



Law Society
of Scotland

Consultation Response

Football (Strict Liability) (Scotland) Bill
Consultation on a proposal for a Bill to make Scottish
professional football clubs strictly liable for their
supporters' behaviour

March 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Obligations Sub-committee welcomes the opportunity to consider and respond to the Consultation by James Dornan MSP on the proposal for a Bill to make Scottish professional football clubs strictly liable for their supporters' behaviour.

We would propose not to answer the questions contained in the consultation, but rather provide the following comments.

Comments

Introductory remarks

We welcome any measures which would eliminate or reduce criminal or offensive behaviour at football matches. However, any new legislation in this area must be fit for purpose and tackle the problem in a proportionate manner while fitting within the wider framework of Scots law.

The Society has been looking at the issue of criminal and offensive behaviour at football matches for some time having commented extensively on the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 at bill stage¹ and to James Kelly MSP's consultation on the proposed repeal of the bill.²

¹ <http://www.lawscot.org.uk/media/948520/crim-briefing-offensive-behaviour-at-football-and-threatening-communications-scotland-act-2012-november-2016-submitted.pdf>

² <http://www.lawscot.org.uk/media/948519/crim-consultation-response-james-kelly-msp-proposed-repeal-football-s-bill-november-2016-submitted.pdf>

In relation to this consultation, we are concerned that imposing “strict liability”, as the idea is generally applicable under Scots law, may not be the most appropriate approach. It would seem inequitable that under the bill, a football club could take some considerable steps to try to make sure their fans behave appropriately but through no fault of theirs they could find themselves facing a fine or other sanction.

Wider context

We refer to the ongoing efforts to tackle issues such as sectarianism and hate crime which cross over with this proposed legislation.

In this regard we note the recent report by Dr Duncan Morrow on tackling sectarianism in Scotland.³ The report highlights the fact that “the supporting evidence for the association between football and sectarianism remains very strong”. However, the report also makes clear that while “since the final Advisory Group report, the football authorities have engaged directly with officials from the Scottish Government...[they have made it] clear that they do not support the strict liability approach.”⁴ We support the recommendation of this report to take a forward-looking approach, steering away from historical blame and focusing on future culture change.

We also note the review of laws covering hate crime offences in Scotland which is being led by Lord Bracadale.⁵ It “will consider whether existing laws represent the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice”. As part of this, it will include an examination of the scope of existing laws and whether this should be adjusted, including with respect to religious statutory aggravation.

Criminal law

In 2011 we noted that much of the offensive behaviour relating to football matches which leads to a public disorder is likely to be caught by substantive criminal law in any case.

We noted (1) *Mark Harris v HMA* [2009] HCJAC 80 where the Appeal Court held that breach of the peace simply requires some serious disturbance to the community and (2) Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) which covers a situation where a person behaves in a threatening or abusive manner and such behaviour would be likely to cause a reasonable person to suffer fear or alarm where it is the intention so to cause fear or alarm or one is reckless as to whether behaviour would cause fear or alarm.

³ [Review of the Implementation of the Recommendations of the Advisory Group on Tackling Sectarianism in Scotland: A report by Dr Duncan Morrow, March 2017](#)

⁴ See page 30

⁵ <http://www.scotland-judiciary.org.uk/24/1727/Lord-Bracadale-to-lead-hate-crime-review>

Furthermore, the Police, Public Order and Criminal Justice (Scotland) Act 2006 introduced Football Banning Orders which can be imposed upon individuals who behave inappropriately at football matches. Orders may be granted where “there are reasonable ground for believing that making a Football Banning Order would help to prevent violence or public disorder at or in connection with any football match.”

Strict liability

Criminal versus civil liability

The idea of strict liability as presented in the consultation raises issues in relation to the concept as it is understood in existing Scots law. Strict liability can apply in a number of legal contexts, but there is no obvious analogous situation to what is being proposed here, which appears to create a sort of hybrid of criminal and delictual liability. As a general principle of law, we consider it must be clear whether the intention is that clubs are to be held criminally liable or whether the rules imposed would be analogous to fines within a regulatory system. Further considerations flow from the type of liability to be imposed; these are explored in greater detail below.

There is a further question as to whether imposing either criminal or delictual liability in the manner suggested would be appropriate in any case or whether this could be done better in some other way.

Civil law – the concept of vicarious liability

The proposal raises a further issue around the idea of vicarious liability at civil law as the clubs would, in effect, be vicariously liable for the actions of their clubs. It is important to note that “vicarious liability” does not equate to “strict liability”.

The nearest example is in the field of delict for acts undertaken in the course of employment.⁶ The general rule is that an employer is vicariously liable in damages if an employee commits a delict in the course of his employment. However, there are exceptions to this rule as the employer is only liable where an act is carried out in the course of employment and either the act, or the mode of doing the act is authorised by the employer.⁷ Therefore, if an employee is expressly told not to do something and notwithstanding that an employee steps out with the bounds of their employment contract and commits a delict the rules of strict liability would not necessarily apply to that offence.

⁶ Another example of civil liability arises in the context of product liability but this does not have such a close correlation as regards human behaviour. The element of control explored in both a criminal and civil context remains a key consideration.

⁷ See for Example *Wilson v Exel UK Ltd T/A Exel* 2010 SLT 671 where the test is set out for strict liability viz "where the wrongful act is done "in the course of the [servant's] employment" being "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master" (paragraph 2)

We believe it would be inappropriate to impose liability on football clubs in a similar way because the relationship between employer and employee is very different from that between a football club and its fans. One of the key differences in this regard, is evident in the level of control which the party upon which strict liability would be imposed (in this case the football club) has in respect of individual actors. Referring back to the employment analogy, employers have a selection process for employees whereas of course, it is the fans who choose to support a particular club. Indeed, football clubs have practically no way of even knowing who enters their grounds, at least insofar as there is any public sale eg at a turnstile.

In principle, one way of addressing this difference would be to ensure that football clubs did have such control to ensure that they avoided the imposition of fines for violent or offensive behaviour. However, implementing such a vetting process for supporters would be both costly and highly impractical. For example, it would hypothetically be possible to require tickets to be allocated to a named person who would require to provide identification at time of the purchase of the ticket and/or at attendance at the stadium but watching sport is a social activity and if a single person was buying tickets for a group then the other members of that group would still be unknown to the club. Requiring each attendee to collect his or her ticket individually would be even less practical and could impose a heavy obligation in terms of staff resourcing if each ticket had to be collected separately. Such a measure therefore appears to be unworkable.

Strict liability in Scots criminal law

As noted in the report, strict liability offences are offences where there is no need to prove criminal intent (*mens rea*), fault, or negligence; it is sufficient to prove that a particular incident occurred. However, strict liability tends to arise in relation to certain statutory offences and it is the person who carries out a particular action who is held responsible, not a third party. Again control is a key element and we are concerned that it is not appropriate to impose criminal liability on clubs which have very little effective control over the behaviour of their supporters.

Strict liability in other jurisdictions

We note that a number of football associations in jurisdictions outwith Scotland, including European football's governing body UEFA, have adopted strict liability rules aimed at addressing behaviour at football matches. The strict liability rules are a civil law matter, where football clubs are held responsible for their fans' behaviour and clubs can avoid sanctions if they demonstrate that they have taken "reasonably practicable" steps to avoid unacceptable behaviour from supporters. The types of sanctions which could be levied include playing games behind closed doors, deduction of points and fines. In 2013 the proposal

to adopt strict liability rules in Scotland was rejected by clubs in the Scottish Professional Football League (SPFL)⁸ of the Scottish Football Association.

Effectiveness and workability

As part of any consideration on the adoption of strict liability rules, it would be useful to understand the effectiveness of the regimes already in operation elsewhere, including consideration of issues such as: the element of control that football clubs have over fans; the practical impact of the regime upon behaviour at football matches; the acceptance and compliance of football clubs with the regimes; the outcome of any disputes/appeals made by club of the governing bodies application of the strict liability rules; and the proportionality of any sanction available.

There requires to be some further justification for taking the same approach in Scotland as in other countries beyond a simple desire for uniformity. Any adjustments to the Scottish legal system must be taken against the context of Scots law as a whole, taking into account alternative measures which might be used to achieve the same objective and any particular characteristics which might make adopting an approach from elsewhere inappropriate. It is important to understand the effect that the introduction of such rules has had in those jurisdictions where they are in place. It would be helpful in this regard to have some in-depth analysis of whether the introduction “strict liability” schemes in other jurisdictions has had a positive effective in reducing criminal and offensive behaviour at football matches.

The example which is given in a proposal relates to the Scottish Cup Final 2016, but it should be noted that this match took place at Hampden Park, Glasgow a "neutral" venue and therefore the clubs themselves were, presumably, not responsible for the policing arrangements etc. In such situations it appears to us that the responsibility for policing, prosecuting and determining such matters would fall to the responsibility of the member clubs or SFA (or in the case of determination the judicial panel appointed by the SFA). If there is opposition amongst the clubs, as is suggested in the proposal, then we would question how effective any legislation implemented would be. As a point of principle, legislation should be practically workable, enforceable and offer a practical benefit.

⁸ <http://www.bbc.co.uk/sport/football/22853305>

Right to enforce liability

Liability under Scots law implies a link to enforcement. In the context of vicarious liability above, the injured party may pursue a claim which can be enforced against the employer for damage caused by an employee (although as noted above, this will not necessarily be a case of strict liability). However, the intention of this proposal does not seem to be to grant rights to the victims of criminal or offensive behaviour which could be pursued on the basis of delict.

Much of the behaviour complained of could already be prosecuted under existing criminal law. However, the proposal suggests imposition of liability on clubs in a situation where the police have chosen not to arrest individuals and charges have not been brought for criminal behaviour. Yet it seems to be suggested that the same law enforcement agencies should then bring a case on the basis of that same individuals' behaviour against the club, even where the club had taken all the steps which could reasonably have been expected of them to reduce or eradicate those actions.

FIFA requirement of independence

From a legal perspective there is a difficulty in imposing strict liability rules and sanctions to what is being proposed here. The following comments apply to the imposition of strict liability rather than the voluntary assumption of such responsibility which, in our view, could not be viewed in the same way. Indeed were such legislation to be enacted compelling the SFA to introduce such sanctions and liabilities it strikes us that this may well impact upon the obligation (under FIFA rules) of the SFA and all national governing bodies to be independent though we leave the SFA to comment on that more fully.

Preferred approach

It seems to us that the appropriate way to tackle criminal acts is for these to be prosecuted in the criminal courts in the usual way. The consultation, correctly, raises issues about a mature society taking responsibility. We agree with that wholeheartedly. However it appears to us that the responsibility ought principally to rest with the individual who is engaging in such behaviour. It is a matter therefore for the Police to carry out any investigations and for the Fiscal Service to prosecute any behaviour which may contravene the criminal law.

This is, however, a separate issue, from requiring clubs to take reasonable steps to eliminate offensive behaviour, or at least reduce the likelihood of its occurrence. For example, where behaviour is objectionable but not criminal, it would still be open to clubs to eject individuals from their grounds. If a club is required to meet certain requirements and fails to do so, it would not necessarily be unfair to impose a



penalty of some description. Similarly, if it is in breach of duties to supporters of either the home club or visiting supporters and an individual is injured as a result, it would be fair to allow the injured party to pursue a claim against the club for breach of that duty.

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