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Title:

Concussion, Employers' Duties and the Law: the U.K. & Ireland with Comparative Perspective from the U.S. and Canada

Date:

2017

Citation:

Anderson, J. & Heshka, J. (2017). Concussion, Employers' Duties and the Law: the U.K. & Ireland with Comparative Perspective from the U.S. and Canada. Cottrell, S (Ed.). Bond, C (Ed.). Kulkami, M (Ed.). Sports Law Yearbook 2016/17, Sports Law Yearbook 2016/17, (1), pp.277-284. LawinSport Limited.

Persistent Link:

<https://hdl.handle.net/11343/303096>

LawInSport & BASL Sports Law Yearbook 2016/17 - Concussion

Introduction

On 31 May 2016, the *Daily Telegraph* in London launched a campaign to tackle what it called "[football's secret shame – dementia](#)". The campaign called for the Football Association in England to commission independent research to answer the question, "Does playing football increase your risk of dementia and other degenerative brain diseases?" and "to work collaboratively to help researchers study a large sample of former professional players and compare their findings to the wider population."¹

2016 was the 50th anniversary of England's World Cup victory and the experiences of the eight surviving outfield players from that England team seemed to act as a catalyst for the campaign, as supported even by [rival newspapers](#): [Ray Wilson](#), Martin Peters and [Nobby Stiles](#) were diagnosed with Alzheimer's in their sixties while Jack Charlton appears to be struggling with memory loss in the last decade or so.

The campaign is of interest for three reasons – its retrospective element; its contemporary interest; and how it encapsulates many of the medical, regulatory and legal issues relating to concussion in contact sport, otherwise discussed principally in terms of rugby union and American football. On the first point, it is noteworthy that fifteen years ago the family of Jeff Astle (as have the family members of the 1966 winning team) were promised that the FA would divert funding into research as to "whether or not the act of repeatedly heading a water soaked leather ball in the 1960s and 1970s might have caused neurological failure."² Astle played professional football for West Bromwich Albion from 1964-1974. He died, aged 59, in 2002. At a subsequently coronial inquest, the coroner, said that repeated contact with the heavy leather ball used in the 1960s caused trauma similar to that of a boxer and labelled the matter an "[industrial disease](#)."³

At one level, the impact of the Astle coronial pronouncement could be deemed limited in the sense that the primary causal factor – the old, heavily stitched leather footballs – have long been replaced by lighter footballs;⁴ nevertheless very recent medical research published in the journal of the American Academy of [Neurology](#) – involving

¹ J Wilson, "George Cohen: English football needs to act on dementia" *The Daily Telegraph* (London) 31 May 2016, available at <http://www.telegraph.co.uk/football/2016/05/31/george-cohen-english-football-needs-to-act-on-dementia/>

² I Herbert, "15 years on from Jeff Astle's death, why are his family still waiting for head injury research?", *The Independent* (London), 18 January 2017, available at <http://www.independent.co.uk/sport/football/news-and-comment/jeff-astle-nobby-stiles-head-injury-west-bromwich-albion-a7533886.html>.

³ N Britten, "Jeff Astle killed by heading ball, coroner rules" *The Daily Telegraph* (London) 12 November 2002, available at <http://www.telegraph.co.uk/news/uknews/1412908/Jeff-Astle-killed-by-heading-ball-coroner-rules.html>

⁴ Medical opinion is divided on this point; see the summary by M Lee, "Jeff Astle: Head injury footballer's case tip of the iceberg?" *BBC News Online* 3 April 2014, available at <http://www.bbc.co.uk/news/uk-england-26817099>.

a relatively large control group of 222 adult amateur players, suggests that repeated heading of a football is a cause of concussion.⁵ This medical underpinning of a causal connection between an elemental part of a sporting activity (such as heading in football) and measurable, chronic brain trauma (as suffered by [Jeff Astle](#)) remains the key concern and, concomitantly, the key area of vulnerability in terms of legal liability, for all sports bodies involved in contact sports and not just the FA. It follows that in discharging its duty of care to ensure that the game of football is played safely, the FA ought to make good their promises on underwriting further medical research and including: better injury surveillance; preventative measures to make the game safer; on-field head injury assessment protocols; rehabilitation and recovery protocols; and, most importantly, so that the future players of the games (and their parents) can make an informed decision as to the sport of choice.⁶

Obfuscation on any of the above might lead to potential legal liability, as has been shown in the case of various American sports, discussed below, and as will now be examined by way of a review of rugby union's experience on this matter in 2016.⁷

Rugby Union and Concussion: A Game Changer

In the first week of 2017, World Rugby, the global governing body for the sport of rugby union, announced two new directives on dangerous tackling offences, sanctioning reckless and accidental head contact. The initiative was, according to World Rugby, as a result of what it calls an evidence based approach to player welfare.⁸

As part of this evidence based approach, World Rugby continuously commissions injury surveillance studies to be carried out at all of its international competitions so that the results can inform its player welfare initiatives, including rule changes. The most recently published surveillance study was at the 2015 World Cup. Concussion (at 13.9%) was the most common match injury. Tackling (21.2%) or being tackled (24.7%) were the most common sources of match injury.⁹ These results, which were

⁵ See also I Herbert, "Repeated heading of a football can cause concussion, new study shows" *The Independent* (London) 1 February 2017, available at <http://www.independent.co.uk/sport/football/news-and-comment/repeated-heading-football-cause-concussion-new-study-dementia-fa-a7558191.html>

⁶ It must be noted that the treatment given to Hull midfielder Ryan Mason who suffered a fractured skull during a Premier League game against Chelsea on 22 January 2017 was roundly praised and including by brain injury charity Headway, see <http://www.independent.ie/sport/soccer/ryan-masons-family-grateful-for-support-during-traumatic-24-hours-35390206.html>

⁷ See generally Jack Anderson, "Shadow of player-led litigation hastens latest rule changes" *The Irish Times* 6 January 2017, available at <http://www.irishtimes.com/sport/rugby/shadow-of-player-led-litigation-hastens-latest-rule-changes-1.2926673>, as informed by T Meakin, "The Evolving Legal Issues on Rugby Neuro-trauma" (2013) 21 (3) *Sport & the Law Journal* 34-42.

⁸ For a summary of World Rugby's approach to the issue of concussion management, and including the above rule amendments, see <http://playerwelfare.worldrugby.org/concussion>

⁹ C Fuller *et al*, "Rugby World Cup 2015: World Rugby injury surveillance study" (2017) 51 *British Journal of Sports Medicine* 51-57 doi:10.1136/bjsports-2016-096275.

consistent with previous surveys, and including those carried out by national rugby federations,¹⁰ duly fed into World Rugby's zero tolerance approach to head contact.

Nevertheless, the above presents an overly neat narrative of the background to the introduction of the new head contact rules and there is no doubt that an apprehension about player-led litigation was also a factor. Indeed, two examples occurred in 2016 when professional rugby players, [Cillian Willis](#) and [Jamie Cudmore](#), announced that there were suing their former clubs for alleged clinical negligence claiming that their employers negligently exposed them to further injury by permitting them to play on post-concussion.

Cillian Willis

In August 2016, various newspapers reported on what they called "the first case of a professional rugby player taking his employers to court due to concussion" when Cillian Willis was reported to have initiated civil proceedings for clinical negligence against Sale Sharks of the English Premiership.¹¹ The gravamen of the proceedings appears to be Willis' allegation that the club and two doctors negligently assessed two head injuries he sustained while playing against Saracens in an LV cup game on 10 March 2013. During that game, Willis, on receiving what appears to have been high tackle in the first half, was treated on the pitch by club doctors. They deemed him fit to play on. He claims that he was concussed. In any event, early in the second half, Willis received another knock to the head. He was again treated and again permitted to play on but was eventually replaced after 47 minutes of the game.

Four factors are of interest in the Willis proceedings. The first factor is the loss suffered by the player: a crucial underlying fact of the claim is that Willis never played rugby again and retired shortly after the above incident aged 28.¹² The second factor is that Willis alleges that the primary causal reason for his retirement was concussion, of which he had a history.¹³ The third factor is that Willis appears to be arguing that he

¹⁰ In England, the Professional Rugby Injury Surveillance Project (PRISP) report for the 2015-16 season was published in January 2017. It monitors the injury risk of Premiership Rugby players in Premiership Rugby, European and national competition as well as training and has done so for the last 13 seasons. A key finding from the 2015-16 season was that concussion was, for the fifth consecutive season, the most commonly reported Premiership Rugby match injury constituting appropriately 25% of all match injuries. In addition, concussion now comprises 20% of all injuries to the ball carrier and 47% of all injuries to the tackler. [http://www.englandrugby.com/mm/Document/General/General/01/32/25/17/1516_PRISP_Annual_Report_FINAL\(withcontentspage\)_English.pdf](http://www.englandrugby.com/mm/Document/General/General/01/32/25/17/1516_PRISP_Annual_Report_FINAL(withcontentspage)_English.pdf)

¹¹ G Cumiskey, "Cillian Willis to sue Sale Sharks over concussion" *The Irish Times* 23 August 2016, available at <http://www.irishtimes.com/sport/rugby/international/cillian-willis-to-sue-sale-sharks-over-concussion-1.2764945>

¹² For a discussion of the measure of future loss in the context of a career ending tackle on a professional sports person, see *Collett v Smith* [2009] EWCA Civ 583 (liability for injury admitted by opposing club) and see also its application in *XYZ v Portsmouth Hospital NHS Trust* [2011] EWHC 243 (QB) (a case of clinical negligence in which liability had been admitted).

¹³ For an interesting discussion of causation in the context of concussion-related negligence claims in sport, see R Bunworth, "Egg-shell skulls or institutional negligence? The liability of World Rugby for

was twice permitted to play on – it remains unknown as to whether he was treated at the half-time break - in circumstances that lead him to allege that World Rugby and Aviva Premiership concussion guidelines, as of March 2013, were not adhered to. The fourth factor is that the claim is described principally as one of clinical negligence though the exact nature of the employment relationship between the doctors and Sale (and hence the issue of vicariously liability), remains unclear.¹⁴

Jamie Cudmore

Jamie Cudmore played for his then employer, Clermont Auvergne, in the semi-final of the 2015 (European rugby) Champions Cup semi-final against Saracens. During the game he clashed heads accidentally with an opponent, Billy Vunipola. Cudmore was removed from the field and underwent the mandatory head injury assessment or HIA (World Rugby's concussion) protocol. Cudmore claims that he failed the HIA and thus should not have been permitted to return to the field of play. He further claims that just as he was about to get changed out of his playing gear, he was asked, principally because his second row partner had been injured, to return to the field of play, which he did. As reported in the media, Cudmore, who has since announced his intention to sue Clermont for negligence, is of the view that: "Clermont's doctors should have known better. But, apparently caught up in the moment and with lines blurred between patient, player, employer and team, allowed him to return before permitting him to play in the final at Twickenham two weeks later...."¹⁵

Again, there are four points of interest to be drawn from the Cudmore incident. The first is that, in contrast to Willis, Cudmore continues to play professional rugby but the loss suffered relates similarly to the "second impact" dangers he was exposed to by his employers in permitting him to play on while concussed. Indeed, recent research suggests that rugby players who returned to play in the same season (and not the same game) after a diagnosed concussion had a 60% greater risk of time-loss injury than players without concussion.¹⁶ The dangers of playing on while concussed during a game can be seen even more starkly in the tragic fatality in 2011 of Ulster schoolboy Benjamin Robinson. In 2016, his parents issuing civil proceedings against World Rugby not only for negligence regarding concussive-type injuries but also for

incidents of concussion suffered by professional players in England and Ireland" (2016) 16 (1/2) *International Sports Law Journal* 82-98.

¹⁴ For an analogy on vicarious liability see *Hamed v Mills and Tottenham Hotspur* [2015] EWHC 298 and 387 (QB) (clinical negligence in the context of the cardiac screening of a player). On employer liability more generally, see J Kirby "Employers' Liability and Concussive Injury in Professional Rugby Union: The application of Health and Safety Legislation to concussive injury in professional Rugby Union in the UK and Ireland." (2015) 13 (2) *The Entertainment and Sports Law Journal*, Online, DOI: <http://doi.org/10.16997/eslj.2>

¹⁵ S Peters, "Doctors twice sent Jamie Cudmore back on to the pitch after serious blows to the head... Now he and wife Jen are fighting for justice" *The Mail on Sunday* 25 September 2016, available at <http://www.dailymail.co.uk/sport/rugbyunion/article-3805807/Doctors-twice-sent-Jamie-Cudmore-pitch-blows-head-wife-Jen-fighting-justice.html>

¹⁶ See M Cross *et al*, "Professional rugby union players have a 60% greater risk of time loss injury after concussion: a 2-season prospective study of clinical outcomes." (2016) 50 (15) *British Journal of Sports Medicine* 926-931.

breach of the governing body's primary duty of care regarding the safety of the game. The scope of the potential threat of litigation to rugby can be seen in the fact that the co-defendants in the Robinson case include the Irish Rugby Football Union, the Ulster Branch, the referee on the day of the fatality, the player's coach and his school.¹⁷

The second point of interest from the Cudmore proceedings is his visceral description of the acute impact that his concussive injuries had – and remember, he went on the play in the Champions Cup final at Twickenham two weeks after the semi-final and received another head knock.

“Cudmore finished the game [the Champions Cup Final] but after blacking out in training the following week he was mercifully, belatedly, stood down. It took him three months to recover – the first few weeks spent largely in a darkened room as he battled post-concussion symptoms including mood swings, sensitivity to light, lethargy and nausea.”¹⁸

Again, this poses question for professional rugby as to employees' health and safety and the nature of the work place in which such players operate, as well as the nature of their rehabilitation and recovery process and the chronic or cumulative impact of such injuries.¹⁹

The third point of interest is that much of the concussion debate on rugby focuses on a lack of trust in the efficacy of current HIA protocols but what the Cudmore experience portrays is a lack of trust emanating from players as to the full extent of some clubs' or even some rugby authorities' interest in their long term welfare.²⁰ In this, and as Cudmore builds a legal case against Clermont, he has alleged that his legal team have been hindered by the fact that “no video footage exists from within the Twickenham changing room while a formal complaint made to European Professional Club Rugby, the organisers of the Champions Cup, drew a response from director general Vincent Gaillard pointing out the HIA was a World Rugby trial and therefore not under his body's jurisdiction.”²¹

¹⁷ See J Watterson and G Cummiskey, “Parents of rugby player Benjamin Robinson issue legal proceedings” *The Irish Times* 28 October 2016, and available at <http://www.irishtimes.com/sport/rugby/parents-of-rugby-player-benjamin-robinson-issue-legal-proceedings-1.2847339>

¹⁸ S Peters, “Doctors twice sent Jamie Cudmore back on to the pitch after serious blows to the head... Now he and wife Jen are fighting for justice” *The Mail on Sunday* 25 September 2016, available at <http://www.dailymail.co.uk/sport/rugbyunion/article-3805807/Doctors-twice-sent-Jamie-Cudmore-pitch-blows-head-wife-Jen-fighting-justice.html>

¹⁹ G Cummiskey and J Watterson, “Concussion dangers not being taken seriously” *The Irish Times* 29 October 2016, and available at <http://www.irishtimes.com/sport/other-sports/is-there-being-enough-done-no-concussion-dangers-not-being-taken-seriously-1.2847505>

²⁰ Cudmore has established the Rugby Safety Network (RSN) - a non-profit foundation to bring awareness to the severity of concussions, and to provide financial support to players suffering from consequences of continuous concussions - and which can be contacted at <http://www.rugbysafetynetwork.org>

²¹ S Peters, “Doctors twice sent Jamie Cudmore back on to the pitch after serious blows to the head... Now he and wife Jen are fighting for justice” *The Mail on Sunday* 25 September 2016, available at

The fourth point of interest from Cudmore is that, in common with the Willis proceedings, at its core is a claim of non-compliance with existing concussion or HIA protocols and including an element of clinical negligence against the club's medical personnel. The first issue returned to the media spotlight when in the 11th minute of the first half of game between Leicester Tigers and Northampton Saints on 3 December 2016 when the Saints' winger George North, who has a [history of concussion](#), appeared to be concussed but was permitted to play on. A subsequent report by the [RFU's concussion management review group](#) determined, on the balance of probabilities, that there were grounds to conclude that North had sustained a period of loss of consciousness and therefore, under the Head Injury Assessment criteria, should not have returned to the field of play.²²

No sanctions were applied against Northampton though the review group did make a number of suggestions relating to medical personnel's duty to review video footage of concussive incidents, and noting that "irrespective of whether part of the HIA assessment has or has not been carried out on the pitch, the entire HIA must be completed again once in the medical room by the examining doctor" and that no HIA should "be unduly shortened without clear reason."²³

In the aftermath of this report, and in the context of possible clinical negligence, the demands on club medical doctors in this report are now quite onerous as exacerbated by the fact that, as some [critics](#) have highlighted, the key issue is not so much compliance by rugby doctors with the extant HIA protocol but whether such protocols are fit for purpose in the first place.²⁴ Put simply, how does a club doctor align the *Bolam*-derived notion of acting in accordance with a respectable body of medical opinion²⁵ with a situation whereby it is admitted that "advances in the practical, immediate management of concussion have been constrained by a lack of progress in the development of an accepted operational definition of concussion that can be used to identify concussed athletes during match play."²⁶ To be fair, World Rugby has fully

<http://www.dailymail.co.uk/sport/rugbyunion/article-3805807/Doctors-twice-sent-Jamie-Cudmore-pitch-blows-head-wife-Jen-fighting-justice.html>

²² The full report can be accessed at http://www.englandrugby.com/mm//Document/General/General/01/32/23/45/CMRGUntowar dIncidentReview-GeorgeNorth_English.pdf

²³ Ibid at pp3-4.

²⁴ Critics of the HIA process, such as former World Rugby medical doctor, Dr Barry O'Driscoll, have argued that the HIA process is being used as an excuse to return or keep players to the pitch – in contrast, in the amateur game a suspected concussion leads to an unequivocal and definitive removal from the game. In response, the RFU's head of medicine has defended the HIA process, stating that 98.5% of concussions and suspected concussions were treated correctly last season, though there has been an acknowledgement of the need to use independent doctors to assess players who have suffered a head injury, see C Jones, "Rugby concussions: RFU head of medicine defends HIA process" *BBC Sport Online* 18 January 2017, <http://www.bbc.co.uk/sport/rugby-union/38397614>

²⁵ *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582, 587, the question being: "whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.."

²⁶ See C Fuller *et al* "Evaluation of World Rugby's concussion management process: results from Rugby World Cup 2015" (2017) 51(1) *British Journal of Sports Medicine* 64-69 at 64.

acknowledged the need for an operational definition of concussion,²⁷ though its definition does not as of yet seem to have received the imprimatur of international experts in the area.²⁸

Summary

Litigation such as the Willis and Cudmore not only places a spotlight on medical negligence in the context of World Rugby's concussion protocols but also other, preventative means of mitigating playing risks in the sport and reducing insurance costs – the most obvious being the directives on high tackles implemented at the beginning of 2017.²⁹ In this, both codes of rugby have a history of player-led litigation leading to regulatory change.

In the 1990s, rugby faced a number of claims, principally in Australia, relating to the safety of its then scrum laws. The litigation, taken by players rendered paraplegic in collapsed scrums, claimed that the rugby authorities had failed in their duty of care to update and ensure the consistency of scrum safety laws.³⁰ Echoes of that litigation can still be heard in the “Crouch-Bind-Set” commands of today's rugby union referees and in rule changes relating to uncontested scrums when no suitably trained replaced front row is available.³¹ Similarly, in a 2005 case from Australian rugby league, a player, Jarrod McCracken, successfully sued two opponents and their club for neck injuries resulting from a spear or tip tackle.³² Spear tackles were subsequently outlawed by World Rugby, as seen most famously in the red card awarded by [Alain Rolland](#) to Wales's Sam Warburton in the semi-final of the 2011 World Cup in New Zealand.

More recently still, World Rugby will also have been aware of the litigation begun this year, again against the rugby league authorities in Australian (NRL), by a player, [Alex McKinnon](#), paralysed in a so-called “[lifting](#)” tackle in a 2014 game. As McKinnon's medical care costs rise, compensation is being sought in the courts and as part of the proceedings scrutiny has fallen upon the NRL's allegedly negligent regulation of such

²⁷ M Raferly *et al*, “Editorial: It is time to give concussion an operational definition: a 3-step process to diagnose (or rule out) concussion within 48 h of injury: World Rugby guideline (2016) 50 *British Journal of Sports Medicine* 642-643.

²⁸ see G Cummiskey, “[Berlin International Consensus] Conference on concussion fails to give HIA its imprimatur” *The Irish Times* 24 January 2017, <http://www.irishtimes.com/sport/rugby/conference-on-concussion-fails-to-give-hia-its-imprimatur-1.2948219>

²⁹ On the insurance issue see J Watterson, “IRFU confirms insurance premiums beginning to soar Union decline to says whether concussion is reason for hike in costs” *The Irish Times* 19 October 2016, available at <http://www.irishtimes.com/sport/rugby/irfu-confirms-insurance-premiums-beginning-to-soar-1.2834377> and Johnny Watterson “IRFU will likely face legal action over concussion, says agent”, *The Irish Times* 21 October 2016, available at <http://www.irishtimes.com/sport/rugby/irfu-will-likely-face-legal-action-over-concussion-says-agent-1.2837382>.

³⁰ *Agar v Hyde*; *Agar v Worsley* (2000) 201 CLR 552; *Haylen v NSW Rugby Union Ltd* [2002] NSWSC 114; *Green v CRFL of NSW* [2008] NSWSC 26.

³¹ *Smoldon v Whitworth* [1997] PIQR P133; *Vowles* [2003] 1 WLR 1607.

³² *McCracken v Melbourne Storm Rugby League Football Club & Ors* [2005] NSWSC 107; [2006] NSWSC 1250; [2007] NSWCA 353

tackles. The McKinnon case has interesting legal, insurance and medical repercussions for both rugby codes and is one to be watched into 2017, as are continuing developments in North America.³³

³³ See J Marcuson, "Alex McKinnon sues NRL after tackle left him paralysed" *Sydney Morning Herald* 21 December 2016 available at <http://www.smh.com.au/rugby-league/league-news/alex-mckinnon-sues-nrl-after-tackle-left-him-paralysed-report-20161218-gtdrx2.html>