



# Extending the duty of care to achieve justice for abused match officials

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## Abstract

The welfare of participants in sport has historically been treated with lesser significance than other, largely commercial, considerations. In recent years, the wellbeing and treatment of athletes has come under the glare of the media and the public, due to a number of high-profile and deeply troubling claims of mistreatment and abuse whilst participating in sport. As result, there has been much support from stakeholders for the plight and well-being of athletes, indeed such concerns led to the commissioning of a “Duty of Care” report in the United Kingdom by former Paralympic athlete, Baroness Tanni Grey-Thompson. Her report was published in April 2017 and covered a number of important areas, including safeguarding and mental welfare. Although the focus was on athletes, there are a number of other participants in sport to whom a duty of care is, or should arguably, be owed. This article contextualizes the position in the UK and elsewhere in world when it comes to participants, the law and duty of care, focussing the analysis to a group of participants who do not garner the same attention: match officials. The author himself is a former football and current rugby union referee. The article shall consider how recent developments in national laws and sporting regulations may well extend the legal duty of care to protect match officials from what has become widespread and unacceptable levels of abuse and ill treatment by athletes and other stakeholders, as well as the options for remedy and redress.

**Keywords** Duty of care · Welfare · Referees · Tort · Criminal · Regulation

## 1 Introduction

The duty of care that is owed to those participating in sport has come under the spotlight in recent years due to numerous high-profile instances of ill treatment. Much of this has quite rightly been focused on the mistreatment of athletes, however, there is one group of participants who are vital to the playing of sport that are often overlooked: match officials. When one thinks of match officials, referees first come

to mind, however, the term encompasses a far broader group of individuals, given the different terms match officials are given in different sports—for instance: umpires, judges and even off-field match officials such as Television Match Officials (‘TMO’) in rugby and Video Assistant Referees (‘VAR’) in football. The author is acutely aware of the tendency for match officials to get overlooked when it comes to their welfare, given he was a football referee in England for seven years (reaching the semi-professional ranks of the sport), and then re-qualified to become a rugby union referee at the amateur level of the sport (a sport he himself played up until the age of 18).

Match officials are arguably a group whose harm suffered is overlooked more than any other participant group in the sport. The author has first-hand experience of this having been a football referee for seven years, officiating at the semi-professional level of football in England, and subsequently a referee in rugby union also for seven years (and counting). Indeed, the author has found that almost all of the pieces written about match officials and the duty of care are about the potential liability that a match official could

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The original online version of this article was revised: Dear readers, Unfortunately the original article as published omitted a final correction request from the author in respect of the case of *DSN v Blackpool Football Club* which had been overturned upon appeal. This has since been corrected with the relevant sub-section on the first-instance ruling having been removed. The publisher apologises for this error.

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face for failing to safely manage a particular sporting fixture, rather than the duties that should rightly be owed to them.

In this article, we will first explore what types of abuse match officials are subject to and at the different types of harm that is caused to them. We will then move on to consider the concept of the duty of care, principally in the legal sense, but also looking at the broader moral or social duty that sport should owe to match officials. We shall also consider how sporting regulations address the abuse of match officials, as well as how the criminal law can intervene in the most serious cases. In focusing on the legal duty in the civil law of negligence, it will be necessary to consider who the potential defendants are when match officials suffer abuse and what the legal status is of the relationship between match officials and those who appoint them to officiate fixtures. Having identified potential defendants it then follows to apply the well-established civil law test for whether a breach of duty has occurred, which begins with whether a duty is, in fact, owed at all by the potential defendants. There is a considerable amount of case law on the duty of care in sport, and although much of it is not about duties owed towards match officials, there are a number of analogies that can be drawn with and from existing cases. Having exhausted the analysis of the civil law test, the article will go on to consider the human rights of match officials in this context, in particular why there is an overwhelming feeling amongst this group of participants that there is often not an avenue of redress that provides any sense of “justice”. Closely linked to the issue of human rights, is the highly topical issue in sport of safeguarding, and arguments will be made as to why match officials should come squarely within this regime, given they are often one of the most at-risk groups taking part in sport. Finally, the article will look to offer some potential solutions so that match officials are given the legal protection they deserve, for what is often a voluntary role done for a love of the particular sport.

Although the article will look to provide some comparative analysis of other jurisdictions/countries, it shall predominantly be based on the law of England and Wales, which is a common law jurisdiction.

## 2 Harm and abuse

Before considering the concept of duty of care, it is first necessary to explain the ill-treatment that match officials experience and the extent of it.

### 2.1 What constitutes harm?

In the area of child protection, harm is defined as ill-treatment or the impairment of physical or mental health. Harm

is caused to individuals through acts of abuse. One statute that deals directly with abuse is the Care Act 2014, in particular sections 42–47 (‘Safeguarding adults at risk of abuse or neglect’).<sup>1</sup> Although “abuse” is not defined in the Act itself, paragraph 14 of the statutory guidance considers the different types and patterns of abuse and neglect and the different circumstances in which they may take place, providing 10 categories of abuse that may be experienced by adults.<sup>2</sup> The categories relevant to match officials are physical abuse and emotional or psychological abuse.

When we come on to look at the duty of care in the realms of the civil law tort of negligence, we shall see that harm has a very specific meaning within the law. However, at this juncture, the author wishes to expand upon the two categories of abuse more broadly.

### 2.2 Physical abuse

Physical abuse is when a person(s) causes physical harm to another. Globally there have been some truly dreadful instances of physical abuse towards match officials:

- In 2013 a football referee in Yucatán United States America died after getting punched in the face by a 17-year-old.<sup>3</sup>
- A year later, also in the United States, another referee was killed in Michigan with a single punch.<sup>4</sup>
- In Ireland in 2018, a referee in an amateur football match was attacked by three players and a supporter, who left the referee with a broken jaw and other serious injuries.<sup>5</sup>
- Then in 2019, a basketball referee based in Kentucky, United States America, was beaten unconscious after a decision he gave at the end of a game which was reported to be “controversial”.<sup>6</sup>
- Most recently, in 2020, the referee of a football-friendly match was punched in the face by a player he had sent off. The player in question aimed three blows at the referee and had to be restrained by others. The match was suspended police and ambulance workers attended the scene.<sup>7</sup>

<sup>1</sup> Care Act 2014 <https://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>.

<sup>2</sup> UK Department of Health and Social Care (2021).

<sup>3</sup> Polcyn (2019).

<sup>4</sup> Polcyn (2019).

<sup>5</sup> Keogh (2018).

<sup>6</sup> Polcyn (2019).

<sup>7</sup> Keogh (2020a).

No one should attend a sporting fixture in any capacity fearing for their physical safety, let alone the one person (or small team of people) who are there to facilitate the playing of the fixture (in the majority of cases voluntarily).

### 2.3 Emotional abuse

Psychological maltreatment can be broken down further into three types of behaviour<sup>8</sup>:

- Spurning—verbal and non-verbal hostile rejecting/degrading;
- terrorising—behaviour that threatens or is likely to harm physically; and
- isolating—denying opportunities for interacting/communicating with peers or others.

Emotional abuse, in particular that which is verbal in nature, occurs within the context of a critical relationship, where that relationship is between actors who have a significant influence over an individual's sense of safety, in this sense in a setting of a sporting fixture.<sup>9</sup>

Emotional abuse in this context does not even have to be blatant shows of dissent, such as shouting at or squaring up to a match official in an aggressive and confrontational way. Rather it can be the constant undermining of a match official's authority. By the end of a contest, this can be just as damaging to the emotional welfare and confidence of a match official, as being shouted at from a few metres. It would be remiss not to highlight that emotional abuse comes not just from those playing the sport in question, but indeed much of the worst types of emotional abuse, and the most insidious (i.e. the constant undermining and questioning), comes from other participants such as coaches and supporters.

The media coverage of sport focuses on the elite level and therefore much more people get to read about verbal abuse and/or more likely see it taking place than physical abuse. It is the author's view that physical abuse of match officials rarely occurs at the higher levels of sport as the participants are fully aware of the career-ending consequences of them committing any such act.

Closely tied to the exposure of verbal abuse towards match officials, there has been the advent of a new avenue of emotional abuse coming from the realms of social media. It is a very difficult balance for match officials who wish to speak with pride about the fact they are a referee, and yet know that in making such pronouncements public, that they are opening themselves up to potential abuse. Such abuse via social media is of course a risk to all participants in sport,

with social media abuse having been at the forefront of the political agenda for governing bodies. However, for match officials the strength of feeling towards them by players, supporters and other stakeholders, is likely to be more potent and therefore potentially any abusive comments or threats may be more damaging.

It is even possible to conceive of situations where psychological harm is caused to a match official by a governing body or league where an individual is denied a high-profile appointment or a promotion without a correct procedure either being in place or being followed. We shall touch upon this scenario again in Sect. 5 below.

### 2.4 Key factors in the prevalence of abuse towards match officials

Match officials at the so-called “grassroots level” of sport are often in a very vulnerable position. Indeed, it has been proven that the wider issues surrounding the abuse of match officials lies at the lower levels of sport (i.e. mass participation), where verbal and physical abuse towards match officials is the most prevalent.<sup>10</sup> Why is this? From the author's experience as a match official, you often travel to the venue on your own, have minimal interaction with the hosting club or the teams (who often make it abundantly clear through their attitude that it is an inconvenience you being there), and have no support presence at the venue to confide in either before the fixture, during a break in play, or after the contest.

What has been evident in research undertaken, is that abuse can occur and be measured at all stages of the match officials working environment regardless of the sport, age or sex of the official.<sup>11</sup> Indeed it has been described as being ingrained in the culture of sport.<sup>12</sup>

This is despite efforts by governing bodies of sport to encourage stakeholders to allow match officials to perform their duties without fear of physical or verbal reprisal. One such high-profile campaign has been the Respect programme run by the English Football Association ('The FA'). Regrettably, it appears as though this program has had little impact on the respect shown towards match officials, with one referee saying, “unsporting behaviour is an inbuilt culture and regarded by managers coached and played their right and opportunity to express themselves a very underhand and undermining the minutes was referees right now no campaign, not even the Respect campaign has had any real sustainable effect.”<sup>13</sup> Such ‘top down’ campaigns have been

<sup>8</sup> Cleland et al. (2020).

<sup>9</sup> Cleland et al. (2020), p. 9.

<sup>10</sup> Cleland et al. (2020), p. 7.

<sup>11</sup> Cleland et al. (2020), p. 21.

<sup>12</sup> Cleland et al. (2020), p. 26.

<sup>13</sup> Cleland et al. (2020), p. 23.

shown to have little effectiveness either in sport or in other sectors of society.<sup>14</sup>

### 3 The duty of care

Any discussion about the term “duty of care” is not straightforward, as there is a more general way in which the term is used, as compared to how it is defined in law. The layman’s use of the term duty of care is often referring to a moral or a social duty, rather than a legal one.<sup>15</sup>

#### 3.1 ‘Duty of care in sport’ report

In April 2017, an independent report was delivered to the UK Government titled ‘Duty of Care in Sport’.<sup>16</sup> This followed the publication of the UK Government’s sport strategy ‘Sporting Future’ in late 2015 in which it aimed to encourage more people to become active, to strengthen the sporting workforce and create a more sustainable and diverse sector.<sup>17</sup> The issues grouped under the term duty of care were considered fundamental to achieving these aims, and therefore the then Minister of Sport asked decorated Team GB Paralympian and prominent figure in sports politics in the UK, Dame Baroness Tanni Grey-Thompson, to look into issues surrounding the so-called duty of care that sports have towards their participants.

The opening statement of the review report states very clearly how people and their welfare are central to the success of the sector:

*“The most important element in sport is the people involved, whether they are taking part, volunteering, coaching or paid employees. The success of sport, in terms of helping people achieve their potential, making the most of existing talent, and attracting new people to sport relies on putting people – their safety, wellbeing and welfare – at the centre of what sport does.”<sup>18</sup>*

The author Baroness Thompson decided to take a deliberately broad approach to the definition of “duty of care”, not following the legal definition, principally because she wished for the sport sector to consider the duty of care in its fullest (i.e. broadest) sense.<sup>19</sup> In doing so, she looked at seven different themes that she felt encompassed the full range of issues that come within a broad interpretation of the duty of care:

- Theme 1: Education;
- Theme 2: Transition;
- Theme 3: Representation of the participant’s voice;
- Theme 4: Equality, diversity and inclusion;
- Theme 5: Safeguarding;
- Theme 6: Mental welfare; and
- Theme 7: Safety, injury and medical issues.

We shall return to the report subsequently in this article, but for now the theme that best sets the scene as to match officials is Theme 7 on safety, injury and medical issues, where it said, “taking steps to ensure the safety of people... officiating... is fundamental.”<sup>20</sup>

#### 3.2 Moral duty

In simple terms, a moral duty is an obligation that arises out of considerations of right or wrong. As such, it is deeply rooted in personal and societal morals, and is much broader than the legal duty of care. Indeed, in several situations no two people will agree on whether there is a moral duty or not on a particular occasion.

#### 3.3 Legal duty—civil law tort of negligence

The legal duty of care arises from the civil tort of negligence in English and Welsh law, with the approach being broadly similar across all common law jurisdictions across the world. The tort of negligence imposes liability for loss or injury caused by carelessness. A breach of a legal duty renders the wrongdoer and in a sporting context any sporting body and liable in damages to the victim of the abuse. Consequently, the legal duty of care is precisely defined by the courts, and there are often significant consequences of widening the scope of the legal duty of care in any particular situation.

To succeed in an action for negligence at common law, it is necessary for a claimant (in this case, the match official) to establish that<sup>21</sup>:

1. the defendant owed a duty to the match official;
2. the defendant breached the duty owed to the match official;
3. the defendant’s breach of duty caused the match official to suffer loss; and
4. the loss caused by the defendant’s breach of duty is recoverable (in law).

<sup>14</sup> Cleland et al. (2020), p. 17.

<sup>15</sup> Norris (2017).

<sup>16</sup> Grey-Thompson (2017).

<sup>17</sup> HM Government (2015).

<sup>18</sup> Grey-Thompson (2017), p. 4.

<sup>19</sup> Grey-Thompson (2017), p. 4.

<sup>20</sup> Grey-Thompson (2017), p. 26.

<sup>21</sup> Troman (2021).

There are no separate principles that apply to the duty of care in a sporting context as compared to the application of the duty of care in other circumstances.<sup>22</sup> However, there is a significant difference in that parties taking part in sport realise there is a risk, and where a duty is found, the standard of care must allow for the particular and special circumstances in which the harm arises.<sup>23,24</sup>

In law, the term “personal injury” in the tort of negligence encompasses both physical and psychiatric (emotional) harm.

The main remedies available in tort once a claim has been successfully proven are damages, putting the abused in the financial position they had been in had the tort not occurred, and injunction, which aims to stop or prevent the behaviour which comprises the tort.

### 3.4 Criminal law

The criminal law in England and Wales does have a concept of the duty of care but only in very narrow circumstances, therefore when talking about the duty of care which the criminal law can address as it pertains to abuse against match officials, we are talking something more akin to the moral duty. The criminal law governs the moral duty people have towards each other in society. Consequently, there are numerous criminal statutes under which those who commit harm against match officials can be prosecuted, and we shall explore these in Sect. 4.

It is not the case that every harm committed against match officials will be fully pursued and prosecuted, however. The Crown Prosecution Service (‘CPS’) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS is independent, and they make decisions independently of the police and government.<sup>25</sup>

Prosecutors must only start or continue a prosecution when the case has passed both stages of what is called the ‘Full Code Test’. The Full Code Test has two stages: (1) the evidential stage; followed by (2) the public interest stage. In short, the evidential stage is that the prosecutor must be satisfied with sufficient evidence to provide a realistic prospect of conviction, also taking into account any possible defences. It is worth stating at this stage that the standard of proof applicable in criminal cases is beyond reasonable doubt, in contrast to the civil standard of on the balance of probabilities, which is also used in sports disciplinary cases.

Then moving on to the second limb of the test, a prosecution will usually take place unless the prosecutor is satisfied

that there are public interest factors tending against prosecution which outweigh those tending in favour. The relevant factors for prosecutors to consider in terms of the public interest include:

- How serious is the offence committed?
- What is the level of culpability of the suspect?
- What are the circumstances of and the harm caused to the victim?
- What was the abuser’s age and maturity at the time of the offence?
- What is the impact on the community?
- Is prosecution a proportionate response?

The principal sanction in the criminal law is of course that the abuser is sent to prison and/or is given a criminal record. As for remedies for the abused match official, there are two possibilities. One is an award under the Criminal Injuries Compensation Scheme, which compensates victims of violent crime for pain and suffering and loss of amenity). The second being the court making a compensation order, which can cover compensation for personal injury.<sup>26</sup>

### 3.5 Sports regulations

The rules which govern both the organisation of and participation in a sport are referred to as a sport’s regulations, however, you will also see them referred to as the sport’s “laws”.

It is rare for there to be one single document that contains all of the regulations applicable to a particular sport, rather they are spread across a number of documents. In respect of the abuse of match officials by other participants (e.g. players), and also potentially other parties (e.g. supporters of a club), you would first look to what is written in the disciplinary regulations for that sport or competition.

Another potentially applicable document from the suite making up the regulatory framework of a particular sport is a code of conduct. A code of conduct sets out the expected behaviours of participants in the sport, with a breach of the code being dealt with by the disciplinary regulations. Although this in of itself does not create a legal duty of care, it does provide for a moral duty of care to be in operation within the sport, enforced by the sanctions in the disciplinary code. As sports become more high-profile and more commercially driven, codes of conduct have become more prevalent.

Another document that may be present in the framework of a particular sport, and is closely related to codes of conduct, is a code of ethics. Again, this is concerned with how

<sup>22</sup> James M in Lewis A and Taylor J 2020, para G1.7.

<sup>23</sup> Norris (2017), p. 157.

<sup>24</sup> Caldwell v Maguire and Fitzgerald (2001).

<sup>25</sup> The Crown Prosecution Service, About CPS (2021).

<sup>26</sup> Elliott and Quinn (2017), p. 8.



people behave and is, by its name, a set of principles rooted in issues surrounding morality.

## 4 Applying traditional causes of action to the abuse of match officials

### 4.1 Potential perpetrators and defendants

When the scenarios in which match officials can be abused are considered, those persons potentially committing such an act(s), in other words the perpetrator and/or potential defendant, can be split into the following categories:

- Players;
- other participants—this could be any number of different individuals involved in a sporting contest including (but not limited to) coaches and administrators of a particular team or club;
- governing body;
- competition organiser;
- clubs;
- Spectators.

The decision of who to pursue a claim against, or indeed a claim at all, will as ever with tortious claims, be dependent on the potential defendant's ability to pay and the existence of any insurance.

For some of the above groups, when a legal action is brought against them, there is potentially both primary and secondary liability. The primary liability being against the individual person(s) committing the act of abuse, and the secondary liability being the potential vicarious liability of an “employer” (i.e. a club) by way of an employment relationship with the abuser.

By way of example, the civil law case of *Gravil v Carroll & Redruth Rugby Football Club* involving the sport of rugby was one where a claim for vicarious liability of a club for physical abuse committed by a player was upheld.<sup>27</sup> The incident took place at the semi-professional level of the sport. The defendant player had a contract of employment with his club, which expressly stated that he should not physically assault an opponent and that if he did so, his club may be vicariously liable for his act. After the final whistle had been blown in the match, the player punched an opponent in a melee and caused him injury. The injured party was awarded damages for the assault by the defendant. The appeal court said that the wrongful act by the player was so closely connected with his employment that it would be fair

and just to hold the club vicariously responsible. The court commented that looking at the matter broadly, it was fair and just to hold the club liable for the punch as the risk of their employee punching the player and causing injury was a reasonably incidental risk to the playing of rugby pursuant to the employment contract.

Later in this article we shall explore in greater depth, in light of recent judicial rulings, which of the potential defendants to a claim by a match official could have vicarious liability imposed upon them.

### 4.2 Civil law: trespass to the person

Before considering the focus of this section, the civil tort of negligence, we must first touch upon the far simpler civil action a referee victim can bring when the subject of abuse: trespass to the person. Whether we are considering a civil battery or an assault, the key issue is the deliberate infliction of harm by the perpetrator upon the match official.

#### 4.2.1 Battery

A civil battery is committed when a perpetrator commits direct and intentional application of force to the victim (e.g. referee) and that the touching was made without their consent. There is no need to establish that any injury has actually been caused, rather this will only be relevant when it comes to the quantum of damages awarded if the claim has been successfully proven on the balance of probabilities by the victim.<sup>28</sup> The successful claim brought by the victim player in *Gravil* was primarily a claim for trespass to the person in the form of a battery by the offending player, from which the vicarious liability claim then flowed.

#### 4.2.2 Assault

The civil tort of assault is committed where the perpetrator's actions (i.e. threats) cause a match official to have a reasonable expectation of immediate physical violence.<sup>29</sup> Given the numerous verbal threats that are often made to match officials, both on and off the field of play, by one of more of the groups of perpetrators outlined above, it is easily conceivable that in certain (perhaps extreme) circumstances a match official could reasonably expect the immediate unlawful force to be inflicted upon them.<sup>30</sup> Whether threatening words alone are sufficient has not been tested in a published tort case, but analogies can be drawn from the criminal law

<sup>27</sup> *Gravil v Carroll & Redruth Rugby Football Club* [2008] EWCA Civ 689.

<sup>28</sup> James (2017), p. 76.

<sup>29</sup> Elliott and Quinn (2017), p. 337.

<sup>30</sup> James (2017), p. 76.

offence of assault where such verbal actions have been found to be sufficient.<sup>31</sup>

### 4.3 Civil law: tort of negligence

We can now move on to explore the possible claims that could be made against a “perpetrator” in the law of negligence where trespass to the person is not possible (i.e. a judge being unlikely to find a reasonable expectation of immediate physical violence).

The main “perpetrators” to consider are the governing body and/or the competition organiser. Neither of these can of course commit the abusive act against the match official, however, to what extent in law could, and indeed, should they be held primarily liable? One way in which such a claim could be constructed is to argue that they have failed to provide a safe working environment for the abused match official.

It is well established that employers owe a duty of care to employees, which obliges them to take reasonable care to ensure employees are safe at work.<sup>32</sup> However, in the context of match officials, the application of the law on this specific issue is complex because they are very rarely, except in limited cases at the elite level, employees of the governing body in the traditional sense. Rather they are appointed on an ad hoc basis by the league and/or governing body, and then at the end of the fixture, if they are paid a fee at all, they are usually remunerated by the home club. That is not to say that a court would not find something akin to an employer-employee relationship on the facts of a particular case.<sup>33</sup> There have been two recent judgments, one from the Court of Appeal in respect of a sporting matter and one from the UK Supreme Court outside of the sport sector, which although not tort cases, will undoubtedly have a bearing on this key question by analogy.

#### 4.3.1 The existence of a duty of care—the UK tax authorities try to capture elite-level football referees

The judgment of the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Limited* (‘PGMOL’) concerned a taxation case brought by HMRC against the entity responsible for the management of football referees at the professional levels in England and Scotland.<sup>34</sup> Some of these referees were not employed by PGMOL under written contracts of

employment, rather, once they had made the list of referees for the competitions appointed by PGMOL, they were engaged on a part-time/ad-hoc basis by the PGMOL to officiate matches, alongside them having a full-time employed job. They were appointed to the list annually each season and were paid match fees and expenses by PGMOL. A code of practice referred to referees being self-employed and said there was no guarantee they will be given matches to officiate, and equally there was no obligation to accept any appointments. HMRC determined that PGMOL was liable to account for PAYE (income tax) and National Insurance Contributions for amounts paid to the referees on the basis that they were employees. The two key legal issues in determining whether or not there are contracts of employment, in other words an employer-employee relationship, are is there sufficient mutuality of obligation and framework of control present in the circumstances?<sup>35</sup>

The upper tax tribunal (‘UT’), in the second instance hearing, upheld the FTT’s ruling in rejecting HMRC’s assertion that contracts of employment were present. The UT said that, as a matter of law, in absence of an obligation on the PGMOL to provide, or on the referee to undertake at least some work, there was insufficient mutuality of obligation to characterise the overarching annual contract between the PGMOL and the part-time referees as a contract of employment.<sup>36</sup> As to whether individual contracts of employment existed for each match appointment the part-time official was given by PGMOL, the fact that a referee could withdraw from an appointment before officiating the game negated the necessary mutuality of obligation.<sup>37</sup>

When it came to the issue of control in individual contracts, the UT said that the ‘critical question’ was whether the PGMOL’s inability to step in and tell a referee how to officiate during a game, or to impose a sanction (at least, not until after the engagement had ended) meant that there was not enough control? The UT said that PGMOL’s inability to step in while the referee was officiating during a game and could only impose sanctions after the end of the engagement, was an irrelevant consideration that the FTT should not have taken into account when concluding that PGMOL did not have a sufficient degree of control during the individual engagements to satisfy the test of an employment relationship.<sup>38</sup>

Upon further appeal by HMRC, the Court of Appeal said it had two broad questions to decide, namely whether the

<sup>31</sup> R v Costanza (1997).

<sup>32</sup> Elliott and Quinn, p. 110.

<sup>33</sup> White and Others v. Chief Constable of South Yorkshire and Others (1999).

<sup>34</sup> The Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Limited (2021).

<sup>35</sup> Bishop Fleming (2021).

<sup>36</sup> Revenue and Customs Commissioners v Professional Game Match Officials Ltd (2020).

<sup>37</sup> Revenue and Customs Commissioners 2020, paras 104-114.

<sup>38</sup> Revenue and Customs Commissioners 2020, para 139.

tribunals erred in law in their conclusions as to mutuality of obligation and control over the referees?<sup>39</sup> In their judgment, the CA made the following findings in respect of the mutuality of obligations issue:

- The FTT erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation. The correct analysis is that if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.<sup>40</sup>
- The UT erred in law in concluding that the individual contracts could not be contracts of employment if they merely provided for a worker to be paid for the work he did, and in concluding that the statements about the mutuality of obligation which is necessary to found an overarching contract also apply to individual engagements.<sup>41</sup>
- The UT also erred in law in upholding the conclusion of the FTT that provisions in a contract which enabled either side to withdraw before performance negated the necessary mutuality of obligation.<sup>42</sup>

The CA agreed with the UT in respect of the FTT's approach to the issue of control, subject to the following qualifications:

- Control by an employee may be exerted by positive, as well as by negative, means;
- A contractual obligation is by its very nature enforceable, if necessary by legal action, whether or not the contract enables the employer to apply a sanction for its breach; and
- The FTT gave decisive weight to irrelevant considerations, that is, to PGMOL's inability to step in during a match, and PGMOL's supposed inability to apply sanctions during the currency of the individual contract.

Consequently, the CA allowed HMRC's appeal, but crucially did not make an actual ruling on the merits of the case, rather remitting it to the FTT for it to consider, on the basis of its original findings of fact, whether there was sufficient

mutuality of obligation and control in the individual contracts for them to be considered contracts of employment.

Despite this, it would seem from the wording of the CA's judgment that they are erring on the side of finding the match officials in question as employees.

#### 4.3.2 The existence of a duty of care—"gig economy" workers challenged as giving employment rights

The case of *Uber BV and others v Aslam and others*<sup>43</sup> concerned employment law, rather than tax law, in terms of how it applies to those people working in the so-called "gig economy". By way of explanation, the "gig economy" involves the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment-by-task basis.<sup>44</sup>

The definition of a "worker" in section 230(3) of the Employment Rights Act 1996, and other relevant legislation, includes anyone employed under a contract of employment but also extends to some individuals who are self-employed. In particular, the definition includes an individual who works under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". Indeed, the SC took a purposive approach to this legislation saying Parliament's intention is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work.<sup>45</sup>

The central question before the UK Supreme Court was whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent.<sup>46</sup>

The starting point was that even though there was no written contract between the drivers and Uber, the contract and its terms had to be inferred from the parties' conduct. A key element of this was the control Uber had over the drivers.

<sup>39</sup> *The Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Limited* (2021).

<sup>40</sup> *The Commissioners for Her Majesty's Revenue and Customs* 2021, para 122.

<sup>41</sup> *The Commissioners for Her Majesty's Revenue and Customs* 2021, para 124.

<sup>42</sup> *The Commissioners for Her Majesty's Revenue and Customs* 2021, para 124.

<sup>43</sup> *Uber BV and others v Aslam and others* (2021).

<sup>44</sup> *Charlton* (2021).

<sup>45</sup> *Uber BV* 2021, paras 71-76.

<sup>46</sup> *Uber BV* 2021, para 1.



In their judgment, the SC emphasised five aspects of the relationship between the drivers and Uber which justified finding a conclusion that the drivers were working for and under contracts with Uber, and, therefore, were “workers”. Of those five, a couple of them could be relevant when considering the relationship between a governing body and match officials:

- Once a driver has logged onto the Uber app, the driver’s choice about whether to accept requests for rides is constrained by Uber;<sup>47</sup> and
- Uber also exercises significant control over the way in which drivers deliver their services, including the use of a rating system whereby passengers are asked to rate the driver on a scale of 1 to 5 after each trip - Any driver who fails to maintain a required average rating will receive a series of warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated.<sup>48</sup>

Again, finding the requisite degree of control is extremely fact-specific, but for our purposes, the fact that the drivers were found to be “workers” significantly expanded the possible range of casual workers who could be provided employee rights and protections.

#### 4.3.3 Whether a claim by a match official in the tort of negligence is likely to be successful as the law currently stands?

If a duty of care can be found owing to match officials by relying on the case law set out above, for a claim to be successful the remaining three stages of the test in Sect. 3.3. must be satisfied.

When it comes to whether the governing body has breached the duty of care to the match official, this will be determined objectively in terms of whether they dropped below the standard of the reasonable and competent organisation in the circumstances? Inevitably this will be fact-specific, but in general match officials could look to what policies the governing body has in place and whether they have been enforced, for instance.

The third limb of the claim in negligence, the so-called ‘but for’ test, may be difficult for a match official to establish. Using the previous theoretical example, could it rightly be said that a governing body’s failure to follow through on a preventative policy was the cause of the harm? The House

of Lords ruling in *Fairchild v Glenhaven Funeral Services Ltd*<sup>49</sup> could be helpful as it said a modified approach to causation is justified where there is more than one tortfeasor, namely all that would have to be shown is that the particular perpetrator had materially increased the risk of the match official being abused.<sup>50</sup>

If this hurdle can be successfully overcome, then the final issue for the claimant match official would be to show the type of harm actually suffered was a reasonably foreseeable consequence of the negligent act. Given the prevalence of abuse of match officials in sport, the author believes this would not be difficult to satisfy.

There are just a couple of final points to bear in mind before we move on. First, if the harm suffered by the match official is due to verbal abuse leading to emotional harm, he or she must be able to demonstrate to the court a recognised psychiatric injury, for example clinical depression, post-traumatic stress disorder or a breakdown<sup>51</sup>, not just simply being upset by shock. Secondly, defences. Where a match official has perhaps failed to enforce the laws of the game correctly when it comes to dissent, or any accompanying policy or guidance, then this may lead to the defendant governing body raising the possibility of contributory negligence, which if successful, would reduce the amount of damages awarded.

#### 4.4 Civil Law: Vicarious Liability for abuse by participants

If a participant either taking part in the contest or otherwise involved in it, committed harm against the match official, then are there circumstances where the club who is responsible for that person(s) could be held vicariously liable for their tortious conduct?

There have been a series of four high-profile cases in the past couple of years that would have a significant legal bearing on such a scenario. Three of which have been judgments by the Supreme Court.

##### 4.4.1 Is the abuser’s relationship sufficiently akin or analogous to employment?

In *Barclays Bank plc v Various Claimants*, a case in which a self-employed doctor who carried out examinations of prospective Barclays employees allegedly committed sexual assaults.<sup>52</sup> The case makes it clear that a person can be held

<sup>47</sup> *Uber BV* 2021, para 96.

<sup>48</sup> *Uber BV* 2021, paras 98-99.

<sup>49</sup> *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* (2002).

<sup>50</sup> Elliot and Quinn (2017), p. 62.

<sup>51</sup> Ziegler M (2019).

<sup>52</sup> *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

vicariously liable for the acts of someone who is not their employee, provided the relationship between them is sufficiently akin or analogous to employment. However, they do not erode the classic distinction between employment (and relationships that are akin or analogous to employment) on the one hand and the relationship with an independent contractor on the other hand. The key legal question for the SC to answer was whether the person who committed the tort is carrying on business on his own account, or whether he is in a relationship akin to employment with the defendant?<sup>53</sup> On the facts, the SC found that the doctor was not at any time an employee or anything close to an employee of the bank. Rather, he was in business on his own account as a medical practitioner, with a portfolio of patients and clients.<sup>54</sup>

#### 4.4.2 Is there a close connection between the abuser's act and the terms of their employment?

Even if someone is an employee and commits a tort, there are still limits as to what acts an employer shall be considered to be vicariously liable for. This was the subject of two cases involving the supermarket chain WM Morrison: *Mr A M Mohamud v WM Morrison Supermarkets plc*<sup>55</sup> and *WM Morrison Supermarkets plc v Various Claimants* case<sup>56</sup>. The legal question at the centre of both cases concerned the “close connection” test, namely whether the wrongful conduct was so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. In deciding on this issue the SC had to answer two questions:

- What function or field of activities has been entrusted by the employer to the employee (i.e. what was the nature of his job)? This is to be viewed broadly; and
- Whether there was a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable?<sup>57</sup>

In the 2016 case, an employee working in the supermarket petrol station came from behind the counter and physically attacked a customer on the forecourt after a disagreement. The SC said his conduct in responding to the customer's request with abuse was of course inexcusable, but interacting

with customers was within the field of activities assigned to him by his employer. In addition, in holding Morrison's vicariously liable, the employee telling the customer not to come back to the petrol station was an order to keep away from Morrison's premises, and therefore he was purporting to act about his employer's business.<sup>58</sup>

In the 2020 case, the Morrison's employee was part of their internal audit team and was tasked with transmitting payroll data for its workforce to its external auditors, which he did, but also made and kept a personal copy of the data. The rogue employee then used this to upload a file containing the data to a publicly accessible filesharing website, as well as sending the file anonymously to three UK newspapers, purporting to be a concerned member of the public who had found it online. In going through the “close connection” test, the SC in this case ruled that, on the facts, the employee's wrongful disclosure of the data was not so closely connected with that task that it can fairly and properly be regarded as made by him while acting in the ordinary course of his employment. On long-established principles, the fact that his employment gave him the opportunity to commit the wrongful act is not sufficient to warrant the imposition of vicarious liability. An employer is not normally vicariously liable where the employee was not engaged in furthering his employer's business, but rather was pursuing a personal vendetta.<sup>59</sup>

#### 4.4.3 What do the cases mean for match officials bringing vicarious liability claims against clubs?

Applying the three cases to the abuse of match officials, the terms upon which players, coaches and other people involved with a club vary wildly. The lower down the sporting pyramid you go, the less likely they are to be employees in the *Barclays* sense, let alone the fact the clubs will probably not have the resources to pay any damages or have any relevant insurance.

### 4.5 Civil law: Occupiers' Liability

Another potential avenue of justice for an abused match official in civil law is the ‘common duty of care’ under section 2(2) of the Occupiers' Liability Act 1957. This is an occupier-specific version of negligence imposing, “a duty to take such care in all of the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there.”<sup>60</sup>

<sup>53</sup> *Barclays Bank plc* 2020, para 27.

<sup>54</sup> *Barclays Bank plc* 2020, para 28.

<sup>55</sup> *Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc* (2016).

<sup>56</sup> *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.

<sup>57</sup> *Mr A M Mohamud* 2016, paras 44-45.

<sup>58</sup> *Mr A M Mohamud* 2016, para 47.

<sup>59</sup> *WM Morrison Supermarkets plc* 2020, paras 32-47.

<sup>60</sup> *James M in Lewis A and Taylor J* 2021, para G1.93.

Importantly for the purposes of formulating an argument for a match official who suffers abuse say, for example, due to a spectator at the event running onto the field, “occupiers” are not just someone in physical occupation of a venue, but extends to anyone with control over it.<sup>61</sup> In a sporting context, clubs, governing bodies, competition organisers and local authorities could have control over a sporting venue and be potential defendants for a claim.

To discharge their duty, occupiers must bear in mind three points:

- They are required to take positive steps to ensure the safety of their visitors—for instance, undertake risk assessments;
- The visitor must be made safe, not the premises; and
- The visitor must be made reasonably safe, not absolutely safe.<sup>62</sup>

Much of this is fact-dependant and the main way in which occupiers can discharge their duty is to adhere to industry guidance or standards.<sup>63</sup> Depending on the sport and level of competition, the liability of occupiers for the behaviour of spectators could hinge on complying with a governing body or competition organiser standards regarding venue safety.

#### 4.6 Criminal law

As a means of providing some form of justice for a physically abused match official, the Offences Against the Persons Act 1861 has a number of statutory offences which may be relevant:

- Section 47—Intention or recklessness as to making the contact.
- Section 20—intentional or recklessness as to making the contact, foresight of some harm being caused, but not necessarily grievous bodily harm.
- Section 18—intent to make contact and intent to cause GBH and/or wounding (i.e. breaking the skin).

There was a case in the sport of rugby union which involved both criminal prosecution and a sporting disciplinary proceeding. The participant concerned was a player called Barry Lockwood. The referee in the match and showed Mr Lockwood a yellow card for holding on after which Mr Lockwood punched and felt the referee suffered concussion and facial injuries and dental damage which required £760 of. Mr Lockwood was prosecuted for assault

occasioning actual bodily harm and pleaded guilty to the charge. He was ordered to perform 80 hours of community service a criminal compensation of £2500 to the referee and costs of £85.<sup>64</sup>

There are often compelling public policy arguments for applying harsh sanctions to such cases.<sup>65</sup> One such is that society as a whole does not want people to be deterred from becoming match officials due to an intimidating and violent environment. By giving harsh penalties, criminal courts can serve to encourage people to keep volunteering as match officials.

Unfortunately, even where video footage exists as evidence, there appears to be some reluctance by the police to proceed to a prosecution. Amateur football referee Satyam Toki required treatment from an ambulance crew after he was punched three times in the face by a player he sent off in a pre-season friendly in August 2020.<sup>66</sup> Mr. Toki was initially reluctant to press charges, even saying he was ‘influenced’ by the police who informed him his attacker was a teacher and would lose his job. But after seeking advice from fellow referees on social media, after they had seen amateur video footage of the attack, he felt owed it to his colleagues to take further action. Regrettably, the player received just a formal warning from police, in the form of simple caution, after being given a 10-year ban by the local football association. It is hard to believe if such an unprovoked attack had happened anywhere other than on a sporting field that the person would have received a criminal conviction and record.

The author can only speculate as to why the police do not seem to follow through when such incidents arise. With the abuse Mr. Toki suffered, it appeared as though the matter failed the first evidential stage of the Full Code Test, despite their being video footage. Despite this, the author does wonder whether the cost and time of dealing with such a matter was also a factor—i.e. proportionality under the public interest stage—although they could not say so publicly as it would directly contradict the CPS guidance which says when applying the Full Code Test, a case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be in respect of the public interest.<sup>67</sup>

#### 4.7 Sporting regulations

Despite all sports prohibiting verbal and physical abuse of match officials, many referees have reported issues concerning a lack of consistent and transparent action relating to

<sup>61</sup> James M in Lewis A and Taylor J 2021, para G1.84.

<sup>62</sup> James M in Lewis A and Taylor J 2021, para G1.96.

<sup>63</sup> James M in Lewis A and Taylor J 2021, para G1.97.

<sup>64</sup> *R v Barry Lockwood*, Unreported.

<sup>65</sup> Potts K and Tennant S in Lewis A and Taylor J 2020, para B3.62.

<sup>66</sup> Coverdale D (2021).

<sup>67</sup> The Crown Prosecution Service (2018).

disciplinary reports, communicating that insufficient punishment for the offending clubs or players is evident on most occasions.<sup>68</sup> For instance, verbal abuse in football at the professional level towards match officials is often only punished with a three or four-game suspension.<sup>69</sup> Even physical abuse towards match officials in football at the top level only attracts less than double-digit match suspension, the leading case of which being the charges The Football Association brought against Aston Villa's Leandro Bacuna in 2017, where he received a six-game suspension for barging into an assistant referee with his chest.<sup>70</sup> In contrast, in rugby union, the captain of a club team was banned for 11 weeks having been sent off in the 2013 English league final for calling the referee a "cheat".<sup>71</sup>

At the lower levels of sport, governing bodies and leagues tend to take a stricter approach. The aforementioned case of Mr Barry Lockwood being a good example. The disciplinary action brought by the Rugby Football Union ('RFU') was separate from the criminal charges, and the first instance disciplinary panel noted the usual starting point the sanction should be a life ban but reduced that to 20 years on the basis of evidence that Mr. Lockwood had been acting out of character due to a concussion. 20 years was then reduced to 10 by taking into account mitigating factors set out in the relevant regulations. An appeal panel accepted the RFU's submissions there was insufficient evidence to allow the potential concussion to constitute a mitigating factor. The RFU, bringing the appeal, persuaded the appeal panel that 10 years was so unduly lenient as to be unreasonable and the appeal panel duly increased Mr Lockwood suspension to 20 years. Given Mr Lockwood's age this was tantamount to a life ban from the sport.<sup>72</sup>

The relationship between the regulatory jurisdiction of governing bodies and the criminal jurisdiction of the police can often be somewhat controversial. When only caution was given to the player who attacked referee Mr. Toki, some people claimed that the decision by the local county football association to proceed with their discipline process when they did not have to, allowed the police to use the 10-year ban the player received as mitigation to justify their decision only to caution.<sup>73</sup>

Although the author is in favour of cooperation between sport and law enforcement when it comes to misconduct which may also amount to criminality, such as the between

the football authorities in England and Wales and the police and CPS, it has long been the author's belief that sanctions issued in sports disciplinary proceedings should not be considered by the criminal law, and vice versa, due to the different theoretical and policy underpinnings sports regulations and criminal statutes have.<sup>74</sup>

Under sporting regulations, clubs are also held accountable for the behaviour of their supporters towards match officials. One such instance of this was in the Irish rugby union, where amateur club Coleraine were fined £5,000 for targeting a female referee with sexist verbal abuse.<sup>75</sup>

Earlier in Section XX, we discussed the emergence of match officials being abused via social media. The first instance of this dealt with by The FA in English football was when the then former Liverpool forward, Ryan Babel, criticised referee Howard Webb after a game against their rivals Manchester United in January 2011. Mr. Babel retweeted a mocked-up picture of Mr. Webb in a Manchester United shirt, and commented: "And they call him one of the best referees? That's a joke. SMH [an abbreviation for 'shaking my head']". Mr. Babel apologised and admitted to the charge of improper conduct. Despite this, he still received a fine of £10,000 and was warned as to his future conduct.<sup>76</sup> In his summing up, the Regulatory Commission Chairman, Roger Burden, said: "Social network sites, like Twitter, must be regarded as being in the public domain and all participants need to be aware, in the same way as if making a public statement in other forms of media, that any comments would be transmitted to a wider audience. It is their responsibility to ensure only appropriate comments are used."<sup>77</sup>

More recently, the leading sports disciplinary body globally, the Court of Arbitration for Sport ('CAS'), partially upheld an appeal by one of the most famous football players in the world, Neymar Jr., in respect of a ban he had received from UEFA for abusive comments he made in an Instagram post about the match officials following a Champions League match his team PSG lost to Manchester United in March 2019, a game in which he did not play. He received a suspension of two games from the competition.<sup>78</sup> Regrettably, The FA are yet to impose a match suspension on a participant for a first-time offence of abusing a match official via social media.<sup>79</sup>

Most seriously of all in respect of actions taken by the competent body under sporting regulations, this past summer, the adjudicatory chamber of the independent Ethics

<sup>68</sup> Cleland J et al. 2020, p. 36.

<sup>69</sup> TBC.

<sup>70</sup> *The FA v Leandro Bacuna* (2017) The FA Regulatory Commission.

<sup>71</sup> BBC Sport (2013).

<sup>72</sup> Adamson (2015).

<sup>73</sup> Keogh (2020b).

<sup>74</sup> Carpenter (2013).

<sup>75</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-45551801>.

<sup>76</sup> Carpenter and Pendlebury (2015).

<sup>77</sup> *FA v Ryan Babel* (2011) The FA Independent Disciplinary Commission.

<sup>78</sup> CAS 2019/A/6367 (2020).

<sup>79</sup> Carpenter and Pendlebury (2021).

Committee of FIFA found Mr. Rosnick Grant, the former national head coordinator of referees of the Haitian Football Association ('FHF'), guilty of having abused his position, as well as of having committed acts of sexual harassment and abuse, including coercion and threats, in violation of the FIFA Code of Ethics. This case was part of an extensive investigation into the FHF, in which several officials were identified as having allegedly been involved in acts of systematic sexual abuse against female football players and coaches (participating either as principals, accomplices or instigators). In the case of Mr. Grant, his conduct was related to sexual harassment and abuse, as well as threats and coercion (to prevent the reporting of such sexual abuse) towards female referees, and taking advantage of his position of authority in Haitian football refereeing in exchange for sexual favours.<sup>80</sup>

Such horrific abuse of match officials painfully exhibits the troubling number of sources abuse can emanate from, and how governing bodies have a clear regulatory (and moral) duty to pursue such misconduct.

## 5 Human rights

Although the abuse of match officials does not itself fit squarely as a human rights issue, a recent ruling of the European Court of Human Rights ('ECtHR') on Article 6 of the European Convention on Human Rights ('ECHR') (right to a fair hearing and access to court) concerning Turkish football<sup>81</sup> does bring into focus the need for governing bodies to have a robust disciplinary process in place for all participants, including match officials.

Before getting into the case itself, it is worth mentioning that although the ECHR does not have a direct effect on private bodies, such as sports governing bodies in England, certain rights can still be invoked dependent on the circumstances, with Article 6 having been invoked in relation to sports disciplinary proceedings on a number of occasions.

Back to our Turkish case.<sup>82</sup> Serkan Akal was a football referee in Turkey who, in 2015, lodged an application with the Turkish Football Federation ('TFF') Arbitration Committee about the TFF's decision to downgrade him from being a top-level assistant referee to a "provincial referee". The Arbitration Committee dismissed his objection, finding that his downgrading had been in accordance with the

applicable law and procedure. There were four other participants, all players, who were also challenging the legality of the Arbitration Committee by relying on Article 6 § 1 (right to a fair hearing and access to court).

All of them alleged that the proceedings before the Arbitration Committee had lacked independence and impartiality, in particular, that the members of the Committee who had decided on their cases were biased towards football clubs because they had been appointed by the TFF's Board of Directors, which was predominately composed of former members or executives of football clubs. Several other complaints under Article 6 § 1 were made about procedural shortcomings in the proceedings, and the lack of judicial review of the decisions against them.

The Court noted that at the time of the applicants' proceedings the Arbitration Committee had exclusive and compulsory jurisdiction over the respective football disputes subject of this appeal, and stressed that that body's rulings were final and not amenable to judicial review by any court. As such, it had to provide the same safeguards as guaranteed under Article 6 § 1 of the Convention. However, the Court considered that there were inadequate safeguards to protect the members of the Arbitration Committee from outside pressure, notably from the TFF's executive body, the Board of Directors, which had an undeniably strong influence on the way the Committee was organised and functioned. In particular, the Board of Directors, which appointed the members of the Arbitration Committee, had always largely consisted of members or executives of football clubs. Those who represented the interests of football stakeholders other than those of clubs were in the minority.

Therefore, Mr. Akal and the other applicants had a legitimate reason to doubt that the Arbitration Committee members would approach their case with the necessary independence and impartiality. There had therefore been a violation of Article 6 § 1.

Consequently, all match officials in an ECHR member state who wish to challenge the actions of their respective governing body, in our case has been subject to some form of abuse, should be alive to the obligations upon that organisation when it comes to the referee's right to regulatory recourse. Only then shall they feel afforded an aforementioned sense of "justice" having been done and one of the governing body's key duties to them having been exercised.

## 6 Safeguarding

As put into the spotlight with the awful abuse conducted by Mr. Rosnick Grant outlined above, if there were any doubt, the mistreatment of match officials can be a significant safeguarding issue.

<sup>80</sup> FIFA (2021).

<sup>81</sup> European Court of Human Rights (2020).

<sup>82</sup> Ali Riza and Others v. Turkey (2020).



Going into depth on the law on safeguarding is beyond the scope of this paper, but there is a world-leading legislative regime in England and Wales that although not applying directly to sports organisations<sup>83</sup>, they must be aware of it in case concerns arise in a particular sport so that governing body can liaise effectively with specialist outside agencies<sup>84</sup>, such as the NSPCC’s Child Protection in Sport Unit. Not only this, but sports have a moral duty to their participants to have robust safeguarding processes in place regardless, especially for officials who are children/minors (i.e. under 18 years of age)<sup>85</sup> and “adults at risk”<sup>86</sup>. After all, the safer a sport is to participate in, the more people will want to be involved with it.

Safeguarding issues pertaining specifically to match officials include a lack of confidence in the sporting disciplinary procedures, meaning that match officials are not reporting a significant proportion of the incidents to which they are exposed.<sup>87</sup> By attempting to deal with any instance of abuse themselves, match officials are putting their own health and wellbeing at risk.

Should match officials not report instances of abuse from teams and/or individuals, it is likely those participants will continue to behave aggressively towards subsequent match officials.<sup>88</sup> In that sense, the author has always been of the view during his refereeing career that each match official owes a moral duty of care to those coming after them.

A second concern is about the locality of the match as to which a particular referee is appointed. By being appointed to officiate individual teams who are known to be aggressive and abusive, this may impact on their home and private lives.<sup>89</sup>

As one can recognise in reading this article, there are overlaps between key areas when it comes to the abuse of match officials. One such is the relationship between the duty of care and expanding the scope of safeguarding in sport, and therefore the responsibilities upon governing bodies. Unacceptable behaviour in sport goes way beyond children and adults at risk, with match officials being a prime example. Therefore, sports governing bodies should adopt specific safeguarding regulations that are broad in application, or widen the scope of existing safeguarding regulations.<sup>90</sup>

## 7 Potential legal and practical solutions

### 7.1 Specific legislation

Recently in England and Wales, a Private Members' Bill has been introduced to the UK House of Commons to amend the Sexual Offences Act 2003 to make sports coach a position of trust for the purposes of child sex offences; and for connected purposes.<sup>91</sup> The author is of the opinion that match officials should be given a similarly special status in law when it comes to being abused, not only in the criminal law, but also the law of negligence, and that the guardians of such a duty should be a sports ombudsman.

### 7.2 Sports Ombudsman

One of the priority recommendations of the Duty of Care in Sport Review was for the government to create a Sports Ombudsman. Such an organisation should have powers to hold governing bodies to account for the Duty of Care they provide to all athletes, coaching staff and support staff, providing independent assurance and accountability to address the issues covered in the review.<sup>92</sup>

There were no further details provided in the Report as to what such a body would like, however, it has been suggested that it’s remit could include jurisdiction over poor governance generally and that it should have both a preventative and investigatory (i.e. preventative) remit.<sup>93</sup>

### 7.3 Radical changes to culture

When a positive culture is created, the people operating within the environment are more content and tend to perform better, the same is true of match officials. For match officials, a positive culture can manifest itself in assurance towards the governing body in supporting them and confidence in the disciplinary proceedings are in place. Any mistrust or breakdown in the relation between the governing body and match officials, in particular mediating abuse, has the potential to positively or negatively contribute towards the prevalence of such.<sup>94</sup>

The opening to a recent decision from The FA’s Regulatory Commission reflected the cultural issues that currently exist in some sports, such as football:

<sup>83</sup> Gallafent K and Bush R in Lewis and Taylor 2021, para B6.19.

<sup>84</sup> Gallafent K and Bush R in Lewis and Taylor 2021, para B6.22.

<sup>85</sup> Children Act 1989, section 105(1).

<sup>86</sup> Care Act 2014, section 42.

<sup>87</sup> The Football Association v Darren Drysdale (2021).

<sup>88</sup> Cleland et al. (2020), p. 40.

<sup>89</sup> Cleland et al. (2020), p. 40.

<sup>90</sup> Gallafent K and Bush R in Lewis and Taylor 2021, para B6.111.

<sup>91</sup> Sexual Offences (Sports Coaches) Bill (2021).

<sup>92</sup> Grey-Thompson (2017), p. 6.

<sup>93</sup> Anderson J, Partington N (2017) Duty of care in sport: making the case for a sports Ombudsman in the UK. LawInSport. <https://www.lawinsport.com/topics/item/duty-of-care-in-sport-making-the-case-for-a-sports-ombudsman-in-the-uk>. Accessed 29 Sep 2021.

<sup>94</sup> Cleland et al. (2020), p. 34.

*“Match officials are entitled to, and should, be treated with respect by all participants. The incessant abuse and haranguing of match officials is unacceptable. It besmirches the sport and is inexcusable. Behaviour of this kind seems generally to be tolerated in football, often by match officials themselves. In our judgement, it should not be.”*<sup>95</sup>

This was also raised in the Duty of Care in Sport report under the theme of safeguarding. Baroness Thompson said that in sport a culture of bullying has in some settings become considered the norm, which was of course not positive.<sup>96</sup>

One suggestion to create a better culture, that the author is fully supportive of in his active officiating capacity, is that governing bodies should start to focus on the care and after-care of match officials in the sport.<sup>97</sup> There is an example of good practice in this regard from the Manchester (county) Football Association (‘MFA’), who not only have the usual appointments officer for match officials but the role is titled as ‘A Duty of Care and Appointments Officer.’<sup>98</sup>

## 8 Conclusions

Match officials in sport are essential participants in the production of organized matches, being tasked as they are with the mission of enforcing the rules and preserving fairness during the competition.<sup>99</sup> Therefore, as a sports lawyer and match official, it is of great sadness and frustration that from the data available it is clear that match officials do not feel as though they are sufficiently respected and protected by their respective sport, or indeed by the law. Be that civil law, criminal law, or sporting regulation.

This article has explored the current state of the law in England and Wales in respect of the duty of care and how this could be utilised by match officials who are subject to either physical or verbal abuse, which leads to actionable harm, as well as the regulatory measures taken by sport at both a national and international level. Part of the reason for this article was to shine a light on the potential avenues of legal recourse available to a match official who has suffered harm so that they achieve a tangible sense of “justice”.

Yet little of the legal analysis is settled or certain, not to mention the practical challenges facing abused match officials of the time and/or cost needed to bring or pursue a civil, criminal or regulatory action, so the current situation remains unsatisfactory. In the author’s opinion, this requires a co-ordinated and broader approach to the protection of match officials through a targeted expansion of the duty of care concept which would give referees and other officials in sport the specially protected and elevated status in law that they deserve. This would develop in parallel along with the expansion of the law in respect of non-employees being classed as workers (and being given equivalent rights), and recent cases regarding vicarious liability, both of which can be of assistance to match officials.

The need for proper legal recourse for participants in sport, including match officials, has been stated in recent human rights case law. There is also the possibility in the authors opinion that the law and sporting regulation surrounding safeguarding should be amended to include match officials as *de facto* “adults at risk”, thereby giving them an additional layer of comfort and protection.

Finally, all of this legal and regulatory change would need to be underpinned by a shift in culture and mindset by all interested stakeholders in sport, ranging from players to fans and the media, who currently see fit to constantly abuse, undermine and question the integrity of match officials at all levels of sport. The majority of them are volunteers who take up the whistle simply because of their passion for their sport and the desire to facilitate people to participate in it in a safe environment. They ought to at least have a safe and abuse-free environment to participate in.

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<sup>96</sup> Grey-Thompson (2017), p 20.

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