicially, made the argument that when a court ‘considers that policy, or justice, requires a departure from a fundamental principle, the court does just that – departs from principle’.[[514]](#footnote-514) In this light, and citing various landmark tort cases to support his point,[[515]](#footnote-515) he questions ‘how strong the certainty argument really is’ when a court can radically change what are thought to be ‘well-established and clear principles’ of tort law.[[516]](#footnote-516) Lord Toulson in *Patel v Mirza* made a similar point, stating that:

‘although a purported advantage of firm rules is greater certainty, the cases do not always fit the rules because courts have often sought ways around them when they do not like the consequence. The flexible approach would not only produce more acceptable results, but would in practice be no less certain than the rule-based approach.’[[517]](#footnote-517)

A fine example to further illustrate this argument might be found in the law on causation. Here, the courts have long grappled with determining the specific kind of loss that must be reasonably foreseeable in order to satisfy the test of remoteness,[[518]](#footnote-518) a task that is broadly akin to the difficulties that a judge might face when attempting to frame the specific context under my model. This is evident in *Jolley v Sutton London Borough Council*,[[519]](#footnote-519) a case in which a young child was injured when a collapsed car jack caused a derelict boat to fall on top of him. While the Court of Appeal denied liability by describing the loss as “physical injury caused by a jack giving way” (which was not foreseeable),[[520]](#footnote-520) the House of Lords adopted a wider view of the relevant harm so as to allow a seemingly deserving claimant to slip under the remoteness test. In their view, the correct classification of the harm was simply “physical injury caused by meddling with the boat” (which *was* foreseeable).[[521]](#footnote-521) Interestingly, Lord Steyn in this case also noted that that it would be a ‘sterile exercise’ to rely on previously decided cases here when judges enjoy such widespread freedom as to how to characterise specific acts.[[522]](#footnote-522) Instead, the stance adopted by the House of Lords may have been partly influenced by theoretical considerations, most notably the deeper pockets of the council and their ability to spread the loss better than the young claimant.[[523]](#footnote-523) Consequently, this case shows not only the potential for theory to displace a rigid adherence to precedent, but also the fact that law is an inherently indeterminate field of study that provides much scope for judicial rhetoric to drastically influence the outcome of cases.

This latter point feeds nicely into my second rebuttal of the uncertainty criticism: the so-called ‘how else?’ argument. The crux of this claim is that a similar potential for unpredictability and inconsistency is evident even in a more formalist and doctrinal approach to vicarious liability. We have already seen, for instance, the ambiguity surrounding the language of ‘doubtfulness’ employed in *Barclays*, and a similar criticism could also be aimed at other semantic tests. For instance, without some perceptible factors propping them up, it is not at all clear what lies behind tests such as ‘a frolic of his own’[[524]](#footnote-524) or ‘an unauthorised mode of doing an authorised act’.[[525]](#footnote-525) After all, as Felix Cohen notes, ‘[a]bsolute certainty is as foreign to language as to life. And the words of a definition always carry their own aura of ambiguity.’[[526]](#footnote-526)

One example demonstrating this point is the decision in *Prince Alfred* which, as we have previously touched upon, rejected a theoretical analysis of vicarious liability on the grounds that ‘minds may differ’ as to the correct application of such rationales.[[527]](#footnote-527) In this light, the High Court of Australia opted for a more formulaic test which asked whether the employment relationship provided not only the opportunity, but also the *occasion* for the harmful conduct.[[528]](#footnote-528) In determining this connection, the High Court stressed that we must have regard to the tortfeasor’s ‘authority, power, trust, control and the ability to achieve intimacy’ with the victim.[[529]](#footnote-529) Now, it is not intuitively clear to me that this development affords any more certainty than my contextual-pluralist model. As Goudkamp and Plunkett observe, there is no bright-line distinction between opportunity and occasion, and attempting to differentiate the two leads to the judicial application of labels that are ‘essentially devoid of content’ and ‘overly focused on terminology’.[[530]](#footnote-530) The comments of the minority in *Prince Alfred* are also particularly revealing in this regard, with both Gagele and Gordon JJ noting that the majority ‘cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case’.[[531]](#footnote-531)

Furthermore, this case is also interesting for highlighting the inevitably of considering theory to give meaning and substance to more doctrinal tests. On this basis, I question just how feasible it is to adopt an approach to vicarious liability that completely eschews theoretical analysis. Indeed, given that the High Court in *Prince Alfred* dismissed the importance of enterprise risk,[[532]](#footnote-532) it might be questioned how else we could decide whether the employee exercised authority, power and trust on their formulation of liability. It seems to me that, in reality, this test amounts to little more than an application of enterprise liability. If the judges were concerned with analysing whether a particular role afforded an employee the ability to exercise power or achieve intimacy, is this not just basing liability on the fact that a certain risk was inherent in a particular position? If not, the High Court did a remarkably poor job of ensuring the certainty, predictability and clarity of the law. If so, then theoretical evaluation seems to be an inevitable by-product of any semantic test. The truth is that there is no magical judicial formula that will help to bring more certainty to vicarious liability, regardless of whether a more doctrinal or socio-legal stance is adopted. Judges are not robots with in-built algorithms programmed for consistency. They are humans, and will make human decisions. Some of these decisions may well be contradictory. In this regard, I can do little more than to echo Lord Dyson’s wise words in *Mohamud* when he colourfully argued that the ‘search for certainty and precision in vicarious liability is to undertake a quest for a chimaera.’[[533]](#footnote-533) If this is true, it would be erroneous to reject my contextual-pluralist model based on its lack of certainty.

**3.5 Conclusion**

In building upon the argument set out in the previous chapter, I have demonstrated here how a contextual-pluralist approach may enable us to achieve a more meaningful, adaptable and transparent doctrine of employer liability. In addition, I have also outlined three developments in relation to vicarious liability that ought to be considered if we are to effectively implement my suggested model of liability: the espousal of a ‘thick’ approach to theory; the adoption of a wider interdisciplinary assessment of the rationales that underpin the doctrine; and the utilisation of empirical data. These are perhaps unsurprising suggestions given my support for both legal realism and pragmatism in this chapter, and my general aversion to overly doctrinal and incremental solutions to vicarious liability disputes. For such reasons, I am not convinced as to any potential criticism related to the ‘unprincipled’ nature of my contextual-pluralist framework, not least because its advocates have failed to define with any sufficient clarity just what a ‘principled’ law is supposed to mean. Likewise, and whilst I do concede that my model is perhaps too loose and malleable for some, I also question just ‘how else’ and ‘where else’ we can find this cherished notion of certainty in the law. Whilst many may remain unconvinced, it may be tentatively argued that we can at least be certain of one thing under my contextual-pluralist model: that theoretical analysis *will* take place, and it will no longer be subject to the haphazard vagaries of what a particular judge ‘had for breakfast’.

Lastly, it is perhaps useful to make one final comment here: my contextual-pluralist proposal has been a challenging one to make in theory, and it is likely to be an even greater challenge to implement in practice. As such, the purpose of the rest of this thesis is an attempt to demonstrate how this model might be applied in practice to the sporting industry. In particular, and by structuring the discussion around the two traditional tests for vicarious liability (that is, the relationship and close connection tests), I outline how a more theoretically informed law on vicarious liability might work in light of numerous different sporting contexts. These range, for instance, from recreational sport to professional sport, and from on-field acts to off-field acts. We begin, in the following chapter, by assessing what my contextual-pluralist model might have to say about the identification of the necessary relationship in the context of amateur sport.

**CHAPTER 4**

**IDENTIFYING THE RELATIONSHIP: VICARIOUS LIABILITY FOR AMATEUR SPORTS PARTICIPANTS**

**4.1 Introduction**

As we have discussed in previous chapters, the first step for any sports-related vicarious liability claim is to prove that the necessary relationship exists between the tortfeasor-player and the defendant-club. Interestingly, whilst we will see later in the chapter that this requirement is no longer a problem for most semi-professional sports teams, there has not yet been any recorded case of a purely amateur sports club being held vicariously liable in the UK. A number of factors might explain the lack of case law on this point. First, and as James and McArdle’s (now somewhat outdated) analysis highlights, it was commonly thought, until quite recently, that some form of employment relationship needed to exist before imposing vicarious liability.[[534]](#footnote-534) As we will see below, however, developments in the past decade or so indicate that this is no longer the case. It may now only be a lack of awareness of the potential for such a claim that is preventing an injured sports participant from testing the vicarious liability of an amateur sports club. Second, even when serious injury has occurred in recreational sport, there have often been other parties – such as coaches[[535]](#footnote-535) and referees[[536]](#footnote-536) who are employed by schools and governing bodies - at fault. As such, there has often been no need for a claimant to make the novel claim that an amateur sports club ought to be vicariously liable for any injury. As the discussion in this chapter will highlight, however, this possibility should not be dismissed under my contextual-pluralist model.

Indeed, and as examined in section 4.2, the prevalence of injury in amateur sport, allied to the inherent limitations on recovery in many sports’ personal accident insurance policies, means that it is now more likely than ever that a recreational sports club will be subject to a vicarious liability claim. This is reinforced by the analysis in section 4.3, which highlights two recent developments to the law in this area that now arguably make it legitimate to hold an amateur sports club strictly liable for the on-field torts of their players. These relate, firstly, to the evolution of the ‘akin to employment’ test, and secondly, to the extension of vicarious liability for unincorporated associations. However, as will be explained in this section, these two developments are rather indeterminate and largely unhelpful, and neither seem to provide any theoretical or normative guidance as to whether an amateur club *should* be held vicariously liable; they simply state that they *could* be. As such, it is tentatively suggested that these unnecessary categories of relationship ought to be replaced with a simpler and clearer test that focusses on ‘responsibility’ for others.

With these limitations of the current law in mind, section 4.4 then assesses how the liability of an amateur sports club might be determined under my contextual-pluralist model. It identifies a pressing tension between a utilitarian-based theory of deterrence (which emphasises the social utility of recreational sport) and the theories of enterprise liability and deep pockets (which seem, by contrast, to prioritise the need to compensate a claimant who was injured on the sports field). It is maintained that loss spreading provides a suitable balance between these two competing positions, and that a focus on a club’s ability to spread loss through adequate insurance is the most effective common theoretical solution in this context. This appears to reinforce my normative intuition from section 2.5.2 that loss spreading is one of the more pertinent theoretical considerations in the amateur sports context, and I hope to strengthen that intuition here from a practical, analytical and comparative perspective. The chapter then concludes by assessing the current insurance cover available to amateur sports clubs. In particular, it peruses the necessary reforms to this insurance cover that ought to be considered if my contextual-pluralist model is to be applied effectively in this context.

**4.2. Setting the Context: A Role for Vicarious Liability in Amateur Sport?**

According to statistics from 2014-15, sports injuries accounted for 367,093 A&E attendances, a figure that represented 1.9% of all recorded emergency department attendances (and 7.7% of all injury-related attendances).[[537]](#footnote-537) More recent studies estimate that these figures could be even higher, with Kirkwood, Hughes and Pollock suggesting that, in one English county, 18.3% of all emergency department attendances were sport-related.[[538]](#footnote-538) Others have similarly suggested that between 1 and 1.5 million people attend A&E departments each year for an injury associated with sport and exercise.[[539]](#footnote-539) Unfortunately, Ekegran, Gabbe and Finch have highlighted that there is a significant ‘knowledge gap about injuries in amateur and community sport settings’,[[540]](#footnote-540) and there is no in-depth data available in England and Wales to assess how many visits to A&E are directly related to participation in amateur sport. This gap is likely due to the absence of a Swedish-style sports injury surveillance system in the UK (a database which register all injuries and insurance payments to 90% of athletes in all levels of sport).[[541]](#footnote-541) Notwithstanding this, however, it is possible to identify some statistics pertaining to the scope of injury in amateur sport, and most notably to those sports that we might define as ‘contact team sports’. In regards to football, for instance, various international studies have contended that the incidence of injury for amateur footballers ranges from anywhere between 5.2 to 20.4 injuries per 1000 hours of participation.[[542]](#footnote-542) In line with other empirical research,[[543]](#footnote-543) Gebert et al found that 27.4% of injuries to amateur footballers were caused by a foul given by the referee.[[544]](#footnote-544) Their study also highlighted that injuries caused by an opponent’s tackle occurred twice as frequently during a competitive game as during training.[[545]](#footnote-545) This suggests that amateur sport is at its most physically invasive when it involves pitting one team against another in a competitive match.

These findings are similarly applicable to numerous other contact team sports. For example, in examining the scope of injury in community-based Australian rules football, some researchers have reported that 79% of players declared at least one injury over the course of the season, with the ‘vast majority’ of injuries occurring during matches.[[546]](#footnote-546) Around 12% of these injuries resulted in four or more missed matches and were classed as severe.[[547]](#footnote-547) In similar fashion, the physical nature of amateur rugby perhaps lends itself to insightful empirical analysis. Gabbett depicts the incidence of injury in rugby league as 160.6 injuries per 1000 game hours, with over 25% of the injuries being to the especially vulnerable head and neck area.[[548]](#footnote-548) He suggests that the tendency of amateur league rugby league players to ‘participate in foul play and violence in an attempt to win a match’ contributes to this high number of head and neck injuries.[[549]](#footnote-549) Likewise, in amateur rugby union, Yeomans et al identify the overall incidence rate of match injuries as 46.8 per 1000 player hours, with contact events accounting for most of these injuries.[[550]](#footnote-550) Interestingly, it was also found that forwards had a slightly higher injury incidence rate of 22.8 per 1000 game hours, as compared to backs (whose incidence rate was 18.1 per 1000 game hours).[[551]](#footnote-551) In sum, then, it appears that the heated nature of competitive sport – and especially those games that involve ‘strong physical contact between opposing players’[[552]](#footnote-552) - renders the possibility of (sometimes serious) injury inevitable in the context of amateur sport.

With this in mind, it can be concluded that an amateur sports participant has three potential options if they are injured on the field of play: (1) let their loss lie where it falls; (2) claim from a pot of insurance money; or (3) seek judicial recourse to recover compensation. Where the injury is less serious, (1) appears a feasible option. After all, and as Mitchell, Finch and Boufous found in their empirical study on sports injuries, the most common form of treatment for injury was self-treatment by the athlete (which occurred in 33.9% of cases).[[553]](#footnote-553) However, where an injury leaves an amateur athlete unable to work and out of pocket, options (2) and (3) become much more attractive. It is notable that, in regards to option (2), most sports offer a no-fault, first-party form of personal accident insurance cover.[[554]](#footnote-554)

In football, for instance, the Football Association’s (FA) launch of the National Game Insurance Scheme (NGIS) in 2012 – delivered by the insurance broker Bluefin Sport - led to the introduction of mandatory insurance for many amateur footballers at all age groups.[[555]](#footnote-555) Although not all County FAs have subscribed to the NGIS,[[556]](#footnote-556) this scheme – which was brought about in an attempt to ‘reduce litigation in the game’[[557]](#footnote-557) - offers coverage to around 66% of amateur football clubs in England.[[558]](#footnote-558) Many County FAs set out different minimum levels of personal accident insurance cover for teams operating in their area, with clubs having to take out either ‘Basic’, ‘Intermediate’ or ‘Superior’ insurance cover. Although premiums vary according to each club, Bluefin helpfully describes a minimum annual payment that is expected for each level of insurance cover.[[559]](#footnote-559) ‘Basic’ insurance is available for as little as £26, whereas ‘Intermediate’ cover is available for a minimum of £40 per team. ‘Superior’ cover ranges from as little as £74 per team (for ‘Superior 120’) to £224 per team (for the more comprehensive ‘Superior 600’ cover), although it must be noted that these costs are likely to be higher in practice.[[560]](#footnote-560) Consequently, it might be concluded that option (2) is the most sensible choice for many injured amateur sports participants, because it avoids the oftentimes costly – and lengthy – legal process of option (3). Additionally, it also means that the injured party will not have to try his luck in attempting to prove the negligence of an opposing player in a court of law. Indeed, even though we have seen that more than a quarter of injuries in amateur sport are caused by foul play, it is fair to say that only a small minority of these fouls are likely to be deemed negligent in light of the courts’ repeated insistence that on-field acts committed in the ‘agony of the moment’ are unlikely to breach one’s duty of care.[[561]](#footnote-561)

Unfortunately, the practical usefulness of these no-fault compensation schemes is severely diminished when one considers more closely what is actually covered by each of these policies. Neither the ‘Basic’ or ‘Intermediate’ cover under the NGIS provide any compensation for emergency medical expenses, rehabilitation or physiotherapy, and nor do they provide any cover for Temporary Total Disablement (a monthly lump sum that could help to replace one’s lost income).[[562]](#footnote-562) Somewhat startlingly, the ‘Basic’ cover does not even provide any redress for broken bones, dislocation and snapped or ruptured tendons, and is limited to providing cover only for death or the loss of limbs and eyes. Even then, however, the coverage is somewhat meagre, and this seems to reflect a trend found in other sports (such as UK basketball, which only offers £25,000 for the loss of two or more limbs or both eyes).[[563]](#footnote-563) For context, it is worth mentioning that, of the 28 counties that subscribe to the NGIS, more than half only mandate personal accident cover at a ‘Basic’ or ‘Intermediate’ level.[[564]](#footnote-564) Consequently, it is easy to see why option (3) may, in fact, be the only viable path for an amateur player to receive adequate compensation for harm suffered on the field. In this light, the comments of various injured recreational footballers are particularly revealing. One stated that he was ‘off work for months but just wasn’t able to get any help. Taking legal action is a last resort but I don’t feel I have any other choice’.[[565]](#footnote-565) Another player, who at the time of his injury was also a self-employed bricklayer, similarly lambasted the current insurance protection afforded to amateur athletes:

‘Although there was insurance cover from the club, it’s just not enough for people who have suffered more serious injuries and any lost earnings aren’t covered, which, for someone like me who is self-employed, is a disaster. It’s an eye-opener for me and I’ve been left with no choice but to seek legal action.’[[566]](#footnote-566)

According to Stephen Nye, a personal injury solicitor at Irwin Mitchell, around 300 players contact his company each year seeking damages from the individual who injured them.[[567]](#footnote-567) Unsurprisingly, it appears that a similar state of affairs may also exist in other contact sports, particularly in rugby and Gaelic games.[[568]](#footnote-568) As Damian Hopley, the current chief executive of the Rugby Players’ Association, once remarked: ‘[p]layers everywhere are under-insured. Some players put more into their car insurance than personal insurance. We have been banging the drum for years about this, but players think they are bullet proof.’[[569]](#footnote-569) It is noteworthy in this regard that a prominent feature of the litigation in *Van Oppen v Bedford Charity Trustees*[[570]](#footnote-570) – which concerned a claim by a schoolboy who was severely injured whilst playing rugby - was the lack of any personal accident insurance scheme to provide adequate compensation.

Now, on this basis, the clear solution here is to expand and improve the first-party coverage available to amateur sports participants, and particularly for those who engage in more physically invasive contact sports. In this regard, I must agree with McArdle and James when they suggest that stories of sportsmen desperately seeking recompense for their injuries through judicial means are ‘unedifying’ and ‘reflect badly on both sport and the law’.[[571]](#footnote-571) Indeed, despite the increasing prevalence of lawyers in the sporting industry, we must not forget that sport is designed to be played on the pitch, and *not* in legal judgments and textbooks. As such, one change we might consider in the context of amateur football is to remove the ‘Basic’ and ‘Intermediate’ options under the NGIS, and simply mandate that all teams take out what is currently the ‘Superior’ policy cover. As we have seen, the ‘Basic’ and ‘Intermediate’ insurance coverage is arguably ‘not worth the paper it’s written on’,[[572]](#footnote-572) and a much wider and more comprehensive range of harm is included in the ‘Superior’ policy coverage. This suggestion for a greater resort to first-party cover largely accords with Atiyah’s famous volte-face in *The Damages Lottery*, where he suggested that tort law should be abolished and replaced with a market that encourages (and sometimes even mandates) the use of privately-arranged first-party insurance.[[573]](#footnote-573) However, much like Conaghan and Mansell who doubt whether Atiyah’s solution is a ‘real panacea’ to the damages lottery,[[574]](#footnote-574) I too am highly sceptical as to whether such improvements to the mandatory personal accident insurance cover under the NGIS are likely to completely eliminate the possibility of an injured amateur sports participant seeking judicial recourse. This is so for a number of reasons.

First, it is unclear whether such a solution will – or ever could – be implemented in practice. There is not an endless pot of money, and more expensive compensation pay-outs will almost certainly necessitate a concomitant increase in premiums for each club. Whether this is a practical and achievable development for many cash-strapped amateur teams is largely open to debate, and it will likely require a detailed investigation into the financial implications of this solution.[[575]](#footnote-575) Second, and even if we were to conclude that this development was economically feasible, it must be recognised that the sums involved in no-fault compensation schemes will be dwarfed by what a party might obtain in an action for negligence. On this basis, an injured amateur sports participant may deem it worthwhile to risk their luck in the lottery of negligence to top up their personal accident insurance compensation, particularly when an injury is especially serious. For instance, even under Bluefin’s ‘Superior’ cover, compensation for tetraplegia is capped at £100,000. Compare this with the damages awarded in *Vowles v Evans and Welsh Rugby Union*,[[576]](#footnote-576) where the claimant suffered permanent incomplete tetraplegia following the negligence of an amateur rugby referee. Here, £1.8 million was awarded in compensation. Similarly, there is no recompense for loss of income or future earnings under any of the first-party NGIS policies, so an individual may still be attracted to an action in negligence to recover damages for these losses. By way of example, in *Langford v Hebran*,[[577]](#footnote-577) an amateur kick-boxer (and trainee bricklayer) was awarded £423,133 in damages for his injury, a large chunk of which was awarded for his potential loss of earnings as a professional fighter.

Third, and as Eggers outlines, most insurance companies will often try to pinpoint some underlying or pre-existing condition in the injured party which may have contributed to their injury.[[578]](#footnote-578) If even a trace of this is found, the insurers will be reluctant to pay out compensation. Consequently, in *Blackburn Rovers Football and Athletic Club v Avon Insurance Plc & Others*,[[579]](#footnote-579) for instance, a professional footballer could not recover from their club’s personal accident policy after retiring due to a degenerative disc disease, despite claims that 75% of male professional footballers at the claimants age suffered from the same condition. Finally, it must be recognised that, if the magnitude of first-party insurance pay-outs increase, so too will the chances of subrogation. Whilst an injured player may well be content to simply accept a hefty personal accident compensation sum from a potentially negligent act, the insurance company who is obliged to meet this claim may not be so content with letting the injurer off the hook. On this basis, an amateur club may still find themselves the subject of a legal claim from an insurance company that seeks to step into the shoes of the injured party.

Consequently, whilst I am much in favour of improving and expanding first-party coverage in amateur sport, it must be recognised that, in practice, this is unlikely to fully eliminate the threat of legal action against another amateur player. If this is the case, the vicarious liability of a non-profit sports team is likely to become an important feature of the litigation, because the tortfeasor himself will, in most instances, be a man of straw that does not possess their own third-party insurance.[[580]](#footnote-580) It is the purpose of the rest of this chapter to explore whether the doctrine of employer liability can – and indeed should – be triggered in this amateur context.

**4.3 The Inadequacy of Current Methods in Determining Vicarious Liability in Amateur Sport**

**4.3.1 Akin to Employment**

Amateur athletes are not employees in the conventional sense of the term.[[581]](#footnote-581) They lack both the necessary contract of employment and remuneration that is generally evident in a contract of service. They cannot, as the High Court in *Gasser v Stinson* pointed out, ‘earn their daily bread as athletes’.[[582]](#footnote-582) The general orthodoxy would, therefore, appear to point towards no vicarious liability for the actions of amateur participants. This was the argument set forth by the Court of Appeal in *Gravil v Carroll and Redruth Rugby Football Club*,[[583]](#footnote-583) a case which concerned the potential vicarious liability of a semi-professional rugby union club after one of their players punched an opposition player during an off-the-ball melee. Despite having other full-time employment, the first defendant had a contract of employment with the second defendant under which he was paid a match fee and win bonus totalling £300. Although finding vicarious liability applied on these facts, Clarke MR was eager to stress that a similar result would not be reached in scenarios where there was no contract of employment.[[584]](#footnote-584) In this regard, it might be said that His Honour was influenced by previous precedent which suggested that ‘moral obligations of loyalty’ between the tortfeasor and defendant were not enough in itself to establish liability.[[585]](#footnote-585) On this basis, and as Parpworth contends, amateur sports clubs would not be vicariously liable for the tortious actions of their players.[[586]](#footnote-586)

In light of more recent developments in this area, however, it must be recognised that *Gravil* may no longer be good law on this point. In particular, the decision precedes the Court of Appeal judgment in *JGE v English Province of Our Lady of Charity*,[[587]](#footnote-587) where it was held that vicarious liability could also be extended to relationships ‘akin to employment’. Although various commentators have suggested that this extension was originally birthed in order to respond to cases of child sexual abuse within religious institutions,[[588]](#footnote-588) Morgan argues that this test is not limited to this context, and that it may now apply to ‘new and emerging forms of enterprise and employment.’[[589]](#footnote-589) In his view, the ‘akin to employment’ development ‘offers a promising route for claimants who wish to establish vicarious liability for amateur players’.[[590]](#footnote-590) In *Various Claimants v Catholic Child Welfare Society*,[[591]](#footnote-591) for instance, the defendant institute (the Institute of the Brothers of the Christian Schools) was held vicariously liable for the sexual abuse perpetrated by some of the brothers, on the basis that these members were akin to employees. The fact that the relationship between the brothers and the Roman Catholic institute was constituted by vow – rather than by contract – was not a bar to a finding of liability; nor was the fact that the Institute did not pay the brothers.[[592]](#footnote-592) Likewise, Morgan suggests that the ‘akin to employment’ formulation in *Cox v Ministry of Justice* is distilled in ‘such a way that it will encompass some amateur sportspersons’.[[593]](#footnote-593) Here, in finding that the defendant was vicariously liable for the negligent actions of a prisoner who dropped a bag of rice on a prison catering manager, the Supreme Court held that a relationship ‘other than one of employment’ can lead to vicarious liability where:

‘harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit… and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.’[[594]](#footnote-594)

However, on the basis of the Supreme Court’s more recent decision in *Barclays Bank v Various Claimants*,[[595]](#footnote-595) it is unlikely that Morgan’s prediction is now correct. This is so despite the fact that Lady Hale in *Barclays* appeared to support the continued existence of the ‘akin to employment’ test in this case. As was discussed in the previous chapter, *Barclays* requires a more incremental approach that assesses the details of the relationship in each case, so it is debatable whether we can now refer to *Cox* to justify vicarious liability for amateur sports participants. After all, *Cox* was concerned with the custody context in which the relationship between the prisoners and the prison service was one of compulsion rather than mutuality.[[596]](#footnote-596) This is arguably a far cry from the context of amateur sport, where participants are generally present for both the love of the game, and the social benefits associated with participation in recreational sport. As Ryan observes, a prisoner is ‘paid a nominal wage to motivate him in the carrying out of his tasks’, and he is ’situated in a position radically different from that of a worker in a truly voluntary relationship’.[[597]](#footnote-597) Consequently, whilst we might say that the ‘akin to employment’ development does not necessarily rule out vicarious liability in the recreational sports context, it must equally be concluded that it most certainly does not rule it *in* either. This is perhaps a fine example of the indeterminacy that has long been associated with the formalist approach to adjudication. Although formalists tend to think that there is only one right answer to every legal problem,[[598]](#footnote-598) the analysis in this section appears to cast some doubt on this formalist claim of determinacy.

Perhaps more concrete guidance can be gleaned by assessing the underlying factors that go towards establishing whether a relationship is one ‘akin to employment’. Again, however, *Barclays* can be criticised for failing to offer the necessary degree of clarity here. Whilst Lord Phillips in *CCWS* laid out five helpful theoretical criteria to assess whether a particular relationship has the ‘same incidents’ as one of employment,[[599]](#footnote-599) Lady Hale in *Barclays* relegated these five criteria to ‘doubtful’ cases.[[600]](#footnote-600) It appears now, then, that one can still be classed as ‘akin to an employee’ without reference to any theoretical factors at all, as indicated by Lady Hale’s reliance on Ward LJ’s judgment in *JGE*.[[601]](#footnote-601) The problem with this, however, is that Ward LJ’s judgment on the ‘akin to employment’ category provided very little assistance that wasn’t previously readily available under older case law. In fact, in his view, the correct approach is to ‘marshal’ the many older tests attempting to identify an employer-employee relationship with a ‘view to abstracting from them, if it is possible, the essence of being an employee’.[[602]](#footnote-602) With one eye on the work of Kidner,[[603]](#footnote-603) the factors that might be determinant of employee status on this formulation of liability may include: the payment of a wage[[604]](#footnote-604); the amount of control exercised by the institution[[605]](#footnote-605); the provision of equipment and tools[[606]](#footnote-606); the parties’ intentions[[607]](#footnote-607); the potential for profit and degree of financial risk undertaken by the individual[[608]](#footnote-608); and the extent to which the alleged employee is integrated into the defendant’s integral business activities.[[609]](#footnote-609) This leads me to two important comments.

First, it is clear that the akin to employment enquiry under this formulation is bound to lead to uncertainty, because it directs judges to the very vague and indeterminate task of ‘understanding the details of the relationship’.[[610]](#footnote-610) In this regard, it appears to suffer from the same flaws as the ‘frolic’ and Salmond tests that were discussed in section 3.4.2. Given the interminable number of divergent structures, practices and contexts that might differentiate one amateur sports club from another, an analysis of these particular considerations is unlikely to produce any definitive answer. Indeed, whilst some amateur clubs may adopt more professional attitudes by imposing fines for tardiness or ‘improper dress’,[[611]](#footnote-611) others may not even provide their players with any equipment. Without some guidance as to which of these factors ought to be afforded the most importance, I doubt whether such an approach is really any more certain than my pluralistic balancing exercise that is informed by context. Of course, this indeterminacy could be somewhat avoided if we accept that the considerations listed by Ward LJ go towards establishing whether the theories of control and enterprise liability are satisfied in any given scenario. However, as we have already established, the judgment in *Barclays* appears to discourage the use of theory in all but the most ‘doubtful’ of cases.

Nevertheless, even if it was accepted that it is legitimate to consider control and enterprise liability when examining the factors listed by Ward LJ, it must be recognised that this is likely to only paint half of the theoretical picture. In examining the list of considerations that apparently go towards establishing the ‘akin to employment’ test, there is clearly no scope, it seems, for an in-depth examination of theories such as loss spreading and social deterrence. This is an unsatisfactory state of affairs, especially as I argue in section 4.4 that both of these theories are particularly relevant considerations in the context of amateur sport. As was suggested in the previous chapter, then, the current approach – based as it is on precedent and an understanding of the details of the case – is not necessarily more desirable than my contextual-pluralist model of liability. Nor is it, I believe, more conducive to predictability. This can be illustrated by briefly analysing the handful of works that have already considered the potential vicarious liability of amateur sports clubs under this ‘akin to employment’ category. Whilst Harris thought that these factual considerations conferred a ‘de facto immunity’ upon amateur sports clubs,[[612]](#footnote-612) Griffith-Jones and Randall (in line with Morgan) thought that they did not necessarily rule out the possibility of vicarious liability here.[[613]](#footnote-613) Once again, this perhaps reinforces the indeterminacy of the ‘akin to employment’ extension in the current law.

The second point to note is a relatively simple one. Given that this ‘akin to employment’ development is merely based on tests that were already in use, we might ask the following question: what, exactly, is the purpose of this new-found test? Foster and Clarke suggest that the ‘akin to employment’ enquiry embodies little more than an ‘increasingly hopeless attempt to cling on to traditional rules’ in scenarios where the court feels that it is just to impute liability, despite the fact that the tortfeasor is not necessarily an employee in the strict sense of the word.[[614]](#footnote-614) Whilst I applaud the potential for adaptability brought about by this development, I must, however, take issue with the unnecessary confusion it creates. For instance, Bell questions whether:

‘the retention of the concept of an independent contractor for whom no vicarious liability attaches mean that the akin to employment test is limited to extending liability to unusual/irregular relationships, or is it retained only in a reduced extent insofar as certain relationships must now be ceded as akin to employment (effectively reducing "independent contractors" to a partial residual category)?’[[615]](#footnote-615)

In light of the insistence in *Barclays* that the ‘akin to employment’ and‘independent contractor’ categories are to be maintained, it remains unclear as to how they both interact with one another, and whether there is any overlap between the two. In his dissenting judgment in *Armes v Nottinghamshire County Council*, Lord Reed appeared to intimate that they were two separate categories,[[616]](#footnote-616) and Giliker similarly concluded that the new ‘akin to employment’ development was not intended to ‘undermine the general rule that there is no vicarious liability for genuinely independent contractors’.[[617]](#footnote-617) Yet, some four years later, she suggested that the ‘akin to employment’ test has ‘caused controversy in that it extends vicarious liability to parties who are technically independent contractors’.[[618]](#footnote-618) True, *Barclays* may have sought to advocate a more ‘cautious approach’ to the ‘akin to employment’ relationship,[[619]](#footnote-619) but serious questions still remain as to how this is to coincide with Lord Sumption’s enduring proposition from *Woodland v Swimming Teachers Association* that vicarious liability ‘has never extended to the negligence of those who are *truly* independent contractors’.[[620]](#footnote-620) Does this quote suggest that we now have ‘fake’ or ‘false’ independent contractors (whom will presumably be deemed akin to employees)?[[621]](#footnote-621) If so, I question the legitimacy of maintaining this distinction between employees and independent contractors if it can be so easily undermined in this manner. Perhaps somewhat facetiously, could we suggest that the law is now also open to developing the concept of a ‘fake employee’?

In fact, many of these concerns as to the correct classification of such terms is largely appeased if one highlights a simple fact that often goes under the radar in many judgments and scholarly works on this topic: that the phrases ‘employee’, ‘akin to employee’ and ‘independent contractor’ are not some intricate legal formulae that allow us to unearth the correct answer on the relationship requirement in every scenario. Rather, they are labels that depict our conclusion about a particular case, and not independent reasons *for* that conclusion.[[622]](#footnote-622) They provide no answer as to why or when it is normatively desirable to impose or reject vicarious liability in a particular case. The ‘akin to employment’ test might admittedly be a useful peg for highlighting that vicarious liability *could* be expanded to amateur sport, but it says nothing as to whether the law *should* be expanded. In light of this concession, it may not be wise to maintain a new ‘akin to employment’ category to work around (or cling on to) an outdated distinction between employees and independent contractors, particularly when such terms generally operate as ‘mere ciphers’.[[623]](#footnote-623) Instead, and in the interests of clarity, it may be better to just simply drop these labels altogether, and ask the question that remains at the heart of vicarious liability: does the relationship between the defendant and the tortfeasor mean that the former should be held *responsible* for the actions of the latter? This provides a much simpler and clearer enquiry that goes to the very core of what vicarious liability is concerned with - responsibility for others. It also provides a further justification for the comparison with the French position on the strict liability of amateur sports clubs in section 4.4.2, as the French Civil Code similarly adopts a test of ‘responsibility’.[[624]](#footnote-624)

**4.3.2 Unincorporated Associations**

For now, however, it is worth briefly discussing one other method that could be employed in order to find vicarious liability in the amateur sports context: that of vicarious liability for unincorporated associations. This possibility stems from Lord Phillips’ judgment in *CCWS*, and in particular from his assertion that, even if the ‘akin to employment’ test had not been satisfied in this case, the defendant institute could still have been held strictly liable on the basis that they were an unincorporated association.[[625]](#footnote-625) In his view, provided that a tortfeasor is ‘acting for the common purpose’ of the other members of the unincorporated association, it will be justifiable to impose vicarious liability.[[626]](#footnote-626) Similar sentiments were also expressed by Hughes LJ in the Court of Appeal in *CCWS*,[[627]](#footnote-627) and there is seemingly nothing in the more recent judgment of *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* (which also concerned the vicarious liability of an unincorporated association) to cast doubt upon this proposition.[[628]](#footnote-628) In this light, Morgan has warned that this category of vicarious liability could be ‘very widespread’,[[629]](#footnote-629) and that it may have the ‘potential to generate significant exposure to vicarious liability for player torts… [at] the grassroots end of football’.[[630]](#footnote-630) This can be illustrated by examining in more detail the types of entities that might be said to constitute an unincorporated association.

According to Lawton LJ in *Conservative and Unionist Central Office v Burrell*, an unincorporated association can be defined as ‘two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations’.[[631]](#footnote-631) Although the bond between the members must be contractual in nature, courts will often find the existence of a contract if an ‘implicit but sufficiently clear understanding is reached by two or more people’.[[632]](#footnote-632) As such, many voluntary and non-profit organisations will be classed as unincorporated associations, and this will clearly encompass various amateur sports clubs.[[633]](#footnote-633) By way of example, Hughes LJ in *R v L* observed that a ‘village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association’.[[634]](#footnote-634) Similarly, Morgan explains that vicarious liability of unincorporated associations is the category one would ‘wish to examine if during a village cricket match a club member of a visiting team negligently hits a six into a playground and injures a child.’[[635]](#footnote-635) It will also cover various other sporting activities played at an amateur and recreational level.[[636]](#footnote-636)

Now, it is important here to understand just how exactly this form of liability works in practice. Given that unincorporated associations do not possess legal personality,[[637]](#footnote-637) it is the members of the group – rather than the group *per se* – that are held vicariously liable for the tort.[[638]](#footnote-638) This means that members are jointly and severally liable for any harm, and one individual could be forced to bear the whole burden if the others are unable to pay. This was clearly an issue that was glossed over by the Supreme Court in *CCWS* in their attempt to respond to the specific facts of that case. However, whilst Pill LJ in the Court of Appeal is probably correct to maintain that we should have no qualms in spreading the cost of harm throughout thousands of world-wide members of the Institute,[[639]](#footnote-639) the same perhaps cannot be said when we apply this logic to the context of amateur sport. Indeed, Morgan outlines how the club treasurer of one unincorporated Welsh rugby club had to register a charge against his house in order to meet an £85,000 compensation award for the unfair dismissal of an employee.[[640]](#footnote-640) As we can see, then, the category of unincorporated associations – much like the ‘akin to employment’ development – hardly provides a satisfactory basis upon which to provide compensation for an injured amateur athlete. If such liability is required, it should only be done so in a manner which typically holds the harm-causing organisation itself accountable, and *not* its very small group of individual sporting members.

That said, it is perhaps also the case that Morgan’s warning as to the likelihood of amateur players being held vicariously liable in this manner is somewhat overstated. This is both a normative and predictive claim. The Court of Appeal in *CCWS*, for instance, seemed keen to emphasise ‘the particular circumstances’ of this case,[[641]](#footnote-641) and Lord Phillips in the Supreme Court was arguably far more concerned with accessing the funds held by the Institute than he was with providing a legally neat category of vicarious liability.[[642]](#footnote-642) This is reinforced by the scholarly suggestion that His Lordship’s extension of the doctrine was rather dubious, because none of the purported precedents he relies upon – most notably *Heatons Transport (St Helens) Ltd v Transport and General Workers’ Union*,[[643]](#footnote-643) *Thomas v National Union of Mineworkers*[[644]](#footnote-644) and *Dubai Aluminium Co Ltd v Salaam*[[645]](#footnote-645)– actually justifies the vicarious liability of unincorporated associations.[[646]](#footnote-646) In this regard, it is suggested that UK courts are far more likely to follow the function-over-form approach advocated by the Supreme Court of Ireland in *Hickey v McGowan*.[[647]](#footnote-647) Here, O’Donnell J opined that ‘the mere fact of voluntary association may not create the type of intense relationship that justifies imposing vicarious liability in the case of a religious order’.[[648]](#footnote-648) This contextualised approach is more normatively attractive, and I must express my support for Clerk’s view when he suggested that, in cases involving amateur sports clubs, courts must be ‘prepared to exercise their supervisory jurisdiction [to ensure] that individual members’ rights are robustly protected’.[[649]](#footnote-649)

Interestingly, Morgan also provides a relatively unique solution that allows us to differentiate between the global unincorporated association in *CCWS* and a typical amateur sports club that comprises of only a few members. He suggests that the breadth of the close connection test at the second stage of vicarious liability could be dependent on the unincorporated association in question.[[650]](#footnote-650) In this way, ‘the connection required to link the tort to a large institutional religious unincorporated association may be different to the connection required to link the tort to the village football team’.[[651]](#footnote-651) However, whilst I agree with the intuition that the former should be treated differently from the latter, I fear that Morgan’s solution has already pre-emptively decided, *without any theoretical justification*, that some organisations and members (such as amateur sports clubs) should be afforded greater legal protection than others (such as religious institutions).[[652]](#footnote-652) This is hardly conducive to a transparent law on vicarious liability, particularly when the extension relating to unincorporated associations has already been persuasively described by Giliker as possessing ‘little or no conceptual analysis’.[[653]](#footnote-653) As such, it may be that another (perhaps better?) method of differentiating between various types of unincorporated associations is simply to adopt my contextual-pluralist model. Rather than distinguishing between different types of associations on the basis of the connection test, my framework would recognise that a distinction could be made on the grounds of the context of the case itself. This might help to provide a normative theoretical justification for why (and when) differences between certain unincorporated associations will lead to different conclusions on liability. Let us see in more detail, then, how my contextual-pluralist framework might provide a better solution to the issue of vicarious liability in amateur sport.

**4.4 A Contextual-Pluralist Approach to Vicarious Liability in Amateur Sport**

Of course, it is easy to criticise current solutions (such as the akin to employment development and the law on unincorporated associations), but it is much harder to provide an alternative method that does not suffer from the same flaws. The purpose of this section, then, is an attempt to outline how (and why) a pluralistic balancing approach under my contextual-pluralist model might provide a more determinate and insightful answer to the issue of vicarious liability in amateur sport. In identifying a common theoretical solution, it is concluded that the theory of loss spreading should come to assume prominence in the somewhat unique context of recreational sport.

**4.4.1 Discerning a Common Theoretical Solution**

As was outlined in Chapter 2, one aspect of my contextual-pluralist model is that it seeks to identify a common theoretical solution to a particular issue. Once this is found, as it was for example in the Supreme Court in *Armes*, then a decision on vicarious liability can be meaningfully justified based on multiple converging theories. Although this exercise will often seem simple in practice, it was noted in section 2.5.2 that there will sometimes be hard cases where theoretical justifications are at odds with one another. The context of amateur sport seemingly provides one such example.[[654]](#footnote-654) As McArdle and James illustrate in relation to on-field sporting injury, ‘the risk of injurious conduct sustained through the failings of another needs to be balanced against the courts’ awareness of the putative social utility of sports participation’.[[655]](#footnote-655) Tremper makes a similar argument, when he suggests that the ‘ideal of victim compensation clashes with and often yields to various other social goods’.[[656]](#footnote-656) The concern here, then, appears to lie in the following theoretical tension: the theory of social deterrence (which encapsulates the economical worry that finding vicarious liability would lead to the discontinuation of numerous recreational sports teams) against the theories of enterprise liability and deep pockets (which would, by contrast, seemingly call for liability in this context). The fact that the latter position is fortified by two theories rather than one is not necessarily determinative either, as it could easily be suggested that the solitary theory of deterrence carries a much stronger argument in its individual capacity than a combination of both enterprise liability and deep pockets. After all, and as Harris argues, ‘[j]udicial attitudes towards sports almost always reflect a desire to further its cause, rather than put its clubs at financial risk’.[[657]](#footnote-657)

Consider, for instance, Lord Bingham’s judgment in *Smoldon v Whitworth*, where he highlighted the fear that imposing negligence liability upon a match official might ‘emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions’.[[658]](#footnote-658) More recently, Jackson LJ in *Scout Association v Barnes* suggested that the risks involved in sports such as rugby, cricket and skiing are generally tolerated by the courts, because ‘recreations of this nature have a recognised social value’.[[659]](#footnote-659) Notably, the social utility of sport has also been put on statutory footing, with both the Compensation Act 2006 and the Social Action, Responsibility and Heroism Act 2015 reflecting a governmental desire to ensure that litigation does not completely overwhelm the organisation of desirable, yet risky, activities such as sport. Elsewhere, and to return to the vicarious liability context, Binnie J in *Jacobi* provided a powerful defence of this social utility argument in a case that concerned the potential liability of a recreational club for sexual abuse perpetrated by its program director. He held that:

‘The imposition of no-fault liability here would tell non-profit recreational organisations… that even if they take all the precautions that could reasonably be expected of them, and despite the lack of any other direct fault for the tort, they will still be held financially responsible for… unforeseen and unforeseeable criminal assaults by their employees. It has to be recognised that the rational response of such organisations may be to exit the… recreational field altogether.’[[660]](#footnote-660)

McIvor has suggested that the potential chilling effect on the operation of many non-profit organisations played a ‘significant role’ in Binnie J’s decision, and it is in this light that she argues that courts must ‘weigh up the policy arguments both for and against the imposition of liability’.[[661]](#footnote-661) Now, it must be conceded that it is hard to assess just how strong the deterrence argument here truly is. One could, for example, respond to Lord Bingham’s concern in *Smoldon* by simply stating that, without a viable option for recovery against a tortfeasor’s club, players are less likely to take the risk of participating in sport (and this could be just as detrimental to the social and health benefits provided by recreational sport as the imposition of liability). Similarly, Sugarman has questioned – seemingly in line with legal consciousness studies – whether the concept of deterrence is really all that strong given that many clubs and players may often be unaware of the looming threat of tortious liability.[[662]](#footnote-662) Clearly, much of this debate is highly speculative. In the absence of any (much needed) concrete empirical evidence as to whether the imposition of vicarious liability would lead to the closure of many amateur sports clubs,[[663]](#footnote-663) a judge is thus likely to rely on his or her intuitive normative instincts on this issue, as was discussed in Chapter 3. Consequently, given the apparent judicial sensitivity to the social utility of sport, it is likely that many – if not most – judges will deem the theory of social deterrence to be a significant factor in this context. The precise weight that will be afforded to this concern will, presumably, vary according to each individual.[[664]](#footnote-664) As Smith LJ observed in *Scout Association*, ‘whether the social benefit of an activity is such that the degree of risk it entails is acceptable is a question of fact, degree and judgment, which must be decided on an individual basis’.[[665]](#footnote-665)

Interestingly, advocates of the social utility argument sometimes appear to rationalise their position by aligning it with other theories of vicarious liability, and most notably enterprise liability. Neyers and Stevens do this, for instance, in their criticism of McLachlin J’s decision to impose vicarious liability on a charitable children’s foundation in *Bazley v Curry*.[[666]](#footnote-666) In their view:

‘It does not make sense to say that the existence of any particular institution increases the risk of paedophilia if we accept the assumption that there should be a sufficient number of these institutions to look after all children in need. The assumption is a solid one since the alternative to the institution is the street. Surely the children are more vulnerable and the paedophile more empowered if they are left on the street… the existence of a particular institution does not put a new risk into the community, it merely localizes an existing risk in a particular location just as the existence of a particular hospital does not contribute to, or exacerbate the risk of dying from illness... Hence, the decision [in *Bazley*] is an intentional and direct assault on the charity sector. It is moved by misguided and misplaced compassion, misguided because it prefers as a policy option that the children have no institution (since all institutional resources are now available to pay for the torts of paedophiles) and misplaced because it is not for judges to show compassionate bias…’[[667]](#footnote-667)

The argument here appears to be that charitable and non-profit organisations do not necessarily create risks, but rather merely *localize* them. On this basis, Neyers and Stevens would likely reject that any tension exists between deterrence and enterprise liability in the amateur sports context, and simply conclude that the common theoretical solution under my contextual-pluralist model points towards excluding charitable and non-profit organisations from vicarious liability. This is contentious, at least when applied to the recreational sports context. According to empirical research by Downward and Rasciute, there is a significant degree of substitution between sport and other leisure activities (like reading, shopping and watching television), such that individuals may ‘choose other leisure activities rather than sports activities’.[[668]](#footnote-668) This finding confirms the intuitions of standard economic theory that ‘indicates that sports demand is really part of a system of broader demands including leisure’.[[669]](#footnote-669) Notable factors which may lower participation in sport relative to leisure include being employed and being married.[[670]](#footnote-670) Given that a significant proportion of adult amateur sportsmen will likely be married and/or employed, it may well be the case that, if a finding of vicarious liability *did* lead to the closing down of a sports club, many of the participants would simply substitute their sporting pursuits for other leisure activities (and would not, as Neyers and Stevens suggest, continue to play sport on the street). To the extent that this is the case, it seems reasonable to conclude that the presence of amateur sports clubs creates – rather than merely localizes – some degree of risk.

Such findings, therefore, cast serious doubt on McBride and Bagshaw’s proposition that the theory of enterprise risk is inconsistent with a law that makes it easier to sue non-profit organisations.[[671]](#footnote-671) In fact, on the basis of the above evidence, risk is arguably one of the strongest theories that one could wish to rely on if they sought to justify the vicarious liability of an amateur sports club. Perhaps what McBride and Bagshaw meant, then, was that the liability of non-profit bodies is contrary to fairness, because such organisations ought not to be saddled with bearing the burden of an activity if they did not concomitantly seek to benefit from it. Admittedly, this argument could possibly be strengthened by the fact that amateur sports players do not appear to further the objectives of their club. Unlike in professional sport (where the aim of the players is to win at all costs), the Corinthian values evident in recreational sport suggest that players only participate due to their love for the game, and not to further any specific objective of the club. However, we could perhaps challenge this analysis on two grounds. First, and as was discussed in section 2.3.1, it is perhaps still fair to impose vicarious liability, because the burden of reduced services will be rolled upon the beneficiaries of the sporting activity. Second, the reasoning in *Cox* perhaps supports the imposition of liability upon amateur sports clubs. Despite the fact that it seemed a ‘significant stretch’ for a prisoner to be construed as advancing the goals of the prison service, Ryan outlines how the Supreme Court ‘deftly circumvented’ this requirement by emphasising that ‘requiring prisoners to work serves the purpose of rehabilitation and therefore furthers the objectives of the prison service’.[[672]](#footnote-672) Perhaps a similar argument could be advanced that participation in amateur sport furthers the club’s objectives of improving health, personal satisfaction and social inclusion.[[673]](#footnote-673) After all, the fact that certain aims serve the public interest is not, according to Lord Reed, a bar to the imposition of vicarious liability.[[674]](#footnote-674)

An analysis of the deep pockets theory also appears to support this conclusion. As McLachlin J suggested in *Bazley*, even if we do assume that ‘charitable enterprises may not employ people to advance their economic interests, other factors… make it fair that they should bear the burden of providing a just and practical remedy’.[[675]](#footnote-675) In her view, it is fair that, as between an innocent victim and a risk-creating non-profit institution, it is the latter that should bear responsibility for the harm.[[676]](#footnote-676) To suggest otherwise, she remarks, ‘smacks of crass and unsubstantiated utilitarianism’.[[677]](#footnote-677) There is some merit in this view, particularly as even the most cash-strapped of sports clubs are far more likely to be able to pay out compensation than an individual. Indeed, we must remember that many amateur sports participants are, as Morland J described at first instance in *Vowles*, ‘young men with mostly very limited income’.[[678]](#footnote-678) In this regard, it is certainly questionable just how fair it is to leave an injured amateur athlete without adequate compensation and/or potentially bankrupt a tortfeasor whose foul play in the heat of the moment caused the injury.

This pressing tension between deterrence on the one hand, and enterprise liability and deep pockets on the other, creates a potentially serious stumbling block to the application of my contextual-pluralist model in this context. Given that we can identify strong policy reasons both for and against the imposition of vicarious liability in amateur sport, it might be wondered how we can identify a common theoretical solution here. The answer lies, I believe, in an assessment of the theory of loss spreading, which seems to provide a delicate balance (or compromise) between these two competing positions. It also fits in with my normative intuition from Chapter 2 that loss spreading is the most significant theory in the recreational sports context. By only imposing liability when an amateur sports club is able to adequately distribute the cost of damages, we can appease supporters of both the social utility and victim compensation camps. Indeed, an ability to spread loss through legal liability insurance ensures that a non-profit sports club is less likely to be litigated out of existence by a large-scale damages award, whilst at the same time ensuring that it provides compensation to a victim who has been injured by an inherent risk created by that activity. Let us assess in the following sections, then, a number of other reasons as to why loss spreading ought to be the controlling theoretical consideration in this context, and what changes to the current insurance cover in amateur sport might be required as a result of this suggestion.

**4.4.2 Analysing the Normative Appeal of a Loss Spreading Approach**

In addition to the balance it strikes between other competing theories, it is suggested that the theory of loss spreading also has a strong normative appeal in the non-profit sports context. This can be illustrated with reference to three (partially overlapping) perspectives: the *practical* reason; the *analytical* reason; and the *comparative* reason. It is hoped that the discussion here will help to reinforce the intuition from Chapter 2 that loss spreading ought to be one of the more significant theoretical considerations in the context of amateur sport.

The *practical* reason is a relatively simple one, in that it suggests that the availability (or not) of insurance has a strong pragmatic influence on judicial decision-making. This is revealed most prominently by Lord Denning in *Morris v Ford Motor Co.*, when he recognised that courts would not be so willing to find liability in most cases ‘except on the footing that the damages are to be borne, not by the man, but by an insurance company’.[[679]](#footnote-679) More recently, Kirby J in the Australian case of *Imbree v McNeilly* made a similar point when he argued that, were it not for the existence of compulsory motor insurance, it would be ‘extremely unlikely’ that a court would impose liability for negligence on an inexperienced driver.[[680]](#footnote-680) Consequently, we can see that an ability to spread loss is an important practical consideration in meeting a large-scale damages award, and it is also one that is likely to accord with the social utility of a particular activity. As the Court of Appeal in *Various Claimants v WM Morrison Supermarkets* observed, ‘the availability of insurance is a valid answer to the Doomsday or Armageddon arguments’ that are often associated with the chilling effects of liability.[[681]](#footnote-681) On this basis, insurance has been treated as a ‘hidden persuader’[[682]](#footnote-682) or ‘hidden hand’[[683]](#footnote-683) behind tortious liability, with the consequence that many view insurance - and not tort law itself - as the ‘primary medium for the payment of compensation’.[[684]](#footnote-684) Empirical support for this view is provided by Lewis who, in recognising that the tort system probably could not survive without the existence of insurance, outlines that insurance companies pay out 94% of tortious damages.[[685]](#footnote-685)

Notably, many judges also seem to have adopted the legal realist technique of bending established legal rules to accommodate loss spreading concerns in vicarious liability cases. This is illustrated by examining the historical line of cases dealing with the concept of agency in relation to the use of motor vehicles, and in particular to those scenarios whereby a vehicle owner permits another to use their vehicle for the owner’s benefit. In many instances, the vehicle is lent to a family member or friend, a factor which should, at least on a formalist approach, have negated any possibility of imposing vicarious liability. Nevertheless, this did not prevent judges from finding a remedy for an injured victim on the basis of agency, by holding that the driver of a vehicle was acting as an agent for the vehicle’s owner.[[686]](#footnote-686) Although this development was correctly criticised by some as ‘artificial and unconvincing’,[[687]](#footnote-687) various scholars have suggested that the extension of vicarious liability in this context is little more than an attempt by the courts to ensure than an injured victim has recompense to a defendant who is covered by motor insurance.[[688]](#footnote-688) Indeed, and as Lord Wilberforce explained in *Morgans v Launchbury*, the language of ‘agency’ here is ‘merely a concept, the meaning and purpose of which is to say “is vicariously liable”’.[[689]](#footnote-689) Although other judges in *Morgans* disputed that the agency concept was only employed here in order to provide a back-door route to accessing the funds of an insurance company,[[690]](#footnote-690) a more recent decision by the High Court of Australia in *Scott v Davis* casts doubt on this response.[[691]](#footnote-691) Here, the owner of a plane was held not to be the principal of a pilot who negligently injured the claimant by crashing the aircraft. The plane’s owner seemingly had no insurance cover for the aircraft, this not being a statutory requirement at the time of the incident; one suspects from Gummow J’s judgment, however, that had the defendant possessed insurance cover for the accident, the claimant may have been far more likely to succeed on these facts.[[692]](#footnote-692)

To be clear, my aim here is only to highlight that some judges deem it acceptable to decide a particular case based on the insurance positions of the respective parties (even when this flies in the face of legal coherence), and *not* to defend the use of agency principles in the law on vicarious liability. In fact, rather than obfuscating this area of law with unnecessary reference to agency, it would have been far more transparent for judges to have candidly admitted that they were only imposing liability in the ‘motor vehicle’ cases because this was consistent with the rules on insurance coverage at the time.[[693]](#footnote-693) Of course, scholars such as Gray would refute this suggestion on the basis that ‘the law should determine the extent of insurance, not the other way around’.[[694]](#footnote-694) But the reality is far more complex than Gray cares to admit. As was discussed in section 2.3.2, it is likely that insurance and law both influence each other, and we will see shortly (in section 4.4.3) an example of how insurance cover could be reformulated to match the potential legal developments under my contextual-pluralist model. As such, it is not simply a case of one following the other. Rather, they should both work together in a symbiotic relationship to achieve a balanced and just outcome on the facts of each case. This is something that already appears to be recognised by judges in the sporting context.[[695]](#footnote-695) In noting that it was open to the Welsh Rugby Union (‘WRU’) to ‘obtain insurance cover against third party liability’, Lord Phillips in *Vowles* openly acknowledged the potential of insurance to both resolve and influence sports-related litigation. In particular, he suggested that:

‘the availability of insurance, both to players against the risk of injury and to referees against the risk of third party liability could bear on the policy question of whether it is fair, just and reasonable to impose a duty of care on referees.’[[696]](#footnote-696)

By the same token, then, there is no reason why the potential to spread loss should not also bear on the policy question as to whether it is fair, just and reasonable to impose vicarious liability on an amateur sports club. In echoing my previous discussion on the common theoretical solution in this context, McMurray has similarly suggested that the ‘tort system benefited all parties in the wake of *Vowles’*.[[697]](#footnote-697) This is because, she argues, the focus on insuring player safety in this case not only helps to shield organisations such as the WRU from large-scale damages awards, it also helps to provide adequate compensation for gravely injured sports participants.[[698]](#footnote-698) As such, we might conclude that the amateur sports context is already particularly receptive to the use of insurance and loss spreading as guiding principles in the resolution of disputes.

In addition to this important practical point, we might also identify a useful *analytical* reason for our focus on spreading loss in this context. This reasoning is based on Keating’s juxtaposition between what he labels the ‘world of acts’ and the ‘world of activities’.[[699]](#footnote-699) The former, which can seemingly be aligned with corrective justice, is concerned with independent wrongs that that might be described as unpredictable and distinct ‘one-shot’ occurrences.[[700]](#footnote-700) In contrast, the distributively-focussed ‘world of activities’ encompasses those systemic risks that are statistically predictable and occur with a large degree of regularity.[[701]](#footnote-701) Much like the risks involved with driving on a road, sport is clearly conceptually closer to this latter model: as was evidenced above in section 4.2, we can say with a large degree of certainty that, if enough sport is played, some injuries are sure to be caused. For Keating, a strict enterprise liability approach is a ‘more reasonable liability regime than negligence’ for harm suffered in this ‘world of activities’.[[702]](#footnote-702) This change in tack – from a world of acts to activities – was supported by the widespread introduction of liability insurance in the late nineteenth century,[[703]](#footnote-703) and this helped to facilitate ‘the construction of homogenous risk pools’.[[704]](#footnote-704) In the same vein, he also suggests that subjecting reciprocal risks to negligence liability may only be justifiable when the ‘accidents that arise out of these risks cannot be insured against’.[[705]](#footnote-705) Now, according to Keating, the extent to which insurability can facilitate strict liability in the ‘world of activities’ depends on a number of relevant factors such as: the magnitude of the activity; whether losses are accidental; the transactional costs of administering such a system; and whether ‘most or all of the relevant actors are persuaded or compelled to purchase such insurance’.[[706]](#footnote-706) It is these practical considerations that necessitate our in-depth look at the current insurance coverage in amateur sport later in this chapter.

For now, however, it is also interesting to note that Keating is seemingly acutely aware of the need to balance the social utility of an act against the need to provide compensation for the foreseeable injuries that are characteristic to an enterprise. In noting that activities such as sport give rise to a ‘higher-than-normal level of risk’, he observes that it would be impossible to remove such risk without casting a ‘pall over the play of the game’.[[707]](#footnote-707) Consequently, and as advocates of the chilling argument would probably suggest, the focus should be on how to *spread*, rather than eliminate, this risk. On the flip side, those who subscribe to the enterprise liability argument (which would likely justify imposing vicarious liability on amateur sports clubs) will also be assuaged by this reasoning. Indeed, and as Keating demonstrates, the connection between loss spreading and enterprise liability is ‘fundamental and intricate’.[[708]](#footnote-708) As such, ‘[w]hen risks are insurable, this leads to a presumption in favour of enterprise liability, because enterprise liability distributes the costs of characteristic risks among all those who benefit from the creation of those risks.’[[709]](#footnote-709)

The idea here, to borrow from Fletcher’s seminal work, is that sporting participants are all members of the same ‘community of risk’.[[710]](#footnote-710) On this basis, because all the members of this group ‘impose identical risks of harm on one another’, it is presumptively fair to spread those losses in equal portion amongst all the members. This is broadly consistent with the logic employed by the Supreme Court of California in *Mary M v City of Los Angeles*, where it was held that losses emanating from the misuse of police authority ‘should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power.’[[711]](#footnote-711) Now, one could refute the fairness of this proposition in the sporting context by questioning whether all the players in a particular sport (or club) actually belong to the same community of risk. We have previously seen, for instance, that forwards in rugby union bear a greater brunt of injuries than those who play as backs.[[712]](#footnote-712) On this basis, one might doubt the fairness of spreading loss amongst a community when its members are not necessarily creating - and being subjected to - identical risks. As Keating concludes, ‘[d]isproportionate distributions of burdens and benefits are presumptively unfair’.[[713]](#footnote-713) However, it is suggested that there is still some theoretical legitimacy in viewing all players on a pitch as a ‘community of risk’. Whilst it is true that some may injure (and suffer injury) at a slightly higher rate than others, Fletcher is correct to identify that reciprocal risks need not be identical, but only need to possess ‘unifying features’.[[714]](#footnote-714) This is particularly appropriate for our context given that the fluid tactical nature of many sports often means that there is no strict line between a traditional ‘defender’ and ‘attacker’.[[715]](#footnote-715) Were we to insist on identical risks, it is unlikely that any so-called ‘community of risk’ could ever exist at all.[[716]](#footnote-716)

With this in mind, the final justification for our focus on loss spreading in the amateur context is a *comparative* one, and it involves a comparison between the French and English positions on the vicarious liability of recreational sports clubs. As Giliker suggests, the benefit of this comparative exercise lies in the fact that it can ‘provide an insight into both the operation of tort law principle and the values and policy objectives that underlie legal development’.[[717]](#footnote-717) In turn, this may allow us to establish a more profound understanding of our own law, which is the first step in facilitating any attempts to improve it.[[718]](#footnote-718) Of course, there are some drawbacks to this comparative approach, but this is not the place to discuss them in full; readers who wish to delve into the merits of comparing laws at a more fundamental level should consult more detailed works.[[719]](#footnote-719) Rather, I simply seek to highlight some specific reasons why the French position may prove to be a somewhat useful steer for English law on this issue, particularly if we are to adopt my contextual-pluralist approach (and its prioritisation of loss spreading) in this context.

First, the French law on vicarious liability, much like the common law in England, requires the commission of a wrongful act that is perpetrated: (i) by an individual that is in a relationship giving rise to responsibility; and (ii) in the course of that person’s functions.[[720]](#footnote-720) This basic framework is also buttressed by similar theoretical justifications. For instance, the law in France originally determined the existence of a necessary relationship based primarily on control.[[721]](#footnote-721) However, much like the law in the UK, the strength of this test was somewhat diluted by changing work environments in the country, such that French law now recognises a more ‘flexible interpretation’ of control that is based not on the power to give instructions on a contractual basis, but rather as a matter of fact.[[722]](#footnote-722) More recently, French courts have also confirmed that strict liability for others is underpinned by a risk-based analysis.[[723]](#footnote-723) As we will see below, this is supported by the policy of victim compensation and the presumption that adequate insurance exists to help spread the loss.[[724]](#footnote-724)

Second, it is evident that the vicarious liability of a recreational sports club seems to proceed on a very similar basis in both England and France. As we have discussed in section 4.2, the liability of such a club is only likely to be tested in the UK if the mandatory first-party insurance provided in a particular sport is inadequate. The same might also be said in French law, although this is subject to one important qualification: in France, every resident is entitled to claim subsidised health care and at least partial compensation for their injuries from the government (whether this be caused due to participation in sport or not).[[725]](#footnote-725) As James outlines, this state-sponsored insurance scheme is administered through the Caisse Primaire d’Assurance Maladie (‘CPAM’), with private legal action against the tortfeasor’s club only considered a real possibility if there is a shortfall in this award.[[726]](#footnote-726) Whilst CPAM payments undoubtedly vary from case to case, Borghetti notes that, in general, the compensation scheme offers ‘generous coverage’, particularly for ‘serious medical treatment’.[[727]](#footnote-727) Arguably, and was discussed above in section 4.2, this same generosity is not evident in the purely private first-party insurance schemes currently operating in many recreational UK sports. Consequently, given that French courts have long approved the extension of vicarious liability to non-profit sports teams, we might conclude – from the perspective of victim compensation, at least – that there is an even stronger argument for doing so in the UK.

The vicarious liability of amateur sports clubs in France is based on what is now Article 1242 of the French Civil Code, which holds a defendant liable for the ‘action of persons for whom one is responsible’.[[728]](#footnote-728) In reminding ourselves of the previous discussion in section 4.3.1, it is clear to see that this provision is not strictly limited to the employer-employee context, and that it may apply to what many would call an ‘independent contractor’.[[729]](#footnote-729) This was captured in the previous version of the French Civil Code, and in particular under Article 1384 (the forerunner of Article 1242). Article 1384(5) formerly outlined the liability of employers for their employees, but French judges became increasingly frustrated at the limits of this provision. Consequently, and in a ‘blatant example of judicial creativity’ in 1991,[[730]](#footnote-730) the courts introduced a general regime of strict liability under Article 1384(1) (now Article 1242(1)) for those under the organisation, direction and control of another.[[731]](#footnote-731) It is this provision that paved the way for holding an amateur sports club vicariously liable under French law.

As such, in two 1995 decisions handed down by the Cour de Cassation, two amateur rugby clubs were held liable under Article 1384(1) for injuries caused by their players after a fight broke out during a match.[[732]](#footnote-732) In the later decision of *X v Club Rugby de Aureilhan*,[[733]](#footnote-733) a similar finding of liability was issued against the ASCA rugby club after one of their players punched the claimant in the eye. Much like the 1995 decisions, this was based on the fact that the club retained the capacity to organise, direct and control the conduct of their members.[[734]](#footnote-734) More recently, a 2018 decision by the French Supreme Court also confirms that this line of reasoning is similarly applicable even after the changes to the French Civil Code.[[735]](#footnote-735) In this case, a football player was sent off by the referee during an amateur football match. After the final whistle, and dressed in ‘civilian clothes’, he rushed from the locker room in a fit of frustration and attacked the referee.[[736]](#footnote-736) In noting that the lower court had erred in their decision, the Cour de Cassation explained that the club’s ability to organise, direct and control the activity of their player meant that liability could be established under Article 1242 of the Civil Code. In light of these decisions, and given the aforementioned similarities between the basic requirements and theoretical justifications in the two jurisdictions, James and McArdle are perhaps correct to argue that ‘the development that English law should be contemplating incorporating from French law is that an amateur club should be as responsible for the actions of its violent players as a professional club.’[[737]](#footnote-737)

Now, if such a development were to occur, it should not necessarily be done so on the basis of control, as the French decisions might suggest. As Giliker notes, the control exercised by amateur rugby clubs is only ‘temporary and limited’ in nature, and she contends that the real theoretical (and contextual) factor behind such an extension of liability in France may have been the introduction of compulsory insurance in French sport in 1984.[[738]](#footnote-738) Under Article L321-1 of the French Sports Code, all amateur clubs must now possess adequate insurance in order to compete against other teams.[[739]](#footnote-739) Two brief comments are in order here. First, the French position on this issue could be useful for illustrating the validity of the social utility stance, and the fact that satisfactory insurance might help to assuage proponents of this argument. Empirical studies in France demonstrate a sharp increase in participation in sport before and after the 1984 reform. Whilst only 44% of the population participated in some form of sporting activity in 1967 (and 49% in 1975), this number rose dramatically to 68% in a 1985 survey.[[740]](#footnote-740) Since then, that figure has somewhat stagnated, with a 2000 study outlining that 72% of the French population took part in some form of sporting activity during that year.[[741]](#footnote-741) Of course, these statistical differences could be explained by several variables (such as the definition of ‘sport’ used in each survey). However, even when taking into account the potential inconsistencies between each study, Aubel and Lefevre conclude that there was still ‘an increase in sport participation… in the 18-year period’ between the 1967 and 1985 surveys.[[742]](#footnote-742) Whilst these figures might seemingly lend credence to the social utility argument, they also highlight that the existence of satisfactory insurance could help to quell such concerns. This appears to reinforce Gardiner et al’s normative hypothesis that ‘an increased use of insurance’ in UK sport ‘does not seem to have caused a major decrease in numbers of volunteers’ in grassroots sport.[[743]](#footnote-743)

The second (and related) point is that the French position on mandating satisfactory insurance perhaps provides a strong normative argument that, if an amateur club’s insurance is also appropriate in the UK, we should be far more willing to impose vicarious liability on such clubs for the torts of their players. Let us now analyse, then, whether the current insurance cover available to amateur sports clubs in the UK allows them to adequately spread any such loss.

**4.4.3 Identifying (and Improving) the Current Insurance Coverage in Amateur UK Sports**

If, as I have suggested, liability under my contextual-pluralist model is based primarily on the extent to which clubs are insured and can spread loss, it makes sense to examine whether the current third-party insurance coverage in amateur sports is suitable for this task. This requires us to adopt a legal realist perspective to assess how law works in action, rather than simply in the books. In the words of Llewellyn, to ‘know law’, and to ‘know anything of what is necessary to judge or evaluate law, we must proceed into these areas which have traditionally been conceived (save by the historical school) as not-law’.[[744]](#footnote-744) As such, and in contrast to formalists who often evaluate the effectiveness of legal rules ‘merely by internal logical symmetry’,[[745]](#footnote-745) the following analysis is firmly centred on using my contextual-pluralist model as a means to meet social ends.

With this in mind, an understanding of the insurance positions of the parties is crucial to an examination of loss spreading in this context.[[746]](#footnote-746) As Lord Wilberforce explained in *Morgans*, ‘[l[iability and insurance are so intermixed that judicially to alter the basis of liability without adequate knowledge… as to the impact this might make on the insurance system would be dangerous and… irresponsible.’[[747]](#footnote-747) It is hoped, then, that the analysis here will highlight some important practical ramifications for the various stakeholders in sport, in that it may encourage ‘clubs and individuals to regularly monitor and reassess their level of insurance cover’.[[748]](#footnote-748) In developing this discussion, this section is loosely structured around two particular points raised in Keating’s earlier analysis: (i) the mandatory nature of insurance (and the costs of effectively implementing it); and (ii) the practicality of insurance in relation to deliberate and malicious on-field acts. By highlighting these very specific considerations, it is hoped that this section helps respond to one of the primary criticisms of a realist-inspired, law-in-action-based approach: that it is sometimes easy to get ‘lost in an infinite maze of trivialities’ if one is not able to ‘concentrate on the [most] important consequences of a legal rule’.[[749]](#footnote-749) The section then concludes by offering a few useful pointers to amateur sports participants in light of this analysis.

*(i) Mandatory Insurance*

We have already seen in section 4.2 that many sports currently operate a (largely inadequate) mandatory first-party personal accident scheme to provide compensation for some sports-related injuries. Nevertheless, the discussion here is concerned with the compulsory third-party liability insurance that all amateur sports clubs in England are required to take out.[[750]](#footnote-750) In particular, the focus in this section is on the inadequate nature of the coverage for ‘player-to-player’ liability. ‘Player-to-player’ cover is a widely employed term in many sports insurance policies, and it is generally used to refer to a situation whereby one player injures another during the course of a game or training session. As such, and given that a negligent player-to-player foul is seemingly the most likely reason for finding an amateur club vicariously liable, the extent to which a particular insurance policy covers such a risk is an important consideration for our purposes. In some sports – most notably rugby union[[751]](#footnote-751) and rugby league[[752]](#footnote-752) – player-to-player risks are included as a matter of course for all affiliated clubs in the third tier of the sport and below. This means that if an amateur rugby player made a poor tackle and negligently injured an opposition player during a game (or even a team-mate during a training session), his club would be fully covered for both their legal defence costs *and* payment of damages if the injured party sought legal action under the doctrine of vicarious liability. In light of the previous discussion (in section 4.2) that some amateur sportsmen irrationally think that they are ‘bullet proof’ and immune to serious injury, it seems sensible to mandate player-to-player cover in order to aid player litigation and respond to this irrationality.

However, as Charalambous and Aitken highlight, not every legal liability policy in sport includes player-to-player risk.[[753]](#footnote-753) One of the most prominent examples of such a policy can be found in amateur football.[[754]](#footnote-754) As part of the NGIS initiative, amateur and semi-professional clubs can take out Bluefin’s ‘Countycover’ policy, which covers public and products liability up to £10 million. However, whilst this policy does provide up to £250,000 to cover legal defence costs for player-to-player claims, it does *not* cover any damages that may be awarded against the defendant club for such claims.[[755]](#footnote-755) Consequently, given that a non-profit sports team is unlikely to be able to pay any significant damages award out of their own pocket, clubs who take out this standard ‘Countycover’ policy will likely find themselves the subject of a judicial debate as to whether the social utility of their continued operation trumps the need to compensate a victim who was injured by a risk-creating activity of the club. Perhaps recognising this undesirable state of affairs, Bluefin also provide a superior ‘Countycover Plus’ policy, which *does* provide cover (of up to £10 million) for player-to-player damages awards. Unfortunately, Bluefin refused to provide any information on the percentage of football clubs that opt for the standard ‘Countycover’ policy, as opposed to the ‘Countycover Plus’ policy.[[756]](#footnote-756) However, the mere existence of the ‘Countycover’ policy suggests that some – if not most[[757]](#footnote-757) – teams will be currently operating with this unsatisfactory basic insurance policy in place. In this light, Morgan has recommended that it would be ‘prudent for local football associations’ to purchase the ‘Countycover Plus’ policy instead of the standard cover.[[758]](#footnote-758)

I would go one step further here and advocate a more paternalistic stance. If, as I maintain above, an amateur club’s ability to spread loss is the key determining factor under my contextual-pluralist model, then the basic ‘Countycover’ policy simply will not do. By failing to cover damage awards in player-to-player cases, we are left once again in the unenviable position of having to balance the concept of deterrence against the theories of deep pockets and enterprise liability. In the absence of an ability to adequately spread the cost of a damage award, we are left with no common theoretical solution in this context. As such, and in keeping with the purported symbiotic relationship that exists between law and insurance, it is suggested that the current insurance coverage offered to many amateur sports clubs should be amended to better match the potential for liability under my contextual-pluralist model. In this regard, it is advised that player-to-player damage awards are to be made an *obligatory* aspect of all sports-related liability insurance policies, and particularly so for those physically invasive sports that involve regular bodily contacts. Indeed, if Davis is correct to argue that ‘it may be appropriate to require non-profits to carry sufficient liability insurance to make them worth suing’,[[759]](#footnote-759) then it must be recognised that the term ‘sufficient’ here clearly includes adequate provision for player-to-player risks.

With this suggestion in mind, it is worth making two important observations here. First, given that I call for compulsorycover of player-to-player damage awards, the related debate about whether liability ought to be based on actual insurance (as opposed to insurability) is seemingly less relevant to this discussion. Whilst it is the *potential* to take out insurance that usually ought to matter in determining liability,[[760]](#footnote-760) Merkin is correct to note that ‘insurability questions simply do not arise’ in cases where it is known that insurance is compulsory.[[761]](#footnote-761) Second, there may also be good reasons to think that, if the vicarious liability of an amateur sports club *is* a real possibility, then a market that provided more satisfactory insurance cover would already have developed by now. In this light, one might suggest that immediate regulation mandating player-to-player cover is unnecessary. However, this viewpoint seemingly fails to recognise that insurance markets may often take a while to catch up with the law. It is surely better, in my view, to be proactive and start altering the market now to match what is, at least under my contextual-pluralist model, a likely development in the law on vicarious liability. Waiting for the market to respond to legal change may mean that many amateur sports clubs are at serious risk of liquidation in the meantime.

A fine example of the need for a more proactive stance in relation to player-to-player costs can be seen with reference to the recent 2019 legal proceedings against the semi-professional football team Ossett United FC.[[762]](#footnote-762) In April 2015, Ossett player Sam Akeroyd negligently broke the opposition player Rees Welsh’s ankle following what was later described as a ‘poor challenge and a horrible incident.’[[763]](#footnote-763) Having been ruled out of participation in football for more than a year, Welsh successfully brought an action against both Akeroyd and Ossett United in the Manchester County Court, leaving the latter having to pay out nearly £135,000.[[764]](#footnote-764) The majority of this figure constituted costs and legal fees which were, inexplicably, not covered by the Northern Premier League’s liability policy.[[765]](#footnote-765) Whilst such fees would clearly be covered under the standard ‘Countycover’ policy, the significant damages award of £19,000 would not be. As was made clear in a club statement by Ossett United’s former chairman Phil Smith, the decision in this case could:

‘filter down to recreational sport like 5-a-side football where an individual can sue an opponent should they receive an injury during a game. This will change not only football but sports participation throughout the country at every level.’[[766]](#footnote-766)

Even if legal defence costs were covered, it is unlikely that many amateur (and perhaps even semi-professional) sports teams could afford such hefty compensatory damages. In fact, there were very real fears that, in order to meet the legal defence costs and damages award, Ossett United would (at best) have been required to sell their home ground, or (at worst) have been forced into liquidation.[[767]](#footnote-767) Fortunately, neither possibility occurred after two of the club’s closest supporters re-mortgaged their house and loaned the money to the club in order to help pay off the debt.[[768]](#footnote-768) Clearly, however, not every club will be able to avoid the chilling aspects of liability in this manner. As such, I can do little more than echo the wise words of Paul Mulderrig (who acted as Rees Welsh’s personal injury solicitor in his claim against Ossett) when he stated that, in the continuing absence of obligatory player-to-player insurance cover for damage awards, we should ‘set our watch and see which is the next team who will face a potentially ruinous claim.’[[769]](#footnote-769)

Of course, the obvious counter-argument to mandating player-to-player insurance cover is that such a development might not be a financially feasible one in every sport. In the footballing context, for instance, some estimates have suggested that a mandatory player-to-player insurance scheme would lead to individual policies costing thousands of pounds.[[770]](#footnote-770) According to Northern Premier League chairman Mark Harris, this ‘could amount to about four weeks of [a club’s] yearly running costs’.[[771]](#footnote-771) Conversely, other estimates are far more conservative, and they suggest that such a development would ‘only increase insurance costs by around £30 to £50 each year per club’.[[772]](#footnote-772) Such a stark contrast demonstrates that something is clear amiss here, although a more in-depth examination of Bluefin’s helpful policy guidance indicates that the latter estimate is perhaps more accurate. During the 2019-20 season, the premium for the standard ‘Countycover’ policy was £24 per club, whilst the premium for the ‘Countycover Plus’ policy was only £50 per club.[[773]](#footnote-773) Given this relatively minor increase in price between these two annual premiums, it might be concluded that the main reason for clubs opting to take out the ordinary ‘Countycover’ policy simply lies in a lack of awareness as to the potential implications of liability, rather than with any serious financial or practical difficulties in taking out the ‘Countycover Plus’ policy.

To the extent that this is the case, it is suggested that sports governing bodies ought to be doing much more to ensure the provision of adequate insurance for all stakeholders in sport.[[774]](#footnote-774) This is an important sports governance issue that has seemingly been overlooked thus far. Normatively, a failure to mandate appropriate insurance cover that includes damages awards from player-to-player risks should, I believe, lead to claims by out-of-pocket players and clubs against the governing bodies themselves. This could proceed along similar lines to the claim that was successfully established in *Watson v British Boxing Board of Control*.[[775]](#footnote-775) It is certainly within the realms of possibility that an injured sportsman (or destitute club) could argue that the governing body breached their duty of care to protect the welfare of its participants by offering inadequate insurance cover for the obvious risks inherent in their sport. Whether (as a matter of prediction) such liability is likely to arise is perhaps a more contentious point given that tort claims against regulatory bodies are oftentimes difficult to make in the UK.[[776]](#footnote-776) But governing bodies cannot complain that they have not been warned.

*(ii) Deliberate Acts*

If the ability to spread loss is the key determining theoretical factor under my contextual-pluralist model, then it must be mentioned that many insurance policies exclude coverage for intentional wrongdoing. For instance, the insurance policy in *KR and others v Royal and Sun Alliance Plc* highlighted that the insurers will not be liable for any ‘injury or damage which results from a deliberate act or omission of the insured’.[[777]](#footnote-777) This is also a common exclusion in the sporting context, as evidenced by the liability cover endorsed by England Hockey. Under this policy, harm ‘following an intention to cause accident or injury’ is excluded.[[778]](#footnote-778) Notably, this exclusion explicitly extends to the perpetrator of the harm. This is seemingly an attempt to respond to the judgment in *Hawley v Luminar Leisure Ltd*, where it was held that the employer of a bouncer who had intentionally inflicted grievous bodily harm on the victim could in fact recover from their accident-only liability policy, because the employer had not themselves been guilty of a deliberate act.[[779]](#footnote-779) Now, this potentially raises a serious obstacle to the primacy of loss spreading in this context. If the ability to spread loss for intentional acts is compromised in this manner, does this mean that some amateur sports participants seriously injured by a deliberate (rather than merely negligent) on-field act will struggle to receive adequate compensation?

Not necessarily. This is so for two reasons. First, because of the exclusion of deliberate acts in most insurance policies, the vast majority of claimants in sports-related personal injury cases bring their claim in negligence rather than trespass to the person – regardless of the facts of the incident. This is aptly demonstrated in *Elliott v Saunders and Liverpool FC*, a case in which the claimant pleaded both negligence and trespass to the person in relation to a career-ending challenge perpetrated by the defendant.[[780]](#footnote-780) However, part way through the trial, the claimant dropped the initial plea of battery. This was not due to any lack of evidence, but rather due to the fact that, even if the claim of battery was successful, the claimant was under the assumption that Liverpool FC’s liability insurance would not pay out for an intentional act.[[781]](#footnote-781) Given that the injured party viewed Liverpool FC’s insurance policy as their main source of compensation, it was only the action in negligence that was pursued. This litigation tactic appears to reinforce Merkin’s claim that legal action ‘will insofar as is possible be framed so that it matches policy coverage’,[[782]](#footnote-782) a point that perhaps also provides an interesting riposte to those scholars (such as Gray) who argue that insurance ought to have no influence on legal procedure. In addition, it also highlights that my focus on insurance in this context is broadly consistent with the usual practices of most sports litigants.

Second, the Supreme Court in *Burnett or Grant v International Insurance Company of Hanover Limited* has recently confirmed the restricted scope of the deliberate act exclusion clause found in many insurance policies.[[783]](#footnote-783) In this case, it was held that a bouncer who applied a fatal three-minute neck hold to a patron did not perform a deliberate act, such that the deceased’s widow was able to successfully claim from the insurers of the wrongdoer’s employer. Lord Hamblen clarified that the notion of ‘deliberate acts’ referred to ‘acts which are intended to cause injury’.[[784]](#footnote-784) Although the bouncer in this case was convicted of assault, it was never established that he had ‘any intention beyond an intention to perform the act of assault, namely the neck hold’.[[785]](#footnote-785) This raises a potentially significant point. Given that a successful battery claim does not necessarily require the defendant to have intended to cause harm (a defendant need only intend to apply unlawful force to the claimant),[[786]](#footnote-786) there is seemingly no guarantee that an insurer will be able to rely on a deliberate act exclusion clause *even if* an injured athlete decides to pursue a trespass claim. This also likely means that it will be nigh-on impossible for an insurance company to successfully trigger the deliberate act exclusion clause for any action in negligence.[[787]](#footnote-787) In this light, it is also worth noting that, in ambiguous cases, the courts will apply the contra proferentem rule to decide the case in favour of the insured party.[[788]](#footnote-788)

*(iii) Immediate Solutions – Suggestions for Amateur Sports Participants*

It has already been proposed in section 4.2 that perhaps the best solution for compensating injury in the recreational sports context lies in an improved mandatory first-party insurance scheme in every sport. Indeed, and as was demonstrated by the Ossett United litigation in which the litigation costs far outweighed the sum awarded in damages, the tort system is arguably an inefficient method of awarding compensation (at least when compared to a no-fault compensation scheme). However, we have also discussed that there is no guarantee that dramatic improvements to no-fault schemes in sport are financially possible, and even if they are, there is nothing to suggest that such improvements are likely to occur in the near future.[[789]](#footnote-789) In the meantime, then, it is strongly advised that amateur sports participants should be in frequent dialogue with their clubs so as to ensure that they know exactly what degree of compensation they might be entitled to for different types of injury. This will be particularly important for those who participate in sports such as cricket that do not currently operate a mandatory personal accident scheme.[[790]](#footnote-790) As we saw in section 4.2, many players are often unaware of – and shocked at – the level of cover provided by their club.[[791]](#footnote-791) Such dialogue could be induced by imposing a regulatory requirement upon all recreational sports clubs to explain to their players (perhaps in writing) the available insurance cover. A similar requirement is evident in France, where Article L321-4 of the French Sports Code mandates that all sporting associations are ‘required to inform their members of the value of taking out a personal insurance policy covering bodily injury to which their sporting practice may expose them’.[[792]](#footnote-792) Of course, this is not a foolproof solution in light of the effect of optimism bias,[[793]](#footnote-793) but it is one that will hopefully still help to promote a greater awareness of the financial repercussions of a sports-related injury.

Once the insurance coverage is made clear to amateur sports participants, they can then make an informed decision to suit their circumstances. If they feel that the current cover is inadequate, an amateur player could either: (a) substitute sport for another leisure activity; (b) carry on playing and run the risk of injury, bearing in mind the potential to sue the opposition club for any negligently inflicted injury under the doctrine of vicarious liability; or (c) take out their own first-party insurance cover. It is interesting in this regard that some players have advocated this latter approach. As Michael Charles, a former striker at the unincorporated non-league football club Metropolitan Police FC, stated:

‘The [club’s] insurance is just there, they have to have it, which is why they get the cheapest one… I’ve known players get injured, look to their club’s insurance and get nothing. There’s no way I’m going to rely on my club to pay my insurance.’[[794]](#footnote-794)

Instead, some amateur and semi-professional footballers have signed up to schemes such as the ‘Our Game’ network, which offers varying levels of personal accident policies to help top up any compensation provided by Bluefin’s personal accident scheme. Such policies range from a ‘Bronze’ membership (which costs £11 a month), to the more comprehensive ‘Gold’ membership (which costs £44 a month).[[795]](#footnote-795) Players who take out these policies are insured against a much wider range of costs than is evident under Bluefin’s ‘Basic’ or ‘Intermediate’ personal accident schemes. For instance, ‘Our Game’ members are entitled to contributions towards all consultations, rehabilitations and injury treatment, as well as wages protection when unable to work (which also includes coverage for those who are self-employed or on a zero-hours contract).[[796]](#footnote-796) If sports participants wish to avoid the vagaries of the court process, they should be advised to seriously consider using such services.

**4.5 Conclusion**

Serious injury is an inevitable by-product of participation in many physically invasive amateur sports. In light of the inadequate sums paid out under many sports personal accident policies, it has been suggested that the most obvious solution is for governing bodies to seriously consider improving the compensation awards provided under these no-fault schemes. Given both the significant sums involved in legal defence costs and the courts’ insistence that most foul play on the pitch will not be considered negligent, improving the state of first-party insurance appears to be the most sensible method of compensating injured amateur sports participants. However, whether this would be a cost-effective solution for many non-profit sports clubs remains in doubt, and it may require governing bodies to assess the logistics of mandating something similar to the ‘Superior’ personal accident cover that is currently offered as part of the NGIS. Nevertheless, even if such improvements *were* possible, there may be a host of other reasons – ranging from larger pay-outs in negligence cases to policy exclusions for pre-existing medical conditions – as to why an individual may also be tempted to pursue a tortious claim against their injurer. To the extent that this is the case, the recent developments relating to the ‘akin to employment’ test and unincorporated associations suggest that an amateur club may be vicariously liable for this harm. However, these may also be rather indeterminate and unhelpful solutions in light of the continuing distinction between employees and independent contractors, and it has been suggested that my contextual-pluralist model provides a more satisfactory method of determining the liability of a recreational sports club.

Under my model, it has been suggested that loss spreading provides a common theoretical compromise between the competing theories of deterrence and enterprise liability/deep pockets. This is justified from both a practical and analytical point of view, and it is also evident in comparisons with the French position on this issue. Importantly, a focus on loss spreading also requires us to conceptualise law and insurance as two concepts in a symbiotic relationship. As such, and in order to respond to the growing threat of liability in this context, it has been suggested that governing bodies in sport ought to be considering making damage awards a compulsory aspect of player-to-player insurance. In order to maximise their chances of receiving compensation, injured sports participants should continue the trend of claiming in negligence, so as to ensure the availability of the opposition club’s legal liability policy. Furthermore, they should also consider purchasing top-up first party insurance cover to ensure that costly and lengthy litigation is only initiated when absolutely necessary.

**CHAPTER 5**

**IDENTIFYING THE RELATIONSHIP: VICARIOUS LIABILITY FOR PROFESSIONAL SPORTS PARTICIPANTS**

**5.1 Introduction**

At first glance, there perhaps appears to be little merit in assessing the necessary relationship in professional sport. After all, and as demonstrated by the Court of Appeal judgment in *Walker v Crystal Palace FC*,[[797]](#footnote-797) English law has long recognised that professional sportsmen are employees: ‘[i]t may be sport to the amateur, but to the man who is paid for it and makes his living thereby it is his work.’[[798]](#footnote-798) Yet, lurking beneath this surface of simplicity are two particular issues that may require attention for the purposes of vicarious liability. The first relates to the employment status of professional athletes in *individual* sports (such as tennis, boxing and golf), whereby the classic position has generally remained that such participants are merely independent contractors working on their own account.[[799]](#footnote-799) However, in light of Opie’s suggestion that civil courts have ‘allowed increasingly exotic claims’ in the sports context,[[800]](#footnote-800) it may only be a matter of time before a similarly innovative claimant seeks to argue that such athletes are, in fact, employees of their (usually more solvent) national governing bodies (‘NGBs’). The second issue – this time in relation to team sports – involves answering *which* employer bears responsibility for a wrongful act committed by a professional athlete who is out on loan to another club. It seems that there are, as Blackshaw observes, ‘a number of grey areas’ regarding the employment status of athletes, many of which he suggests would ‘form a worthy and challenging topic for a most interesting PhD thesis’.[[801]](#footnote-801)

Section 5.2 commences the analysis by firstly examining - with reference to the recent tribunal proceedings between professional cyclist Jess Varnish and British Cycling – the employment status of government-funded individual athletes. In contributing to the growing debate on the relevance of other areas of law to the determination of employment status for vicarious liability, I suggest that we should adopt a policy-oriented approach that recognises that certain factors may be granted more or less weight depending on the particular legal issue animating the litigation. In this regard, a contextual-pluralist analysis of the Varnish saga (which is informed by relevant theories such as control and enterprise liability) reveals that NGBs ought to be vicariously liable for certain tortious actions committed by their athletes. Similarly, in Section 5.3, I examine whether these conclusions can equally be transposed to the context of *non*-funded individual athletes. Here, I utilise professional tennis and golf as two instructive examples to highlight that competition organisers, as well as governing bodies, may also be subject to a vicarious liability claim under my contextual-pluralist model of liability.

Thereafter, in section 5.4, I examine whether other causes of action may offer a more appropriate method of holding an NGB accountable for injury-causing conduct. This includes an analysis of direct duties in negligence and the closely related concept of the non-delegable duty of care, but it is maintained that neither seem to be a sufficiently satisfactory replacement for a more policy-oriented vicarious liability claim. Finally, section 5.5 deals with the issue of which employer is to be held vicariously liable for harm committed by a borrowed employee. After criticising the traditional presumption that the general employer ought to bear the heavy burden of showing that the temporary employer should assume responsibility, I examine the possibility of dual vicarious liability in the sporting context (an analysis which also appears to reinforce the close relationship between the theories of control and enterprise liability). Based on this discussion, I analyse the appropriate level of contribution between two employers who are held dually liable for the loaned tortfeasor’s conduct.

**5.2 Vicarious Liability for Funded Individual Athletes**

The reference to the ‘funded’ athlete here refers to those professional sports participants who are funded by an NGB in order to help them fulfil their athletic and medal-winning potential. With the assistance of funding from UK Sport, NGBs are able to operate a World Class Performance Programme (WCPP) in their respective sports.[[802]](#footnote-802) Those athletes selected for a WCPP will enter into a Performance Athlete Agreement (PAA) which imposes certain obligations on the individual participant (such as, for example, behavioural standards or restrictions relating to their image rights).[[803]](#footnote-803) In return, NGBs provide a wide range of benefits – including the provision of world-class coaching, sports science advice and access to high-tech equipment and facilities[[804]](#footnote-804) – which are estimated to be worth up to £60,000 per athlete per annum.[[805]](#footnote-805) Alongside this, UK Sport also directly fund (primarily through National Lottery income) the living and personal sporting costs of WCPP-initiated athletes through the guise of an Athlete Performance Award (APA).[[806]](#footnote-806) This is awarded on the basis of both means-testing and athletic potential, with athletes at the so-called ‘Podium level’ usually receiving an annual £28,000 tax-free grant.[[807]](#footnote-807) Around 1,300 of the UK’s leading athletes in a variety of individual sports benefit from such investment,[[808]](#footnote-808) with many participants (such as those in athletics or cycling) reliant on the funding for much of their professional careers.[[809]](#footnote-809)

Unfortunately, and perhaps due to the desire for medals and national success, many NGBs have adopted a domineering approach over their athletes that might be said to imitate the role of an employer instructing an employee. Despite protestations – in both the UK[[810]](#footnote-810) and US[[811]](#footnote-811) – that the agreement between an athlete and their respective sporting body only gives rise to independent contractor status, the courts have frequently stressed that they will look to the ‘reality of the situation’ rather than simply defer to the label used by the parties themselves.[[812]](#footnote-812) This is a particularly important exercise for many sports-related employment disputes because, as Schwab highlights,[[813]](#footnote-813) most NGBs can exert monopolistic power over athletes on a ‘take it or leave it’ basis,[[814]](#footnote-814) and it is unlikely that an athlete would be able to compete under the auspices of an NGB without adhering to their ‘legally controversial’ contractual demands.[[815]](#footnote-815) In this light, it is little surprise that some funded athletes have sought to challenge their legal status as independent contractors. The most relevant case in point here involves the recent legal proceedings between professional cyclist Jess Varnish and British Cycling/UK Sport.

**5.2.1 *Varnish v British Cycling Federation***

The crux of this case rested on the true reason for Varnish being dropped from British Cycling’s WCPP in 2016. Whilst the governing body maintained that the decision was performance-related, Varnish contended that the underlying reason related to both her criticism of certain coaches at British Cycling, and the misogynistic comments of its former technical director, Shane Sutton (who allegedly told Varnish to ‘go and have a baby’).[[816]](#footnote-816) However, before she could pursue a claim for unfair dismissal or sex discrimination, she first had to prove that she was either an employee (or worker[[817]](#footnote-817)) of British Cycling or UK Sport under s.230 of the Employment Rights Act 1996. The Employment Tribunal (ET) at first instance concluded – much like it had done almost 20 years earlier in relation to a similar claim by former track cyclist Wendy Everson[[818]](#footnote-818) - that Varnish was neither an employee or worker of the governing body.[[819]](#footnote-819) Likewise, the absence of any ‘day-to-day relationship’ between the claimant and UK Sport similarly precluded employee and worker status here.[[820]](#footnote-820) In her appeal case that dropped the (presumably weaker) claim against UK Sport, the Employment Appeal Tribunal (EAT) reaffirmed the ET’s decision on the basis that the first instance tribunal had properly and reasonably directed itself as to the relevant legal and factual principles.[[821]](#footnote-821) The key features of this litigation were the so-called three ‘irreducible minimum’ required to establish an employment relationship: mutuality of obligation, personal performance and control.[[822]](#footnote-822) Given that Varnish did not challenge the initial judgment on the two latter requirements, it may reasonably be concluded that Judge Ross’ sentiments on these two factors in the ET continue to constitute good law.

On the issue of control, the ET considered this to be a ‘significant feature’, in that ‘many aspects of [Varnish’s] life including what she ate how, when and where she trained were closely controlled by British Cycling.’[[823]](#footnote-823) With reference to the PAA, Judge Ross also found that the NGB exercised control over the claimant’s media image and appearances, her personal commercial work and use of social media, and when she could take time off.[[824]](#footnote-824) Interestingly, the ET also found that Varnish was ‘integrated into [British Cycling’s] organisation, working closely with her coach and wearing the team clothing’ at all events and training sessions.[[825]](#footnote-825) Although not every aspect of the purported employment relationship between the two parties was supported by the notion of control (such as the fact that Varnish could choose both her own coach and equipment if she so wished),[[826]](#footnote-826) it was clear that Judge Ross considered British Cycling’s degree of control in this scenario as taking them beyond a mere regulator of the sport. Unfortunately for Varnish, however, this fact was outweighed by the absence of mutual obligations and personal service in her relationship with British Cycling.[[827]](#footnote-827)

In relation to the former, Mr Justice Choudhury in the EAT rejected the claimant’s plea that the obligations under the PAA constituted work (and that the services simultaneously provided to her constituted remuneration),[[828]](#footnote-828) and he reiterated the ET’s findings that she was simply privy to a ‘contract where services are provided to [her], not the other way around’.[[829]](#footnote-829) In other words, there was no obligation on British Cycling to provide work, nor was there a corresponding obligation on Varnish’s part to ‘accept and perform the work in exchange for consideration, usually wages.’[[830]](#footnote-830) This finding seemingly also influenced the view that Varnish failed to satisfy the personal performance requirement. On this issue, Judge Ross found that, whilst Varnish certainly could not substitute another rider to carry out her obligations under the PAA,[[831]](#footnote-831) she was not personally performing work *provided by British Cycling*. Rather, she was simply ‘performing a commitment to train in accordance with the individual rider agreement’ in the hope that she would be selected for international competition.[[832]](#footnote-832) Given that the determination of personal performance here hinged heavily on the so-called ‘wage/work bargain’, one might say that it was the lack of mutual obligations between the two parties that was fundamental in deciding the employment status of Varnish in this case.[[833]](#footnote-833)

Now, for our purposes, it is interesting to consider what might have happened in the alternative scenario if Varnish had *not* been dropped from Team GB in 2016, but instead had gone on to compete in future professional events whilst funded by British Cycling. Let us say that, during one such event, she negligently (or intentionally) injures a fellow competitor or spectator, perhaps in a similar manner to Miguel Angel Lopez when he punched a fan at the Giro d’Italia in 2019.[[834]](#footnote-834) If the current decision in *Varnish* is also the benchmark for determining an employment relationship in the law of tort, then British Cycling would likely not be held vicariously liable for this act. However, it must be questioned whether, under my contextual-pluralist model of liability, the definition of an employee might – and should - differ depending on the area of law in question. Two particular points are immediately relevant here. First, whilst I have suggested in section 4.3.1 that we ought to move away from the ‘employee’ and ‘independent contractor’ labels in favour of a broader test of responsibility, it must be recognised that this suggestion is a rather radical one. Many would likely still insist on vicarious liability being limited to employees (and those akin to employees), so it makes sense here to still consider whether the term ‘employee’ can possess different meanings in different contexts.

Second, astute observers might recall my suggestion in section 3.4.1 that, under my pragmatist-inspired contextual-pluralist approach to precedent, a case from one area of law (such as property damage) might prove insightful or relevant for another area (such as personal injury). One might question whether this can be reconciled with the context-specific and policy-sensitive definition of ‘employee’ advocated in this chapter. However, I would suggest that an appropriate answer lies in a more explicit articulation of *when* the underlying policy bases of two distinct areas or contexts are similar enough to provide guidance. As such, whilst we will see below that the generally received view now supports a context-specific approach to the definition of employment, there has been very little critical discussion as to what extent cases from employment law (and indeed other areas of law) might provide an instructive steer in determining the scope of vicarious liability. The following sections seek to fill in this gap in the literature, as well as hopefully shedding some light on the relevance of *Varnish* to the vicarious liability of NGBs.

**5.2.2 Employment Law and Vicarious Liability: Time for Harmonisation?**

Until fairly recently, it had long been assumed that the definition of an ‘employee’ was the same across multiple strands of the law (whether that be employment, insurance, intellectual property or tort law).[[835]](#footnote-835) As testament to this fact, many of the leading monographs and textbooks discussing the necessary relationship for vicarious liability refer interchangeably to labour law cases.[[836]](#footnote-836) However, recent judicial statements appear to now cast some doubt on this idea. In particular, Lady Hale in *Barclays Bank v Various Claimants* suggested that whilst it might be ‘tempting to align the law of vicarious liability with employment law’, it would ultimately be going ‘too far down the road to tidiness’ to do so in light of the differing contextual reasons in each domain.[[837]](#footnote-837) This appreciation of context-specificity is echoed by Ward LJ’s function-over-form approach in *JGE v English Province of Our Lady of Charity*.[[838]](#footnote-838) As his Lordship explains:

‘If the case is one where an employee seeks a remedy against his employer, for example for unfair dismissal, then the case does require that the true relationship of employer/employee be established in order to found the claim… On the other hand, the remedy of an innocent victim against the employer of the wrongdoer has a different justification rooted, as we have seen, in public policy. The fluid concept of vicarious liability should not, therefore, be confined by the concrete demands of statutory construction arising in a wholly different context.’[[839]](#footnote-839)

As illustrated in Prassl’s work, this policy-specific approach is consistent with the concept of legal realism that underpins my contextual-pluralist model. In shifting the focus of scholarly attention from the employee to the employer, Prassl criticises the ‘received unitary concept of the employer, where the employer has come to be defined as a single entity, substantively identical in all circumstances and domains of employment law and beyond.’[[840]](#footnote-840) In this, he argues that our law should transition from ‘the current rigidly formalistic approach to a flexible, functional concept’ which determines the existence of an employment relationship on the basis of specific functions exercised by a particular entity.[[841]](#footnote-841)

Now, it is worth highlighting that not every employment law scholar has subscribed to this point of view. Butlin and Allen, for instance, are perhaps the most prominent advocates of a harmonising approach to the employment relationship, and they suggest that ‘the law on vicarious liability and worker status should march hand in hand’ because they are ‘inextricably interlinked’.[[842]](#footnote-842) In this, they promote a conflation of the employment and vicarious liability contexts in order to avoid a ‘damaging and undesirable’ risk of ‘regulatory dissonance’,[[843]](#footnote-843) as well as to ‘ensure legal certainty for both employers and employees across different strands of the law’.[[844]](#footnote-844) Pitt adopts a similar view, arguing that it would be ‘undesirable if different tests were to develop for identifying contracts of employment according to what was at stake.’[[845]](#footnote-845) One of the key tenets of this view is that it helps to ensure ‘consistency between two interwoven strands of the law’.[[846]](#footnote-846) However, if, as I suspect, the policies at play are oftentimes different in both the employment and vicarious liability contexts, then a lack of consistency between them becomes not just unproblematic, but also perhaps sometimes desirable. On this basis, I find it rather questionable for Gray to critique the permissibility of vicarious liability for acts forbidden by an employer by referencing the parol evidence rule of contract law (and the fact that courts in that area of law place primary on the written agreement between the parties).[[847]](#footnote-847) Surely the obvious rationale for different rules in contract and tort lie in the different policies underpinning the two areas of law? For contract law, we might say that courts are primarily concerned with ensuring contractual stability and certainty of transactions, such that the parties’ decision on the allocation of risks assumes greater importance; for vicarious liability, however, courts are perhaps more acutely aware of the underlying policy objective of adequate compensation for wrongful injury.

For such reasons, I also find Butlin and Allen’s view unconvincing, and this can perhaps be best illustrated by considering the mutuality of obligation requirement in both employment and tort law. More specifically, whilst the concept of mutual obligations has been described as the most ‘prominent’[[848]](#footnote-848) and ‘essential’[[849]](#footnote-849) feature of contemporary employment protection litigation, it is, I suggest, a largely irrelevant factor in the determination of an employer’s strict liability for the torts of their employees. As Kidner opines, an analysis of the mutuality requirement is likely to skew our view of the employer-employee relationship ‘towards the demands of employment law and the policies embedded therein’.[[850]](#footnote-850) In fact, the most recent judgment of the EAT in *Varnish* suggests an even more contextualised role for mutuality of obligation, with Mr Justice Choudhury highlighting that it may only be a useful criterion in employment law for cases involving intermittent working environments.[[851]](#footnote-851) As such, it is suggested that the theory of control is a much more apt consideration for vicarious liability cases, and it should certainly not be viewed as possessing the same importance in this context as the concept of mutuality or other employment law-specific considerations (such as whether an individual is treated as an employee for tax purposes). This is so for two reasons.

First, it must be recognised that the concept of mutuality focusses solely on the relationship between the purported employer and employee. In contrast, and as Ward LJ in *JGE* referred to above, vicarious liability cases possess an added component: an innocent third-party victim. In this regard, the theory of control appears a far more useful factor to consider. Whilst it is true that the control is exercised by the employer over the employee, the existence or absence of such control has an important moral and normative impact on third parties. Three particular cases illustrate this point well. The first is that of *Home Office v Dorset Yacht Co Ltd*,[[852]](#footnote-852) a case in which the government were held liable in negligence for a failure to control the actions of several borstal boys. Whilst it is clear that the context of the proceedings were different in this case (the claimants preferring instead to base their claim on primary liability grounds),[[853]](#footnote-853) *Dorset Yacht* is still of great importance in highlighting that ‘control imports responsibility’ when assessing the liability of a defendant for the actions of another.[[854]](#footnote-854) Such comments also provide us with a useful framework for examining the relationship between employment law and vicarious liability: decisions in the former should only be instructive for the latter when the focus is on those cases, or parts of cases, which share the same underlying policies. Whilst *Dorset Yacht* indicates that control is one such policy that straddles both areas of law, mutuality of obligations does not. Likewise, deep pockets and loss spreading are fine examples of theories that are important for vicarious liability, but not particularly relevant for employment law. The fact that many individual athletes (such as Varnish) are required to apply for funding may indicate that such athletes do not possess deep pockets, at least not *vis-à-vis* their NGB. However, whilst such an analysis is relevant for vicarious liability purposes, it is of far less normative importance in the employment context when deciding whether an individual was unfairly dismissed.

This argument can be sharpened by taking a second example from the facts of *O’Kelly v Trusthouse Forte*.[[855]](#footnote-855) In this case, a hotel employed wine butlers on a regular - yet casual - basis, such that the hotel was not obliged to provide (and the staff were not obliged to accept) any work. When one of the butlers was fired, his claim for unfair dismissal was rejected by the Court of Appeal on the basis that his relationship with the hotel lacked the necessary mutuality of obligation. However, once we drop the ‘unnecessary baggage’ of additional employment law provisions such as the need for mutuality,[[856]](#footnote-856) we can see how a vicarious liability claim might have succeeded on the facts of *O’Kelly*. As Kidner posits, in light of the ‘divergence of the needs of employment law and vicarious liability’, it would be entirely surprising if the hotel was not vicariously liable for one of their casual waiters negligently spilling wine over a patron.[[857]](#footnote-857) It is likely that Peel and Goudkamp also had this case in mind when they correctly argued that there is something distinctly ‘odd’ about a scenario whereby an employer exhibits close control over a tortfeasor’s manner of work, yet the employer is not held liable for the tortfeasor’s acts simply because they had the option to decline him work at certain times.[[858]](#footnote-858) With this in mind, I can do little more than to echo McKendrick’s view that the ‘test for the existence of an employment relationship should depend upon the legal question which is being asked’.[[859]](#footnote-859) Under my contextual-pluralist model of liability, then, we should treat cases such as *Kafagi v JBW Group Ltd* – which refer indiscriminately to purely employment law policies such as mutuality of obligation in determining the scope of vicarious liability[[860]](#footnote-860) – with a degree of caution.

A third and final case law example illustrating the different policies at play in employment and tort law can be found in Sedley LJ’s judgment in *Dacas v Brook Street Bureau (UK) Ltd*.[[861]](#footnote-861) Whilst the employment tribunal in these proceedings had previously concluded that no employment relationship existed between the claimant and Wandsworth Council for the purposes of an unfair dismissal claim, his Lordship maintained that if the issue of employment had arisen in relation to a personal injury action – instead of the ‘more abstract question of contract law’ – a different result would have ensued.[[862]](#footnote-862) In other words, had Mrs Dacas injured a third party by negligently leaving cleaning equipment in a dangerous area, it would be a ‘near-certainty’ that vicarious liability would befall the council, and that those advancing an alternative submission ‘could look forward to a bad day in court’.[[863]](#footnote-863) Again, this illustrates the normative importance of third-party victims in vicarious liability cases, and it may also tentatively suggest that some judges are of the view that the right to bodily integrity is perhaps deserving of greater protection than the right not to be unfairly dismissed. Given Dagan’s comments – which suggest that ‘our lives are divided into economically and socially differentiated segments, and each such ‘transaction of life’ has some features that are of sufficient normative importance… that justifies a distinct legal treatment’[[864]](#footnote-864) – this may be a sensible distinction to make. However, the extent to which it applies to professional sport is, perhaps, a discussion for another day.[[865]](#footnote-865)

**5.2.3 Formulating a Policy-Oriented Approach to Vicarious Liability for Funded Athletes**

I have discussed in the previous section that the primacy of control in the vicarious liability context is arguably justified in light of its normative significance in relation to third parties. To suggest that mutuality of obligations is equally as relevant here is, in the words of Posner, to allow that concept to become ‘unmoored from any plausible goal of employment’ law.[[866]](#footnote-866) Nevertheless, we might also identify a second reason for our focus on control in this context: it overlaps with several other theories of vicarious liability in a way that mutuality and personal performance clearly do not.[[867]](#footnote-867) In this regard, an assessment of control is conducive to the identification of a common theoretical solution to the issue of vicarious liability for funded athletes. As was discussed in Chapter 2, control may overlap with a number of theories such as deterrence and fault, but the emphasis here is on its similarities with enterprise liability (and in particular its notions of fairness and risk).

We might recall that fairness is based on the idea that an employer who benefits from a particular activity ought to simultaneously bear the burdens of that conduct. According to Flannigan, the notion of benefit is intrinsically linked to the theory of control, in that ‘a person’s ability to benefit in an equity or residual sense normally depends on whether or not that person controls the performance of the work’.[[868]](#footnote-868) Morgan too makes a similar point when he outlines that ‘[a]cting on behalf of the employer, and control, also link to [the] wider notion of enterprise liability’.[[869]](#footnote-869) Both control and benefit appear to overlap with the concept of integration, such that the terms ‘control’, ‘integration’ and ‘benefit’ can often be used interchangeably. Kidner makes the connection between the first two, when he highlights that the ‘degree of control exercised by the employer may well depend on the degree to which the “employee” is integrated into the activities of the enterprise’.[[870]](#footnote-870) In this manner, Bell is correct to illustrate that control can be (and indeed has been in Tomlinson LJ’s Court of Appeal judgment in *Armes v Nottinghamshire County Council*[[871]](#footnote-871)) accorded ‘indirect relevance’ by assessing the integration of an activity into the defendant’s enterprise.[[872]](#footnote-872) Furthermore, various judges have demonstrated that integration is also closely interlinked with any benefits enjoyed by an employer. This was explicitly recognised by Lord Reed in *Cox v Ministry of Justice*,[[873]](#footnote-873) and Irwin LJ in the Court of Appeal in *Barclays* similarly outlined that Dr Bates (the tortfeasor in this case) was sufficiently integrated into the business activity of the defendant because his work was primarily done for the benefit of the bank.[[874]](#footnote-874)

Given that ‘control’, ‘integration’ and ‘benefit’ all appear to be cut from the same cloth, we might make the following observation: if an individual is subject to strict control by an organisation, it is likely – but not necessarily inevitable[[875]](#footnote-875) - that they are also integrated into that organisation’s business activities and providing a benefit to that entity. It is no surprise, then, that an analysis of fairness appears to justify vicarious liability for many funded individual athletes. In *Varnish*, for instance, it was reported that the ‘ultimate goal’ for both British Cycling and its athletes was to ‘win medals for the British Team’.[[876]](#footnote-876) Given that the benefit derived from the tortfeasor’s activities need not necessarily be financial in nature,[[877]](#footnote-877) one may simply point to the fact that success would ‘reflect well on the institution’ as one of the benefits received by British Cycling.[[878]](#footnote-878) However, it is also evident that an NGB’s failure to meet their annual medal and performance targets (as set by UK Sport) will likely lead to ‘savage cuts’ on the funding offered to that sport,[[879]](#footnote-879) so it is arguably the case that British Cycling also reap a financial benefit from the high degree of control that they exercise over their athletes. Moreover, it was also noted in the EAT that the NGB were also able to make use of Varnish’s image ‘in connection with the promotion, publicity or explanation of the Podium Programme’,[[880]](#footnote-880) again suggesting a profit-making benefit to both British Cycling and UK Sport.

In addition to fairness, we might also say that control overlaps to a significant extent with the risk-related formulation of enterprise liability. This is illustrated by Flannigan when he states that the ‘ability to control is what enables the employer to take risks. When the employer has no control, he is not in a position to apply his risk set to the activity or operation’.[[881]](#footnote-881) Again, it may be inaccurate to suggest that control *always* overlaps with risk: just because an employer is able to control the occurrence of a certain harm does not necessarily make it an inherent risk of that employer’s business. However, the close overlap between the two is evident once again in *Varnish*. Here, we might say that the existence of the PAA – which includes the package of benefits provided by the NGB and the concomitant obligations imposed on athletes – enables (and thus also increases) the risk of injury to others. The extent to which it is increased, however, perhaps depends on the type of act committed. Given that British Cycling only exercise control over (and benefit from) certain aspects of Varnish’s life, it may be that vicarious liability would only be appropriate for acts intrinsically linked to that control/benefit. By way of example, we have seen that the NGB were able to exercise significant control over Varnish’s use of social media, such that any tortious comments made by Varnish on Twitter could be fair game for vicarious liability. Similarly, given that British Cycling reap the (reputational and financial) benefit of medals from Varnish’s performances, any negligent injury she causes during competition should also be susceptible to vicarious liability.

Contrast this with a scenario whereby Varnish assaults her coach in anger after a particularly bad performance at an event. Given that the NGB allow Varnish to choose her own coach, it is perhaps less appropriate to impose vicarious liability on British Cycling for this act. In this manner, we might say that something similar to the harm-within-risk rule from legal causation ought to operate here,[[882]](#footnote-882) with the result that control, benefit and risk all need to overlap to some extent in order to produce the strongest possible version of enterprise liability. This point was recognised by Bell when he suggested that both ‘benefit and risk must be kept close together if an enterprise theory is to hold’.[[883]](#footnote-883) With reference to the facts of *Armes*, he further elaborates that the benefit to the council in utilising foster parents in this case was in ‘running the child welfare system/discharging its duties, so this should then remain the focus of the risk creation point’.[[884]](#footnote-884) An application of vicarious liability to the individual sports context appears to further reinforce the need to heed this advice, and I will touch upon this point again in the context of sporting disrepute clauses in section 7.3.2.

With these points in mind, it is useful to step back and consider what lessons we might learn from a policy-oriented approach to *Varnish* and, more broadly, what this potentially means for the vicarious liability of many NGBs. It is arguable that, if we change the facts in *Varnish* to emphasise the potential negligence of the claimant (much like Sedley LJ did in *Dacas*), British Cycling ought to be vicariously liable for any tortious harm caused by Varnish. Under the approach advocated here, control – already established as significant in the ET’s judgment – would be afforded greater importance, with the mutuality and personal performance factors (which pointed in the opposite direction to control in the tribunal’s decision) concomitantly being downplayed. This analysis is reinforced by the fact that control overlaps to a significant extent with enterprise liability, and both fairness and risk would seemingly also justify the imposition of vicarious liability for funded athletes in many scenarios. In addition, the existence of funding under both the PAA and APA may also illustrate that the NGB has deeper pockets than the individual athlete, so it is likely that the common theoretical solution in this context points towards vicarious liability.

Now, this is not to say that *Varnish* was incorrectly decided, and nor does it mean that all funded athletes should now be classed as employees for the purposes of unfair dismissal. Rather, the policy-oriented approach advocated here allows us to recognise, as the Supreme Court did in *Pimlico Plumbers Ltd v Smith*,[[885]](#footnote-885) that an athlete can be an employee for one purpose, and self-employed for another. This is important, in that it helps us to avoid those doomsday arguments that are often associated with the provision of employment rights and benefits to funded athletes.[[886]](#footnote-886) For instance, it has been estimated that, had Varnish been found an employee of British Cycling or UK Sport, many NGBs would have encountered ‘serious financial difficulties’, with one in five British athletes facing a funding cut.[[887]](#footnote-887)

**5.3 Beyond Funded Athletes: Vicarious Liability in Other Individual Sports**

In light of the *prima facie* case for the vicarious liability of funded athletes, we might take this analysis a step further and question whether a similar determination could equally apply to other professionalised individual sports where funding is absent. In particular, this requires us to examine whether the theoretical arguments applicable to funded athletes under my contextual-pluralist model are equally as strong when applied to non-funded athletes. At first glance, the answer appears to be ‘no’. A simple deep pockets analysis, for instance, suggests that there is no need for vicarious liability at all in this scenario, as non-funded professional athletes are likely to be solvent and able to meet a significant damages award themselves. Consequently, when we see various tempestuous tennis stars engaging in potentially harm-causing activities – such as Novak Djokovic negligently hitting a line judge with a tennis ball at the 2020 US Open;[[888]](#footnote-888) Nick Kyrgios hurling his racket into the crowd at Wimbledon in 2015;[[889]](#footnote-889) David Nalbandian wounding a line umpire after kicking out at an advertising board in 2012;[[890]](#footnote-890) and Juan Ignacio Chela spitting at his opponent Lleyton Hewitt in 2005[[891]](#footnote-891) – we might justifiably conclude that there is no need to consider the potential liability of a governing body at all in these scenarios. After all, both corrective justice and deterrence seem to point towards imposing direct liability on the athletes, and the main compensation rationale for vicarious liability largely falls away when we consider the lucrative career of a professional tennis player.

However, this analysis may be criticised as under-inclusive. Imposing direct liability on the tortfeasor may only be a viable option for those athletes at the very apex of the sport who regularly compete for the biggest prizes in tennis. In contrast, a negligence claim against those athletes lower down the pecking order is far less feasible. In fact, according to a 2013 study by the International Tennis Federation (‘ITF’), around 45% of the 13,736 professional tennis players earned nothing from the sport in that year,[[892]](#footnote-892) and athletes placed outside of the top 200 ranking spots were unlikely to earn more than £40,000 in prize money over the course of those 12 months.[[893]](#footnote-893) As such, when we hear of stories such as those involving former world number 248 Harmony Tan – who accused her opponent of intentionally hitting her in the eye with a tennis ball during an ITF event[[894]](#footnote-894) – we might conclude that the vicarious liability of the relevant tennis governing body is much more appropriate here. This is reinforced by the healthy financial status of many organisations that seek to regulate their respective sports. One example is that of the PGA Tour in golf. Despite its status as a non-profit organisation, the PGA Tour actually boasts an annual revenue in excess of $1 billion.[[895]](#footnote-895) This, it is suggested, feeds into a number of other relevant points here.

First, the PGA Tour is actually a competition organiser (rather than an NGB),[[896]](#footnote-896) and it may be that organisers of sports competitions could be just as susceptible to vicarious liability as governing bodies.[[897]](#footnote-897) Given that control over non-funded athletes is often exercised simultaneously by varying bodies, it might be that dual vicarious liability (considered in more detail in section 5.5.2) is sometimes appropriate in this context. This could be particularly useful for sports such as boxing, where the so-called ‘alphabet soup’ of sanctioning organisations – which includes four different bodies overseeing six world champions in each of seventeen different weight categories – undoubtedly complexifies the analysis.[[898]](#footnote-898) Second, tennis is clearly not the only sport in which it might be appropriate to hold a regulator vicariously liable, and it is for such reasons that I also examine how my contextual-pluralist model might be applied to the sport of golf. The potential for injury here is obvious, particularly to spectators. This is evidenced by the recent incident at the 2018 Ryder Cup, where an onlooker was blinded in one eye after being hit by Brooks Koepka’s wayward shot.[[899]](#footnote-899) Whilst there was no evidence that Koepka was negligent in his drive, it would not be difficult to imagine - following the line of ‘reckless duffers’ cases such as *Pearson v Lightning*[[900]](#footnote-900) and *Phee v Gordon*[[901]](#footnote-901)- a slightly different scenario in which negligence could be established. For instance, had it been established that Koepka was intoxicated when he took the shot – much like former professional golfer Rocco Mediate, who admitted that drinking whilst on PGA Tour courses was ‘normal’ for him[[902]](#footnote-902) - it may have been justifiable to hold the organisation responsible for this harm.

Third, in analysing the potential scope of vicarious liability in these sports, it must be highlighted that the exercise conducted here is similar to that carried out by Prassl and Risak when they examined in detail the ‘complexity of underlying fact patterns’ in the employer functions carried out by Uber and TaskRabbit.[[903]](#footnote-903) On this basis, many of the factors that are considered under Morgan’s dual axis approach (which considers both ‘day to day control’ and ‘discretion in role’) are applied here.[[904]](#footnote-904) These include, for instance, prescription of: working hours and location; uniforms; disciplinary systems; the use of certain methods and equipment; and when breaks can be taken. An application of these factors to governing bodies and competition organisers in professional tennis and golf highlights both their control over, and benefit from, the athletes competing under their auspices, and this suggests that vicarious liability may sometimes be appropriate even for non-funded athletes. This conclusion is also consistent with Dabscheck’s analysis, as he highlights how a more nuanced assessment of the restrictions imposed upon professional jockeys – such as limited control over their own attire, fitness levels, use of intellectual property rights and adherence to gambling and drug codes – suggests that they ‘should be properly regarded as employees and not independent contractors’.[[905]](#footnote-905) Interestingly, this may have meant that, had negligence been established in the seminal ‘sports torts’ case of *Caldwell v Maguire and Fitzgerald* (which involved allegedly ‘careless riding’ by a professional jockey),[[906]](#footnote-906) the British Horseracing Authority could have been vicariously liable for this injury.

Finally, it may be that the discussion in this section could lead some NGBs to seriously consider imposing an obligation upon all athletes in their sport to take out appropriate liability insurance. Indeed, if an athlete is insured against any negligent harm he causes, the injured party is less likely to feel the need to test the vicarious liability of an NGB in a court of law.[[907]](#footnote-907) The practicality of this solution is, however, largely dependent on two factors: the type of sport and the extent of control exercised by the governing body. For some sports, such as tennis and golf, compulsory liability insurance for every athlete might be a useful development for the governing bodies to consider, particularly in light of the potential for injury in these sports and the stringent regulation that these athletes are subjected to. For other regulators, such as the World Darts Federation (WDF), this suggestion may be a rather pointless one. Not only is darts a sport in which injuries hardly ever occur, but the WDF also take a relatively lenient approach to the obligations of their players, and thus do not really possess the necessary degree of control over their athletes to justify vicarious liability.[[908]](#footnote-908) However, even if there are NGBs that wish to mandate liability insurance for all participants, some burning questions remain: would such a development lead to the end of pro-am tournaments, where professional and amateur athletes compete together in a single event? It is one thing to require a professional athlete to take out appropriate liability insurance, but it is another thing entirely to require an amateur player to do so, particularly considering the likelihood that they may not be able to afford (or at least justify the cost of) such insurance. Likewise, we might also ponder whether insurers would be willing to provide such cover at all. Boyes makes the point that, in light of the increasing wealth of many top athletes, insurers may refuse to cover those who play high-value opponents.[[909]](#footnote-909) After all, who really wants to insure the person who might blind Rafael Nadal or Jordan Spieth?

**5.3.1 Tennis**

Professional tennis is governed by a number of bodies, one of which being the aforementioned ITF.[[910]](#footnote-910) The ITF operates as the world governing body of tennis, with responsibilities including the enforcement of the Rules of Tennis and the organisation of various tournaments (such as the four ‘Grand Slam’ tournaments, the international Davis Cup and Fed Cup, and the lower-rung ITF Men’s and Women’s Word Tennis Tours). The Association of Tennis Professionals (ATP) - which operates several competitions under the ATP Tour and ATP Challenger Tour - acts as the governing body for men’s tennis, whilst the Women’s Tennis Association (WTA) acts as the global governing body for women’s tennis. Although Gibson argues that the economic independence of professional tennis players means that no governing body is exercising control over them,[[911]](#footnote-911) a brief perusal of the ITF, Grand Slam and ATP rulebooks suggest that this analysis is perhaps too simplistic. For example, in regards to the provisions laid down by the ITF and the Grand Slam Board (GSB), the rules outline that both bodies can exercise control over: the discipline of athletes found guilty of doping or corruption;[[912]](#footnote-912) the time and location of matches;[[913]](#footnote-913) the audible and visible actions of the athletes (including any ‘unsportsmanlike conduct’);[[914]](#footnote-914) when athletes can take a break during a match;[[915]](#footnote-915) and the prompt attendance at post-match media conferences.[[916]](#footnote-916)

This latter requirement sparked international outrage during the 2021 French Open, when the former world number one Naomi Osaka cited mental health issues for her refusal to attend a post-match press conference.[[917]](#footnote-917) She was later fined $15,000 for the failure to honour this obligation, and one suspects that this was largely because the governing bodies in tennis stood to benefit from her interaction with the media. As the Grand Slam rulebook highlights, media appearances by the top stars provides ‘valuable exposure to the media and fans’, and this in turn helps to ‘drive engagement’ with the sport.[[918]](#footnote-918) One can see, therefore, parallels with respect to funded athletes like Varnish, as governing bodies here are enjoying a similar level of control over, and benefit from, non-funded athletes too. This is reinforced by other stringent regulatory policies that are imposed by the ITF and GSB on professional tennis players, such as: restrictions on their participation in other events,[[919]](#footnote-919) the degree to which they can promote their own sponsors,[[920]](#footnote-920) and the close regulation of what attire and equipment is appropriate to wear and use during competition (something which I have considered in more detail elsewhere).[[921]](#footnote-921) In particular, participants competing at Wimbledon are famously obliged to wear white clothing,[[922]](#footnote-922) and there are comprehensive regulations on what footwear is acceptable for differing types of court.[[923]](#footnote-923)

Likewise, the ATP rulebook exhibits many similar limits on an athlete’s discretion, both on and off the court. In relation to the former, the ATP can impose financial penalties on so-called ‘commitment players’ – those ranked in the top 30 of the ATP’s official rankings – who fail to participate in a certain number of competitions.[[924]](#footnote-924) The rationale behind such a rule is, presumably, that the ATP want to accrue the financial and promotional benefits of the top stars regularly competing under their brand. Regarding the off-field control of professional tennis players, it is noteworthy that the ATP currently operate a so-called ‘STARS program’.[[925]](#footnote-925) This initiative, which was introduced in an effort to exploit the ‘popularity of athletes through sponsorships and media’,[[926]](#footnote-926) mandates that ‘[a]ll players competing in the main draw of any ATP Tour tournament will be required, if asked, to participate in ATP sponsored activities.’[[927]](#footnote-927) Each player is required to dedicate up to two hours per week to the program, as well as participating in up to two activity days for promotional purposes (which may even take place ‘outside of an ATP Tour tournament week and/or location’).[[928]](#footnote-928) Given that such activities sometimes place athletes in a position of power by working with children,[[929]](#footnote-929) it could certainly be argued that, if a tennis player sexually abused a child as a result of his engagement with this program, the ATP ought to be vicariously liable for this act. Unlike an on-court injury caused during a training session or warm-up (which the ATP exercise very little control over and reap no benefit from),[[930]](#footnote-930) attendance at STARS events is something that the ATP explicitly mandate and profit from. In this light, we could say that the risk of off-court sexual abuse at a promotional event is within the scope of the governing body’s relevant control/integration.

**5.3.2 Golf**

Similar themes evident in tennis can also be identified in the context of professional golf. For instance, the aforementioned PGA Tour, which identifies itself as the ‘world’s premier membership organization for touring professional golfers’,[[931]](#footnote-931) is able to exert a significant degree of control over those participating in their events. According to its most recently published handbook covering the 2019-20 season, the competition organiser is able regulate a players’ use of mobile devices and social media throughout the tour,[[932]](#footnote-932) as well as impose strict limitations on any sponsorships and equipment deemed contrary to the spirit of golf.[[933]](#footnote-933) As evidenced by *PGA Tour Inc v Martin*,[[934]](#footnote-934) this even extends to the PGA Tour’s attempts to control whether certain disabled competitors are permitted to use golf carts to traverse the course (which, according to some, looked ‘lousy on television’).[[935]](#footnote-935) A professional golfer’s discretion in role is also inhibited by strict rules requiring them to maintain a certain pace of play whilst out on the green,[[936]](#footnote-936) as well as further restrictions on their signing of autographs and consumption of alcohol during competitions.[[937]](#footnote-937) This latter provision suggests that the PGA Tour ought, in fact, to be held vicariously liable for any injury caused due to the negligent swing of an intoxicated golfer, as the control exercised by the organisation over this conduct is closely related to the relevant risk of harm.

Of course, this is not to say that professional golfers do not retain some form of control over their activities. They are able to choose both their own caddy and which tournaments they wish to enter, but even here the PGA Tour seem to have the last word. The organisation gives the final approval on each caddy,[[938]](#footnote-938) and members of the tour must compete in at least 25 events over the course of the year or else risk a ‘major fine’ or suspension.[[939]](#footnote-939) Much like with the obligation foisted upon ‘commitment players’ by the ATP, we could say that this requirement to play a certain number of games is especially important for vicarious liability purposes, as the governing bodies and competition organisers are explicitly influencing the level of risk posed by their athletes. In this light, Sharpe is seemingly correct to argue that these control mechanisms ‘tend to show an employer-employee relationship between the PGA Tour and its golfers.’[[940]](#footnote-940) Given that this comment was made for the purposes of employment and disability law, we could say that her argument is further strengthened when it is applied to the context of vicarious liability (because, as explained above, the normative importance of control is even more significant in this context).

A similar state of affairs is also identifiable in women’s golf, where the Ladies Professional Golf Association (LPGA) – and its concomitant LPGA Tour – operates in a functionally similar manner to its male counterpart. One of the LPGA’s more interesting policies for our purposes arose in August 2008, when the organisation attempted to enforce a new rule mandating that all participants on the tour speak English during pro-am events and when interacting with the media.[[941]](#footnote-941) The purported reason for this rule was to ‘please corporate sponsors’ and to ‘maximize the marketability of its players’ in an attempt to improve the popularity of the tour.[[942]](#footnote-942) Although the LPGA later backtracked on this policy (albeit with a version of the rule still remaining an option),[[943]](#footnote-943) this example shows that, by acceding to these demands, foreign women golfers were clearly asked to carry on an activity that constituted ‘an integral part of the business activities’ of the LPGA, and were doing so for its benefit.[[944]](#footnote-944) Lloyd persuasively argues that, ‘[b]y controlling the language that an LPGA player must speak, the LPGA is effectively exerting one of the most stifling and limited forms of employer control.’[[945]](#footnote-945) In this light, and as he further elaborates, the ‘courts must take a hard look at whether a professional golfer is really an independent contractor when the tour mandates the language that she must speak during the course of her membership on the tour.’[[946]](#footnote-946) As I discuss in more detail in Chapter 7, much of this debate appears to relate back to the proper role of the athlete, and whether their job also entails off-field responsibilities such as portraying their sport in a positive light.

**5.4 Alternatives to Vicarious Liability?**

Under the policy-based approach to vicarious liability offered above, it seems reasonable to conclude that many victims of funded and non-funded athletes will be able to look to the doctrine of employer liability to give them a better chance of receiving full compensation from a governing body or competition organiser. In case I am wrong on this point, however, it is worth discussing whether there are other viable alternatives to hold such an organisation accountable for harm-causing activity. In this regard, and in addition to a claim under vicarious liability, Weir has helpfully outlined two other ‘inevitably triangular routes’ – which, he suggests, ‘must be kept separate’ – to find judgment against an NGB for the tortious actions of a purported employee.[[947]](#footnote-947)

The first option is to simply impose a direct duty upon governing bodies and competition organisers to ensure the safety of their sport. This might be considered the most straightforward and sensible option, particularly as Bell outlines that vicarious liability is perhaps best thought of as a ‘bandage where primary liability fails to secure the substantive (monetary) result thought most fair and reasonable on the facts’.[[948]](#footnote-948) However, this method, which was discussed in the previous chapter in relation to *Watson v British Boxing Board of Control*,[[949]](#footnote-949) will require the injured party to prove some degree of fault on behalf of the organisation.[[950]](#footnote-950) Thus, to return to our intoxicated golfer example, The R&A or PGA Tour would only be liable in negligence for this harm if it could be shown that they were aware of the tortfeasor’s inebriated state, but failed to take action. In contrast, vicarious liability under the model proposed above would likely still apply in such a scenario, irrespective of the organisations’ knowledge or any prior training they offered to the athlete.[[951]](#footnote-951) The reality is that many actions that would succeed in this strict liability sphere would be dismissed out of hand if they were to proceed under the fault-based edifice of the direct duty. As Dickinson explains, an action in vicarious liability may be more advantageous than a claim attempting to prove the direct liability for another in negligence, in that the ‘available defences may well be narrower, or the rules of remoteness more favourable.’[[952]](#footnote-952) In this regard, I must express my disagreement with Gray when he insists that, under his more restrictive model of employer liability, the existence of the tort of negligence goes ‘a long way to addressing any concerns that a victim will be left without a remedy’.[[953]](#footnote-953)

The second (and perhaps more claimant-friendly) route around Weir’s triangle lies in what many believe to be the ‘sister doctrine’ - or the ‘poor relation’[[954]](#footnote-954) - of vicarious liability: the non-delegable duty of care.[[955]](#footnote-955) This functions as a personal duty not just to take care, but also to ensure that care is taken by whomever the relevant task has been delegated to.[[956]](#footnote-956) Consequently, and despite operating under the guise of the fault-based notion of primary liability, this duty is (exceptionally) a form of no-fault liability.[[957]](#footnote-957) Somewhat controversially, non-delegable duties are oftentimes used to achieve what many thought was once impossible: namely, vicarious liability for so-called independent contractors. In fact, Fleming even goes so far as to argue that they are simply a ‘disguised form of vicarious liability’.[[958]](#footnote-958) Support for this view may be derived from an example touched upon in section 3.2.3, which relates to the liability of hospitals to their patients. During the period when it was assumed that vicarious liability would not apply to hospitals, many judges attempted to plug this gap in the law by holding that hospitals were instead subject to a non-delegable duty to ensure the taking of reasonable care in the treatment of patients.[[959]](#footnote-959) In a similar vein, Murphy highlights how the non-delegable duty was also cleverly used in *Wilsons & Clyde Coal Co v English* to circumvent the now-abolished common employment doctrine.[[960]](#footnote-960) Despite this rule precluding an employee from suing a fellow employee for negligence,[[961]](#footnote-961) the courts were still able to secure justice in this case by imposing upon the employer a non-delegable duty of care to ensure a safe place of work.

Such examples lend credence to the scholarly intuition that non-delegable duties are simply tools of convenience that enable judges to fill in some of the lacunas in the current protection afforded to claimants in tort law.[[962]](#footnote-962) In this regard, Williams has famously critiqued the duty as a ‘logical fraud’ and described it as one of the ‘leading sophistries in the law of tort’.[[963]](#footnote-963) However, if non-delegable duties truly are just ‘palliative concepts’,[[964]](#footnote-964) this raises a more fundamental question: given that the sole purpose of such duties is now to seemingly work around the limits on vicarious liability, would it not be better to reform the doctrine of vicarious liability itself in order to avoid the need to resort to this fictitious duty in the first place? Morgan appears to make this point when he highlights that, if vicarious liability is flawed, ‘it demands reform, not a conceptual tap-dance to avoid the issue’.[[965]](#footnote-965) As such, it may be that the broader test of responsibility advocated in the previous chapter may help to obviate the need for a non-delegable duty as a gap-filler here, as it would openly allow for the possibility of vicarious liability for so-called independent contractors. By continuing to recognise both causes of action, however, judges may (in the words of Ibbetson) be adding ‘to the fragmentary and atomized nature of the law of tort(s) by setting in place a further set of near-arbitrary rules.’[[966]](#footnote-966)

Perhaps in response to this criticism, there have been some judicial attempts in recent years to conceptualise the legal framework for non-delegable duties, particularly in relation to outsourced agency staff. The most notable example here is that of *Woodland v Essex County Council*, a case that also neatly illustrates that such duties may extend to a sports-related context.[[967]](#footnote-967) Here, a school was held to owe a non-delegable duty of care to a young pupil who was injured during a swimming lesson, despite the fact that the injury occurred due to the negligent supervision of an independent instructor who had contracted with the school to provide the teaching. One notable feature of this litigation was the inadequate insurance cover possessed by the contractor, a fact which necessitated the ‘last ditch’ claim against the school.[[968]](#footnote-968) In light of Baroness Hale’s observation that a private school pupil in such a scenario would have a contractual claim for damages against their school,[[969]](#footnote-969) it is perhaps little surprise that the Supreme Court imposed a non-delegable duty here. It would fly in the face of both egalitarianism and public expectation to simultaneously reject a remedy for a state-school pupil, and this seems to reflect the above analysis (in section 5.3) of the deep pockets argument in relation to individual athletes; courts will not, it seems, allow victims of lower-ranked professional athletes to go uncompensated, especially when those harmed by athletes at the pinnacle of their sport will feasibly have a direct claim against the tortfeasor.

Nevertheless, the lasting legacy of *Woodland* appears to lie in Lord Sumption’s guidance as to when a non-delegable duty ought to arise. This was probably offered in an attempt to respond to those accusations that suggested such duties were operating on a largely ad hoc and haphazard basis.[[970]](#footnote-970) In short, non-delegable duties are now to be divided into two categories. The first includes those cases where the defendant is involved in some inherently hazardous activity. The second (and seemingly more common) category is characterised by five defining features: (i) the claimant is especially vulnerable or dependent; (ii) there is an antecedent relationship between the claimant and defendant (which generally involves the latter exercising custody, care or charge over the former), and from which it is possible to impute a positive duty to protect the claimant from harm; (iii) the claimant cannot control how the defendant performs those obligations; (iv) the defendant delegates a function which is integral to the duty he assumes towards the claimant; and (v) this function was performed negligently by the third party.[[971]](#footnote-971) On the basis of this guidance, we might identify two specific points: one from a narrow (sport-specific) perspective, and one from an altogether broader vantage point.

In relation to the former, it is entirely unclear as to whether the *Woodland* non-delegable duty is a sufficient alternative to vicarious liability in the professional sports context. For instance, if teaching children to swim is not deemed an ‘extra-hazardous’ activity, then it is unlikely that many other individual sports would be classed as such (although whether this conclusion extends to combat sports such as boxing is less certain). Furthermore, an application of Lord Sumption’s second category of non-delegable duties is equally as unhelpful here. Can an injured athlete be construed in any meaningful way as vulnerable in light of an NGBs monopolistic powers? If so, are they under the custody, care or charge of that organisation? Likewise, is a spectator injured by a wayward golf shot dependent on the governing body? More fundamentally, and on the basis of Tomlinson LJ’s Court of Appeal judgment in *Armes*, can it even be said that the playing of sport is integral to an NGBs functions? In adopting his Lordship’s reasoning, it might be argued that because the governing body itself cannot participate in the sport, they cannot also logically delegate the duty to ensure that it is played in a reasonably safe manner.[[972]](#footnote-972) Similarly, there may also be serious doubts as to whether the running of promotional events is an integral function of an NGBs duties (such that there may, for instance, be no non-delegable duty for sexual abuse arising from an ATP STARS event). After all, Giliker highlights that whilst the provision of treatment is clearly an integral function of a hospital, the organisation of social outings for patients would not be.[[973]](#footnote-973) Whilst Lord Sumption’s guidance was never meant to be ‘set in stone’,[[974]](#footnote-974) it is fair to say that his five-factor test generates a significant amount of uncertainty in the law.[[975]](#footnote-975) As such, it may reasonably be concluded that whilst the non-delegable duty might be able to *supplement* a vicarious liability claim against an NGB or competition organiser, it should in no way *replace* this cause of action.

Following on from this, it is predicted that, from a broader perspective, we might see more cases following in the footsteps of *Armes*, such that the non-delegable duty and vicarious liability claims are run together. This is already evident in a number of recent dental negligence cases,[[976]](#footnote-976) and several scholars have questioned why the possibility of a non-delegable duty was not also raised by the claimants in *Barclays*.[[977]](#footnote-977) To a certain extent, I am somewhat indifferent as to which route we take around Weir’s triangle, so long as the correct decision – based on factual nuance and a detailed assessment of theory – is reached. Indeed, Beuermann notes that both vicarious liability and the non-delegable duty of care are ‘capable of being manipulated to achieve a desired result’,[[978]](#footnote-978) so those claims that suggest that one route is somehow superior to the other are perhaps guilty of ‘doctrinaire legalism’.[[979]](#footnote-979) However, as Merkin and Steele note, given that non-delegable duties are a form of primary (rather than vicarious) liability, the resulting damages award may be affected by an insurer’s unwillingness to pay out to the insured party.[[980]](#footnote-980) As was briefly touched upon in section 4.4.3(ii) in reference to the discussion of *Hawley v Luminar Leisure Ltd*,[[981]](#footnote-981) the *ex turpi causa* principle dictates that an employer held personally liable for a criminal act will be unable to claim against their insurers for the costs related to this harm. In contrast, if the criminal act is committed by ‘an employee or other person for whom the assured faces vicarious liability, the insurers have no such defence’.[[982]](#footnote-982) This point, allied to the generally under-developed nature of non-delegable duties, suggests that vicarious liability is likely to be the stronger of the two claims, and that claimants seeking to pursue both causes of action ought to prioritise this argument.

**5.5 Vicarious Liability for Loaned Players**

Moving away from the individual sporting context, we might identify an increasingly pertinent issue in the determination of the necessary relationship in the realm of professional teamsports. Indeed, Summerhayes has posed (but not answered) the question of who the employer might be when two teams arrange for an athlete to go out on loan.[[983]](#footnote-983) According to the *Financial Times*, whilst loan deals in Europe’s ‘Big Five’ professional football leagues – England, Spain, Germany, Italy and France – constituted just 6% of all transfers in 1992, that figure has sky-rocketed to 29% in 2019.[[984]](#footnote-984) In fact, the rise has been so dramatic that some international governing bodies have even sought to curb the amount of loan deals clubs can enter into, with FIFA endorsing a move to limit the number of international loans of players aged 22 and over.[[985]](#footnote-985) As a result, we might say that employment relations in sport have, much like developments in other workplaces, somewhat ‘fissured’ in the past three decades.[[986]](#footnote-986) Perhaps the reason for this dramatic rise in such deals lies in the ever-growing purposes for which loan transfers might be used. For instance, whilst loans were previously primarily used to assist clubs during an injury crisis or to support the development of fringe players, they are now used in a more sophisticated manner as a ‘business strategy involving strategic alliances and value generation.’[[987]](#footnote-987) One example relates to the advent of so-called ‘loan-with-an-option-to-buy’ deals, whereby the temporary employing club are granted the first option to purchase the player at a fixed price at the end of a loan.[[988]](#footnote-988)

Aside from these ‘try before you buy’ deals, other types of loan agreements include those intended to circumvent professional football’s Financial Fair Play (FFP) rules, an initiative designed to improve the ‘overall financial health of European club football’ by preventing clubs from overspending.[[989]](#footnote-989) Perhaps the most infamous recent example of such a deal is Kylian Mbappe’s move from Monaco to Paris Saint-Germain in 2017.[[990]](#footnote-990) Having already bought Neymar in the same transfer window, PSG were seemingly aware that an outright purchase of Mbappe would, in all likelihood, breach FFP regulations. Therefore, they instead opted to loan Mbappe for a season, with the added obligation that if PSG were not relegated from the first division (a highly unlikely scenario given their recent dominance of French football), they would be obliged to pay Monaco €180 million to acquire Mbappe’s permanent services. Consequently, given that the motivation of the loan was simply to skirt around FFP rules, we might say that PSG were, in all but name, Mbappe’s sole employer. A similar phenomenon might also be identified in professional rugby union. It has been reported that over half of the Gallagher Premiership Rugby teams are exploiting a ‘loophole’ that allows clubs to ‘loan’ out players who can then be recalled to act as injury cover without breaching the league’s salary cap.[[991]](#footnote-991) Consequently, many of these loaned athletes only play one or two games for their temporary club before being sent back to their permanent employer.[[992]](#footnote-992)

**5.5.1 Identifying the Responsible Employer**

This proliferation in the number and complexity of sporting loan transfers raises an interesting line of enquiry for our purposes: which employer is vicariously liable for the tortious acts of the loaned athlete? The starting point for such an analysis is perhaps still that of *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd*.[[993]](#footnote-993) In this case, the defendant harbour authority hired out a crane, along with its driver, to a firm of stevedores (the temporary employer). When the driver negligently injured the claimant, the House of Lords decided that the harbour board (as the general employer) bore responsibility for the harm, as they paid the driver and retained the overriding power to dismiss him. In reaching this conclusion, various judges suggested that, in most cases, the general employer would bear a ‘heavy’ burden of showing that control has been fully vested in the temporary employer so as to make them liable for the harm.[[994]](#footnote-994) Despite this approach finding favour in more recent case law,[[995]](#footnote-995) it is suggested that this burden is a rather unhelpful and unnecessary one. Indeed, and as Brodie hints at, this presumption in *Mersey Docks* might have obscured the fact that, functionally, the borrowed crane driver in this case was actually ‘engaged in the conduct of the temporary employer’s enterprise’.[[996]](#footnote-996)

In light of the various different motivations for sporting loans, it may be better to do away with this misconceived presumption about where liability ought to lie, and instead look at each scenario as the legal pragmatist does: by treating each set of circumstances as individual and requiring its own, fresh, consideration of the best course of action. This would simply require a contextualised and fact-based appreciation of the realities of the relationship which takes into account factors such as: who exercises control over the tortfeasor; who pays their wages; who retains power of dismissal; the length of the loan; and whether there is a right to recall the player.[[997]](#footnote-997) So long as these factors are openly informed by the relevant theories of vicarious liability, I do not believe that my support for this approach necessarily clashes with my criticism of the indeterminacy of the ‘akin to employment’ test in section 4.3.1. After all, these factors can go a long way towards assessing which employer receives the most benefit from the transaction, and (as was discussed above) will hopefully also shed some light on the extent to which the tortfeasor was integrated into the two particular organisations. As section 5.5.3 also illustrates, loss spreading and deep pockets concerns can also be accommodated at the apportionment of liability stage. In short, then, the argument here is that fact sensitivity and theory ought to be prioritised over presumptions of liability.

In applying this approach to sport, we may conclude that, in the rugby union ‘loophole’ scenario referred to above, the general employer should be held responsible for any tortious conduct committed by a loanee. By lifting the veil on this transaction, we can see that the purpose of the loan was solely designed to benefit the permanent employer, as reinforced by their ability to recall the player after a very short period of time.[[998]](#footnote-998) Likewise, in cases where players are loaned only for a matter of weeks, as is common in professional football and rugby,[[999]](#footnote-999) we might also argue that the parent club remains the employer (although this analysis will, of course, need to be supplemented by a close scrutiny of the contractual provisions of the loan in order to identify the true motivations of the parties). In contrast, and perhaps more usually, the temporary employer will be vicariously liable where the terms of the agreement highlight that the loaned athlete is sufficiently embedded into their organisation. This would be the case in the aforementioned Mbappe scenario where the loan was masquerading as a permanent transfer, as well as in more prolonged loan deals, such as James Rodriguez’s unusually lengthy two-year loan move from Real Madrid to Bayern Munich in 2017. As Peel and Goudkamp observe, where ‘A’s services are supplied to X on a long-term basis subject to the entire control of X, that is likely to result in X alone being liable.’[[1000]](#footnote-1000) Sport, it seems, provides a perfect example of highlighting the need for a truly contextual approach to the ‘borrowed servant’ problem, rather than beginning with unhelpful general assumptions about where responsibility ought to lie.

A more recent case law example that appears consistent with this analysis is *Hawley*,[[1001]](#footnote-1001) a case in which a bouncer at a nightclub deliberately punched the claimant in an act that led to the latter suffering severe brain damage. The issue for the Court of Appeal was whether vicarious liability for the doorman’s actions rested with the tortfeasor’s general employer (ASE, an agency firm supplying bouncers to nightclubs) or temporary employer (Luminar, an operator of nightclubs, who had employed the bouncer for over two years). In highlighting that the doorman was so far ‘embedded in Luminar’s organisation’ that he ‘was no longer recognisable as an employee of ASE’,[[1002]](#footnote-1002) the court held that the temporary employer was solely responsible. Despite still paying his wages, ASE had ‘no immediate or effective control’ over the bouncer’s activities during the two years he worked at Luminar’s club.[[1003]](#footnote-1003) Rather, it was the nightclub manager who ‘told the doormen where to stand and when to move’.[[1004]](#footnote-1004) Hallett LJ, in a passage that is roundly consistent with the importance afforded to control in this chapter, notably stated that:

‘The question of control may not be wholly determinative, but, for as long as *Mersey Docks* remains the authoritative decision on when responsibility for an employee’s tortious acts may pass from a general employer to a ‘temporary deemed employer’, the question of control remains at the heart of the test to be applied.’[[1005]](#footnote-1005)

One of the more interesting facets of this case is the Court of Appeal’s refusal to find dual vicarious liability, a fact which Lord Phillips was later critical of in *CCWS*.[[1006]](#footnote-1006) I end this chapter by examining this alternative method of apportioning liability between the general and temporary employer, as well as analysing how such an approach might map on to the sporting context.

**5.5.2 Dual Vicarious Liability?**

In advocating a rethink of the age-old proposition that ‘[n]o man can serve two masters’ at once,[[1007]](#footnote-1007) Atiyah was one of the earliest supporters of the dual liability approach. In his view, it was ‘strange’ that courts had not yet ‘countenanced what might be thought the obvious solution to the problem, namely to hold *both* employers liable to the plaintiff’, and ‘leave them to dispute among themselves who should bear the burden’.[[1008]](#footnote-1008) In more recent times, both Fleming[[1009]](#footnote-1009) and Prassl have championed this view, with the latter highlighting that employer functions ‘can be exercised jointly by several parties, or parcelled out between different *loci* of control’.[[1010]](#footnote-1010) In his words, the nature of the control test ‘often instinctively leads to a multilateral analysis of complex work arrangements.’[[1011]](#footnote-1011) One of the few cases in which this reasoning was accepted is *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*.[[1012]](#footnote-1012) Here, the installation of air conditioning on the claimant’s property was sub-contracted from the first defendant to the second defendant, who then contracted with the third defendant to provide labour for the work. One such worker, Mr Strang, negligently caused a flood whilst working on the claimant’s premises. The Court of Appeal was tasked with answering who should be liable for Strang’s negligence; the third defendant (given that Strang had been acting under the instructions of their fitter) or the second defendant (given that their foreman supervised the entire operation)?

In highlighting that the perceived unitary notion of employer liability rested on ‘slender authority’,[[1013]](#footnote-1013) the Court unanimously determined that dual liability existed on these facts so as to hold both the second and third defendants vicariously liable. However, both judges adopted somewhat different reasoning in arriving at this conclusion. As was discussed in section 2.5.1, May LJ preferred to focus on the ‘employers' right (and theoretical obligation) to control the relevant activity of the employee’,[[1014]](#footnote-1014) an argument that was received favourably in the later case of *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*.[[1015]](#footnote-1015) According to his Lordship, ‘a proper application’ of the *Mersey Docks* principles will rarely lead to dual liability.[[1016]](#footnote-1016) In contrast, Rix LJ adopted a broader integration-based approach, and he doubted whether the doctrine of dual vicarious liability should be ‘wholly equated with the question of control’.[[1017]](#footnote-1017) Instead, he suggested, we should examine whether the employee in question is ‘so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.’[[1018]](#footnote-1018) Which approach, we might therefore ask, is to be preferred?

According to Barron, May LJ’s control test is more likely to be correct, because Rix LJ ‘seems to confuse the tests he considers’.[[1019]](#footnote-1019) In Barron’s view, an assessment of integration is more relevant to the issue of whether an employment relationship exists in the first place, rather than with the question of which employer ought to be held responsible for the harm. He attempts to support this statement by referencing *Hawley*,[[1020]](#footnote-1020) but it is here that his argument runs into trouble. Hallett LJ in *Hawley* actually highlighted, in a similar vein to my analysis in section 5.2.3, that the ‘extent to which an organisation can control another's employee will obviously be relevant to the question of how much the employee has become embedded in that organisation’.[[1021]](#footnote-1021) Consequently, to the extent that control and integration are closely related, it makes little sense to support May LJ’s formulation whilst simultaneously downplaying Rix LJ’s test. The only difference between the two approaches, it seems, is that Rix LJ’s test is more conducive to a pluralistic balancing exercise that openly allows consideration of multiple theories.[[1022]](#footnote-1022) This is perhaps unsurprising in light of the fact that his Lordship sought to give consideration ‘to the function and purposes of the doctrine of vicarious liability’, much like I did when developing my contextual-pluralist model of liability in Chapters 2 and 3. Equally unsurprising is that Lord Phillips (who notably laid out his theoretical five-step test in *CCWS*) also expressed his approval for Rix LJ’s integration-based approach,[[1023]](#footnote-1023) and it was on the basis of this test that Lord Phillips advocated for dual vicarious liability in *Hawley*. This appears to support the view of various commentators who have recognised that the adoption of Rix LJ’s formulation will likely lead to more frequent findings of dual liability in the future.[[1024]](#footnote-1024)

This scholarly intuition has now seemingly been confirmed by the recent case of *Natwest Markets Plc v Bilta*,[[1025]](#footnote-1025) where the Court of Appeal found dual liability between two parties in relation to fraudulent banking activities. Notably, this finding was based primarily on Rix LJ’s integration test, and the judge at first instance was clearly persuaded by the further guidance offered by His Lordship in *Viasystems* (which, it is suggested, could also be useful for an application of dual vicarious liability to the sporting context).[[1026]](#footnote-1026) In short, Rix LJ observed that the general employer would remain liable where the tortfeasor is used for a limited time in the general employer’s ‘own sphere of operations’ and using their equipment; in contrast, where the tortfeasor is ‘seconded for a substantial period of time’ to the temporary employer to perform a role embedded in that organisation, the temporary employer should be solely liable. Dual vicarious liability will be found, according to Rix LJ, where the employee is ‘selected and possibly trained by his general employer… but employed at the temporary employer’s site… using the temporary employer’s equipment, and subject to the temporary employer’s directions’.[[1027]](#footnote-1027) Let us consider two common sporting examples to demonstrate how this guidance, allied to the use of theory, might work in practice.

The first relates to injury caused by athletes whilst out on international duty. In many sports, players are released by their clubs to their respective governing bodies in order to partake in international representative fixtures.[[1028]](#footnote-1028) Where this is the case, we might question whether it is appropriate to impose dual liability on both the tortfeasor’s club and NGB when negligence is committed on international duty. One of the only cases to test this assumption arose in 2009, when the former professional footballer Dean Ashton sued both Chelsea FC and the Football Association (FA) for an injury he suffered during an England training session in 2006.[[1029]](#footnote-1029) The perpetrator of the injury, Shaun Wright-Phillips, was, at the time, contracted to Chelsea. On the basis of Rix LJ’s guidance, might it have been arguable that, if the negligence of Wright-Phillips had been established, both the FA and Chelsea could have been dually liable? Possibly. Wright-Phillips was trained primarily by Chelsea, and given the sporadic nature of international breaks in professional football, it could hardly be said that he was ‘seconded for a substantial period of time’ to the FA. Conversely, it could be argued that England also provided training, and that Chelsea’s general lack of control over such actions meant that Wright-Phillips was solely embedded into the FA’s organisation for that harm.[[1030]](#footnote-1030) The fact that the case was eventually settled in 2011 – with the FA alone paying out compensation – seems to accord with this analysis.[[1031]](#footnote-1031)

Nevertheless, if we are cognisant of the importance of context and fact sensitivity, it must be recognised that, under slightly different facts, the governing body may not have been so quick to concede sole liability. Consider, for example, the altercation between Raheem Sterling and Joe Gomez whilst both were on international duty for England in 2019.[[1032]](#footnote-1032) Sterling’s assault on Gomez was fuelled by a previous clash between the two when they were playing for their respective clubs, Manchester City and Liverpool, a few days prior. Given that the friction between the players arose as a result of their integration into their own clubs (where both players were also subject to the control of their respective general employers), it is suggested that dual liability between the FA and Manchester City would have been a sensible outcome had Gomez had sought recourse to the civil courts.

A second type of temporary sporting transfer that seems particularly apt for dual vicarious liability are those developmental loans that are designed to nurture and improve young upcoming talent. Such deals, which usually involve one large club and one smaller club, provide a benefit to both parties in that they boost the resource value of the (typically larger) general employer’s assets,[[1033]](#footnote-1033) whilst simultaneously providing an immediate injection of talent at a relatively low cost for the (typically smaller) temporary employer. In many cases, the general employer is content to continue paying the full wages of the loanee, provided that the athlete is gaining important experience in playing competitive professional matches.[[1034]](#footnote-1034) Of course, just because some larger clubs continue to pay the wages of a developmental player does not necessarily mean that they ought to automatically bear any responsibility for harm committed by such a player whilst out on loan. As we saw in *Hawley*, for instance, ASE paid the errant doorman, but it was Luminar who were held solely liable for his conduct. It is suggested, however, that there may be good theoretical reasons to distinguish a sporting developmental loan from the facts of *Hawley*. These reasons are primarily based on the notion that the loaned athlete is often treated ‘as if they were in the building’ of their permanent employer.[[1035]](#footnote-1035)

For instance, in the modern era, it is now common practice for representatives from the general employer to regularly visit the loaned athlete at training and to debrief them after every game, as well as to compile detailed GPS and performance data on the player.[[1036]](#footnote-1036) Notably, many loan agreements for youth players also often entail penalty clauses of six-figure sums for the borrowing team if the loaned player does not participate in a certain number of games.[[1037]](#footnote-1037) Where this is the case, it is reasonable to conclude that the lending club still retain some degree of control over (and benefit from) the player’s activity, so much so that Geey questions whether the general employer’s ‘material influence over the selection and recruitment policies of another’ is in fact compatible with FIFA’s regulations.[[1038]](#footnote-1038) In addition, we could also say that, by including such penalty clauses, the general employer is also influencing the level of risk posed by their on-loan asset. Finally, it is often the case that the permanent employer retains the power to dismiss or punish the loaned athlete for any wrongful behaviour. By way of example, when Burnley FC loanee Danny Drinkwater was involved in a nightclub incident in 2019, it was reported that his parent club, Chelsea, ‘allowed’ Burnley to ‘deal with the incident and decide on any punishment’.[[1039]](#footnote-1039) In this regard, it might be said that Chelsea, much like Luminar in *Hawley*, had the ‘last word’ on the control exercised over the athlete.[[1040]](#footnote-1040)

Taken together, an in-depth examination of the contractual provisions in many loan agreements indicates that a finding of dual vicarious liability will often be a sensible and logical outcome in the sporting context. This is reinforced by a theoretical analysis, with factors such as control and enterprise liability indicating that a bright-line test rendering either the general or temporary employer wholly liable will, in many scenarios, be far too simplistic.

**5.5.3 Apportionment of Responsibility**

If, as I have suggested, dual liability is to be invoked with more frequency in the borrowed servant context, the final question to ask is what the division of responsibility ought to be between the two employers. Perhaps the starting point for such an assessment should be an examination of any contractual provisions agreed by the parties. This might prove a particularly pragmatic solution in the context of sport, particularly as Bond, Widdop and Parnell note that, due to the level of trust required by the two parties entering into a loan arrangement, clubs usually prefer to enter into loan deals with a small number of ‘interconnected’ clubs in ‘closed triads’.[[1041]](#footnote-1041) According to their recent empirical study, each Premier League club has, on average, three loan partner clubs.[[1042]](#footnote-1042) These regular transactions are perhaps conducive to a situation whereby agreements as to the division of liability can be worked out *ex ante* between two parties already exhibiting an established pre-existing level of trust. Consequently, whilst I have previously highlighted in section 5.2 that courts will generally look to the realities of the relationship (rather than its label) in assessing the existence of an employment relationship,[[1043]](#footnote-1043) it is suggested that courts should be more willing to accept the parties’ intentions in this context. In contrast to the determination of an employment relationship (which, as we have seen, often operates against the background of an NGBs or club’s monopolistic power), we are dealing here with two commercial entities in a relationship of trust conducting an arms-length business agreement. If some clubs do not currently negotiate agreements about indemnification for vicarious liability, they perhaps, on the basis of this discussion, ought to consider doing so.

In the absence of such an agreement, however, judges will, following the guidance laid down in *Viasystems*, apportion liability jointly and severally on a 50/50 basis. According to May LJ, it is a ‘logical necessity’ that, because the court is not concerned with an assessment of the personal responsibility of an employer, the division of contributory responsibility under the Civil Liability (Contribution) Act 1978 should be equal.[[1044]](#footnote-1044) On this basis, both judges in *Viasystems* were eager to stress that dual vicarious liability should only be imposed where the right of control is equally shared.[[1045]](#footnote-1045) This should be contrasted with the Supreme Court of Canada’s division of dual liability in *Blackwater v Plint*.[[1046]](#footnote-1046) In holding that both the Canadian government and the United Church were responsible for a dormitory supervisor’s sexual assault of a student at a boarding school, McLachlin CJ concluded that liability should be apportioned 75/25 between Canada and the Church. This was because, as between the two defendants, Canada was the ‘more senior of the two’ and was in a better position to control and supervise the situation.[[1047]](#footnote-1047) The Supreme Court rejected Canada’s argument - later resurrected and buttressed by Neyers - which suggested that it was illogical that ‘someone who has held liable without fault, could be more at fault than another person who was held liable without fault’.[[1048]](#footnote-1048)

I too reject this argument. In light of the discussion in section 2.2, it is suggested that Neyers’ reference here to fault is based on mere fiction. Given that vicarious liability operates as a principle of strict liability, we would not say that an employer solely liable was wholly ‘at fault’ for the tortfeasor’s harm. In this regard, by allowing unequal apportionment of responsibility, we are not necessarily suggesting that a party who bears the greater brunt of the burden is more at fault. After all, and as Case highlights, responsibility is a ‘neutral term’, and it is not axiomatic that it ought always to be conflated with culpability or fault.[[1049]](#footnote-1049) Rather, it may simply suggest - perhaps for reasons relating to control, benefit or another relevant theory – that it is fairer that one party bear a greater share of responsibility than the other. This view is seemingly also supported by Brodie’s work on dual liability, as he outlines that *Viasystems* fails to recognise the ‘variety of forms of control’, and that, in a borrowed employee scenario, different employers may well possess ‘different levels of responsibility’.[[1050]](#footnote-1050)

In addition, the Canadian approach in *Blackwater*, which seems more in line with Atiyah’s seminal work, also provides a much more flexible method of imposing dual vicarious liability. As outlined in Neyers’ work, this is largely because unequal apportionment appears to herald a shift towards the use of judicial notions of ‘just and equitable’ in each case.[[1051]](#footnote-1051) In this light, we might surmise that my contextual-pluralist model has much more in common with the *Blackwater* approach to dual liability than it has with the non-interventionist model adopted in the UK, primarily because the Canadian approach is open to the influence of value judgments on the apportionment of responsibility. However, provided the reasons for such judgments are both sensible and transparent, I have little problem with permitting distributive justice concerns to seep into the apportionment decision. For instance, it could enable a judge to take into account other factors in the context of sporting loans, such as the theories of deep pockets and loss spreading. The wealth disparity between elite and lower-league clubs (particularly in football) is well known,[[1052]](#footnote-1052) and it may be that the *Blackwater* approach allows us to be more cognisant of such concerns. By freeing ourselves from the shackles of equal apportionment imposed by *Viasystems*, the Canadian approach appears to provide judges with greater scope to conduct a wider theoretical examination of a particular case, and this is largely consistent with the broader legal realist ethos that underlies my contextual-pluralist model of vicarious liability.

**5.6 Conclusion**

It is likely that the common theoretical solution under my contextual-pluralist model would point towards the vicarious liability of many NGBs for certain acts intrinsically linked to the control they possess and/or the benefit they reap. This is certainly the case for funded athletes, where the deeper pockets of the governing body would seem to further justify vicarious liability in this context. This was illustrated with reference to the facts of *Varnish*, and it was highlighted from this case that certain factors prominent in employment law (such as mutuality of obligation and personal performance) ought to be downplayed when dealing with the issue of vicarious liability. Conversely, the adoption of a policy-oriented approach also means that theories such as control should be prioritised in this context, as this seemingly has a much stronger moral and normative impact on third parties. As a result of this analysis, it has been observed that athletes could be classed as an employee for one purpose, but an independent contractor for another. The same is also true for non-funded athletes, although a vicarious liability claim here may admittedly not be strictly necessary when dealing with a claim against those sportsmen who compete at the apex of their sport. However, aside from these (select few) athletes, a brief perusal of the overly intrusive regulatory measures imposed by NGBs and competition organisers in both professional tennis and golf illustrates that the imposition of vicarious liability on these bodies is certainly feasible. In this regard, it has been suggested that, depending on the governance structure of each sport, it may be wise for some regulatory organisations to consider imposing a requirement for mandatory liability insurance on all athletes.

To this, I have also maintained that neither an action in negligence, nor an action under the closely related doctrine of the non-delegable duty of care, can adequately replace this more policy-oriented approach to employer liability. In particular, given the generally undefined and uncertain nature of the non-delegable duty, this cause of action should only be seen, at best, as supplementing (rather than completely replacing) a claim in vicarious liability for the actions of an individual athlete. Finally, I have also demonstrated that, in the context of team sports, the temporary transfer of a player may give rise to thorny issues as to which employer ought to take responsibility for any ensuing harm. Again, the theories of control and enterprise liability are important here, and I have suggested that, in many cases, dual liability will often be an appropriate response in light of my preference for Rix LJ’s broader integration-based approach. My recommendation to permit unequal apportionment in this context also allows us to maintain a more flexible model of vicarious liability, in that it allows for insights from other relevant theories (such as deep pockets and loss spreading) to shape the analysis.

**CHAPTER 6**

**IDENTIFYING A CLOSE CONNECTION: VICARIOUS LIABILITY FOR ON-THE-FIELD ACTS**

**6.1 Introduction**

Having discussed in the previous two chapters the plethora of issues related to the establishment of an employment relationship in both amateur and professional sport, our focus now shifts to the second of the two fundamental tests required to hold an employer vicariously liable: that the tortious act be committed by an employee *in the course of their employment*. Whilst some sports law scholars have maintained that it is an inherently troublesome exercise to draw a line between those on-field acts that are, and are not, within the course of employment,[[1053]](#footnote-1053) others have resorted to an overly simplistic and elementary distinction between negligent and intentional acts in applying the close connection test from *Lister v Hesley Hall*.[[1054]](#footnote-1054) Section 6.2 subjects this distinction to critical analysis, and explains, on the basis of the only on-field vicarious liability case to be heard in the UK (*Gravil v Carroll and Redruth Rugby Football Club*),[[1055]](#footnote-1055) how a more granulated and theoretically-informed approach is necessary. Thereafter, the following sections explore the numerous theoretical justifications that were employed by the Court of Appeal in this case in order to impose vicarious liability.

Consequently, in section 6.3, I discuss the utility of individual deterrence in relation to on-field conduct, and I examine whether the imposition of liability on sports clubs may help to eradicate foul play by those athletes that possess a penchant for brutal or violent behaviour. It is suggested that this form of deterrence may be a useful theory to consider here, and that claims relating to the tortious acts of a sport’s so-called ‘hard men’ should be directed down the more appropriate route of vicarious liability (rather than, as some scholars have suggested, being framed in terms of an employer’s primary liability). It is noted, however, that it would not be wise to rely solely on the theory of deterrence to help respond to all tortious on-field harm caused by athletes. In this light, I suggest that enterprise liability perhaps ought to be the most dominant consideration in this context. This theory is informed not only by a fairness-based rationale that analyses the benefits enjoyed by a club, but also by the notion of risk (which seemed to be the more dominant enterprise liability justification for the result in *Gravil*). This discussion sits nicely alongside my normative intuition outlined in Chapter 2, where I maintained that enterprise liability should be viewed as the primary factor in assessing the close connection test for harm committed on the sports field. Although *Gravil* failed to recognise that a risk-based approach to vicarious liability may clash with an assessment of a sport’s so-called playing culture at the standard of care stage, it will be discussed in this section how my empirically focussed contextual-pluralist model may provide one innovative method of avoiding this conflict.

**6.2 The Negligence-Intentional Divide in Vicarious Liability Sports Cases**

**6.2.1 Negligent Acts**

As was discussed in section 4.4.3(ii), the usual practice for injured sports claimants is to pursue an action in negligence, the primary motivation of which is to ensure that the injured party retains access to the applicable insurance policies of the tortfeasor’s employing club.[[1056]](#footnote-1056) Barring the case of *Gravil* (which is considered in more detail below),[[1057]](#footnote-1057) alternative causes of action under trespass to the person – which requires evidence of an intentional act[[1058]](#footnote-1058) - are rarely initiated, largely because most insurance policies exclude cover for deliberately inflicted injury.[[1059]](#footnote-1059) With this rider in mind, it is clear that the bar for establishing negligence is a relatively high one. Following Donaldson MR’s clarification in *Condon v Basi* as to the applicable standard of care in sport,[[1060]](#footnote-1060) many judges have generally been cognisant of sport’s social utility and the fact that many games are often played at a very fast speed by participants who are acting in the heat of the moment.[[1061]](#footnote-1061) In addition, and as was made clear by Tuckey LJ in *Caldwell v Maguire and Fitzgerald*, courts are required to take into account the prevailing circumstances of any sporting contest, including ‘its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant.’[[1062]](#footnote-1062) In other words, courts take into account the fact that risk is an intrinsic aspect of many sports, and that it is often ‘part of the fundamental attraction to that sport in the first place’.[[1063]](#footnote-1063) This is reinforced by the sentiments of Dyson LJ in *Blake v Galloway* when he maintained that:

‘the participants are taken impliedly to consent to those contacts which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts… But they do not assume “the risk of a savage blow out of all proportion to the occasion”’.[[1064]](#footnote-1064)

Whenever negligence is established, however, the vicarious liability of the tortfeasor’s employer becomes an important feature of the litigation. One of the first known examples of a sports club being held vicariously liable for on-field conduct occurred in *McCord v Cornforth and Swansea City AFC*,[[1065]](#footnote-1065) where the latter were held vicariously liable for a negligent career-ending challenge committed by their captain John Cornforth. Since then, and following a line of cases including *Watson and Bradford AFC v Gray and Huddersfield Town AFC*[[1066]](#footnote-1066) and *Thomas v Thornton and Bramley Rugby League Club*,[[1067]](#footnote-1067) the vicarious liability of sports clubs for the negligent actions of their players has reached an almost ‘presumptive, uncontested status’,[[1068]](#footnote-1068) with the result that many later cases have not even listed the tortfeasing athlete as a defendant in the proceedings.[[1069]](#footnote-1069) This is unsurprising in light of Lord Phillips’ comments in *Various Claimants v Catholic Child Welfare Society* that suggest that, ‘[w]here the tortfeasor does something that he is required or requested to do pursuant to his relationship with the defendant in a manner that is negligent, [the course of employment] test is likely to be satisfied.’[[1070]](#footnote-1070) Indeed, it is perhaps of little surprise that, since the seminal case of *Lister*, the majority of cases dealing with the course of employment criterion have related to *intentional* acts perpetrated by the tortfeasor. As such, and to translate this to the sporting context, vicarious liability for on-field negligent actions is simply now par for course because of its ‘integral connection with the player’s employment by the club’.[[1071]](#footnote-1071)

**6.2.2 Intentional Acts**

In contrast to negligent acts, it is perhaps less clear-cut whether vicarious liability will arise for deliberately violent on-field acts. Seemingly in line with the comments made by Cox,[[1072]](#footnote-1072) Beloff et al maintain that a club is unlikely to be held responsible for an employee’s deliberate act, and that only negligent or reckless injury will trigger vicarious liability.[[1073]](#footnote-1073) However, whilst it might be acceptable to argue normatively that this ought to be the case, it is far more problematic, from a descriptive point of view, to suggest that this *is* the case. Indeed, one can identify numerous examples in recent years of various intentional acts – such as a racist attack at a petrol station,[[1074]](#footnote-1074) an assault at an after-work Christmas party[[1075]](#footnote-1075) and the rape of a Jehovah’s Witness by an elder[[1076]](#footnote-1076) – that were deemed to be within the course of employment. The apparent problem with Beloff et al’s conclusion here, then, is that their analysis relies primarily on pre-*Lister* case law.[[1077]](#footnote-1077) Throughout the twentieth century, the outcome of cases was largely predicated on the second limb of the so-called Salmond test, which asked whether a particular tortious act was a ‘wrongful and unauthorised mode of doing some act authorised by the master’.[[1078]](#footnote-1078) This gave rise to the presumption that intentional harm would rarely (if ever) lead to vicarious liability,[[1079]](#footnote-1079) as Stevens correctly suggested that it would be stretching language beyond credulity to argue that many deliberate acts (such as sexual abuse) could be described in any way as an improper mode of doing an authorised act.[[1080]](#footnote-1080) Perhaps in light of the intuition that the claimant in *Lister* was a deserving victim, various judges in this case – most notably Lords Steyn and Millett – laid the Salmond test to rest, and introduced a broader test of ‘close connection’.[[1081]](#footnote-1081) It was much easier to find vicarious liability for intentional acts on the basis of this test, for it was far more logical to say, for instance, that sexual abuse was closely connected to a particular individual’s employment.

The incorrectness of Beloff et al’s analysis is also neatly illustrated by the outcome in *Gravil*. In this case, the claimant, Andrew Gravil, was playing for Halifax Rugby Football Club when he was punched in the face by an opposition player following a post-scrum melee in a rugby union game. The blow, which occurred after the referee’s whistle had gone, caused a blow-out fracture of Gravil’s right orbit. After successfully demonstrating an actionable battery against the initial tortfeasor, Richard Carroll, the claimant also sought to establish the vicarious liability of Carroll’s employer at the time, Redruth Rugby Football Club. In overruling the findings of Gray J in the Bristol District Registry, the Court of Appeal agreed with the claimant’s contention that Redruth ought to be held responsible for this harm. Clarke MR, in adopting an approach that is broadly consistent with my contextual-pluralist framework of vicarious liability, suggested that it was ‘fair and just to hold the club vicariously responsible for the injury to the claimant’,[[1082]](#footnote-1082) and he attempted to buttress this reasoning with reference to two particular theoretical considerations.

The first, as was noted in section 2.4.1, relates to the deterrent effects of liability. In the court’s view, the imposition of vicarious liability here would encourage many sports clubs to adequately discipline any athlete who flagrantly breaches the rules of the game.[[1083]](#footnote-1083) The second reason for holding Redruth responsible for this harm was centred around the fact that off-the-ball melees occurred with such frequency in rugby that they could reasonably be regarded as ‘part of the game’.[[1084]](#footnote-1084) Clarke MR was thus eager to stress that the throwing of punches was an ‘ordinary (though undesirable) incident of a rugby match’, and it was something that ‘both clubs would have expected to occur’.[[1085]](#footnote-1085) Although His Honour did not explicitly use the term, this was (in all but name) an argument based on enterprise liability. Indeed, and as Chamallas notes, an examination of the foreseeability and frequency of a particular act forms the basis of an enterprise risk enquiry,[[1086]](#footnote-1086) and it is perhaps for such reasons that other scholars have suggested that risk is closely aligned with the notion of causation.[[1087]](#footnote-1087)

With this in mind, a number of observations might be made about this case. First, it is relevant that *Gravil* remains the only UK case to consider the vicarious liability of a sports club for deliberate on-the-field conduct.[[1088]](#footnote-1088) This paucity of cases is perhaps best explained by the evidential difficulties in proving intention in a fast-paced physically invasive sport, as well as by the so-called sporting omerta (which suggests that many sporting communities subscribe to the adage that “what happens on the pitch, stays on the pitch”).[[1089]](#footnote-1089) As such, it is likely that an assessment of the course of employment enquiry in relation to on-field injuries will only be necessary for those scenarios that involve some particularly egregious off-the-ball act. Second, *Gravil* confirms that there is now little need to resort to this unhelpful negligence-intentional divide in establishing the closeness of connection in each scenario. It may often be the case that some intentional acts are just as intrinsic to a particular sport as a negligent or mistimed challenge. Take, for instance, the “beanball” pitch in professional baseball, a practice which involves the pitcher intentionally throwing the ball at a batter’s head. Roser-Jones observes that this is now ‘an accepted custom in baseball, where pitchers known for their hits are commonly referred to as “headhunters”, and managers order such hits strategically’.[[1090]](#footnote-1090)

Third, it appears that loss spreading is a less relevant factor when it comes to an assessment of the course of employment test in sport. This is supported by Clarke MR’s judgment in *Gravil*, when he criticised Gray J’s conclusion in the earlier appeal case. In the latter’s view, the inherent risk of violence in rugby did give rise to a close connection here, but this was not a strong enough reason to impose vicarious liability given the non-profit nature of the semi-professional rugby club.[[1091]](#footnote-1091) Clarke MR in the Court of Appeal could not see, however, how this fact:

‘leads or tends to lead to the conclusion that the question whether the connection between the employment and the tort was so close as to make it fair and just to hold the club liable should be answered in the negative.’[[1092]](#footnote-1092)

Clarke MR is surely correct here. As was discussed in section 2.5.2, the ability to spread loss is a more important consideration for the first stage of vicarious liability, whereas enterprise liability seems more appropriate for an examination of the close connection requirement. As such, if we are analysing whether a particular on-field act was within the course of an amateur or semi-professional athlete’s employment, it will be rather unnecessary under my contextual-pluralist model to examine the theory of loss spreading again. We can assume that, if the claim reached this second stage, an examination of the defendant club’s ability to spread loss would already have been conducted at the first stage. This reinforces, once again, the apparent need to segregate one case into two different contexts, depending on the particular element of vicarious liability that is under consideration. Of course, one counter point to this is that, if the analysis is done sequentially, there might be a de facto priority of loss spreading in sporting vicarious liability cases (since we only get to examining other theories if the first stage is passed). However, it is worth remembering that this may only be the case in the context of *amateur* sport. If we are examining the relationship requirement in, say, the context of harm committed by a loaned professional athlete, we saw in Chapter 5 that control and enterprise liability will be afforded the most importance here. In this light, and to stress once more the underlying thrust of my contextual-pluralist model, it will be the context that determines the weight to be afforded to each theory in any given scenario.

Finally, and on a point of broader significance, it is clear from the surrounding literature on *Gravil* that remarkably little attention has been paid to the application of the close connection test in this case. Despite judicial comments that suggest that the fundamental issue in this litigation was the potential liability of clubs for off-the-ball assaults,[[1093]](#footnote-1093) the vast majority of scholarly analysis following this case has focussed on the potential employment status of semi-professional athletes,[[1094]](#footnote-1094) with many commentators seemingly content to assume that punching an opposition player is in fact an inherent aspect of contemporary rugby. The following analysis seeks to fill in this lacuna by offering a detailed analysis of the two particular theories that were utilised in order to justify the satisfaction of the close connection test in *Gravil*: deterrence and enterprise risk. It will be argued that, whilst the concept of deterrence could be a useful theoretical consideration in the context of on-field acts, it cannot, by itself, provide a satisfactory indicator of vicarious liability. Not only does this help to reinforce the pluralistic methodology that underpins my approach to the doctrine, but it also paves the way for viewing enterprise liability as the more dominant theoretical consideration in this context.

**6.3. Deterrence and the Sporting ‘Hard Man’**

The Court of Appeal in *Gravil* highlighted that the ‘line between playing hard and playing dirty’ is often a fine one, and that the ‘temptation for players to cross the line… may be considerable unless active steps are taken by clubs to deter them from doing so’.[[1095]](#footnote-1095) In this regard, the court envisaged that, if vicarious liability were to be imposed in such scenarios, it would spur clubs into taking disciplinary action against their violent players (rather than, as might otherwise be the case, simply turning a blind eye to their foul play). Notably, most scholars who discuss the theory of (individual) deterrence in regards to on-field conduct seem to suggest that it will be most relevant in relation to those players who demonstrate ‘a propensity for violence on the pitch’.[[1096]](#footnote-1096) This seems to be a sensible limitation in light of the fact (mentioned in *Gravil*)that we should only want to deter ‘dirty’ players, rather than those who simply play the game in a physical – yet fair – manner.

Perhaps more appropriate terminology for these ‘dirty’ players is evident in the sporting vernacular, in which such athletes are often endearingly referred to as ‘hard men’ or ‘enforcers’. Their primary role is to protect and motivate their own teammates by intimidating the opposition,[[1097]](#footnote-1097) and it is common for such players to have ‘hassled, kicked and punched their way to the top’.[[1098]](#footnote-1098) In adopting what appears to be deterrence-based reasoning, Morgan has recently opined that clubs ought to think twice about employing (and selecting) such players who have a penchant for violence.[[1099]](#footnote-1099) In his view, if a club ‘encourages aggressive behaviour in a player outside of the rules of the game, for instance by instructing them to act as an on-pitch “enforcer”… vicarious liability for their on-pitch acts of violence is likely.’[[1100]](#footnote-1100) James and McArdle make a similar point in their work when they suggest that, ‘[w]here the club knows of a player’s propensity to violent or aggressive play, and either buys him for that reason or continues to pick him despite his playing in that manner, then vicarious liability should attach.’[[1101]](#footnote-1101)

This current scholarly consensus, however, appears to skirt over a potentially important issue here: whether direct liability in negligence may be a more appropriate method of imposing liability on an employer for the actions of a dirty or volatile player. In this regard, if we are to accept that the deterrence of violent play is a significant reason for imposing (or refusing to impose) vicarious liability in the on-field context, it must adequately respond to this concern.

**6.3.1 Direct Liability: A Preferable Cause of Action?**

One of the more notable judgments relied upon by James and McArdle is the US case of *Tomjanovich v California Sports Inc*.[[1102]](#footnote-1102) Gullota had suggested, in the aftermath of this judgment, that *Tomjanovich* ‘could become instrumental in deterring violence in professional sport’,[[1103]](#footnote-1103) and this is perhaps an intuitively appealing stance in light of the facts of the case. Here, the claimant (a professional basketball player in the National Basketball Association) was seriously injured after being punched in the face by Kermit Washington, an opposition player representing the Los Angeles Lakers. Washington had been hired by the club primarily to act as an ‘enforcer’ on the court, and the Lakers were clearly well aware of – and perhaps even impressed by - the tortfeasor’s propensity for violence. This was illustrated by the fact that the club had persuaded Washington to ‘appear in a Sports Illustrated article on basketball’s “enforcers”’.[[1104]](#footnote-1104) Interestingly, the Lakers were held both personally *and* vicariously liable for the harm to Tomjanovich. Liability under the former was predicated on the basis that the club had seemingly authorised and ratified Washington’s conduct by failing to control or reprimand their violent employee. This finding of negligence perhaps sits rather uneasily alongside James’ recent suggestion that, where a ‘club is aware of such a [violent] tendency but ignores it, or otherwise fails to control, discipline or retrain the player, then… the club will be vicariously liable.’[[1105]](#footnote-1105) It also appears to clash with James and McArdle’s (somewhat dubious) assertion that a club might escape vicarious liability if they are not aware of an athlete’s volatile history.[[1106]](#footnote-1106) Given that notions of fault appear to be creeping into this analysis, the theory of individual deterrence may be open to the criticism that it unduly blurs the conceptual divide between primary and vicarious liability.

Indeed, the Court of Appeal judgment in *Mattis v Pollock* appears to provide support for the argument that direct liability in negligence is the preferred response to the antics of sporting hard men.[[1107]](#footnote-1107) This case concerned a nightclub bouncer (Mr Cranston) exacting revenge on a patron by stabbing him in the back. Much like the Lakers in the *Tomjanovich* litigation, the employer here was clearly aware of Cranston’s violent nature, and it was this reputation that led to his employment. The nightclub owner had specifically intended to employ a ‘bully’ in order to both respond to a ‘weak door’ and to ‘intimidate customers’.[[1108]](#footnote-1108) Whilst Judge LJ found that vicarious liability was established on these facts, he did conclude that, had it been necessary to decide the issue, he would have held the employer personally liable under negligence for knowingly employing a bouncer with ‘aggressive tendencies, which he encouraged rather than curbed’.[[1109]](#footnote-1109) Giliker argues that direct liability would have been a far more judicious basis upon which to impose liability on the nightclub owner,[[1110]](#footnote-1110) and others would appear to agree with this stance.[[1111]](#footnote-1111) McIvor, for example, criticises the judicial confusion between primary and vicarious liability in *Mattis*, and she points to the first limb of the old Salmond test - which considered whether a wrongful act was authorised by the master – as one reason for the courts mixing these two forms of liability.[[1112]](#footnote-1112) Similarly, Binnie J in *Jacobi v Griffiths* commented that ‘an undue emphasis on the deterrence factor may blur the line between vicarious liability and negligence’, and he stressed that we ought to consider ‘developing and refining the paths of potential direct liability’ for many employment-related harms.[[1113]](#footnote-1113)

Now, if this analysis was not developed any further, I would have no qualms in rebutting these claims. As may be obvious by my discussion in section 5.4 (where I argued that it may matter very little whether a claim is founded under vicarious liability or a non-delegable duty), I am unmoved by arguments which are based on the conceptual coherence of the law. To a large extent, my view is that these concerns about the appropriate role of primary and vicarious liability are best left stored in the proverbial ivory tower of academia. However, it must be recognised that there is a potentially important practical reason for maintaining a distinction between primary and vicarious liability: that is, the availability of punitive (or exemplary) damages. Such damages were, in fact, a feature of the *Tomjanovich* case, with the claimant there receiving $3.25m ($1.5m of which constituting punitive damages). These awards are primarily designed to punish the wrongdoer for their (usually intentional) behaviour,[[1114]](#footnote-1114) whilst at the same time seeking to deter that party from committing similar acts in the future.[[1115]](#footnote-1115) However, whilst the award of such damages is now an established practice in cases which concern personal liability, it is far more controversial, as we saw in section 2.5.2, to impose them vicariously on an employer who has not demonstrated any degree of fault. Given that the authorisation or ratification of a ‘hard man’s’ antics may sometimes be done with the intention of making a profit in excess of any compensation claim,[[1116]](#footnote-1116) it may be that punitive damages could occasionally be applicable in this scenario on the basis of *Rookes v Barnard*.[[1117]](#footnote-1117)

The problem with relying on this argument to justify direct liability, however, is that it fails to recognise that English law has been notably restrictive in its approach to awarding punitive damages.[[1118]](#footnote-1118) Indeed, it has perhaps little surprise that the only examples in which punitive damages were awarded for on-field sporting injury were cases heard in other jurisdictions.[[1119]](#footnote-1119) Moreover, the argument for direct liability also appears to gloss over two (potentially more important) practical issues that do not arise if one imposes vicarious liability for the tortious behaviour of sporting enforcers. The first, which was mentioned in sections 4.4.3 and 5.4, relates to the availability of insurance. Whilst direct intentional acts of the employer are seemingly not covered by an insurance policy, an employer held *vicariously* liable for an intentional act willbe able to rely on their insurers to foot the bill. On this basis, it might be said that both the injured claimant and the defendant club may favour a vicarious liability claim over an action in negligence. Second, and as was touched upon in section 2.4.1, there will usually be serious evidentiary difficulties in proving that an employer knowingly hired a so-called ‘hard man’. As will be explored in the following section, the advantage of vicarious liability is that it overcomes this evidentiary hurdle by allowing clubs to internalise the costs of hiring enforcers.

**6.3.2 The Malleable Concept of ‘Reputation’**

It was suggested in the previous section that the issue of an employer’s responsibility to deter dirty play by ‘hard men’ is perhaps better suited to a claim under vicarious liability, despite the intuitive appeal of an action in negligence. Although it was seen that some scholars view a club’s knowledge or awareness of an athlete’s violent tendencies as pivotal to the establishment of a vicarious liability claim, this is arguably incorrect. As was discussed in section 2.2, vicarious liability is a species of strict liability, so it should not require any degree of fault on behalf of the employer.[[1120]](#footnote-1120) This, it is suggested, is a key advantage of a vicarious liability claim. Given the existence of the aforementioned sporting omerta, fault will likely be difficult to detect in this context. This is seemingly due to the fact such a claim would need to make reference to the reputation of the tortfeasor himself, as the claimant in *Mattis* did. Indeed, James and McArdle note that it was Cranston’s ‘intent on avenging the damage to his reputation and re-establishing himself as Pollock’s “enforcer”… that rendered the incident so closely connected to the employment’ for the purposes of vicarious liability.[[1121]](#footnote-1121)

Now, it must be conceded that a focus on an individual’s reputation is not a particularly novel consideration when determining the scope of liability in sport. It was evident, for instance, in the *McCord* judgment, where Kennedy J pointed to the tortfeasor’s previous good character in the sport to find that the challenge was negligent rather than intentional.[[1122]](#footnote-1122) However, I do question just how legitimate (or practical) it is to rely on the malleable notion of reputation to support a direct liability claim in this context. Whilst Morgan suggests that clubs should reconsider selecting players who possess ‘hard or violent reputations’,[[1123]](#footnote-1123) it must be questioned whether a judge (or indeed any other individual) is able to determine, with sufficient clarity, whether a particular athlete possesses this ‘hard man’ reputation. If I am correct about this point, this further weakens the claim for an action in negligence (as opposed to vicarious liability) against a club who employs an on-field enforcer.

Let us take a brief example involving the controversial Uruguayan striker, Luis Suarez. Whilst the forward did in fact bite a player whilst playing for AFC Ajax in 2010,[[1124]](#footnote-1124) is it really fair to say that, when Liverpool signed the striker in 2011, he had a ‘reputation’ for biting opponents (such that Liverpool could be held directly liable for his later bite on Chelsea FC’s Branislav Ivanovic)?[[1125]](#footnote-1125) Not all sports employers will adopt the Lakers’ stance of encouraging their players to appear in magazine articles on ‘enforcers’, nor will many clubs - perhaps aside from those competing in the National Hockey League - attempt to outline in detail the specific attributes of enforcers for salary arbitration purposes.[[1126]](#footnote-1126) Perhaps the only real way to measure an athlete’s character, aside from a gut-instinct reaction, is through an empirical analysis of the number of cautions received by each player. After all, the Court of Appeal in *Gravil* were keen to highlight that, whilst Carroll received a yellow card from the referee for his off-the-ball attack, the RFU disciplinary panel favoured the showing of a red card for his assault.[[1127]](#footnote-1127) However, as the following application to football highlights, assessing the reputation of a player by reference to their disciplinary record is fraught with difficulty.

This is perhaps best demonstrated by turning our focus to a player that many scholars have deemed to be the typical ‘hard man’ of the sport: former Manchester United midfielder, Roy Keane.[[1128]](#footnote-1128) Throughout his 13-year career in the Premier League, Keane received 69 yellows cards and 7 red cards during 366 appearances.[[1129]](#footnote-1129) Contrast this with Scott Parker, a similarly high-energetic midfielder that was often looked upon as a hard-working and enthusiastic ball-winner (rather than a ‘dirty’ player in the same mould as Keane). Parker received 23 more yellow cards and only 2 less red cards in a similar number of games.[[1130]](#footnote-1130) In fact, Keane has a cleaner yellow and red cards per minute ratio than many other players – such as Cesc Fabregas, Pablo Zabaleta and Christian Benteke – that we do not usually associate with reckless play. We might also consider Robbie Savage here, a former player who Davies and Ryall have labelled as one of the ‘famous hard men of football’.[[1131]](#footnote-1131) Surprisingly, Savage only received 1 red card in his entire 346-game Premier League career, and this was only for handball.[[1132]](#footnote-1132) This leads us to an important observation: statistics may be an unreliable method of determining an athlete’s character, particularly in light of the obvious methodological issues in determining the reason for a card (sanctions for time-wasting and handball are clearly far different than sanctions for brutal play). In fact, Gardiner and Felix have correctly posited that such statistics probably tell us more about the developing attitudes of referees rather than the violent nature of individuals.[[1133]](#footnote-1133) It is interesting in this regard that Keane did not consider himself a dirty player, and in a 2002 interview he even suggested that he was only involved in two tackles throughout his career that left players needing to be substituted due to injury.[[1134]](#footnote-1134) We must remember that a reputation as a ‘hard man’ (which is often created and perpetuated by the media, pundits and fans) does not cause injury: bad tackles do.

With this in mind, a number of observations ought to be made here. First, the legitimate concerns about the proper identification of a sporting hard man appear to suggest that a vicarious liability claim will often be a more practical response to an employer’s liability for any on-field harm caused by a ‘dirty’ player. Unlike a claim in negligence, vicarious liability will not necessarily require proof that the club was aware of an athlete’s volatile tendencies, and this will allow them to internalise the costs of selecting (and perhaps even encouraging the behaviour of) supposedly violent players.[[1135]](#footnote-1135) Second, this discussion may also suggest that a successful claim in negligence for knowingly employing an aggressive individual is likely to be rare in practice. As this section has attempted to illustrate, in the ‘agony of the moment’, everyone has the potential to act irrationally and cause serious injury.[[1136]](#footnote-1136) Third, these concerns about the unreliability of reputation are not limited to professional sport. In fact, such problems may be even more pronounced in contexts where employees are not consistently in the public eye, as in *Mattis*. Fourth, to the extent that reputation *is* considered by clubs when selecting employees (as Morgan suggests should be the case), it might be argued that this impedes the legitimate societal interest in providing wrongdoers with a second chance.[[1137]](#footnote-1137) It could also lead to an interesting restraint of trade argument by the exiled employee.

Finally, and on a note of broader significance, this discussion has highlighted that the theory of deterrence (at least in its individual, rather than social, form) may have some role to play in determining the appropriate scope of vicarious liability for on-field harm. However, there are good reasons to think that deterrence alone is not a sufficient indicator of an employer’s responsibility for on-field brutality. Whilst it may provide a good reason for imposing vicarious liability, it does not seem to provide a satisfactory method for determining what particular acts a sports club will be held liable for. In fact, deterrence would presumably lead to vicarious liability for *every* on-field act, because we should want to deter all negligent and intentional harm (no matter how far removed from the game it is). In addition, we might also recall from section 2.4.1 that we ought to be careful of relying on deterrence in the absence of empirical evidence. Consequently, if individual deterrence is to operate as a significant indicator of liability here, it needs to be buttressed by (and arguably subsidiary to) another theory. As the following section illustrates, enterprise liability may be able to respond to these deficiencies in the theory of deterrence.

**6.4 Vicarious Liability for On-the-Field Acts: An Enterprise Liability-Based Approach**

The discussion so far has argued that, in contrast to the apparent view of some scholars who prefer a direct claim in negligence, the theory of deterrence could be used to establish vicarious liability for on-field tortious conduct. However, and in line with my broader call for a pluralistic approach to this area of law, it was suggested that deterrence may need to play a secondary role to the more prominent theory of enterprise liability here. This point was seemingly missed by Clarke MR in *Gravil*, as he made no attempt to establish which theory ought to be the most dominant in this context. As such, whilst the judgment in *Gravil* is to be commended for its theoretical analysis, it arguably suffers from the same flaw that was identified in the ‘thick’ case of *Armes v Nottinghamshire County Council* (in section 3.3.1).[[1138]](#footnote-1138)

We might also recall that Clarke MR focussed predominantly on the risk-related formulation of enterprise liability in his judgment. Now, it is easy to see why he did so. After all, and as Nixon outlines, many sports could perhaps best be described as giving rise to a ‘culture of risk’ in which many injuries and harmful activities are normalised.[[1139]](#footnote-1139) Given that participation in some sports thus requires participants to subject themselves to a ‘higher-than-normal level of risk’,[[1140]](#footnote-1140) it may seem appropriate to assess the inherency of these risks in relation to each particular sport to assess whether vicarious liability ought to be imposed.[[1141]](#footnote-1141) This coincides with the general judicial consensus that, in most instances, the concept of enterprise liability will be the ‘most influential’ determinant of an employer’s vicarious responsibility.[[1142]](#footnote-1142) This focus on risk here is also consistent, I believe, with the benefits of my contextual-pluralist model outlined in section 3.2.

For instance, focussing on what conduct is inherent to, and expected to occur in, each sport provides us with the adaptability to take into account the changing norms and informal rules of that particular game. Indeed, with the aid of rule changes by the International Rugby Board, it is clear to see how acceptable conduct in rugby union scrums has evolved over the years.[[1143]](#footnote-1143) Likewise, and to take a further example, a football player’s approach to aerial duels has arguably changed over time. According to one FIFA spokesman, players in the modern game are more frequently raising their elbows during aerial challenges,[[1144]](#footnote-1144) with the result that any injury caused by a flailing elbow is perhaps now more likely to be regarded as an ordinary and expected incident of contemporary football. As such, and given that the informal culture of a particular sport is ‘evidently quite elastic’,[[1145]](#footnote-1145) a flexible risk-based approach may provide the most satisfactory indicator of vicarious liability in this context. Similarly, and in contrast to deterrence, we might also say that risk provides the most meaningful justification for liability here, as it furnishes us not only with the reason for *why* an employer is held responsible, but also a more focussed method for determining *what* acts an employer will be held liable for.

That said, however, there is arguably more scope for an assessment of benefit enterprise liability here than some judges may care to admit. Whilst Clarke MR briefly mentioned that ‘undetected foul play may be perceived to advance the club’s interests’,[[1146]](#footnote-1146) Gray J in an earlier appeal maintained that it was somewhat of a stretch to classify Carroll’s on-the-field brawl as benefitting his club in any way. In his view, the conduct was more likely to harm Redruth because the player had been sent to the sin bin, and he was subsequently banned from the sport for eight weeks.[[1147]](#footnote-1147) However, just because a club was negatively impacted in one respect (losing a player) does not necessarily mean that they do not benefit in other ways. For instance, had it been established that Gravil was a star player for his team, it is easy to see how Redruth would have benefitted from taking him out of the game before he could inflict any serious sportive damage. Likewise, a club may also benefit from one of their players engaging in underhanded behaviour that is designed to rile up the opposition. If it could be shown that the brawl in *Gravil* only occurred because Carroll was hoping to provoke a reaction from the opposition that would be detected by the referee,[[1148]](#footnote-1148) then a fairness-based rationale could equally justify imposing vicarious liability on Redruth here. More broadly, there may also be longer-term financial benefits from an employee engaging in violent on-field behaviour. One might consider here the common practice of fighting in ice hockey. Rubin notes that club owners are generally supportive of fighting on the rink, as they view such conduct as a ‘necessary marketing tool’ that helps to sell tickets.[[1149]](#footnote-1149)

In light of this analysis, one ought to keep in mind three wider points about the role of benefit enterprise liability here. First, this application of vicarious liability to sport neatly illustrates that an employer may still benefit from an activity even if they concomitantly suffer some form of loss from it. This appears to fit nicely alongside Lord Reed’s more liberal interpretation of ‘benefit’ in *Cox v Ministry of Justice*, where he highlighted that the benefit an employer derives from the tortfeasor’s activities need not be profit-making.[[1150]](#footnote-1150) Second, the benefit formulation of enterprise liability may tentatively suggest that vicarious liability for on-field acts is more likely to occur in professional sport. This is due to the partisan nature of professional sport, and the fact that elite clubs are more likely to accrue a significant financial and/or sporting benefit from the success that may be attributed to violent on-field behaviour. Third, and as was discussed in the previous chapter, it must be noted that the justification for vicarious liability is seemingly at its strongest whenever benefit overlaps with the risk-related formulation of enterprise liability.[[1151]](#footnote-1151) Let us now assess, then, how a risk-based approach might be applied in this context.

**6.4.1 Enterprise Risk and Playing Culture**

Whilst I have already made clear that I find the notion of risk a convincing rationale for imposing liability in this context, it must be noted that the determination of vicarious liability based on the ordinary and inherent risks of a sport is open to criticism. The primary difficulty here, which was not identified in *Gravil*, lies in the fact that a risk-based approach to vicarious liability seems to clash with the assessment of a sport’s playing culture that is used to determine whether a tortious act was committed by an athlete in the first place. To be clear, a sport’s playing culture is considered as part of an action in both negligence and trespass. For negligence claims, it is considered at the standard of care stage; in trespass cases, it is considered as part of the defence of consent.[[1152]](#footnote-1152) For purposes of consistency, and because negligence is usually the preferred cause of action for injured sports claimants, the following sections will primarily refer to the notion of playing culture at the standard of care stage.

Now, in order to illustrate the potential clash between vicarious liability and the requirements of the underlying tort in this context, it is worth briefly explaining what is meant by reference to a sport’s playing culture here. According to Murphy, Williams and Dunning, sport, like many other social activities, ‘can be conducted in terms of a “spirit” or ethos which condones rule infractions to a greater or lesser degree’.[[1153]](#footnote-1153) This quote nicely captures the essence of a sport’s playing culture, which has otherwise been understood to mean a ‘normative system inside of and parallel to the formal regulatory framework of the sport.’[[1154]](#footnote-1154) In sum, then, it suggests that those acts that occur with such frequency and impunity in a particular sport are understood and consented to by all participants, despite the fact that the specific act in question might be contrary to the official rules of the game.[[1155]](#footnote-1155) By way of example, James and McArdle argue that the incident in *Caldwell* – which involved a professional jockey suffering serious injuries after the ‘careless riding’ of the two defendants – was one that ‘occurred very frequently within national hunt racing, [so] it could be seen as an integral part of the sport’s playing culture’.[[1156]](#footnote-1156) As Tuckey LJ explained in the Court of Appeal, whilst the harm in this case was, in theory, avoidable, it was something that was ‘bound to occur from time to time’.[[1157]](#footnote-1157) Judges will, therefore, take into account a number of factors – such as the nature of the sport, the level at which it is played, and the type of act committed (as well as the frequency with which it occurs) – in order to determine whether certain conduct is within a sport’s playing culture.[[1158]](#footnote-1158) If it is, then the harm will be considered to be an acceptable and inherently associated risk of that sport, and the injurer will not be held to have breached their duty of care.

To be clear, I have no issue with courts taking into account the playing culture of a sport in order to assess the potential breach of an athlete’s duty of care. Attempting to regulate on-field conduct solely by reference to the official guidelines and rulebooks found in each sport, as scholars such as Grayson and Voicu advocate,[[1159]](#footnote-1159) is akin to what Frank describes as training ‘prospective dog breeders who never see anything but stuffed dogs’.[[1160]](#footnote-1160) An appreciation of the intrinsic risks and commonly occurring acts of foul play in different sports is conducive to a ‘law-in-action’-based approach, and it is largely consistent with my support for a legal realist conception of the law outlined in earlier chapters. As such, I can do little more than praise Lord Jones’ approach in *McMahon v Dear*, a case which concerned a personal injury action against a golfer who blinded the claimant in one eye. After referring to The R&A’s ‘Rules of Golf’ in this case, his Lordship admitted that:

‘in searching for the meaning of the safety guidelines, I am not performing the same task as I would be if construing a statute or interpreting a contract. What I need to do is determine, as a matter of fact *and in practical terms*, what the golfer ought to do during the round, if following the guidance.’[[1161]](#footnote-1161)

With these points in mind, I must stress that I do not wish to see the abandonment of the playing culture concept in the law. Not only does it provide a more practical and realistic method of assessing liability for on-field injury, but recent case law has also confirmed that it is a firmly entrenched rule in this area of law.[[1162]](#footnote-1162) The retainment of the playing culture concept may lead, however, to what Tucker has identified as a ‘classic catch-22’ scenario here. In his words, ‘[i]f the possibility that the reckless misconduct of an employee will injure an opponent is an "inevitable toll" of business, it is incongruous to say at the same time that the athlete does not assume the risk of injury.’[[1163]](#footnote-1163) As such, the ‘type of action that could result in employer liability should, at the same time, bar the plaintiff's action altogether, because it must have been foreseen.’[[1164]](#footnote-1164) To be sure, let us consider again the facts of *Gravil*. If punching truly is an ‘ordinary’ and ‘expected’ element of modern rugby (as the Court of Appeal proposed), does this not suggest that Gravil’s battery claim should have been automatically struck out on the grounds that he implicitly consented to this harm as part of rugby union’s playing culture?[[1165]](#footnote-1165) On the flip side, if the blow to Gravil was not part of the intrinsic risks as defined by rugby’s playing culture - and thus a form of negligence or an actionable trespass - then the argument for finding a close connection between Carroll’s punch and his employment is, on the basis of enterprise liability at least, greatly weakened.

There is certainly a double-edged sword here, in that the more acts that we think are inherent to the playing of a particular sport for the purposes of vicarious liability, the more we potentially remove from the scope of negligence to negate a breach of duty in the first place. Unfortunately, and with the exception of Tucker’s analysis, the few works that have touched upon the issue of vicarious liability in the sporting context have yet to recognise this tension. James and McArdle, for instance, suggest that a ‘poorly executed’ tackle would give rise to a ‘relatively straightforward case of vicarious liability’, because challenges ‘made with more force than is necessary are an integral part of the playing of most contact sports and are consented to by the players.’[[1166]](#footnote-1166) However, if a tackle was implicitly consented to by a player, then surely no negligence or trespass could be established in the first place, meaning that there is no wrongful act upon which to base the vicarious liability of an employer. The quandary was seemingly so perplexing to Tucker that he concluded that we should hold only ‘the participant-defendant, but not the team, liable’ in every case.[[1167]](#footnote-1167) This is, of course, a rather unacceptable response insofar as it provides a *de jure* immunity to sports clubs for any harmful conduct that occurs on the field of play.

One potential solution to this catch-22 might be to distinguish the implied consent of sporting participants from their knowledge of the inherent risks of the sport. Although we have seen the conflation of these two concepts in Dyson LJ’s judgment in *Blake* (above),[[1168]](#footnote-1168) it may be possible to differentiate them here. We might say, in line with the views of some scholars, that playing culture is concerned with the issue of implied consent.[[1169]](#footnote-1169) In contrast, vicarious liability is perhaps more appropriately concerned with the (wider) notion of what risks are inherent to a particular sport. It may not necessarily be the case that an individual can be said to impliedly consent to (or accept) every reasonably foreseeable risk. This is evident in Beever’s work when he highlights that, whilst most car owners will be aware of the inherent risks of getting behind the wheel, this does not automatically mean that they consent to the risk of being injured by another individual’s dangerous driving. If this were the case, he explains, ‘then only the insane or ignorant could sue for road accidents’.[[1170]](#footnote-1170) Lord Denning in *Nettleship v Weston* also made a similar point, when he suggested that ‘[k]knowledge of the risk of injury is not enough’ to constitute a successful defence of *volenti*.[[1171]](#footnote-1171) Consequently, whilst the risk of a road accident is one that most reasonable drivers are aware of, it is not a risk that they are necessarily willing to acceptfor the purposes of implied consent.

Can this reasoning be equally transposed to the sporting context, and in particular to the facts of *Gravil*? Not quite. According to Pendlebury’s empirical study into the perception of playing culture amongst rugby union athletes, many participants are not only aware of the potential risk of being punched, but many in fact also *consent* toit as part of the sport. In the author’s words, ‘punching is seemingly accepted by the rugby union participants as an integral part of the game’.[[1172]](#footnote-1172) To the extent that most players *accept* the risk of a punch (rather than just merely being aware of the risk), the double-edged sword outlined by Tucker is still a very much active concern in relation to *Gravil*. This is seemingly confirmed by the recent analysis of Deakin and Adams who suggest that:

‘…if a foul is committed in the course of a game, consent can normally be assumed for the purposes of both a battery and a negligence claim, unless the conduct of the defendant is completely beyond normal expectations of the participants in some way.’[[1173]](#footnote-1173)

Interestingly, punching is not the only act that appears to be within the ‘normal expectations’ of rugby union players. In fact, the overwhelming majority of respondents to Pendlebury’s empirical study also suggested that kicking another player on the field of play was an act that was implicitly consented to by participants.[[1174]](#footnote-1174) The line was drawn, however, in regards to an off-the-ball headbutt. Most players were of the view that such conduct ‘could not, and should never, be accepted as part of the game’.[[1175]](#footnote-1175) The respondents appeared to justify this conclusion by reference to the fact that they had never seen a headbutt occur on the field of play before.[[1176]](#footnote-1176) As such, it may be tentatively concluded that, had Carroll headbutted (rather than punched) Gravil during the post-scrum melee, Clarke MR ought not to have found vicarious liability in this case quite so readily. This conclusion would be further reinforced if one could not pinpoint any identifiable benefit to Redruth from Carroll’s act.

Perhaps the issue that we need to address going forward is how we are to best frame the playing culture in each particular sport in order to avoid this potential clash with vicarious liability. Although courts in sports negligence cases continue to refer to the customs and conventions of each game,[[1177]](#footnote-1177) McArdle is undoubtedly correct to highlight that the lack of conceptualisation in regards to each sport’s playing culture leaves judges and athletes ‘without sufficient guidelines as to the precise nature of the consent’ given by participants.[[1178]](#footnote-1178) In line with the views of other scholars, it is suggested that governing bodies are perhaps in the best position to define with sufficient accuracy what the playing culture of their sport ought to entail.[[1179]](#footnote-1179) For instance, it might be that, in time, the playing culture of a sport could be reformulated to only include those acts that occur very frequently in every game.[[1180]](#footnote-1180) If this formulation is supported, it might then be possible to say that, whilst off-the-ball punching in rugby is outside of that sport’s playing culture when assessing the standard of care, it still occurs with enough frequency to make it an ordinary and foreseeable risk for the purposes of vicarious liability. This would be largely consistent with Judge Friendly’s contextual approach in the US case of *Ira S Bushey and Sons Inc v United States*, where he approved a passage from a leading treatise which suggested that ‘what is reasonably foreseeable in [the context of vicarious liability]… is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence.’[[1181]](#footnote-1181)

Now, whether this is a workable (and indeed desirable) distinction to make is, of course, open to debate. Some might question, for instance, whether this solution adopts an overly narrow conception of playing culture, such that some regularly occurring acts that we instinctively think ought not to lead to liability– such as, in football, a ‘high boot’ tackle that is made in a genuine attempt for the ball – are now legally actionable. After all, whilst head-high tackles are not particularly uncommon in football, it would be erroneous to suggest that they occur frequently in every game so as to make them part of football’s playing culture. In the meantime, then, and in the absence of any guidance from governing bodies on this point, it is suggested that one innovative solution to the catch-22 outlined in *Gravil* may be provided by adopting my contextual-pluralist model of vicarious liability. Let us now assess, in the following section, how this solution might work in practice.

**6.4.2 Avoiding the Double-Edged Sword: A Contextual-Pluralist Answer?**

As was made clear by Lord Woolf CJ in *R v Barnes*, an assessment of a sport’s playing culture is a necessarily ‘objective one’ that ‘does not depend upon the views of individual players’.[[1182]](#footnote-1182) In other words, judges are currently required to conduct a normative analysis of the standard of care in each case to determine which on-field acts *they* think are deserving of civil (or criminal) liability. This is made clear in *R v Billinghurst*,[[1183]](#footnote-1183) a case in which the defendant rugby player, not unlike the incident in *Gravil*, punched an opposing scrum-half in the face during an off-the-ball incident. Despite hearing testimonial evidence from other professional rugby players to the tune that punching in rugby was ‘the rule rather than the exception’,[[1184]](#footnote-1184) Billinghurst was found guilty and sentenced to nine months’ imprisonment (suspended for two years). Pendlebury insightfully argues that the court in *Billinghurst* were ‘determined to point out that even if punching is part of the actual playing culture of rugby, it is not part of the playing culture as defined by the court.’[[1185]](#footnote-1185)

This gives rise to a crucial distinction, particularly when we recall my suggestion from section 3.3.3 that my contextual-pluralist model ought to usually be buttressed by empirical evidence. Given that an empirical approach will generally legitimise a much wider range of acts than a normative judicial decision, it might be that the catch-22 identified in *Gravil* could be rationalised by separating the empirical and normative dimensions of the enquiry. In this regard, and from a normative judicial standpoint, an off-the-ball punch would not be within the *court’s* conception of rugby union’s playing culture. On this basis, anyone who commits such an act will be held to have breached their duty of care towards the injured party. In contrast, however, when we come to empirically assess the vicarious liability of the wrongdoer’s club for this harm, my contextual-pluralist model would suggest, on the basis of Pendlebury’s aforementioned study, that such a punch was an inherent and expected risk of rugby union. When viewed in this light, the empirical slant of my contextual-pluralist model may provide a solution to the double-edged sword problem that has long bemused scholars such as Tucker. As a result, claimants who wish to establish the vicarious liability of a sports club for an intentional on-the-field act ought to strongly consider presenting some form of empirical evidence to support their proposition that the wrongdoer’s conduct was an ordinary and foreseeable risk of a certain sport. In light of the current sparsity of qualitative projects that touch upon this issue,[[1186]](#footnote-1186) this will likely require counsel for the claimant to conduct their own investigation into the frequency of such an act, similar to that found in both *Billinghurst* and *Blissett*. This recommendation is explored in more detail in section 6.4.3.

To clarify how such an approach might work in practice, let us consider two other scenarios in which vicarious liability might be imposed upon a sports club. The first relates to so-called ‘hit lists’ or ‘bounties’, whereby players (and oftentimes coaches) pool together money in order to pay out bonuses to those who injure opposition players. Such a practice has been alleged to occur in both rugby league[[1187]](#footnote-1187) and ice hockey,[[1188]](#footnote-1188) although it is widely considered to be most prominent in American football. This is evidenced by the New Orleans Saints 2009 bounty scandal, in which the club’s defensive co-ordinator, Gregg Williams, administered additional bounty payments to those Saints players who deliberately injured the opposition. These payments were doubled (or sometimes even tripled) when the club entered the play-offs, with players receiving the most money for a “knock-out” hit.[[1189]](#footnote-1189) Of course, where a coach participates in (and even administers) the bounty, it will be a relatively simple matter of holding the club vicariously liable for the negligent actions of the coach.[[1190]](#footnote-1190) Nevertheless, let us assume here that there is only one player - or at least only a small group of players - involved in the creation and execution of a hit-list,[[1191]](#footnote-1191) and the club is unaware of this practice. In this instance, the courts are never likely to regard the creation of a hit-list as being within the playing culture of American football - and rightly so, given that it would impede an otherwise meritorious claim against the wrongdoer in negligence or trespass.

However, many former and current NFL players have admitted that the creation of hit lists is a rather common practice in American football, and something that is generally accepted as an ordinary aspect of the sport.[[1192]](#footnote-1192) According to the former defensive back Matt Bowen, the placing of bounties on opposition players is a ‘fundamental part of the NFL’s culture that isn’t talked about outside of team facilities’.[[1193]](#footnote-1193) He outlined that, during his time at the Washington Commanders (formerly Washington Redskins), the construction of hit lists was a ‘common practice’ for the team, with money being awarded for ‘big hits’ that took an opposing player ‘out of the game’.[[1194]](#footnote-1194) On this basis, we can see that an empirical assessment of such practices would likely point towards the vicarious liability of the tortfeasor’s club under my contextual-pluralist model, despite the fact that the placing of bounties would never be considered by a court to be normatively within the playing culture of American football. This would be further reinforced by the fact that the employing club were receiving an apparent benefit from the actions of their employees.

A similar conclusion might also be reached in regards to on-pitch violence against referees, a point which also neatly illustrates that it may be necessary to garner views on the inherent risks of a sport from other individuals (and not just participants). Particularly in light of the drastic decline in the number of football referees in England,[[1195]](#footnote-1195) it is highly unlikely that a court would ever conclude that a referee implicitly consents to any form of abuse on-the-field, despite the fact that it occurs with alarming regularity. In fact, Cleland, O’Gorman and Webb highlight that almost two-thirds of football referees receive verbal abuse ‘at least every couple of matches’.[[1196]](#footnote-1196) Admittedly, whilst 6.2% of surveyed referees did indicate that they had never received abuse on the field, the authors note that this figure might be explained by the fact that these referees ‘expect’ such behaviour and ‘play it down as something that is culturally embedded in the game’.[[1197]](#footnote-1197) Notably, almost one in five referees in both football and rugby union have also reported being physically assaulted by athletes,[[1198]](#footnote-1198) a fact that prompted one football referee to conclude that the ‘level of abuse that match officials are expected to deal with would be unacceptable in any other occupation’.[[1199]](#footnote-1199) Consequently, whilst a judge is never likely to normatively conclude that referees accept this harm for the purposes of a standard of care enquiry, it is possible to simultaneously justify the imposition of vicarious liability for these ordinary and foreseeable risks when we adopt a more empirical assessment of liability that is called for by my contextual-pluralist model.

Before assessing the potential objections to this solution, it is perhaps worth very briefly mentioning how this empirical-normative dichotomy could be further justified by reference to the legal realist jurisprudence that underpins my contextual-pluralist model of liability. We might recall from Chapter 3 that my suggested framework of vicarious liability is rooted within Llewellyn’s so-called ‘grand style’ of legal reasoning which is concerned with the overt consideration of social and policy issues.[[1200]](#footnote-1200) This empirical-normative dichotomy is largely an instantiation of this grand style, in that it openly considers (and upholds) the need to provide adequate compensation to victims for injuries that might be said to be part-and-parcel of the playing of sport. Likewise, this instrumentalist approach also provides a nice balance between the competing notions of ‘law as science’ and ‘law as craft’. On the one hand, my contextual-pluralist solution utilises scientific insights by calling for a greater consideration of empirical data in relation to tortious acts committed on the field of play. In this regard, this perhaps provides further support for contending that my contextual-pluralist solution errs more on the side of ‘scientific legal realism’ (as opposed to ‘traditional legal realism’). On the other hand, the solution advocated here is also open to the use of judicial craft, in that it recognises that the concept of a sport’s playing culture can be subjected to different definitions depending on the legal context under consideration.[[1201]](#footnote-1201) As such, this empirical-normative dichotomy perhaps provides further support for Dagan’s argument in section 3.3.3, when he suggested that science and craft could be used in a complimentary (rather than competing) manner to improve legal reasoning.

**6.4.3 Objections to My Contextual-Pluralist Solution**

Now, I must concede that there are some difficulties associated with the solution that I posit above. However, as I attempt to explain here, none of them ought necessarily to be seen as fatal to the implementation of a risk-based approach. It must be recognised that, due to the necessity of examining the playing culture at the standard of care stage, we are dealing here with the rather unique scenario in which the inherent risks of an enterprise have already been considered when identifying the existence of the underlying tort (rather than, as is typical in cases in which an employer is held strictly liable, during the vicarious liability enquiry). As such, we must be aware that unique problems often call for radical solutions.

The first objection to my contextual-pluralist solution is a simple one: many may question whether it is incongruous to adopt a normative approach to the inherent risks of a sport for the purposes of breach of duty, but then to adopt an empirical test when we come to assess the vicarious liability of the club. Might this lead to unnecessary confusion and inconsistency in this area of law? Perhaps. My feeling, however, is that this normative-empirical dichotomy could be justified by highlighting the different policy bases underlying both negligence and vicarious liability. In regards to an assessment of the inherent risks for the underlying tort, various scholars have correctly highlighted that deference to the views of individual athletes is likely to ‘excuse overly violent (and often cowardly and cynical) play’,[[1202]](#footnote-1202) with the result that it grants athletes an unparalleled ‘license for thuggery’.[[1203]](#footnote-1203) Consequently, in order to ensure that an appreciation of a sport’s playing culture does not lead to the unreasonable maintenance of the (oftentimes anti-progressive) status quo, judges have adopted a normative stance to the level of acceptable violence in each sport.

This policy concern is clearly not applicable, though, when dealing with vicarious liability. In fact, an empirical assessment of the inherent sporting risks for the purposes of vicarious liability is likely to *widen* – rather than restrict – the potential for compensation, because an athlete’s perception of acceptable risk is likely to legitimise a broader array of on-field acts. Consequently, rather than being seen as upholding an anti-progressive stance, adopting an empirical approach for vicarious liability purposes could instead be celebrated for providing a more realistic and adaptable method of adjudication. Seen in this light, the normative-empirical dichotomy could be justified by the theory of deep pockets and the policy of victim compensation, and it also appears to fit nicely with the ethos of broader liability that generally underpins my contextual-pluralist model. Notably, my suggestion here also appears consistent with my approach outlined in the previous chapter, when I argued that we ought to look to the underlying policy basis of each area of law in order to determine the appropriate legal solution. Much like the definition of ‘employee’ in Chapter 5 (which I suggested ought to differ depending on whether the context of the case was concerned with vicarious liability or unfair dismissal), the concept of inherent sporting risk could be subject to different methodologies (i.e. normative or empirical) depending on the legal question being asked (i.e. standard of care or vicarious liability).[[1204]](#footnote-1204) Granted, this approach may be open to the criticism that it works backwards to achieve a desired result, but, as I suggested in Chapter 3, so long as this is done in a transparent manner, this should not necessarily be a problem (at least for those who are persuaded by a legal realist approach to private law). After all, scholars such as Morgan have similarly adopted an approach that appears to work backwards to resolve sports-related vicarious liability issues.[[1205]](#footnote-1205)

The second concern relates to what might happen if the defendant produces empirical data to counteract the claimant’s evidence that a particular harm was a reasonably foreseeable and frequent occurrence in that sport. In this instance, we might ponder why one particular view ought to be determinative. However, the courts have long had to deal with similar issues in the context of professional negligence, as illustrated by the so-called *Bolam* test (and the later *Bolitho* gloss that was applied to it).[[1206]](#footnote-1206) It is rather common in medical negligence cases for judges to be faced with two competing sets of evidence; one body of expert opinion produced by the claimant (which will suggest that a doctor has not acted in accordance with an accepted practice) and one produced by the defendant (which, conversely, will seek to justify a particular act by reference to the similar practices of other doctors). Notably, the court will not determine the issue by deciding which body of opinion they prefer.[[1207]](#footnote-1207) Rather, once the doctor is able to show that his acts are consistent with reasonable expert opinion, then ‘the judge or jury *have* to accept’ this evidence.[[1208]](#footnote-1208) A similar approach might work in the sporting context: once the claimant can demonstrate that a particular act was within the ordinary and expected risks of their sport, then the close connection test ought to be satisfied (regardless of any reasonable counter-evidence that might be produced by the defendant-club). Of course, the *Bolitho* exception may still apply to the sporting context in order to ensure that a particular set of views are ‘capable of withstanding logical analysis’,[[1209]](#footnote-1209) although it will likely be necessary in the future to clarify what criteria should lead a judge to find that a body of sporting opinion was unreasonable or irresponsible.[[1210]](#footnote-1210)

Finally, my contextual-pluralist solution is perhaps open to the criticism that it may give rise to an inherently indeterminate method of adjudication. The risk of many on-field tortious acts could often be framed in various ways, with different permutations capable of leading to different empirical results. Consider, for instance, Morgan’s suggestion that the result in *Gravil* would ‘equally apply in a football context’ because although ‘violence may be more prevalent on-pitch with rugby… on-pitch violence in football is not unheard of.’[[1211]](#footnote-1211) In this manner, he is able to conclude that ‘on-pitch violence’ is a ’reasonably incidental risk’ of football. However, in assessing the relevance of *Gravil* to football, one might ponder whether the correct framing of the act ought merely to be ‘violence’ or, more specifically, ‘punching’? If the latter, it is far more controversial to suggest that *Gravil* applies to the footballing context, as off-the-ball punching arguably occurs with much less frequency in football than it does in rugby union. Numerous other examples could be given here. Consider, once again, Suarez’s bite on Ivanovic. If the act is framed simply as a ‘bite’, then it is perhaps unlikely that a respectable body of sporting opinion would deem this to be an inherent or expected risk of football. However, if his conduct is framed, for instance, as an ‘act of gamesmanship intended to unsettle the opposition’, then it is much easier to conclude that Suarez’s actions were committed within the course of his employment. Rhetoric, it seems, may thus be the primary factor influencing the determination of vicarious liability in this context.

One might question, however, whether this is really all that bad. In fact, and as I explored in section 2.5, my contextual-pluralist model itself could be subject to the same definitional criticisms in relation to the appropriate context of a case. But this is not a particularly unique or novel concern. We have already seen in section 3.4.2, for instance, that judges in causation cases are often confronted by similar issues. Likewise, in vicarious liability disputes, judges have long been required, even under the traditional Salmond test, to determine how widely or narrowly a particular act ought to be characterised. Take the case of *London County Council v Cattermoles (Garages) Ltd*,[[1212]](#footnote-1212) for example, where the issue for the Court of Appeal was whether the tortfeasor – who had been warned by his employer only to move cars out of a garage by hand – was acting in the course of employment when he negligently drove into the claimant’s vehicle. Clearly, if the tortfeasor had only been employed to move cars *by hand*, then he was not acting within the course of employment according to the once-popular Salmond test.However, the court preferred a broader reading – according to which the tortfeasor was simply employed to move cars – which allowed them to find the defendant garage company vicariously liable for their employee’s negligence. A similar judicial determination will likely be required here, with judges having to decide, on the basis of both logic and consistency, how a particular on-field act ought to be framed. Consequently, and as was touched upon in section 3.3.3, we can see that even if a more empirical conception of vicarious liability is adopted under my model of liability, this will not automatically render the normative intuitions of judges entirely useless.

**6.5 Conclusion**

It has been argued in this chapter that *Gravil*’s focus on deterrence and enterprise liability as relevant theoretical factors in the on-field context is a sensible one. In regards to the former, it was suggested that a club’s responsibility for the tortious behaviour of notoriously violent athletes ought to be vicarious in nature. This is primarily due to the availability of insurance for a vicarious liability claim, as well as the evidentiary difficulties in demonstrating that a club knowingly employed a ‘hard man’ with a reputation for brutality. It was maintained, however, that under my contextual-pluralist model of liability, deterrence could not alone determine a club’s vicarious liability for on-field violence. As such, I highlighted the importance of adopting an enterprise liability approach that is sensitive to both a benefit and risk-based analysis of liability. Importantly, the adoption of this approach would finally put to rest the anachronistic distinction between negligent and intentional acts that was better suited to the now-outdated era in which the Salmond test was utilised.

Importantly, I noted that a risk-based assessment of vicarious liability in this context could clash with the normative analysis of a sport’s playing culture for the purposes of a negligence (or trespass) claim. This is a significant finding that has yet to be considered in any detail in most of the existing literature that exists on this topic. As such, I outlined that a more empirical conception of the inherent customs of a sport for the vicarious liability enquiry might work to avoid this potential conflict. It was suggested that this solution would coincide nicely with the instrumental, legal realist approach that was outlined in detail in Chapter 3. Whilst it was conceded that some commentators might take issue with this solution, I concluded that this normative-empirical distinction could be justified by reference to the different policy bases that underpin both vicarious liability and the law on negligence. As such, and with this risk-based approach in mind, I analyse in the following chapter whether clubs and governing bodies could also be held vicariously liable for the *off*-field acts committed by their star players.

**CHAPTER 7**

**IDENTIFYING A CLOSE CONNECTION: VICARIOUS LIABILITY FOR OFF-THE-FIELD ACTS**

**7.1 Introduction**

In March 2016, footballer Adam Johnson was sentenced to six years imprisonment after pleading guilty to sexual activity with a child contrary to s.9 of the Sexual Offences Act 2003. It was held that the athlete had digitally penetrated a 15-year old girl in an act which the lead prosecutor described as a ‘calculated, considered and carefully orchestrated’ exploitation of his celebrity status.[[1213]](#footnote-1213) The besotted victim was an avid fan of both Johnson and his employing club, Sunderland AFC, and it was reported that she would often wait outside the club’s stadium in an attempt to catch a glimpse of her “idol”.[[1214]](#footnote-1214) As part of his grooming process (which also violated s.15 of the Act), Johnson offered the girl a signed Sunderland shirt in return for a ‘thank you kiss’,[[1215]](#footnote-1215) an act which the presiding judge described as a clear ‘abuse of trust’ of the position in which the defendant, a revered elite footballer, had been placed.[[1216]](#footnote-1216) Although it was reported that the victim ‘never sought financial gain’ for this harm,[[1217]](#footnote-1217) it is interesting to consider whether Johnson’s employer might have been held vicariously liable had the young girl also pursued damages in a civil suit. This is becoming an increasingly pertinent issue in light of the multitude of news stories that depict other professional athletes engaging in similar disgraceful acts.[[1218]](#footnote-1218) Consequently, and in contrast to the previous chapter - which examined the liability of clubs for those athletes who *metaphorically* left everything on the pitch and caused injury – the discussion here grapples with the question as to whether vicarious liability should also attach for athletes who instead *literally* leave the field of play to commit their harmful conduct.

Two brief introductory points ought to be made here. First, whilst it is recognised that sports stars commit a variety of offences away from the field (ranging from drink driving, for instance, to fighting in nightclubs), there is a heavy emphasis on sexual harm in this chapter. As illustrated by the so-called ‘Summer of Hell’ in the National Rugby League (NRL) in Australia, off-field gendered violence by professional athletes is currently a significant issue for many sports clubs. During the 2018 off-season, there was a ‘string of high-profile [NRL] players accused of serious acts of violence and misconduct against women’, with athletes implicated in a different off-field scandal once every 22 days.[[1219]](#footnote-1219) This focus on sexual abuse also allows me to illustrate how insights from gender studies might be applied in order to determine the appropriate scope of vicarious liability in this context. Second, it is worth briefly clarifying why a claim against an athlete’s employer may be necessary at all here. After all, if Johnson’s victim did wish to pursue a civil claim for damages, surely it would be easier (and more logical) for her to commence a direct claim against the pecunious perpetrator himself? Two reasons, however, lead me to doubt whether this suggestion is entirely correct.

First, it should be noted that not all athletes are as well remunerated as Johnson. For lower league footballers who are convicted of sexual assault – such as Ched Evans during his stint in League 1 with Sheffield United,[[1220]](#footnote-1220) and Tyrell Robinson at League 2’s Bradford City[[1221]](#footnote-1221) - it may be necessary for claimants to seek recourse to the deeper pockets of the tortfeasor’s employer. This may also be the case in sports that continue to impose salary caps, such as rugby union and basketball. Second, and even if a professional athlete *was* the recipient of a handsome salary during his playing career, it must be recognised that a conviction for a serious off-field offence is likely to effectively end the wrongdoer’s career, as it did with Johnson.[[1222]](#footnote-1222) In this regard, there is no guarantee that an athlete will be able to fully afford a significant damages award (which will often be imposed many years after the incident), particularly if they were unable to work during this time. This is also reinforced by the vast judicial discretion evident under s.33 of the Limitation Act 1980 to circumvent the traditional three-year period in which to commence a civil claim.[[1223]](#footnote-1223) Given the startlingly high levels of bankruptcy amongst retired professional athletes,[[1224]](#footnote-1224) it may well be necessary for a victim to also sue the tortfeasor’s former employer when pursuing a claim in which the limitation period has been disapplied.

With these points in mind, section 7.2 clarifies why a risk-based approach ought to be adopted here. It draws on insights from other closely-related areas of law – such as privacy and unfair dismissal – to demonstrate why, in Bartlett and Sterry’s words, ‘there must be a clear connection between [the tortfeasor’s] work and the activity under investigation’.[[1225]](#footnote-1225) In illustrating how the notion of risk might be applied in this context, I refer to the interdisciplinary field of gender studies. When this issue is viewed through this lens, it is revealed that both the hazing of young athletes and the sexual abuse of women away from the sports field could lead to the vicarious liability of professional sports clubs. It is argued here that such harm is not merely coincidental, and that numerous risk factors could support the claim that one’s employment as a professional athlete makes a material and significant contribution to the harm suffered by these victims. After making this claim, the section culminates by offering six normative guidelines for judges to consider in applying this risk-based approach to off-field harm. This once again reinforces the truly fact-sensitive nature of liability that is required under my contextual-pluralist model.

In section 7.3, I analyse how my risk-based guidance is preferable to an approach that seeks to impose vicarious liability on the basis that athletes are role models and brand ambassadors for the sport. Although this suggestion is implicit in the very small handful of works that have touched upon the scope of liability for athletes’ extramural behaviour, it is argued that this suggestion is far too wide and open-ended to be considered a satisfactory indicator of employer liability. However, this section does illustrate how the role model status of professional athletes could be used to support a fairness-based justification for vicarious liability in this context. The idea outlined here is that, since clubs and governing bodies often seek to benefit from an athlete’s fame and success through the imposition of overly intrusive disrepute clauses, it is fair for them to also bear the burden of any foreseeable risks of harm. The section concludes by demonstrating how the (overlapping) concepts of risk, benefit and control could work together to produce a harmonious and logically consistent theory of enterprise liability in relation to off-field injury.

**7.2 Establishing the Relevant Nexus: A Risk-Based Analysis of Off-the-Field Acts**

In contrast to most other decisions on vicarious liability, it must be recognised that the typical employee in our off-the-field sports context is a rather unique tortfeasor. Unlike in those cases involving well-known national juggernauts such as Morrisons and Barclays Bank, the wrongdoer in the current context is an esteemed professional athlete who, in some instances, might even be more popular and influential than their own employer.[[1226]](#footnote-1226) Particularly since the turn of the twenty-first century, Whannel notes that there has been ‘an erosion of a clear distinction between public and private domains’ for elite athletes,[[1227]](#footnote-1227) which may simply be just another way of saying that the line between ‘on-duty’ and ‘off-duty’ has been significantly blurred for these celebrity employees. This development was likely spurred by both advancements in technology and the broader commercialisation and commodification of professional sport,[[1228]](#footnote-1228) with fans arguably being just as concerned (if not *more* concerned) with the off-field exploits of their favourite players as they are with their on-pitch achievements.[[1229]](#footnote-1229) As testament to this fact, many sports stars are showered with a plethora of sponsors, and various scholars have even suggested that some athletes (and particularly those competing in the upper echelons of their sport) can be viewed as brands in their own right.[[1230]](#footnote-1230) As the famous basketball player LeBron James has recently attested to, the culture of celebrity that is now prevalent in much of modern society has meant that ‘the first time [he] stepped on an NBA court, [he] became a businessman’.[[1231]](#footnote-1231)

Needless to say, such concerns do not really apply to amateur athletes. These participants are not celebrities, and there is no sense in which we can state that they are still ‘on-duty’ for their club when conducting themselves away from the sport. As such, it must be noted that this chapter is solely concerned with the *professional* sports context, rather than with the recreational sector. The discussion here might, however, prove of wider interest to those concerned with employer liability for other famous tortfeasors, particularly those involved in the entertainment industry. After all, it has yet to be tested, in either the literature or case law, whether the unique factual matrix provided by one’s celebrity status can (or indeed should) influence the scope of the close connection test. Nevertheless, and as we will see in section 7.3.2, differences may also still exist between sport and other industries, such that a conclusion in one context ought not to be blindly followed in another. It would, in fact, be a betrayal of my contextual-pluralist model to suggest that vicarious liability for an athlete’s off-field sexual assault should automatically lead to vicarious liability for similar actions by, say, a film star or musician.

Consequently, given that the discussion here is strictly related to the professionalsports context, it makes sense that our focus is primarily on enterprise liability. Indeed, and was explained in Chapter 2, a professional club’s capacity to adequately spread loss through insurance ought not to be as decisive to liability here given the ability of most professional sports clubs to easily absorb the loss. As such, the relevant enquiry in this context, as Chamallas writes, should be ‘the ability to establish a nexus between the enterprise (or institution) and the risk’.[[1232]](#footnote-1232) In light of a similar methodology in other (closely related) areas of law, this focus on the inherent risks or characteristics of a particular sport is not a particularly controversial one. For instance, in relation to privacy, Nicol J in *Ferdinand v MGN* suggested that the decision to find in favour of Prince Caroline of Monaco in *Von Hannover v Germany* was because the intrusive photographs of the claimant in this case did not call into question ‘her fitness to perform the ceremonial duties which her status required’.[[1233]](#footnote-1233) Similar judicial sentiments were also expressed in *AMC v News Group Newspapers Ltd*, a case which concerned a married professional athlete attempting to block the publication of his affair with another woman. Here, Laing J observed that being a professional athlete did not make the claimant ‘an example in every sphere of his existence’; importantly, ‘[a]ny scrutiny of [the claimant’s] conduct away from sport ought to bear a reasonable relationship with the fact that he is a sportsman.’[[1234]](#footnote-1234)

A similar enquiry is also utilised in unfair dismissal cases, with judges reiterating that ‘a dismissal for misconduct outside the workplace can only be justified where there is sufficient connection between the crime committed and the employee’s work’.[[1235]](#footnote-1235) As such, dismissal for theft by a department store worker could be justified in light of the clear link between shoplifting and the employee’s role,[[1236]](#footnote-1236) but a barrister’s disbarment for drink driving manslaughter would be unfair because it has ‘neither connexion nor significance for any professional functions as a barrister’.[[1237]](#footnote-1237) Notably, the claimant professional rugby player in *Mason v Huddersfield Giants Ltd* was held to have been unfairly dismissed, given the absence of an intrinsic link between his role as an athlete and his failure to promptly remove a picture of his teammate’s anus on his personal Twitter page.[[1238]](#footnote-1238) Of course, by highlighting these examples, I do not mean to suggest that a case in one area of law should be strictly followed in another. The underlying policy basis of each area of law is different, so just because an athlete was justifiably dismissed for a certain action does not necessarily mean that this also gives rise to a sufficient nexus to hold the employer strictly liable (and vice versa). Sanders has illustrated this point in some detail when she highlighted, based on comments in *Lister v Hesley Hall Ltd*,[[1239]](#footnote-1239) that a school would not be vicariously liable for sexual abuse committed by a groundsman.[[1240]](#footnote-1240) She contrasts this with *P v Nottinghamshire County Council*,[[1241]](#footnote-1241) a case in which the dismissal of a school groundsman for a sexual offence against his own daughter at home was justified, because of the potential risk of him committing a similar act on children in the school. Consequently, whilst the two tests do appear to sometimes point in different directions,[[1242]](#footnote-1242) it must be recognised that the necessity of establishing an intrinsic connection between an enterprise and a particular risk is a common trend throughout other areas of law that seek to regulate the extramural activities of individuals. This arguably provides a further justification for adopting an enterprise liability approach in this context.

With these points in mind, two final observations about my risk-based analysis can be made. First, in considering the connection between sport and the relevant off-field risk, we should be cognisant of my contextual-pluralist model’s call for any conclusion to be empirically justified. For present purposes, this will require me to draw upon observations from some interdisciplinary fields, such as gender studies. This area of research comprises several relevant frameworks, two of which are considered especially useful for our purposes: masculinity studies and feminist theory. To a large extent, both of these perspectives overlap, and it is unsurprising that Kimmel has referred to masculinity studies as a ‘significant outgrowth of feminist studies and an ally to its older sister in a complex and constantly shifting relationship’.[[1243]](#footnote-1243) As such, whilst both subfields are clearly relevant to the overarching issue of gendered violence, masculinity studies – which centres on the ‘damaging impact of patriarchy of men’[[1244]](#footnote-1244) – will be geared more towards harm suffered by male athletes in sport. In contrast, the lens of feminist theory is reserved more for violence perpetrated by professional sportsmen against women. In adopting this approach, the discussion in this section may be of both narrow and broad appeal. It is narrow in the sense that it may reinforce, once again, how many of the traditional rationales for vicarious liability can be intellectually enhanced by a socio-legal interdisciplinary approach. Its wider appeal lies in its potential contribution to the growing literature on feminist legal theory, particularly as it highlights tort law’s broader failure to recognise appropriate remedies for gendered harms.

Furthermore, I also believe that my focus on feminist jurisprudence in this chapter is broadly consistent with my support for legal realism and legal pragmatism outlined in Chapter 3. In relation to the former, Quinn observes that the work of contemporary feminist legal scholars is ‘seen as a direct descendant of the traditional antiformalist tale’.[[1245]](#footnote-1245) It is noteworthy that some scholars have proclaimed Critical Legal Studies to be the progeny of legal realism,[[1246]](#footnote-1246) as they both share the view that ‘law is not systematically intelligible in its own terms’.[[1247]](#footnote-1247) In this regard, Quinn has accurately posited that ‘it is out of the rib of Critical Legal Studies that modern feminist jurisprudence is said to be born’.[[1248]](#footnote-1248) She goes on to note that many scholars who subscribe to feminist legal theory have ‘accepted the traditional framing of the running realist narrative’,[[1249]](#footnote-1249) and it is arguably for such reasons that a feminist perspective is a particularly enlightening one for this chapter.

A similar overlap can also be identified between legal pragmatism and feminist jurisprudence. This is made clear by Brake, who argues that:

‘[p]ragmatism’s rejection of formalism, emphasis on experience, affinity for interdisciplinary work, and understanding of knowledge as situational make it a hospitable intellectual framework for exploring feminist critiques of law and society’.[[1250]](#footnote-1250)

To this, it might also be maintained that both pragmatism and feminism share an overarching commitment to context-sensitivity in the resolution of disputes. As Radin outlines, pragmatism and feminist legal theory both share a commitment to, *inter alia*, ‘situatedness, contextuality, embeddedness, [and] narrativity of meaning’.[[1251]](#footnote-1251) This is also made clear in Minow and Spellman’s work on this issue.[[1252]](#footnote-1252) It is on this point, though, that we sometimes see criticism aimed at legal pragmatism. For instance, Haack suggests that, because pragmatists rely on such a wide array of tools and ideas, legal pragmatism can only be described as a ‘desperately confusing scholarly mare’s nest’.[[1253]](#footnote-1253) Similarly, others have opined that a pragmatic, all-things-considered approach may be prone to the influence of the subjective biases of decision-makers.[[1254]](#footnote-1254) However, it may be that a feminist legal perspective not only overlaps with pragmatism, but also provides a convincing riposte to some of these criticisms that are sometimes levied against pragmatism. For example, and to return once again to Brake’s work, the criticism relating to the incompatibility of pragmatism and feminist jurisprudence arguably:

‘overlooks the possibility of a dialectical relationship between pragmatism and critical theory, in which each school of thought enriches the other, rather than remaining fixed and constant. For example, feminism’s focus on women’s experience can help ensure that pragmatism lives up to its commitment to the centrality of experience in producing knowledge by making sure that women’s experiences are fully included and incorporated.’[[1255]](#footnote-1255)

Similarly, she also suggests that the values that underpin (and the lessons that we can learn from) feminist legal theory can equally be used to help respond to the concern that ‘pragmatism does not identify which elements of context to emphasise’.[[1256]](#footnote-1256) As Brake further elaborates, ‘feminism’s commitment to the importance of gender to understanding social, cultural and legal phenomena can help answer the burning question left by pragmatism of which contexts matter’.[[1257]](#footnote-1257) In this light, it is clear to see that there are a number of benefits associated with mapping feminist theory onto the pragmatic perspective, and it is for such reasons that I consider the wider field of gender studies in the following sections of this chapter.

The second (brief) point about my risk-based analysis is that it appears to cast serious doubt on Morgan’s description of the scope of vicarious liability in the off-field sports context. Under his interpretation of the current law, a club will not be liable for an athlete assaulting a member of the public in a nightclub, nor will they be responsible for a player raping an individual whom they have met outside of club activities.[[1258]](#footnote-1258) The following analysis normatively challenges this overly narrow descriptive stance, and directs attention to the appropriate scope of vicarious liability in two particular off-the-field contexts: firstly, the abuse of young athletes during initiation rites; and secondly, the sexual assault of women. In outlining the need for a fact-sensitive approach, the analysis concludes by translating this discussion into practical guidance for judges.

**7.2.1 Abuse of Young Athletes**

The only vicarious liability decision to deal with the off-field conduct of a professional sportsman is *GB v Stoke City Football Club Ltd*, a case which concerned the alleged sexual practice of ‘gloving’ by Stoke City FC’s first-team goalkeeper Peter Fox during the 1980s.[[1259]](#footnote-1259) This involved the senior player applying an ointment to a glove, and digitally penetrating the claimant’s anus. This act was supposedly administered as an informal punishment to the claimant who had made a number of mistakes in his role as an apprentice footballer at the club (such as providing lukewarm tea for the senior players, and making an erroneous line call during training).[[1260]](#footnote-1260) Due to the considerable period of time between the alleged act and the trial, HHJ Butler concluded that the claimant had not successfully proven, on the balance of probabilities, that he had in fact been gloved.[[1261]](#footnote-1261) Nevertheless, His Honour did go on to consider whether vicarious liability could have been imposed upon Stoke City had the allegations in this case been verified.

In HHJ Butler’s view, even if the claimant had been able to adduce sufficient evidence, the club would *not* have been held vicariously liable for this act, because they did not confer any express or implied power upon the tortfeasor to discipline youth players.[[1262]](#footnote-1262) In Morgan’s words, this creates an authority-based approach, with vicarious liability only being imposed where the tortfeasor exercises authority over the victim.[[1263]](#footnote-1263) However, it is interesting that throughout this obiter section in *GB*, HHJ Butler drew upon two passages from prior cases which emphasised the importance of enterprise risk to the determination of vicarious liability.[[1264]](#footnote-1264) Yet, on the facts of the immediate case, His Honour rejected an application of such a risk-based approach on the spurious grounds that it ‘would involve an extension of the boundaries of vicarious liability beyond the parameters of the decided authorities’.[[1265]](#footnote-1265) *GB*, it is suggested, provides a fine example of how judicial reasoning could have been improved by the adoption of a ‘thick approach’ under my contextual-pluralist model. Perhaps if counsel for the claimant had delivered a more theory-heavy pleading that challenged some of the defendants’ more doubtful claims – such as the assertion that the sporting enterprise ‘did not create or enhance the risk of that kind of behaviour occurring’ to an apprentice[[1266]](#footnote-1266) – then the judge may not have been able to skirt around this theoretical issue quite as easily.

Such a risk-based claim could have been predicated on the disparate power relations inherent in professional football. Indeed, as was made clear by McLachlin J in *Bazley v Curry*, ‘the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer.’[[1267]](#footnote-1267) This ‘conferral of authority’ test appears to be at the heart of the so-called ‘tailored’ approach to vicarious liability that is applied in cases involving sexual abuse.[[1268]](#footnote-1268) Now, there is currently some uncertainty as to whether this ‘tailored’ approach represents a new test altogether, or whether it simply just refines the criteria that courts ought to take into account into determining the traditional close connection test in cases of sexual abuse.[[1269]](#footnote-1269) In line with my discussion in section 3.3.2 – where I highlighted that my contextual-pluralist framework only seeks to fine-tune the existing law (rather than completely replace it) – I must express my preference for the latter interpretation. Silink and Ryan note that the ‘close connection test at stage 2 is itself inherently capable of accommodating cases of sexual abuse’,[[1270]](#footnote-1270) and it may be added that it is also inherently capable of accommodating a contextual approach that is sensitive to a nuanced application of various theoretical rationales. Consequently, it is perhaps wise to adopt the language of Lord Phillips in *Various Claimants v Catholic Child Welfare Society*, where he emphasised the importance of certain *criteria* that are relevant in sexual abuse cases.[[1271]](#footnote-1271) In this regard, and as he further continues:

‘what has weighed with the court has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them…’[[1272]](#footnote-1272)

As such, and to return our focus to the sporting context, if we are to decide whether Fox’s alleged act of gloving truly was an abuse of the authority that was conferred upon him virtue of his status as a senior athlete, it may be helpful to consider the two-step enquiry propounded by Males LJ in *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB*.[[1273]](#footnote-1273) The first step requires us to ask whether Fox’s status as an established first-team goalkeeper placed him ‘in a position of power or authority’ over the apprentice footballers. HHJ Butler in *GB* appeared to think that it did not, as he was seemingly persuaded by the defendant’s argument that even though the youngsters looked up to the senior players as role models, this ‘did not amount to the conferring of a power over them’.[[1274]](#footnote-1274) This, I suggest, may be a rather erroneous conclusion. As was made clear by Chamberlain J at first instance in *Barry Congregation*, any organisation that ‘sets its leaders up as moral… exemplars… imbues those leaders with power and authority’.[[1275]](#footnote-1275) As we will see later in section 7.3.2, athletes may, on the basis of the wide-ranging disrepute clauses that are incorporated into their professional contracts, be held out as ‘moral exemplars’ by their own employers. Of course, the power exhibited by Fox in *GB* may not have been akin to the considerable power wielded by the tortfeasors in those cases involving priests[[1276]](#footnote-1276) or police officers,[[1277]](#footnote-1277) but it was still a significant degree of power given that the tortfeasor occupied a position in the first-team that young athletes sought to emulate. As such, it is worth remembering, as McLachlin J did in *Jacobi v Griffiths*, that ‘power must be understood in context’.[[1278]](#footnote-1278)

HHJ Butler was keen to emphasise, however, the potential ramifications of imposing vicarious liability on the basis of Stoke City’s conferral of power upon Fox. His Honour suggested that a finding of liability here would lead to all employers in every sector being held vicariously liable for any harm committed against an apprentice by a full-time employee.[[1279]](#footnote-1279) This, it is argued, is a rather gross over-generalization that could have been avoided by a more explicit application of enterprise risk in this case. Indeed, just as the same act of sexual abuse by a groundsman in *Lister* would not have given risen to vicarious liability, it is not possible to say that assaulting a trainee in every other profession is just as likely to give rise to employer liability. The power disparity (and risk of abuse of such power) between, say, an apprentice and senior worker in the IT or retail industry is clearly different to that exhibited between a rookie and professional athlete in a physically invasive sport. This is arguably reinforced by the necessarily young age of a rookie athlete (as opposed to a trainee in the banking or construction sector, for instance, who could plausibly be an adult). Whilst the Court of Appeal in *Barry Congregation* did not seek to distinguish between adult and child sexual abuse in their application of the ‘tailored’ approach in that case, it was recognised that it will generally be more difficult to establish a significant power disparity when the tortfeasor and victim are both adults.[[1280]](#footnote-1280) This only serves to reinforce the contention that the power gap between an apprentice and full-time employee will not always be the same in every industry, and that a truly contextual approach is needed in this area of law.

This point can be further buttressed by examining the entrenched values and attitudes that are evident in professional sport, and this brings us nicely to an assessment of Males LJ’s second enquiry in the context of *GB*: whether Fox’s alleged conduct was an abuse of his power, as opposed to an act that was ‘unconnected with his status’ as a senior professional footballer. In answering this question, it is suggested that insight from masculinities studies is helpful in demonstrating that the risk of sexual abuse is far more intrinsic to elite sport than it is to most other industries. As touched upon above, this field of research examines the notion of what it means to “be a man”, and in particular how the hegemonic masculinity prevalent in various cultures and institutions leads to the formation of socially dominant male groups.[[1281]](#footnote-1281) Given this, it seems a particularly apt theory to apply here, especially as the overwhelming scholarly consensus appears to view professional sport as an ‘active engine in the creation and preservation of power relationships’.[[1282]](#footnote-1282) In fact, participation in sport is widely perceived to act as a ‘masculinising process’,[[1283]](#footnote-1283) in that the emergence of modern sport in the late nineteenth century was reportedly a reaction to the concern that boys were becoming more feminine as a result of industrialisation.[[1284]](#footnote-1284) This led to the embodiment of various militaristic characteristics in sport (such as an emphasis on aggression, discipline, toughness and obedience), and ultimately to a culture whereby individuals view ‘other peoples’ bodies as objects of their power and domination’.[[1285]](#footnote-1285) As Brake observes, so long as athletes exhibit these traits, they are ‘clothed with an enviable masculinity’.[[1286]](#footnote-1286) With this in mind, three particular points are relevant here.

First, being ‘masculine’ is not to be strictly associated with being male. Masculinity is a cultural construction that is divorced from biology, so it may be that much of the discussion in this section is equally applicable to female athletes who embody hypermasculine traits in the locker room. Second, off-field sexual violence may only be an expected cultural norm in those sports that are described by scholars as ‘quintessentially’ masculine, such as rugby and football.[[1287]](#footnote-1287) The practical significance of this is considered below in section 7.2.3 where I set out some useful guidelines for determining an employer’s vicarious responsibility for off-field abuse. Finally, it is worth noting that, because masculinity is a socially constructed phenomenon, it must constantly be re-proven and reinforced, lest it be lost.[[1288]](#footnote-1288) This produces a hierarchy of masculinities in the sports dressing room, with all athletes seeking to establish and reaffirm their position as the most dominant ‘alpha-male’ athlete.[[1289]](#footnote-1289) As is evidenced by the tortfeasor’s actions in *GB*, one way to reach the apex of masculinity is to perpetrate violence against rookie athletes or those other male participants who do not easily fit into society’s dominant conception of ‘manliness’.[[1290]](#footnote-1290) This violence is often sexual in nature, as Belkin notes that ‘[i]n almost every cultural and institutional context imaginable, penetration is associated with masculinity and dominance while penetrability is a marker of subordination’.[[1291]](#footnote-1291) In this light, Adams, Anderson and McCormack argue that athletes ‘employ the processes of hegemonic oppression to construct socially esteemed identities (predicated on being heterosexual and masculine), in an effort to maintain or improve their position within the social stratification.’[[1292]](#footnote-1292) On the flip side, the ability to endure such pain and “take it like a man” is also one way for young athletes to ascend the masculinity hierarchy,[[1293]](#footnote-1293) particularly in light of the established cultural norm that, if they survive the ordeal, they might have the opportunity to exert their own power and dominance over an apprentice later in their career.

As we see from this discussion, it is suggested that exposure to masculinities studies may have aided HHJ Butler in understanding that Fox’s behaviour in *GB* was, in fact, an expected and inherent risk of professional football, such that the vicarious liability of Stoke City should have been triggered had the events in question been factually proven. This conclusion may also be consistent with the discussion on benefit enterprise liability in section 7.3.2, particularly if we accept that producing a tough, aggressive player was to Stoke City’s advantage. Notably, whilst *GB* was concerned with informal punishment, vicarious liability ought to also arise for any harm that is caused during initiation rituals, as such harm is seemingly grounded in the same toxic masculine hegemony as punishment. These rituals, which are often referred to in North America as ‘hazing’,[[1294]](#footnote-1294) are defined by Thompson, Johnstone and Banks as ‘activities whereby senior members put incoming athletes through challenges in order to assimilate them into the team culture’.[[1295]](#footnote-1295) These challenges are often sexual in nature, and they allow those at the top of the power hierarchy to feminize and emasculate the newcomers while further solidifying the heteromasculine identities of those involved.[[1296]](#footnote-1296) In this light, Volkwein-Caplan and Sankaran are correct to argue that sexual hazing is ‘particularly likely to occur in tightly knit competitive male groups (e.g. military units, gangs, college fraternities, sport) that bind men emotionally to one another and contributes to their seeing sex relations from a position of power and status’.[[1297]](#footnote-1297) It is perhaps no coincidence, then, that in one of the more recent UK cases to consider vicarious liability in the military context, the facts revolved heavily around a second lieutenant attempting to prove his masculine value and bravery to his peers by engaging in a daring jump from a bridge. The captain in command had put ‘immense’ pressure on the claimant to jump in order to prove that he was as brave as the other men in the group, and it was for such reasons that the Court of Appeal found that the negligence of the captain was committed within the course of his employment.[[1298]](#footnote-1298)

Now, under my contextual-pluralist model, it is worth briefly examining whether empirical facts can vindicate these normative intuitions. The available data suggests that they might. Aside from anecdotal evidence from former athletes themselves,[[1299]](#footnote-1299) various US-based studies have found that between 42% and 74% of college athletes have been the victim of hazing,[[1300]](#footnote-1300) with Waldron concluding that over 50% of such athletes were subject to what she labels ‘severe hazing’ (which includes brandings, physical beatings and sexual assault).[[1301]](#footnote-1301) Similar statistics are evident in other countries, with Favero et al outlining that 47.1% of Portuguese university athletes experienced some form of sexual hazing.[[1302]](#footnote-1302) Recent findings from Kerschner and Allan confirm that this is a risk increased by sport, as they reported that 40.9% of college athletes experienced hazing, as opposed to 24.8% of non-athletes.[[1303]](#footnote-1303) Qualitative research by other scholars suggests that the rate of hazing is linked to the perceived masculinity of each sport, such that athletes are more likely to experience hazing in ‘competitive, team and contact sports than in less competitive, individual and non-contact sports’.[[1304]](#footnote-1304)

Of course, it is worth reiterating here that this data is sourced from US studies relating to college athletes, and that there continues to be a dearth of information related to the prevalence of initiation ceremonies in (professional) UK sport.[[1305]](#footnote-1305) As such, it is crucial that some jurisdictional sensitivity be shown here. Of course, it is not necessarily the case that findings from other countries ought to be dismissed out of hand. Indeed, in some instances, UK judges have sought to rely on US studies when no empirical data on a particular issue exists on this side of the Atlantic. For instance, Auld LJ in his *Review of the Criminal Courts* was content to rely primarily on US studies on juror bias in recommending the need for racially mixed juries in the UK.[[1306]](#footnote-1306) However, it is necessary to briefly explain why empirical studies in the context of American college sport could provide a somewhat instructive comparison for assessing the prevalence of hazing and off-field sexual abuse in the professional sporting industry in England and Wales.

At first glance, the American sporting context might seem a rather peculiar comparison here. After all, the differences between the so-called ‘American model’ and ‘European model’ of sport have been well rehearsed, with numerous differences relating to the use of salary caps, the priority afforded to competitive balance, and the system of promotion/relegation (which is foreign concept to the closed league system that is utilised in most US sports).[[1307]](#footnote-1307) Yet, beyond these regulatory differences, there arguably exists a striking similarity in relation to the underlying financial and cultural ethos of the two contexts. Unlike university sport in the UK, US college sport – which is regulated by the National Collegiate Athletic Association (NCAA) – is a multi-billion dollar industry that is watched by millions of fans across the globe.[[1308]](#footnote-1308) For context, it is reported that the University of Texas’ football team hosts a crowd of around 90,000 people every week, and it is estimated that the team generates almost $100 million a year for the university.[[1309]](#footnote-1309) These figures – which would not look out of place in the top-flight of English football – are bolstered by the fact that the University of Texas has even introduced its own television network to broadcast the teams’ games.[[1310]](#footnote-1310)

In this light, it is little surprise that many college athletes in the US are often treated as celebrities, much like professional sports stars in the UK. Indeed, Gerrie notes that, during the 2014-15 season, Duke University’s star player, Jahlil Okafor, was worth around $2.6m due to his immense ‘identity, celebrity and star status’.[[1311]](#footnote-1311) NCAA athletes are also accustomed to training for multiple hours each day, and are often supplied with cutting-edge facilities, equipment and diet plans in order to maximise their potential.[[1312]](#footnote-1312) Consequently, it is perhaps unsurprising that these high-profile US college athletes are sometimes held out as role models that are able to influence social change.[[1313]](#footnote-1313) What this picture arguably shows, then, is that US college athletes are seemingly subjected to the same influences and competitive environment as many professional sports stars in the UK. In this light – and bearing in mind the ‘special affinity’ that appears to exist between the UK and US in terms of ‘popular culture and sport’[[1314]](#footnote-1314) – it could be concluded that those studies on the risk of hazing in US college sport may be broadly applicable to the UK professional sporting industry too. This is, of course, not to say that US data is always unquestionably applicable to the UK context. After all, it would be somewhat contradictory for me to adopt a contextual approach to vicarious liability, but then go on to completely ignore any lingering differences between the UK and US sporting norms. However, what I do maintain is that the two contexts may share enough similarities to make the statistics on the prevalence of hazing in US college sport an instructive – though certainly not a determinative – guide for UK professional sport. That said, it is also hoped that, by shedding some light on this issue, the discussion in this section will open the door to conducting some (much needed) empirical data on the prevalence of hazing in the UK professional sporting context.

**7.2.2 Sexual Assault of Women**

Oftentimes, sporting initiation rituals also involve some form of violence against (or objectification of) women,[[1315]](#footnote-1315) and this brings us to an analysis of the second off-field act which may give rise to vicarious liability: the sexual assault of women. Athletes often use violence against women to demonstrate their masculinity, a point which once again reinforces the overlap between the two related fields of gender studies perused in this chapter. Notably, both women inside and outside of a particular sporting institution are at risk of such harm. As examples of the former, one need only delve into the purported misogynistic culture of sports such as figure skating,[[1316]](#footnote-1316) cycling,[[1317]](#footnote-1317) cheerleading,[[1318]](#footnote-1318) golf[[1319]](#footnote-1319) and horse racing.[[1320]](#footnote-1320) For purposes of brevity, and because we have already touched in the previous section upon harm caused to participants who are directly involved in the sporting milieu, this section predominantly focuses on the sexual assault of women who are not current or aspiring professional athletes. This discussion will help in shaping the more nuanced parameters of my contextual-pluralist model in this context, as well as hopefully laying to rest the lingering scholarly suspicion that there is some form of ‘geographical component’ to the course of employment enquiry, as suggested by Lunney, Nolan and Oliphant.[[1321]](#footnote-1321) Indeed, an application of vicarious liability to the professional sports industry allows us to tease out the fact that it is the *risk* of harm that ought to be the crucial determinant of liability, and *not* the physical proximity between the tortious act and the employer’s establishment.[[1322]](#footnote-1322) Therefore, because many athletes are expected to travel as part of their employment, it is not logical to maintain that an act of sexual assault in a hotel room after an away game is any less susceptible to vicarious liability than a similar act of abuse committed near their employer’s base of operations.

Unfortunately, there are countless high-profile examples of professional athletes engaging in such acts all over the globe. Footballers Cristiano Ronaldo and Neymar, as well as basketballer Kobe Bryant, have all been accused of raping women in hotel rooms, and there have been a string of similar incidents involving players competing in the National Football League (NFL).[[1323]](#footnote-1323) Comparable stories can also be identified in other physically invasive team sports such as rugby league, as evidenced by the 2010 incident in which six Huddersfield Giants players were arrested on suspicion of raping a woman during a pre-season tour in Newcastle.[[1324]](#footnote-1324) In assessing whether such acts could give rise to vicarious liability, the question here is whether the risk of sexual assault against women is significantly heightened by the culture of professional sport (or whether, as some scholars suggest, the correlation between the harm and the employment is overstated due to the increased public attention on sporting celebrities).[[1325]](#footnote-1325) As illustrated above, a feminist lens - which illuminates the marginalization of women in society - is applied here in light of both (i) the gendered and androcentric nature of elite sport, and (ii) the fact that off-field sexual harm committed by sports stars against non-athletes disproportionately affects women.

It must be noted that this feminist perspective is certainly not a mainstream consideration for the law on vicarious liability. Aside from some sporadic scholarly exposition,[[1326]](#footnote-1326) the only explicit mention of feminist theory in the context of vicarious liability comes from Justice Souter’s judgment in the US case of *Faragher v City of Boca Raton*.[[1327]](#footnote-1327) Here, the sexual harassment of a female lifeguard by her two supervisors gave rise to vicarious liability due to the ‘fairness of requiring the employer to bear the burden of foreseeable social behaviour’.[[1328]](#footnote-1328) In reaching this conclusion, Justice Souter drew upon the feminist work of Susan Estrich to illustrate the importance of job-created power.[[1329]](#footnote-1329) In this regard, and in light of the so-called ‘tailored’ approach to sexual abuse (which, as we saw, similarly takes into account the conferral of power and authority on tortfeasors), it may be that feminist legal scholarship has already been implicitlyinfluencing the scope of vicarious liability in recent cases. If this is true, it would be preferable for judges to follow in the footsteps of Justice Souter and candidly admit this fact. Not only may this help to enrich a theory-based application of vicarious liability, but it may also assist us in demonstrating that the sexual assault of women is, in fact, an increased risk of the professional sports industry.

Indeed, feminist scholars have long outlined several explanations as to why the sexual assault of women is a particularly likely occurrence in professional sport, and many of these reasons are neatly summarised by the comments of Garo Mardirossian (an attorney for a female victim who accused an NBA coach of sexual assault in a hotel room in 2014). In his view, ‘[a]ided by their fame, money and power, and motivated by a culture that tolerates misogynistic gender bias, too many men in professional basketball inappropriately abuse women’.[[1330]](#footnote-1330) In this, the suggestion is that the subculture of elite male sport both devalues and denigrates women, with the misogynistic peer norms operating as ‘a key risk factor for men’s perpetration of sexual violence’.[[1331]](#footnote-1331) Many athletes are often institutionalized into believing that they must detach themselves from any form of femininity, and in so doing they become ‘aggressive towards females in order to see themselves above feminine, or feminine traits’.[[1332]](#footnote-1332) In fact, feminist literature highlights numerous examples of toxic locker-room language in a variety of sports, with statements of hostility towards women often closely intertwined with phallocentric discussion of women as sexual objects.[[1333]](#footnote-1333) In addition, male athletes are also accustomed to using phrases such as ‘pussy’ or ‘girl’ in a derogatory manner against their own teammates.[[1334]](#footnote-1334) Such talk is often utilised as a means of reaffirming men’s superiority over women, and various scholars argue that these attitudes create a ‘rape-prone’ culture that ‘promotes and encourages’ the sexual control and domination of women.[[1335]](#footnote-1335) This has led commentors such as Kidd to scathingly describe the sporting dressing room as a ‘training ground for rape’.[[1336]](#footnote-1336)

Importantly for the purposes of enterprise (and vicarious) liability, many feminist writers in this context emphasise the institutional and organisational conditions that lead to such misogyny, rather than examining the traits of a few individual “bad apples” who commit sexual harm. Indeed, Anderson’s work highlights that placing male athletes in gender-integrated sports – as opposed to all-male gender-segregated sports – may actually reduce the chances of individual participants committing violence against women.[[1337]](#footnote-1337) By way of example, consider Fogel’s recent report of a university hockey athlete who committed rape simply because he was afraid of saying “no” to his teammates (and not because he had any ‘biological drive or impulse to commit sexual assault’).[[1338]](#footnote-1338) In addition, psychological research in the area of social norms theory illustrates that if one possesses a belief that their peers are accepting of sexual violence, then that individual is more likely to commit sexual assault.[[1339]](#footnote-1339) It is perhaps unsurprising, then, that recent studies suggest that 45% of sexual assault allegations against college football players involved more than one offender.[[1340]](#footnote-1340) This ought to be contrasted with figures on multiple perpetrator rapes in the wider US population, where it is estimated that only around 10% of sexual assaults involved more than one assailant.[[1341]](#footnote-1341)

One explanation for this discrepancy is the toxic rape culture that is prevalent in many sports. This has sometimes resulted in off-field competitions between athletes who vie for the most sexual encounters or ‘notches on the bedpost’.[[1342]](#footnote-1342) One of the more recent examples of this occurred in 2019 when cricketer Alex Hepburn was convicted of rape after partaking in a ‘deep-seated and long-running’ sexual conquest game ‘between a number of professional sportsmen’.[[1343]](#footnote-1343) In this regard, and because engagement in a sexual act is often couched in the language of “scoring”, sex often becomes a game in itself to many individuals (and like most games, there are winners and losers). For professional athletes who are usually required to possess a win-at-all-costs mentality, they may seek to turn a loss (i.e. the rejection of their sexual advancements) into a win (i.e. engagement in a sexual act), often through physical force and violence. This is perhaps faintly reinforced by the conservative understandings of sex that are symbolically at play in the basic rules of many sports. For instance, and as Dundes observes, the ultimate goal for American football players is to ‘assert their masculinity by penetrating the endzones of their rivals’.[[1344]](#footnote-1344)

Finally, the hyper-masculine subculture of professional sport provides another relevant - though, as we discuss in section 7.3.2, not necessarily unique - factor which may further enhance the risk of off-field sexual assault against women: the belief amongst participants that, due to their celebrity status and athletic success, they are entitled to easy sexual access to women’s bodies.[[1345]](#footnote-1345) As the former NBA star Dennis Rodman once boasted, ‘[a]s long as I play ball, I can get any woman I want’.[[1346]](#footnote-1346) This was seemingly a feature of Adam Johnson’s criminal trial, in which the lead prosecutor suggested that it was ‘an excessive arrogance and an unwarranted level of expectation’ that brought Johnson to the courtroom.[[1347]](#footnote-1347) Such feelings of entitlement have arguably been ingrained in sport for many decades, with the instigator of the modern Olympics, Pierre de Coubertin, even maintaining in 1912 that ‘female applause’ should be awarded for male athleticism.[[1348]](#footnote-1348) Of course, if sex with a woman is suddenly unavailable, an athlete steeped in a culture of fame and expectation may feel entitled to seize what he believes he deserves. These feelings of entitlement are also compounded by research that suggests that women are most attracted to men who play aggressive and competitive sports.[[1349]](#footnote-1349) This may lead to professional athletes erroneously assuming that *all* females crave a sexual encounter with sports stars, thus marking all women as ‘virtually unrapeable’.[[1350]](#footnote-1350) As was demonstrated by the public reaction to the rape allegations made against Kobe Bryant,[[1351]](#footnote-1351) athletes are oftentimes depicted as the target of promiscuous women, and such victim-blaming ideologies arguably only serve to reinforce the acceptability to athletes of sexually assaulting a woman who has been disparagingly referred to (by both peers and the media) as a ‘gold-digger’.[[1352]](#footnote-1352)

Taken together, these arguments provide a solid foundation upon which to argue that off-field sexual assault of women is an intrinsic and heightened risk of professional sport, and therefore an act for which clubs could be held vicariously liable. Numerous statistics also demonstrate that it is empirically – and not just normatively – desirable to impose strict liability on sports clubs for such acts. Building upon the similar findings of earlier studies conducted in the 1990s,[[1353]](#footnote-1353) Young et al found that 54.3% of surveyed university athletes in the US engaged in some form of sexual assault against women, as opposed to 37.9% of non-athletes.[[1354]](#footnote-1354) Other investigations portray a similar trend, with a 2019 study concluding that NCAA athletes were disciplined for sexual misconduct at a rate three times higher than the general student population.[[1355]](#footnote-1355) Empirical research also suggests that athletes are more likely to accept ‘rape myths’ (distorted beliefs about rape that justify their sexual violence),[[1356]](#footnote-1356) as well as being more confused about the appropriate boundaries of sexual consent.[[1357]](#footnote-1357) This is perhaps an unsurprising by-product of their erroneous assumption that all women desire sexual intercourse with them. It is important to mention, however, two caveats on these empirical findings.

First, and as was touched upon in section 7.2.1, much of this data is limited to collegiate and university sport, and there has unfortunately been an alarming lack of research on the prevalence of off-field sexual assault amongst *professional* athletes. This is likely because, as McCray notes, the research on the relationship between sporting participation and violence against women has largely stagnated since the turn of the 21st century.[[1358]](#footnote-1358) Nevertheless, such statistics may well be required in order to promote greater transparency of the connection between sexual assault and participation in professional sport. Second, it may be that the current empirical data also conceals a rather important methodological issue. It has thus far been presumed that it is the toxic culture of sport that increases the risk of sexual violence against women. However, it might well be the case that certain personality types who are prone to such behaviour are simply attracted to these aggressive sports in the first place. To the extent that this is the case, it may not be appropriate to impose vicarious liability. This is because the employment context would not then be causally linked to the injury, but would rather only be setting the time and space for the wrong without necessarily increasing its likelihood. On this basis, the employer’s involvement in the harm would simply be coincidental, and the law has already determined that no tortious liability should ensue for coincidental injury.[[1359]](#footnote-1359)

The answer may not, however, be an either/or one. In fact, it seems plausible that *both* factors might be operating here to generate the increased risk of sexual assault. As Hall observes, ‘[t]here are, undoubtedly, stereotypical ‘bees’ drawn to residential ‘honey pots’ (bringing in sadistic/predatory norms); but it also appears likely that certain institutional conditions… tend to produce abusive behaviour in hitherto ‘normal’ adults.’[[1360]](#footnote-1360) In order to find a close connection, then, Binnie J in *Jacobi* outlined that the employment must have ‘materially’ and ‘significantly contributed to the occurrence of the harm’.[[1361]](#footnote-1361) According to cases in the related area of causation, a ‘material contribution’ may simply be one that is more than *de minimis*.[[1362]](#footnote-1362) This is largely in accordance with Sykes’ law-and-economics analysis, in which he highlighted that even a ‘partial cause’ would still be enough to warrant the imposition of vicarious liability upon an enterprise.[[1363]](#footnote-1363) This response could equally be used to counteract those suggestions that an athlete’s propensity for sexual violence is created only by their talent, rather than by their employment. Again, the more we believe that talent is the primary reason for, say, their expectation of access to women’s bodies, the less justifiable it becomes to impose vicarious liability. However, we might once again conclude that it is a combination of these factors that gives rise to this risk. This can perhaps be demonstrated by the recent incident involving Manchester United footballer Harry Maguire, who was detained by Greek authorities after his involvement in a brawl on the island of Mykonos in August 2020. In an apparent attempt to avoid further punishment for his action, Maguire is alleged to have said: “Do you know who I am? I am the captain of Manchester United, I am very rich, I can give you money… please let us go.”[[1364]](#footnote-1364) However, if indeed talent was the *only* reason for a professional athlete’s expectation of being above the law, then surely a more apt suggestion to the Greek authorities would have been “I’m a very good footballer and I can give you money”?

To a large extent, we may never truly know just how significant the institutional and individual factors are in each case. Given the inherently discretionary nature of this area of law, it is clear that reasonable judicial minds may differ on this issue, particularly as Foster notes that the language of ‘material contribution’ can take on different meanings in different contexts.[[1365]](#footnote-1365) However, I hope that I have done enough in this section to illustrate that, in most cases, an athlete’s employment will constitute a more-than-negligible cause of their off-field sexual violence.

**7.2.3 Concluding Guidance**

With the above points in mind, this section offers six normative considerations that judges could utilise in order to translate the prior analysis into concrete practical guidance. Whilst it is clear that this discussion will apply to both hazing and sexual abuse, it could also apply, as the sixth factor highlights, to some non-sexual acts too. Importantly, this six-point guidance reaffirms that a truly contextual and fact-sensitive approach will be necessary to help us determine vicarious liability for off-the-field acts under my contextual-pluralist model. As such, and largely in contrast to Lord Toulson’s view in *Mohamud v WM Morrison Supermarkets Plc* (where he argued that measuring the closeness of connection on a scale of 1 to 10 would be a ‘forlorn exercise’),[[1366]](#footnote-1366) I suggest that vicarious liability in this context is perhaps best viewed in light of a spectrum-based approach. This will require judges to consider (and balance) the following six considerations, and it will likely be a matter of judicial discretion as to which factors a judge deems to be the most important in each case.

*(1) Physical vs non-contact sports*: Various scholars have identified the existence of a gendered hierarchy within male sport, such that athletes in certain sports are more prone to engaging in off-the-field violence.[[1367]](#footnote-1367) One notable risk factor is participation in aggressive sports, and in particular the notion that being physically ‘aggressive on the field is associated with having a strong sex drive.’[[1368]](#footnote-1368) Forbes et al provide empirical support for this proposition, observing that males who partake in more physically invasive sports exhibited a higher level of sexual hostility towards women than did athletes in other (less brutal) sports.[[1369]](#footnote-1369) The latter games are more fixated on the accuracy and elegance of the participants, and this appears to give rise to a more ‘refined’ and ‘genteel’ masculinity that makes any off-field sexual assault less inherent to that enterprise.[[1370]](#footnote-1370) Of course, fierce competitors and aggressive playing styles exist in even the most placid of sports (the golfer Sergio Garcia perhaps springs to mind here): however, the focus for this factor is on whether physicality and aggression are a necessary prerequisite to successful participation at the elite level of the sport (as it is, for instance, in rugby, ice hockey and American football).

*(2) Team vs individual sports*: Perhaps due to the need to constantly re-prove their masculine capital amongst peers, some commentators have similarly suggested that participation in team sports - as opposed to individual sports - further increases the risk of violent off-field behaviour.[[1371]](#footnote-1371) This is perhaps unsurprising in light of the aforementioned observation by feminist scholars that many athletes are subject to immense peer pressure to commit sexual violence against women. The alarmingly high number of gang rapes committed by athletes is seemingly testament to this fact. However, one might identify a tension here in relation to combat sports, in that they are both physically aggressive *and* an individual sport. However, the anomaly of combat sports perhaps only serves to reinforce the fact that the six considerations outlined here are only to be viewed as useful pointers for judges, and it is the *ensemble* of these factors that will help to shed light on whether a certain off-field risk was intrinsic or not. This will necessarily require judges to conduct a delicate balancing exercise. Many might, therefore, logically surmise that the overtly aggressive nature of combat sports outweighs the fact that it is not a team game, such that a governing body in the sport of, say, boxing, could plausibly be held liable for a boxer’s extramural behaviour. This analysis would, of course, also need to take into consideration other relevant factors outlined below, such as the level at which the boxer was competing, and the type of act that was committed.

*(3) Popularity of the sport*: Empirical data suggests that athletes competing in what are termed ‘center sports’ (i.e. sports that attract the most publicity and finances, such as football and basketball) are more likely to display sexually violent tendencies than those participants who compete in the less prominent ‘marginal sports’ (such as swimming or volleyball, for instance).[[1372]](#footnote-1372) This is perhaps unsurprising given that athletes who play in the former are more likely to possess a greater sense of entitlement to the ‘privileges’ of their elite status.

*(4) On-field position and role in team*: On a related point, Welch observes that a propensity for off-field violence against females may even be directly linked to an individual’s role *on*-the-field, with those players in the more prestigious roles – such as the running back in American football – more likely to harm women.[[1373]](#footnote-1373) This could be due, in part, to the so-called ‘winner effect’, a biological phenomenon that suggests that testosterone levels increase following competitive success.[[1374]](#footnote-1374) Gonzalez-Bono et al note, however, that changes to testosterone in team sports are not typically linked with the outcome of a sporting contest (i.e. a win or loss), but more with an individual’s contribution to that outcome.[[1375]](#footnote-1375) The greater the contribution one makes to their team’s success, the higher their increase in testosterone is likely to be. Consequently, given that a game-winning goal or touchdown is more likely to be scored by a star player who occupies the most prestigious role, it may be useful to assess the tortfeasor’s on-field position in determining vicarious liability for off-field sexual acts.[[1376]](#footnote-1376) One could also assess whether the athlete is a regular starter in the first-team or a bit-part reserve player, as changes in testosterone levels are likely to be much lower for the latter.[[1377]](#footnote-1377) Of course, it is worth reiterating that a participant’s role on the field is not, by itself, a conclusive factor (and it may only be useful to help tip the balance in very borderline cases). Indeed, the fact that Fox in *GB* occupied the arguably less prestigious role of goalkeeper ought not to necessarily rule out vicarious liability in this case given the overwhelming weight of other factors (such as the widespread popularity and masculine physicality of football, as well as the inherent risk of hazing in the sport).

*(5) Level at which the sport is played*: We might recall from section 2.5.2 that, under my contextual-pluralist model, the context of a case could change depending on whether the employer is a Premier League or League 2 team. This difference could be reflected here, in that a lower league team perhaps ought to be less likely to be held vicariously liable for an athlete’s off-the-field act. This could be justified with reference to the muted sense of entitlement that comes with an employee’s more modest athletic success, as well as by the loss spreading implications of imposing liability. Indeed, it is noteworthy that no identifiable liability insurance policy exists to help sports clubs cover any financial losses caused by their athlete-employees off-the-field. The closest available alternative (in football) is abuse cover, but this is reserved for those ‘involved in an official capacity (eg managers, coaches, members and officials) who are involved with football activities for youth and/or vulnerable adults’,[[1378]](#footnote-1378) and Morgan notes that, in any event, it is unlikely to cover informal conduct such as hazing.[[1379]](#footnote-1379) Whilst this lack of appropriate cover might not be an issue for those employers swathed in the riches of the Premier League, it may be of more financial concern to lower league professional clubs (such as Tyrell Robinson’s employer, Bradford FC, for example).

Now, it must be recognised that this suggestion may give rise to a conundrum, in that it arguably makes the imposition of vicarious liability more difficult in those circumstances where it is needed most. After all, a victim is less likely to have a direct claim against a tortfeasor who competes in a less affluent league. This could be rectified by offering liability insurance cover for a wider range of extramural behaviour. Whether this coverage would (or even could) be offered by the market will require a detailed empirical economic assessment, similar to that suggested in Chapter 4 in relation to amateur sport. If such a solution was possible, however, it may then become less desirable to differentiate between higher and lower-league teams in construing the context of a case under my contextual-pluralist model of liability (as was initially suggested in section 2.5.2).

*(6) Type of act*: As Judge Friendly remarked in *Ira S Bushey & Sons v United States*, vicarious liability does not ‘reach into areas where the servant does not create risks different from those attendant on the activities of the community in general’.[[1380]](#footnote-1380) Consequently, and in addition to the above criteria, we must also take into account the nature of the wrongful act in deciding whether or not to impose vicarious liability. Interestingly, over a 14-year period between 2000 and 2013, NFL players had a much lower arrest rate for public order crimes – such as drink driving, public indecency and animal abuse – compared to the general population.[[1381]](#footnote-1381) This suggests that NFL clubs ought not to be vicariously liable for, say, the fatal drink driving incident caused by Henry Ruggs in 2021,[[1382]](#footnote-1382) or for Michael Vick’s involvement in running an illegal dog-fighting ring in 2007.[[1383]](#footnote-1383) In contrast, and despite the overall US population having a much higher arrest rate in general than NFL players, the rate of arrest for *violent* crime – which includes offences such as sexual assault, rape, battery and robbery – was ‘significantly higher’ among NFL players in many of the yearly comparisons.[[1384]](#footnote-1384) Of course, variations in this category of offences will differ, and it may be that some sexual acts are more intrinsically linked to a player’s employment than other acts. In this regard, it may be instructive to adopt a similar spectrum-based approach to that utilised by Ouseley J in the privacy case of *Theakston v MGN Ltd*, where he highlighted that whilst ‘[s]exual relations within marriage at home would be… protected from most forms of disclosure… a transitory engagement in a brothel’ may not be.[[1385]](#footnote-1385) Although Ouseley J’s approach may no longer constitute good law on the reasonable expectation of privacy for sexual encounters,[[1386]](#footnote-1386) his methodology may still be useful for our purposes here.

*Concluding Observations*

With these six factors in mind, two brief points perhaps ought to be made here. The first relates to how these guidelines might inform the more general data on the prevalence of hazing and sexual assault provided above. We have seen, for instance, that empirical findings suggest that sport increases the risk of sexual assault of women by around 43%.[[1387]](#footnote-1387) Now, given that judges have yet to specify the precise statistics that lie behind an ‘inherent’, ‘substantial’ or ‘reasonably incidental’ risk (as noted in section 2.3.1), detractors of my argument may suggest that a 43% increase is not high enough to justify imposing vicarious liability. However, as a rule of thumb, we might say that the lower the increased general risk in any empirical study, the stronger the six specific considerations outlined above may need to be. As is often the case under my contextual-pluralist model, this will require a nuanced balancing exercise under a pragmatic, all-things-considered enquiry. Whilst many may be put off by the inevitable uncertainty created by the guidance here, it seems preferable to insisting on a specific increase (such as the ‘doubling of the risk’ approach offered in some factual causation cases),[[1388]](#footnote-1388) which is likely to result in an overly rigid application of vicarious liability. For example, an insistence on a 100% increase in the hazing statistics referred to above would mean that a finding of 49.5% of sports-related hazing (from a baseline of 24.8% for non-athletes) would not be enough to impose vicarious liability, whereas a finding of 49.7% would be.[[1389]](#footnote-1389) It is highly doubtful whether such a strict approach is desirable, particularly in light of the different methodologies and definitions of hazing that might be used in each study.

On a related second point, it may also be useful to briefly illustrate how my guidance might be tentatively applied to real-life scenarios. At one end of the spectrum, where vicarious liability is most unlikely under my suggested framework, we might find a lower-ranked golfer who commits domestic violence against his wife or long-term partner behind closed doors. Moving towards more borderline cases in the centre, we might see a budding young professional basketballer who sexually assaults a new female lover in his apartment. At the furthest end of the spectrum (where liability is normatively most appropriate) is an elite international rugby player who, perhaps as part of a sexual conquest game between his teammates, rapes a woman in a hotel room where he is staying following an away game. In contrast to the golfer example, it is the inherently misogynistic and violent subculture of professional rugby (as well as the athlete’s perceived entitlement to certain sexual privileges resulting from his athletic success) that makes the latter scenario a more intrinsic risk of the sport. This is supported by many of the empirical statistics referred to above. Following this analysis, then, we might conclude that Sunderland AFC were arguably more likely than not to have been found vicariously liable for Adam Johnson’s sexual assault had his victim sought compensation. Johnson was a successful attacking footballer who, at the time of the offence, played for a popular Premier League club in a physically invasive team sport. As previously mentioned, his act was motivated by an arrogant expectation of access to women, and the available empirical data appears to suggest that his employment as an elite professional footballer may have materially contributed to the sexual assault of his victim in this incident.

**7.3 Reaffirming Vicarious Liability: A Fairness-Based Approach to Role Modelling**

It might be that, in regards to the off-field behaviour of elite sportsmen, the notion of enterprise risk alone could justify vicarious liability. However, in case I am wrong on this point, it may be necessary to discuss how the role model status of professional athletes could also give rise to a benefit enterprise liability justification in this context. Importantly, it is worth stressing here what the argument in this section is *not* about. As I highlight below, my argument is not that vicarious liability is justified simply because athletes are role models and brand ambassadors away from the field. This would give rise to an overly extensive conception of employer liability in this context. Rather, I simply seek to demonstrate how an athlete’s role model status could support a fairness-based justification for vicarious liability, and I do this with reference to the ubiquity of so-called disrepute clauses in modern professional sport.

**7.3.1 Role Models and the Course of Employment**

It might be thought to be somewhat of a strawman argument to even suggest that a sports club ought to be held vicariously liable for extramural behaviour simply because their athletes have a responsibility to act as a role model away from the field. However, this possibility should not be overlooked. Of the three articles that very briefly touch upon the issue of vicarious liability for criminal off-pitch conduct by sportsmen, two make reference to an athlete’s role model status in discussing the course of employment test in this context.[[1390]](#footnote-1390) In fact, McCallum even observes that it is unclear how far vicarious liability could extend for private behaviour in light of the fact that professional athletes ‘not only have responsibilities on the pitch but also off the pitch, as an ambassador of the clubs who employ them’.[[1391]](#footnote-1391) This is reinforced by the views of some athletes themselves, when they suggest that being a role model away from the sport is part of their job.[[1392]](#footnote-1392) My aim in this section is to briefly illustrate why the imposition of vicarious liability based predominantly upon their status as role models should be avoided. In making this argument, I outline two reasons as to why such an approach might give rise to an overly broad and indeterminate application of vicarious liability.

The first can be exemplified with reference to *Jacobi*, a case in which the Canadian Supreme Court refused to find a recreational boys’ and girls’ club vicariously liable for the sexual assault perpetrated by an employee whom the club had held out to be ‘a trusted confidant and role model’.[[1393]](#footnote-1393) Here, Binnie J feared that, if liability were to be found, it would mean that all organisations providing positive role models to children would be subject to no-fault liability if their employees committed sexual abuse.[[1394]](#footnote-1394) This is an understandable concern in light of the wide-ranging definitions that are used to define ‘role modelling’. According to Yancey, for instance, ‘[a] role model is an individual perceived as exemplary, or worthy of imitation’.[[1395]](#footnote-1395) Other scholars adopt a similar two-pronged definition of role model status, which they say is attributable to both outstanding achievement and the ability to motivate others to adapt their behaviour.[[1396]](#footnote-1396) Given the multitude of individuals that might legitimately fit these requirements – which may range from a university student acting as an ambassador at an open day, to the Prime Minister of a country – it seems reasonable to avoid resort to the ‘somewhat ubiquitous’ language of role modelling to determine the boundaries of vicarious liability.[[1397]](#footnote-1397) After all, and as Addis posits, due to the malleable nature of the term, the rhetoric of ‘role modelling’ is often invoked by commentators as a fig leaf to make conclusory normative claims, rather than providing a distinct method of analysis *for* that claim.[[1398]](#footnote-1398) Consequently, and as was similarly discussed in section 3.2.1 in relation to the fair, just and reasonable test, without some underlying (theoretical) guidance to prop this phrase up, we risk the law descending into an arbitrary mess of rules.

The second (related) reason for rejecting a role model-based approach is that it would lead to a potentially illimitable number of acts satisfying the course of employment enquiry. If we assume that professional athletes *are* role models – and UK privacy case law would suggest that this is the case[[1399]](#footnote-1399) – then a close connection could be found in every scenario involving off-field misconduct by a sportsman. Although this would be consistent with the (implausible) view that professional athletes are ’24 hours a day, 7 days a week’ employees who must constantly act as brand ambassadors for their club,[[1400]](#footnote-1400) it sits uneasily alongside the findings in the previous chapter. After all, there is perhaps little wisdom in a model of liability that purports to impose responsibility on clubs for everyharmful act committed away from the field whilst simultaneously maintaining that only certain acts *on*-the-field could give rise to a similar form of liability.

Of course, this concern might be appeased by adopting the view of scholars such as Feezell and Spurgin, who suggest that an athlete is only a role model within the limited confines of the sport they play (i.e. for their on-pitch exploits), *unless they actively seek out a role as a social influencer*.[[1401]](#footnote-1401) On this basis, we might say that someone like Marcus Rashford – who has recently been instrumental in campaigning against the UK government’s policy on free school meals – is a role model in the ‘broader’ sense of the word, and can justifiably be viewed as a ‘moral exemplar’ outside of his limited sphere of existence on the football pitch.[[1402]](#footnote-1402) However, there appears to be something fundamentally illogical with tying this conception of role modelling to vicarious liability. From the victim’s perspective (who is likely to have idolised the wrongdoer regardless), it seems absurd that their potential compensation could be dictated by an athlete’s voluntary self-determination as to whether they are a social influencer or not. It perhaps mattered very little to Adam Johnson’s victim whether or not the Sunderland player was advocating some form of social change. Likewise, we might also question just how wide the scope of vicarious liability would be on this formulation. If Marcus Rashford is an activist for eliminating child poverty, does this mean that vicarious liability could only be imposed for any off-the-field act he committed which is intrinsically related to this work? If so, the fact that Rashford is a role model in the broader sense of the word would still not be enough to hold his employer (Manchester United) liable for, say, his sexual abuse of a woman. Lastly, it must be recognised that, if vicarious liability is predicated on an athlete’s role as social influencer, it would only be natural for clubs to dissuade their employees from engaging in such work (at great cost to society) in order to avoid the potential for liability.

What this discussion highlights is that the scope of the close connection test in the off-field context should not be based primarily on whether or not a professional athlete is a role model and/or brand ambassador. If such a status is relevant at all, then we ought to view it from a legal and contractual perspective, rather than, as much of the literature on this issue has previously done, through a moral or philosophical lens. Indeed, surely the best starting point in determining whether an athlete was acting within the course of their employment is to examine what the employer was demanding of their employee in the first place.[[1403]](#footnote-1403) When this vantage point is adopted, we see that the existence of disrepute clauses in many professional sporting contracts may provide an additional benefit enterprise liability justification for vicarious liability that could work in tandem with the risk-based approach outlined above in section 7.2.

**7.3.2 The Normative Significance of Sporting Disrepute Clauses**

As has been made clear by the jurisprudence of the Court of Arbitration for Sport (‘CAS’), sporting disrepute clauses – or, as they have otherwise been termed, ‘morals clauses’ - are intrinsically linked to the perceived notion that a professional athlete is both ‘a leader and a role model’ within the community.[[1404]](#footnote-1404) These clauses are commonly found in many contracts in the entertainment industry,[[1405]](#footnote-1405) and they have equally been described as ‘ubiquitous’ in the sports sector.[[1406]](#footnote-1406) Whilst the first example of such a provision occurred in 1922 in an attempt to regulate the off-field conduct of the legendary baseballer Babe Ruth,[[1407]](#footnote-1407) the rapid commercialisation of professional sport has meant that it is now common practice for clubs to incorporate disrepute clauses into every contract offered to an athlete. Indeed, the collective bargaining agreements in the four major US sporting leagues – the NFL, NBA, MLB and NHL – all contain a ‘standard player agreement that include(s) a morals clause’.[[1408]](#footnote-1408) Likewise, in the UK, both the Premier League[[1409]](#footnote-1409) and the Gallagher Premiership[[1410]](#footnote-1410) utilise standard playing contracts that include provisions forbidding athletes from bringing their employers or their sport into disrepute.

A fine example of a disrepute clause in action can be seen in reference to the recent controversy surrounding the English rugby union player Danny Cipriani, who was found guilty of assaulting a bouncer and resisting arrest outside a nightclub in 2018. The Rugby Football Union (RFU) subsequently charged Cipriani with ‘conduct prejudicial to the interest of the game’ under rule 5.12 of the RFU’s Membership rules,[[1411]](#footnote-1411) and the independent disciplinary panel reiterated that, as a role model, Cipirani was ‘expected to behave in line with the core values of the game which include respect and discipline’.[[1412]](#footnote-1412) Similar wording is also evident in the rulebooks of many individual sports,[[1413]](#footnote-1413) as well as in the tortfeasor’s contract in *Gravil v Carroll and Redruth Rugby Football Club*. As noted in Clarke MR’s judgment in this case, the semi-professional rugby union player here had been required to ‘observe the highest standards in his conduct both on and off the field’ so that he did not ‘bring the club, the RFU or rugby into disrepute’.[[1414]](#footnote-1414)

Now, one might make a number of interesting observations about these specific examples. First, given that such disrepute clauses are often included for the benefit of both clubs *and* governing bodies, it seems that dual vicarious liability may be appropriate in responding to the off-field actions of athletes who participate in team sports.[[1415]](#footnote-1415) This is consistent with my call for greater resort to dual vicarious liability in section 5.5.2, and it also reflects the fact that many of the normative risk factors outlined above in section 7.2 – such as toxic masculine practices and perceived entitlement to women – are actually intrinsic risks created by particular sports as a whole, rather than by individual clubs *within* that sport. In this regard, and in addition to the liability of clubs, it is perhaps desirable in this context to also impose vicarious liability on regulatory bodies and competition organisers as a proxy for sector liability. Whether such a conclusion could equally justify the imposition of strict liability on other stakeholders with a vested interest in the off-field behaviour of athletes – such as advertisers and sponsors who rely on disrepute clauses to unilaterally terminate an agreement with an athlete who ‘engages in reprehensible behaviour or conduct that may negatively impact his or her public image’[[1416]](#footnote-1416) – is less clear. In this instance, it would need to be shown that such a company satisfies the stage one relationship test.[[1417]](#footnote-1417) If they do, it may also be possible to include them as a defendant in a vicarious liability claim for off-field harm.

Second, and in light of the fact that disrepute clauses are utilised in a variety of other industries, one might question whether my argument in this chapter proves too much. Indeed, one could point to the various risk factors of sexual assault highlighted above, and argue that they similarly apply to numerous other industries in which morals clauses are used. For example, misogynistic language and toxic masculine hierarchies are arguably a feature of the legal profession,[[1418]](#footnote-1418) and it might also be suggested that this is an industry that is equally replete with competitive streaks and a winner-loser dichotomy. Likewise, a perceived entitlement to women as a result of fame and success seemingly applies just as much to musicians and film stars, whilst the physically aggressive nature of professional sport perhaps pales in comparison to the military. However, what is striking here is that in no other industry are the *conglomeration* of these factors quite as strong as in sport. Working in a law firm, for instance, does not entail any physical aggression as part of its role. In contrast, whilst military personnel *are* required to use violence, the lack of celebrity status for such individuals means that the risk factor of easy sexual access to women is not as strong here as in sport.

Of course, this is not necessarily to say that all of the normative factors outlined above need to be satisfied before imposing vicarious liability. After all, my guidance to judges is not intended to act as a checklist or box-ticking exercise. What it does illustrate, though, is that the justification for vicarious liability in some sports is arguably stronger than in most – if not all – other industries that possess similar risk factors. In this light, whilst my discussion in this chapter perhaps ought to send a salutary warning to other enterprises about the possibility of vicarious liability for extramural behaviour, my context-sensitive approach means that the analysis here should only ever be instructive (rather than determinative) for these other sectors. This is reinforced by the fact that any purported increased risk of sexual violence in these other industries ideally ought to be empirically validated, as well as by the fact that the relationship test at stage one would also need to be satisfied (which may, for instance, rule out vicarious liability for truly independent film stars or musicians). Framed in this way, the possibility of indeterminate (or overly broad) liability is significantly diminished.

Third, and to return more specifically to the issue of disrepute clauses, it is clear that these contractual provisions cover a much wider range of behaviour than sexual violence, and they have been used to sanction athletes involved in (amongst other things) drink driving, discrimination, kidnapping and assault cases.[[1419]](#footnote-1419) Clearly, not all of these acts will give rise to vicarious liability under a risk-based approach. As such, the benefit enterprise liability justification perused here will need to work harmoniously alongside the risk-based argument outlined in section 7.2. The need for some form of consistency between these two strands of enterprise liability was discussed in Chapter 5, and it will be explored shortly how a fairness argument based on the existence of disrepute clauses can supplement the notion of risk in this context.

For now, however, it is perhaps worth sharpening the normative theoretical relevance of disrepute clauses to the imposition of vicarious liability. In particular, it could be said that, in line with comments made in *Cox v Ministry of Justice* and *Armes v Nottinghamshire County Council*, such clauses indicate that off-field torts are committed as a ‘result of activity taken by the employee on behalf of the employer’.[[1420]](#footnote-1420) Indeed, it seems that sports clubs - through a process known as ‘meaning transference’ – often seek to latch onto an athlete’s ‘established familiarity and credibility’ to make their own enterprise more appealing to the public.[[1421]](#footnote-1421) We could say that this was the point at the heart of the Cipriani case, in that the RFU was seeking to transfer the perceived ideals of respect and discipline (two fundamental traits of any professional sportsman) from Cipriani to the organisation. On this basis, it is arguable that sports stars are only required to behave in an orderly manner away from the field *because it serves their employers interests*. Likewise, and to further reiterate this point, the existence of disrepute clauses also demonstrates that off-the-field conduct could be classed as part of the employer’s business activity.[[1422]](#footnote-1422) According to Lord Reed in *Cox*, this requirement is concerned with the so-called ‘fairness’ aspect of enterprise liability: that ‘since the employee's activities are undertaken as part of the activities of the employer and for its benefit, it is appropriate that the employer should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him.’[[1423]](#footnote-1423)

This can be illustrated with reference to the world-renowned footballer Cristiano Ronaldo, whose transfer to Juventus in July 2018 was seemingly motivated just as much by the commercial and broadcasting opportunities this opened up to his employer as it was by his on-field talent. In light of the so-called “Ronaldo effect”, the club’s share price more than doubled following his signing, raising Juventus’ market capitalisation to €1.5 billion.[[1424]](#footnote-1424) The four-year contract offered by the club also allowed them to use his image rights in promotional campaigns for Juventus.[[1425]](#footnote-1425) Given that ‘$47 million of Ronaldo’s estimated $108 million earnings [in 2017] came from endorsements’,[[1426]](#footnote-1426) this was clearly a huge financial coup for the Italian club. In fact, the commercial value of the Ronaldo ‘brand’ was so great that, when Juventus travelled to Asia to participate in a pre-season friendly in 2019, South Korean fans threatened the club with legal action after they left the Portuguese striker on the bench for the entire game.[[1427]](#footnote-1427) Given, therefore, that the club was benefitting from Ronaldo’s reputational and commercial success in this manner, it seems fair to maintain that they should also have to bear the consequences of any reasonably foreseeable harm that he might cause as part of this role. After all, the link between his off-field conduct and the reputation of Juventus was seemingly so stark that, when rape allegations were made against Ronaldo in 2018, the stock market valuation of his club plummeted by over €100 million.[[1428]](#footnote-1428) In line with Lord Phillips’ comments in *CCWS*,[[1429]](#footnote-1429) this may serve to further reinforce the contention that Ronaldo’s off-field conduct was intrinsically linked to the business activities of Juventus.

Now, it may be easy to assume that this is an atypical example in light of Ronaldo’s widespread fame and exorbitant success. It may also be a rather unusual case insofar as the allegations which affected Juventus were reported to have occurred whilst Ronaldo was playing for Manchester United in 2009.[[1430]](#footnote-1430) However, as illustrated by the facts of *Mason*, this fairness-based reasoning could be equally applicable to other (more quintessential) examples involving professional sportsmen who do not possess the same celebrity status as Ronaldo. As discussed in section 7.2.1, the facts in *Mason* involved a picture of an individual’s anus being posted on the claimant rugby player’s social media account by one of his teammates. Due to the fact that the claimant has heavily intoxicated at the time, he failed to promptly remove this post. Although the subsequent dismissal of the athlete was held to be unfair, it had been argued by the defendant club that the tweet brought them into disrepute, as ‘the club took advantage of those players who subscribed to Twitter by ensuring that they tweeted information about the club to their followers’.[[1431]](#footnote-1431) But by the same logic, then, if a club is seeking to avail themselves of any financial (and/or public relations) benefit as a result of their employees’ popularity, it is only fair that they should take responsibility – through the guise of vicarious liability – when an employee turns bad. In other words, sports employers should not be allowed to have their cake and eat it too by receiving any positive meaning transference whilst simultaneously being able to reject any negative meaning transference.

*Mason* is also interesting in that it highlights a potentially crucial distinction between acts that are intended to actively contribute to the positive reputation of an employer, and acts that provide no benefit to an employer but otherwise still tarnish their reputation. *Mason* is arguably an example of the former in that his use of social media was helping his club to build ‘relationships with the community, families and children’.[[1432]](#footnote-1432) In contrast, the alleged rape by Ronaldo is seemingly an example of the latter, as it was clearly not done in the context of providing any such benefit to his employer at the time. For these latter acts, it will likely be necessary for a fairness justification predicated on disrepute clauses to work alongside and supplement my risk-based approach outlined in section 7.2. In contrast, for those acts that are committed in the context of charity-led initiatives designed to proactively promote the status of their employer – such as those found in Clause 4 of the standard Premier League contract, which deals with the ‘community, public relations and marketing’ duties of athletes[[1433]](#footnote-1433) - it may be that benefit enterprise liability could alone justify vicarious liability here, regardless of whether the act committed was an intrinsic risk of the sport. This could include, for instance, any tortious conduct that occurs in relation to signing autographs, engaging in charity work or visiting youth centres. This is reinforced by HHJ Butler’s comments in *GB*, when he indicated that, if Peter Fox had assaulted a young fan in the course of performing his contractual obligation to act as the president of a youth fan club, then the club would probably have been held vicariously liable.[[1434]](#footnote-1434) Consequently, this means that clubs and governing bodies in even the most genteel of non-contact sports – such as golf, snooker and volleyball – may still wish to seriously consider their potential liability for off-field conduct if they mandate engagement with any of these civic or social duties.

Importantly, one may wonder whether this latter analysis contradicts the argument I made in section 5.2.3, where I highlighted that control, benefit and risk may need to work together to help produce a harmonious theory of enterprise liability. Two comments may suffice to help respond to this potential inconsistency. First, the key point made in Chapter 5 was *not* that control, benefit and risk must all point to the same conclusion on liability in order to determine whether an employer ought to be held responsible for a particular injury. Rather, I simply sought to demonstrate that if both benefit and risk were normatively relevant to a particular context, then they both need to be geared towards the same type of harm. In other words, whenever both forms of enterprise liability are raised as justifications for imposing or rejecting liability, it would not be desirable to apply risk-based reasoning to any act other than those from which the employer stood to benefit (and vice versa). There is nothing in this analysis to suggest, however, that benefit or risk could not alone justify vicarious liability. Second, and even if I am mistaken on this first point, it is worth remembering that my call for a ‘harm-within-risk’ rule to be incorporated into vicarious liability was made in order to help produce ‘the *strongest possible version* of enterprise liability’.[[1435]](#footnote-1435) As such, it may still be acceptable to impose vicarious liability without any such overlap between benefit and risk, so long as it is recognised that such a conclusion is somewhat weaker from an enterprise liability perspective.

The final observation about sporting disrepute clauses is a simple one: given the significant overlap between the theories of benefit and control (as discussed in sections 2.4.2 and 5.2.3) it may be that the overly intrusive regulation allowed by disrepute clauses further justifies the imposition of vicarious liability on sports employers. Indeed, because such clauses purport to make professional athletes ‘answerable for all publiclyknown albeit private time conduct’, Jonson, Lynch and Adair have suggested that the current employment of sports stars is analogous to a ‘”master-servant” contract relationship typical of a bygone era, where the master owns the slave.’[[1436]](#footnote-1436) Other scholars have likewise pointed out that disrepute provisions are also oftentimes used to silence athletes by stifling dissent and diversity of opinion.[[1437]](#footnote-1437) This is reinforced by the inordinate amount of discretion afforded to employers in deciding whether to sanction an athlete under a disrepute charge. According to the CAS panel in *D’Arcy v Australian Olympic Committee*, to bring an entity into disrepute is to lower its reputation ‘in the eyes of ordinary members of the public to a significant extent.’[[1438]](#footnote-1438) More recent judgments have clarified that it refers to the ‘loss of reputation or dishonour’.[[1439]](#footnote-1439) As we can see, disrepute clauses thus seem to be based predominantly on community standards and moral values, and the highly malleable nature of these concepts means that athletes are subject to an unreasonable amount of control.[[1440]](#footnote-1440) In this regard, it might well be suggested that if clubs are so eager to govern the actions of their players beyond the touchline, then they should equally be ready to assume responsibility for those actions when an individual misbehaves. After all, and as was highlighted in *Home Office v Dorset Yacht Co Ltd*, ‘control imports responsibility’.[[1441]](#footnote-1441)

With these points in mind, it might be worthwhile to mention two concluding comments. First, Davidson has suggested (albeit in the US context) that the expansion of the doctrine of vicarious liability could explain why many employers have taken a more active interest in the off-duty conduct of employees.[[1442]](#footnote-1442) The contention here appears to be that, if an employer is at risk of being held strictly liable for a wider range of acts, then it is only rational for them to encroach upon their employees’ private life in order to ensure that any particular individual is not likely to commit a tort. But by the same token, then, we might alternatively conclude that an increased attempt to control and regulate the off-duty behaviour of employees (as evidenced by such discretionary disrepute clauses) should normatively also lead to an increased scope of vicarious liability. This may be yet another example of how insights from the law on privacy and unfair dismissal could help us to determine the appropriate scope of employer liability in this context.

The second point is that, whilst sports clubs have long sought to take advantage of such ill-defined and pervasive disrepute provisions in an attempt to protect the good will and reputation of their brand, the analysis offered here demonstrates that these clauses could in fact function as a significant financial *disadvantage*, in that they potentially open employers up to a wider scope of vicarious liability. Of course, whether the potential exposure to liability generated by these clauses outweighs the benefits of inducing better off-field behaviour is an important empirical economic question for each club to assess. However, the discussion here highlights that many employers ought to at least think twice before incorporating such oppressive and unduly extensive clauses into their athletes’ contracts. In this regard, I must agree with Paterson when he suggests that disreputable conduct ‘should be more clearly defined’.[[1443]](#footnote-1443) Rather than simply relying on a condensed and amorphous disrepute charge, clubs should instead consider drafting separate and more precise contractual provisions to regulate specific off-the-field acts. This could work to benefit various stakeholders in sport, including the players (who will have a better idea about what conduct is, and is not, acceptable away from the pitch) and the clubs themselves (who could potentially limit their control over - and perhaps therefore their responsibility for - their employees to certain acts).

**7.4 Conclusion**

The somewhat unique nature of the celebrity tortfeasor has yet to be considered in UK case law on vicarious liability, and it has been illustrated here how a risk-based approach – based on insights from the law on privacy and unfair dismissal – could help to provide a satisfactory remedy for harm caused by such individuals. In outlining that various socio-legal and interdisciplinary fields could be utilised to help inform the scope of employer liability under my contextual-pluralist model, it has been shown how research on gendered violence (and in particular, insights from masculinity studies and feminist theory) could help to shape a risk-based approach in this context. This is largely consistent with the current law’s so-called ‘tailored’ approach to vicarious liability that is adopted in sexual abuse cases. In this light, it has been contended that it may be both normatively and empirically appropriate to impose liability on professional sports clubs for many acts of hazing and sexual abuse that occur away from the sports field. It was suggested here that such harm is not merely coincidental, and that various institutional factors may be operating as a material contribution to the injuries that victims suffer. As such, I have endeavoured to lay down six guiding considerations that judges may wish to examine in translating this theoretical discussion into practice. As is conceded under my legal realist understanding of the law, it will necessarily be left to the discretion of each individual judge as to the precise weight to afford to each of these normative factors.

Although some may remain unconvinced by the potential uncertainty of my guidance, I have outlined that a risk-based approach is preferable to the imposition of vicarious liability based on the role model status of professional athletes (which would, seemingly, lead to liability for *every* off-field act). However, it was asserted that a professional athlete’s somewhat unique status as a brand ambassador for their sport could, perhaps, go towards establishing a fairness-based justification for employer liability in this context. This analysis was based on the ubiquity of disrepute clauses in the sports industry, and the notion that employers often seek to latch on to the reputational and sporting success of their employees. Given that both clubs and governing bodies rely on these overly intrusive and all-encompassing clauses, it was intimated that dual vicarious liability may often be appropriate in this context. It was concluded that sports employers ought to reconsider their use of such contractual provisions if they wish to minimise their chances of being held strictly liable for off-field harm.

**CHAPTER 8**

**Conclusion: The Final Whistle**

This study has sought to explore the appropriate scope of vicarious liability in the sports industry, primarily with reference to my theoretically informed contextual-pluralist model (the justification and content of which was outlined in Chapters 2 and 3). In this regard, I have analysed how stage one of vicarious liability – which necessitates a particular relationship between the tortfeasor and defendant – might apply in respect to both amateur sports and individual professional sports. Chapter 4 outlined that, in the absence of improvements to the mandatory first-party insurance cover in many sports, recreational clubs ought to be worried about their potential liability for the torts of their players. In a similar vein, Chapter 5 suggested that sports governing bodies and competition organisers could be construed, for vicarious liability purposes at least, as the employers of the athletes that compete under their auspices. Moreover, and in Chapters 6 and 7, I outlined how stage two of vicarious liability – which is concerned with finding a close connection between the relationship and wrongful behaviour – might be applied to both on-field and off-field harm. In relation to the former, I suggested that courts ought to empirically assess the inherent risks of each sport so as to avoid a clash with the notion of ‘playing culture’ at the standard of care stage. In regards to the latter, it was argued (from a risk-based perspective) that a wide range of sexually violent off-the-field acts could give rise to vicarious liability. This conclusion was supported by a fairness-based approach that examined the normative significance of the pervasive disrepute clauses that exist in many professional sporting contracts.

In light of this summary, it is perhaps worth delving into how the research questions posed in Chapter 1 have been addressed in subsequent chapters. In focussing on the first research question (which asked whether a new model of employer liability might be developed in order to help rationalise the doctrine), I have endeavoured to create a new ‘contextual-pluralist’ framework of vicarious liability. As such, it may be useful to map the first research question onto Part I of the thesis (i.e. Chapters 2-3). By sketching out my suggested model of liability, I have attempted to respond to the various scholarly remarks, noted in Chapter 2, that suggest we have yet to identify a convincing and cogent justification for the existence of the doctrine. In outlining the need for factual nuance and policy sensitivity in this area of law, my suggested model of liability leads to three important claims. The first is that a combination of the theoretical rationales, which could usefully be predicated on the emergence of the ‘fair, just and reasonable’ test in this area of law, might finally provide a convincing justification for the continued existence of vicarious liability. In this regard, I have rejected the more principled, incremental approach advocated by the Supreme Court in both *Barclays Bank v Various Claimants*[[1444]](#footnote-1444)and *WM Morrison Supermarkets v Various Claimants*,[[1445]](#footnote-1445) and have instead suggested that we ought to continue analysing and applying theory in every case. The Court of Appeal judgment in *Barclays*,[[1446]](#footnote-1446) as well as the Supreme Court judgment in *Armes v Nottinghamshire County Council*,[[1447]](#footnote-1447) provide two fine examples of how such a ‘thick’ approach to theory ought to work in practice.

Second, and given the significant overlap between many of the relevant theories – as we saw, for instance, in relation to the similarities between control, benefit and risk in Chapters 5 and 7 – my contextual-pluralist model highlights that the doctrine of vicarious liability may be conducive to a pluralistic balancing approach. To be clear, whilst a mixed theory approach has seemingly already been utilised in some cases (and also rejected by some scholars), this is the first work to entertain the possibility that the relevance of each theory ought to be directly correlated to the particular context in question. In this light, I have suggested that we may be able to determine which theories are most relevant in each scenario by outlining the appropriate context of the case. By way of example, loss spreading was considered the most persuasive theory in the context of the relationship requirement in amateur sport (Chapter 4), whilst enterprise liability was touted as one of the most prominent factors for an assessment of the close connection test in relation to on-the-field harm (Chapter 6).

The third broad claim is that the adoption of my contextual-pluralist model is likely, in many instances, to lead to a wider scope of vicarious liability than the current *Barclays*/*Morrison* approach. One example to illustrate this point might be seen, for instance, in Chapter 7. There, I discussed the ‘thin’ authority of *GB v Stoke City Football Club Ltd*,[[1448]](#footnote-1448) a case in which the presiding judge ruled out liability for the alleged off-the-field abuse of a young professional footballer. However, it was demonstrated how the adoption of a ‘thick’ approach in this case – which would have examined in far more detail the relevance of gender studies to the theory of enterprise liability – might have justified liability here. Importantly, it was also examined why this was a more normatively and empirically desirable outcome on the facts of the case. It is perhaps also worth mentioning here, however, that my call for a contextual-pluralist model of vicarious liability is not necessarily tantamount to a call for the doctrine to spiral out of control. It was highlighted in Chapter 3, for example, that an application of theory could, in some rarer instances, help to rein in overly broad liability. This was evidenced most clearly when the concept of risk was applied to the ‘theory exclusionist’ case of *Mohamud v WM Morrison Supermarkets Plc*.[[1449]](#footnote-1449) It was also illustrated, I believe, by my rejection of a role model-based test in relation to vicarious liability for off-the-field acts. It was suggested in Chapter 7 that this approach, which had seemingly been implicitly supported by some scholars, would lead to an overly extensive scope of vicarious liability in this context.

Notably, and beyond the benefits of better results in individual cases, Chapter 3 was also important in highlighting that the adoption of my contextual-pluralist model is likely to lead to a more meaningful, adaptable and transparent law on employer liability. This was demonstrated with reference to many other areas of law, primarily because the underlying focus of this thesis has also been on *what* the purpose of the law is and *how* judges ought to apply it. However, just as my suggested model has its strengths, it may equally have its drawbacks. Many readers – and particularly those who subscribe to a formalist interpretation of the law – may bemoan the uncertain and unprincipled nature of my model. For instance, it might be questioned how the context of a case is to be adequately defined. This is a legitimate concern, and whilst it will ultimately depend on the discretion of each individual judge, it is hoped that some of the analyses in later chapters could help to provide some useful guidance. For instance, the six normative risk factors outlined in Chapter 7 could be instructive in determining the context of a case dealing with off-the-field harm. Simply defining the context for Adam Johnson’s sexual offence as, say, ‘off-field harm by a professional athlete’, is likely to be too generalised. The different risk factors between each type of sport, act and the level at which the sport is played suggest that a more appropriate conception of the context for Johnson’s act might be ‘off-field sexual violence by a Premier League footballer’.[[1450]](#footnote-1450) As was highlighted in that chapter, this would then allow loss spreading to become a more pertinent concern when dealing with a similar act that is committed by a professional athlete in a lower league (or less popular sport).

Another objection raised in Chapter 2 is whether my contextual-pluralist model can suitably function when two theories (or two groups of theories) clash with each other. Again, however, the analysis in later chapters suggests that this problem is not necessarily insurmountable. I outlined in Chapter 4, for instance, that a conflict between deterrence and enterprise liability/deep pockets could be resolved through the adoption of a loss spreading approach, which seeks to strike a delicate balance between these two competing theoretical stances. In line with an instrumentalist and legal realist tradition, judges will be required to use appropriate empirical data to resolve clashes between two sets of theories. In many other instances, however, identifying a common theoretical solution will be a relatively simple task. Chapter 5, for example, outlined that a combination of risk, benefit, control, loss spreading and deep pockets could justify the vicarious liability of governing bodies and competition organisers in relation to both funded and non-funded athletes.

In applying these rationales to the various contexts perused in this study, the thesis has also responded to the second research question posed in the introduction: how these theories might be applied to the sports industry. This was answered primarily in Parts II and III of the thesis (i.e. Chapters 4-7). Importantly, and as was noted in the introduction, this was the first work to provide an in-depth and up-to-date application of vicarious liability for several torts in a multitude of different sports. In this regard, it is suggested that the heavy emphasis on the role of theory in this thesis has contributed not only to the broader theoretical debate in private law, but also to the theoretically deficient area of sports law. Additionally, and aside from theoretical consistency, I have also repeatedly highlighted the practical implications of my analysis in this study. These will be of interest to various stakeholders in sport, such as sports clubs (both amateur and professional), governing bodies, competition organisers, sponsors and athletes. Some examples of practical guidance outlined in this thesis include, *inter alia*: the provision of more comprehensive legal liability insurance cover in recreational sport (Chapter 4); the removal of overly intrusive regulatory requirements on athletes in individual sports (Chapter 5); the acceptance of employing and selecting so-called ‘hard men’ for their on-field exploits (Chapter 6); and the elimination (or at least modification) of overly extensive and pervasive disrepute clauses (Chapter 7).

The third and final research question – which was also answered primarily in Parts II and III of the thesis - was concerned with the lessons we might learn about vicarious liability by applying it to the sports sector. To this end, a number of notable observations can be made from the analysis in each chapter. In Chapter 4, for instance, my sporting application highlighted that the relevance of loss spreading ought not to be conceptualised in terms of insurance following the law (or vice versa). Rather, it was highlighted that the law on vicarious liability should seek to work symbiotically in a harmonious relationship with the relevant insurance cover, and I demonstrated how this might be done in the recreational sports context. In making this suggestion, it was also illustrated that the both the akin to employment test and the law on unincorporated associations are not satisfactory indicators of the relationship requirement. Instead, and in line with French law on this issue, it might be better to simply focus on the language of ‘responsibility’. This discussion also arguably provides yet another example of how a more theoretically-informed ‘thick’ approach to theory – which, in this context, was centred around the concepts of loss spreading, enterprise liability and deterrence – leads to superior and more determinate results than those provided by the current law.

Likewise, in Chapter 5, my sport-specific analysis led to a number of other broader lessons for vicarious liability. The first was that we may be able to glean guidance from other areas of law so long as the focus is on those normative factors (such as control) that are relevant to employer liability. In this regard, it was suggested that mutuality of obligation is a rather superfluous consideration outside of the employment law sphere. Second, and in light of the intrusive regulation of various individual athletes, it was highlighted that control, benefit and risk may all need to overlap to some degree in order to produce the strongest and most harmonious theory of enterprise liability. Third, it will often be inappropriate and unwise for claimants to rely solely on a non-delegable duty claim. Whilst such an action may be able to support a vicarious liability claim, it should in no way replace it. Finally, it was also observed that sport demonstrates the need for dual vicarious liability to be imposed more frequently. In this regard, it was suggested that we may want to consider adopting the Canadian stance of unequal apportionment of liability.

The application of vicarious liability to the sports sector in Chapter 6 exemplified the need to dispose of the unhelpful distinction between negligent and intentional acts in determining the closeness of connection in each case. My analysis of sporting enforcers also highlighted that vicarious liability may still have an important role to play in cases that seem, at least *prima facie*, better suited to a primary liability claim. This is largely due to the more comprehensive insurance cover that exists for vicarious liability claims, as well as the difficulties in proving fault for an action in negligence (which was illustrated in the sporting context by reference to the malleable notion of reputation). More broadly, my sporting analysis in this chapter also emphasised the merits of empirical data to help back up risk-based claims, as well as highlighting the vast judicial discretion that continues to exist in deciding how to frame a particular tortious act for the purposes of employer liability.

Chapter 7 also highlighted a number of key lessons for vicarious liability. For instance, my sporting application revealed that it may be permissible to draw on closely related areas of law – such as unfair dismissal and privacy – to provide an instructive steer for the application of the close connection test in relation to extramural activity. Additionally, and in light of the various risk factors that may all contribute to the heightened risk of off-field sexual abuse by professional athletes, it was argued that a material contribution-based test may need to be adopted in cases where we are unable to precisely pinpoint the specific causes of a particular risk. Finally, my sport-specific analysis illustrated that vicarious liability should be sensitive to insights from other socio-legal interdisciplinary fields. It was maintained that such insight could help to enrich some of the more ‘traditional’ theories of vicarious liability, such as, in this instance, enterprise risk. In this regard, it was demonstrated that a more nuanced, ‘thick’ approach that draws on insights from masculinity studies and feminist theory could have produced a different – and, in fact, better – outcome in some previously decided cases in this area of law.

With these lessons in mind, it is perhaps worth mentioning a few significant omissions in this thesis, and how these gaps could lead to future research on this topic. The first relates directly to the consequences of this study’s conclusions for the athletes themselves, and in particular to the question of whether a sports employer held vicariously liable ought to have a right of indemnification against their wrongdoing employee. This concern is intrinsically related to the notion of corrective justice, as some judges have suggested that it ought to be ‘the person who caused the damage… who must in law be called on to pay damages arising therefrom’.[[1451]](#footnote-1451) Whilst the use of indemnities is not practically feasible in most employment contexts (given the shallow pockets of most tortfeasors),[[1452]](#footnote-1452) we must remember that, in professional sport at least, many athletes are highly-paid and expensively-acquired employees. In this regard, the sporting context is rather unique, and it may thus be reasonable for the wrongdoing athlete to indemnify their club for any on-field or off-field loss they have caused. Support for this proposition might be gleaned from the lengthy legal proceedings involving the former professional footballer Adrian Mutu, who has been ordered to pay £15.2m in damages to his former employer, Chelsea FC, after unilaterally breaching his contractual obligations.[[1453]](#footnote-1453) Although the club’s case against Mutu centred around his unlawful ingestion of cocaine (which led to a seven-month ban from the sport, and his subsequent dismissal from Chelsea FC), similar reasoning could be equally applicable to any breach of contract resulting from an athlete’s tortious behaviour.[[1454]](#footnote-1454) Whether the acceptance of an indemnity in professional sport is inconsistent with employer-employee relations – a factor that militates against the existence of an indemnification claim in most other industries[[1455]](#footnote-1455) – is also interesting in light of the fact that contracts and relationships routinely break down in this context (usually after a player has handed in a transfer request).

The second avenue for further research relates to the possibility of conducting empirical studies to further support some of the normative and theoretical arguments made in this thesis. This could include, for instance, empirical research into whether the imposition of vicarious liability on sports clubs actually deters foul play (as was suggested in *Gravil v Carroll and Redruth Rugby Football Club*).[[1456]](#footnote-1456) Similarly, empirical analysis exploring the prevalence of hazing and sexual abuse in professional sport would also be a useful line of enquiry. Whilst I have demonstrated in Chapter 7 that judges can, and indeed have, relied on US studies to support their findings on liability in the UK, it would certainly be desirable to also gather UK statistics to help us more accurately assess the frequency of these sexual harms. The third (and most broad) recommendation for future work was touched upon in the introduction, and it concerns the potential vicarious liability of other individuals in the sporting industry, such as managers, coaches, scouts, nutritionists and medical staff. It is hoped that my in-depth theoretical exposition of such liability for athletes could potentially lead to a more socio-legal examination of vicarious liability for these other actors. Given my previous work on doping in sport,[[1457]](#footnote-1457) it might be fruitful to examine the potential vicarious liability of sports clubs and governing bodies for backroom staff who encourage their athletes to consume an illicit substance.[[1458]](#footnote-1458)

Having outlined the potential future research that may be conducted as a result of this study’s conclusions, it is perhaps instructive to end this thesis where we began: with the comments of the legendary American football coach, Vince Lombardi. In one of his most famous quotes, he suggested that ‘[p]erfection is not attainable, but if we chase perfection we can catch excellence’.[[1459]](#footnote-1459) In a similar vein, and in light of the potential flaws in my contextual-pluralist model that have been candidly admitted throughout this study, it would be overly presumptuous to maintain that my suggestions here would lead to a perfect law on vicarious liability. However, by at least striving for perfection – that is to say, by adopting a ‘thick’ approach to the doctrine that is sensitive to the wide array of theories, factual scenarios and empirical studies that may all influence the outcome of a case – we may be able to achieve an excellent law on vicarious liability. And in light of the vast doctrinal inconsistencies and theoretical uncertainties that have plagued this area of law for well over a century, excellence will, I believe, do just fine.

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11. *CCWS* (n 8), para [19]. Even in 2016, Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10 opined that developments in this area of law had ‘not yet come to a stop’ (at para [1]). [↑](#footnote-ref-11)
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20. Mark James, ‘Sport, Safety and Participation – The Year in Review 2018/19’ (LawInSport, 15 May 2019). [↑](#footnote-ref-20)
21. Rachel Vorspan, ‘“Rational Recreation” and the Law: The Transformation of Popular Urban Leisure in Victorian England’ (2000) 45 McGill Law Journal 891, p.907-08. The significance of football in sports law is aptly demonstrated by its dominance in Court of Arbitration for Sport (‘CAS’) cases. According to Rustam Sethna, ‘A Data Analysis of the Arbitrators, Cases and Sports at the Court of Arbitration for Sport’ (LawInSport, 04 July 2019), there are nine times as many football cases published by CAS as the second most popular sport (athletics). [↑](#footnote-ref-21)
22. To take one example, the discussion of liability for loaned players in Chapter 5 is only really relevant for a select handful of professional team sports (such as football and rugby), because such deals are not generally used in amateur or individual professional sports. [↑](#footnote-ref-22)
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27. [2012] 2 WLR 709, para [10]. [↑](#footnote-ref-27)
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38. [2006] UKHL 34, para [8]. [↑](#footnote-ref-38)
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40. See, e.g., *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627, p.639 (per Lord Morton); *Majrowski* (n 13), para [14] (per Lord Nicholls). [↑](#footnote-ref-40)
41. [2002] UKHL 48, para [155]. [↑](#footnote-ref-41)
42. *Lane v Cotton* (1701) 1 Salk 17, p.18 (per Holt CJ); *Ackworth v Kempe* (1778) 1 Doug 41, p.43 (per Lord Mansfield); *Laugher v Pointer* (1826) 108 ER 204, p.207 (per Littledale J). For more recent applications of this theory, see *Twine v Bean’s Express Ltd* [1946] 1 All ER 202, p.204 (per Uthwatt J) and *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1, p.18 (per Lord Simonds). [↑](#footnote-ref-42)
43. (1849) 4 Exch 244, p.255. See also *Hern v Nichols* (1700) 1 Salk 289, p.289 (Holt CJ arguing that ‘[s]eeing somebody must be a loser, by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger’). [↑](#footnote-ref-43)
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45. Robert Stevens, *Torts and Rights* (OUP 2007) p.261. [↑](#footnote-ref-45)
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64. See, e.g., Harold Laski, ‘The Basis of Vicarious Liability’ (1916) 26 Yale Law Journal 105, p.121. [↑](#footnote-ref-64)
65. Keating (n 28) p.1267. [↑](#footnote-ref-65)
66. Gregory Keating, ‘The Theory of Enterprise Liability and Common Law Strict Liability’ (2001) 54 Vanderbilt Law Review 1285, p.1287-8. [↑](#footnote-ref-66)
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69. See, e.g., *Lister* (n 3), para [28] (per Lord Steyn); *Dubai Aluminium* (n 16), para [21] (per Lord Nicholls). [↑](#footnote-ref-69)
70. *Bazley v Curry* [1999] 2 SCR 534, p.554. [↑](#footnote-ref-70)
71. *CCWS* (n 9), para [35]. To clarify, point (iii) is more related to the benefit/burden principle, whereas point (iv) more closely resembles the risk-based aspect of enterprise liability. [↑](#footnote-ref-71)
72. [2017] UKSC 60, para [67]. [↑](#footnote-ref-72)
73. Charles Tremper, ‘Compensation for Harm from Charitable Activity’ (1991) 76 Cornell Law Review 401, p.426-8; Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) p.855; Christian Witting, ‘Modelling Organisational Vicarious Liability’ (2019) 39 Legal Studies 694, p.699-700. [↑](#footnote-ref-73)
74. *Cox v Ministry of Justice* [2016] UKSC 10, para [30]. [↑](#footnote-ref-74)
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76. ibid, p.217. [↑](#footnote-ref-76)
77. This is also supported by Calabresi, when he suggests that enterprises ought to bear the burdens of their harms if they are to identify their true costs: see Guido Calabresi, ‘Some Thoughts on Risk Distribution and the Law of Torts’ (1961) 70 Yale Law Journal 499. [↑](#footnote-ref-77)
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79. See, e.g., *Bazley* (n 45); *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689; *Cox* (n 49). [↑](#footnote-ref-79)
80. Richard Kidner, ‘Vicarious Liability: For Whom Should the Employer be Liable?’ (1995) 15 Legal Studies 47, p.56. See also Robert Stevens, ‘Non-Delegable Duties and Vicarious Liability’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) p.361. [↑](#footnote-ref-80)
81. Gray (n 8) p.117. [↑](#footnote-ref-81)
82. Howard Klemme, ‘The Enterprise Liability Theory of Torts’ (1976) 47 University of Colorado Law Review 153, p.201; *London Drugs Ltd v Kuehne & Nagel International Ltd* (1993) 97 DLR (4th) 261, p.284. [↑](#footnote-ref-82)
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84. Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) p.162. [↑](#footnote-ref-84)
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86. *Bernard v Attorney General of Jamaica* [2004] UKPC 47, para [19] (per Lord Steyn); *Brayshaw v Partners of Apsley Surgery* [2018] EWHC 3286 (QB), para [69] (per Spencer J). [↑](#footnote-ref-86)
87. Po Jen Yap, ‘Enlisting Close Connections: A Matter of Course for Vicarious Liability?’ (2008) 28 Legal Studies 197, p.206-7. [↑](#footnote-ref-87)
88. Jenny Steele, *Risks and Legal Theory* (Bloomsbury 2002) p.207. [↑](#footnote-ref-88)
89. *Bazley* (n 45), para [31]. [↑](#footnote-ref-89)
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91. Phillip Morgan, ‘Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability’ (2015) 31 Journal of Professional Negligence 276, p.291. [↑](#footnote-ref-91)
92. David Tan, ‘Internalising Externalities - An Enterprise Risk Approach to Vicarious Liability in the 21st Century’ (2015) 27 Singapore Academy of Law Journal 822, p.845. [↑](#footnote-ref-92)
93. Anne Spafford, ‘The Enterprise Risk Theory: Redefining Vicarious Liability for International Torts’ (LLM Thesis, University of Toronto 2000) p.8; Bruce Feldthusen, ‘Vicarious Liability for Sexual Torts’ in Nicholas Mullany and Allen Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services 1998) p.227. [↑](#footnote-ref-93)
94. 150 P.2d 436, p.441 (1944). [↑](#footnote-ref-94)
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97. Calabresi (n 52) p.523. [↑](#footnote-ref-97)
98. *Lister* (n 3) para [65]. For academic support, see Beau Baez, ‘Volunteers, Victims, and Vicarious Liability: Why Tort Law Should Recognise Altruism’ (2009) 48 University of Louisville Law Review 221, p.233. [↑](#footnote-ref-98)
99. *Bazley* (n 45), para [31]; Calabresi (n 52) p.517. [↑](#footnote-ref-99)
100. [2005] EWCA Civ 1151, para [55]. [↑](#footnote-ref-100)
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103. Paula Giliker, ‘Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?’ (2015) 31 Professional Negligence 259, p.260. [↑](#footnote-ref-103)
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110. Feldthusen (n 68) p.224. [↑](#footnote-ref-110)
111. Atiyah (n 59) p.22; *Morris v Ford Motor Co Ltd* [1973] 1 QB 792, p.798. [↑](#footnote-ref-111)
112. Williams (n 6) p.232. [↑](#footnote-ref-112)
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114. *Cox* (n 49) para [20]; Atiyah (n 59) p.22 (arguing that the deep pockets rationale is ‘no justification at all, when taken by itself’). [↑](#footnote-ref-114)
115. Gray (n 8) p.152. [↑](#footnote-ref-115)
116. Anthony Gray, ‘Liability of Educational Providers to Victims of Abuse: A Comparison and Critique’ (2017) 39 Sydney Law Review 167, p.185. [↑](#footnote-ref-116)
117. This is considered in detail in section 5.5 in the context of dual vicarious liability. [↑](#footnote-ref-117)
118. Atiyah (n 59) p.334. [↑](#footnote-ref-118)
119. Arthur Ripstein, *Equality, Responsibility and the Law* (CUP 2001) p.16. [↑](#footnote-ref-119)
120. Note, however, the discussion in Chapter 7 where it is highlighted that, in professional sport, the wealth gap between a sports club and a celebrity-athlete may be considerably smaller. [↑](#footnote-ref-120)
121. Emmanuel Voyiakis, *Private Law and the Value of Choice* (Hart 2017) p.216. [↑](#footnote-ref-121)
122. Pauline Bomball, ‘Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law’ (2021) 43 Sydney Law Review 83, p.95. [↑](#footnote-ref-122)
123. Fleming (n 43) p.410. [↑](#footnote-ref-123)
124. *Gravil* (n 54), paras [26]-[7]. [↑](#footnote-ref-124)
125. Jack Anderson, *Modern Sports Law* (Hart 2010) p.244. See also Philip Hutchinson, ‘Who Shoulders the Blame? An Analysis of Vicarious Liability in the Sports Industry’ (LawInSport, 03 October 2016); Mark James, *Sports Law* (3rd edn, Palgrave 2017) p.87-8. [↑](#footnote-ref-125)
126. See, e.g., *Bazley* (n 45), paras [32]-[3] (per McLachlin CJ). [↑](#footnote-ref-126)
127. *Lepore* (n 4), para [305]. [↑](#footnote-ref-127)
128. ibid, para [306]. [↑](#footnote-ref-128)
129. McBride and Bagshaw (n 48) p.854. [↑](#footnote-ref-129)
130. Gray (n 8) p.145-6; Schwartz (n 24) p.1760; Neyers and Stevens (n 10) p.396. [↑](#footnote-ref-130)
131. Agnieszka McPeak, ‘Sharing Tort Liability in the New Sharing Economy’ (2016) 49 Connecticut Law Review 171, p.192. [↑](#footnote-ref-131)
132. Gregory Keating, ‘Distributive and Corrective Justice in the Tort Law of Accidents’ (2000) 74 Southern California Law Review 193, p.222. [↑](#footnote-ref-132)
133. Catherine Sharkey, ‘Institutional Liability for Employees’ Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages’ (2018) 53 Valparaiso Law Review 1, p.5. To similar effect, see Williams Landes and Richard Posner, ‘The Positive Economic Theory of Tort Law’ (1981) 15 Georgia Law Review 851, p.904. [↑](#footnote-ref-133)
134. *Lepore* (n 4),para [219]. [↑](#footnote-ref-134)
135. Ataner (n 58) p.93; Neyers (n 10) p.295; Giliker (n 14) p.250. [↑](#footnote-ref-135)
136. Gray (n 8) p.130. [↑](#footnote-ref-136)
137. *Jacobi* (n 34), para [75] (per Binnie J); *Bazley* (n 45), paras [42] and [49]-[54] (per McLachlin CJ); *Hickey v McGowan* [2017] IESC 6, para [48] (per O’Donnell J). [↑](#footnote-ref-137)
138. Neyers (n 10) p.293-6 (discussing both an ‘employer-focussed’ and ‘employee-focussed’ version of deterrence). Other scholars also refer to the economic distinction between ‘under-deterrence’ and ‘over-deterrence’, thus further highlighting that deterrence (or at least the effects of deterrence) can be utilised and understood in a variety of different ways. See, e.g., Stephen Shapiro, ‘Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?’ (2011) 62 Mercer Law Review 449. [↑](#footnote-ref-138)
139. For a recent discussion on economic analysis of law, see Hanoch Dagan and Roy Kreitner, ‘Economic Analysis *In* Law’ (2021) 38 Yale Journal on Regulation 566, p.571-4. [↑](#footnote-ref-139)
140. Neyers and Stevens (n 10) p.402. [↑](#footnote-ref-140)
141. ibid p.396-8; Neyers (n 10) p.293-6. [↑](#footnote-ref-141)
142. James Gallen, ‘Vicarious Liability and Historical Abuse: A Critical Analysis of *Hickey v McGowan*’ (2017) 58 Irish Jurist 184, p.191. [↑](#footnote-ref-142)
143. One notable work here is that of Justin Sevier, ‘Vicarious Windfalls’ (2017) 102 Iowa Law Review 651, p.657 who found no evidence that employers ‘would meaningfully change their employee selection criteria based on their beliefs about their vicarious liability for the acts of their employees’. On closer inspection, however, it is apparent that almost 60% of the sampled participants had not even owned a business (p.692), and he admits that his study is limited to the hiring practices of small business (p.707). In this regard, his useful - but limited - work is hardly worthy of being the last word on this issue. [↑](#footnote-ref-143)
144. Fleming James and John Dickinson, ‘Accident Proneness and Accident Law’ (1950) 63 Harvard Law Review 769, p.781. [↑](#footnote-ref-144)
145. Baty (n 5) p.147; William Blackstone, *Commentaries on the Laws of England: Volume 1* (ed Wayne Morrison) (Cavendish 2001) p.429. [↑](#footnote-ref-145)
146. Bomball (n 97) p.95. [↑](#footnote-ref-146)
147. (1880) 6 QBD 530, p.532-3. [↑](#footnote-ref-147)
148. See *Honeywill and Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191, p.196 (per Slesser LJ). [↑](#footnote-ref-148)
149. [1924] 1 KB 762, p.771. [↑](#footnote-ref-149)
150. *Mersey Docks* (n 17) p.17. [↑](#footnote-ref-150)
151. *Gold v Essex County Council* [1942] 2 KB 293, p.305 (per Mackinnon LJ); Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576, p.582. In *JGE* (n 8) para [65], Ward LJ thought that control had ‘become an unrealistic guide’. [↑](#footnote-ref-151)
152. See, e.g., Otto Kahn-Freund, ‘Servants and Independent Contractors’ (1951) 14 MLR 504, p.505-6. [↑](#footnote-ref-152)
153. *CCWS* (n 9), para [36] (per Lord Phillips) [emphasis added]. [↑](#footnote-ref-153)
154. (1955) 93 CLR 561. [↑](#footnote-ref-154)
155. ibid, p.571. [↑](#footnote-ref-155)
156. For examples, see generally: Jennifer Arlen and Bentley MacLeod, ‘Beyond Master-Servant: A Critique of Vicarious Liability’ in Stuart Madden, *Exploring Tort Law* (CUP 2005) p.111-42; Alex Ma, ‘Vicarious Liability and the Close Connection Test: The Past, Present, and Future’ (2009) 1 City University of Hong Kong Law Review 117, p.120-2; Lord Phillips, ‘Vicarious Liability on the Move’ (2015) 45 Hong Kong Law Journal 29, p.31; Phillip Morgan, ‘Certainty in Vicarious Liability: A Quest for a Chimaera?’ (2016) 75 Cambridge Law Journal 202, p.203; Gray (n 8) chapter 9. [↑](#footnote-ref-156)
157. Giliker (n 14) p.59. [↑](#footnote-ref-157)
158. Gray (n 8) p.208. See also *Blackwater v Plint* (2005) 258 DLR (4th) 275, para [69] (per McLachlin CJ) (suggesting that ‘the degree of fault may vary depending on the level of supervision. Parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact’). [↑](#footnote-ref-158)
159. Robert Flannigan, ‘Enterprise Control: The Servant-Independent Contractor Distinction’ (1987) 37 University of Toronto Law Journal 25, p.46. See also at p.53 when he argues that control ‘fits hand in glove with risk-taking. A risk-taker is not one who is in a position of subordination’. [↑](#footnote-ref-159)
160. *Armes* (n 47), para [65]. [↑](#footnote-ref-160)
161. *Cox* (n 49), para [21]. [↑](#footnote-ref-161)
162. Morgan (n 130) p.203. [↑](#footnote-ref-162)
163. *CCWS* (n 9), para [49]. [↑](#footnote-ref-163)
164. *Viasystems* (n 75), para [16]. [↑](#footnote-ref-164)
165. Atiyah (n 59) p.16. See also Frank Burton, ‘Limitation, Vicarious Liability and Historic Actions for Abuse: A Changing Legal Landscape’ [2013] Journal of Personal Injury Law 95, p.116. [↑](#footnote-ref-165)
166. [1971] 2 QB 691; Voyiakis (n 96) p.226-7. [↑](#footnote-ref-166)
167. ibid, p.211. [↑](#footnote-ref-167)
168. ibid, p.227-8. [↑](#footnote-ref-168)
169. See, e.g., Giliker (n 14) chapter 7; *JGE* (n 8), para [61] (per Ward LJ). [↑](#footnote-ref-169)
170. Keating (n 41) p.1317. [↑](#footnote-ref-170)
171. Jeffrey Lockwood, ‘Epilogue. Unwrapping the Enigma of Ecofeminism: A Solution to the Illusion of Incoherence’ in Dougas Vakoch (ed), *Ecofeminism and Rhetoric: Critical Perspectives on Sex, Technology, and Discourse* (Berghahn Books 2011) p.169. [↑](#footnote-ref-171)
172. Gregory Pappas, ‘The Pragmatists’ Approach to Injustice’ (2016) 11 The Pluralist 58, p.61; Wibren van der Burg, ‘Pragmatist Reflective Equilibrium’ (2022) p.3, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4085789>; Robert Passmann, ‘Should Pluralists be Pluralists about Pluralism?’ (2021) 199 Synthese 12663. [↑](#footnote-ref-172)
173. Todd Lekan, ‘Actions, Habits, and Practices’ in Anton Leist (ed), *Action in Context* (de Gruyter 2012) p.174. [↑](#footnote-ref-173)
174. Todd Lekan, ‘Just Like an Animal: Cognitively Disabled Humans and the Argument from Marginal Cases’ in Nate Whelan-Jackson and Daniel Brunson (eds), *Disability and American Philosophies* (Routledge 2022) Ch 6. [↑](#footnote-ref-174)
175. Keren-Paz (n 31) p.3. See also, at p.13: ‘[t]he extent to which an egalitarian rule [might thwart intended distributive consequences] … changes with the context, and when backlash is insigniﬁcant more weight should be given to the rules ex post effects (on both potential and particular litigants).’ [↑](#footnote-ref-175)
176. Alan Thomas, *Value and Context: The Nature of Moral and Political Knowledge* (OUP 2010) p.220. [↑](#footnote-ref-176)
177. Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019). One example provided by Sumption is the legalisation of euthanasia (at p.63-6). [↑](#footnote-ref-177)
178. ibid, p.6. [↑](#footnote-ref-178)
179. *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27, para [38]. [↑](#footnote-ref-179)
180. ibid. [↑](#footnote-ref-180)
181. The discussion in section 3.2.2 (on adaptability), and my analysis of Hanoch Dagan’s tension between ‘law as progress’ and ‘law as tradition’ in section 3.3.2, also feeds into my view that law is not – and indeed should not be – a stagnant concept. [↑](#footnote-ref-181)
182. GHL Fridman, ‘”The Course of Employment”: Policy or Principle?’ (2002) 6 Newcastle Law Review 61, p.73-4; Neyers and Stevens (n 10) p.404; Tom Dean, ‘Liability in the Absence of Fault: Can the Doctrine of Vicarious Liability Be Theoretically Justified?’ (2014) 2 Bristol Law Review 85, p.99. For a similar argument in the context of agency, see Luke McCarthy, ‘Vicarious Liability in the Agency Context’ (2004) 4 Queensland University of Technology Law & Justice Journal 1, p.6-7. [↑](#footnote-ref-182)
183. Sumption (n 152) p.35. [↑](#footnote-ref-183)
184. It might also be added that, even if Parliament did enact legislation to help provide some clarity and consistency to the law on vicarious liability, judges would still need to interpret the statutory provisions. This interpretation itself could still allow for some form of judicial activism to take place. Cf Dan Priel, ‘Legal Realism and Legal Doctrine’ in Pierluigi Chiassoni and Bojan Spaic (eds), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism* (Springer 2020). [↑](#footnote-ref-184)
185. *Clayton v The Queen* (2006) 231 ALR 500, para [119]. [↑](#footnote-ref-185)
186. Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press 1960) p.305. [↑](#footnote-ref-186)
187. Scott Shapiro, *Legality* (Belknap Press 2011) p.241. [↑](#footnote-ref-187)
188. ibid. See also Randall Kelso, ‘Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making’ (1993) 20 Pepperdine Law Review 531, p.533. C/f Priel (n 159), who ties a legislative approach to legal realism and draws upon the work of Bentham as the first scientific legal realist. [↑](#footnote-ref-188)
189. Steven Burton, ‘Normative Legal Theories: The Case for Pluralism and Balancing’ (2013) 98 Iowa Law Review 535, p.553. [↑](#footnote-ref-189)
190. Gary Schwartz, ‘Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice’ (1997) 75 Texas Law Review 1801, p.1827. [↑](#footnote-ref-190)
191. Hanoch Dagan, ‘Pluralism and Perfectionism in Private Law’ (2012) 112 Columbia Law Review1409, p.1427. [↑](#footnote-ref-191)
192. [2005] EWCA Civ 1151. [↑](#footnote-ref-192)
193. ibid, para [52]. [↑](#footnote-ref-193)
194. ibid, para [79]. [↑](#footnote-ref-194)
195. ibid. [↑](#footnote-ref-195)
196. *CCWS* (n 9), [45]. See also, writing extra-judicially, Lord Phillips (n 131) p.35. [↑](#footnote-ref-196)
197. Phillip Morgan, ‘Vicarious Liability on the Move’ (2013) 129 LQR 139, 141-42; Claire McIvor, ‘Vicarious Liability and Child Abuse’ (2013) 29 Professional Negligence 62, p.65. [↑](#footnote-ref-197)
198. [2020] UKSC 13. [↑](#footnote-ref-198)
199. [2006] EWCA Civ 18, para [82]. [↑](#footnote-ref-199)
200. Giliker (n 14) p.242. [↑](#footnote-ref-200)
201. [1912] AC 716, p.738-40 (suggesting that, of the two innocent parties in this case, it was better to hold liable the innocent party who ‘clothed that third person’ with authority, because they could ‘insure the honesty’ of their employees). [↑](#footnote-ref-201)
202. Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (7th edn, CUP 2006) p.230. [↑](#footnote-ref-202)
203. Jane Stapleton, ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 LQR 301. [↑](#footnote-ref-203)
204. Merkin and Steele (n 80) p.141. [↑](#footnote-ref-204)
205. Giliker (n 14) p.242. For support, see Witting (n 48) p.710. [↑](#footnote-ref-205)
206. Gray (n 8) p.153-6. [↑](#footnote-ref-206)
207. Andrew Robertson, ‘Justice, Community Welfare and the Duty of Care’ (2011) 127 LQR 370. [↑](#footnote-ref-207)
208. *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, para [21] (per Lord Reed); *Steel v NRAM Ltd* [2018] UKSC 13. [↑](#footnote-ref-208)
209. *Hughes v Rattan* [2021] EWHC 2032 (QB), para [128] (per Heather Williams QC); *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, para [47] (per Lord Toulson); *Vaickuviene v* *J Sainsbury plc* [2013] CSIH 67, para [36] (per Clerk LJ); *JGE* (n 8), para [57] (per Ward LJ); *Maga* (n 35), para [44] (per Lord Neuberger); *N v* *Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB), para [37] (per Nelson J). [↑](#footnote-ref-209)
210. *SKX v Manchester City Council* [2021] EWHC 782 (QB), para [54] (per Cavanagh J); *Barclays* (n 156), para [27] (per Lady Hale); *Grubb v Shannon* [2018] SC GLA 13, para [113] (per Sheriff Reid); *Armes* (n 47), para [87] (per Lord Hughes); *Cox* (n 49), para [42] (per Lord Reed); *CCWS* (n 9), para [94] (per Lord Phillips). [↑](#footnote-ref-210)
211. Ronald Dworkin, *Law’s Empire* (HUP 1986) chapter 2. [↑](#footnote-ref-211)
212. Gray (n 8) p.154. [↑](#footnote-ref-212)
213. Christine Beuermann, ‘Up in *Armes*: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort’ (2018) 25 Torts Law Journal 1, p,18. To like effect, see Desmond Ryan, ‘Making Connections: New Approaches to Vicarious Liability in Comparative Perspective’ (2008) 30 Dublin University Law Journal 41, p.58. [↑](#footnote-ref-213)
214. [1990] 2 AC 605. [↑](#footnote-ref-214)
215. Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) p.187. [↑](#footnote-ref-215)
216. Stevens (n 20) p.259. [↑](#footnote-ref-216)
217. ibid. [↑](#footnote-ref-217)
218. Christopher Robinette, ‘Can There Be A Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine’ (2005) 43 Brandeis Law Journal 369; Christopher Robinette, ‘Torts Rationales, Pluralism, and Isaiah Berlin’ (2007) 14 George Mason Law Review 329. [↑](#footnote-ref-218)
219. Fleming James, ‘Tort Law in Midstream: Its Challenge to the Judicial Process’ (1959) 8 Buffalo Law Review 315. [↑](#footnote-ref-219)
220. Robinette (2005) (n 193) p.413-14. [↑](#footnote-ref-220)
221. Karl Llewellyn, *The Bramble Bush: On Our Law and its Study* (Oceana Publications 1960) p.2. [↑](#footnote-ref-221)
222. Herman Oliphant, ‘A Return to Stare Decisis’ (1928) 14 American Bar Association Journal71, p.73-4. [↑](#footnote-ref-222)
223. Amir Paz-Fuchs, ‘It Ain’t Necessarily So: A Legal Realist Perspective on the Law of Agency Work’ (2020) 83 MLR 558, p.569. [↑](#footnote-ref-223)
224. Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) 4-5. [↑](#footnote-ref-224)
225. The issue of coaches “revving up” their players is touched upon in more detail in Chapter 6. [↑](#footnote-ref-225)
226. Neil Partington, ‘Beyond the “*Tomlinson* Trap”: Analysing the Effectiveness of Section 1 of the Compensation Act 2006’ (2016) 37 Liverpool Law Review 33, p.42. [↑](#footnote-ref-226)
227. ibid (also noting that, in contrast, ‘the objectives of the professional coach would be unlikely to prioritise “grassroots” participation to the same extent’). [↑](#footnote-ref-227)
228. [1973] AC 127 (HL). [↑](#footnote-ref-228)
229. *Romford Ice* (n 76). [↑](#footnote-ref-229)
230. Keren-Paz (n 31) p.15. [↑](#footnote-ref-230)
231. Robinette (2005) (n 193) p.414. [↑](#footnote-ref-231)
232. *Mohamud* (n 184). [↑](#footnote-ref-232)
233. Miguel Delaney, ‘The Death of the 72? Why Football Outside the Premier League is on its Knees’ (*The Independent*, 23 May 2019) <<https://www.independent.co.uk/sport/football/football-league/premier-league-epl-efl-league-one-two-championship-miguel-delaney-a8926126.html>> last accessed 14 September 2021; Daniel Plumley, Jean-Philippe Serbera and Rob Wilson, ‘Too Big to Fail? Accounting for Predictions of Financial Distress in English Professional Football Clubs’ (2020) 22 Journal of Applied Accounting Research 93. [↑](#footnote-ref-233)
234. [2021] EWCA Civ 356. [↑](#footnote-ref-234)
235. As illustrated in section 7.2.1, I agree on this point with the analysis in Allison Silink and Desmond Ryan, ‘Twenty Years on from *Lister v Hesley Hall Ltd* – Is there Now a “Tailored Close Connection Test” for Vicarious Liability in Cases of Sexual Abuse, or Not?’ (2022) 38 Professional Negligence 15, p.25. [↑](#footnote-ref-235)
236. *Barry Congregation* (n 209) para [84]. [↑](#footnote-ref-236)
237. ibid, para [96]. [↑](#footnote-ref-237)
238. *Reilly v Devereux* [2009] 3 IR 660, para [28] (per Kearns J). [↑](#footnote-ref-238)
239. On the distinction between science and craft in Dagan’s work, see section 3.3.3. [↑](#footnote-ref-239)
240. Hanoch Dagan, ‘The Realist Conception of Law’ (2007) 57 University of Toronto Law Journal 607, p.650. [↑](#footnote-ref-240)
241. Shmueli (n 27) p.767. [↑](#footnote-ref-241)
242. Allan Beever, ‘Structure of Aggravated and Exemplary Damages’ (2003) 23 OJLS 87, p.96; Anthony Sebok, ‘Punitive Damages: From Myth to Theory’ (2007) 92 Iowa Law Review 957, p.982-3; Michael Sturley, ‘Vicarious Liability for Punitive Damages’ (2010) 70 Louisiana Law Review 501, p.516 [↑](#footnote-ref-242)
243. Clarence Morris, ‘Punitive Damages in Tort Cases’ (1931) 44 Harvard Law Review 1173, p.1199-1200. For more exploration of the deep pockets point, see Deborah Travis, ‘Broker Churning: Who is Punished? Vicariously Assessed Punitive Damages in the Context of Brokerage House and their Agents?’ (1993) 30 Houston Law Review 1775, p.1800-1 and *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, p.517 (per Lord Woolf MR). [↑](#footnote-ref-243)
244. As evidenced by *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, employers can take out insurance cover for vicarious punitive damages. [↑](#footnote-ref-244)
245. John Dewey, *Lectures in China, 1919–1920*, Trans. and ed. Robert Clopton and Tsuin-Chen Ou (University Press of Hawaii) p.53. See also John Dewey, *Liberalism and Social Action* (GP Putnam’s Sons 1935) p.48-9 (noting that individuals have the power to ‘respond to the intelligence, the knowledge, ideas and purposes that have been integrated in the medium in which individuals live’). [↑](#footnote-ref-245)
246. John Dewey, ‘Democracy and Educational Administration’ in Jo Ann Boydston (ed), *The Later Works of John Dewey: Volume 11* (Southern Illinois University Press 1987) p.225. [↑](#footnote-ref-246)
247. Veli-Mikko Kauppi, Katarina Holma and Tiina Kontinen, ‘John Dewey’s Notion of Social Intelligence’ in Katarina Holma and Tiina Kontinen (eds), *Practices of Citizenship in East Africa: Perspective from Philosophical Pragmatism* (Routledge 2020) p.46. [↑](#footnote-ref-247)
248. Dewey, *Liberalism and Social Action* (n 220) p.49. [↑](#footnote-ref-248)
249. John Dewey, ‘The Public and its Problems’ in Boydston (n 221) p.268. [↑](#footnote-ref-249)
250. ibid, p.364. [↑](#footnote-ref-250)
251. Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 Yale Law Journal 823, p.846. [↑](#footnote-ref-251)
252. ibid, p.846. [↑](#footnote-ref-252)
253. Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 Philosophy and Public Affairs 205, p.217. [↑](#footnote-ref-253)
254. [1969] 2 QB 173, p.184-185. See also, in the Canadian context, *Ontario Ltd v* *Sagaz Industries Canada Inc* [2001] 2 SCR 983, para [48] (per Major J). [↑](#footnote-ref-254)
255. Dagan (n 149) p.1424. [↑](#footnote-ref-255)
256. Giliker (n 14) p.248. [↑](#footnote-ref-256)
257. George Crowder, ‘Value Pluralism, Diversity and Liberalism’ (2015) 18 Ethical Theory and Moral Practice 549, p.551. [↑](#footnote-ref-257)
258. Kauppi, Holma and Kontinen (n 222) p.48. They further note Dewey’s argument that the ‘quest for universal answers actually hampers the ability to solve problems, because an attempt to solve a problem whose conditions have not been clearly determined is “simply useless”’. [↑](#footnote-ref-258)
259. [2020] UKSC 13. [↑](#footnote-ref-259)
260. [2020] UKSC 12. [↑](#footnote-ref-260)
261. This is a quote taken from David Wingfield, 'Perish Vicarious Liability?' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) p.417, who used this phrase to suggest that courts should be more willing to ask what risks are inherent to a particular enterprise. [↑](#footnote-ref-261)
262. Paula Giliker, ‘Rough Justice in an Unjust World’ (2002) 65 MLR 269, p.276. See also Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) p.251-2. [↑](#footnote-ref-262)
263. Phillip Morgan, ‘Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?’ (2015) 31 Journal of Professional Negligence 276, p.289; Jonathan Morgan, ‘Vicarious Liability for Independent Contractors?’ (2015) 31 Journal of Professional Negligence 235, p.235. [↑](#footnote-ref-263)
264. Po Jen Yap, ‘Enlisting Close Connections: A Matter of Course for Vicarious Liability?’ (2008) 28 Legal Studies 197, p.214. [↑](#footnote-ref-264)
265. [2002] UKHL 48. [↑](#footnote-ref-265)
266. ibid, para [23]. [↑](#footnote-ref-266)
267. ibid, para [25]. [↑](#footnote-ref-267)
268. Keith Stanton, ‘Defining the Duty of Care for Bank References’ (2016) 32 Professional Negligence 272, p.274. [↑](#footnote-ref-268)
269. Keith Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (2006) 22 Professional Negligence 134, p.136. [↑](#footnote-ref-269)
270. ibid, p.142. [↑](#footnote-ref-270)
271. Hanoch Dagan, ‘The Realist Conception of Law’ (2007) 57 University of Toronto Law Journal 607, p.658–9. [↑](#footnote-ref-271)
272. See, e.g., Donal Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 LQR 559, p.583. [↑](#footnote-ref-272)
273. [2005] UKHL 28. [↑](#footnote-ref-273)
274. ibid, para [33]. [↑](#footnote-ref-274)
275. Gregory Keating, ‘The Idea of Fairness in the Law of Enterprise Liability’ (1997) 95 Michigan Law Review 1266, p.1272. [↑](#footnote-ref-275)
276. Claire McIvor, ‘The Use and Abuse of the Doctrine of Vicarious Liability’ (2006) 35 Common Law World Review 268, p.279. [↑](#footnote-ref-276)
277. Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) p.155. [↑](#footnote-ref-277)
278. *Armes v Nottinghamshire County Council* [2017] UKSC 60, para [36]. [↑](#footnote-ref-278)
279. *Morrison* (n 2), para [24]. [↑](#footnote-ref-279)
280. David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) p.182. [↑](#footnote-ref-280)
281. *Bazley v Curry* [1999] 2 SCR 534, para [14]. [↑](#footnote-ref-281)
282. See, e.g., *Lister v Hesley Hall* [2002] 1 AC 215, para [60] (Lord Hobhouse noting that ‘an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application’). [↑](#footnote-ref-282)
283. [2013] QB 722, para [54]. [↑](#footnote-ref-283)
284. Neil Duxbury, ‘The Birth of Legal Realism and the Myth of Justice Holmes’ (1991) 20 Common Law World Review 81 suggests that the general orthodoxy of viewing Holmes as a traditional legal realist might perhaps be somewhat overstated. [↑](#footnote-ref-284)
285. Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, p.469. [↑](#footnote-ref-285)
286. ibid, p.476. [↑](#footnote-ref-286)
287. Karl Popper, *The Logic of Scientific Discovery* (Routledge 2000) p.59. [↑](#footnote-ref-287)
288. Karl Llewellyn, ‘How Appellate Courts Decide Cases (Part 1)’ (1945) 16 Pennsylvania Bar Association 220, p.227. [↑](#footnote-ref-288)
289. Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press 1960) p.217. [↑](#footnote-ref-289)
290. Karl Llewellyn, ‘On the Good, the True, the Beautiful, in Law’ (1942) 9 University of Chicago Law Review 224, p.243. [↑](#footnote-ref-290)
291. Llewellyn (n 31) p.305. [↑](#footnote-ref-291)
292. Dan Priel, ‘Legal Realism and Legal Doctrine’ in Pierluigi Chiassoni and Bojan Spaic (eds), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism* (Springer 2020) p.150. [↑](#footnote-ref-292)
293. Thomas Mayo, ‘Charles D. Breitel – Judging in the Grand Style’ (1978) 47 Fordham Law Review 5, p.8. [↑](#footnote-ref-293)
294. *Barclays* (n 1) para [27]. [↑](#footnote-ref-294)
295. Simon Verdun-Jones, ‘The Jurisprudence of Karl Llewellyn’ (1974) 1 Dalhousie Law Journal 441, p.472. [↑](#footnote-ref-295)
296. Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009) p.193. [↑](#footnote-ref-296)
297. See, e.g., the discussion of Lord Sumption’s view in Section 2.5. [↑](#footnote-ref-297)
298. (2001) 207 CLR 21, para [93]. [↑](#footnote-ref-298)
299. Linda Dickens, ‘Exploring the Atypical: Zero Hours Contracts’ (1997) 26 Industrial Law Journal 262, p.263. [↑](#footnote-ref-299)
300. 60 F Supp 3d 1067, 1081 (ND Cal, 2015). [↑](#footnote-ref-300)
301. Andrew Bell, ‘Vicarious Liability: Quasi-Employment and Lose Connection’ (2016) 32 Journal of Professional Negligence 153, p.155–156. For case law examples, see *Uber BV v Aslam* [2019] 3 All ER 489 and *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29. [↑](#footnote-ref-301)
302. *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, paras [83]-[5] (per Lord Phillips); *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717. The tailored approach to sexual abuse is explored in more detail in section 7.2.1. [↑](#footnote-ref-302)
303. John Salmond, *The Law of Torts* (Stevens and Haynes 1907) p.83. [↑](#footnote-ref-303)
304. Alex Ma, ‘Vicarious Liability and the Close Connection Test: The Past, Present, and Future’ (2009) 1 City University of Hong Kong Law Review 117, p.125. [↑](#footnote-ref-304)
305. [1999] 2 SCR 570. [↑](#footnote-ref-305)
306. *Lister* (n 24), para [27] (per Lord Steyn); para [70] (per Lord Millett); cf para [60] (per Lord Hobhouse). [↑](#footnote-ref-306)
307. The Times 31 July, 1984, as cited by Ewan McKendrick, ‘Vicarious Liability and Independent Contractors – A Re-Examination’ (1990) 53 MLR 770, p.781. [↑](#footnote-ref-307)
308. [2005] UKHL 2, para [45] (Lord Nicholls arguing that, ‘[i]f the common law is to retain its legitimacy it must remain capable of development’). [↑](#footnote-ref-308)
309. See Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) p.21 (arguing that ‘the real Realist legacy in legal philosophy’ is a ‘naturalized jurisprudence predicated on a pragmatic outlook’). To similar effect, see Adam Dyrda, ‘Pragmatism, Holism, and the Concept of Law’ (2015) 8 Erasmus Law Review 2, p.7; Edmund Ursin, ‘Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability’ (2013) 50 San Diego Law Review 537, p.584-5. Cf Mark Mendell, ‘Dewey and the Logic of Legal Reasoning’ (1994) 30 Transactions of the Charles S Peirce Society 575, p.611-15. [↑](#footnote-ref-309)
310. Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Indiana University Press 2007) p.47-8. [↑](#footnote-ref-310)
311. John Dewey, 'My Philosophy of Law' in Julius Rosenthal Foundation for General Law, *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston Law Book Co 1941) p.77. [↑](#footnote-ref-311)
312. [2013] QB 840, paras [52]-[3]. [↑](#footnote-ref-312)
313. [2016] UKSC 42, para [69]. [↑](#footnote-ref-313)
314. ibid, para [128] (Lord Kerr referring to the benefits of a ‘rounded assessment of the various public policy considerations at stake’). [↑](#footnote-ref-314)
315. ibid, paras [91]-[2]. [↑](#footnote-ref-315)
316. ibid, para [265]. [↑](#footnote-ref-316)
317. [2014] UKSC 47, para [42]. [↑](#footnote-ref-317)
318. [2014] UKSC 55. See also the 2014 Singapore Court of Appeal decision in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609, paras [69]-[71] (per Andrew Phang Boon Leong JA). [↑](#footnote-ref-318)
319. ibid, para [62] (referring to *Les Laboratoires Servier v Apotex* [2012] EWCA Civ 593, para [73] (per Etherton LJ)). [↑](#footnote-ref-319)
320. ibid, para [20]. [↑](#footnote-ref-320)
321. Although this term is generally credited to the realist Jerome Frank, Schauer contends that it is not clear whether he said anything of the like: see Fredrick Schauer, *Thinking Like A Lawyer: A New Introduction to Legal Reasoning* (HUP 2009) p.129. [↑](#footnote-ref-321)
322. Similar debates on the relevance of policy have also arisen in the context of the duty of care; see, e.g., *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, para [84](per Lord Mance) and *Smith v Ministry of Defence* [2013] UKSC 41, para [170] (per Lord Carnwath). [↑](#footnote-ref-322)
323. See generally, John Griffith, *The Politics of the Judiciary* (4th edn, Fontana Press 1991); Allan Hutchinson, *Its All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Duke University Press 2000). [↑](#footnote-ref-323)
324. Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24 Australian Bar Review 135, p.138. [↑](#footnote-ref-324)
325. Susan Kiefel, ‘Vicarious Liability in Tort - A Search for Policy, Principle or Justification’ (New South Wales Supreme Court Judges Conference, August 2017) <<https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ25Aug2017.pdf>>

     p.2. [↑](#footnote-ref-325)
326. [2003] HCA 4, para [106]. [↑](#footnote-ref-326)
327. *Bazley* (n 23), para [36]. [↑](#footnote-ref-327)
328. (1862) 158 ER 993. [↑](#footnote-ref-328)
329. Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) p.854 (citing Theo Barker and Michael Robbins, *History of London Transport, Volume 1* (Allen & Unwin, 1963) p.69-98). [↑](#footnote-ref-329)
330. See generally *Hillyer v The Governors of St Bartholomew’s Hospital* [1909] 2 KB 820, p.829 (per Kennedy LJ). [↑](#footnote-ref-330)
331. [1951] 2 QB 343, p.361. [↑](#footnote-ref-331)
332. Glanville Williams, ‘The Risk Principle’ (1961) 77 LQR 179, p.192-3. [↑](#footnote-ref-332)
333. John Smillie, ‘The Foundation of the Duty of Care in Negligence’ (1989) 15 Monash University Law Review 302, p.315. [↑](#footnote-ref-333)
334. Priel (n 34) p.156. For more sustained critique on the ‘hunch’ theory of law, see section 3.3.3. [↑](#footnote-ref-334)
335. Kit Barker, ‘Wielding Occam's Razor: Pruning Strategies for Economic Loss' (2006) 26 OJLS 289, p.301. [↑](#footnote-ref-335)
336. Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harper 2015) p.116-8. [↑](#footnote-ref-336)
337. Dan Priel, ‘Two Forms of Formalism’ in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Bloomsbury 2019) p.177-8. [↑](#footnote-ref-337)
338. See, e.g., Priel (n 34) p.151. [↑](#footnote-ref-338)
339. See Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (OUP 2013). [↑](#footnote-ref-339)
340. Priel (n 34) p.153-4. [↑](#footnote-ref-340)
341. To be clear, I must stress that this section does not endeavour to include *every* case touching on vicarious liability in recent years. I have, however, included what many will consider to be the most important cases that have developed the doctrine during the past decade or so. [↑](#footnote-ref-341)
342. *Morrison* (n 2). [↑](#footnote-ref-342)
343. [2016] UKSC 11. [↑](#footnote-ref-343)
344. [2018] EWCA Civ 2214. [↑](#footnote-ref-344)
345. [2018] EWCA Civ 2339. [↑](#footnote-ref-345)
346. [2020] EWCA Civ 180. [↑](#footnote-ref-346)
347. This phrase was first coined in *Mohamud* (n 85), para [47] (per Lord Toulson), and was later adopted by the Court of Appeal in *Bellman* (n 86), para [26] (per Asplin LJ) and by the Supreme Court in *Morrison* (n 2), para [14] (per Lord Reed). [↑](#footnote-ref-347)
348. Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) p.7. [↑](#footnote-ref-348)
349. James Lee, ‘The Supreme Court, Vicarious Liability and the Grand Old Duke of York’ (2020) 136 LQR 553, p.557. [↑](#footnote-ref-349)
350. *Various Claimants v* *WM Morrison Supermarkets plc* [2017] 3 WLR 691, para [194]. [↑](#footnote-ref-350)
351. *Morrison* (n 2) para [24]. [↑](#footnote-ref-351)
352. James Plunkett, ‘Taking Stock of Vicarious Liability’ (2016) 132 LQR 556, p.561-2. [↑](#footnote-ref-352)
353. Paula Giliker, ‘Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention’ (2018) 77 Cambridge Law Journal 506, p.533. [↑](#footnote-ref-353)
354. *Mohamud v WM Morrison Supermarkets plc* [2014] EWCA Civ 116, para [35]. [↑](#footnote-ref-354)
355. *Barclays* (n 1). [↑](#footnote-ref-355)
356. [2016] UKSC 10. [↑](#footnote-ref-356)
357. [2021] EWCA Civ 356. [↑](#footnote-ref-357)
358. [2015] EWCA Civ 47. [↑](#footnote-ref-358)
359. [2018] EWCA Civ 1157. [↑](#footnote-ref-359)
360. [2015] EWHC 2862 (QB). [↑](#footnote-ref-360)
361. [2018] EWHC 3286 (QB). [↑](#footnote-ref-361)
362. See, e.g., *Cox* (n 98), paras [32]-[34] (per Lord Reed); *Barclays* (n 1), para [28] (per Lady Hale); *Graham* (n 100), para [14] (per Longmore LJ); *Kafagi* (n 101), paras [53]-[54] (per Singh LJ); *GB* (n 102), paras [145]-[146] (per Butler HHJ); *Brayshaw* (n 103), paras [68]-[69] (per Spencer J). [↑](#footnote-ref-362)
363. *Armes* (n 20). For similar theoretical approaches to the possible vicarious liability of foster carers in Canada and New Zealand, see (respectively) *KLB v British Columbia* [2003] 2 SCR 403 and *S* *v Attorney-General* [2003] 3 NZLR 450. [↑](#footnote-ref-363)
364. [2018] EWCA Civ 1670. [↑](#footnote-ref-364)
365. *Armes* (n 20), para [61]. [↑](#footnote-ref-365)
366. ibid, para [62]. [↑](#footnote-ref-366)
367. ibid, para [63]. [↑](#footnote-ref-367)
368. ibid, paras [66]-[70]. [↑](#footnote-ref-368)
369. ibid, para [68]. [↑](#footnote-ref-369)
370. ibid, para [69]. [↑](#footnote-ref-370)
371. *Barclays* (n 1), para [27]. [↑](#footnote-ref-371)
372. *Barclays* (n 106), paras [39]-[40] and [56]-[57]. [↑](#footnote-ref-372)
373. *Barclays* (n 1), para [28] (per Lady Hale). [↑](#footnote-ref-373)
374. ibid, para [27]. [↑](#footnote-ref-374)
375. As Nicola Davies J explained at first instance in *Barclays*: the ‘control was of a higher level of prescription than might usually be found in the context of an examination required to be performed by a doctor.’ See *Barclays* (n 106), para [27]. [↑](#footnote-ref-375)
376. Paula Giliker, ‘Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability? *Barclays* and *Morrison* in the UK Supreme Court’ (2021) 37 Professional Negligence 55, p.61. [↑](#footnote-ref-376)
377. *Hughes v Rattan* [2021] EWHC 2032 (QB), para [100] (per Ben Collins QC); *DJ v Barnsley MBC* [2021] 1 WLUK 632, para [23] (per Simon Myerson QC). [↑](#footnote-ref-377)
378. *TVZ & others v Manchester City Football Club Ltd* [2022] EWHC 7 (QB), para [321] (per Johnson J); *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352, paras [100]-[4] (per Stuart-Smith LJ); *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680, paras [143]-[60] (the court seemingly ignoring Lady Hale’s express warning from *Barclays* as to the role of theory); *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), para [144] (per Chamberlain J). [↑](#footnote-ref-378)
379. Craig Purshouse, ‘Halting the Vicarious Liability Juggernaut: *Barclays Bank PLC v Various Claimants*’ (2020) 28 Medical Law Review 794, p.795; cf Andrew Bell, *‘*Plus ça Change*,*Plus*C'est*la Vicarious Liability’ (2020) 36 Professional Negligence 150, p.155 (observing that the ‘[a]pplication of [broader policy ideas] to any particular case may well remain as much of a lottery as before’). [↑](#footnote-ref-379)
380. Donal Nolan, ‘Reining in Vicarious Liability’ (2020) 49 Industrial Law Journal 609, p.615. [↑](#footnote-ref-380)
381. *Barclays* (n 106), para [42]. [↑](#footnote-ref-381)
382. Bruce Feldthusen, ‘Vicarious Liability for Sexual Abuse’ (2001) 9 Tort Law Review 173, p.173. [↑](#footnote-ref-382)
383. Karl Llewellyn, *The Common Law Tradition* (Little Brown & Co 1960) p.38. [↑](#footnote-ref-383)
384. *Barclays* (n 1) para [28]. [↑](#footnote-ref-384)
385. Arno Becht, ‘A Study of The Common Law Tradition: Deciding Appeals’ (1962) Washington University Law Quarterly 5, 7. [↑](#footnote-ref-385)
386. *Barclays* (n 106), para [56] (Irwin LJ referring to control as ‘the most critical factor’). [↑](#footnote-ref-386)
387. In *Bellman* (n 86), Irwin LJ did, however, emphasise the fact-sensitive nature of the case by reiterating that ‘this combination of circumstances will arise very rarely’: see paras [37]-[40]. [↑](#footnote-ref-387)
388. Christine Beuermann, ‘Vicarious Liability: A Case Study in the Failure of General Principles’ (2017) 3 Professional Negligence 179, p.187. [↑](#footnote-ref-388)
389. *Mohamud* (n 85). [↑](#footnote-ref-389)
390. *Cox* (n 98). [↑](#footnote-ref-390)
391. This is perhaps best evidenced by the proceedings in *Barclays*, and it also probably explains why claimants in more recent cases - such as *Rattan* (n 119) - still seek to invite discussion of theory. As highlighted above, *Mohamud* may be somewhat of an anomaly to this trend, as a risk-based approach to this case would likely have excluded the imposition of vicarious liability. [↑](#footnote-ref-391)
392. The recent case of *Barry Congregation* (n 99) appears to continue this trend. Somewhat peculiarly for a vicarious liability case, both stages of the doctrine were considered in detail here. However, whilst the theory of enterprise liability was applied by Davies LJ in a relatively thorough manner at the first stage (paras [74]-[81]), it received but one sentence of analysis at the second stage (para [88]). [↑](#footnote-ref-392)
393. Giliker (n 4) p.251. [↑](#footnote-ref-393)
394. *CCWS* (n 44), para [47]. [↑](#footnote-ref-394)
395. [2012] 2 WLR 709, para [40]. [↑](#footnote-ref-395)
396. [2010] EWCA Civ 1106, para [37]. [↑](#footnote-ref-396)
397. *CCWS* (n 44), para [48]. [↑](#footnote-ref-397)
398. Gray (n 19) pp.198, 215. [↑](#footnote-ref-398)
399. [2017] SGCA 58, para [63]. [↑](#footnote-ref-399)
400. *CCWS* (n 44), paras [56]-[7], [88]-[93]. [↑](#footnote-ref-400)
401. Dagan (n 13) p.610. [↑](#footnote-ref-401)
402. ibid. [↑](#footnote-ref-402)
403. Dagan (n 80) p.61. [↑](#footnote-ref-403)
404. Llewellyn (n 124) p.36-8. [↑](#footnote-ref-404)
405. Phillip Morgan, ‘Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?’ (2018) 38 Legal Studies 242, p.257-8. [↑](#footnote-ref-405)
406. Priel (n 79) p.182. [↑](#footnote-ref-406)
407. [2014] AC 366, para [94]. [↑](#footnote-ref-407)
408. Priel (n 34) p.157. As Priel further elaborates, when reading cases, he apparently sees ‘well-meaning, but rather jejune attempts by judges who are intelligent but… have little relevant training. They are armed with little more than vague verbal formulas and appeals to open ended values, backed up by speculations rather than empirical evidence, to provide answers to policy questions.’ [↑](#footnote-ref-408)
409. Douglas Brodie, ‘Enterprise Liability: Justifying Vicarious Liability’ (2007) 27 OJLS 493, p.498. [↑](#footnote-ref-409)
410. *Lister* (n 24), para [83]. [↑](#footnote-ref-410)
411. Patrick Parkinson and Judy Cashmore, ‘Assessing the Different Dimensions and Degrees of Risk of Child Sexual Abuse in Institutions’ (*Royal Commission into Institutional Responses to Child Sexual Abuse*, June 2017). [↑](#footnote-ref-411)
412. ibid, p.25. [↑](#footnote-ref-412)
413. ibid, p.94. [↑](#footnote-ref-413)
414. Brodie (n 151) p.499. [↑](#footnote-ref-414)
415. [2005] EWCA Civ 251, para [56]. [↑](#footnote-ref-415)
416. [2008] EWCA Civ 689, paras [26]-[27]. [↑](#footnote-ref-416)
417. Alysia Blackham, ‘Legitimacy and Empirical Evidence in the UK Courts’ (2016) 25 Griffith Law Review 414, p.415. [↑](#footnote-ref-417)
418. Kylie Burns, ‘It’s Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases’ (2013) 21 Torts Law Journal 73, p.73. [↑](#footnote-ref-418)
419. Steven Chanenson, ‘Get the Facts, Jack - Empirical Research and the Changing Constitutional Landscape of Consent Searches’ (2003) 71 Tennessee Law Review 399, p.447. [↑](#footnote-ref-419)
420. Richard Redding, ‘Reconstructing Science through Law’ (1999) 23 Southern Illinois University Law Journal 585, p.606. [↑](#footnote-ref-420)
421. This is an example offered by Lady Hale in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, para [172]. [↑](#footnote-ref-421)
422. See Kylie Burns, ‘The Way the World is: Social Facts in High Court Negligence Cases’ (2004) 12 Torts Law Journal 215, p.238. [↑](#footnote-ref-422)
423. Blackham (n 137) p.435. See also, on similar lines, Priel (n 34) p.159 (noting that courts ‘have attempted to address the problems of lack of information, mainly by expanding participation in the legal proceedings to those who can bring useful information on the wider impact of court decisions’). [↑](#footnote-ref-423)
424. Claire McIvor, ‘Debunking Some Judicial Myths about Epidemiology and Its Relevance to UK Tort Law’ (2013) 21 Medical Law Review 553, p.583. [↑](#footnote-ref-424)
425. Ernest Weinrib, ‘The Disintegration of Duty’ in Stuart Madden (ed), *Exploring Tort Law* (CUP 2012) p.167. [↑](#footnote-ref-425)
426. *Armes* (n 20), paras [68]-[9]. [↑](#footnote-ref-426)
427. *Sienkiewicz* (n 141), para [172]. [↑](#footnote-ref-427)
428. Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia Law Review 809, p.843. [↑](#footnote-ref-428)
429. On the issue of ‘cognitive framing’ more generally, see Tamanaha (n 38). [↑](#footnote-ref-429)
430. Priel (n 34) p.160. [↑](#footnote-ref-430)
431. Dagan (n 13) p.637-8. [↑](#footnote-ref-431)
432. ibid. [↑](#footnote-ref-432)
433. See, e.g., Anthony Kronman, ‘Jurisprudential Responses to Legal Realism’ (1988) 73 Cornell Law Review 335. [↑](#footnote-ref-433)
434. Dagan (n 13) p.638. [↑](#footnote-ref-434)
435. Richard Posner, *Overcoming Law* (Harvard University Press 1995) p.19. [↑](#footnote-ref-435)
436. Giliker (n 118) p.68. [↑](#footnote-ref-436)
437. Jonathan Burnett, ‘Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*’ (2007) 29 Sydney Law Review 163, 163. [↑](#footnote-ref-437)
438. *Lister* (n 24), para [13]. [↑](#footnote-ref-438)
439. *Jacobi* (n 47), para [37]. To similar effect, see *Lepore* (n 58), para [128] (per Gaudron J). [↑](#footnote-ref-439)
440. *Bazley* (n 23), para [27]. [↑](#footnote-ref-440)
441. *Sprod v Public Relations Orientated Security Pty Ltd* [2007] NWSCA 319, para [53]. [↑](#footnote-ref-441)
442. Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) p.263; Stephen Waddams, ‘Private Right and Public Interest’ in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge 2008) p.7. [↑](#footnote-ref-442)
443. Ronald Dworkin, ‘The Model of Rules’ (1967) 35 University of Chicago Law Review 14, p.23; Peter Cane, ‘Another Failed Sterilisation’ (2004) 120 LQR 189, p.192; Andrew Robertson, ‘On the Function of the Law of Negligence’ (2012) 33 OJLS 31, p.37. [↑](#footnote-ref-443)
444. Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts* (CUP 2011) p.xv. [↑](#footnote-ref-444)
445. James Plunkett, ‘Principle and Policy in Private Law Reasoning’ (2016) 75 Cambridge Law Journal 366, p.377. [↑](#footnote-ref-445)
446. *JGE* (n 25), para [54]. [↑](#footnote-ref-446)
447. [2013] UKSC 66, para [28]. [↑](#footnote-ref-447)
448. *Dubai Aluminium* (n 7), para [26]. [↑](#footnote-ref-448)
449. *Morrison* (n 2), para [24]. [↑](#footnote-ref-449)
450. See, e.g., Tom Dean, ‘Liability in the Absence of Fault: Can the Doctrine of Vicarious Liability be Theoretically Justified’ (2014) 2 Bristol Law Review 85, p.92; Richard Glofcheski, ‘A Frolic in the Law of Tort: Expanding the Scope of Employers’ Vicarious Liability’ (2004) 12 Tort Law Review 18, p.38-9; Lewis Klar, ‘Judicial Activism in Private Law’ (2001) 80 Canadian Bar Review 215, p.240. [↑](#footnote-ref-450)
451. [2016] HCA 37, para [68] [emphasis added]. Given their findings that a trial in this case could not be conducted fairly (due to the claimant’s delay in commencing the proceedings), the High Court refused to make any determination on the school’s liability for the sexual abuse committed by its boarding master. [↑](#footnote-ref-451)
452. *Woodland* (n 189), para [12]. [↑](#footnote-ref-452)
453. [1942] AC 509. [↑](#footnote-ref-453)
454. Giliker (n 4) p.153. In this light, it is somewhat surprising that Giliker seems to propose an incremental approach in her later articles: see Paula Giliker, ‘A Revolution in Vicarious Liability: *Lister*, the *Catholic Child Welfare Society Case* and Beyond’ in Sarah Worthington, Andrew Robertson and Graham Virgo, *Revolution and Evolution in Private Law* (Hart 2018) p.139; Giliker (n 81) p.533-4; Giliker (n 104) p.66. [↑](#footnote-ref-454)
455. 524 U.S. 775, p.797 (1998). [↑](#footnote-ref-455)
456. See also Peter Cane, ‘Vicarious Liability for Sexual Abuse’ (2000) 116 LQR 21, p.22 (questioning whether two cases can be anything more than ‘similar’ on their facts). [↑](#footnote-ref-456)
457. *Bazley* (n 23), para [15]. [↑](#footnote-ref-457)
458. Richard Pildes, ‘Forms of Formalism’ (1999) 66 University of Chicago Law Review 607, p.608-9. [↑](#footnote-ref-458)
459. Ernest Weinrib, *The Idea of Private Law* (2nd edn, OUP 2012) p.5. [↑](#footnote-ref-459)
460. Geoffrey Samuel, ‘Is Law Really a Social Science? A View from Comparative Law’ (2008) 67 Cambridge Law Journal 288, p.288. [↑](#footnote-ref-460)
461. Richard Posner, 'Legal Scholarship Today' (2002) 115 Harvard Law Review 1314, p.1316. [↑](#footnote-ref-461)
462. Felipe Jimenez, ‘A Formalist Theory of Contract Law Adjudication’ (2020) 5 Utah Law Review 1121, p.1124. [↑](#footnote-ref-462)
463. ibid p.1123. [↑](#footnote-ref-463)
464. Paul Troop, ‘Why Legal Formalism is Not a Stupid Thing’ (2018) 31 Ratio Juris 428, p.436. [↑](#footnote-ref-464)
465. Emily Sherwin, ‘Formalism and Realism in Private Law’ in Andrew Gold et al (eds), T*he Oxford Handbook of the New Private Law* (OUP 2021) p.465. [↑](#footnote-ref-465)
466. See, e.g., Weinrib (n 201). [↑](#footnote-ref-466)
467. Ernest Weinrib, ‘Legal Formalism’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 2010) p.327. [↑](#footnote-ref-467)
468. This is particularly the case in some of Giliker’s more recent work, where she outlines that the close connection test in the UK ‘leaves much to the discretion of the courts’. See, e.g., Paula Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6 Chinese Journal of Comparative Law 265, p.275. [↑](#footnote-ref-468)
469. William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld & Nicolson 1973) p.8; cf Fiona Cownie, Anthony Bradney and Mandy Burton, *English Legal System in Context* (6th edn, OUP 2013) p.13 (highlighting the argument that the leading legal realists had a ‘much more ambivalent attitude towards formalism’). [↑](#footnote-ref-469)
470. Thomas Miles and Cass Sunstein, ‘The New Legal Realism’ (2008) University of Chicago Law Review 831, p.834. [↑](#footnote-ref-470)
471. Karl Llewellyn, ‘Some Realism about Realism’ (1931) 44 Harvard Law Review 1222, p.1237. [↑](#footnote-ref-471)
472. Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (HUP 1997) p.162-3. [↑](#footnote-ref-472)
473. Randall Kelso, ‘Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making’ (1993) 20 Pepperdine Law Review 531, p.537-8. [↑](#footnote-ref-473)
474. Ernest Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 Yale Law Journal 949, p.955. See also Richard Posner, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986) 37 Case Western Reserve Law Review 179, p.181 (stating that, by referring to the phrase ‘realism’, he means ‘deciding a case so that its outcome best promotes public welfare in non-legalistic terms; it is policy analysis’). [↑](#footnote-ref-474)
475. [1965] AC 656, p.685. [↑](#footnote-ref-475)
476. *Mohamud* (n 85), para [45]. [↑](#footnote-ref-476)
477. Harold Laski, ‘The Basis of Vicarious Liability’ (1916) 26 Yale Law Journal 105, p.121. [↑](#footnote-ref-477)
478. Ellis Lewis, *Winfield on Tort* (6th edn, Sweet & Maxwell 1954) p.173. [↑](#footnote-ref-478)
479. Priel (n 79) p.176-7. [↑](#footnote-ref-479)
480. See, e.g., Cohen (n 170) p.843; Herman Oliphant, ‘A Return to Stare Decisis’ (1928) 14 American Bar Association Journal 71. [↑](#footnote-ref-480)
481. Milton Regan, ‘How Does Law Matter?’ (1998) 1 Green Bag 265, p.269. [↑](#footnote-ref-481)
482. William Landes and Richard Posner, *The Economic Structure of Tort Law* (HUP 1987) p.5-6. See also James Hackney, ‘Guido Calabresi and the Construction of Contemporary American Legal Theory’ (2014) 77 Law and Contemporary Problems 45, p.46. [↑](#footnote-ref-482)
483. Martha Chamallas and Jennifer Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (NYU Press 2010) p.34-5. [↑](#footnote-ref-483)
484. See generally Michael Sevel, ‘How Judges are Free to Decide Cases’ (2018) Revista Forumul Judecatorilor 113, p.120; Max Radin, ‘The Theory of Judicial Decision: Or How Judges Think’ (1925) 11 American Bar Association Journal 357, p.359. [↑](#footnote-ref-484)
485. Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) p.118-21. [↑](#footnote-ref-485)
486. Feldthusen (n 124) p.177. [↑](#footnote-ref-486)
487. Priel (n 79) p.186-7. [↑](#footnote-ref-487)
488. Cohen (n 170). [↑](#footnote-ref-488)
489. See, e.g., Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 European Legal Scholarship 292, p.293; Frederick Schauer, ‘Legal Realism Untamed’ (2013) 91 Texas Law Review 749, p.769. [↑](#footnote-ref-489)
490. Priel (n 79) p.182. See also Amir Paz-Fuchs, ‘It Ain’t Necessarily So: A Legal Realist Perspective on the Law of Agency Work’ (2020) 83 MLR 558, p.576. [↑](#footnote-ref-490)
491. Hanoch Dagan, ‘Doctrinal Categories, Legal Realism, and the Rule of Law’ (2015) 163 University of Pennsylvania Law Review 1889, p.1890. For similar conclusions by other realist scholars, see: John Dickinson, ‘Legal Rules: Their Function in the Process of Decision’ (1931) 79 University of Pennsylvania Law Review 833, p.833; Brian Leiter, ‘Legal Realism and Legal Doctrine’ (2015) 163 University of Pennsylvania Law Review 1975, p.1983-4; Shyamkrishna Balganesh, ‘The Constraint of Legal Doctrine’ (2015) 163 University of Pennsylvania Law Review 1843, p.1857-8. [↑](#footnote-ref-491)
492. Sullivan (n 52) p.41. [↑](#footnote-ref-492)
493. In addition, it may also be that *Century Insurance* could be relevant for a modern non-smoking case too. Under my suggested role for precedent, it might be that a case dealing with one aspect of vicarious liability (say, property damage) could provide some useful insight or clarification in another area (say, personal injury). It is notable - and indeed even commendable - that in his judgment in *Lister* (which concerned sexual abuse), Lord Steyn referred to *Morris v Martin & Sons* [1966] 1 QB 716- a vicarious liability case concerning theft - to support his proposition that the law ought not to show ‘greater zeal in protecting jewellery than in protecting children’: see *Lister* (n 24), para [72]. [↑](#footnote-ref-493)
494. Jason Neyers and David Stevens, ‘Vicarious Liability in the Charity Sector’ (2005) 42 Canadian Business Law Journal 371, p.387. [↑](#footnote-ref-494)
495. 628 N.E.2d 46, p.48-9 (Ohio 1994) (quoting *Bing v Thunig*, 143 N.E.2d 3, p.9 (N.Y. 1957)). [↑](#footnote-ref-495)
496. Priel (n 34) p.145. [↑](#footnote-ref-496)
497. Dagan (n 233) p.1890. [↑](#footnote-ref-497)
498. Priel (n 34) p.144. [↑](#footnote-ref-498)
499. See, e.g., Felix Cohen, ‘Modern Ethics and the Law’ (1934) 4 Brooklyn Law Review 33. [↑](#footnote-ref-499)
500. Priel (n 34) p.145. [↑](#footnote-ref-500)
501. ibid, p.144. [↑](#footnote-ref-501)
502. ibid, p.147. [↑](#footnote-ref-502)
503. See, e.g., Paul Marshall, ‘English Law of Vicarious Liability: Off on a Frolic of its Own – or the Flight from Principle?’ (2020) 1 Journal of International Banking and Financial Law 15, p.17. According to Lord Buckley in *Newgrosh v Newgrosh* [1950] 1 WLUK 230, palm tree justice is a form of ‘justice which makes orders which appear to be fair and just in the special circumstances of the case.’ See also *Duport Steels v Sirs* [1980] 1 WLR 142, p.168 (per Lord Scarman). [↑](#footnote-ref-503)
504. [1997] IRLR 80, p.81. [↑](#footnote-ref-504)
505. Dagan (n 81) p.134. [↑](#footnote-ref-505)
506. Priel (n 34) p.152. [↑](#footnote-ref-506)
507. ibid, p.152-3. This criticism is reinforced, according to Priel, by the fact that Dagan is a value pluralist. [↑](#footnote-ref-507)
508. Llewellyn (n 125) p.17-9. [↑](#footnote-ref-508)
509. Karl Llewellyn, ‘A Realistic Jurisprudence - The Next Step’ (1930) 30 Columbia Law Review 431, p.448; Jerome Frank, *Courts on Trial* (Princeton University Press 1949) p.73. [↑](#footnote-ref-509)
510. Priel (n 34) p.152. [↑](#footnote-ref-510)
511. Herman Oliphant and Abram Hewitt, ‘Introduction’ in Jacques Rueff (ed), *From the Physical to the Social*

     *Sciences: Introduction to a Study of Economic and Ethical Theory* (John Hopkins Press 1940) p.xv-xvi. A similar sentiment underlines the argument made by Kennedy in Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 Harvard Law Review 1685. [↑](#footnote-ref-511)
512. Consequently, given that the law is equally uncertain (regardless of whether we adopt my contextual-pluralist approach or the incremental solution), it is suggested that my model has the edge over the more doctrinal approach proposed by the Supreme Court in *Barclays* and *Morrison*. As explained in section 3.2 (as well as in the discussion on the ‘thick’ approach to theory in section 3.3.1), the principled, incremental approach lacks the necessary meaningfulness, adaptability and transparency that is evident in my framework of liability. [↑](#footnote-ref-512)
513. *Barry Congregation* (n 99), para [84]. [↑](#footnote-ref-513)
514. Lord Neuberger, ‘Some Thoughts on Principles Governing the Law of Torts’ (Singapore Conference on Protecting Business and Economic Interests, August 2016) <<https://www.supremecourt.uk/docs/speech-160819-03.pdf>> para [27]. [↑](#footnote-ref-514)
515. The cases he uses to illustrate his point read much like a textbook on tort law. He cites *Rylands v Fletcher* (1868) LR 3 HL 330; *Donoghue v Stevenson* [1932] AC 562; *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465; *Murphy v Brentwood Borough Council* [1991] AC 398; *White v Jones* [1995] 2 AC 207; *SAAMCo v York Montague* [1996] UKHL 10; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; *Chester v Afshar* [2004] UKHL 41; *Coventry v Lawrence* [2014] UKSC 13; *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. [↑](#footnote-ref-515)
516. Neuberger (n 256) paras [24], [48]. [↑](#footnote-ref-516)
517. *Patel* (n 55), para [90]. [↑](#footnote-ref-517)
518. Contrast *Hughes v Lord Advocate* [1963] AC 837 with *Doughty v Turner Manufacturing* [1961] AC 388. [↑](#footnote-ref-518)
519. [2000] 1 WLR 1082. [↑](#footnote-ref-519)
520. *Jolley v Sutton London Borough Council* [1998] 1 WLR 1546. [↑](#footnote-ref-520)
521. *Jolley* (n 261), p.1093. [↑](#footnote-ref-521)
522. ibid, p.1089. [↑](#footnote-ref-522)
523. Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) p.315. [↑](#footnote-ref-523)
524. *Joel v Morrison* (1834) 6 C & P 501, p.503 (per Parke B). [↑](#footnote-ref-524)
525. Salmond (n 45) p.83. [↑](#footnote-ref-525)
526. Cohen (n 170) p.836. [↑](#footnote-ref-526)
527. *Prince Alfred* (n 193), para [45]. [↑](#footnote-ref-527)
528. ibid, para [80]. [↑](#footnote-ref-528)
529. ibid, para [81]. [↑](#footnote-ref-529)
530. James Goudkamp and James Plunkett, ‘Vicarious Liability in Australia: On the Move?’ (2017) 17 Oxford University Commonwealth Law Journal 162, p.167. To similar effect, see Desmond Ryan, ‘From Opportunity to Occasion: Vicarious Liability in the High Court of Australia’ (2017) 76 Cambridge Law Journal 14, p.17. [↑](#footnote-ref-530)
531. *Prince Alfred* (n 193), para [131]. [↑](#footnote-ref-531)
532. ibid, paras [45], [59]-[60]. [↑](#footnote-ref-532)
533. *Mohamud* (n 85), para [54]. [↑](#footnote-ref-533)
534. Mark James and David McArdle, ‘Player Violence, Or Violent Players? Vicarious Liability for Sports Participants’ (2004) 12 Tort Law Review 131, p.133 (arguing that ‘there has been remarkably little discussion of vicarious liability’ in sports litigation, primarily because, in many cases, no employment relationship was thought to exist). [↑](#footnote-ref-534)
535. *Mountford v Newlands School* [2007] EWCA Civ 21. [↑](#footnote-ref-535)
536. *Vowles v Evans and Welsh Rugby Union* [2003] EWCA Civ 318. [↑](#footnote-ref-536)
537. NHS Digital, ‘Accident and Emergency Attendances in England – 2014–15’ (NHS, 28 January 2016) <<https://digital.nhs.uk/data-and-information/publications/statistical/hospital-accident--emergency-activity/2014-15>> last accessed 10 February 2022. [↑](#footnote-ref-537)
538. Graham Kirkwood, Thomas Hughes and Allyson Pollock, ‘Results on Sports-Related Injuries in Children from NHS Emergency Care Dataset Oxfordshire Pilot: An Ecological Study’ (2019) 112 Journal of the Royal Society of Medicine 109, p.111. One reason for the large disparity between these findings and the official NHS statistics is provided by the authors in a previously published work. They suggest that receptionists at emergency departments documented twice as many sport-related injuries than were officially published in Hospital Episode Statistics. See Graham Kirkwood, Thomas Hughes and Allyson Pollock, ‘Unintentional Injury in England: An Analysis of the Emergency Care Data Set Pilot in Oxfordshire from 2012 to 2014’ (2017) 71 Journal of Epidemiology and Community Health 289. [↑](#footnote-ref-538)
539. Jon Nicholl, Patricia Coleman and BT Williams, ‘Pilot Study of the Epidemiology of Sports Injuries and Exercise Related Morbidity’ (1991) 25 British Journal of Sports Medicine 61. See also Robin Knill-Jones, ‘Sports Injury Clinics’ (1997) 31 British Journal of Sports Medicine 95 (suggesting that sports-related injuries account for somewhere between 3.9 and 7.1 percent of the NHS workload) [↑](#footnote-ref-539)
540. Christina Ekegren, Belinda Gabbe and Caroline Finch, ‘Sports Injury Surveillance Systems: A Review of Methods and Data Quality’ (2016) 46 Sports Medicine 49, p.49. [↑](#footnote-ref-540)
541. Malin Aman, Magnus Forssblad and Karin Henriksson-Larsen, ‘Insurance Claims Data: A Possible Solution for a National Sports Injury Surveillance System? An Evaluation of Data Information against ASIDD and Consensus Statements on Sports Injury Surveillance’ (2014) 4 British Medical Journal Open 1. [↑](#footnote-ref-541)
542. # Martin Hagglund, Markus Walden and Jan Ekstrand, ‘Injury Recurrence is Lower at the Highest Professional Football Level than at National and Amateur Levels: Does Sports Medicine and Sports Physiotherapy Deliver?’ (2016) 50 British Journal of Sports Medicine 751, p.752; Anne-Marie van Deijsterveldt et al, ‘Differences in Injury Risk and Characteristics between Dutch Amateur and Professional Soccer Players’ (2015) 18 Journal of Science and Medicine in Sport 145, p.148.

     [↑](#footnote-ref-542)
543. Astrid Junge and Jiri Dvorak, ‘Soccer Injuries: A Review on Incidence and Prevention’ (2004) 34 Sports Medicine 929; Lars Peterson et al, ‘Incidence of Football Injuries and Complaints in Different Age Groups and Skill-Level Groups’ (2000) 28 American Journal of Sports Medicine S51. [↑](#footnote-ref-543)
544. Angela Gebert et al, ‘A Comparison of Injuries in Different Non-Professional Soccer Settings: Incidence Rates, Causes and Characteristics’ (2019) 12 Open Sports Sciences Journal 28, p.30. [↑](#footnote-ref-544)
545. ibid, p.32. A similar finding is evident in Ramin Kordi et al, ‘Comparison of the Incidence, Nature and Cause of Injuries Sustained on Dirt Field and Artificial Turf Field by Amateur Football Players’ (2011) 3 Sports Medicine, Arthroscopy, Rehabilitation, Therapy & Technology 1. [↑](#footnote-ref-545)
546. Christina Ekegren, Belinda Gabbe and Caroline Finch, ‘Injury Surveillance in Community Sport: Can we Obtain Valid Data from Sports Trainers?’ (2015) 25 Scandinavian Journal of Medicine and Science in Sports 315, p.317. [↑](#footnote-ref-546)
547. ibid. [↑](#footnote-ref-547)
548. Tim Gabbett, ‘Incidence, Site, and Nature of Injuries in Amateur Rugby League over Three Consecutive Seasons’ (2000) 34 British Journal of Sports Medicine 98, p.101. [↑](#footnote-ref-548)
549. ibid. See also Doug King et al, ‘Neck Back and Spine Injuries in Amateur Rugby League: A Review of Nine Years of Accident Compensation Corporation Injury Entitlement Claims and Costs’ (2011) 14 Journal of Science and Medicine in Sport 126. [↑](#footnote-ref-549)
550. Caithriona Yeomans et al, ‘The Incidence of Injury in Amateur Male Rugby Union: A Systematic Review and Meta-Analysis’ (2018) 48 Sports Medicine 837. The disparity between the incidence rate in rugby league and rugby union is perhaps due to the differing definition of an ‘injury’ utilised by both sets of authors. [↑](#footnote-ref-550)
551. ibid, p.842. [↑](#footnote-ref-551)
552. *Elliott v Saunders and Liverpool FC* (unreported) High Court (QBD), 10 June 1994, p.9. [↑](#footnote-ref-552)
553. Rebecca Mitchell, Caroline Finch and Soufiane Boufous, ‘Counting Organised Sport Injury Cases: Evidence of Incomplete Capture from Routine Hospital Collections’ (2010) 13 Journal of Science and Medicine in Sport 304, p.306. Other common actions (for males) following an injury include a visit to the physiotherapist (24.7%), an appointment with a general practitioner (16.1%), or simply no treatment at all (18%). Notably, less common treatments include a visit to an emergency department (7%) and admission to hospital (3.5%). [↑](#footnote-ref-553)
554. See, e.g., in rugby union (<https://www.howdengroup.com/uk-en/england-rugby-insurance/players>), cricket (<https://www.howdengroup.com/uk-en/ecb/members-personal-accident-insurance>), hockey (<http://www.ps-hockey.co.uk/summary>) and swimming (<http://asa.howden-sites.co.uk/personal-accident>). For an interesting summary of the insurance offered in Gaelic sports, see Mark Roe, ‘Injury Scheme Claims in Gaelic Games: A Review of 2007-2014’ (2016) 51 Journal of Athletic Training 303. [↑](#footnote-ref-554)
555. Bluefin Sport, ‘Football Team Personal Accident Insurance’ <<https://ngis.bluefinsport.co.uk/club-and-teams/personal-accident-insurance/>> last accessed 15 February 2022. [↑](#footnote-ref-555)
556. 23 out of 51 County FAs have not subscribed to the NGIS. However, clubs in these counties can still take out Bluefin’s personal accident insurance, provided that this cover meets their own counties’ minimum insurance requirements. See Bluefin Sport, ‘Other County FA’ <<https://ngis.bluefinsport.co.uk/county-fas/find-my-county-fa/other-county-fa/>> last accessed 25 June 2022. [↑](#footnote-ref-556)
557. Bluefin Sport, ‘Group Personal Accident Insurance’ <<https://ngis.bluefinsport.co.uk/media-library/bluefin-sport/pdfs/ngis-microsite/cfa-pa-downloads/0405-0521-ngis-adult-basic-and-youth-basic-pa-brochure-no-ipt--2021to22_v1.pdf?la=en&hash=2D7CE1B7C04D35024B138309586478F41FA3FCCC>> last accessed 15 February 2022. [↑](#footnote-ref-557)
558. James Riach, ‘The Mandatory Insurance that Can Leave Amateur Footballers on £30 a Week’ (*The Guardian*, 17 February 2016) <<https://www.theguardian.com/football/2016/feb/17/mandatory-inurance-amateur-footballers-fa-grassroots-ngis>> last accessed 18 February 2022 (highlighting that ‘Bluefin Sport is the FA’s preferred broker for the NGIS, which covers more than 14,000 adult teams, thousands more youth sides and about 200,000 players’). [↑](#footnote-ref-558)
559. Bluefin Sport, ‘Group Personal Accident Insurance’ <<https://www.thefa.com/-/media/cfa/berks-bucksfa/files/affiliation/ngis-adult-basic-and-youth-basic-pa-brochure-2018to19.ashx>> last accessed 15 February 2022. [↑](#footnote-ref-559)
560. For instance, a policy schedule uploaded by one amateur football team highlights that their annual Superior 200 cover set them back £148.72, despite the fact that Bluefin’s minimum premium for this policy was only £96: see AFC Westend, ‘Documents & Policies’ <<https://afcwestend.co.uk/documents-policies/>> last accessed 23 February 2022. [↑](#footnote-ref-560)
561. See, e.g., *Wooldridge v Sumner* [1963] 2 QB 43, p.67 (per Diplock LJ). For more recent confirmation of this point, see *Fulham Football Club v Mr Jordan Levi Jones* [2022] EWHC 1108 (QB), para [63] (per Lane J). [↑](#footnote-ref-561)
562. Bluefin Sport, ‘Summary of Cover’ <<https://ngis.bluefinsport.co.uk/media-library/bluefin-sport/pdfs/ngis-microsite/generic-ngis-pa-downloads/summary-of-cover-adultsyouth-ngis-2019.pdf?la=en&hash=CF10C912F55F4561B053FCBEE7A9E589D12A50A7>> last accessed 18 February 2022. [↑](#footnote-ref-562)
563. <http://www.basketballenglandinsurance.co.uk/pa>. [↑](#footnote-ref-563)
564. Bluefin Sport, ‘County FA Insurance Requirements’ <<https://ngis.bluefinsport.co.uk/county-fas/find-my-county-fa/>> last accessed 15 February 2022. [↑](#footnote-ref-564)
565. Ben Rumsby, ‘FA’s Grand Plan to Cut Compensation Culture in Grass-Roots Game Remains Problematic’ (*The Telegraph*, 20 May 2015) <<https://www.telegraph.co.uk/sport/football/11619547/FAs-grand-plan-to-cut-compensation-culture-in-grass-roots-game-remains-problematic.html>> last accessed 15 February 2022. [↑](#footnote-ref-565)
566. ibid. [↑](#footnote-ref-566)
567. Riach (n 25). See also the comments of Kelly Ferguson, also a lawyer at Irwin Mitchell, who stated that there ‘must be an end to the postcode lottery of personal accident insurance as it is leaving some people injured in collisions with other players without any support at all, even though they may be missing months of work through injuries’: Rumsby (n 32). [↑](#footnote-ref-567)
568. See, e.g., Irish News, ‘Players and Clubs Being Left Out of Pocket by Scheme’ (*Irish News*, 30 January 2015) <<http://www.irishnews.com/sport/gaafootball/2015/01/30/news/players-and-clubs-being-left-out-of-pocket-by-scheme-114488/>> last accessed 19 February 2022 (highlighting a potential shortfall of thousands of pounds in regards to the cover provided by the GAA Player Injury Scheme in light of the cost of treatment for many injuries). [↑](#footnote-ref-568)
569. Peter Bills, ‘Hampson Case Reveals Rugby’s Insurance Nightmare’ (*Irish Independent*, 12 February 2006) <<https://www.independent.ie/sport/rugby/hampson-case-reveals-rugbys-insurance-nightmare-26408367.html>> last accessed 11 December 2021. [↑](#footnote-ref-569)
570. [1990] 1 WLR 235. See also the litigation in *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107, which was seemingly spurred by the fact that the claimant could not recover any compensation under the New South Wales Sporting Injuries Scheme: see Pauline Sadler, Cameron Yorke and Kyle Bowyer, ‘The Effect of the Decision in *McCracken v Melbourne Storm Rugby League Football Club* on Professional Sport in Western Australia’ (2006) 12 Journal of Contemporary Issues in Business and Government 29, p.30. [↑](#footnote-ref-570)
571. David McArdle and Mark James, ‘Are you Experienced? Playing Cultures, Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*’ (2005) 13 Tort Law Review 193, p.211. [↑](#footnote-ref-571)
572. Riach (n 25). [↑](#footnote-ref-572)
573. Patrick Atiyah, *The Damages Lottery* (Hart 1997) chapter 8. See also Richard Abel, ‘Should Tort Law Protect Property Against Accidental Loss?’ (1986) 23 San Diego Law Review 79. [↑](#footnote-ref-573)
574. Joanne Conaghan and Wade Mansell, From the Permissive to the Dismissive Society: Patrick Atiyah’s Accidents, Compensation, and the Market’ (1998) 25 Journal of Law and Society 284, p.290. [↑](#footnote-ref-574)
575. Given the existing figures (outlined in section 4.4.3(i)) for the more comprehensive legal liability insurance cover offered by Bluefin Sport (£50 per year per club), it seems plausible to conclude that an improved first-party insurance scheme – such as one akin to the aforementioned ‘Superior 600’ cover, which costs £224 per year per club – would be a more expensive option. In this light, it may be reasonable to conclude that it would be cheaper (and arguably more desirable) for clubs to take out liability insurance rather than subscribe to a drastically improved first-party insurance scheme. [↑](#footnote-ref-575)
576. *Vowles* (n 3). [↑](#footnote-ref-576)
577. [2001] EWCA Civ 361. [↑](#footnote-ref-577)
578. Peter Eggers, ‘The Pitfalls that Face a Sportsperson or a Sports Organisation in Arranging and Claiming Under Insurance Cover’ (LawInSport, 22 July 2015). [↑](#footnote-ref-578)
579. [2006] EWHC 840 (QB). [↑](#footnote-ref-579)
580. See, e.g., Tony Weir, ‘Subrogation and Indemnity’ (2012) 71 Cambridge Law Journal 1, p.4 (arguing that ‘if there is one class of persons who are unlikely to carry insurance, it is the working class, and it is they who are especially likely to be guilty of torts, since liability attaches to people who do things badly and only people who do things at all can do them badly’). [↑](#footnote-ref-580)
581. For a contrary Australian view which suggests that unpaid volunteers are employees for the purposes of vicarious liability, see *Kennedy v Pender & Narooma Rugby League Football Club* (unreported) New South Wales District Court, 2002. [↑](#footnote-ref-581)
582. Unreported, Queen’s Bench Division 15 June 1998 (per Scott J). [↑](#footnote-ref-582)
583. [2008] EWCA Civ 689. [↑](#footnote-ref-583)
584. ibid, paras [10] and [29]. [↑](#footnote-ref-584)
585. See, e.g., *Carmichael v National Power plc* [1999] 1 WLR 2042, p.2045. [↑](#footnote-ref-585)
586. Neil Parpworth, ‘Vicarious Liability on the Rugby Union Field’ (2008) 172 Justice of the Peace and Local Government Law 572, p.574. [↑](#footnote-ref-586)
587. [2013] QB 722. [↑](#footnote-ref-587)
588. David Tan, ‘A Sufficiently Close Relationship Akin to Employment’ (2013) 129 LQR 30, p.33-4; Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) p.850; Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) p.196-7. [↑](#footnote-ref-588)
589. Phillip Morgan, ‘Certainty in Vicarious Liability: A Quest for a Chimaera?’ (2016) 75 Cambridge Law Journal 202, p.204. [↑](#footnote-ref-589)
590. Phillip Morgan, ‘Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?’ (2018) 38 Legal Studies 242, p.253. [↑](#footnote-ref-590)
591. [2012] UKSC 56. [↑](#footnote-ref-591)
592. ibid, para [57]. [↑](#footnote-ref-592)
593. Morgan (n 57) p.253. [↑](#footnote-ref-593)
594. [2016] UKSC 10, para [24]. [↑](#footnote-ref-594)
595. [2020] UKSC 13. [↑](#footnote-ref-595)
596. See, e.g., Paula Giliker, ‘Vicarious Liability in the UK Supreme Court’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook* (Volume 7, Appellate Press 2017) p.154. [↑](#footnote-ref-596)
597. Desmond Ryan, ‘”Close Connection” and “Akin to Employment”: Perspectives on 50 Years of Radical Developments in Vicarious Liability’ (2016) 56 Irish Jurist 239, p.258. [↑](#footnote-ref-597)
598. Scott Shapiro, *Legality* (Belknap Press 2011) p.241. Cf Ernest Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 Yale Law Journal 949, p.1008 (arguing that ‘[n]othing about formalism precludes indeterminacy… Formalism merely insists that such indeterminacy not be seen… as a reason for transforming a juridical exercise into a political one’). [↑](#footnote-ref-598)
599. *CCWS* (n 58), para [47]. [↑](#footnote-ref-599)
600. *Barclays* (n 62), para [27]. [↑](#footnote-ref-600)
601. ibid, para [18]. [↑](#footnote-ref-601)
602. *JGE* (n 54), para [70]. [↑](#footnote-ref-602)
603. Richard Kidner, ‘Vicarious Liability: For Whom Should the ‘Employer’ be Liable?’ (1995) 15 Legal Studies 47. [↑](#footnote-ref-603)
604. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, p.515 (per MacKenna J). [↑](#footnote-ref-604)
605. *Short v J & W Henderson Ltd* (1946) 62 TLR 427, p.429 (per Lord Thankerton). [↑](#footnote-ref-605)
606. *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161, p.169 (per Lord Wright). [↑](#footnote-ref-606)
607. *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, para [61] (per Mummery LJ). [↑](#footnote-ref-607)
608. *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, p.184-5 (per Cooke J); *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, p.382. [↑](#footnote-ref-608)
609. *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* [1952] 1 TLR 101, p.111 (per Denning LJ). [↑](#footnote-ref-609)
610. *Barclays* (n 62), para [27]. [↑](#footnote-ref-610)
611. Charlie Eccleshare, ‘Why Petty Rules Make me Want to Give Up Sunday League Football – An Open Letter to Overly Officious Administrators’ (*The Telegraph*, 12 January 2017) <<https://www.telegraph.co.uk/football/2017/01/12/petty-rules-make-want-give-sunday-league-football-open-letter/>> last accessed 15 February 2022. [↑](#footnote-ref-611)
612. Jack Harris, ‘A Sporting Chance’ (2012) 162 New Law Journal 1248, p.1249. [↑](#footnote-ref-612)
613. David Griffith-Jones and Nicholas Randall, ‘Civil Liability Arising out of Participation in Sport’ in Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice* (3rd edn, Bloomsbury 2014) p.1617. [↑](#footnote-ref-613)
614. Steve Foster and Marie Clarke, ‘Expanding the Law or Unruly Justice? The Development of Vicarious Liability and the Decision in *Barclays Bank*’ (2019) 24 Coventry Law Journal 93, p.102. [↑](#footnote-ref-614)
615. Andrew Bell, ‘“Double, Double Toil and Trouble”: Recent Movements in Vicarious Liability’ (2018) 4 Journal of Personal Injury Litigation 235, p.241. [↑](#footnote-ref-615)
616. [2017] UKSC 60, para [76]. [↑](#footnote-ref-616)
617. Giliker (n 63) p.156. [↑](#footnote-ref-617)
618. Paula Giliker, ‘Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability? *Barclays* and *Morrison* in the UK Supreme Court’ (2021) 37 Professional Negligence 55, p.57. [↑](#footnote-ref-618)
619. ibid, p.62. [↑](#footnote-ref-619)
620. [2013] UKSC 66, para [3]. [↑](#footnote-ref-620)
621. Giliker (n 85) p.58. [↑](#footnote-ref-621)
622. The same may also be said about the oft-cited distinction between a ‘contract of services’ and a ‘contract for services’, as was recently supported in *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157, para [21] (per Singh LJ). For support on this point, see also Phillip Morgan, ‘Vicarious Liability on the Move’ (2013) 129 LQR 139, p.144. [↑](#footnote-ref-622)
623. See Jonathan Morgan, ‘Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken’ (2015) 74 Cambridge Law Journal 109, p.130 (critiquing the ‘assumption of responsibility’ concept on similar grounds). [↑](#footnote-ref-623)
624. Likewise, it may also align with my analysis in Chapter 5 which suggests that, if we are to continue using the term ‘employee’, then different definitions of the phrase will be required in order to distinguish an ‘employee’ for vicarious liability purposes and an ‘employee’ for other purposes (such as unfair dismissal or tax law). This is also recognised by Kidner (n 70) when he suggests (at p.54) that we now need a new word that has ‘no independent meaning’ to help ‘describe those for whom an employer would be vicariously liable’. It is tentatively suggested that the phrase ’responsibility’ may fit this bill. [↑](#footnote-ref-624)
625. *CCWS* (n 58), para [20]. [↑](#footnote-ref-625)
626. ibid, para [61]. [↑](#footnote-ref-626)
627. [2010] EWCA Civ 1106, para [41]. [↑](#footnote-ref-627)
628. [2021] EWCA Civ 356, para [81]. [↑](#footnote-ref-628)
629. Morgan (n 89) p.141. [↑](#footnote-ref-629)
630. Morgan (n 57) p.255. [↑](#footnote-ref-630)
631. [1982] 1 WLR 522, p.525. [↑](#footnote-ref-631)
632. Nicholas Stewart, Natalie Campbell and Simon Baughen, *The Law of Unincorporated Associations* (OUP 2011) p.12. [↑](#footnote-ref-632)
633. See, e.g., Sport England Club Matters, ‘Unincorporated Organisations’ <<https://www.sportenglandclubmatters.com/governance/getting-the-right-structure/unincorporated-organisations/>> last accessed 22 March 2022 (noting that an unincorporated association is the ‘most common type of structure for an amateur club’). [↑](#footnote-ref-633)
634. [2008] EWCA Crim 1970, para [11]. [↑](#footnote-ref-634)
635. Phillip Morgan, ‘Recasting Vicarious Liability’ (2012) 71 Cambridge Law Journal 615, p.632. [↑](#footnote-ref-635)
636. See, e.g., Ranald Macpherson, ‘Who Pays? Vicarious Liability and *Grubb v Shannon*’ (2018) 142 Reparation Bulletin 5, p.8 (referring to a bowling club as an unincorporated association); Rugby Football Union, ‘Why Incorporate?’ <<https://www.englandrugby.com/dxdam/52/52b51b7e-8228-4894-b01f-1bad589b1045/Why_Incorporate.pdf>> last accessed 17 February 2022 (noting that ‘[m]any rugby clubs are set up as unincorporated associations’). [↑](#footnote-ref-636)
637. Richard Clements and Ademola Abass, *Complete Equity and Trusts: Text, Cases, and Materials* (5th edn, OUP 2018) p.196-7. [↑](#footnote-ref-637)
638. *Jacobi v Griffiths* [1999] 2 SCR 570, para [75] (per Binnie J). [↑](#footnote-ref-638)
639. *CCWS* (n 94), para [76] (per Pill LJ). [↑](#footnote-ref-639)
640. Morgan (n 57) p.256. [↑](#footnote-ref-640)
641. *CCWS* (n 94), para [76] (per Pill LJ); para [41] (per Hughes LJ). [↑](#footnote-ref-641)
642. CCWS (n 58), para [32]. See also Paula Giliker, ‘Vicarious Liability ‘On the Move’: The English Supreme Court and Enterprise Liability’ (2013) 4 Journal of European Tort Law 306, p.310. [↑](#footnote-ref-642)
643. [1973] AC 15. [↑](#footnote-ref-643)
644. [1986] Ch 20. [↑](#footnote-ref-644)
645. [2002] UKHL 48. [↑](#footnote-ref-645)
646. Claire McIvor, ‘Vicarious Liability and Child Abuse’ (2013) 29 Professional Negligence 62, p.64; Morgan (n 89) p.140-1. [↑](#footnote-ref-646)
647. [2017] IESC 6. [↑](#footnote-ref-647)
648. ibid, para [39]. [↑](#footnote-ref-648)
649. William Clerk, ‘How to Claim Against an Unincorporated Amateur Sports Club in England and Wales’ (LawInSport, 18 March 2016). [↑](#footnote-ref-649)
650. Morgan (n 57) p.257-8. Similar suggestions were previously made by Hughes LJ in *CCWS* (n 94), para [42] and Lord Hope, ‘Tailoring the Law on Vicarious Liability’ (2013) 129 LQR 514, p.526. [↑](#footnote-ref-650)
651. ibid, p.257. [↑](#footnote-ref-651)
652. This is also faintly illustrated by Morgan’s assertion that we should not ‘unnecessarily’ expose amateur clubs and members to vicarious liability (p.261). But whether it is necessary or unnecessary to do so is arguably open to normative debate, and should not be so readily assumed. [↑](#footnote-ref-652)
653. Paula Giliker, ‘Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention’ (2018) 77 Cambridge Law Journal 506, p.532. [↑](#footnote-ref-653)
654. Another (similar) example might be in the context of medical malpractice, as such cases often also involve striking a balance between compensation to a victim and the social utility concern of discouraging defensive practices. [↑](#footnote-ref-654)
655. McArdle and James (n 38) p.211. [↑](#footnote-ref-655)
656. Charles Tremper, ‘Compensation for Harm from Charitable Activity’ (1991) 76 Cornell Law Review 401, p.423. [↑](#footnote-ref-656)
657. Harris (n 79) p.1249. Note also Neil Partington, ‘Legal liability of Coaches: A UK Perspective’ (2014) 14 International Sports Law Journal 232, p.233 (noting that ‘sport is progressively seen in the EU as a medium to achieving social policy objectives’). [↑](#footnote-ref-657)
658. [1997] PIQR 133, p.134. See also Julian Fulbrook, *Outdoor Activities, Negligence, and the Law* (Ashgate 2005) p.143; Erin McMurray, ‘I Expected Common Sense to Prevail: *Vowles v Evans*, Amateur Rugby, and Referee Negligence in the UK’ (2004) 29 Brooklyn Journal of International Law 1307, p.1310-11. [↑](#footnote-ref-658)
659. [2010] EWCA Civ 1476, para [29]. To similar effect, see *Sutton v Syston Rugby Football Club Ltd* [2011] EWCA Civ 1182, para [13] (per Longmore LJ). [↑](#footnote-ref-659)
660. *Jacobi* (n 105), para [75]. In the UK context, see *Woodland* (n 86), para [25] (per Lord Sumption) (arguing that ‘courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services’). [↑](#footnote-ref-660)
661. Claire McIvor, ‘The Use and Abuse of the Doctrine of Vicarious Liability’ (2006) 35 Common Law World Review 268, p.287. [↑](#footnote-ref-661)
662. Stephen Sugarman, ‘Doing Away with Tort Law’ (1985) 73 California Law Review 555, p.565-7. [↑](#footnote-ref-662)
663. One useful, albeit highly limited, empirical work on this issue in the UK is Natalie Low et al, ‘Helping Out: A National Survey of Volunteering and Charitable Giving’ (National Centre for Social Research and the Institute for Volunteering Research, 2007) p.68 (which found that over 40% of respondents to a survey cited concerns about the risk of liability as a reason for not volunteering). Although this study focussed on individuals rather than clubs, we must remember that it is individuals – and particularly unpaid volunteers - who are ‘stereotypically associated with facilitating, organising and delivering desirable activities’: see Neil Partington, ‘Beyond the “*Tomlinson* Trap”: Analysing the Effectiveness of Section 1 of the Compensation Act 2006’ (2016) 37 Liverpool Law Review 33, p.36. [↑](#footnote-ref-663)
664. Contrast, for instance, the majority and minority judgments in *Armes* (n 83). Lord Reed, as part of the majority, disputed the relevance of deterrence and social utility at para [68], whilst Lord Hughes, in his dissenting judgment, considered at para [89] that the imposition of vicarious liability in this case may ‘inhibit the generally laudable practice of family placements’. [↑](#footnote-ref-664)
665. *Scout Association* (n 126), para [49]. [↑](#footnote-ref-665)
666. [1999] 2 SCR 534. [↑](#footnote-ref-666)
667. Jason Neyers and David Stevens, ‘Vicarious Liability in the Charity Sector: An Examination of *Bazley v Curry* and *Re Christian Brothers of Ireland in Canada*’ (2005) 42 Canadian Business Law Journal 371, p.402-3. For a similar argument in the sporting context, see Tremper (n 123) p.473-4. [↑](#footnote-ref-667)
668. Paul Downward and Simona Rasciute, ‘The Relative Demands for Sports and Leisure in England’ (2010) 10 European Sport Management Quarterly 189, p.190. [↑](#footnote-ref-668)
669. ibid, p.203-4. [↑](#footnote-ref-669)
670. ibid, p.210. [↑](#footnote-ref-670)
671. McBride and Bagshaw (n 55) p.855. See also Robert Stevens, ‘Non-Delegable Duties and Vicarious Liability’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) p.361-2. [↑](#footnote-ref-671)
672. Ryan (n 64) p.258. [↑](#footnote-ref-672)
673. These are merely a few of the instrumental benefits of participation in sport as identified by a 2002 governmental report. See Department for Culture, Media and Sport / Strategy Unit, *Game Plan: A Strategy for Delivering Government’s Sport and Physical Activity Objectives* (DCMS/Strategy Unit 2002), para [2.8] <<http://www.gamesmonitor.org.uk/files/game_plan_report.pdf>> last accessed 26 April 2022. See also The Football Association, ‘Grassroots Game Worth Over £10bn to English Economy and Saves NHS £43m’ <<http://www.thefa.com/news/2019/jul/09/social-and-economic-value-of-adults-grassroots-football-in-england-090719>> last accessed 03 March 2022 (suggesting that participation in amateur football saves the NHS over £43 million per year, as well as contributing a total of almost £11 billion to the economy). [↑](#footnote-ref-673)
674. *Cox* (n 61), para [32]. [↑](#footnote-ref-674)
675. *Bazley* (n 133), para [30]. [↑](#footnote-ref-675)
676. ibid, para [50]. [↑](#footnote-ref-676)
677. ibid, para [54]. [↑](#footnote-ref-677)
678. [2002] EWHC 2612 (QB), para [23]. [↑](#footnote-ref-678)
679. [1973] 1 QB 792, p.798. [↑](#footnote-ref-679)
680. [2008] HCA 40, para [111]. See also *Nettleship v Weston* [1971] 2 QB 691, p.699 (per Lord Denning). For a discussion on the relevance of insurance to the objective standard of care, see Tony Honore, ‘Responsibility and Luck: The Moral Basis of Strict Liability’ (1988) 104 LQR 530, p.535. [↑](#footnote-ref-680)
681. [2018] EWCA Civ 2339, para [78]. [↑](#footnote-ref-681)
682. Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007) p.129-30. [↑](#footnote-ref-682)
683. Richard Lewis, ‘The Relationship between Tort Law and Insurance in England and Wales’ in Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) p.63. [↑](#footnote-ref-683)
684. Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (6th edn, Butterworths 1999) p.191. [↑](#footnote-ref-684)
685. Richard Lewis, ‘Insurance and the Tort System’ (2005) 25 Legal Studies 85, p.86, 109. [↑](#footnote-ref-685)
686. See, e.g., *Samson v Aitchison* [1912] AC 844; *Ormrod v Crossville Motor Services Ltd* [1953] 1 WLR 409; and, in the Australian context, *Soblusky v Egan* (1960) 103 CLR 215. [↑](#footnote-ref-686)
687. *Scott v Davis* (2000) 204 CLR 333, para [346] (per Callinan J). [↑](#footnote-ref-687)
688. Luke McCarthy, ‘Vicarious Liability in the Agency Context’ (2004) 4 Queensland University of Technology Law & Justice Journal 1, p.5; Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) p.112; Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) p.871. [↑](#footnote-ref-688)
689. [1973] AC 127, p.135. Consequently, and according to Lord Denning MR in the Court of Appeal ([1971] 2 QB 245, p.255), the term ‘agency’ in this context does not have the same meaning as it does in the law of contract. For support on this point, see Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (22nd edn, Sweet & Maxwell 2020) para 8-187. [↑](#footnote-ref-689)
690. ibid, p.145 (per Lord Cross); p.150 (per Lord Salmon). [↑](#footnote-ref-690)
691. *Scott* (n 154). [↑](#footnote-ref-691)
692. ibid, para [254] (Gummow J arguing that, ‘in the absence of [compulsory third-party insurance], it is difficult to impose an absolute liability upon a person such as Mr Davis in respect of non-commercial activities’). [↑](#footnote-ref-692)
693. Since the introduction of both s.143 of the Road Traffic Act 1988 (introducing compulsory third-party insurance) and the Motor Insurance Bureau for uninsured drivers, this agency extension seems now to be of historical curiosity only. The fact that very few cases now refer to this exception is also telling, in that it further suggests that its existence is primarily owed to the lack of mandatory third-party insurance at the time. [↑](#footnote-ref-693)
694. Gray (n 55) p.141. [↑](#footnote-ref-694)
695. See, e.g., *Gravil*, para [28] (per Clarke MR); cf *Watson v British Boxing Board of Control* [2001] QB 1134, p.1163 (per Lord Phillips). [↑](#footnote-ref-695)
696. *Vowles* (n 3), para [12]. [↑](#footnote-ref-696)
697. McMurray (n 125) p.1344. [↑](#footnote-ref-697)
698. ibid, p.1343-4. [↑](#footnote-ref-698)
699. Gregory Keating, ‘The Idea of Fairness in the Law of Enterprise Liability’ (1997) 95 Michigan Law Review 1266, p.1331-3. [↑](#footnote-ref-699)
700. ibid, p.1331. [↑](#footnote-ref-700)
701. ibid, p.1332. [↑](#footnote-ref-701)
702. ibid, p.1353 (further adding that, ‘in the world of acts… strict liability shifts, but does not spread, the costs of nonnegligent accidents. It is thus no fairer than negligence’). [↑](#footnote-ref-702)
703. See, e.g., William Douglas, ‘Vicarious Liability and Administration of Risk I’ (1929) 38 Yale Law Journal 584, p.591. [↑](#footnote-ref-703)
704. Keating (n 166) p.1338. See also, at p.1336: ‘[t]he institution of insurance can thus effect at least a partial transformation of the world of acts in the world of activities’. [↑](#footnote-ref-704)
705. Gregory Keating, ‘Distributive and Corrective Justice in the Tort Law of Accidents’ (2000) 74 Southern California Law Review 193, p.213. See also Gregory Keating, ‘Rawlsian Fairness and Regime Choice in the Law of Accidents’ (2004) 72 Fordham Law Review 1857, p.1916 (arguing that, ‘in a world where liability cannot be insured against, either liability or loss may be devastating. If so, negligence liability may be preferable, because it is equally fair and less expensive to operate’). [↑](#footnote-ref-705)
706. Keating (n 166) p.1336. [↑](#footnote-ref-706)
707. Keating (2004) (n 172) p.1920. [↑](#footnote-ref-707)
708. Keating (n 166) p.1338. [↑](#footnote-ref-708)
709. Keating (2000) (n 172) p.220. [↑](#footnote-ref-709)
710. George Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 Harvard Law Review 537, p.548-9. For support that ’22 players on a football pitch can be seen in their entirety as a community of risk’, see Jack Anderson, *Modern Sports Law* (Hart 2010) p.238. [↑](#footnote-ref-710)
711. 814 P.2d 1341, 1349 (Cal. 1991). [↑](#footnote-ref-711)
712. See Yeomans et al (n 17). [↑](#footnote-ref-712)
713. Keating (2000) (n 172) p.208. [↑](#footnote-ref-713)
714. Fletcher (n 177) p.572. [↑](#footnote-ref-714)
715. In football, for instance, it is increasingly common for some forwards to chip in significantly with defensive duties, whilst many defenders are often now given license to attack. By way of example see, e.g., Spanish centre-back Sergio Ramos, who is widely regarded for his attacking prowess. In his title-winning 2019-20 season at Real Madrid, Ramos was the club’s second-highest top scorer. [↑](#footnote-ref-715)
716. Keating (n 166) p.1320 demonstrates this point in the context of road accidents, which he suggests is the ‘canonical case of reciprocal risk imposition’. He observes that, even here, the risks are ‘imperfectly reciprocal’, because vehicles vary in performance and size, whilst the drivers of such vehicles also vary in their ‘native and acquired skills’. [↑](#footnote-ref-716)
717. Paula Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6 Chinese Journal of Comparative Law 265, p.266. [↑](#footnote-ref-717)
718. Jaakko Husa, *A New Introduction to Comparative Law* (Bloomsbury 2015) p.20. [↑](#footnote-ref-718)
719. See, e.g., Uwe Kischel, *Comparative Law* (OUP 2019) pp.45-86. [↑](#footnote-ref-719)
720. Giliker (n 184) p.280. [↑](#footnote-ref-720)
721. ibid, p.281. [↑](#footnote-ref-721)
722. Paula Giliker, ‘Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective’ (2011) 2 Journal of European Tort Law 31, p.41. As such, and much like the law in the UK (see section 2.4.2), French law now recognises that control can exist even in the absence of specialist knowledge. [↑](#footnote-ref-722)
723. Eva Steiner, *French Law: A Comparative Approach* (OUP 2018) p.277; Cass (Ass plen) 19 May 1988, D 1988.513. [↑](#footnote-ref-723)
724. Jean-Sebastien Borghetti, ‘The Culture of Tort Law in France’ (2012) 3 Journal of European Tort Law 158, p.164-70. [↑](#footnote-ref-724)
725. ibid, p.164. [↑](#footnote-ref-725)
726. Mark James, ‘Liability for Professional Athletes’ Injuries: A Comparative Analysis of Where the Risk Lies’ (2006) 1 Web Journal of Current Legal Issues. Interestingly, he also outlines that ‘the CPAM cannot claim a reimbursement from the player who caused the injuries, nor from that player’s employing club’. [↑](#footnote-ref-726)
727. Borghetti (n 191) p.164 (adding that, whilst ‘entitlement to social security payments normally results from contribution’, there does exist a ‘minimum social security coverage… for people who are not in a situation to contribute’. This also includes compensation for lost income (up to a fixed amount). [↑](#footnote-ref-727)
728. John Cartwright, **Bénédicte Fauvarque-Cosson and Simon Whittaker, ‘French Civil Code (English Translation)’ <**<http://translex.uni-koeln.de/601101/_/french-civil-code-2016/>> last accessed 10 April 2022. [↑](#footnote-ref-728)
729. Giliker (n 184) p.281; Giliker (n 189) p.47. For such reasons, French courts prefer the (wider) terms of ‘*commettant*’ and ‘*prepose*’, rather than the narrower ‘*employeur*’ and ‘*employe*’. [↑](#footnote-ref-729)
730. Giliker (n 155) p.133. [↑](#footnote-ref-730)
731. *Association des centres educatifs du Limousin et autre c/ Consorts Blieck*, Ass plen 29 March 1991 D 1991.324. [↑](#footnote-ref-731)
732. Civ 2, 22 May 1995 Bulletin II N° 155; JCP 1995 II 2250. [↑](#footnote-ref-732)
733. Civ 2, 3 February 2000 JCP 2000 II 10316. [↑](#footnote-ref-733)
734. James and McArdle (n 1) p.143-4. [↑](#footnote-ref-734)
735. In this regard, Giliker (n 184) p.283 appears correct to argue that ‘little will change’ in relation to how judges interpret the relationship requirement under Article 1384 and Article 1242. [↑](#footnote-ref-735)
736. Civ 2, 5 July 2018 Bulletin II N° 154. [↑](#footnote-ref-736)
737. James and McArdle (n 1) p.144. [↑](#footnote-ref-737)
738. Giliker (n 158) p.137-141. [↑](#footnote-ref-738)
739. Légifrance, ‘Sports Code’ <<https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006547685>> last accessed 05 November 2021. James (n 193) also notes that clubs ‘are not allowed entry to a competition unless they have adequate insurance in place and the competition organisers must also have insurance in place’. [↑](#footnote-ref-739)
740. Brice Lefevre, Guillaume Routier and Ramon Llopis-Goig, ‘Sport Participation in France and Spain: An International Comparison of Voraciousness for Sport’ (2020) 81 Poetics 1, p.15 (Fig. 1). [↑](#footnote-ref-740)
741. ibid. See also Maarten van Bottenburg, Bas Rijnen and Jacco van Sterkenburg, ‘Sports Participation in the European Union: Trends and Differences’ (Nike Europe Operations Netherlands BV, 2005) p.94. [↑](#footnote-ref-741)
742. Oliver Aubel and Brice Lefevre, ‘The Comparability of Quantitative Surveys on Sport Participation in France (1967-2010)’ (2015) 50 International Review for the Sociology of Sport 722, p.734. [↑](#footnote-ref-742)
743. Simon Gardiner et al, *Sports Law* (4th edn, Routledge 2012) p.508. [↑](#footnote-ref-743)
744. Karl Llewellyn, ‘Some Realism about Realism’ (1931) 44 Harvard Law Review 1222, p.1249. [↑](#footnote-ref-744)
745. Randall Kelso, ‘Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making’ (1993) 20 Pepperdine Law Review 531, p.534. [↑](#footnote-ref-745)
746. See Rob Merkin, ‘Tort, Insurance and Ideology: Further Thoughts’ (2012) 75 MLR 301, p.303 (also arguing that, ‘where the parties’ insurance position is unknown and unknowable, then it should be left out of account’). [↑](#footnote-ref-746)
747. *Morgans* (n 156), p.137. [↑](#footnote-ref-747)
748. Bilal Mirza, ‘How Player Insurance Works in Rugby Union and the Modern Challenges Facing Insurers’ (LawInSport, 10 January 2020). [↑](#footnote-ref-748)
749. Felix Cohen, ‘The Problems of a Functional Jurisprudence’ (1937) 1 Modern Law Review 5, p.7. [↑](#footnote-ref-749)
750. Amateur Football Alliance, ‘Insurance’ <<https://www.amateur-fa.com/play/player-support/insurance>> last accessed 23 June 2022. [↑](#footnote-ref-750)
751. Email from Mr David Williams (Senior Sports Corporate Broker) from Howden UK Group Ltd, 18 November 2019, on file with the author. [↑](#footnote-ref-751)
752. Rugby League, ‘Insurance’ <<https://staging.rugby-league.com/get-involved/club-support/operations/insurance>> last accessed 14 January 2022. [↑](#footnote-ref-752)
753. Joshua Charalambous and Steven Aitken, ‘Key Insurance Policies in Sport and the Role of the Lawyer’ (LawInSport, 24 August 2016). [↑](#footnote-ref-753)
754. For a similar example in a less popular – yet equally dangerous – sport, see the insurance cover provided by KBIS in the sport of polo: British Equestrian Insurance, ‘Master Policy of Public Liability Insurance Issued to Hurlingham Polo Association’ <<https://hpa-polo.co.uk/wp-content/uploads/2020/04/02_HPA_Members_Wording_Document_2020.pdf>> last accessed 22 April 2022. [↑](#footnote-ref-754)
755. Bluefin Sport, ‘Legal Liability Insurance’ <<https://ngis.bluefinsport.co.uk/media-library/bluefin-sport/pdfs/ngis-microsite/legal-liability-downloads/0400-0521-ngis--countycover-and-countycover-plus-brochure-2021-22_v1.pdf?la=en&hash=01361E8F6F80CAB871525AA18BE137AF81D11FCB>> last accessed 15 May 2022. Notably, even the cover for legal defence costs is based on the insurer believing that there is a ‘strong possibility of successfully defending the allegation.’ [↑](#footnote-ref-755)
756. Email from Bluefin Sport, 14December 2021, on file with the author. [↑](#footnote-ref-756)
757. According to personal injury lawyer Kelly Ferguson, ‘in many cases, player-to-player injuries, which are the most common types of injury in football, are not covered by the public liability insurance’. See Rumsby (n 32). [↑](#footnote-ref-757)
758. Morgan (n 57) p.260. [↑](#footnote-ref-758)
759. Kevin Davis, ‘Vicarious Liability, Judgment Proofing, and Non-Profits’ (2000) 50 University of Toronto Law Journal 407, p.440. [↑](#footnote-ref-759)
760. In terms of predictability, it is often easier to know whether insurance is available rather than whether a certain organisation has opted for the cover. Furthermore, basing liability on insurability also avoids providing an incentive to an organisation not to opt for certain insurance coverage in an attempt to avoid liability. [↑](#footnote-ref-760)
761. Merkin (n 213) p.303. [↑](#footnote-ref-761)
762. A similar example also occurred in 2010 involving Ashton United (another semi-professional football team). They were required to pay out £32,500 in damages after one of their defenders negligently broke the leg of an opposition player. This fee reportedly left the club ‘on the brink of financial collapse’: see The Bolton News, ‘Justice Has Been Done, Says Injured Footballer’ (*Bolton News*, 09 March 2010) <<https://www.theboltonnews.co.uk/news/5048485.justice-has-been-done-says-injured-footballer/>> last accessed 21 February 2022. [↑](#footnote-ref-762)
763. Jeremy Wilson, ‘Player’s Broken Ankle Puts Non-League Club’s Future in Jeopardy After They Lose Landmark Legal Case’ (*The Telegraph*, 18 November 2019) <<https://www.telegraph.co.uk/football/2019/11/18/players-broken-ankle-puts-non-league-clubs-future-jeopardy-lose/>> last accessed 24 February 2022. At the time of the incident, Akeroyd played for Ossett Town (who were later merged with Ossett Albion in July 2018 to form Ossett United). [↑](#footnote-ref-763)
764. ibid. [↑](#footnote-ref-764)
765. BBC, ‘Ossett United: The Tackle that Threatens the Future of a Non-League Club’ (*BBC News*, 20 November 2019) <<https://www.bbc.co.uk/sport/football/50479168>> last accessed 24 February 2022. [↑](#footnote-ref-765)
766. Ossett United, ‘Club Statement Re: Landmark Legal Case that Threatens Sport Participation Across the UK’ <<https://www.ossettutd.com/news/article/landmark-case-threatens-all-sport/>> last accessed 22 February 2022. [↑](#footnote-ref-766)
767. ibid. It is noteworthy that the club was also forced to set up a GoFundMe page in an attempt to raise enough funds to meet the damages and legal fees. Almost £6,000 was raised following the public outcry in many news outlets. See GoFundMe, ‘Ossett United’ <<https://www.gofundme.com/f/SaveOurGround>> last accessed 22 April 2022. [↑](#footnote-ref-767)
768. Email from Mr James Rogers (Ossett United Chairman) from Ossett United FC, 14 December 2021, on file with the author. [↑](#footnote-ref-768)
769. Jeremy Wilson, ‘FA Urged to Introduce Mandatory Player-to-Player Insurance as Ossett United’s Future Remains in Jeopardy’ (*The Telegraph*, 19 November 2019) <<https://www.telegraph.co.uk/football/2019/11/19/fa-urged-arrange-mandatory-player-to-player-insurance-ossett/>> last accessed 24 February 2022. [↑](#footnote-ref-769)
770. ibid. [↑](#footnote-ref-770)
771. BBC (n 232). [↑](#footnote-ref-771)
772. Wilson (n 236). [↑](#footnote-ref-772)
773. Bluefin Sport, ‘2019-20 Season’ <<http://www.thefa.com/-/media/cfa/liverpoolfa/files/leagues-and-clubs/affiliation/bluefin-insurance-2019-20.ashx?la=en>> last accessed 22 February 2022, p.23. [↑](#footnote-ref-773)
774. Furthermore, even if it were *not* the case that a mandatory player-to-player insurance scheme would only cost around £30-£50 extra per club, it is suggested that governing bodies still ought to be doing more here. They could, for instance, undertake sustained empirical research into assessing the economic viability of implementing compulsory player-to-player insurance in their particular sport. [↑](#footnote-ref-774)
775. *Watson* (n 162) (the claimant here was successful in his claim that the boxing governing body in question breached their duty of care by failing to provide adequate ringside medical treatment). [↑](#footnote-ref-775)
776. For a specific sporting example, see *Wattleworth v Goodwood Road Racing Company Ltd and Royal Automobile Club Motor Sports Association Ltd and Federation Internationale de l’Automobile* [2004] EWHC 140. More generally, see Mark James, *Sports Law* (3rd edn, Palgrave 2017) pp.111-16. [↑](#footnote-ref-776)
777. [2006] EWCA Civ 1454, para [9]. [↑](#footnote-ref-777)
778. Hiscox, ‘Sports and Recreation – Clubs and Associations: Summary of Cover’ <<http://www.ps-hockey.co.uk/uploads/documents/ps-hockey/11503-KF-HSP-UK-PSS-CLU-2.pdf>> last accessed 25 April 2022. [↑](#footnote-ref-778)
779. [2006] EWCA Civ 18. In other words, the vicarious nature of the employer’s liability meant that, from their point of view, the bouncers’ actions were in fact accidental. Had the employer’s liability been personal, however, insurance cover would have been excluded because then the injuries could not then have been viewed as ‘accidental’ from their point of view. [↑](#footnote-ref-779)
780. (unreported) High Court (QBD), 10 June 1994. [↑](#footnote-ref-780)
781. Mark James, ‘The Trouble with Roy Keane’ (2002) 1 Entertainment Law 72, p.81; Neville Cox, ‘Civil Liability for Foul Play in Sport’ (2003) 54 Northern Ireland Legal Quarterly 351, p.366-7. Whilst the tort of battery does not necessarily require an intention to injure (*Wilson v Pringle* [1987] 1 QB 237, p.249), it does at least require an intention to touch. According to Lord Goff in *Re F* [1990] 2 AC 1, p.73, and contrary to earlier authorities, this touching may not need to be ‘hostile’. [↑](#footnote-ref-781)
782. Merkin (n 213) p.302. [↑](#footnote-ref-782)
783. [2021] UKSC 12. [↑](#footnote-ref-783)
784. ibid, para [45]. [↑](#footnote-ref-784)
785. ibid, para [59]. As Lord Carloway neatly elaborated in the appeal case ([2019] CSIH 9, para [23]): ‘the phrase 'deliberate acts' in the policy is intended to cover acts which involve the insured, or his employees, doing something with the deliberate intention of bringing about a particular objective… the exclusionary phrase [in this case] does not cover a deliberate act of an employee, intended as one of restraint, which ‘accidentally’ causes injury or death to the person restrained. For the exclusion to operate, the employee must have deliberately intended to cause the death of, or at least serious injury to, the deceased. That is not the situation in this case.’ [↑](#footnote-ref-785)
786. See, e.g., *R v Parmenter* (1991) 92 Cr App R 68. [↑](#footnote-ref-786)
787. As illustrated by David Fisher, ‘*Burnett v International Insurance Co of Hanover Ltd* ([2021] UKSC 12: Case Comment’ (2021) 3 Journal of Personal Injury Law 134, p.137, it will ‘need something like a conviction for murder or something equally as heinously premeditated’ for an insurer to rely on a ‘deliberate acts’ exclusion. [↑](#footnote-ref-787)
788. *Yorkshire Water Services Ltd v Sun Alliance and London Insurance Plc (No.1)* [1997] CLC 213, p.221 (per Stuart-Smith LJ). [↑](#footnote-ref-788)
789. As also discussed in section 4.2, there may be a host of other reasons – ranging from higher compensation awards in tort to restrictions on recovery from first-party schemes – that mean improving first-party cover would not necessarily eliminate the possibility of legal action against an amateur sports club. On this basis, it is suggested that governing bodies should still mandate cover for player-to-player risks, *even if* the personal accident insurance policies are drastically improved. [↑](#footnote-ref-789)
790. Nina Goolamali and Luka Krsljanin, ‘Playing Football is Simply Not Cricket – Issues with Athletes’ Insurance against Training and Warm-Up Injuries Following the Rory Burns Case’ (LawInSport, 04 February 2020). See also Tremper (n 123) p.433. [↑](#footnote-ref-790)
791. See discussion to n 33. [↑](#footnote-ref-791)
792. Légifrance (n 206). [↑](#footnote-ref-792)
793. This is a psychological phenomenon which describes the tendency of individuals to under-estimate their chances of undergoing a negative life event. In this regard, Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (University of Chicago Press 2008) p.237 suggests that ‘[p]eople tend to be overly optimistic about… their likelihood of being in accidents, which in turn affects how much insurance they buy and how many precautions they take’. [↑](#footnote-ref-793)
794. Riach (n 25). [↑](#footnote-ref-794)
795. Our Game Football, ‘Player Membership’ <<https://ourgamefootball.com/player/>> last accessed 03 March 2022. [↑](#footnote-ref-795)
796. ibid. [↑](#footnote-ref-796)
797. [1910] 1 KB 87. [↑](#footnote-ref-797)
798. ibid, p.93 (per Farwell LJ). [↑](#footnote-ref-798)
799. See, e.g., Martin Minkowitz, ‘Jockeying for Benefits - Professional Athletes and Workers' Compensation’ (1991) 21 Brief 24, p.24; Simon Gardiner et al, *Sports Law* (4th edn, Routledge 2012) p.396. [↑](#footnote-ref-799)
800. Hayden Opie, ‘Survey: A Global Perspective on the Most Important Cases Affecting the Sports Industry’ (2009) 16 Villanova Sports and Entertainment Law Journal 99, p.109. See also Mark James, *Sports Law* (3rd edn, Palgrave 2017) p.99 (outlining that we have already seen an extension of the law in this area to ‘new contexts and new defendants who had not previously considered themselves to be at risk from litigation’). [↑](#footnote-ref-800)
801. Ian Blackshaw, ‘The Professional Athlete – Employee or Entrepreneur?’ (2006) 3-4 International Sports Law Journal 91, p.95. [↑](#footnote-ref-801)
802. UK Sport, ‘World Class Programme’ <<https://www.uksport.gov.uk/our-work/world-class-programme>> last accessed 26 January 2022. [↑](#footnote-ref-802)
803. Andrew Smith et al, ‘The Funding and Employment Status of Elite Athletes – A Comparison of the UK, USA and Germany’ (LawInSport, 06 May 2016). [↑](#footnote-ref-803)
804. UK Sport, ‘How UK Sport Funding Works’ <<https://www.uksport.gov.uk/our-work/investing-in-sport/how-uk-sport-funding-works>> last accessed 26 January 2022. [↑](#footnote-ref-804)
805. Smith et al (n 7). [↑](#footnote-ref-805)
806. Jonathan Taylor and Jamie Herbert, ‘Government Intervention in the Sports Sector’ in Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice* (Bloomsbury 2014) p.32. [↑](#footnote-ref-806)
807. UK Sport (n 8). [↑](#footnote-ref-807)
808. UK Sport (n 6). According to UK Sport, ‘Current Funding Figures’ <<https://www.uksport.gov.uk/our-work/investing-in-sport/current-funding-figures>> last accessed 22 March 2022, UK Sport fund (through contributions to the respective NGBs) the following individual sports: archery, athletics, badminton, boxing, canoeing, cycling, diving, equestrian, gymnastics, judo, karate, rowing, sailing, shooting, swimming, taekwondo and triathlon. [↑](#footnote-ref-808)
809. Libby Payne and Caroline Mathews, ‘The Employment Status and Rights of Funded Athletes in the UK’ (LawInSport, 13 November 2018). [↑](#footnote-ref-809)
810. See, e.g., Katie Russell and Rebecca Nicholson, ‘Are Professional Athletes Employees?’ (2019) 10 Global Sports Law and Taxation Reports 36, p.38-9 (referring to British Cycling’s statement that suggests that its ‘relationship with [athletes] is not one of employer-employee but that of a service provider supporting talented and dedicated athletes to achieve their best’). [↑](#footnote-ref-810)
811. See Smith et al (n 7) (highlighting the US Rowing APA which maintains that athletes are ‘independent contractors providing services to US Rowing on a contract basis’). [↑](#footnote-ref-811)
812. *Autoclenz Ltd v Belcher* [2011] UKSC 41, para [22]. [↑](#footnote-ref-812)
813. Brendan Schwab, ‘Embedding the Human Rights of Players in World Sport’ (2018) 17 International Sports Law Journal 214, p.217-8. [↑](#footnote-ref-813)
814. *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) 1 WLR 909, p.929-30 (per Farquarhson LJ). [↑](#footnote-ref-814)
815. Schwab (n 17) p.217-8. See also the more recent example of *Pechstein v International Skating Union* CAS 2009/A/1912 on the issue of forced arbitration clauses in sporting contracts. [↑](#footnote-ref-815)
816. PA Media, ‘Jess Varnish wins Right to Appeal against Verdict in British Cycling Case’ (*The Guardian*, 17 December 2019) <<https://www.theguardian.com/sport/2019/dec/17/jess-varnish-wins-right-to-appeal-verdict-in-case-against-british-cycling>> last accessed 17 October 2021. [↑](#footnote-ref-816)
817. As highlighted by the Employment Appeal Tribunal in *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667, para [17], the determination of worker status will ‘involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker’s favour’. However, cf *Bates van Winkelhof v Clyde and Co LLP* [2014] UKSC 32, para [26] (per Baroness Hale, where she notes that ‘the question of whether [individuals] can also be workers… would be a very different question from whether they can be employees’). [↑](#footnote-ref-817)
818. *Everson v British Cycling Federation* (unreported), 2001. [↑](#footnote-ref-818)
819. *Miss J Varnish v British Cycling and UK Sport* (Case No. 2404219/2017). [↑](#footnote-ref-819)
820. ibid, para [274]. [↑](#footnote-ref-820)
821. *Miss J Varnish v British Cycling* [2020] UKEAT/0022/20/LA (citing Elias LJ in *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99, para [9]). [↑](#footnote-ref-821)
822. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497; *Nethermere (St Neots) Limited v Gardiner & Another* [1984] ICR 612. [↑](#footnote-ref-822)
823. *Varnish* (n 23), paras [158]-[9]. [↑](#footnote-ref-823)
824. ibid, paras [160]-[3]. Other examples, such as the accusation that coaches were listening to Varnish through hotel bedroom doors, were not considered to be examples of ‘extreme control’; rather, they were ‘illustrative of coaches behaving in a way commensurate with their duties in loco parentis where the athletes were under 18’ (see para [164]). [↑](#footnote-ref-824)
825. ibid, para [224]. [↑](#footnote-ref-825)
826. ibid, para [230]. [↑](#footnote-ref-826)
827. ibid, para [154]. [↑](#footnote-ref-827)
828. *Varnish* (n 25), para [41]. [↑](#footnote-ref-828)
829. *Varnish* (n 23), para [245]. [↑](#footnote-ref-829)
830. ibid, para [139]. In this light, Judge Ross construed the purpose of the relationship as one to simply enable Varnish to ‘be the best athlete she could possibly be’ (para [257]). [↑](#footnote-ref-830)
831. As is made clear in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367, a contractual term indicating that the individual may provide a substitute to carry out the work is inconsistent with a contract of employment. [↑](#footnote-ref-831)
832. *Varnish* (n 23), paras [157], [242]. [↑](#footnote-ref-832)
833. This is also reinforced by the fact that the ET’s findings on mutuality of obligation constituted the bulk of Varnish’s appeal in the EAT. [↑](#footnote-ref-833)
834. Lawrence Ostlere, ‘Miguel Angel Lopez Escapes Punishment after Punching Giro d’Italia Fan who Knocked Him off Bike on Stage 20’ (*The Independent*, 01 June 2019) <<https://www.independent.co.uk/sport/cycling/giro-ditalia-2019-miguel-angel-lopez-punches-fan-video-watch-crash-a8939806.html>> last accessed 22 March 2022. For a discussion of whether such an intentional act would satisfy the close connection test for vicarious liability, see section 6.2.2. [↑](#footnote-ref-834)
835. Paula Case, ‘Developments in Vicarious Liability: Shifting Sands and Slippery Slopes’ (2006) 22 Journal of Professional Negligence 161, p.164; Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) p.31-3; Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 Australian Journal of Labour Law 235. For a case law example, see *Calder v H Kitson Vickers & Sons (Ltd)* [1988] ICR 232, p.254 (per Ralph Gibson J). [↑](#footnote-ref-835)
836. See, e.g., Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) chapter 9; Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) chapter 31; Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) chapter 15; Simon Deakin and Zoe Adams, *Markesinis and Deakin’s Tort Law* (8th edn, OUP 2019) chapter 19. [↑](#footnote-ref-836)
837. [2020] UKSC 13, para [29]. [↑](#footnote-ref-837)
838. [2013] QB 722. See also *Jones v Tower Boot Co* [1997] 2 All ER 395 (the term ‘course of employment’ here was, in the context of the Race Relations Act 1976, given a wider meaning than it currently possesses under the common law of vicarious liability). [↑](#footnote-ref-838)
839. ibid, para [59]. [↑](#footnote-ref-839)
840. Jeremias Prassl, *The Concept of the Employer* (OUP 2015) p.10. [↑](#footnote-ref-840)
841. ibid p.155. See also p.110 (where he conflates both a unitary and formalist approach). [↑](#footnote-ref-841)
842. Sarah Butlin and Robin Allen, ‘Worker Status and Vicarious Liability: The Need for Coherence’ (2018) (University of Cambridge Faculty of Law Research Paper No 21/2018) p.2 [↑](#footnote-ref-842)
843. ibid. [↑](#footnote-ref-843)
844. ibid, p.1. [↑](#footnote-ref-844)
845. Gwyneth Pitt, *Employment Law* (9th edn, Sweet and Maxwell 2014) p.102-3. [↑](#footnote-ref-845)
846. Butlin and Allen (n 46) p.11. See also Keith Ewing, John Hendy and Carolyn Jones, ‘Universality and Effectiveness of Labour Law’ (2019) 10 European Labour Law Journal 334, p.335 (arguing that this approach seeks ‘a common position in all legal settings’). [↑](#footnote-ref-846)
847. Gray (n 40) p.73. See also p.174 (where he ponders why contract law permits ‘parties to manage risk through contracts, and to limit or remove risk through company structures, but baulks at such efforts in relation vicarious liability’). [↑](#footnote-ref-847)
848. Prassl (n 44) p.30. See also Jeremias Prassl, ‘Who is a Worker?’ (2017) 133 LQR 366, p.370-1 [↑](#footnote-ref-848)
849. *Nethermere* (n 26) p.632 (per Dillion LJ). [↑](#footnote-ref-849)
850. Richard Kidner, ‘Vicarious Liability: For Whom Should the Employer be Liable?’ (1995) 15 Legal Studies 47, p.47. [↑](#footnote-ref-850)
851. *Varnish* (n 25) para [39]. [↑](#footnote-ref-851)
852. [1970] AC 1004. [↑](#footnote-ref-852)
853. cf John Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’ (2011) 30 Law and Philosophy 1, p.19 (stating ‘I tend to think… that *Dorset Yacht* should have been treated as a vicarious liability case’). [↑](#footnote-ref-853)
854. *Dorset Yacht* (n 56), p. 1055 (per Lord Pearson). See also *Kafagi v JBW Group* [2018] EWCA Civ 1157, para [41] (per Singh LJ) and, in the Australian context, *Attorney General for New South Wales v Perpetual Trustee Co* *Ltd* (1952) 85 CLR 237, p.285 (per Fullagar J). For scholarly support on this point, see Robert Flannigan, ‘Enterprise Control: The Servant-Independent Contractor Distinction’ (1987) 37 University of Toronto Law Journal 25, p.60 (highlighting that, where the employer does not exercise a degree of control that is more than ‘nominal’, vicarious liability will likely be an ‘inappropriate response’). [↑](#footnote-ref-854)
855. [1984] 1 QB 90. [↑](#footnote-ref-855)
856. Phillip Morgan, ‘Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?’ (2015) 31 Journal of Professional Negligence 276, p.295. [↑](#footnote-ref-856)
857. Kidner (n 54) p.50. As he further elaborates (at p.49), ‘the mutuality of obligation argument, while highly significant for employment law, may not prove too damaging for vicarious liability since it can be argued that when the waiters presented themselves for and began work there was a binding obligation on both sides.’ [↑](#footnote-ref-857)
858. Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet and Maxwell 2014) para [21]-[011]. [↑](#footnote-ref-858)
859. Ewan McKendrick, ‘Vicarious Liability and Independent Contractors – A Re-Examination’ (1990) 53 MLR 770, p.784. [↑](#footnote-ref-859)
860. *Kafagi* (n 58), para [50] (Singh LJ referring to the fact that the tortfeasor-bailiff could turn down work offered by the Respondent company). [↑](#footnote-ref-860)
861. [2004] EWCA Civ 217. [↑](#footnote-ref-861)
862. ibid, para [74]. [↑](#footnote-ref-862)
863. ibid, para [72]. Note also David Cabrelli, *Employment Law in Context* (4th edn, OUP 2020) p.133-4 (arguing that the general trend and reasoning in *Dacas* was ‘clearly motivated by policy considerations… at the expense of doctrinal coherence’). More specifically, in the context of vicarious liability, see Douglas Brodie, ‘Vicarious Liability: Boundary Lines Restored’ (2020) 154 Reparation Bulletin 1, p.2 (arguing that ‘borderline cases’ are likely to be ‘determined in favour of employment where the context of the proceedings is reparation’). [↑](#footnote-ref-863)
864. Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (OUP 2013) p.37. [↑](#footnote-ref-864)
865. See, for instance, Bob Goldman, Patricia Bush and Ronald Klatz, *Death in the Locker Room: Steroids in Sport* (Icarus Press 1984) p.32 (highlighting that 52% of surveyed professional athletes would take a drug that killed them within 5 years if it guaranteed their sporting success). [↑](#footnote-ref-865)
866. Eric Posner, ‘The Economic Basis of the Independent Contractor/Employee Distinction’ (2021) 100 Texas Law Review 353, p.378. [↑](#footnote-ref-866)
867. Of course, one might make the point that the benefit formulation of enterprise liability overlaps to some extent with mutuality of obligation. However, it seems to me that benefit is more closely linked to control than the concept of mutual obligations. The latter appears to be more concerned with whether there is an obligation to work, rather than whether this obligation provides a benefit. In this regard, just because mutual obligations exist does not also mean that a benefit exists (and vice versa). This is illustrated on the facts of both *Varnish* and *O’Kelly*: in both cases, the defendant was receiving a benefit (explained in the context of *Varnish*, below), but mutuality of obligations was found not to exist in either scenario. [↑](#footnote-ref-867)
868. Flannigan (n 58) p.33 (also adding that ‘[w]hoever has this control will be in a position to vary the economic return or equity benefit from the activity’). [↑](#footnote-ref-868)
869. Morgan (n 60) p.290. [↑](#footnote-ref-869)
870. Kidner (n 54) p.62. Similarly, Christian Witting, ‘Modelling Organisational Vicarious Liability’ (2019) 39 Legal Studies 694, p.705 refers to an employer’s ability to control as an ‘integration mechanism’. [↑](#footnote-ref-870)
871. [2015] EWCA Civ 1139, para [15]. [↑](#footnote-ref-871)
872. Andrew Bell, ‘The Liability of Local Authorities for Abuses by Foster Parents’ (2018) 34 Professional Negligence 38, p.40. [↑](#footnote-ref-872)
873. [2016] UKSC 10, para 23 (His Lordship highlighting that the justification for assessing integration is founded on the notion that the ‘employee’s activities are undertaken as part of the activities of the employer and for its benefit, [and that] it is appropriate that the employer should bear the cost of harm wrongfully done by the employee’). [↑](#footnote-ref-873)
874. [2018] EWCA Civ 1670, paras [51]-[2]. [↑](#footnote-ref-874)
875. One notable exception to this might be parental liability for the torts of their children. Whilst we saw in section 2.4.2 that parents can exercise strict control over their offspring, it would be rather artificial to suggest that the actions of young children advance the interests of their parents in any way. As such, this example may suggest that, in those rare scenarios where control and benefit point to different conclusions, it will be the latter that is usually afforded greater weight. [↑](#footnote-ref-875)
876. *Varnish* (n 23), para [80]. [↑](#footnote-ref-876)
877. *Cox* (n 77), para [30]. [↑](#footnote-ref-877)
878. *Varnish* (n 25), para [47]. [↑](#footnote-ref-878)
879. *Varnish* (n 23), para [28]; James Toney, ‘Team GB Set to Scrap Medal Targets for Tokyo Olympics’ (*The Independent*, 10 June 2021) <<https://www.independent.co.uk/sport/olympics/tokyo-games-2021-great-britain-b1863512.html>> last accessed 04 September 2021. [↑](#footnote-ref-879)
880. *Varnish* (n 25), para [5]. [↑](#footnote-ref-880)
881. Flannigan (n 58) p.35. [↑](#footnote-ref-881)
882. This is often also referred to as the ‘loss within the scope of duty’ rule. For a more detailed discussion on this area of law, see Tsachi Keren-Paz, ‘Liability for Consequences, Duty of Care and the Limited Relevance of Specific Reliance: New Insights on *Bhamra v Dubb*’ (2016) 32 Professional Negligence 50. [↑](#footnote-ref-882)
883. Bell (n 76) p.41. [↑](#footnote-ref-883)
884. ibid. [↑](#footnote-ref-884)
885. [2018] UKSC 29. [↑](#footnote-ref-885)
886. See the discussion in Charles Fursdon, Robert Lewis and Chloe Westerman, ‘The Jess Varnish Decision - Why British Athletes are Still Not Considered “Employees” and What it Means for Athletes and NGBs’ (LawInSport, 05 April 2019). [↑](#footnote-ref-886)
887. Russell and Nicholson (n 14). Note also the argument made by Thomas Linden QC (the lawyer for British Cycling), who suggested that a judgment for Varnish would have been equivalent to the ‘skies falling in’ for UK NGBs. See Tom Cary, ‘Jess Varnish Unlikely to Hear Outcome of Tribunal For at Least Four Weeks’ (*The Telegraph*, 18 May 2020) <<https://www.telegraph.co.uk/cycling/2020/05/18/jess-varnish-unlikely-hear-outcome-tribunal-appeal-least-four/>> last accessed 20 April 2022. [↑](#footnote-ref-887)
888. BBC, ‘Novak Djokovic Apologises after Hitting Line Judge with Ball at US Open’ (*BBC News*, 07 September 2020) <<https://www.bbc.co.uk/sport/tennis/54052345>> last accessed 27 April 2022. For a previously similar incident involving the Canadian player Denis Shapovalov, see Press Association, ‘Denis Shapovalov Fined $7000 for Smashing Ball in Tennis Umpire’s Eye’ (*The Guardian*, 06 February 2017) <<https://www.theguardian.com/sport/2017/feb/06/denis-shapovalov-fined-smashing-ball-tennis-umpire-eye>> last accessed 27 April 2022. [↑](#footnote-ref-888)
889. Esther Addley, ‘Nick Kyrgios Bounces Racket into Crowd During Tantrum at Wimbledon’ (*The Guardian*, 03 July 2015) <<https://www.theguardian.com/sport/2015/jul/03/kyrgios-bounces-racket-spectators-tantrum-wimbledon>> last accessed 27 April 2022. [↑](#footnote-ref-889)
890. David Ornstein, ‘David Nalbandian Disqualified from Queen’s Final after Kick’ (*BBC News*, 18 June 2012) <<https://www.bbc.co.uk/sport/tennis/18491229>> last accessed 27 April 2022. [↑](#footnote-ref-890)
891. See, e.g., Chris Seddell, ‘The 13 Nastiest On-Court Spats in Tennis History (*Bleacher Report*, 26 October 2011) <<https://bleacherreport.com/articles/908424-13-nastiest-on-court-spats-in-tennis-history-video>> last accessed 27 April 2022 (also reporting other various infamous tennis assaults, such as Stefan Koubek choking Daniel Koellerer at an ATP event in 2010). [↑](#footnote-ref-891)
892. BBC, ‘Tennis Match-Fixing “A Secret on the Tour Everybody Knows”’ (*BBC News*, 19 January 2016) <<https://www.bbc.co.uk/sport/tennis/35356550>> last accessed 23 April 2022. [↑](#footnote-ref-892)
893. BBC, ‘Tennis Match-Fixing Allegations Explained’ (*BBC News*, 18 January 2016) <<https://www.bbc.co.uk/news/uk-35343063>> last accessed 23 April 2022. This is not even taking into account the other common expenses for tennis players, such as outlay on travel and coaching. [↑](#footnote-ref-893)
894. Tennis World, ‘French Player Accuses Opponent of Intentionally Hitting Her in the Eye with Ball’ (*Tennis World*, 13 January 2020) <<https://www.tennisworldusa.org/tennis/news/Tennis_Stories/82713/french-player-accuses-opponent-of-intentionally-hitting-her-in-the-eye-with-ball/>> last accessed 27 April 2022. Unfortunately, this is a rather common practice amongst tennis players, and there are numerous other examples of players intentionally hitting the ball at an opponent, often in an attempt to cause injury. See, e.g., BBC, ‘Nick Kyrgios “Wanted to Hit” Rafael Nadal with Shot at Wimbledon’ (*BBC News*, 04 July 2019) <<https://www.bbc.co.uk/sport/tennis/48877052>> last accessed 27 April 2022. [↑](#footnote-ref-894)
895. Monte Burke, ‘The PGA Tour: A Not-for-Profit Money Machine’ (*Forbes*, 8 May 2013) <<https://www.forbes.com/sites/monteburke/2013/05/08/the-pga-tour-a-not-for-profit-money-machine/#c21746d57339>> last accessed 13 November 2021. [↑](#footnote-ref-895)
896. The governance of golf is instead left to the United States Golf Association (USGA) for US golf, and to The R&A for every other country. [↑](#footnote-ref-896)
897. This accords with the analysis found in Gardiner et al (n 3) p.395 (where it is highlighted that, in German law, ‘a competition organiser or a sponsor could be considered an employer’). [↑](#footnote-ref-897)
898. Jack Anderson, *The Legality of Boxing: A Punch Drunk Love?* (Routledge 2006) p.65-70. [↑](#footnote-ref-898)
899. BBC, ‘Ryder Cup: Spectator Blinded in One Eye Says She Could Have Died on Golf Course’ (*BBC News*, 03 October 2018) <<https://www.bbc.co.uk/sport/golf/45734449>> last accessed 26 April 2022. [↑](#footnote-ref-899)
900. [1998] EWCA Civ 591. See also the earlier case of *Lewis v Buckpool Golf Club* [1993] SLT 43. [↑](#footnote-ref-900)
901. [2011] CSOH 181. [↑](#footnote-ref-901)
902. Matt Bonesteel, ‘Now Sober, Pro Golfer Rocco Mediate Admits to Drinking While Playing PGA Tour Events’ (*The Washington Post*, 07 February 2019) <<https://www.washingtonpost.com/sports/2019/02/07/now-sober-pro-golfer-rocco-mediate-admits-drinking-while-playing-pga-tour-events/>> last accessed 26 April 2022. [↑](#footnote-ref-902)
903. Jeremias Prassl and Martin Risak, ‘Uber, Taskrabbit and Co.: Platforms as Employers – Rethinking the Legal Analysis of Crowdwork’ (2016) 37 Comparative Labour Law and Policy Journal 619, p.621. [↑](#footnote-ref-903)
904. Phillip Morgan, ‘Recasting Vicarious Liability’ (2012) 71 Cambridge Law Journal 615, p.642-3. Notably, only the factors are applied here (rather than his multi-axis model itself). This is largely because I am unable to identify any clear-cut distinction between control and discretion, and, in my view, discretion in role is simply just a by-product of a lack of control. In the absence of any independence between these two axes, Morgan’s suggestion becomes a rather unhelpful determination of the relationship requirement for vicarious liability. [↑](#footnote-ref-904)
905. Braham Dabscheck, ‘Sweated Labour, Literally Speaking: The Case of Australian Jockeys’ in Young Lee and Rodney Fort (eds) *The Sports Business in the Pacific Rim: Economic and Policy* (Springer 2014) p.322-5 (adding also that ‘these are not strictures that would apply to independent contractors such as electricians or plumbers’). [↑](#footnote-ref-905)
906. [2001] EWCA Civ 1054. [↑](#footnote-ref-906)
907. Somewhat paradoxically, this might mean that the exercise of even greater control over athletes could make NGBs less likely to be held vicariously liable. However, even if the injured party was fully compensated by the tortfeasor’s liability insurance, the vicarious liability of a NGB may still be tested if the insurer exercises their rights of subrogation. [↑](#footnote-ref-907)
908. World Darts Federation, ‘Playing and Tournament Rules’ <<https://dartswdf.com/rules>> last accessed 02 February 2022. A glance at the (relatively brief) rules imposed by the WDF highlights that many obligations that are commonplace in other sports – such as mandatory attendance at post-match conferences – are absent here. This is presumably because they are not as commercially-minded as the other world governing body for darts, the Professional Darts Corporation (PDC). For their (more detailed) rulebook, see Darts Regulation Authority, ‘Darts Regulation Authority Rule Book’ <<https://www.pdc.tv/sites/default/files/2020-08/DRA-Rules.pdf>> last accessed 02 February 2022. [↑](#footnote-ref-908)
909. Simon Boyes, ‘Compensate Footballers after Injury, But Don’t Let Insurance Costs Ruin the Game’ (*The Conversation*, 28 February 2014) <<https://theconversation.com/compensate-footballers-after-injury-but-dont-let-insurance-costs-ruin-the-game-23797>> last accessed 23 August 2021. [↑](#footnote-ref-909)
910. To clarify, the analysis here is limited to those tournaments held in the UK (the most notable of which being Wimbledon, but also including other events such as the Nitto ATP Finals, the Queen’s Club Championship and the Eastbourne International). However, it may be that the present analysis could prove persuasive in other jurisdictions where professional tennis events are commonly held, such as in France, Australia and the USA (although this will, of course, be dependent on the customs and practices relating to vicarious liability in each country). [↑](#footnote-ref-910)
911. Andy Gibson, *Sports Law in Australia* (Kluwer 2017) paras [173]-[4]. [↑](#footnote-ref-911)
912. See, e.g., International Tennis Integrity Agency, ‘Tennis Anti-Corruption Program (2021)’ <<https://www.itftennis.com/media/4483/2021-tennis-anti-corruption-program-english.pdf>> last accessed 23 January 2022. [↑](#footnote-ref-912)
913. According to International Tennis Federation, ‘2022 Men’s and Women’s ITF World Tennis Tour Regulations’ <<https://www.itftennis.com/media/7286/2022-itf-world-tennis-tour-regulations.pdf>> last accessed 28 April 2022, p.171 (hereafter ‘ITF World Tennis Tour’) and Grand Slam Board, ‘2022 Official Grand Slam Rulebook’ <<https://www.itftennis.com/media/5986/grand-slam-rulebook-2022-f-2.pdf>> last accessed 28 April 2022, p.39 (hereafter ‘Grand Slam Rulebook’), a player may be fined, respectively, $50 or $10,000 if they are not ready to play when their match is called. [↑](#footnote-ref-913)
914. ITF World Tennis Tour (n 117) p.177-9; Grand Slam Rulebook (n 117) p.46-9. [↑](#footnote-ref-914)
915. See ITF World Tennis Tour (n 117) p.136; Grand Slam Rulebook (n 117) p.21-2 (highlighting that participants are allowed to leave the court for a ‘reasonable time’ for a toilet break once during a best-of-three sets match). [↑](#footnote-ref-915)
916. Athletes must attend their post-match media conference within a reasonable time (usually 60 minutes) of the conclusion of each match or risk being penalised: see ITF World Tennis Tour (n 117) p.180 and Grand Slam Rulebook (n 117) p.45. [↑](#footnote-ref-916)
917. Tumaini Carayol, ‘Naomi Osaka Will Not Speak to French Open Press Due to Mental Health Impact’ (*The Guardian*, 27 May 2021) <<https://www.theguardian.com/sport/2021/may/27/naomi-osaka-will-not-speak-to-french-open-press-mental-health-tennis>> last accessed 19 December 2021. [↑](#footnote-ref-917)
918. Grand Slam Rulebook (n 117) p.45. [↑](#footnote-ref-918)
919. ITF World Tennis Tour (n 117) p.161-3; Grand Slam Rulebook (n 117) p.37. [↑](#footnote-ref-919)
920. ITF World Tennis Tour (n 117) p.172-5; Grand Slam Rulebook (n 117) p.41-3. [↑](#footnote-ref-920)
921. James Brown, ‘The Creation and Regulation of Sports Equipment: Implications for the Future' (2020) 18 Entertainment and Sports Law Journal 1. [↑](#footnote-ref-921)
922. Grand Slam Rulebook (n 117) p.41. See also All England Lawn Tennis Club, ‘Clothing and Equipment’ <<https://www.wimbledon.com/en_GB/about_wimbledon/clothing_and_equipment.html>> last accessed 28 April 2022. [↑](#footnote-ref-922)
923. ITF World Tennis Tour (n 117) p.171-2; Grand Slam Rulebook (n 117) p.39-41. [↑](#footnote-ref-923)
924. Association of Tennis Professionals, ‘2022 ATP Official Rulebook’ <<https://www.atptour.com/en/corporate/rulebook>> last accessed 28 April 2022, p.10-3 (hereafter ‘ATP Rulebook’). [↑](#footnote-ref-924)
925. See also (ibid, p.14-5) the requirement that all players are to grant and assign to ATP ‘the right in perpetuity to record in tangible form’ and to allow ATP to use their ‘name, performance, likeness, voice, and biography, in any and all media… solely for purposes of advertising and promoting [the] ATP Tour.’ Mixed Martial Arts fighters competing under the UFC are also subject to similar limitations on the use of their intellectual property rights: see Daniel Pannett, ‘Collective Bargaining in Sport: Challenges and Benefits’ (2015) 4 UCL Journal of Law and Jurisprudence 189, p.202. [↑](#footnote-ref-925)
926. Alessandra Sorrentini and Tommasina Pianese, ‘The Relationships among Stakeholders in the Organization of Men’s Professional Tennis Events’ (2011) 3 Global Business and Management Research: An International Journal 141, p.149. [↑](#footnote-ref-926)
927. ATP Rulebook (n 128) p.15. [↑](#footnote-ref-927)
928. ibid p.15-6. [↑](#footnote-ref-928)
929. See, e.g., ATP Staff, ‘Flashback: Successful Kids’ Day Supports More Than 400 Children in Budapest’ (*ATP Tour*, 20 April 2020) <<https://www.atptour.com/en/news/budapest-2018-charity-event>> last accessed 15 February 2022. [↑](#footnote-ref-929)
930. The lack of control over training and tactics is, for some scholars, crucial to the finding that a tennis player ought to be viewed as an independent contractor. See Collin Flake, ‘Getting to Deuce: Professional Tennis and the Need for Expanding Coverage of Federal Antidiscrimination Laws’ (2014) 16 Texas Review of Entertainment & Sports Law 51, p.62-3; Amy Gibson, ‘The Association of Tennis Professionals: From Player Association to Governing Body’ (2010) 10 Journal of Applied Business and Economics 23; Deborah Healey, *Sport and the Law* (UNSW Press 2009) p.59-60. [↑](#footnote-ref-930)
931. PGA Tour, ‘About Us’ <<https://www.pgatour.com/company/aboutus.html>> last accessed 14 March 2022. [↑](#footnote-ref-931)
932. PGA Tour, ‘Player Handbook and Tournament Regulations: 2019-20’ <<https://qualifying.pgatourhq.com/static-assets/uploads/2019-2020-pga-tour-handbook--regs-09_10_19.pdf>> last accessed 28 April 2022, p.74-5 (hereafter ‘PGA Tour Handbook’). [↑](#footnote-ref-932)
933. ibid, p.75-8 (for sponsorship limitations) and p.60 (for equipment restrictions). See also the highly technical and in-depth equipment rules produced by The R&A and USGA: The R&A and USGA, ‘The Equipment Rules’ <<https://www.randa.org/~/media/files/equipment-rules-2020-v2.ashx?la=en>> last accessed 28 April 2022. [↑](#footnote-ref-933)
934. 532 US 661 (2001). [↑](#footnote-ref-934)
935. Richard Sandomir, ‘Golf; A By-the-Book Defence Versus Martin’s Reality’ (*New York Times*, 08 February 1998) <<https://www.nytimes.com/1998/02/08/sports/golf-a-by-the-book-defense-versus-martin-s-reality.html>> last accessed 14 January 2022. [↑](#footnote-ref-935)
936. PGA Tour Handbook (n 136) p.67-70; The R&A, Pace of Play Manual’ <<https://www.randa.org/en/rulesequipment/pace-of-play/manual>> last accessed 28 April 2022. See also DP World Tour Partners, ‘Plan to Tackle Slow Play Comes Into Effect’ (*European Tour*, 14 January 2020) <<https://www.europeantour.com/european-tour/news/articles/detail/plan-to-tackle-slow-play-comes-into-effect/>> last accessed 28 April 2022. [↑](#footnote-ref-936)
937. PGA Tour Handbook (n 136) pp.66, 71. [↑](#footnote-ref-937)
938. Tanya Sharpe, ‘Casey's Case: Taking a Slice out of the PGA Tour's No-Cart Policy’ (1999) 26 Florida State University Law Review 783, p.802. [↑](#footnote-ref-938)
939. See, e.g., Bob Harig, ‘Jordan Spieth Must Qualify for Tour Championship to Avoid PGA Sanctions’ (*ESPN*, 9 September 2018) <<https://www.espn.co.uk/golf/story/_/id/24618330/jordan-spieth-faces-fine-suspension-misses-minimum-number-pga-tour-events>> last accessed 13 October 2021. [↑](#footnote-ref-939)
940. Sharpe (n 142) p.805. For an excellent overview of the various relevant factors pointing towards employee status in professional golf, see the discussion at p.801-5. [↑](#footnote-ref-940)
941. John Newport, ‘How the LPGA Bungled on English’ (*Wall Street Journal*, 13 September 2008) <<https://www.wsj.com/articles/SB122125269803829639>> last accessed 28 April 2022. [↑](#footnote-ref-941)
942. Aaron Lloyd, ‘You’re Next on the Tee, Just Remember to Speak English! Could the LPGA Really Force Players to Learn and Speak English?’ (2009) 9 Virginia Sports and Entertainment Law Journal 181, pp.182, 189. [↑](#footnote-ref-942)
943. Seema Patel, *Inclusion and Exclusion in Competitive Sport* (Routledge 2015) p.144. [↑](#footnote-ref-943)
944. *Cox* (n 77), para [24] (per Lord Reed). See also *Martin* (n 138), p.669. [↑](#footnote-ref-944)
945. Lloyd (n 146) p.189. [↑](#footnote-ref-945)
946. ibid, p.189-90. [↑](#footnote-ref-946)
947. Tony Weir, *A Casebook on Tort* (10th edn, Sweet & Maxwell 2004) p.292. [↑](#footnote-ref-947)
948. Andrew Bell, ‘"Double, Double Toil and Trouble": Recent Movements in Vicarious Liability’ (2018) 4 Journal of Personal Injury Litigation 235, p.246. [↑](#footnote-ref-948)
949. [2001] QB 1134. [↑](#footnote-ref-949)
950. See, e.g., *Wattleworth v Goodwood Road Racing Company Ltd and Royal Automobile Club Motor Sports Association Ltd and Federation Internationale de l’Automobile* [2004] EWHC 140 (the RAC – the NGB for motor-racing in the UK – was not liable in negligence for the claimant’s crash, because they had taken all reasonable efforts to ensure the safety of the track). For a more recent recognition of this point in a case which involved both a vicarious liability and negligence claim, see *Chell v Tarmac* [2022] EWCA Civ 7, paras [33]-[5] (per Davies LJ). [↑](#footnote-ref-950)
951. Note that many governing bodies often run mandatory annual educational seminars for their athletes, which cover a variety of on and off the field responsibilities: see, e.g., ATP Staff, ‘Players Go Back to School with ATP University (*ATP Tour*, 21 March 2016) <<https://www.atptour.com/en/news/atp-university-educates-players-miami-2016>> last accessed 28 April 2022. [↑](#footnote-ref-951)
952. Andrew Dickinson, ‘Fostering Uncertainty in the Law of Tort’ (2018) 134 LQR 359, p.361. For a sports-related example of the causative requirements under a claim in negligence, see *Stratton v Hughes* [1998] EWCA Civ 477. [↑](#footnote-ref-952)
953. Gray (n 40) p.272. [↑](#footnote-ref-953)
954. Dominic De Saulles, ‘Hard Choices and Non-Delegable Duties: *Armes v Nottinghamshire CC*’ (2018) 2 Journal of Personal Injury Litigation 73, p.81. [↑](#footnote-ref-954)
955. Gray (n 40) p.248. See also Robert Stevens, ‘Non-Delegable Duties and Vicarious Liability’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) p.368 (highlighting that ‘most textbooks’ include non-delegable duties as an ‘embarrassing coda to vicarious liability’). [↑](#footnote-ref-955)
956. *Armes* *v Nottinghamshire County Council* [2017] UKSC 60, para [31] (per Lord Reed). [↑](#footnote-ref-956)
957. Claire McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 Common Law World Review 268, p.290. [↑](#footnote-ref-957)
958. John Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) p.434. However, cf

     Paula Giliker, ‘Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?’ (2015) 31 Professional Negligence 259, p.266 and Jonathan Morgan, ‘Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken’ (2015) 74 Cambridge Law Journal 109, p.120. [↑](#footnote-ref-958)
959. *Gold v Essex County Council* [1942] 2 KB 293, p.301 (per Lord Greene MR); *Cassidy v Ministry of Health* [1951] 2 QB 343, p.362-3 (per Denning LJ). For more recent judicial acceptance of this point, see *A (A Child) v Ministry of Defence* [2004] EWCA Civ 641, para [63] (per Lord Phillips MR). [↑](#footnote-ref-959)
960. John Murphy, ‘Juridical Foundations of Common Law Non-Delegable Duties’ in Neyers, Chamberlain and Pitel (n 159) p.379 (citing [1938] AC 57). See also *Davie v New Merton Board Mills* [1959] 1 AC 604, p.637 (per Lord Reid), and, in the Australian context, *Kondis v State Transport Authority* [1984] 154 CLR 672, p.678 (per Mason J). [↑](#footnote-ref-960)
961. See, e.g., *Priestley v Fowler* [1837] 150 ER 1030. [↑](#footnote-ref-961)
962. David Tan, ‘Taking Two Bites at the Cherry: Vicarious Liability and Non-Delegable Duty’ (2018) 134 LQR 193, p.193; Gray (n 40) p.217-8; Jonathan Morgan, ‘Vicarious Liability for Independent Contractors?’ (2015) 31 Professional Negligence 235, p.247; Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) p.144; McIvor (n 161) p.290-1. [↑](#footnote-ref-962)
963. Glanville Williams, ‘Liability for Independent Contractors’ (1956) 14 Cambridge Law Journal 180, pp.181, 193. [↑](#footnote-ref-963)
964. *Farraj v King’s Healthcare NHS Trust* [2009] EWCA Civ 1203, para [103] (per Sedley LJ). [↑](#footnote-ref-964)
965. Morgan (n 162) p.121-2. See also Morgan (n 166) p.247 (where he also states that ‘it would be better to avoid doctrinal convolutions and ask openly - when (if at all) should there be vicarious liabilityfor the torts of an independent contractor’). [↑](#footnote-ref-965)
966. David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) p.183. [↑](#footnote-ref-966)
967. [2013] UKSC 66. [↑](#footnote-ref-967)
968. Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) p.245. See also *Woodland v Swimming Teachers Association* [2012] EWCA Civ 239, para [34] (per Tomlinson LJ). [↑](#footnote-ref-968)
969. *Woodland* (n 171), para [30]. A similar point is made in *Gold* (n 162), p.301 (per Lord Greene MR). [↑](#footnote-ref-969)
970. See, e.g., Giliker (n 166) p.122. [↑](#footnote-ref-970)
971. *Woodland* (n 171), para [23]. [↑](#footnote-ref-971)
972. See *Armes* (n 75), para [24] (per Tomlinson LJ). He maintained that ‘accommodation within a family unit was not something which the local authority could itself provide and this cannot properly be regarded as a purported delegation of duty. It was inherent in the permitted choice of foster care that it must be provided by third parties’. [↑](#footnote-ref-972)
973. Paula Giliker, ‘Non-Delegable Duties and Institutional Liability for the Negligence of Hospital Staff: Fair, Just and Reasonable?’ (2017) 33 Professional Negligence 109, p.120. [↑](#footnote-ref-973)
974. *Woodland* (n 171), para [38] (per Baroness Hale). [↑](#footnote-ref-974)
975. This is further evidenced by Giliker (n 162) p.268-72 (who discusses three school-related examples to demonstrate the lack of clarity in regards to Lord Sumption’s guidance). [↑](#footnote-ref-975)
976. *Ramdhean v Agedo* [2020] 1 WLUK 406; *Breakingbury v Croad* (unreported) 19 April 2021, County Court (Cardiff). See also the earlier case of *Davie* (n 164), where the claimant argued both vicarious liability (at p.619) and a non-delegable duty (at p.623). [↑](#footnote-ref-976)
977. Peter Watts, ‘The Travails of Vicarious Liability’ (2019) 135 LQR 7, p.11; Steve Foster and Marie Clarke, ‘Expanding the Law or Unruly Justice? The Development of Vicarious Liability and the Decision in *Barclays Bank*’ (2019) 24 Coventry Law Journal 93, p.101. One justification for not pursuing a non-delegable duty claim in *Barclays* is provided by Paula Giliker, ‘Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability? *Barclays* and *Morrison* in the UK Supreme Court’ (2021) 37 Professional Negligence 55, p.70 (‘given the uncertainty whether the non-delegable duty argument extends to sexual abuse and potential difficulties establishing an antecedent relationship, [the non-delegable duty claim] was understandably not pursued’). [↑](#footnote-ref-977)
978. Christine Beuermann, ‘Up in *Armes*: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort’ (2018) 25 Torts Law Journal 1, p.21. [↑](#footnote-ref-978)
979. Atiyah (n 39) p.7. [↑](#footnote-ref-979)
980. Merkin and Steele (n 172) p.318-22. [↑](#footnote-ref-980)
981. [2006] EWCA Civ 18. [↑](#footnote-ref-981)
982. Merkin and Steele (n 172) p.319. The authors also illustrate this point with respect to punitive damages. If an employer is held personally liable for such damages, it is almost certainly the case that the insurers could refuse to indemnify the policy-holder based on the *ex turpi causa* defence. In contrast, an insurer for an employer who is held *vicariously* liable for punitive damages will likely be obliged to respond to these costs. [↑](#footnote-ref-982)
983. Julian Summerhayes, ‘Injury Liability: Off-the-Ball Player Attacks: Club Liability’ (2008) 6 World Sports Law Report. [↑](#footnote-ref-983)
984. Murad Ahmed and John Burn-Murdoch, ‘How Player Loans are Reshaping European Football’s Transfer Market’ (*Financial Times*, 30 August 2019) <<https://www.ft.com/content/9bd82b30-caf2-11e9-a1f4-3669401ba76f>> last accessed 15 September 2021. [↑](#footnote-ref-984)
985. BBC, ‘Clubs Face Loan Restrictions after FIFA Announces New Regulations’ (*BBC News*, 27 February 2020) <<https://www.bbc.co.uk/sport/football/51665904>> last accessed 16 September 2021. Teams such as Chelsea FC – who had over 28 players out on loan during the 2019/20 season - will be significantly affected. [↑](#footnote-ref-985)
986. David Weil, *The Fissured Workplace* (HUP 2014) p.7. [↑](#footnote-ref-986)
987. Alexander Bond, Paul Widdop and Daniel Parnell, ‘Topological Network Properties of the European Football Loan System’ (2020) 20 European Sport Management Quarterly 655, p.657. [↑](#footnote-ref-987)
988. Ahmed and Burn-Murdoch (n 188) (highlighting that, in 2009, there were 28 loans leading to a later purchase from the temporary employer. In 2019, there were ‘at least 101 loan-to-buy deals within the big five leagues’). [↑](#footnote-ref-988)
989. UEFA, ‘Financial Fair Play: All You Need to Know' (*UEFA*, 30 June 2015) <<https://www.uefa.com/news/0253-0d7f34cc6783-5ebf120a4764-1000--financial-fair-play-all-you-need-to-know/>> last accessed 15 September 2021. [↑](#footnote-ref-989)
990. For an excellent summary of the saga – as well as additional examples such as Tottenham Hotspur’s ‘loan-with-an-obligation-to-buy’ deal for Real Betis’ Giovani Lo Celso – see Rory Smith, ‘Play Now, Pay Later: How Loans Became Soccer’s Favored Accounting Tool’ (*New York Times*, 26 August 2019) <<https://www.nytimes.com/2019/08/24/sports/soccer-loans.html>> last accessed 15 September 2021. [↑](#footnote-ref-990)
991. Tom Morgan, ‘Exclusive: More Than Half of Premiership Rugby Clubs Exploiting Loan Loophole to Move Players Off Wage Bill’ (*The Telegraph*, 20 January 2020) <<https://www.telegraph.co.uk/rugby-union/2020/01/20/exclusive-half-premiership-rugby-clubs-exploiting-loan-loophole/?WT.mc_id=tmg_share_tw>> last accessed 23 March 2022. [↑](#footnote-ref-991)
992. One example is that of Bath forward Mike Williams, who was sent out on a ‘season-long loan’ to Yorkshire Carnegie. However, Williams made only one appearance (as a substitute) for the latter club, and was later recalled to Bath. When he returned to his parent club, his wages were, as per RFU regulations, excluded from the salary cap imposed on every Gallagher Premiership team. See John Evely, ‘Bath Rugby Defend the Use of Salary Cap Permitted Season-Long Loans’ (*Somerset Live*, 23 January 2020) <<https://www.somersetlive.co.uk/sport/other-sport/bath-rugby-defend-salary-cap-3769451>> last accessed 23 March 2022. [↑](#footnote-ref-992)
993. [1947] AC 1. [↑](#footnote-ref-993)
994. ibid, p.10 (Viscount Simon, highlighting that the burden can only be discharged in ‘quite exceptional circumstances’), p.13 (Lord Macmillan), p.21 (Lord Uthwatt). [↑](#footnote-ref-994)
995. *Natwest Markets Plc v Bilta* [2021] EWCA Civ 680, para [187] (the Court of Appeal maintaining that the ‘circumstances in which such a complete shift from the actual employer to the organization to which the employee is loaned will arise, must be very rare’). Note also a similar position in other Commonwealth courts: *McKee v Dumas* (1976) 70 DLR (3d) 70, p.75 (per Dubin JA) (Canada) and *Kondis* (n 164) para [11] (per Mason J) (Australia). [↑](#footnote-ref-995)
996. Douglas Brodie, ‘Enterprise Liability: Justifying Vicarious Liability’ (2007) 27 OJLS 493, p.502. [↑](#footnote-ref-996)
997. See *Viasystems (Tyneside) Ltd v Therman Transfer (Northern) Ltd* [2005] EWCA Civ 1151, para [7] (per May LJ) for a helpful summary of the relevant factors outlined in *Mersey Docks*. [↑](#footnote-ref-997)
998. Interestingly, Giliker (n 166) p.88 highlights how, in German law, the right to recall the employee suggests that the general employer should bear at least some of the responsibility for the employee’s negligent conduct. [↑](#footnote-ref-998)
999. Section 57 of the English Football League regulations permits clubs to sign goalkeepers on week-long emergency loans under certain conditions. See English Football League, ‘Section 6 – Players’ <<https://www.efl.com/-more/governance/efl-rules--regulations/efl-regulations/section-6---players/>> last accessed 23 March 2022. [↑](#footnote-ref-999)
1000. Peel and Goudkamp (n 62) para 21-016. [↑](#footnote-ref-1000)
1001. *Hawley* (n 185). [↑](#footnote-ref-1001)
1002. ibid, para [85]. [↑](#footnote-ref-1002)
1003. ibid, para [84]. [↑](#footnote-ref-1003)
1004. ibid, para [77]. [↑](#footnote-ref-1004)
1005. ibid, para [82]. Luca Ratti, ‘Agency Work and The Idea of Dual Employership: A Comparative Perspective’ (2009) 30 Comparative Labour Law and Policy Journal 835, p.864 also observes, on the basis of this case, that the ‘control test is still the most relevant factor in the judges' reasoning’ in the context of borrowed employees. [↑](#footnote-ref-1005)
1006. *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, para [46]. [↑](#footnote-ref-1006)
1007. *Laugher v Pointer* (1826) 5 B&C 547, p.558 (per Littledale J); *Yewens v Noakes* (1880) 6 QBD 530. As demonstrated by Lord Hope, ‘Tailoring the Law on Vicarious Liability’ (2013) LQR 514, p.519, Australian cases such as *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1986] 160 CLR 626, para [32] also subscribe to this view. For more recent Australian authority on this point, see *Day v The Ocean Beach Hotel Shell Harbour Pty Ltd* [2013] NSWCA 250. [↑](#footnote-ref-1007)
1008. Atiyah (n 39) pp.156, 163 [emphasis in original]. [↑](#footnote-ref-1008)
1009. Fleming (n 162) p.45 (highlighting that, ‘[s]ince in most cases control is divided between lender and borrower, the most obvious conclusion would perhaps have been to impose joint liability’). [↑](#footnote-ref-1009)
1010. Jeremias Prassl, 'The Notion of the Employer' (2013) 129 LQR 380, p.389. [↑](#footnote-ref-1010)
1011. Prassl (n 44) p.28. [↑](#footnote-ref-1011)
1012. *Viasystems* (n 201). [↑](#footnote-ref-1012)
1013. ibid, para [20] (per May LJ). [↑](#footnote-ref-1013)
1014. ibid, para [52]. [↑](#footnote-ref-1014)
1015. [2009] QB 775. [↑](#footnote-ref-1015)
1016. *Viasystems* (n 201), para [46]. [↑](#footnote-ref-1016)
1017. ibid, para [79]. [↑](#footnote-ref-1017)
1018. ibid. [↑](#footnote-ref-1018)
1019. Alan Barron, ‘Vicarious Liability for Employees and Agents’ (2006) Scots Law Times 79, p.81. [↑](#footnote-ref-1019)
1020. Alan Barron, ‘The Impact of Post-*Lister* Vicarious Liability on the Licensed Trade in the United Kingdom’ (2007) 4 Entertainment and Sports Law Journal 1, p.6. [↑](#footnote-ref-1020)
1021. *Hawley* (n 185), para [82]. Consequently, when Hallett LJ mentioned that control was at the heart of the test for borrowed employees, we might also conclude that so too are integration and benefit. [↑](#footnote-ref-1021)
1022. ibid (Hallett LJ noting that Rix LJ ‘did not say that the degree of control was irrelevant, far from it’). [↑](#footnote-ref-1022)
1023. *CCWS* (n 210), para [45]. See also, writing extra-judicially, Lord Phillips, ‘Vicarious Liability on the Move’ (2015) 45 Hong Kong Law Journal 29, p.35. [↑](#footnote-ref-1023)
1024. Phillip Morgan, ‘Vicarious Liability on the Move’ (2013) 129 LQR 139, p.141-2; Paula Giliker, ‘Vicarious Liability ‘On the Move’: The English Supreme Court and Enterprise Liability’ (2013) 4 Journal of European Tort Law 306, p.310; Claire McIvor, ‘Vicarious Liability and Child Abuse’ (2013) 29 Professional Negligence 62, p.65. [↑](#footnote-ref-1024)
1025. [2021] EWCA Civ 680. [↑](#footnote-ref-1025)
1026. *Bilta v Natwest Markets Plc* [2020] EWHC 546 (Ch), para [214] (per Snowden J). This guidance was also relied upon by Hallett LJ in *Hawley* (n 185), para [85]. [↑](#footnote-ref-1026)
1027. *Viasystems* (n 201), para [80]. [↑](#footnote-ref-1027)
1028. cf Simon Boyes, ‘Caught Behind or Following-On? Cricket, the European Union and the ‘Bosman Effect’’ (2005) 3 Entertainment and Sports Law Journal 1. He highlights the position in English cricket, whereby a system of ‘central contracts’ are used. This entails the NGB directly employing athletes, who are then effectively leased back to clubs to participate in county competitions. [↑](#footnote-ref-1028)
1029. Jamie Jackson, ‘Dean Ashton Brings Compensation Claim for Career-Ending Injury’ (*The Guardian*, 16 February 2010) <<https://www.theguardian.com/football/2010/feb/16/dean-ashton-compensation-ankle-injury>> last accessed 23 March 2022; Jason Burt, ‘PFA Hope Dean Ashton Does Not Sue Former Chelsea Winger Shaun Wright-Phillips’ (*The Telegraph*, 11 December 2009) <<https://www.telegraph.co.uk/sport/football/teams/west-ham/6787188/PFA-hope-Dean-Ashton-does-not-sue-former-Chelsea-winger-Shaun-Wright-Phillips.html>> last accessed 23 March 2022. One of the key factors motivating this litigation was the absence of adequate insurance for Ashton’s injury, a point that is examined in more detail in the previous chapter. [↑](#footnote-ref-1029)
1030. This also appears to accord with the analysis of vicarious liability for dual employment in Mark James, *Sports Law* (3rd edn, Palgrave 2017) p.90. [↑](#footnote-ref-1030)
1031. BBC, ‘FA Agree Compensation with Dean Ashton Over Injury’ (*BBC News*, 02 February 2011) <<http://news.bbc.co.uk/sport1/hi/football/teams/w/west_ham_utd/9385690.stm>> last accessed 23 March 2022. [↑](#footnote-ref-1031)
1032. BBC, ‘Raheem Sterling Dropped by England after Joe Gomez Clash Before Euro 2020 Qualifier’ (*BBC News*, 12 November 2019) <<https://www.bbc.co.uk/sport/football/50383693>> last accessed 23 March 2022. [↑](#footnote-ref-1032)
1033. In fact, many large clubs have even been accused of abusing the loan system by ‘stockpiling’ younger talent. See Alistair Magowan, ‘Premier League: Is the Loan System Being Abused by Clubs?’ (*BBC News*, 08 September 2015) <<https://www.bbc.co.uk/sport/football/34125476>> last accessed 23 March 2022. [↑](#footnote-ref-1033)
1034. Gregor Robertson, ‘How Managing Loan Players Has Become A Scientific Process’ (*The Times*, 07 October 2019) < <https://www.thetimes.co.uk/article/how-managing-loan-players-has-become-a-scientific-process-dx99zv8cl>> last accessed 22 March 2022 (outlining that, ‘in August 2018 Crystal Palace wrote to EFL clubs offering their players on loan for free – provided they play’). [↑](#footnote-ref-1034)
1035. ibid. [↑](#footnote-ref-1035)
1036. ibid. [↑](#footnote-ref-1036)
1037. ibid. In some instances, these penalties are so significant that ‘some clubs would rather send a player to a club that can afford to pay a penalty, than send him to a club who can’t afford a penalty, but might develop him better.’ [↑](#footnote-ref-1037)
1038. Ahmed and Burn-Murdoch (n 188); Daniel Geey, *Done Deal: An Insider's Guide to Football Contracts, Multi-Million Pound Transfers and Premier League Big Business* (Bloomsbury Sport 2019) p.39-41. [↑](#footnote-ref-1038)
1039. Matt Law, ‘Danny Drinkwater to Hold Talks with Burnley Manager Sean Dyche Today after Injury in Assault Outside Manchester Nightclub’ (*The Telegraph*, 08 September 2019) <<https://www.telegraph.co.uk/football/2019/09/08/danny-drinkwater-hold-talks-burnley-boss-sean-dyche-injury-assault/>> last accessed 23 March 2022. [↑](#footnote-ref-1039)
1040. *Hawley* (n 185), para [85]. [↑](#footnote-ref-1040)
1041. Bond, Widdop and Parnell (n 191) p.17. [↑](#footnote-ref-1041)
1042. ibid p.11. These transactions are often conducted by what sporting parlance would refer to as ‘parent’ and ‘feeder’ clubs. Notable examples of such relationships include: Liverpool and KRC Genk, Manchester United and Royal Antwerp and Chelsea and Vitesse Arnhem. [↑](#footnote-ref-1042)
1043. See text to n 16. [↑](#footnote-ref-1043)
1044. *Viasystems* (n 201), para [52]. See also para [85] (per Rix LJ). [↑](#footnote-ref-1044)
1045. ibid, para [52] (May LJ maintaining that ‘[i]f the relationships yield dual control, it is highly likely at least that the measure of control will be equal, for otherwise the court would be unlikely to find dual control’); para [78] (Rix LJ suggesting that ‘it will only be where the right of control is shared that vicarious liability can be dual’). [↑](#footnote-ref-1045)
1046. (2005) 258 DLR (4th) 275. [↑](#footnote-ref-1046)
1047. ibid, para [65]. [↑](#footnote-ref-1047)
1048. Jason Neyers, ‘Joint Vicarious Liability in the Supreme Court of Canada’ (2006) 122 LQR 195, p.199. [↑](#footnote-ref-1048)
1049. Case (n 39) p.165. In this regard, ‘responsibility’ may merely indicate that ‘the law regards the damage as within the scope of the defendant’s liabilities where certain value-neutral preconditions are met’. [↑](#footnote-ref-1049)
1050. Douglas Brodie, ‘The Enterprise and the Borrowed Worker’ (2006) 35 Industrial Law Journal 87, p.89. [↑](#footnote-ref-1050)
1051. Neyers (n 252) p.199. [↑](#footnote-ref-1051)
1052. See UEFA, ‘Benchmarking Report Highlights Profits and Polarisation’ (*UEFA*, 16 January 2020) <<https://www.uefa.com/insideuefa/protecting-the-game/club-licensing/news/newsid=2637880.html>> last accessed 24 March 2022 (observing that, in 2018, the English Premier League’s 20 clubs generated more income between them than the 617 other clubs who participated in Europe’s top-flight leagues outside of the ‘Big Five’). [↑](#footnote-ref-1052)
1053. See Mark James, ‘Liability for Professional Athletes' Injuries: A Comparative Analysis of Where the Risk Lies’ (2006) 1 Web Journal of Current Legal Issues. [↑](#footnote-ref-1053)
1054. [2002] 1 AC 215. [↑](#footnote-ref-1054)
1055. [2008] EWCA Civ 689. [↑](#footnote-ref-1055)
1056. See, e.g., *Elliott v Saunders and Liverpool FC* (unreported) High Court (QBD), 10 June 1994. [↑](#footnote-ref-1056)
1057. *Gravil* (n 3). [↑](#footnote-ref-1057)
1058. *Letang v Cooper* [1965] 1 QB 232, p.239-40 (per Lord Denning). [↑](#footnote-ref-1058)
1059. See, e.g., *KR and others v Royal and Sun Alliance Plc* [2006] EWCA Civ 1454. [↑](#footnote-ref-1059)
1060. *Condon v Basi* [1985] 1 WLR 866. [↑](#footnote-ref-1060)
1061. *Elliott* (n 4), p.9 (per Drake J); *Bolton v Stone* [1951] AC 850; *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054, para [28] (per Tuckey LJ); *Wooldridge v Sumner* [1963] 2 QB 43, p.67-68 (per Diplock LJ). [↑](#footnote-ref-1061)
1062. ibid, para [11]. [↑](#footnote-ref-1062)
1063. Baroness Grey-Thompson, ‘Duty of Care in Sport: Independent Report to Government’ (Department for Digital, Culture, Media and Sport, April 2017) p.26. [↑](#footnote-ref-1063)
1064. [2004] EWCA Civ 814, para [21]. [↑](#footnote-ref-1064)
1065. (1997) The Times, 11 February. [↑](#footnote-ref-1065)
1066. (1998) The Times, 26 November. [↑](#footnote-ref-1066)
1067. (unreported) County Court (Leeds), 15 January 1999. [↑](#footnote-ref-1067)
1068. Jack Anderson, *Modern Sports Law* (Hart 2010) p.243. See also Simon Gardiner et al, *Sports Law* (4th edn, Routledge 2012) p.505. [↑](#footnote-ref-1068)
1069. *Fulham Football Club v Mr Jordan Levi Jones* [2022] EWHC 1108 (QB); *Pitcher v Huddersfield Town Football Club* (2001) WL 753397; *Gaynor v Blackpool Football Club* [2002] CLY 3280. [↑](#footnote-ref-1069)
1070. [2012] UKSC 56, para [62]. [↑](#footnote-ref-1070)
1071. Mark James and David McArdle, ‘Player Violence, or Violent Players? Vicarious Liability for Sports Participants’ (2004) 12 Tort Law Review 131, p.136. [↑](#footnote-ref-1071)
1072. Neville Cox, ‘Civil Liability for Foul Play in Sport’ (2003) 54 Northern Ireland Legal Quarterly 351, p.366-7. [↑](#footnote-ref-1072)
1073. Michael Beloff et al, *Sports Law* (2nd edn, Hart 2012) p.157. [↑](#footnote-ref-1073)
1074. *Mohamud* v *WM Morrison Supermarkets plc* [2016] UKSC 11. [↑](#footnote-ref-1074)
1075. *Bellman* v *Northampton Recruitment Ltd* [2018] EWCA Civ 2214. [↑](#footnote-ref-1075)
1076. *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2021] EWCA Civ 356. [↑](#footnote-ref-1076)
1077. *Racz v Home Office* [1994] 2 AC 45; *Makanjuola v Commissioner of Police for the Metropolis* [1989] 2 Admin LR 214. [↑](#footnote-ref-1077)
1078. JW Salmond, *Law of Torts* (Stevens and Haynes 1907) p.83. [↑](#footnote-ref-1078)
1079. See, e.g., *Keppel Bus Co v Sa’ad bin Ahmad* [1974] 1 WLR 1082. However, cf *Poland v John Parr and Sons* [1927] 1 KB 236 and *Morris v Martin* [1966] 1 QB 716. [↑](#footnote-ref-1079)
1080. Robert Stevens, *Torts and Rights* (OUP 2007) p.270. See also *New South Wales v Lepore* [2003] HCA 4, para [117] (Gaudron J stating that it was a ‘misuse of language’ to say that deliberate criminal acts were committed within the course of employment). [↑](#footnote-ref-1080)
1081. *Lister* (n 2), paras [20], [67]. [↑](#footnote-ref-1081)
1082. *Gravil* (n 3), para [40]. [↑](#footnote-ref-1082)
1083. ibid, paras [26]-[8]. [↑](#footnote-ref-1083)
1084. ibid, para [23]. [↑](#footnote-ref-1084)
1085. ibid. Clarke MR was clearly convinced by the comments of Lord Steyn in *Bernard v Attorney General of Jamaica* [2004] UKPC 47, para [19] (who had highlighted that ‘an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on’). [↑](#footnote-ref-1085)
1086. Martha Chamallas, ‘Vicarious Liability in Torts: The Sex Exception’ (2013) 48 Valparaiso University Law Review 133, pp.138, 144-6. [↑](#footnote-ref-1086)
1087. Phillip Morgan, ‘Distorting Vicarious Liability’ (2011) 74 MLR 932, p.934. [↑](#footnote-ref-1087)
1088. Other foreign examples include, in the US, *Atlanta Baseball v Lawrence*, 38 Ga. App. 497, 144 S.E. 351 (1928) and *Averill v Luttrell*, 44 Tenn. App. 56, 311 S.W.2d 812 (1957) and, in Australia, *McCracken v Melbourne Storm Rugby League Club* [2005] NSWSC 107. [↑](#footnote-ref-1088)
1089. See generally, Jack Anderson, ‘Violence, Sport and the Law: An Application to Gaelic Games’ (1999) 7 Sport and the Law Journal 51. [↑](#footnote-ref-1089)
1090. Courtlyn Roser-Jones, ‘A Costly Turnover: Why the NFL's Bounty Scandal Could Change the Current Legal Standard of Deferring to Internal Disciplinary Sanctions in Instances of Game-Related Violence’ (2013) 20 Sports Lawyers Journal 93, p.102. [↑](#footnote-ref-1090)
1091. *Gravil* (n 3), para [35]. At para [31], it was even highlighted that, had Gray J been asked to consider a club’s responsibility for such an act in the *professional* sphere, his conclusion would probably have been different. [↑](#footnote-ref-1091)
1092. ibid, para [35]. [↑](#footnote-ref-1092)
1093. ibid, para [2] (noting that Hughes LJ approved permission to appeal this case on the basis that ‘the suggested liability for “off-the-ball” assaults committed during games is of sufficient potential importance for professional sporting clubs to provide a compelling reason for this court to entertain an appeal’). [↑](#footnote-ref-1093)
1094. See, e.g., the discussion of *Gravil* in section 4.3.1. [↑](#footnote-ref-1094)
1095. *Gravil* (n 3), para [26]. This reasoning is supported by Anderson (n 16) p.244. [↑](#footnote-ref-1095)
1096. Neil Parpworth, ‘Vicarious Liability on the Rugby Union Field’ (2008) 172 Justice of the Peace and Local Government Law 572. See also Mark James, *Sports Law* (3rd edn, Palgrave 2017) p.95 (suggesting that a deterrence-based approach poses ‘significant problems for clubs that employ a player with a known reputation for foul play, or one who over a period of time develops such a reputation whilst playing for a club, if steps are not taken to reduce the risk of the player harming others’). [↑](#footnote-ref-1096)
1097. According to JCH Jones and Kenneth Stewart, ‘Hit Somebody: Hockey Violence, Economics, the Law, and the *Twist* and *McSorley* Decisions’ (2002) 12 Seton Hall Journal of Sport Law 165, p.182, the tortfeasor in *R v McSorley* [2000] BCJ 116 - a renowned enforcer in ice hockey who hit an opposition player in the head with his stick during a game in 2000 - was only sent on to the rink in the final 20 seconds of the match in order to fight the other team’s enforcer. The idea behind the fight was that, if the tortfeasor won, it would have given his team ‘some pride to take into the next game’. [↑](#footnote-ref-1097)
1098. James (n 44) p.95. In games such as football, the number of ‘hard men’ are said to be dwindling, although such roles still play an important part in other sports (such as ice hockey). See generally, Alex Capstick, ‘Are Ice Hockey “Enforcers” the Toughest Guys in Sport? (*BBC News*, 18 January 2012) <<https://www.bbc.co.uk/news/magazine-16383129>> last accessed 11 December 2021. [↑](#footnote-ref-1098)
1099. Phillip Morgan, ‘Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?’ (2018) 38 Legal Studies 242, p.260. [↑](#footnote-ref-1099)
1100. ibid, p.248. [↑](#footnote-ref-1100)
1101. James and McArdle (n 19) p.142. [↑](#footnote-ref-1101)
1102. No. H-78-243 (S.D. Tex. Aug. 17, 1979). [↑](#footnote-ref-1102)
1103. Stephen Gulotta, ‘Torts in Sports - Deterring Violence in Professional Athletics’ (1980) 48 Fordham Law Review 764, p.765. [↑](#footnote-ref-1103)
1104. Jeffrey Citron and Mark Ableman, ‘Civil Liability in the Arena of Professional Sports’ (2003) 36 UBC Law Review 193, p.224. [↑](#footnote-ref-1104)
1105. James (n 44) p.95. The analysis of James and McArdle (n 19) is also open to the criticism that it confuses these two distinct causes of action. They write (at p.142) that ‘[t]he defendant employer [in *Tomjanovich*] was found vicariously liable for, *inter alia*, the negligent supervision of its employee-player by failing adequately to control, train and discipline him.’ [↑](#footnote-ref-1105)
1106. James and McArdle (n 19) p.141-3. It appears that the authors may have been influenced by the erroneous comments of HHJ Seymour in *Mattis v Pollock* [2002] EWHC 2177 (QB) who suggested, at para [83], that if personal liability could not be established, then neither could vicarious liability (and vice versa). [↑](#footnote-ref-1106)
1107. [2003] 1 WLR 2158. [↑](#footnote-ref-1107)
1108. ibid, para [9] (per Judge LJ); [2002] EWHC 2177 (QB), para [18] (per HHJ Seymour). [↑](#footnote-ref-1108)
1109. ibid, paras [33]-[4]. [↑](#footnote-ref-1109)
1110. Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) p.170. [↑](#footnote-ref-1110)
1111. Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) p.51-2. [↑](#footnote-ref-1111)
1112. Claire McIvor, ‘The Use and Abuse of the Doctrine of Vicarious Liability’ (2006) 35 Common Law World Review 268, p.280. For a more recent case law example of a judge blurring the conceptual line between primary and vicarious liability, see *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11, paras [34] and [45] (per Lord Toulson). [↑](#footnote-ref-1112)
1113. [1999] 2 SCR, para [74]. See also *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, para [55] (per Rix LJ). [↑](#footnote-ref-1113)
1114. As punitive damages are seemingly based on the ‘outrageous’ nature of the defendant’s conduct, it is not strictly necessary to prove intentional behaviour. See, e.g., *A v Bottrill* [2003] 1 AC 449; *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453. [↑](#footnote-ref-1114)
1115. Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 16 December 1997) p.161. [↑](#footnote-ref-1115)
1116. Given the large sums that are available as prize money in professional sport, one could imagine a scenario in which a club is happy to employ a violent (yet highly talented) player who allows them to win more games, even if they are later required to pay out compensation for harm that results from his foul play. Notably, there is no requirement to show that the defendant did *in fact* make a gain; it is simply enough to demonstrate that the defendant *intended* to make a gain. See, e.g. Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) p.763-5. [↑](#footnote-ref-1116)
1117. [1964] AC 1129, p.1226. [↑](#footnote-ref-1117)
1118. See, e.g., James Edelman, ‘In Defence of Exemplary Damages’ in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) p.229. [↑](#footnote-ref-1118)
1119. *Tomjanovich* (n 50); *Canterbury Bankstown Rugby League Football Club v Rogers* [1993] Aust Tort Reports 81-246. [↑](#footnote-ref-1119)
1120. To be clear, however, this does not necessarily mean that strict liability is limited to no-fault cases only. As explored by Tsachi Keren-Paz, ‘Liability Regimes, Reputation Loss, and Defensive Medicine’ (2010) 18 Medical Law Review 363, p.370-5, the ‘pooling effect’ of strict liability suggests that it could equally apply to fault-based cases too. [↑](#footnote-ref-1120)
1121. James and McArdle (n 19) p.138-9. [↑](#footnote-ref-1121)
1122. David McArdle, *From Boot Money to Bosman: Football, Society and the Law* (Cavendish 2000) p.162; The Independent, ‘Football: Pounds 250,000 Award for Foul that Ruined Career’ (*The Independent*, 20 December 1996) <<https://www.independent.co.uk/sport/football-pounds-250000-award-for-foul-that-ruined-career-1315401.html>> last accessed 29 April 2022. [↑](#footnote-ref-1122)
1123. Morgan (n 47) p.260. [↑](#footnote-ref-1123)
1124. The Independent, ‘Remembering when Liverpool Forward Luis Suarez Caused Outrage by Biting Branislav Ivanovic’ (*The Independent*, 21 April 2020) <<https://www.independent.co.uk/sport/football/premier-league/luis-suarez-bite-liverpool-chelsea-branislav-ivanovic-a9474176.html>> last accessed 29 April 2022. [↑](#footnote-ref-1124)
1125. For an interesting discussion of the legal consequences flowing from this act, see Irena Martinkova and Jim Parry, ‘On Biting in Sport – The Case of Luis Suarez’ (2015) 9 Sport, Ethics and Philosophy 214. [↑](#footnote-ref-1125)
1126. Citron and Ableman (n 52) p.225. [↑](#footnote-ref-1126)
1127. *Gravil* (n 3), para [5]. In this regard, Parpworth (n 46) writes that ‘[n]o mention was made during the course of the judgment of the first defendant's disciplinary record. We do not know whether he had struck opponents in previous matches. If he was a player who had shown a propensity for violence on the pitch, *Gravil* implicitly suggests that a professional club will need to take appropriate measures to ensure that opponents are not assaulted.’ [↑](#footnote-ref-1127)
1128. Mark James, ‘The Trouble with Roy Keane’ (2002) 1 Entertainment and Sports Law Journal 72. [↑](#footnote-ref-1128)
1129. Premier League, ‘Players: Roy Keane’ <<https://www.premierleague.com/players/407/Roy-Keane/stats>> last accessed 29 April 2022. [↑](#footnote-ref-1129)
1130. Premier League, ‘Players: Scott Parker’ <<https://www.premierleague.com/players/1518/Scott-Parker/stats>> last accessed 29 April 2022. Parker played only 2 more games than Keane. [↑](#footnote-ref-1130)
1131. Paul Davies and Emily Ryall, ‘Evaluating Violent Conduct in Sport: A Hierarchy of Vice’ (2017) 11 Sports, Ethics and Philosophy 1, p.4. [↑](#footnote-ref-1131)
1132. Premier League, ‘Players: Robbie Savage’ <<https://www.premierleague.com/players/706/Robbie-Savage/stats>> last accessed 29 April 2022. [↑](#footnote-ref-1132)
1133. Simon Gardiner and Alexandra Felix, ‘Juridification of the Football Field: Strategies for Giving Law the Elbow’ (1995) 5 Marquette Sports Law Journal 185, p.198. It is similarly suggested that these statistics might also be influenced by the position of the player. Defenders and goalkeepers in football – who often have to deal with a ‘last man’-type scenario – are more prone to red cards than attackers by virtue of their role on the field. [↑](#footnote-ref-1133)
1134. Tom Humphries, ‘Keane Accepts Portion of Blame for Saipan’ (*The Irish Times*, 31 August 2002) <<https://www.irishtimes.com/news/keane-accepts-portion-of-blame-for-saipan-1.1093763>> last accessed 29 April 2022. Perhaps even more startlingly, Keane won a free-kick for his side in both instances. [↑](#footnote-ref-1134)
1135. See generally, Simon Deakin, ‘’Enterprise-Risk: The Juridical Nature of the Firm Revisited’ (2003) 32 Industrial Law Journal 97; Guido Calabresi and Jon Hirschoff, ‘Toward a Test for Strict Liability in Tort’ (1972) 81 Yale Law Journal 1055. [↑](#footnote-ref-1135)
1136. *Wooldridge* (n 9), p.67 (per Diplock LJ). [↑](#footnote-ref-1136)
1137. Consider, for example, the case of *Nahhas v Pier House (Cheyne Walk) Management* [1984] 1 EGLR 160, where the defendant was held personally liable for employing a former professional thief to work as a porter. As noted by Simon Deakin and Zoe Adams, *Markesinis & Deakin’s Tort Law* (8th edn, OUP 2019) p.557, automatically imposing liability on the employer in such situations is likely to defeat the justifiable interest in rehabilitating offenders. [↑](#footnote-ref-1137)
1138. [2017] UKSC 60. [↑](#footnote-ref-1138)
1139. Howard Nixon, ‘Accepting the Risks of Pain and Injury in Sport: Mediated Cultural Influences on Playing Hurt’ (1993) 10 Sociology of Sport 183. See also Peter Donnelly, ‘Sport and Risk Culture’ in Kevin Young (ed), *Sporting Bodies, Damaged Selves: Sociological Studies of Sports-Related Injuries* (Elsevier 2004) p.32-3. [↑](#footnote-ref-1139)
1140. Gregory Keating, ‘Distributive and Corrective Justice in the Tort Law of Accidents’ (2000) 74 Southern California Law Review 193, p.217. [↑](#footnote-ref-1140)
1141. *Graham v Commercial Bodyworks* [2015] EWCA Civ 47, para [16] (per Longmore LJ); McBride and Bagshaw (n 66) p.845-7 (classifying cases which gives rise to foreseeable ‘aggravations or annoyances’ as ‘special risk’ cases, and citing *Gravil* as one such example). [↑](#footnote-ref-1141)
1142. *Armes* (n 86), para [67] (per Lord Reed). [↑](#footnote-ref-1142)
1143. See, e.g., Andrew Murray, Iain Murray and James Robson, ‘Rugby Union: Faster, Higher, Stronger: Keeping an Evolving Sport Safe’ (2014) 48 British Journal of Sports Medicine 73. [↑](#footnote-ref-1143)
1144. Alan Biggs, ‘FIFA Ponders Red Card for Elbows’ (*The Guardian*, 02 March 2007) <<https://www.theguardian.com/football/2007/mar/02/newsstory.sport6>> last accessed 16 January 2022. For case law supporting this proposition, see *R v Blissett*, The Independent, 4th December 1992 (where the former FA Chief executive, Graham Kelly, said that a raised elbow during an aerial duel was something that occurred at least 50 times per match). [↑](#footnote-ref-1144)
1145. Jones and Stewart (n 45) p.181. See also Mark James and Simon Gardiner, ‘Touchlines and Guidelines: The Lord Advocate's Response to Sportsfield Violence’ (1997) Crim Law Review 41, p.44. [↑](#footnote-ref-1145)
1146. *Gravil* (n 3), para [36]. [↑](#footnote-ref-1146)
1147. ibid. [↑](#footnote-ref-1147)
1148. Notable ‘masters of the dark arts’ in football include Pepe, Sergio Ramos and Diego Costa. In regards to the latter, see Barney Ronay, ‘Chelsea’s Diego Costa Leaves No Evidence after the Perfect Heist’ (*The Guardian*, 19 September 2015) <<https://www.theguardian.com/football/blog/2015/sep/19/chelsea-diego-costa-evidence-heist-arsenal>> last accessed 20 June 2022 (referring to an incident in which Costa ‘deliberately and skilfully got an opponent sent off… [and this] effectively won the game for his team’). [↑](#footnote-ref-1148)
1149. Steven Rubin, ‘The Vicarious Liability of Professional Sports Team for On-the-Field Assaults Committed by their Players’ (1999) 1 Virginia Journal of Sports Law 266, p.285. [↑](#footnote-ref-1149)
1150. [2016] UKSC 10, para [30]. [↑](#footnote-ref-1150)
1151. To take one example, this would mean that there is a very strong case for imposing vicarious liability on an ice hockey team if one of their employees intentionally injures an opposition player during an on-rink fight. In line with the discussion in section 6.3, this conclusion may be further strengthened if the tortfeasor was considered an on-field enforcer by his employer. [↑](#footnote-ref-1151)
1152. James (n 44) p.91-2. James also notes that, because the playing culture of a sport is considered at the breach of duty stage, ‘volenti is left with little, and perhaps no, role to play’ in sporting negligence cases. As he further explains at p.92-3, ‘[i]f the injury-causing conduct of the defendant is an acceptable means of playing the sport in question or is within its playing culture, then there is no breach of duty and therefore no liability… Alternatively, if the injury-causing conduct of the defendant is an unacceptable means of playing the sport… then negligence is established. No question of volenti arises as participants do not agree to allow players to act in a manner that is incompatible with the playing culture of the sport. Sports participants agree to the inherent risks associated with playing the game… but they do not permit the defendant to act negligently.’ [↑](#footnote-ref-1152)
1153. Patrick Murphy, John Williams and Eric Dunning, *Football on Trial: Spectator Violence and Development in the Football World* (Routledge 1990) p.18. [↑](#footnote-ref-1153)
1154. Steve Greenfield et al, ‘Reconceptualising the Standard of Care in Sport: The Case of Youth Rugby in England and South Africa’ (2015) 18 Potchefstroom Electronic Law Journal 2184, p.2199. [↑](#footnote-ref-1154)
1155. Glanville Williams, ‘Consent and Public Policy’ (1962) Criminal Law Review 74, p.81. [↑](#footnote-ref-1155)
1156. David McArdle and Mark James, ‘Are you Experienced? Playing Cultures, Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*’ (2005) 13 Tort Law Review 193, p.198. [↑](#footnote-ref-1156)
1157. *Caldwell* (n 9), para [12]. [↑](#footnote-ref-1157)
1158. *R v Barnes* [2004] EWCA Crim 3246, para [15] (per Lord Woolf). See also John O’Brien, ‘What Happens on the Field Stays on the Field? – Battery in Sport’ (2015) 130 Precedent 23, p.24 (outlining, for instance, that ‘a player might reasonably expect certain contact in a game of rugby, whereas the same contact in a game of cricket might be highly objectionable’). [↑](#footnote-ref-1158)
1159. Edward Grayson, *Sport and the Law,* (2nd edn, Butterworths 1994) p.157; Alexandra-Virgil Voicu, ‘Civil Liability Arising from Breaches of Sports Regulations’ (2005) 1 International Sports Law Journal 22, p.22-3. [↑](#footnote-ref-1159)
1160. Jerome Frank, ‘Why Not a Clinical Lawyer-School?’ (1933) 81 University of Pennsylvania Law Review 907, p.912. [↑](#footnote-ref-1160)
1161. [2014] CSOH 100, para [216] [emphasis added]. [↑](#footnote-ref-1161)
1162. *Fulham* (n 17), paras [27] and [63] (per Lane J). [↑](#footnote-ref-1162)
1163. Neil Tucker, ‘Assumption of Risk and Vicarious Liability in Personal Injury Actions Brought by Professional Athletes’ (1980) 1980 Duke Law Journal 742, p.761. [↑](#footnote-ref-1163)
1164. ibid, p.762. [↑](#footnote-ref-1164)
1165. The analysis of the Colorado District Court in *Hackbart v Cincinnati Bengals* *Inc*. 435 F. Supp. 352, p.356 (D. Colo. 1977) - which was later overruled by the United States Court of Appeals for the Tenth Circuit - appears to support this proposition. [↑](#footnote-ref-1165)
1166. James and McArdle (n 19) p.138-9. [↑](#footnote-ref-1166)
1167. Tucker (n 111) p.762. [↑](#footnote-ref-1167)
1168. *Blake* (n 12). [↑](#footnote-ref-1168)
1169. McArdle and James (n 104) p.6; O’Brien (n 106) p.25-6. [↑](#footnote-ref-1169)
1170. Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) p.349. [↑](#footnote-ref-1170)
1171. [1971] 2 QB 691, p.701. However, cf the views of Lord Salmon (at p.704). [↑](#footnote-ref-1171)
1172. Adam Pendlebury, ‘Perceptions of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of *Barnes’* (2006) 4 Entertainment and Sports Law Journal 1, p.4. [↑](#footnote-ref-1172)
1173. Deakin and Adams (n 85) p.764. [↑](#footnote-ref-1173)
1174. Pendlebury (n 120) p.4-5. [↑](#footnote-ref-1174)
1175. ibid, p.5. [↑](#footnote-ref-1175)
1176. ibid. [↑](#footnote-ref-1176)
1177. *Craig v Tullymurry Equestrian Centre* [2019] NIQB 94, para [80] (per Maguire J). [↑](#footnote-ref-1177)
1178. McArdle (n 70) p.159. See also McArdle and James (n 104) p.4 (noting that ‘the lack of clarification of what “playing culture” is and who is to define it remains especially problematic’). [↑](#footnote-ref-1178)
1179. Pendlebury (n 120) p.6; McArdle and James (n 104) p.12. [↑](#footnote-ref-1179)
1180. See, e.g., *Caldwell* (n 9), para [26] (former professional jockeys noting that the incident that occurred in this case was one that happened ‘five or six times in the course of a day’s racing’). [↑](#footnote-ref-1180)
1181. 398 F 2d 167, p.171 (2nd Cir, 1968), quoting Fowler Harper and Fleming James, *Law of Torts* (Little Brown & Co 1956) p.1372. For a similar approach, see also John Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) p.422. [↑](#footnote-ref-1181)
1182. *Barnes* (n 106), para [15]. [↑](#footnote-ref-1182)
1183. [1978] Crim LR 553. [↑](#footnote-ref-1183)
1184. ibid p.553. The quote, which the defendant sought to rely on, came from Mervyn Davies, a former Welsh international rugby union player. Note also the comments of Simon Devereux (from *R v Devereux*, The Independent, 23 February 1996) who, after being released early from his 9-month imprisonment for on-field assault, stated that his ‘flare-up’ was ‘no different to countless others on rugby pitches the length and breadth of Britain every Saturday of the season’. See Anderson (n 16) p.196. [↑](#footnote-ref-1184)
1185. Pendlebury (n 120) p.4. [↑](#footnote-ref-1185)
1186. I have only been able to identify two works that delve into an empirical assessment of a sport’s inherent risks: Pendlebury (n 120); Curtis Fogel, *Game-Day Gangsters: Crime and Deviance in Canadian Football* (Athabasca University Press 2013) pp.31-56. [↑](#footnote-ref-1186)
1187. *Canterbury Bankstown* (n 67). [↑](#footnote-ref-1187)
1188. See, e.g., the alleged pre-meditated plan by the Vancouver Canucks NHL team to target Colorado Avalanche’s Steve Moore in a 2004 game: *R v Bertuzzi* [2004] BCPC 472. [↑](#footnote-ref-1188)
1189. National Football League, ‘NFL Says Saints Created “Bounty” Program from 2009 to 2011’ (*NFL*, 02 March 2012) <<https://www.nfl.com/news/nfl-says-saints-created-bounty-program-from-2009-to-2011-09000d5d82757bcd>> last accessed 16 May 2022. [↑](#footnote-ref-1189)
1190. McArdle (n 70) p.168. [↑](#footnote-ref-1190)
1191. By way of example, see the hit-list created by the Green Bay Packers’ Charles Martin in 1973, when he was reported to have the numbers of five opposition players he sought to injure written on a towel and tucked into his waist. This story is outlined in more detail by Roser-Jones (n 38) p.104. [↑](#footnote-ref-1191)
1192. Associated Press, ‘Cris Carter Admits to Bounties’ (*ESPN*, 09 May 2012) <<https://www.espn.co.uk/nfl/story/_/id/7907610/cris-carter-formerly-minnesota-vikings-admits-authorizing-bounties>> last accessed 13 May 2022. [↑](#footnote-ref-1192)
1193. Patrick Hruby, ‘New Orleans Saints Bounty is Just A Part of the Game’ (*The Guardian*, 05 March 2012) <<https://www.theguardian.com/sport/blog/2012/mar/05/nfl-bounty-new-orleans-saints-brett-favre>> last accessed 13 May 2022. [↑](#footnote-ref-1193)
1194. Simon Evans, ‘Redskins Players Also Had “Bounty” System: Reports’ (*Reuters*, 03 March 2012) <<https://www.reuters.com/article/us-nfl-bounty-idUSTRE8220TW20120303>> last accessed 13 May 2022. [↑](#footnote-ref-1194)
1195. Peter Dawson, Tom Webb and Paul Downward, ‘Abuse is Not a Zero-Sum Game! The Case for Zero Tolerance of Match Official Physical and Verbal Abuse’ (2022) 22 European Journal of Sport Science 417, p.417 (noting that almost 6,700 of the 31,735 FA-affiliated referees walked away from the game in 2018). According to Celena Dell, Misia Gervis and Daniel Rhind, ‘Factors Influencing Soccer Referee’s Intentions to Quit the Game’ (2016) 17 Soccer & Society 109, on-field abuse is one of the primary factors contributing to a referee’s decision to quit. [↑](#footnote-ref-1195)
1196. Jamie Cleland, Jimmy O’Gorman and Tom Webb, ‘Respect? An Investigation into the Experience of Referees in Association Football’ (2018) 53 International Review for the Sociology of Sport 960, p.966. [↑](#footnote-ref-1196)
1197. ibid. [↑](#footnote-ref-1197)
1198. ibid, p.967; Tom Webb, Mike Rayner and Richard Thelwell, ‘An Explorative Investigation of Referee Abuse in English Rugby League’ (2018) 10 Journal of Applied Sport Management 14, p.19-20. [↑](#footnote-ref-1198)
1199. ibid, p.966. [↑](#footnote-ref-1199)
1200. See, e.g., Karl Llewellyn, ‘On the Good, the True, the Beautiful, in Law’ (1942) 9 University of Chicago Law Review 224, p.243. [↑](#footnote-ref-1200)
1201. As Dagan observes, ‘legal craft relates to lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication’. See Hanoch Dagan, ‘The Real Legacy of American Legal Realism’ (2018) 38 Oxford Journal of Legal Studies 123, p.141. [↑](#footnote-ref-1201)
1202. Anderson (n 16) p.196. See also Barbara Hink, ‘Compensating Injured Professional Athletes: The Mystique of Sport Versus Traditional Tort Principles’ (1980) 55 New York University Law Review 971, p.989; Jack Anderson, ‘No Licence for Thuggery: Violence, Sport and the Criminal Law’ (2008) 10 Criminal Law Review 751, p.761. [↑](#footnote-ref-1202)
1203. *R v Lloyd* (1989) 11 Cr App R(S) 36, p.37 (per Pill J). [↑](#footnote-ref-1203)
1204. For vicarious liability purposes, then, we might say that risk ought to be viewed in similar terms to that posited by John Chicken and Tamar Posner, *The Philosophy of Risk* (Thomas Telford 1998) p.119 (who prioritise the ‘individual’s perception of the acceptability of the risks and benefits involved’). [↑](#footnote-ref-1204)
1205. Morgan (n 47) p.257-8 suggests that the nature of the connection required at stage two could differ depending on the relationship in question at stage one. This approach, however, may be just as open to the criticism that it works backwards to achieve a desired result. [↑](#footnote-ref-1205)
1206. *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City and Hackney Health Authority* [1998] AC 232. [↑](#footnote-ref-1206)
1207. *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634, p.648 (per Lord Scarman); *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871, p.895 (per Lord Diplock). [↑](#footnote-ref-1207)
1208. *Adams v Rhymney Valley DC* [2000] Lloyd’s Rep PN 777, para [41] (emphasis added). [↑](#footnote-ref-1208)
1209. *Bolitho* (n 154) p.243 (per Lord Browne-Wilkinson). [↑](#footnote-ref-1209)
1210. For now, the seven-point guidance on the relevant *Bolitho* factors outlined by Mulheron may be particularly instructive. See Rachel Mulheron, ‘Trumping *Bolam*: A Critical Legal Analysis of *Bolitho’s* “Gloss”’ (2010) 69 Cambridge Law Journal 609. [↑](#footnote-ref-1210)
1211. Morgan (n 47) p.247-8. [↑](#footnote-ref-1211)
1212. [1953] 1 WLR 997. [↑](#footnote-ref-1212)
1213. Josh Halliday, ‘Adam Johnson Jailed for Six Years for Sexual Activity with Schoolgirl’ (*The Guardian*, 24 March 2016) <<https://www.theguardian.com/uk-news/2016/mar/24/adam-johnson-should-be-jailed-for-up-to-10-years-court-told>> last accessed 17 May 2022. See also *R v Johnson* [2017] EWCA Crim 191, para [42]. [↑](#footnote-ref-1213)
1214. Sarah Baxter, ‘It’s Game Over for Adam Johnson but Ched Evans Deserves a Replay’ (*The Times*, 06 March 2016) <<https://www.thetimes.co.uk/article/rightly-its-game-over-for-adam-johnson-but-ched-evans-deserves-another-shot-k9cffzcm7>> last accessed 17 May 2022. [↑](#footnote-ref-1214)
1215. Josh Halliday, ‘Adam Johnson’s Arrogance Led to Child Sexual Assault, Court Told’ (*The Guardian*, 12 February 2016) <<https://www.theguardian.com/uk-news/2016/feb/12/adam-johnsons-arrogance-led-to-child-sexual-assault-court-told>> last accessed 17 May 2022. [↑](#footnote-ref-1215)
1216. *R v Adam Johnson*, Sentencing Remarks of HHJ Rose (Bradford Crown Court, 24th March 2016), available at <<https://www.judiciary.uk/wp-content/uploads/2016/03/r-v-johnson-sentencing.pdf>> last accessed 12 October 2021. [↑](#footnote-ref-1216)
1217. BBC, ‘Adam Johnson Jailed for Six Years’ (*BBC News*, 24 March 2016) <<https://www.bbc.co.uk/news/uk-england-35891143>> last accessed 17 May 2022. [↑](#footnote-ref-1217)
1218. See, e.g., BBC, ‘Benjamin Mendy: New Hearing Set for Rape-Accused Footballer’ (*BBC News*, 11 March 2022) <<https://www.bbc.co.uk/news/uk-england-manchester-60710163>> last accessed 17 May 2022; BBC, ‘England Rugby International Arrested on Suspicion of Raping A Teenager’ (*BBC News*, 12 January 2022) <<https://www.bbc.co.uk/sport/rugby-union/59967847>> last accessed 17 May 2022. [↑](#footnote-ref-1218)
1219. Tim Fernandez and Kelly Fuller, ‘A Scandal Every 22 Days: ARLC Hits Back Over Fresh de Belin Federal Court Challenge’ (*ABC News*, 30 July 2019) <<https://www.abc.net.au/news/2019-07-30/de-belin-federal-court-arlc-response/11367644>> last accessed 18 May 2022. [↑](#footnote-ref-1219)
1220. Evans’ conviction was later quashed in *R v Evans* [2016] EWCA Crim 452. [↑](#footnote-ref-1220)
1221. BBC, ‘Tyrell Robinson and Korie Berman Jailed for Sexual Activity with Children’ (*BBC News*, 26 January 2021) <<https://www.bbc.co.uk/news/uk-england-leeds-55817131>> last accessed 18 May 2022. [↑](#footnote-ref-1221)
1222. Despite being released from prison in March 2019, Johnson has yet to resume his professional career. This is likely due to the negative publicity that a club would receive for employing such a tainted player. See, e.g., Owen Gibson, ‘Ched Evans Deal Called off Following Pressure on Oldham Athletic’ (*The Guardian*, 08 January 2015) <<https://www.theguardian.com/football/2015/jan/08/ched-evans-signing-called-off-oldham>> last accessed 18 May 2022. [↑](#footnote-ref-1222)
1223. For a sporting example in which the limitation period was disapplied, see *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352. In illustrating the fact-sensitive nature of this enquiry, however, it is noteworthy that it was not considered fair or just to disapply the limitation period in *TVZ & others v Manchester City Football Club Ltd* [2021] EWHC 1179 (QB). [↑](#footnote-ref-1223)
1224. Kyle Carlson et al, ‘Bankruptcy Rates Among NFL Players with Short-Lived Income Spikes’ (2015) 105 American Economic Review 381 (highlighting that almost 16% of NFL players were bankrupt within 12 years of retirement). Other – perhaps more dubious – estimates suggest that 60% of retired NBA players were bankrupt within 5 years: Pablo Torre, ‘How (and Why) Athletes Go Broke’ (*Sports Illustrated*, 23 March 2009) <<https://vault.si.com/vault/2009/03/23/how-and-why-athletes-go-broke>> last accessed 18 May 2022. [↑](#footnote-ref-1224)
1225. Glen Bartlett and Regan Sterry, ‘Regulating the Private Conduct of Employees’ (2012) 7 Australian and New Zealand Sports Law Journal 91, p.97-8. [↑](#footnote-ref-1225)
1226. See, e.g., Tom Dart, ‘Why NBA Stars like James Harden and LeBron James Invest in Soccer Clubs’ (*The Guardian*, 22 July 2019) <<https://www.theguardian.com/sport/2019/jul/22/why-nba-stars-like-james-harden-and-lebron-james-invest-in-football-clubs?CMP=share_btn_tw>> last accessed 18 May 2022 (noting that, in July 2019, basketballer James Harden had over 10 times as many Twitter followers as his former employer, the Houston Dynamos). At the time of writing, footballer Cristiano Ronaldo also has more Instagram followers than all 20 of the current Premier League clubs combined. [↑](#footnote-ref-1226)
1227. Gary Whannel, *Media Sports Stars: Masculinities and Moralities* (Routledge 2002) p.145. For a more recent argument along these lines, see Giuseppe Carabetta, ‘Off-Duty Misconduct and the Employment Relationship: A Review of the Case Law’ (2021) 48 Australian Business Law Review 497, p.498-9. [↑](#footnote-ref-1227)
1228. Chelsea Augelli and Tamara Kuennen, ‘Domestic Violence & Men’s Professional Sports: Advancing the Ball’ (2018) 21 University of Denver Sports & Entertainment Law Journal 27, p.38; Simon Boyes, ‘Legal Protection of Athletes’ Image Rights in the United Kingdom’ (2015) 15 International Sports Law Journal 69, p.70 [↑](#footnote-ref-1228)
1229. Steve Greenfield and Guy Osborn, *Regulating Football: Commodification, Consumption and the Law* (Pluto Press 2001) p.102. [↑](#footnote-ref-1229)
1230. Simon Chadwick and Nick Burton, ‘From Beckham to Ronaldo – Assessing the Nature of Football Player Brands’ (2008) 1 Journal of Sponsorship 307; Peter Kelly and Christopher Hickey, ‘‘Bringing the Game into Disrepute’: the Ben Cousins Saga, Sports Entertainment, Player Welfare and Surveillance in the Australian Football League’ (2012) 3 Asia-Pacific Journal of Health, Sport and Physical Education 35, p.43. [↑](#footnote-ref-1230)
1231. Dart (n 14). [↑](#footnote-ref-1231)
1232. Martha Chamallas, ‘Vicarious Liability in Torts: The Sex Exception’ (2013) 48 Valparaiso University Law Review 133, p.159. [↑](#footnote-ref-1232)
1233. [2011] EWHC 2454 (QB), para [91] (referring to *Von Hannover v Germany*, App No 59320/00 (2005) 40 EHRR 1). [↑](#footnote-ref-1233)
1234. [2015] EWHC 2361 (QB), para [20]. [↑](#footnote-ref-1234)
1235. *Crowe v An Post* [2016] ELR 93, p.97. For scholarly confirmation on this point, see: Simon Honeyball, *Honeyball & Bowers’ Textbook on Employment Law* (14th edn, OUP 2016) p.180-2; Gwyneth Pitt, *Employment Law* (9th edn, Sweet & Maxwell 2014) p.308; David Cabrelli, *Employment Law in Context* (4th edn, OUP 2020) p.662. [↑](#footnote-ref-1235)
1236. *Moore v C & A Modes* [1981] IRLR 71. [↑](#footnote-ref-1236)
1237. *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] 97 CLR 279, p.289 (per Fullagar J). [↑](#footnote-ref-1237)
1238. [2013] EWHC 2869 (QB). [↑](#footnote-ref-1238)
1239. [2002] 1 AC 215, para [62] (per Lord Hobhouse). [↑](#footnote-ref-1239)
1240. Astrid Sanders, ‘The Law of Unfair Dismissal and Behaviour Outside Work’ (2014) 34 Legal Studies 328, p.337. [↑](#footnote-ref-1240)
1241. [1992] IRLR 362 (CA). [↑](#footnote-ref-1241)
1242. This distinction between *Lister* and *P* suggests to me that the establishment of a work/conduct nexus for unfair dismissal purposes appears to be concerned with the policy issue of whether the conduct interferes with the employee’s suitability for the job. This is reinforced by the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, para [31] <<https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html>> last accessed 14 October 2021. In contrast, the nexus for the purposes of vicarious liability seems to be more focussed on assessing whether the tortious harm was an inherent risk of the industry. Arguably, this is a more restrictive test. [↑](#footnote-ref-1242)
1243. Michael Kimmel, ‘Foreword’ in Judith Gardiner (ed), *Masculinity Studies and Feminist Theory: New Directions* (Columbia University Press 2002) p.ix; cf Lucas Gottzen, ‘Is Masculinity Studies Really the ‘Odd Man Out’?’ (2018) 13 International Journal for Masculinity Studies 81. [↑](#footnote-ref-1243)
1244. Alex Hobbs, ‘Masculinity Studies and Literature’ (2013) 10 Literature Compass 383, p.383. [↑](#footnote-ref-1244)
1245. Mae Quinn, ‘Feminist Legal Realism’ (2012) 35 Harvard Journal of Law & Gender 1, p.13. [↑](#footnote-ref-1245)
1246. Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 Philosophy and Public Affairs 205, p.207. Other schools of thought, such as the law and economics movement, are said to also be heavily influenced by legal realism: Brian Leiter, *Naturalizing Jurisprudence* (OUP 2007) p.95-6. Cf Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon 1995) ch 5. [↑](#footnote-ref-1246)
1247. Ernest Weinrib, ‘Legal Formalism’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 2010) p.337. [↑](#footnote-ref-1247)
1248. Quinn (n 33) p.13. [↑](#footnote-ref-1248)
1249. ibid. See also Ken Kress, ‘Legal Indeterminacy’ (1989) 77 California Law Review 283, p.283 (highlighting that the work of critical theorists is rooted in legal realism); Mark Tushnet, ‘Some Current Controversies in Critical Legal Studies’ (2011) 12 German Law Journal 290, p.290 (noting that ‘many people associated with CLS find that their work converges with, and is influenced by, some aspects of contemporary feminist theory’). [↑](#footnote-ref-1249)
1250. Deborah Brake, ‘Title IX as Pragmatic Feminism’ (2007) 55 Cleveland State Law Review 513, p.519. [↑](#footnote-ref-1250)
1251. Margaret Radin, ‘The Pragmatist and the Feminist’ in Michael Brint and William Weaver (eds), *Pragmatism in Law and Society* (Westview Press 1991) p.134. [↑](#footnote-ref-1251)
1252. Martha Minow and Elizabeth Spelman, ‘In Context’ (1990) 63 Southern California Law Review 1597, p.1620. [↑](#footnote-ref-1252)
1253. Susan Haack, ‘On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?’ (2005) 50 American Journal of Jurisprudence 71, p.74. [↑](#footnote-ref-1253)
1254. Dan Priel, ‘Legal Realism and Legal Doctrine’ in Pierluigi Chiassoni and Bojan Spaic (eds), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism* (Springer 2020) p.157. See also Brake (n 33) p.518 (noting that critics of pragmatism ‘contend that pragmatism’s rejection of objective moral truth and its agnosticism toward particular substantive values provide no traction for social critiques with a substantive vision of justice, such as critical race theory or feminism’). [↑](#footnote-ref-1254)
1255. ibid. [↑](#footnote-ref-1255)
1256. ibid, p.520. [↑](#footnote-ref-1256)
1257. ibid, p.518. See also Charlene Seigfried, *Pragmatism and Feminism* (University of Chicago Press 1996) p.37 (arguing that ‘[p]ragmatism needs feminism to carry out its own stated program, since feminists are in the forefront of philosophers addressing the social and political issues that affect women’). [↑](#footnote-ref-1257)
1258. Phillip Morgan, ‘Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?’ (2018) 38 Legal Studies 242, p.248. [↑](#footnote-ref-1258)
1259. [2015] EWHC 2862 (QB). It is noteworthy that, as the claimant was 16 at the time of the first assault, he was not considered to be a ‘child’ here, but rather a ‘young person’ (para [5]). [↑](#footnote-ref-1259)
1260. ibid, para [156]. [↑](#footnote-ref-1260)
1261. ibid, paras [138]-[141]. This was not to say, however, that this was ‘the equivalent of a positive finding that no such assaults took place’. As His Honour noted, the ‘absolute truth’ was likely not revealed by this trial. [↑](#footnote-ref-1261)
1262. ibid, paras [148], [161]. [↑](#footnote-ref-1262)
1263. Morgan (n 46) p.250. This suggests that only acts committed by the apprentice’s coach would lead to liability. [↑](#footnote-ref-1263)
1264. *Mohamud v WM Morrisons Supermarkets plc* [2014] EWCA Civ 116, para [46] (per Treacy LJ); *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, paras [86]-[7] (per Lord Phillips). [↑](#footnote-ref-1264)
1265. *GB* (n 47), para [161]. [↑](#footnote-ref-1265)
1266. ibid, para [145]. [↑](#footnote-ref-1266)
1267. [1999] 2 SCR 570, para [44]. For similar comments in later cases (both in the UK and overseas), see *New South Wales v Lepore* [2003] HCA 4, para [67] (per Gleeson CJ); *Doe v Bennett* [2004] 1 SCR 436, paras [31]-[2] (per McLachlin CJ); *Armes v Nottinghamshire County Council* [2017] UKSC 60, para [61] (per Lord Reed). [↑](#footnote-ref-1267)
1268. *CCWS* (n 52), paras [83]-[7] (per Lord Phillips); *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, para [23] (per Lord Reed); *The Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2021] EWCA Civ 356, paras [83]-[4] (per Davies LJ); *AB v Chethams School of Music* [2021] EWHC 1419 (QB), para [95] (per Fordham J). [↑](#footnote-ref-1268)
1269. Allison Silink and Desmond Ryan, ‘Twenty Years on from *Lister v Hesley Hall Ltd* – Is there Now a “Tailored Close Connection Test” for Vicarious Liability in Cases of Sexual Abuse, or Not?’ (2022) 38 Professional Negligence 15, p.25. [↑](#footnote-ref-1269)
1270. ibid, p.33. In this regard, the authors suggest that we ought to avoid the tailoring metaphor because it appears to connote reference to a different test altogether. [↑](#footnote-ref-1270)
1271. *CCWS* (n 52), para 83 [emphasis added]. [↑](#footnote-ref-1271)
1272. ibid, para [84]. [↑](#footnote-ref-1272)
1273. *Barry Congregation* (n 56), para [97]. [↑](#footnote-ref-1273)
1274. *GB* (n 47), para [145]. [↑](#footnote-ref-1274)
1275. *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB), para [162]. See also McLachlin J’s comments in *Bazley* (n 55), para [44]: ‘The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced.’ [↑](#footnote-ref-1275)
1276. *Bennett* (n 55); *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; *JGE v English Province of Our Lady of Charity* [2013] QB 722; *CCWS* (n 52); *Barry Congregation* (n 56). [↑](#footnote-ref-1276)
1277. *Mary M v City of Los Angeles* 54 Cal 3d 202 (1991); *Bernard v Attorney-General of Jamaica* [2004] UKPC 47; *Attorney-General of the British Virgin Islands v Hartwell* [2004] UKPC 12; *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB). [↑](#footnote-ref-1277)
1278. [1999] 2 SCR 570, para [18]. [↑](#footnote-ref-1278)
1279. *GB* (n 47), para [161]. His Honour was seemingly once again persuaded by counsel for the defendant, when they stated, at para [146], that the ‘risk of friction or confrontation between different classes of employee [was] no more inherent in the club's business conducted at the Victoria Football Ground than in any other workplace.’ [↑](#footnote-ref-1279)
1280. *Barry Congregation* (n 56), para [96]. [↑](#footnote-ref-1280)
1281. See generally Michael Kimmel, Jeff Hearn and RW Connell (eds), *Handbook of Studies on Men & Masculinities* (Sage 2005). [↑](#footnote-ref-1281)
1282. Jonah Bury, ‘Non-Performing Inclusion: A Critique of the English Football Association’s Action Plan on Homophobia in Football’ (2015) 50 International Review for the Sociology of Sport 211, p.212. See also Mary Kane and Lisa Disch, ‘Sexual Violence and the Reproduction of Male Power in the Locker Room: The “Lisa Olson Incident”’ (1993) 10 Sociology of Sport Journal 331, p.334; Cara Carmichael Aitchison, *Sport and Gender Identities: Masculinities, Femininities and Sexualities* (Routledge 2007) p.17. [↑](#footnote-ref-1282)
1283. Jonathan Salisbury and David Jackson, *Challenging Macho Values: Practical Ways of Working with Adolescent Boys* (Routledge 1996) p.205. [↑](#footnote-ref-1283)
1284. Eric Anderson, *Inclusive Masculinity: The Changing Nature of Masculinities* (Routledge 2009) p.27; Julie Konieczny, ‘There's Nothing Worse than Losing to a Girl: An Analysis of Sex Segregation in American Youth Sports’ (2020) 8 Indiana Journal of Law & Social Equality 70, p.81. [↑](#footnote-ref-1284)
1285. Michael Messner, *Power at Play: Sports and the Problem of Masculinity* (Beacon Press 1992) p.151. See also Jimmy Sanderson et al, ‘A Hero or Sissy? Exploring Media Framing of NFL Quarterbacks Injury Decisions’ (2014) 4 Communication & Sport 3, p.6. [↑](#footnote-ref-1285)
1286. Deborah Brake, ‘Sport and Masculinity: The Promise and Limits of Title IX’ in Frank Cooper and Ann McGinley (eds), *Masculinities and the Law: A Multidimensional Approach* (NYU Press 2012) p.209. [↑](#footnote-ref-1286)
1287. Steven Schacht, ‘Misogyny On and Off the “Pitch”: The Gendered World of Male Rugby Players’ (1996) 10 Gender & Society 550, p.551. In relation to football, see Adi Adams, Eric Anderson and Mark McCormack, ‘Establishing and Challenging Masculinity: The Influence of Gendered Discourses in Organized Sport’ (2010) 29 Journal of Language and Social Psychology 278, p.281. [↑](#footnote-ref-1287)
1288. Tal Peretz and Chris Vidmar, ‘Men, Masculinities, and Gender-Based Violence: The Broadening Scope of Recent Research’ (2021) 15 Sociology Compass 1, p.3. [↑](#footnote-ref-1288)
1289. Lisa Mazzie, ‘Michael Sam and the NFL Locker Room: How Masculinities Theory Explains the Way We View Gay Athletes’ (2014) 25 Marquette Sports Law Review 129, p.137-9. As Michael Kimmel, ‘Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity’ in Peter Murphy (ed), *Feminism and Masculinities* (OUP 2004) p.186 explains, male athletes are ‘under the constant careful scrutiny of other men. Other men watch us, rank us, grant our acceptance into the realm of manhood. Manhood is demonstrated for other men's approval.’ [↑](#footnote-ref-1289)
1290. Curtis Fogel and Andrea Quinlan, ‘Sexual Assault in the Locker Room: Sexually Violent Hazing in Canadian Sport’ (2020) Journal of Sexual Aggression 1, p.13-4. [↑](#footnote-ref-1290)
1291. Aaron Belkin, *Bring me Men: Military Masculinity and the Benign Façade of American Empire, 1898-2001* (Hurst Publishers 2012) p.83. [↑](#footnote-ref-1291)
1292. Adams, Anderson and McCormack (n 62) p.280. [↑](#footnote-ref-1292)
1293. Brake (n 74) p.222. [↑](#footnote-ref-1293)
1294. Jennifer Waldron, ‘Degrading and Harming New Teammates During Hazing: ‘Athletes will be Athletes’’ in Melanie Lang (ed), *Routledge Handbook of Athlete Welfare* (Routledge 2020) p.119. [↑](#footnote-ref-1294)
1295. Jamie Thompson, James Johnstone and Curt Banks, ‘An Examination of Initiation Rituals in a UK Sporting Institution and the Impact on Group Development’ (2018) 18 European Sport Management Quarterly 544, p.544. For a similar definition, see RB Crow and Eric Macintosh, ‘Conceptualizing a Meaningful Definition of Hazing in Sport’ (2009) 9 European Sport Management Quarterly 433, p.449. [↑](#footnote-ref-1295)
1296. Jennifer Waldron, Quinten Lynn and Vikki Krane, ‘Duct Tape, Icy Hot & Paddles: Narratives of Initiation onto US Male Sport Teams’ (2011) 16 Sport Education and Society 111, p.113. [↑](#footnote-ref-1296)
1297. Karin Volkwein-Caplan and Gopal Sankaran, *Sexual Harassment in Sport: Impact, Issues, and Challenges* (Meyer & Meyer Sport 2002) p.11. [↑](#footnote-ref-1297)
1298. *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635, para [11]. More recently, see *TPKN v Ministry of Defence* [2019] EWHC 1488 (QB) (where the Ministry of Defence were held vicariously liable for rape committed by a member of the armed forces after a social event in Gibraltar). [↑](#footnote-ref-1298)
1299. See Jack Thorne, ‘When Do Sport Teams' Initiation Ceremonies Cross Legal Boundaries? Part 1’ (LawInSport, 17 July 2014) (describing how former Manchester United stars Gary Neville and David Beckham were subject to sexual initiations, with the former reportedly being forced to strip naked whilst having the club kit scratched in dubbin onto his skin with a wire brush). [↑](#footnote-ref-1299)
1300. See, e.g., Elizabeth Allan, David Kerschner and Jessica Payne, ‘College Student Hazing Experiences, Attitudes, and Perceptions: Implications for Prevention’ (2018) 56 Journal of Student Affairs Research and Practice 32; Jay Johnson et al, ‘An Examination of Hazing in Canadian Intercollegiate Sports’ (2018) 12 Journal of Clinical Sport Psychology 144; Elizabeth Allan and Mary Madden, ‘Hazing in View: College Students at Risk’ (Initial Findings from the National Study of Student Hazing, March 2008) <<https://stophazing.org/wp-content/uploads/2020/12/hazing_in_view_study.pdf>> last accessed 03 November 2021. [↑](#footnote-ref-1300)
1301. Jennifer Waldron, ‘Predictors of Mild Hazing, Severe Hazing, and Positive Initiation Rituals in Sport’ (2015) 10 International Journal of Sports Science & Coaching 1089, p.1095. [↑](#footnote-ref-1301)
1302. Marisalva Favero et al, ‘Hazing Violence: Practices of Domination and Coercion in Hazing in Portugal’ (2018) 33 Journal of Interpersonal Violence 1830. [↑](#footnote-ref-1302)
1303. David Kerschner and Elizabeth Allan, ‘Examining the Nature and Extent of Hazing at Five NCAA Division III Institutions and Considering the Implications for Prevention’ (2021) 7 Journal of Amateur Sport 95, p.103. [↑](#footnote-ref-1303)
1304. Jennifer Waldron and Christopher Kowalski, ‘Crossing the Line: Rites of Passage, Team Aspects, and Ambiguity of Hazing’ (2009) 80 Research Quarterly for Exercise and Sport 291, p.296. Other studies, however, found that hazing was more prevalent in non-contact individualistic sports, such as cheerleading. See, e.g., Jeffrey Gershel et al, ‘Hazing of Suburban Middle School and High School Athletes’ (2003) 32 Journal of Adolescent Health 333. [↑](#footnote-ref-1304)
1305. Mark Groves, Gerald Griggs and Kathryn Leflay, ‘Hazing and Initiation Ceremonies in University Sport: Setting the Scene for Further Research in the United Kingdom’ (2012) 15 Sport in Society 117, p.117; Ben Clayton, ‘Initiate: Constructing the ‘Reality’ of Male Team Sport Initiation Rituals’ (2013) 48 International Review for the Sociology of Sport 204, p.215. [↑](#footnote-ref-1305)
1306. Sir Robin Auld, *A Review of the Criminal Courts of England and Wales: Report by the Right Honourable Lord Justice Auld* (The Stationary Office 2001) p.167. [↑](#footnote-ref-1306)
1307. Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) p.3-4. [↑](#footnote-ref-1307)
1308. Marc Edelman, ‘Will March Madness be NCAA’s Last Dance Featuring Amateurism as it Knows It’ (*Forbes*, 17 March 2021) <https://www.forbes.com/sites/marcedelman/2021/03/17/will-march-madness-2021-be-shamateurisms-last-dance/?sh=6b69084368a6> last accessed 06 December 2022. [↑](#footnote-ref-1308)
1309. John Wolohan, 'The NCAA Cases: Is it Losing Its Hold on College Sports in the United States?’ (LawInSport, 07 March 2013). See also John Wolohan, ‘Paving the Way to Professionalism for College Athletes – A Review of California’s Fair Pay for Play Act’ (LawInSport, 20 September 2019) (noting the example of Syracuse University, which generated around $94m in revenue from athletics in 2017-18). [↑](#footnote-ref-1309)
1310. ibid. [↑](#footnote-ref-1310)
1311. Wes Gerrie, ‘More than Just the Game: How Colleges and the NCAA are Violating their Student-Athletes’ Rights of Publicity’ (2018) 18 Texas Review of Entertainment & Sports Law 111, p.113. [↑](#footnote-ref-1311)
1312. Jocelyn Robinson, ‘USA vs UK Collegiate Sports System’ (*Masterclass Sports*) <https://www.masterclasstours.co.uk/blog/usa-vs-uk-collegiate-sports-system> last accessed 07 December 2022. [↑](#footnote-ref-1312)
1313. See, e.g., Jonathan Casper, Michael Pfahl and Mark McSherry, ‘Athletics Department Awareness and Action Regarding the Environment: A Study of NCAA Athletics Department Sustainability Practices’ (2012) 26 Journal of Sport Management 11. [↑](#footnote-ref-1313)
1314. HC Deb 08 October 2013, Vol 568, col 17WH (per Mr Hugo Swire). See also James Laurence, ‘Community Disadvantage and Race-Specific Rates of Violent Crime: An Investigation into the “Racial Invariance” Hypothesis in the United Kingdom’ (2015) 36 Deviant Behaviour 974, p.979 (referring to the fact that ‘the UK and US share similar cultural goals (predominantly economic success and consumption)’). [↑](#footnote-ref-1314)
1315. See, e.g., Nina Philadelphoff-Puren, ‘Dereliction: Women, Rape and Football’ (2004) 21 Australian Feminist Law Journal 35, p.45 (detailing an initiation ritual used by the Canterbury Bulldogs rugby team which tasked apprentice players with publicly urinating or defecating on women in clubs and brothels). [↑](#footnote-ref-1315)
1316. See the recent incident involving the Olympian Ashley Wagner who accused her fellow figure skater John Coughlin of sexually assaulting her during her sleep at a training camp in 2008. According to Jere Longman, ‘Ashley Wagner’s Account of Sexual Assault Shakes Figure Skating’ (*New York Times*, 01 August 2019) <<https://www.nytimes.com/2019/08/01/sports/ashley-wagner-sexual-assault.html>> last accessed 18 May 2022, such accusations have ‘further raised concerns that the dynamics of figure skating feed a culture in which young women are all too vulnerable’. [↑](#footnote-ref-1316)
1317. Lawrence Ostlere, ‘British Cycling “Extremely Concerned” by Report Alleging Widespread Harassment of Women in the Sport’ (*The Independent*, 22 August 2019) <<https://www.independent.co.uk/sport/cycling/rouleur-report-sexual-harassment-abuse-british-cycling-uci-a9074916.html>> last accessed 18 May 2022 (British Cycling saying it is ‘extremely concerned’ by a report detailing a ‘shocking culture’ of sexual harassment within the sport. This can also be seen, it is suggested, in the *Varnish* case detailed in Chapter 5, where the claimant cyclist was told to ‘go and have a baby’). [↑](#footnote-ref-1317)
1318. Juliet Macur and John Branch, ‘Pro Cheerleaders Say Groping and Sexual Harassment are Part of the Job’ (*New York Times*, 10 April 2018) <<https://www.nytimes.com/2018/04/10/sports/cheerleaders-nfl.html>> last accessed 18 May 2022. [↑](#footnote-ref-1318)
1319. See, e.g., Lee McGinnis, Julia McQuillan and Constance Chapple, ‘I Just Want to Play: Women, Sexism, and Persistence in Golf’ (2005) 29 Journal of Sport and Social Issues 313. [↑](#footnote-ref-1319)
1320. See, e.g., John Williams and Gavin Hall, ‘A Good Girl is Worth their Weight in Gold’: Gender Relations in British Horseracing’ (2020) 55 International Review for Sociology of Sport 453. [↑](#footnote-ref-1320)
1321. Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) p.867. [↑](#footnote-ref-1321)
1322. For judicial support on this point, see: *Lister* (n 27), para [44] (per Lord Clyde) and *Bellman v Northampton Recruitment* [2018] EWCA Civ 2214, para [22] (per Asplin LJ). [↑](#footnote-ref-1322)
1323. Notable perpetrators include: Kellen Winslow (who was convicted of raping an unconscious teen in 2003); Ray Rice (who was filmed knocking his fiancée unconscious in 2014); and Ben Roethlisberger (who has been accused of sexually assaulting numerous women). The controversial wide receiver Antonio Brown has also been involved in several high-profile incidents (including rape, sexual assault and domestic abuse). [↑](#footnote-ref-1323)
1324. Press Association, ‘Six Huddersfield Giants Players Arrested on Suspicion of Rape’ (*The Guardian*, 20 January 2010) <<https://www.theguardian.com/sport/2010/jan/20/huddersfield-giants-police-rape-allegations>> last accessed 18 May 2022. [↑](#footnote-ref-1324)
1325. Merrill Melnick, ‘Male Athletes and Sexual Assault’ (1992) 63 Journal of Physical Education, Recreation & Dance 32, p.32; Todd Crosset et al, ‘Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices’ (1995) 19 Journal of Sport & Social Issues 126, p.126. [↑](#footnote-ref-1325)
1326. The most prominent works which marry the doctrine of vicarious liability with feminist legal theory are Chamallas (n 20) p.160-6 and Freya Kristjanson, ‘Vicarious Liability for Sexual Assault’ (1999) 19 Canadian Woman Studies 93, p.100. [↑](#footnote-ref-1326)
1327. 524 U.S. 775 (1998). [↑](#footnote-ref-1327)
1328. ibid, p.800. [↑](#footnote-ref-1328)
1329. ibid, p.803 (citing Susan Estrich, ‘Sex at Work’ (1991) 43 Stanford Law Review 813, p.854). [↑](#footnote-ref-1329)
1330. Associated Press, ‘Broadcaster says NBA Coach Luke Walton Laughed at her During Alleged Assault’ (*The Guardian*, 24 April 2019) <<https://www.theguardian.com/sport/2019/apr/24/luke-walton-kelli-tennant-assault-allegations-nba>> last accessed 18 May 2022. Other scholars, and most notably Alicia Cintron, Jeffrey Levine and Kristy McCray, ‘Preventing Sexual Violence on College Campuses: An Investigation of Current Practices of Conducting Background Checks on Student-Athletes’ (2020) 30 Journal of Legal Aspects of Sport 41, p.46 have summarised a number of other reasons for this increased risk, some of which include: head injuries, lack of discipline, tokenism, drug and alcohol use and a lack of appropriate legal sanctions. [↑](#footnote-ref-1330)
1331. Michael Flood and Sue Dyson, ‘Sport, Athletes, and Violence Against Women’ (2007) 4 NTV Journal 37, p.40. See also Timothy Davis and Tonya Parker, ‘Student-Athlete Sexual Violence against Women: Defining the Limits of Institutional Responsibility’ (1998) 55 Washington and Lee Law Review 55, p.65 and Brian Pronger, *The Arena of Masculinity: Sports, Homosexuality, and the Meaning of Sex* (St Martin’s Press 1990). [↑](#footnote-ref-1331)
1332. Augelli and Kuennen (n 16) p.87. [↑](#footnote-ref-1332)
1333. See, e.g., Timothy Curry, ‘Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk about Competition and Women’ (1991) 8 Sociology of Sport Journal 119; Mariah Nelson, *The Stronger Women Get, The More Men Love Football: Sexism and the American Culture of Sport* (Harcourt, Brace and Co 1994) p.88; Ben Clayton and Barbara Humberstone, ‘Men’s Talk: A (Pro)feminist Analysis of Male University Football Players’ Discourse’ (2006) 41 International Review for the Sociology of Sport 295; cf Eric Anderson and Rhidian McGuire, ‘Inclusive Masculinity Theory and the Gendered Politics of Men’s Rugby’ (2010) 19 Journal of Gender Studies 249. [↑](#footnote-ref-1333)
1334. Schacht (n 75) p.558. [↑](#footnote-ref-1334)
1335. Peggy Reeves Sanday, ‘The Socio-Cultural Context of Rape: A Cross-Cultural Study’ (1981) 37 Journal of Social Issues 5, p.25-6; Deborah Brake, ‘Lessons from the Gender Equality Movement: Using Title IX to Foster Inclusive Masculinities in Men's Sport’ (2016) 34 Law & Inequality 285, p.302; Brian Pappas, ‘On the Same Team: Locker Room Talk, Student Athletes, and a Call for a Restorative Justice Approach to Sexual Assault Education’ (2017) 6 Tennessee Journal of Race, Gender & Social Justice 165, p.169. [↑](#footnote-ref-1335)
1336. Bruce Kidd, ‘The Men’s Cultural Centre: Sports and the Dynamic of Women’s Oppression/Men’s Repression’ in Michael Messner and Donald Sabo (eds), *Sport, Men, and the Gender Order* (Human Kinetics 1990) p.42. [↑](#footnote-ref-1336)
1337. Eric Anderson, ‘”I Used to Think Women Were Weak”: Orthodox Masculinity, Gender Segregation, and Sport’ (2008) 23 Sociological Forum 257, p.274-5. [↑](#footnote-ref-1337)
1338. Curtis Fogel, ‘Precarious Masculinity and Rape Culture in Canadian University Sport’ in Elizabeth Quinlan et al (eds), *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Wilfred Laurier University Press 2017) p.152. [↑](#footnote-ref-1338)
1339. Christina Dardis et al, ‘An Investigation of the Tenets of Social Norms Theory as They Relate to Sexually Aggressive Attitudes and Sexual Assault Perpetration: A Comparison of Men and Their Friends’ (2015) 6 Psychology of Violence 163. [↑](#footnote-ref-1339)
1340. William Beaver, ‘College Athletes and Sexual Assault’ (2019) 56 Society 620, p.622 (referring to Jessica Luther, *Unsportsmanlike Conduct: Football and the Politics of Rape* (Akashic Books 2016)). [↑](#footnote-ref-1340)
1341. Jessica Woodhams, ‘Leadership in Multiple Perpetrator Stranger Rape’ (2012) 27 Journal of Interpersonal Violence 728, p.729. A broadly similar estimate of multiple perpetrator rapes (between 7-23%) is evident in the UK population. [↑](#footnote-ref-1341)
1342. Thomas Jackson and Joanne Davis, Prevention of Sexual and Physical Assault Toward Women: A Program for Male Athletes’ (2000) 28 Journal of Community Psychology 589, p.592. [↑](#footnote-ref-1342)
1343. BBC, ‘Alex Hepburn’s Rape Conviction Upheld at Court of Appeal’ (*BBC News*, 30 June 2020) <<https://www.bbc.co.uk/news/uk-england-hereford-worcester-53231524>> last accessed 19 May 2022. [↑](#footnote-ref-1343)
1344. Alan Dundes, ‘Into the Endzone for a Touchdown: A Psychoanalytic Consideration of American Football’ (1978) 37 Western Folklore 75, p.86. [↑](#footnote-ref-1344)
1345. Deborah Brake, ‘The Struggle for Sex Equality in Sport and the Theory Behind Title IX’ (2001) 34 University of Michigan Journal of Law Reform 13, p.94; Deborah Brake, ‘Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds’ (2012) 22 Marquette Sports Law Review 395, p.404. [↑](#footnote-ref-1345)
1346. As cited in Stanley Teitelbaum, *Sports Heroes, Fallen Idols* (University of Nebraska Press 2008) p.24. [↑](#footnote-ref-1346)
1347. James Ducker, ‘Johnson ‘Knew he was Committing Child Sex Offence’ (*The Times*, 12 February 2016) <<https://www.thetimes.co.uk/article/johnson-knew-he-was-committing-child-sex-offence-ngds9h60g>> last accessed 19 May 2022. [↑](#footnote-ref-1347)
1348. David Goldblatt, *The Games: A Global History of the Olympics* (WW Norton Company 2016) p.109-10. [↑](#footnote-ref-1348)
1349. Gayle Brewer and Sharon Howarth, ‘Sport, Attractiveness, and Aggression’ (2012) 53 Personality and Individual Differences 640. [↑](#footnote-ref-1349)
1350. Brake (n 74) p.212. [↑](#footnote-ref-1350)
1351. See Richard Haddad, ‘Shield or Sieve – *People v Bryant* and the Rape Shield Law in High-Profile Cases’ (2005) 39 Columbia Journal of Law & Social Problems 185, p.185-8. [↑](#footnote-ref-1351)
1352. Deb Waterhouse-Watson, ‘News Media on Trial: Towards a Feminist Ethics of Reporting Footballer Sexual Assault Trials’ (2016) 16 Feminist Media Studies 952, p.953. [↑](#footnote-ref-1352)
1353. See, e.g., Mary Koss and John Gaines, ‘The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation and Fraternity Affiliation’ (1993) 8 Journal of Interpersonal Violence 94; Mary Frintner and Laurna Rubinson, ‘Acquaintance Rape: The Influence of Alcohol, Fraternity Membership, and Sports Team Membership’ (1993) 19 Journal of Sex Education and Therapy 272 (finding that 20.2% of males involved in sexual assault were sports team members, despite athlete making up less than 2% of the campus population); Crosset et al (n 92) (finding that athletes made up only 3.7% of males at the surveyed universities, but were responsible for 19% of all sexual assaults). [↑](#footnote-ref-1353)
1354. Belinda-Rose Young et al, ‘Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes’ (2017) 23 Violence Against Women 795, 803-4. Note also Fogel (n 105) p.142 (outlining that athletes made up only 2-3% of campus populations at Canadian universities, but were involved in 23% of sexual assault cases). [↑](#footnote-ref-1354)
1355. Kenny Jacoby, ‘College Athletes More Likely to be Disciplined for Sex Assault’ (*USA Today*, 12 December 2019) <<https://eu.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-athletes-more-likely-disciplined-sex-assault/4379153002/>> last accessed 19 May 2022. According to rape prevention expert John Foubert in this article, this signifies that ‘hard data show athletes to be more dangerous to women than nonathletes’. [↑](#footnote-ref-1355)
1356. Robin Sawyer, Estina Thompson and Anne Chicorelli, ‘Rape Myth Acceptance among Intercollegiate Student Athletes: A Preliminary Examination’ (2002) 18 American Journal of Health Studies 19; Sarah Murnen and Marla Kohlman, ‘Athletic Participation, Fraternity Membership, and Sexual Aggression among College Men: A Meta-Analytic Review’ (2007) 57 Sex Roles 145. [↑](#footnote-ref-1356)
1357. Lise Wade, ‘Rape on Campus: Athletes, Status, and the Sexual Assault Crisis’ (*The Conversation*, 07 March 2017) <<https://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255>> last accessed 14 January 2022. [↑](#footnote-ref-1357)
1358. Kristy McCray, ‘Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study’ (2015) 16 Trauma, Violence, & Abuse 438, p.440 (she identifies only 2 publications on this issue since 2000, and I have similarly not been able to identify any later work on this topic that has not already been cited in this chapter). [↑](#footnote-ref-1358)
1359. *South Australian Asset Management Corporation v York Montague Ltd* [1996] UKHL 10. [↑](#footnote-ref-1359)
1360. Margaret Hall, ‘After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse’ (2000) 22 Journal of Social Welfare & Family Law 159, p.162. [↑](#footnote-ref-1360)
1361. *Jacobi* (n 66), para [79]. This test was later applied by Lord Neuberger in *Maga* (n 64), para [53]. [↑](#footnote-ref-1361)
1362. See, e.g., *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, p.621 (per Lord Reid); *Bailey v Ministry of Defence* [2009] 1 WLR 1052, p.1068 (per Waller LJ); *Williams v Bermuda Hospitals Board* [2016] AC 888. [↑](#footnote-ref-1362)
1363. Alan Sykes, ‘The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines’ (1988) 101 Harvard Law Review 563, p.572-5. [↑](#footnote-ref-1363)
1364. Jack Rathborn, ‘Harry Maguire Trial: Manchester United Captain asked Police ‘Do you know who I am?’ after Alleged Assault, Court Hears’ (*The Independent*, 25 August 2020) <<https://www.independent.co.uk/sport/football/premier-league/harry-maguire-trial-assault-police-greece-mykonos-bribery-court-a9687416.html>> last accessed 19 May 2022. Although Maguire has vehemently denied these accusations of bribery, Laurie Robinsin, ‘Professional Athletes - Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts’ (1998) 73 Indiana Law Journal 1313, p.1331 correctly adduces that it is common practice amongst wrongdoing athletes to excuse their off-field behaviour by declaring: “Officer, I play for the…”.  [↑](#footnote-ref-1364)
1365. Neil Foster, ‘Material Contribution in *Bonnington*: Not an Exception to ‘But For’ Causation’ (2022) 49 University of Western Australia Law Review 404, p.422-3. [↑](#footnote-ref-1365)
1366. [2016] UKSC 11, para [45]. [↑](#footnote-ref-1366)
1367. Craig Jenkins and Tom Ellis, ‘The Highway to Hooliganism - An Evaluation of the Impact of Combat Sport Participation on Individual Criminality’ (2011) 13 International Journal of Police Science and Management 117, p.120; Flood and Dyson (n 119) p.38; David Whitson, ‘The Embodiment of Gender: Discipline, Domination and Empowerment’ in Susan Birrell and Cheryl Cole (eds), *Women, Sport, and Culture* (Human Kinetics 1994) p.367. [↑](#footnote-ref-1367)
1368. Wendy MacGregor, ‘It’s Just a Game Until Someone Is Sexually Assaulted: Sport Culture and the Perpetuation of Sexual Violence by Athletes’ (2018) 28 Education & Law Journal 43, p.51. [↑](#footnote-ref-1368)
1369. Gordon Forbes et al, ‘Aggressive High School Sports Attitudes Among College Men as a Function of Participation in Dating Aggression, Sexual Coercion, and Aggression-Supporting’ (2006) 12 Violence Against Women 441, p.450-1. Note also Sebastien Guilbert, ‘Violence in Sports and Among Sportsmen: A Single or Two-Track Issue?’ (2006) 32 Aggressive Behavior 231, p.234 (identifying that athletes who partake in less physical sports such as table tennis and swimming appear to exhibit more psychological or verbal (rather than physical) aggression when off-duty). [↑](#footnote-ref-1369)
1370. Brake (n 74) p.211. [↑](#footnote-ref-1370)
1371. Scot Boeringer, ‘Associations of Rape-Supportive Attitudes with Fraternal and Athletic Participation’ (1999) 5 Violence Against Women 81. Similarly, in the investigation reported by Jacoby (n 143), 30 of the 47 athletes found responsible for sexual offences played the contact team sport of American football. [↑](#footnote-ref-1371)
1372. Elizabeth Gage, ‘Gender Attitudes and Sexual Behaviors: Comparing Center and Marginal Athletes and Nonathletes in a Collegiate Setting’ (2008) 14 Violence Against Women 1014. [↑](#footnote-ref-1372)
1373. Michael Welch, ‘Violence Against Women by Professional Football Players: A Gender Analysis of Hypermasculinity, Positional Status, Narcissism, and Entitlement’ (1997) 21 Journal of Sport and Social Issues 392. [↑](#footnote-ref-1373)
1374. See, e.g., Samuele Zilioli and Neil Watson, ‘Testosterone Across Successive Competitions: Evidence for a ‘Winner Effect’ in Humans?’ (2014) 47 Psychoneuroendocrinology 1. [↑](#footnote-ref-1374)
1375. Esperanza Gonzalez-Bono et al, ‘Testosterone, Cortisol, and Mood in a Sports Team Competition’ (1999) 35 Hormones and Behaviour 55. [↑](#footnote-ref-1375)
1376. ibid, p.61 (noting that forwards in a professional basketball game in Spain had higher increases in testosterone levels than centers and guards). [↑](#footnote-ref-1376)
1377. For general support on this point, see Robert Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Penguin 2017) p.105. [↑](#footnote-ref-1377)
1378. Bluefin Sport, ‘Legal Liability Insurance’ <<https://ngis.bluefinsport.co.uk/media-library/bluefin-sport/pdfs/ngis-microsite/legal-liability-downloads/0400-0521-ngis--countycover-and-countycover-plus-brochure-2021-22_v1.pdf?la=en&hash=01361E8F6F80CAB871525AA18BE137AF81D11FCB>> last accessed 15 May 2022, p.6. It is also limited to those persons who have been checked by the Disclosure & Barring Service (DBS), and it is unlikely that many professional footballers hold DBS status. [↑](#footnote-ref-1378)
1379. Morgan (n 46) p.260. [↑](#footnote-ref-1379)
1380. 398 F 2d 167, p.172 (2d Cir. 1968). He added that, whilst the Coast Guard were vicariously liable for negligent property damage caused by a drunken seaman, such liability would not have followed had the seaman shot a security guard who he realised was his wife’s lover. [↑](#footnote-ref-1380)
1381. Wanda Leal, Marc Gertz and Alex Piquero, ‘The National Felon League?: A Comparison of NFL Arrests to General Population Arrests’ (2015) 43 Journal of Criminal Justice 397, p.400. Notably, NFL players also had a substantially lower arrest rate for property crimes, such as burglary, theft and fraud. [↑](#footnote-ref-1381)
1382. BBC, ‘Henry Ruggs III: NFL Star Faces Charges over Fatal Drink-Driving Crash’ (*BBC News*, 03 November 2021) <<https://www.bbc.co.uk/news/world-us-canada-59143625>> last accessed 19 May 2022. See also Jon Bois, ‘Are Pro Athletes More Likely to Get Arrested for DUI?’ (*SB Nation*, 06 June 2012) <<https://www.sbnation.com/nfl/2012/6/6/3066024/justin-blackmon-pro-athlete-dui>> last accessed 14 March 2022. [↑](#footnote-ref-1382)
1383. Warren Fiske, ‘Vick Pleads Guilty, Apologizes in Dogfighting Case’ (*Reuters*, 27 August 2007) <<https://www.reuters.com/article/us-nfl-vick-idUSN2744252420070827>> last accessed 19 May 2022. [↑](#footnote-ref-1383)
1384. Leal, Gertz and Piquero (n 169) p.400 (noting that 2004 was the only year in which the violent crime arrest rate was higher for the general population than for NFL athletes. In other years – such as 2007 and 2008 – the arrest rate for violent crime amongst NFL players was more than double that of the general population). [↑](#footnote-ref-1384)
1385. [2002] EMLR 22, para [60]. [↑](#footnote-ref-1385)
1386. *PJS v News Group Newspapers Ltd* [2016] UKSC 26, para [32] (per Lord Mance). [↑](#footnote-ref-1386)
1387. See text to n 142. [↑](#footnote-ref-1387)
1388. *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10. [↑](#footnote-ref-1388)
1389. See text to n 91. [↑](#footnote-ref-1389)
1390. Laura McCallum, ‘An Overview of Key Case Law Relating to Negligent Liability for Sports Injuries (Part 1)’ (LawInSport, 07 October 2016); Morgan (n 46) p.248 (suggesting that there would be no vicarious liability for assault in a nightclub *despite the fact* that ‘players are encouraged to be role models on and off the pitch’). The third article – Philip Hutchinson, ‘Who Shoulders the Blame? An Analysis of Vicarious Liability in the Sports Industry’ (LawInSport, 03 October 2016) – does not refer to the role model status of professional athletes, but this is likely because his focus here was on sexual misconduct at club-run charity events. Given that case law already supports vicarious liability in this scenario (n 222), it was seemingly unnecessary for the author to delve into the scope of an athlete’s ambassador obligations for this point. [↑](#footnote-ref-1390)
1391. ibid. [↑](#footnote-ref-1391)
1392. Sandra Lynch, Daryl Adair and Paul Jonson, ‘Professional Athletes and their Duty to be Role Models’ in Arthur Caplan and Brendan Parent, *The Ethics of Sport: Essential Readings* (OUP 2017) p.231 (outlining the views of former NBA star Karl Malone, who suggested that professional athletes cannot ‘accept all the glory and the money that comes with being a famous athlete and not accept the responsibility of being a role model’). [↑](#footnote-ref-1392)
1393. *Jacobi* (n 66), para [4]. [↑](#footnote-ref-1393)
1394. ibid, para [82]. [↑](#footnote-ref-1394)
1395. Antronette Yancey, ‘Building Positive Self Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach’ (1998) 33 Adolescence253, p.256. [↑](#footnote-ref-1395)
1396. Pamela Wicker and Bernd Frick, ‘The Inspirational Effect of Sporting Achievements and Potential Role Models in Football: A Gender-Specific Analysis’ (2016) 21 Managing Sport & Leisure 265, p.266. [↑](#footnote-ref-1396)
1397. *Ferdinand* (n 21), para [87] (per Nicol J). [↑](#footnote-ref-1397)
1398. Adeno Addis, ‘Role Models and the Politics of Recognition’ (1996) 144 University of Pennsylvania Law Review 1377, p.1455 (stating that ‘[w]hen a particular activity or commitment is seen to be desirable, commentators use the concept of role model as a rhetoric of approval. But when the desirability of such commitment or activity is in doubt, the concept of role model is used as a rhetoric of disapproval. In either case, those who invoke it offer neither empirical data nor the force of logic to justify their use’). [↑](#footnote-ref-1398)
1399. *A v B* [2003] QB 195, para [43] (per Lord Woolf); *Ferdinand* (n 21), para [90] (per Nicol J); *Jackson v BBC* [2017] NIQB, para [64] (per Keegan J). [↑](#footnote-ref-1399)
1400. Bartlett and Sterry (n 13) p.105; Paul Jonson, Sandra Lynch and Daryl Adair, ‘The Contractual and Ethical Duty for a Professional Athlete to be an Exemplary Role Model: Bringing the Sport and Sportsperson into Unreasonable and Unfair Disrepute’ (2013) 8 Australian and New Zealand Sports Law Journal 55, p.56. For a more sensible view, see Paul Horvath, ‘Anti-Doping and Human Rights in Sport: The Case of the AFL and the *WADA* Code’ (2006) 32 Monash University Law Review 357, p,375. [↑](#footnote-ref-1400)
1401. Randolph Feezell, ‘Celebrated Athletes, Moral Exemplars, and Lusory Objects’ (2005) 32 Journal of the Philosophy of Sport 20; Earl Spurgin, ‘Hey, How Did *I* Become a Role Model? Privacy and the Extent of Role Model Obligations’ (2012) 29 Journal of Applied Philosophy118, p.118-23. [↑](#footnote-ref-1401)
1402. Feezell (ibid) p.21. [↑](#footnote-ref-1402)
1403. See *Lister* (n 27), para [60] (per Lord Hobhouse). [↑](#footnote-ref-1403)
1404. CAS 2008/A/1605 *Jongewaard v Australian Olympic Committee*, para [19]. [↑](#footnote-ref-1404)
1405. Carole Epstein, ‘Morals Clauses: Past, Present and Future’ (2015) 5 Journal of Intellectual Property and Entertainment Law 72, p.82. [↑](#footnote-ref-1405)
1406. Elle Madalin, ‘Tolerance is Tricky Business: Israel Folau at the Court of Arbitration for Sport and the Moral Case for the Protection of Athletes’ Free Expression’ (2017) 12 Australian and New Zealand Sports Law Journal 53, p.53. [↑](#footnote-ref-1406)
1407. Caysee Kamenetsky, ‘The Need for Strict Morality Clauses in Endorsement Contracts’ (2017) 7 Pace Intellectual Property, Sports & Entertainment Law Forum 289, p.290. [↑](#footnote-ref-1407)
1408. Fernando Pinguelo and Timothy Cedrone, ‘Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know’ (2009) 19 Seton Hall Journal of Sports and Entertainment Law 347, p.364. As illustrated by Casinova Henderson, ‘How Much Discretion is Too Much for the NFL Commissioner to Have over the Players' Off-the-Field Conduct’ (2010) 17 Sports Lawyers Journal 167, p.178, US league commissioners have also invoked ‘in the best interest of the sport’ clauses to sanction misbehaving athletes. [↑](#footnote-ref-1408)
1409. Premier League, ‘Handbook, Season 2020/21’ <<https://resources.premierleague.com/premierleague/document/2020/08/11/1256c4b9-23bb-4247-93c0-028f042b010d/2020-21-PL-Handbook-110820.pdf>> last accessed 13 April 2022, clause 3.2.5. [↑](#footnote-ref-1409)
1410. Rugby Football Union, ‘Standard Form Player Contract – Version 2018’ <<https://www.englandrugby.com/dxdam/6a/6af05ffc-de18-42cf-8967-1ee2e688bd60/PremiershipStandardPlayerContract.pdf>> last accessed 13 April 2022, clause 6.8. [↑](#footnote-ref-1410)
1411. Rugby Football Union, ‘Rules of the RFU’ <<https://www.englandrugby.com/dxdam/27/27533fb9-f2b8-429c-85d4-e190658d658d/2020-21%20Rules%20final.pdf>> last accessed 13 April 2022, clause 5.12. [↑](#footnote-ref-1411)
1412. Gerard Meagher, ‘Danny Cipriani Avoids Ban as RFU Decides to Take No Further Action’ (*The Guardian*, 23 August 2018) <<https://www.theguardian.com/sport/2018/aug/22/danny-cipriani-avoids-ban-after-rfu-hearing>> last accessed 19 May 2022. [↑](#footnote-ref-1412)
1413. Grand Slam Board, ‘2022 Official Grand Slam Rulebook’ <<https://www.itftennis.com/media/5986/grand-slam-rulebook-2022-f-2.pdf>> last accessed 28 April 2022, p.52; World Professional Billiards and Snooker Association, ‘WPBSA Members Rules and Regulations’ <<https://wpbsa.com/wp-content/uploads/WPBSA-Members-Rules-as-amended-18.01.17.pdf>> last accessed 28 April 2022, clause 1.3. [↑](#footnote-ref-1413)
1414. [2008] EWCA Civ 689, para [7]. [↑](#footnote-ref-1414)
1415. For off-field harm caused by athletes in *individual* sports (who are by nature of their role not part of a club), the governing body alone will be the primary target for a vicarious liability claim. [↑](#footnote-ref-1415)
1416. Pinguelo and Cedrone (n 196) p.351. [↑](#footnote-ref-1416)
1417. It is notable that, according to Simon Gardiner and others, *Sports Law* (4th edn, Routledge 2012) p.395, ‘in German law, a competition organiser or a sponsor could be considered an employer.’ [↑](#footnote-ref-1417)
1418. Alexandra Topping, ‘Sexual Misconduct Cases at Record High in Legal Profession’ (*The Guardian*, 20 January 2020) <<https://www.theguardian.com/law/2020/jan/20/sexual-misconduct-cases-at-record-high-in-legal-profession>> last accessed 19 May 2022. [↑](#footnote-ref-1418)
1419. See generally Kadence Otto, ‘Criminal Athletes: An Analysis of Charges, Reduced Charges and Sentences’ (2009) 19 Journal of the Legal Aspects of Sport 67. [↑](#footnote-ref-1419)
1420. [2016] UKSC 10, para [22] (per Lord Reed); [2017] UKSC 60, para [55] (per Lord Reed). [↑](#footnote-ref-1420)
1421. Andrew Zarriello, ‘A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection against Athletic Scandal’ (2015) 56 Boston College Law Review 389, p.396; Sarah Katz, ‘Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements’ (2011) 20 Cardozo Journal of International & Comparative Law 185, p.190; Noah Kressler, ‘Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide’ (2005) 29 Columbia Journal of Law & the Arts 235, p.240-1. [↑](#footnote-ref-1421)
1422. *CCWS* (n 52), para [35] (per Lord Phillips). [↑](#footnote-ref-1422)
1423. *Cox* (n 208), para [23]. [↑](#footnote-ref-1423)
1424. Murad Ahmed, ‘Ronaldo: Why Juventus Gambled €100m on a Future Payday’ (*Financial Times*, 16 September 2018) <<https://www.ft.com/content/cc72b6a6-b5b9-11e8-b3ef-799c8613f4a1>> last accessed 20 May 2022. The former chairman Andrea Agnelli admitted that this transfer was ‘the first time that the commercial side and the sporting side of Juventus came together in assessing the costs and benefits [of a signing].’ [↑](#footnote-ref-1424)
1425. ibid. [↑](#footnote-ref-1425)
1426. Ben Hoyle, ‘Nike ‘Deeply Concerned’ by Cristiano Ronaldo Rape Claim’ (*The Times*, 05 October 2018) <<https://www.thetimes.co.uk/article/nike-deeply-concerned-by-cristiano-ronaldo-rape-claim-b52drmdx8>> last accessed 20 May 2022. [↑](#footnote-ref-1426)
1427. John Duerden, ‘Ronaldo’s 90 Minutes on the Bench in Seoul was Another Own Goal in Asia’ (*The Guardian*, 30 July 2019) <<https://www.theguardian.com/football/2019/jul/30/cristiano-ronaldo-juventus-european-clubs-asia-tours>> last accessed 20 May 2022. This appears to support empirical findings that television audiences now prefer to watch a game littered with star players (regardless of how they are distributed across the two teams), rather than a more competitive game with less ‘high-level’ players. See, e.g., Raul Caruso, Francesco Addesa and Marco Di Domizio, ‘The Determinants of the TV Demand for Soccer: Empirical Evidence on Italian Serie A for the Period 2008-2015’ (2019) 20 Journal of Sports Economics 25. [↑](#footnote-ref-1427)
1428. Ben Hoyle, ‘Ronaldo Rape Allegations Wipe €100m off Value of Juventus’ (*The Times*, 06 October 2018) <<https://www.thetimes.co.uk/article/ronaldo-rape-allegations-wipe-100m-off-value-of-juventus-vr9vh3w3k>> last accessed 20 May 2022. [↑](#footnote-ref-1428)
1429. *CCWS* (n 52), para [35]. [↑](#footnote-ref-1429)
1430. In this light, and due to the relationship requirement at stage one, it would be Manchester United who would be held vicariously liable if the victim decided to commence a civil claim. Only if the rape occurred whilst Ronaldo was contracted to Juventus would the Italian club be held liable. [↑](#footnote-ref-1430)
1431. *Mason* (n 26), para [50]. See also Sarah Hook and Sandy Noakes, ‘Employer Control of Employee Behaviour Through Social Media’ (2019) 1 Law Technology and Humans 141, p.156 (noting that there are ‘some employees (e.g., Israel Folau) whose position and status within an organisation are such that it is clearly part of their employment contract to protect the employer’s reputation at all times’). [↑](#footnote-ref-1431)
1432. ibid, para [38]. [↑](#footnote-ref-1432)
1433. See, e.g., Premier League (n 197), clause 4; Martin Kosla, ‘Disciplined for Bringing a Sport into Disrepute – A Framework for Judicial Review’ (2001) 25 Melbourne University Law Review 654, p.673. [↑](#footnote-ref-1433)
1434. *GB* (n 47), para [148] (per HHJ Butler). [↑](#footnote-ref-1434)
1435. See p.129 of this thesis [emphasis added]. [↑](#footnote-ref-1435)
1436. Jonson, Lynch and Adair (n 189) p.59. [↑](#footnote-ref-1436)
1437. Kosla (n 221) p.655; Jason Haynes, ‘Social Justice Movements and the Neutrality of Sport: The Case for Re-Defining the “No Disrepute” Clause’ (2021) 1 International Sports Law Review 4, p.6-7. [↑](#footnote-ref-1437)
1438. CAS 2008/A/1574, para [46]. See also CAS 2007/A/1291 *Zubkov v FINA*, para [20] (adding that ‘public opinion of the sport must be diminished as a result of the conduct in question’). [↑](#footnote-ref-1438)
1439. CAS OG 16/009 *Russian Weightlifting Federation (RWF) v International Weightlifting Federation (IWF)*, para [7.13]. [↑](#footnote-ref-1439)
1440. As evidenced in *Jongewaard* (n 192), para [18], the appellant had a ‘contractual obligation to not engage in (publicly known) conduct which, *in the absolute discretion of the President of the AOC*, brought or would be likely to bring him into disrepute.’ [emphasis added]. [↑](#footnote-ref-1440)
1441. [1970] AC 1004, p. 1055 (per Lord Pearson). [↑](#footnote-ref-1441)
1442. John Davidson, ‘Reconciling the Tension between Employer Liability and Employee Privacy’ (1998) 8 George Mason University Civil Rights Law Journal 145, p.147-8. [↑](#footnote-ref-1442)
1443. James Paterson, ‘Disciplining Athletes for Off-Field Indiscretions: A Comparative Review of the Australian Football League and the National Football League’s Personal Conduct Policies’ (2009) 4 Australian and New Zealand Sports Law Journal 105, p.136. [↑](#footnote-ref-1443)
1444. [2020] UKSC 13. [↑](#footnote-ref-1444)
1445. [2020] UKSC 12. [↑](#footnote-ref-1445)
1446. [2018] EWCA Civ 1670. [↑](#footnote-ref-1446)
1447. [2017] UKSC 60. [↑](#footnote-ref-1447)
1448. [2015] EWHC 2862 (QB). [↑](#footnote-ref-1448)
1449. [2016] UKSC 11. [↑](#footnote-ref-1449)
1450. On the basis of the guidance in Chapter 7, one could, of course, narrow the context down even further, perhaps to ‘off-field sexual abuse of an underage victim by an attacking Premier League footballer’. As illustrated in Chapter 2, though, the adoption of an overly narrow interpretation of each context is likely to render this approach useless, and could be tantamount to resorting to a case-by-case approach to liability. [↑](#footnote-ref-1450)
1451. *Semtex v Gladstone* [1954] 2 All ER 206, p.212 (per Finnemore J). [↑](#footnote-ref-1451)
1452. Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) p.31; *London Drugs Ltd v Kuehne & Nagel International Ltd* (1993) 97 DLR (4th) 261, p.284 (per La Forest J). [↑](#footnote-ref-1452)
1453. For the latest instalment in this saga – which involved the European Court of Human Rights upholding the award against Mutu – see *Mutu and Pechstein v Switzerland*, App nos 40575/10 and 67474/10 (ECtHR, 2 October 2018). [↑](#footnote-ref-1453)
1454. For a non-sporting example, see *Lister v Romford Ice and Cold Storage* [1957] AC 555 (employer held vicariously liable for the negligent actions of their employee lorry driver, but the defendants were able to successfully claim back £1600 in damages from the wrongdoer himself). [↑](#footnote-ref-1454)
1455. See, e.g., *Morris v Ford Motor Co. Ltd* [1973] 1 QB 792, p.798 (per Lord Denning MR). [↑](#footnote-ref-1455)
1456. [2008] EWCA Civ 689. [↑](#footnote-ref-1456)
1457. James Brown, ‘Genetic Doping: WADA we do About the Future of ‘Cheating’ in Sport?’ (2019) 19 International Sports Law Journal 258. [↑](#footnote-ref-1457)
1458. See, e.g., Australian Associated Press, ‘Cronulla Sharks Face Legal Action from Third Former Player over Supplements’ (*The Guardian*, 05 February 2014) <<https://www.theguardian.com/sport/2014/feb/06/cronulla-sharks-legal-supplements-broderick-wright>> last accessed 20 May 2022; Mark Russell, ‘Former Essendon Rookie Hal Hunter to Sue Club over Supplements Program’ (*The Age*, 10 February 2016) <<https://www.theage.com.au/national/victoria/former-essendon-rookie-hal-hunter-to-sue-club-over-supplements-program-20160210-gmqeea.html>> last accessed 20 May 2022. This possibility was also touched upon by Joellen Riley and David Weiler, ‘Modern-Day Gladiators: The Professional Athlete Employment Relationship Under the World Anti-Doping Code’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Bloomsbury 2016) p.179-80. [↑](#footnote-ref-1458)
1459. As cited in Chuck Carlson, *Game of My Life* (Sports Publishing LLC 2004) p.149. [↑](#footnote-ref-1459)