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<http://dx.doi.org/10.1080/14730980210001730501>

Title	The trouble with Roy Keane
Authors	James, MD
Publication title	Entertainment Law
Publisher	Routledge Taylor & Francis
Type	Article
USIR URL	This version is available at: http://usir.salford.ac.uk/id/eprint/2124/
Published Date	2002

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The Trouble with Roy Keane

MARK JAMES

This article analyses the potential legal actions that could arise out of Roy Keane's challenge on Alf-Inge Haaland in the light of the comments attributed to Keane in his recently published autobiography. This challenge becomes all the more interesting because of these comments as it raises the possibility that every cause of action that has ever been used in this country in respect of an incident of participator violence may come into play. Throughout, the implications for contact sports of this kind of legal intervention and the ever-present argument over the need for the law to be used in these circumstances will be referred to. The incident is used as a reference point for the application of the law to disputes arising out of football matches and to highlight the public policy arguments for and against bringing the various causes of legal action.

Introduction

On 21 April 2001, during the derby game between Manchester United FC and Manchester City FC at United's Old Trafford stadium, United player Roy Keane made a challenge on City's Alf-Inge Haaland. The challenge injured Haaland's right knee and resulted in Keane being sent off and subsequently banned for four matches.¹ On the face of it, the incident was nothing more controversial than one of the most successful and well-respected hard men of the modern game of football injuring his opposite number during a high profile, highly charged local derby match.

Then the rumours started that Keane had gone deliberately out of his way to make contact with and possibly injure Haaland. The challenge was alleged to have been made out of revenge for an incident that had occurred the previous season between the two players, when Haaland was playing for Leeds United FC.² On this earlier occasion, Keane had stayed down after the challenge because of damage to his cruciate ligament and was immediately accused by Haaland of feigning injury in an attempt to get him sent off. Despite the furore at the time of the second challenge, the matter was considered closed when Keane was banned by the Football Association for his challenge on Haaland.

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Entertainment Law, Vol.1, No.3, Autumn 2002, pp.72–92

PUBLISHED BY FRANK CASS, LONDON

Fast forward to the summer of 2002. Haaland has not completed a competitive match since the injury and is currently awaiting his fourth knee operation.³ On 12 August, *Keane: The Autobiography* is serialised in *The Times*. The book itself is published on 31 August.⁴ In it, he gives his version of what happened that day:

I'd waited almost 180 minutes for Alfie, three years if you looked at it another way. Now he had the ball on the far touchline. Alfie was taking the piss. I'd waited long enough. I fucking hit him hard. The ball was there (I think). Take that you cunt. And don't ever stand over me again sneering about fake injuries. And tell your pal Wetherall there's some for him as well. I didn't wait for Mr Elleray to show the card. I turned and walked to the dressing room.⁵

Completely unexpectedly, Keane had admitted what many had suspected all along. The challenge on Haaland was deliberate, it was intended to hurt and had been almost two years in the planning. Keane had apparently confessed to assaulting a fellow player intentionally during the course of a game, that he had not cared whether or not the ball was playable and that he knew that his challenge was an automatic sending off offence. Now it was time for the law to become involved.

This article begins by explaining the legal context in which incidents of participator violence are judged and shows that despite the hopes of players, clubs, governing bodies and fans, the law does apply to the conduct of players during a game. It then goes on to analyse the various potential causes of action that can arise in such circumstances, using the Keane–Haaland incident as a means of explaining how the law applies and the evidential problems that may arise. The potential actions for criminal assault, trespass to the person, negligence, vicarious liability and unlawful interference with contract are all examined with conclusions given on the likelihood of success of each. The article concludes with a brief discussion of the implications of the outcome of the Football Association's disciplinary commission hearing and the impact that such an incident can have on sport and the law.

Sports Injuries and the Law

The law has been involved in issues of participator violence for many years. The criminal law jurisprudence can be traced back to *R v. Bradshaw* [1878] 14 Cox CC 83, when a footballer was prosecuted, but acquitted, on a charge of manslaughter following a body-check that ruptured the intestines of the defendant's opponent, leading to the victim's death several days later. The tortious case history, although more recent in genesis beginning with *Condon*

v. *Basi* [1985] 1 WLR 866, discussed below, has become much wider in terms of causes of action. Under normal circumstances, cases of participator violence result in a tortious claim of some form, usually negligence, as the injured player seeks compensation for the injuries that they have suffered. The criminal law is more rarely resorted to, being used only where the injuries are particularly serious or the assault is clearly deliberate, such as a punch, *R v. Lincoln* [1990] 12 Cr App R(S) 250, or a head butt, *Attorney-General's Reference (No.27 of 1983)* [1994] 15 Cr App R(S) 737.

However, what is unusual about the Keane–Haaland incident is the apparent confession of the perpetrator of the injury, Roy Keane. As will be shown below, this removes one of the main difficulties for most criminal charges, the issue of proving the defendant's state of mind, or *mens rea*, when making the challenge. The possibility of a criminal prosecution does not negate any potential claim for compensation that the injured party may wish to pursue. Thus, there may also be claims in both negligence and trespass to the person, the latter again being based on Keane's apparently admitted state of mind at the time of the tackle.

Beyond the actions between the players, there are a number of claims under which Haaland's employer, Manchester City FC, may seek redress. For example, the club can claim that they have lost the services of Haaland and that they too wish to be compensated for this loss. Finally, both Haaland and Manchester City FC would seek to join Manchester United FC as second defendants to any claim, claiming that United are vicariously liable for the actions of their player, Keane.

Each of these potential legal actions will be examined in more detail below, as will the claims being made by and on behalf of Roy Keane as regards any potential defence that he may plead. The issue of consent will be analysed specifically as the scope of its application in the context of participator violence remains somewhat contentious. In particular, the extent of the players' consent will be examined to highlight that it is specific acts of the defendant that are consented to rather than the actual degree of injury caused and that players cannot necessarily legally consent to acts that they consider to be a part of the normal playing of the game if the law does not also agree that this should be the case.

Throughout, the various arguments for and against the law's involvement with this kind of incident will be referred to. However, what must be remembered from the outset is that sports participants are not and never have been above the law:

No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land ... If a man is playing according to the rules and practices of the game and not going beyond it, it may be

reasonable to infer that he is not actuated by any malicious motive or intention [and therefore not acting criminally] ... But, independent of the rules, if the prisoner intended to cause serious hurt ... or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful.⁶

Thus, it is not for the law to refrain from interfering in sports-related disputes. It is for sport and its governing bodies to ensure that there is no room for the law to become embroiled in such matters. Governing bodies cannot exclude the operation of the law. What they can do instead is to adopt strategies that make recourse to the law unnecessary. For example, they can change the rules of the game to make it less dangerous, for example by banning the tackle from behind,⁷ or they can increase the disciplinary penalties that can be imposed for foul and violent or dangerous conduct, such as the now mandatory minimum three-match ban for being sent off.⁸ The deterrent effect of such measures could mean that the unlawful challenges occurred less frequently and consequently that the law would only rarely be resorted to. However, such measures cannot stop the law's intervention where the challenge is so far outside of the playing culture of the sport that it cannot be said to have been part of the normal playing of the game.

This is the inherent difficulty both for governing bodies and for those who play contact sports. On the one hand physical contact, sometimes heavy physical contact such as in the two codes of rugby, is an integral part of the playing of the game. With that contact comes the inherent risk of injury occurring as a result of those contacts. What the law seeks to do is to describe when the running of those risks becomes unacceptable because it is too dangerous, or where an act cannot be said to be one of the inherent risks of the sport. The comparative lack of use of the law over the years means that these limits have never been defined properly. Thus, many of the cases that come before the courts are still defining the scope of the law. This leaves a great deal of uncertainty for those involved in contact sports, meaning that almost every case that comes to court receives a disproportionate amount of media attention. This is multiplied when the parties to the claim are well known. Further, what is particularly interesting and unusual about the Keane–Haaland challenge is that it gives rise, potentially, to all the causes of action that have previously come before the courts out of incidents of participator violence. It is against this backdrop that Keane's acts and the interplay between sport and the law must be examined.

Criminal Assault

The most serious legal action that Keane could find himself involved with is being prosecuted for assaulting Haaland.⁹ In this context, assault means only that the defendant has made some intentional or reckless contact with the victim. The degree of injury caused to Haaland means that he would be likely charged under either section 18 or section 20 of the Offences Against the Person Act 1861 (OAPA) respectively for causing or inflicting grievous bodily harm to another. Section 18 OAPA is the more serious offence and requires that the defendant intends to assault the victim and intends to cause the victim grievous bodily harm. Although Keane's words are evidence of an intention to make a physical contact with Haaland, and therefore commit an assault on him, there is probably not sufficient evidence in the words used after the challenge to prove that Keane actually intended to cause such a high degree of personal injury to Haaland. Thus, a section 18 charge would be likely to fail for a lack of evidence regarding the intention to cause grievous bodily harm.

However, the section 20 OAPA offence requires a much reduced *mens rea*, as was confirmed in *R v. Savage, R v. Parmenter* [1992] 1 AC 699. To commit a section 20 assault, the defendant must have either intended or been reckless as to the making of the contact and must have foreseen that his act would cause some harm to the victim. The defendant need not actually foresee that grievous bodily harm will be caused, just that some harm will be caused. This charge would seem to be appropriate for Keane. His description of the challenge in *Keane: The Autobiography* is evidence of either an intention to make contact with Haaland, or at least to act with subjective recklessness¹⁰ in respect of making such contact, *R v. Venna* [1976] QB 421. Further, in making a challenge of this nature, Keane will have foreseen that some harm, for example bruising, would occur as a result of his challenge. As Haaland suffered grievous bodily harm, the offence is complete.

Since publication of his autobiography, Keane has tried to explain the comments about the incident further. Unfortunately, the various comments attributed to him have further clouded the issue, particularly in respect of his *mens rea*. In response to the FA's disciplinary charge, Keane has claimed that he has not brought the game into disrepute because what he said was simply an honest account of what has happened to him during his playing career. This would seem to reinforce that the challenge was intentional thereby supplying the necessary *mens rea* for assault. In contradiction to this, he has also claimed that the ghost writer, Eamonn Dunphy, inaccurately paraphrased his comments and that he did not in fact say what is in the book.¹¹ If this is true, then only the negligence charge, discussed below, would be able to survive as there would be no evidence of intent to make contact with or cause injury to Haaland. Following the FA's disciplinary

commission's findings of 15 October 2002, it can be assumed at this point that Keane did make the comments in the book and that the *mens rea* is therefore present.

Keane's only potentially available defence would be consent based on *Bradshaw* and *R v. Brown* [1994] 1 AC 212. There is some debate over whether consent should be categorised as a defence in its own right or whether absence of consent should be an element of the offence of assault. If consent is part of the offence, then the prosecution will have to prove its absence beyond reasonable doubt, here that Haaland did not or could not consent to this type of challenge. If consent is a defence to assault, then here Keane would have the evidential burden of introducing some evidence that Haaland consented to his challenge on the basis that it was an integral part of the game of football and injury from it was one of the inherent risks of participation. The prosecution would then have to disprove this beyond reasonable doubt. From a practical point of view, whichever construction of consent is correct, ultimately, the prosecution must disprove the existence of the victim's consent and the success of their arguments will depend on whether or not challenges such as these are treated by the law as being an integral part of the game of football.

Although it may seem somewhat strange to claim that Haaland would have consented to being injured in this way, the legal concept of consent operates by granting immunities to certain acts, rather than the injuries caused by them. By taking part in a sport such as football, all players consent to all contacts being performed upon them that are an integral part of the playing of the game, regardless of the injuries caused to the players. Provided that the injury-causing act was an integral part of the playing of the game, any injuries that are caused as a result of such physical contacts are deemed to have been consented to by the injured player. Players consent to the sporting contact and the risk of injury from these contacts. They do not consent to or run the risk of injury from acts unconnected with the playing of the game. Thus, any injury that results from a clash of heads as two footballers attempt to head the ball at the same time is consented to, whereas an injury resulting from a punch is not. For example, in *R v. Billinghamurst* [1978] Crim LR 553, despite the arguments of the defence that punching an opponent was acceptable in the course of a rugby union match, the court held that fighting was unconnected with the playing of the game and therefore could not be consented to by the victim. The defendant was convicted under s.20 OAPA.

The difficulty in this area is trying to define precisely what is and what is not consented to by participants in contact sports. The mere fact that an injury was caused by a challenge outside of the rules of the sport will not of itself be sufficient to negate consent:

Games like football are not the same as fights and bouts, but they are similar in involving the use of force between players in accordance with the rules. In these games, the consent by the players to the use of moderate force is clearly valid and the players are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game ... A player may, however, be convicted of battery ... if he does an act with intent to harm outside of the bounds of the sport.¹²

Thus, some degree of foul play is allowed before the criminal law is contravened. However, as yet, there is no English law decision that has explained the extent of the law of consent as it applies to contact sports. In general terms, those acts that are an integral part of the playing of the particular sport, or are part of the sport's playing culture, for example where a player is trying to make a challenge or tackle, are consented to. Those that are not connected with the playing of the game, for example fighting, *Billingham*, and head butting, *Ferguson v. Normand* [1995] SCCR 770, discussed below, are not considered by the courts to be acts that are capable of being consented to and are therefore criminal assaults.

The difficulties in this area of the law are twofold. First, players may in fact consent to an act that the courts hold cannot in law be consented to, as occurred in *Billingham*. Second, that issues such as these only become 'live' where injuries, usually serious, are caused. Most such challenges do not result in an injury serious enough to prevent the victim from completing the game. However, where the victim is injured, the law is faced with a difficult case that tests it to its limits.

Keane's challenge falls right on the borderline between being part of the playing culture of professional football and a challenge unconnected with the playing of the game. It is at least quasi-criminal violence in that it violates the official rules of the sport, the criminal law and, to a significant degree, the informal player norms, and is as such generally not an acceptable part of the game.¹³

In the only similar reported case, *R v. Blissett* [1992] *Independent*, 4 December, the defendant was acquitted of a charge under s.18 OAPA. Whilst playing in a professional football match in the English Third Division, Blissett had risen to challenge for the ball with an opponent. Both players were attempting to head the ball. In the course of the challenge, Blissett's elbow came into contact with his opponent's face, fracturing his cheekbone and eye socket. The victim was unable to play professional football again. Although sent off by the match referee, Blissett was cleared of violent conduct by a Football Association disciplinary commission before being acquitted of assault at his trial. At the trial, the court placed

great emphasis on the evidence of the then chief executive of the FA, Graham Kelly who claimed that this was the kind of challenge that a regular spectator of football would expect to see at least 50 times per game. In other words, that this type of challenge was so common as to be part of the playing culture of football.

Regardless of how common a type of challenge is, it cannot become lawful simply through regular repetition. Either the challenge was an inherent part of the game or it was not. The referee thought that it was outside of the rules of the game as he sent off Blissett for the challenge. The FA tribunal agreed with the decision but added no further penalty for violent conduct.¹⁴ Thus, this type of challenge is undoubtedly on the very borderline of the law. Footballers do jump with their elbows high and do often catch opponents in the face, whether deliberately or otherwise. However, because this challenge was seen as relatively normal, it was not considered to be a criminal assault.

Keane's situation appears to be significantly different. What may put his particular challenge beyond that which is an integral part of the game, or part of football's playing culture, is his state of mind. If he intended to injure Haaland by the challenge, then that is not part of the playing of the game and could be more closely equated with punching an opponent. Consent would not operate and the offence under s.20 OAPA would be committed. However, if Keane intended to go for the ball and only to perform a hard challenge on Haaland to put him off his game, then consent would be operative and no criminal offence committed. This latter type of challenge is such an integral part of the way that modern football is played that all connected with the game would consider it to be within the playing culture and therefore consented to.

This type of play has, by inference, been accepted as a legitimate tactic by the Law Commission in *Consent in the Criminal Law*.¹⁵ In redrafting its proposals for how the law of consent should be developed, it specifically made reference to the fears of the Rugby Football League about tackling hard to 'psyche out' your opponent and to the Test and County Cricket Board's concerns about the use of bouncers to intimidate a batsman.¹⁶ By analogy, in football a tackle that was designed both to go for the ball and to 'rough up' or 'psyche out' an opponent would be acceptable even if it was a breach of Law 12, provided that the conduct was not unconnected with the playing of the game, which such play is not. At most, it would usually warrant a free kick being awarded against the tackler. Thus, as long as a tackle is being attempted, criminal liability would not attach. However, if the aim of the challenger was to injure their opponent, consent could not operate and the assault offence would be committed.

Thus, although on the face of it Keane may have committed a serious criminal assault, there is a sufficient grey area in the law that could mean

that in fact no offence was committed. Without a clearer definition of what is acceptable conduct capable of being consented to in the context of contact sports, most such acts will not result in successful prosecutions. However, if the quote from *Keane: The Autobiography* is found to constitute evidence of intent to commit the assault and foresight of some harm being caused by that assault, then this 'confession' could supply sufficient evidence to result in a conviction under s.20 OAPA.

The decision to take the matter further will then lie with the police and the Crown Prosecution Service. Although it is unusual for the police to pass on cases involving professional sports participants to the CPS and for the CPS to launch a prosecution against the player, it is not unheard of. For example, in *R v. Devereux* [1996] *The Times*, 26 February, the defendant was a player for the Gloucester Rugby Union Football Club. He was eventually jailed for nine months for punching an opponent during a game and fracturing his jaw in three places. In football, Duncan Ferguson was sentenced to three months in prison for head butting an opponent during a Scottish Premier League match, *Ferguson*. What can be said with greater certainty is that if Keane had assaulted Haaland in this way in a Sunday league match he would probably be facing a sentence of around six months in prison, *R v. Birkin* [1988] Crim LR 854.¹⁷ Birkin was a footballer who punched an opponent, breaking his jaw, in retaliation for a late tackle that had occurred earlier in the game.

The entire basis of a criminal action against Keane would depend upon two points, one evidential and one legal. The evidential question is whether or not he actually said what is attributed to him in his autobiography. This is pivotal in providing sufficient evidence of the *mens rea* necessary for criminal responsibility. This will undoubtedly prove to be a highly contentious point. The legal question is more subtle and is the one that the courts have so far failed to address in adequate detail; to what do participants in contact sports consent? A case like this could be used as a vehicle to establish more precisely the limits of the law of consent as it applies to contact sports. It could define what is an integral part of the game, what is an inherent risk of playing the game and which acts fall within and which outside the playing culture of the sport. However, these points are likely to remain of academic interest only for the time being. As both Haaland and Manchester City FC appear to be more interested in receiving compensation than securing some form of punishment for Keane, it is much more likely that a civil action will be brought.

Civil Battery

Keane's apparent confession would also appear to give rise to an action for trespass to the person, specifically battery, against him. A civil battery requires only that the defendant intended to make contact with the claimant,

Collins v. Wilcock [1984] 1 WLR 1172. There is no additional requirement that the defendant foresees or intends to cause the claimant any harm. Thus, the elements of battery appear complete. As would be the case if there was to be a prosecution, consent negates a claim of trespass to the person and raises the same discussions as above in respect of a criminal assault; was the challenge an integral part of the playing of the game and was it within the playing culture of football? Normally such a challenge would be considered to be on the borderline of what is considered to be acceptable conduct, as is demonstrated by the sending off and the subsequent playing ban. However, such actions for battery are extremely rare.

The main reason for this was raised in the case of *Elliott v. Saunders and Liverpool Football Club*, 10 June 1994 unreported H.C. judgment. Elliott began his action by pleading both battery and negligence in respect of a career-ending challenge involving Saunders where the two players had gone for the ball at the same time. During the early part of the trial, it was agreed by the parties that the claim for battery should be dropped, not for any lack of evidence, but because it would mean that if successful, Liverpool's insurance would not pay out. Their employer's liability insurance covered only negligent conduct of employees such as Saunders, not their deliberate acts. Thus, despite its seeming appropriateness, it is extremely unlikely that an action in trespass to the person would be pursued by either Haaland or Manchester City FC.

Negligence

By far the most likely cause of action would be in negligence.¹⁸ Negligence made a late entry into the domain of sporting-legal disputes in *Condon*. The claimant was through on goal in a Sunday league football match when he was deliberately fouled from behind by the defendant. The challenge broke the claimant's leg. At the start of his judgment, Donaldson M.R. stated that,

It is said that there is no authority as to what is the standard of care which covers the conduct of players in competitive sports generally, and above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players but that appears to be the position. This is somewhat surprising but appears to be correct.¹⁹

Since then, negligence has been pleaded on a number of occasions in sports disputes involving injuries. *Elliott*, although ultimately losing his case, was the first professional footballer to bring an action in negligence. *McCord v. Cornforth and Swansea City Football Club*, 19 December 1998 unreported H.C. judgment, case no.95/NJ/2006, saw the first professional footballer succeed with his action and receive damages for a career-ending injury that

had resulted from a foul tackle by the defendant. The claimant-player in *Watson and Bradford City FC v. Gray and Huddersfield Town Football Club*, 29 October 1998 unreported H.C. judgment, case no.1997/W/97, was the first professional footballer to receive damages and be able to resume his playing career, though arguably never to fulfil his potential. The action in this case had arisen out of a high and late foul challenge that broke the claimant's leg. There have also been numerous cases in many sports at the amateur level where damages have been received for injuries caused during sports participation.²⁰

The one area of doubt that had existed was over the precise nature of the applicable test for negligence in cases arising out of acts of participator violence. It had been argued that, based on *Wooldridge v. Sumner* [1963] 2 QB 43, the test should be one of the defendant acting with a reckless disregard for the health and safety of the claimant.²¹ In *Wooldridge*, the defendant, a show jumper, had lost control of his horse and injured a press photographer. The Court of Appeal held that this was an inherent risk of the sport and that a greater degree of negligence was required than a simple mistake made in the heat of competition. The reported cases that followed *Wooldridge* used a variety of terms to describe the degree of carelessness exhibited by the defendant making the test more uncertain.

However, the issue has now been clarified by the much more detailed and considered opinion of the Court of Appeal in *Caldwell v. Maguire and Fitzgerald* [2001] EWCA Civ 1054, where a professional jockey was claiming for injuries caused to him by the careless riding of the jockeys in front of him. The actions of the defendants had caused the rider in front of the claimant to fall, which in turn led to the claimant's horse unseating him. This fall caused the claimant serious injuries.²² The Court of Appeal approved the approach to establishing negligence in sport that was described by the trial judge, Holland J. It was held that liability should be found in accordance with the following propositions, all of which were based on the established sporting-legal jurisprudence:

1. Each contestant in a lawful sporting contest owes a duty of care to each and all other contestants.
2. That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants.
3. The prevailing circumstances are all such properly attendant upon the contest and include its object, the demands inevitably made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment reasonably to be expected of a contestant ...
4. Given the nature of such prevailing circumstances the threshold for

- liability is in practice inevitably high; the proof of a breach of duty will not flow from proof of no more than an error of judgment or from mere proof of a momentary lapse of skill (and thus care) respectively when subject to the stresses of [competition].
5. In practice it may therefore be difficult to prove any such breach of duty absent of conduct that in point of fact amounts to reckless disregard for the fellow contestant's safety. I emphasise the distinction between the expression of legal principle and the practicalities of the evidential burden.²³

In the context of injuries caused during a professional football match the law would be formulated in the following way. First, each footballer owes a duty of care to all other players. Second, that duty is to exercise all care that is objectively reasonable in the prevailing circumstances of the game to avoid the infliction of injury to all other players. Third, and making the above football-specific, the prevailing circumstances will include trying to score goals and trying to prevent the opposition from scoring goals against your team; the making of tackles to try to gain, or regain, possession of the ball; the physical and mental demands on players playing Premier League football; the inherent risks associated with making tackles and trying to score goals; the Laws of Association Football; the customs and conventions, or playing culture, of football, for example tackling a player hard in an attempt to put them off their game and the standards, skills and judgment of a professional footballer. Fourth, that something more than an error of judgment or lapse of skill will be required. Negligence requires more than a marginally late or foul tackle, *Pitcher v. Huddersfield Town Football Club*, 17 July 2001 unreported H.C. judgment, case no.WL753397. Finally, although a high threshold that may evidentially amount to reckless disregard for the safety of other players, the test is still negligence in all the circumstances. Thus it must be established whether the challenge under consideration was a reasonable one to perform in the circumstances of the game.

Once again, the issue of liability turns almost exclusively on what is considered to be an integral part of the playing of the game and whether a challenge such as Keane's can be considered to be part of the playing culture of professional football. This time, however, there is plenty of authority that has discussed the circumstances in which a player is considered to have fallen below the standard of play expected of them in a particular sport. Such a challenge as Keane's, whether considered by non-lawyers to be a mistimed attempt at getting the ball or an attempt to rough up or intimidate an opponent, has, legally, gone beyond mere carelessness in the execution of a legitimate move accepted as being part of the game. Part of the appeal of sport is that players cannot play the game perfectly every time and that there

is an element of uncertainty in the way that a game unfolds and in its ultimate outcome. Where players make errors of judgment and skill, or mistime challenges, these are considered to be part of the game and an action could not be brought for injuries sustained in this manner, as was the case in *Elliott* and *Pitcher*. However, this situation appears to be different in the light of Keane's apparent confession as to his motive for making the challenge, leading to the incident being more closely analogous to cases such as *Watson* and *Leebody v. Ministry of Defence* [2001] CLY 4544, both of which involved challenges which were high, late and caused serious injury.

Keane owed all other players, including Haaland, a duty to exercise reasonable care to avoid causing them injuries. By deliberately going for the player in this way, Keane acted in a manner that was inconsistent with the prevailing circumstances of the game. According to *Keane: The Autobiography*, this was not an error of judgment or a momentary lapse of skill but a deliberate attempt to hit and possibly hurt Haaland. Such a challenge is sufficient to surmount the high evidential threshold required for a successful action in negligence based on an act of participator violence, as was the case in *Watson* and again more recently in the case of *Leebody*. The challenge appears to be unreasonable and therefore negligent because Keane did not take all care that was objectively reasonable in the circumstances to avoid inflicting injury on Haaland, leaving Keane likely to be found liable for the injuries caused and consequential loss incurred from his challenge.

The only possible defence to a claim of negligence in these circumstances would be *volenti non fit injuria*. This is a plea by the defendant that the claim of negligence should not succeed because the claimant was aware in advance of the risk of the negligent act occurring, *Condon*. A plea of *volenti* is intimately entangled with the analysis of whether the injury-causing act was part of the playing culture of the sport. Although this is a somewhat circular argument, *volenti* would only act as a defence in instances of participator violence where the act itself was an integral part of the playing of the game and accepted by the participants as such. Sports participants accept that the play of their opponents will not always be perfect, that errors of judgment and careless conduct will occur. By this, they agree to run the inherent and integral risks of participating in the sport in question. However, they do not agree to run the risk of injury being caused by an act that is unconnected to the playing of the game. This would exclude from the scope of *volenti* deliberate assaults, such as punching another player, and acts that were either too dangerous or motivated by non-sporting considerations, such as revenge.

Thus, an action in negligence would almost certainly succeed on the facts that are currently available. The execution of the challenge and the apparently admitted motive behind it are clear evidence that Keane has

dropped below the objectively reasonable standard of play expected of a professional football player in these circumstances. Many of the previous successful actions in negligence have arisen out of much less contentious challenges. There is little reason to suspect that liability would not be found if this incident were to be litigated.

A better line of argument for Keane would be to seek a massive reduction in the amount of damages claimed on the basis that there is an insufficient causal link between his challenge and the injuries currently preventing Haaland from playing. For a successful claim of negligence, the damage suffered must be reasonably foreseeable, *Donoghue v. Stevenson* [1932] AC 562. Keane injured Haaland's right knee, but Haaland's ongoing problems have been with his left knee. Unless Haaland can prove a causal nexus between the challenge and the injuries to his left knee, for example that the injury to the right knee exacerbated the pre-existing injury to his left knee, then his damages will be very greatly reduced. This line of argument would not prevent a successful claim in respect of the injuries caused to Haaland's right knee; however, at its most successful, this line of argument might reduce the compensation claim to a sum of only a few thousand pounds.

For both civil causes of action, battery and negligence, the claim is for damages. The claimant can claim for the pain, suffering and loss of amenity caused to him by the tortious act. He can also claim for loss of earnings and any other consequential losses, for example medical expenses. However, unusually in this case, there is also the possibility of an award of aggravated damages.²⁴ Aggravated damages are damages awarded to a claimant to compensate them for the additional injury caused to their feelings by the time, place and manner in which the injury was caused and the conduct of the defendant in respect of the injury. In a non-sporting decision that brought together many of the strands of this area, *Appleton v. Garrett* [1996] PIQR P1, held that real and informed consent as regards the particular act must be absent, that there must have been exceptional or contumelious conduct or motive on the part of the defendant that was capable of sustaining an award of damages and there was no reason to exclude such a claim where it was based in trespass to the person. The claimant's damages were increased by 15 per cent to reflect the aggravated element of the claim.

Further, in the Australian case of *Rodgers v. Bugden and Canterbury-Bankstown* [1993] ATR 81-246, it was held in respect of injuries caused to the claimant during a professional rugby league match, that aggravated damages were payable because of the humiliation suffered by the claimant by being injured live on national television and having his injury and future career discussed throughout the sports media for many months afterwards. The defendant had broken the claimant's jaw by a high tackle that kept him out of the game for several months. The claimant's damages were increased

by around 10 per cent to reflect the aggravated nature of the claim. Thus, if these authorities were followed, there is a chance of any award of damages being increased because of the very public place in which the injury was caused and the 'contumelious motive' of the defendant.

Vicarious Liability of Manchester United FC

In addition to Keane's personal liability, the sporting-legal authorities have been clear that where the defendant-player is a professional, then their employing club should be vicariously liable for the injuries caused to the claimant. In *Elliott, McCord* and *Watson*, the defendants' clubs, respectively Liverpool FC, Swansea City FC and Huddersfield Town FC, were each joined as second defendants to the claim and were held to have been vicariously liable for the acts of the defendant-players.

The basis of vicarious liability is that where an employer receives the benefit of the actions of an employee, it should also bear any losses that are incurred by them. The limit on this is that the losses must have been incurred during the course of the employee's employment. An employee's course of employment encompasses all acts authorised by the employer and includes authorised acts performed in an unauthorised manner. Thus, where a footballer injures an opponent by a negligent tackle, vicarious liability will arise as the tackle is an act authorised by the employing club, as was the case in *McCord*. Further, it will encompass injuries caused by most acts of foul play, even serious foul play, as these will be classed as authorised acts that have been performed in an unauthorised manner, as was the case in *Watson* and *Leebody*. As the challenge on Haaland was performed during the course of play and in the context of attempting to get the ball, Keane would appear to have been performing an authorised act, a tackle, in an unauthorised manner, in that it was a foul and potentially dangerous tackle, thus leaving Manchester United FC vicariously liable for the injuries caused to Haaland.

Vicarious liability does not extend to cover acts that are not authorised by the employer, in that they are not connected with the defendant's employment. Where the employee is acting 'on a frolic of his own', he alone is liable for the damage caused. However, in the context of sport, this is likely to receive a very narrow interpretation. Throughout the time that the game is in progress and the player is playing, he/she is acting in the course of his/her employment. Any challenge that has anything to do with the playing of the game, such as that performed by Keane, is merely an unauthorised means, a foul, of carrying out an authorised act, a tackle. Short of punching or headbutting an opponent whilst on the field of play, or attacking them in any way after the game has ended, for example in the car

park after the match, the acts of the defendant-player will be held to be in the course of their employment.

In the United States, vicarious liability has even been extended to cover actual assaults committed by sports participants. Although US decisions are not binding on English courts, they do provide good examples of how English law may develop in such an unusual context. In *Tomjanovich v. California Sports Inc.* [case no.H-78-243 (Sd Tx)], the court held that where the defendant-player punched the claimant and broke his jaw during a National Basketball League match, the employing club should be vicariously liable for the damages caused. The basis of the decision was that where a renowned hard man, or enforcer as such players are referred to in basketball, is employed because of their physical and confrontational style of play, and where it is known that such a player may cause injury because of that style of play, the employing club should be vicariously liable for any injuries caused by that player unless it can be shown that they had taken steps to train that player to play in a less violent or potentially dangerous manner. Washington, the defendant's player in question, had a poor disciplinary record and the defendants had not taken any steps to retrain him out of his aggressive playing style, if for no other reason than his style of play was why he was on the playing staff in the first place.

In Britain, players in Keane's mould are actively sought out by many clubs and are encouraged to play in this style as it is considered to be an important role within and tactic for many teams. Manchester United are no exception to this. A challenge such as Keane's is an integral part of his style of play and would be considered to have been committed in the course of his employment without the need for recourse to a more controversial authority such as *Tomjanovich*. Further, the authorisation of the book by Sir Alex Ferguson on behalf of the club would appear implicitly to accept that the challenge was performed in the course of Keane's employment with Manchester United.²⁵ This would leave United, or at least their insurers, liable for the damages claimed by Haaland.

Unlawful Interference with Haaland's Contract of Employment

By far the most unusual potential action to arise out of the Keane–Haaland incident is a claim by Manchester City FC against Keane, and therefore vicariously against Manchester United FC, for unlawful interference with Haaland's contract of employment with City.²⁶ If the claim was successful, City would be able to recover any costs that they had expended in relation to Haaland's rehabilitation and replacement in the first team squad. Such an action has been attempted only once before in the sporting context, in *Watson*, where it was unsuccessful. However, this area of the law is

particularly unclear and was if anything made worse by the *Watson* judgment.

In *Watson*, the defendant had challenged the claimant after the ball had been played, breaking his leg. The claimant-player's action in negligence was successful and he was awarded damages just under £1m. This was based on expert accounts of the claimant's potential and that he would have been able to play in the Premier League had he not been injured. *Watson* now plays in the English Third Division. Alongside the negligence claim, *Watson's* club, Bradford City FC, pursued an action for unlawful interference with his playing contract. The claim was that *Watson* had been the club's record signing and one of their highest paid players. He had been injured in one of his first appearances for the club and was injured for the most part of the duration of his contract. In effect, Bradford were claiming for the 'wasted' transfer fee, monies paid to *Watson* and the cost of a replacement, potentially a huge claim.

In dismissing the claim for unlawful interference with the contract of employment, Hooper J. did not define the tort and made no reference to any case law, leaving the area ripe for a further claim to clarify the law in respect of sports injuries causing non-performance of a playing contract. The case appears to hold that to constitute the tort of unlawful interference with a contract, the defendant must have acted at least recklessly in respect of the injury-causing act. As the defendant's act was found to have been only negligent, Bradford City FC's claim failed.

The lack of discussion of the definition of the tort by Hooper J. adds to the lack of clarity in this area. *Clerk and Lindsell on Torts* refers to unlawful interference as a tort of 'uncertain ambit'.²⁷ The tort appears to require that unlawful means have been used by the defendant with the object and effect of causing damage to another, *Merkur Island Shipping Corp. v. Laughton* [1983] 2 AC 570. Unlawful means includes torts, *Lonrho v. Fayed* [1990] 2 QB 479. The unlawful act must be directed against the claimant or intended to harm the claimant's interests. By analogy to the tort of unlawfully procuring a breach of contract, intention can be inferred where the defendant appreciated the probable consequences to the claimant or had been reckless as to those consequences, *Stratford v. Lindley* [1965] AC 269.

Keane's situation appears to be different to *Watson* and Bradford's because of the apparent confession that he intended to make contact with Haaland. This intentional unlawful act, either a civil or criminal assault, is a sufficient basis for an unlawful interference. As a professional footballer playing in a professional match, Keane will have had at least constructive knowledge of the existence of Haaland's contract of employment with Manchester City FC. He would also have appreciated that a probable consequence of such a challenge would be to interfere with Haaland's

ability to perform his contractual duties by his being too injured to continue playing for a period, or he was reckless as to whether these consequences would have occurred.

For a cause of action to be pleaded based on facts such as these is extremely rare. To make this claim even more difficult, it is acknowledged that the tort is of unclear ambit and that, as with the civil and criminal assaults, there could be evidential difficulties in trying to prove the defendant's intention to injure and his intention to interfere with the existing contract of employment. There is a possibility that Manchester City FC would be able to recover damages for the costs that they have incurred through Haaland's incapacity; however, they would have to be prepared to take a pioneering case to establish the precise parameters of the law before they could succeed. As Bradford City found, the lack of clarity of the law on this point as much as the evidential difficulties in proving this tort should be enough to dissuade most potential claimants for bringing a claim based on this unusual cause of action.

Conclusions

On 15 October 2002, the FA's disciplinary commission found Roy Keane guilty on two charges of bringing the game into disrepute. The first charge related to his admission that he was inappropriately motivated in his challenge on Haaland. The second related to his having made personal profit from writing about the incident. He was banned for five matches and fined £150,000.²⁸ The tribunal, presumably, believe that Keane did say the comments attributed to him in the book and that he is profiting from it. Keane has not pursued an appeal against either the ban or the fine. The next move in this saga will now have to come from Haaland.

The Keane–Haaland incident has brought back into focus the interaction between sport and the law. It is of particular relevance as it involves an incident of participator violence, the kind that all players of all sports can relate to, rather than some more exotic element of European Union law as is under consideration in relation to transfers and broadcasting rights. It should also serve as a timely reminder that the law can and will be used by players of all sports where they have suffered injury at the hands, or feet, of another player.

The legal actions discussed above are neither new to the law, nor to sport. Both the civil and criminal actions have long jurisprudential histories to justify their use following incidents of participator violence. The only point of law that requires clarification concerns the action of unlawful interference with contract. However, when compared to the potential actions for criminal assault, trespass and particularly negligence, this is only of minor importance.

Throughout the country, incidents such as these occur every day that sport is played. Yet, there is still outcry whenever the law is resorted to by

an injured player. The claimant-player is criticised for damaging the sport, or being a money-grabber or acting out of spite. Meanwhile, the FA escapes criticism for its unduly lenient approach to foul and violent conduct. Whereas Keane was banned for four matches for his challenge on Haaland and five matches for writing about it, Patrick Vieira received a six-match ban for spitting at Neil Ruddock.²⁹ This is not good evidence of a governing body keen on discouraging violent play.

Incidents such as this simply serve to reinforce the dichotomy that surrounds participator violence. Roy Keane will almost undoubtedly not be prosecuted for his challenge. However, if he had committed such a challenge in a parks game, he would probably be looking at a term of imprisonment of about six months. It is more likely that he, and Manchester United FC vicariously, will be sued for the injuries caused. However, many players find themselves unable to take tortious actions against opponents who are uninsured and who would never be able to meet any award made against them, *Cubbin v. Minis* [2001].³⁰

Canadian courts have a long history of convicting sports participants who deliberately injure others during the course of a match, particularly where the weapon of choice is an ice hockey stick. Canadian criminal law is very similar to English law and has seen many more sports-related prosecutions over the years and is, therefore, a jurisdiction from which we could learn much. Despite handing down fines and prison sentences over the years, criminal cases still regularly occur, originating from all levels of Canadian sport. However, more recently, the Canadian courts have taken a much more active stance in respect of the punishment of participator violence.

The early cases involved two professional ice hockey players in the National Hockey League, *R v. Maki* [1970] 14 DLR (3d) 164, and *R v. Green* [1970] 16 DLR (3d) 137. However, the law has since developed through a series of other hockey cases from all levels of the sport, but in particular in *R v. Cey* [1989] 48 CCC (3d) 480, and *R v. Ciccarelli* [1989] 54 CCC (3d) 121. In each of these four cases, fights had broken out and an ice hockey stick was used to inflict varying degrees of injury on the victim. In the former cases the defendants were acquitted but in the latter both were convicted though with extremely light sentences; in the case of *Ciccarelli* a mere one day in jail. As in England, the courts have generally imposed very low sentences on sports participants.

However, in *R v. McSorely* [2000] BCPC 117, the court took a different approach to punishment. The defendant was convicted of assault with a weapon for hitting an opponent with an ice hockey stick during a National Hockey League match. On being granted a conditional discharge for the offence, McSorely was bound by a condition that he would not engage in any sporting event where his victim was to be on the opposition team. This

outcome was ground-breaking in that, instead of imposing a relatively meaningless punishment on a very highly paid professional sportsman, it actually impacted on his playing career, even if only for two games per season. What it did show was that if players were going to be involved in participatory violence, the courts would find a way of punishing them that would stop them from repeating the conduct in the future. No player would want to be enjoined from playing against every other team in the league on the basis of his foul play, thus the deterrent effect against repeat behaviour is massive.

Although perhaps an extreme example of legal intervention, it very clearly places the emphasis on the governing bodies of sport to ensure that incidents like this do not happen and that when they do they are dealt with quickly, efficiently and fairly, punishing the transgressors and/or compensating the injured. If they do not, then actions like this will continue to be brought with ever-increasing frequency, perhaps even resulting in a *McSorley*-style legal response from the English courts. If the FA still fails to act, then it may find itself as the defendant next time around on the basis of *Watson v. BBC* [2001] QB 1134, for failing to run football with reasonable regard for the health and safety of the participants. Perhaps that will at last make them sit up and take notice.

The trouble with Roy Keane is that through this incident, injured players will be encouraged to make more claims for damages, a scenario that the football authorities would hope to avoid. Yet those same authorities continue to do little or nothing to improve their own system of punishment and compensation to ensure that such challenges become rarer and that such injuries are properly compensated. Complaints from some quarters that Keane has been harshly treated when compared to others who have behaved with a similar disregard for the health of their fellow players are missing the point. It is those others who should have been punished more severely, not Keane who should have been treated more leniently. It is the FA's treatment of violent conduct that encourages players to persist with these challenges that cause the injuries that are ultimately litigated. The law does not act of its own accord or in isolation. It needs injuries to occur and players to make complaints before a case can end up in court.

The law cannot refuse to act when incidents like this are brought to its attention and as the Canadian courts have shown they are increasingly willing to take innovative steps to ensure that violent conduct is not repeated or copied. A playing ban is the ideal punishment in these circumstances. The players are not a threat to society at large, only to other players. To stop them from playing both punishes them and protects the class of people most likely to be harmed by their actions.

This incident highlights the continuing and uneasy nature of the relationship between sport and the law. Sport does not want the law to be

involved in its disputes as it would rather deal with them 'in house'. Where the law does apply, it is often regarded as being an expensive, heavy-handed and inflexible dispute resolution medium. The law needs to be clearer so that all involved in sport can anticipate the likely legal response to their acts. For sport, the only way to avoid an even greater degree of juridification is for the governing bodies to retake control of their sports before the law does it for them.

NOTES

1. The ban comprised three matches for the challenge on Haaland and an additional one match for this being his second sending off of the season.
2. Manchester United FC v Leeds United FC, FA Carling Premier League game, Old Trafford, 14 September 1999.
3. Although the challenge injured Haaland's right knee, he is claiming that this has exacerbated a pre-existing injury in his left knee. It is his left knee that has required corrective surgery.
4. R. Keane and E. Dunphy, *Keane: The Autobiography* (London: Michael Joseph, 2002).
5. *Ibid.*, 281. The 'Wetherall' referred to is David Wetherall, a team mate of Haaland's at Leeds when the first incident occurred.
6. *Bradshaw*, at 83 per Bramwell J.
7. Law 12, FIFA Laws of the Game, www.thefa.com/rulesandregulations, accessed 18 Sept. 2002.
8. Rule 7(e), Disciplinary Procedures Concerning Field Offences in First Team Competitive Matches, www.thefa.com/disciplinary.
9. See further, M. James, 'The Criminal Law and Participator Violence', in S. Gardiner *et al.*, *Sports Law* (London: Cavendish Publishing, 2001), ch.15; and M. James, 'Sports Participation and the Criminal Law', in J. Taylor and A. Lewis (eds.), *Sports Law and Practice* (London: Butterworths, 2002) ch.E6.
10. Subjective recklessness in this context is where the defendant foresaw the risk of making contact with the victim yet carried on to complete the challenge and run the risk.
11. http://news.bbc.co.uk/sport1/hi/football/teams/m/man_utd/2237915.stm, accessed 17 Sept. 2002.
12. G. Williams, 'Consent and Public Policy', *Criminal Law Review* 74 (1962), 80.
13. M. Smith, *Violence and Sport* (Toronto: Butterworths, 1983), 9.
14. Blissett would today receive at least a three-match ban, *ibid.* n.7.
15. Law Commission, *Consent in the Criminal Law*, consultation paper no.139 (London: HMSO, 1995), paras.12.15–12.31.
16. The TCCB is now the England and Wales Cricket Board.
17. See further, James, *Sports Law* (note 9), 680ff. Sentences for participator violence cases are generally about one-third of those handed down for similar assaults in other settings.
18. See further, *ibid.*, ch.16.
19. *Condon*, at 866 per Donaldson M.R.
20. James, *Sports Law* (note 9).
21. A. Felix, 'The Standard of Care in Sport', *Sport and the Law Journal* 4/1 (1996), 32.
22. See further, M. James and F. Deeley, 'The Standard of Care in Sports Negligence Cases', *Entertainment Law* 1/1 (2002), 104.
23. *Caldwell*, at para.11 per Tuckey L.J.
24. See further, A. Dugdale, *Clerk and Lindsell on Torts*, 18th edn. (London: Sweet and Maxwell, 2001), 29–121ff.
25. *Guardian*, 14 August 2002.
26. Dugdale (note 24), 24–88ff.
27. *Ibid.*
28. http://football.guardian.co.uk/News_Story/0,1563,812741,00.html, accessed 17 Sept. 2002.
29. <http://news.bbc.co.uk/1/hi/sport/football/733907.stm>, accessed 17 Sept. 2002.
30. *Cubbin v. Minis*, *Sport and the Law Journal* 9/1 (2001), 103.