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What does the Social Action, Responsibility & Heroism Act 2015 mean for sports volunteers and NGBs?

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The [Social Action, Responsibility and Heroism Act 2015 \(the "Act"\)](#)¹ received Royal Assent on 12 February.²

According to the Ministry of Justice, this should be welcome news for millions of people who volunteer,³ with sports volunteering comprising the single biggest sector of volunteering in the UK.⁴ As highlighted by European 10,000m champion Jo Pavey, volunteers are “*absolutely crucial*”,⁵ since “*volunteers and coaches make sport happen*”,⁶ research indicating that sports volunteering in England has an estimated economic value of around £2 billion a year.⁷

THE LIABILITY RISKS OF VOLUNTEERING

Perhaps alarmingly, however, evidence suggests that being worried about risk and liability is a significant reason for not volunteering.⁸ In particular, sports coaches appear increasingly concerned about the prospect of legal liability,⁹ with contemporary jurisprudence even asking why volunteers would be willing to become involved in sports coaching given the associated liability risks.¹⁰ Consequently, as with section 1 of the [Compensation Act 2006](#),¹¹ (more comment on which is below) the Act is intended to signify a strong message from the Government that persons will be safeguarded from unreasonable exposure to negligence liability or breach of statutory duty when acting for the benefit of society.

Importantly, given the extensive benefits derived from involvement in a wide range of sporting activities, the scope of this statutory provision should extend to “*Everyday Sporting Heroes*”. But, in reality, will volunteers such as sports coaches and instructors be better protected from litigation risk with the implementation of the Act?

THE REMIT OF THE 2015 ACT

Lord Faulks summarised the core aim of the Act as:

“to provide reassurance to people who act in socially beneficial ways, behave in a generally responsible manner, or act selflessly to protect someone in danger by ensuring that the courts recognise their actions and always take that context into account in the event that something goes wrong and they are sued.”¹²

Although the Act's title tells us that its focus extends beyond sport, as a socially desirable activity, oftentimes reliant on volunteering, there seems little doubt that sports-related activities can fall within its remit.

It is a short Act, comprising of just five sections. We will take each in turn:

Section 1, *When this act applies*, states:

"This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care."

The important point here is that the Act *requires* the courts, when considering *any claim* that a person was negligent or in breach of statutory duty, to take into account *each* of the following three provisions when determining the steps that the person was required to take to meet the relevant standard of care.

Section 2, *Social action*, states:

"The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members."

Section 3, *Responsibility*, states:

"The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others."

This section, by requiring the court to have regard, when something goes wrong, to whether the person sued demonstrated a predominantly responsible approach towards protecting the safety or other interests of others, represents an actual change in the law. In making this change, Lord Faulks confirmed that the courts will be obliged to weigh in the balance whether a person had demonstrated a predominantly responsible approach when determining whether the defendant met the required standard of care. Significantly, the Minister of State for Justice continued, "*[w]hile that does not rewrite the law in detail, it is a substantive change*".¹³

Section 4, *Heroism*, states:

*"The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger and without regard to the person's own safety or other interests."*¹⁴

In summary, the four sections confirm the Act's core aim, delineated by Lord Faulks, as being intended to provide reassurance to people acting: (i) in socially beneficial ways; (ii) in a predominantly responsible manner; or (iii) acting selflessly to protect someone in danger, by ensuring that the courts recognise, and account for, both the actions and context of the alleged negligence.¹⁵

WHAT EFFECT IS THE ACT LIKELY TO HAVE IN PRACTICE?

Interestingly, section 1 of the [Compensation Act 2006](#) (CA 2006) already stipulates:

*"A court considering a claim in negligence or breach of statutory duty **may**, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—*

prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

*discourage persons from undertaking functions in connection with a desirable activity."*¹⁶[emphasis added]

The rather obvious conclusion is that the Act is remarkably similar in effect to section 1 of the CA 2006, the only practical difference being that Courts **must** take into account the former, whereas they **may** take into account the latter. This point was debated extremely enthusiastically during the passage of the Bill through the House of Commons and House of Lords, where [numerous comments](#) were made to the effect that any change to the law will be extremely limited.¹⁷ Notably, Lord Pannick observed somewhat entertainingly that;

*"the Bill puts me in mind of what Basil Fawlty says of his wife Sybil in the celebrated television programme, 'Fawlty Towers'. I hope that noble Lords will excuse this unparliamentary language. He said: 'She should be a contestant on "Mastermind". Special subject: the bleedin' obvious'. The Bill is a statement of the legally obvious. I find it very difficult to believe that, if enacted, it is going to make any difference whatever to any case that becomes before the courts".*¹⁸

Indeed, such is the extent of the overlap and duplication with section 1 of the CA 2006 that Lord Lloyd of Berwick went so far as to regard the Bill as being "*of no importance at all. It is useless*".¹⁹ Although echoing this dissent, the Bill's successful passage through the Lords was reflected in Lord Pannick's acknowledgement that "*[t]his is a Government Bill that has been through the House of Commons. Its contents are not objectionable; they are simply pointless. Such a Bill is not worthy of provoking a fundamental conflict between the two Houses of Parliament*".²⁰ In short, there appeared considerable support in the House of Lords for the argument that the "*Bill is a tiddler*", with "*no particular harm and no particular good in passing it*".²¹

WILL THE ACT BROADEN THE COURT'S PERSPECTIVE?

On the Government's view, it appears plain that, in seeking to ensure that the standard of care required of defendants in the particular circumstances under the Act is set at a sensible and reasonable level, requiring the courts to adopt a slightly broader view of the defendant's conduct is deemed advantageous.²²

This may indeed be the case. Nonetheless, in practice, courts already do this.²³ For instance, the well-established components of the law of negligence presently require the magnitude of risk to be balanced against the cost of preventative measures,²⁴ and the

social value of the activity,²⁵ when establishing the standard of care incumbent on defendants.

Further, interpretation by the courts of the somewhat ambiguous and opaque wording regarding “*the benefit of society*”; “*predominantly responsible approach*”; and “*acting heroically*”, may prove problematic,²⁶ and could lead to a number of unintended consequences, including wasted court time and expense in clarifying the full scope and intended effect of the Act.²⁷

Nevertheless, the Act is drafted to promote socially beneficial activities,²⁸ and the corresponding jurisprudence of section 1 of the CA 2006 has been engaged by the judiciary to confirm that many physical recreations, including rugby and cricket, have a recognised social value.²⁹ For instance, when considering a negligence claim in the context of amateur rugby football, whereby the claimant had a bad accident whilst taking part in a U16 Colts pre-season training session with his local club, Longmore LJ reinforced that:

*“It is important that neither the game's professional organisation nor the law should lay down standards that are too difficult for ordinary coaches and match organisers to meet. Games of rugby are, after all, no more than games and, as such are obviously desirable activities within the meaning of section 1 of the Compensation Act 2006”.*³⁰

Additionally, the challenges of an efficient and professionally run outdoor pursuits centre,³¹ and the training of school children for the Ten Tors Expedition³² on Dartmoor,³³ have also been recognised as socially desirable activities under section 1 of the CA.

By analogy, there seems little doubt that sections 2 and 3 of the Act will apply to the coaching of sport, with the Act's provisions affording practitioners another statutory tool to call in assistance in support of their case. As such, the Act can be expressly pleaded in Particulars of Claim/Defence and relied on to further inform the court about the standard of care exercised in the case in question.

Similarly, the Act seems intended to give reassurance to organisations acting for the benefit of society, and so extend to national governing bodies of sport (NGB). Importantly, although the drafting of this legislation appears peculiarly mindful of voluntary organisations,³⁴ as is consistent with section 1 of the CA 2006, its application should not be confined to solely volunteers or voluntary organisations.

For instance, following *Watson v British Boxing Board of Control*,³⁵ should the safety protocols adopted by a NGB be alleged to be inadequate,³⁶ a material consideration for the court might be whether or not the NGB had demonstrated a predominantly responsible approach towards protecting the safety or other interests of others. In considering whether or not the health and safety protocols adopted by associations were sufficient in reasonably protecting others from personal injury (most typically athletes/players), the intention of section 3 of the Act in this context would seem to be geared towards reassuring organisations adopting a generally responsible approach to the safety of others during an activity that “*the law is on their side*”.³⁷

Nonetheless, there appeared to be a dearth of case law examples provided by sponsors of the Bill to illustrate how judicial consideration of whether a predominantly responsible

approach towards protecting the safety or other interests of others by defendants may have affected the outcome of a specific case. This may be because of the highly fact sensitive nature of claims brought in negligence.

However, perhaps one such case to consider, involving the instructing of sport, may have been *Anderson v Lyotier*.³⁸ In *Anderson v Lyotier*, a ski instructor (M. Portejoie) was found liable in negligence for the catastrophic personal injury suffered by the claimant when he collided with a tree when skiing off piste. Generally, skiing may be regarded as a socially desirable activity,³⁹ thereby likely to engage section 1 of the CA 2006,⁴⁰ and now sections 2 and 3 of the Act. Even so, the court held that the particular slope in question was a “*step too far*”, being beyond the capability of the claimant (and other members of the adult group), thereby creating a foreseeable risk of serious injury.⁴¹ Significantly, for present purposes, Foskett J made it clear that he “*did not find it particularly palatable to have to find M. Portejoie in breach of duty*”, accepting that the defendant was a very experienced ski instructor and “*a generally conscientious one who is concerned for the safety and well-being of his students*”.⁴² This marks a striking resemblance to section 3 of the Act. Since the Government has stated that it would welcome if the court’s consideration of the Act’s provisions tipped the balance in favour of a defendant in a finely balanced case,⁴³ it is perhaps conceivable (though essentially academic) that application of the Act might have prevented a finding of negligence liability in *Anderson*.

Although at first glance *Anderson* appears to endorse the scope of the Act, it is contended that this more expansive inquiry of the wider context, by requiring courts to adopt a slightly broader view of the defendant’s conduct, is arguably already achievable by engagement of section 1.⁴⁴ This assertion appears to concur with the general view of Lord Lloyd.⁴⁵

SHOULD THERE BE APPROPRIATE CIVIL LIABILITY IMMUNITY IN ENGLAND AND WALES?

Although there remains considerable uncertainty regarding what type of conduct will satisfy the Act’s provisions,⁴⁶ this author’s view is that it is somewhat disconcerting why no serious consideration or scrutiny was afforded to the possibility of appropriate civil liability immunity in this jurisdiction,⁴⁷ as in the Republic of Ireland.⁴⁸ Significantly, in recommending legal liability premised on a gross negligence standard for individual volunteers, the Law Reform Commission of Ireland considered that:

“[T]he imposition of a gross negligence test succeeds in striking a balance between the policy of encouraging altruistic behaviour with the public’s right to seek redress. With regard to encouraging altruistic behaviour, the leniency of the gross negligence test may be understood as a reward for good behaviour. Furthermore, it militates against the deterrent effect that the fear of litigation may cause. The Commission is of the view that this is an appropriate approach regarding Good Samaritans and individual volunteers, whether formal or informal, taking into account the benefits that flow from their activities and the sacrifices that they have made, from their own pocket and time, in conferring them. The application of the ordinary negligence test, on the other hand, would be to impose too heavy a burden that would threaten the continuation of such benevolent activities”.⁴⁹

Curiously, the possibility of limiting negligence liability for volunteers in this jurisdiction was never fully discussed, signifying a missed opportunity for meaningful discussion and critical consideration of a potential substantive change to the law designed to better protect and reassure “*Everyday Sporting Heroes*”. In dismissing this, Lord Faulks stated, “*I reaffirm that the Bill does not seek to confer immunity from civil liability on anyone whose actions fall within its scope*”.⁵⁰

SUMMARY

Generally, the laudable intentions underpinning passage of the Act appear to be succinctly articulated by Lord Faulks as follows:

*“This Bill will contribute to an increasing reassurance which I hope the public has and that volunteers have in approaching life, which inevitably has many risks. ... This debate has divided roughly—only roughly— between lawyers who are hostile to the Bill and nonlawyers who seem rather more, with exceptions, in favour of it. We, as lawyers, should reflect a little on the occasional disconnect that exists not only between politicians and the public but sometimes between lawyers and the public. Should Parliament be legislating in this fashion at all if it is simply sending a message? I entirely accept what my noble friend Lord Hurd said about the fact that one should be very cautious indeed before legislating simply to send a message. But, on the other hand, I suggest that it would be idle to pretend that part of what we do is not conveying an important message”.*⁵¹

Significantly, section 1 of the CA 2006 was also intended to send a strong message to encourage volunteering, and although perhaps well intentioned, on balance, the author contends that the Act ultimately appears unlikely – at least from a strict legal perspective – to better safeguard amateur or professional sports coaches and instructors from the emerging prospects of legal liability.⁵²

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5. Ibid.
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7. Sport and Recreation Alliance: <http://www.sportandrecreation.org.uk/lobbying-and-campaigning/sport-research/UK-fact-figures> (last visited 13 February 2015).
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9. S Greenfield, 'Law's impact on youth sport: should coaches be "concerned about litigation"?' (2013) 2(2) *Sports Coaching Review* 114, 121.
10. J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 249; R Heywood and P Charlish, 'Schoolmaster Tackled Hard Over Rugby Incident' (2007) 15 *Tort Law Review* 162, 171.
11. Compensation Act 2006: http://www.legislation.gov.uk/ukpga/2006/29/pdfs/ukpga_20060029_en.pdf.
12. Hansard HL vol 756 col 1545 (4 November 2014), per Lord Faulks, available at: <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/lhan51.pdf> (last visited 17 March 2015).
13. Ibid, col 1573.
14. At first glance, section 4 would appear likely to be of limited application in the context of sport.
15. See note 12, col 1545, per Lord Faulks.
16. See note 11, section 1.
17. See note 12, col 1576-8, per Lord Faulks.
18. Ibid, col 1563, per Lord Pannick.
19. Ibid, col 1549.
20. Ibid, col 1565, per Lord Pannick (also see col 1555 per Lord Beecham; col 1560 per Lord Brown; col 1568 per Lord Aberdare; and col 1572 per Lord Kennedy of Southwark).
21. Ibid, col 1569, per Lord Hurd of Westwell.
22. Ibid, col 1572-3 per Lord Faulks.
23. See for instance, N Poole, 'Heroes and Villains', 3 July 2014, available at: <http://nigelpooleqc.blogspot.co.uk/2014/07/heroes-and-villains.html?spref=tw> (last visited 13 February 2015).
24. E.g., *Bolton v Stone* [1951] AC 850.
25. E.g., *Tomlinson v Congleton BC* [2003] UKHL 47.
26. See note 12, col 1553, per Lord Beecham.
27. Ibid, col 1558-9, per Lord Brown of Eaton-under-Heywood.
28. Ibid, col 1546, per Lord Faulks.
29. *Scout Association v Barnes* [2010] EWCA Civ 1476 at [29] per Jackson LJ.
30. *Sutton v Syston RFC Limited* [2011] EWCA Civ 1182 at [13].
31. *Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360.
32. See <http://www.tentors.org.uk/thechallenge/aboutthechallenge/> (last visited 16 March 2015).

33. *Wilkin-Shaw v Fuller* [2012] EWHC 1777. Importantly, although Owen J found section 1 of the Compensation Act 2006 to be engaged, he continued (at [46]), “but it does not seem to me that section 1 adds anything to the common law. Some risk is inherent in many socially desirable activities. The Ten Tors event, and the training that those who participate must undergo, is a classic example”.
34. See note 12, col 1545.
35. *Watson v British Boxing Board of Control* [2001] QB 1134. Michael Watson successfully sued the British Boxing Board of Control for providing inadequate medical equipment and assistance at ringside when he fought Chris Eubank on 21 September 1991 for the World Boxing Organisation Super-Middleweight title at Tottenham Hotspur Football Club in London.
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37. See note 12, col 1546.
38. [2008] EWHC 2790.
39. *Scout Association v Barnes* [2010] EWCA Civ 1476 at [29].
40. Interestingly, section 1 was not cited in *Anderson v Lyotier*. Nonetheless, a number of more recent cases involving sport (broadly defined) have engaged section 1, including: *Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360; *Sutton v Syston RFC Limited* [2011] EWCA Civ 1182.
41. *Anderson v Lyotier* [2008] EWHC 2790 at [118] and [133].
42. *Ibid*, at [119]-[120] (emphasis added).
43. See note 12, col 1573.
44. E.g., see *Uren v Corporate Leisure (UK) Limited* [2013] EWHC 353 at [195] per Foskett J recognising the “great social value” of an RAF “Fun day”; *Scout Association v Barnes* [2010] EWCA Civ 1476 at [32] per Jackson LJ (dissenting). Also see, M Lee, ‘Safety, regulation and Tort: Fault in Context’ (2011) 74(4) *Modern Law Review* 555, 558.
45. See note 12, col 1550.
46. *litigationfutures*, ‘Government reforms receive Royal Assent but implementation timetable kept under wraps’, 13 February 2015, available at: <http://www.litigationfutures.com/news/government-reforms-receive-royal-assent-implementation-timetable-kept-wraps> (last visited 13 February 2015).
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50. See note 12, col 1547.
51. *Ibid*, col 1576.
52. N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232.
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