

2016

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Cedric Vanleenhove & Jan De Bruyne, Evolutions in the Enforcement of U.S. Punitive Damages in England - The Case of Football Injuries, 19 U. Denv. Sports & Ent. L.J. 249 (2016).

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Evolutions in the Enforcement of U.S. Punitive Damages in England - The Case of Football Injuries

**EVOLUTIONS IN THE ENFORCEMENT OF U.S. PUNITIVE DAMAGES
IN ENGLAND - THE CASE OF FOOTBALL INJURIES**

Cedric Vanleenhove¹ & Jan De Bruyne²

ABSTRACT

This article discusses the situation in which an American judge awards punitive damages for a crushing tackle on a football (soccer) pitch but the judgment needs to be enforced in England because the tackling player transferred to that country. This contribution investigates whether this type of award can be executed in England against the tortfeasor's assets there. England's approach towards foreign punitive damages is peculiar. The enforcement of multiple damages, a form of punitive damages arrived at by multiplying the compensatory damages, is statutorily barred by the Protection of Trading Interests Act 1980. For foreign punitive damages other than multiple damages, the sole available authority, namely Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*, seems to support a receptive attitude. The legal basis of the punitive award, therefore, dictates the outcome of the enforcement proceedings in England.

I. Introduction

Shocking or career-threatening tackles have been observed in various football competitions around the world. Every football league has its examples of crushing challenges which have left the victim with long-term suffering. The Major League Soccer in the United States is no exception. Remember Hristo Stoichkov's leg-

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shattering tackle in 2003 during a game between D.C. United and American University. The tackle caused severe physical and psychological injuries to his opponent Freddy Llerena-Aspiazu. When the victim of such an incident decides to file a law suit to recover damages from the wrongdoer, it is possible that punitive damages are available. Punitive damages are essentially a sum of money placed on top of the normal compensatory damages. They seek to punish the defendant for his outrageous misconduct and to deter him and others from similar misbehavior in the future.

This article analyses the situation in which a tackling player who is ordered to pay punitive damages transfers from a team in the U.S. to a club in England. In those circumstances, it will be difficult for the victim to enforce his judgment for punitive damages in the United States. Football players usually lead a nomadic existence during their career. When they leave their club for a new team overseas, they mostly start a new life in the country of their most recent employer, leaving no or very few assets behind. Although its position as the leading domestic football league can be disputed,³ it cannot be denied that the English Premier League is one of the most reputable football leagues in the world. In addition to the quality of football it offers, England's top league also boasts the highest wages.⁴ Football players from or playing in the United

³ In a 2014 study, Bleacher Report ranked the Premier League as the top league worldwide based on four statistics: goals per game, red cards per game, wins against top clubs from other leagues and point differential between the top team and the bottom team in the league. Joe Tansey, *Statistically Ranking the World's Top 10 Football Leagues*, BLEACHER REPORT (Jan. 14, 2014), <http://bleacherreport.com/articles/1922780-statistically-ranking-the-worlds-top-10-football-leagues>.

⁴ An exclusive study undertaken by Sportsmail in 2014 revealed that the average yearly salary in the Premier League amounts to GBP 2.3 million, far ahead of the figure in the Bundesliga (Germany) and the Serie A (Italy). *See in this regard*: Nick Harris, *Premier League Wages Dwarf Those Around Europe with Top-Flight Players in England Earning an Average of £2.3million a Year... Almost 60 Per Cent More Than in Germany*, DAILY MAIL (Nov. 14, 2014), <http://www.dailymail.co.uk/sport/football/article-2833020/Premier-League-wages-dwarf-Europe-flight-players-England-earning-average-2-3million-year.html>.

States are thus drawn to this attractive football competition. There are a number of examples of famous players who have made the move from the U.S. football competition to the English Premier League. In 1999 Colorado Rapids sold Marcus Stephen Hahnenmann to Fulham. Goalkeeper Tim Howard left Metrostars for Manchester United in 2003. Fulham bought Clint Dempsey from New England Revolution in 2007. Brad Guzan transferred from Chivas USA to Aston Villa in 2008. Finally, DeAndre Yedlin very recently swapped Seattle Sounders FC for Tottenham Hotspur.

The aim of this contribution is to investigate whether the victim will be able to enforce the punitive damages award obtained in the U.S. against the tortfeasor in England. This article first sheds light on the application of general tort law principles in the context of sport liability in the United States. A brief outline of this matter is indispensable in order to set the stage for the question of the enforcement of punitive damages in England (part II). This contribution then discusses the notion of punitive damages and especially examines their application in the context of sport injuries and liabilities (part III). Finally, insight into the enforcement chances of an American award for punitive damages for sport injuries in England is provided (part IV). England's approach towards foreign punitive damages is peculiar. The enforcement of multiple damages, a form of punitive damages arrived at by multiplying the compensatory damages, is statutorily barred by the Protection of Trading Interests Act 1980. For foreign punitive damages other than multiple damages, Lord Denning's *obiter dictum* in *S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* seems to support a receptive attitude (part V).

II. Tort Law in the Context of Sport Injuries in the U.S.

Sports such as hockey or football necessarily involve a certain risk of violent physical contact. Such conduct is often part of the game in contact sports and sometimes even encouraged.⁵ It is, therefore,

⁵ Michael F. Taxin, *The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Pro-*

accepted that participants assume, to a certain extent, the risk of physical injury which is inherent in playing such (violent) sports.⁶ Injuries incurred by professional football players due to an opponent's tackle will thus not often result in civil litigation.⁷ If an injured football player, nevertheless, decides to file a law suit against the opponent-tortfeasor, he can base his claims on three grounds of recovery, namely negligence, intention, and recklessness.⁸

Most US courts have, however, rejected the negligence standard in the context of professional sports due to policy considerations (e.g. the risk of floodgate litigation) and the assumption of risks principles – *volenti non fit injuria* (e.g. the claim that the plaintiff consented to the very conduct that forms the basis of the claim).⁹

Professional Athletes, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 819 (2004); Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV., 194 (1990). See *Jaworski v. Kiernan*, 696 A.2d 332, 337 (Conn. 1997) (where the court held that “players in their enthusiasm will commit inadvertent rules violations from which injuries may result. The normal expectations of participants in contact team sports include the potential for injuries resulting from conduct that violates the rules of the sport”).

⁶ See *Nydegger v. Don Bosco Preparatory High School*, 495 A.2d 485, 486 (N.J. Super. Ct. Law Div. 1985) (in which Judge Meehan concluded that those who participate in a sport such as football “expect that there will be physical contact as a result [...] Those who participate are trained to play hard and aggressive”). See also Richard J. Hunter Jr., *An “Insider’s” Guide to the Legal Liability of Sports Contest Officials*, 15 MARQ. SPORTS L. REV. 369, 373 (2005).

⁷ Jeffrey A. Citron & Mark Abelman, *Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. REV. 193, 194-195 (2003); Matthew S. Walker & Chris J. Carlsen, *Note, The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 400-402 & 412-413 (1981-1982); Erica K. Rosenthal, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 FORDHAM L. REV. 2631, 2632 (2004) (internal quotations omitted). See also Donald T. Meier, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout from the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 153 (2002).

⁸ See Rosenthal, *supra* note 7, at 2647.

⁹ *Jaworski v. Kiernan*, 696 A.2d 332, 335-338 (Conn. 1997); *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 574 S.E.2d 246, 249 (Va. 2003); An-

There has been an evolution in U.S. case law towards a standard of recklessness in cases of professional sports liability.¹⁰ Recklessness is a form of conduct which amounts to a greater degree of fault than negligence where the actor does not desire harmful consequence but foresees the possibility and consciously takes the risk or, alternatively, a state of mind in which a person does not care about the consequences of his or her actions.¹¹ Recklessness can occur when the defendant acted with “reckless disregard of [plaintiff’s] safety.”¹² This recklessness standard had been followed by many U.S. courts in both the amateur¹³ and professional¹⁴ sport context.¹⁵

derson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983); *Karas v. Strevell*, 227 Ill. 2d 440, (2008). See also Citron & Abelman, *supra* note 7, at 202; Rosenthal, *supra* note 7, at 2648; Lazaroff, *supra* note 5, at 195. But see *Babych v. McRae*, 567 A.2d 1269 (Conn. Super. Ct. 1989); *Lestina v. West Bend Mut. Ins. Co.*, 176 Wis.2d 901, 914 (Wis. 1993). See Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants Be Required to be Reasonable*, 5 SETON HALL J. SPORTS L. 253, 264 (1995); Mark M. Rembish, *Liability for Personal Injuries Sustained in Sporting Events After Jaworski v. Kiernan*, 18 QUINNIPIAC L. REV. 307, 316 (1998).

¹⁰ Taxin, *supra* note 5, at 823; Yasser, *supra* note 9, at 254-255.

¹¹ Section 500 of the Restatement Second of Torts stipulates that “the actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” BRYAN A. GARNER, BLACK’S LAW DICTIONARY 1277 (9th ed. 2009).

¹² *Hackbart v. Cincinnati Bengals, Inc. & Charles Clark*, 601 F.2d 516, 524 (1979).

¹³ *Nabozny v. Barnhill*, 334 N.E.2d 258 (1975) (dealing with an amateur football match). See Matt Partin, *Tort Law: Nabozny v. Barnhill - Tort Liability for Players in Contact Sports*, 45 UMKC L. REV. 119 (1976). Other cases in which the plaintiff claimed recovery for physical injuries because of participating in an amateur sport game are: *Bourque v. Duplechin*, 331 So. 2d 40 (La. Ct. App. 1976) (in the context of an amateur softball game) and *Oswald v. Twp High School Dist. No. 214*, 406 N.E.2d 157 (1980) (in the context of an amateur basketball game).

¹⁴ *Hackbart v. Cincinnati Bengals, Inc. & Charles Clark*, 601 F.2d 516, 524 (1979) (in which the plaintiff was a football player who was injured when an

Intention is another ground on which claims for recovery can be founded. Intentional wrongdoing (e.g. battery or assault) involves claims that are based on a deliberate interference with another person either through threats of physical contact or directly through the physical contact itself.¹⁶ An intentional tort requires the actor to have intended to cause the harm which resulted from the act.¹⁷ It is, however, clear that in professional sport events, where “violent conduct is expected, encouraged, and a vital part of the game, it is difficult to show an intent to injure on the part of a player who was

opponent intentionally struck him in the back of the head. The United States Court of Appeals for the Tenth Circuit reversed the decision of the lower court and held that the defendant’s behavior was outside the scope of the playing rules as well as the general customs of professional football). *See also* Robert J. Gauvin v. Richard Clark, 404 Mass. 450, 454 (Mass. 1989) (in which the defendant “butt-ended” the plaintiff by ramming the back end of his hockey stick into the latter’s stomach causing severe injuries. The Supreme Judicial Court of Massachusetts concluded that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and that a player might incur liability if he breaches such duty causing physical injuries).

¹⁵ *See* ADAM EPSTEIN, *SPORTS LAW* 118-119 (1st ed. 2012). Yasser, *supra* note 9, at 257-26; Lazaroff, *supra* note 5, at 198-205; Rosenthal, *supra* note 7, at 2648-2653; Taxin, *supra* note 5, at 823-826.

¹⁶ Citron & Abelman, *supra* note 7, at 198-199; Yasser, *supra* note 9, at 255-256

¹⁷ Michael K. Zitelli, *Unnecessary Roughness: When On-field Conduct Leads to Civil Liability in Professional Sports*, 8 WILLAMETTE SPORTS L.J. 1, 2-3 (2010). There is a general agreement that “an intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and battery for which recovery may be had.” *See* Overall v. Kadella, 361 N.W.2d 352, 357 (Mich. Ct. App. 1984). *See also* Moser v. Ratinoff, 130 Cal. Rptr. 2d 198, 206 (Ct. App. 2003) (where the California Second District Court of Appeal held that there may be a cause of action if the defendant’s behavior in a biking contest is intentional or reckless and outside the range of the expected behavior); Averill v. Luttrell, 311, S.W.2d 812 (Tenn. Ap. 1957) (where the court ruled that the defendant was liable because of an intentional act on a baseball field. A professional baseball batter broke his jaw and was knocked unconscious when the opponent catcher hit him in the back of his head. The injured batter subsequently sued the catcher for assault and battery. The court entered a judgment in favor of the plaintiff and held the catcher liable for assault). *See* Stephen J. Gulotta Jr., *Torts in Sports--Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 784-785 (1980).

merely doing what he is paid to do.”¹⁸ Moreover, a defendant can also (sometimes successfully) invoke the defense of consent and assumption of risk of participating in professional sport games.¹⁹

In sum, the football player who suffers shocking and career-threatening injuries might be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former’s safety or with the intention to cause him physical injuries. Professional football players are, however, “encouraged to toughen up, to be macho and forego their right to sue.”²⁰ It can, nevertheless, be argued that so-called crushing or career-ending tackles in football meet the requirements of reckless or intentional conduct. This in turn influences the availability and the award of punitive damages, which is discussed in the next part.²¹

III. Punitive Damages in General and in the Context of Sport Injuries

In civil law systems the victim of a tort committed by another person, a legal entity, or the government is entitled to be placed in the situation he or she would have been in had the tort not taken place.²² The tortfeasor has to pay damages to compensate for the harm suffered by the plaintiff as a result of the tort. These compensatory damages (also referred to as actual damages) are further categorized into patrimonial and non-patrimonial damages. The

¹⁸ Taxin, *supra* note 5, at 825-826; Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORTS L. 127, 135 (1996).

¹⁹ See *People v. Freer*, 86 Misc.2d 280, 282 (Dist. Ct. 1976). See also Diane A. Carpenter, *Decreasing Sports Violence Equals Increasing Officials' Liability*, 3 LOY. L.A. ENT. L. REV. 127, 129 (1983). Taxin, *supra* note 5, at 826-830 with further references.

²⁰ Rosenthal, *supra* note 7, at 2632 (internal quotations omitted). See also Meier, *supra* note 7, at 153; Walker & Carlsen, *supra* note 7, at 412-413.

²¹ See for an extensive comparative study and further references Cedric Vanleenhove & Jan De Bruyne, *Liability for Football Injuries and Enforcement in the EU - Will US Punitive Damages be Shown the Red Card in Europe?*, 14 VA. SPORTS & ENT. L.J. 50 (2014).

²² See CEES VAN DAM, EUROPEAN TORT LAW (1st ed. 2006).

former serve to reimburse the plaintiff's quantifiable monetary losses such as property damage and medical expenses. The latter compensate for non-monetary forms of damage, with physical or emotional pain and suffering and loss of reputation as most common examples.²³

Punitive damages, on the other hand, are not (primarily) intended to compensate the plaintiff for harm done. In contrast to their acceptance within common law jurisdictions, they are said to be relatively non-existent in civil law countries. The remedy transcends the corrective objective of re-establishing an arithmetical equilibrium of gains and losses between the injurer and the injured.²⁴ Punitive damages provide plaintiffs with additional monetary relief beyond the value of the harm incurred.²⁵ They are awarded in excess of any compensatory or nominal damages.²⁶ The Second Restatement of Torts and the Black's Law Dictionary define punitive damages as: "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."²⁷ The U.S. Supreme Court views punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."²⁸ Punitive damages thus

²³ Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANNUAL SURVEY OF INT'L & COMP. LAW 185, 187 (2011); Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 DEF. COUNSEL J. 320, 325 (2007).

²⁴ Francesco Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, in DUNCAN FAIRGRIEVE & EVA LEIN, EXTRATERRITORIALITY AND COLLECTIVE REDRESS 280 (1st ed. 2012); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

²⁵ BRYAN A. GARNER, BLACK'S LAW DICTIONARY 175 (3rd pocket ed. 2006).

²⁶ Gabrielle Nater-Bass, *U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries*, 4 DAJV NEWSLETTER 154 (2003), available at <http://www.arbitralwomen.org/files/publication/0210141916206.pdf>.

²⁷ RESTATEMENT (SECOND) OF TORTS § 908 (1979). Garner, *supra* note 25, at 175.

²⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

focus on the socio-legal significance of the wrongdoing and on the importance of discouraging its repetition.²⁹

The foundational requirement for punitive damages is the infringement of a legally protected interest.³⁰ In order to be able to obtain punitive damages, the plaintiff must have suffered actual damage and must provide sufficient evidence thereof. There is thus no separate cause of action for punitive damages.³¹ Important is that the fact that the defendant has acted in an unlawful manner does not suffice for punitive damages to be awarded. The conduct in question must involve a degree of aggravation.³² The Restatement of Torts emphasizes that “punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”³³ Mere negligence can thus never form the basis for a punitive damages award.³⁴ Some states, however, allow punitive damages in cases where the tortfeasor’s behavior amounts to gross negligence, but then the negligence must be so gross that there was a conscious indifference to the rights and safety of the plaintiff.³⁵

²⁹ Quarta, *supra* note 24, at 280; Vanleenhove & De Bruyne, *supra* note 21, 55-58.

³⁰ 22 AM. JUR. 2D *Damages* § 551 (1988).

³¹ 25 C.J.S. *Damages* § 197; 22 AM. JUR. 2D *Damages* § 551, 553 (1988).

³² 22 AM. JUR. 2D *Damages* § 569. Lotte Meurkens, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in LOTTE MEURKENS & EMILY NORDIN, *THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT?* 10 (1st ed. 2012).

³³ Across the different U.S. States, various terminology is employed to express this required high standard of misconduct: “egregious”, “reprehensible”, “bad faith”, “fraud”, “malice”, “oppression”, “outrageous”, “violent”, “wanton”, “wicked” and “reckless.” RESTATEMENT OF TORTS § 908 (1979).

³⁴ 25 C.J.S. *Damages* § 205. LINDA L. SCHLUETER, *PUNITIVE DAMAGES* 162 (6th ed. 2005).

³⁵ Schlueter, *supra* note 34, at 161; Anthony J. Sebok, *Punitive Damages in the United States*, in: HELMUT KOZIOL & VANESSA WILCOX (EDS.), *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES* 155 (1st ed. 2009); Vanleenhove & De Bruyne, *supra* note 21, 55-58.

Punitive damages have already been claimed and awarded at several occasions in cases of professional sport liability.³⁶ In *Polonich v. A.P.A. Sports*, for instance, the U.S. District Court for the Eastern District of Michigan awarded an amount of \$350,000 in punitive damages to the plaintiff who suffered physical injuries during a hockey game after the defendant hit him in the face with a hockey stick.³⁷ Another famous case in which punitive damages were awarded is *Tomjanovich v. California Sports*. Tomjanovich, a basketball player of the Houston Rockets, was punched in the face by Kermit Washington of the Los Angeles Lakers when the former tried to break up a fight between players of both teams. As a consequence, Tomjanovich suffered severe physical injuries that ultimately ended his career. He subsequently brought a claim against the L.A. Lakers alleging both vicarious liability and negligent supervision. The jury found the defendant liable for the physical injuries that were caused by Washington's battery. Tomjanovich was awarded approximately \$3.25 million including \$1.5 million in punitive damages.³⁸

Within the framework of this article, the question arises whether and to which extent punitive damages can be awarded under U.S. law when a football player dangerously tackles an opponent, thereby causing shocking and career-threatening injuries. As previously mentioned, a plaintiff will have to prove that the defendant acted with reckless disregard of the plaintiff's safety or with the intent to cause physical injuries. It can be argued that "crushing" football tackles are often executed with reckless disregard of the opponent's safety or with the intention to cause physical injury and thus

³⁶ See Gil B. Fried, *Punitive Damages and Corporate Liability Analysis in Sport Litigation*, 9 MARQ. SPORTS L. J. 45 (1998).

³⁷ *Polonich v. A.P.A. Sports*, No. 74635 (E.D. Mich. filed Nov. 10, 1982). See Wyatt M. Hicks, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*, 11 J. LEGAL ASPECTS SPORT 209, 222 (2001); John F. Carroll, *Torts in Sports – 'I'll See You in Court!'*, 16 AKRON L. REV. 537, 539 (1983).

³⁸ *Tomjanovich v. Cal. Sports*, No. H-78-243, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex. 1979). See Citron & Abelman, *supra* note 7, at 199; Zitelli, *supra* note 17, 6-7; Vanleenhove & De Bruyne, *supra* note 21, 55-58.

open the door for courts to award punitive damages. In most football leagues in the world a number of such horrifying tackles have happened. For instance, Alf-Inge Håland's career ended due to the deliberate knee-high tackle by Roy Keane during the Manchester Derby in 2001. Another example is Axel Witsel's leg-breaking horror tackle that put Anderlecht player Marcin Wasilewski out for almost an entire year.³⁹

Such career-ending tackles have also occurred in the United States. For instance, Freddy Llerena-Aspiazu suffered multiple open fractures of his right leg and several other physical and psychological injuries during a football game. He filed a lawsuit in the U.S. District Court of the District of Columbia claiming damages from former Bulgarian international Hristo Stoichkov whose tackle caused the injury. Llerena-Aspiazu alleged that Stoichkov's tackle was the direct and the proximate result of the defendant's recklessness. Llerena-Aspiazu further argued that Stoichkov's raised-cleats tackle constituted outrageous conduct that was malicious, wanton, reckless or in willful disregard of rights. Therefore, Llerena-Aspiazu sought \$5 million in punitive damages from Stoichkov.⁴⁰ Although a financial settlement was reached between Llerena-Aspiazu and Stoichkov,⁴¹ the case shows that it is conceivable that punitive damages can be awarded if the court accepts that the tortfeasor deliberately tried to injure the plaintiff or acted willfully or grossly negligent with a conscious disregard for the safety of others. Given the unpredictable nature of a football player's career and the structure of the global football market, it is possible that by the end of the suit the tortfeasor has transferred to another club in another country and that enforcement outside of the U.S. thus becomes necessary. The question which is addressed in the following part is whether and to what extent the judgment and the punitive

³⁹ Vanleenhove & De Bruyne, *supra* note 21, 55-58.

⁴⁰ Freddy Llerena-Aspiazu v. Major League Soccer, et al., No. 1:06-cv-00343-RWR (D.C. 2006).

⁴¹ Notice of Settlement, Freddy Llerena-Aspiazu v. Major League Soccer, et al., No. 1:06-cv-00343-RWR (D.C. 2006); Vanleenhove & De Bruyne, *supra* note 21, 55-58.

damages award can be enforced against the assets of the defendant in England.

IV. Enforcement of Punitive Damages in England

A. General Rules on Enforcement

As is the case in all EU Member States, the enforcement of U.S. punitive damages awards in England is not regulated by supranational legislation.⁴² The U.S. and the UK (and consequently England) are not parties to a bilateral or multilateral treaty on the recognition and enforcement of judgments. In 1976 the U.S. and the UK tried to conclude a bilateral agreement on the reciprocal recognition and enforcement of judgments in civil matters but failed.⁴³ The English private international law rules, therefore, apply to American judgments seeking recognition and enforcement in England and Wales.

Under English common law, the institution of a fresh legal action is required for the enforcement of a foreign judgment. The foreign decision imposes an obligation on the defendant. This obligation then becomes the subject matter of the new action for the amount of the debt in England. However, the plaintiff may apply for summary judgment under Part 24 of the Civil Procedure Rules on the basis that the judgment-debtor has no defence to the claim. In any event, the English court will verify whether the foreign court had jurisdiction to adjudicate the claim against the defendant.

⁴² American punitive damages are thus subjected to a patchwork of national rules. See CEDRIC VANLEENHOVE, *PUNITIVE DAMAGES IN PRIVATE INTERNATIONAL LAW: LESSONS FOR THE EUROPEAN UNION* (1st ed. 2016) (forthcoming) (providing an overview of the positions taken by Germany, France, Spain and Italy).

⁴³ Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26 1976, 16 *International Legal Materials* 1977, 71. See Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 *VA. J. INT'L L.* 443, 443-468 (1977); Peter Hay & Robert J. Walker, *The Proposed U.S.-UK Recognition-of-Judgments Convention: Another Perspective*, 18 *VA. J. INT'L L.* 753, 753-770 (1978).

Only when, in the view of English law, the foreign court was entitled to summon the defendant and subject him to judgment, enforcement in England will be possible.⁴⁴

Under English common law, the defendant has nine defences to rely on in order to prevent the enforcement of the unfavourable judgment.⁴⁵ Three are particularly relevant in the context of a punitive damages award. First, the Protection of Trading Interests Act of 1980 (“PTIA”) bars the enforcement of multiple damages in England. Second, English courts will not enforce foreign penal judgments. Lastly, the defendant could attempt to invoke the public policy exception to exclude the possibility of enforcement of a punitive award.⁴⁶

For punitive damages specifically, a distinction needs to be made between multiple damages for which specific legislation exists (part B) and punitive damages other than multiple damages for which no such legislation is available (part C).

B. Multiple Damages

1. Section 5 of the Protection of Trading Interest Act – Unenforceability of Multiple Damages

Multiple damages are a form of punitive damages arrived at by multiplying the amount of compensatory damages. The Protection of Trading Interest Act (“PTIA”) is a statute from 1980 which prohibits the enforcement of multiple damages in England. PTIA attempts to thwart the exercise of U.S. extraterritorial jurisdiction

⁴⁴ JAMES FAWCETT & JANEEN M. CARRUTHERS, *CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW* 516-517 (14th ed. 2008); Michael Polonsky, *Particular Issues Affecting the Recognition and Enforcement of U.S. Judgments*, 19 *INT’L L. PRACTICUM* 156, 158 (2006);

⁴⁵ FAWCETT, CARRUTHERS, NORTH, *supra* note 44, 551.

⁴⁶ Robert Merkin, *Enforceability of Awards of Punitive Damages in the United Kingdom*, *I.J.I.L.* 18, 19 (1994).

over foreign citizens.⁴⁷ Section 5 provides that a judgment of an overseas country cannot be registered and no court in the UK may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment grants multiple damages.⁴⁸ The rule represents the British belief that the treble damages which are recoverable under U.S. antitrust law are penal in nature and should not be available to private plaintiffs acting as private attorneys general.⁴⁹ Section 5 aims to neutralize the treble damages incentive for private parties in U.S. legislation in that it forces private litigants to weigh the benefits and costs of such an action given the unenforceability in the UK.⁵⁰ Although intended to apply to multiple damages (treble damages) arising out of antitrust litigation, a literal reading of the Act prohibits the enforcement of any type of multiple damages irrespective of the underlying cause of action.⁵¹ The Act only applies to multiple damages and does not cover other punitive damages.

It has to be noted that Section 5 of PTIA renders the compensatory element of a multiple damages award unenforceable as well. This follows from a textual interpretation of the Act and is supported by Dicey and Morris who state that “Judgments caught by [S]ection 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor.”⁵² Judge Parker (and Lord Diplock later agreed on that point⁵³) remarked in *British Airways v. Laker*

⁴⁷ Tina J. Kahn, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476, 479 (1980).

⁴⁸ §§ 5.1 and 5.2. A judgment for multiple damages is defined in Section 5(3) as “a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment was given.”

⁴⁹ Kahn, *supra* note 47, at 489.

⁵⁰ Kahn, *supra* note 47, at 510, 513 & 515.

⁵¹ Kahn, *supra* note 47, at 510.

⁵² LAWRENCE COLLINS, DICEY & MORRIS ON THE CONFLICT OF LAWS 566 (13th ed. 2000).

⁵³ *British Airways v. Laker Airways*, [1985] AC 58 (H.L.) 89.

Airways that Section 5 of PTIA is aimed at judgments in antitrust matters and affects the whole award, not just the multiple damages part of it.^{54,55} This view has been confirmed in other cases such as *Lewis v. Eliades*, where Lewis did not raise this issue on appeal.⁵⁶

2. The Decision of the Court of Appeal in *Lewis v. Eliades*

In *Lewis v. Eliades*, a part of a U.S. judgment provided for treble damages for violations under the United States Federal Racketeer Influenced and Corrupt Organisations Act (“RICO”).⁵⁷ RICO permits litigants to recover civil damages based on a number of criminal violations and provides the opportunity for a claimant to obtain treble damages in addition to the costs of the law suit.⁵⁸ The English courts were faced with the question whether the presence of these treble damages would make the whole judgment unenforceable in England under PTIA.

The proceedings in this case started in the United States District Court for the Southern District of New York. Former managers and promoters of the famous English boxer Lennox Lewis brought a suit in federal court against him after the breakdown of their relationship. Lewis counterclaimed on the basis of *inter alia* breach of contract, fraud, and racketeering contrary to RICO. In its judgment of March 15, 2002, the U.S. District Court held each of the defendants on the counterclaim liable for an amount of \$7,273.641 USD. The District Court awarded \$6,821.159 USD for breach of fiduciary duty, \$56.400 USD for fraud and \$369.082 USD as damages under RICO. The latter sum, however, was the compensatory amount without the treble multiplication.⁵⁹

⁵⁴ *British Airways v. Laker Airways*, [1984] QB 142 (H.L.) 161.

⁵⁵ Elaine Kellman, *Enforcement of Judgments and Blocking Statutes: Lewis v. Eliades*, 53 I.C.L.Q. 1025, 1028 (2004).

⁵⁶ Emma Malcolm, *Winning the Fight for the Enforcement of US damages*, ENT. L.R. 133 (2004).

⁵⁷ *Lewis v. Eliades*, [2004] 1 WLR 692.

⁵⁸ 18 USC 1964(c); Kellman, *supra* note 55, at 1028.

⁵⁹ Kellman, *supra* note 55, at 1025.

Lennox Lewis then sought to enforce the judgment in England. The defendants in the enforcement proceedings argued that the judgment could not be enforced because of Section 5 of PTIA. They asserted that Lewis was entitled to an automatic trebling of the compensatory damages under RICO and that this blocked the enforcement of the New York judgment in its entirety. On August 1, 2002, Master Whitaker declined to follow the defendants' argument and granted summary judgment for an amount of \$6,273,641 USD, *i.e.* the original amount awarded minus \$1 million USD as agreed set-off between parties.

In the High Court proceedings, Judge Nelson also rejected this argument. In a decision of February 28, 2003, he noted that the trebling of the basic compensatory award was clearly not automatic. The claimant can decide to waive his right to recover these damages, can withdraw his application for treble damages, or can decide not to enforce the multiple portion of the award.⁶⁰ In the case at hand, Judge Nelson made his decision to enforce the American judgment conditional on: (1) Lewis withdrawing two motions he had filed in the U.S. District Court for the Southern District of New York; or (2) on his undertaking not to enforce the multiple damages against the defendants. Lewis had requested the U.S. District Court to treble the amount of the compensatory damages under RICO and to issue these treble damages in a separate judgment (in order to prevent any problems under PTIA). Judge Nelson, however, made it clear that the latter technique would not hinder the application of Section 5 of PTIA.^{61,62} The High Court's ruling thus depended on the factual circumstances surrounding the case. It can arguably be derived from the decision that an unmultiplied award is enforceable in England if the judgment creditor agrees not to request multiplication in the rendering court, withdraws a pend-

⁶⁰ Lewis v. Eliades, [2003] 1 All ER (Comm) 850, 862; Kellman, *supra* note 55, at 1026, n. 4.

⁶¹ Lewis v. Eliades, [2003] 1 All ER (Comm) 850, 863.

⁶² Kellman, *supra* note 55, at 1026.

ing application for multiplication, or undertakes not to enforce the award beyond its compensatory element.⁶³

Lennox Lewis complied with the condition laid down by Judge Nelson. For an unknown reason, the clerk in the United States District Court, nevertheless, ordered the issuance of a separate judgment for treble RICO damages. Judge Baer of the United States District Court subsequently set this order aside and ordered a single judgment (bearing the date of the original judgment) to replace the original judgment for an amount of \$8,065.805 USD. The new amount reflected the – unwanted as a result of Lewis' withdrawal – trebling of the RICO damages of \$396.082 USD to \$1,188.246 USD plus an additional \$40 USD for an earlier miscalculation.⁶⁴

On appeal before the Court of Appeal in England, the situation had thus significantly changed. With the RICO damages having been trebled, the question to be answered became how Section 5 of PTIA had to be interpreted. One interpretation was that the treble damages tainted the other heads of damages, resulting in the total rejection of the judgment for enforcement purposes. Another understanding of Section 5 of PTIA meant that the other heads of damages could be enforced despite the statutory rejection of a judgment for treble damages. It should be remarked that Lewis did not try to enforce the RICO damages themselves which indicates that his lawyers probably believed that this would not stand a chance given the clear language of the Act.⁶⁵

On October 9, 2003, the Court of Appeal ruled that the presence of treble damages does not mean that other damages are not recoverable.⁶⁶ It found that the non-RICO damages could be severed and distinguished from the unenforceable treble damages.⁶⁷ The Court of Appeal dismissed arguments based on Judge Parker's

⁶³ Kellman, *supra* note 55, at 1029-1030.

⁶⁴ Kellman, *supra* note 55, at 1026.

⁶⁵ Malcolm, *supra* note 56, at 133; Kellman, *supra* note 55, at 1026.

⁶⁶ *Lewis v. Eliades*, [2004] 1 WLR 692; Polonsky, *supra* note 44, at 158; Rouhette, *supra* note 23, at 335.

⁶⁷ Polonsky, *supra* note 44, at 158.

observation in *British Airways v. Laker Airways* and the opinion of Dicey and Morris as these relate to the compensatory part of a treble damages award and not to the legal fate of the other heads of damages in a mixed judgment.⁶⁸ It, therefore, held that the whole judgment was enforceable, save the treble RICO damages in the amount of \$1,188.246 USD and the sum of \$1 million USD as set-off between the parties.⁶⁹

Ironically, the American judge's action of awarding Lewis more money by trebling the damages under RICO resulted in a lower amount to be recovered from the defendants in England due to Section 5 of PTIA. Judgment creditors seeking to enforce RICO claims or other claims for multiple damages against the English assets of the defendant should thus make certain that these multiple damages are clearly separated from other heads of damage. Moreover, in order to ensure maximum return in the UK, the plaintiff should consider not requesting the multiplication of the basic compensatory award provided for by the applicable statute.⁷⁰

C. Punitive Damages

Forms of punitive damages which do not involve the multiplication of the compensatory damages are outside the ambit of PTIA and, therefore, follow a different regime. It is well settled in England that an English court will not lend its aid to the enforcement of a foreign penal law.⁷¹ By imposing a penalty, a state exercises its sovereign power. Such an act of sovereignty cannot have any effect in the territory of another nation.⁷² English courts will, therefore, not enforce a foreign judgment when it is given in respect of a

⁶⁸ Kellman, *supra* note 55, at 1027-1028.

⁶⁹ Lewis v. Eliades, [2004] 1 WLR 692, 705.

⁷⁰ Polonsky, *supra* note 44, at 159.

⁷¹ Follitt v. Ogden, [1790] 3 Term Rep 726; *Huntington v. Attrill*, [1893] AC 150.

⁷² FAWCETT, CARRUTHERS, NORTH, *supra* note 44, at 126.

fine or penalty. However, a sum payable to a private individual is not a fine or penalty.⁷³

This principle was applied in the early 20th century case of *Raulin v. Fisher*.⁷⁴ The matter involved an American lady who injured a French officer in the *Bois de Boulogne* (France) while riding her horse recklessly. She was prosecuted for criminal negligence and fined 100 francs. Under French law, a criminal court can rule on the civil claim for damages as well if the victim decides to intervene in the criminal proceedings. The victim opted to do so and was awarded 15.917 francs for damages and costs in the same judgment. When the victim tried to enforce the judgment in England, Judge Hamilton made a distinction between the fine and the compensation. He ruled that the civil damages were recoverable because they were payable to an individual and not to the state. These damages could be severed from the fine which was unenforceable due to its penal character.⁷⁵ The crucial criterion to determine whether a foreign measure is a penalty, therefore, appears to be the receiver of the sums. If the money goes to the foreign state, the sum has to be classified as penal.

This formalistic approach was confirmed in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*⁷⁶ This is the only case touching upon the issue of the enforceability of punitive damages.⁷⁷ A French company had sold clothing to English merchants but after delivery the buyers failed to pay the agreed price. The seller brought its payment claim before the Commercial Court of Lille. In addition, it sought a further 10.000 francs on the basis of “*résistance abusive*,”⁷⁸ a head of damages awardable in France

⁷³ Polonsky, *supra* note 44, at 156.

⁷⁴ *Raulin v. Fisher*, [1911] 2 KB 93.

⁷⁵ *FAWCETT, CARRUTHERS, NORTH*, *supra* note 44, at 561; Merkin, *supra* note 46, at 21.

⁷⁶ *S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd.*, [1978] Q.B. 279.

⁷⁷ Although the damages for “*résistance abusive*” were not qualified as punitive by the Court of Appeal.

⁷⁸ CODE CIVIL [C. CIV.] art. 1153 (Fr.).

where a defendant has unjustifiably opposed the plaintiff's claim. The Lille court gave judgment in default of appearance for the plaintiffs for the amount claimed, interest, and costs. Enforcement of the judgment in England was governed by the 1933 Foreign Judgments Act which regulates enforcement for judgments originating in countries with which the UK has a mutual recognition treaty. The defendants resisted enforcement of the 10,000 francs (awarded as a result of the unreasonable refusal by the defendants to pay a plain claim) in England on the ground that the French judgment imposed a penalty. Under Section 1(2)(b) of the Act, sums payable in respect of a penalty are excluded from enforcement. The defendants further relied on Section 4(1)(a)(v), which states that enforcement should be denied when it would violate public policy of the requested state.⁷⁹

As to the characterisation of the sum for the "*résistance abusive*," all three judges in the Court of Appeal agreed that the amount for the unreasonable withholding of sums under a valid claim was compensatory, not penal and, therefore, enforceable.⁸⁰ Lord Denning believed it to be compensation for losses not covered by an award of interest, such as loss of business caused by want of cash flow, or for costs of the proceedings not covered by the court's order for costs. He, however, expanded *obiter dictum* upon the issue and summarized the defendants' argument as sustaining that the 10,000 francs were punitive or exemplary damages which amounted to a penalty and were, therefore, unenforceable under Section 1(2)(b) of the 1933 Act.⁸¹ He repeated the conventional idea that a fine or other penalty only refers to sums payable to the state by way of punishment and that a sum payable to a private individual is not a fine or penalty.⁸²

⁷⁹ This public policy exception is similar to the one at common law.

⁸⁰ Nicholas Edwards & Robert G. Lee, *Recognition and Enforcement in English Law of Money Judgments from Outside the UK*, 12 I.B.F.L. 1, 2 (1994).

⁸¹ The other judges in the case, Lord Justice Goff and Lord Justice Shaw, did not refer to the notion "punitive damages."

⁸² *S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd.*, [1978] Q.B. 279, 299-300.

Although given in *dicta*, Lord Denning's statements relating to punitive damages are interesting given the hybrid nature of punitive damages. They are awarded not to compensate (at least not always and not primarily) but to punish the wrongdoer for reprehensible conduct. However, they are not payable to the state. Lord Denning's remark seems to explicitly support the view that, despite their inherent criminal nature, for enforcement purposes in England punitive damages avoid the penal label because they are awarded to a private person instead of to the state.^{83,84} Lord Denning further ruled that English public policy does not oppose the enforcement of a claim for exemplary damages because these are "still considered to be in conformity with the public policy in the United States and many of the great countries of the Commonwealth."⁸⁵ He thereby indicated that punitive damages do not pose a problem from a public policy perspective either.⁸⁶ However, the *obiter* character of his elaboration should be underlined, leading to the conclusion that, at the very least, the enforceability of (U.S) punitive damages in the UK has not yet been definitively settled.

In our view it is curious how, on the one hand, the enforcement of punitive damages seems to be accepted by Lord Denning and distinguished scholars such as Dicey and Morris. The reasoning behind this acceptance is that punitive damages cannot be qualified as penal since they are not awarded to the state but to the plaintiff. On the other hand, multiple damages, a subcategory of punitive damages, are not enforceable because they are barred by a statute

⁸³ Collins, *supra* note 52, at 476.

⁸⁴ In some U.S. states split-recovery systems are in place. In Oregon, for instance, a statute allocates 70% of the punitive damages awarded to the state. OR. REV. STAT. § 31.735 (2003). California law provides that 75% of the award flows to a Public Benefit Trust Fund. CAL. CIV. CODE § 3294.5. Only the part going to the plaintiff would thus be eligible for enforcement in the UK.

⁸⁵ S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd., [1978] Q.B. 279, 300.

⁸⁶ The same conclusion was reached by the Supreme Court of Australia (Full Court) and the British Columbia Court of Appeal in *Benefit Strategies Group Inc. v. Prider*, [2005] SASC 194 and *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 WWR 573.

(PTIA). They are even deemed to be so unacceptable that the compensatory “basic award” (*i.e.* before multiplying) cannot be enforced either. Punitive damages can, however, in some instances reach much higher numbers as they are “plucked out of the air.”⁸⁷

Until the *ratio decidendi* of a judgment deals with the issue of enforcement of foreign punitive damages, Lord Denning’s *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* remains the only authority to rely on in support of the enforcement of such damages. The risk of unenforceability in England is, therefore, real.⁸⁸ The compensatory damages in a judgment for punitive damages will in any case be enforceable because PTIA does not apply and the punitive damages thus do not “infect” the compensatory damages. The compensatory damages are another head of damages which can be severed from the punitive award. The severing of judgments in order to distinguish enforceable from unenforceable portions was demonstrated in, for example, *Raulin v. Fisher* and *Lewis v. Eliades*.

V. Concluding Remarks

The article examined the liability for football injuries in the U.S. and especially focused on the enforcement of a judgment containing punitive damages in England. We elaborated on the scenario of a football player who dangerously tackles an opponent and thereby causes shocking and career-threatening injuries. The player risks to be sued on two major grounds in the U.S., namely recklessness and intention. A claimant will be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former’s safety or with the intention to cause him physical injuries. So-called crushing or horrifying tackles in football can meet the requirements of reckless or intentional conduct. This in turn influences the availability and the award of punitive damages.

⁸⁷ Merkin, *supra* note 46, at 23.

⁸⁸ Polonsky, *supra* note 44, at 158; Rouhette, *supra* note 23, at 335 (according to Rouhette, it is even likely that punitive damages will not be enforced).

The article subsequently discussed the English approach towards the enforcement of punitive damages. In England multiple damages are statutorily barred by PTIA. If the victim of a tackle has been awarded punitive damages in the U.S. on the basis of a multiplier statute, he will end up with nothing as both the basic compensatory damages and the punitive damages will be blocked (in contrast, other heads of damage will not be denied enforcement). Therefore, if the player suffering injury from a tackle already foresees the necessity of enforcement in England, he is advised to waive his right to recover multiple damages or to withdraw the application for such damages. If the need for enforcement in England only becomes apparent after the trial, the player should decide not to enforce the multiple portion of the award in order to safeguard the unmultiplied compensatory damages.

Whether other forms of punitive damages can survive the English courts' scrutiny is uncertain. Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* appears to suggest a positive answer. This attitude seems logical given the fact that the English legal system itself provides for punitive damages in its substantive law. In *Rookes v. Barnard*, Lord Devlin laid down three categories in which punitive damages can be awarded: (1) oppressive, arbitrary or unconstitutional action by the servants of the government; (2) cases in which the defendant calculated his behavior in order to make a profit which may exceed the compensation payable to the victim; and (3) punitive damages expressly provided for by statute.⁸⁹ Making punitive damages available under domestic law while at the same time refusing to enforce punitive damages originating from abroad would amount to legal hypocrisy and would show a lack of internal legal coherence. As things stands, the legal basis of the American punitive damages award is thus of paramount significance as it might mean the difference between all or nothing.

⁸⁹ *Rookes v. Barnard*, [1964] U.K.H.L 1 (H.L.) 37-38.

