The Law Reform Consultation Paper on Liability of Clubs, Societies and other Unincorporated Associations and the Civil Law (Miscellaneous Provisions) Act 2011 - A Clash of Public Policy?

1. Introduction

This paper arises from the joint TIBA-SLBA CPD of the 3rd of March 2023, and the aim of the paper is to focus in more depth on one aspect of that; the intersection of the Law Reform Consultation Paper on Liability of Clubs, Societies and other Unincorporated Associations and the Civil Law (Miscellaneous Provisions) Act 2011.[1]

2. The LRC Consultation Paper

The first thing that has to be said about the Law Reform Commission Consultation Paper on Liability of Clubs, Societies and other Unincorporated Associations (hereafter "the LRC Consultation Paper" or "the Paper")[2] is that this does not purport to be a full treatment of it. It is far too broad, too detailed, and too impressive a piece of work to be able to do it justice in the time available. It must be read and engaged with on its own merits; this paper seeks rather to engage with a part of a part, while hopefully giving enough background to allow readers to then engage with the Paper themselves on that part.

The core of the LRC's report arises from the Supreme Court's decision in *Hickey v. McGowan* [2017] IESC 6, and it is fair to say that the main thrust of the Paper is aimed at such cases of historical sexual abuse.[3] There can be little doubt that this is a question that must be addressed in some manner, if justice is to be done. Sport is not immune from this question of addressing historic abuse; as cases such as the recent conviction in Terenure College or the decision of the Court of Appeal of England & Wales on vicarious liability in *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352 show, dealing with this horrendous legacy is a societal question.

As the Paper stresses, its main focus is, then, on recovery of damages awarded, often on the

[1]This paper draws heavily on "Torts, Sports and the Courts: Does Statutory Reform of Tort Liability Work?", a TIBA paper delivered in on the 16th November, 2022 and available on the TIBA website to members. Various areas of this paper, such as social utility, are dealt with in more detail in that paper.

[2]Consultation Paper Liability of Clubs, Societies and Other Unincorporated Association LRC CP 68 – 2022 (hereafter "the Paper"). References are to the paragraph number in the Paper.

[3]"This project was partly prompted by the 2017 decision of the Supreme Court in *Hickey v McGowan*" - Paper, 4.

basis of vicarious liability, against unincorporated bodies. As all practitioners are aware, though, this goes far wider than the cases of historical abuse, because the classic unincorporated body in Irish life is the club, and, above all others, the unincorporated local sports club.

To sum up a wide-ranging and comprehensive consultation paper, the LRC proposals would extend the range of those who can successfully sue a club and remove a barrier to recovery. Indeed, that is part of its stated aims; it expressly lists as objectives in Chapter 4.2 (c) the objective of providing that the assets of an unincorporated association are available to meet its responsibilities[4] (d) the objective of providing that unincorporated associations can be sued in their own names[5] (h) the objective of removing the impediment to suing a club of which you are a member.[6] In short, it is part of the objectives of this Report to make it easier for more people to sue and recover from unincorporated clubs – the clubs that are usually the smallest and with the fewest resources.

The mechanism for this is that the consultation paper proposes that all unincorporated clubs – and, naturally, sports clubs would be some of the leading examples of this, if not already the most common example of such – would have to convert to a different structure.[7]

The Paper rejects mandatory incorporation as being "a blunt measure"[8], and instead has three possible models it discusses as options.[9] Model 1 is registration as a non-profit registered association, which would give separate legal personality on registration.[10] Model 2 would give separate legal personality to unincorporated associations that meet certain specified criteria.[11] Model 3 would not give separate legal personality but would set out how such bodies could be liable, both in civil and criminal terms[12]; much of the content of this model would form the basis of Models 1 and 2.[13]

[4]Paper at 4.19
[5]Paper at 4.20
[6]Paper at 4.25-26
[7]Paper at 4.119 et seq.
[8]Paper at 4.11, after discussion at 4.9-11. It should be noted that the Paper stresses that the CLG is "an existing solution"; 4.7-8.
[9]Paper at 4.119
[10]Paper at 4.134 et seq.
[11]Paper at 4.143 et seq.
[12]Paper at 4.155 et seq.
[13]Paper at 4.120

As it notes, Models 1 and 2 would make it easier to take claims against clubs, members could sue clubs, and they are not means of providing full limited liability.[14] The Paper is very clear that it feels that this should only come with registration as a company, with all the formality and regulatory burden that comes with this.[15] In essence, if the Paper is adopted, no matter what happens, the structure of clubs will change and the liability of clubs will be expanded.

That then leads to the question of what the level of liability now is. It is this, dealt with in the Civil Law (Miscellaneous Provisions) Act 2011, that this paper now turns.

3. The Civil Law (Miscellaneous Provisions) Act 2011

The Civil Law (Miscellaneous Provisions) Act 2011 ("the 2011 Act") is not an easy piece of legislation to deal with less for its own complexity as that it is a classic, bitty miscellaneous provisions Act, tidying up many unrelated areas. It is easy, therefore, to miss its contents. For the purposes of this paper, the key provision is section 4 (hereafter, for simplicity, "the Act"). As it is not one with which practitioners generally seem familiar, it is set out here in its entirety.

4.— The Civil Liability Act 1961 is amended by the insertion of the following Part after Part IV:

"PART IVA

Liability For Negligence of Good Samaritans, Volunteers and Volunteer Organisations

51A.— (1) In this Part—

'emergency' includes circumstances arising in connection with an actual or apprehended accident;

'good samaritan' means a person who, without expectation of payment or other reward, provides assistance, advice or care to another person in an emergency, but does not include a person who does

[14] "The models for reform set out in Models 1 and 2 below should be considered as a means of achieving a type of body corporate status, and should not be considered as means of providing full limited liability." - Paper at 4.133

[15] "The Commission considers that limited liability is properly confined to entities governed by the elaborate company law regime. The protection of limited liability status is highly regulated by the CRO and the Corporate Enforcement Authority, and rightly so. It is undesirable that there should be a means of obtaining the protection of limited liability without the compliance, oversight and enforcement mechanisms of company law. ... Therefore, what is proposed here are alternatives to the CLG, but they come with the substantial disadvantage that they cannot be a shortcut to limited liability in a parallel and diluted "company-law-light" regime." - Paper at 4..125, 4.127

so as a volunteer;

'negligence' does not include breach of statutory duty;

'voluntary work' means any work or other activity that is carried out for any of the following purposes:

(*a*) a charitable purpose within the meaning of the Charities Act 2009 ;

(*b*) without prejudice to the generality of paragraph (*a*), the purpose of providing assistance, advice or care in an emergency or so as to prevent an emergency;

(*c*) the purpose of sport or recreation;

'volunteer' means a person who does voluntary work that is authorised by a volunteer organisation and does so without expectation of payment (other than reasonable reimbursement for expenses) or other reward;

'volunteer organisation' means any body (whether or not incorporated) that is not formed for profit and that authorises the doing of voluntary work whether or not as the principal purpose of the organisation.

(2) A reference in this Part to the provision of assistance, advice or care to a person includes a reference to any of the following activities:

(*a*) the administration of first-aid to the person;

(*b*) the treatment of the person using an automated external defibrillator;

(*c*) the transportation of the person from the scene of an emergency to a hospital or other place for the purposes of ensuring the person receives medical care.

(3) Nothing in subsection (2) shall operate to limit the nature of activities that may constitute assistance, advice or care for the purposes of this Part.

51B.— This Part shall not apply to any cause of action that accrued before the commencement of this Part.

51C.— (1) This Part shall not apply in relation to the negligent use of a mechanically propelled vehicle in a public place.

(2) In this section 'mechanically propelled vehicle' has the same meaning as it has in Part VI of the Road Traffic Act 1961.

...

51E.— (1) A volunteer shall not be personally liable in negligence for any act done when carrying out voluntary work.

(2) The protection from personal liability conferred on a volunteer by subsection (1) shall not apply to any act done by the volunteer if—

(*a*) the act was done by the volunteer in bad faith or with gross negligence, or

(*b*) the volunteer knew or ought reasonably to have known that the act was—

(i) outside the scope of the voluntary work authorised by the volunteer organisation concerned, or

(ii) contrary to the instructions of the volunteer organisation concerned.

(3) An agreement, undertaking or arrangement has no effect to the extent that it provides for a volunteer to give a volunteer organisation an indemnity against, or to make a contribution to a volunteer organisation in relation to, a liability that—

(*a*) the volunteer would incur for his or her negligence but for the operation of subsection (1), and

(*b*) the volunteer organisation incurs as a result of its vicarious liability for that negligence.

51F.— The protection from personal liability conferred on a good samaritan by section 51D or a volunteer by section 51E is in addition to any protection from personal liability conferred on the good samaritan or volunteer by or under any other enactment or rule of law.

51G.— (1) This section applies to proceedings relating to the liability of a volunteer organisation for negligence arising from activities carried out by or on behalf of the organisation.

(2) In any proceedings to which this section applies, when determining whether the volunteer organisation owed a duty of care to the plaintiff or any other person, a court shall consider whether it would be just and reasonable to find that the organisation owed such a duty having regard to the social utility of the activities concerned.

(3) Nothing in this section shall operate to limit the matters that a court may consider, in proceedings to which this section applies, when determining whether a volunteer organisation owed a duty of care to a plaintiff or other person."

One would assume that where it was felt necessary to legislate to such an extent to protect sport, that there would be weighty evidence of a pressing need for such dramatic protection. Surprisingly, the

Explanatory Memorandum to the Bill that became the Act seems to make almost no reference to such in regards to sport – the word "sport" being mentioned only once[16].

This becomes less surprising when one looks at the Law Reform Commission Consultation Paper which was the genesis of this Part of the 2011 Act, *Civil Liability of Good Samaritans and Volunteers*[17]. As is clear from the Paper, this arose in the context of fears over potential liability for Good Samaritans intervening in emergencies. The Paper refers to sporting bodies as volunteer organisations as volunteer organisations, in a list including "voluntary public hospitals, major sporting organisations (such as the GAA or the Special Olympics), church-based institutions, credit unions, political parties, employer organisations, trade unions, major organisations supporting those with limited intellectual capacity and educational institutions"[18], but is clear that this is merely one, small, category. In the analysis of Volunteer Service Providers in Chapter 3[19], sport and sporting bodies are not mentioned at all. Significantly, so firmly was this Paper centred on the Good Samaritan provision in which it had its origin and which is also included in Part 3 of the Act, that no sporting body even made submissions on the subject. It seems a fair inference that this is not indicative of a pressing need for protection against a wave of baseless litigation; there is no reference whatsoever to such in the context of sport in that 2007 Consultation Paper.

The parliamentary debates are somewhat more enlightening, but not noticeably so. The Bill commenced in the Seanad[20]. In the debate there, while considerable reference was made to the Good Samaritan element of Part 2 of the Bill, only one speaker directly raised the point about sporting bodies[21], and it was answered, in one sentence, that it was understood that sporting bodies were organisations[22]. No reference to a pressing need to fend off a wave of litigation in sport was made at

[16]http://www.oireachtas.ie/documents/bills28/bills/2011/2911/B2911s.pdf

[17]LRC CP 47 – 2007, hereinafter, "the Paper". This paper does not seek to address the Social Action, Responsibility and Heroism Act 2015 in England and Wales, save to note that not only is it seemingly the first example of legislation by acronym, but is an example of the problem in a wider context of an extreme nature. Cf. the comments of Lord Pannick KC at http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150106-0001.htm#15010644000364 To the best of the author's knowledge, that Act has never been relied on in UK litigation.

[18]Ibid, 1.64, at p. 22.

[19]Ibid, 3.99 et seq, pp 89-106.

[20]http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/2911/document1.htm

[21]Sen. Michael Mullins; "I wish to pick up on two points. First, I greatly welcome the proposed good samaritan provision and it is right and proper for it to be enshrined in legislation. Will GAA clubs and other sporting organisations be regarded as organisations covered under this Bill?"

[22]Alan Shatter TD: "Senator Mullins asked if the legislation will cover GAA clubs. Organisations — which GAA clubs are — engaging in volunteer work are, as I understand, volunteers within the definitional provision in the legislation."

this stage, or the Committee Stage[23]. When it first reached the Dáil, it may fairly be said that sport did not feature as a topic of scrutiny of Part 3 at all.

As to wider evidence, even on which to establish a comparative basis on whether there is an over-eagerness to sue sporting bodies, this is difficult to come by. There are several reasons why this is so. First, the bodies themselves do not appear to keep significant records of the number of times they are sued[24]. Second, other sources of data are fuzzy at best. One may attempt an approximation based on the number of times a given sporting body appears as a defendant in a personal injury list; this is, however, no real indicator as to truly sporting-related cases, as it would include road traffic accidents where the body may be vicariously or personally liable, construction accidents in the building of clubhouses, workplace accidents, and other incidents which are entirely unrelated to the sporting character of the body as opposed to the normal course of life in a litigious country.

Significantly, one reference was made by Senator Jillian van Turnhout:

"I am involved in several voluntary organisations and I have noted an undue expectation of a duty of care. This may arise where, as a result of an accident, a case is brought against an individual or an organisation by a concerned parent. The problem is that the insurance companies will urge organisations to settle before it goes to court, thereby not allowing the courts to intervene as is proposed in this Bill. This results in an increase in insurance costs for the voluntary organisations. I can provide examples of where this has happened."

In that regard, one must turn to the Paper, where it refers to the provisions of the UK Compensation Act:

1.108 The *Compensation Act 2006* was enacted as a response to the concern that the UK was succumbing to a "compensation culture." *Although this concern was criticised as unfounded, it was acknowledged that the mere perception was having disastrous effects*[25]. The Commission notes that

[23]http://debates.oireachtas.ie/seanad/2011/07/05/00008.asp

[24]Private enquiries made of the IRFU in 2015. As of the time of those enquiries, a search of the courts.ie High Court Search facility as of 31/7/15 (the end of the legal year) showed only one personal injury case then live against the IRFU.

[25]Cf. the comments of Baroness Ashton introducing the Compensation Bill to the House of Lords that it was at least in part to "tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour:" .http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/legist/compensation_wms_lords.pd

the 2006 Act has been criticised for confusing the situation, by doing no more than restating the current common law approach in the UK, and by introducing the ambiguous term "desirable activity."[26] [Emphasis added]

It would therefore appear that the reason sport and sporting bodies obtained the significant protection of the 2011 Act was on the basis not of data, but of anecdote at best, and that not from the sporting area[27]. It seems more that there was a risk of litigation but an unfounded fear of it; so far as one can tell, or at least so far as the available data indicates, that fear of litigation is not supported by evidence for it. However, it remains the fact that the 2011 Act was passed, and the clear public policy as set out in the Act is as the Oireachtas intended; it should be harder for a plaintiff to succeed against a sporting body.

4. The 2011 Act and the LRC Paper.

To note from the outset; the LRC Paper does not address the 2011 Act. This may seem surprising; regrettably, it may be less surprising in reality than it should be. Despite considerable efforts made, the awareness of this Act – or, perhaps more fairly, this part of an omnibus technical Act – is less than it might be generally, even among practitioners. The usual red-flag of case law does not exist, and so it makes it harder to find in the normal course of research.

However, one can see how the one could easily affect the other as regards the stated aim of expanding liability of unincorporated clubs – which includes the volunteers in those clubs. The extent to which the individual volunteer is protected by the increased threshold of the 2011 Act is, in reality, trite law; it is obvious, and therefore not dealt with here. However, even the volunteer organisation is protected.

It is a precondition for vicarious liability that there must be the liability of the individual. The 2011 Act raises the bar for that liability in the case of a volunteer; concentrating on the main exception,

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f Apparently, one must now legislate for fear of fear itself; one cannot but wonder what FDR would make of it.

[26]Paper, page 40. Cf.

[27]For an analogous situation in relation to the origins of the Occupiers Liability Act, see "The Lobby Is Marshalled" in McMahon & Binchy *Law of Torts* (4th ed.) 12.61-2 at 444-5. Cf the report of Lord Young of Graffham, *Common Safety, Common Sense,* where the notion of compensation culture was stated as being one "more of perception than reality", born of the fertile imaginations of the media. Significantly, it notes at p24 that the Lord Chief Justice had never seen cases of the type that were discussed at length as risks in the Oireachtas debates on the 2011 Act. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf

there must be gross negligence first before there could be vicarious liability. Take, for an example of how this would play out, take the parallel of the higher threshold for on-pitch liability and vicarious liability as shown in *Fulham Football Club v Jones* [2022] EWHC 1108. The facts were that the plaintiff respondent was playing in an under 18 game for Swansea. Towards the end of the first half of the match, a Fulham midfielder tackled the plaintiff, as a result of which the plaintiff suffered a career-ending injury to his right ankle. He sued Fulham as being vicariously liable for assault and the negligence of their player. The assault claim was dismissed[28], but the plaintiff succeeded at first instance on negligence; this was appealed and came before Lane J. It is not proposed to set out the examination by Lane J. of the law from *Condon v. Basi* [1985] 1 WLR onwards to *Tylicki v. Gibbons* [2021] EWHC 3470 (QB), given the length, but it is well worth reading in its own right as a guide to the area. He quoted and followed *Tylicki* at 30:

The threshold for liability is high and the mere error of judgment or lapse in skill is not sufficient, taken in the context of this highly competitive and inherently risky sport. In effect, while recklessness has been expressly stated not to be the test for a finding of negligence, in effect the evidential burden is such that requires a reckless disregard for the safety of others. Of course, in placing the threshold at that high level, regard is being had to all the circumstances of the sport, the inherent dangers and the high degree of competitiveness with a requirement on jockeys to win or be best placed.

Having done so, and examining the findings at first instance, Lane J. allowed the appeal on all grounds. Of particular note was the finding at 85 that the trial judge had "set a standard for reckless or quasi-reckless behaviour in the context of professional football, which is far below what is needed to establish such liability." The (professional) footballer was not negligent; neither were his employers, Fulham. The parallel with the reckless disregard of gross negligence of off-pitch amateurs is apparent.

So, then, if under the 2011 Act, a volunteer in an unincorporated sport club is not grossly negligent, the club cannot be vicariously liable. Further, even if the volunteer has been grossly negligent, and even if the test for vicarious liability is met, the Court must consider the social utility of attaching liability to the volunteer organisation – the club. As the cases like *Wall v National Parks and Wildlife*

[28]See by way of contrast *Gravil v Carroll & Anor* [2008] EWCA Civ 689, where a professional second row punching an opponent and breaking his jaw was held to be sufficiently closely connected to the ordinary course of employment as a professional rugby player as to attract liability.

Service [2017] IEHC 85, *Mulcahy v Cork City Council* [2020] IEHC 547 and *Brady v Moore & Anor* [2022] IEHC 420 make clear, this is no low bar. The Consultation Paper, however, takes issue with this, quite directly.

It was suggested by Stack J in Brady v Moore that "if liability were too readily imposed, people who otherwise volunteer their time might be dissuaded from doing so and this would be damaging to the social life and leisure pursuits of a very large proportion of the population". However, the Commission considers that volunteers who have sustained harm should not have to shoulder the financial cost of the negligent acts of others, purely on the basis that they are both members of the same association.[29]

> The problem is that, in cases such as *Brady v. Moore*, where everyone involved was a volunteer working on a GAA club, the policy of the Act is that merely negligent acts of others are not enough for a volunteer, or through them a club, to shoulder the financial costs of negligent acts, whether members of the same association or not.

The 2011 Act is a check on liability. However, it is precisely this expansion of liability including vicarious liability that forms a key part of the Paper. In short, the LRC Paper wants to make it easier to sue clubs; the 2011 Act wants to make it harder and volunteers. Something has to give.

5. Discussion and Suggestions

Public policy as expressed in legislation is to is not immutable. It may be clearer, in some regards, and it must be given effect insofar as it is expressed in the statute in question, but it is not set for all time as it is understood at a given moment. A statute is always speaking, and may be silenced forever at any time by another statute amending or repealing it.

A specific public policy as expressed in legislation dealing with one particular area is not a universal. The 2011 Act deals with unincorporated and incorporated volunteers and sports bodies; it is neutral as to the governance structure of the volunteer and sports bodies protected in terms of liability. It is

[29]LRC Paper at 4.26 Note, in the wider sports law context, the Australian case of *Agar v. Hyde,*[2000] HCA 41; 201 CLR 552; 173 ALR 665; 74 ALJR 1219 where the (then) unincorporated status of the then-IRFB (now World Rugby) was part of the basis for a claim being dismissed.

the nature of the activity with which the public policy of the 2011 Act concerns itself, and that area alone.

This, then, might suggest a possible mechanism. If one were to imagine a Venn diagram, with the sets of "unincorporated bodies" and the set of "sports bodies protected by the policy of the 2011 Act", there will be an intersection of unincorporated sports (and volunteer) bodies protected by the 2011 Act. All other members of the set of unincorporated bodies are unaffected by the 2011 Act. Although I would hope readers would forgive a sports lawyer focussing on the sports bodies overall, it is fair to accept that they are not the primary focus of the Consultation Paper and that the main thrust of that Paper is only minimally turned aside were it to leave sporting bodies out.

On the other side, there will be many sports bodies (and their members) protected by the policy of the 2011 Act to protect and encourage volunteerism and sport who are already incorporated and have the dual armour of limited liability and the 2011 Act. These will, in many cases, by the largest sporting bodies and those best able to ride out being found liable. It might reasonably be argued that if the aim is a wider spread of sporting bodies providing the public benefits of sport, it does not assist this if those already best protected and most successful are given another means to outcompete and swallow others.

Therefore, in the intersection, there may be a good argument for a bespoke carve-out; that the necessary steps envisaged under the Models would not apply to those unincorporated bodies subject to the provisions of the 2011 Act. This, though, is a matter for the LRC – and it is a matter to be put before it by submissions.

6. Conclusion

The Paper is correct that matters cannot remain as they are, if justice is to be done in the wider sense of unincorporated bodies. How this is to be squared with existing public policy in relation to those bodies which are protected by the 2011 Act is a live question. This paper does not pretend to give a definitive answer to that question, but it does hope to put the question squarely in order that an informed debate is possible in the submissions to the LRC. The last word of this paper is to urge readers to make such submissions in time.