FORUM OF INSURANCE LAWYERS

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Sports SFT Round Table Bulletin

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Insurability of Sports – Lennox Batten

When it comes to insuring for first party sports injuries and medical expenses for professional sports, it is important to understand the respective needs of those clubs and teams as well as the coverage available.

Within sports insurance, there is a hierarchy amongst sports organisations – from grassroots clubs through to the professional leagues and associations, and whilst all are buying liability insurance, there is a smaller but more varied take-up of Personal Accident insurance.

First party medical includes personal accident insurance and medical expenses insurance.

From the insurance perspective Sports Personal Accident insurance can include Accidental Death (AD) and/or Permanent Total Disablement (PTD) by accident or illness. This is essentially career ending insurance and protects the individual or Club for loss future earnings or loss of asset value respectively.

It is also possible to buy Temporary Total Disablement (TTD) to cover financial loss incurred during shorter term injury, i.e. reimbursement for loss of wages or again an indemnity for loss of availability to play.

Cover can also be extended to cover medical expenses incurred in the aftermath of any injury, but given that all top level professional sports teams have their own medical teams on an annual payroll, requests for cover are normally only for extra medical and necessary repatriation expenses incurred whilst travelling abroad.

More specifically when looking at professional sports involving player contact, such as football and rugby, it is clear that injuries are an unavoidable consequence playing the game, and whilst not every individual will suffer an injury, teams will suffer injuries across their playing squads. For any group of professional players there can be an expected level of injury for any team which they now monitor very closely as it "one of the costs of doing business."

So how do professional sports teams look to insure their risks? From a short term injury perspective where there is expected loss, few if any buy Temporary Total Disablement. It is simply not cost-effective. With ever improving medical support and supervision, teams are managing the short term risk as cost effectively as possible, but medical advances are also continuing to marginalise the risk of more serious injuries leading to a career ending scenario.

Given the latter situation, most professional football teams now go even further when considering their need to buy mainstream PA cover, i.e. AD or PTD. Most teams now look to buying such cover from a catastrophic loss perspective, and in doing so may apply their own criteria as to catastrophic loss and their premium budget. For instance;

- If they choose to insure on an individual basis, they may only buy cover for their larger value players.
- Some may wish to cover players only when Playing, Practicing and Training (PPT) as they deem such activity to be the highest risk.
- Others may look to insuring the travel / accident side of things only rather than PPT as they see this as the area for true aggregation of loss, i.e. car or plane crash
- To fine tune premiums a team may only insure against a single incident that needs to involve two or more players, i.e. if only one player involved then no cover.

It is important to remember that in the United Kingdom, the National Health Service also provides a safety net for both teams and individuals, especially in traumatic cases where irrespective of medical insurance, much medical care is provided by the NHS direct.

The insurance industry recognises a number of sports as "High Risk". Essentially those that involve physical contact and or extreme activities.

Today underwriters (as well as the teams themselves) have the benefit of being able to review the level of injuries in a particular sport using an increasing availability of technical data. This is crucial for underwriters in assessing the risks and contributing to their pricing methodology.

One of the challenges faced by sports such as football and rugby, is the release of players from their clubs to play for their countries, with the inherent risk of being injured on international duty whilst under contract and being paid the club. To hedge the financial risk to clubs for releasing their players to play for their country, FIFA have established a central fund whereby they can reimburse clubs to cover a players wages whilst he/she is injured on international duty (subject to a max cap per week).

This has been achievable through the revenues that can be raised through Football World Cups and other FIFA sanctioned events but is more challenging for other sports where the profile of the sport is not as high and where the impact of playing for the national team versus the club may carry different weighting and payment structures.

In looking to obtain cover, teams decide on what limit to cover taking into account players asset values and contract length, salaries and bonuses, and it is important that both insurers and clubs are in common understanding and agreement of the justification of the Sum Insured.

Sport is evolving – we have seen the rise of lifestyle sports and extreme sports, and now the advent of E - sports, which could include new risks associated with repetitive strain injury (RSI) and mental fatigue. These are less visible and both the sport and the insurance industry will need time to understand and evaluate the impact of playing such sports and the scope providing effective insurance.

Liability – Richard Rainbow

Third-party liability covers injury to a third-party such as a visitor to sporting premises, these types of claims would traditionally include slips and trips are the dangers associated with mass attendance, particularly those at temporary structures where there are risks of falls or even, such as at the Hillsborough disaster, the risk of crushing incidents. These high-risk liabilities are governed by a relatively small international market.

Different sports approach liability insurance differently, and the professional teams have different dedicated personnel to help ascertain and manage the risks associated therewith including finance, legal and human resources departments.

Naturally, each individual department has a different objective, traditionally, the lawyers want coverage, the finance department wants premiums, and the risk managers want something in between the two.

Primary factors in ensuring high risk sports include what is defined as “defensibility “, risk analysis, risk transfer, safety, equipment, and legal changes provide the market with the ability to mitigate the risks, and some sports are very good at this while others lagged behind.

Geographical differentials – often sports insurance is dramatically affected by geographical location and factors associated therewith including the litigation culture of the particular country or region, for example, North America and the Republic of Ireland are high-risk given the attitude towards litigation.

“The scope of the duty of care is informed by the state of knowledge today. “

Where are we in the courts? – Simon Brown KC

We are looking at third-party liabilities, particularly of those participating, the correct identity of any defendants and the insurance provisions, including whether other insurances may affect recovery of damages.

Bringing a claim in sports against the club

There are difficulties in proceeding against the governing sporting bodies due to the duty of care owed by them to the individual participants.

Nevertheless, there are a number of reasons why third-party claims are brought at a lower level, some cases can be against a number of parties under the club umbrella, as an example, treatment from a club medic, or coaching staff, another player or the organisers of an event.

Similarly, a referee could be sued for negligence, using whichever insurance policy may be in place.

The benefit here is that each individual should have their own insurance.

There are also advantages in proceeding against the club itself, firstly, the certainty of insurance provision and the duties of care, as well as additional employer/employee duties.

These will include the law of vicarious liability and responsibilities to employees such as risk assessments. In addition, there may also be statutory and regulatory duties imposed which could have been breached under the employment regulations.

However, the advantages of proceeding against a club do have limitations, and the way in which a case is formulated is of vital importance.

In the case of Czernuszka (neeWatts) v Natasha Mercedes King [2023] EWHC 380 (KB) - the claimant was negligently tackled by the defendant, and as a result sustained catastrophic injuries, that left her paraplegic.

In his judgement, Mr Justice Martin Spencer said the defendant had been intimidating and was "out to get revenge" furthermore, she executed the tackle in a dangerous manner, which was likely to cause injury.

The legal test confirmed that sport was not immune to the rules of negligence or liability and that to establish civil liability one does not have to demonstrate recklessness.

The claimant lawyers were clever in pleading a "negligent" tackle (they did not argue that this was a criminal act) indeed, a crime would have been expressly excluded by the insurance policy and the civil claim had a lower burden of proof.

Included within the findings of fact were the following, The defendant's team played in an inappropriately, aggressive and intimidatory manner -

"The defendant, despite attempting to dominate play … became increasingly frustrated … she was looking for an opportunity for revenge on the claimant; the defendant … executed the "tackle "…in a way that was dangerous and liable to cause injury."

The judge stated that sport was not immune to the law of negligence and courts had deemed actionable injuries sustained where the conduct of an opposing player fell below the standard of care appropriate and to be expected.

The test employed was whether the defendant failed to exercise such a degree of care, as was appropriate in all the circumstances of the case.

Previous case law had not established a rule or principle that the contacts complained of must be reckless or demonstrate a very high degree of carelessness in order for liability to be established: that was the standard applied in the particular circumstances of that case.

What was vital in this case, and in any other is that the claimant did not allege the tackle was a criminal assault and indeed this would be outside the scope of the club's responsibility and the insurers policy.

The crown prosecution service (CPS) has shown no interest in intervening in sporting claims.

In R v Barnes [2004] EECA 3246 - The defendant was convicted of Grievous Bodily Harm (GBH) for a late sliding tackle resulting in a serious leg injury, this case was brought before Lord Woolf on appeal, and he stated quite specifically that "courts did not get involved. "Sports have their own disciplinary proceedings for such matters. Accordingly, the conviction at first instance, was quashed on appeal.

Lord Woolf held that "… Organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct… It is undesirable that there should be any criminal proceedings…"

This approach is crucial to insurers, because if action is deemed criminal outside the sporting arena or dealt with under the disciplinary process, then the scope for both the club and insurer to escape liability is very much reduced.

In other cases, such as the notorious, Chris Eubank versus Michael Watson trial, governing bodies, have been sued directly in this case the British boxing board of control (BBBC) was sued for a breach of the duty of care and inappropriate management of a well-publicised match in which Michael Watson was catastrophically injured by Chris Eubank.

It was argued that the BBBC had acted inappropriately and had not complied with their own rules and guidance which specified that medical welfare was paramount. It was held on the specific circumstances, there was sufficient proximity between the board and the claimant to establish a direct duty of care and the claim was successful on the basis that the defendant failed to provide sufficient medical provision and were negligent.

Watson v British Boxing Board of Control (BBBoC) [2000] EWCA Civ 2116.

It was held that the lack of adequate ringside medical facilities available and this had caused serious brain damage which had been avoidable.

The Court of Appeal ruled that the British boxing board of control owed a of duty of care, and despite the fact they were not the organiser of the fight. Because the board of control set down minimum mandatory requirements (which have been followed by the promoters), there was a sufficiently Proximate relationship, and that's a duty to take Reasonable care to ensure the personal injuries are properly treated.

The Australian appeals court case of Agar v Hyde [2000] HCA 41 3 August 2000 S159/1999 set the standard for claims against governing bodies. In this case, two players who sustained severe spinal injury, playing rugby union sued a number of defendants, including the governing body.

The appeal court held that there was no duty of care owed by the board to the players in relation to the risk of injury.

"…duties of care owed to individuals and must be considered in relation to the facts of that individual's case. "

Furthermore, if the appellant owed of duty to the respondents, then they would have owed a similar duty to many thousands … throughout the world under the laws of the game… "

Common law has historically drawn a distinction between a positive act, causing damage and a failure to act which results in injury.

However current claims (the recent concussion and dementia claims) are demonstrating this and new unique feature as lawyers are seeking compensation against not only the clubs, but also the governing bodies and examining the industry standard, these are groundbreaking cases encapsulating multiple defendants.

They seek to establish a duty of care, both domestically and internationally and the duty to protect against harm, relates to each and every player in the sport involved. They claim these on matters which the governing bodies could and should have been aware of across all such sports. In this way, they seek to distinguish the claims from Agar v Hyde arguing, the duty is owed to the whole cohort of players and therefore, including each individual.

Whilst governing bodies should be looking internally at their own sports for guidance, and not across the whole sporting gambit, nevertheless in terms of events, and crowd control there is rationale that one large arena sporting event is not necessarily this similar to a rock concert and certainly the movement of people is very similar. Accordingly, we are beginning to witness the collaboration of organisers and governing bodies.

One such area in which we see collaboration and exchange of information is the concussion forum which is sharing statistics and data amongst members in an effort to help educate. The education through dissemination of statistics and information is essential. If such injuries are to be reduced or eradicated in sport, however, it is very difficult to filter this information down from the professional clubs to the grassroots players,

The size of the marketplace, and the difference in sports is a problem in and of itself as the individuals do not have the necessary specialist knowledge.

"An expert must be 100% invested "

National governing bodies are now collaborating and engaging with each other, they are spending huge amounts of funding not only on the development of the sport, but also on the systems, claims management et cetera.

Whilst we are experiencing less injury claims now against national governing bodies for injury, there is an increasing culture of claims associated with gender inequality, directors and office claims, harassment and employment. These new types of claims have become very expensive, and particularly from the legal costs point of view.

National governing bodies are facing increasingly challenging issues as outlined above, which is shifting the focus of attention to a priority on insurance and administration and away from cultivating sporting excellence.

It is essential that clubs and bodies adopt a pre-incident approach, appropriate staff, structures, and procedures to prevent and safeguard issues before they happen (a proactive approach) rather than becoming reactionary and trying to resolve issues after the event.

The market is faced with a growing culture surrounding new risks, including concussion, injuries, industrial disease, such as asbestosis and mental health claims - these new risks are changing the market, and the risk analysis of underwriters has to be able to identify sensible reserves.

The necessary information is simply not available in the market at the current time.

In conclusion, in order for the markets to evolve with the changing landscape of risk, it is vital that all interested parties and particularly the professional sporting bodies and insurance, industry, collaborate and exchange information and statistics wherever possible to enable informed risk analysis.

It remains to be seen whether a governing body will be held liable for injury due to rules, not being enforced - only time will tell.