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Exploring Vicarious Liability to Remedy the #E-Too Movement

Eloise Hewson

Abstract

The esports, or competitive video gaming, industry is an exciting area of economic and cultural growth. Gaming can facilitate interpersonal connection, shared problem-solving, and creativity. Players may purchase a game, watch a streamer play it online, join an online gaming community, attend a tournament, compete professionally, or find employment in game development or a related field. The gaming industry generates enormous economic value and employs tens of thousands of people in the UK alone. However, the esports sector does not extend its benefits equally. Women are regularly verbally harassed in video games, countless women have been groped at esports events, women have been raped by professional players, underage fans have been groomed. Abuse is endemic to online gaming communities.

This article argues that it is necessary to hold esports teams vicariously liable for the harms caused by professional players in order to remedy abuse in online games. The first section proposes that serious instances of abuse committed by professional esports players have normalised misogyny in gaming communities and proposes that non-tortious solutions are inadequate. The second section considers civil legal options and argues that, whilst individual players could be held liable in tort, the lack of means of most abusers renders direct claims worthless. Finally, section three shows that esports teams could be held vicariously liable for abuse if three doctrinal ambiguities were clarified. It is concluded that these ambiguities should be resolved in order to compel esports teams to compensate victims and lessen abuse by improving social norms in online gaming communities.

‘this is the INTERNET folks... there are no laws here, at least not clearly defined ones’¹

1 The Problem

1.1. Introduction

The sexualised abuse of women is endemic throughout the internet² and is especially acute in online gaming communities; over 60 per cent of female gamers are harassed,³ and employees⁴ and underage fans⁵ repeatedly report being abused by professionals employed in the esports⁶ industry. Esports misogyny rises tirelessly in a toxic cycle of

¹ Anonymous online comment quoted in Keats Citron, ‘Law’s Expressive Value in Combating Cyber Gender Harassment’ (2009) 108(3) Michigan Law Review 373, 401.

² See for example Emma Jane, ‘“Back to the Kitchen, Cunt”: Speaking the Unspeakable About Online Misogyny’ (2014) 28(4) Journal of Media and Cultural Studies 558, 560–563; Keats Citron (n 1) 374, 380–384.

³ Jenny McBean and Seb Martin, ‘Bryter Female Gamer Survey’ (Bryter 2020) 20 <<https://pages.bryter-research.co.uk/hubfs/003-FGS-1603/Bryter%20-%20Female%20Gamers%20Survey%202020.pdf>> accessed 25 May 2022 (survey of 1001 female and 1003 male participants who play video games at least monthly, commissioned by Women in Games charity.) See further Women in Games, ‘Bryter X Women in Games’ <<https://www.womeningames.org/project/diversity-guide/>> accessed 25 May 2022.

⁴ Dom Sacco, ‘Method back on track after almost imploding in wake of abuse scandal’ (*EsportsNews*, 26 June 2020) <<https://esports-news.co.uk/2020/06/26/method-players-partners-step-away-over-abuse-scandal/>> accessed 25 May 2022; Method, ‘Statement on Co-CEO: An Update from Method’ <<https://www.method.gg/statement-on-co-ceo>> accessed 25 May 2022; Cecilia D’Anastasio, ‘Inside The Culture Of Sexism at Riot Games’ (*Kotaku*, 7 August 2018) <<https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483>> accessed 25 May 2022.

⁵ Cecilia D’Anastasio, ‘When Your Favorite Streamer Turns Out to Be a Creep (Or Worse)’ (*Kotaku*, 19 February 2019) <<https://kotaku.com/when-your-favorite-streamer-turns-out-to-be-a-creep-or-1832734851>> accessed 25 May 2022.

⁶ For definitions of esports, see Omar Ruvalcaba and others, ‘Women’s Experiences in eSports: Gendered Differences in Peer and Spectator Feedback During Competitive Video Game Play’ (2018) 42(4) Journal of Sports and Social Issues 295, 296 (survey

public outcry and continuing abuse.⁷ The 2012 *#Ireazonwhy* movement, in which female game creators shared experiences of industry discrimination on Twitter, exposed widespread sexual harassment and led some to anticipate genuine positive change.⁸ Less than two years later, a female developer was accused of trading sex for positive game reviews, sparking a culture war between progressive industry-members, who saw the rumours as an unsubstantiated smear campaign, and anti-feminist trolls. Women were given actionable death and rape threats.⁹ In 2019, news outlets proclaimed that there was a newfound determination for equality¹⁰ after the *#MeToo* movement prompted women to expose sector-wide abuse in the games

of 61 female and 31 male esports viewers recruited from university psychology department and observation of 39 female and 48 male Twitch streamers); Michael Ward and Alexander Harmon, 'ESport Superstars' (2019) 20(8) *Journal of Sports Economics* 987, 987 (collection of community-compiled earnings data relating to 24,000 players); John Holden and Thomas Baker, 'The Econtractor? Defining the Esports Employment Relationship' (2019) 56(2) *American Business Law Journal* 391, 393; Lindsey Darvin, Ryan Vooris and Tara Mahoney, 'The Playing Experiences of Esports Participants: An Analysis of Treatment Discrimination and Hostility in Esport Environments' (2020) 2(1) *Journal of Athlete Development* 36, (survey of 471 participants, 77% of whom were male, recruited via Reddit).

⁷ Jane (n 2) 566.

⁸ Mary Hamilton, '#Ireazonwhy: The Hashtag That Exposed Games Industry Sexism' *The Guardian* (London, 28 November 2012) <<https://www.theguardian.com/technology/gamesblog/2012/nov/28/games-industry-sexism-on-twitter>> accessed 25 May 2022.

⁹ Caitlin Dewey, 'The Only Guide to Gamergate You Will Ever Need to Read' *Washington Post* (14 October 2014) <<https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/>> accessed 25 May 2022; Nick Wingfield, 'Feminist Critics of Video Games Facing Threats in "GamerGate" Campaign' *New York Times* (New York, 15 October 2014) <<https://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html>> accessed 20 May 2021; Editorial, 'The Guardian View on Gamergate: When Hatred Escaped' *The Guardian* (London, 20 August 2019) <<https://www.theguardian.com/commentisfree/2019/aug/20/the-guardian-view-on-gamergate-when-hatred-escaped>> accessed 25 May 2022.

¹⁰ Lucy Orr, "'This Industry Has a Problem with Abuse': Dealing with Gaming's #MeToo Moment' *The Guardian* (London, 17 September 2019) <<https://www.theguardian.com/games/2019/sep/17/gaming-metoo-moment-harassment-women-in-games>> accessed 25 May 2022.

industry by sharing their experiences online.¹¹ Only a short while later, over three days in June 2020, hundreds of women publicly alleged that they had been assaulted or harassed by esports professionals.¹² Many assumed that improvements were inevitable following June 2020,¹³ but the events of the past decade show that proactive change is necessary to break cycles of abuse in esports.

This article argues that esports teams should be held vicariously liable for the torts of their players in order to lessen abuse in gaming communities. This first section proposes that the esports gender harassment problem is caused by the formation of toxic communities around abusive high-level players and shows that non-tortious solutions to this problem are inadequate. Section two shows that abusive players could be held liable in tort, but that claims are undermined by the lack of financial resources of individual abusers. Finally, section three argues that esports teams could be held vicariously liable for the torts of their players, but that three doctrinal ambiguities currently frustrate claims. It is concluded that the ambiguities in the doctrine should be resolved in order to compel teams to compensate victims and lessen abuse in wider gaming communities.

¹¹ Laurie Penny, 'Gaming's #MeToo Moment and the Tyranny of Male Fragility' (*Wired*, 9 June 2019) <<https://www.wired.com/story/videogames-industry-metoo-moment-male-fragility/>> accessed 25 May 2022; Orr (n 10); John Holden, Thomas Baker and Marc Edelman, 'The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports' (2019) 52 *Ariz St L J* 1, 12.

¹² Shannon Liao, 'Gaming Companies Are Responding to a Wave of Sexual Misconduct Allegations' *CNN Business* (New York, 25 June 2020) <<https://edition.cnn.com/2020/06/25/tech/gaming-metoo-twitch/index.html>> accessed 25 May 2022; Wes Fenlon, 'Women in the Games Industry Speak Out Over Sexual Assault and Harassment' (*PCGamer*, June 2020) <<https://www.pcgamer.com/women-in-the-games-industry-speak-out-over-sexual-assault-and-harassment/>> accessed 25 May 2022.

¹³ Taylor Lorenz and Kellen Browning, 'Dozens of Women in Gaming Speak Out About Sexism and Harassment' *New York Times* (New York, 23 June 2020) <<https://www.nytimes.com/2020/06/23/style/women-gaming-streaming-harassment-sexism-twitch.html>> accessed 25 May 2022; Darwin, Vooris and Mahoney (n 6) 44.

1.2. Limitations

Two limitations as to scope should be noted. First, although online abuse often occurs across borders,¹⁴ this article will focus on English law. This approach is appropriate because many recent allegations of abuse have involved English players, potentially engaging English law.¹⁵ Internationality limitations will be discussed further as each solution is analysed.¹⁶ Second, although this piece unavoidably disproportionately discusses male-on-female abuse,¹⁷ *esports gender abuse* is taken to mean *abuse relating to gender*, rather than merely that affecting women. It should particularly be noted that male-on-male abuse is frequently downplayed¹⁸ and often invokes gender norms in similarly harmful ways.¹⁹

The lack of high-quality research into online abuse provides an additional limitation. Jane proposes that online harassment is understudied because it is vulgar and falls outside of ordinary scholarly discourse.²⁰ Perhaps more pertinently, journalists and academics who write about online gender abuse are often subjected to harassment;²¹ one researcher witnessed debates about her ‘rapeability’

¹⁴ See for example Steven Messner, ‘WoW’s Top Competitive Raid Guild Is Collapsing Amid Multiple Accusations of Sexual Assault and Abuse’ (*PCGamer*, June 2020) <<https://www.pcgamer.com/wows-top-competitive-raid-guild-is-collapsing-amid-multiple-accusations-of-sexual-assault-and-abuse/>> accessed 25 May 2022.

¹⁵ See for example Messner (n 14); Cale Michael, ‘Evil Geniuses Cut Ties with Dota 2 Caster GrandGrant Amid Sexual Harassment Allegations’ (*DotEsports*, 22 June 2020) <<https://dotesports.com/dota-2/news/evil-geniuses-cuts-ties-with-dota-2-caster-grandgrant-amid-sexual-harassment-allegations>> accessed 25 May 2022.

¹⁶ See ss 2.3 and 3.3.

¹⁷ Jane (n 2) 559.

¹⁸ Martha Chamallas, ‘Vicarious Liability in Torts: The Sex Exception’ (2013) 48(1) *Valparaiso U L Rev* 133, 164.

¹⁹ Jane (n 2) 565.

²⁰ *ibid* 558.

²¹ *ibid* 561–563.

circulating online following the publication of her work.²² As such, it appears that the proliferation of online abuse itself limits research engagement. Somewhat ironically, online abuse may also be under-researched because it is trivialised. Keats Citron argues that cyber harassment is considered juvenile ‘locker-room talk’ affecting only ‘overly sensitive complainers’.²³ Online abuse is dismissed as a *social problem*²⁴ and infantilised as an issue to be solved by parents.²⁵ One *New York Times* journalist, after describing women being driven from their homes during *gamergate*, jovially concluded that progress was indicated by Lara Croft’s ‘more modestly proportioned’ breasts.²⁶

A final limitation is imposed by the lack of research analysing the esports industry.²⁷ What little research has been conducted is sometimes compromised by commercial interests²⁸ and poor participant selection. Whilst one empirical study of gamers present on Reddit²⁹ attracted overwhelmingly male responses,³⁰ recruitment within a university psychology department attracted majority female participants,³¹ casting doubt on the extent to which small-scale studies can represent diverse online communities. To account for unavoidable

²² *ibid* 562.

²³ Keats Citron (n 1) 375, 395–396.

²⁴ Liao (n 12); Paula Giliker, “‘Tailoring’ the Close Connection Test for Sexual Abuse Victims: Vicarious Liability in the Court of Appeal” (*University of Bristol Law School Blog*, 26 April 2021) <<https://legalresearch.blogs.bris.ac.uk/2021/04/tailoring-the-close-connection-test-for-sexual-abuse-victims-vicarious-liability-in-the-court-of-appeal/>> accessed 25 May 2022.

²⁵ Digital, Culture, Media and Sport Select Committee, *Government Response to the Digital, Culture, Media and Sport Select Committee Report on Immersive and Addictive Technologies* (CP 241, 8 June 2020) (Government response to DCMS) para 32.

²⁶ Wingfield (n 9).

²⁷ Holden and Baker (n 6) 394.

²⁸ *ibid* 398.

²⁹ Darvin L, Vooris R and Mahoney T, ‘The Playing Experiences Of Esports Participants: An Analysis Of Treatment Discrimination And Hostility In Esport Environments’ (2020) 2(1) *Journal of Athlete Development* 36.

³⁰ Darvin, Vooris and Mahoney (n 6) 42.

³¹ Ruvalcaba and others (n 6) 301, 304.

source deficiencies, multiple references are used to verify statistics where possible and methods are described briefly in the first citation of empirical sources.

1.3. The importance of lessening abuse

Research on esports gender harassment is important because of the significant effect that abuse can have on victims' lives. Cyber harassment impacts the day-to-day activities of those affected and leads to social withdrawal.³² Women affected by threats specifying an 'exact time of attack' have described feelings of terror consuming their lives.³³ Harassment may also trigger mental health conditions;³⁴ one woman assaulted by an esports player was recently admitted to a psychiatric ward.³⁵ Victims of cyber harassment also bear the financial losses of seeking treatment and obscuring their online and physical activities from abusers.³⁶

As Keats Citron has argued, whilst victims bear the most significant effect of harassment, abuse also harms wider online communities.³⁷ The Government has acknowledged that video games have positive cultural, social, and educational effects³⁸ which are denied to women excluded from online spaces.³⁹ Almost half of one-thousand female gamers interviewed in 2020 stated that abuse ruined the online gaming experience.⁴⁰ Almost a third of women⁴¹ also reported being forced to

³² Keats Citron (n 1) 385.

³³ Dewey (n 9); Jane (n 2) 563; Wingfield (n 9) discussing a threatened mass shooting.

³⁴ Keats Citron (n 1) 390.

³⁵ D'Anastasio (n 5).

³⁶ Holden, Baker and Edelman (n 11) 21–22.

³⁷ Keats Citron (n 1) 375, 390.

³⁸ Government Response to DCMS (n 25) para 2. See also Department of Culture, Media and Sport, *Report on Immersive and Addictive Technologies* (HC 2017-19, 1846) (DCMS Report) para 1.

³⁹ DCMS Report (n 38) paras 175–176.

⁴⁰ McBean and Martin (n 3) 22.

⁴¹ *ibid* 21.

attempt to ‘pass’ as men online by avoiding voice-communications, using gender-neutral pseudonyms, and mimicking male behaviour.⁴² Women are also prevented from forming online relationships and fully engaging with games; a significantly lower percentage of women than men play against random opponents or friends met online,⁴³ and fewer women would class themselves as ‘proper’ or ‘hardcore’ gamers,⁴⁴ indicating that women are unable to share in the positive effects of online gaming.

Harassment in esports can also cause negative economic consequences. The esports industry generates roughly \$700M per year,⁴⁵ attracting more viewers⁴⁶ and offering higher prize pools than most traditional major sports.⁴⁷ In the UK, the games sector generates £1.52B gross economic value⁴⁸ and employs 22,000 people.⁴⁹ However, harassment lowers commercial⁵⁰ and governmental⁵¹ investment. Women are also unable to benefit equally from sector growth due to the exclusionary effects of abuse.⁵² Equal amounts of men and women play games,⁵³ but only 12 per cent of game developers are female⁵⁴ and there are no female players in the vast majority of high-level esports teams.⁵⁵ Female employees are

⁴² Keats Citron (n 1) 375, 387.

⁴³ McBean and Martin (n 3) 5.

⁴⁴ *ibid* 10.

⁴⁵ Ruvalcaba and others (n 6) 296; Ward and Harmon (n 6) 987.

⁴⁶ Ruvalcaba and others (n 6) 296; Ward and Harmon (n 6) 987; Darwin, Vooris and Mahoney (n 6) 40.

⁴⁷ Holden and Baker (n 6) 392; Holden, Baker and Edelman (n 11) 6–7; Darwin, Vooris and Mahoney (n 6) 40.

⁴⁸ DCMS Report (n 38) para 157.

⁴⁹ Government Response to DCMS (n 25) para 3.

⁵⁰ Holden, Baker, and Edelman (n 11) 7–8, 22. See also for example Sacco (n 4).

⁵¹ DCMS Report (n 38) para 163; Government Response to DCMS (n 25) para 28.

⁵² Keats Citron (n 1) 375, 386; Government Response to DCMS (n 25) para 36.

⁵³ DCMS Report (n 38) para 174; McBean and Martin (n 3) 5.

⁵⁴ DCMS Report (n 38) para 174.

⁵⁵ See for example *Overwatch League, ‘Players’* (Overwatch League 2021) <<https://overwatchleague.com/en-us/players>> accessed 25 May 2022.

encouraged to refuse to work at studios with sexist cultures,⁵⁶ impeding equal career development and frustrating change.⁵⁷ Many women have also abandoned esports careers following harassment by powerful male colleagues.⁵⁸ Lessening abuse could promote both economic growth and equal access to profit.

1.4. Industry breakdown

Gaming communities form where players communicate via messages or voice-chat either in-game or via third party platforms. Discord, which allows users to communicate via text or voice in chatroom-style forums,⁵⁹ is used by over 250 million gamers.⁶⁰ Twitch allows players to live stream their gameplay and talk to viewers via a chat window.⁶¹ Many professional players stream during their downtime,⁶² and most esports tournaments are broadcast over Twitch.⁶³ High-level players

⁵⁶ Orr (n 10).

⁵⁷ Keats Citron (n 1) 394.

⁵⁸ Dewey (n 9); D’Anastasio (n 4); Holden, Baker and Edelman (n 11) 3–4; D’Anastasio (n 5); Michael (n 15).

⁵⁹ Discord <<https://discord.com/>> accessed 25 May 2022.

⁶⁰ Kaylee Fagan, ‘Everything You Need to Know About Discord, the App That Over 250 Million Gamers Around the World Are Using to Talk to Each Other’ (*Insider*, 12 October 2020) <<https://www.businessinsider.com/how-to-use-discord-the-messaging-app-for-gamers-2018-5?r=US&IR=T>> accessed 25 May 2022.

⁶¹ Twitch <<https://www.twitch.tv/>> accessed 25 May 2022; Ruvalcaba and others (n 6) 296–297.

⁶² Damian Alonzo, ‘What It’s Like Being an Overwatch League Pro’ (*PCGamer*, February 2016) <<https://www.pcgamer.com/uk/what-its-like-being-an-overwatch-league-pro/>> accessed 25 May 2022; Hunter Bayliss, ‘Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional ESports Players’ (2016) 22 *Washington and Lee Journal of Civil Rights and Social Justice* 359, 376–377.

⁶³ Bayliss (n 62) 384; Jacob Wolf, ‘Overwatch League to Be Streamed on Twitch.tv in Two-Year, \$90 Million Deal’ (*ESPN*, 9 January 2018) <https://www.espn.co.uk/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal> accessed 25 May 2022; Archimtiros, ‘Mythic Castle Nathria Race to World First Livestreams and Raid Coverage’ (*WoWHead*, 15 December 2020) <<https://www.wowhead.com/news/mythic-castle-nathria-race-to>>

can build large followings on Twitch, with some streams attracting hundreds of thousands of viewers.⁶⁴ Online gaming communities also coalesce around platforms such as YouTube, Reddit, and 4chan.⁶⁵ It is also notable that, in gaming communities as elsewhere, Twitter has developed a role in facilitating large-scale movements such as the June 2020 abuse allegations.⁶⁶

Over a quarter of gamers watch competitive esports tournaments.⁶⁷ Professional players are often attached to teams, many of which begin as small grassroots groups.⁶⁸ Teams often expand, incorporate, and begin to manage income and streaming activity.⁶⁹ The largest esports teams operate across multiple games and attract significant external investment.⁷⁰ Some esports competitions are organised informally by the teams involved.⁷¹ However, many tournaments are managed by a separate league corporation, which may be independent from, or affiliated with, the original developers of the game. For example

world-first-livestreams-and-raid-coverage-319847> accessed 25 May 2022; Max Miceli, 'LCS Posts Strongest Twitch Viewership of 2021 Spring Split in Week 3' (*DotEsports*, 22 February 2021) <<https://dotesports.com/league-of-legends/news/lcs-posts-strongest-twitch-viewership-of-2021-spring-split-in-week-3>> accessed 25 May 2022.

⁶⁴ Holden and Baker (n 6) 399–400. See also Mark Johnson and Jamie Woodcock, 'The Impacts of Livestreaming and Twitch.tv on the Video Game Industry' (2018) 41(5) *Media, Culture and Society* 670, 671 (collection of semi-structured interviews with over 100 professional and semi-professional streamers, demographic information not provided); McBean and Martin (n 3) 16.

⁶⁵ Holden, Baker and Edelman (n 11) 19–20.

⁶⁶ See for example allegations mentioned in Sacco (n 4); Michael (n 15).

⁶⁷ McBean and Martin (n 3) 17.

⁶⁸ See for example EchoGuild <https://twitter.com/EchoGuild?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor> accessed 25 May 2022; WoWProgress <<https://www.wowprogress.com/>> accessed 25 May 2022.

⁶⁹ See for example Method <<https://www.method.gg/>> accessed 25 May 2022.

⁷⁰ See for example Complexity <<https://complexity.gg/>> accessed 25 May 2022; Steven Rondina, 'Who Owns Every Team in the Overwatch League?' (*Win*, 24 February 2020) <<https://win.gg/news/3890/who-owns-every-team-in-the-overwatch-league-question-mark>> accessed 25 May 2022.

⁷¹ Archimtiros (n 63).

Valve, the developers of Counter Strike: Global Operations, have no relationship with the teams playing their game or the league organising tournaments.⁷² By contrast Activision Blizzard, the developers of Overwatch, wholly own the Overwatch League and manage teams closely.⁷³

This article mainly analyses abuse in World of Warcraft, a massively multiplayer online game in which players complete quests and fight monsters in an open-world environment,⁷⁴ and Overwatch, a first-person shooter in which teams of six compete to finish map-based objectives.⁷⁵ These games have been selected because, despite being developed by the same studio,⁷⁶ they exemplify the differences between organised and grassroots esports management. Whilst Activision Blizzard manage the Overwatch League for commercial gain,⁷⁷ World of Warcraft's *Race to World First* competition has been developed by teams inside the community⁷⁸ and is largely unacknowledged by game developers.⁷⁹

⁷² Holden and Baker (n 6) 406–407.

⁷³ *ibid* 408, 428; Overwatch League, 'Rules of Competition and Code of Conduct' (Overwatch League, 2 February 2019) para 5.16(a)(ii) <<https://overwatchleague.com/en-us/news/21568602/rules-of-competition-and-code-of-conduct>> accessed 25 May 2022. For further examples, see Bayliss (n 62) 364–366; Holden and Baker (n 6) 404–405.

⁷⁴ World of Warcraft <<https://worldofwarcraft.com/en-gb/start>> accessed 25 May 2022; Steven Messner and Heather Newman, 'World of Warcraft Beginner's Guide: How to Get into WoW in Time for Shadowlands' (*PCGamer*, October 2020) <<https://www.pcgamer.com/uk/how-to-get-into-world-of-warcraft/>> accessed 25 May 2022.

⁷⁵ Overwatch <<https://playoverwatch.com/en-us/about/>> accessed 25 May 2022.

⁷⁶ Activision Blizzard <<https://activisionblizzard.com/home>> accessed 25 May 2022.

⁷⁷ Holden and Baker (n 6) 428. See also Johnson and Woodcock (n 64) 673.

⁷⁸ Archimtiros (n 63).

⁷⁹ Preach Gaming, 'Castle Nathria Roundtable - With Complexity Limit and Echo!' (10 January 2021) 54.10–55.00 <https://www.youtube.com/watch?v=IR2I4Cw-wH8&ab_channel=PreachGaming> accessed 25 May 2022.

1.5. Causes of esports gender abuse

Numerous studies have found that, whilst women and men experience similar levels of abuse in online games,⁸⁰ the type of abuse encountered varies in severity between the sexes.⁸¹ Whilst men experience more in-game criticism and swearing, women face much higher levels of demeaning and discriminatory abuse.⁸² Female players' mistakes are amplified,⁸³ they are frequently told that they are worse players than men in the same rank,⁸⁴ and they are entirely excluded from games twice as often as men.⁸⁵ Female gamers are also sexually harassed and sent unsolicited sexual pictures a disproportionate amount⁸⁶ in what has been described by one female streamer as a 'gross lust-fest'.⁸⁷ Women are ultimately threatened with sexual violence and rape far more often than men.⁸⁸

Rather than being a novel phenomenon, online gender abuse is a modern incarnation of a 'much older discursive tradition' which holds women out as inferior beings existing only to pleasure men.⁸⁹ Low levels of gender diversity in gaming has nurtured a hegemonic culture hostile to non-traditional players;⁹⁰ as games have attracted an increasingly diverse audience, friction has been created in a subculture where misogyny traditionally ran unchecked.⁹¹ Men are notably more

⁸⁰ McBean and Martin (n 3) 20; Ruvalcaba and others (n 6) 302, 306.

⁸¹ See further Keats Citron (n 1) 374–375.

⁸² McBean and Martin (n 3) 20; Darwin, Vooris and Mahoney (n 6) 42–43, 49.

⁸³ DCMS Report (n 38) para 46.

⁸⁴ Keats Citron (n 1) 380; Cecilia D'Anastasio, 'Twitch Confronts Its Role in Streaming's #MeToo Reckoning' (*Wired*, 26 June 2020) <<https://www.wired.com/story/twitch-streaming-metoo-reckoning-sexual-misconduct-allegations/>> accessed 25 May 2022.

⁸⁵ McBean and Martin (n 3) 20.

⁸⁶ *ibid.*

⁸⁷ D'Anastasio (n 84).

⁸⁸ Keats Citron (n 1) 380, 389; McBean and Martin (n 3) 20.

⁸⁹ Jane (n 2) 565–566.

⁹⁰ Holden, Baker and Edelman (n 11) 8–9; Darwin, Vooris and Mahoney (n 6) 38–39, 41.

⁹¹ Wingfield (n 9); Dewey (n 9); Editorial, 'The Guardian View on Gamergate: When

abusive than women in online games,⁹² and significantly less able to recognise discrimination and intervene where it happens to others.⁹³ Anonymous gaming spaces allow male players to engage with abusive discourse without fear of reprisal.⁹⁴

Arguably the most significant cause of gender-based harassment in esports is the normalisation of abuse by high-level players. Sexual comments are directed at female streamers ten times as often as males,⁹⁵ at an average of at least one comment every two minutes.⁹⁶ However, there is no difference in the prevalence of sexualised comments posted to male and female streamers' chats overall,⁹⁷ suggesting that for each time a female streamer is abused in her own stream, another woman is abused in a male streamer's chat. Jane explains that misogyny escalates online because men compete to formulate the most offensive insults,⁹⁸ a phenomenon likely exacerbated by the perceived proximity between male esports players and their Twitch fans.⁹⁹ MethodJosh, a prominent esports player and streamer, allegedly developed a micro-community on Twitch and Discord in which girls were referred to as 'whores' and 'thots' and interrogated for their age, height, weight, and relationship status.¹⁰⁰ Some argue that MethodJosh encouraged sexism in his community to attract views from male gamers who were unsuccessful with

Hatred Escaped' (n 9); Holden, Baker and Edelman (n 11) 8–9; Kenzie Gordon quoted in Lorenz and Browning (n 13).

⁹² McBean and Martin (n 3) 20; Darvin, Vooris and Mahoney (n 6) 42–43, 49.

⁹³ Darvin, Vooris and Mahoney (n 6) 42–43 and 49.

⁹⁴ Holden, Baker and Edelman (n 11) 8–9.

⁹⁵ Ruvalcaba and others (n 6) 305.

⁹⁶ *ibid* 307.

⁹⁷ *ibid*.

⁹⁸ Jane (n 2) 560–561.

⁹⁹ Noah Smith, "It's Not as Awesome as People Imagine": Esports Players Say "Dream Job" is More Than Fun and Games' *Washington Post* (13 December 2018) <<https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/>> accessed 25 May 2022.

¹⁰⁰ D'Anastasio (n 5).

women.¹⁰¹ MethodJosh's most popular Twitch clips show him entertaining fans by explaining in detail how to take intimate pictures¹⁰² and then calling young female fans live on stream to ask for sex.¹⁰³

1.6. Examples of abuse

Example allegations will now be discussed in order to demonstrate the patterns of abuse that proposed solutions must address. It is acknowledged that many reports are unsubstantiated, and the accuracy of individual allegations is therefore not relied upon.¹⁰⁴ Gamertags will be used rather than full names in order to provide both privacy and readability. It is unavoidably difficult to provide a comprehensive account of abuse in esports, as women have reported feeling unable to make public allegations and many stories inevitably fail to attract media attention.¹⁰⁵ Of the over one-hundred allegations made in June 2020 alone, claims ranged from gender-based discrimination, to inappropriate sexualised behaviour, to physical assault.¹⁰⁶ Many women allege that players made repeated sexual advances online or in person or touched them without consent at esports functions.¹⁰⁷ Three particularly serious allegations are outlined below.

In 2018, Overwatch League player DreamKazper was suspended from competition following allegations of sexual misconduct with

¹⁰¹ *ibid.*

¹⁰² Kungozai Methodjosh Highlights and Compilations, 'MethodJosh Most Viewed Twitch Clips of All Time Compilation! Truly the Best of MethodJosh' (19 February 2019) (MethodJosh Clips) 04.35–05.48 <https://www.youtube.com/watch?v=opI523KMJj4&ab_channel=KungozaiMethodjoshHighlightsandCompilations> accessed 25 May 2022.

¹⁰³ *ibid* 07.28–08.27, 08.45–09.14 (content warning: sexual harassment.)

¹⁰⁴ Note however admissions in Lorenz and Browning (n 13); Fenlon (n 12).

¹⁰⁵ See for example Liao (n 12).

¹⁰⁶ *ibid*; Lorenz and Browning (n 13); Messner (n 14).

¹⁰⁷ See for example Michael (n 15).

minors.¹⁰⁸ DreamKazper, aged twenty-one, was accused of asking for nude pictures from fourteen- and fifteen-year-old fans.¹⁰⁹ It was further alleged that the player purchased plane tickets so that an underage fan could visit him and demanded nude photographs as ‘payment’ when she refused to stay.¹¹⁰

In 2019, Elvine, a popular World of Warcraft player, was caught by an FBI child abuse operation after asking an agent posing as a fourteen-year-old girl to meet up for sex.¹¹¹ Elvine was known to be sexually aggressive with online fans and multiple sources alleged that he made inappropriate advances at conventions.¹¹² One woman claimed that Elvine pressured her into his hotel room at a convention, made sexual advances for an hour, grabbing her when she attempted to leave, and only released her when a friend replied to an ‘SOS message’.¹¹³

MethodJosh has been recorded on stream categorising his computer files into ‘kinda creepy’, ‘ban from Twitch’, and ‘probably a prison sentence’.¹¹⁴ Shortly before June 2020, the player told his fans to ‘enjoy the ride’ figuring out that ‘this all isn’t a joke and I’m serious and need help.’¹¹⁵ In June 2020 MethodJosh, a member of World of

¹⁰⁸ Julia Alexander, ‘Overwatch League Player Fired After Sexual Misconduct Allegations’ (*Polygon*, 9 April 2018) <<https://www.polygon.com/2018/4/8/17213638/overwatch-league-suspends-player-jonathan-dreamkazper-sanchez>> accessed 25 May 2022; Robert Paul, ‘Full Benefits, 6-Figure Salaries, 401Ks and Nutritionists - 2 Professionals Reveal What it’s Really Like to Be Paid to Play Video Games for a Living’ (*Insider*, 18 April 2018) <<https://www.businessinsider.com/what-its-like-to-play-in-the-overwatch-league-2018-4?r=US&IR=T>> accessed 25 May 2022.

¹⁰⁹ Cecilia D’Anastasio, ‘How Two Underage Girls Say an *Overwatch* Pro Took Advantage of Them’ (*Kotaku*, 11 April 2018) <<https://kotaku.com/how-two-underaged-girls-say-an-overwatch-pro-took-advan-1825185594>> accessed 25 May 2022. See also D’Anastasio (n 5).

¹¹⁰ D’Anastasio (n 109). See also D’Anastasio (n 5).

¹¹¹ D’Anastasio (n 5).

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ MethodJosh Clips (n 102) 09.14–10.00.

¹¹⁵ *ibid.* 10.00–10.30.

Warcraft's top competitive team,¹¹⁶ was accused of soliciting illegal images, grooming, sexual harassment, and rape.¹¹⁷ MethodJosh allegedly distributed sexual pictures of ex-girlfriends and fans.¹¹⁸ Multiple fans aged fourteen and fifteen reported being told that they were 'the perfect age' before being groomed and asked for sex.¹¹⁹ One female streamer alleged that MethodJosh raped her when she visited his house to stream with him.¹²⁰

In summary, abuse typically includes: verbal sexual harassment; the sharing of intimate pictures; sexual assault or rape; and the grooming of underage fans. It is important to address this abuse both because of its effect on victims and in order to prevent the normalisation of harassment in wider online communities.

1.7. The inadequacy of non-tortious solutions

Tort law is proposed as the most fruitful source of redress for esports gender abuse in this article because of the impracticability of alternative solutions. Although abuse may sometimes constitute a criminal offence,¹²¹ investigations into esports players have proved difficult to substantiate in practice¹²² and this difficulty is compounded

¹¹⁶ Messner (n 14).

¹¹⁷ Sacco (n 4).

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*; Messner (n 14).

¹²⁰ Messner (n 14).

¹²¹ See for example the Sexual Offences Act 2003 ss 1, 2, 3, 9, 10, 14, 15 and 15A, the Protection of Children Act 1978 ss 1 and 2(3), and the Coroners and Justice Act 2009 s 62.

¹²² Messner (n 14) discussing the allegations against MethodJosh; D'Anastasio (n 84) discussing the allegations against Elvine. See further Office for National Statistics, 'Sexual offences in England and Wales Overview: Year Ending March 2020' (18 March 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/sexualoffencesinenglandandwalesoverview/march2020>> accessed 25 May 2022.

by court backlogs in the UK¹²³ and the systemic trivialisation of cyber harassment.¹²⁴

Abuse could arguably be lessened should communications platforms employ more extensive monitoring. However, Twitch's own transparency report shows that only 2 per cent of reports of 'hateful conduct, sexual harassment, and harassment' were acted upon in 2020.¹²⁵ Even where companies attempt to tackle issues, abusers often avoid detection by using ephemeral platforms such as Snapchat¹²⁶ and 'fragmenting' their digital presence across multiple platforms.¹²⁷

Internal sanctions, another potentially useful solution, are routinely under-applied by esports teams. Players frequently boycott companies seen to support victims¹²⁸ and intimidate women by leaking private information and issuing actionable death and rape threats in order to suppress initial complaints.¹²⁹ Whilst some retaliation is explicitly dangerous, much more is insidiously doubtful. The rape myth that many women raise complaints as revenge¹³⁰ is doggedly repeated,¹³¹

¹²³ Haroon Siddique, 'Crown Court Backlog Has Reached "Crisis Levels", Report Warns' *The Guardian* (London, 30 March 2021) <<https://www.theguardian.com/law/2021/mar/30/crown-court-backlog-has-reached-crisis-levels-report-warns>> accessed 25 May 2022; Caelainn Barr and Alexandra Topping, 'Fewer Than One in 60 Rape Cases Lead to Charge in England and Wales' *The Guardian* (London, 23 May 2021) <<https://www.theguardian.com/society/2021/may/23/fewer-than-one-in-60-cases-lead-to-charge-in-england-and-wales>> accessed 25 May 2022.

¹²⁴ Keats Citron (n 1) 397, 402–403.

¹²⁵ Twitch, *Transparency Report 2020* (2 March 2021) Reports and Enforcements section <<https://www.twitch.tv/p/en/legal/transparency-report/>> accessed 25 May 2022.

¹²⁶ D'Anastasio (n 5).

¹²⁷ See discussion of Elvine in D'Anastasio (n 5).

¹²⁸ Holden, Baker and Edelman (n 11) 24–25. See also Kenzie Gordon quoted in Lorenz and Browning (n 13).

¹²⁹ Keats Citron (n 1) 385; Penny (n 11); Dewey (n 9); Jane (n 2) 562–563; Wingfield (n 9).

¹³⁰ Genevieve Waterhouse, Ali Reynolds and Vincent Egan, 'Myths and Legends: The Reality of Rape Offences Reported to a UK Police Force' (2016) 8 *The European*

creating a hostile environment in which victims are less able to speak out.

Pervasive sexism inside esports teams also undermines internal sanctions. As noted by the Court of Appeal in *Gravil*, there is also an ‘obvious temptation’ for sports teams to ignore abuse in order to retain capable players.¹³² Victims are often humiliated and disbelieved during internal investigations in close communities, as leaders prefer the accounts of favoured members over those of complainants.¹³³ It is hardly surprising that Method failed to discipline MethodJosh adequately; Sasha Stevens, a Method co-CEO, has also been found to have manipulated power dynamics in order to make unwanted sexual advances towards female employees.¹³⁴ When Stevens’ conduct was reported to the team the employees affected were threatened with legal action.¹³⁵ In light of these failings, the next section investigates civil claims as an additional method of redress.

2 The problem with direct tortious claims

2.1. Establishing liability

Abuse in esports is a serious and pervasive issue which cannot be remedied effectively by the criminal law, platform monitoring, or internal sanctions. This section shows that direct tortious claims against abusive teams and players are also insufficient methods of

Journal of Psychology Applied to Legal Context 1, 2.

¹³¹ See for example Dom Sacco, ‘Finding the Courage to Speak Out About Harassment in Esports: Opinion & List of UK-Focused Accusations’ (*EsportsNews*, 3 July 2020) <<https://esports-news.co.uk/2020/07/03/finding-courage-speak-out-about-harassment/>> accessed 25 May 2022 discussing those who *distort the truth*.

¹³² *Gravil v Carroll* [2008] EWCA Civ 689, [2008] 6 WLUK 425 [26] (Lord Clarke MR).

¹³³ *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2021] EWCA Civ 356, [2021] 4 WLR 42 [16]–[18] (Davies LJ).

¹³⁴ Method (n 4); Messner (n 14) discussing AnnieFuchsia and Swebliss’ allegations.

¹³⁵ *ibid*.

redress. First, it is shown that direct tortious claims against esports teams are unlikely to succeed; whilst teams may negligently inflict harm by employing abusive players,¹³⁶ it will often prove prohibitively difficult to demonstrate breach of duty of care. It is then argued that claims against individual players could succeed, principally in trespass to the person and wilful infringement of personal safety, which remedy the direct and indirect infliction of harm respectively.¹³⁷ However, it is concluded that claims against individual players would be worthless due to the lack of financial means of many abusers.

Turning firstly to direct claims in negligence, esports employers have a duty to provide a safe working environment, potentially establishing team liability where a player abuses a fellow employee.¹³⁸ Teams may also have wider duties to fans, as companies who create risk by choosing to engage dangerous employees act negligently.¹³⁹ However, team liability in negligence is likely frustrated by the difficulty of proving that employers have acted below the standard of the reasonable esports team.¹⁴⁰ Defendants will not be held liable where their inadequate employment practices are common in the sector;¹⁴¹ in *EXE*, it was considered acceptable for a school to hire a known child sex offender, as DBS checks were uncommon at the time of employment.¹⁴² Most esports teams do not screen players thoroughly or investigate allegations of abuse closely, thus rendering lax

¹³⁶ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932 [7] (Hale LJ).

¹³⁷ *Wong* (n 136) [7] (Hale LJ).

¹³⁸ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 (HL) 87–88 (Maugham LJ).

¹³⁹ *Haynes v Harwood* [1935] 1 KB 146 (CA) 153–153 (Greer LJ); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) 1027 (Reid LJ), 1037–1038 (Morris LJ); *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887, [2003] 1 WLR 2158 [33] (Judge LJ).

¹⁴⁰ *Nettleship v Weston* [1971] 2 QB 691 (CA) 699 (Lord Denning MR).

¹⁴¹ *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256, [2010] 1 WLR 1441 [65] (Lord Neuberger MR).

¹⁴² *EXE v Governors of the Royal Naval School* [2020] EWHC 596 (QB), [2020] 3 WLUK 214 [1], [144], [147], [155] (Griffiths J).

employment practices sufficient.¹⁴³ Further, Martha Chamallas and Philip Morgan agree that it is difficult for complainants to gather sufficient information to demonstrate that employers failed to take necessary precautions.¹⁴⁴ Whilst a breach may be established where a team encourages¹⁴⁵ or fails to remedy¹⁴⁶ abuse which they have been made aware of, most claims in negligence against esports teams are likely to fail.

Should an esports team be found to have breached a duty of care, claims are reasonably likely to satisfy the remaining elements of negligence. Cause in fact may be established where a player's employment has exposed them to the complainant, as *but for* the negligent recruitment the abuse would not have taken place.¹⁴⁷ As the independent action of a third party employee, sexual abuse will only be foreseeable where it is very likely to occur.¹⁴⁸ However, liability for serious abuse may be imposed where the tortfeasor's actions are somewhat less foreseeable,¹⁴⁹ and Chamallas has argued that, since *#metoo*, workplace sexual abuse has become inherently more foreseeable.¹⁵⁰ Whilst the breach of duty requirement is the sole element likely to frustrate claims, it imposes a significant barrier to direct team liability.

¹⁴³ See for example Maddy Myers, 'How Pro Gamers Live Now: Curfews, Personal Chefs, and All of it on Camera' (*Kotaku*, 21 June 2018) <<https://kotaku.com/how-pro-gamers-live-now-curfews-personal-chefs-and-a-1827017564>> accessed 25 May 2022; Messner (n 14).

¹⁴⁴ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) *MLR* 932, 945; Chamallas (n 18) 153.

¹⁴⁵ *Mattis* (n 139) [33] (Judge LJ).

¹⁴⁶ *Maga* (n 141) [65]–[67], [74] (Lord Neuberger MR).

¹⁴⁷ See *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 *QB* 428 (CA).

¹⁴⁸ *Dorset Yacht* (n 139) 1030 (Reid LJ).

¹⁴⁹ *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 *WLR* 1273 [21], [25] (Nicholls LJ).

¹⁵⁰ Martha Chamallas, 'Will Tort Law Have its #MeToo Moment?' (2018) Ohio State Public Law Working Paper 456, 31.

Tortious claims brought against individual players are more likely to succeed. Claimants have frequently successfully claimed for sexual assault under trespass to the person.¹⁵¹ Battery is direct¹⁵² and non-consensual¹⁵³ touching¹⁵⁴ with intent to bring about physical contact.¹⁵⁵ Any touch beyond that which is generally accepted in everyday life can constitute a battery,¹⁵⁶ and as such much of the physical abuse allegedly committed by esports players could engage this tort. Unlawful physical contact may also constitute assault if apprehended immediately beforehand.¹⁵⁷ Rape may also constitute false imprisonment,¹⁵⁸ which is defined as unlawful restraint¹⁵⁹ with intent to deprive the complainant of their liberty.¹⁶⁰ False imprisonment was proved in *Lawson*, where the claimant had been ‘constrained by the apprehension of violence’ over three days,¹⁶¹ but may not warrant additional damages where the only deprivation of liberty is the assault itself.¹⁶²

Esports players may also be liable in the tort of wilful infringement of

¹⁵¹ See for example *Lawson v Graves-Smith (Dawes Executor)* [2006] EWHC 2865 (QB), [2006] 11 WLUK 300; *Haringey LBC v FZO* [2020] EWCA Civ 180, [2020] 2 WLUK 190; *B v Cager* [2021] EWHC 540 (QB), [2021] 3 WLUK 99; *Barry Congregation* (n 133). See also Nikki Godden, ‘Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?’ (2011) 22(2) *King’s Law Journal* 157; Phillip Morgan, ‘Vicarious Liability and the Beautiful Game - Liability for Professional and Amateur Footballers?’ (2018) 38 *LS* 242, 244.

¹⁵² *Wong* (n 136) [7] (Hale LJ).

¹⁵³ *Collins v Wilcock* [1984] 1 WLR 1172 (HC) 1777–1778 (Goff LJ); *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) 72–73 (Goff LJ).

¹⁵⁴ *Collins* (n 153) 1777 (Goff LJ).

¹⁵⁵ *Letang v Cooper* [1965] 1 QB 232 (CA) 239 (Lord Denning MR); *Wilson v Pringle* [1987] QB 237 (CA) 249 (Croom-Johnson LJ).

¹⁵⁶ *Collins* (n 153) 1777–1778 (Goff LJ); *Re F* (n 153) 72–73 (Goff LJ).

¹⁵⁷ *Collins* (n 153) 1777 (Goff LJ).

¹⁵⁸ Godden (n 151) 161.

¹⁵⁹ *Collins* (n 153) 1777 (Goff LJ).

¹⁶⁰ *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2010] QB 732 [72] (Lord Neuberger MR).

¹⁶¹ *Lawson* (n 151) [110] (Eady J).

¹⁶² *Cager* (n 151) [36] (Johnson J).

the right to personal safety, described from here as the tort in *Rhodes*.¹⁶³ The tort in *Rhodes* is engaged by harmful non-direct conduct, such as verbal harassment, directed at the claimant with intent to cause severe distress and resulting in a recognised psychiatric illness.¹⁶⁴ In *C v WH*, it was obvious that grooming and sexual abuse would cause harm to the vulnerable claimant, engaging the tort in *Rhodes*.¹⁶⁵ and suggesting that esports players who sexually manipulate young fans may also be held liable under this tort.

Abuse alleged in the esports sector may engage a number of additional torts. Civil proceedings could be brought for statutory harassment¹⁶⁶ where a player has abused another on at least two occasions in a way designed to cause distress.¹⁶⁷ As held in *AMP*, the sharing of sexual images without consent can establish liability for statutory harassment.¹⁶⁸ Sharing private images will also engage the tort of misuse of private information if the claimant's interest in confidentiality outweighs the defendant's interests in publication,¹⁶⁹ as is invariably the case where sexual images have been shared.¹⁷⁰ In summary, civil claims may be available following sexual assault, rape, grooming, verbal sexual harassment, and the sharing of intimate pictures, potentially remedying all common patterns of abuse seen in the esports sector.

¹⁶³ *OPO v Rhodes* [2015] UKSC 32, [2016] AC 219.

¹⁶⁴ *ibid* [88] (Lady Hale DP and Toulson LJ).

¹⁶⁵ *C v WH* [2015] EWHC 2687, [2015] 9 WLUK 449 [89] (Nelson J).

¹⁶⁶ Protection from Harassment Act 1997 ss 1 and 3.

¹⁶⁷ *Dowson v Chief Constable of Northumbria* [2010] EWHC 2612 (QB), [2010] 10 WLUK 459 [142] (Simon J).

¹⁶⁸ *AMP v Persons Unknown* [2011] EWHC 3454 (TCC), [2011] 12 WLUK 641 [44] (Ramsey J)

¹⁶⁹ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 [134] [137] (Hope LJ).

¹⁷⁰ *AMP* (n 168) [17] [32] (Ramsey J). See further Copyright, Designs and Patents Act 1988 s 85.

2.2. Usefulness of direct tortious claims

Civil claims cannot entirely replace the sanctions previously discussed. Platform monitoring could stop harm before it occurs.¹⁷¹ Industry sanctions are cost-effective methods of influencing online norms.¹⁷² Criminal penalties can protect wider communities¹⁷³ and accurately reflect the severity of abuse.¹⁷⁴ Further, claims in tort may have a comparatively lower deterrent effect than other sanctions, especially where tortfeasors are unable to pay compensation personally.¹⁷⁵ It is therefore important to remedy failings in all solutions discussed in order to lessen abuse in esports. However, civil claims can provide useful additional remedies when used alongside other solutions.¹⁷⁶ As Godden has argued, using civil claims as an addition to, rather than replacement for, criminal complaints is unproblematic.¹⁷⁷ Paula Giliker noted in 2017 that many civil sexual abuse claims are preceded by criminal complaints in practice,¹⁷⁸ a trend which has continued in recent years.¹⁷⁹ Bringing both criminal and civil cases can also benefit claimants, as where convictions are

¹⁷¹ See s 1.7.

¹⁷² See s 1.7.

¹⁷³ Ellen Bublick, 'Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies' (2006) 59(1) *SMU L Rev* 55, 75.

¹⁷⁴ Godden (n 151) 162.

¹⁷⁵ Chamallas (n 18) 154.

¹⁷⁶ See discussion in *Wong* (n 136) [16] (Hale LJ).

¹⁷⁷ Godden (n 151) 159, 178.

¹⁷⁸ Paula Giliker, 'A Revolution in Vicarious Liability: Lister, the Catholic Child Welfare Society Case and Beyond' in Worthington, Robertson and Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2017) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016347> accessed 25 May 2022.

¹⁷⁹ *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), [2020] 7 WLUK 293 [4] (Chamberlain J); *EXE* (n 142) [24]–[25] (Griffiths J); *Haringey LBC* (n 151) [4] (McCombe LJ) citing *FZO v Adams* [2018] EWHC 3584, [2018] WLUK 750 [3] (Cutts J); *Barry Congregation* (n 133) [8] (Davies LJ); *Cager* (n 151) [23] (Johnson J).

secured they may be used as evidence in civil trials turning on identical facts.¹⁸⁰

Tortious claims can benefit claimants in ways that other solutions cannot. Whilst compensation orders may be issued following criminal claims,¹⁸¹ these are unsuitable in complex sexual abuse cases.¹⁸² Compensation may also be provided by the Criminal Injuries Compensation Authority (CICA).¹⁸³ However, complainants may prefer tortious remedies, which demand compensation directly from abusers, over claiming through CICA, which draws from public funds.¹⁸⁴ Further, as awareness of the extent of the harm caused by sexual abuse has improved, civil financial awards have become significantly larger than CICA payouts.¹⁸⁵ Recent civil rape claimants have been awarded £62,000¹⁸⁶ and £240,337,¹⁸⁷ and claims following the sexual assault of minors have attracted damages of £87,748¹⁸⁸ and £1,112,390¹⁸⁹ in recognition of the complex psychiatric problems caused by abuse. A recent claim for grooming under the tort in *Rhodes* also attracted significant damages of £51,370.¹⁹⁰ It should be acknowledged that awards of high damages may perpetuate the myth that women fabricate claims for financial benefit,¹⁹¹ but this consideration should not prevent victims from fully recovering their losses. Whilst awards made for the misuse of private information are

¹⁸⁰ Civil Evidence Act 1968 ss 11(1) and 11(2). See also *JXJ* (n 179) [35] (Chamberlain J).

¹⁸¹ Power of Criminal Courts (Sentencing) Act 2000 s 130.

¹⁸² *Giliker* (n 178) 5–6.

¹⁸³ Criminal Injuries Compensation Act 1995 s 1(1).

¹⁸⁴ *Godden* (n 151) 174. See further *Giliker* (n 178) 6.

¹⁸⁵ *Godden* (n 151) 171.

¹⁸⁶ *Barry Congregation* (n 133) [1] (Davies LJ).

¹⁸⁷ *Lawson* (n 241) [140] (Eady J).

¹⁸⁸ *Cager* (n 151) [43] (Johnson J).

¹⁸⁹ *Haringey LBC* (n 151) [2] (McCombe LJ).

¹⁹⁰ *C v WH* (n 165) [94] (Nelson J).

¹⁹¹ *Godden* (n 151) 173.

typically lower,¹⁹² valuable injunctions may be issued to prevent the wider dissemination of private photographs.¹⁹³

Tortious claims may also allow claimants to achieve a sense of justice by confronting their abusers in court. It should be noted that claimants may face intrusive questioning in civil trials which could cause additional distress.¹⁹⁴ For example, the claimant in *Haringey LBC* was asked to discuss intimate details of his relationship with his current partner,¹⁹⁵ and the recent contraceptive medical history of the claimant in *C v WH* was presented in court.¹⁹⁶ However, some argue that aggrieved parties¹⁹⁷ can benefit from reversing power dynamics by exposing abuse in court.¹⁹⁸ The appeal of civil claims will inevitably vary between claimants, but tortious liability could seemingly usefully remedy the financial and emotional harm caused by abuse in the esports sector.

2.3. Feasibility of claims against individual players

As previously established, claims brought directly against esports teams in negligence are likely to fail, whereas claims brought against individual players are likely to succeed. It is argued in this section that, whilst tortious claims against individual players are broadly feasible, such actions will often be worthless due to the lack of financial means of most abusers.

Neither the international nature of esports abuse, nor claimant anonymity concerns, should render tortious claims against players

¹⁹² See for example *Campbell* (n 169) [10] (Nicholls LJ).

¹⁹³ *AMP* (n 168) [11] (Ramsey J).

¹⁹⁴ *Bublick* (n 173) 76–77; *Godden* (n 151) 177–178; as noted in *JXJ* (n 179) [55] (Chamberlain J).

¹⁹⁵ *Haringey LBC* (n 151) [31] (McCombe LJ) citing *FZO* (n 179) [97] (Cutts J).

¹⁹⁶ *C v WH* (n 165) [40]–[41] (Nelson J).

¹⁹⁷ *Morgan* (n 151) 260.

¹⁹⁸ *Godden* (n 151) 179–180.

unfeasible. Despite the cross-border nature of online abuse, so long as a claimant is inside their home jurisdiction when receiving harmful communications they may elect to sue in the courts of their own country¹⁹⁹ and cases will be decided under domestic law.²⁰⁰ These rules also apply wherever the claimant and defendant share a nationality, regardless of where abuse occurs.²⁰¹ As detailed earlier, claimants may be reluctant to make complaints due to fear of receiving further online abuse from retaliatory players.²⁰² Tortious claims remain feasible because courts have the power to grant anonymity orders to claimants whose own interests, for example in safety and privacy, outweigh the public interest in open justice,²⁰³ and to victims of sexual offences.²⁰⁴ Anonymity orders have been widely used in recent civil sexual abuse²⁰⁵ and harassment²⁰⁶ cases.

It is often more feasible to prove sexual abuse allegations under the civil, rather than criminal, law. The ‘obvious advantage of the civil law’ is that it is easier to prove a case on the balance of probabilities

¹⁹⁹ Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels I (Recast)) arts 5(1) and 7(2); Case C-21/76 *Handelskwekerij G J Bier BV v Mines de Potasse d’Alsace SA* [1976] ECR I-01735 [15], [19]. Note that application in the UK post-Brexit remains unclear.

²⁰⁰ Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II) art 4(1). See also art 1(2)(g) relating to privacy claims. See *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019* for continuing effect post-Brexit.

²⁰¹ Brussels I (Recast) (n 289) art 4(1); Rome II (n 290) art 4(2).

²⁰² See s 1.7.

²⁰³ Civil Procedure Rules 1998 in Coulson LJ, *The White Book 2021* (Sweet & Maxwell 2021) R 39.2(1) and R 39.2(4); *XXX v Camden LBC* [2020] EWCA Civ 1468, [2020] 4 WLR 165 [24] (Dingemans LJ).

²⁰⁴ Sexual Offences (Amendment) Act 1992 ss 1(1) and 1(2); *Cager* (n 151) [2] (Johnson J).

²⁰⁵ See for example *Maga* (n 141); *C v WH* (n 165); *EXE* (n 232); *Haringey LBC* (n 151); *Barry Congregation* (n 133); *Cager* (n 151).

²⁰⁶ *AMP* (n 168) [2], [46] (Ramsey J).

than beyond reasonable doubt.²⁰⁷ This benefit is, admittedly, somewhat undermined by the higher ‘intermediate’ standard of proof sometimes incorrectly employed where criminal conduct is alleged in civil courts.²⁰⁸ The House of Lords have clarified that the seriousness of a claim does not raise the civil standard of proof unless the conduct alleged is inherently unlikely,²⁰⁹ but the Lords’ decision sits uneasily with recent cases such as *C v WH* in which a rape allegation was dismissed on the basis that it was ‘very serious’²¹⁰ in spite of the finding that the defendant groomed and sexually assaulted the claimant over a number of years,²¹¹ rendering rape entirely plausible. Regardless of whether an intermediate standard of proof is incorrectly employed in practice, civil claims remain somewhat easier to prove than criminal cases.

Civil cases also have the advantage of being distanced from the rape myths which undermine the criminal process. Whilst *rape* is ‘loaded with gender-based assumptions’, *trespass to the person* is not an inherently sexual claim, potentially weakening misogynistic connotations.²¹² The judge in *EXE* expressly noted that lack of violence did not necessarily indicate consent,²¹³ dispelling the *real rape myth* which could have impeded criminal charges.²¹⁴ It should however be remembered that judges must refer to the tortious claim being brought, rather than merely referring to *rape*,²¹⁵ in order to avoid transposing rape myths into the civil law.²¹⁶

²⁰⁷ Godden (n 151) 167.

²⁰⁸ *ibid* 169–170.

²⁰⁹ *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [70], [72] (Hale LJ).

²¹⁰ *C v WH* (n 165) [74] (Nelson J).

²¹¹ *ibid* [69]–[70] (Nelson J).

²¹² Godden (n 151) 161–162.

²¹³ *EXE* (n 142) [118] (Griffiths J).

²¹⁴ Waterhouse, Reynolds and Egan (n 130) 3, 7–8.

²¹⁵ See for example *Barry Congregation* (n 133) [1]–[2] (Davies LJ).

²¹⁶ Godden (n 151) 161–163.

It is acknowledged that the elements of some tortious claims are harder to make out than corresponding criminal offences. First, whereas children cannot consent to sex in the criminal law,²¹⁷ consent is a defence to trespass to the person even where victims are under sixteen.²¹⁸ It is plainly arguable that a child's consent should not be recognised in the civil law;²¹⁹ in *EXE*, the underage claimant was blamed for 'taking the initiative'²²⁰ in a judgment incompatible with both the criminal law and general common sense. The consent of a child who has been groomed thankfully remains invalid.²²¹ Second, whilst criminal harassment and grooming offences are not result-dependant,²²² the tort in *Rhodes* is only engaged where a claimant suffers a recognised psychiatric illness.²²³ Sexual harassment is therefore not actionable in tort following mere emotional distress, potentially indicating that the civil law continues to underrepresent the severity of gendered harms.²²⁴ Whilst these flaws will somewhat undermine the feasibility of tortious claims, civil remedies likely remain feasible for most victims of esports abuse.

Although tortious claims for abuse in the esports sector are broadly feasible, direct claims against players will often be worthless due to the precarious finances of most abusers. Numerous authors have demonstrated that sexual abusers are frequently unable to satisfy judgments.²²⁵ Esports players are especially unlikely to have the financial means to pay compensation; whilst successful players can attain high salaries and prizes,²²⁶ the vast majority of professionals

²¹⁷ Sexual Offences Act 2003 ss 5, 6, 7, 8, 9 and 10.

²¹⁸ *EXE* (n 232) [75], [124] (Griffiths J).

²¹⁹ *ibid* [76] (Griffiths J).

²²⁰ *ibid* [90]–[95], [120], [122] (Griffiths J).

²²¹ *Haringey LBC* (n 151) [126]–[130] (McCombe LJ). See also *Cager* (n 151) [28] (Johnson J).

²²² Protection from Harassment Act 1997 s 1; Sexual Offences Act 2003 ss 14 and 15.

²²³ *OPO* (n 163) [73] (Lady Hale DP and Toulson LJ).

²²⁴ See further Keats Citron (n 1) 392–393.

²²⁵ Godden (n 151) 174; Chamallas (n 18) 136.

²²⁶ Jerome Heath, 'The Biggest Prize Money Winners in Esports History' (*DotEsports*, 11 March 2021) <<https://dotesports.com/general/news/top-earning->

make very little money from online gaming.²²⁷ The average esports player earns around \$6,000 per year,²²⁸ and low rewards are compounded by the high attrition rate in the sector.²²⁹ Players' earnings typically peak as teenagers²³⁰ and only a fifth of professional careers last over two years.²³¹ Lack of means may force complainants to bring cases against tortfeasors' employers through vicarious liability.²³² Such actions are not exclusive with direct tortious claims. The next section examines the availability of vicarious liability in the esports sector in order to establish whether claimants could access remedies from solvent defendants.

3 Vicarious liability

3.1. Introduction to vicarious liability

Vicarious liability allows a claimant to sue an employer for a tort committed by their employee, and is established under a two stage test.²³³ First, it must be demonstrated that there is a relationship akin to employment between the defendant and the tortfeasor.²³⁴ It is argued here that esports employment often satisfies this test, as players work for employers rather than acting as independent contractors. In practice, esports players may be employed by both teams, who manage rosters and funding, and leagues, who run

esports-players-21870> accessed 25 May 2022.

²²⁷ See further Morgan (n 151) 243.

²²⁸ Ward and Harmon (n 6) 1000–1001.

²²⁹ *ibid* 1000.

²³⁰ *ibid* 1006.

²³¹ *ibid* 1005.

²³² Godden (n 151) 175; Giliker (n 178) 7. See for example *C v WH* (n 165); *Barry Congregation* (n 133).

²³³ *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] AC 973 [1] (Lady Hale P).

²³⁴ *ibid* [1], [27] (Lady Hale P).

tournaments,²³⁵ in which case both employers could be held dually vicariously liable.²³⁶

Second, vicarious liability can only be established where there is sufficient connection between the employment relationship established and the tortfeasor's harmful behaviour.²³⁷ The application of vicarious liability to abuse in traditional sports has been analysed previously.²³⁸ However, Lord Hope has noted that the connection between employment in entertainment industries and the abuse of fans remains unclear.²³⁹ It is argued here that three doctrinal ambiguities must be resolved in order to clarify the application of vicarious liability to the esports sector.

3.2. Establishing Liability Under Stage One

The first stage of the vicarious liability test is satisfied where a tortfeasor is in a relationship akin to employment with an esports team or league, rather than 'carrying on business on [their] own account.'²⁴⁰ In order to establish whether a relationship akin to employment exists, courts must analyse the relationship between the tortfeasor and defendant on a case-by-case basis.²⁴¹ In this section, typical esports employment relationships will be examined and it will be argued that teams and leagues are likely to be held vicariously liable under the stage one test.

²³⁵ See s 1.4.

²³⁶ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 [79] (Rix LJ). See also *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 [39]–[40], [45] (Lord Phillips P).

²³⁷ *Barclays Bank* (n 233) [1] (Hale LJ); *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, [2020] AC 989 [25] (Lord Reed DP).

²³⁸ Morgan (n 151).

²³⁹ Lord Hope of Craighead, 'Tailoring the Law on Vicarious Liability' (2013) 129(Oct) LQR 514, 526. See also *Christian Schools* (n 236) [85] (Lord Phillips P).

²⁴⁰ *Barclays Bank* (n 233) [27] (Lady Hale P).

²⁴¹ *ibid.*

Defendants who closely direct the activities of tortfeasors are typically in relationships akin to employment.²⁴² In *Gravil*, the Court of Appeal found a rugby club vicariously liable partly on the basis that players were required to make themselves available for matches and training.²⁴³ As Holden and Baker argue, esports teams and leagues direct the activities of players far more closely than traditional sports employers.²⁴⁴ Esports employers can exert overwhelming influence over players because of the power differentials present in the sector;²⁴⁵ leagues typically own the intellectual property underpinning players' highly specialised careers,²⁴⁶ and competitors are often recruited by teams as minors,²⁴⁷ transported to unfamiliar countries,²⁴⁸ and then monitored by managers who act as 'the mom, the dad, the agent... the landlord, [and] the life coach.'²⁴⁹ During World of Warcraft's *Race to World First*, players are expected to play for up to fourteen hours per day, with sleep and breaks closely regulated.²⁵⁰ Professional Overwatch players' schedules are managed by the League,²⁵¹ who retain the ability to change working rules and conditions at their discretion.²⁵²

²⁴² *Christian Schools* (n 236) [56] pt ii (Lord Phillips P); *Barclays Bank* (n 233) [28] (Lady Hale P). See also *Barclays Bank* (n 233) [20] (Lady Hale P) on the importance of control.

²⁴³ *Gravil* (n 132) [7], [9] (Lord Clarke MR).

²⁴⁴ Holden and Baker (n 6) 410–412.

²⁴⁵ *ibid* 412.

²⁴⁶ Bayliss (n 62) 377–378; Holden and Baker (n 6) 412.

²⁴⁷ Paul (n 108). See also Overwatch League (n 73) para 3.1.

²⁴⁸ Alonzo (n 62).

²⁴⁹ Myers (n 143).

²⁵⁰ Ben Barrett, '1,960 Man-Hours Per Week: The Truth About WoW Raiding at the Highest Level' (*PCGamesN*, 15 December 2017) <[²⁵¹ Overwatch League \(n 73\) para 5.3; Holden and Baker \(n 6\) 429.](https://www.pcgamesn.com/world-of-warcraft/wow-raiding-nighthold-method-danish-terrace-death-jesters#:~:text=by%20Network%2DN-.1%2C960%20man%2Dhours%20per%20week%3A%20the%20truth%20about%20WoW%20raiding,Mythic%20difficulty%20%E2%80%93%20unlocks%20next%20week.> accessed 25 May 2022; Preach Gaming (n 79).</p>
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²⁵² Overwatch League (n 73) para 1.4; Holden and Baker (n 6) 430.

Overwatch teams typically live together in company housing and are held to strict training schedules with defined hours for training, eating, and socialising.²⁵³ Some teams mandate curfews at bedtime.²⁵⁴ As esports teams and leagues typically direct activities in minute detail, they are very likely to be considered akin to employers.

Three further factors suggest that esports players are likely to be considered akin to employees. First, tortfeasors who are bound by external rules have repeatedly satisfied the first stage of the test.²⁵⁵ Teams and leagues near universally impose disciplinary authority over players;²⁵⁶ Overwatch League players are held to a written code of conduct interpreted and amended entirely at the discretion of the League.²⁵⁷ Second, those who do not work under a portfolio practice are also typically akin to employees.²⁵⁸ Many teams and leagues restrict players' abilities to compete in other competitions, move between teams, and work elsewhere, actively stifling portfolio practices.²⁵⁹ It is also often unfeasible for players expected to compete for extended hours to seek external work.²⁶⁰ Although many players stream alongside their employment, some personal streams will generate very little income, and success largely depends on the celebrity conferred by players' professional esports employment.²⁶¹ Third, those paid retainers and engaged across multiple projects are

²⁵³Alonzo (n 62). See also discussion of League of Legends schedules in Myers (n 143).

²⁵⁴Myers (n 143).

²⁵⁵See for example *Christian Schools* (n 236) [56] pt iv (Lord Phillips P); *Gravil* (n 132) [7], [9] (Lord Clarke MR). cf *JXJ* (n 179) [138] (Chamberlain J).

²⁵⁶Bayliss (n 62) 375, 402; Holden and Baker (n 6) 405.

²⁵⁷Overwatch League (n 73) para 1.4.

²⁵⁸*Gravil* (n 132) [7], [9] (Lord Clarke MR). cf *Barclays Bank* (n 233) [28] (Lady Hale P); *SKX v Manchester City Council* [2021] EWHC 782 (QB), [2021] 4 WLR 56 [53] (Cavanagh J).

²⁵⁹Holden and Baker (n 6) 412, 429. cf discussion of the ESL Pro League in Holden and Baker (n 6) 407, 426

²⁶⁰See RogerBrown discussing this point in *Preach Gaming* (n 79) 51.50–54.00.

²⁶¹*ibid* 51.50–54.00. See further Bayliss (n 62) 365, 376–377.

more likely to be akin to employees.²⁶² Top World of Warcraft guilds now provide payment in order to retain skilled players,²⁶³ and Overwatch League competitors are paid minimum salaries of \$50,000 per year.²⁶⁴ Many players also sign contracts extending across multiple tournament seasons,²⁶⁵ likely establishing vicarious liability under the stage one test.

In doubtful cases, courts examine the five ‘policy reasons’ underpinning vicarious liability in order to establish whether a relationship akin to employment exists.²⁶⁶ Although it is argued here that many esports players undoubtedly satisfy the stage one test, the policy factors will briefly be considered for completeness. The three most important policy factors require that tortfeasors work ‘on behalf of the employer’ and as ‘part of the business activity of the employer’, thus ‘creat[ing] the risk of the tort’.²⁶⁷ The work completed by esports professionals is the business of their team and league,²⁶⁸ and the risk of abusive behaviour increases as players are exposed to fans. Under the fourth policy factor, defendants controlling tortfeasors more closely may be akin to employers; as previously established, teams and leagues exercise a large degree of control over players.²⁶⁹ Finally, the greater ability of teams and leagues, rather than individual abusers, to compensate victims may sometimes support the imposition of vicarious liability.²⁷⁰ As such,

²⁶² *Barclays Bank* (n 233) [28] (Lady Hale P); *SKX* (n 258) [53] (Cavanagh J).

²⁶³ Preach Gaming (n 79) 45.00–52.00.

²⁶⁴ Noah Higgins-Dunn, ‘Six-Figure Salaries, Million-Dollar Prizes, Health Benefits and Housing Included - Inside the Overwatch League’ *CNBC* (29 September 2019) <<https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html>> accessed 25 May 2022. See also Bayliss (n 62) 378.

²⁶⁵ Higgins-Dunn (n 264); Bayliss (n 62) 378.

²⁶⁶ *Barclays Bank* (n 233) [27] (Lady Hale P).

²⁶⁷ *Christian Schools* (n 236) [35] (Lord Phillips P). *Barclays Bank* (n 233) [20] (Lady Hale P).

²⁶⁸ Holden and Baker 2019 (n 6) 429.

²⁶⁹ *Christian Schools* (n 236) [35] (Lord Phillips P). See also *Barclays Bank* (n 233) [20] (Lady Hale P).

²⁷⁰ *Christian Schools* (n 236) [35] (Lord Phillips P); *Barclays Bank* (n 233) [20] (Lady

the policy factors further support the conclusion that the stage one test is met.

3.3. Establishing liability under Stage Two

It will now be argued that three ambiguities in stage two of the test for vicarious liability should be resolved in order to clarify that esports employers may be held liable for the torts of their players. The standard stage two test examines whether a tortfeasor's actions were committed 'in the ordinary course of [their] employment'.²⁷¹ Courts should firstly clarify whether sexual abuse committed in the course of engaging with fans is sufficiently connected to employment. An alternative stage two test examining 'proximity' and 'authority' can be used in sexual abuse cases.²⁷² The second and third necessary clarifications relate to whether employers confer authority when they confer celebrity, and whether the alternative test applies in the same way to the abuse of adults as to the abuse of children.

The standard stage two test is met where a tortfeasor's wrongful conduct was committed 'in the ordinary course of [their] employment';²⁷³ courts must examine whether the wrong was sufficiently connected to the 'field of activities' usually entrusted to the employee.²⁷⁴ The Supreme Court has stated that 'sexual abuse can never be a negligent way of performing [an employment] requirement',²⁷⁵ as it is too dissimilar to authorised activities.²⁷⁶ However, the court is yet to consider a case in which an abusive employee has been tasked with cultivating relationships with fans;

Hale P).

²⁷¹ *Morrison Supermarkets* (n 237) [25] (Lord Reed DP).

²⁷² *Christian Schools* (n 236) [83]–[84] (Lord Phillips P); *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Barry Congregation* (n 133) [83]–[84] (Davies LJ).

²⁷³ *Morrison Supermarkets* (n 237) [25] (Lord Reed DP).

²⁷⁴ *ibid.*

²⁷⁵ *Christian Schools* (n 236) [62] (Lord Phillips P).

²⁷⁶ *Morrison Supermarkets* (n 237) [23] (Lord Reed DP).

Morgan has argued that sports teams could be held vicariously liable for sexual abuse where victims are met ‘in the context of club activities’ or where players are ‘tasked with engaging with members of the public for the purposes of the club.’²⁷⁷

The torts of esports players who meet victims in the context of team activities should be considered to be sufficiently connected to their employment. In *Maga*, the Court of Appeal held a church liable for the torts of an abusive priest who had developed a relationship with his victim during ‘church-organised’ discos.²⁷⁸ Where employees meet victims at work, a sufficient connection can be established even where abuse ultimately occurs away from the workplace or outside of usual employment hours.²⁷⁹ Much of the physical abuse alleged in esports has taken place at conventions and tournaments attended by teams in professional capacities.²⁸⁰ Allegations of groping at after-parties are commonplace.²⁸¹ Esports players also meet victims during online team events. Women joined MethodJosh’s Discord server after finding him on team livestreams²⁸² and both of the underage fans allegedly groomed by DreamKazper followed him after watching promotional events.²⁸³

The standard test should also be met because esports players are frequently tasked with engaging with fans by their employers.²⁸⁴ It

²⁷⁷ Morgan (n 151) 248.

²⁷⁸ *Maga* (n 141) [48] (Lord Neuberger MR).

²⁷⁹ *Haringey LBC* (n 151) [150] (McCombe LJ). Although see also *EXE* (n 142) (Griffiths J) [127].

²⁸⁰ Messner (n 14).

²⁸¹ See for example (Michael n 15); Dom Sacco, “‘This Criminal Behaviour Needs to Get Out of Society’ - UK FGC Host Logan Sama on Disturbing Reports from EVO After-Party” (*EsportsNews*, 11 August 2019) <<https://esports-news.co.uk/2019/08/11/logan-sama-on-evo-after-party/>> accessed 25 May 2022. See also D’Anastasio (n 5).

²⁸² D’Anastasio (n 5).

²⁸³ D’Anastasio (n 109). See also *Overwatch League* (n 73) para 1.1 for a list of mandatory team events.

²⁸⁴ See for example Smith (n 99); Archimtiros (n 63).

was considered relevant when establishing vicarious liability in *Maga* that the tortfeasor priest had been entrusted with a duty to attract people to church by developing relationships within his community.²⁸⁵ Similarly, dicta in *GB* suggests that an employee responsible for a youth fan club would act within their employment when abusing supporters.²⁸⁶ Esports teams ‘boost individual [player] profiles’²⁸⁷ in the expectation that employees will attract fans by being ‘as accessible as possible’ online.²⁸⁸ Esports players are also often required to chat with fans during mandatory team streams such as *Race to World First* events, which run for upwards of sixteen hours per day.²⁸⁹ As sexual abuse is connected to esports players’ duties to meet and develop personal relationships with fans, future judgments should clarify that sexual abuse can be connected to employment under the standard test.

An alternative stage two test can be applied where sexual abuse is alleged in order to emphasise criteria ‘particularly relevant to that form of wrongdoing.’²⁹⁰ Courts can hold employers vicariously liable for sexual abuse where employment confers ‘proximity’ to and ‘authority’ over victims.²⁹¹ It is clearly arguable that esports players are afforded proximity to potential victims through exposure to fans. However, courts should clarify that employers grant players authority over victims where they confer celebrity status.

²⁸⁵ *Maga* (n 141) [46]–[47] (Lord Neuberger MR).

²⁸⁶ *GB v Stoke City Football Club Ltd* [2015] EWHC 2862, [2015] 10 WLUK 831 [148] (Butler J). Morgan (n 151) 249.

²⁸⁷ Method, ‘Road to World First’ <<https://www.method.gg/road-to-world-first>> accessed 25 May 2022.

²⁸⁸ Smith (n 99).

²⁸⁹ Archimtiros (n 63). See also discussion of mandatory streaming in professional League of Legends in Smith (n 99).

²⁹⁰ *Morrison Supermarkets* (n 237) [23] (Lord Reed DP). See also *Christian Schools* (n 236) [83] (Lord Phillips P).

²⁹¹ *Christian Schools* (n 236) [84] (Lord Phillips DP); *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Barry Congregation* (n 133) [83]–[84] (Davies LJ).

Esports teams confer authority on their employees by creating ‘athlete-celebrities’²⁹² who stream under team branding and use team-based pseudonyms such as ‘MethodJosh’.²⁹³ Courts have previously found conferral of authority where tortfeasors enjoy general moral responsibility, for example by virtue of employment in teaching or the priesthood.²⁹⁴ Authority conferred by celebrity is, admittedly, entirely different. However, whilst arguing that vicarious liability should be restricted, Morgan has proposed that authority is context-specific, as some claimants will not respect traditional authority figures in practice.²⁹⁵ Just as context can limit liability, it can also extend it; although celebrity sportspeople may not be afforded universal respect, it is proposed the test should be satisfied where tortfeasors hold authority over the actual claimant in question.

Celebrity esports players hold authority over fans and junior colleagues. In *Barry Congregation*, authority had led the sexually abused claimant to assume that the tortfeasor would act with ‘pure motives’.²⁹⁶ In a similar way, esports players occupy positions of trust within online communities due to the power differentials created by celebrity status.²⁹⁷ Authority also manifested in *Barry Congregation* as a fear that there would be ‘repercussions’ if a complaint was made.²⁹⁸ Many victims have expressed fear about speaking out against celebrity esports players with large followings and industry connections,²⁹⁹ believing that their reports would be dismissed³⁰⁰ and their careers undermined³⁰¹ by abusers wielding community authority.

²⁹² Darwin, Vooris and Mahoney (n 6) 40.

²⁹³ See for example Sacco (n 4).

²⁹⁴ *Maga* (n 141) 45 (Lord Neuberger MR).

²⁹⁵ Morgan (n 144) 941.

²⁹⁶ *Barry Congregation* (n 133) [85] (Davies LJ).

²⁹⁷ See discussion of Dreamkazper in D’Anastasio (n 109); D’Anastasio (n 5) discussing followers feeling they can trust *the objects of their fandom*.

²⁹⁸ *Barry Congregation* (n 133) [85] (Davies LJ).

²⁹⁹ See discussion of Elvine in D’Anastasio (n 5).

³⁰⁰ Messner (n 14).

³⁰¹ Liao (n 12); Messner (n 14); Allegations against Iamspoon in D’Anastasio (n 84).

As it is arguable that the conferral of celebrity status confers authority over potential victims, it should be clarified whether such a situation would satisfy the alternative test.

Finally, it should be clarified that the alternate test applies in the same way regardless of whether adults or children are abused. Courts often baldly state that the alternate test applies ‘in cases concerned with the sexual abuse of children.’³⁰² In *Barry Congregation*, the Court of Appeal was split on the question of whether the alternate test could apply in the same way where an adult had been abused.³⁰³ Davies LJ, giving the lead judgment, considered that the age of the claimant was unimportant as ‘the rationale for the test’ did not depend on the ‘characteristics of the victim’.³⁰⁴ By contrast, Males LJ, whilst acknowledging that each case is fact-specific, argued that adults could generally be expected to resist abuse by removing themselves from harmful situations.³⁰⁵ Males LJ’s approach has so far been accepted at face value by the academic community, potentially rendering adult victims less able to access tortious remedies.³⁰⁶

Davies LJ’s application of the alternate test should be preferred for two reasons. First, risk-based approaches increasingly underpin vicarious liability,³⁰⁷ and yet the risk of sexual abuse does not necessarily lessen with age. Unequal power dynamics, for example between employees and managers³⁰⁸ or celebrities and fans,³⁰⁹

³⁰² *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Christian Schools* (n 236) [3] (Lord Phillips P).

³⁰³ *Barry Congregation* (n 133).

³⁰⁴ *ibid* [84] (Davies LJ).

³⁰⁵ *ibid* [96] (Males LJ).

³⁰⁶ Giliker (n 24); Abigail Scott, ‘Revisiting the Close Connection Test for Vicarious Liability: Adult Sexual Abuse Cases’ (*Ropewalk Chambers*, 23 March 2021) <<https://www.ropewalk.co.uk/knowledge-sharing/blog/personal-injury/1792/revisiting-the-close-connection-test-for-vicarious-liability-adult-sexual-abuse-cases>> accessed 25 May 2022.

³⁰⁷ Giliker (n 178) 17.

³⁰⁸ See for example *Method* (n 4).

³⁰⁹ See for example *D’Anastasio* (n 109).

increase the risk of sexual abuse even where victims are adults.³¹⁰ Chamallas argues that judges who have not experienced workplace sexual harassment struggle to appreciate that abuse can be engendered by employment dynamics,³¹¹ an interesting claim when it is considered that the lead judgment in *Barry Congregation* was provided by a female judge, whilst the adult employee exception was suggested by a man.³¹² Second, as vicarious liability attempts to ensure that harm is borne by the party who should ‘fairly bear liability’,³¹³ denying adult claimants a remedy effectively blames victims for abuse.³¹⁴ As Chamallas has noted, it is unfair to expect women to alter their own behaviour on the assumption that they will be harmed intentionally by men,³¹⁵ and as such it should be clarified that the alternative test applies in the same way regardless of the age of the victim.

Esports teams could be held vicariously liable for the torts of their players if it was clarified that sexual abuse is a wrongful way of engaging with fans, satisfying the standard test, or that employers who confer celebrity confer authority and that adults are not expected to resist abuse, satisfying the alternate test. These ambiguities should be resolved whenever an appropriate case is next considered, although it is acknowledged that these points could best be addressed if a test case was brought before the courts.

Finally, it is acknowledged that vicarious liability should not be expanded to remedy abuse in specific sectors at the expense of overall doctrinal coherence.³¹⁶ Vicarious liability scholars have repeatedly argued that public outrage over sexual abuse has extended the

³¹⁰ Chamallas (n 18) 166.

³¹¹ *ibid* 159.

³¹² *Barry Congregation* (n 133).

³¹³ *Christian Schools* (n 236) [83] (Lord Phillips P).

³¹⁴ See further Waterhouse, Reynolds and Egan (n 130) 2.

³¹⁵ Chamallas (n 18) 155.

³¹⁶ Lord Hope (n 239) 525.

doctrine,³¹⁷ undermining clarity,³¹⁸ facilitating opportunistic claims,³¹⁹ and placing a disproportionate burden on corporate defendants.³²⁰ Giliker has recently described vicarious liability as an ‘uncontrolled instrument of distributive justice’ imposing liability on ‘innocent’ defendants.³²¹ The innocence of corporate defendants will be questioned in the following section, but for now it should be noted that the clarifications proposed here are not expansions, but rather the novel and proper application of existing rules. Further, these clarifications are limited to narrow fact patterns; clarification one will apply only where employees have been tasked with engaging with fans, and the development of the alternative sexual abuse test means that clarifications two and three are insulated from having any effect on commercial cases.³²²

3.4. Usefulness of vicarious claims

Vicarious liability could usefully remedy abuse in the esports sector by triggering wider industry change. It is commonly argued that vicarious liability is of limited use because it frustrates ‘corrective justice’³²³ by forcing losses upon ‘innocent’ employers.³²⁴ This argument is undermined by the reality that employers are frequently personally responsible for abuse, even where specific negligent practices cannot be identified. Morgan has proposed that establishing

³¹⁷ Phillip Morgan, ‘Vicarious Liability on the Move’ (2013) 129 LQR 139, 139; Giliker (n 178) 3, 19–20.

³¹⁸ Lord Hope (n 239) 525.

³¹⁹ Paula Giliker, ‘Vicarious Liability “On the Move”’: The English Supreme Court and Enterprise Liability: A Commentary on Various Claimants v Catholic Child Welfare Society [2012] United Supreme Court 56’ (2013) 4(3) Journal of European Tort Law 306, 313.

³²⁰ *ibid* 312.

³²¹ Giliker (n 178) 1, 3, 19–20.

³²² Donal Nolan, ‘Reigning in Vicarious Liability (Case Comment)’ 49(4) ILJ 609, 621. *cf* Giliker (n 24).

³²³ Godden (n 151) 174; Giliker (n 178) 1.

³²⁴ Morgan (n 144) 945; Giliker (n 178) 1.

company liability through negligence is often preferable to vicarious liability, as negligence claims identify specific blameworthy officials and practices.³²⁵ Morgan’s argument demonstrates Chamallas’ claim that people prefer to blame individuals than to recognise systematic failings;³²⁶ abuse is often rationalised as a ‘pathological outsider infiltrating an otherwise healthy system’ where it is actually symptomatic of wider institutional failure.³²⁷ For example, it is unlikely that Method would be held liable in negligence for failing to investigate MethodJosh adequately, despite this failing indicating the presence of a wider misogynistic and elitist culture at the organisation.³²⁸ Employers who allow abusive cultures to develop are partly responsible for abuse, and it is therefore appropriate that they bear losses through vicarious liability.

Vicarious liability claims would be useful in the esports sector because teams currently do not take their responsibility to reduce abuse seriously. Celebrity esports players are typically not required to comply with any background checks or sexual harassment training.³²⁹ The twenty-three-year-old CEO of one Overwatch League team responded to sexual abuse allegations by having ‘parental’ discussions with players and mandating visits to art galleries so that employees could ‘develop their public personas in healthy ways’.³³⁰ Holden, Baker, and Edelman argue that industry change is possible; just as company liability has improved employment practices in traditional sports, abuse could be lessened in esports.³³¹ The imposition of liability may encourage teams to take proactive steps to reduce abuse by improving recruitment and training and promoting internal

³²⁵ Morgan (n 144) 945.

³²⁶ Chamallas (n 18) 167–169.

³²⁷ *ibid* 170–171.

³²⁸ See s 3.1; Messner (n 14); Sacco (n 4).

³²⁹ D’Anastasio (n 5); D’Anastasio (n 84).

³³⁰ Myers (n 143). See further Lyons discussing coach responses to abuse in Paul (n 108).

³³¹ Holden, Baker and Edelman (n 11) 39–40.

transparency.³³² Method's reformation demonstrates that teams make positive changes when held to account;³³³ the team now conducts background checks, provides anti-harassment training, has formal disciplinary and reporting procedures, and employs an external HR consultant.³³⁴ Crucially, where teams reduce harassment amongst elite players, social norms evolve, lessening abuse in wider online communities.³³⁵

It must briefly be acknowledged that it may not be useful or appropriate to impose vicarious liability on very small teams. Whilst some esports teams are large corporations which can instigate meaningful change,³³⁶ others are small grassroots organisations.³³⁷ Vicarious liability could likely be established even where teams are unincorporated,³³⁸ players are amateur,³³⁹ and no profits are generated.³⁴⁰ Courts have justified imposing liability on unincorporated groups on the basis that previous defendants have had more extensive financial resources³⁴¹ and insurance³⁴² than individual tortfeasors. However, as Morgan has discussed, there is no limited liability in unincorporated sports teams, and as such any individual player could be forced to pay compensation.³⁴³ Further, small teams are likely to face 'fluctuating membership' and lack authority over

³³² *Gravil* (n 132) [26] (Lord Clarke MR); *Morgan* (n 151) 247–248, 251, 260; *Chamallas* (n 18) 152.

³³³ *Sacco* (n 4).

³³⁴ *Method* (n 184); *Method*, 'Meet the New Method Guild' <<https://www.method.gg/meet-the-new-method-guild>> accessed 25 May 2022.

³³⁵ *Holden, Baker and Edelman* (n 11) 39, 42.

³³⁶ *Rondina* (n 70).

³³⁷ See discussion of team size in *Preach Gaming* (n 79) 45.00–46.00, 51.20–51.40.

³³⁸ *Christian Schools* (n 236) [20], [27] (Lord Phillips P); *Morgan* (n 151) 255.

³³⁹ *Morgan* (n 151) 252–254; *Barclays Bank* (n 233) [29] (Lady Hale P). cf *Gravil* (n 132) [10], [41] (Lord Clarke MR).

³⁴⁰ *Gravil* (n 132) [9] (Lord Clarke MR); *Christian Schools* (n 236) [57]–[58] (Lord Phillips P); *Morgan* (n 151) 254.

³⁴¹ *Christian Schools* (n 236) [31]–[32] (Lord Phillips P).

³⁴² *Gravil* (n 132) [28] (Lord Clarke MR).

³⁴³ *Morgan* (n 151) 256.

players,³⁴⁴ a problem especially acute in informal online groups. As such, whilst it is useful to hold most esports teams liable for the torts of their players in order to effect wider community change, small teams should arguably be shielded from liability.³⁴⁵

3.5. Feasibility of Vicarious Claims

Cost is the most significant barrier to the feasibility of civil claims against esports teams.³⁴⁶ Legal aid is available to some complainants alleging sexual offences, harassment, and child sexual abuse;³⁴⁷ costs may be covered in civil rape,³⁴⁸ sexual assault,³⁴⁹ and grooming cases,³⁵⁰ where indecent pictures of children have been shared,³⁵¹ and where an injunction is sought following harassment.³⁵² However, adult claimants seeking compensation for verbal harassment or the sharing of intimate pictures are ineligible for legal aid, as are those who exceed maximum income limits³⁵³ or those bringing claims with too low a chance of success.³⁵⁴ As legal uncertainty could undermine the availability of funding, ambiguities in the vicarious liability should be resolved in order to render claims feasible.

³⁴⁴ *ibid* 256.

³⁴⁵ *ibid* 261.

³⁴⁶ Bublick (n 173) 77; Godden (n 151) 177; Holden, Baker and Edelman (n 11) 25.

³⁴⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) s 9, Sch 1 Pt 1 ss 3(1), 37(1) and 39(1).

³⁴⁸ *ibid* Sch1 Pt 1 s 39(1); Sexual Offences Act 2003 s 1.

³⁴⁹ LASPO 2012 (n 347) Sch1 Pt 1 s 39(1); Sexual Offences Act 2003 ss 2, 3, 9, 10.

³⁵⁰ LASPO 2012 (n 347) Sch1 Pt 1 s 39(1), Sch1 Pt 1 s 3(1); Sexual Offences Act 2003 ss 14, 15, 15A.

³⁵¹ LASPO 2012 (n 347) Sch1 Pt 1 s 3(1).

³⁵² *ibid* Sch1 Pt 1 s 37(1).

³⁵³ *ibid* s 11; The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ss 6, 7, and 8.

³⁵⁴ Civil Legal Aid (Merits Criteria) Regulations 2013 ss 5 and 43; The Conditional Fee Agreements Order 2013 ss 3 and 5; Constitutional Affairs Committee, 'Constitutional Affairs - Third Report' (HC 2005-06); Stuart Sime, *A Practical Approach to Civil Procedure* (OUP 2020) ch 2 para 2.18.

Merely increasing awareness of the possibility of liability in the esports sector could effect change, even where funding constraints frustrate some claims. Clarifying the application of vicarious liability to esports teams would empower lawyers and charities³⁵⁵ to warn employers of the risk of liability and make victims aware of their legal options.³⁵⁶ Many employers currently consider esports to be an ‘unregulated’ industry,³⁵⁷ but those aware of the financial consequences of abuse have made meaningful improvements.³⁵⁸ As such, increasing awareness of vicarious liability in esports by clarifying the doctrine would be likely to prompt teams to reform their practices proactively before any litigation is brought.

4 Conclusion

This article has argued that vicarious liability could play a key role in remedying and lessening abuse in the esports sector. Courts should clarify at the next opportunity that sexual abuse is a wrongful way of developing relationships with fans, that employers who confer celebrity confer authority, and that sexual abuse is connected to employment in the same way regardless of the age of the victim. Should these clarifications be made, funding constraints would be lessened and industry awareness of liability would be increased, promoting improvements in esports employment practices and ultimately reducing abuse by changing social norms in online gaming communities.

³⁵⁵ Women in Games <<https://www.womeningames.org/>> accessed 25 May 2022; British Esports, ‘Women in Esports’ <<https://britishesports.org/women-in-esports-campaign/>> accessed 25 May 2022.

³⁵⁶ See further Keats Citron (n 1) 377, 413.

³⁵⁷ Preach Gaming (n 79) 46.10–46.20.

³⁵⁸ Method, ‘Method Rebuild’ (2 October 2020) <<https://www.method.gg/rebuild>> accessed 30 May 2021