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Legal Liability of Coaches: A UK Perspective

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Abstract

Attracting more coaches is fundamental to achievement of the European dimension in sport and the further promotion of sport in the European Union. Given the emerging relationship between the law and sports coaching, recruitment of such volunteers may prove problematic. Accordingly, this article critically considers the legal liability of sports coaches. To inform this debate, the issue of negligent coaching is critically scrutinised from a UK perspective, uncovering a number of distinct legal vulnerabilities facing volunteer coaches. This includes the inherent limitations of 'objective reasonableness' when defining the standard of care required in the particular circumstances. More specifically, fuller analysis of the justification of customary practice, and the legal doctrine of *in loco parentis*, reveals important ramifications for all organisations providing training and support for coaches. In short, it is argued that proactively safeguarding coaches from professional liability should be a priority for national governing bodies, and, following the recently published EU Work Plan for Sport for 2014–2017, the Expert Group on Human Resource Management in Sport. Importantly, given the EU's supporting, coordinating and supplementing competence in developing the European dimension in sport, a Commission funded project to address the implications of the 'compensation culture' in sport is also recommended.

Keywords: Legal liability; Sports coaches ; Volunteer; Negligence; Professional liability

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Introduction

Momentum for achievement of the European dimension in sport is considerable and will continue to be heavily reliant on volunteer sports coaches working at grassroots level. Since attracting more coaches is fundamental to the further promotion of sport in the European Union this article critically considers whether these volunteers are sufficiently protected from legal liability. To inform this debate, the issue of negligent coaching is carefully scrutinised from a UK perspective, recognising the professional liability of coaches as an emerging concern. In particular, the possible limitations of analogous authority, relative paucity of cases directly on point, and the inherent limitations of 'objective reasonableness' when defining the standard of care required in the circumstances, are highlighted as being potentially problematic. Having contextualised this developing intersection between the law of negligence and sports coaching in some detail, the article next conducts a fuller analysis of the justification of customary practice and the legal doctrine of *in loco parentis*, uncovering a number of specific legal susceptibilities facing coaches. Subsequently, the implications that flow from this analysis for national governing bodies of sport (hereafter: NGBs) are discussed. In being mindful to present a balanced critique of these evolving concerns, recognition is also made of the considerable existing control mechanisms in the UK intended to shield and reassure volunteers, followed by a brief consideration of the utility of public liability insurance. Ultimately, in seeking to better safeguard both volunteer and professional coaches from litigation risk, this article's legal analysis should contribute to the identification of best practice risk management approaches by those organisations providing training and support for coaches, including NGBs, and, following the recently published EU Work Plan for Sport for 2014-2017, the Expert Group on Human Resource Management in Sport.

Context

Article 6 and Article 165 of the Treaty on the Functioning of the European Union afford the EU a supporting, coordinating and supplementing competence for sport in order to develop

the European dimension in sport.[1] Developing the European dimension in sport has strengthened the cooperation between the EU and the Member States,[2] underpinned by recognition of the specificity of the role sport plays in enhancing health, education, social integration, and culture.[3] Indeed, in promoting the EU Work Plan for Sport for 2011-2014 the societal role of sport was a prominent theme which prioritised areas including health-enhancing physical activity (hereafter: HEPA),[4] social inclusion in and through sport, and voluntary activity in sport.[5] Publication on 14 June 2014 of the EU Work Plan for Sport for 2014-2017 further consolidates the social utility of sport, reinforcing a number of priority themes and key topics, including HEPA and volunteering.[6] Moreover, in also contributing to the objective of developing a European dimension in sport, a priority of the Erasmus+ Programme includes the promotion of healthy behaviours through grassroots sports as a means to promote healthy lifestyles, social inclusion and the active participation in society of young people.[7]

Undoubtedly, sport is progressively seen in the EU as a medium to achieving social policy objectives,[8] the sport movement being 'indispensable' in achieving and fully exploiting

[1] Brussels, 18.1.2011 COM(2011) 12 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Developing the European Dimension in Sport, p. 2, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0012&from=EN (last visited 1 August, 2014).

[2] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the implementation of the European Union Work Plan for Sport 2011-2014 COM(2014) 22 final, para. 1, http://ec.europa.eu/sport/library/documents/com201422_en.pdf (last visited 1 August, 2014).

[3] White Paper on Sport, COM (2007) 391, p. 3, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0391&from=EN (last visited 1 August, 2014). Also see, Governance of Sport HL Bill (2014-15) 20 (UK), cl. 5 (Sport and public health), http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0020/15020.pdf (last visited 29 July, 2014).

[4] Providing the EU with the further legal basis of Article 168 TFEU which stipulates that 'Union action, which shall complement national policies, shall be directed towards improving public health ...'.

[5] Work Plan for Sport for 2011-2014 (2011/C 162/1) p. 2, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42011Y0601(01)&from=EN (last visited 1 August, 2014).

[6] Work Plan for Sport for 2014-2017 (2014/C 183/03), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42014Y0614(03)&from=EN (last visited 1 August, 2014).

[7] Erasmus+ Programme Guide (European Commission, 1 January 2014) p. 29, http://ec.europa.eu/programmes/erasmus-plus/documents/erasmus-plus-programme-guide_en.pdf (last visited 1 August, 2014).

[8] VOLUNTEERING IN THE EUROPEAN UNION (SUMMARY) Educational, Audiovisual & Culture Executive Agency (EAC-EA) Directorate General Education and Culture (DG EAC) Final Report submitted by GHK *17 February 2010,* p. 197, http://ec.europa.eu/citizenship/pdf/doc1018_en.pdf (last visited, 1 August, 2014).

strategic aims.[9] Sport in European society is reliant on amateur structures,[10] the majority of Member States being heavily dependent on volunteers for sporting provision,[11] with one of the most common activities carried out by volunteers being coaching/training (73%).[12] In short, successful realisation of the European dimension in sport, and more specifically the promotion of the HEPA initiative, will ultimately depend to a considerable extent on mobilising amateur sports coaches working at grassroots level.[13] Interestingly, the EU has long acknowledged the importance of volunteering,[14] and in particular, the 'evolving and complex environment' in which voluntary activities are undertaken.[15] Significantly, it is contended that one such evolving complexity yet to be carefully analysed is the emerging intersection between the law and sports coaching. *Annex 1* to the Work Plan for Sport 2014-17 appears to endorse this submission by explicitly highlighting the need to include 'best practices on legal [and fiscal] mechanisms' when the Expert Group makes recommendations designed to encourage volunteering in sport.[16] Accordingly, in an attempt to help inform this debate, this article will critically scrutinise the potential civil liability of sports coaches from a UK perspective.

UK Perspective

According to the National Council for Voluntary Organisations, it is estimated that 12.7 million people are involved in volunteering activities in England once a month, and 19.2 million once a year, with the most recent statistics available suggesting volunteering is at peak levels.[17] In 2008/09 the sport/exercise sector was the most popular area for formal volunteers,[18] it

[9] Brussels, 28.8.2013 COM (2013) 603 final 2013/0291 (NLE) Proposal for a COUNCIL RECOMMENDATION on promoting health-enhancing physical activity across sectors, p 10, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013277%202013%20INIT (last visited 1 August, 2014).
[10] *Supra* note 3.
[11] *Supra* note 8*,* p. 12.
[12] Id p. 189.
[13] *Supra* note 9, p. 4. Although the focus of this article centres on the majority of coaches in the EU who are volunteers, professional liability in this context would, of course, also extend to professional coaches.
[14] *Supra* note 8*,* p. 6.
[15] Id p. 192.
[16] *Supra* note 6. Preparation of these Expert Group recommendations to be completed by 2015.
[17] See http://data.ncvo.org.uk/a/almanac14/how-many-people-regularly-volunteer-in-the-uk-3/ (last visited 9 July 2014). See further Social Action, Responsibility and Heroism Bill [9] (2014-15) Research Paper 14/38 (8 July 2014) pp. 3-4, http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill (last visited 1 August, 2014).
[18] http://www.ivr.org.uk/ivr-volunteering-stats (last visited 1 August, 2014).

being recognised that volunteers and coaches are vital to the existence and continuation of grassroots sport, since 'volunteers and coaches make sport happen'.[19] In short, it would appear that the vast majority of coaching is delivered by volunteers,[20] often with limited training,[21] the latest four-year study of coaching in the UK revealing that approximately half of the coaches in this jurisdiction do not hold a coaching qualification.[22] Importantly, previous experience as players and enthusiasm are often regarded as sufficient prerequisites for volunteer coaches.[23] This will be argued to potentially accentuate exposure to negligence liability.

Professional Liability

In the context of sport, it is clear that the ordinary principles of the law of negligence are applicable.[24] Given the tort of negligence is underpinned by the 'Neighbour principle',[25] requiring the exercise of reasonable care to avoid injuring anyone who ought reasonably to be considered as being affected by one's actions or omissions,[26] it is plainly apparent that coaches must display reasonable care when assuming such a role.[27] Given the supervisory, instructional and safety functions of a coach, providing the foundation of the coach-athlete relationship, it is just, fair and reasonable[28] that coaches may be held liable for a breach in the standard of care causing personal injury to participants. A finding of liability in negligence would involve establishing that the sports coach's conduct had fallen below the required objective standard ascertained by the court,[29] in guarding against reasonably foreseeable risk,[30] in the specific

[19] http://www.sportengland.org/support__advice/volunteers.aspx (last visited 1 August, 2014).
[20] Coach Tracking Study: A four-year study of coaching in the UK (2012), p. 17, the employment status of coaches in the UK classifying 76% as volunteers (unpaid), http://www.sportscoachuk.org/sites/default/files/Coach-tracking-study.pdf (last visited 1 August, 2014).
[21] Nygaard and Boone 1985, p. 13.
[22] *Supra* note 20, p. 17, the national average of coaches holding a coaching qualification being 53%.
[23] Healey 2009, p. 159.
[24] E.g., *Smoldon v. Whitworth* [1997] P.I.Q.R. P133; *Vowles v. Evans* [2003] 1 W.L.R. 1607; *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ 1054; *Condon v. Basi* (1985) 2 All ER 453. See generally Griffith-Jones 2007, pp. 715 & 740.
[25] *Donoghue v. Stevenson* [1932] AC 562.
[26] *Blyth v. Birmingham Waterworks* (1856) 11 Ex 781, 784; *Donoghue v. Stevenson* [1932] AC 562, 580.
[27] Griffith-Jones 2007, pp. 737-8.
[28] *Caparo v. Dickman* [1990] 2 AC 605, 617-618 per Lord Bridge.
[29] *Vaughan v. Menlove* (1837) 3 Bing N.C. 468; *Nettleship v. Weston* [1971] 2 Q.B. 691.
[30] *Overseas Tankship (UK) Ltd v. The Miller Steamship Co Pty Ltd ('The Wagon Mound No 2')* [1967] 1 AC 617.

circumstances.[31] Since this standard of care would reflect the 'special skill or competence' required by the coaching 'profession',[32] the legal liability of coaches will be approached from the perspective of professional liability.[33]

Emerging Issue

Legal liability in negligence for participant injury is a significant issue facing all coaches.[34] Most claims brought against sports coaches for sports related injuries are for negligence,[35] with a likely future increase in such litigation in the UK.[36] Clarifying the relationship between a coach and those under the coach's instruction represents a fundamental gap in both the case law and the academic literature relating to the UK.[37] The very narrow principles derived from judgments directly on point establishes that for instance, at the elite level, coaching that is 'robust' and 'fairly tough' would 'not begin to amount to negligence'.[38] Of more universal application, is the recognition by the courts that overtraining, or training requiring an unreasonable level of intensity, may provide a cause of action for a claim in negligence.[39] Nevertheless, the pivotal question of what constitutes reasonableness in the circumstances has

[31] E.g., see *Bolton v. Stone* [1951] AC 850; *Paris v. Stepney Borough Council* [1951] AC 367; *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835; Compensation Act 2006, section 1.

[32] *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586 per McNair J. The test for negligence being 'the standard of the ordinary skilled man exercising and professing to have that special skill'. Importantly, further endorsement of sports coaching being classified as a profession includes: the moral aspect of coaching, reflected in codes of conduct and ethics produced by NGBs, and additionally, by the 'community' context in which much coaching is delivered; opportunities (or requirements) for membership of professional associations e.g., for coach accreditation/continuing professional development/insurance; and the apparent enhanced status of sports coaches in modern society: see Powell and Stewart 2012, pp. 2-3.

[33] See further, Powell and Stewart 2012, pp. 1-6. Technically, although this article's specific focus relates to professional negligence, claims against coaches may also be brought in, for instance, contract, this wider realm of causes of action supporting the preferred adoption of the more contemporary term professional liability.

[34] McCaskey and Biedzynski 1996, p. 9.

[35] Mitten 2013, pp. 215-16.

[36] Kevan 2005, p. 61. See for instance, most recently: *Davenport v. Farrow* [2010] EWHC 550; *Petrou v. Bertoncello and Others* [2012] EWHC 2286; *Drummond Cox v. Dundee City Council* [2014] CSOH 3 (liability in delict); and *Sutton v. Syston Rugby Football Club Limited* [2011] EWCA Civ 1182. In *Sutton*, although the ultimate focus was on the Club's common law duty of care, a cause of action in negligence may be established where a coach fails to conduct an adequate pitch inspection (at [13]).

[37] See generally, James 2010, p. 93.

[38] *Brady v. Sunderland Association Football Club Ltd*, Unreported, Court of Appeal, 17 November 1998. Importantly, in the sixteen years since this judgment was delivered, coaching practices and methods (including the tracking and monitoring of performance and injuries) have developed considerably.

[39] *Davenport v. Farrow* [2010] EWHC 550. The overtraining of elite young athletes may constitute a child protection issue, particularly in the context of elite international sport: see further, Gray and Blakeley 2008, p. 813.

yet to be fully scrutinised, allowing only speculative conclusions,[40] with academic commentary tending to address the issue more generally,[41] often with the emphasis being on school sport.[42] This absence of legal authority and guidelines concerning the standard of care required of sports coaches, defining the content of the tort,[43] compounds the age old problem of predicting conduct deemed 'negligent'.[44]

Limitations of analogous authority

The relative dearth of case law categorically addressing the negligence of sports coaches, as distinguished from teachers,[45] and instructors,[46] has required previous academic commentary on the issue of coaches' liability in negligence to consider the issue somewhat generally. Awkwardly, courts refrain from crystallising what amounts to reasonable care in the specific circumstances by means of more definite and discrete rules, the malleable test of reasonableness viewed as being adaptable to the circumstances of each individual case, and offering such flexibility that more definitive guidelines are regarded as unnecessary.[47] Clerk and Lindsell on Tort highlights the judiciary's avoidance of 'reducing to rules of law the question whether or not reasonable care has been taken',[48] with citation of authority discouraged as a means of clarifying reasonable care given the uniqueness of particular situations.[49] Nonetheless, individual cases may provide useful guides on what may comprise conduct that is regarded as reasonable or unreasonable.[50]

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[40] Gardiner et al. 2006, p. 649.
[41] E.g., Anderson 2010, pp. 92-7.
[42] E.g., Grayson 1999, pp. 190-9; Cox and Schuster 2004, pp. 230-47; Beloff et al. 2012, pp. 146-8; Hartley 2009, pp. 55-63.
[43] Steele 2010, p. 115.
[44] Morris 2011, pp. 92-3.
[45] E.g., *Hammersley-Gonsalves v. Redcar and Cleveland Borough Council* [2012] EWCA Civ. 1135; *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389; *Mountford v. Newlands School and Another* [2007] EWCA Civ. 21.
[46] E.g., *Anderson v. Lyotier* [2008] EWHC 2790; *Morrow v Dungannon* [2012] NIQB 50; *MacIntyre v. Ministry of Defence* [2011] EWHC 1690; *Woodroffe-Hedley v. Cuthbertson*, Unreported, Queen's Bench Division 20 June 1997.
[47] Jones and Dugdale 2010, p. 517.
[48] Id. See *Qualcast (Wolverhampton) Ltd v. Haynes* [1959] AC 743.
[49] Foskett v. Mistry [1984] R.T.R. 1.
[50] *Supra* note 47. Indeed, cases concerning PE teaching and sports instructing remain instructive in clarifying the scope of the duty owed by a sports coach and are indicative of this emerging aspect of sports law. It is forcefully submitted that any attempt to regard the terms of coach, instructor and teacher as being categorical likely

Problematically, given the considerable emphasis on the scrutiny of the sporting (coaching) context demanded by the law of negligence, despite analogous case law generally being illustrative of this developing aspect of sports law,[51] there would appear much scope for judges to distinguish tentative legal principle derived from seemingly comparable judgments. The scope for a potentially narrow application of legal principle from analogous authority was revealed in *Anderson v. Lyotier*,[52] Foskett J distinguishing *Woodbridge School v. Chittock*,[53] by noting that '[i]t was conceded that the context of the present case is not identical since Chittock was concerned with a *schoolteacher*, *not a ski instructor*'.[54] Significantly, it remains unclear to what extent the legal principles developed and established in the specific circumstances of school sport can confidently be applied to contexts of voluntary participation in activities delivered by volunteers.[55]

Standard of Care

The decisive factor on which cases of negligence brought against coaches will be decided concerns the standard of care,[56] this being informed and moulded by the full factual context and circumstances in which sports coaches are operating.[57] Although courts have recognised that 'it is preferable that there should be a reasonably certain and reasonably ascertainable standard of care',[58] the nebulous and woolly nature of reasonableness as a legal test fails to provide much by way of guidance when attempts are made to define the standard of care.[59] This is intensified by a lack of strong authority with reference to the professional

misrepresents the complex contextualised dynamics of coaching (see further, Jones et al. 2004, p. 1) which is underpinned by a 'mutually dependent relationship' (see Ryall and Oliver 2011 pp. 187-8). Nonetheless, a search for legal principle and certainty appears to sometimes demand (artificial) definitional distinctions.

[51] James 2013, p. 92.

[52] *Anderson v. Lyotier* [2008] EWHC 2790.

[53] *Woodbridge School v. Chittock* [2002] EWCA Civ. 915. Following *Chittock*, defence counsel argued that the decision by the ski instructor in *Anderson* to take the mixed ability adult ski group off-piste on the final day was 'within a reasonable range of options'. Importantly, Simon Paul Chittock was a sixth form student aged 17 ½ at the time of the serious accident, a relatively experienced skier for his age, with parental permission to ski unsupervised on all of the slopes at the resort. Nevertheless, the analogy submitted was denied by Foskett J.

[54] *Anderson v. Lyotier* [2008] EWHC 2790 at [122] (*emphasis added*).

[55] Barnes 1996, p. 296.

[56] *Supra* note 36, p. 62.

[57] *Supra* note 27, p. 23.

[58] *Nettleship v. Weston* [1971] 2 Q.B. 691, 709 per Megaw LJ.

[59] Clancy 1995, p. 28.

liability of sports coaches, essentially requiring coaches to act in accordance with 'informed common sense'.[60] Paradoxically, the tort of negligence's emphasis on the application of common sense principles[61] potentially reinforces and perpetuates the tendency for coaches to adopt negligent entrenched practice, since common sense may be regarded as 'to a large extent a shorthand for dominant cultural values, the ideology – or sets of ideologies – into which we are socialised from an early age'.[62] Interestingly, there is some evidence to indicate that soccer coaching behaviours can often be belligerent, reflective of the culture in professional soccer, preparation for the rigours of the game regarded as requiring young players to be exposed to such harsh and authoritarian approaches to coaching.[63] Significantly, the highest level of voluntary activity across Member States is undertaken in the sport of football, with a number of former professional sportspersons regarding community coaching as a worthwhile activity.[64] Clearly, should personal injury to a participant be caused by coaching techniques evincing a reckless disregard for the wellbeing and safety of those in the coach's charge,[65] there would be strong and justifiable grounds for a finding of liability in negligence. Indeed, irrespective of whether the coaching being delivered is by volunteers or professionals, in order to protect the legitimate right of participants to seek redress for personal injury when appropriate, it is entirely right that coaches should be legally accountable.

More generally, a lack of sensitivity to potential civil liability may be reflected in much coach education, given the tendency to focus on the bioscientific aspects of sports science, with facilitation of such a mechanistic approach a potential barrier to the appreciation of the evolving complexities of coaching.[66] Importantly, unlike the reactive development of child protection safeguarding procedures and legal provision,[67] a fundamental aim of this article is to heighten awareness of the scope of potential litigation, advocating a proactive approach to risk

[60] Cox and Schuster 2004, p. 235.
[61] E.g., *Perry v Harris* [2008] EWCA Civ. 907 at [47], their Lordships adopting an instinctive approach to principles of common sense and fairness recognising that 'to a large extent a case of this nature properly turns on first impressions'.
[62] Thompson 2003, p. 97 cited in Cassidy et al. 2009, p. 164.
[63] Cushion and Jones 2006, p. 148.
[64] *Supra* note 8, pp. 9 and 221.
[65] *Wooldridge v. Sumner* [1963] 2 Q.B. 43; *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ. 1054.
[66] Cassidy et al. 2009, pp. 93-4.
[67] Gray and Blakeley 2008, p. 779.

management to better protect and safeguard coaches from professional liability, and as a result, improve the health, safety and welfare of all participants in structured and supervised coaching environments.

Judicial clarification of the scope or standard of care required of coaches would present a transparent illustration of the level of due care necessary to avoid breaching the duty of care owed to performers.[68] At first glance, such an observation appears to merit little serious consideration since it is trite law to recognise that the standard of care is incapable of lending itself to being defined, with the standard of care 'always extremely fact sensitive'.[69] Indeed, as noted by Judge LJ in *Caldwell*, 'the issue of negligence cannot be resolved in a vacuum. It is fact specific'.[70] Importantly, reasonableness is reflective of the circumstances at the material time,[71] requiring courts to be mindful of coaching as a dynamic social practice that is responsive to new information and knowledge, with the principles of coaching being constantly assessed and revised.[72] Since the law of negligence does not operate in a social vacuum, the prevalent 'policy lens at the time' will also shape determination of the standard of care.[73] Evidence of the tendency to heighten the standard of care barometer was articulated in *Hamstra et al v. British Columbia Rugby Union*, the court stating that 'the standard of care as it relates to the risk of serious debilitating cervical spine injury in British Columbia in May 1986 is … a lower one than the Court would apply in British Columbia were the same injury to occur today in similar circumstances'.[74]

In short, the standard of care required of sports coaches requires contemporary analysis, critical consideration of the justification of customary practice and the legal doctrine of *in loco parentis* illustrative of developments in this area of professional liability.

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[68] Fulbrook 2005, p. 142.
[69] Norris 2009, p. 126.
[70] *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ. 1054 at [30].
[71] Griffith-Jones 2008, p. 716.
[72] *Supra* note 66, pp. 130-1.
[73] Hartley 2009, p. 56.
[74] *Hamstra et al. v British Columbia Rugby Union* [1989] 1 C.C.L.T. (2d) 78, http://www.sportlaw.ca/1995/06/the-standard-of-care-of-coaches-towards-athletes/ (last visited 1 August, 2014). Also see, *Browning v. Odyssey Trust Company Limited* [2014] NIQB 39 at [23] per Gillen J.

Customary Practice

Should a coach face a claim of alleged negligence a likely argument would be that the act causing the harm was in accordance with general and approved practice in the circumstances, often referred to as the custom of the trade,[75] or *Bolam* test.[76] This advocates the use of regular and approved practices that are logically justifiable,[77] and operates as a strong justification for teachers and coaches,[78] provided strict supervision has been implemented.[79] Importantly, *Bolitho* judicial scrutiny may be regarded as having '"considerable force" in the non-medical professional context',[80] the specificity of sports coaching establishing that the professional negligence tests, and legal principles, developed from *Bolam* and *Bolitho* (and *Wilshire*), would be applicable to the professional liability of coaches.[81] Simply applied, if the coach has used a reasonable technique, approved by a body of informed opinion, there will be no liability,[82] with discretionary decision making likely to be accepted 'within a range of reasonable options'.[83] Regular and approved practice is regarded as that conducted nationally rather than locally, and may be evident in the publications of NGBs and the schemes of work produced by local education authorities.[84] In short, customary practice may safeguard coaches from professional liability by means of a 'partial immunity rule'.[85]

Importantly, it appears the case that to avail of the *Bolam* proposition, the coach should always be advised to balance the benefits of the activity with the reasonably foreseeable harm, this acknowledged as being routine good practice. This would ensure that the practice adopted by the coach is not only recognised and approved, but is capable of being justified and withstanding logical analysis. Effectively, this requires a two stage test, the second limb of

[75] Barrell 1978, p. 289.
[76] *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.
[77] *Bolitho v. City of Hackney Health Authority* [1998] AC 232.
[78] *E.g.*, *Wright v. Cheshire County Council* [1952] 2 All ER 789; *Woodbridge School v. Chittcock* [2002] EWCA Civ. 915.
[79] Glendenning 1999, p. 310.
[80] Mulheron 2010, p. 613.
[81] *Supra* note 51, p. 94.
[82] *Supra* note 55, p. 303.
[83] *Woodbridge School v. Chittcock* [2002] EWCA Civ 915 at [18] per Auld LJ. Also see Whitlam 2012, p. 57. Nonetheless, as previously mentioned, this principle can be narrowly applied (see *supra* note 53).
[84] Whitlam 2005, p. 26.
[85] Howarth 1991, p. 96. See further Nolan 2013, p. 653.

'justifiable' requiring coaches to operate as critical and reflective practitioners, and being potentially difficult to satisfy for all coaches failing to keep up-to-date with their own continuing professional development in order to keep abreast of the latest coach education. Whilst this ensures that negligent entrenched practice should be prevented,[86] this modern statement of the *Bolam* principle demands a more rigorous analysis than the coach merely following routine practice. Problematically, since many coaches are inclined to reproduce and model coaching methods and discourse reflective of their experience of coaching as players,[87] it is hypothesised that a significant number of volunteer coaches may unwittingly be exposed to liability in negligence, where entrenched practice (previously regarded as routine practice) creates an unreasonable risk resulting in participant injury. This assertion appears to have particular resonance in the EU, where volunteering has been specifically regarded by former professional players as an opportunity to give back to the community that had previously supported them.[88] Despite a logical touchstone of acceptable practice often being informed common sense, judicial scrutiny requires a more robust consideration of reasonableness, perhaps challenging preconceived and stereotypical notions internalised by coaches about standardised practices. This is certainly an aspect of potential professional liability of coaches that NGBs and the EU's Expert Group reporting on HEPA and volunteering in sport would be advised to be mindful of.

In loco parentis

Since the test adopted in *Williams v. Eady*,[89] that of a careful parent, the legal doctrine of *in loco parentis*, pronouncement of which varies with different age groups and generations,[90] has been recognised as providing a useful benchmark for the duty of care owed by teachers[91] and coaches.[92] Nonetheless, the predominate tendency by the courts to raise the general

[86] *Supra* note 37, p. 91.
[87] *Supra* note 66, p. 4.
[88] *Supra* note 8*,* p. 221.
[89] *Williams v. Eady* (1893) 10 T.L.R. 41.
[90] Grayson 1999, p.191**.**
[91] E.g., *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273, 277 per Boreham J; *Wilkin-Shaw v. Fuller* [2012] EWHC 1777 at [39] per Owen J.
[92] *Supra* note 66, p. 150.

standard of care expected of school teachers,[93] with the responsibilities of teachers (and coaches) no longer compared to those of parents, but rather the benchmark appropriate to a competent professional person,[94] renders the application of the term *in loco parentis* problematic. This was succinctly articulated by Lord Justice Croom-Johnson when *Van Oppen v. Clerk to the Bedford Charity Trustees* was considered by the English Court of Appeal:

> The background to the case is that the duty of care which the school owes to its pupils is not simply that of the prudent parent. In some respects it goes beyond mere parental duty, because it may have special knowledge about some matters which the parent does not or cannot have. The average parent cannot know of unusual dangers which may arise in the playing of certain sports, of which rugby football may be one. That is why the school undertakes to see that proper coaching and refereeing must be enforced. It might know that some types of equipment in, for example, gymnastics have their dangers. But this is all part of the duty placed on the school to take reasonable care of the safety of the person and property of each pupil.[95]

Consequently, due to the specialised skill or competence required by teachers and coaches,[96] and the potential hazardous circumstances in which these posts are performed,[97] it is clear that a PE teacher and sports coach would be judged by an 'enhanced standard of foresight',[98] likely demanding a heightened standard of care. In Canada the careful parent test also provides a benchmark for gymnastics teachers,[99] but significantly, this standard of care is judicially modified 'to allow for the larger-than-family size of the physical education class and the supraparental expertise commanded of a gymnastics instructor'.[100] Although this specialist knowledge or expertise does not enlarge the duty of care owed (objective reasonableness), it brings into consideration factors concerning the scope and degree of that duty (standard of care) which may be essential in deciding whether or not the duty of care has been discharged.[101] This is indicative of professional liability. Importantly, an inexperienced PE

[93] *Supra* note 75, p. 275.
[94] Whitlam 2012, p. 57. E.g., *Wilkin-Shaw v. Fuller* [2012] EWHC 1777 at [40].
[95] *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389, 414-15 per Croom-Johnson LJ.
[96] *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586 per McNair J.
[97] *Wilshire v. Essex Area Health Authority* [1987] Q.B. 730. Also see, Harris 1995, p. 330.
[98] Whitlam 2012, p. 58.
[99] *Supra* note 55, p. 299.
[100] *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, (B.C.C.A.) July 22, 1976, at [74] per Carrothers J.A.
[101] *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273, 287 per Boreham J.

teacher, or volunteer coach, would likely be judged at the same standard as more experienced colleagues,[102] which might prove particularly challenging in circumstances where non-specialist teachers and coaches with an interest and enthusiasm for sport provide instruction that may be inadequate.[103] Since one of the most common activities carried out by volunteers in the EU is coaching, this appears potentially problematic. In the UK context, with over three quarters of coaches classified as volunteers, and almost half of the coaches in this jurisdiction not holding a coaching qualification, careful and timely consideration of this apparent vulnerability must be made to ensure that volunteer coaches are appropriately protected and safeguarded from legal liability.

In short, it is suggested that best practice initial coach accreditation and education programmes, combined with the necessary continuing professional development of coaches,[104] has extended 'supraparental expertise' to such an extent that judicial modification of the *in loco parentis* doctrine renders it somewhat artificial, restrictive and outdated.[105] Most recently, the Supreme Court in *Woodland v. Swimming Teachers Association*,[106] reinforced the limitations of attempts to apply the notion of *in loco parentis* in the educational context,[107] the judgment requiring of schools 'a greater responsibility than any which the law presently recognises as being owed by parents'.[108] Consequently, with regard to defining the content of the duty of

[102] *Wilshire v. Essex Area Health Authority* [1987] Q.B. 730; *Nettleship v. Weston* [1971] 2 Q.B. 691. Also see, *supra* note 98, p. 57.
[103] *Supra* note 60, p. 235.
[104] Concussion management being illustrative of this requirement.
[105] Interestingly, although Owen J in *Wilkin-Shaw v. Fuller* [2012] EWHC 1777 at [39] accepts that the nature of the duty of the teacher responsible for the training of pupils for the Ten Tors Expedition was to show such care as would be exercised by a reasonably careful parent, importantly, he continues (at [40]): 'the school was under a duty to ensure that the first defendant was competent to organise and to supervise the training, and that the team of adults assisting him in the training exercise had the appropriate level of experience and appropriate level of competence to discharge any role required of them'. Such a level of competence and expertise would appear to extend beyond that of the reasonably careful parent. Consequently, it is respectfully submitted that reference to the reasonably careful parent is somewhat superfluous to the court's reasoning.
[106] *Woodland v. Swimming Teachers Association* [2013] UKSC 66.
[107] Ibid. at [41], Lady Hale Deputy President stating 'it is not particularly helpful to plead that the school is *in loco parentis*. The school clearly does owe its pupils at least the duty of care which a reasonable parent owes to her children. But it may owe them more than that'. Also see *Van Oppen v. Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389, 414-415, per Croom-Johnson LJ. The appellate judges refrained from the use of the terminology of in *loco parentis*, despite this having been adopted at first instance.
[108] Ibid. at [25].

care owed by sports coaches to their charges, it is submitted that reference to terminology embracing the concept of *in loco parentis* is best resisted.

NGBs

Crucially, following *Watson v. British Boxing Board of Control*,[109] since NGBs are associations with specialist knowledge giving advice to coaches and volunteers on the understanding that this information will be relied upon, reasonable care ought to be exercised by NGBs in order to protect and safeguard coaches. Policy considerations, including promotion of EU initiatives and fulfilment of the Olympic legacy, accentuate this duty of care. This is a responsibility of some magnitude. Consequently, it is strongly contended that NGBs have a duty to warn and make coaches aware of regular and approved coaching methods that would withstand logical analysis, best practice risk management policies and procedures, and ultimately, realistic appraisal and appreciation of litigation risk.[110] Since prospective risk analysis would alert NGBs and other awarding bodies to the emerging scope of legal liability for coaches, the relative paucity of case law directly on point, or availability of endorsed insurance provision, is unlikely justification for NGBs omitting to appropriately address this developing issue of professional liability. Adopting a contemporary risk assessment lens, this exposure is plainly foreseeable given the evolving relationship between sports coaching and the law. Moreover, in circumstances where coaches are directly employed, appointed or sanctioned by NGBs, claims based on vicarious liability would also appear possible.[111] Consequently, it is entirely appropriate that all NGBs consider conducting a comprehensive risk assessment covering all facets of potential negligent coaching, to ensure that their legal (and moral) duty of care is successfully discharged.

Since coaches must be fully aware that they will not be exonerated from liability should they expose participants to unreasonable risk resulting in personal injury, best practice in coach education and development could address the issue of negligence liability by means of training

[109] *Watson v. British Boxing Board of Control* [2001] Q.B. 1134.
[110] James notes that the precise scope of the duty of care owed by NGBs is yet to be fully tested or established by the UK courts: *supra* note 51, p. 101.
[111] Id p. 102; *Vowles v. Evans* [2003] 1 W.L.R. 1607.

that might be entitled the 'Professional Liability of the Coach'. The dynamic nature of this aspect of professional liability requires support and commitment to the continuing professional development of coaches, extending beyond initial qualification. Further, given the significance of this issue for both amateur and professional coaches throughout the EU, inclusion of such a legal component, perhaps among the topics regarding transversal key competences or skills, could be harmonised with EU legislation. In addition to enhancing the safeguarding of coaches, this would assist all NGBs when effectively assimilating coaches from different jurisdictions within domestic coaching frameworks. Importantly, it is contended that being proactive in addressing legal risk may ultimately enhance the sporting experience, involvement and performance of all participants by improving all levels of coaching.

Control Mechanisms

Although the aim of this article is to heighten awareness of the potential legal liability of sports coaches, it is appropriate to recognise important existing safeguards inherent in the application of the law of negligence in the English courts. Such control mechanisms include the emphasis on the fact specific nature of sports-related litigation;[112] the tort of negligence's control devices of duty, breach, causation and damage; and judicial tenderness reflecting policy issues embodied in section 1 of the Compensation Act of 2006.[113] For instance, since the functions of sports coaches would likely be regarded as being connected with the promotion of a desirable activity, engagement of section 1 of the Compensation Act 2006 should explicitly concentrate the court's attention on the celebrated *Tomlinson* balancing exercise when assessing reasonableness in the specific circumstances.[114] Accordingly, careful consideration by the court of the social value of the activity giving rise to the risk should encourage the setting of the standard of reasonable care in the circumstances to be at a realistic and sensible level. Nonetheless, introduction of the Social Action, Responsibility and Heroism Bill on 13 June 2014

[112] For instance, consideration of the prevailing circumstances enables the court to distinguish between the expression of legal principle and the practicalities of the evidential burden of 'reckless disregard': see *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ 1054 at [11]. Nonetheless, as argued above, the corresponding lack of more definitive legal guidelines specifically addressing negligent coaching remains highly problematic.
[113] See further, *supra* note 41, pp. 251-3.
[114] *Tomlinson v. Congleton BC* [2003] UKHL 47 at [34], [47], [48] per Lord Hoffmann and at [81] per Lord Hobhouse.

by the UK government[115] endorses the view that more needs to be done to reassure and protect volunteers.

Insurance

Interestingly, it has been suggested that in the UK being worried about risk and liability is a significant reason for not volunteering.[116] Important challenges concerning insurance and liability have also been raised by sport organisations within the EU,[117] with the recently published Work Plan for Sport for 2014-2017 recognising the need to address this issue.[118] Fundamentally, some volunteers may regard insurance as conflicting with the very essence and principle of volunteering to coach,[119] it additionally being submitted that the stress,[120] stigma, 'ridicule' in court,[121] and negative labelling[122] often associated with a finding of negligence may not be negated through public liability insurance coverage. This indicates that insurance may be necessary but not always sufficient in safeguarding volunteers. Further, in failing to address the core issues of avoiding unreasonable risk, sharing best practice, and arguably raising the standard of volunteering and coaching, insurance is certainly not the complete answer, doing little to raise awareness of potential negligence liability.

[115] Social Action, Responsibility and Heroism HC Bill (2014-15) [9] (UK).
[116] Low et al. 2007, p. 64. See further, UK Parliament, Social Action, Responsibility and Heroism Bill (HC Library Research Paper s 14/38, 2014) p. 8, http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill (last visited 1 August, 2014).
[117] *Supra* note 8, p 256.
[118] *Supra* note 6, *Annex* 1.
[119] Brown 1997, p. 579.
[120] Spengler et al. 2009, p. 49. See further, UK Parliament, Social Action, Responsibility and Heroism Bill (HC Library Research Paper s 14/38, 2014) pp. 2-3, http://www.parliament.uk/briefing-papers/RP14-38/social-action-responsibility-and-heroism-bill (last visited 1 August, 2014).
[121] Epstein 2013, p. 117.
[122] E.g., *Carter v. N.S.W. Netball Association* [2004] N.S.W.S.C. 737, where a volunteer netball coach suffered a 'severe psychological reaction' following serious accusations including 'gross neglect of duty of care'. Paul Horvath and Penny Lording note that the court found that Ms Carter's conduct constituted no more than 'excessively enthusiastic coaching',
http://www.ausport.gov.au/sportscoachmag/safety/coaches_rights_when_complaints_are_made (last visited 1 August, 2014).

Conclusion

In fulfilling the EU's strategic vision of the European dimension in sport, considerable reliance on the altruistic motives of volunteer sports coaches may unwittingly be exposing these individuals to legal liability. In the UK, the elusive nature of reasonableness as a legal test is limited in providing guidance when attempts are made to define the standard of care required of a sports coach. Although coaches will not be liable for sporting injury resulting from the ordinary and inherent risks of physical activities, providing reasonable care has been taken in the circumstances, such an affirmation is somewhat nebulous and may fail to adequately safeguard coaches from professional liability. More specifically, the foregoing legal analysis highlights significant limitations and difficulties concerning the justification of customary practice and the doctrine of *in loco parentis*. Crucially, the intersection between the law and sports coaching continues to develop, crystallising the necessity for NGBs, the EU's Expert Group on Human Resource Management in Sport, and ultimately, all coaches, to adopt a proactive approach to best practice risk management in this field. Further, given the EU's supporting, coordinating and supplementing competence for sport, it would appear eminently sensible for a Commission funded project to address the implications of the 'compensation culture' in sport.

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