

# **THE LAW OF NEGLIGENCE**

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## **AUSTRALIAN RULES FOOTBALL**

### **1. HOW DOES THE LAW RELATE TO AUSTRALIAN RULES FOOTBALL?**

**Generally sport and in particular Australian Rules Football (“football”) is seen by the law as a special area whereby the law and legal systems does not directly interfere with the specific rules in relation to that sport e.g., the Rules of Australian Rules Football – the rules by which most if not all football is played in Australia and for the most part is not an arena were laws or legal systems will interfere. There are of course exceptions – the most recent being the interference of the Courts in relation to alleged drug taking of players from an AFL football team including its coach and support staff<sup>1</sup> or where it is alleged there is a restraint of trade of the player. Both the prohibited drug case and restraint of trade are outside the scope of this paper and will be the subject of a later paper. But the Courts will certainly interfere not hesitate to interfere where injury is caused to a footballer during a match and outside the AFL Rules.<sup>2</sup>**

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<sup>1</sup> The World Anti-Doping Code (“WADA”) Code has been established to provide a basis for World and National Governing Bodies to adopt rules and regulations concerning the use of illegal performance enhancing substances in sport.

<sup>2</sup> In the case, *McNamara v Duncan* (1971) 26 ALR 584 at 588, Fox J. illustrated the problem for an offending player as follows: “*I do not think it can be reasonably held that the plaintiff consented to receiving a blow such as he received in the present case. It was contrary to the Rules and was deliberate. Forceable body contact is of course part of Australian Rules football as it is with some other codes of football, but such contact finds justification in the Rules and usages of the game. Winfield (op cit) says (at 748) in relation to a non-prize fight ‘a boxer may consent to accidental fouls, but not to deliberate ones’. Street on Torts (4<sup>th</sup> edit. p.75) deals with the presumed ambit of consent in cases of accidental injury ‘A footballer consents to those tackles which the rules permit, and, it is thought*

## **2. CAN FOOTBALLERS PLAYING IN A MATCH BE HELD LIABLE FOR NEGLIGENCE ACTS THAT THEY COMMIT WHILE PLAYING THE GAME?**

**Many injuries occur to footballers participating in football matches and generally this is seen as an accepted part of participating in the sport. There are however certain injuries that occur which simply cannot be considered as part and parcel of our great game. These incidents which give rise to injury are usually highlighted by the offending players' appearance before the AFL Victoria Tribunal or before AFL Victoria Country Appeal Board. But in addition to any penalty meted out by the Tribunal/Appeal Board to the offending player, in certain instances the law can also intervene and find that certain actions are illegal.<sup>3</sup>**

**Often criminal cases can be brought as a result of a dangerous tackle made by a player during the match or from a punch thrown behind the play or even before, during or after the match that is, in effect, an assault and which causes serious injury to an opposition player. In this instance, there can also be a civil claim arising for the tort of an offence against the person<sup>4</sup> or negligence. Injuries caused by such actions as this**

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*to be those tackles contravening the rules where the rule infringed is framed to maintain skill of the game: but otherwise if his opponent gouges out an eye or perhaps even tackles against the rules and dangerously'. Prosser Law of Torts (3<sup>rd</sup> ed p103) says, 'One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the rules of the game.'"*

<sup>3</sup> In the High Court case, *Agar v Hyde* [2000] HCA 41, Gleeson CJ (as he then was) observed (at Para 15) that: *"People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public money and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of autonomy, but also the public benefit of sport. Sporting injuries that result in physical injury are not only permitted; they are encouraged."*

<sup>4</sup> Trespass to the person, commonly known as assault is a tort that may be available to a player who has suffered a sporting injury as a result of an opponent's action. Trespass requires an *intentional* act by the offending player. There must be a positive act as an omission or inaction will not amount to

**are often caused by a deliberate act, such as a charge or a punch behind the play carried out on the spur of the moment and generally in retaliation to some earlier exchange between the players, and generally in breach of the clear duty of care that a player owes to all those persons involved in the match, which of course covers all umpires, opposition players, coaches, spectators, trainers, runners, timekeepers and anyone else involved in the match.**

**As will be shown below, the action of the player which caused the offence need not be a deliberate act; a negligent act will be sufficient to raise liability. This paper is concerned with the actions of that player but the concepts discussed may of course be extended to all those officials etc., involved in the organisation and running of a particular match.**

**This paper will confine itself to looking at a situation where the actions of the offending player may have not been deliberate in the circumstances, but instead arose from a negligent act carried out against an opponent.**

### **3. WHAT IS NEGLIGENCE?**

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**trespass, but it is not necessary that the act be forcible, or hostile, or that the offending player intended injury to result. If for example, a player's elbow injures another player, it is a trespass if the offending arm is swung deliberately regardless of whether there was any intention to injure. If however the motion of the arm is involuntary, perhaps because of a tackle, this does not give rise to trespass because the player's action is unintentional. In relation to negligence not only may the offending player be liable for an assault but also his Football Club may be liable, even where the assault was committed by the act of the offending player which was outside the AFL Rules of the game. In the case, *Budgen v Rodgers* (1993) Aust. Tort Reports 81-246, where Budgen assaulted Rodgers in a rugby match, Bugden was held liable for assault which was occasioned by a deliberate blow to Rodger's head with a forearm contrary to the rules of the game. The Canterbury Bankstown Rugby League Football Club who employed Bugden who employed Bugden was also held liable for Bugden's act. The Judge stated: "If an employee, (Bugden) in seeking to win uses means which are legitimate in one area but not in another, and the employer, by his attitude to winning and his motivation of or instructions to the employee, creates a real risk that the employee will act illegitimately, that may assist the finding that the employer is liable for what happened." Further, the Court intimated that there may be a cause for exemplary damages (damages in the form of punishment) where Coaches and Clubs deliberately encourage rough play.**

**The tort of negligence is a famous tort and raises its head mainly in such areas as motor vehicle accidents, personal injuries, the administration of medical practices etc., but it has certainly been extended into the sporting arena.**

**For the tort of negligence to be found against a player in a football match the following need to be established:**

- **That a Duty of Care exists;**
- **That there is a Breach of such Duty;**
- **That the Breach of the Duty of care caused damage or injury to the other player.**

#### **4. DUTY OF CARE**

**Any person who participates in or has a personal capacity to organise and manage sports programs and events has a duty to make such activities as safe as possible for anyone who participates in the game. This duty is referred to in the eyes of the law as the *Duty of Care*.**

**For any claim of negligence to be actionable the first thing to be establish is whether a Duty of Care existed between the two players involved in an incident on the ground during the match.**

#### **5. HOW IS A DUTY OF CARE ESTABLISHED IN A FOOTBALL CONTEXT?**

**The English and Australian cases on negligence in sport have clearly established the following<sup>5</sup>:**

- **that each player in a lawful sporting contest owes every other player in that game a Duty of Care;**

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<sup>5</sup> See: *Wooldridge v Sumner* (1963) 2 QB 43; *Rootes v Shelton* (1967) 116 CLR 383; *Woods v Multi-Sport Holdings Pty. Ltd.* [2002] HCA 9.

- that the Duty is to exercise all Care that is *objectively reasonable* in the *prevailing circumstances* in the match in order to avoid injury to all other players;
- the *prevailing circumstances* has been defined by the courts to include the object of the match; the demands made upon the players, the inherent dangers in the game, its rules, conventions and customs and the standards, skills and judgments *reasonably* to be expected of the players;
- the universal measure of the actions of the player is *reasonableness* in the circumstances.

## 6. BREACH: HOW IS A PLAYER'S BREACH OF THE DUTY OF CARE ESTABLISHED?

Once a Duty of Care has been established in order to find liability it must be shown that the Duty of Care has been breached taking into account the *prevailing circumstances* of the football match.

The various English and Australian cases set out a catalogue of factors and tests to be applied in the circumstances<sup>6</sup>. I adopt the following two tests from the authorities as being indicative of the establishment of the liability of an offending player as follows:

- A *reckless disregard* of safety test;
- The playing culture of the sport test.

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<sup>6</sup> Some general observations may be made as follows: When a duty of care exists, its content is only to take reasonable care to avoid such harm as may be reasonably foreseeable. There is no absolute duty to prevent it. See: *Sullivan v Moody* (2001) 207 CLR 562, 576; *Graham Barclay Oysters Pty. Ltd. v Ryan* (2002) 211 CLR 540, 555; *Woolcock Street Investments Pty. Ltd. v CDG Pty. Ltd.* (2004) 216 CLR 515, 524; *Vairy v Wyong Shire Council* [2005] HCA 62 at [66]. Further, the precautions that the duty requires are to be considered prospectively in the light of the circumstances that should have been known to the offending player at the time immediately prior to the harm. See also: *Shirt v Wyong Shire Council* (1980) 146 CLR 40 at 47-48.

**The standard of care to establish negligence in the sporting arena was stated as the *reckless disregard* of safety test<sup>7</sup>.**

**(a) For the *reckless disregard of safety* test to apply the threshold for liability is high and proof of a mere error of judgment or a lapse of skill by the offending player would not be sufficient to establish a breach of duty. In practice it would be difficult to prove a breach of duty unless there is proof of conduct amounting to *reckless disregard* for an opponent's safety<sup>8</sup>. Obviously, such breach is clear where a player is found guilty of striking etc., an opponent and causing injury outside the AFL Rules before the Tribunal/Appeal Board as a result of a report or investigation into his conduct.**

**(b) Under the *playing culture of the sport* test in order to establish liability the playing culture of the sport and the conditions in which participation takes place are the two factors which need to be considered. By focusing on the playing culture of the sport a Court is able to establish whether the act of the offending player was in fact an integral part of the playing of the game and resulted from the inherent risk taken by all the participants in the playing of the football match, or if it was in fact unconnected with the proper playing of the football match, and in fact was an**

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<sup>7</sup> See: *Wooldridge v Sumner* [1963] QB 43.

<sup>8</sup> In the English case, *Wooldridge v Sumner* [1963] 2 QB 43, which was said to found the *reckless disregard* test, the jockey was not held liable and the court concluded that “unless the conduct of the participant was to evince a reckless disregard or the conduct was reckless and in disregard of the safety of other players” the defendant cannot be held guilty. The Court of Appeal held that “a spectator accepts the risk of a lapse of judgment or skill in a competition from a competitor who is going all out to win, but does not have to accept the risk of a participant having a reckless disregard for his safety.” In the Australian High Court case, *Rootes v Shelton* [1968] ALR 33, the Court held that “by engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of one participant to the other, Whether or not such a duty arises and if it does, its extent must necessarily depend in each case upon its own circumstances.” As recent as the case, *Blake v Galloway* [2004] CA 3 ALL E.R. 315 the *reckless disregard* test was applied by the Court.

**action by the player outside the AFL Rules and therefore negligent.**

- 7. While it can be said that sports law is simply an application of general legal principles to the football oval, an offending player in a football team will almost certainly be held liable in respect of any deliberately inflicted injury where the contact is made outside the safety rules of AFL Victoria. An offending player will only be found not to be liable if the contact between the players is found to be an inherent risk in playing the game. But a strike by fist or elbow by one player on an opponent behind the play can never be an inherent risk of the match and is clearly outside the AFL Rules of Football.**
- 8. Where negligence (and/or trespass to the person) is proved in a Court of law then a damages award will be made by a Court and may include medical expenses, loss of earnings, past and future, disfigurement, pain and suffering (covering physical pain, worry, frustration and anxiety) and loss of amenities. The latter head of damage allows additional payment to be made for the loss of a superior skill, such as where the player is unable to ever play football again as a result of his injury. The amount of damages that may be awarded against the offending player is subject to assessment by the Court, the intention being that the player will receive damages that closely approximate, in monetary terms, his or her actual loss. The award of damages has the potential to be very significant indeed depending on the circumstances of the injury caused by the offending player.**
- 9. As previously stated above, the football club for which the offending player competes may also be liable for damages in the circumstances.**

## **CONCLUSION**

- 10. Anyone who during a football season plays football for a club in Victoria or has an official capacity to organise and manage football matches each week has a duty to make such activities as safe as possible for anyone who participates. Each has a Duty of Care in relation to that responsibility.**

- 11. In this short memorandum, I have endeavoured to highlight that a breach of the Duty of Care by an offending player against an opponent during a football match outside the AFL Rules may result in either criminal or civil sanctions being taken against that player in the Courts. The most likely action faced by an offending player is a claim for negligence in the civil courts for damages. Such action will target the offending player and if he is under contract to play with that football club he is most likely to also be in an employer/employee relationship with his club. This being so then his football club may also be a target for an action for damages by the injured player.**
- 12. On examination of a Chart which was an extract from a Report authored by Louise Flood and James Harrison, Flinders University, On Hospitalised Sport Injury, Australia 2002-03, and the figures contained therein show that Australian Rules Football was the clear winner on the number of hospitalisation due to sport and recreation in the 2002-2003 year with nearly 4000 cases. Obviously, not all of these hospitalised injuries from Australian Rules Football arose from the actions of players causing injury through their actions during a game while acting outside the imprimatur of the AFL Rules. But even though these figures are 12 years old, they do highlight the potential for targeted litigation in relation to those hospitalisations which did arise in the circumstances described above from a breach of the Duty of Care by a player against an opponent during the playing of a football match. In my opinion, footballers and administrators should be made well aware that any action taken by them during a football match against an opponent and outside the Rules of the game may have significant consequences for both their playing, financial and economic futures.**

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