

**HM Government**

**COMPULSORY INSURANCE (SPORTS) BILL**

**MARCH 2009**

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Presented to Parliament by the Secretary of State  
By Command of Her Royal Majesty

March 2009

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## **Consultation Document**

### **Foreword**

The characterisation of a compulsory insurance no fault scheme is rooted in the principle of distributive justice, compensating victims without having to establish causation and fault. Conversely, the current liability for negligence claims for sports injuries involves fault considerations based on legal theoretical concepts determined through judicial precedent, which are inherently limited within the confines of the established legal principles of duty of care, proximity and negligence. This in itself creates a tension as wider concepts of “fault” are not currently covered under the law of negligence. To this end, the range of sports injury claims amenable to recovery has widened significantly, creating a risk of floodgate claims.

Moreover with regard to sports injuries claims under negligence, the last decade has seen a marked increase in sports injuries claims in respect of loss of career. Whilst participation consent is implied in respect of injuries falling within the ambit of inherent risks in the game, the extent of this “consent” has become contentious in practice with negligence liability arising for non-contact sport in addition to contact

sport. For example, in the case of Condon v Basi ([1985] 1 WLR) it was asserted that an “inherent risk” in the game for the purpose of determining implied consent was essentially a question of fact, dependent on the circumstances of the game, including the regulations, the rules and customs and the inherent dangers. It was further stated that this was an objective test.

Accordingly, the parameters of liability have remained uncertain with regard to who the appropriate tortfeasor is, along with the extent of liability for both professional and amateur players bringing claims in negligence. For example, in the leading case of Smoldon v Whitworth (1997] PIQR 133) it was determined that a referee of the Rugby Union match was liable for injuries suffered by a rugby player by another player as a result of a collapsed scrum. In this particular case, the referee had failed to enforce the rules of the International Rugby Board as applied to a rugby game, in which there were more than 20 collapsed scrums. Furthermore, there had also been complaints from certain players, a warning from one of the touch judges and shouts from the spectators.

Furthermore, in the more recent case of Vowles v Evans ([2002] EWHC 2612), the Court of Appeal asserted that at all levels of sport a referee owed a duty to take reasonable care for the safety of players. Legal commentators have suggested that these cases by analogy point towards potential liability of coaches for failing to take reasonable care for the safety of their players. However, the liability of coaches remains ambiguous as it has been untested, however in light the Smoldon decision, the categories of potential defendants has clearly widened in sports injury claims.

It is also important to mention that the relevant organisation putting on the game could also be liable for the player’s injuries. For example, in the case of Watson v British Boxing Board of Control [2001]2 WLR 1256, it was held that the Board owed Watson a duty of care to provide appropriate resuscitation equipment and a person or persons qualified to use such equipment at the ringside. The Court made it clear that it was the duty of the Board and of those advising it on medical matters to be proactive in accounting for foreseeable risks and to seek competent advice as to how a recognised danger could be combated.

Firstly, in the case of Condon v Basi ([1985]) the Court of Appeal asserted that there is a positive duty on all participants in sport to take reasonable care in the conduct of the game. Furthermore, it was asserted that the standard of care is objective and will ultimately depend on the particular circumstances of the case. In this case itself, it was stated that relevant factors taken into account in order to determine whether the standard of care has been complied with include the objectives of the game, the physical demands made upon its contestants and its inherent dangers, the rules and regulations along with the standards, skills and judgment reasonably to be expected of a contestant in the game.

Accordingly, if a participant fails to exercise an appropriate degree of skill which is appropriate in all the circumstances or acts in a way which a claimant cannot be expected to have consented then there will be liability in negligence. However, in the sporting context it is evident that sports are played in accordance with the formal regulatory rules as well as established norms within the game. As such, conduct which is normally unacceptable will be accepted within the accepted method of playing a sport and the internal “playing culture” of a sport, will be a normal part of the game.

The Court of Appeal further developed the concept of what would be considered the appropriate degree of care and skill within the sporting arena in the case of Caldwell v Maguire and Fitzgerald (2001] EWCA Civ 1054) which has been applied by courts in determining negligence in sporting cases. In this decision, the Court of Appeal reiterated that players owed a duty of care to all other participants and that this duty of care was defined as being to exercise all care that is objectively reasonable in the circumstances to avoid injury to other participants. The Court of Appeal repeated the relevant circumstances cited in the Condon case and fourthly stated that the threshold of liability would be high.

Notwithstanding the high threshold, the wide category of defendants in sports liability along with the growing compensation culture reflected by claims in both contact and non contact sports, it is proposed that a compulsory insurance scheme would go further to address this and provide distributive justice. It is submitted that a distributive loss allocation based system through compulsory insurance would shift

resources to ensure meritorious plaintiffs are protected, will prevent floodgate claims.

Indeed, theoretically the corrective justice system centres on “correcting the wrongdoer's wrongful act”, which is the basis of current negligence claims for sports injuries and to this end, the tort of negligence has developed a legal notion of fault for the purpose of establishing liability. However, some argue that the current scheme contradicts the theoretical purpose of corrective justice due to fault based liability being limited to the confines of a rigid test of duty of care, proximity and foreseeability.

### **Justification, Summary and Key elements of the bill**

However, the growth of insurance as customary practice has introduced the notion of loss distribution, where the question is not who is to blame, but who can most easily bear the loss caused by a particular accident. For example, in the case of Smith v Eric S Bush ([1989] 2 WLR 790) Lord Griffith asserted that:

“There was once a time when it was considered imprudent to even mention the possible existence of insurance cover in a lawsuit. But those days are long past..... the availability and cost of insurance must be a relevant factor when considering which of the two parties should be required to bear the risk of loss”.

Accordingly, it is reiterated that the implementation of a compulsory insurance scheme as proposed in this Bill would address the rights of meritorious plaintiffs whilst protecting against floodgate claims and ad hoc extensions of negligence based liability for sports injury claims.

We are committed to ensuring that both professional and amateur sports players are adequately compensated for injuries causing loss of income and career expectation, whilst preventing floodgate claims. To this end, it is submitted that the inconsistent application of “fault” clearly creates uncertainty compounded by its inability to cover

the wide range of circumstances that fall within the tort. Furthermore, as some element of culpability will inherently be linked to the effective running of a no-fault compensation scheme, this in itself highlights the fundamental need to reassess the law's approach to the concept of fault in negligence claims, which can be addressed by loss allocation provisions at the outset through compulsory insurance.

What is being proposed is a draft Bill: no final decisions have yet been made. This consultation therefore invites views of anyone with an interest and forms a significant part of the process of shaping the Government's final policy proposals.

## **COMPULSORY INSURANCE (SPORTS) BILL**

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## **Purpose**

A Bill to require sports professionals in both contact and non-contact sport to insure against their liability for personal injury to other sports players in the course of organised sport; and for purposes connected with the matter aforesaid.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -

### **1. General Insurance Obligations and Definitions**

(1) Except as otherwise provided by this Act, every sports professional participating in organised sport in Great Britain at both professional and amateur club and league level shall insure, and maintain insurance under one or more approved policies with an authorised insurer or insurers against liability for bodily injury sustained by them, arising out of and in the course of participating in the organised sport in Great Britain, but except in so far as regulations otherwise provide not including injury suffered outside Great Britain.

(2). The Secretary of State by statutory instrument, enact Regulations to provide that the amount for which any sports professional is required by this Act to insure and maintain insurance shall, either generally or in such cases or classes of case as may be prescribed by the regulations, be limited in such manner as may be so prescribed.

(3) For the Purpose of this Act -

“approved policy” means a policy of insurance not subject to conditions or exceptions prohibited for those by regulations;

“authorised insurer” means –

(i) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 to effect and carry out contracts of insurance of a kind required by this Act and make regulations under this Act, or

(ii) An EEA firm of the kind defined in paragraph 5(d) of Schedule 3 to the Financial Services and Markets Act 2000, which has permission under paragraph 15 of that Schedule to effect and carry out contracts of insurance of a kind required by this Act and regulations made under this Act.

“business” includes a trade or profession, and includes any activity carried on by a body of persons, whether corporate or unincorporate;

“organised sport” means the undertaking of physical activity, played according to specific rules at both professional and amateur club and league level throughout Great Britain and where appropriate covered by the regulations set out in Schedule 1 to this Act;

“sports professionals” means both professional athletes in organised sport receiving payment for their performance in Great Britain and amateur athletes involved in organised sport in Great Britain.

## **2. Categories of individuals to be covered**

For the purpose of this Act, the term “sports professional” means an individual who receives payment for performance in organised sport, or alternatively individuals participating in organised sport on an amateur basis.

## **3. Insurance Obligations.**

(1) This Act shall require sports professionals to insure against the risk of foreseeable injury in organised sport.

(2) Provisions may be made by regulations for securing that certificate of insurance in such form and containing such particulars as may be prescribed by the regulations are issued by insurers to sports professionals entering into contracts of insurance in accordance with the requirements of this Act and for the surrender in such circumstances as may be so prescribed of certificates so issued.

(3) Where a certificate of insurance is required to be issued to an sports professional in accordance with regulations under subsection (2) above, the sports professional (subject to any provision made by the regulations as to the surrender of the certificate) shall during the currency of the insurance and such further period (if any) as may be provided by the regulations –

i) comply with any regulations requiring them to display and present copies of insurance for the information of the relevant regulatory body, club or league responsible for the regulation of the relevant organised support;

ii) produce the certificate of insurance or a copy thereof on demand to any inspector duly authorised by the Secretary of State for the purposes of this Act and produce or send the certificate or a copy thereof to such other persons, at such place and in such circumstances as may be prescribed by regulations;

iii) permit the policy of insurance or a copy thereof to be inspect by such persons and in such circumstances as may be so prescribed.

(4) A person who fails to comply with a requirement imposed by or under this section shall be liable to a fine not exceeding level [ ] on the standard scale.

#### **4. Penalty for Failure to Insure**

A sports professional actively engaged in organised sports who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level [ ] on the standard scale.

## **5. Regulations**

(1) The Secretary of State may by statutory instrument make regulations for any purpose for which regulations are authorised to be made by this Act, but any such statutory instrument shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(2). Any regulations under this Act may make different provision for different cases or classes of case, and may contain such incidental and supplementary provisions as appear to the Secretary of State to be necessary or expedient for the purpose of the regulations.

## **6. Limit of Amount of Compulsory Insurance**

(1) The amount for which a sports professional is required by the Act to insure and maintain insurance under one or more policies of insurance shall be, or shall be in aggregate be not less than £5 million in respect of direct injury claims.

### *Final Provisions*

## **7. Extent**

This Act extends to the whole of the United Kingdom

## **8. Commencement**

This Act comes into force at the end of two months beginning with the day it is passed.

## **9. Short title**

The short title of this Act is the Compulsory Insurance (Sports) Act 2009.

