

TITLE PAGE

Collisions and Concussion in Sport: Time for a Duty of Care?

Matthew James Parry

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ABSTRACT

In recent years there has been an increase in public awareness about the consequences of concussion, as retired players announce that they are suffering from serious long-term injuries, and questions have been raised about the long-established framework of sports which include actions with a strong potential to cause concussive and sub-concussive events. Despite an increase in literature, both medical and legal, there has been a lack of clear resolved jurisprudence indicating a potential avenue for players to recover compensation or for those responsible for framing the sports to be held accountable for their action or inaction. This thesis uses existing medical evidence to contend that there is a significant problem with concussive and sub-concussive events in sport, focusing as case studies on Association Football, Rugby Union, and American Football, and argues that there is potential scope for a duty of care to exist on both sporting bodies and employer clubs. In order to make this argument it is necessary to overcome the barrier of such a duty of care in negligence not presently existing, but it is established that new duties of care can be developed, and it is argued that the criteria for such an extension can be satisfied under the existing law. The thesis also confronts a significant hurdle to such an extension, which is the concept that players consent to such risks, particularly at the professional level when they are highly remunerated. This contention is countered at several levels, with the overall argument concluding that consent cannot be appropriate as a defence to a claim in this type of case, where the relevant body failed in their duties.

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Introduction

Analysis of the relationship between the rule of law and sporting activities has rarely been in a more robust condition. From Grayson's contention that "the law of the land does not stop at the touchline,"¹ to Beloff's later argument that "sports law [is] more than mere private law,"² the relationship between sport and the law has been gradually moving closer as the mechanisms and principles of law find their way with increasing frequency onto the sporting field. Where once the idea of a 'sports law' was doubted,³ it is evident that such a phenomenon now exists as "discrete doctrines are taking shape in the sporting field which are not found elsewhere,"⁴ including questions of performance enhancing drugs and the relationship between the spectator and the participants, often framed by the presence of the Court of Arbitration for Sport.

There are many contemporary and relevant areas within sports and law, with drug scandals,⁵ and violence on the football pitch⁶ reoccurring on a regular basis, while global sociological discord caused by public player protests⁷ shows that novel legal and social questions are constantly emerging. These are all, however, in one way or another, incidental to the actual sporting activity and this thesis will focus on an area that is at the centre of sporting activities and that, while not new, does have significant contemporary implications. That question is the relationship between sports and the law in respect of physical integrity on the sporting field and whether the legal parameters can or should be redefined to address the insidious issue of concussion injuries.

¹ Edward Grayson, *Sport and the Law*, (3rd Edition, Butterworths, 2000), 4.

² Michael Beloff et al, *Sports Law*, (2nd Edition, Hart Publishing, 2012), 5.

³ Ibid, n. 1.

⁴ Ibid, n. 2.

⁵ Where websites are referenced, the footnote will contain the details and the URL will be in the Bibliography. All websites were last accessed on the 1st August 2022. Martha Kelner, 'Bradley Wiggins and Team Sky accused in damaging drugs report' (*The Guardian Online*, 5 March 2018).

⁶ Perihan Ekmekci et al, 'Beyond a Game: Peer Education to Separate Football and Violence' (2018). *International Online Journal of Education and Teaching* Vol 5 (1), 180, 181.

⁷ Isaac Fanning, 'Why we're protesting during the US national anthem' (*BBC online*, 23 October 2017).

The significance of this has increased recently with additional reporting of this issue at the end of 2020 and the beginning of 2021, the announcement of commencement of legal proceedings by a group of rugby players against World Rugby,⁸ and the emergence of a vocal organisation committed to improving safety standards in rugby.⁹ Notwithstanding these recent developments, physical injuries in sport are not a new phenomenon. It is inevitable that in any physical activity there will be injuries, from the benign to the significant, and in 2000, Grayson emphasised the potential for injuries to be inflicted by an opponent, suggesting that 20% of the injuries at Arsenal Football Club had been caused by an opponent, either within or outside the laws of the game.¹⁰ Grayson posited that these injuries, if correctly evidenced, could well lead to a civil claim or a criminal prosecution,¹¹ although the courts have placed a high burden of proof in these cases. In *R v Barnes*¹² the Court of Appeal emphasised that criminal law should be the last recourse, and one that should only be used where the conduct is of an extreme nature. There is greater potential for remedy in civil law, but even then, the standard is whether there has been “dangerous or reckless play,”¹³ a very high hurdle to clear given the pace at which sporting events are played. Since Grayson’s claim, liability in these cases remains the exception rather than the norm,¹⁴ with those cases that have been prosecuted in the criminal courts or have been subject to civil claims being primarily those where the Defendant’s actions have been a clear breach of the principles of the game as opposed to merely breaking the laws of the game.

In this thesis, which will focus on black-letter law and the potential for its development, the theme of injuries is central, but the focus is on two key points. The first point is that it will be examining injuries sustained not through a breach of the rules but as an inevitable consequence of the current rules, thus forming part of the game as is expected, rather than subject to the capricious decision of a player to break the rules. For example, a football player

⁸ Reuters Staff, ‘Six more former players join concussion lawsuit’ (*Reuters online*, 17 December 2020).

⁹ Progressive Rugby ‘Home Page’ (*Progressive Rugby*).

¹⁰ *Ibid*, n1, 302.

¹¹ *Ibid*, n1, 302-303.

¹² [2004] EWCA Crim 3246.

¹³ *Elliot v Saunders and Liverpool FC* (unreported, High Court, June 10, 1994, Lexis Citation 3968) building on principles established in *Condon v Basi* [1985] 2 All ER 453.

¹⁴ Cases have been commenced before being settled, without admission of liability. *O’Neil v Fashanu* (unreported, High Court, 10 October 1994, Lexis Citation 1736), *Knight v Bennett and Chester City FC* (unreported, High Court, 13 October 1997).

who punches another player is not playing within the rules of the game but is breaking them. This thesis looks at actions that are within the rules of sport and cause significant injuries and argues that there should be potential liability for these actions.

The nature of these injuries represents the second crucial difference. This thesis focuses on internal rather than external injuries, specifically those situations where contact leads to concussive or sub-concussive events, both as single incidents and as a sequence of incidents. It argues that the situation with concussion is of sufficient seriousness that the governing bodies and the clubs themselves must act or be held to be liable for the injuries that are caused through the playing of contact sports.

Methodology

The primary lens through which this thesis is being argued is black-letter law, with a strong focus on the law as it presently exists in England and Wales and the approaches that could be used to deal with the problem of concussive and sub-concussive events that will be set out. While this is the focus of the paper, there are other approaches that are used to aid the robustness of the legal analysis. To establish the existence of the problem, secondary quantitative and qualitative research will be used from medical backgrounds. In addition, to frame the problem and understand the appropriateness of the answers that will be proposed, there will also be a consideration of the law in context, with a focus on the precautionary principle in tort law and the role that paternalism must play in consent. The aim of the thesis is to provide a potential path for the legal system to take to navigate the problem that is identified.

The Players, The Victims, And The Problem.

In 2015, a twenty-four-year-old American retired from his job, citing concerns of future medical issues. At the time he was earning half a million pounds per year.¹⁵ In the same year,

¹⁵ BBC, 'Chris Borland: NFL Player quits over concussion fears' (*BBC Sport*, 17 March 2015).

a twenty-seven-year-old Tongan died shortly after working a shift in Japan,¹⁶ while in 2017 a retired Englishman stated that he was “concerned that [he] might develop dementia,”¹⁷ following medical investigations that examined his employment of twenty years.

The link between Chris Borland, Talifolau Taku, and Alan Shearer is their profession as sportsmen. All three are, or were, professional sportsmen whose chosen sport involved an element of intentional bodily contact that was ancillary to the sport itself.¹⁸ In the former two sports, American Football and Rugby Union, the contact was player to player, permitted within the meaning of the game, while in the case of the latter, Football, the contact was through heading a “precision engineered ball.”¹⁹ In all three cases serious consequences arose out of the demands of the sport, from early retirement, through concerns about lasting injury, to the extreme of death in the case of Talifolau Taku.

These are three examples taken from a far wider pool to illustrate the breadth of contact related injuries in sports and demonstrate that the issue at the centre of this thesis is not limited geographically or economically; the spectre of severe consequences hangs over sports that involve physical contact that have the potential to impact upon the head. The question is whether, in the modern era of sporting law, this should be tolerated, and this thesis will argue that the traditional approach of limited legal intervention should not continue. The three cases also include the two sports that will be analysed; it will be seen²⁰ that they have among the worst record of concussion injuries while also being amongst the most popular sports currently played.²¹

¹⁶ Jack De Menzes, ‘How a Tongan player’s death swept under the carpet highlights the need for change in Polynesian player welfare’ (*The Independent*, 4 December 2017).

¹⁷ Alan Shearer, ‘Making My Documentary Dementia Football and Me’ (*BBC*, 12 November 2017).

¹⁸ As opposed to boxing where the violent action is a central part of the sport and is “fulfilled in all boxing matches” Jack Anderson, *The Legality of Boxing: A Punch-Drunk Love?* (Routledge-Cavendish and Birkbeck Law Press, 2007), 84.

¹⁹ Sarah Knapton, ‘Alan Shearer: I fear I may develop dementia from years of heading heavy footballs’ (*The Telegraph*, 9 November 2017).

²⁰ See Page 27.

²¹ This thesis focuses on the jurisdiction of England and Wales and therefore there will not be a focus on American Football.

Before this analysis, however, it is necessary to assess precisely what is being discussed and the next Chapter²² will analyse what concussion injuries are, why they are particularly relevant now, and what must be done to make sports safer. This will be followed by an analysis of the undue deference that has been afforded to sports in respect of similar situations before arguing that this should not continue, that the common law is able to impose liability, and that it should do so.

²² See Page 16.

Chapter One: Stunned and Concussed.

Introduction

Injuries are a part of sport. They have always been a part of sport, in its traditional incarnation and the modern form, and will always remain a part of sport, from stubbed toes in training, to pulled hamstring muscles without any contact from another player, to broken legs after being fouled by an opponent. This thesis focuses on one specific aspect of this pantheon; actions within a sport that are caused by a rule-compliant action but that cause concussion injuries, either through concussive or sub-concussive events. This chapter will explain what concussion is and why it is a fundamental problem, both within sport generally, and, specifically, within the three identified sports.

The immediate practical significance of concussion related injuries has been drawn internationally and domestically by high profile stories of public interest,¹ that include both long term impairment² and death³. Concussion itself, however, is not new, indeed the consequences of boxing matches, with competitors getting progressively more lethargic as they were repeatedly punched, was a cause for medical surveys into the nexus between repeated head impact and chronic traumatic encephalopathy.⁴ What is evolving now, is a dual recognition of the specific link to wider sport and the potential seriousness of the consequences of concussion. As more medical evidence is produced, so the picture becomes both clearer and grimmer for those who participate in sports.

¹ In this thesis many medical journals are used. Where possible, precise pinpointing is done by paragraph or page, where this is not possible, reference to the section heading will be used. Simon Rice et al, 'Sport Related Concussion and Mental Health Outcomes in Elite Athletes: A Systematic Review' (2018) *Sports Med* 48 447, 466.

² Harry Cockburn and Alex Matthews-King 'Severe concussion in your 20s increases risk of dementia by more than two thirds, study warns', (*The Independent*, 10 April 2018).

³ Ken Belson, 'How a Boy's Concussion Death Changed British Sports' (*New York Times*, 13 December 2015), Alan Neuhauser, 'Sudden Death, the mysterious brain injury that's killing young athletes', (*US News*, August 16, 2016).

⁴ Paul McCrory et al 'The evidence for chronic traumatic encephalopathy in boxing' (2007) *Sports Med* 37 (6) 467, Introduction.

This chapter does not seek to break new ground in respect of medical research in respect of concussion, but instead seeks to explain what it is, why it is relevant to this thesis, and what the particular issues are in respect of two particular sports, Football and Rugby Union. The purpose is to introduce the general issue, identify specific concerns, and place some context to the discussions that will follow.

What Is Concussion?

McCrory notes that one key limitation for research of concussion is the absence of a single definition.⁵ In its simplest form, concussion can be described as a “physiological injury occurring because of an impact to either the head or body that transmits forces to the brain.”⁶ The basis of the injury is that the body contains a “cerebrospinal fluid inside your skull”⁷ which cushions the brain from average knocks. This protection can be weakened, however, by a “violent blow to your head or upper body [that] can cause your brain to slide back and forth against the inner walls of your skull.”⁸ Much in the same way that the physical integrity of a helmet may be disrupted despite showing no visible signs of fracture, so the protection of the brain is lessened by the impact.

The breadth of this definition is expanded upon by other literature which emphasises the importance of the initial blow, and the consequences, with the potential for both short-term and long-term consequences⁹ and as a “form of traumatic brain injury following a direct force to the head.”¹⁰ Wicklund goes on to describe concussion as “a complex pathophysiologic

⁵ Paul McCrory, ‘What’s in a name?’ (2001) *British Journal of Sports Medicine* 35, 285.

⁶ J.K. Dierijck et al, ‘Sub-concussive trauma, acute concussion, and history of multiple concussions: Effect on quiet stance postural control stability’ (2018) *International Journal of Psychophysiology* 123, 74, Introduction.

⁷ Mayo Clinic Staff ‘Concussion’ (*The Mayo Clinic Online*).

⁸ *Ibid*, n. 7.

⁹ Christopher Sahler and Brian Greenwald, ‘Traumatic Brain Injury In Sports: A Review’ (2012) *Rehabilitation research and Practice* vol 659652, Abstract.

¹⁰ Stefan Dimou and Jim Lagopoulos ‘Toward objective markers of concussion in sport: A review of white matter and neurometabolic changes in the brain after sports related concussion’ (2014) *Journal of Neurotrauma* 31(5) 413, 413-414.

process that changes the way the brain normally functions. The injury can be caused by a bump, jolt, or blow to the head or body.”¹¹ This by itself is uncontroversial but beyond that, the definition of concussion has not been static but has shifted over five decades¹² with a wider definition from 1966¹³ being broken down to a specific list of features.¹⁴

In the literature, there are also synonyms for concussion, which can be considered a layperson’s term, with the most often appearing in journals being Traumatic Brain Injury (TBI), which takes a broader approach, stating that it is “any period of observed neurologic dysfunction or confusion, disorientation, change in consciousness, or amnesia that occurs following blunt trauma, acceleration and deceleration forces, or exposure to blast.”¹⁵ Even at this early stage, it is clear that the broad term covers a range of events, which needs to be limited down. This will be done by focusing on the short-term effects of concussion, but also the longer-term issues of Clinical Traumatic Encephalopathy.

The Distinctive Features of Concussive and Sub-concussive events

A key issue with the problems of concussion, which will be a repeated theme of this thesis, is that unlike most injuries, it may not be obvious that an injury has occurred as the injury may or may not lead to loss of consciousness while the symptoms may be non-specific but yet lead to the impairment of neurological functions.”¹⁶ While a blow to the head can lead to proximate symptoms, which would fall within the definition of a concussive event, it is also

¹¹ Alissa Wicklund et al, ‘Getting back on the horse: Sport Specific Return to Play in Rodeo Athletes After Concussion Injury’ (2018) *Journal of Athletic Training* 53(7) 657, Conclusion.

¹² Julie L Guay et al, ‘The Era of Sport Concussion: Evolution of Knowledge, Practice and the Role of Psychology’ (2016) *American Psychologist* Vol 71, 875.

¹³ ES Gurdjian and HC Volis, ‘Congress of Neurological Surgeons Committee on head injury nomenclature: glossary of head injury’ (1966), *Clin Neurosurg*, 386.

¹⁴ “a direct blow to the head or body that transmit sudden force to the head, a rapid onset of neurological symptoms that may evolve or spontaneously resolve, a functional versus structural disturbance and a graded set of symptoms that typically follow a sequential course of recovery but may become prolonged in some individuals.” Ibid n. 12, Introduction.

¹⁵ Junyou Wang et al ‘Risk factors for positive brain CT scan in children with traumatic brain injury and GCS = 15: A retrospective study’ (2021) *Medicine (Baltimore)* 100(4), Introduction.

¹⁶ Ibid n10, Steven Broglio et al ‘National Athletic Trainers’ Association position statement: Management of sport concussion’ (1999) *Journal of Athletic Training* 49(2) 245, Michael Collins et al ‘Relationship between concussion and neuropsychological performance in college football players’ (1999) *JAMA* 282 964.

possible for asymptomatic participants to be at risk, where there are no symptoms that can allow athletes to be monitored or withdrawn. Montenigro et al draw a parallel between this type of injury and smoking, noting that there is a causal relationship between sub-concussive events and long-term effects although not a universal relationship.¹⁷ These sub-concussive events have been said to comprise the majority of impacts in sport¹⁸ and epitomise a crucial thread that elevates the risks of concussion injuries, which is their elusive character.

This nature is also represented in the long-term consequences which are unclear. This was demonstrated by Katz who wrote that “the clinical effects of concussion can be subtle and difficult to detect with conventional assessment tools”¹⁹ leading to significant questions about the accuracy of detecting concussion, and whether there is a risk of under-reporting, either intentionally or inadvertently.²⁰

Despite this ambiguity, it is agreed that the most common acute symptoms of concussion are headache and dizziness which normally resolve within 7-10 days, sometimes extending to 14 days.²¹ As a one-off incidence, this can be equated to an innocuous injury, along the lines of those previously noted such as a pulled muscle, which indicates a comparative low level of concern.

¹⁷ Philip H Montenigro et al, ‘Cumulative Head Impact Exposure Predicts Later Life Depression, Apathy, Executive Dysfunction and Cognitive Impairment in Former High School and College Football Players’ (2017) *Journal of Neurotrauma*, Jan, 328, Discussion.

¹⁸ Julien Lepine et al, ‘The independent influence of concussive and sub-concussive impacts on soccer players’ neurophysiological and neuropsychological function’ (2017) *International Journal of Psychophysiology* Volume 112 February 22, 22.

¹⁹ Barry Katz et al ‘Baseline Performance of NCAA Athletes on a Concussion Battery: A Report from the CARE Consortium’ *Sports Med* (2018) 48, Introduction.

²⁰ See Page 48.

²¹ Dave Ellemberg et al ‘Advances in sport concussion assessment: from behavioural to brain imaging measures’ (2009) *Journal of Neurotrauma* 26(12) 2365, Tracey Covassin and Esther Bay ‘Are there gender differences in cognitive function, chronic stress and neurobehavioral symptoms after mild to moderate traumatic brain injury’ (2012) *Journal of Neuroscience Nursing* 44(3) 124, Michael Streiffer et al ‘The Potential Role of the Cervical Spine in Sports-Related Concussion: Clinical Perspectives and Considerations for Risk Reduction’ (2019) *Journal of Orthopaedic and Sports Physical Therapy* March 49 3 202, Stefan Dimou, *Ibid* n. 10, Steven Broglio et al *ibid* n. 16, Michael Collins et al *ibid* n. 16, Chelsea Williamson et al ‘Return to Learn After Sport Related Concussion: A Survey of Secondary School and Collegiate Athletic Trainers’ (2018) *Journal of Athletic Training* 53(10) 990, Laura Purcell, ‘Sport-related concussion: Evaluation and management’ (2014) *Paediatric Child Health* 19(3); 153.

There are, however, two crucial departures from this seemingly benign starting point. The first is that while one concussive event may cause comparatively minor problems, a second, a third, and a fourth will cause more. Over the course of their careers, it will be seen that the players can suffer far more concussive events than this number leading to serious long-term consequences.²² Even a single blow, in 23% of cases, has been found to lead to persistent symptoms being reported.²³ The second exception is where Chronic Traumatic Encephalopathy (CTE) occurs; the development of long-term adverse consequences that increase the likelihood of a range of linked health concerns including dementia, Multiple Sclerosis and Parkinson's Disease, amongst others. Gardner and Yaffe explain that concussive events that lead to CTE can be seen as associated as a potential risk factor in the development of the long-term conditions, including those noted above as well as dementia and amyotrophic lateral sclerosis (ALS).²⁴ This will be explored in more detail, but as the focus is on sporting concussions, it is necessary to consider how this has been specifically approached.

Sports-related concussion definition

Unsurprisingly, sport related concussion has been defined in much the same way, and was referred to in an International Consensus²⁵ on the subject as "immediate and typically transient symptoms of traumatic brain injury induced by biomechanical forces."²⁶ The obvious feature of sport related concussion is that it occurs during the course of a sporting activity, whether through a tackle to the head or other part of the body that is misplaced or mistimed,²⁷ a deliberate and legitimate attempt to halt a player in his or her tracks,²⁸ or the repetitive heading of a piece of heavy sporting equipment.²⁹

²² See Page 21 Longer term consequences of concussion and Chronic Traumatic Encephalopathy.

²³ Charles Tator et al 'Post-concussion syndrome: demographics and predictors in 221 patients' (2016) *Journal of Neurosurgery* 125(5) 1206, Introduction.

²⁴ Raquel Gardner and Kristine Yaffe, 'Epidemiology of mild traumatic brain injury and neurodegenerative disease' (2015) *Molecular and Cellular Neuroscience* Volume 66 Part B May 75.

²⁵ Paul McCrory et al 'Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich, November 2012' (2012). *Br J Sports Med*; 47:250.

²⁶ *Ibid*, Section 1.

²⁷ See Page 36.

²⁸ See Page 36.

²⁹ See Page 41.

The crucial distinction between sporting acts and non-sporting acts is that the latter are unlikely to be repeated. For example, concussion can conceivably occur through a car accident,³⁰ whether through a direct blow to the brain, or whiplash injuries, as concussion may also occur indirectly when an impulsive force to the neck or upper body is transferred to the head.³¹ However, unless an individual is very unlucky, this will not be a repeated occurrence, and there will be one single concussive event. By contrast, a footballer will repeatedly head the ball, and a Rugby Union player will be constantly tackled. There is, therefore, the opportunity for multiple, and numerous, concussive events to occur, unlike the accidental scenario of a car accident, and most non-sporting instances, which means that the risk of concussive events and non-concussive events take on particular importance in sport.

Longer term consequences of concussion and Chronic Traumatic Encephalopathy

Chronic Traumatic Encephalopathy

As indicated above, studies show that the typical concussion injury resolves itself between 7 and 10 days³² which would conceivably place it at a comparatively low level of injury risk. The American Association of Neurological Surgeons go further than this, warning that “although resolution...typically follows a sequential course..., it is important to note that in some cases symptoms may be prolonged.”³³ This implication that there can be longer term consequences is underscored by the developing nature of this as an area of study. In this light, concussion has been said to be a very complex injury which can lead to a diverse range of signals being sent out that may not always be clear although Gavett argues that the potential for neurodegenerative disease to occur in a sportsman later in life has been recognised for a

³⁰ Benjamin Elkin et al, ‘Whiplash Injury or Concussion? A Possible Biomechanical Explanation for Concussion Symptoms in some Individuals Following a Rear End Collision’ (2016) JOSPT Vol 46 Issue 10 874, Ibid n. 10.

³¹ Ibid.

³² Ibid n. 21.

³³ American Association of Neurological Surgeons, ‘Sports Related Head Injuries’ (AANS).

considerable time, at least as early as 1928³⁴ when Martland found clinical abnormalities in boxers, specifically “nearly one-half of the fighters who have stayed in the game long enough.”³⁵ Likewise, Saulle emphasises that there have been close links with contact sports³⁶ and while there is some agreement that the incidence and prevalence of CTE is unclear,³⁷ the greater concern about this lack of certainty is the feeling that as more is learned about concussion, and the dangers of the head being exposed to impact, “the more we realize that we don’t know.”³⁸ What is clear from medical assessments and surveys over the past twenty years is that while the full scope of the problem may not have been fully exposed, there are potential long term consequences³⁹ of concussion injuries that can occur both after one blow that players appear to have recovered from and also after multiple concussive events suffered over a period of time.

The first of these involves situations where a player seemingly recovers from the concussive event within the suggested times but in fact is not fully recovered and receives a second concussive event. The second is where a player may recover, for all intents and purposes, from the first blow, but can later develop symptoms as a result of multiple blows to the head. This can result in “catastrophic”⁴⁰ brain swelling⁴¹ and the effects of recurrent concussion and the risk of chronic traumatic encephalopathy (CTE), a neurodegenerative disorder.⁴²

The Physical Impact of CTE

The physical impact of CTE can be described in several different ways. The first, which is from a medical perspective only, but assists in being the most graphic, is that there are physical

³⁴ Brandon E Gavett et al, ‘Chronic Traumatic Encephalopathy: A potential late effect of sport-related concussive and sub-concussive head trauma’ (2011) *Clinical Sports Medicine* 30, 179, Synopsis.

³⁵ Harrison Martland, ‘Punch drunk’ (1928) *JAMA* 91: 1103.

³⁶ Michael Saulle and Brian Greenwald ‘Chronic Traumatic Encephalopathy: A Review’ (2012) *Rehabilitation Research and Practice, Epidemiology*.

³⁷ *Ibid* n. 34, 180.

³⁸ Johna Register-Malik ‘Concussion in Sport: Changing the Culture’ (*Injury Prevention Blog* June 8, 2016).

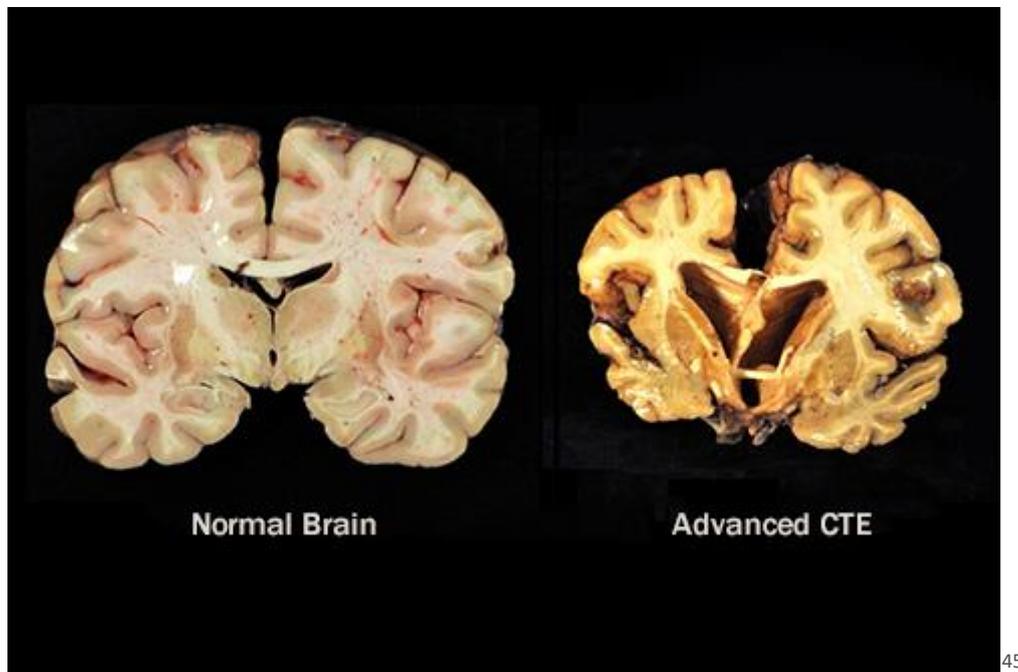
³⁹ Annika Prien et al ‘Epidemiology of Head Injuries Focusing on Concussions in Team Contact Sports: A Systematic Review’ (2018) *Sports Med* 48:953, Introduction.

⁴⁰ *Ibid* n. 36, Sequelae of TBI in Sports.

⁴¹ Paul McCrory et al, ‘Second impact syndrome or cerebral swelling after sporting head injury’ (2012) *Current Sports Medicine Reports*, 11, 21, 22.

⁴² *Ibid* n. 34, Synopsis.

changes to the brain itself. Gavett goes into significant detail,⁴³ but for non-medical experts, the most troubling statement is taken from another study which simply describes “a significant reduction in brain weight.”⁴⁴ This can be visibly seen in the diagram below.



The sharp contrast between the normal brain and the brain with Advanced CTE, effectively reflects the deterioration of the physical structure of the brain. This is the technical impression of CTE. However, the physical manifestations of CTE are no less worrying. Clinically, CTE has been associated with memory problems, depression, poor impulse control, anger, apathy, and impaired motor behaviours,⁴⁶ all symptoms which are significant in themselves, but still do not reveal the full extent of the problem.

⁴³ “Enlargement of the lateral and third ventricles is also commonly seen in CTE; the third ventricle may be disproportionately widened. Additional gross features include atrophy of the frontal and temporal cortices and of the medial temporal lobe, thinning of the hypothalamic floor, shrinkage of the mammillary bodies, pallor of the substantia nigra, and hippocampal sclerosis” Ibid n. 34, Neuropathology of CTE.

⁴⁴ Onder Albayram et al, ‘Chronic traumatic encephalopathy- a blueprint for the bridge between neurological and psychiatric disorders’ (2020) *Translational Psychiatry* 10, 424, Pathological Features from TBI to CTE.

⁴⁵ Web MD ‘A Visual Guide to Concussions and Brain Injuries’, (*Web MD* 9th March 2021).

⁴⁶ Chad Asplund, ‘Best TM Brain damage in American Football Inevitable consequence or avoidable risk?’ (2005) *Br J Sports Med*; 49: 1015.

The full extent of the problem can be seen from the cases where these symptoms escalate and begin to settle as recognisable and distinct long-term illnesses and diseases. There have been a wide range of case studies linking athletes to long-term health problems generally⁴⁷ with McKee emphasising that there is a link between a career in sports and the consequential effects.⁴⁸ Even more serious, however, has been the link between CTE and life-changing and life-ending diseases, including Alzheimer's Disease,⁴⁹ affective disorders,⁵⁰ motor neurone disease.⁵¹ Crucially, there is no clear time-line between the initial concussive event and the onset of these conditions, with it having been described as an "insidious,"⁵² emphasising the covert development of the condition. To put it bluntly, it is impossible to predict if such a condition will hit and when it will hit.

In summary of the physical conditions, either multiple concussive incidents, or long-term effects of one concussive incident, can lead to recognised conditions for which there is no treatment and only the hope of management, including Alzheimer's Disease and Multiple Sclerosis. This has been particularly prevalent in recent studies with cases emerging on a regular basis of athletes from the fifties and sixties who have encountered some time after they finished playing.⁵³ In 2020, England rugby World Cup winner, Steve Thompson, who has been diagnosed with early on-set dementia, stated that he couldn't remember any of the

⁴⁷ Ibid n. 39, Lindsay D Nelson et al 'Age Difference in recovery After Sport-Related Concussion: A Comparison of High School and Collegiate Athletes' (2016) *Journal of Athletic Training*; 51(2) 14, Stephen Macciocchi et al 'Neuropsychological functioning and recovery after mild head injury in collegiate athletes' (1996) *Neurosurgery* 39 (3) 510, Michael McCrea et al 'Acute effects and recovery time following concussion in collegiate football players: the NCAA concussion study' (2003) *JAMA*; 290(19) 2556, David Erlanger et al 'Symptom based assessment of the severity of a concussion' (2003), *Journal of Neurosurgery*; 98(3) 477.

⁴⁸ Ann McKee et al 'The spectrum of disease in chronic traumatic encephalopathy' (2013) *Brain*; 136 (Pt 1) 43, Omalu Bi et al 'Chronic traumatic encephalopathy (CTE) in a National Football League Player: Case report and emerging medico legal practice questions' (2010) *Journal of Forensic Nursing*; 6(1) 40.

⁴⁹ Everett Lehman et al 'Neurodegenerative causes of death among retired National Football League players' (2012) *Neurology* 79(19) 1970.

⁵⁰ Kevin Guskiewicz et al 'Recurrent concussion and risk of depression in retired professional football players' (2007) *Med Sci Sports Exerc* (39) 903.

⁵¹ Shaheen Lakhan and Annette Kirchgessner 'Chronic traumatic encephalopathy: the dangers of getting "dinged"' (2012) *SpringerPlus* 1, 2.

⁵² Ibid McKee n. 48, *Clinical and Demographic Features of CTE*.

⁵³ Including Dodie Weir, Rob Burrows and Gordon McQueen: BBC 'Dodie Weir: 'I don't blame rugby for my MND' (BBC, 29 August 2017), Jonathan Liew 'Cruel news about Rob Burrow's MND should provoke rugby into action' (*The Guardian*, 23 December 2019) BBC 'Gordon McQueen: Former Scotland, Manchester United & Leeds defender diagnosed with dementia' (*BBC Sport*, 23 February 2021).

games that he played in during the successful 2003 competition,⁵⁴ while former Wales coach Warren Gatland ominously stated that “Even I’m scared watching the collisions. We’ve not seen the impact rugby will have on these young men.”⁵⁵

The picture becomes clearer with every incident; the practical images of former players suffering years, and decades, after they have ceased playing their professional sport. In the introduction⁵⁶ three players were mentioned; they are just the tip of the iceberg, with new instances being reported on a regular basis. It will be seen that Gatland’s comments underpin the even greater problem which is that the older players were participating in an amateur era; it will be seen that the greatest likelihood of CTE impacting on a generation of players will be those who have played during the professional era; those who are still playing, and those, without change, who will continue to play in the generations to come.

The Mental Health Impact

The potential problems do not stop at the physical; the mental health implications provide further reasons to find a clear connection between sports concussion and the potential for significant problems⁵⁷ as there have been additional issues with recent reviews which have demonstrated that there is a potential link between concussion and mental health outcomes⁵⁸ with Finkbeiner concluding that the majority of studies suggested a link between ‘depressive symptoms’ and a record of concussion injuries.⁵⁹ Similar studies found links between later-life depression and multiple prior concussions.”⁶⁰ There is also the potential for this to be significantly aggravated in the case of elite athletes who have the potential to have a significant fall from their previous status, not only professionally but personally. In July

⁵⁴ BBC Sport ‘Concussion in sport: More former rugby union players prepare to take action’ (*BBC*, 17 December 2020).

⁵⁵ *Progressive Rugby ‘Rugby in Crisis’ (Progressive Rugby)*.

⁵⁶ *Ibid* 12.

⁵⁷ *Ibid* 12.

⁵⁸ Nathan Finkbeiner et al ‘Knowing What we don’t know: long term psychiatric outcomes following adult concussion in sports’, (2016) *Can J Psychiatry* 61(5) 270.

⁵⁹ *Ibid*.

⁶⁰ Geoff Manley ‘A systematic review of potential long-term effects of sport related concussion’ (2017) *Br J Med* 51:1969, Conclusion.

2022, former Wales rugby union captain, Ryan Jones, was diagnosed with probable CTE at the age of 41, having only retired in 2015. In an emotional interview, he stated, amongst other things, that “I lived 15 years of my life like a superhero and I'm not. I don't know what the future holds.”⁶¹ This indirect link to the non-physical impact of concussive events was given a stronger grounding when he revealed that the reason for his decision to resign from an executive role at the Welsh Rugby Union was prompted by a diagnosis of depression, the cause of which has been linked to this new diagnosis.⁶² In an even more tragic case, the death of rugby player, Siobhan Cattigan following concussive incidents in the game, led to her father noting that “They fixed her broken bones but turned their backs on Siobhan’s broken brain.”⁶³ Again this underpins the idea that there is a strong focus on the visible injuries but far less focus on the invisible injuries, which can in both the short and long term have the worst consequences.

To develop these studies, Rice’s⁶⁴ review sought to extend those of Finkbeiner and Manley and focused on elite athletes, including those who were active at the time and those who were retired. Rice found that there was “evidence of acute/subacute associations between concussion and depression symptoms”⁶⁵ and “some evidence of longer term effects for elevated depression symptoms in retired athletes”⁶⁶ with “depression [being] the most frequently considered and reported mental health outcome in the concussion research.”⁶⁷ The recommendation that followed the analysis was that it was essential to ensure that “any prolonged concussion recovery must include monitoring of mental health symptoms, in particular depression.”⁶⁸ These analyses clearly highlight that there is a mental situation to be considered as well as a physical one.

Summary

⁶¹ BBC Sport, ‘Ryan Jones: Ex-Wales captain reveals early onset dementia diagnosis’ (*BBC Sport*, 17 July 2022)

⁶² Ibid

⁶³ Ben James, ‘Siobhan Cattigan death: Family of Scotland rugby player tell how 26-year-old ‘crumbled before their eyes’ in harrowing interview’, *Wales Online* (22 July 2022).

⁶⁴ Simon Rice et al ‘Sport Related Concussion and Mental Health Outcomes in Elite Athletes: A Systematic Review’ (2018) *Sports Med* 48:447, 466.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

Concussion, then, can be seen as an insidious occurrence, with a concussive event being comparatively easy to incur, with potentially mild symptoms, but with the potential to lead to consequences in the long-term that have a significant and devastating impact upon the individuals who have suffered from it. Further, there is a particular danger when an individual suffers multiple concussive events, with the effect of developing CTE, as demonstrated both visually and in the narrative.

Specific Impact of Concussion in Sport

General incidence of concussion in sports

Concussion is an increasing problem with wide social implications that impacts on every corner of society. Studies show significant increases in recent years of visits to emergency departments⁶⁹ and that “traumatic brain injury (TBI) is the leading cause of disability in children older than 1 year and is a leading cause of death in children.”⁷⁰ However, within the ambit of this thesis, it is also clear that it is a particular problem for sport, and this can be demonstrated through both general and specific studies.

There have been broad studies as to the impact of concussion injuries in sport, although they have provided varied figures. The strongest links have been demonstrated through surveys involving minors. In this context, the link between head injuries to sport was demonstrated by Purcell’s study which showed that in Canada 53.4% of head injuries in children 10 to 14 years of age and 42.9% of head injuries in adolescents 15 to 19 years of age were sport-related.⁷¹ This picture extends to other jurisdictions⁷² with Yang’s research showing that

⁶⁹ Ibid n. 12.

⁷⁰ Todd Glass et al ‘Traumatic Brain Injuries and Computed Tomography Use in Paediatric Sports Participants’ (2015) *AJEM* 33, 10, 1458, Johna K Register-Mihalik et al ‘Considerations for Athletic Trainers: A Review of Guidance on Mild Traumatic Brain Injury Among Children from the Centers for Disease Control and Prevention and the National Athletic Trainers Association’ (2019) *Journal of Athletic Training* 54(1) 12.

⁷¹ Ibid Purcell, n. 21

⁷² Mersine Bryan et al ‘Sports- and recreation- related concussions in US Youth’ (2016) *Paediatrics* 138(1), Mallika Marrar, et al ‘Epidemiology of concussions among United States high school athletes in 20 sports’ (2013) *Am J Sports Med* 47 (10) 15.

“each year in the United States an estimated 1.1-1.9 million sports and recreation related concussions occur among children aged 18 years and younger.”⁷³

The Center for Disease Control and Prevention recently estimated that more than 2.6 million children 18 years and younger are treated in emergency departments (EDs) for nonfatal sports- and recreation-related injuries annually, with approximately 6.5% of these injuries being TBIs.⁷⁴ There is also a significant emphasis on sports as a cause of the registered concussive events in hospitals, with surveys demonstrating that 30% of concussive events treated in hospitals for people between the age of 5 and 19 are as a result of sports.⁷⁵

These numbers are not limited to minors, as was seen by the research of Marshall,⁷⁶ who wrote that “every year between 1.6 million and 3.8 million athletes in the United States suffer a concussive injury resulting from sports participation”⁷⁷ while Katz et al report that “nearly four million sport and recreation-related concussions occur in the US annually.”⁷⁸ Katz’s research did go on to note that while around a third of athletes contacted reported suffering at least one concussion before studying at a college level, only 2.7% of college athletes reported more than three concussions. This number was of particular importance as Katz emphasised that three concussions was an indicator of greater future risk.⁷⁹

Most recently, there have been even greater strides towards clarity on this subject, with Nowinski et al stating that “we have the highest confidence in the conclusion that [repeated head injuries] causes CTE.”⁸⁰

⁷³ Jingzhen Yang ‘New and Recurrent Concussions in High School Athletes Before and After Traumatic Brain Injury Laws, 2015-2016’ (2017) *AJPH* December Vol 107 No 12 1916, 1916.

⁷⁴ *Ibid* Glass n. 70, *ibid* Register-Malik n. 70.

⁷⁵ Lisa Bakhos et al ‘Emergency department visits for concussion in young child athletes’ (2010) *Paediatrics*; 126 (3): E550.

⁷⁶ Cameron Marshall, ‘Sports-related concussion: A narrative review of the literature’ (2012) *J Can Chiropr Assoc* Dec 56(4); 299.

⁷⁷ *Ibid*, Introduction.

⁷⁸ Barry Katz et al ‘Baseline Performance of NCAA Athletes on a Concussion Battery: A Report from the CARE Consortium’ (2018) *Sports Med* 48: 1971, Introduction.

⁷⁹ *Ibid*, Results.

⁸⁰ Christopher Nowinski et al ‘Applying the Bradford Hill Criteria for Causation to Repetitive Head Impacts and Chronic Traumatic Encephalopathy’ (2022) *Front Neurol* 22 July 2022.

The studies, which primarily considered American sports, also explored the sports that had the highest incidence of sports-related concussion, stating that American Football had the highest incidence rate, followed by hockey and lacrosse.⁸¹ It is clear that “sports related concussion is common in contact and collision sport athletes.”⁸² and the numbers are made even more stark when compared to non-sporting incidents as “in the US it is estimated that 300,000 sports-related concussions occur annually. Among individuals 15–24 years of age, sports are second only to motor vehicle crashes as the leading cause of concussion.”⁸³ Beyond this generality, however, there are several problems with tracking the incidence of concussion in sports, including the reluctance of players to report the event, which is discussed below.⁸⁴ However, an objective issue is highlighted by Williamson which emphasises the point made earlier⁸⁵ that there is no certainty as to how concussion, or specifically a sports-related concussion, will manifest itself, noting that “student-athletes with an SRC may experience a myriad of symptoms which are highly variable based on several factors including sex, age and number of previous concussions.”⁸⁶ Likewise, as will be focused upon later,⁸⁷ there is a significant problem with players being unaware of concussion until the more serious consequences occur. This is not uncommon in medical research with Nowinski’s recent work stating that the evidence is “imperfect and, like all similar research, it will remain imperfect in perpetuity.”⁸⁸ Therefore, while it can be stated that there is a problem, the full extent of the problem is unlikely to be realised. The numbers demonstrate what is known, and even without the reasonable assumption that the figures may be worse than they appear, they are certainly bad enough to take very seriously.

⁸¹ John Lloyd and Frank Conidi ‘Brain Injury in Sports’ (2016) *Journal of Neurosurgery* Volume 124 March 667, Published online October 16, 2015.

⁸² Lindsay Nelson et al ‘Age Difference in recovery After Sport-Related Concussion: A Comparison of High School and Collegiate Athletes’ (2016) *Journal of Athletic Training*; 51(2) 14, Ibid Bakhos (n. 75), Daniel Daneshvar et al ‘The epidemiology of sport related concussion’ (2011) *Clinical Sports Medical Journal* 30(1): 1.

⁸³ Luke M Gessel et al, ‘Concussions amongst United States high school and collegiate athletes’ (2007) *J Athletic Training* Oct-Dec; 42(4) 495, Introduction.

⁸⁴ See Page 48.

⁸⁵ Ibid 21.

⁸⁶ Ibid Williamson (n. 21), Introduction.

⁸⁷ See Page 54.

⁸⁸ Ibid n. 80.

The Gender Divide

Before moving on to individual sports, it is noteworthy that the studies reviewed have primarily concerned male athletes, even in sports where female participation is also high. The studies that have been done on female concussion injuries are fewer, but they are important to consider as in the first instance they corroborate the problem that has been identified, which is that concussion injuries are growing more frequent and more serious. Gilmartin et al found that Irish female concussion cases presented 15 times between 2017 and 2018 compared to once between 2007 and 2008⁸⁹ while McGroarty's study sought to examine reasons that "may predispose female athletes to worse outcomes after concussions in comparison to male athletes."⁹⁰

The second instance issue suggests an even greater concern that may exist. McGroarty's review hinted at "female-specific head impact kinematics"⁹¹ that may leave female players at greater risk of the long-term consequences of concussion that have already been discussed⁹² while a 2011 study of NCAA athletes found that collegiate female athletes were actually more at risk than their male counterparts⁹³ in three of the researched sports: ice-hockey,⁹⁴ basketball and football. Research into the reasons for this increased vulnerability has not narrowed down the causes to any one reason but has, possibly more worryingly, identified numerous potential causes, with Snedeker identifying a range of possibilities, including the "axonal infrastructure in males, sex differences in cerebral blood flow, variability in level of steroid hormones, and stronger, larger necks in males."⁹⁵ Williams supports this, noting that

⁸⁹ Stephen Gilmartin and J Ryan, 'A Temporal Comparative Study of Women's Rugby Injuries Presenting to an Emergency Department' (2019) *Ir Med J*, Vol 112; No 9, P1004.

⁹⁰ Neil McGroarty et al, 'Sports-Related Concussion in Female Athletes: A Systematic Review' (2020) *The Orthopaedic Journal of Sports Medicine*, 8(7), Conclusion.

⁹¹ *Ibid*, Biomechanics of Impacts.

⁹² *Ibid*.

⁹³ Tracey Covassin, 'The Female Athlete: The Role of Gender in the Assessment and Management of Sport-Related Concussion' (2011) *Clin Sports Med* 30, 126.

⁹⁴ The paper acknowledges (126) that the ice-hockey results may be distorted as they reflected three years of data as opposed to sixteen years for the other sports.

⁹⁵ Katherine Snedeker et al, 'Understanding Traumatic Brain Injury in Females: A State-of-the-Art Summary and Future Directions' (2021) *J Head Trauma Rehabil* Vol 36 1 pp E1.

it is clear that the brain, the crucial organ in concussive injuries, are different for male and females and that there is inevitably going to be a difference in the reaction.⁹⁶

It is clear from both Snedeker's⁹⁷ and McGroarty's⁹⁸ work that the comparative amount of research on concussion injuries is far lower for female sport than male sport. Yet the research that exists does confirm that it is a problem that is as relevant for the female sports as for males, and that it may even be that when considering the particular vulnerability of women, the relevant parties will have to take greater care in respect of their duties, in order to ensure that the participants are protected.

Tracking Concussion Incidence in Individual Sports

The normal way in which incidents of injury such as this are tracked by medical research is to identify the rate of injury or through the population rate by dividing the number of events by the amount of person time observed while in sport this is typically done by playing time.⁹⁹ This presents a number of incidents, on average, per 1000 hours of participation which can then be roughly tracked to the number of games by dividing 1000 by the time spent on each game and the players who would participate in that game. This is of course not precise as most games do not last the exact amount of time stated. For example, a football match is ninety minutes long, with twenty-two players which theoretically amounts to thirty-three hours but there may be additional factors including injury time, extra time, and players sent off. However, it can be said that 1000 hours equates to approximately thirty-three games of football or twenty-five games of rugby.

The difficulties of precise calculation do require caution, as does the previously stated uncertainty in identifying whether concussion has occurred,¹⁰⁰ as this has led to varied figures

⁹⁶ Jess Hayden, 'Long-term brain damage likely a significantly bigger issue in women's rugby than men's, says lead concussion doctor' (*Rugby Pass*, 14 Dec 2020).

⁹⁷ *Ibid* n. 95.

⁹⁸ Neil McGroarty et al, 'Sports-Related Concussion in Female Athletes: A Systematic Review' (2020) *The Orthopaedic Journal of Sports Medicine*, 8(7).

⁹⁹ Zachary Kerr et al 'Epidemiologic Measures for Quantifying the Incidence of Concussion in National Collegiate Athletic Association Sports' (2017) *Journal of Athletic Training*; 52 (3) 167, Introduction.

¹⁰⁰ *Ibid* 18.

being provided depending on the medical survey. The surveys do, however, suggest a clear trend with sufficient similarity between the figures. Koh's broad study of contact sports found "the highest concussion incidence in men's ice hockey followed by American Football, rugby and football (soccer),¹⁰¹ although in more recent studies, ice hockey has fallen below the first two of these. More recently, American Football has been identified by Campbell at 8.2 concussions per 1000 hours¹⁰² with another survey stating that a player has a 7.4% chance of receiving a concussion while playing.¹⁰³ Rugby is approximately half of this, with two surveys placing the figure at 4.33¹⁰⁴ and 4.73¹⁰⁵ although Cheradame's study that focused on the French Premier rugby competition over five years placed the figure at a much higher 10.4.¹⁰⁶ The figures for football are much lower, with the studies being more consistent, with three surveys providing numbers of 1.19,¹⁰⁷ 1.24,¹⁰⁸ and 1.7.¹⁰⁹

Breaking this down, the studies suggest that for every thirty-three football games there will be approximately 1.24 concussive events, and for every twenty-five rugby games there will be 4.3 concussive events. Or, to use the top division of the sports, there will be those numbers of concussive events three times every two cycles of competition. For football, this would represent 23.56 concussive events over the league season, in the Premier League alone, or 23 players receiving concussions that could lead to significant long term health problems of which they are completely unaware. With every club registering twenty-five players, this equates to approximately 5% of the Premier League participants, every season, receiving a

¹⁰¹ JO Koh, JD Cassidy, EJ Watkinson 'Incidence of concussion in contact sports: a systematic review of the evidence' *Brain Inj* 2003; 17(10) 901, Introduction.

¹⁰² Richard A Campbell et al 'Risk of Concussion During Sports Versus Physical Education Among New Mexico Middle and High School Students' *AJPH* January Vol 108 No 1 94.

¹⁰³ Christina Mack 'Epidemiology of Concussion in the National Football League, 2015-2019' (2021) *Sports Health* April, Results.

¹⁰⁴ *Ibid* n. 39.

¹⁰⁵ Andrew Gardner et al, 'A Systematic Review and Meta-Analysis of Concussion in Rugby Union' (2014) *Sports Medicine* December, Volume 44, Issue 12, 1717.

¹⁰⁶ Jeremy Cheradame et al, 'Incidence and Risk Factors in Concussion Events: A 5-year study in the French Top 14 rugby union championship' (2021) *The American Journal of Sports Medicine*:49(7), Results.

¹⁰⁷ Frederik Verdung et al "Concussion incidence and recovery in Swedish elite soccer- prolonged recovery in female players' (2020) *Scandinavian Journal of Medicine and Science in Sports* Volume 30 Issue 5, 947, Introduction.

¹⁰⁸ *Ibid* n. 39

¹⁰⁹ James Mooney et al 'Concussion in soccer: a comprehensive review of the literature' (2020) *Future Medicine* Vol 5 No 3, Epidemiology.

concussion, and placing their health and life at risk.¹¹⁰ These figures are also supported by the practical numbers. Kerr's study showed twenty-five American Football concussions being reported in a single season.¹¹¹ This roughly equates to the figures broken down from Prien and Campbell's studies.

Explanation for the increased figures

Hume's study went on to report that when compared to non-contact sport participants, and non-professional rugby players, there was a clear hierarchy with the professional players performing worst, then the community players, and then the non-contact sport players. This applied in respect of "complex attention, processing speed, executive functioning, and cognitive flexibility."¹¹² This is particularly relevant for Rugby Union, which until the mid-nineties was an amateur sport until it became professional, and the figures taken before and after the introduction of professionalism demonstrate a clear link to the increase of concussion injuries. Garroway's study revealed that while there was a reduction in playing numbers, there was an almost doubling of injuries incurred by the players.¹¹³

One of the possible explanations for the increase in concussion injuries, which is equally applicable to Rugby Union and, to a lesser degree Football, is another, more public, problem that is confronting sports. Brief mention has already been made of the second significant problem that is facing contemporary sports, that of doping,¹¹⁴ and while this thesis is not addressing this issue, it is worth thinking about why athletes resort to doping. The self-evident answer is to gain an advantage, and the advantage that anabolic steroids typically provides is "extra testosterone. The goal of taking anabolic steroids is to increase muscle mass."¹¹⁵ This is an important point; anabolic steroids do not increase skill as such, instead they increase muscle and thus weight of the players which has also been a phenomenon that has occurred

¹¹⁰ A Premier League team may register up to twenty-five players, although some may not play and others (under the age of 21) can be played without needing to be registered.

¹¹¹ Ibid n. 98, 167.

¹¹² Patricia Hume et al 'A Comparison of Cognitive Function in Former Rugby Union Players Compared with Former Non-Contact-Sport Players and the Impact of Concussion History' (2017) *Sports Med* 47:1209.

¹¹³ W.M Garroway et al 'Impact of Professionalism on injuries in rugby union' (2000) *British Journal of Sports Medicine*; 34: 348.

¹¹⁴ Ibid 10.

¹¹⁵ Benjamin Wedro 'Steroid Types, Side Effects and Treatments' (*E-Medicine Health*, 26 February 2020)

naturally, ascribed to “specialization of training and nutrition programs from the high school level to the pros.”¹¹⁶ The purpose behind this was summarised by Norton and Olds who stated that “athletes in many sports have been getting taller and more massive over time...in open-ended [contact] sports, more massive players have an advantage”¹¹⁷

The stark facts are startling. In the 1960s an average American Football defence player weighed 265 pounds compared to the 2000s when the average was 288.7 pounds but even this is small compared to the offensive players who jumped from an average 250 pounds to 315 pounds.¹¹⁸ In Rugby Union, the average weight of a forward has increased by 9kg and the average weight of a back by 8.5kg.¹¹⁹

The graphic realisation is that as players get bigger, so their capacity to injure another player also grows,¹²⁰ as “with the increased emphasis on player size and level of competition, however, comes an increase in the amount of force a player will exert when colliding with the wall, floor, net, or even upon player contact.”¹²¹ This is of particular concern to the question of concussion as when a player does increase weight, whether through muscle capacity or not, the skull is not an area of the body that increases in size or protection. Therefore, the target is the same, but the weapon is correspondingly bigger. Deane carried out a study into the correlation between an increase in body mass and the infliction of injury and found that not only was there a link between increased weight and rate of injuries but that “29% of the rise in injury rates during game play from 1988-2004 was due to increases in weight alone.”¹²²

Limitations of the Medical Data

¹¹⁶ Brian Dalek, *Mens Health* ‘The Evolution of the Football Player’ (*Mens Health*, January 4, 2013)

¹¹⁷ Kevin Norton and Tim Olds, ‘Morphological evolution of athletes over the 20th century: causes and consequences’ (2001) *Sports Med*; 31(11): 763, 763.

¹¹⁸ Kathleen O’Brien, ‘It’s not your imagination. Here’s how much bigger NFL players have got over the years.’ (*Inside jersey* May 16, 2019).

¹¹⁹ Mike Walden, ‘Are Rugby Players Bigger?’ (*Sports Injury Clinic*).

¹²⁰ Erin McMurray (2004). ‘I expected common sense to prevail: *Vowles v. Evans*, amateur rugby, and referee negligence in the U.K.’ *Brooklyn Journal of International Law* 29(3), 1307.

¹²¹ Kimberly Deane, ‘Bigger Bodies, Bigger Bruises: How men’s collegiate hockey player sizes affect injury rates 1989-2004’ (2012), (*University of New Hampshire Repository Sprint*) 41.

¹²² *Ibid*.

It has already been noted¹²³ that the surveys, while broadly consistent in acknowledging that contact sports can lead to concussions and that it is more likely now than previously, are inconsistent in the precise data that they provide. Each of the surveys acknowledges that their data has limitations. Broadly, these limitations come down to two crucial factors.

The first of these is the lack of sufficient “data to investigate the role played by the intervals between successive concussions on subsequent symptoms.”¹²⁴ The data focuses on incidents that occurred on the pitch, and whether they led to concussion injuries or not, and they do not take into account the possible differences in how the individuals were treated and whether or not this has an impact on the long term nature of concussion. However, while this represents an information gap, it does not affect the critical point which is that concussive events are not injuries that can be treated as, for example, a twisted ankle or a broken leg can be. Once the concussive event has occurred, the subsequent actions can make the event worse or not make it worse. There is a legitimate discussion concerning the subsequent actions that can and should be taken, but this thesis is focusing on the need to avoid the concussive events from occurring in the first place.

The second limitation of the available data is that it is restricted to those concussions that were reported to or were identified. This will be addressed in more detail in a later Chapter¹²⁵ but it is a recurring theme of concussion injuries which is that they are frequently under-reported and as they lack distinctive external features, the numbers are likely to be understated rather than over-reported. While this does represent a weakness in the medical literature, it is one that serves to emphasise the danger of concussion, as any adjustment of the figures would need to be upwards rather than downwards.

In spite of these limitations, there is a clear pattern that appears in the literature, which is that concussions are more frequently caused through contact sports than non-contact sports, and that while the short-term problems caused by concussive injuries may be minor, the long-

¹²³ Ibid 17.

¹²⁴ Jian Chen et al ‘Differential Effect of Recurrent Concussions on Symptom Clusters in Sport Concussion Assessment Tool’ (2019) *Journal of Sport Rehabilitation* 28, 735.

¹²⁵ See Page 265.

term consequences have the potential to be extremely serious. Further, the short-term problems may be rightly elevated to a higher level of seriousness as multiple concussions can lead to serious problems and even a single concussion may be sufficient to manifest itself in longer term problems at a later date. In short, it is a problem in sport that needs to be addressed, but the problem can be better identified through an analysis of the specific sports and their relationship with concussion injuries.

Rugby Union

The Action

The first sport is Rugby Union. One player is the ball carrier at any one point, and the opposition seek to block his or her progress. The primary target is the ball carrier, although there are other situations where players can come into contact, including rucks, mauls, and scrums. Only the ball carrier, however, can be legitimately targeted and there are clear rules on how that player can be tackled, which are represented by the description of a 'tackle'. A significant issue, however, is that there are many ways beyond the direct impact of a tackle, where a concussive event can be caused. It was stated earlier¹²⁶ that a blow to the body can cause the whiplash effect even without direct head contact and the nature of the tackle allows a player to be driven backwards and into the ground. In other sports, the tackle leads to the play being over, while in rugby union the play continues, with potential body stresses increasing until a stop in play. The continuous nature of Rugby Union also means that a player can be involved in several contacts within the same play, theoretically suffering multiple concussive events before the relevant authorities become aware of the situation and are able to remove the player.

Statistics

In Rugby Union, the statistics have been comparatively thin, primarily because most of the surveys have been carried out in America, where Rugby Union remains a minority sport.

¹²⁶ See Page 17.

However, there have been some robust studies on concussion within sport, particularly linked to the question of the increase in these since professionalism.¹²⁷ Garroway's investigations showed a clear increase in injuries generally, and this is replicated when considering concussion specifically. Gardner's research into the subject revealed an overall incidence of match-play concussion in men's rugby-15s of "4.73 per 1,000 player match hours"¹²⁸ which translates to approximately one concussion for a player every four matches that are played. Rafferty looked specifically at the change between the 2012/2013 season and the 2015/2016 seasons, and found that only three seasons later, the situation had got far worse. Working from this survey, which found a concussion incidence of 9.9 concussions every 1000 match hours in 2012/2013, Rafferty identified an increase to 21.5 concussive events per 1000 match hours by 2015/2016. These figures were reflected by a 2021 Report which focused on the United Kingdom and Australia, and placed the former figure at 20.4 concussive injuries per 1000 match hours and the latter at 14.8.¹²⁹ On the same calculation as previously, this translates to at least one concussive event in every match that is played.¹³⁰ Extrapolating from this, Rafferty takes the view that headlines the article, which is that on average a professional player will have suffered a concussion after playing 25 matches.¹³¹ In the Pro 14 alone, the clubs play sixteen matches in a season and, taking into account cup, European and international matches, the average injury rate suggests that a player will receive a concussion every season.

The magnitude of the situation is summarised by Prien's recent work which emphasises that that "when comparing football, rugby, ice hockey, and American Football, the highest concussion rate was found in rugby."¹³² This clarifies the extent to which this is a problem within the sport. These figures are supported by the fact that in 2018 reports emerged

¹²⁷ Ibid n. 112. and emphasised recently with players shown to have developed abnormal brain formations after just one season playing the game, Thomas S Owens et al, 'Contact events in rugby union and the link to reduced cognition: evidence for impaired redox-regulation of cerebrovascular function', (2021) *Journal of Experimental Physiology* Volume 106 Issue 9.

¹²⁸ Ibid n. 105.

¹²⁹ Karl Zimmerman et al, 'White matter abnormalities in active elite adult rugby players' (2021) *Brain Communications* Vol 3 Issue 3.

¹³⁰ James Rafferty et al, 'On average a professional rugby union player is more likely than not to sustain a concussion after 25 matches,' (2019) *British Journal of Sports Medicine*; 53: 969.

¹³¹ Ibid.

¹³² Ibid n. 39.

confirming that in the sport, concussion was the most reported match injury "for the sixth straight season."¹³³

Medical research into Rugby Union has also focused on youth sports, as an area of particular concern, and this is an aspect that will be considered when analysing the extent to which a participant has the capacity to take responsibility for their actions in entering the field of play. A review of the concussion surveys indicated that rugby had by far the highest percentage of concussion reported with 4.5 for every thousand instances, while hockey and American Football followed, with 1.20 and 0.53 respectively. These figures broadly align with research into adult Rugby Union where "results of the meta-analysis revealed an overall incidence of match-play concussion in men's rugby-15s of 4.73 per 1,000 player match hours."¹³⁴ Clearly, this a problem that faces both junior rugby and senior rugby.

The problems get even worse when the impact of concussion within rugby is considered. Hume's study, which compared different sports noted that the "rugby group performed worse on composite memory"¹³⁵ suggesting that the consequences for the brain are more serious than in other sports. This is also backed up by Rafferty's work that emphasises that concussive injuries are 38% more likely to lead to greater injuries at a later date than non-concussive injuries,¹³⁶ reiterating the crucial point about CTE, which is that the greater risk is not the immediate injury, but the later complications.

World Rugby, who are the governing body for Rugby Union, ordered a review of concussion injuries in 2016¹³⁷ and this review highlighted a concern that is particularly troubling for this sport, which is that while the traditional view was that the greater risk was to the player being tackled, the tackler themselves were in fact in even greater jeopardy, because the impact of two colliding forces would reverberate to both of the participants in the tackle.¹³⁸ The reason

¹³³ BBC Sports, 'Rugby Injuries: Eight-point plan to reduce risks involves review of laws' (*BBC Sport*, 26 March 2018).

¹³⁴ *Ibid* n. 105.

¹³⁵ *Ibid* n. 112112, Results.

¹³⁶ *Ibid* n. 130.

¹³⁷ World Rugby 'New measures to limit contact with the head announced' (*World Rugby*, 14 December 2016).

¹³⁸ Martin Rafferty et al, 'Getting Tough on Concussion: how welfare-driven law change may improve player safety- a rugby union experience' (2020) *British Journal of Sports Medicine* Published Online First: 12 August.

for this was the “energy transfer in the tackle”¹³⁹ In order to address the situation, therefore, it is not enough to merely look to protect the player who is receiving the tackle, but also the player who is making the tackle.

The picture that is painted is bleak, and this spectre possibly is a reason for the recent litigation that has been discussed in respect of Rugby Union,¹⁴⁰ together with the establishment of Progressive Rugby¹⁴¹ to lobby for a safer sport. It is accepted that, the governing bodies have made some efforts to adapt to the situation. It will be argued, however, that these have been insufficient.

Preventative Measures

World Rugby have endeavoured to take some steps to address the increased concerns with the situation, choosing to take two paths, one dealing with management and one with reduction. In respect of the former, they have followed the Protocol path, introducing the Concussion Protocol¹⁴² which sets out the steps that must be taken to deal with concussion injuries once they occur. Broadly speaking, if the official becomes aware of a player suffering, or potentially suffering from a head injury, then the official will remove the player from the field requiring a Head Injury Assessment. A temporary replacement can be brought on, and after a ten-minute assessment, the player will only be allowed to return if the medical staff are satisfied that there is no evidence of a concussion.

Clearly, this is better than allowing a player with concussion to remain on the pitch. However, it does nothing to prevent a concussion injury from occurring in the first place. Using Rafferty’s figures, a player who would previously have suffered at least once concussion after 25 games, would still, with the Protocol, have suffered that concussion. The Protocol prevents a second concussion in the same game, and also prevents the player from playing in a

¹³⁹ Ross Tucker et al, ‘Risk factors for head injury events in professional rugby union: a video analysis of 464 head injury events to inform proposed injury prevention strategies’ (2017) *British Journal of Sports Medicine*; 51: 1152, Results.

¹⁴⁰ Rugby World Staff, ‘World Rugby facing concussion lawsuit’, (*Rugby World*, December 8, 2020).

¹⁴¹ Progressive Rugby ‘Home Page’ (*Progressive Rugby*).

¹⁴² World Rugby ‘World Rugby Concussion Guidance’ (*World Rugby*).

subsequent game until they have passed the necessary criteria to confirm that they have recovered.

Therefore, it is the second avenue that they have followed which must, again, be considered. Here, World Rugby have again taken two different approaches. The first has been to gradually reduce the height to which players are permitted to tackle. In the past decade, tackles that would have previously been approved, or even encouraged, like the spear tackle whereby a player is 'speared' or 'dumped' into the ground, have been removed from the game,¹⁴³ and there have been discussions about lowering the height further, with a trial currently ongoing which only permits tackles at waist height rather than any higher.¹⁴⁴ While it is promising that trials such as this have been considered, there is a cautionary tale in a previously abandoned trial which was mentioned in the same article, where the number of concussions actually increased as a result of the rule change. There are multiple potential reasons for this, ranging from the difficulty of calculating a tackle in a high-speed, intense situation, through to the difficulty with changing the mind-set of players who have been tackling in the same way for their entire careers.

One way that World Rugby have attempted to avoid this problem has been to focus instead on sanctions for players who broke the existing rules, with a view to raising awareness of the dangers of challenges to the head, and the upper body by increasing the frequency of yellow and red cards that remove players from the game temporarily or permanently.¹⁴⁵ The article reports that at the 2019 Rugby World Cup, there was a significant increase in sanctions, and a reduction in concussion injuries suffered, a reduction by 28%.¹⁴⁶ Clearly this is a positive start, but it fails to address clearly the overall risks of the tackle at any height, given the previous discussions about the effect of contact with any part of the party, not merely the head.

¹⁴³ Rugby Laws 2021 Rule 10.4(j).

¹⁴⁴ BBC, 'World Rugby to test waist-height tackles as part of trial' (*BBC Sport* 8 August 2019).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

In Rugby Union, therefore, there has been an acknowledgement that there need to be changes, and there has been a focus on managing concussions. However, the rule adjustments that have been made to try to reduce concussions, while successful, have not managed to get them down to a significantly lower level, meaning that there will still be a considerable number of players who are at risk of concussion, CTE, and future serious consequences.

Association Football

The Action

At first glance, Association Football, hereafter Football, would seem to be an unusual accompaniment for Rugby Union, as that sport involves legitimate tackles to the upper body which increase the likelihood of a player's head, and by extension brain, being at risk. Football, by comparison, only permits tackles at ground level, and any tackle that is above the foot would be against the rules.¹⁴⁷ While it is nominally a contact sport, with shoulder barging and tussling for position being other incidents of contact, there are fewer challenges that would be of specific concern than in either of the other two sports. It is true that players have suffered serious injury/illness on the pitch, with Fabrice Muamba being technically dead after suffering a heart attack,¹⁴⁸ and Christian Eriksen suffering a cardiac arrest during Denmark's Euro 2021 game against Finland.¹⁴⁹ Yet while these injuries fall closer to the type of injury that we are considering, as they are 'hidden injuries', it does not fall within the range of discussion for concussion.

There are two actions that can lead to issues in respect of concussion, and both have to do with the action of heading the football. This action is both permitted and encouraged as it forms an important aspect of the game, both defensively and offensively. The action has been

¹⁴⁷ The Football Association, *Laws of the Game of Football 2021*.

¹⁴⁸ BBC 'Alan Shearer: Football, Dementia and Me', (*BBC iPlayer*).

¹⁴⁹ Sky News, 'Christian Eriksen thanks well-wishers as he recovers from cardiac arrest- 'it means a lot', (*Sky News*, 15 June 2021).

scrutinised recently thought because of two problems. The first, which is not the main subject of discussion is that when two players jump for the ball, it is possible for a collision of heads to occur, often with ferocity as they actively compete for the ball. This is possible with opposing players, but also with members of their own team.¹⁵⁰ This concern has been around for longer,¹⁵¹ but with the emerging concerns over concussion, there has been a greater scrutiny of this consequence.¹⁵² Maher emphasised the dangers of this in 2014, stating that “heading the ball is considered to increase the risk for concussions due to incidental head-to-head or elbow to head contact.”¹⁵³ However, while this is a relevant point to consider, it has not been regarded as a permeating concern, and it is the action itself which has been under the spotlight in recent times.

This is of particular importance because it is a regular part of both practice and play and has been since football’s inception. The potential issue first came to prominence due to former England captain Alan Shearer who participated in concussion research with a view to determining the potential dangers. Shearer was a top level footballer in the 90s and was said to have practise[d] heading 150 times a day and suffered regular head-to-head clashes on the pitch.¹⁵⁴ Talking about medical research that he has been involved with, Shearer stated that he was “concerned that I might develop dementia, it is definitely something that bothers me, that I might not have a future because of football.”¹⁵⁵ Shearer specifically referred to the potential issues with practice, stating that during one practice session it would be normal to be heading the ball between 30 and 50 times.¹⁵⁶

This action has similar features to both Rugby Union as it is a common part of the game. Players will head the ball when attacking or defending set pieces, or when the ball is hit long. The difference between football and the other sports is that there may be no competition at all. While there will likely be another player in the vicinity, the potential risks occur even

¹⁵⁰ Simon Stone, ‘Rui Patricio: Wolves Goalkeeper ‘going to be OK’ after head injury’ (*BBC Sport*, 16 Mar 2021).

¹⁵¹ Paul McCrory, ‘Brain Injury and heading in soccer’ (2003) *British Medical Journal* 327 (7411) 351.

¹⁵² Headway, ‘Headway reiterates calls for concussion subs in football’, (*Headway*, 20 July 2000).

¹⁵³ Monica Maher et al ‘Concussions and heading in soccer; a review of the evidence of incidence, mechanisms, biomarkers and neurocognitive outcomes’ (2014) *Brain Inj* 28(3) 271, Effects of Heading.

¹⁵⁴ Sarah Knpton ‘Alan Shearer: I fear I may develop dementia from years of heading heavy footballs’ (*The Telegraph* 9 November 2017).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

without another player in sight. Therefore, football is unique, of the three sports to be considered, as it involves, technically, a player inflicting injury upon themselves rather than another player inflicting it upon them.

Statistics

While concussion has been on the radar for Rugby Union for some time, football has been subject to fewer detailed surveys with the tests undergone by Shearer representing the primary contribution to the results. Shearer submitted to tests to analyse whether or not heading a football has the potential to contribute to dementia, with the results demonstrating that “standard soccer heading results in immediate and measurable alterations in brain function”¹⁵⁷ with the potential that “the acute changes in corticomotor inhibition, accompanied by cognitive changes, following the sub-concussive impact of football heading raise concerns that this practice, routine in soccer, may affect brain health.”¹⁵⁸

The study that Shearer was involved in involved examining his brain but also those of a field of former footballers, both dead and alive. Stewart noted that in the study of footballers, 220 out of 1,180 had died of neurodegenerative disease-related causes compared to 228 from the control group. What was concerning to Stewart was that there were three times as many people in the control group and therefore “we expected to see 3 times the number of deaths.”¹⁵⁹ Instead there were roughly the same number, suggesting that if the groups had been the same number, the football players would have been three times as susceptible to the concern.

The study set out to determine whether professional footballers are at greater risk of getting and dying from dementia and provided compelling evidence that there is a significant increased risk of concussion within Football. What the survey did not specifically assist with was determining the cause of the concussive injuries, with Stewart noting that this was “very

¹⁵⁷ Thomas G Di Virgilio, et al. 'Evidence for Acute Electrophysiological and Cognitive Changes Following Routine Soccer Heading' (2016) *Ebio Medicine*, Volume 13, 66.

¹⁵⁸ *Ibid.*

¹⁵⁹ Daniel Mackay et al 'Neurodegenerative disease mortality among former professional soccer players' (2019) *New England Journal of Medicine*; 381: 1081.

difficult to determine with the data we had.”¹⁶⁰ Stewart acknowledged that the concussive events could have been caused by heading the ball or by head-to-head injuries, although the very existence of these figures makes it clear that there is a problem. The research went on to suggest that the risk rates for former footballers were significantly higher than other individuals, specifically 5 times greater for Alzheimer’s disease, almost 4 times greater for motor neurone disease and 2 times greater for Parkinson’s disease.¹⁶¹

The problem is exacerbated by a common myth which is that modern footballs are lighter than those seen in earlier decades and that the new ball is safer than the old, which was once described as “a bag of bricks.”¹⁶² However, the researchers who worked with Shearer calculated that “the average older ball was lighter, coming in at around 390g while newer versions weighed in at roughly 430g.”¹⁶³ The reason for this was that older footballs were lighter in dry conditions, but that when used in the rain, they would absorb water, potentially raising the weight to 595g. The modern footballs are coated in polyurethane to keep out the water which makes them 40g heavier as a starting point.¹⁶⁴

This by itself provides a startling revelation. In Rugby Union it was seen that the progress has been towards trying to make the sport safer. Paradoxically, in Football this particular move made the sport safer in certain weather conditions, but the unintended consequence of this has been to make it less safe in other weather conditions.

As has been acknowledged, the research is in its early days and yet there is sufficient data to say that there is a problem with concussion within Football, even if the specific cause of that is less clear. What is equally clear is that potentially concussive events are routinely carried out in training sessions, far more than is the case in either Rugby Union. It is also relevant that the Scottish Football Association have reacted to the research carried out on Alan Shearer, which was conducted primarily in Scotland, by announcing a ban on heading the ball in junior football following one of the researcher's statements that while the evidence was not

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Four Two, ‘Could modern footballs cause concussion?’ (*Four Two*).

¹⁶³ Ibid n. 159.

¹⁶⁴ Ibid.

conclusive, "we can't wait on the evidence one way or another on heading"¹⁶⁵ While the details of the proposals have not yet been released, there was speculation that the ban might follow the Recognise To Recover program in America where those under the age of 10 were prevented from heading the ball and those under the age of 17 were restricted. The possible merit of these proposals will be examined later in the thesis, when considering individual rights,¹⁶⁶ but the proactive response is a testament to the seriousness of the problem.

Preventative Measures

Because football has entered the concussion discussion comparatively late, the preventative measures are at a far earlier stage than those in the previous two sports. As of January 2021, the use of concussion substitutes was authorised, and implemented at some levels across the sport. This means that where a player suffers concussion, they can be substituted even if the team has already used their limit of 'normal' substitutions. This can be used up to a maximum of twice, and to avoid tactical use of this change, the opposition is also allowed to make a change at the same time. This was one variant of the change introduced by the rule-makers and has been adopted by the Premier League in England. The other was similar but on a more restricted basis, with only one concussion substitution being allowed, and without the reciprocity that is afforded by the alternative measure.

More recently, and ahead of the 2021/2022 season, a cross-section of bodies that represent the various levels within the domestic game announced that 'higher-force' heading would be limited in training to ten per week per player, although it was phrased as a "recommendation."¹⁶⁷ This follows earlier moves by the authorities to prevent teaching heading to those under the age of 11 and to limit the extent to which those above this age can be trained in this area.¹⁶⁸ While this was welcomed by campaigners,¹⁶⁹ it was also noted that there is an element of uncertainty behind the definition of a 'higher force header' and

¹⁶⁵ BBC 'Scottish FA expected to ban children heading footballs within weeks' (*BBC Sport*, 16 January 2020).

¹⁶⁶ See Page 187.

¹⁶⁷ BBC News, 'Heading in football: Professional Players in England limited to 10 'higher force headers' a week in training' (*BBC News*, 28 July 2021).

¹⁶⁸ BBC News, 'FA Guidelines: Children to no longer head footballs in training' (*BBC News*, 24 February 2020).

¹⁶⁹ BBC News 'Heading in football: Dawn Astle welcomes new limit in training for professionals in England' (*BBC News*, 29 July 2021).

that the science that has been used by the authorities to emerge with the limitation has not been published.¹⁷⁰ It is certainly the case that the footballing authorities have begun to take some steps in respect of the issue, but the extent to which these will have an impact is, at present, unclear.

Summary of the Preventative Measures

These analyses demonstrate that both sports that are under discussion in this thesis have specific problems that lead to a realistic chance of concussive events occurring, with each sport having its own susceptibilities. There is consistency, however, in respect of the measures that have been taken to address these concerns, with two distinctive approaches being taken.

The first, and most popular, has been to facilitate the removal of the player from the field of play, as demonstrated by Rugby Union's concussion protocol and the new measures in football. These have been bolstered in Rugby Union by requirements that there be independent assessments of players when they leave the field because of suspected concussion, and a requirement that they pass a Head Injury Assessment before returning. This has led former Welsh captain Sam Warburton to say that while there was a greater concern about concussive events that in previous years, the problem was being "managed."¹⁷¹ This reflects the approach accurately; it seeks to manage the concussive event to prevent it from getting worse, and to seek to ensure that a concussed player does not return to the game, either on the same day or in a later match, until they have demonstrated that they are no longer concussed.

These changes are not bad; they are welcome, and certainly they are preferable to the previous approach. However, they do nothing to deal with the concussive event occurring in the first place; whether these rules exist or not the player will still suffer the concussive event and therefore the potential consequences remain.

¹⁷⁰ Ibid.

¹⁷¹ BBC 'Eddie Butler's Six Nations' (*BBC Sport*, 6 February 2021).

The second approach has been more restrictive as it involves a process of revolution rather than evolution but would also be a far more robust approach to reducing the incidences of concussion in the first place. This involves identifying the rules of the game that lead to an increased chance of concussive events and mitigating this by removing them from the process of the game. There is precedent for this in Rugby Union; the spear tackle, which involved tackling a player, elevating them from the ground, and dumping them onto the ground, was banned from the game from 2009,¹⁷² with the starting sanction being a red card, or ejection from the game.¹⁷³ The tackle was seen as significantly dangerous and even brutal due to the lack of control over the player's landing.¹⁷⁴

There has, however, been less rush to introduce such law changes in respect of concussion injuries. Rugby has, again led the way by beginning a trial on banning tackles above the waist, with a view to reducing concussion injuries by reducing the whiplash effect.¹⁷⁵ However, this is taking a medium to long term view, with the end goal being a potential ban on such tackles by the 2023 World Cup, or four years after the trial was introduced. In American Football, there have been some adjustments to the rules that seek to protect the players by banning the lowering of the head and seeking to avoid 'blindside' hits that cannot be anticipated and catch the player by surprise. The NFL Chief Medical Officer reported that after these changes, amongst others, the incidents of concussion were reduced by 28% from the previous season.¹⁷⁶ In football, there has been a tentative move in this direction, with a focus on training sessions, but there is little to suggest that there will be any significant actions taken in respect of the game itself.

It can therefore be seen that while the three sports have made some progress in this field, the focus remains on managing concussion injuries and while there is some focus on prevention rather than treatment, this is occurring at a pace that will leave players vulnerable in all three sports.

¹⁷² Rugby Laws 2021, Law 10.4 (j).

¹⁷³ Ibid.

¹⁷⁴ Paul Rees 'Video sparks crackdown on spear tackles', (*The Guardian*, 26 October 2005).

¹⁷⁵ BBC 'World Rugby to test waist high tackles as part of trial' (*BBC Sport*, 8 August 2019).

¹⁷⁶ BBC 'Concussion in sport: What can be learned from the NFL?' (*BBC Sport*, 24 December 2019).

Specific concerns of the incidence of concussion injuries

One question that will be seen consistently throughout this thesis is why concussive injuries should be treated differently to physical injuries given the accepted inevitability that in any activity that involves contact, there will be the potential for injuries. Concussive and non-concussive events, however, have individual aspects that require particular caution and should place a great responsibility on the organisations with the ability to reduce the likelihood of these injuries occurring.¹⁷⁷

Under-reporting

It was earlier noted that a problem with identifying the levels of sports related concussion injuries arise from difficulties with knowing when such an injury has occurred. Pearce demonstrated this, concluding from surveys that nearly 20% of the participants had experienced a concussion but had not reported it at the time of occurrence.¹⁷⁸ Torres et al¹⁷⁹ revealed that 24% of those with a history of concussion reported that they had knowingly concealed concussion symptoms to allow them to continue playing in a game.¹⁸⁰ Campbell et al¹⁸¹ carried out a survey comparing younger students and found within their survey that 3.5 pupils in every 100 were removed from their athletics classes because of concussion¹⁸² while only one third of those concussion injuries were treated in an emergency department.¹⁸³ Meanwhile other surveys have estimated that over 50% of concussion injuries are not reported by players or under-diagnosed by physicians.”¹⁸⁴ These numbers represent a significant gap in research and lead to fears that the numbers could be significantly worse, in

¹⁷⁷ This theme will be particularly prominent when considering the effectiveness of consent, See Page 236.

¹⁷⁸ Alan Pearce et al 'Do as I say: contradicting beliefs and attitudes towards sports concussion in Australia' (2017) *Journal of Sports Science* 35, 19 1911.

¹⁷⁹ Daniel Torres et al 'Sports-related concussion: Anonymous survey of a collegiate cohort' (2013) *Neurology: Clinical Practice* 3(4), 279.

¹⁸⁰ Ibid.

¹⁸¹ Richard Campbell et al 'Risk of Concussion During Sports Versus Physical Education Among New Mexico Middle and High School Students' (2018) *AJPH* January Vol 108 No 1 93.

¹⁸² Ibid.

¹⁸³ Ibid, 94.

¹⁸⁴ JF Baker et al 'Concussion among under 20 rugby union players in Ireland: Incidence, attitudes and knowledge' (2013) *Irish Journal of Medical Science* 182(1) 121, Zachary Kerr et al 'Motivations associated with nondisclosure of self-reported concussions in former collegiate athletes' (2016) *The American Journal of Sports Medicine* 44(1) 220, Emily Kroshus et al 'Understanding concussion reporting using a model based on the theory of planned behaviour' (2014) *Journal of Adolescent Health* 54(3) 269.

a way that physical injuries are not; physical injuries typically have a more direct link to the ability of the player to participate in the game than concussive events.

The question of why this has happened has been analysed with McCrea¹⁸⁵ observing that there were two features that play an important role in the non-reporting. The first was an understatement by the players of the seriousness of the injury, stemming from a lack of understanding or knowledge. The second was a reluctance to be removed from the match. Register-Mihalik et al¹⁸⁶ discovered a third reason, linked to the second, which was the idea that the athletes did not want to let down their team-mates and coaches.¹⁸⁷

In terms of the first point, regarding lack of awareness, Cusimano et al and Pearce et al have suggested that sports media and journalists have some responsibility for the issue with Cusimano suggesting that sports media commentators tended to glorify players who suffer concussions,¹⁸⁸ and Pearce referring to some of the synonyms used by journalists as understating the seriousness of the issue. Pearce referred to situations where descriptors such as “‘head knock’, ‘ding’ or ‘bell rung’ can inappropriately lead to a downplay of the seriousness of concussion”¹⁸⁹ and this supports a contention that the importance of the risks of these incidents are, at best, not treated with sufficient seriousness and, at worst, are used to enhance the rhetoric of commentary.

Of particular interest to Campbell was the fact that “the concussion risk during physical education was 60% higher than for students during sports.”¹⁹⁰ Campbell considered that there were various possible explanations for this, including the attention to injuries during sports as opposed to practice sessions, and the fact that those who play sports may be fitter than those compelled to take it as a class.¹⁹¹ This theme of disparity between comparable

¹⁸⁵ Michael McCrea et al ‘Unreported concussion in high school football players: Implications for prevention’ (2004) *Clinical Journal of Sport medicine* 14(1) 13.

¹⁸⁶ Johna Register-Mihalik et al ‘Knowledge, attitude and concussion reporting behaviors among high school athletes: A preliminary study’ (2013) *Journal of Athletic Training* 48(5) 645.

¹⁸⁷ Ibid.

¹⁸⁸ Michael Cusimano et al ‘Canadian minor hockey participants knowledge about concussion’ (2009) *The Canadian Journal of Neurological Sciences* 36(3) 315.

¹⁸⁹ Ibid n. 181.

¹⁹⁰ Ibid, n.181, 94.

¹⁹¹ Ibid, 94.

situations was also found by Williamson who focused on the comparative pressure to return to study as against the pressure to return to action on the sports field. In both cases there were a range of focal points of pressure, including parents, coaches, other athletes, physicians, and professors/teachers. Crucially, at secondary school level 15.14% stated that there had been no pressure to return to the sporting field as opposed to 42.05% to return to the classroom. This difference continues into college sports where 17.88% found no pressure to return to the sports field and 37.50% felt no pressure to return to the classroom. There is clearly a wide sphere of participants who felt pressure to return to the sports field but not to the classroom.¹⁹²

On the professional level, while not specifically relevant to the sports under discussion here, the commercial reality of a professional athlete was underlined by Wicklund's study of the Americas sport of rodeo. This is a sport where the participants are primarily only compensated when they ride, which Wicklund summarises as encouraging "participation despite injury"¹⁹³ and is a logical foundation for the underreporting of symptoms given that missing an event means forfeiting entry fees as well as potential earnings."¹⁹⁴ It will be argued in Chapter Five that where there is an employer relationship, there is, and should be, a duty on the employer to ensure that such a situation does not arise. However, this is inapplicable when individuals are self-employed, and it increases the importance of ensuring that player safety is not only left to the players to decide.

The last point is particularly troubling as it points to the serious issue of peer pressure in sports, with Katz arguing that "They are frequently under-reported to hide the injury and/or accelerate return to play because of competing messages from stakeholders who pressure medical personnel for early return to play or in hopes of a rapid return to competition."¹⁹⁵

¹⁹² Chelsea Williamson et al 'Return to Learn After Sport Related Concussion: A Survey of Secondary School and Collegiate Athletic Trainers' (2018) *Journal of Athletic Training* 53(10), 990.

¹⁹³ Alissa Wicklund et al 'Getting back on the horse: Sport Specific Return to Play in Rodeo Athletes After Concussion Injury' (2018) *Journal of Athletic Training* 53(7), 657.

¹⁹⁴ Ibid.

¹⁹⁵ Barry Katz et al 'Baseline Performance of NCAA Athletes on a Concussion Battery: A Report from the CARE Consortium' (2018) *Sports Med* 48: 1971, citing Kathryn Schneider et al 'Rest and treatment/rehabilitation following sport related concussion: a systematic review' (2017) *Br J Sports Med* 51(12), 930, John Leddy and B Willer 'Use of graded exercise testing in concussion and return to activity management' (2013) *Curr Sports Med Rep* 12(6), 370, John Leddy et al 'Exercise treatment for post-concussion syndrome: a pilot study of

This was demonstrated in the blood-gate scandal involving Harlequins Rugby Union team where a young player, Tom Williams, chewed on a 'blood capsule' to feign injury to allow manipulation of the rules around substitutions. Recalling the event, another, more senior player, observed that "Everyone would have done the same. If you get told to do it, you do it. Especially when it's Dean Richards telling you to do it."¹⁹⁶ In this case, there was a combustible mix of peer, or superior, pressure, financial pressure, and, according to Williams, a lack of understanding on the spur of the moment of the consequences, that pushed him into the decision that he made.

Of course, this type of blatant cheating is some distance away from the decision-making process that is being dealt with here, and in the Harlequins scandal, it would have been thought that there would have been ethical considerations that might have held the player in check. That, though, is precisely the point. If a player is deciding whether to report a potential concussion or to play on, there is no immediate ethical question; the pressures to play on are magnified and it is more and not less likely that they will make a decision that is detrimental to their health.

A crucial aspect to this is that an underlying factor in all the contributing factors to underreporting is the lack of knowledge and education, of the players and of those who are otherwise involved in the sport. It will be argued that while increased education of the participants is an essential requirement for the sports, this alone will not be a sufficient measure and that the sports must ensure that they keep up to date with the rules of their sports and that clubs must ensure that they do not take advantage of the participants, regardless of whether they are fully informed or not.

The unpredictable nature of concussion

changes in functional magnetic resonance imaging activation, physiology and symptoms' (2013) *J Head Trauma Rehabil.* 28(4), 241.

¹⁹⁶ BBC, 'Bloodgate 10 years on: Tom Williams on rugby's biggest scandal' (*BBC Sport*, 11 April 2019).

Nelson et al note that one reason for being concerned about the different impact on children is the distinctive features between adults and minors, in particular “differences in neck strength, skull thickness, brain size, cerebral blood volume, degree of myelination, and other physiologic factors.”¹⁹⁷ The implication of this study was that it is harder to predict in a child what the impact of the blow to the head will be. This concern cannot be limited to minors, as they are all factors that will differ between adults. If you were to compare two Rugby Union players, for example a lock-forward, who is traditionally tall and strong, but with some speed, and a winger-back, who may be shorter but is normally faster, there will likely be many different physical aspects, including many of those identified by Nelson.

In the same way, it is inevitable that a blow that affects one player badly will affect a second player differently. This is before the earlier point is factored in which is that previous concussive events will have a significant impact on the effect of a further concussive injury.¹⁹⁸ It may well be that some players develop a reputation for concussion injuries, with George North¹⁹⁹ and Leigh Halfpenny²⁰⁰ being of recent note, but they do not get any special treatment on the rugby pitch, and if they were playing at a lower level it is unlikely that the opposition and/or referee would even know that they had such a propensity for concussion injuries. Indeed, a concern borne of cynicism could well be that a player with a reputation for concussion injuries could be targeted by a team more concerned with winning a sporting contest than preserving player safety.²⁰¹ Concussive events are simply unpredictable, in the way that damage to other parts of the body is more predictable.

There is also the fact that the potential incidental connections are remote and difficult to trace with any degree of precision. In 2017 former Scottish Rugby Union player, Doddie Weir, was diagnosed with Motor Neurone Disease (MND) and at the time he attributed the condition to unfortunate chance,²⁰² as indeed is the case with many sufferers who have not

¹⁹⁷ Ibid n. 82, 14, Ibid n. 75.

¹⁹⁸ Ibid 17.

¹⁹⁹ BBC, ‘George North would be told to retire were he an amateur, says Dr Barry O’Driscoll’, (*BBC Sport*, 22 December 2016).

²⁰⁰ Wales Online, ‘Leigh Halfpenny talks about his ‘difficult and unpredictable’ head injury for the first time’ (*Wales Online*, 4 March 2019).

²⁰¹ This consideration will be developed more in Chapter Five, See Page 217.

²⁰² BBC, ‘Dodie Weir: I don’t blame rugby for my MND’ (*BBC Sport*, 29 August 2017).

had the long exposure to contact sports that he did, including Professor Stephen Hawking. It is a mark of the questions that are now starting to be asked about the collisions involving the head that in 2019 he acknowledged that there may have been a connection between the repeated blows to the head and the development of the condition.²⁰³ The crucial point is that if there many more neurological conditions that can be caused, or even encouraged, by concussive blows, then there develops a far stronger case to say that those with power to change the conditions of sports have a responsibility to exercise that power.

The medical evidence that was discussed earlier suggests that by the time they have played 25 rugby matches, a player will have received at least one concussive event.²⁰⁴ However, Asplund's thesis suggests that there is no clear clinical picture of the consequences for the players who have reached this mark, although the non-exhaustive list that he provides, demonstrate that they are not the typical consequences that a player would expect to be subjecting themselves to when playing a sport.²⁰⁵ At best there is a risk of injury that might cause longer term injuries, while at worst, the result can be death, as in the case of fourteen-year-old Ben Robinson who died after playing in a rugby game after three tackles and died at side of the pitch.²⁰⁶

Critical to the context of these consequences is that these are not the traditional 'fighting sports' or sports where the or a goal is to incapacitate the opponent. In all the sports, physical injury is a regrettable and undesired side-effect of compliance with the rules, and in view of this, and when weighed with the consequences of concussion, this does appear to be a moment to consider the extent to which the law should seek regulation of the sports, much as the courts chose to do when prohibiting prizefighting.

Identification of concussion injuries

²⁰³ Debbie Jackson, 'Doddie Weir: The rugby legend who won't give in to MND' (*BBC Sport*, 7 December 2019).

²⁰⁴ *Ibid* 24.

²⁰⁵ Chad Asplund et al 'Best TM Brain damage in American Football Inevitable consequence or avoidable risk?' (2015) *Br J Sports Med*; 49:1015.

²⁰⁶ BBC 'Carrick Pupil Ben Robinson died 'minutes after rugby tackle', (*BBC News*, 29 August 2012).

The final concern that is particular to concussive events amalgamates, to a degree, the first two that have been raised, which related to under-reporting and uncertainty over the path of concussion and focuses on the difficulty of identifying concussion when it occurs.

It is trite to say that any internal injury will be harder to identify than an external injury, even for the player who is suffering from the injury. Putkuian emphasises the difficulty of this for one on the side-line, calling it a “challenging responsibility for the athletic trainer and side-line team physician.”²⁰⁷ The reasons for this are cited as being the difficulty of making an on the spot decision, in the heat of competition, when the athlete may wish to return to the pitch quickly, and the longer that the physician takes to resolve the matter, the longer the team will have to play either a man/woman down²⁰⁸ or, arguably, with a less adept player on the pitch.²⁰⁹

Nor is it only professionals within sports who struggle with this, and McCrea has argued that “concussion is often considered by clinicians to be among the most complex injuries in sports medicine to diagnose, assess and manage.”²¹⁰ This is because of various reasons, but it is easily reflected by the reality that the player may not know that they have a concussion injury and the body is not necessarily communicating the injury to the player in a way that they would recognise. This can be contrasted with a broken leg where the player’s ability to walk or run is inhibited, or a broken tooth where there is an immediate pain trigger.²¹¹

Likewise, McCrea notes that the methods of testing are unhelpful and rather than a diagnostic test, the question is down to the judgement of the physician or a “clinical diagnosis based largely on the observed injury mechanism, signs, and symptoms. A vast majority of sport-related concussions...occur without loss of consciousness or frank neurological signs.”²¹² In one sense this is similar to all diagnoses in medicine, but it can at least be said that with

²⁰⁷ Margot Putkuian ‘Clinical Evaluation of the Concussed Athlete: A View from the Sideline’ (2017) *Journal of Athletic Training* 52(3) 236, 236.

²⁰⁸ In Football where temporary replacements are not permitted while the diagnosis process is occurring.

²⁰⁹ In Rugby Union where temporary replacements are permitted while the diagnosis process is occurring.

²¹⁰ Michael McCrea et al ‘Day of injury assessment of sport-related concussion’ (2013) *Br J Sports Med*; 47:272.

²¹¹ *Ibid.*

²¹² *Ibid.*

concussive events, the symptoms are more generic, and less specific, at least in the immediate aftermath of the impact.

This is reflected by the ambiguity of the Consensus Statement of Concussion Injuries in Sports which notes that there are signs and symptoms that can be experienced and that “a concussion should be suspected if an injured athlete exhibits any of these signs or symptoms and appropriate management should be initiated.”²¹³ This is, however, rendered less helpful by the immediate acknowledgement that “concussion signs and symptoms may develop within minutes to hours and sometimes even days following an injury.”²¹⁴ Given that the average football or Rugby Union match lasts for around 2 hours, the meaning of this is that a player who receives a concussion in a game may not display any symptoms and, in a worst case scenario, may go on to suffer a second concussion in the same game, thus increasing the chances of the consequences that were discussed earlier.

The Consensus added further warning in respect of children, noting that “signs and symptoms of concussion in younger children may be more subtle and difficult to ascertain because of limited communication skills.”²¹⁵ Effectively this states that all of the negative consequences that are noted in the previous paragraph, may also apply to children but that it is even harder to identify the condition and therefore there is even more chance that they will go unnoticed.

The Consensus did go on to discuss what should happen in the event of a concussion, or possible concussion being identified, but while these points are helpful and essential, they miss out the crucial question which is: what about the concussions that are missed? The statement went on to say that the “ability to treat or reduce the effects of concussive injury after the event is minimal”²¹⁶ which emphasises the unique problems that exist with this particular type of sporting injury. If, as appears to be uncontroversial, it is not possible to identify when a concussion has occurred, then it is absolutely essential that the focus must be on reducing the likelihood of concussions occurring.

²¹³ Paul McCrory et al 'Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport' (2013) held in Zurich, November 2012, *Br J Sports Med*;47:250.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

The key here is that a player could suffer a concussion on the field of play and yet demonstrate no symptoms whatsoever that would indicate its presence because “concussion signs and symptoms may develop within minutes to hours and sometimes even days following an injury.”²¹⁷ Therefore, the potential injury is a phantom injury, one that may not be detectable, in contrast to most other injuries until it is too late.

The Importance of Timing

A legitimate question that can be posed is why there is such urgency to address the situation now. To answer this, it is necessary to look at two aspects. The first of these is developing understanding of concussion, and until the last few years, the gravity of the situation has been either ignored, or dismissed with Asplund stating that the NFL deliberately closed their eyes to the extent of the problem in American Football until they were compelled to act by a legal claim being brought against them.²¹⁸ That claim led to a settlement of approximately \$765 million to claimants who were met the medical conditions set out in the settlement. Yet even this was on the basis that the agreement “cannot be considered an admission by the NFL of liability, or an admission that plaintiffs' injuries were caused by football”²¹⁹ demonstrating that while strides in the right direction are being made, there remains a reluctance to fully engage with the extent of the problem. Likewise, in recent times there has been a significantly increased awareness of the consequences of concussive events with player after player in rugby union and, to a lesser extent, football, revealing a diagnosis of an illness with potential links to CTE.

This is a perfect example of the difficulties of self-regulation, which will be addressed,²²⁰ an example that only grows in strength with the realisation several years later that the NFL dispute is on-going amidst claims that it “is still to deliver a penny to former players and their

²¹⁷ Laura Purcell ‘Sport-related concussion: Evaluation and management’ (2014) *Child Health*;19 (3); 153.

²¹⁸ Chad Asplund, ‘Best TM Brain damage in American Football Inevitable consequence or avoidable risk?’ (2015) *Br J Sports Med*; 49:1015.

²¹⁹ Mark Fainaru-Wada et al ‘NFL Players settle concussion suit’ (*ESPN Online*, 29 August 2013).

²²⁰ See Page 73.

families for brain injuries stemming from football.”²²¹ Yet a reluctance by the organising bodies to acknowledge the potential issues and injuries are not the only reason for the emerging knowledge. It has already been seen that medical analysis is based around the principle that “The more we learn about concussion, as well as exposure to head impacts, the more we realize that we don’t know”²²² and this raises the urgency of the situation, as if the knowledge that remains hidden is any worse than the understanding that has now been realized, then the potential for problems are conceivably extremely significant.

The medical literature supports the belief that there has been an awakening of sorts in appreciating the potential effects of concussion in sports, with Clay writing that between 2001 and 2009 there was an increase of reported sports related concussion injuries of 62% and that there has been “an increased awareness in concussion.”²²³ The comparative newness of the studies were hinted at by Rivera who wrote in 2013 that “over the past decade, professionals in the sports medicine field have debated the long term implications of concussions”²²⁴ with the implication being that before 2003 the subject received little attention. Possibly most noteworthy was the conclusion by Koh in 2009 that there were “There are few good studies on the incidence of concussion and limited information on the risk of concussion for females in contact sports.”²²⁵

Therefore, it is possible to see that while there has been an acknowledgement of potential adverse effects caused by sporting violence, as demonstrated by the actions by the NCAA in the 1930s²²⁶ it is only recently that there has been an awakening of understanding as to the serious repercussions of concussion in sports, and as such it is an aspect that warrants consideration of involvement by the legal structures.

²²¹ Ibid n. 219.

²²² Johna Register-Malik, ‘Concussion in Sport: Changing the Culture’, (*BMJ Online*, 8 June 2016).

²²³ Michael Clay ‘Epidemiology of concussion in sport: a literature review.’ (2013) *Journal of Chiropractic Medicine*;12(4): 230.

²²⁴ Vivian Rivera ‘Examination of the relationship between sport concussion and long term neurodegenerative and psychological disorders: a literature review’ (2013). *HIM* 1990-2015, 1456.

²²⁵ Jae Koh et al ‘Incidence of concussion in contact sports: a systematic review of the evidence, *Brain Injury*,’ (2009) 17:10, 901.

²²⁶ Ibid.

Once again, there is a clear recognition of the importance of addressing the issue now. For a long time now, sports have been allowed to regulate themselves, with little concern for outside influence and part of the innovative 'sports law' has developed around sport's attempts to regulate themselves. Yet, in light of the medical developments, it is asserted that this situation cannot continue and it is worth noting that this moment was foretold by the acknowledged father of sports law when Grayson wrote that "so long as sport, leisure and recreational activities are capable of self-regulation, or careful or responsible control by sporting governing bodies, or institutions or promotional organisations, without injurious or potentially injurious consequences, traditional legal sources are rarely required to intervene. When health and safety are at risk, the general legal system alone cannot protect the community which obtains its pleasures within the conventional sporting spheres. It not only needs evidence from the medical world whether about drugs, violence, or maladministration, to prove specific breaches of regulations and of the rule of law"²²⁷

Conclusion

Schwartz wrote in a foreword for the *Journal of Law, Medicine and Ethics* that in fact his articles relating to this very issue were "never about law, medicine nor ethics. They were about making sense."²²⁸ He wrote this in response to criticisms from within the industry, including that the risks were minimal, that the frequency of them was minimal, and that unless organising bodies were specifically asked by the players to make changes, it was not the place of an organising body or club to do so. In replying to these, and other criticisms, Schwartz noted that the decision not to act was about choice, and that he was asking the organisations to recognise "the choices being made, and owning up to them."²²⁹ The extent to which the player's decision to participate is relevant will be considered in later chapters but the concept of sense can be extended to Adams' point when writing that "although sudden death during sport is an unfortunate risk of participating in such physical activity, the

²²⁷ Simon Payne (ed) *Medicine, Sport, and the Law*, (Blackwell Scientific Publications 1990), 9.

²²⁸ Alan Schwartz, Foreword 'Journal of Law, Medicine & Ethics', 280.

²²⁹ Ibid.

development and implementation of best-practice recommendations enhances the care provided to athletes at all levels.”²³⁰

What is most starkly identified by this chapter, and in particular the section discussing football, is the fact that in other situations where there has been an issue of player safety, with a causal link established, there has been action taken.²³¹ In that case, the consequences of the issue were dramatic and visible. Although death did not occur, everyone could see the player literally within an inch of his life, indeed, for a moment, beyond his life. This chapter has demonstrated that players are suffering injuries every time a round of sport is played, that have immediate consequences, and long-term consequences, but that are often invisible. The reaction to this risk should be no less than that to the incident involving Fabrice Muamba.

Much of what is to come is controversial, insofar as it deviates from contemporary norms. But the conclusions from this section are not controversial.

It is evident that aspects of physical sports can cause concussion injuries to players.

It is evident that the rate of concussion injuries is increasing.

It is evident that there are long term consequences from concussion injuries that include permanent damage and even death.

It may not be evident that the law should step in to require action to try to limit the impact of concussion. But the following chapters will argue that it should be.

²³⁰ William Adams et al ‘Assessment of Evidence-Based Health and Safety Policies on Sudden Death and Concussion Management in Secondary School Athletics: A benchmark study’ (2018) *Journal of Athletic Training* 53(8), 756.

²³¹ *Ibid* 43.

Chapter Two: Society's Relationship with Sports.

Introduction

Chapter One identified that there is a fundamental risk to players through concussion injuries in both the short term and the long term and that the time is right to focus on this issue.¹ This thesis argues that a more pro-active approach needs to be taken by the courts to protect sports participants and, to properly make this case, the status quo will be analysed in this chapter. Specifically, it will be argued that while the science of concussion is comparatively new, violence and the potential for injury is not, which has left the potential for this type of controversy to arise. This risk has been exacerbated by a focus on self-regulation by sporting bodies, with the Third Report on Concussion in Sport² recording surprise at the practice of allowing sports to “mark their own homework.”³ Building on this, the broad approach of the courts will be analysed with the conclusion being that traditionally a similar *laissez-faire* approach to sporting liability has been taken.⁴ This has led to an argument, not fully embraced by the courts, but not discouraged, that sport is a special case, and that the law should not cross the touchline to intervene with on field activity, as long as the rules of the game are followed. This chapter will argue that any merit that this argument has traditionally had is redundant in view of the modern rationale for sport and the seriousness of the risks that are prevalent in modern sports.

Sporting Violence: Entwined and endorsed by time.

At first glance, the dark tone of the first chapter⁵ appears to be leagues away from the popular image of sport, which has been characterised as a distraction, something to idle away time, and a pleasure, not a burden. Indeed the etymology of the word ‘sport’ emanates from the

¹ Ibid 26.

² House of Commons Digital, Culture, Media and Sport Committee, *Third Report Concussion in Sport* (HC) 2021 46.

³ Ibid, 60.

⁴ See Page 68.

⁵ Ibid 16.

French verb *sporten*, or to divert,⁶ and also the Latin term *desporto*, which means, literally 'to carry away.'⁷ Both of these definitions infer an activity that is ancillary to mainstream life, that is designed to disengage an individual from the rigours of life, literally, in the Latin sense, to carry away the rigours and focus on a distraction, while the absence of labour and strife is emphasised by Huizinga's statement that "it is never a task."⁸

The noun and verb 'player' and 'to play' are therefore used to describe the participants and their activity; they are players, and they play, they are not described as workers and they do not work, a reference to a time before sport could be work, in the later amateur and more recently professional eras. Lord Denning's often quoted reference to cricket summarises the utopian vision of sport: "In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play, and the old men watch."⁹ There is little to suggest that at the end of this idyllic paradise can be found injury, misery, and death which was highlighted in Chapter One.¹⁰

This idealistic view of sport is underlined by the European Charter which defines it as:

"forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels."¹¹

The emphasis is on the positive outcomes of sport, conjuring up images of ancient opponents resolving their differences over a well-contested game, and then agreeing to peaceful co-existence as a result, or a promotion of physical wellbeing and health, goals that form part of the government's strategy on sport¹² and which were identified in Parliament's Report.¹³

⁶ Editors of Webster's New World Dictionary, *Websters New Collegiate Dictionary* (Websters Publishing, New York, Fourth Edition).

⁷ Tim Kevan et al *Sports Personal Injury* (First Edition, Sweet & Maxwell, 2002), 3.

⁸ Johan Huizinga *Homo Ludens: A Study of the Play Concept in Culture* (Routledge and Kegan, 2016), 8.

⁹ *Miller v Jackson* [1977] 1 QB 966.

¹⁰ *Ibid* 16.

¹¹ European Sports Charter 1993, Article 2(1)(a).

¹² HM Government, 'Sporting Future: A New Strategy for an Active Nation', (Dec 2015).

¹³ *Ibid* n. 2, 8.

Yet sport, physical contact, and injury, whether intentional as in boxing, incidental, as in rugby, or accidental as in football, have always gone hand in hand, representing a nexus that has waxed and waned as sport has developed, but has never disappeared. It will be seen that physical altercations, and their consequences, in sport, have been tolerated by society and that, if anything, it can be said that such violent outcomes are better organised today than in the past, but not that incidents are less frequent.¹⁴ There are many sports where incidents of violence have indeed become part of the game, with ice-hockey seeing scuffles as part of "social control,"¹⁵ and player melees in Football and Rugby Union being accepted (up to a point) as a means of letting the players release some tension. It is not uncommon for pushing and shoving to occur on a rugby pitch, with the referee content to allow the players to calm down before restoring order.

History of Violence

Of the violent sports, boxing unquestionably has a central stage, although cannot be said with any certainty when sport was first imagined. Kevan et al claim that "the earliest evidence of the existence of boxing is recorded in Egyptian hieroglyphics around 4000BC."¹⁶ Brasch supports this contention, noting that "stone representations from the fifth millennium BC were excavated in the Middle East, near Baghdad, unmistakably depicting pugilist tactics."¹⁷ Thus, in the very early stages of society, sport and violence were linked, even though the motives of the combatants cannot be established with any degree of certainty.¹⁸

¹⁴ The instances of violence are most seen in ice hockey, where player brawls have traditionally been common although rules have sought to reduce their frequency (Greg Wyshinski, 'The new normal: Why fighting in the NHL has dropped to new lows' (30 July 2019), ESPN). In *R v Green* [1971] 1 OR. 591, 594 (Ont Prov Ct 1970) the victim testified that the blows that were exchanged were normal within the game, with the court concluding that "this is an extremely ordinary happening in a hockey game and the players really think nothing of it." (*R v Green*, 594). White notes that "Dramatic and numerous outbreaks of violence among athletes in the past twenty years have drawn public interest and concern", Diane White, 'Sports Violence as Criminal Assault: development of the Doctrine by Canadian Courts' (1986) *Duke Law Journal* No 6. 1030, 1030, which is reflected in the attempts of the Canadian courts to identify lines where consent is admissible as a defence and where it is not. *R v Cote* (22 CR.3d 97 (Que. Prov Ct 1881), *R v Watson* (26 CCC.2d 150 (Ont Prov Ct 1975).

¹⁵ Kenneth Colburn Jr 'Honor, Ritual and Violence in Ice Hockey' (1985) *The Canadian Journal of Sociology* Vol 10 No 2 Spring.

¹⁶ *Ibid* n. 7, 3.

¹⁷ Richard Brasch *How Did Sport Begin? A look at the origins of man at play* (Tynron Press Scotland, 1986), 54.

¹⁸ Brasch suggests that the aim of sports may equally have been to placate the Gods or to train for warfare, *ibid*, 54.

In later years, however, there is a clearer link between the social activity that would now be recognised as sport and violence which was reflected in the stated and recommended motivations for this activity. Plato, for example, argued that legislators should:

"ordain that soldiers shall perform lesser exercises without arms every day...fighting with boxing gloves and hurling javelins...in order that sport may not be altogether without fear, but may have terrors and to a certain degree show the man who has and who has not courage...considering that if a few men should die, then the citizens will never find a test...which is a far greater evil to the state than the loss of a few"¹⁹

Plato's philosophy contrasts with the placid concepts of diversion and past time, expressly recognising the potential for fatalities, in the same sentence as describing the activity as sport, and yet conceding that such a loss is acceptable. Cohen goes on to say that "what we do know is that football had a certain significance as a cult activity."²⁰ He adds that the soldiers were ordered to engage in the sports to improve their physique, discipline, and enthusiasm to better protect against potential invaders.²¹ Again, this places the emphasis not on leisurely diversion but on training soldiers for warfare. It follows those violent actions in sport were an inherent part of the game to prepare the combatants for their future endeavours. By this point they had become an accepted rather than ancillary part of sports.

This mentality of preparing for war continued outside of the formal military structure as "the aristocracy also saw sport, in the form of jousts and tournaments, as an enjoyable means of preparation for war",²² while beyond the aristocratic circle, sport enabled man to hunt for food and to defend his family.²³ These examples suggest that sport was physical because the end justified the means, and that in fact there was little about the activity itself that considered the health and safety of the participants.

¹⁹ Plato *Dialogues on Laws*, (Benjamin Jowett tr. Oxford University Press) S839 1892), 211.

²⁰ Alexander Wild (ed) *CAS and Football Landmark Cases*, (TMC Asser Press 2012), 1.

²¹ *Ibid*, 3.

²² Jack Anderson *Modern Sports Law, A Textbook*, (1st Edition, Hart Publishing 2010), 8.

²³ *Ibid* n. 17, 9.

This is reflected most clearly in boxing, which was perfectly suited for the preparation of warriors and it has been noted that, "(as) a dangerous, bloody sport, boxing was considered good preparation for warfare."²⁴ The same author, however, goes on to suggest that the necessity of the action was not distinguished from the virtue, arguing that "boxers became exalted heroes, models of the agonistic ideal who celebrated the gods with their deeds and embodied the goal of unified mental, physical, and spiritual cultivation."²⁵ Once again, the violence in the acts was seen as a celestial celebration rather than a necessary evil, with little consideration of whether it might be an unnecessary evil.

Elias goes further, referring to Philostratos who wrote that "people had regarded the game-contests as an exercise for war and war as an exercise for these contests"²⁶. In his summary he emphasises that the key to a sporting contest was not the winner or the loser but the taking part. However, this was not reflective of the present-day attitude embracing the positives of participation, but rather the negatives of surrender.²⁷ Thus, Hector's vanquishing at the hands of Achilles was acceptable because he fought until he could fight no more rather than, to use modern parlance, 'throwing in the towel'. True defeat in the sporting contests was to surrender prematurely; far better to risk fatality than ignominy, and Elias emphasises that when an individual was killed in a boxing or wrestling match, the victim was often lauded as the victor.²⁸ Later, this thesis will examine a prevalent mentality of 'winning at all costs'²⁹ and it is clear that ancient civilisations would have thoroughly approved of this mentality, for it would be better to be injured, even permanently, than to yield in the face of such injury.

Not only was violence justified by both necessity and adulation, but those who committed violent acts would not be deemed to be culpable, so long as they conducted themselves within the confines of a sporting bout. This remains the position today, where both extreme acts and extreme consequences, and even a combination of the two, will be acceptable if

²⁴ Elliott Gorn *The manly art. Bare Knuckle Prize Fighting In America*, (2nd Edition, Cornell University Press, 2010), 22.

²⁵ *Ibid*, 22.

²⁶ Eric Dunning (Ed) *The Sociology of Sport: A Selection of Readings* (London: Frank Cass 1971), 101.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ See Page 226.

within the rules of the game which requires a serious consideration of the bodies responsible for making those rules.³⁰

The extent of the violence associated with early sport can be seen by the following description of football as "nothyng but beastely fury and extreme violence"³¹ while another commentator called it "a develishe pastime...and hereof groweth envy, rancour and malice and sometimes brawling, murder, homicide and great effusion of blood as experience daily teacheth."³² In a possible suggestion that the reporters of the day were as prone to drama as those of modern times, the following excerpt can be seen from the *Derby Mercury* newspaper in 1845:

"the assembling of a lawless rabble, suspending business to the loss of the industrious, creating terror and alarm to the timid and peaceable, committing violence on the persons and damage to the properties of the defenceless and poor, and producing in those who play moral degradation and, in many cases, extreme poverty, injury to health, fractured limbs and (not infrequently) loss of life, rendering their homes desolate, their wives widows and their children fatherless."³³

The paradox of the examples that have been given above, with physicality being at the centre of sports, is that one of the most frequent justifications for sport, in particular sport involving violence, has been the benefits to health. Radhakrishnan endorsed this and writes that "participation in sport improves physical well-being in the mentally handicapped...through a process of mutual interaction,"³⁴ while the perceived physical benefits of participation in sport were emphasised in the 2021 Report into Sport.³⁵ This will be reviewed further when discussing the public policy of extending liability in this area,³⁶ but while it may be the case that sport can improve health in general, it is clear from the preceding Chapter³⁷ that in certain, not infrequent cases, there can be a very detrimental impact on health.

³⁰ See Page 143.

³¹ Joseph Strutt *The Sports and Pastimes of the People of England*, (Charles Cox, London, 1903).

³² Ibid.

³³ *Derby Mercury*, 1 January 1845.

³⁴ Simon Payne (Ed), *Medicine, Sport and the Law* (Blackwell Scientific Publications, 1990), 149.

³⁵ Ibid n. 2, 30.

³⁶ See Page 132.

³⁷ Ibid 20.

It can be seen, from the examples that have been given, that while many sports will have no physical engagement, the spectre of, and consequences from, violence and violent consequences have never been far removed from the existence of sports and that in the early days, it was a positively welcomed influence. That being so, the next question to consider is why this situation has been allowed to develop and how it is the violence has been allowed to take place within sport?

Laissez-faire: if it isn't broken (too much), why fix it?

Stripping the romance and Corinthian goals from sporting activities, a social phenomenon can be seen to have emerged within which exists conduct that would be contrary to the legal norms, with individuals assaulting each other, with ferocity, and yet these sports continue daily. There are three ways in which actions within a sport can be regulated. The first is the governing body themselves, the second is Parliament, and the third is the courts. It was seen earlier³⁸ that the governing bodies have made some steps to regulate themselves, although the focus of these actions was criticised.³⁹

Legislature

The most common response to sociological developments is through the legislature, where "there is a long history of events sparking swift legislative response especially when these events are widely reported and commented upon."⁴⁰ There are many good reasons for this being the case, with the legislature being democratically accountable and having the resources to establish a clear legislative framework that can balance the relative interests of the parties without needing to react to the existing common law framework that either allows or prevents intervention by the courts. Greenfield and Osborn underline this point by referencing the Dangerous Dogs Act 1989 which was debated upon and passed following

³⁸ Ibid 45, Ibid 39.

³⁹ Ibid.

⁴⁰ Steve Greenfield and Guy Osborn *Regulating Football* (Pluto Press 2001), 5-6.

incidents involving savage attacks by dogs.⁴¹ They identify a clear cause and effect; the incident occurred, outrage increased, and action took place. This is a common trend in contemporary society where a once accepted activity becomes socially unacceptable and, through either Parliament or the courts, becomes an illegal activity either by an immediate Act of Parliament or by a gradual restriction on that activity through either Parliament or the courts. An example of the former occurred in 2007 when it became an offence to smoke in a public place that was otherwise a smoke-free zone⁴² while the use of asbestos, common in the building trade since the nineteenth century, was gradually phased out between 1969 and 2012.⁴³ It is clear, therefore, that Parliament has acted in the past, and they have showed some signs of concerns in recent times. This thesis does not seek to suggest that the judiciary are a preferable source of regulation for this issue, but rather that the likelihood of the legislature intervening in a manner that is sufficiently robust is so unlikely that it is not a realistic option.

This raises the question as to why there has not been a similar reaction in respect of sport. It does not reflect a complete reluctance to legislate on sporting matters, because regulation has been enacted to regulate those who spectate on the sports⁴⁴ and how they may be accommodated safely within stadiums.⁴⁵ In the 2021 Third Report on Concussion, it was expressly stated that there was a “history of the Government looking into issues of sporting safety and failing to follow through with practical interventions”⁴⁶ and the Report recommended that UK Sport should be required to take greater responsibility for ensuring that sports that it funds take the risk of concussion seriously,⁴⁷ while also stating that “the Government cannot avoid taking a proactive role in taking a proactive role in ensuring that[a precautionary approach to risk management] occurs.”⁴⁸

⁴¹ HC Deb, 15 June 1989, Vol 154(6th).

⁴² Health Act 2006, s7.

⁴³ Control of Asbestos Regulations 2012 (SI 2012/632).

⁴⁴ Football (Disorder) Act 2000.

⁴⁵ The Football Spectators (Seating) Order 2005 (SI 2005/1751) made under section 11 of the Football Spectators Act 1989.

⁴⁶ *Ibid* n. 2, 32.

⁴⁷ *Ibid* n. 2, 31.

⁴⁸ *Ibid* n. 2, 33.

These words, however, are not reflected in the actions that are required by the government. Just as the governing bodies have focused on treatment, so the Report focuses on education and awareness. Both approaches are necessary, but they are not sufficient to address the crucial question of preventing concussion injuries from occurring in the first place. Where the Report does recommend clear action, in respect of UK Sport, it is of limited value. UK Sport's mandate extends to funding for, predominantly, amateur events with the focus of the Olympics. While this may lead to some change, with UK Sport having the power to allocate resources, it has minimal influence over the three sports that are under discussion here, all of which can be categorised as professional sports. In dealing with these sports, the Report was far more cautious, but it is noteworthy that at the start of Section 4 there is an immediate recognition of the relevance that it is a commercial venture rather than a casual amateur activity. That this is a difference is relevant, but to place it in such a position of prominence overstates the significance of this, and the Report acknowledges that there are issues with players ignoring common sense and the need for regulation to overrule a desire to compete in order to protect the players.⁴⁹ Ultimately, the Report, while acknowledging the inactivity of the Government, goes no further than recommending that there be a move towards consensus of definition, and further education.

Why, then, is the legislature so reluctant to intervene? It can be argued that there are three reasons for this. The first two appear paradoxical but are entwined as they are, respectively, that the issue is both too small and too large. It is too small, insofar as it represents, when compared to the issues affecting the nation at large, particularly in view of Brexit, Covid, and the economic crisis of the day, a comparatively tiny part of the political spectrum. To the players who are involved it is a life-changing problem, but in a system of limited legislative time,⁵⁰ there are many competing issues that affect far more people. In 2022, to date, Acts of Parliament have involved leases of land, charities, pensions, taxes, and the dissolution of Parliament. All of these involve either society as a whole or regulatory process of the legislative system. To make room for an issue that is critical but specific to one part of one part of society seems exceptionally unlikely.

⁴⁹ Ibid n. 2, 8.

⁵⁰ On average, since 2008, 33 Acts of Parliament have been passed annually, Parliament Commons Library Website.

Paradoxically, the second issue is that the problem is too large. It has already been seen that sport plays a central role in people's lives and while the burden of this particular situation impacts, or at least is known to impact, comparatively few people, the benefit is seen by large parts of the country. This provides a politically charged issue for the legislature based as it is around the party system whereby a contentious issue has the potential to be weighed as a vote winner or loser rather than an objective viewpoint. While, as the Report on Concussion notes, the situation is potentially a very dangerous one, there is nothing to suggest that the weight of public opinion would support significant changes to the rules of sports, as has been present when the legislature has acted in the past. For example, when the smoking ban was introduced, there were questions raised about paternalism and unnecessary government intervention, and there was controversy, but the risks of smoking had been in the public domain for far longer and were far clearer. Further, passive smoking created a potential risk to everyone, while contact sports do not, making it far harder to achieve the necessary weight of public opinion to overcome the inevitable political pressures.

The third concern with the legislature being the answer to the problem is a mixture of the likelihood of intervention and their ability to intervene. It has already been seen⁵¹ that there have been some attempts made to deal with the concussions once they have been established and it will be seen later⁵² that the normal test in tort law is reasonableness which allows each sport and each action to be treated on a case-by-case basis. Nagel emphasises the difficulty of this area, noting that we count as 'harm' duels and fights but not boxing⁵³ while also noting that different cultures treat different things in different ways. As such, it would be difficult to draft legislation that covered all of the different types of sports, allowing sufficient nuance and flexibility to establish a sufficient balance between the competing interests. If the best that the legislature can achieve is to require that there be a reasonable approach by the necessary parties, then while this would be useful, there is no reason why the courts cannot be used to achieve the same outcome.

⁵¹ Ibid 39, Ibid 45.

⁵² See Page 194

⁵³ Ernest Nagel The Enforcement of Morals Humanist May/June 1968 18-27, 27

Therefore, while in a utopian world, the legislative approach would be the preferred option, it is both unlikely to happen from a political perspective, based both on historical events and contemporary reality.

The Courts

This brings the analysis to the judicial options. On the very rare occasions where the outside world has penetrated the field of play to impose regulation, it has been through the actions of the courts, and Collins identifies two occasions where “a police constable has actually walked on to a football pitch and cautioned a player for using language likely to cause a breach of the peace.”⁵⁴ It is noteworthy that Collins describes these incidents as ones of inappropriate language being used by the players rather than any violent acts and that it is possible to surmise that the actions were taken as a result of spectators being potentially offended rather than the player to whom the language was directed.

As with the instances established by Collins, there have been rare occasions where “society [has been] willing to hold sports participants accountable for their actions”⁵⁵ although the same authors acknowledge that “prosecutions and civil litigation are low.”⁵⁶ Donnellan cites Lee Bowyer as an example, a professional footballer who was involved in a brawl with his then teammate, Kieron Dyer, and who pleaded guilty to a public order offence.⁵⁷ In respect of this incident, it was clear that the decision to prosecute was made on public policy grounds, based on complaints that had been received.⁵⁸ However, as in other cases, the actions by the player were not consistent with the rules of the game, and were outside the permitted conduct.

⁵⁴ Valerie Collins *Recreation and the Law*, (E and FN Spon, Second Edition), 48

⁵⁵ Jeff Yates and William Gillespie 'The Problem of Sports Violence and the Criminal Prosecution Problem' (2002) 12 *Cornell Journal of Law & Public Policy*, 168

⁵⁶ *Ibid.*

⁵⁷ Martin Wainwright, 'Court fines Bowyer for punching team-mate' (*The Guardian*, 6 July 2006).

⁵⁸ *Ibid.*

This is consistent with other occasions where players have been subjected to the legal consequences of their on-field actions, with these typically occurring when their actions are so far outside the rules of the game as to constitute a flagrant breach. In the nineties, Duncan Ferguson was prosecuted for a head-butt that took place during a football game⁵⁹ and Eric Cantona⁶⁰ was prosecuted for kicking a spectator. In the case of the former, the action was outside the scope of the rules while in the latter both the action and the target were outside the scope of the rules. Moving sports to Rugby Union, in *R v Lloyd*⁶¹ a player kicked an opponent in the head while he was lying prone on the floor. A conviction was upheld on the basis that “what the appellant did...had nothing to do with rugby-football. It had nothing to do with the play in progress.”⁶²

In none of these cases was a player subjected to legal scrutiny because of the consequences of their actions, but rather because of the actions themselves and it is this that needs consideration. The accepted principle that has emanated through the sporting-legal relationship has been that if the action is within the rules of the game, then that is sufficient, and the law will adopt a hands-off approach.

The picture that emerges after exploring the issue is that the difference between sport and other social phenomenon can be broken down into two aspects: an emphasis on self-regulation, and a respect for the societal importance of sport.

History of self-regulation

It is clear, from this, that without legislative or judicial intervention, the traditionally accepted default position has been that sport has been self-governing, with a deep suspicion of attempts to incorporate the law into its midst.⁶³ Self-regulation is not, however, absolute and there is precedence for state intervention in previously accepted sports. Greenfield and

⁵⁹ The Metro Staff ‘Footballer Jailed Over Punch’ (*The Metro*, 11 Jan 2007).

⁶⁰ BBC News ‘Cantona Banned over Attack on Fan’ (*BBC News*, 27 Jan 2005).

⁶¹ (1989) 11 Cr. App R(S) 36

⁶² *Ibid*, 38.

⁶³ Karen Bill (ed) *Sport Management* (Learning Matters Ltd 2009), 200.

Osborn refer to numerous occasions where the state has intervened to ban or regulate sports, with reference to football during the fourteenth and fifteenth century.⁶⁴ This has been continued in more contemporary times, with certain sports having been deemed to be contrary to contemporary expectations and standards and, over time, prize fighting,⁶⁵ cockfighting, cock-throwing, bear baiting,⁶⁶ and fox-hunting with dogs⁶⁷ have all been banned. Donnellan identifies the reasons for the first three prohibitions, stating that these “blood sports were banned due to the rioting and drinking that often accompanied them”⁶⁸ while the historical bans emerged from political concerns about the working classes gathering for such frivolous and potentially mischievous purposes and the primary arguments raised in respect of the ban on hunting foxes with dogs was the cruelty to the animals.⁶⁹ More recently, the ‘sport’ of dwarf-tossing was banned in France, justified loosely on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although the ban was appealed to the European Court on Human Rights, there was no substantive assessment of the rationale for the law as the Applicant failed to establish a legitimate cause of action.⁷⁰

These are, however, a small number of sports, considering the length of time that is covered by sporting history, and it is noteworthy that of those sports only one involves humans engaging with humans, while in the remainder, the cruelty was aimed not at humans but at animals. The principle that the starting point is self-regulation was emphasised by the contention that “in the past, sporting bodies were able to immunise themselves from judicial intervention”⁷¹ and this deference has been evident for at least the past hundred years. Paradoxically, it is a difficult theme to identify because it is the absence of action by the legislature or judiciary that is being sought to identify, and yet this deference can best be shown with reference to the question of on-field misconduct.

⁶⁴ Ibid n. 40, 2.

⁶⁵ *R v Coney* (1882) 8 QBD 534.

⁶⁶ Cruelty To Animals Act 1835, s3.

⁶⁷ Hunting Act 2004, s1.

⁶⁸ Laura Donnellan *Sport and the Law: A Concise Guide* (Blackhall Publishing, 2010) 43.

⁶⁹ Hansard V363, 27 February 2001 10.39pm.

⁷⁰ *Wackenham v France*, U.N. Doc. CCPR/C/75/D/854/1999

⁷¹ Ibid n. 65, 35.

The Relationship Between Sports and the State

The evidence for the possibility of change has been already noted by the emerging laws against football hooliganism. In much the same way as stadium safety and field of play actions, this was traditionally seen as “football’s problem, as something to be controlled by the sport’s governing bodies.”⁷² It was only when the legislature deemed that “it couldn’t be dealt with in this manner [and so] would be treated as a public-order problem and subject to firm policing”⁷³ that the legislature got involved. These situations, however, had a greater impact on individuals beyond the sporting arena, with societal consequences and activities beyond the actual sporting event meaning that it was harder for sports themselves to regulate and easier for the legislature to justify intervention. There has been far less willingness for the legislature or the courts to involve themselves in what goes on within the sport itself.

The General Problem

Within sports, the first recourse for almost all disputes and challenges will be an internal one, usually prescribed by the governing body. This problem has normally been seen in the context of a player who makes a particularly bad challenge, and feasibly could face criminal sanctions. The first stage, certainly chronologically, would be for the player to be sanctioned internally by their governing body. Greenfield and Osborn use the example of Roy Keane who received a three-match suspension for a bad challenge and red card, which was later adjusted to an eight-match suspension after he revealed in his autobiography that his actions were intentional.⁷⁴ In that case, there was no subsequent external action, despite threats of both criminal and civil proceedings. The potential problem with this approach was summarised by Hicks as a lack of confidence that the internal organisations will make decisions with the correct priorities.

⁷² Ibid n. 40, 7.

⁷³ Ibid, 7.

⁷⁴ Steve Greenfield and Guy Osborn ‘The Role of Law Within Sport’ (*Idrots Forum* 2003), 2.

Using ice-hockey as an example, Hicks contended that the crucial goal of the organisations would be to keep viewing numbers high⁷⁵ which, in this situation, may not be consistent with taking action to ensure that the players safety is of paramount importance. In the case set out above, Keane's actions were, by his own admission, a deliberate attempt to injure another player, seemingly no part of the game, and yet for this intentional act only a five-match suspension was deemed appropriate, or approximately one eighth of the season. While it is dangerous to seek to quantify the respective seriousness of challenges, it is difficult to see how the victim in that case could feel that it would have had any significant impact on improving his safety the next time the player takes to the pitch.

Contrasting the problem, however, is the broader argument which is that the organisations have a far better ability to deal with the situation in a way that will have a real impact on the player. Hicks uses the example of Marty McSorley who struck another player on the head with his hockey-stick. The criminal sanction of probation had very little impact on him, while the decision of the NHL to suspend him for a year would have had a significant impact on both his playing career and his earnings.⁷⁶ Although it can be argued that this was due to the criminal sanction being unduly lenient, if it had been harsher, then it would have opened up potential questions about whether or not the player was being punished twice for the same offence.

An argument that supports this pattern is that courts are not experts in this particular area, and that the organisations who have expertise in the field should be the ones who have the opportunity to resolve situations when they arise; the view being that the internal regulation is reflective of an arbitration process which has greater flexibility to deal with the specific situation than a court which, for all of its powers, has a comparatively limited range of options at its disposal. The advantages of this formed part of the basis for a proposed Sports Ombudsman in a Committee Report, led by Baroness Grey-Thompson which included recommendations that there should be consideration of additional training and education of players and non-playing staff.⁷⁷

⁷⁵ Wyatt M Hicks 'Preventing and Punishing Player-To-Player Violence in Professional Sports: The Court System Versus League Self-Regulation' (2001) *Journal of Legal Aspects of Sport* Vol 11:209, 217.

⁷⁶ *Ibid*, 214.

⁷⁷ 'Duty of Care in Sport' (*Independent Report to Government*, April 2017)

The Particular Problem

There are, however, clear reasons that suggest that while a Sports Ombudsman could have a “positive effect on sport in the UK,”⁷⁸ it would not be best placed to deal with this issue, and would be more effective at addressing the other six points set out in the Report.⁷⁹ First, while it was proposed four years ago, so far the organisation has not been created, and inevitably there would be a significant questions as to the extent of its powers and scope of jurisdiction, before it even considered the first complaint. Secondly, although there are numerous models that can be used, the normal Ombudsman approach is to deal with individual complaints as opposed to significantly broader issues of policy, and it is argued that this falls into the latter not the former category. Finally, by the organisation’s very nature, it is less authoritative than either Parliament or the courts, and from a symbolic perspective, as well as that of precedent, it would be preferable for a clearly external body to regulate this issue.

Even accepting this, clearly, there is a tension in determining responsibility for the actions in the sporting arena, with some potential difficulties in identifying precisely when wider law should intervene. However, there are elements of this problem that should end concerns about whether it is appropriate for the law to involve themselves in this question. The first is that the overall argument about the law’s involvement may itself be old-fashioned. When Grayson first wrote about the competing interests, even football was in the infancy of its commercial development, certainly compared to the current position, while other sports were often still imbued with amateur status. Nowadays, it is possible to argue that any talk of tension is inaccurate⁸⁰ due to the increased commercialisation of sport.⁸¹ Clubs now are limited companies, shareholders have the option of protecting their rights in courts, and, with ever increasing frequency, the insolvency courts find themselves having to deal with creditors issuing winding up orders against clubs who have proven themselves unable to deal with the

⁷⁸ Jack Anderson and Neil Partington ‘Duty of care in sport: time for a sports ombudsman?’ (2018) ISLR 3, 10.

⁷⁹ Ibid n. 72.

⁸⁰ John Bale *Sport, Space, and the City* (London Routledge, 1993).

⁸¹ Steve Greenfield and Guy Osborn ‘Regulating Sport: finding a role for the law’ (2010) *Sport in Society* 12:2, 367.

fluctuating fortunes of the sport. Over the past decade, the law has not so much imposed themselves on sports as sports have drawn the law into their dealings by the increase of their engagement with everyday laws. Therefore, it is possible to say, with far more confidence than twenty years ago, that the law and sport are inexorably entwined.

This does not mean that in every situation, the law will rush to involve itself, and certainly there are situations where the might of the law will be less helpful than the internal workings of the individual sport, particularly with individual disciplinary incidents. However, where there are issues that are of wider concern, as evidenced by insolvency situations, racism and, in this case, health, the law has not shrunk from engaging with sport in order to support and, on occasion, supplant their supremacy.

Violent Sporting Actions- An Acceptable Part of Society?

A Tolerated Act?

While the courts have shown deference to sporting activities, boundaries have been identified that cannot be crossed with Lord Templeman emphasised the importance of criminalising activities to “protect itself against a cult of violence.”⁸² He went on to state that “Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.”⁸³ This would seem to fit the situation, as sports provide pleasure, to spectators and presumably to those who engage in the activity, but also, as has been seen, involve the infliction of pain and considerable suffering. While there is no *mens rea* of violent intent in the sports under consideration, there are clearly acts of violence that can lead to the injuries.

This quote, however, is not from a case condemning acts that lead to injuries in sports, instead being the lead opinion in *R v Brown*⁸⁴ where the court refused to permit consensual, sexual

⁸² *R v Brown* [1994] 1 AC 212, 237.

⁸³ *Ibid*, 237.

⁸⁴ *Ibid*.

acts of violence but in the same breadth approved, in law at least, of “violent sports including boxing.”⁸⁵

It will be seen⁸⁶ that an element of jurisprudential gymnastics was needed in order for this decision to be justified, with a dissenting view asserting that boxing is “another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.”⁸⁷ Lord Mustill disagreed with the primary decision, but even in dissent it appeared that he was unable to find a satisfactory approach with the argument appearing to be nothing more or less than an argument that boxing is legal because it is so tied into the mindset of society. This argument has been developed, with Gunn and Ormerod, contending that the decision is based on an assertion these sports are “needed in the public interest.”⁸⁸ Applying this test, boxing, and other sports that involve physical contact, appear to be lawful,⁸⁹ although the express tie to the public interest suggests that this has the potential to change.

At its narrowest reading, *R v Brown*⁹⁰ fails to adequately explain why sports should not be treated in the same way as other violent activities, while at its widest reading it can be read to suggest that sport is special, that it has a sufficient social importance as to render it beyond the scope of the courts and Parliament, for so long as the participants follow the rules of that particular sport. One part of this special status is that the sports will be afforded sufficient autonomy to develop its own regulation and be protected from external scrutiny. Social importance is an exceptionally vague concept and can potentially be seen in one of two lights.

⁸⁵ Ibid, 232.

⁸⁶ See Page 269.

⁸⁷ Ibid n. 82, 265.

⁸⁸ Steve Greenfield and Guy Osborne *Law and Sport in Contemporary Society* (Frank Cass 2000) 29. Anderson emphasises the ambiguity of this, stating that “precisely because there is little guidance to the criteria underpinning the public interest in the existing list of exceptions; it may be time to consider an alternative approach”. Jack Anderson, Jack Anderson *The Legality of Boxing: A Punch-Drunk Love* (Routledge Cavendish 2007), 104.

⁸⁹ “there is a strong argument that boxing is contrary to the public interest and therefore illegal since all fights involve the infliction or attempted infliction of actual bodily harm. But there is a strong philosophical objection to banning boxing and there is no apparent Parliamentary interest in doing so.” Steve Greenfield and Guy Osborne *Law and Sport in Contemporary Society* (Frank Cass 2000), 29.

⁹⁰ Ibid n. 82.

The first is that sport is so engrained in the human psyche that it cannot be removed, and the second is that it is of a significant benefit to society so that it should not be removed.

Sporting Populism

It has already been seen that there is a long history with sport and Kapuscinski sheds some light on this nexus between sports and the law, in this case law enforcement, by explaining the consequences for a Mexican prison after the national team beat Belgium in a football match. Kapuscinski writes that the warden of Chilpancingo Prison was so ecstatic at the result that he “ran around firing a pistol in the air [shouting] ‘Viva Mexico’”.⁹¹ This would have been concerning, but to then release 142 criminals who were described as “dangerous [and] hardened”⁹² elevates it to the disturbing. The conclusion of the story becomes simply absurd, as he was later acquitted by a Mexican court as having “acted in patriotic exaltation.”⁹³

This decision of the court is even more remarkable because it takes the fervour and cultural importance of sport beyond even the confines of the field of play and bestows particular treatment on a supporter despite actions that were at best reckless, and at worst potentially dangerous to members of the public. It does, however, emphasise the populism of sports, a concept that is not new, with the Roman Senate and later Emperors using Gladiatorial games as a way of shoring up support for their positions. This belief was reflected in Lord Mustill’s dissent in *R v Brown*⁹⁴ when it was reluctantly concluded that the violent sport of boxing was tolerated by the law only because the public demanded that it remain.

Sport Improving Society

If it were merely a question of sport being popular, then it seems unlikely that there would be sufficient justification for such a radically different treatment. There is however, a more objective perspective that emphasises the importance of physical sport to society and can be

⁹¹ Ryszard Kapuscinski *The Soccer War*, (W Brand Tr: Granta Books London 1990), 160.

⁹² *Ibid*, 160.

⁹³ *Ibid*, 160.

⁹⁴ *Ibid* n. 82.

seen as a better justification for its tolerance than it being popular. Guttman argues that “sport plays an ever-increasing part in the life of the individual, as it does in the life of nations, and represents as much a positive element in the culture of our modern life as it did in the culture of ancient nations.”⁹⁵ Essentially, his argument is that sport can have a positive impact on society. This is given more detail by Holt who directly links sport with education, arguing that youngsters can acquire an education that is outside the academic textbook, including principles of “daring and endurance but better still, temper, self-restraint, fairness, honour, unenvious approbation of another's success and all that 'give and take' of life which stands a man in good stead when he goes forth into the world.”⁹⁶ Lord Hailsham took this beyond the ideal, arguing that “sport, I believe...is an essential part of education...Organised sport is undoubtedly part of our national culture”⁹⁷ and commentators consistently argue that there are intrinsic links between the natural way of life and culture.⁹⁸

This provides safer ground for an argument that sport should be treated differently. It is easy to see how sports can be seen as a positive influence, through encouraging fitness through training and competition and from this socio-medico perspective, the importance of sport socially has been emphasised by Radhakrishnan who argues that participation in sport improves physical well-being in the mentally handicapped promotes a better image of self, at the same time increasing acceptance amongst peers, through a process of mutual interaction.”⁹⁹ Adams and Wren have argued that sport, specifically boxing, provides a form of preparation for life and adds to the attributes already identified those of “self-confidence, discipline, and true sportsmanship, [together with] social responsibility.”¹⁰⁰

Building on this, the ambassadorial aspect of sport can be considered, with the Amsterdam Treaty containing a Declaration of Sport as a method for “reinforcing community values and

⁹⁵ Ludwig Guttman *Textbook of Sport for the Disabled* (University of Queensland 1977), Simon Payne (ed) *Medicine, Sport, and the Law*, (Blackwell Scientific Publications 1990), 6.

⁹⁶ Richard Holt *Sport and the British: A Modern History* (Oxford, Clarendon 1989), 93.

⁹⁷ Quinton Hogg, Baron Hailsham *A Sparrows Flight: The Memoirs of Lord Hailsham of St Marylebone* (Fontana Press 1990), 336.

⁹⁸ “Organised sport forms an important part of the heritage of the people of the United Kingdom” (Simon Payne (ed) *Medicine, Sport, and the Law*, (Blackwell Scientific Publications 1990), Foreword xi.

⁹⁹ Simon Payne (ed) *Medicine, Sport, and the Law*, (Blackwell Scientific Publications 1990), 149.

¹⁰⁰ *Ibid*, 230.

forging identify.”¹⁰¹ Meanwhile, Greenfield and Osborn have emphasised that the Treaty identified that “sport was an ideal platform for achieving social democracy and could be used to tackle issues such as racism and xenophobia.”¹⁰²

Internationally, Juan Antonio Samaranch, former President of the International Olympic Committee, stated that sports activity is “the largest social force of our time”¹⁰³ Indeed, “[no] other modern social event makes people feel so strongly that they belong to a global village.”¹⁰⁴ Nafziger gave specific examples of this referring to “ping pong diplomacy”¹⁰⁵ between the United States and China, tennis matches that helped to facilitate relations between South Korea and China, unification of North and South Korea for international competition, soccer matches between Albania and the United Kingdom and a baseball competition between Cuba and the United States.¹⁰⁶

It can be taken, from the consensus of analysis, that sport holds a special place in the public consciousness, even if the preference of any given individual differs from horse-racing to rugby, cricket to rugby-union, and this is enhanced by the potential presence of spectators at an event, for as Barnes wrote in *The Times* in 1999:

“a sporting dispute is not like a dispute between unions and management. A sporting dispute is something that involves and invades everyone who cares for sport. It feels- perhaps irrationally- like a personal attack. It does, after all, affect ourselves and our pleasures.”¹⁰⁷

All this means that, as Weatherill claims, "Sport possesses unusual features which mark it out from 'normal' industry."¹⁰⁸ These features lend a legitimacy to actions that in any sphere

¹⁰¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on sport *Official Journal C 340, 10/11/1997 P. 0136.*

¹⁰² The Helsinki Report on Sport COM (1999) 644 final, 4.

¹⁰³ Olympic Review (March 1984), 156.

¹⁰⁴ Arno Mayor 'Peace Without Victory' (1999) (UNESCO Courier April 1999), 9.

¹⁰⁵ James Nafziger *International Sport Law* (Transnational Publishers Inc, Second Edition 2004), 216.

¹⁰⁶ Ibid.

¹⁰⁷ Simon Barnes, *The Times*, 20 Jan 1999

¹⁰⁸ Ibid n. 88, 176.

would be deemed to be unsociable, immoral, or even illegal, while the extent of the public interest, involving as it does “about 22 million people in all, on at least one occasion per month...it embraces all generations from the cradle to the grave”¹⁰⁹ lend support to the earlier noted contentions of Greenfield and Osborn that there is little appetite for the abolition of or interference with sports, regardless of their capacity for brutal and severe consequences.

Emerging consequences and changing backdrop of bodily integrity

Identifying why sport has been afforded this informal special status that has led to a laissez-faire approach is important because it demonstrates the significance of the obstacles that must be overcome in order to argue that there should be intervention. The argument that must be faced is not merely a restrictive interpretation of law, but rather an inherent acceptance of violence in sports. It has been seen already, that while the general trend has been toward permitting self-regulation and treating sport as a special exception when weighed against the more typical treatment of acts that endanger bodily integrity, there have been occasions where sporting acts that were both traditional and deemed to be of right, have been abolished.¹¹⁰ Primarily, these have been cases where animal cruelty has been at issue, with bear baiting and cock fighting both having been criminalised¹¹¹ but in the area of boxing, the courts did take a stand and refuse to condone prize-fighting, with the courts holding that the unorganised approach of boxing was insufficiently regulated to be tolerable, particularly when there was an alternative. It is noteworthy that in this case, although the court technically abolished prize fighting, what they in fact did was rule that the existing form of boxing was unsustainable and pushed the organising bodies into evolving the sport into a form that was acceptable. Whether by chance or design, the abolition of prize fighting merely allowed a new form of boxing to emerge, one that Anderson discusses and suggests may itself have now become out-dated and ripe for reform.¹¹²

¹⁰⁹ Ibid n. 99, Foreword at xi.

¹¹⁰ Ibid 75.

¹¹¹ Ibid 73.

¹¹² Jack Anderson *The Legality of Boxing: A Punch-Drunk Love* (Routledge Cavendish 2007), 82.

Sport, therefore, is an evolutionary concept not a static one. There are ebbs and flows, and times certain sports become redundant and are abandoned. It is not proposed that this is necessarily required with the three sports under discussion, but it will be argued, as part of the discussion of negligence, that the time is right for the courts to play a greater role in ensuring that participants of these sports are better protected by the governing bodies, by the clubs, and by each other, from injuries that, it is now clear, can have catastrophic consequences.

Chapter Three: Tort and the Duty of Care

Introduction

The first two chapters argued that contact sports have a problem with concussion injuries; a problem that will only worsen, and that at present great deference has been afforded to the sports to regulate their own activities. While sports have made some adjustments to their approaches,¹ these have not been primarily focused on preventing concussion injuries but on managing the consequences of concussion injuries. A result of these actions has been the announcement of a class action against World Rugby² and against individual clubs.³ At around the same time, Parliament initiated hearings that culminated in the Report that has already been referred to,⁴ although the Report also made it clear that the ongoing litigation limited its abilities to explore the full extent of the situation.⁵ Nevertheless, while the overtures of the Report were promising with indications that athletes should not be allowed to trade long term health for short term rewards⁶ and that the Government has a responsibility to engage with the question proactively,⁷ there was little indication or suggestion that this would lead to legislation that would clearly impose duties on bodies to ensure that the concerns were met. Rather than focus on a political question arguing why the legislature should intervene, the balance of this thesis will argue that the courts should take up the baton offered by the Report, together with the medical research, and extend their own form of protection to players.

The Potential Resolutions

¹ Ibid 39, Ibid 45.

² BBC Sport, 'Concussion in sport: More former rugby union players prepare to take action' (*BBC Sport*, 17 December 2020).

³ Gavin Cummisky, 'How head injuries finished the rugby career of Cillian Willis' (*The Irish Times*, 23 March 2019).

⁴ House of Commons Digital, Culture, Media and Sport Committee, *Third Report Concussion in Sport* (HC 46) 2021.

⁵ Ibid, 18.

⁶ Ibid, 3.

⁷ Ibid, 33.

It was seen in Chapter Two that this thesis does not object to the principle of legislation resolving the issue but that there are practical reasons why the judiciary would be the most likely path to resolution.⁸ Regardless, however, of the path, there are, effectively, three approaches that could be taken with an increasing gradient of intervention. The deferential option would be to say that sports can develop measures that they deem appropriate, reflecting the traditional approach. The middle option would be to say that sports must take measures to improve the safety of the players, including prevention rather than management, but that the sports themselves may continue. The most extreme measure would be to ban the sports in their current form, leaving open the possibility, as happened with boxing, for the sports to re-emerge in a more appropriate and suitable guise.

Most of the attention in this field to date has been on those sports that involve the deliberate infliction of violence. Greatest emphasis within this category has been attributed to boxing, although the modern sport of Mixed Martial Arts, normally abbreviated to 'MMA' must also be seen as falling within a similar category.⁹ Anderson¹⁰ comprehensively analysed this particular sport, writing that "boxing presents a level of physicality that is unparalleled in most contact sports"¹¹ with "the most efficient means of victory [being] to render one's opponent unconscious."¹² Anderson considered the various approaches to address the issues within boxing, arguing that leaving the sport as it is was too dangerous, but that while other countries, such as Norway, have abolished boxing"¹³ it was possible to reform the sport sufficiently to render it permissible. However, much as the three sports in this thesis have been slow to respond, he argued that there was an unanswerable case that "as the professional boxing world can no longer be persuaded to reform, it must in effect be punished

⁸ Ibid 68.

⁹ MMA is a sport that "has few rules and permits wrestling holds, punching, marital arts throws and kicking." Laura Donnellan, 'Putting a legal and regulatory shape on MMA' (*RTE*, 19 February 2018). Donnellan notes that there is a potential asymmetry about the legality of MMA as "It is now accepted as a mainstream sport. Its legality is somewhat dubious as it derives its legality from boxing. Boxing is legal because it is not prize fighting. Prize fighting was declared illegal as it caused a breach of peace." Laura Donnellan 'Mixed Martial Arts Legal Issues' (*Sports Law Blog*).

¹⁰ Jack Anderson *The Legality of Boxing: A Punch-Drunk Love* (Routledge Cavendish 2007).

¹¹ Ibid, 1.

¹² Ibid, 1.

¹³ Ibid, 171.

into doing so,"¹⁴ recognising that change will only be likely to occur if prompted from external forces.

The 2021 Report¹⁵ underlined the reluctance of the legislature to act as that external force, and so the logical source to consider is how such pressure can be imposed by common law, through the law of tort. The remainder of this thesis will argue that the courts can impose a duty of care,¹⁶ that they should impose a duty of care,¹⁷ and that while consent is a significant factor, it is not sufficient to overcome the strong arguments in favour of such a development.¹⁸

The Potential Basis of Liability

The law of negligence centres on a party who owes a duty of care to another to only act in a way that avoids harm to that party. The next three chapters will argue that this duty should embrace two potential Defendants, specifically sport's governing bodies,¹⁹ and employer clubs.²⁰

One of the key points that will be analysed²¹ is precisely what this duty will, or could, require from the various potential Defendants. The duty of care in tort law is not absolute, and it is not argued that there should be an absolute test of strict scrutiny. Instead, the normal standard in English law that will be proposed will be that the individuals or organisations would be required to take steps that would be reasonable. It will also consider whether a less usual standard could be adopted, to take into account the particular difficulties of the balancing of interests, specifically gross negligence. Regardless of the question, the crucial question then is what steps the parties would need to take in order to insulate themselves from a potential claim in negligence or gross negligence, and this will be answered, although

¹⁴ Ibid, 176.

¹⁵ Ibid n. 4.

¹⁶ See Page 116.

¹⁷ See Page 194.

¹⁸ See Page 249.

¹⁹ See Page 143.

²⁰ See Page 217.

²¹ See Page 194.

one of the advantages of proceeding through the common law is that the test will be sufficiently flexible to adjust as new medical evidence emerges.²²

This is particularly relevant when considering the differences between these sports and boxing. In the latter, the difficulty of seeking to address the issues through negligence is that there is little flexibility within the sport. The crucial part of the sport, to punch the opponent, is also the cause of the significant injuries. With every punch there is a risk to physical integrity, whether to the stomach, the head, or even to the opposing gloves. On the one hand this makes it hard to justify its existence, but once this case is made, it then becomes harder to argue that the sport should be required to significantly change its rules to better protect the participants. It is a straight choice between tolerating the sport or abolishing it.

This is not the case with the sports in question, where the goal is to do an activity, to score a try, or a goal, but the route to achieving this aim, in the current rules, involves significant concussive risks. These routes are a choice; a choice of those who choose to set the rules. It will be argued that the evolving understanding of the dangers inherent in sports affecting the physical integrity of the participants, particularly in respect of modern medical research, means that these specific rules cannot be justified, and the sports must change. This will be detailed more in Chapter Four,²³ when analysing governing bodies but several different approaches will be considered, including, at the upper level, for football for heading to be banned, and in Rugby Union, tackling to be banned. It will be argued that while these changes would significantly change the nature of the sport, the sports themselves would remain intact. In Chapter Five²⁴ the prospective liability of the clubs will be considered, and it will be argued that they must ensure that the players are not encouraged to go beyond that which is safe for the sake of competitiveness and winning, while in Chapter Six²⁵ the question of consent will be analysed.

²² See Page 199.

²³ See Page 199.

²⁴ See Page 217.

²⁵ See Page 249.

As has been suggested, the core of the legal analysis focuses on negligence. It will be argued that when an on-field action complied with the rules of a sport, and where a concussive event is a result of that action, the common law is capable of protecting the victim of that action but that this capacity is currently dormant as there is no precedent that comprehensively extends the duty of care to situations where the player was injured in compliance with the rules.²⁶ It will therefore be necessary to argue that the existing law of negligence should be extended to encompass this potential liability and this Chapter will analyse the methodology that is used, or is claimed to be used, by the court in extending the law of negligence, in order to apply the medical developments that have previously been established to the law and to argue that the law is capable of being expanded.

This chapter analyses the law of negligence, with particular emphasis on the duty of care, and attempts to unravel the approach that is currently used by the courts in their application to novel situations to analyse how this can be potentially applied to sporting actions. This jurisprudence and literature review summarises that which has been produced through the eras identified by Hedley²⁷ from the early stages of negligence through to the more recent cases that have enhanced the understanding of the points.²⁸

The key questions that will be answered through the historical navigation are how a new duty of care is established,²⁹ to what extent are there restrictions on this development,³⁰ and, if there is a trend, is it amenable to the type of development that is sought by this thesis.³¹ It will be seen that although there is ambivalence as to the method of development, duties can

²⁶ This thesis is limited to this situation, as situations where the sporting rules are broken are covered by existing authority, per *Letang v Cooper* [1965] 1 QB 232, *McCord v Swansea FC* The Times 11 February 1997 Lexis Citation 3845, *Watson and Bradford City FC v Gray and Huddersfield Town FC*, The Times 26th November 1998; *Caldwell v Maguire* [2001] EWCA Civ 1054, *Gaynor v Blackpool FC* [2002] CLY 3280; *R v Billingurst* [1978] Crim LR 553; *R v Barnes* [2004] EWCA Crim 3246, *R v Doble* (Unreported, Stafford Crown Court 9-10 September 1980), *Woolridge v Sumner & Anor* [1963] 2 QB 43, *Wilks v Cheltenham Car Club* [1971] 2 All ER 369, amongst others.

²⁷ Steve Hedley, *Tort* (7th Edition, Oxford, 2011), 28.

²⁸ TT Arvind and Jenny Steele, *Tort law and the legislature: common law, statute and the dynamics of legal change* (1st Edition, Bloomsbury Publishing 2012), 235.

²⁹ See Page 90.

³⁰ See Page 109.

³¹ See Page 139.

be extended as potential negligence evolves and that the current direction of negligence claims are consistent with such a development.

The Duty of Care in Negligence

To establish liability for negligence, there are five elements: the existence of a duty of care, the breach of that duty, causation of damage, proximity of loss and evidence of loss.³² The first of these, and the one that will be the focus of this chapter, crystallised for the first time in *Donoghue v Stevenson*³³ where the court ruled that a duty could exist outside of a specified contractual relationship.³⁴ The others tests are more capable of being discussed in a specific factual context, while the first has increased importance because of its existence as the initial hurdle. It is fruitless to discuss whether the case specific facts satisfy the later limbs, if it cannot first be established that the duty owed by the potential Defendant rises to the level of a legal duty, as opposed to a moral or spiritual duty.³⁵ This examination will be used to argue that a duty of care should exist for the benefit of a sports competitor, in certain situations, against the sport's governing bodies, the employer of the clubs, and other players. A wider appraisal of the rationale for a duty of care is necessary here because, as will be shown, the duty of care that is being proposed is a novel duty and therefore requires clear justification with reference to the broader principles.

Purpose of Duty of Care

Historical Purpose of a Duty of Care

³² Kirsty Horsey and Erika Rackley *Tort Law* (6th Edition, Oxford University Press, 2019).

³³ [1932] AC 532.

³⁴ *Ibid.*

³⁵ *Donoghue v Stevenson*, *Ibid* n. 33, 580: "The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply" per Lord Atkin

The historical purpose and significance of the duty of care has been one of the control mechanisms of negligence³⁶ with Ibbetson explaining that it arose in the nineteenth century due to the jury's primary function of determining the other tests of negligence.³⁷ Thus, it became "the principal tool for judicial control of the jury"³⁸ as the judge had the power to withdraw a case from a jury³⁹ by, to use modern parlance, giving a directed verdict on the question of whether a duty existed or not.⁴⁰ It can be seen as an opportunity for the judiciary to determine what could and could not be capable of incurring liability,⁴¹ allowing the judiciary to act as guardians to the development of the law, a role that is referred to today and will be seen to be predominantly demonstrated by use of public policy in judicial analysis.⁴²

The Continuing Purpose of a Duty of Care?

As the starting point of the common law of negligence, this component has been described as a "core ingredient"⁴³ or "foundational element"⁴⁴ of the cause of action. Additionally, the question of duty is commonly seen as the logical starting point of the negligence enquiry, the source of the dispute between the parties and, as will be seen, it is the place where the framing of the question can be crucial in determining the outcome of the case.

The importance of the duty of care is no longer grounded, primarily, in the idea of insulating the parties from the unpredictability of a jury,⁴⁵ and there is a school of thought that contends

³⁶ Neil Partington, 'Sports coaching and the law of negligence: implications for coaching practice' (2016) *Journal of Personal Injury Law*, 4, 232, Control Mechanisms.

³⁷ David Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999), 176–177.

³⁸ *Ibid*, 176-177.

³⁹ Morgan notes that this explains the lack of 'duty' as a test in jurisdictions that have a civil code and do not have the jury system. Jonathan Morgan 'The rise and fall of the general duty of care' (2006) PN 2006, 22(4), 206.

⁴⁰ Jonathan Morgan 'The rise and fall of the general duty of care' (2006) 22(4) PN 206, *Ibid* n. 37, G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, Expanded Edition 2003), 184.

⁴¹ *Hughes Holland v BPE Solicitors* [2017] UKSC 21, [20] per Lord Sumption.

⁴² Randal Macpherson 'Seek and you will find: Commodity Solution Services Ltd v First Scottish Searching Services Ltd [2019] SAC (Civ) 4; 2019 S.L.T. (Sh Ct)' 63 Rep. B. 2019, 148, 2-6.

⁴³ Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559.

⁴⁴ *Ibid*.

⁴⁵ Since the alterations on the use of juries in civil cases in the Common Law Procedure Act 1854.

that it has no place in contemporary law,⁴⁶ with its functions being capable of consideration under the other limbs of the test for negligence. This school was most eloquently championed by Buckland who argued that the duty of care is an "unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice"⁴⁷ while Smith contended that the concept was "confusing and ambiguous."⁴⁸ In spite of these contentions, which are outside the ambit of this thesis, duty of care remains an important part of establishing liability for negligence although the debate over its very existence gives a flavour of the ambiguities that riddle the doctrine.

The importance of retaining the duty of care has been emphasised from both wings of the liability spectrum, with Murphy contending that the potential to widen the boundaries of liability allowed jurisprudence to remain that of a "civilized community"⁴⁹ and arguing that it is "entirely proper"⁵⁰ that "the development of the law should be warranted by current values and current social conditions."⁵¹ This has particular relevance in this type of discussion where the question is whether a new duty should be developed.

From the opposite perspective it has been argued that the development of a duty of care is defensive, in order to avoid the elevation of all carelessness into a tort⁵² and as such, it acts as a "crucial device"⁵³ to raise barriers when they need to be raised, often to prevent the opening of floodgates.⁵⁴ Stapleton contends that the alternative, where the liability-defining question is whether the duty of care has been breached, is not sustainable as there are occasions when a "no-liability outcome"⁵⁵ is desired, even when the actions of the defendant

⁴⁶ Percy H Winfield, *The History of Negligence in the Law of Torts* (1926) 42 LQR 184; Patrick S Atiyah, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press 6th ed, 1999), 58, Allen M Linden (ed), *Studies in Canadian Tort Law* (Butterworths, 1968) 215.

⁴⁷ William Warwick Buckland 'The duty to take care.' (1935) 51 LQR 639.

⁴⁸ *Ibid* n. 43.

⁴⁹ *Quinn v Canadian Airlines International* (1994 Can LII 7262), 62.

⁵⁰ John Murphy 'Contemporary Tort Theory and Tort Law's Evolution' (2019) *Canadian Journal of Law and Jurisprudence* 65.

⁵¹ *Willers v Joyce* [2016] UKSC 43, [179] per Lord Sumption.

⁵² *Moorgate Mercantile Co. Ltd v. Twitchings* [1977] 1 A.C. 919 per Lord Edmund-Davies.

⁵³ Jane Stapleton 'Duty of care: peripheral parties and alternative opportunities for deterrence' (1995) 111 LQR. 301.

⁵⁴ Robert L Rabin 'Duty Concept in Negligence Law: A Comment' (2001) 54 *Vand. L. Rev.* 787.

⁵⁵ *Ibid* n. 53, 303.

have been deemed unreasonable.⁵⁶ This perspective is supported by Fleming who argued that the crucial role of the courts in respect of negligence was to limit the extent to which liability could grow and that the duty concept was "nothing more or less"⁵⁷ than a control device "fashioned by the courts to achieve that purpose."⁵⁸

What is clear, based on both history and contemporary law, is that the duty question is flexible and therefore capable of greater malleability. Smith has described the duty question as being fundamentally "open-ended"⁵⁹ and that because of this, "over time more and more of the issues raised by negligence litigation have come to be dealt with under its rubric."⁶⁰ Murphy has attributed, in part, the changing scope of the duty of care, to a development "in process of time in response to the development of the society in which it rules"⁶¹ and quotes Lord Goff who stated that "our laws are subject to the ebb and flow of the tides of fashion and opinion"⁶² clarifying, beyond all doubt, that the core of the duty in question is flexibility over certainty, and ambiguity over clarity. These assertions demonstrate the fluidity of the duty of care and indicate the need to identify with as much clarity as possible the current tides of duty in order to argue that the proposed development is timely and necessary.

The question therefore becomes, how has this flexibility and ambiguity manifested itself over the various eras of English law and is there a clear and accepted approach that is currently used. The uncertainty of the question has been emphasised by Tan who wrote that "the search for a universal test to determine whether a duty of care should be imposed for negligence liability has plagued common law jurisdictions for over half a century."⁶³ In making this statement, Tan was guided by a remarkable statement by the United Kingdom Supreme Court that "the common law in this jurisdiction has abandoned the search for a general principle capable of providing a practical test applicable in every situation in order to

⁵⁶ Ibid, 303.

⁵⁷ John G Fleming, 'Remoteness and Duty' (1953) 31 Can. Bar Rev. 471, 474.

⁵⁸ Ibid.

⁵⁹ Lewis Klar (ed) *Studies in Canadian Tort Law* (Butterworths, Canada 1977), 9.

⁶⁰ Ibid.

⁶¹ *Lister v Romford Ice & Cold Storage Co* [1957] AC 555, 591-592 per Lord Radcliffe.

⁶² Lord Goff, 'Judge, Jurist and Legislature' *The Child & Co Oxford Lecture* (1986).

⁶³ David Tan 'The end of the search for a universal touchstone for duty of care?' (2019) Vol 125 Issue 2 LQR 200.

determine whether a duty of care is owed and, if so, what is its scope.”⁶⁴ In spite of this pessimistic note, though it will be seen that the caution is well founded, it is necessary to analyse the development of the duty of care in an effort to understand how the court could and should extend the duty of care to include sporting injuries caused by playing within the rules.

The Development from *Donoghue v Stevenson*⁶⁵ to the Present Day

As negligence is, and has always been, a common law principle, inevitably there was a time before it existed as a cause of action, at a time when the law was seen as “fragmented.”⁶⁶ At this point, the concept of negligence was seen less as an individual cause of action upon which someone could be sued than as an umbrella concept for understanding other torts with specific actions.⁶⁷ Likewise, the term ‘duty of care’ was given a specific meaning for specific relationships and the categories where it was relevant were later described as “virtually closed”.⁶⁸ In the context of an innkeeper and guest, for example, the term was used to describe that relationship⁶⁹ and it was accepted by the courts that an individual who possessed a gun had a responsibility to use it in an appropriate manner.⁷⁰

There were, then, individual compartments of actions, which had as an underlying theme a concept of duty of care, but it is accepted that there was no recognised link between them⁷¹ although there was an attempt in *Heaven v Pender*⁷² with the statement that:

“Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those

⁶⁴ *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [15].

⁶⁵ *Ibid* n. 33.

⁶⁶ *Ibid* n. 37, 188.

⁶⁷ Percy H Winfield ‘The History of Negligence in the Law of Torts’ (1926) 42 LQR 184.

⁶⁸ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 per Lord Reid.

⁶⁹ *Winterbottom v Wright* [1842] 10 M & W 109.

⁷⁰ *Langridge v Levy* (1837) 2 M & W 519.

⁷¹ *Ibid* n. 32, 32.

⁷² [1883] 11 QBD 503.

circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger"⁷³

This, as a statement of negligence, is remarkably like that which would follow, yet for the subsequent 49 years the law remained sufficiently compartmentalised that Lord Atkin's statements in *Donoghue v Stevenson*⁷⁴ have been conclusively taken to be the birth of the modern law of negligence.

The result was that regardless of the potential breadth of Brett MR's statement, the impact remained potential only, and the relevance of duty of care was typically limited to contractual situations where that duty had been expressly agreed by the parties.⁷⁵

The Possibilities and Limitations of *Donoghue v Stevenson*⁷⁶

*Donoghue v Stevenson*⁷⁷ was the first case to tie these strands together and expressly allow a claim in negligence. Despite being the first key case in this area of law to develop a duty of care, there are numerous aspects of *Donoghue*⁷⁸ which are relevant for this thesis. First, the court acknowledged that negligence is, by its nature, a developing tort and that "the categories of negligence are never closed"⁷⁹ clarifying that the court would be open to the development of novel tortious scenarios and logically leaving it feasible that the categories could be extended, at some point, to sporting cases. This lays the foundation for a case to be made, that actions by sporting bodies and clubs may fall within the boundaries of a duty of care. This statement is a keystone for the principle that the law is intended to evolve with knowledge and understanding, creating not a bright line rule but rather jurisprudence that can adapt to meet the needs of the times in which it is used.

⁷³ Ibid, 509 per Brett MR.

⁷⁴ Ibid n. 33.

⁷⁵ Ibid n. 32, 32.

⁷⁶ Ibid n. 33, 580-581 per Lord Atkin.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid, 619 per Lord Macmillan.

Secondly, while the general and basic need for an individual or organisation to take reasonable care in respect of the actions of another⁸⁰ was abstract, setting out approximations of general application rather than precise tests, it nonetheless made it clear that when a person or organisation is in a position where they can influence another, there is the possibility of a duty existing from one to the other, seemingly establishing a framework for liability rather than the detailed pieces. This basic framework has been refined by the common law in cases since this time, but the broad potential scope of the duty has never been overruled. It provides for the possibility that in a sporting context there could be a duty of care, although as will be seen, to date that duty has not been utilised.

It must be noted that there were also indications that this should not be considered a complete reversal of previous tendencies towards limiting liability, despite the opening up of the new pocket of liability. In particular, there was an additional part of the ruling, which reduced the standard of liability from the strict liability, that had existed where there was a specific relationship, to a fault based liability, which resulted in the development of the second limb of negligence, the question of whether the established duty had been breached.⁸¹ The result of this is that although the gateway to liability was widened, allowing a greater range of potential cases in, once through the door there would be a heightened scrutiny on whether or not liability should be present in those cases, thus making it harder to establish liability.

Lord Atkin's approach was indicative of the realities of the case; it was a statement that was broad and dramatic, with language that stated clearly that a different path needed to be followed. In terms of detail, however, it was unhelpful, having been regarded by commentators as "extraordinarily empty."⁸² However, as a basis for the duty of care, its dual intent is clear: to ensure flexibility over time, and to encourage the taking of responsibility for those who may be adversely affected by an individual's actions.

⁸⁰ Ibid n. 32, 34.

⁸¹ Ibid n. 33.

⁸² Joanne Conaghan and Wade Mansell *The Wrongs Of Tort* (2nd Ed, Pluto Press 1999) 13.

Sporting Cases

Based on *Donaghue v Stevenson*,⁸³ and before considering the significant developments that have occurred since this case, it can be seen as feasible for a duty of care to exist in sporting cases. The reality is that in this area, sporting cases have been very thin on the ground and that although there has been an increase in those who have been injured during a sporting activity seeking to pursue their claims through the legal system,⁸⁴ the courts have rarely been called upon to make determinations on the crucial legal question of a duty of care. Therefore, although there have been a handful of cases that help to indicate whether a duty of care exists or not, it is accepted that while a duty of care could exist, at present the courts have not acknowledged its existence. In the rare sporting cases that have come before the courts in this context, the determinations have either been very narrow or against the idea that a duty of care can exist. However, those cases are instructive in assisting with the likelihood of such a duty being found to exist were the question to be asked in the litigation that is presently pending.

*Watson v British Board of Boxing Control*⁸⁵

During a boxing match between Michael Watson and Chris Eubank, Watson was 'knocked out' by Eubank, with the medical response being criticised⁸⁶ as it took seven minutes for doctors to first attend to him. Watson was then sent to a hospital that was not adequate for his needs. He spent 40 days in a coma and six years in a wheelchair. Proceedings were issued against the British Board of Boxing Control (BBBC), on the basis that they were the domestic governing body that had sanctioned the bout, alleging that they had failed in their duty of care to him.⁸⁷ The High Court found that there was a duty of care that had been breached and so that liability attached. The Court of Appeal ruled that because the BBBC had involved themselves in the organisation, by sanctioning the match and setting down the way it should be conducted, they were deemed to be responsible not only for ensuring that injuries were not inflicted, but

⁸³ Ibid n. 33, 619.

⁸⁴ Bruce Gardiner, 'Liability for Sporting Injuries' (2008) *Journal of Personal Injury Law* 17.

⁸⁵ [2001] QB 1134.

⁸⁶ Ibid, 1164-1165.

⁸⁷ Ibid.

also for adequately treating injuries if they did occur. Effectively the court took the view that they had assumed the risk in the same way that a doctor assumes the risk when he voluntarily assists an individual.⁸⁸

Lord Phillips MR acknowledged that this was, unquestionably, new ground, including a comment that “[The judge] did not, however, identify any obvious stepping-stones to his decision. I do not find this surprising. There are features of this case which are extraordinary, if not unique.”⁸⁹ It will be seen that this is unusual in cases where the duty of care is potentially to be developed, as the courts typically prefer to follow an incremental approach. However, Lord Phillips MR emphasised, citing Lord Steyn, that while stepping stones are one method of extending a duty of care, there are cases where analogies cannot be found, and in those cases, it is necessary to consider “an intense and particular focus on all its distinctive features, and then applying established legal principles to it.”⁹⁰ Thus, while the establishing of liability against the BBBC was out of step with existing authorities, its development was a natural one.

*Watson*⁹¹ is an important case in this discussion for several reasons. First, it was a good example of a case where the courts would hold an organisation liable for injuries to a participant. The specific rationale of the case will be discussed in the next chapter but crucially for this chapter, it was made clear that the court considered that there was a potential avenue into this type of liability, particularly in respect of the question of whether allowing a duty of care would leave the governing body exposed to indeterminate liability. This was a key argument of the BBBC stating that the finding of a duty would place them at the risk of unforeseeable claims, as any duty would be owed to a potentially indeterminate class, an

⁸⁸ "In *Barnett v Chelsea & Kensington Management Committee* [1969] 1 Q.B. 428 Nield J. drew a distinction between a casualty department of a hospital that closes its doors and says no patients can be received, in which case he would, by inference, have held there was no duty of care, and the case before him where the three watchmen, who had taken poison, entered the hospital and were given erroneous advice, where a duty of care arose. Likewise, a doctor who happened to witness a road accident will very likely go to the assistance of anyone injured, but he is not under any legal obligation to do so, save in certain limited circumstances which are not relevant, and the relationship of doctor and patient does not arise. If he volunteers his assistance, his only duty as a matter of law is not to make the victim's condition worse. Moreover, no such duty of care exists, even though there may be close physical proximity, simply because one party is a doctor and the other has a medical problem which may be of interest to both". *Watson v BBBC*, *ibid*, 1150 per Lord Phillips MR

⁸⁹ *Ibid* n. 85, [8], per Lord Phillips MR.

⁹⁰ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, *Perrett v Collins* [1998] 2 Lloyd's Rep 255.

⁹¹ *Ibid* n. 85.

argument that has received positive treatment at various stages of the development of the duty of care.⁹² This argument, however, was rejected by the Court of Appeal as the duty was only owed to individuals, like the Claimant, who were a member of the Board and it was possible to identify the number of individuals who were in this category. George emphasises that this was a highly influential point for the Court of Appeal⁹³ and demonstrates that one question that will need to be considered is the extent to which it is possible to categorise potential claimants.

The ruling in *Watson*⁹⁴ was a significant step forward as previously, organisations like the BBC had been protected on the grounds of public interest⁹⁵ and the existence of other remedies⁹⁶ and potential defendants⁹⁷ and began to contemplate the concept that direct liability could flow from the importance of ensuring the safety of the participants.⁹⁸

Agar v Hyde⁹⁹

Optimism that this authority might provide a clear direction forward was halted by *Agar v Hyde*¹⁰⁰ from the High Court of Australia. In *Agar*¹⁰¹ two rugby players claimed against the members of the International Rugby Football Board,¹⁰² now known as World Rugby (the highest governing body within rugby), on the grounds that they had a duty to reduce unnecessary risk within the game, specifically within the remit of scrummaging.¹⁰³ The request for relief therefore went further than *Watson*¹⁰⁴ as it required the governing body to

⁹² *Playboy Club London v Banca Nazionale del Lavoro SPA* [2018] UKSC 43.

⁹³ James George, 'Watson v British Boxing Board of Control: Negligent Rule-Making in the Court of Appeal' (2002) 65 MLR 106, 112.

⁹⁴ *Ibid* n. 85.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, *Perrett v Collins* [1998] 2 Lloyd's Rep 255

⁹⁸ Mark James *Sports Law*, (4th Edition, Palgrave, 2017), 102.

⁹⁹ [2000] HCA 41.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² Later known as the International Rugby Board (1998), now known as World Rugby (2014).

¹⁰³ Hayden Opie 'Negligence Liability of rule-making bodies in sport' [2002] *International Sports Law Review*, 61.

¹⁰⁴ *Ibid* n. 85.

anticipate issues and prevent them, but following the analysis of the English case would have provided them with a stepping stone to make that move.

Had the High Court of Australia taken the same approach as the English Court of Appeal, then they may have asked what the role of the governing body was and could reasonably have concluded that a crucial role was to protect the players. They would have asked whether the organisation had sufficient medical expertise, or the opportunity to avail themselves of sufficient medical expertise and, again, there was sufficient concern about the medical implications that they had implemented a rule change to reduce the impact of the collision.¹⁰⁵

Instead, the High Court of Australia focused on four questions. The first, which is irrelevant to the thesis but was sufficient to dispose of the case for four of the judges, was that there were fatal issues with service of the proceedings.¹⁰⁶ The comments of the five judges in respect of the substance were therefore obiter, with only Gleeson CJ focusing the opinion primarily on the duty of care.

The second point of focus was on the elusiveness of the sought standard, the alleged duty being to take reasonable care,¹⁰⁷ which Opie notes as being unclear: to what extent must a non-governing body go in order to make their sport safe enough?¹⁰⁸ Gleeson CJ emphasised that the Respondents took two different approaches in oral argument, first arguing that there was a “duty to take reasonable care in monitoring the operation of the rules of the game to avoid unnecessary harm to players.” This was later developed to “taking reasonable care to ensure that the rules did not provide for circumstances where risks of serious injury were unnecessary.”¹⁰⁹ All five members of the court expressed reservations as to this, on several points, including how the court can distinguish between serious and non-serious injury and what the concept of reasonable care meant. This latter point was particularly relevant in respect of the identity of the Defendants/Appellants as the decision noted that they were all individual members of the unincorporated association and no single member had the power

¹⁰⁵ Ibid n. 103, 61.

¹⁰⁶ Ibid n. 99, 128

¹⁰⁷ Ibid n. 99.

¹⁰⁸ Ibid n. 103, 68.

¹⁰⁹ Ibid n. 99, 5

to make any amendments to the rules; in a sense they were being asked to ensure not only that they voted in a particular way but also to ensure that other members also voted the same way which creates a very tenuous link for establishing a duty of care.

They also chose to focus, for the third point, on the principle of individual responsibility stating that the “freedom [to compete] was accompanied by individual responsibility for the injuries that might be suffered.”¹¹⁰ This will be dealt with comprehensively in Chapter 6.¹¹¹

Finally, and one of the crucial differences between the cases, apart from the different jurisdiction, which go some way to explaining how the courts emerged with different decisions was the approach to the determinate nature of the class. In *Watson*¹¹² the court emphasised that the concern of an indeterminate class was unhelpful to the governing body because the numbers, and potential Claimants, could be identified. In *Hyde*¹¹³ the Defendant was the international governing body, effectively the highest authority, and thus it would be far harder to assess the numbers of individuals to whom a duty was owed.¹¹⁴ For the claimants to assert a limited and known class [when it would affect every player in the world] was a far harder task.¹¹⁵

More fundamentally, in *Watson*¹¹⁶ the court attacked the penumbra of the central question and found in favour of the Claimant without having to address the question of whether the rules during the fight were safe; liability attached itself instead to the safety provisions that

¹¹⁰ Ibid n. 99.

¹¹¹ See Page 249

¹¹² Ibid n. 85.

¹¹³ Ibid n. 99.

¹¹⁴ World Rugby Handbook, 2021, Regulation 2 requires that ‘Persons’, defined to include everyone who could reasonably be involved with the game, must comply with the Regulations but delegate responsibility for enforcing these Regulations to the Unions who have membership with World Rugby.

¹¹⁵ “The extent of the potential liability is confined only by the number of people who choose to play the sport anywhere in the world ... Such an amateur sport may be played in many countries, in widely differing circumstances, ranging from organised competitions to casual games, by people of different ages, physical abilities, vulnerabilities, and degrees of skill, enthusiasm, recklessness and courage. It is said that there is a duty, in relation to the rules of the sport, to take reasonable care to protect them all against unnecessary risk of injury. For practical purposes, the liability is indeterminate.” *Agar v Hyde* Ibid n99 per Gleeson LJ, Kris Lines ‘Thinking outside the box (-ing) ring: the implications for sports governing bodies following *Watson*’ [2007] *International Sports Law Review*, 71.

¹¹⁶ Ibid n. 85.

must be put into place. In *Hyde*,¹¹⁷ for better or for worse, the Claimants chose to attack the rules itself, which made it a step beyond the *Watson*¹¹⁸ ratio, and easier for the court to dismiss the claim for liability. *Agar v Hyde*¹¹⁹ goes beyond the question that was analysed in *Watson*¹²⁰ and cannot be seen as limiting that case's authority, although it does give an indication of the difficulties that will be faced in establishing that a duty of care should exist.¹²¹

The questions that are raised do provide a valuable framework for some of the discussions that must be had here. Rather than arguing against the decision itself, it is easier to consider whether the same points would be relevant if a similar case were to be brought today, under the principles of this thesis. Some can be dealt with quickly. For example, the governance of World Rugby is clearer than that of the IRFB with an Executive being designated as responsible for the decision-making progress for rules. A lawsuit against World Rugby therefore passes over the issues that were raised in *Agar v Hyde*.¹²² Likewise, the procedural service points can be seen as case specific.

The duty of care ambiguity that was criticised for being too wide and difficult to implement can be overcome by the specific type of injuries that are being scrutinised in this thesis. A concern of the court was distinguishing between those injuries that were expected to be part of the game and those that were not. By contrast, this thesis is not contending that injuries other than concussive and sub-concussive events should be subject to scrutiny, and there has already been some discussion, with more to follow, as to why these types of injury are particularly distinct.¹²³

The final point concerns the question of creating a potentially indeterminate liability. This was a point that the court in *Agar v Hyde*¹²⁴ were particularly concerned about with the majority opinion stating that "the extent of the potential liability is confined only by the number of

¹¹⁷ Ibid n. 99.

¹¹⁸ Ibid n. 85.

¹¹⁹ Ibid.

¹²⁰ Ibid n. 85.

¹²¹ Ibid.

¹²² Ibid n. 99

¹²³ Ibid

¹²⁴ Ibid n. 99

people who choose to play the sport anywhere in the world.”¹²⁵ If this were the case then it can be seen as a significant issue that would continue today, especially as the rugby playing world has only got larger, and the popularity of the game has increased. However, *Watson*¹²⁶ has already shown that this was not a significant concern for the court in the domestic jurisdiction on the basis that the BBBC would have records of those who would fall within their domain. The very basis of sports is the registration system, with even amateur sports having to register players with their respective leagues to participate. So, while World Rugby might say that they are unaware of players in the Welsh Rugby Union Division 3 East (a very low league that primarily has amateur teams), there is a registration list with the Welsh Rugby Union, which is accessible by World Rugby if requested. There may be a large number of them, but the numbers would be identifiable. Likewise, it is not suggested in this thesis that any duty of care would extend to unorganised games in parks, or participants who have not signed up, whether individually or through clubs, to follow the rules established by World Rugby. Once this has happened, there is a record of the potentially affected players, and this therefore does provide a closed class, albeit, it is accepted, a potentially very large class.

The Lower Courts

Brief mention should be made of a handful of decisions that have failed to be appealed beyond the lower court and which are referred to by Brodie in a summary of cases that have failed to ignite the embers of liability.¹²⁷ Two of these cases, *Hood v Forestry Commission*¹²⁸ and *Wall v British Canoe Union*¹²⁹ referenced an individual choosing to take part in a sport-hobby, in the former case mountain bike cycling and in the latter canoeing. In both cases the claimant suffered, in the former case injury and the latter death, and claimed that they were owed a duty. In both cases the court found that there was no liability. In *Hood*,¹³⁰ the duty of care was self-evident on a statutory basis under the Occupiers Liability Act 1957, but the court

¹²⁵ Ibid n. 99

¹²⁶ Ibid n. 99

¹²⁷ Douglas Brodie, ‘Striking the balance: sport and risk’ (2019) 146 Rep B, 7.

¹²⁸ [2017] 3 WLUK 189.

¹²⁹ [2015] 7 WLUK 983.

¹³⁰ Ibid n. 128.

found that they had taken reasonable steps to ensure that the track was safe. They emphasised that participation in such an event was based on the thrill and that it would not be appropriate to require the landowner to protect against every risk. In *Wall*¹³¹ the court found that there was an insufficient proximity between the parties as the guidebook that was relied upon by the Defendant was a general text rather than one aimed at the participant. Specifically, HHJ Lopez found that attaching a duty of care would open that care up to an unlimited class of persons. In *Clarke v Kerwin*¹³² a motorcyclist participating in an event was found not to have adjusted his speed correctly and that the safety measures that he was requesting, signs to be erected at every natural hazard, was unreasonable.

Brodie argues that these cases highlight the difficulty of establishing liability in sporting cases¹³³ referring to *Tomlinson v Congleton BC*¹³⁴ where the claimant dived into shallow water and injured himself and the court ruled that except for minors, employees, or those with a lack of genuine and informed choice there would be “no duty to protect against obvious risks or self-inflicted harm.”¹³⁵

These authorities do paint a bleak picture for an argument in favour of extending liability. However, while they do not directly support such an extension, the extent to which they weaken the argument is dubious. First, the three lower court cases are not binding and are at best persuasive. Secondly, the facts are dissimilar to this very specific set of circumstances. In all four cases, the individual was pursuing the activity and was injuring themselves. Here, in Rugby Union, the participants are contacting other participants and are inflicting injuries on each other not on themselves, which removes a clear limb of self-inducement from the analysis. In football, where the main action is to head the ball, the player is doing so as part of competition with others and is raising a clear potential to injure another player through accidental contact.

¹³¹ *Ibid* n. 129.

¹³² [2018] 4 WLUK 497.

¹³³ Douglas Brodie, ‘Striking the balance: sport and risk’ (2019) 14t Rep B 8.

¹³⁴ [2004] 1 AC 46.

¹³⁵ *Ibid*.

Thirdly, and as a response to *Tomlinson*,¹³⁶ a key distinction is that in that case, and indeed in the others, the risks were clear. Here, it has already been established that the symptoms of concussive and sub-concussive events are not always clear¹³⁷ and it will be seen that that in many situations there will be a lack of genuine informed choice.¹³⁸

The Refereeing Cases

There is one final body of sporting cases that need to be considered, as even though they do not advance the contention that the courts would be willing to recognise liability for injuries suffered while the rules have been complied with, they do identify the difficulties that can be caused by the nature of concussion injuries, as well as emphasising the importance of ensuring the safety of the players in regulating sports matches.

The refereeing difficulty

The key difficulty for referees stems from, to use sporting parlance, the corridor of uncertainty, where there is a degree of decision making, and the referee must balance the safety of the participants against the forces of entertainment. This situation was demonstrated in *Vowles v Evans and the Welsh Rugby Union*¹³⁹ where a referee, following various collapsed scrums, chose not to pursue a policy of non-contested scrums, whereby the players set in the position but are prohibited from competing until the ball has emerged from the scrum. The court referred to the guidance set out that where a specialist front row forward is not available the referee should consult with the captains and then order non-contested scrums.¹⁴⁰ Crucially the referee has discretion, and the referee instead allowed a non-specialist player to replace the front row forward. After numerous collapsed scrums, the

¹³⁶ Ibid.

¹³⁷ Ibid 52.

¹³⁸ See Page 258.

¹³⁹ [2003] EWCA Civ 318.

¹⁴⁰ Laws of Rugby Union 2021, 3(12).

injury occurred. The referee was found to be liable, and, by reason of vicarious liability, this attached to the Welsh Rugby Union.¹⁴¹

This developed the case of *Smolden v Whitworth*¹⁴² where the referee failed to follow the appropriate procedure in respect of the forming of scrums, and the Court found that the referee was liable for the injuries suffered by the claimant as a result. The question of whether there was a duty of care was not in dispute, as this was conceded, with the question turning on whether the duty was breached. with the court identifying that the circumstances of the game were crucial and that the question was whether or not the actions were reasonable in all the circumstances, rejecting a claim by the appellant that the test should mirror that for participants of a “reckless disregard for safety.”¹⁴³ In so doing, the court emphasised that the duty upon referees was to “apply the rules of the game and ensure that they are observed.”¹⁴⁴

Theoretically, this should be a simple matter and one that is unaffected by the increased awareness of concussion injuries as whether or not the rules have been broken should be clear. However, this assumes that the rules of sports are simple. Certainly, some are simple to follow, as indicated by *Evans*¹⁴⁵ and *Smolden*.¹⁴⁶ In both of these cases the referee failed to follow a rule and therefore liability attached, in the same way as if a player fails to follow a rule; injuries caused could potentially lead to liability.

However, rules in sports are not always this simple and there is the potential for discretion to be exercised. There are two potential examples in Rugby Union here. The first is when the referee has the discretion to allow an advantage to be played.¹⁴⁷ It is possible to envisage a situation whereby a player is concussed but the referee is unaware and yet advantage is

¹⁴¹ Caddell notes that the motivation for Llanharan opting to compete at scrums was to avoid the penalty points that would attach if they were compelled to pursue non-contested scrums (Richard Caddell ‘The Referees Liability for Catastrophic Sports Injuries- A UK Perspective’ (2004) 15 Marq. Sports L. Rev 421, 421). This will be considered in the next section to this chapter when analysing the effect on governing bodies directly. See Page 132.

¹⁴² *Smolden v Whitworth & Nolan* [1997] PIQR P133, CA.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid* n. 139

¹⁴⁶ *Ibid* n. 142.

¹⁴⁷ Rugby Union Laws, 2021, Rule 7.

played for a considerable period.¹⁴⁸ This time may be crucial and although Rule 7(3)(h) goes on to say that “advantage must not be applied and the referee should blow the whistle immediately when it is suspected that a player is seriously injured”¹⁴⁹ the referee may exercise discretion because they are not aware of the potential concussion.

On these particular facts, it could be legitimate to say that the referee would not be liable for exercising their discretion to play advantage because they were unaware of the situation. However, would this change if the player has a reputation for concussions and does not immediately get to his or her feet?

In an analogous case in America, the victims of a brawl in a baseball game sought to claim against the referees for failing to control the game and players correctly.¹⁵⁰ The court found that liability would only attach in these situations if the players involved had a “known propensity towards violence or there was a total absence of supervision.”¹⁵¹ Bearing in mind that the referee is therefore required to be aware of past instances of violence, it is not a significant leap to say that they may also be required to be aware of players who have a propensity to concussion injuries. For example, domestically, rugby player George North suffered “four or five concussions in two years”¹⁵² which suggests a propensity to concussion injuries. Based on the *Aboubakr*¹⁵³ decision, albeit in a different jurisdiction, a referee would likely be minded being more cautious when dealing with potential concussion with this player than with one who has no history of concussion. Yet, in doing so, there is the potential for the referee insisting that one of Wales’ best players leave the pitch when a different standard is used for other players. This inconsistency turns the referee from a neutral by-stander into an active participant.

Norris raises an interesting example when discussing the general concept of a duty of care in respect of sporting participants, citing the example of a “rugby case where a player showed

¹⁴⁸ As advantage can be played for an extended period.

¹⁴⁹ Rugby Union Laws, 2021, Rule 7(3)(h), Laws of the Game.

¹⁵⁰ *Aboubakr v Metro Park District of Tacoma*, 94 Wn App 1044 (1999).

¹⁵¹ *Ibid*, 3.

¹⁵² BBC Sport ‘George North would be told to retire were he an amateur’ (*BBC News*, 22 December 2016) 1.

¹⁵³ *Ibid* n. 150.

obvious signs of concussion which were missed by the medical and support staff so that the player returned to the pitch and suffered another significant head injury with serious consequences.”¹⁵⁴ The example is clearly aimed at whether the medical and support staff are liable, but what of the referee? One of his primary responsibilities is the safety of the players, and if there are signs that the player is unwell, then he has an obligation under Law 22(c)¹⁵⁵ to insist that the player leaves the pitch even if the player himself insists that all is well.¹⁵⁶ Yet the referee is unlikely to be a medical expert, and the medical experts have cleared the player to enter the game. At this point, the referee is torn between potential liability, if the medical expert is not independent, and potential accusations of interfering with the game unnecessarily, something that is a novelty caused by the increased information about concussion. In the past, a player’s injuries would likely be obvious, and primarily physical, but now the referee must be aware of a player’s potential mental injuries.

There are additional points of concern, particularly considering concerns about recruitment of referees with social and legal developments in the sporting world. By way of example, following the 2015 Rugby World Cup, a decision by international referee Craig Joubert created sufficient turmoil that it warranted a journal article analysing whether the referee, and World Rugby vicariously, could be liable for negligence in respect of the financial sums lost by the country that the incorrect decision had penalised. While no action resulted from the event, and Muller concluded that a claim would have little prospect of success,¹⁵⁷ it reflects the increased awareness of the possibilities of legal action arising from decisions and while in this case, Muller could conclude that “In short, whilst referees can influence the course of a game, the players have an equal (if not greater) ability to control its outcome”¹⁵⁸ where issues of concussion are at stake, it may well be that the player has less awareness of his condition than an outsider observing his actions.

¹⁵⁴ William Norris ‘A Duty of Care in Sport: What it Actually Means’ (2017) JPIL. 162.

¹⁵⁵ Rugby Union Laws, 2021, Rule 22. “A player is deemed to be permanently injured if the referee decides (with or without medical advice) that it would be inadvisable for the player to continue. The referee orders that player to leave the playing area.”

¹⁵⁶ Thomas Rudkin ‘Keeping Your head: Concussion in sport’ (2015) Ent LR 38, referring to Amir Khan in a 2012 world title fight (boxing).

¹⁵⁷ Alisdair Muller ‘Can you Penalise a Referee? The Craig Joubert decision’ (2016) Ent LR 79.

¹⁵⁸ Ibid.

Thus, there is a significant danger for the referee in determining how to proceed, when armed with the knowledge of the potential for concussion injuries. It is true that there are potential protections for the referee and Caddell draws a distinction between situations where the game has been paused, primarily for scrummages in Rugby Union, and situations in open play where liability will be far less likely.¹⁵⁹ More generally the referee may be protected by the understanding that the imposition of liability will be the exception rather than the norm¹⁶⁰ and by the discussion in *Smolden*¹⁶¹ of the importance of avoiding the opening of floodgates¹⁶² but it is clear that there will be an increased risk, and there is a significant question as to whether that risk should be borne by the referee.

There was an additional reference following the death of cricketer Philip Hughes. The official coroner's report, while not criticising the umpires who had been in charge of regulating the game, did suggest that additional training in respect of the medical impacts of concussion would be important. While this does not suggest immediately that umpires and/or referees should be deemed to have a higher knowledge of medicine than the average person, preferring instead to discuss the potential for the information being useful, it is certainly arguable that it is one step closer to intensifying the scrutiny of officials in their conduct of the game.¹⁶³

The Difficulties With Establishing a Duty of Care

Although *Donaghue*¹⁶⁴ left open the possibility for new duties of care to emerge, subsequent case law has retreated from this to a certain extent. To begin with, over the subsequent thirty-five years, the courts gradually developed the law of negligence with the duty of care extending to situations that were far closer to Lord Atkin's liberal and broad interpretation

¹⁵⁹ Richard Caddell 'The Referees Liability for Catastrophic Sports Injuries- A UK Perspective' (2004) 15 Marq. Sports L. Rev 420.

¹⁶⁰ Ibid n. 98, and in *Smolden*, Ibid n. 142 "The referee could not be properly held liable for errors of judgement, oversights or lapses of which any referee may be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not be easily crossed" per Bingham LCJ.

¹⁶¹ Ibid n. 142.

¹⁶² Ibid n. 142.

¹⁶³ New South Wales, State Coroner's Court, Inquest into the death of Phillip Joel Hughes (2016), 216.

¹⁶⁴ Ibid n. 33.

than to Lord MacMillan's restrictive and narrow interpretation.¹⁶⁵ The expansionist approach that was taken was emphasised by Linden who wrote that "the dominant sweep of history in negligence law has been toward expanding the neighbour principle into every nook and cranny of negligence law."¹⁶⁶

A prime example of the expansion of duty of care can be seen in *Hedley Byrne v Heller*.¹⁶⁷ Until this point, even with the developments, *Donoghue v Stevenson*¹⁶⁸ had only been held as covering physical acts rather than statements, and then primarily causing physical loss rather than economic loss. Before *Hedley Byrne*¹⁶⁹ there had been no case allowing recovery in negligence for economic loss caused by negligent words,¹⁷⁰ and the belief had been that actions not actionable with reference to contract law or fiduciary duty were outside of the purview of tort,¹⁷¹ This was in much the same way that until *Donoghue*¹⁷² any case was limited to contractual rights or established torts such as nuisance.¹⁷³

Whether it was the intention of the court in *Hedley Byrne*¹⁷⁴ or not, the decision was reflective of an era where the duty of care boundaries were dramatically extended, and the scope of liability widened. In such a climate, it would be far easier to contend that novel duties of care should be found and developed enthusiastically, including those under discussion in this thesis. However, after *Anns v Merton London Borough Council*¹⁷⁵ where the court effectively reversed the burden that had traditionally been applied, where the plaintiff was required to demonstrate that a duty of care was owed, there was a significant tightening of the approach by the courts. In *Anns*,¹⁷⁶ Lord Wilberforce stated that there was no need to "bring the facts of that situation within those of previous situations in which a duty of care has been held to

¹⁶⁵ *Davis v Foots* [1940] 1 KB 116; 5, *Butler v Standard Telephones & Cables Ltd* [1940] 1 KB 399; [1940]; *Glasgow Corp v Muir* [1943] AC 448; *Bolton v Stone* [1951] AC 850; *White v John Warwick & Co Ltd* [1953] 1 WLR. 1285; [1953]; *Gledhill v Liverpool Abattoir Utility Co* [1957] 1 WLR. 1028 amongst others.

¹⁶⁶ Allen Linden, 'The Good Neighbour in Trial: A Fountain of Sparkling Wisdom' (1983) 17 UBC L. Rev. 67.

¹⁶⁷ *Hedley Byrne v Heller* [1964] AC 465.

¹⁶⁸ *Ibid* n. 33.

¹⁶⁹ *Ibid* n. 167.

¹⁷⁰ Jane Stapleton, 'Duty of care and economic loss: a wider agenda' (1991) LQR. 1991, 107(Apr), 249.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* n. 33.

¹⁷³ *Ibid* n. 46.

¹⁷⁴ *Ibid* n. 167

¹⁷⁵ [1978] AC 728.

¹⁷⁶ *Ibid*.

exist.¹⁷⁷ This meant that to establish a duty of care, Lord Wilberforce simply asked whether there was foreseeability that the actions would lead to harm. Once this was established, the question that was then posed was whether there was any reason why there should not be a duty of care.¹⁷⁸ This approach was summarised by Lord Goff when he noted that “the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not,”¹⁷⁹ implying that a duty of care would be the starting point unless reasons could be given for it not being imposed.

Clearly, if this environment continued to exist, then this thesis would be less controversial. However, the approach in *Anns*¹⁸⁰ was itself heavily criticised¹⁸¹ and the decision itself was overturned in *Murphy v Brentwood CC*¹⁸² as the courts took a step back from the wider approach to imposing a duty of care. The court, per Lord Keith, noted that “*Anns* introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations.”¹⁸³ The implication from this, moving away from the previous attitudes, was that novel duties of care should be developed with caution, rather than merely considering whether there was a good reason not to do it. It reintroduced the potential for a distinction between a continuation of existing duties of care and the development of new duties.

What is of greater concern to the potential extension of liability to sporting cases is that the decision has greater resonance than mere application to the facts of the case. Had the court simply wished to draw a line and say that the duty of care could not be expanded, then this would have been possible, and Howarth argues that liability could have been denied on the

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ *Smith v Littlewoods* [1987] 2 WLR 480.

¹⁸⁰ Ibid n. 175.

¹⁸¹ Robert Bradgate, ‘*Anns*: The Retreat Continues’, (1988) *The Modern Law Review* Vol. 51, No. 3 (May, 1988), 382, Keith M Stanton ‘The Decline of Tort Liability for Professional Negligence’ (1991) *Current Legal Problems*, Volume 44, Issue 1, 1 January 1991, 83, Volume 9, Issue 1, Martin J Davies ‘The end of the affair: duty of care and liability insurance’ (1989) Cambridge University Press, March 1989, 67.

¹⁸² [1991] 1 AC 398.

¹⁸³ Ibid, 471.

facts of the case, without denouncing the *Anns*¹⁸⁴ decision.¹⁸⁵ In spite of these possibilities, the court were unequivocal and “in no mood to compromise on *Anns*”¹⁸⁶ and in a brutal fashion overruled the case in addition to “all decisions subsequent to *Anns* which purported to follow it.”¹⁸⁷ The inevitable conclusion has to be that the courts were not inclined to pursue such a widespread and liberal approach to the finding of a duty of care where one has not previously been found to exist.

The Modern Approach

Since *Anns*,¹⁸⁸ and the retreat from this wide test combined with a reluctance to replace it with a new test, the most referenced authority has been *Caporo v Dickman*¹⁸⁹ which was decided at the tail end of the retreat from *Anns*,¹⁹⁰ and established a three-fold test of reasonable foreseeability of the harm, a proximate relationship, and that the imposition of liability must be fair just and reasonable.¹⁹¹

This test remains imprecise, but at least seems a little clearer than *Donoghue v Stevenson*.¹⁹² Lack of clarity is only one criticism however, as the relevance of the test itself has been called into question with Lord Reed stating that “the proposition that there is a *Caparo*¹⁹³ test which applies to all claims in the modern law of negligence...is mistaken”¹⁹⁴ and Lord Walker describing the *Caparo*¹⁹⁵ tests as “only a set of fairly blunt tools.”¹⁹⁶ The reasons for the criticism go some way to setting out the different ways in which a new duty is capable of being developed, or at least some of the broad considerations that need to be analysed in order to give rise to a new duty.

¹⁸⁴ Ibid n. 175.

¹⁸⁵ Specifically, he highlights that on the facts the Council could be found to have behaved reasonably and secondly that the plaintiffs had accepted the results as they were living at the property; David Howarth, ‘Negligence after Murphy: Time to re-think.’ Cambridge Law Journal, 50(1), March 1991, 58.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid n. 175.

¹⁸⁸ Ibid n. 175.

¹⁸⁹ [1990] UKHL 2.

¹⁹⁰ Ibid n. 175.

¹⁹¹ Ibid n. 189.

¹⁹² Ibid n. 33.

¹⁹³ Ibid n. 189.

¹⁹⁴ *Robinson v CC West Yorkshire Police* [2018] UKSC 4.

¹⁹⁵ Ibid n. 189.

¹⁹⁶ *Customs and Excise Commissioners v. Barclays Bank* [2006] UKHL 28, [71].

The criticism is primarily based upon the fears that the tests can “give rise to unpredictability, not necessarily of result, but certainly of method”¹⁹⁷ and suggestions that the current understanding of duty of care are incomprehensible,¹⁹⁸ which does not bode well when seeking a normative rationale for the extension of a duty of care.

This inconsistency has only been highlighted by the decisions since *Caparo*,¹⁹⁹ as the jurisprudence has become, if anything, more fractured, with individual lines of liability developing, all of which seemingly have different approaches to the others, all based, seemingly on a *Caparo*²⁰⁰ foundation. For example, where a case involves pure economic loss, it is clear that it is necessary that there be a “special relationship”²⁰¹ in order to establish an assumption of responsibility whereas for non-economic loss consideration of assumption of responsibility has been limited to cases where it is necessary to justify the duty to be owed.²⁰² While there are arguments for this approach, it does not embrace the idea of a consistent and clear rationale, instead implying a tree with multiple branches all winding off in different directions.

Bringing this summary of a duty of care up to date, the ambiguity of the tests and the reluctance to extend the duty significantly, were demonstrated in *Playboy Club London v Banca Nazionale del Lavoro SPA*²⁰³ and *Darnley v Croydon Health Services NHS Trust*.²⁰⁴ The former case revolved around the principles of negligent misstatement and discussed the extent to which there could be a duty of care upon a bank to a third party, of whose existence they were unaware but who relied upon an inaccurate reference that was provided to attest

¹⁹⁷ Carl Stychin, ‘The vulnerable subject of negligence law’ (2012) 8(3) Int. J.L.C. 337.

¹⁹⁸ John Hartshorne, ‘Confusion, Contradiction and Chaos within the House of Lords post *Caparo v Dickman*’ (2008) 16(1) Tort Law Review 8.

¹⁹⁹ *Ibid* n. 189.

²⁰⁰ *Ibid*

²⁰¹ *Ibid* n. 92

²⁰² “It has never been a requirement of the law of the tort of negligence that there be a particular antecedent relationship between the defendant and the plaintiff other than one that the plaintiff belongs to a class which the defendant contemplates or should contemplate would be affected by his conduct.” Per Hobhouse LJ- *Perrett v. Collins* [1998] 2 Lloyds Rep. 261 compared with *Watson*, *ibid* n. 85 where assumption of responsibility formed the basis of liability.

²⁰³ *Ibid* n. 92.

²⁰⁴ [2018] UKSC 50.

to the financial standing of the individual gambler in the case. In finding that there was no duty of care in this case, the court analysed the legal developments emphasising the importance of incremental developments, consistent with the retreat from *Anns*²⁰⁵ and confirming that the question was whether the Defendant had taken on a voluntary assumption of responsibility as this remained the foundation of duty of care where there is a claim for economic loss.²⁰⁶

Factually, *Banca Nazionale*²⁰⁷ underpinned the core question of duty of care. It was not disputed that the statement was incorrect, or indeed that they had any basis for giving the statement that they did. Nor could there be any real doubt expressed that the statement was relied on by the Claimant, and that they suffered loss after this action. Indeed, the only aspect of a contractual claim of misrepresentation was that they lacked contact with the bank themselves.²⁰⁸

Nonetheless, the court found that the actions of the Defendant bank did not rise to the level of a legal duty of care, with the court taking the view that the potential class of Claimants was too high and that “it must also be part of the statement’s known purpose that it should be communicated and relied upon by that person if the representor is to be taken to assume responsibility to them.”²⁰⁹ This built upon a principle of *Hedley Byrne v Heller*²¹⁰ where the courts were concerned about the potential for unlimited liability and it was held that is still necessary for there to be a particular nexus between the Claimant and Defendant²¹¹ and that “a defendant giving a representation cannot be held to have assumed responsibility in relation to absolutely anybody who might happen to rely on it.”²¹²

The importance of this case is in demonstrating that there is still an element of restrictiveness in extensions of duty of care, and that the bank could only have assumed responsibility

²⁰⁵ Ibid n. 175.

²⁰⁶ Ibid n. 92.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Claire Livingstone ‘The house doesn't always win - Supreme Court rejects Playboy casino's negligence claim against Italian bank’ (2019) Ent. LR 2019, 30(1), 22.

²¹⁰ Ibid n. 167.

²¹¹ Ibid n. 209.

²¹² Ibid.

towards the party to whom they gave the information. The court ruled that "the representor must not only know that the statement was likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B"²¹³ Crucially this draws a very narrow veil over the category of potential claimants, leaving aside questions of what it would be reasonable to expect and focusing on what was known by the parties.

The *Darnley*²¹⁴ case is less relevant in this context for its facts, as it applies specifically to a medical context, than for the useful recent summary of the law in this area, with its "confirm[ing] and clarify[ing] core elements of the negligence enquiry."²¹⁵ In this case, the court confirmed that it was still necessary to establish, as a primary function, that a duty of care exists, and then to establish whether that duty has been breached. The case also underlined the modern application of *Caparo*²¹⁶ which has been that it is not necessary to reference the tests unless seeking to establish a novel duty of care as opposed to relying on an existing duty of care.²¹⁷ In the case itself, the court confirmed that there was an existing duty upon a hospital towards persons presenting themselves "complaining of an illness or injury."²¹⁸

It is evident from these cases that it is necessary to first of all determine whether the injuries in this category of cases fall within an existing category and if, as it will be argued, they do not, then to analyse whether there should be an extension in accordance with the *Caparo*²¹⁹ principles.

The residue of the debate: how do the courts proceed?

The discussion of the development of a duty of care is important because as has already been stated, the current law does not support a duty of care in these sporting cases. It is therefore

²¹³ Ibid n. 92, 11.

²¹⁴ Ibid n. 204

²¹⁵ Sarah Fulham-McQuillan 'Foreseeing difficulties: duty, scope, and causation' (2019) PN 2019, 35(2), 116.

²¹⁶ Ibid n189

²¹⁷ Ibid n204, 12

²¹⁸ Ibid n204, 16

²¹⁹ Ibid n189

necessary to argue that the law should be extended, and to make this argument, three separate issues need to be considered. The first is to explore the rationale for this extension. To put it bluntly, what theoretical foundations are triggered to justify the law of negligence protecting these potential claimants? This section will argue that the precautionary principle of negligence supports the use of negligence as a tool in these cases. Secondly, the question arises as to whether this is the type of harm that should be regulated. It will be argued that while there are nuances that divert from a traditional view of harm, it is such that it is appropriate for regulation by the courts. Finally, on a more practical footing, it is necessary to appreciate the unsettled nature of the law, and the remainder of this section will consider the guidance that can be drawn from the authorities, as unsettled as the jurisprudence remains.

The Precautionary Principle

It has been seen,²²⁰ and will be seen further,²²¹ that in negligence jurisprudence, a central consideration is public policy, and whether a particular extension or restriction of the doctrine is reasonable. It has also been conceded that while there is significant medical knowledge surrounding concussive events and sport,²²² that knowledge is developing and varied, with a message being formed that is strong but not certain, and with inevitable variables, in particular based around the individuality of participants and the difficulties of diagnosing this hidden injury. This impacts on the issue of foreseeability; the extent to which a prospective Defendant can foresee the risks of their actions. Through certain lenses, it could be argued that the courts would be wrong to extend liability to cover actions by governing bodies in sports. An insurance approach would contend that mandatory insurance would suffice, while a libertarian approach would pass the burden of risk entirely onto the choice of the participant. A scientific certainty approach would require absolute certainty of the dangers before imposing liability. None of these would support an extension of liability in these cases.

²²⁰ Ibid page 112

²²¹ See page 132

²²² Ibid page 35

Instead, therefore, this thesis argues that the correct way to consider this particular problem is that of the precautionary principle. This is the idea that where the prospective risks are so significant as to be irreversible, then the absence of scientific certainty will not be sufficient to prevent an expectation that actions will be taken.²²³ It addresses concerns over potential lack of certainty in the scientific knowledge with Fisher et al emphasising that the focus is more on the potential consequences of not acting in the circumstances.²²⁴ For this reason, this approach has been favoured in areas of public and social policy that have been subject to judicial scrutiny, including cases involving the environment and banking cases. In both of these situations, there was evidence of a risk, but in both situations there were practical reasons for complete scientific evidence being impractical. In both cases, the consequences of failing to act are potentially overwhelming, with the latter leading to economic breakdown and the former planetary breakdown. In both cases, therefore, the courts have proceeded on the basis of the evidence that is available and have not accepted arguments that greater clarity is needed in order to require actions from parties to deal with the risk.

The precautionary principle is not without controversy and has been criticised for being unscientific, with Resnik arguing its opponents contend that requiring action when the risk has not been calculated to a sufficient level of certainty is, by definition, not following the science and also has the potential to cause significant costs and cause disruption, stifling growth and being unnecessarily deferential to possible risks rather than those that are proven.²²⁵ This line of argument has often translated into courts' analyses, particularly in respect of public policy, with medical negligence cases raising the spectre of defensive medicine causing more harm than good and the need to allow individuals and organisations the freedom to react according to what the clear evidence is as opposed to what it might be interpreted to be. These arguments have had traction and it has already been seen that the courts favour an incremental approach, partly in order to ensure that jurisprudence

²²³ Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, *European Journal of International Law* (2006), Vol.17 No.2, pp.445-462, 446

²²⁴ Elizabeth Fisher et al (eds.), 2006, *Implementing the Precautionary Principle: Perspectives and Prospects*, Edward Elgar Publishing Limited, Chapter 1, at 3

²²⁵ David Resnik, "Is the Precautionary Principle Unscientific?" (2003) 34 *Studies in History and Philosophy of Biological and Biomedical Sciences* 329, 330

develops at a trot rather than a gallop, and that parties are not expected to perform that which is not practical.

The precautionary principle is, however, a very diverse one and although the starting point is clear, which is that individuals and organisations when taking decisions should be expected to consider the potential risk and to proactively take steps to prevent, or at least minimise, that risk,²²⁶ there are different ways to consider that risk. Tinker emphasises that at one end of the spectrum is “strong precaution”²²⁷ which would require the possibility of risk to be met with a response, irrespective of cost. By contrast “weak precaution”²²⁸ takes a more balanced approach and states that lack of scientific certainty does not prevent action being expected but nor does it mandate it. When weak precaution is applied wider considerations must be contemplated including a cost-benefit analysis of the actions taken. Unlike the strong precaution, Tinker notes that the burden of proving the need for a response falls with those advocating action, which links effectively with the discussion of public policy that has already been carried out.²²⁹

Three points can be seen from this principle that make the precautionary principle an appropriate basis for intervention. First, and crucially, it is the basis for intervention when there are consequences that are both critical and irreversible. The medical evidence has already established that this is the case here. In the event that medical advances were to be different, for example providing a cure for the many conditions that can be caused by CTE, then it could be argued it insurance might provide an appropriate remedy. On the evidence provided, this is not the case. Secondly, it is accepted, as will be seen, that the relevant bodies will have some flexibility in their approach to the duty of care, and that they are being required to prioritise player welfare, not exclude all risks of concussion. It is arguable that a strong precaution approach would require abolition of the sport, which is not an

²²⁶ Bruce Pardy Applying the Precautionary Principle to Private Persons : Should it Affect Civil and Criminal Liability? *Les Cahiers de Droit*, vol. 43, nn 1, mars 2002, pp. 63-78 (2002) 43 *Les Cahiers de Droii* 63, 66

²²⁷ Catherine Tinker, 1996, “State Responsibility and the Precautionary Principle”, in Freestone, D. & Hey, E. (eds.), 1996 pp.56-57.

²²⁸ *Ibid*

²²⁹ *Ibid*

argument made in this thesis. Finally, the precautionary principle is an emerging doctrine that is appropriate for dealing with the recognition of nuance and ambiguity that is inevitable with scientific development. Just as it is utilised to deal with extreme situations at the cutting edge of scientific discovery, so too is it relevant and appropriate for a basis in the cases under discussion in this thesis.

Harm

The precautionary principle provides a rationale for extending a duty, but this will only be relevant if the harm that is suffered is such that would justify intervention by either the legislature or the judiciary. This is a necessary consideration as a basis for both the argument that the law should intervene but also the significant argument that will be addressed in Chapter Six,²³⁰ that the liberty of an individual to act as they choose should not be infringed. As any intervention involves a reduction of the participant's liberty, it must be analysed whether the de facto significant harm is sufficient to warrant the interference with the liberty of the participants.

This is particularly relevant as, in theory, there are numerous ways in which the problem that has been identified could be dealt with. The most significant impact would, of course, be had by making the sports in question illegal, something that is not being suggested here. At the other end of the spectrum, the approach that has been more commonly taken in sports could be applied, with a far lighter touch, allowing the natural moral condition of humanity to apply pressure, possibly aided by indirect engagement by the legislature, so that in time the practices that are criticised will be phased out. Even this, very light touch, was criticised by Mill who deplored the indirect nature of extra-legal coercion stating that it was "far more pervasive and insidious"²³¹ than using legal sanctions as it would leave "fewer means of escape, penetrating much more deeply into the details of life and enslaving the soul itself."²³²

²³⁰ See Page 249

²³¹ John Mill, *Mill on Liberty* Oxford Clarendon Press 1980 2 Ch 1 para 2

²³² *ibid*

To take this approach, to leave the matter to extra-legal coercion, which could include peer-pressure, regulatory oversight and other forms of coercion would, in spite of Mill's protests, represent the most *laissez faire* approach, and would allow resolution to develop in line with societal norms. However, this has two fundamental flaws. The first is that the harm is suffered by the minority (those who participate in sport on a regular basis) and therefore relying on extra-legal coercion that is often implemented by the majority may be completely ineffective. Secondly, such a process is, fundamentally, slow and the harm that has been detailed in the earlier chapters²³³ is both urgent and exceptionally severe. It is already too late for some sportsmen and women who have played as recently as 2015²³⁴ and every day that passes without action makes the problem worse, not better. The risk of harm, now, means that if it can be seen as a legitimate harm to be regulated against, means that action must be taken.

The two questions that must be considered are: can concussive events be treated as harm and should there be a positive requirement to intervene, as opposed to a negative requirement to prevent harm.

Can Concussive Events be Treated as Harm?

It is, hopefully, uncontroversial that the consequences of CTE are sufficient, under any measure, to constitute harm. That is to say that the result would be sufficiently harmful to warrant the imposition of a liberty-interfering action by a body, whether that be the judiciary or the legislature. Feinberg notes that physical harm, or even the risk of physical harm can justify the intervention of the law.²³⁵ For the former he uses common assault as an example and for the latter the reckless discharge of weapons in public. Although no medical metric is used, the presence of physical violence is clearly sufficient to constitute harm on

²³³ Ibid 21

²³⁴ BBC Sport, Ryan Jones: Ex Wales Captain receives early onset dementia diagnosis' (17 July 2022)

²³⁵ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984), 10

this definition, and Feinberg notes that this is no controversial, even under the stricter interpretation that would have been taken by Mill.²³⁶

This does not deal with the central issue, however. It has been established that CTE is the extreme, though not uncommon, outcome of concussive events. It is, effectively, the worst-case scenario that manifests itself as one of a range of medical conditions.²³⁷ It is not immediate and as a secondary condition it is not harm that can be prevented without preventing the concussive events. If it is not something that can be prevented, then Mill would likely argue that the actions on the sports pitch are not sufficiently connected to the result to allow the harm analysis to be applied. Instead, Mill would look to the immediate harm, the concussive event, to determine whether this is sufficiently serious to warrant an interference with the liberty of the participants. This poses a far greater problem for establishing that the harm is sufficient.

It was previously noted that concussive events, by themselves, do not constitute significant harm. The symptoms were typically mild²³⁸ and while disorientating have comparatively limited short-term impact. Within the context of a sporting event, rather than an assault, the risk of harm would be mild and indeed would be considerably less than all of the physical injuries that the player could suffer, ranging from a broken ankle to a torn hamstring muscle, all of which would incapacitate the player for a far longer period of time. Yet, on Mill's analysis, the only ground for coercing an individual is to prevent significant harm. Further, the medical analysis also showed that there were significant issues with cumulative concussive events²³⁹ as opposed to singular events which would require a consideration of the potential for future impact on the individual as opposed to what the actual event causes. This might provide a greater basis for liability for subsequent concussive events, as the risk of harm would be greater, but it would not assist greatly in this situation as the evidence clearly indicates that even one concussive event has the

²³⁶ Ibid

²³⁷ Ibid 21

²³⁸ Ibid 17

²³⁹ Ibid 21

potential to cause significant issues.²⁴⁰ Of even greater concern is the unpredictability of concussive events; while the risk is significant, it is not inevitable, while the events that Mill was more content to allow the doctrine of harm to apply to were where the risk was far greater, i.e. situations where a player is assaulted.

Plainly, concussive events run into theoretical difficulties when considering the strict application of Mill's doctrine. Feinberg, however, takes a different perspective which is wider and does allow for a greater breadth of analysis that fits effectively with concussive events. Crucially, Feinberg accepts that while risk of harm is a starting point, it is not the end point. Instead, Feinberg breaks down the human condition to go beyond the limited definition of physical harm and to consider the question of interests, asking what are the interests of the individual? In answering this question, he draws on Socrates, noting that an individual interest is the pursuit of excellence and that to interfere with that interest is to do harm to the individual.²⁴¹ Feinberg uses this analysis to deal with one of the difficult situations that he identifies, specifically whether someone who has been killed can have been harmed. Without delving into the philosophical analyses of life and its nature, he reconciles the conflict by referring to the deprivation of the chance to fulfil their potential; the harm is not the loss of life but the loss of opportunity to progress in life.

This analysis works effectively for concussive events where the loss may not be significant immediately, but the potential long-term consequences are significant. Feinberg continues to provide analysis that fits neatly into this situation by giving an example that could have been crafted for this type of injury, stating that:

“if the characteristics of at least one component part are crucially altered then the complex whole can no longer behave in the way that it usually does, and we say that, because of its impaired function, that it is broken.”²⁴²

²⁴⁰ Ibid 21

²⁴¹ Joel Feinberg, 'The Moral Limits of the Criminal Law: Harm to Others (Oxford University Press 1984), 67

²⁴² Ibid, 33.

Remarkably, this is a reflection of the precise nature of concussive events, as demonstrated in the diagram earlier that showed the difference between a healthy brain and one that had been subjected to concussive events.²⁴³ The brain, in these injuries is crucially altered and in the short term it will no longer behave in the way that it usually does. Whether the individual recognises it or not, whether the symptoms manifest themselves or not, the event has caused the brain to change, thus clearly equating to harm under Feinberg's analysis.

Duty to intervene

The second of the questions that the harm analysis uncovers is less controversial but is still relevant to the discussion and deals with causation. It is trite that once a duty has been established, liability will only attach if the victim can establish a causal link between the actions of the tortfeasor and the consequences. However, it is also relevant to the question of whether a duty of care should exist and, if so, how that duty should be framed, as the strength of a duty of care is clearly linked to what the exact duty upon the party is; a requirement that a party have consideration for an issue is less than a requirement that they take reasonable measures which is less again than the burden imposed by strict liability. This is particularly important because this thesis proposes imposing a duty on an organisation to actively manage the laws of the games, some of which have been around for a significant period of time, to respond to the medical issue. While there is black letter support for this it is important to trace the theoretical challenges of this requirement.

Practical Principles of the Law

Despite the unsettled status of the law, some guidance can be drawn from the authorities. Tofaris²⁴⁴ argues that the correct approach to take is to first identify whether there is a line

²⁴³ Ibid 22.

²⁴⁴ Stelios Tofaris 'Duty of care in negligence: a return to orthodoxy?' (2018) 77 CLJ. 45.

of authority establishing that a duty of care is or is not owed. If there is, then this must be followed. Where the court is being asked to depart from the existing line, then it must examine the *Caparo*²⁴⁵ principles, including what is “fair, just and reasonable.”²⁴⁶ Where there is a novel case²⁴⁷ upon which the court has not ruled, then the courts must develop the law “incrementally and by analogy with established authority.”²⁴⁸ Tofaris emphasises that this includes a consideration of the ‘fair, just and reasonable’ test.²⁴⁹ It should be stressed that this does not exclude situations where the existence of a duty has been rejected, but where that is the case “policy considerations under the guise of the ‘fair just and reasonable’ limb of *Caparo*²⁵⁰ should subside in favour of a more traditional and legalistic examination of existing precedent”²⁵¹ unless the question that is being considered is novel.

It is evident from the above, and this will be taken further in the next Chapter,²⁵² that even before potential Defendants are targeted in respect of our hypothetical victim, the boundaries that have been drawn up are not immediately helpful for her or him. Not only are none of the cases in the direct lineage of development remotely connected to sports, but even *Watson*²⁵³ limits its analysis to situations where the injury has occurred and should have been dealt with in a better way, or where structural standards of health and safety were not met.

The question that still arises, as duties owed on the sporting pitch when the rules have been complied with would be a novel development, is how courts apply the vague tests of foreseeable and ‘fairness’ as set out by *Caparo*²⁵⁴ once it has been established that the claim

²⁴⁵ Ibid n. 189.

²⁴⁶ Ibid n. 189, 26.

²⁴⁷ As to whether or not a situation is novel, “Robinson suggests that a novel situation is one which falls outside an established category of liability, or which cannot be resolved by reference to established principles in the existing case law. In this respect, Lord Reed treated physical loss resulting foreseeably from positive conduct as constituting axiomatically an established category, irrespective of the precise factual circumstances” Tofaris, ibid n. 244.

²⁴⁸ Ibid n. 189, 27.

²⁴⁹ Ibid n. 244.

²⁵⁰ Ibid n. 189.

²⁵¹ Rebecca Gladwin-Geoghegan and Steve Foster ‘Police liability in negligence: immunity or incremental liability?’ (2018) 23(1) Cov. LJ 38.

²⁵² See Page 142.

²⁵³ Ibid n. 85.

²⁵⁴ Ibid n. 189.

is novel. This analysis will constitute the balance of this Chapter, focusing on the relevance of incremental development, assumption of responsibility, and public policy and consider the manner in which they have been interpreted by the courts

Incremental development

A consistent theme of the development of duties, whether novel or based on existing precedent, has been that the development should be done "incrementally and by analogy with established authority."²⁵⁵ This by definition, bodes ill for the development of a duty to prevent injuries caused within the rules, as cautious presumption will be against extensive developments.

The analysis of this principle, which can be literally seen as a very slow movement, has been done partially in the negative, representing a rejection of generalisation in relation to the duty of care²⁵⁶ and an endorsement of the principle that recognition of novel duties of care should be cautious. The relevance to this thesis is clear; the slower the courts are to recognise new duties of care, the less likely they will be to make an affirmative statement on the subject.

Some academics have gone even further, suggesting that incremental development should be halted reasoning that the only motivation for the law of negligence continuing to exist was that "in some areas of activity there is a settled expectation that negligence law will apply"²⁵⁷ and that therefore "the only cases that should be covered by negligence are cases where there is a settled expectation that negligence will apply."²⁵⁸ Taking Howarth's position, effectively that new protections could be provided more robustly and democratically by legislation²⁵⁹ then there would be no prospect of the duty of care being extended; it does not exist in precedent and therefore it cannot exist at law. It will be seen later, that one of the public policy pro-liability factors is that protection is unlikely to be afforded from a different

²⁵⁵ Ibid n. 194, 27.

²⁵⁶ Keith Stanton, 'Professional negligence: duty of care methodology in the twenty first century' (2006) 22(3) P.N. 134.

²⁵⁷ David Howarth, 'Negligence after Murphy: Time to re-think.' (1991) 50 Cambridge Law Journal 58.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

quarter, including the legislature, and so the discussion on this point will be reserved until then.²⁶⁰

It was seen earlier that the courts have not taken this approach and have continued to acknowledge the possibility of novel duties of care, while acknowledging that incremental development is essential.²⁶¹ The courts have retained caution while not resorting to complete inaction.

An example of how the court will develop the law into novel areas was seen in *White v Jones*²⁶² where a beneficiary of a will was left disappointed due to the negligence of the legal representative, whose instructions had emanated from the legatee. Under existing authorities²⁶³ there was no duty owed by the legal representative to the beneficiary. Lord Goff conceded establishing that there had been an active assumption of responsibility by the solicitor to the beneficiary would be difficult and that therefore it was more appropriate to extend the principle on the basis that the development was analogous to existing decisions.²⁶⁴ Lord Browne-Wilkinson endorsed this approach stating that: “it is legitimate to extend the law to the limited extent proposed using the incremental approach by way of analogy.”²⁶⁵

Clearly, in that case, the court felt that a development of the law was appropriate, and this was justified by reference to the absence of an alternative remedy, and the appropriateness of a duty of care being owed. In one sense *White v Jones*²⁶⁶ can be seen as a direct descendent of *Donoghue v Stevenson*²⁶⁷ where the court also extended the duty of care beyond the accepted limits of the time.

The principle has not been without criticism, and Stapleton has been particularly sceptical of its use in order to justify a restrictive approach to liability, noting that in the ‘post-Anns’ era,

²⁶⁰ See Page 191

²⁶¹ Ibid n. 92.

²⁶² *White v Jones* [1995] 2 AC 207 per Lord Goff.

²⁶³ Ibid n. 167.

²⁶⁴ Keith Stanton, ‘Professional negligence: duty of care methodology in the twenty first century’ (2006) PN, 22(3), 134.

²⁶⁵ Ibid n. 262 per Lord Browne-Wilkinson.

²⁶⁶ Ibid per Lord Goff.

²⁶⁷ Ibid n. 33.

there was a particular determination of the higher courts to confine liability²⁶⁸ and that incrementalism was one of the tools that was deployed in pursuit of this goal, raising the concern that its existence was a reaction to the excesses of the 'Anns period' as opposed to a reasoned development of jurisprudence.

An acknowledged problem with the concept is that "in spite of the authorities, and continued support for its use, its meaning is vague"²⁶⁹ and the case that has been used above, *White v Jones*,²⁷⁰ emphasises this point. Here, the minority of the court asserted that the majority in the case had extended liability without anything to demonstrate that there were cases that were capable of being extended to deal with the situation²⁷¹ with Lord Mustill contending that the proposed extension would be something that was radically different.²⁷² Stanton goes further and suggests that it is a serious over-simplification of the analysis and should be seen as "an assertion that it was fair just and reasonable to impose a duty of care on the facts of the case."²⁷³ While this may or may not be a valid reason to extend the law, it is not a clear and concise principle that is of any great assistance.

The other problem is that as a check on the development of liability it is less of a dead end than a speed bump in the road. The purpose is not to prevent duties of care from being established, but instead to slow down the development and ensure that a step-by-step approach is taken as was shown in *Gorham v British Telecommunications plc*²⁷⁴ which involved advice that went beyond that of a solicitor-client and thus was "novel"²⁷⁵ but which was justified by the incremental approach. Thus, the theory effectively says that an action may not be actionable today, but it may be at some point in the indeterminate future. The most that it can be said to establish, therefore, is that such a development is possible, but not at this time, which is neither clear nor precise.

²⁶⁸ Peter Cane and Jane Stapleton (Ed) *The Law of Obligations Essays in Celebration of John Fleming* (Clarendon Press Oxford) 65-66.

²⁶⁹ Keith Stanton, 'Professional negligence: duty of care methodology in the twenty first century' (2006) PN 22(3), 134.

²⁷⁰ [1995] 2 AC 207.

²⁷¹ Ibid n. 262 per Lord Keith.

²⁷² Ibid n. 262 per Lord Mustill.

²⁷³ Ibid n. 269.

²⁷⁴ [2000] EWCA Civ 234.

²⁷⁵ Ibid n. 269.

Stanton raises a final point in criticising the principle, which is that it treats precedent with an unhealthy deference, noting that where “the circumstances are unprecedented, the claimant must lose.”²⁷⁶ This would be arguably appropriate if society existed in a vacuum with no evolution of technology or information. Yet in many areas of tort law, in particular negligence, and even more so in sports law, it is reasonable to say that it is “in a state of rapid evolution”²⁷⁷ This being the case, it is arguable that the principle of incrementalism, while necessary as a consideration, should be given less weight where the evolution of the factors have left existing precedent redundant. There is possibly no better evidence of this than the reminder that *Donoghue v Stevenson*²⁷⁸ itself was a novel case and if the principle of incremental development had been implemented, then it is arguable that the course of tort law would have changed dramatically. “There was a long line of cases limiting a manufacturer’s or retailer’s liability to those who had contractual privity.”²⁷⁹ Lord Denning referred to Lord Buckmaster as one of the “timorous souls”²⁸⁰ who refused to recognise a new cause of action, in contrast to the majority of “bold spirits”²⁸¹ who were willing to make a change where justice required.²⁸² Chamberlain writes that “Generally speaking, we tend to be critical of Lord Buckmaster for his failure to recognise the changing needs of society”²⁸³ and that “More broadly, it meant that consumers were more vulnerable to latent defects in products.”²⁸⁴

It can be said, then, that when analysing whether the duty of care can be extended, it is necessary to consider whether or not there are analogous cases, and whether or not the development is a natural one, but that there are situations where the courts will consider taking an unusually large step forward in creating a duty if that is what is needed in the specific case and can be justified in the specific case.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid n. 33.

²⁷⁹ Erika Chamberlain ‘Lord Buckmaster: the reluctant villain in *Donoghue v Stevenson*’ (2013) *Jur. Rev.* 2013, 3, 24.

²⁸⁰ *Candler v Crane Christmas & Co* [1951] 2 KB 164

²⁸¹ Ibid.

²⁸² Ibid n. 279.

²⁸³ Ibid.

²⁸⁴ Ibid.

Assumed Responsibility

Passing on from the speed with which a duty can develop, it has been seen above that a central principle of *Donoghue v Stevenson*²⁸⁵ was the concept of liability being owed to your 'neighbour', with this being a central question in determining to whom a duty is owed. A key question that has been present since *Donoghue*²⁸⁶ has been the extent to which this can be stretched, ranging from great elasticity in *Anns*²⁸⁷ to a far more restrictive approach in the subsequent years.²⁸⁸

The concept of an individual assuming the responsibility for their actions on another was not considered in the original *Donoghue*²⁸⁹ case, as it will be remembered that the court spoke about those who would be impacted by the act of the potential wrongdoer. The principle first gained prominence when addressing the question of economic loss in *Hedley Byrne v Heller*,²⁹⁰ based on the notion that while non-economic loss was by its nature foreseeable, economic loss was far harder to foresee and that for liability to attach for such losses, it would be necessary for the wrongdoer to have done something more, to have by their actions acknowledged the existence of the potential victim, and assumed a responsibility for their losses.

This principle, which acts as an additional barrier to recovery, has been reinforced by the court in recent economic loss cases including *Northern Rock Asset Management v Steel*²⁹¹ where it was stated that assumption of responsibility is "the foundation of ... liability" for misstatement leading to economic loss."²⁹² Gordon writes that the decision was reached "by application of this [assumption of responsibility] concept, cross-checked by incrementalism"²⁹³ which

²⁸⁵ Ibid n. 33.

²⁸⁶ Ibid.

²⁸⁷ Ibid n. 175.

²⁸⁸ *Junior Books Ltd v Veitchi and Co Ltd* [1983] 1 AC 520.

²⁸⁹ Ibid n. 33.

²⁹⁰ [1964] AC 465.

²⁹¹ Ibid.

²⁹² Ibid, 24.

²⁹³ Emily Gordon, 'Out with the old, in with the older? Hedley Byrne reliance takes centre stage' (2018) CLJ, 77(2), 251.

suggests that the two concepts need to work in harmony when analysing novel areas of duty of care.

The liabilities that are the subject of this thesis are, of course, do not involve, primarily, economic loss. However, the principle has emerged as a ground relied upon by the courts to extend duties of care in cases that involve non-economic loss, and has “assumed increasing importance in the determination of duty.”²⁹⁴ It was seen earlier in *Watson*²⁹⁵ that the court specifically referred to the assumption of responsibility by the British Board of Boxing Control in respect of the boxing conditions, and therefore is a logical starting point in arguing that where a party is deemed to have assumed responsibility, there will be a better argument for the extension of a duty of care.

As with much in this area, the development of assumption of responsibility has not been without criticism. One common objection is that it is a circular concept that defies definition, with Lord Griffiths stating that:

"The phrase ‘assumption of responsibility’ can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice”²⁹⁶

In that case²⁹⁷ the court noted that the presence or absence of a voluntary assumption of responsibility remained a relevant factor, even if it were not determinative, and the lukewarm position of Lord Hoffmann indicated that the presence of ‘voluntary assumption’ did little more than to suggest that liability would attach to an action by the defendant as opposed to a failure to do something.²⁹⁸

²⁹⁴ Carl F. Stychin ‘The vulnerable subject of negligence law’ (2012) 8(3) Int. JLC. 337.

²⁹⁵ Ibid n. 85.

²⁹⁶ *Smith v Eric Bush* [1990] AC 831, 862 per Lord Griffiths.

²⁹⁷ Ibid.

²⁹⁸ Ibid n. 40.

Assumption of responsibility does have limits and it is not seen by the judiciary a key to unlock all gates of liability. Goudkamp has asserted that the test “is generally difficult to satisfy, all other things being equal”²⁹⁹ partly because of the common laws’ traditional approach, going back to *Donoghue v Stevenson*,³⁰⁰ that there is no duty owed to control third parties.³⁰¹ Thus, in *Michael v Chief Constable of South Wales Police*³⁰² the police were not deemed to have assumed responsibility to safeguard the interests of the person who had reported a potential crime, even though they were aware of all of the information needed to act and, from a practical perspective, had the opportunity to intervene.³⁰³ In the *Michael*³⁰⁴ case, as in others, the court took the view that the starting point remained the traditional principle that there was no duty, and required specific factors in order to trigger the possibility of an assumption of responsibility and this was endorsed in *Playboy Club London Limited v Banca Nazionale del Lavoro SPA*³⁰⁵ where the court reiterated that it is insufficient for a Defendant to understand that the relevant information will be relied on by the Claimant, but that “it must also be part of the statement's known purpose that it should be communicated and relied upon by the claimant.”³⁰⁶ Therefore, for the burden to fall on the Defendant, where assumed responsibility is alleged, it is necessary that both the relationship and the purpose of the information be known to the Defendant. This places a high burden on a claimant seeking to establish that an assumption of responsibility has been created.

The limiting factors that were noted in *Playboy Club London Limited v Banca Nazionale del Lavoro SPA*³⁰⁷ do not mean that the principle is of no value at all, and Stanton has acknowledged that the reasoning in that case evidenced the continued relevance of the principle.³⁰⁸

²⁹⁹ James Goudkamp ‘Duties of care between actors in supply chains’ (2017) 4 2017 JPI. Law 205.

³⁰⁰ Ibid n. 33.

³⁰¹ Ibid n. 299.

³⁰² [2015] UKSC 2.

³⁰³ Ibid.

³⁰⁴ Ibid n. 92.

³⁰⁵ Ibid.

³⁰⁶ Anne Jeavons and Emmanuel Sheppard, ‘Case Analysis’ (2018) 10 JIBFL 658.

³⁰⁷ Ibid n. 92.

³⁰⁸ Keith Stanton, ‘Defining the duty of care for bank references Case Commentaries *Playboy Club London Limited v Banca Nazionale del Lavoro SPA*’ (2016) 4 PN 272.

The importance of this principle was shown in the earlier case of *Watson*³⁰⁹ where the difficulty for the court was in establishing why the Defendant should be taken to owe a duty of care to the Claimant, a boxer who had suffered serious injuries because of a consensual bout between himself and another in his weight class. While there was proximity, insofar as the Defendant were responsible for aspects of the bout, the injuries were caused, deliberately and within the rules, by the Claimant's opponent, and there was no contention that the injuries had been caused by the Defendant.

In answering this question, not as to the injuries caused but in the way in which the injuries were managed, the court took the view that the board assumed responsibility for the control of the activity, that they determined the details of the medical care and facilities that should be provided, and that the parties relied upon the Board for this purpose.³¹⁰ In coming to this conclusion, the court considered a variety of cases in which situations have arisen in which there has been a finding of assumption of responsibility. The court also took into account the specific nature of the Defendant, emphasising that "the injuries which are sustained by professional boxers are the foreseeable, indeed inevitable, consequence of an activity which the Board...controls"³¹¹ and that "The Board...made compliance with these [safety] rules mandatory."³¹² The court therefore found that by their actions they had assumed responsibility for the policies being adhered to and that liability could attach. Crucially, for future reference, they made particular reference to the fact that the actions of the parties would inevitably lead to injuries, and that this was why there were rules in the first place. When arguing later that this is applicable to the status quo, this will become a crucial point but for now, it is clear that the doctrine of assumption of responsibility is one that fits well with the consequences of sporting injuries.³¹³

Public policy: what does this mean?

³⁰⁹ Ibid n. 85.

³¹⁰ Robin Oppenheim 'The "mosaic" of tort law: the duty of care question' (2003) JPI. Law (Sep) 151.

³¹¹ Ibid n. 85 [79].

³¹² Ibid n. 85 [82].

³¹³ See Page 190.

The third, and most contentious, limb of the *Caparo*³¹⁴ test is that imposing liability be “fair just and reasonable.”³¹⁵ In identifying what this means in the context of duty of care, it is logical to consider the main criticisms first that it is imprecise³¹⁶ and secondly that it represents a deference to grounds of policy in determining the boundaries and extent of the duty of care, such considerations being better suited to the legislature than the judiciary.

The first criticism needs little discussion, as the very nature of the words are vague and unclear, which leaves them unhelpful for a court, or academic, attempting to determine whether a perceived duty is or is not a legal duty in the same manner of the infamous comment of Justice Potter Stewart when he wrote in defining a term that “I cannot define it, but I know it when I see it.”³¹⁷

The second criticism was summarised by Lord Neuberger, writing extra-judicially, who noted that “almost all aspects of the law of torts are grounded on policy, and any attempt to identify or distil principles will normally be fraught with problems,”³¹⁸ emphasising that public policy is an excellent shield to use as cover for a decision, being difficult to distil a bright line rule from behind its protection while the fondness for the use of metaphors in this context was highlighted by the statement that ‘public policy is a very unruly horse and once you get astride it you never know where it will carry you.’³¹⁹

Despite these clear difficulties of public policy, its existence at the heart of the duty of care jurisprudence is undeniable, as Lord Mance emphasised by indicating that it was “unrealistic”³²⁰ to think that courts should not take this into consideration, reflecting the changing nature of society and the inevitability in a common law system that the law should develop accordingly.

³¹⁴ Ibid n. 189.

³¹⁵ Ibid

³¹⁶ “Lord Bridge...with whom three other members of the committee agreed...observed that the concepts of proximity and fairness were so imprecise as to deprive them of utility as practical tests.” (*NRAM v Steel* [2018] UKSC 13 at [22] per Lord Wilson).

³¹⁷ *Jacobellis v Ohio* 378 U.S. 184 (1964).

³¹⁸ David Neuberger, 'Stop needless dispute of science in the courts' (2016) 531 *Nature* 9.

³¹⁹ *Richardson v Mellish* (1824) 2 Bing 229, 252.

³²⁰ Ibid n. 194, 84 per Lord Mance.

The logical follow-up question is to consider what is meant by public policy, as the description itself has been seen as impossibly vague, with an overriding arc being that “the court must remember that it is engaged “in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with notions of what is fit and proper.”³²¹ Equally unhelpful is the statement that the court are required “to weigh anti-duty factors against pro-duty factors,³²² which is both self-evident and non-explanatory.

Lord Browne-Wilkinson tried to assist, stating that:

“In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would be-claimants if they are not to have a cause of action in respect of the loss they have individually suffered.”³²³

This at least seeks to address what is meant by the test and what the court are required to consider, although the statement itself suggests that it is no more than a mathematical exercise that seeks to take into account potential loss by a Claimant against potential risk to the Defendant. It does not go further, and explain what this means possibly, as Morgan suggests, because the court were unable to clarify matters. Morgan prefers a simpler, and possibly more brutal, assessment, stating that it means nothing more or less than “consideration of all relevant factors militating for and against liability, by the court.”³²⁴

Stapleton has made an effort to forensically determine what is meant by public policy, and the factors that should be taken into account, identifying that at least three concerns arise: the danger of opening floodgates, the availability of alternative remedies, and existing, exhaustive action by Parliament.³²⁵ Stapleton does emphasis, however, that these are

³²¹ Ibid 27.

³²² Ibid n. 299.

³²³ *Barrett v Enfield LBC* [2001] 2 AC 550.

³²⁴ Jonathan Morgan ‘The rise and fall of the general duty of care’ (2006) 22(4) PN 206.

³²⁵ Ibid n. 170.

necessary but not sufficient considerations in the determination of a new duty of care and that there are additional factors that will apply to different cases in varying degrees.³²⁶

Stapleton has sought to identify what is, or what should be, a factor in determining whether a duty should be extended based on public policy, with reference to what she terms 'duty factors.'³²⁷ The relevance of these is that "Sometimes a duty factor, such as the concern not to encourage abortion, weighs in favour of a duty, sometimes it weighs against a duty, and sometimes it is simply not raised by the facts of the case at all."³²⁸ To determine whether or not a duty will attach, it should therefore be possible to list the duty factors for and against the existence of a duty, and then evaluate whether or not a duty will attach and therefore a weighing process is seen as necessary. The way that this happens in practice can be seen in *Marc Rich and Co v Bishop Rock Marine Co Ltd*³²⁹ where the court, in addition to deciding whether a duty already existed, weighed the importance of anti-duty factors were considered, including the existing rules of carriage by sea, the availability of insurance, and the availability for the claimant of surveys.³³⁰

It has to be noted that Stapleton's analysis focuses on an ideal world, while accepting that the judicial reasoning often falls short of the ideal.³³¹ This is demonstrated by the fact that some of the factors to which Stapleton gives short shrift are still in use by the court. For example, Stapleton calls the principle of assumption of responsibility "unconvincing"³³² and yet it has been seen earlier that it is central to recent jurisprudence in the field,³³³ although it must also be noted that her concern with the principle was based around the lack of precision that could be attached to it, and the concern that just as 'public policy' is a term that is unhelpful, so is the term 'assumption of responsibility', and she goes on to say that:

³²⁶ Ibid.

³²⁷ Peter Cane and Jane Stapleton (Ed) *The Law of Obligations Essays in Celebration of John Fleming* (Clarendon Press Oxford 1998) 60-61.

³²⁸ Ibid, 62.

³²⁹ Ibid n. 90.

³³⁰ Christian Witting, 'Negligent inspectors and flying machines' (2000) 59(3) CLJ 544.

³³¹ Ibid n. 327, 64-65.

³³² Ibid, 64.

³³³ Ibid, 64.

“Of course if a person x not only undertakes a particular task but explicitly undertakes the legal risk of liability for any injury thereby caused this would be a convincing factor in favour of a duty on that person being recognised...but the mere undertaking of a task does not justify a conclusion of an undertaking of legal risk. The law is thrown back on the normative question: should the defendant be under a duty, should he be taken in law to have undertaken the legal responsibility?”³³⁴

A key contribution of Stapleton’s analysis is that whether a duty factor is of value or not often depends on perspective, and the specific question or phrase that is used. Thus, she notes that a fear of the imposition of a duty of care exposing defendants to a large volume of claims is unhelpful, while the context of indeterminate claims is potentially useful, as it would be strange if a defendant could claim that he or she could be immune because of the high number of victims. It is not strange for a defendant to claim that there is no possible way of identifying the potential number of victims.³³⁵ It can be seen, therefore, that it is not sufficient to simply rely on general reasons to allow or reject the imposition of a duty of care, but instead it is necessary to consider its impact on jurisprudence and society. In the context of sporting law injuries, which will be considered in the next chapter,³³⁶ questions will be addressed in as specific a manner as they can be in the circumstances.

Stapleton’s analysis of pro duty factors identifies the circular problem which is that in a particular situation a defendant who by his own positive act, has carelessly caused physical damage to the claimant or his property is always held to a duty of care to the victim. This is so even if the claimant and defendant are complete strangers; claimant and defendant are physically distant; the claimant is rich and insured; the defendant is a public authority and so on. In other words, apart from Crown privilege, no factor counter-veiling to the recognition of a duty has yet been identified which has the force to outweigh this pro-liability factor. Thus, she contends, that “if I carelessly trip a stranger into a swimming pool where he drowns it will

³³⁴ Ibid 64-65.

³³⁵ Ibid 65-66.

³³⁶ See Page 131.

be held that he is my neighbour that we are proximate and that it would be fair just and reasonable to impose a duty of care on me.”³³⁷

The objections to this are that it “can be little more than a recital of the relevant fact pattern”³³⁸ and that it is only justifying a duty being imposed on a party whose own careless act the claimant’s person or property has been physically damaged.”³³⁹ It is a factor that is explanatory of situations where there is an absence of limiting factors as opposed to a wealth of pro-liability factors and, as Stapleton acknowledges, it is of little explanatory value in respect of complicated and novel areas.

A slightly more concrete pro-liability factor can be said to be the statement by Hobhouse LJ who emphasised the importance of considering the protection of the person and his property in law, thus emphasising that the possibility of a new duty of care being created is for practical purposes and not to develop a theoretical aspect of the law.³⁴⁰

Additionally, Stapleton refers to “specific concerns which weigh convincingly in favour of liability”³⁴¹ which have been utilised by the judiciary in creating new or extending old duties of care. An example that is provided is where an individual is liable not only to the people who may be injured, but to those who would rescue the injured party and may suffer injuries themselves. This is a specific factor that weighted in favour of liability as to not provide this would discourage rescue. Stapleton has also noted that the starting point of the cases also has an impact on the nature of the policy that is being discussed, referencing the unwanted baby cases where a medical professional negligently conducted operations that should have prevented birth. Analytically the only damage of which the child could complain, was life itself which the courts were reluctant to endorse as being in the public interest. The next unwanted case was presented in a [different] way, brought by the parents who sued for their own loss. Here not only was the previously countervailing argument absent but a separate pro-liability argument was convincingly cited by the court in justifying its recognition that the careless

³³⁷ Ibid n. 327, 65-66.

³³⁸ Ibid 65-66.

³³⁹ Ibid 65-66.

³⁴⁰ Perrett v Collins [1998] 2 Lloyds Rep. 255 per Hobouse LJ.

³⁴¹ Ibid n. 327, 72-73.

medical defendant owed the parents a duty of care; a denial would tend to encourage abortion, again a result that would have flown in the face of a community consensus that this is a phenomenon which should not be positively encouraged.³⁴²

Thus, to determine whether a pro-liability factor can be established, where there is a novel question, it can be seen that questions that have prompted the courts to determine that public policy is affected include non-exclusively, whether it will encourage an unwanted action, or discourage a wanted action, in line with the established cases.

Equally, however, there are several factors that can potentially weigh against public policy establishing a duty. Stapleton lists a number of these,³⁴³ many of which will apply in very fact-particular cases, but there are some that will warrant additional consideration when assessing whether a duty of care should be extended, in particular that the subject is more appropriate for Parliamentary action and that socially desirable activities will be prohibited. These will be considered in more detail when analysing the specific sports.³⁴⁴

Finally, and unusually, there is a third type of factor, which has the potential to include some of those that have already been discussed as they are factors that can be either pro-liability or anti-liability. This often arises as a result of considering the purpose behind the legislation, where such legislation exists in the field and thus mitigates the anti-liability factor, which was

³⁴² Ibid n. 327, 72-73.

³⁴³ That the proper vindication of the law's concern with the liberty of the individual justifies a refusal to recognise any duty of affirmative action towards a stranger, The defendant is casually only a periphery party, The plaintiff himself had adequate means of avoiding the risk eventuating and causing loss, The imposition of a duty might produce a specified unattractive socio-economic impact, A duty here would expose the defendant to the risk of liability for an indeterminate time or to an indeterminate class, The concern to separate executive and judicial powers requires the denial of a duty in relation to the broad policy decisions of public bodies, Recognition of a duty here might bring the law into disrepute, Imposition of a duty might threaten to involve substantial systemic evidentiary difficulties, Imposition of a duty might threaten the control of public order, Recognition of a duty would positively encourage dependent parties to be dependent on tort, It might encourage exploitation of others, It is more appropriate to Parliamentary action, Inconsistent with free speech, Undermine the policy of a piece of legislation, Negatively impact on plaintiffs, Render actionable conduct that was not a free choice, Content could not be adequately defined, Onerous on disadvantaged groups, Major departure from traditional legal categorisation, Major invasion of a fundamental aspect of liberty, Discourage socially beneficial forms of hospitality. Ibid n327,72-74.

³⁴⁴ See Page 199.

considered by Stapleton to be unsatisfactory, that of a duty not being likely where Parliament has chosen to act within that area rather than leave it dormant.³⁴⁵

An example of this was seen by the court in *Perrett v Collins*³⁴⁶ where the court considered the nature of the legislation in the aviation field and found that the purpose of the legislation was “the protection of persons in the position of the present plaintiff”,³⁴⁷ specifically a claimant who was seeking to fly an aeroplane that had previously been inspected. Equally, of course, this double-edged sword could cut the other way, and if legislation is in place that is seen by the courts as representing an exhaustive coverage of that area, then it will likely be seen as an anti-duty factor rather than a pro-duty factor.

As sporting law has developed, there has been a conscious awareness³⁴⁸ of the need to ensure that any obligations set down by either the law or the sporting organisations should not be “too difficult for ordinary coaches and match organisers to meet.”³⁴⁹ Yet there are also suggestions that the greater the potential the liability, the better the training will be, with Mayer suggesting that “raising the standard of liability would cause the promoters...to provide better training and supervision of referees so that referees are not negligent in their officiating.”³⁵⁰

Conclusion

The purpose of this review was to attempt to determine a framework for the discussion that follows, to allow the contemporary sporting environment to be fitted for a suit of duty. The situation, however, may have best been summarised Sir Brian Neill in *BCCI v Price Waterhouse (No.2)*³⁵¹ who suggested that potential new duties should be considered using all of the approaches and that when the analysis is correct, the “several approaches will yield the same result”³⁵² with the implication being that there is no one test.

³⁴⁵ Ibid n 327, 72-73.

³⁴⁶ Ibid n 340, Per Hobhouse, Swinton Thomas and Buxton LJ.

³⁴⁷ Ibid, 9.

³⁴⁸ Ibid n. 154.

³⁴⁹ *Sutton v System Rugby Club* [2011] EWCA Civ 1182 per Longmore LJ.

³⁵⁰ Michael Mayer ‘Stepping in to Step out of Liability: The Proper Standard of Liability for Referees in Foreseeable Judgment-Call Situations,’ (2005) 3(1) DePaul Journal of Sports Law & Contemporary Problems 84.

³⁵¹ *BCCI v Price Waterhouse (No 2)* [1998] BCC 617.

³⁵² Ibid.

This is not particularly helpful, but it does highlight three crucial points:

First, the doors to new duties of care are not closed, and the courts will consider developing these points, even if they will not be happy to do so. Secondly, the first question must be whether there is precedent for the determination of a duty of care. If the answer to this question is in the affirmative, then it is likely that it will be seen to exist. Thirdly, if there is no precedent, then it will be necessary to consider whether there is a sufficient proximate relationship and whether the damage was foreseeable, and then to analyse whether or not it would be fair, reasonable and just to impose a duty of care. In analysing the first, the question of assumption of responsibility applied, and in respect of the second it is necessary to analyse the pro and anti-liability factors. These will be considered in Chapter Four.

It is clear that there are many potentially relevant factors but there are some that may be considered with more intensity than others, in particular the principles of assumed responsibility and incremental development.

Finally, it is evident that all the circumstances must be considered, and the contemporary relation of assumed responsibility, that of vulnerability is worthy of consideration, and may be a vital factor in the event that assumed responsibility cannot be established.

It is arguable that the best that can be said at this stage, by way of summary, is that where there is a novel set of facts, the test that the court will use is unclear, a point that was highlighted in *Customs & Excise Commissioners v Barclays Bank*³⁵³ where the finding was that flexibility is necessary in order to develop the jurisprudence appropriately³⁵⁴ in spite of Morgan's warning that this will likely lead to a deluge of single instances.³⁵⁵

The next step is to analyse the extent to which these points are applicable to the particular question in this thesis: that of concussion injuries and the appropriate responsibility.

³⁵³ [2007] UKHL 28.

³⁵⁴ *Ibid*, per Lord Bingham [6], Lord Hoffmann [35]; Lord Roger [53]; Lord Walker [71]; Lord Mance [93].

³⁵⁵ *Ibid* n40.

Chapter Four: The Need to Expand the Duty to Protect the Players

Introduction

It has been established that the courts can extend the duty of care, that there will be a presumption that they will not extend it, but, crucially, that this presumption can be rebutted, and that to do this it is necessary to analyse the arguments in favour of liability and those against, drawing on previous authorities and contemporary arguments.¹

The Argument

The remaining thesis will examine the primary participants in the sporting structure and analyse the new developments, considering existing law to determine the extent to which responsibility and liability may attach under existing laws and thus the extent to which outside scrutiny may be necessary to fully protect the individual participants in the game. At the heart of the discussion is the underlying competition of principles between establishing a “safe working environment”² for sporting participants and protecting the stated primary attraction of sport being the “unrestrained qualities, the delight of its unpredictability, the exploitation of human error and the thrill of its sheer physicalness.”³ The pattern, therefore, will be to examine the existing position and then analyse the extent to which the concussion developments might impact on that existing law.

This chapter will focus on what has often been called the organising bodies of sports but can be described as the administrators of sports.⁴

¹ Ibid 139.

² Simon Gardiner et al *Sports Law* (4th Edition, Routledge 2011), 499.

³ Ronald Di Nicola and Scott Mendeloff ‘Controlling Violence in Professional Sports: Rules Reform and the Federal Professional Sports Violence Commission’ (1983) 21 *Duquesne Law Review*, 845.

⁴ T Morris, J Summer, Sandy Gordon, David Lavellee *Career transitions in competitive sport* (Wiley-Brisbane 2016), J Medalha, ‘Duties of Sport Administrators in Selected Brazilian Sport Associations with Implications for Professional Preparation’ (PhD Thesis, Indiana 1983).

The argument in respect of administrative bodies will form three parts. First, there will be a short summary of what is meant by the phrase and a specific discussion of how some of the arguments in respect of their liability have played out in the United States of America in respect of concussion injuries in the National Football League. Secondly, there will be an analysis of how the existing law does cover some aspects of concussion injury and how they need to be extended to provide a more rigorous protection of participants in sports. Finally, it will be argued that these protections are insufficient and that there needs to be a duty of care extended to the administrative bodies making of rules, to require them to amend existing rules to increase the protection of players from concussion.

Governing/Administrative Bodies: The Guardians of Sport

Introduction

This chapter analyses the responsibility of those administer the individual sports, and the impact that they can have on their respective sports. The thesis will argue that in three of their roles there is the potential for them to be liable for failing to reasonably address the risks of concussion, with the first two being immediately applicable, and the third needing development.

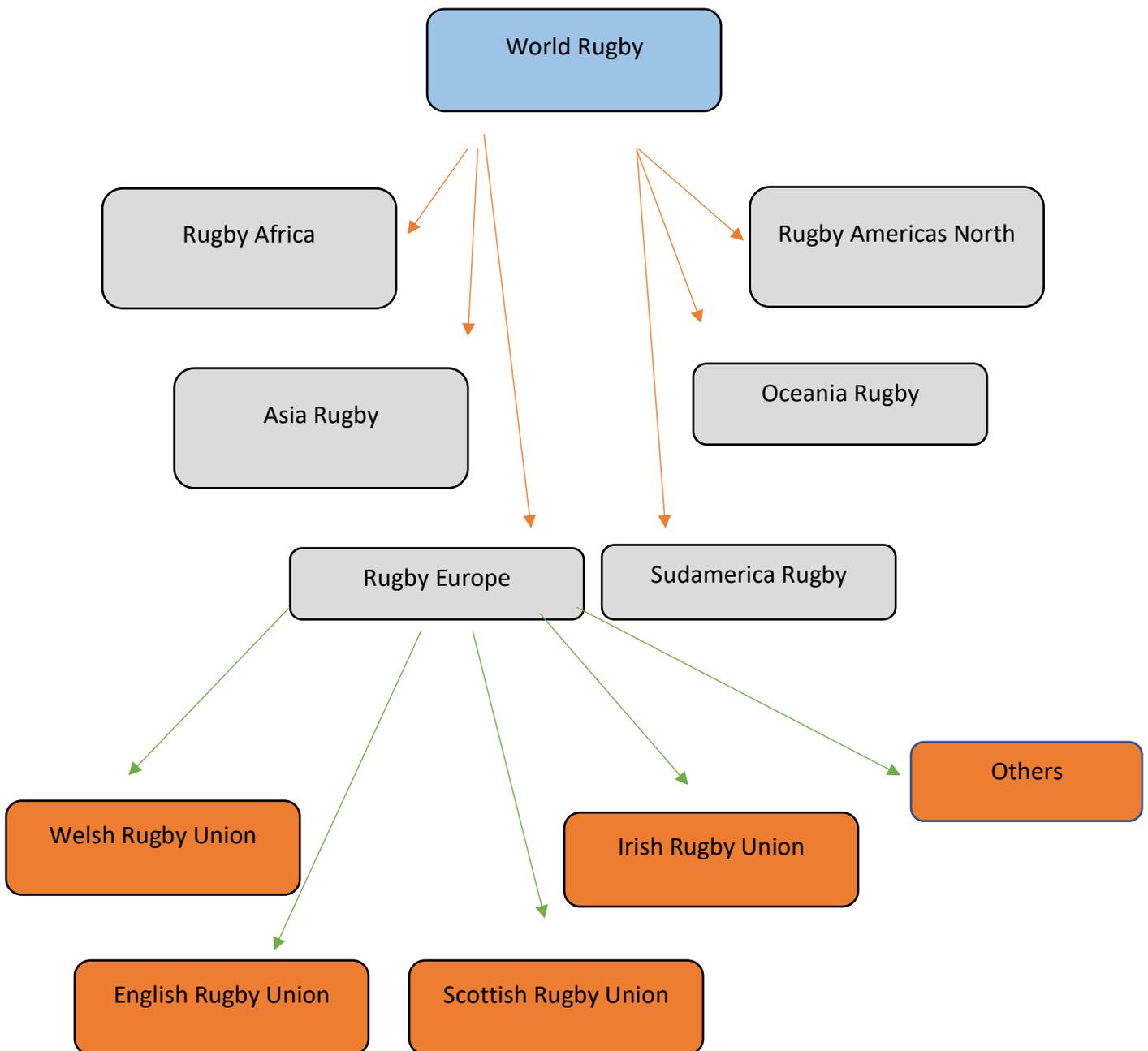
What are the administrative bodies?

The administrative body can be any body that does not directly participate in the sporting activity as a participant, but which influences, in one way or another, the conduct of the sport from a neutral perspective, i.e., they are not aligned to either side. In this context the focus is on the rule makers and those who administer the specific events themselves. Although the phrase can seem artificially inelegant, with organising body being more frequently utilised, there is a reason for widening the field, as the role taken by a body varies from sport to sport, as will be seen. Depending on the branch of liability in question, it will broadly cover an organisation who determines the rules or those who organise the individual events.

Who administers sports?

The identity of these bodies would normally be less relevant than their function, as any principle that attaches potential liability would apply regardless of the identity of the organising body and would apply equally to any successor in that role. It lends context, however, to identify those with responsibility for the sports under discussion to give an indication of their nature, scope, and role and to understand the various stages in which they have the potential to influence and shape their sport. In this context, there will be a brief analysis of the organisational structure behind Rugby Union and Football.

Rugby Union



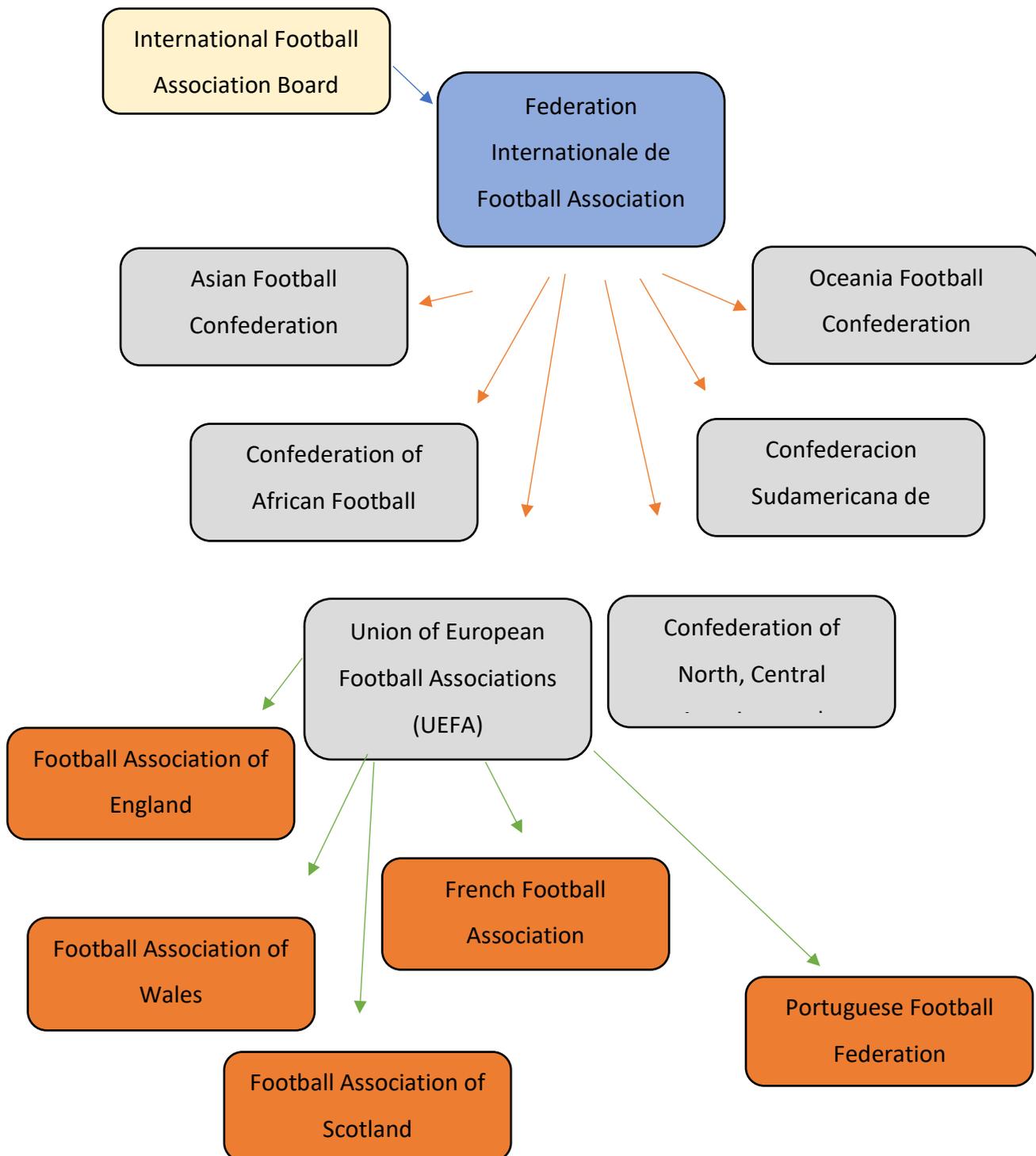
At its heart, the rugby governance structure is linear, with one organisation, World Rugby, which is responsible for the rules of the game as well as the organisation of the main international competition, the Rugby Union World Cup, together with additional competitions including the Women's World Cup and the World Sevens Competition.

Crucially, World Rugby has the ultimate responsibility for the development of rules, and they are organisation who, on an annual basis, determine what the rules should be. These must then be implemented by the organisations beneath them in the hierarchy. In the event that there is liability for a failure to change the rules, it would therefore be World Rugby who would ultimately bear that responsibility.

That does not, of course, absolve other organisations of potential responsibility as they all in some way involve themselves in the administration of sports, albeit at a lower level. Therefore, Rugby Europe have responsibility for the administration of the Six Nations Rugby Competition, and in the event that they fail to appropriately implement the rules that have been set out, they would potentially be open to liability. Likewise, the organisations that form part of Rugby Europe also have organisational responsibility within their geographic jurisdictions.

The picture of Rugby Union therefore is a fairly clear one, with a clear rules maker and clear organisers, with World Rugby falling into both categories. Regardless, it should be clear, at any stage, as to which administrative body will bear potential liability.

Football



The diagram above sets out one limb of the hierarchy of football, specifically following down the European line of authority. Most would assume that FIFA have ultimate responsibility,

and they are the primary organisational authority over the international competitions within the sport.⁵ They do not, however, have authority to alter the Laws of Football. This power resides with a separate, and pre-existing, body, the International Football Association Board⁶ who regulate the Laws on an annual basis. For example, in 2017, the IFAB changed the rules relating to kick-off to state that the ball may move forward or backwards. This became a new law of the game and could not be derogated from by any of the organisations below the IFAB on the hierarchy save where they fall into an accepted exception.⁷ Therefore, any claim in respect of the actual Laws of the game, for example whether the Law permitting a player to use his head to play the ball is reasonable, would only lie against the IFAB.

This does not exclude FIFA from potential liability. In the event that their actions in administering an international competition were deemed to be unreasonable, then they would be a potential target, on that limited basis. This would also apply to the bodies to whom FIFA has delegated powers within their geographic area. All six of these bodies are set out on the diagram, and for Europe this is the Union of European Football Associations (UEFA).⁸ UEFA would therefore not have potential liability for the Laws of the game or for the organisation of events within the jurisdiction of FIFA, but they would for events over which they organised or exercised control.⁹ This would apply equally to the other organisations within their regions.

Finally, there are the fifty-six individual national organisations, within the geographic umbrella of UEFA which are in the same position as the national organisations under the other geographic umbrellas. They are not all represented in the diagram, but their position is the same as those that are noted. Their position is broadly analogous with that of the British Board of Boxing Control insofar as they are responsible for the administration of football within their own jurisdiction. They would not have potential liability for the laws, however, unless it was a claim for failing to apply the laws that had been set down by the higher authorities.

⁵ As well as futsal, beach soccer and efootball.

⁶ IFAB.

⁷ IFAB Laws of the Game 2021.

⁸ www.uefa.com.

⁹ *Watson v British Board of Boxing* [2001] QB 1134.

What Is The Defined Role of the Administrative Body?

The precise scope of the activities of the administrative body are varied, but regardless of this, their role can be seen as a reflection of the governance of society, with a division of the legislative role, the judicial role and the executive role although it can be seen that not all of the administrative bodies carry out these functions.¹⁰ Thus, to a varying degree, they may establish the rules, render decisions on conflicts within that particular sport, and carry out the day-to-day governance of the activity.

A key focus will be on their legislative function within sport, this will normally be demonstrated by the making of rules, as seen by the IFAB in football, and World Rugby in Rugby Union. As Parliament passes laws domestically, so they will be responsible for the maintenance of rules and changing them over time in response to situations. This role can also, to a degree, be carried out by bodies beneath them in the hierarchy; for example, it was seen that the English FA have some powers, particularly in terms of increasing the safety standards. It is through this role that it will be argued that there should be liability, with the organisations being held to account if they do not make reasonable adjustments to developments within the medical world.

One facet of the concept of an organising body is therefore based on the premise that a sport has rules and there must be a body who has power and responsibility in respect of establishing the parameters of sporting activities. The extent of their voluntary and involuntary role was discussed in two of the leading cases in this field, and will be considered in the next section,¹¹ but the key features of their existence are that they exercise "a public function which it had assumed for the public good,"¹² that the, or at least a, "purpose of the [National Governing Body/International Federation] was to control and manage the sport"¹³ and that they have

¹⁰ Wladimir Andreff and Stefan Szymanski (ed) *Handbook on the Economics of Sport* (Edward Elgar Publications 2006), 227.

¹¹ *Watson*, *ibid* n. 9 and *Agar v Hyde* [2000] HCA 41.

¹² *ibid* n. 9.

¹³ Kris Lines 'Thinking outside the box (-ing) ring: the implications for sports organising bodies following *Watson* (2007) *International Sports Law Review*, 72.

access to information, or the possibility of accessing information, that could be used in order to frame the nature of the game.¹⁴

This takes the analysis to the apex of the sporting pyramid, with the organising body, the creators of the rules who provide “effective governance arrangements that underpin the rules of the game”¹⁵ and without whose impact in establishing harmonised rules for Lines suggests that the interaction of teams in formal competition would be impossible.¹⁶ The importance of regulation within a game was confirmed in *R v Brown*¹⁷ where Lord Jauncey distinguished between sport and the sado-masochistic activities of that case by noting that “there was, of course, no referee present, as there would be in a boxing or football match.”¹⁸ The ability of the adjudicators, duly appointed, to intervene, was identified as a key distinction between the sado-masochistic activities and sporting activities¹⁹ and made it clear that this was a modern expectation of sport, even if historically, as has been seen, the existence of rules was less of a strict requirement.²⁰

There is another relevant side to the administrative role, more so further down the hierarchy, which is the way the Laws or Rules are exercised. This is far less controversial, and it will be seen that when an administrative organisation fails to exercise their responsibilities with diligence, having put themselves in a position where they had the chance to do so, it will not be difficult to draw a line of liability. This is particularly relevant for those organisations who control larger aspects of the game, for example the appointment of officials and doctors, and will assist in drawing a line between the professional and amateur side of sports.

Litigation in Sport

¹⁴ Peter Charlish ‘The Astrid Andersen case’ (2004) *International Sports Law Review* 94.

¹⁵ *Ibid* n. 10, 227.

¹⁶ *Ibid* n. 13, 68.

¹⁷ [1994] 1 AC 212.

¹⁸ *Ibid*.

¹⁹ Ben Livings ‘Legitimate Sport’ or Criminal Assault? What Are the Roles of the Rules and the Rulemakers in Determining Criminal Liability for Violence on the Sports Field?’ (2006) 70:6 *Journal of Criminal Law*, 495.

²⁰ *Ibid*.

The Figures

It was seen in Chapter One,²¹ through the medical summary, that there has been an increase in concussion injuries caused in the pursuit of sporting activities and yet it will be seen below that this has rarely translated into recorded litigation. This is not to say that litigation not been contemplated or even occurred, and Gardiner suggests²² that there has been an increase in this, but there are potential reasons for the discrepancy between cases commenced and cases reported which are common in litigation. It could be that the injuries have been covered by insurance or it could be that a claim was made and settled or dismissed and not appealed. It is likely that the published tip of the iceberg conceals a far greater mass of ice hidden from view, although the waters have sunk a little as greater publicity has been given to the issue recently. All that can be said for certain is that the higher courts have not developed the law since *Watson*.²³

One aspect of the relationship between the law and sports is that although organising bodies present a tempting target,²⁴ armed as they are with insurance, money, and power, in practical terms they have not been a popular target for litigation arising out of injuries caused on the pitch²⁵ and this is emphasised by the decision in *Watson*²⁶ where the court's analysis of the law was limited to a review of non-sporting cases without significant reference to analogous sporting instances. There are potential reasons for this, including the existence of other potential respondents to actions, including employers, and the existence, at the higher levels, of insurance that has the potential to keep cases out of the judicial system. However, there is one clear case, albeit not in a sport focused on in this thesis, where the governing body has been an identified target.

Concussion and the National Football League

²¹ Ibid 24.

²² Bruce Gardiner, 'Liability for Sporting Injuries' (2008) *Journal of Personal Injury Law* 17.

²³ Ibid n. 9.

²⁴ Hayden Opie 'Negligence Liability of rulemaking bodies in sport' (2002) *International Sports Law Review* 59

²⁵ Mark James *Sports Law*, (3rd Edition, Palgrave 2017) 101.

²⁶ Ibid n. 9.

Chapter One²⁷ emphasised the impact of concussion injuries and that although its existence is not new, awareness of it is now sufficiently developed to trigger a response. The cases that have been looked at both considered more traditional forms of injuries, although *Watson*²⁸ did have some link with concussion, and there has been limited case law dealing with this development in the English jurisdiction.

The question of the relevant responsibility of a governing body has been closest to being raised in the United States of America where litigation commenced against the NFL in 2012.²⁹ It was seen earlier that although the NFL are not the overall rule makers in respect of their sport, they do have autonomy within their jurisdiction, and therefore have significant influence in respect of introducing rules and this was one of the key issues at the heart of the litigation.

The litigation³⁰ in question was formally commenced on the 7 June 2012³¹ when in excess of four thousand former professional American Football players filed a class action lawsuit against the NFL³² alleging "long-term chronic injuries, financial losses, expenses, and intangible losses suffered by the [players and their families]"³³ and that "[t]he plaintiffs' complaints allege a failure to ensure accurate diagnosis and recording of concussive brain injuries so that the condition can be treated in an adequate...manner."³⁴

The pleadings are detailed in their claims against multiple Defendants, including the NFL and the manufacturers of various safety equipment, but the central claims against the NFL can be broken down into fraud and/or misrepresentation and negligence.

²⁷ Ibid 14.

²⁸ Ibid n. 9.

²⁹ *Maxwell v. NFL*, (2012) 16 Mich. St. U.J Med. & L. 265

³⁰ Ibid.

³¹ Elise Michael, 'School of Hard Knocks - The Impact of the NFL Concussion Litigation' (2015) 33 *Cardozo Arts & Ent. L.J.* 289.

³² Ibid n. 29.

³³ Ibid.

³⁴ Zach Winnick, 'NFL Head Injury Suits Remain in Calif. Federal Court' (2011) *LAW360 (Law 360.com*, 5 December 2011).

Fraud and/or misrepresentation

The complaint alleged that the NFL had been made aware of the potential impact of contact in tackles on players through concussion injuries and that they had deliberately concealed this information from the players. In the alternative, it was alleged that the NFL had been negligent in their representation of the position in respect of the science of concussion injuries resulting from tackles, and that this had impacted on the players of the game. This has limited impact on this thesis, save for consideration when looking at the possibility of players having the ability to determine for themselves whether to engage in these activities.

Negligence

Of greatest relevance to this thesis is the claim for negligence, which substantially alleged that the NFL had acted negligently in possessing knowledge of the potential medical consequences of allowing repeated impact to the head and not using this information to change the rules of the game in order to lessen the impact of the tackles. The alleged negligence was split by years in order to reflect the numbers of the players in the class and the different levels of knowledge at different points in time³⁵ but generally contended that there had been both knowledge and inaction which, the Plaintiffs argued, constituted negligence.

The Plaintiffs sought a declaration that the NFL had committed misfeasance in their actions and that injunctive relief was appropriate in respect of the remedies sought.³⁶ In particular they requested that the NFL be required to monitor current and former players for signs of concussion injury. There was a particular emphasis on brain injuries and other conditions caused by concussion, ranging from Parkinson's disease through Alzheimer's disease and including Chronic Traumatic Encephalopathy and the scope of the class meant that the claim included a range of damages claims from personal injury to wrongful death.

³⁵ Ibid n. 29.

³⁶ Ibid.

The basic contention³⁷ of the plaintiffs was that the NFL knew, or at least had reason to believe, that the rules of American Football, specifically the nature of the tackles, or 'hits' to use the American parlance, placed players in harm's way. This was summarised as stating that "the NFL possesses a general duty to exercise reasonable care because its conduct as the organising body of a violent game creates a risk of physical harm"³⁸ and that the NFL had fraudulently misled the players into believing that there was no, or minimal, danger despite the traditional violence associated with the game and the increasing force that could be used by participants.³⁹ The key question that was expected to emerge at trial was, if the facts of the case were made out, "whether the NFL had a duty to change its harmful practices or, at a bare minimum, provide the players with information regarding the risk of injury."⁴⁰

The first point that is clear from this case, before considering the path that it took to resolution, is that it is exactly the type of case that is envisaged by this thesis, a case that goes beyond the ratio of *Watson*⁴¹ while following the footsteps that have been established in that case. While the jurisdictions are different, and there is the additional weight of a claim for fraud, the principles set out in *Watson*⁴² can be seen to transpose. It will be recalled that the court in that case asked whether the body had effective control over the event, then whether they had the knowledge to understand the risks and finally whether or not it was reasonable to impose liability. Had *Maxwell*⁴³ proceeded to trial, these are the precise questions that the court would have had to answer.

There is also a synergy in the response of the Organising body Defendant in *Maxwell*.⁴⁴ In an analysis of *Watson*, it has been noted that the "BBBC was liable for not implementing medical advice despite evidence that no other boxing authority in the world applied more rigorous

³⁷ Ibid.

³⁸ Jeremy P Gove. 'Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem,' (2012) 14 Vanderbilt Journal of Entertainment and Technology Law 649.

³⁹ Andrew B. Carrabis, 'Head Hunters: The Rise of Neurological Concussions in American Football and its Legal implications,' (2011) 2 Harv.J. Sports & Ent. L. 373.

⁴⁰ Ibid n. 29.

⁴¹ Ibid n. 9.

⁴² Ibid.

⁴³ Ibid n. 29.

⁴⁴ Ibid.

standards”⁴⁵ with the implication being that the Respondent had done everything that they reasonably could in the circumstances, and with the information that was available to them at the time.

Similarly, the NFL’s response was, in part, that they had fully complied with their duties pointing to their history of safety innovations.⁴⁶ Specifically, they argued that they have acted⁴⁷ over the course of their history to rectify issues with potential safety as they occurred.⁴⁸ Thus, both recently and historically, the NFL pointed to rule changes occurring as a result of medical advances in information and awareness. In the 1920s, immediately after forming, they introduced a leather ‘helmet’ and, moving with the times, introduced a mandatory superior plastic helmet, only four years after it was first created. In later decades they introduced new variants on the helmets and adjusted the rules to prevent players taking advantage of the new headgear to score an advantage,⁴⁹ including the offence of grabbing a facemask.⁵⁰

The complication for the NFL, in respect of the second point, was that the negative side of their case has been a matter of public record as far back as 2007 when reports that the NFL

⁴⁵ Ibid n. 13, 74.

⁴⁶ Robert M. Sagerian, ‘A Penalty Flag for Pre-emption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act,’ (2013) 35 T. Jefferson L. Rev. 232.

⁴⁷ In 2010, the NFL reworded the League’s rules to prohibit a player from “launching himself off the ground and using his helmet to strike a player in a defenceless posture in the head or neck. In the same season, the NFL mandated that once a player loses his helmet on the playing field, the current play must immediately be whistled dead. Also, in 2010, the NFL mandated that during field goals or extra point attempts, defenders must line up with their entire bodies on the outside of the snapper’s body to protect the snapper while he is in a position of vulnerability. To reinforce the seriousness of the rule changes, in the middle of the 2010 season, Commissioner Goodell issued a memo to all NFL teams stating that “more significant discipline, including suspensions, will be imposed on players that strike an opponent in the head or neck area in violation of the rules. In 2011, the NFL also mandated that certified athletic trainers be available in press boxes during all NFL games. Starting in the 2013–2014 season, if a running back lowers the crown of his helmet while he is inside the tackle box or while he is less than three yards downfield and makes contact with a defender, the team will be given a 15-yard penalty. (Thomas A. Drysdale ‘Helmet-to-Helmet Contact: Avoiding a Lifetime Penalty by Creating a Duty to Scan Active NFL Players for Chronic Traumatic Encephalopathy,’ (2013) 34 Journal of Legal Medicine 425.

⁴⁸ NFL, ‘Owners Pass Four Rules in an Attempt to Make the Game Safer,’ (*NFL.com* 25 March 2009) (announcing new rules with focus on player safety); Caleb Hellerman, ‘NFL to Require Sideline Test After Head Blows,’ (*The Chart Blog*, February 25, 2011).

⁴⁹ Ibid n. 31.

⁵⁰ NFL Rulebook 2021, Rule 12.2.14: “No player shall grasp and control, twist, turn, push, or pull the facemask of an opponent in any direction.”

were publishing implied that multiple concussions were not a problem, while medical research dating back to the 1950s suggested that after three concussions a player should retire⁵¹ while Kain criticised the NFL's Concussion Committee for publishing "articles producing contrary findings whenever it anticipated studies or information implicating causal link between concussions and cognitive deterioration."⁵² Specifically, the Committee stated that:

"Because a significant percentage of players returned to play in the same game [as they suffered a mild traumatic brain injury] and the overwhelming majority of players with concussions were kept out of football-related activities for less than 1 week, it can be concluded that mild [traumatic brain] injuries' in professional football are not serious injuries."⁵³

Further to this, the quality of the rule amendments that were made have been criticised as shallow, emphasised by Carrabis, calling their reliance on visible symptoms to dictate removal of a player from the pitch as "ill-advised" taking into account that the symptoms could not be properly evaluated until 48 hours after the incident.⁵⁴ There have also been suggestions that the NFL incentivised players to return to the pitch quickly and clubs to endorse this in order to avoid action on concussion and the consequences of it.⁵⁵ There were also suggestions that the pace with which the rule changes were made were insufficient, with Gove writing that "the delay in rule change is unfortunate, because eliminating the head as a tool in tackling and blocking is necessary to reduce the cognitive decline in NFL players."⁵⁶

⁵¹ Augustus Thorndike 'Serious Recurrent Injuries of Athletes Contraindications to Further Competitive Participation,' (1952) 247 *New Eng. J. Med.* 554, 555-56 ("Patients with cerebral concussion that has recurred more than three times or with more than momentary loss of consciousness at any one time should not be exposed to further body-contact trauma.")

⁵² Daniel Kain, 'It's Just a Concussion: The National Football League's Denial of a Causal link Between Multiple Concussions and Later- life Cognitive Decline,' (2009) 40 *Rutgers LJ* 725.

⁵³ Goldberg Persky White 'Football Concussion Injury Litigation: Chronic Traumatic Encephalopathy (CIE), Dementia pugilistica,' (*GPW Law* July 22, 2011) (quoting Elliot J. Pellman & David C. Viano, 'Concussion in Professional Football Summary of the Research Conducted by the National Football League's Committee on Mild traumatic Brain Injury,' (2006) *Neurosurgical Focus*, October 1, 6).

⁵⁴ *Ibid* n. 39.

⁵⁵ *Ibid* n. 52.

⁵⁶ *Ibid* n. 38.

It is likely that a decision in the case would have required a clear statement of contemporary duties for a governing body. However, the case never reached the trial stage as, in 2014, after previous attempts at settlement had failed a settlement was reached whereby the NFL were not required to admit liability⁵⁷ and agreed to pay in the region of \$765 million, including \$675 million in compensation for players who have suffered brain injuries because of the game over a sixty-five-year period. The settlement, as reported, also provides for funds to be set aside to conduct on the field medical exams and to conduct research into the area or neurology.⁵⁸

In the absence of a trial, and the subsequent judgment, it is necessary to rely on speculation as to the potential outcome as the legal arguments that were preferred by the plaintiffs, no less ground-breaking than they would be in the English jurisdiction, were not tested, an aspect that leaves room for speculation as to the merit of the arguments. Michael notes that the two primary claims were problematic, and focuses on the issue of proximity within causation, emphasising the difficulties in alleging that the NFL themselves caused the injuries, when none of their agents directly inflicted them on the injured players.⁵⁹ Additional difficulties were inevitable with the potential contention of assumption of responsibility, with the argument being that the player had assumed the risk by taking to the field in a situation that was clearly potentially dangerous. This approach was also taken by Anderson when discussing the Rugby Union litigation, emphasising that World Rugby has been transparent about the concerns of concussion and that the players involved in the current litigation will struggle to establish a duty of care.⁶⁰

Carrabis,⁶¹ by contrast, took a more optimistic view, based on prior cases where the defence of assumed responsibility has been overcome⁶² because there was insufficient knowledge of the specific danger, and the “Chicago Bears downplayed the seriousness of the concussion

⁵⁷ John Guccione, ‘Moving Past a Pocket Change Settlement: The Threat of Pre-emption and How the Loss of Chance Doctrine Can Help NFL Concussion Plaintiffs Prove Causation,’ (2014) 22 J.L. & Pol’y 910.

⁵⁸ *Ibid* n. 31.

⁵⁹ *Ibid*.

⁶⁰ Jack Anderson ‘It is odds against players will succeed in claim against World Rugby’, *Irish Times*, Dec 12, 2020.

⁶¹ *Ibid* n. 39.

⁶² *Hoge v. Munsell*, 835 N.E.2d 200 (111. App. Ct. 2002).

and thus Hoge lacked the requisite awareness.”⁶³ In this case, the player had suffered two concussions and argued that the team doctor for his club had failed to warn him appropriately about the risks of continuing to play. The question boiled down to whether he was aware of the particular and specific risk that he was said to have assumed and the court, by a jury verdict, found that he did not, and liability was established.⁶⁴ Cerra does emphasize, however, that there was less difficulty in the Hoge⁶⁵ case because the Defendant was the team doctor and therefore there was a far easier nexus to establish a duty of care.⁶⁶

Certainly, the claims that were brought would present application difficulties in other jurisdictions, particularly if seeking to establish a general liability as opposed to a fact-specific situation. It will be seen that progress has been made in dealing with the issues of causation and negligence domestically⁶⁷ but the allegations of fraud are unlikely to have a wider application.

Indeed, Michael contends that an entirely different analysis would have given the claimant a far better prospect of success in their claim, specifically the claim of unreasonable risk.⁶⁸ This doctrine, first developed by Cardozo J⁶⁹ states that where there has been conduct by the defendant that places the claimant in harm’s way, then even if there is no direct causation between the actions of the defendant and the injury to the claimant, then liability may still attach.⁷⁰ The test for determining whether liability is found is requires a balancing of four factors: whether a reasonable man in the defendant’s position would have regarded it likely that a protected interest of the plaintiff would be harmed, what that person would have considered the extent of the injury to be, the social utility of the defendant’s conduct, and the social cost of avoiding the risk by using other methods.⁷¹ While there is not a specific

⁶³ David S. Cerra, ‘Unringing the Bell: Former Players Sue NFL and Helmet Manufactures over Concussion Risks in Maxwell v. NFL,’ (2012) 16 Mich. St. U.J Med. & L. 265.

⁶⁴ Ibid n. 39.

⁶⁵ Ibid n. 62.

⁶⁶ Ibid n. 63.

⁶⁷ See Page 154.

⁶⁸ Ibid n. 31.

⁶⁹ *Palsgraf v Long Island R.R.* 248 N.Y. 339 (1928).

⁷⁰ Anonymous Note, ‘Impact of the Risk Theory on the Law of Negligence.’ (1950) Harvard Law Review, vol. 63, no. 4, 1950, 671.

⁷¹ Ibid.

correlation between this cause of action and domestic laws, it can fall within the broader duty of care for negligence, and it will be argued⁷² that both governing bodies and clubs have a duty, when setting the rules and requiring players to play to those rules, to prioritise player welfare over either excitement or winning.

Michael applies this test to the settled case by noting that the NFL are the authority that regulates and controls the game and should have been aware of the medical developments in the field, particularly those that related specifically to tackles.⁷³ Therefore they clearly were aware that there was an issue, and there can be little doubt about the extent of the issue, as the consequences have previously been established.⁷⁴ It is at this juncture that the critical question arises as to whether the burden is on the NFL to change the rules of the game or merely to educate the players and it will be argued later, when considering the domestic approach that there is a twin duty on organising bodies to both educate the participants and to ensure that the rules exist to sufficiently protect the participants.⁷⁵

It can be seen from the *Maxwell v NFL*⁷⁶ that while no liability has been found or admitted in respect of the NFL's duties towards their participants, there is a trend towards a greater proactivity by the organising body, and it is now necessary to identify how that trend can be replicated in a domestic context.

It is clear immediately, that there are, at least, two roles that may be complementary but could also lead to conflict. On the one hand, they have an inherent obligation to maintain their sport and, where possible develop it, and the other hand they have to consider the safety of the participants, be they the players, officials or spectators. Certainly, safety plays an inherent part of the latter, and if a sport becomes too risky then there is a strong possibility of the sport being rejected in favour of other sports, but it will be seen that an important aspect of contact sports is excitement, and that the danger of reducing the contact nature of

⁷² See Page 153.

⁷³ Elise Michael, 'School of Hard Knocks - The Impact of the NFL Concussion Litigation,' (2015) 33 *Cardozo Arts & Ent. LJ* 289.

⁷⁴ *Ibid*, 20.

⁷⁵ See Page 151.

⁷⁶ *Ibid* n. 29.

the sport, risks reducing the attraction of the sport.⁷⁷ Hoehn summarises these under one umbrella, identifying that one of the key legislative roles is to “refine and regularly develop these rules to enhance safety or consumer interest.”⁷⁸ It will be seen, however, that this is the source of a key debate in respect of the precise legal duties for an organising body; to what extent are they required to amend their rules in order to ensure player safety?⁷⁹

Liability domestically

It is easy to say that the NFL litigation does not assist in the contention that liability should attach to administrative bodies who fail to respond to knowledge that they possess. Several arguments were noted indicating that the settlement came about because of external factors as opposed to issues of liability, and these cannot be refuted and of course the law in the American jurisdiction is different to that in this jurisdiction.

Yet in another sense, the broader issues that were considered were exactly the same, the competing interests of excitement and safety, protection and individual liberty, and the extent to which the rule makers should be required to actively involve themselves in the protection of the individuals and it is in this light that the potential liability of organising bodies can be considered in the aftermath of *Watson*.⁸⁰ It was seen that determining whether the liability net should be cast wider requires consideration of both the pro-liability factors and the anti-liability factors, and the latter part of this chapter will focus on this analysis.

Yet, *Watson*⁸¹ led to a determination of liability on a less grand and more prosaic platform, based again on the three primary functions that have been identified, and these will be considered in turn⁸² as all three are potentially impacted by the emerging information about

⁷⁷ See page 179

⁷⁸ *Ibid* n. 10, 227.

⁷⁹ See Page 162.

⁸⁰ *Ibid* n 9.

⁸¹ *Ibid*.

⁸² Pre-event administrative checks, during event safety provision, and the playing and safety rules of the game itself. Mark James *Sports Law* *Ibid* n. 25, 102.

concussion injuries. Therefore, the following sections will analyse the existing duty, and how it will be impacted by the triggering factor of concussion.

It will be seen that in respect of their first two duties, incremental developments would be permissible to extend liability for failing to adequately protect individuals once concussion injuries have been inflicted, and that in respect of the final duty, the potential class to whom the duty would be owed is sufficiently clear and precise to enable the development of a duty to provide rules that protect the participants and that such a development is not only permissible, but preferable and necessary.

The facts of *Watson*⁸³ have already been analysed⁸⁴ and it is necessary to look at the two ways in which the courts have held that organising bodies can be liable.

Is there any certainty?

It would be easy to take the previous cases and content that there is in fact no certainty in the law which for any new law striving to be established is a fundamental problem. Ironically, there are some certainties, and although many of them take a negative tone, in identifying areas where the organising body will not be liable, that in itself assists in narrowing the horizon down to those areas where there is the potential for liability to be established.

The first crucial aspect flows from the *Watson*⁸⁵ emphasis on control. Organising bodies will only have to concern themselves with liability when there is an element of control over the individual who is seeking to bring a claim. This was a strong distinguishing feature of *Agar v Hyde*⁸⁶ as World Rugby, despite having the highest authority to change the rules, were deemed to be too distant from the players who could bring the claim. The distinctions between this case and the current situation have previously been discussed.⁸⁷

⁸³ Ibid n. 9.

⁸⁴ Ibid 95.

⁸⁵ *Agar v Hyde* [2000] HCA 41.

⁸⁶ Ibid.

⁸⁷ Ibid 99

This immediately takes us to a place where the organising body will be less likely to be liable for injuries, regardless of whether their rules are implicitly being followed: casual, informal, or, as the American language would say, pick-up games. These are games where the nexus between the organising body and the participants will be more tenuous as there will be no imposition of those rules on the players. One of the key aspects in *Watson*⁸⁸ was that the BBBC has imposed their control on the match. For example, if one of the boxers had not weighed in at the required weight, the BBBC would not have allowed the bout to continue. If the organisers had changed the venue at the last minute to the carpark outside, then it would not have been allowed to continue. Lines emphasises that “sanctions cannot be imposed for failing to follow IF/NGBs rules”⁸⁹ and that in many of the situations, it is probable that the organising body will not be aware of the match-taking place.

It must be emphasised that even this lacks an element of certainty as the question of proximity is not absolute. Lines instead emphasises that the “same control factors identified in traditional negligence, namely foreseeability, proximity and assumption of responsibility”⁹⁰ will be used and there will always be a grey area in the middle. A good starting point, however, was identified in *Sutradhar v National Environment Research*⁹¹ where the court emphasised the importance of bodies only being liable where unsafe rules were relied on by parties for whom the rules had been produced or, at least, that they were aware that those parties would rely on them. To hold otherwise would be to open the organising body to "Liability in an indeterminate amount for an indeterminate time to an indeterminate class"⁹²

Domestic Liability of Organising bodies

⁸⁸ Ibid n. 9

⁸⁹ Ibid n. 13.

⁹⁰ Ibid.

⁹¹ *Sutradhar v National Environment Research Council* [2006] UKHL 33, 27.

⁹² Ibid, 27.

The decision to settle the class action case, albeit with individual cases still having the potential to develop⁹³ has meant that the question of liability remains unanswered and while the NFL have introduced measures to address concussion and the potential for CTE, it remains unclear as to their effectiveness. While there are differences between the sports, the potential questions of causation are no less clear, at least for Rugby Union as set out by Bunworth who specifically considers the negligence test, and notes that in view of the increased literature and analysis of the various issues with concussion “it would appear to be unarguable for World Rugby to allege that it was unaware of the potential for harm as a result of playing rugby, and that brain injuries suffered were not reasonably foreseeable.”⁹⁴ Rather than causation, it is likely that the court would focus on the question of whether a duty of care is owed, and whether there is sufficient proximity within the relationship.”⁹⁵

In assessing whether the time has come for *Watson* and *Agar* to be extended to require that additional responsibility be taken by the sporting organising bodies it is logical to follow the *Watson* authority, focusing first on the areas that it already covers, and thus do not require any extension, and then moving on beyond reflection to analogous extension. James mirrors the three potential avenues of liability with the three primary functions of the sporting bodies: to licence events, to ensure appropriate medical support for the participants, and to create the rules of the sport.⁹⁶

First Role: Facilitating hosting events

The first role of organising bodies, that is most commonly visible, is their involvement in facilitating the hosting of events. On the face of it this seems to be tangential to the wider question as to whether the organising body can be held responsible for the rules under which they choose to operate but it is important for three reasons.

⁹³ In American class action suits, individuals can choose to opt out of the suit to pursue an individual claim.

⁹⁴ Richard Bunworth ‘Egg-shell skulls or institutional negligence? The liability of World Rugby for incidents of concussion suffered by professional players in England and Ireland,’ (2016) 16 *Int Sports Law J* 82.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* n. 25, 106.

First, there are similarities in the principle of control. It was seen earlier under that an important feature of *Watson*⁹⁷ was that the organising body had assumed control over the event and thus had assumed a responsibility. This was analysed to demonstrate that there are situations where the organising body will not be responsible, in matches where they abdicate responsibility or where they have insufficient control to assume responsibility. It will be seen that a similar principle applies in respect of this limb of liability.

Secondly, merely establishing that there should be a duty of care is not sufficient, and it was seen in *Agar v Hyde*⁹⁸ that one of the main reservations of Gleeson CJ was in the formulation of the proposed duty of care by the claimants. In the context of this limb, it will be seen that formulations have already been established and as such will provide a useful guide as to what the formulation might be.

Finally, the analysis will establish the parameters of the liability. One of the key issues in extending any duty is to ensure that there is coverage up to the point of demarcation where the outer limits of liability should lie. If it is necessary for a new duty to pick up where the existing duties stop, it is necessary to know where that line is.

In respect of specific responsibilities for the facilitation of hosting sporting events, the organising body is required to produce competition guidelines and, on occasion, grant permits for organisers to hold events in compliance with those rules⁹⁹ and it is this that often distinguishes between a sanctioned and non-sanctioned match. It is evident that there can be no concept of responsibility or liability for every sporting contest, as it is not contended that every football match has an organising body to regulate it. Thus, to use the boxing parlance, there is a distinction between a sanctioned match, where the organisers are subject to the authority of the organising body, and a non-sanctioned match where they are not.¹⁰⁰

⁹⁷ Ibid n. 9.

⁹⁸ Ibid.

⁹⁹ *Stratton v Hughes and Cumberland Sporting Car Club Ltd and Royal Automobile Club Motor Sports Association Ltd (RAC)* (unreported 22nd May 1998 QBD Lexis Citation 1991).

¹⁰⁰ It will be necessary to consider whether a sporting body 'washing its hands' of a particularly contentious match, for example the 'boxing' event between YouTube stars KSI and Logan Paul is sufficient to avoid liability. BBC News 'KSI v Logan Paul: YouTube boxing fight ends in a draw' (*BBC News*, 26 August 2018).

On a factual level, an example of how this can be implemented was seen in the 2010 Winter Olympic Games, hosted by Canada. The Vancouver Organising Committee (VANOC) were responsible for ensuring, amongst other duties, the safety of the hosting stadiums and tracks. During a practice run for the luge, a high-speed event toboggan event on ice, Georgian racer Nodar Kumaritashvili came off the track, collided with a pole, and died.

At first glance there were, as with injuries in any sport, a number of potential targets for responsibility, including but not limited to whether the athlete complied with guidelines (the athlete), whether the luge itself was faulty (the manufacturers), and whether the Management had prepared the slope in accordance with the guidelines (the owners). But they were all following regulations that had been established by VANOC who had been charged with preparing a slope that was of Olympic standard, both in ensuring competition and safety.

The intensity of the track, satisfying the former, was never in doubt and when it had first opened it was publicly described by the newspaper¹⁰¹ as “violent and rough . . . and not for the faint of heart.”¹⁰² Subsequent reports noted that the top speed was 106 miles per hour whereas the intention was to design for top speeds of 90 miles per hour while other athletes criticised the risky situation of the venue.¹⁰³ In spite of this, the venue had been approved by VANOC for practice runs and would, had the incident not happened, have been used for the Olympics itself.

The fall-out from the incident involved an investigation and pursuant to regulations, compensation was paid by VANOC in respect of the death. Indeed, such compensation is guaranteed by the Olympic Charter¹⁰⁴ in one form or another as the National Committees are required to insure their athletes¹⁰⁵ and, as a quid pro quo, athletes are required to sign a liability waiver¹⁰⁶ in respect of the International Olympic Committee (IOC). Yet this does

¹⁰¹ Wall Street Journal, Saturday February 12, 2010.

¹⁰² Edward Wotjys ‘Sports Injury Prevention Failure’ (2010) 2(3) Sports Health, 184.

¹⁰³ An Austrian luger noted, “If you start having problems there was nothing you could do [to make corrections] because of the speed.” A Polish luger echoed these comments: “It was crazy fast” Ibid.

¹⁰⁴ The Olympic Charter, By-Law to Rule 27 and 28, 2.2.

¹⁰⁵ Helen Grimberg, ‘Injury Liability: Liability for death or permanent injury: analysis’ (Berrymans LLP 2010).

¹⁰⁶ Ibid.

demonstrate both the impact that the organising body can have on the potential for injuries and the difficult challenge that the bodies face in having to balance safety and excitement.

The current legal position of this limb of liability was clarified by the court in *Wattleworth v Goodwood Road Racing Company Ltd*¹⁰⁷ with the duty being discharged by the provision of “appropriate advice by reasonable and competent experts in race track safety.”¹⁰⁸ Here, the key was not whether the organising body had themselves ensured that the track was safe; that responsibility fell to the organisers, but instead whether or not the advice and guidance that had been provided is adequate to enable the organisers to provide a safe environment.¹⁰⁹ There is however a clear statement that a duty is adopted by dint of the organising body permitting organisers to hold their events and also, crucially, that they are required to seek advice from people with specific expertise not in race track competitiveness but in race track safety. The emphasis on this aspect of the balancing act reflects that it is not sufficient simply to say that the organising body themselves have drawn the balance, but that they must have followed the process.¹¹⁰

The importance of the organising body asserting their interest was emphasised by *Fowles v Bedfordshire County Council*¹¹¹ where Millet LJ noted that the defendants: “[W]ere under no duty as occupiers to take steps to prevent their visitors harming themselves by their own foolish conduct.”¹¹² The question of liability arose because the defendant in the case had placed the claimant in a position to perform the gymnastic manoeuvre that had been carried out. In doing so they had “*voluntarily assumed* a duty to teach him properly and to make him aware of the dangers. They failed to do either.”¹¹³ This principle was maintained in

¹⁰⁷ *Wattleworth v Goodwood Road Racing Company Ltd and Royal Automobile Club Motor Sports Association Ltd and Federation Internationale de l'Automobile* [2004] EWHC 140 (QB).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* n. 25, 103.

¹¹⁰ This approach seemingly corresponds with the tests that have been applied in medical law negligence case, with *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 and *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771 whereby the test is whether the doctor has reached the standard of a responsible body of medical opinion. If that level has been reached, and the body of medical opinion is not entirely illogical or indefensible, then the duty will not have been breached.

¹¹¹ [1996] ELR 51.

¹¹² *Ibid.*

¹¹³ *Ibid.*

*Portsmouth Youth Activities v Poppleton*¹¹⁴ where the Claimant paid to take part in a wall climbing leisure activity. There were some warnings, but they were not prevalent. The Claimant, who was inexperienced, attempted a manoeuvre that was unorthodox and not advisable, and fell, suffering significant injuries. The original finding of liability with 75% contributory negligence was overturned by the Court of Appeal on two grounds. The first, factually, was based around causation but the second was whether there was even a duty of care as the organisation did not “purport to offer instruction or supervision”¹¹⁵ and the Claimant was “an adult who voluntarily engaged in a hazardous activity of his own free will and in the awareness that he had not been instructed or trained and was not being supervised.”¹¹⁶

These cases have twin points. The first is that the liability will not attach automatically, simply because the claimant is present. If the claimant had been a stranger to the gym, and if the gym had complied with their administrative responsibilities, then liability would not have been found. There had to be something more, a relationship that establishes the responsibility, and thus the liability which on the surface suggests that the organising bodies need not fear liability. Yet under the surface, there is a more subtle point, specifically that where the party has provided some support, even if it is not the extent of the support that was provided in the facts of the case, then it is possible for liability to be assumed voluntarily, and once that has been done, liability can attach for failing to create a safe environment.

The question that must then arise is the extent to which a sporting body voluntarily assumes a duty in respect of the provision of facilities. Certainly there are examples of sports organising bodies refusing to allow a boxing match to proceed,¹¹⁷ or a football team to compete at a higher level because of concerns over their facilities.¹¹⁸ However, while these are all generally applicable, and a failure to provide reasonable guidance can lead to liability, it is difficult to

¹¹⁴ *Portsmouth Youth Activities Committee (A Charity) v Poppleton* 2008 [EWCA] Civ 646.

¹¹⁵ William Norris ‘Duty of Care and Personal Responsibility: occupiers, owners, organisers and individuals’ (2008) JPI Law 187.

¹¹⁶ *Ibid.*

¹¹⁷ Michael Coppinger, ‘Cancelled Fights have a considerable impact on boxing’ *Boxing Scene*, June 18, 2009

¹¹⁸ Rotherham United, ‘Portsmouth away fixture postponed due to health and safety concerns’ *Rotherham Utd FC*, 18 July 2019.

immediately perceive a causal link between the quality of the facilities, save for medical provisions which will be addressed in the next section, and the imminence of concussion.

Yet there is an additional aspect that should give rise to some concerns in this aspect of liability, and this concerns the principle in *Fowles v Bedfordshire CC*.¹¹⁹ In this case, it was not the equipment that was faulty, but the training, and the inadequate training had led to liability.¹²⁰ Evidentially, the organising body does not train sporting participants directly, as that is a matter for their clubs. However, many organising bodies impose regulations on the coaches and trainers and require them to gain certification before being permitted to gain employment at various levels. If a participant has inflicted a concussion injury on another participant, for example by heading the ball incorrectly in football, or if a participant has suffered a concussion injury through their own poor tackling technique in rugby, then there is potential for the organising body to be liable under the existing law of *Fowles*.¹²¹

Further, there is an additional potential aspect of liability that must be considered. Following the NFL litigation and settlement, the NFL have introduced a regulation limiting contact practices, where full tackles may be used, to one per week¹²² with the intention of reducing the potential for injury caused by full body contact in sport. Transferring this to, for example, Rugby Union, if a similar rule were to be introduced, then there would be two ways in which the organising body could potentially be held liable.

First, it could be argued that the rule has created new risk of injury as participants lack the training to be able to handle the full tackle situation effectively on the field of play. Pursuant to the principle in *Fowles*,¹²³ this would represent a sporting body assuming responsibility by making a rule in an area that had previously been dormant, and thus exposing themselves to

¹¹⁹ Ibid n. 111.

¹²⁰ “Having assumed the task of teaching Mr Fowles how to perform the forward somersault, the defendants voluntarily assumed a responsibility to teach him properly and to make him aware of the dangers. They failed to do either; and then compounded their failure by providing unrestricted access to the crash mat, thereby encouraging him to use it to practice what he had been taught, without warning him that he must on no account do so without supervision.” Per Millett LJ *Fowles*, ibid n. 111.

¹²¹ Ibid.

¹²² Caleb Korngold et al ‘The National Football League and Chronic Traumatic Encephalopathy: Legal Implications’ (2013) 41 J Am Acad Psychiatry Law 430.

¹²³ Ibid n. 111.

the consequences. Secondly, in the event that the clubs were not complying with that rule, the organising body would be potentially liable for failing to regulate the situation and to protect the participants.

This raises serious questions about the effectiveness of this particular duty in protecting the participants of sports from injuries. As long as a sport remains at arms-length, leaving the primary organisation responsibility to others, then it will be difficult to demonstrate that liability should attach, as demonstrated by the law's approach to rescuers, with a similar test applying whereby potential liability will attach once active engagement with the situation commences.¹²⁴ Liability was found in *Watson*¹²⁵ because the involvement of the BBBC was direct and clear and the event was non-compliant. Seeking to increase player safety consistently must involve the governing body, and while this first limb of liability has some teeth, they are blunted by the distance often found between the governing body and the day-to-day activity of the sports. The case law assists in demonstrating that the law can regulate the activities of the governing body but does not assist greatly in the substantive protection. However, if other limbs can be used to establish an obligation of action, then *Watson*¹²⁶ does provide a potential avenue for enforcement.

Second Role: Ensuring medical standards

The second generally accepted role of the organising body is to ensure that medical standards at the events are sufficient to treat injuries caused. Again, this revolves around their influence and control, in the same manner as their duty to ensure the adequacy of facilities. While the implementation of the regulations are typically the responsibility of the organiser, it is the organising body that is required to ensure that the frameworks are in place for appropriate treatment of the athletes after injuries have been suffered. The grounding of this role is the

¹²⁴ *R v Miller* [1983] 1 All ER 978.

¹²⁵ *Ibid* n. 9.

¹²⁶ *Ibid*.

assumption that sport is a dangerous activity and that there is a chance that there will be injuries.

The bedrock of the legal obligations is again *Watson*.¹²⁷ Medically, it was not disputed that he was suffering from intra-cranial bleeding.¹²⁸ The medical procedures that were in place were not compliant with what was described as “current best practice guidelines”¹²⁹ that mandated that treatment should be commenced as soon as possible, but in any event within 60 minutes. As it was, more than 90 minutes passed before the operation was able to begin and it was argued that this contributed to the permanent loss of brain function. The court found that “it was reasonable for a boxer to rely on the defendant to take reasonable care for his safety during and after a bout”¹³⁰ and that as that duty had not been adhered to, liability was established. On appeal the court noted that it “considered the safety of boxers to be of paramount importance”¹³¹ but that the duty was “not to take reasonable care to avoid causing personal injury but to take reasonable care to ensure that reasonably foreseeable personal injuries sustained were treated properly.”¹³² The importance of changing this approach will be considered in the next section,¹³³ but for now the focus is on what they are required to do.

In *Watson*,¹³⁴ the court emphasised that “the BBBC did not create the initial danger to the boxers”¹³⁵ but that they imposed themselves by setting out mandatory guidelines, in a similar analysis to the assumption of responsibility that has previously been considered. If these guidelines did not represent “a safe system by which injuries incurred as the result of a fight can be properly treated”¹³⁶ then liability would emerge. Crucially, Lord Phillips stated that:

¹²⁷ Ibid.

¹²⁸ Ibid [75].

¹²⁹ Ibid [75].

¹³⁰ Ibid [77].

¹³¹ Ibid [78].

¹³² Ibid [79].

¹³³ See Page 217.

¹³⁴ Ibid n. 9.

¹³⁵ Ibid, [79].

¹³⁶ Ibid, [80].

“[W]here A places himself in a relationship to B in which B’s physical safety becomes dependent upon the acts or omissions of A, A’s conduct can suffice to impose on A, a duty to exercise reasonable care for B’s safety. In such circumstances A’s conduct can accurately be described as the assumption of responsibility for B, whether ‘responsibility’ is given its lay or legal meaning.”¹³⁷

It is important to note that although the appeal against liability was denied, the Court of Appeal did not go as far as the lower court. The lower court’s finding was far wider, stating that there was a duty of care throughout the bout, while Lord Phillips specifically stated that the duty was limited to the treatment.

One of the crucial aspects of the case was the extent to which the BBBC had controlled the medical requirements for it is only where they “assume a regulatory rather than an advisory role,”¹³⁸ that liability can attach, with the court considering the determinate nature of the class of protectees, and that the BBBC held themselves out as having knowledge that the boxers lacked.¹³⁹

This route to liability does not require the organising bodies to change the rules of the sport to reduce the cause of concussion, rather it focuses on the results of an injury, yet there may be a practical requirement for rules to be introduced, as the duty is to “ensure that reasonably foreseeable personal injuries sustained were treated properly.”¹⁴⁰ A key part of this test is identifying that injuries exist in the first place. This is a test that has required little attention to date, for the obvious reasons that it is uncontroversial in respect of physical injuries. The referee in boxing is required to stop the fight if a boxer is unable to carry on¹⁴¹ and while there is controversy over how far the referee should allow the fight to be taken the likelihood is that purely physical injuries will be easily identified. For example, if a boxer has a broken leg, then this is a clear case that would pose no difficulties for the referee.

¹³⁷ Ibid n. 9, 1270.

¹³⁸ Ibid n. 24.

¹³⁹ James George ‘Watson v British Boxing Board of Control: Negligent Rule-Making in the Court of Appeal,’ (2002) MLR 65, 1.

¹⁴⁰ Ibid n. 9,

¹⁴¹ BBBC Rules, 2021, Rule 3.34 “it is up to a referee to say if a boxer is unable to carry on and that he or she “may consult the ringside doctor at any stage.”

However, as has been previously seen, the question of concussion is a far harder one to assess, particularly for the lay-person, even a referee with experience of the sport.¹⁴² It cannot be legitimately argued that concussion injuries are not foreseeable, the weight of the medical evidence was set out in Chapter One,¹⁴³ and again in considering the stance of the NFL, and yet the organising body is under an obligation to ensure that once a concussion injury has been inflicted, that the injury is properly treated. Therefore, in order to comply with this, there is a duty upon the organising body to ensure that there is a process in place.

The only logical approach, given the medical analysis previously set out,¹⁴⁴ is to involve a professional, and Rugby Union has chosen to follow this path. World Rugby has introduced a Head Injury Assessment (HIA) Protocol¹⁴⁵ which requires match officials to remove, temporarily, a player if they display symptoms. They are assisted in this by team doctors and an independent match day doctor who have access to video replays. Once they have been temporarily removed, the player is assessed and then, if necessary, removed from the game. Meanwhile, the English Premier League introduced the requirement that an independent doctor must be available to assess players who may be suffering from concussion, in order to remove the partiality of the individual clubs, a move that has been followed by UEFA.¹⁴⁶

Certainly, Rugby Union have adjusted their stance, and it is arguable that they are doing sufficient work to pass the test under *Watson*¹⁴⁷ of 'treating injuries properly' insofar as they are seeking to identify an injury that is not immediately visible, and which cannot be guaranteed to be detected. In doing so, however, they place themselves, and the referee, under significant pressure, as if they do not detect a possible concussion, then liability will, logically, attach under the *Watson* principle.¹⁴⁸ The law, therefore, appears to be robust in

¹⁴² Ibid 54.

¹⁴³ Ibid 17.

¹⁴⁴ Ibid.

¹⁴⁵ World Rugby 'World Rugby enhances the HIA review process' (*World Rugby* 13 September 2017).

¹⁴⁶ Harper Macleod LLP 'Sports injuries: a risky business. How does the law look at negligence in the sporting world' (*Harper Macleod LLP*, 31 January 2020).

¹⁴⁷ Ibid n. 9, 1270.

¹⁴⁸ Ibid n. 9.

ensuring that organising bodies who seek to carry out their responsibilities are complying with those responsibilities appropriately.

Whether motivated by public relations, or by potential liability, sporting organising bodies have moved toward changing regulations in order to better treat concussion, and certainly this is in the spirit of the second limb of *Watson*.¹⁴⁹ However, these actions do not prevent concussions from taking place, instead seeking to treat the concussions once they have occurred. In the case of Michael Watson, if the medical treatment had been of a sufficiently high standard, then the consequences may have been less severe, but he would still have suffered from concussion in the first place, and the medical research previously discussed demonstrates that concussions are very much a cumulative process.¹⁵⁰ For all of the best intentions in the world, the second duty of requiring medical treatment, does not come close to curing the main problem of the participants incurring concussions in the first place.

Third Role: The Creation of rules

In determining responsibility and, potentially, liability, the logical starting point is consideration of the idea that “often, the inherent risks of a sport are shaped by its official rules,”¹⁵¹ an idea that fits well with the parameters of this thesis, as it has already been seen that risks outside the rules are already potentially actionable.

The application of the *Watson*¹⁵² test to concussion injuries in respect of the second limb demonstrated that while the decision itself did not mandate that the organising bodies altered the rules of the game, the nature of concussion injuries required additional regulations to be introduced to comply with their duties. The existing rules and regulations were simply not fit for purpose and to continue without changes would render them exposed to litigation.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid n. 24, 59.

¹⁵² Ibid n. 9.

It can be seen from the sections above that certain aspects of the organising bodies potential liability is well covered by the existing law. Specifically, there is a duty to ensure that venues are of a certain quality and that there are provisions in place to address foreseeable injuries, into which category it was evidenced previously concussions now clearly fall. However, these duties involve curing and preventing a worsening of injuries, without addressing the question of preventing concussions in the first place, and it is this that requires extensive consideration: how can organising bodies prevent concussions from arising in the first place?

The mechanism that potentially exists to enable this duty is the ability, and requirement, of organising bodies is to create rules. From an outsider's perspective, it may even appear that this is not something that is necessarily within their ambit for even the youngest football fan knows that the object of the game is to get the ball into the net. Yet, while this is the overriding objective of the game, and has not changed since its inception the individual rules that deal with how this objective is to be achieved have changed, and it is the sporting organising body that implements these changes, whether from the number of substitutes that are permitted¹⁵³ to the permissibility of using different body parts to control the ball.¹⁵⁴

The two key differences between the role of the organising body in this area, and the previous area, are that while the organising bodies can elect to set the parameters for facilities and medical care, they cannot elect to derogate from their rule making abilities.¹⁵⁵ It is, fundamentally, the reason for their existence. The second difference is that while the previous duties enable them to address injuries after they have been incurred, their rule making powers allow them, potentially, to reduce the risk of injuries occurring in the first place. Examples of this can be seen, simplified, without difficulty although it should be emphasised that these are only examples and not at this point recommendations.

¹⁵³ BBC Sport 'Premier League concussion substitutes trial to start on 6 February' (*BBC Sport*, 29 Jan 2021).

¹⁵⁴ BBC Sport, 'Handball rule changed as football's law makers IFAB confirms new accidental ruling' (*BBC Sport*, 5 Mar 2021).

¹⁵⁵ Save, as indicated, for situations where they are required to make adjustments to comply with the second limb of the duty.

In football, repetitive heading of the ball contributes to concussion injuries¹⁵⁶ and so the organising bodies could ban the use of the head to control the football. In Rugby Union, tackling a player can lead to head collisions¹⁵⁷ and so the organising bodies could ban tackling either in part or in full. These rules would not entirely remove concussions from the games, but they would make a serious impact on the frequency of concussion injuries.¹⁵⁸

These are all rules that could, in addition to others, hypothetically, be made. The respective sports would still be able to continue, within the meaning of their end product; a football player could still score a goal, and a rugby player could still score a try. Yet, these rules have not been implemented nor have any rules that affect the game significantly and would substantially prevent or reduce concussions from occurring in the first place. This section will analyse the legal status quo and then the reasons for this status quo to be changed.

It has already been seen that *Agar v Hyde*¹⁵⁹ attempted to face, head on, this question of a duty to make rules that are safe and that the Australian High Court took the clear view that such liability should not attach. Similar cases have also arisen, with the results being much the same. Therefore, in *Haylen v New South Wales Rugby Union Ltd*¹⁶⁰ the courts again found that the participant knew what they were getting involved in and could not therefore criticise the organising body for failing to take preventative measures.

The reason for this focus, sparse though it is, on the Australian jurisprudence, is that the domestic courts have not had to rule on this question. In the decisions of *Watson*,¹⁶¹ *Wattleworth*,¹⁶² and others previously discussed, the courts have not made a decision on whether there is a duty on the organising bodies to be proactive in preventing injuries where there is an awareness of the potential for concussions to follow.

¹⁵⁶ Ibid 43.

¹⁵⁷ Ibid 38.

¹⁵⁸ Ibid 48.

¹⁵⁹ Ibid n. 85.

¹⁶⁰ [2002] NSWSC 114.

¹⁶¹ Ibid n. 9

¹⁶² Ibid n. 107

There have occasions where courts have been prepared to suggest that liability may be possible, although factually the duty has not been met. In the first, *Hamstra v British Columbia Rugby Union*,¹⁶³ a rugby player broke his neck, whilst playing in the front row of a scrum, which collapsed in a match in 1986. He sued the referee, his school, and the British Columbia Rugby Union ("BCRU"). The court recognised that it was feasible for there to be a duty but on the facts stated that the circumstances, involving a voluntary organisation, were relevant in determining that the duty had not been breached, and that by extension there was no duty upon the organising body to change the rules in that case. Interestingly, the court also stated that "In my opinion the standard of care the law imposes on the BCRU is a greater one than that of a rescuer"¹⁶⁴ which provides the kernel of the idea that were the court to impose a duty, it would be a significant one.

This obiter statement was in response to the claim of the Defendant which was that if a duty were to be applied, then the organisation should be seen as a rescuer, as an individual intervening between parties involved in an incident, on the basis that this would add an extra barrier to establishing liability. Although the rejection of this was not helpful to the Claimant on the facts, it does lend weight to the height of the duty that should be considered in the event that a duty does exist.

The logical follow-up to this is to ask whether the court could have raised this question in *Watson*,¹⁶⁵ albeit that it would only have been analysed on an obiter dicta basis as the court found in that case for the Claimant on other grounds. It is inescapable that the question could easily have been considered as the injuries resulted from a blow that was delivered in accordance with the rules. There was no suggestion that it was a low punch, or a punch delivered outside the parameters of the fight, or that there were any weapons concealed in the gloves. The injuries caused were exactly as anticipated by the rules of the game. The importance of this was underlined by Beloff who has emphasised that there are few sports

¹⁶³ [1997] 1 SCR 1092.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid n. 9.

that are at the apex of safety, and if changes would be required to alter the essential nature of the sport, there will be no breach of duty if they fail so to do.¹⁶⁶

It is equally inescapable that the court chose not to consider this, indeed going further and stating that the responsibility of the organising body was limited to those situations that had been set out in the judgment of the court. This is not surprising as the point raised previously¹⁶⁷ emphasised that the hypothetical rule changes would not fundamentally alter the nature of the sport, while any rule change that was required in boxing would change fundamentally the nature of the sport. The difference, and the key reason for not analysing combat sports,¹⁶⁸ is that the purpose of boxing is to injure, in some way, the other competitor. The rule changes over time, established independently or imposed by law, have focused on increasing the safety of the fighter but have not affected the basic concept of one fighter punching another fighter, with a particular focus on the head as a target.¹⁶⁹

Immediately, therefore, there is a distinction between this potential source of liability and the previous two, as the courts have not yet stated that liability may exist to require a sporting body to exercise control over their rules. This does not mean that such a path is closed off, but it does mean that there needs to be a keen consideration of the pro-liability and anti-liability factors.

Yet, in spite of this apparent desert of jurisprudence, some interest can be derived from the lower courts in *Watson* who took a wider view than that of Lord Phillips in the Court of Appeal. Ian Kennedy J at first instance had ruled that the crucial aspects were that there was a clear nexus between the boxer and the organisation, that the boxer did not accept breached rules and crucially that by failing to adopt a protocol that was accepted by neurosurgeons they had breached the duty.¹⁷⁰

¹⁶⁶ Michael Beloff et al *Sports Law*, (2nd Hart 2012), 151.

¹⁶⁷ *Ibid.*

¹⁶⁸ Including Mixed Martial Arts amongst others.

¹⁶⁹ Jack Anderson *The Legality of Boxing: A Punch-Drunk Love* (Birkbeck Law Press 2007).

¹⁷⁰ *Ibid* n. 9.

The essential aspect of the lower court's decision was that by failing to adhere to a rule that would have made a difference, the BBBC had breached their duty to the claimant and thus liability attached. Although this was not expressly upheld by Lord Phillips MR, he did state that:

“where A places himself in a relationship to B in which B's physical safety becomes dependent upon the acts or omissions of A, A's conduct can suffice to impose on A, a duty to exercise reasonable care for B's safety. In such circumstances A's conduct can accurately be described as the assumption of responsibility for B, whether responsibility is given its lay or legal meaning.”¹⁷¹

Additional points from the *Watson*¹⁷² case also support the wider principle. In considering whether or not a duty of care should be established, Lord Phillips MR noted, consistent with the cases that would later follow, that it was important to be able to identify the class who might be affected, that it was relevant that “a primary stated object of the Board was to look after its boxing members physical safety,”¹⁷³ that the Board controlled that activity and that the Board encouraged its members in the pursuit of an activity that involved inevitable physical injury.¹⁷⁴

In the context of imposing a duty to ensure that sufficient rules are present to protect sporting participants, these factors can be seen as being of direct relevance. As a sporting body, the participants are registered with that body, otherwise they would not be subject to their disciplinary provisions, and therefore the number of a potential class are limited. Regardless of the extent to which the organising body has a duty to protect its players, it is unarguable that one of their objects is to look after their members' safety, and even if it is not the main objective, as will be discussed shortly, it is one of two primary objectives, with the other being entertainment. It is unarguable that the organising body controls the rules, or at least that an organising body somewhere in the hierarchy controls the rules and that as the competing

¹⁷¹ Ibid, 1270A-B.

¹⁷² Ibid.

¹⁷³ Ibid, 1281G-H.

¹⁷⁴ Ibid, 1281G-H.

factor with safety is entertainment, it is also clear that the organising body encourages participants to engage with the sporting activity, while being aware of the potential for injury to be caused.

There is a further advantage to the silence of the courts in these matters, and that is that there has been no express statement that the duty does not exist. As was identified earlier, where there has been an express rejection of a duty of care, it is a far more complicated exercise to extend in that direction. Given that there has not been such an express rejection, in England and Wales at all, and in Commonwealth countries recently, it is necessary to consider what Stapleton called the pro and anti-liability factors in order to deal with the last of the tests that were seen earlier as being necessary to extend liability: that of public policy.

Pro Liability and Anti Liability Factors

It is clear from the above that the development of liability in this area would be controversial, and there are arguments against this development. This section addresses the key arguments in favour of the development of liability and mitigates the arguments that are opposed to that approach. There are several factors to consider in this context and the approach that will be taken is to analyse each of the considerations, which normally reflect a pro-liability and an anti-liability argument in order to demonstrate the importance of extending liability in this area. I will then argue that the cumulative weight of these arguments leads to the conclusion that an extension of liability is necessary.

Safety versus Excitement

It has already been seen that a core responsibility of organisational bodies is to create rules for the sport. For most, this is more a question of refinement, as the core rules or Laws have been in place for generations,¹⁷⁵ but the following question applies equally to the refinement

¹⁷⁵ The International Football Association Board, for example, took responsibility for the Laws of Football in 1886.

of existing Rules/Laws and the creation of new Rules/Laws that would be necessary for a brand-new sport, for example when the International Quadball Association¹⁷⁶ were drafting the Rules to be applied to quadball. That question is: what is the purpose of the rules?

There are two possible answers to this question. The first is that the purpose is to ensure that the sport is exciting and of interest to the public. This motivation was openly stated by the NFL in 2012, when their Committee Report used the phrase, "If someone wants to accuse the National Football League of promoting offense to make the game more exciting, [the committee] believes the league should plead guilty."¹⁷⁷ This demonstrates the importance to sporting bodies of ensuring that the game is exciting.

The second is to ensure that the athletes are safe when taking part. The two are not necessarily mutually exclusive, but where there is the danger of concussion injuries, it is clear that there is little room for overlap and any steps that improve health and safety are likely to have some sort of detrimental impact on the excitement and impulse driven side of sport.

The question was at the heart of the court's decision in *Watson*¹⁷⁸ as, in order to reach the decision that they did, they found that the primary object of the BBBC was to care for "the needs of boxers, and in particular the physical safety of boxers."¹⁷⁹ They went even further in their judgment, stating that "Boxer members of the board, including Mr Watson, could reasonably rely upon the board to have taken reasonable care in making provision for their safety."¹⁸⁰ In stating this, they relegated the contrary interest, that of exciting, impulse action, to a far lower status, to the extent that it was not even mentioned. Opie went further in contending that "whatever public or other function the BBBC might be seen to perform, it took a subordinate role to boxers' safety."¹⁸¹

¹⁷⁶ International Quadball Association Website

¹⁷⁷ 'Offensive/Defensive Balance: A Historical Perspective' 2012 NFL Competition Committee Report.

¹⁷⁸ Ibid n. 9.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid n. 24, 65.

If this is correct, then there seems to be little argument with the principle that safety is paramount. Yet, the fact remains that the court were only applying this principle to the logistical side of the sport. Rather than saying that safety was paramount to prevent injury, on the facts they were saying that one you have provided an opportunity for them to be injured, you then have a duty to take reasonable care to tend to that injury. Effectively, they were placing the duty one step further down the line than is necessary for this argument. This more restrictive approach is supported reluctance of the court to build on Watson in subsequent years.

Breivik draws a comparison with the world outside of 'play', that of industry, writing that "modern industrial society is obsessed with safety and control...Modern society is a huge industrial, technological and economic structure which simply must not collapse. One doesn't play with an atomic reactor."¹⁸² Breivik compares this approach to the traditional human enterprise of constant exploration, often against natural elements, in order to facilitate discovery, noting that the development of safety has tamed the natural instincts of man.¹⁸³

This comparison neatly encapsulates two polar opposites, one where safety is paramount but where excitement will suffer or, in the case of industry, possibly profits. This is a typical example of a situation where knowledge is acquired and the law reacts, as demonstrated by the asbestos cases in England and Wales. Asbestos, as a building material, was used without any real concern for at least a thirty-year period between 1940 and 1970. However, once research indicated that there were significant health issues with asbestos, no amount of profit could justify workers to those risks, and this was confirmed by the development of law which has triggered many compensation claims as well as legislation to protect those without viable Defendants.¹⁸⁴

The overview of traditional sports in Chapter Two puts this into the sporting perspective as it can be seen that in an era of unregulated sports, safety was not even a consideration, the rules were best demonstrated by their absence and the sports reflected an almost exclusively

¹⁸² Michael McNamee (Ed) *Philosophy, Risk, and Adventure Sport*, (Abingdon 2007).

¹⁸³ Ibid.

¹⁸⁴ Pneumoconiosis etc (Workers Compensation) Act 1979.

laissez faire approach in terms of safety. Even the most rudimentary protections were not in place with the focus being on enjoyment and excitement rather than player safety.

It is evident therefore that excitement and spontaneity is an integral part of a sport and when public debates emerge as to whether an activity is a sport, it is often the case that the more exciting an activity, the more spontaneous an activity, the more likely it is to be classed as a sport rather than as the more mundane hobby or entertainment.¹⁸⁵ More, it is the excitement that increases the enjoyment of the game and “when sportsmen dice with death, the admiration for their achievement intensifies. This may be an explanation for the controversial choice of Lewis Hamilton over Rory McIlroy for BBC Sports Personality of 2014.”¹⁸⁶

There are three effective arguments as to why this element of excitement is relevant in considering liability. The first is that it is difficult if not impossible to remove all risk of injury and therefore the question arises as to where the line should be drawn. Beloff notes in respect of cricket that “it is not easy to see how any measures can entirely remove the risk in cricket where a hard object is aimed towards a human body.”¹⁸⁷ That of course is not strictly accurate as there are ways in which the risk can be removed; replacing the cricket ball with a tennis ball, for example, or limiting the pace at which a delivery can be bowled. However, while this would not visibly change the nature of the game, it would change the dynamic of the game which has been established by the governing body to ensure, as much as possible parity between the teams. Just as increasing the size of the goalposts in football would favour attackers over defenders, so using a tennis ball in cricket would favour batsmen over bowlers. This would significantly disrupt the balance between excitement and sport and Although additional adjustments could be made to compensate, it would be difficult for cricket to be able to maintain its credibility as a competitive sport. Beloff does not deny that there is an ability to change the rules, but his crucial point was that “a distinction must be drawn between the could and the should.”¹⁸⁸

¹⁸⁵ Professional Wrestling, not to be confused with the all too spontaneous amateur wrestling.

¹⁸⁶ Michael Beloff QC ‘Editorial’ (2015) *International Sports Law Review* 2.

¹⁸⁷ *Ibid*, 2.

¹⁸⁸ *Ibid*, 2.

The second argument, leading on from the first, is that findings of liability increase the possibility of sports, more so the less popular sports, becoming impossible to organise. This was noted as the reaction of a New Zealand community after an organiser of a marathon was convicted under New Zealand law for failing to give proper rules for her event. The consequence was that one of the competitors ran in a road lane that had not been closed off and was hit by a car. The reaction of the community was described as extreme and “predicting dire consequences for all sports organisation in New Zealand.”¹⁸⁹

Finally, there is the cold, hard reality, which is that sports are made attractive by the threat of injury and the excitement that they generate as discussed earlier.¹⁹⁰ Beloff emphasises that it is not feasible to make sports completely safe while still retaining the levels of excitement¹⁹¹ and in many sports (particularly the more extreme ones) it is clear the threat of such injuries is an integral part of that activity's popularity. This builds on the idea that “confronting physical challenge within the structure of the rules of organised sport is seen by society as desirable”¹⁹² and that the benefits of these activities outweigh the potential downsides with injuries being “tolerated as the price to be paid for the total benefits that sport delivers.”¹⁹³ For those who don't want to take the risks, there is a simple option which is to choose to play a less risky sport.

These points are all valid, and yet this factor has been identified as a pro-liability factor simply because the Corinthian ideal of previous eras no longer exists. Sports are regulated by organisations that choose to involve themselves, and the argument that they exist as pure adrenaline valves, with excitement as the goal, is lessened by the taming process that has already occurred. Opie notes that in the past certain activities were deemed to be excessive, in spite of all of the benefits that were triumphed above and so many of the more violent, hostile, and exciting sports are subject to strict rules, including that of prize-fighting which in its original incarnation has been banned.”¹⁹⁴ The days where football players could have sharp

¹⁸⁹ Peter Charlish ‘The Astrid Andersen case’ (2004) ISLR, 86

¹⁹⁰ Ibid

¹⁹¹ Michael Beloff QC ‘Editorial’ (2012) ISLR. 2012, 2, 11-12.

¹⁹² Ibid n. 24, 64.

¹⁹³ Ibid, 64.

¹⁹⁴ Ibid, 64.

blades on their person other and rugby players had carte blanche to inflict violence in the scrummage, have been reduced, not by the advance of the law, but by the advance of technology making it harder for players to get away with misdemeanours. A key aspect of *Watson*¹⁹⁵ was that when an organising body assuming control, and only in that situation, they will expose themselves to liability.

There is additional relevance in the wording that was used in *Watson*.¹⁹⁶ The BBBC was said to exercise "a public function which it had assumed for the public good". While on its face this might seem to suggest that organising bodies must carry out their actions in the interest of those that watch, rather than those who participate, the public rather than the athletes, this is an obsolete concept that can be demonstrated by public interest defence in cases involving defamation of character. An old argument in those cases was that if the public were interested in a story, then it was publishable, regardless of its accuracy. This has been replaced by a far more subtle approach, which asks not if it is of interest to the public, but whether it is in the interests of the public. While increased excitement is of interest to the public, an improvement level of player safety must absolutely be in the interests of the public.

While on the subject of the Corinthian attitudes toward sport, it should also be stated that the "true values" of sport, those of sportsmanship, decency and comradeship, are promoted by "greater consciousness of the need for safety, accident prevention and the avoidance of needless or excessive injury in sport."¹⁹⁷ The court in *Woods*¹⁹⁸ did not say, not does this paper say, that injuries can always be avoided, and indeed in that case they found that the burden was too high and the risks too obvious, but it is clear that injuries that are capable of being avoided should be.

Objectively, this is by itself, a strong argument. It is only when linked with other factors, which will be considered, that it starts to lose a little, though it will be shown by no means all, of its weight. It was best stated by Curtis J in *Smolden v Whitworth*.¹⁹⁹

¹⁹⁵ Ibid n. 9.

¹⁹⁶ Ibid.

¹⁹⁷ *Woods v Multi-Sports Holdings Pty. Ltd* (2002) 186 ALR. 145, 168 per Kirby J.

¹⁹⁸ Ibid.

¹⁹⁹ *Smoldon v Whitworth* [1997] PIQR P133, CA. per Curtis J.

"I see nothing objectionable in the law seeking to prevent and protect rugby players from unnecessary and potentially highly dangerous if not lethal aspects of the game by the imposition of a duty of care. No responsible player and no responsible referee has anything to fear."²⁰⁰

The medical data in Chapter One²⁰¹ makes it clear that there are now an increasing number of situations that would fit the description by Curtis J as 'highly dangerous if not lethal.' That case concerned refereeing decisions, but where these situations can be reduced, even if only by one, there is no amount of excitement inducing, adrenaline bursting action that can justify preventing such action and, where an organising body disagrees, the law must be allowed to intervene.

Acceptance of Risk

A fundamental difficulty that Bunworth²⁰² acknowledges is the principle that the players have accepted the risks based on their awareness of the rules or, as was eloquently phrased in a Colorado decision "professional sport is a species of warfare not actionable in court"²⁰³ and this was a point that was emphasised in *Agar*.²⁰⁴ There are two points that can be considered here. The first is that sports have, as previously noted,²⁰⁵ introduced regulations to deal with concerns about the individual sports. In the case of football, for example, the organising body have ruled that the use of weapons is not permissible. They have also chosen to intervene to protect non-participants by way of safety regulations and therefore they do select which risks they will protect against and which they will not.

²⁰⁰ Ibid.

²⁰¹ Ibid 30.

²⁰² Richard Bunworth 'Egg-shell skulls or institutional negligence? The liability of World Rugby for incidents of concussion suffered by professional players in England and Ireland' (2016) 16 Int Sports Law J 82.

²⁰³ *Hackbart v Cincinnati Bengals* 435 F. Supp. 352 (D. Colo. 1977).

²⁰⁴ Ibid n. 85.

²⁰⁵ Ibid 39, Ibid 45.

Secondly, Bunworth notes that “We enter into a sport fear-free and for the enjoyment that it brings us. We do not consider the potential hazards and the possible life-changing possibilities that may lie in wait...”²⁰⁶ The argument of accepted risk is founded upon an assumption that the participants are aware of the dangers that lie ahead and, to a large degree this is true of physical injuries. A player who takes part in a football game can identify that a mis-timed tackle may result in a broken leg. Yet it is harder to argue that a player is aware of the potential impact of heading the football repeatedly. At the very least, in order for the principles of accepted risk to apply, it would be necessary for the organising body to have a duty to educate the members of their organisation who are participating in the game and even then, the youth of the players and the long term consequences of the injuries makes it hard to establish that there is true awareness of the dangers.

It is clear that the consent of the individual is relevant, and this will be considered in Chapter Six.²⁰⁷ However, given the seriousness of the situation, and the consequences, it is appropriate to have, as a starting point, the principle that an organising body is under a duty to adapt their rules to the evolving issues of the time.

Bunworth’s contention is that there comes a point when it is insufficient to say that the risk is acceptable and that at that point the organising body must act. There is no framework as such for establishing at what point this will happen, but it can be seen from the existing authorities that the closer the nexus between the potential victims and the organising body, the more obvious the risk, and the extent of the impact on the sport will all be factors in determining whether the duty will expand to cover the present situation. This is emphasised by the analysis of a football federation’s duties:

“Each of the international sports organising bodies therefore has a responsibility to eliminate, wherever possible, unacceptable risks of serious injury and even death and to reduce the level of other risks so far as is reasonably practicable, while not fundamentally changing the nature of their sport.”²⁰⁸

²⁰⁶ Ibid n. 202.

²⁰⁷ See Page 249.

²⁰⁸ Colin Fuller et al ‘Risk management: FIFA's approach for protecting the health of football players’ (2012)

In this context it is impossible to ignore the reality that this is an unacceptable risk of serious injury or death; the changes that have already been posited are not such as to change the nature of the sport significantly, and certainly not in a manner that has not been attempted already.

Assigning this responsibility does not come without difficulties. Gardiner focused on the difficulties of proving that a specific rule had a sufficiently serious impact on participants²⁰⁹ adding that there would be serious practical issues with developing such a framework on a practical level. Yet this analysis, from 2008, is perhaps less concerning that it might appear, as the volume of medical evidence that has been produced does make it clear that there are some aspects of the sports that directly cause either concussion or, at least, the risk of concussion, and this being the case, it would be relatively simply to identify the rules that need to be amended, as indeed has been done above, in conjunction with the earlier medical sections.²¹⁰

Vulnerability

It will be recalled that vulnerability was an aspect that was considered in the previous analysis of duty of care and was considered to be easier to achieve than assumption of responsibility as it is unnecessary to demonstrate the nexus between the organisation and the individual. However, it was also seen as being less accepted as a principle and so less clear as a path to liability.

There are additional concerns, that link to the previously noted debate between paternalism and freedom, which is that these are individuals who have free will. Whether they choose to play the sport for compensation, in which case they enter into the sport as part of a contract, or whether they do so on an amateur level, it is evident that they are making, at some level, a decision to play.

46 Br J Sports Med 11.

²⁰⁹ Ibid n. 22.

²¹⁰ Ibid 49. Summary of the Preventative Measures

This raises an obvious problem with a discussion of vulnerability as when there is a consideration of vulnerable people, the discussion would normally be seen to revolve around minors or individuals who have a particular vulnerability that requires additional protection as seen in the case of *Phelps v Hillingdon London Borough Council*²¹¹ where a Council, through a school, were held to owe a duty to children with special needs to ensure that they received appropriate education.

By contrast, most sports players will be of age²¹² and situations where they have a particular characteristic that increases their vulnerability will be the exception rather than the rule. Yet, this does not render vulnerability useless as the concept has been referred to in cases involving adults of this type, indeed adults involved in standard everyday activities. It was noted earlier that vulnerability was applied in *Stovin v Wise*²¹³ where the road users were seen as the vulnerable parties and dependent on highway authorities to take care in their actions, even though there was no clear link between the road user and the Highway Authorities and even though the actual incident was caused by another individual road user. This is a neat analogy as the organising body are not involved in the causing of the accident, but their actions have the potential to increase the danger for the individual who has suffered. Indeed, the victim is additionally vulnerable because they have no claim against the other sports participant if they have complied with the rules of the sport as understood by the participants.

Stapleton has taken a view that the question to be considered must be whether the plaintiff has an inability to take action in a particular situation²¹⁴ and other jurisdictions have crafted a position where the plaintiff must lack ability to act, and the defendant is in a superior position of knowledge and freedom to act.²¹⁵

²¹¹ [1998] EWCA Civ 1686.

²¹² There are however situations, even on a professional level, where minors may be involved. For example, football academies often begin to train future players before they have reached the level of teenagers and these players will be involved in matches that will be subject to rules set by organising bodies.

²¹³ *Stovin v Wise* [1996] AC 923.

²¹⁴ Peter Cane and Jane Stapleton (Ed) *The Law of Obligations Essays in Celebration of John Fleming* (Clarendon 1998).

²¹⁵ Footnote 31 in Stychin per McHugh J, Carl F. Stychin 'The vulnerable subject of negligence law' (2012) 8(3) Int. JLC 337.

The importance of vulnerability is enhanced by the analysis earlier of the importance safety and it has been repeatedly emphasised that regardless of the extent of the duty to consider participant safety it is a consideration. There is, by definition, therefore, an acceptance that the rules that are set down by the organising body will have to be followed by the players, and that they will be required to take the consequences of those actions. If it is accepted that there is this culture of obedience, then it is equally clear that there is an element of vulnerability, and if participants are seen, in this context only, as vulnerable, then it is clearly a pro-liability factor.²¹⁶

The nature of the individuals, while unique to each sport, also would tend to point towards the participants being vulnerable. As seen earlier²¹⁷ the nature of the parties is important and, on the sports that have been identified it is clear that the features point towards vulnerability. World Rugby, and FIFA are both international or national entities which economic resources, human resources, and the potential to generate a wealth of knowledge, which was underlined by the allegations in the *Maxwell*²¹⁸ case where the NFL were able to investigate the consequences of tackling and then to craft the message that they chose to send to the players. By contrast, the players are individuals who may have the support of their employers and a Union but outside of that are, essentially, one individual. Further, while they may or may not have been minors at the outset of their career, they will, in the majority of cases, have been young and there will certainly be questions as to whether they would have a sufficient understanding of the risks that they are subjecting themselves to. While it may seem galling to call an eighteen-year-old earning the average wage for a year in a week, the mere presence of money, while possibly impacting on their freedom to make choice, does not alter the fact that they retain serious aspects of vulnerability and therefore the reasonableness of protecting them increases.

²¹⁶ Goodin emphasised this, stating that vulnerability must "derive from the fact that other people are dependent upon you and are particularly vulnerable to your actions and choices.": Robert Goodin *Protecting the Vulnerable: A Re-Analysis of our Social Responsibilities* (University of Chicago Press 1985) 33.

²¹⁷ Ibid 50.

²¹⁸ Ibid n. 29.

The Role of the Organisational Body

One of the potential factors that was referred to earlier was that of freedom of choice, and this will be returned to in Chapter Six²¹⁹ to frame the responsibility that should fall upon the head of the participants. However, freedom of choice also applies to the organising bodies, and this framed the judgment of the Court of Appeal in *Watson*²²⁰ when they ruled that the Board had chosen to enter the field, chosen to set out rules, and chosen to make them mandatory. In taking this choice, in making this decision, they could not then escape from the consequences of this action.

To take the role of the organising body at its most liberal, it is possible to compare it to a charity that is non-profit, staffed by volunteers, and has no ulterior motives at all in respect of the industry into which it is engaging. In this situation, the charity is not able to absolve itself of all liability; it must still comply with the normal responsibilities that any individual or organisation would have in that context. If a charity were to neglect to carry out health and safety checks on food and were to send, for example, an open tin of food to a country where starvation is a critical factor, thus causing significant consequences through illness and death, would the charitable status of the organisation be enough to save them from liability? The answer must surely be no; they were not compelled to step into that role, they chose to do so.

Equally, the roles of the organising body may seem to be a necessity, but there is no compulsion on that particular organising body to carry out that role. If FIFA were to abdicate responsibility for the rules, or World Rugby were to say that they would no longer be setting the rules for their sport, then another organisation would intervene, whether state run or non-state run, and the requirement that they comply with standards of society and law would fall to that organisation. The roles of the organising body have been described earlier, and they are responsibilities, it is entirely fair, just and reasonable that those who choose to take these responsibilities should not be written a blank sheet to carry out their activity's *carte blanche* but should be held to the evolving standards of society.

²¹⁹ See Page 249.

²²⁰ *Ibid* n. 9.

Availability of Checks on liability

Finally, in the pro-liability factors, it is not being contended that there should be a completely open door to liability where injuries are suffered on the pitch. It is accepted that there are inherent risks to playing sport, and when the formulation of the duty is considered, after the other two relevant parties have been considered, it will be seen that there are checks that can be placed on liability. Players have responsibilities, as do their employers, and it has already been seen that there are some areas where the responsibilities of organising bodies will not extend.

The mere existence of these protections, and the ability of the common law to craft a bespoke liability, much in the same way that rescuers are treated differently, and emergency services are treated differently, allows the courts the manoeuvring space to protect participants in those situations where it is necessary to extend additional protection, while still affording the organising bodies the flexibility to ensure that their sports remain their sports and not some quasi-sport that is unrecognisable and contrary to the history and traditions of sporting activities.

Self-Regulation

One of the peculiar aspects of sport that can be used to oppose such a move is the argument that the principles of self-regulation have worked, and argument that was addressed earlier.²²¹ Norris notes that while there is no formal duty, "It is also as an expression of such a duty-that a sport such as rugby has guidelines about uncontested scrums and (particularly for younger players) about contests between players of disparate sizes and why sports such as rugby and racing both have strict concussion protocols."²²² Norris therefore notes that the various mechanisms of self-regulation have been effective in encouraging actions by the organising bodies without recourse to the law courts.

²²¹ Ibid 72.

²²² Ibid n. 115.

This debate has indeed been played out in a less critical form with the recent rule changes on Video Analysis Referees (VAR) where public debate has focused on the advantages of more precise and accurate refereeing decisions against the interference with the smooth passage of the game.²²³ Yet, this relates to a comparatively small advantage, and one that is largely based on aesthetics, whereas the balancing act in respect of concussion injuries is far more pronounced when considering the number of injuries that have been caused by the current rules of the game. If a clear warning was needed, after the consideration of the medical evidence, an assessment of the potential for serious injuries suggested that a player sacrifices twenty years of his life for playing in the NFL, and this article was written long before the concept of concussion was considered with any level of seriousness.²²⁴ This suggests that the development of technology has been used more for the entertainment element of the game rather than the safety element.

A further problem with this argument, other than the points of self-regulation in sport generally which have previously been highlighted²²⁵ is that self-regulated responses to incidents may not be consistent or guaranteed. This was emphasised following the death of Australian cricketer Philip Hughes, after being struck on the head by a quick delivery in a game situation. The review, by David Curtain, which was ordered after the incident, noted that a concussion protocol was being implemented by Cricket Australia, and discussed the importance of the use of helmets, but declined the opportunity to recommend changing the laws of the game.²²⁶ In the circumstances, this appears to be a fairly tame response where such a serious issue is at stake.

Bunworth refers to the *Watson*²²⁷ case, noting that in that case, the BBC adopted responsibility for the medical facilities by setting out requirements. In respect of World Rugby,

²²³ Carlo Garganese & Sam Brown 'Is VAR killing football's soul or is it needed to stop injustices?' (*Goal.Com*, 18 January 2018)

²²⁴ Hofeld, 'Athletes-Their Rights and Correlative Duties (1975) 19 *Trial Law Guide* 383, 401 cited in Wayne Cohen 'The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation' (1990) 7 *U. Miami Ent & Sports L. Rev* 311.

²²⁵ *Ibid* 68.

²²⁶ David Curtain, 'Independent Review into the Death of Phillip Joel Hughes. Final Report' (2015).

²²⁷ *Ibid* n. 9.

he goes on to state that “It is certainly arguable that through its adoption of the Pitch Side Concussion Assessment rules and the Return to Play protocols, World Rugby has assumed responsibility for determining the nature of assistance to be provided to players following a concussion or suspected concussion. It has, in essence, arrogated itself the task of determining what could be termed quasi-medical assistance, in a comparable manner to that described in Watson. As a result of this, competition organisers and national unions tend not to consider the matter as appropriate for them to adopt a differing approach, instead relying upon World Rugby’s expertise. Aware of this reliance, it can be said that World Rugby has assumed control of the matter and the rules are tantamount to being mandatory. Further, the PSCA and Return to Play protocols involve assessing players for concussion symptoms and making clinical judgments. As a result, they should be considered medical assistance in a comparable manner to those at the root of the Watson case.”²²⁸

Other examples of situations where the governing body has been reluctant to change the rules are in boxing, where deaths have occurred, yet the rules have not been altered to require additional protective equipment, and in ice hockey ‘fights’ that play no part of the substantive sport yet have not been banned, although some rules have been introduced in order to minimise the damage caused by these fights.²²⁹ , and there has been no requirement that the rules be changed in order to reduce the violence caused by these fights. At present, there appears to be a laissez-faire approach in respect of the substantive rules of the game and it is this laissez faire approach of self-regulation, that it is contended is out of touch with the medical developments surrounding concussive injuries.

There is in this debate a paradox. That paradox is that the reason for sporting rules being subject to scrutiny is the apparent civilising of the activity, away from the less regulated days of historical sport. By demonstrating that the sports can be made safer, and by involving themselves in the sports, they have opened themselves up to critique when they fail to do it consistently or with effectiveness. The paradox is that they could avoid this liability by simply withdrawing from the sporting world and allowing the sport to fall back to an unregulated

²²⁸ Ibid n. 94.

²²⁹ Ibid

state. This would, likely, lead to more injuries as the rules settled back into an equilibrium without regulation. This, therefore, is the paradox that could be used as an argument against an extension of liability. As a variant of the self-regulation argument: 'we know best', is the argument: without us it would be worse!

This argument is, of course, flawed, as the simple answer is that without sporting regulation, there would be far more pressure on the legislature to intervene, as they did in making baiting sports illegal, and prize-fighting illegal.²³⁰ Regulation is necessary, not for the existence of the sport, but for the existence of the sport free to some extent from the intervention of external forces. In this analysis, the sporting bodies have a choice of accepting responsibility for their actions or accepting external intervention from non-sporting bodies. The choice that cannot be available any more is the third option that they currently enjoy; the freedom to make rules as they choose, with no consequences for the decisions that they make.

What Should the Duty Of Care Require?

Once it is accepted that the courts can extend the duty of care to participants in this situation, and that it is appropriate for this step to be taken, there still remains the crucial question of what that duty should be, and whether there should be any special considerations, considering the range of anti-liability factors that have already been contemplated.

'Simple' Negligence

The starting point (and indeed the end point) in English tort law is the principle of negligence. The only question is whether there has been a breach of the duty of the Defendant to take reasonable skill and care in the carrying out of their actions. If there has been, then there is a breach of the duty. If there has not been, then there is no breach. However, as the court noted in *Agar v Hyde*,²³¹ the picture is not that clear. The court

²³⁰ See Page 235.

²³¹ Ibid n. 85

criticised the Claimants in that case for being unclear in precisely what they were asking the Defendants to do or not to do and while the case failed on numerous grounds, this is one that can be seen as most transferable to this thesis.

Taking that case as a starting point, it will be remembered that two potential duties were contemplated: either the duty to take reasonable care to monitor the operation of the rules to avoid unnecessary risk of harm, or to take reasonable care to ensure that the rules did not provide for circumstances where risks of serious injury were taken unnecessarily. It was not stated in the judgment why the test developed during the case although the latter formulation seems to be more precise in addition to encompassing a broader duty as the duty is not merely to monitor but to ensure, placing a more onerous duty on the actions of the governing body.

Regardless, Gleeson CJ remained unimpressed with the formulation, placing particular emphasis on the difficulties with the latter part of the test. It does, however, provide a basis for the test that this thesis proposes.

Certainly, the first part cannot be argued with. Under a simple negligence basis, it is trite to say that the requirement on a Defendant is reasonable care to take whatever steps they are required to take. The second part of the formulation- to ensure that the rules did not provide for circumstances where risks of serious injury were taken unnecessarily- can be framed in a clearer fashion.

First, the wide concept of serious injury can be, within the purview of this thesis, restricted to concussive and sub-concussive events. This deals with a key issue of Gleeson CJ which was that the test for serious injury was too vague as to be impossible to follow. The question of why this type of injury should be treated differently to physical injuries has been summarised earlier.²³² For the same reasons, the final part focusing on necessity can be

²³² Ibid 48

deleted as it adds nothing- there is no reason for concussive events to be part of these sports.

That still leaves the unclear middle part. This can be adjusted by requiring that the responsible parties ensure that the rules seek to remove risks rather than the ungainly consideration of 'providing for circumstances.'

Thus, the test would be: the Defendant must take reasonable care that the rules of the sport remove, as an intended part of the game, risks of concussive and sub-concussive injuries from the sport. This formulation would set a clear standard for the governing bodies and also limit their duty to what is reasonable and only within the specific topic that is under discussion, and which carries the specific risks. Although this thesis is focusing on the establishing of a duty of care rather than the other components of establishing a negligent act and remedy, it can be seen that there would be ways for the governing body to protect themselves. They would be expected to follow the science rather than anticipate it, but they would be expected to react to it promptly and proactively. As with all negligence cases, the more pro-active they are, the less likely they are to have breached their duty of care, so putting into place regular reviews of both the science and the laws, as well as ensuring that the rules are clearly explained and easy to follow would assist them in demonstrating that they have complied with their duty. Crucially, the emphasis on 'intended part of the game' would not require the governing body to address such situations as accidental collisions that can occur in any game.

One possible change to this formulation, which would benefit the governing body significantly, would be to substitute the word 'minimise' for the word 'remove'. This would link well with the anti-liability factors which emphasise that these sports are a balancing of safety and excitement and an acceptance that removing concussive events from the games entirely is not feasible, nor is it possible to ever make the game completely safe. There are, however, two arguments against this change. The first is that such an adjustment would implicitly accept that some concussions are acceptable. This cannot be justified in light of

the medical evidence, and while it is accepted that there can be accidental collisions that lead to concussive events, it is counter-intuitive to extend these accidental collisions to those that are endorsed by the rules. Secondly, such a move would immediately raise questions as to what is meant by minimising and while there are always inevitable interpretations of language in legal cases, such ambiguity would provide more questions than answers and move away from the central thrust of preventing harm in the future.

This formulation would be similar, if not easier for Defendants to meet, than corresponding formulations in state common law in the USA where the jurisprudence has been developed further. In *Vendrell v School District*²³³ the standard was that “stakeholders have a legal duty to provide reasonable care in protecting athletes from foreseeable risk”²³⁴ which is a wider duty than that which has been proposed, although it must be stressed that this thesis is focusing on one specific duty of the governing bodies- other aspects that would fit within the *Vendrell*²³⁵ test have already been established in *Watson*.²³⁶

Gross Negligence

As has been seen above, the normal test in English tort law is simple negligence. There is no need to establish anything beyond this and there is no specific tort that requires such analysis- it is a concept that is recognised only in criminal law. Other jurisdictions, however, do distinguish between simple negligence and gross negligence, with the latter requiring something beyond behaving unreasonably, normally involving recklessness. This is primarily for two reasons. The first is that in some jurisdictions the claimant is entitled to seek punitive damages, as opposed to only actual damages of pain, suffering, loss of amenity and financial loss. However, to obtain the additional quantum, the higher threshold must be met.²³⁷ The second basis for the requirement is to provide insulation for organisations, often

²³³ Supreme Court of Oregon, En Banc. P.2d 406 (Supreme Court of Oregon (1962b)).

²³⁴ William L Nixon, ‘Tackling Concussion Liability Heads On: Stakeholder’s Standard of Care’ (2020), *Journal for Physical and Sports Educators*, V33 202

²³⁵ *Ibid*

²³⁶ *Ibid*

²³⁷ Kevin L Austin, ‘Punitive Damages in Negligence Cases: The Conflicting Standards’ (1995) *Missouri Law Review*, V60 13 A6

governmental, from negligence claims on the basis of public policy, often related to the importance of work that the organisations do and the importance of ensuring that they have sufficient ability to take risks to carry out their essential duties. Thus, in Michigan, *Tarlea v Crabtree*,²³⁸ it was emphasised that governmental employees have immunity from tort law save where their actions constitute gross negligence. The court in that case equated the test to ‘wilful disregard’ and ‘singular disregard for significant risks.’

Clearly, the gross negligence standard, if transposed into English law, would be a way of addressing the anti-liability factors while still providing a basis for liability in the worst cases. Hypothetically, such a standard would give the governing bodies longer to react to the science and only impose liability in the event that it was clear that the risks were obvious, and they turned a blind eye to the situation. There is some superficial appeal to a solution as it would ensure that there is some protection while also enshrining the importance of sport and providing a degree of reassurance to the governing bodies having to make significant decisions that might impact huge numbers of participants while seeking to balance the other goals of their sport.

However, in spite of the attractions, it is not possible to reconcile this compromise with the problem, let alone the realities of English law. It is true that there are some situations where the common law offers protections. For example, there is no duty of rescue. However, this analogy does not work. As indicated earlier, if an individual has not assumed responsibility, then they can be held liable for harm. However, governing bodies have taken the opportunity to make the rules and regardless of the moral arguments of the merits of changing the direction of a train to run over five people as opposed to ten, their legal duty should be clear; they have an opportunity to save lives that is not afforded to others, and they have that opportunity through their choice; there is no basis for affording them additional protection.

²³⁸ 263 Mich App 80, 88; 687 NW2d 333 (2004)

Secondly, the governing body do have options. If they do not wish to have the responsibility to change the rules, then they can simply cede the power. There is no more reason to apply different standards to them than there are to assist an energy company or a train company. Both are essential services and yet they must adhere to the same principles of simple negligence that every other organisation and individual must.

Finally, to elevate negligence to a different level here would overlook the entire thrust of this paper which is that people's lives, both in terms of mortality and quality of life, are being lost. That there are counter-interests is relevant but should not be overpowering. The test is not strict liability and does not say that upon a concussive event being inflicted, liability will follow. It simply requires that the governing bodies take reasonable care to prevent it.

How Could the Governing Bodies Satisfy the Duty?

Following the duty discussed above,²³⁹ it is clear that there must be a clear ideas of how a governing body can satisfy the duty of care that this thesis contends should be imposed. Although this thesis focuses on establishing a duty of care, as the subsequent discussions of breach of duty, causation, and damage are substantive topics in their own right, this section will discuss the relevant points that will provide context for the extent to which the duty will be a reasonable burden upon the governing bodies as opposed to an unreasonable one, focusing on the attitudes that would assist the governing bodies in defending their actions. The section will then give some indication of the substantive actions that the governing bodies could take to discharge the duty.

Following the Science

²³⁹ Ibid 194

It has been seen that the underlying foundation behind this duty is the precautionary principle, which emphasises that it is not necessary to wait for certainty before taking steps to protect participants. However, that should be seen as requiring not that science be anticipated but rather that there should be an awareness of the developing science and a willingness to react accordingly to that science. It could be argued that this is something that the governing bodies have already done, as demonstrated by their actions, but it is important to note that the duty suggested above places an emphasis on the prevention of concussive events as opposed to the approach that has been taken by the governing bodies which has been to minimise the impact of the injuries.

Considering the existing legal action against World Rugby, for example, the players and former players involved all claim to have suffered injuries at various points over the past forty years. Clearly, it will be harder for the players from earlier decades to demonstrate that World Rugby were sufficiently aware of the risks and in the event that the case does reach court, there will be evidence about what they knew, when, and what they should have known at that relevant point. It is equally clear that there is nothing that the governing bodies can do to change what was done in the past; if the court finds that they owed a duty of care, then they will have to justify their actions at the specific timeframes. Going forward, however, it will be harder for them to justify inactivity, and therefore the importance of recognising the science and demonstrating that they are taking it into account becomes of central importance.

Thus, establishing Committees to review the developing science and ensuring that there are opportunities for emergency reactions to developments would assist in demonstrating that there is a science-based approach rather than an entertainment-based approach. Likewise, adjusting the central foundations of the laws of the game to emphasise that the overall approach to the sport will have as a primary goal the health, safety and well-being of the participants would underpin an appropriate response to the duty.

Action over inaction

One of the crucial questions that needs to be considered is the extent to which trial period should be allowed. The typical approach by sports has been to issue a new law on a trial period, limiting the law to a particular event or age group. The justification for such an approach is that the impact of changes cannot be quantified with certainty, and it is necessary to test the impact of changes before deploying them on a more wide-spread basis, as there is the potential for unintended consequences that may be worse than the consequences that they were designed to prevent. For example, one possibility that could be considered is removing substitutions during a match except for injuries in rugby union. The argument in favour of this would be that it avoids having 'impact players' or the 'Bomb Squad' strategy that has been utilised by South Africa of substituting their entire front row at or shortly after half time. The result is a fresh set of players against tired players which gives the South African team a physical advantage but can be argued to place the opposition at greater risk. Against this argument is the danger that as players get tired, their concentration suffers and so their technique may be flawed and allow a greater risk of injury. The theoretical arguments could be supported or dismissed by a consideration of a trial period, but this means that there is potential inactivity while the trial period is being undertaken.

This, in a sense, is the difficulty that faces the governing bodies under the proposed duty of care. Widespread changes, such as abolition of the sport or of a significant part of the sport, would dramatically impact the entertainment, but it would represent a clear discharge of their duty. Smaller changes that seek to reduce concussive events in accordance with their duty, may shift the nature of the game subtly, retaining the entertainment but potentially making the situation worse. It would be difficult to argue with a test-case approach from the governing body if it can be justified that the parameters of the trial basis are clearly established, and that the length of the trial is sufficiently short so as to not represent a 'holding pattern' or stalling tactic. Again, the likely question to be asked is whether the governing body are reasonably following the science or whether they are placing entertainment above the question of player safety. Thus, any trial period law changes would

have to be clearly justified in order for the governing body to ensure that they are adhering to their duty of care.

Causation

As indicated,²⁴⁰ the central question being asked here concerns the duty of care. However, as the focus is on black-letter law, it is reasonable to ask whether the prospective claimants can establish that the actions of the governing bodies represented a causative link, i.e., did the inactivity of the governing bodies cause the concussive events. This is relevant because while the mere establishing of a duty of care would represent a significant shift in tort law, from a practical basis, if the claimants fail on any one of the necessary limbs under tort law, they will not be entitled to a remedy. An *obiter* duty being established would assist future claimants but not the existing ones if causation cannot be made out.

There are two potential obstacles to claimants here and they are linked. The first is that they will need to show that but for the activity or inactivity of the governing body they would not have suffered the injuries and secondly that the injuries were suffered because of their participation in sports. The latter would seem to be the most problematic, particularly in the case of the older competitors, as the invisible nature of the injuries, together with the time delay between potentially suffering the concussive events and any CTE diagnosis, means that there could be many other factors that could have caused the injuries. This will continue to be more of a challenge for older competitors but will be less difficult for those who are younger to establish. The second obstacle, which potentially could be harder, is to establish the specific events that led to the diagnosis of the CTE. Again, this will be harder for the older competitors than for the younger, who will be able to demonstrate the connection.

²⁴⁰ Ibid 109

Beyond the broad requirement of a duty of care in negligence, it is clear that any duty would require the relevant body to consider the welfare of the player in their decisions, particularly in respect of rulemaking. However, there are a number of broad options that they could choose to ensure that they comply with such a duty.

Option 1- Abolition

In analysing boxing Anderson states that his purpose was to examine “whether there should be a complete ban on professional boxing or whether the problems that have been identified can be properly and adequately addressed by regulatory reforms, supported where necessary by legal sanctions.”²⁴¹ Anderson considered carefully the question, and concluded that there were serious justifications for taking such an approach, not least that “Proscription would, by definition, clarify boxing’s anomalous legal status”²⁴² in the context of currently legal activities that in one case led to a medical summary that “the swelling induced by the bout was so pronounced that it had pushed Johnson’s brain from the right side of his skull to the left.”²⁴³

The examples that have been given already demonstrate that these concerns are not restricted to contact sports where violence is intended, but also to those where it is a by-product of the sport. If more evidence were needed of the wider consequences,²⁴⁴ in 2017 an autopsy of Aaron Hernandez, a one-time American Football legend and later convicted murderer, revealed “the most severe case of chronic traumatic encephalopathy ever discovered in a person his age, damage that would have significantly affected his decision-making, judgment and cognition.”²⁴⁵ This, in a twenty-seven year old who had reached the pinnacle of his chosen sport and the depths of society, reveals that, potentially, there are consequences not only for the athletes but also for society. More recently, Zac Easter, a

²⁴¹ Ibid n. 169, 192.

²⁴² Ibid, 195.

²⁴³ Ibid, 194.

²⁴⁴ An issue that has been prevalent from the start of this thesis is the difficulty of assessing the impact of concussive events that take place over the course of a career, even a short career, in the context of the other aspects of a player. It cannot be said with certainty that other aspects of the case studies did not have bearing on the outcome, but it can be inferred from the circumstances that the concussive events suffered during the sporting practice sessions and/or matches did have an impact.

²⁴⁵ Adam Kilgore, ‘Aaron Hernandez suffered from most severe CTE ever found in a person his age’ (*Washington Post*, 9 November 2017).

twenty-four-year-old American Football player took his own life following mental health issues including depression, mood-swings, and short-term memory loss. In a thirty-nine-page suicide note, Easter explained that he had shot himself in the chest so that his brain could be used for medical research; the autopsy included the sport that he loved as a cause of the CTE that was diagnosed after his death.²⁴⁶

However, in spite of these compelling facts, and a large number of similarly tragic cases to consider within boxing, Anderson concluded that the likely result would be that boxing would “probably lead to an underground (and dangerous) version of the sport [and] a return to the prize fighting days of the mid-nineteenth century when crudely prepared fighters and their backers sought secluded venues in which to fight.”²⁴⁷ When one of the principle arguments for making the change is to protect the participants, clearly it must be determined whether there is an alternative path forward.

It is true that the sport of boxing and the sports that are being discussed here are different. Boxing, in its purest form, is a simple sport to organise, requiring no more than two participants and any who wish to observe. Team sports are harder to organise, and particularly when they are formed into leagues and cups, and it may well be that there is less appetite to watch an underground version. However, the numbers involved in the latter also demonstrate with far greater clarity the potential adverse reaction to an outright ban. A Sport England Survey found that between 2015 and 2016 1.8 million people, over the age of 18, played football at least once a week, while two hundred thousand played Rugby Union at least once a week and a hundred and fifty-six thousand boxed at least once a week. Likewise, globally, a survey showed that boxing is the tenth most popular sport while Football is a truly global sport and Rugby Union is in the top twenty of worldwide sports, but is in the top three domestic sports in England and Wales.²⁴⁸ It is reasonable to assume that there would be a significant reaction in the event that such popular sports were banned.

²⁴⁶ Ben Wyatt, ‘Zac Easter: He left his brain behind to save others from his fate’ (*BBC News*, 28 April 2021).

²⁴⁷ *Ibid* n. 169, 195-196.

²⁴⁸ <http://www.biggestglobalsports.com/>.

In the absence of a complete ban, Anderson suggested that “regulatory reform would confront and could largely overcome professional boxing’s intrinsic problems,”²⁴⁹ suggesting that the risks could be reduced so as to be manageable without requiring abolition. As part of a 12-point plan that Anderson proposed, three crucial points stand out. The first, which was identified as point 1, was that “the health, welfare, and dignity of the boxer should at all times be paramount,”²⁵⁰ the second was that the education and personal development of the players should be improved,²⁵¹ and the third was that the rules should be amended to try to bring the safety record of the professional sport more in line with the amateur sport which was described as “commendable.”²⁵² Using these three points as a baseline, the remainder of this chapter will examine how a similar approach can and should be applied to Football and Rugby Union in order to increase the prevention of concussion injuries rather than simply managing them once they have occurred.

Option 2- Amend Rules to Prioritise Player Safety

Absent abolition, the best way for governing bodies to ensure that they meet the duty of care would be to ensure that their rules are sufficiently robust to prevent, or at least minimise concussion injuries. It has already been stated that removing injuries from a contact sport is impossible, and this is also the case with concussion injuries. However, adjusting their rules is a clear means for the governing body to demonstrate compliance with their duty of care

Such an approach is not novel. The Consensus Statement on Sport emphasised that sporting bodies should consider rule changes to limit head injuries where “a clear-cut mechanism is implicated in a particular sport.”²⁵³ The Statement itself suggested that heading in football was an example of this due to the significant number of concussion injuries that occur as a result of that one action within the sport.

²⁴⁹ Ibid n. 169, 196.

²⁵⁰ Ibid, 182.

²⁵¹ Ibid, 183.

²⁵² Ibid, 183.

²⁵³ Paul McCrory, et al. ‘Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich’, November 2012, Br J Sports Med 2013;47:250.

The Specific Actions- Heading

The crucial point that this Chapter has sought to emphasise is that requiring actions like this from the governing bodies is not imposing dramatic and draconian new duties upon the governing body, it is simply requiring them to use the same balancing act that they would already be familiar with in determining the merit of new rules but seeking to ensure that player safety is paramount as opposed to excitement. Therefore, when considering whether heading a ball should be banned in football, the governing body would still be entitled to consider the advantages to the game and the disadvantages, but they would also have to factor in consideration of the player welfare. Is the action of sufficient necessity to the game of football that it can be balanced against the safety of the players? Of course, if there was a way to render heading the ball safer that would be preferable, for example to use a softer ball that medical expertise confirms does not cause concussion injury (foam for example) then this would be a perfectly acceptable decision. This thesis is not seeking to dictate the specific rule changes but simply to propose the standard that should be followed, with the emphasis being on player safety rather than excitement.

Looking at the arguments that could be raised in respect of football, it is not an essential part of the game as goals can still be scored using feet. There is precedence for parts of the body not being permitted to be used, as outfield players cannot use hands, and in 1992 the laws changed to prevent a goalkeeper from picking up the ball after a pass back from their own players. From an entertainment perspective, it could be argued that it would remove a dimension of the game, but it is difficult to see how this would be a sufficiently strong argument to counter the high proportion of concussions that are suffered from heading the ball. Therefore, on the current evidence and knowledge, it is contended that the governing body would struggle to justify retention of heading as a part of the game and if they chose not to amend the rules accordingly, then there would be potential for liability against that organisation.

Specific Actions- The Tackle

This question does become more difficult to clarify in respect of Rugby Union as the action of the tackle is essential for the game as it is currently played; remove tackling and the game must be changed, remove heading from football, and it could, theoretically, still be played. Yet, the same question applies: to what extent is it necessary, and is it justifiable in the face of the consequences? Here, there are some stronger arguments to be made in support of retaining the tackle as a part of the game. In Rugby Union preventing an attacking player from reaching the scoring area is essential to the game; without such rules the game would cease to be viable. This places the action at a higher starting point than football. However, as the research shows, the risk of concussive injuries is also higher than football which means that the risk is consummately greater. In both sports there are variants that could retain the spirit of defence while removing the tackle; touch rugby requires a player to be 'tagged' by touching them. The attacking team has a limited number of tags before the ball is turned over to the other side; a 'limited play' format that already exists in rugby league.

Effectively this would make the sport non-contact, removing the physicality and thus the risk of concussion injury outside the very accidental. It must be conceded, however, that it would change the nature of the game entirely.

This delicate situation places emphasis on the next question of whether the status quo of the tackle can be retained but with a change to the rule to reduce the risk of concussion injuries. This has been the case already with the permitted tackle area being gradually lowered with the current trial being to lower it to waist height.²⁵⁴ Paradoxically one concern of an earlier rule change was that lowering the tackle area from the line of the shoulders to the line of the armpits led to an increase in concussions, not suffered by the ball carrier but by the tackler.²⁵⁵ The study was unable to explain why this was, as it was outside the purview of the study, but possible explanations included the change in technique and the different connection made by the tackler with the carrier.²⁵⁶ This does question whether changing the nature of the

²⁵⁴ Ian Cameron, 'Waist-High tackling has the potential to be adopted for 2023 RWC', (*Rugby Pass*, 8 August 2019).

²⁵⁵ Keith Stokes et al 'Does reducing the height of the tackle through law change in elite men's rugby union (The Championship, England) reduce the incidence of concussion? A controlled study in 126 games' (2021) *British Journal of Sports Medicine* 2021 55:220.

²⁵⁶ *Ibid.*

tackle will be effective in reducing concussion injuries, but it also raises questions as to whether yet further changes are necessary.

An issue with the current proposal of lowering the permitted area to waist height is that it does not deal with the whiplash effect that was earlier discussed. A player making contact with the waist will still cause that whiplash and while it may reduce head-to-head contact, that may make the reduction of concussion injuries ineffective. A bolder move that could, potentially, be more effective, would be to lower the tackle height even further. High body impacts make for entertaining viewing, but Rugby Union coaches suggest that tackling at thigh level is the most effective method of stopping an opponent and increasing the prospects of winning the ball back.²⁵⁷ This reduces the level of contact between the two players and retains fidelity to the principle which is that the purpose of the tackle is to stop the player's progress rather than to injure the player in a full head on collision.

One obvious issue with this proposal of lowering the tackle height yet further is that there is no medical evidence to support the contention that this would lower concussion rates, but it is common sense to suggest that it would not increase it and would reduce the impact of two significant physical objects colliding with each other. Once the trials of the current height are concluded, it may well be that the risk of concussion is already reduced to a sufficient level, but it may also be that the height needs to be lowered again, particularly if there are unintended consequences, for example an increase in players being kicked in the head. Crucially, what can be said, is that this should be guided by medical evidence and player safety, rather than a focus on what is or is not more entertaining for the spectators.

Alternative rules

²⁵⁷ Dan Cottrell 'How to tackle the legs to win more turnovers' (*Rugby Coach Weekly*), BBC News, 'Tackling Skills' (*BBC News*).

It must be conceded that the proposals above would change the nature of the games, although it is argued that the substance of the games would continue to exist. They are of course the changes that would also have the greatest impact on player safety and therefore, any other actions are both easier and harder to justify. The crucial difficulty is that there are many actions that could be taken to reduce the impact of concussive events after the event, and as indicated, this is the direction that the governing bodies have gone,²⁵⁸ but this thesis is concerned with reducing the number of concussive events in the first place, which reduces the options for change.

One possibility is to consider other aspects of collision where concussive events may occur and change that part of the game. In rugby union, for example, the use of scrummages could be removed or replaced by uncontested scrums, which is already done in rugby league. One issue that has been worked on by rugby union is the lowering of the tackle area, and while the medical research does suggest that any contact can cause concussive events, keeping tackles, but requiring them to be below the waist would have the potential to reduce concussive events and so could be seen to meet to their duty of care, although it is clear that abolition would be the easiest way for the governing bodies to ensure compliance.

Specific Actions- Workload

The crucial limit to liability for governing bodies is that they can only be liable for something that is within their sphere of responsibility, and it is not contended that everything is within this spectrum. They can, however, impose rules upon participation. For example, in an effort to increase safety, World Rugby stipulate that in a specialist position only someone with that specialist knowledge can fill that role; if there is no specialist hooker available then scrums will be uncontested.²⁵⁹ They have already imposed the rule that where a player suffers a head

²⁵⁸ It has been suggested that there should be longer periods of required rest following a concussive event, that there should be additional doctors at games to help detect concussive events. Again, these all deal with mitigating the impact rather than prevention.

²⁵⁹ Rugby Union Laws 2021, Law 3.13.

injury, then they are unable to play for a designated period. There is, therefore, precedent for a governing body intervening to proscribe or prescribe the amount of match time that a player can be used for.

This is important because Rafferty's study shows that there is a connection between volume of game time and injury risk²⁶⁰ while Williams' study indicates that the threshold for a high risk of injury, both concussive and non-concussive, is 35 matches in a season while the threshold for a low risk of injury is 15 matches in a season.²⁶¹ These findings are emphasised by the logical point which is that over the course of a season concussion injuries are more likely to occur in the second half of a season, by which point the workload on players has increased significantly, and while they may be accustomed to the intense workload, it is beginning to have a significant impact on their bodies.²⁶² This is less relevant to the NFL where a full season of regular season and post-season totals twenty-one games (with the possibility of pre-season matches increasing the number to around twenty-five) but a Premiership player could potentially have to play between fifty and sixty games in a season and a Pro 15 Rugby Union player between thirty and forty. This excludes internationals (and practice) which could add up to ten (although in Rugby Union the international season often runs concurrently with club rugby). Clearly, then, one course of action that is open to the governing body, particularly in football and Rugby Union, is to impose a cap on the number of games played by players in one season or, achieving the same result, require a minimum gap between games for each player, effectively compelling the clubs to rotate players to ensure that this is achieved.

In many respects this is a duty that should be easier for the governing body to impose than the other changes as it does not change the actual rules in the slightest, and if anything falls closer to their more established duties of appropriate organisation of sporting events. Together with the established precedent for providing limits as to when players can and cannot play, it is also arguable that it could increase the entertainment of the sports by having

²⁶⁰ James Rafferty et al 'On average, a professional rugby union player is more likely than not to sustain a concussion after 25 matches.' (2019) *British Journal of Sports Medicine* 2019; 53:969.

²⁶¹ Sean Williams et al 'How Much Rugby is Too Much? A Seven-Season Prospective Cohort Study of Match Exposure and Injury Risk in Professional Rugby Union Players' (2017) *Sports Med* 47, 2395.

²⁶² Masaru Teramoto et al 'Game Schedules and Rate of Concussions in the National Football League.' (2017) *Orthopaedic Journal of Sports Medicine* Volume 5, Issue 11, 23 November 2017.

players fresh for games rather than tired after playing multiple games in a week. The crucial argument against would be that it would favour those clubs who have the greater resources and could be seen as prejudicing those without as they would have a lesser squad depth at their disposal. A counter to this argument is that the clubs who are not in European competitions would, in any event, play fewer games in the season and so the burden upon them would be lower. While the specific number would have to be the subject of greater medical research, it is reasonable to require the governing bodies to limit the number of games that a player participates in and given the existing research places thirty-five as the border for high risk of concussive injuries, it would be appropriate, as things stand, to say that a maximum of thirty four games per season would be a proportionate and reasonable rule to introduce.

These have been examples of the type of action that it would be reasonable to expect from a governing body, and that it would be reasonable to impose a duty of care for them to address. That is not to say that this would be a bright line rule. Clearly, as with all negligence, the duty of care evolves depending on the medical evidence, but these are examples of approaches that would make the players safer and would help to protect governing bodies from the liability that this Chapter has contended is feasible.

Minors

The previous sections have focused on the broader perspective of sporting participants. There are greater concerns, and consequentially a great responsibility on sporting bodies, when it comes to minors. It has been seen that the risk to the brain of a developing minor is increased over that of an adult, and this was exemplified by the injuries suffered by Zac Easter.²⁶³ Although the end result occurred in his adulthood, the injuries began during his playing of the game as an adolescent, and other incidents have underlined the seriousness of this situation. It is not suggested that any additional changes need to be made to the rules, but it is contended that the arguments that could be raised against the changes, particularly in respect of having tackles at all in Rugby Union, are far outweighed by the risks of injury to the player

²⁶³ Ibid page 203

when the participant is a minor and at a far greater risk than the adult. Therefore, there is no reason to require or allow tackling in the games when the alternatives that have been proposed equally fit the goals of youth sport.

The Sought Outcome

It must be accepted that there is a potential contradiction between the proposal here and the problem that was raised in Chapter One.²⁶⁴ There, the severity of the situation with concussion was raised, and it forms the basis for this thesis. It was made clear that the risks are significant, the full extent of these risks is unknown, and that the two sports in question might be on the precipice of a very serious situation unless they act or are compelled to act. The proposals in this sub-section would not eradicate the issue of concussion from these sports in the same way that an absolute abolition would. They would likely, based on the medical evidence identified earlier,²⁶⁵ have a significant impact on the rate of concussion injuries simply because the actions that lead to a high proportion of the concussion injuries would have been removed but concussion would still be a part of the games, albeit a greatly reduced part.

There are two primary reasons for advocating this approach, consistent with the previous analysis of the laws of negligence.

First, it has been seen that the nature of the duty as framed is important and that when a new duty is established it must follow the principles of both incremental development and a focus on the assumption of responsibility. Currently, there is no framed duty of care upon organising bodies and to take a leap from that position to one where they must ensure that there is no concussion, would not be following an incremental approach. Rather, it would be reverting to the *Anns*²⁶⁶ era where large leaps were taken toward establishing liability. This is particularly the case as the full extent of the problem is not yet clear.²⁶⁷ For the courts to impose a duty to reasonably act to prevent concussion injuries, by following the actions set

²⁶⁴ Ibid 14

²⁶⁵ Ibid 24

²⁶⁶ *Anns v Merton LBC* [1978] AC 728.

²⁶⁷ Ibid 32.

out, would not prevent, in the future, a court taking a further step which could go further and could result in the abolition of these sports. Taking this more limited step now would be consistent with the principle of incremental development and would not limit the potential for future extension of the duty of care.

Secondly, the principle that was utilised in *Watson*²⁶⁸ of assumption of responsibility is also satisfied by the more restricted approach. It has been seen that this becomes relevant when an individual or an organisation places themselves in a position where they take responsibility for a series or sequence of events. It was clear in *Watson*²⁶⁹ that the organising body took responsibility for the medical arrangements, and this applies equally to the rules of the sport. However, as has been seen, one argument that is often raised against imposing a duty of care is that the players accept some risks and that they should not be prevented from engaging in their sport if they are aware of the risks. It will be seen later²⁷⁰ that consent is tenuous argument here, but as it is clear that participants are prepared to take some risks, there is a strong argument, at least at the moment, to say that absolute abolition is not the appropriate measure and that instead a duty to reduce the main risks to the extent that is possible is the better solution, so long as the players are afforded the opportunity to be aware of the risks that they are taking. The next subsection deals with education and it is clear that the duty to make rules in such a way that minimise the risk of concussion must also be accompanied by a duty to ensure that the players are sufficiently educated about the risks.

Option 3- Education of Players

The third option, which should be seen as supplemental to the rules changes but, if the courts were to draw a narrower duty, could also be seen as an alternative, albeit a less effective standalone response, is to require the education of sporting participants and those who are involved in the training of players. Recent data that was gathered did not demonstrate a strong presence of existing education within football, with 40% of respondents stating that

²⁶⁸ Ibid n. 9.

²⁶⁹ Ibid.

²⁷⁰ See Page 230.

there was no education and 22% stating that they were not sure.²⁷¹ The figures were a little better for player (as opposed to non-player) education with 38% stating that it was not delivered and 15% stating that they were not sure.²⁷² The study acknowledges that this does not take into account pre-existing knowledge or other knowledge that they may gain independently, but the numbers suggest that there remains a significant gap in knowledge which cannot be appropriate when weighed against the significance of the risk.

This is absolutely something that can be dealt with by governing bodies, and indeed is an integral part of professions including solicitors, barristers, and accountants. These professions require a certified level of competence before entering the profession and thereafter a continuing education to ensure that their knowledge remains at an appropriate level. The rationale for this is that such education is necessary to retain the necessary levels of knowledge to protect themselves and also those with whom they come into contact, and this would be appropriate considering the risks that the participants are exposing themselves to when they play. Anderson proposed, in respect of boxing, that the education programmes would incorporate information about the prospect of earnings and the risks of long-term injury, together with figures of those who succeed in breaking into the professional ranks of sports. Education could easily incorporate information about the risks, together with case studies of players who have experienced problems, together with continuing education on how to manage the risk and what to do if individual circumstances arise. Regardless of the extent to which the education is heeded, this would take the crucial step of helping the governing body to demonstrate that they are complying with their responsibilities to reduce the risk of concussion injuries in sports. There could, and should, also be additional assessments of the participants in order to ensure that the information has been understood rather than just heard, with regular re-certification of the players on an annual basis, to ensure that the players are as aware as they can be of the potential and probably consequences of their actions.

²⁷¹ Craig Rosenbloom et al 'Sport-related concussion practices of medical team staff in elite football in the United Kingdom, a pilot study' (2021) *Science and Medicine in Football*.

²⁷² *Ibid.*

Conclusion

It is clear that the status quo is very much against the concept of imposing liability for failing to amend rules in order to prevent injuries from occurring. In this vein, in 2016 Bunworth conceded, along with Beloff²⁷³ and Gardiner²⁷⁴ that the prospects of a current finding of liability are slim, but warned that the changing environment, with increased awareness of the potential for serious injuries may lead to a changing of attitude and a belief of the courts that “the risk of players suffering such brain injuries is no longer acceptable.”²⁷⁵ In view of the developments in medical awareness, and the low level impact of the changes to the sport that would be necessary, it is now the case that if the organising bodies do not react to the developments, and emphasise safety rather than simply “Considering risk as an integral part of the various dimensions constituent of human life”²⁷⁶ it would be appropriate for the court to incrementally extend the duty of care to require them to be proactive and not reactive.

Yet, this has emerged not from judicial activity but from judicial inactivity, as the question has not yet been answered (and has only recently been asked). The better situation to consider therefore should be whether there is a jurisprudential reason why liability should not be imposed. Indeed, it is contended in view of the points made here that the imposition of a duty would not be that much of a step for the law to take considering both *Watson*²⁷⁷ and *Wattleworth*.²⁷⁸ This can be emphasised when considering the analysis of the court in *Banco Nazionale*²⁷⁹ when establishing the circumstances in which the court will develop their jurisprudence.

One crucial point that has been made is that establishing that a duty should be present is not the same as identifying the nature of that duty, and this is something that will be returned to

²⁷³ Ibid n. 166, 151.

²⁷⁴ Ibid n. 2, 499.

²⁷⁵ Ibid n. 94.

²⁷⁶ Jairo Antônio da Paixão, Discobolul ‘Risk and Excitement in Adventure Sports in Nature’ – Revista UNEFS de cultură, educație, sport și kinetoterapie Anul VI nr.4 (22) 2010.

²⁷⁷ Ibid n. 9.

²⁷⁸ Ibid n. 107.

²⁷⁹ [2018] UKSC 43.

at the end of the thesis, after the nature of responsibility owed by the clubs and the individuals has been considered.

What can be said at this point is that there will have to be an element of control by the organising body, and so only matches that are, for want of a better phrase, sanctioned by the organising body. While control is not an absolute phrase, it can be said that a friendly park game, with no referees, will not subject an organising body to liability while a Premiership match will. The grey area in the middle will be considered more in the final chapter on the nature of the duty. It is also apparent that the duty will need to be more enhanced when it comes to children but that for adults there will need to be some deference to the idea of personal responsibility, and so the duty is likely to be closer to the exceptional cases than to the standard liability of the common law.

Chapter Five: Clubs, Coaches, and Competitiveness

Introduction

Chapter Four argued that professional bodies with responsibility for changing the rules of sports should be liable for a failure to intervene considering the developing awareness of issues with concussive and sub-concussive events. This chapter considers another potential Defendant in civil cases, the organisation one step further down the chain, the organisation which is responsible for the player themselves.

The two realities of litigation are that the party with most resources is most likely to be the primary litigation target as they are most likely to have available assets to satisfy any judgment. Likewise, the party with most power to effect change is most likely to have responsibility to make that change. This was why the governing bodies were examined in such detail; the extent of their capacity to have an impact is, at present, significantly greater than their liability to carry out changes.

In contrast to this, sporting clubs have less of an impact. A club that is a member of a league administered by the governing body cannot decide which rules they follow and which they do not. The rules are set by the governing body and from the perspective of the clubs, their responsibility is to ensure that those rules are followed.

Where they fail to follow the rules, then liability is certainly feasible, in the same way that a player is not protected from liability if their conduct goes beyond that which the rules permit.¹ It is not going to be argued that if the governing body states that tackling in rugby is permitted, a club should instruct its players to attempt to play the game on a different footing; this would not be feasible, and even if it were, at best it would lead to an inconsistent improvement in the situation that would be grounded in temporary assent rather than permanent change. Equally, if heading continues to be part of the game in football, it will not be argued that clubs

¹ *R v Barnes* [2004] EWCA Crim 3246.

should instruct their players to adhere to stricter rules that put them at a disadvantage, and the clubs may as well not field a team at all.

There are, however, situations where the clubs can be liable for their actions and legal frameworks in place that do leave scope for clubs to be legally responsible for their actions, and these can be discussed in the context of concussion injuries. It will be argued that the existing laws, if utilised, provide the scope for liability to be attached to clubs, and that there is a case for a change in legislative or judicial direction in order to go further in ensuring the safety of the players.

In order to address these points, the chapter will analyse the two primary mechanisms for liability in respect of clubs and then examine the significant areas of controversy that exist, with a focus on the culture of 'winning at all costs' and the need for the courts to engage with this culture in order to ensure that there is full and appropriate protection.

Why should the clubs be liable?

It is reasonable to ask, why are the clubs even being considered? After all, a strong case has been made to say that the sporting bodies should be held liable for failing to establish appropriate rules. There are three reasons for considering the clubs in addition to the sporting bodies. First, the possibility of liability in one direction does not preclude the possibility of liability in another, and it may well be that individual clubs are better placed to be Defendants than a governing body, particularly as the extent of responsibility would be to a far narrower class. For example, the football governing body would owe a duty of care to every football player in the game, but Chelsea Football Club, by comparison, would only owe it to their squad of players. This might make the employer a more attractive Defendant, from a purely financial perspective,² as well as nullifying any of the previous concerns of foreseeability that were seen in attaching liability to a governing body.

² It might also be considered whether the financial resources of a large, billionaire backed employer, may be more attractive than a governing body, even one backed by insurance.

Secondly, the scope of jurisdiction for the governing body is not absolute. They can control the rules of the game itself and it can be argued that they can have some limited influence over the training systems in place by the clubs, but many aspects of the day-to-day activity of sports will still be in the hands of the clubs, and it is these actions that will have an impact on the welfare of the players at that club. Two clubs may feasibly follow the same laws of a game and yet their approach may be tactically very different, an example that will be seen later in the Chapter.³ It will be argued that where a club takes an unreasonable approach to the rules that have been set down, there is, and should be, a potential path to liability.

Finally, and with specific relevance to the sporting culture, the clubs are the ones who choose their own philosophy and approach to the game. This may be guided by the rules of the game and by social imperatives, but the standards that are set by the governing bodies are only as strong as the spirit with which they are implemented. It will be seen that there is clear guidance as to the protections that employees have, and this is far stronger than the protection the players have been argued to have against the governing body. It is therefore appropriate to ensure that the players have recourse not only against the wider sporting body, which owes them a general duty, but also against their own employer which owes them a specific duty.

It is true that in the context of the main question in this thesis, which is whether there is or should be a legal obligation to prevent concussion injuries as opposed to treating them, the employer has less opportunity to impact on the debate. Concussion will be part of the game, or it will not be, and that decision is outside their realm of influence. However, it will be seen that they still have a part to play and while the impact of their decision making may be less, it is not insignificant.

The Two Protections for Employees

³ See Page 226

It is clear that while athletes may be different to other types of employees, they retain the same benefits and protections that are afforded to other employees.⁴ Specifically, they have the right to be protected from the negligence of their employers and clubs have a responsibility, as far as is reasonably practicable, to ensure the health and safety of their players.⁵ There are two ways, typically, that employees can protect themselves against the actions of an employer. The first is by statute, with the Health and Safety at Work Act 1974 providing protections for an employee in specific situations, and the second is the common law of negligence, which has already been considered in the previous chapter. As the statute is the more specific of the two, it is this that will be analysed first.

Statutory Protections

The chief bulwark for employee's safety in statute is the Health and Safety at Work Act 1974 which provides that "it shall be the duty of every employer to ensure so far as reasonably practicable, the health and safety and welfare at work of all his employees."⁶

This phrasing has caused significant discussion within the wider employment law community, and judicial analysis, but certain crucial points have emanated from it. In particular, the legislation is unclear as it relies on the key phrase of 'reasonably practicable' which can cause difficulties in evaluating what should be done to ensure the health and safety of people within their sphere of responsibility. This has the potential to lead to both confusion for the clubs, and uncertainty in assessing whether or not an action is sufficient to satisfy this test. The clubs can only be expected to comply with the law as it is, and therefore the existence of ambiguity in this section is unhelpful.

⁴ Simon Gardiner et al, *Sports Law* (4th edn, Routledge, 2012), 394 and 418.

⁵ Management of Health and Safety at Work Regulations 1999, Schedule 1; Safety, Health and Welfare at Work Act 2005 (Ir), Schedule 3; Joanne Kirby 'Employers' Liability and Concussive Injury in Professional Rugby Union: The application of Health and Safety Legislation to concussive injury in professional Rugby Union in the UK and Ireland' (2015) 13 *The Entertainment and Sports Law Journal* 2.

⁶ Health and Safety at Work Act 1974, s 2.

However, it is also clear that the duty is firmly on the employer to identify relevant dangers, and to take steps to address them.⁷ Kirby notes that the employer cannot simply bury their head in the sand, and let the situations develop, instead they must be proactive in seeking to deal with situations that are a logical consequence of the work of the employee. This fits the concussion situation well, as this interpretation of the legislation would not permit the employers to simply wait for the governing bodies to act. Instead, they would be required to investigate ways in which the risks can be managed internally and takes appropriate steps to minimise those risks.

There is another significant advantage for potential litigants using the statutory claim. It will be seen in Chapter Six⁸ that consent of the participant is a defence that is central to claims of negligence. This, however, does not assist the employer in the statutory claims. Instead, the approach is that if the employee should have been aware of the risk, then so should the employer and they should have taken steps to prevent it from occurring.⁹ This factor alone makes potential liability on a statutory basis potentially more attractive than the common law approach.

There are clear parallels with the non-sporting world where this can be relevant. The legislation specifically envisages that the employer's focus should not be solely on their own benefit but on the working environment. Imagine a situation where the highest performing employee of a financial institution phoned in with a serious illness the day before a crucial, multi-million-pound contract. It is unquestionably in the best financial interests of the company for the employee to attend the meeting, but it is unquestionably in the best interests of the employee that they rest and recover. In that situation, the employer would be expected to ensure a safe working environment, irrespective of the cost to them, or even the wishes of their employee. The statutory framework is in place in order to protect employees from themselves, as much as it is from others, with Kirby¹⁰ quoting Jowitt J stating

⁷ Joanne Kirby 'Employers' Liability and Concussive Injury in Professional Rugby Union: The application of Health and Safety Legislation to concussive injury in professional Rugby Union in the UK and Ireland' (2015) 13 The Entertainment and Sports Law Journal 2.

⁸ See Page 249.

⁹ *Ibid* n. 7, 2.

¹⁰ *Ibid* n. 7, 2.

that “the statutory duty has, as one of its objects, the protection of workers who may be neglectful of their own safety in a way which should be anticipated.”¹¹ Crucially, therefore, a player can choose to be as contemptuous of his or her own safety as they wish, but an employer who allows them to do this, or, worse, encourages it, will be significantly at risk of being held to have breached their statutory obligations.

This is important for two reasons. The question of whether the risk of concussion is one that is now clear on the basis of the science, has previously been answered.¹² This is bolstered by the lower threshold in respect of the legislation. Kirby notes that the previously discussed controversy over whether there is a conclusive link between the sporting actions and the concussion injuries are not relevant in this context. Instead “the appropriate question is was there a risk of which the employer was aware of ought to have been aware?”¹³ The question then becomes what they should do about it and whether they are doing all that is needed. Kirby suggests several practical mechanisms that would be feasible for clubs and that might have some impact, the majority of which seek to reduce the chances of a concussed player re-taking the field, increasing recovery time, and seeking to reduce the chances of undetected concussed player being asked to play before an appropriate rest period.¹⁴

One of the proposals suggests assessing whether a reduction in collision impact training would be effective, and this reaches the significant problem with the second part of this piece of legislation which limits the actions of the employer to that which is reasonably practicable.

¹¹ *R v Patchett Engineering* [2000] Lexis Citation 2928, 17.

¹² *Ibid* 15.

¹³ Joanne Kirby ‘Employers’ Liability and Concussive Injury in Professional Rugby Union: The application of Health and Safety Legislation to concussive injury in professional Rugby Union in the UK and Ireland’ (2015) 13 *The Entertainment and Sports Law Journal* 2.

¹⁴ 1. Carry out a risk assessment of their concussion management and education systems, 2. Remove a player if there is a suspicion of concussion and place them in a graduated return to play protocol, 3. Establish video footage and live feeds linked to medics to enable them to monitor players, 4. Use independent specialist doctors to determine whether a player should be removed, 5. Mandatory, comprehensive education of all employees, including players, of the risks of concussive injuries, 6. Limit the possibility for players to manipulate data to increase the chances of being cleared to play, 7. Carry out risk assessments for every player, 8. Collate data on head collisions within a season and rest a player once they reach a certain number of head injuries, 9. Consider reducing collision impact training sessions, 10. Create their own concussion management protocol. Management of Health and Safety at Work Regulations 1999 Schedule 1; Safety, Health and Welfare at Work Act 2005 (Ir), Schedule 3; Joanne Kirby ‘Employers’ Liability and Concussive Injury in Professional Rugby Union: The application of Health and Safety Legislation to concussive injury in professional Rugby Union in the UK and Ireland’ (2015) 13 *The Entertainment and Sports Law Journal* 2.

This is the strongest proposal by Kirby¹⁵ with the potential to reduce the prospect of concussion injuries occurring in the first place. In some sports, for juniors, this has already taken place¹⁶ as a direct response to the increased concerns around dementia. However, the previous discussion identified the difficulties with this, as a reduction in training has the potential to lead to a reduced competence in the skill; if the action itself remains part of the game, then it can be argued, cogently, by the employers, that removing the skill from training sessions could be negligent on their part if it leads to the players being unable to perform that skill safely in training. Certainly, they could argue that it is not practicable for them to have to do it, as it would place their players at a disadvantage when competing with other employers who do practice the skill. It is feasible that such a requirement would not be held to be reasonably practicable, unless the skill itself is removed from the game.

What is clear from Kirby's list of possible measures that can be taken, is that there is an overall theme that emanates from them. This theme is that the player welfare is the priority, not the game itself.

A manager does not decide whether to remove a player, an independent doctor decides.

A manager does not decide whether to rest their star player, an independent doctor decides.

A manager does not ask a player to play through the pain; an independent doctor decides.

This theme will be returned to in the second half of this chapter, arguing that by requiring the clubs to make every decision with the player's welfare at its heart, an action which is entirely practicable, this legislation can have real impact, even though it runs contrary to the approach that seemingly is very much the convention.

Common Law

¹⁵ Ibid n. 7, 2.

¹⁶ BBC News 'Heading ban for children during football training' (*BBC News* 25 Feb 2020).

General Approach

Statutory protection, as stated previously, has the advantage to potential litigants of being drafted specifically to protect the rights of employees in the workplace and the burden is on what the employers can do rather than whether the employee chose to accept them. By contrast, the common law is far wider in scope with greater opportunity for flexible arguments but is also more constricted as any consideration of the test must be considered in light of the argument that the employee chose to accept the risks, a discussion which will be analysed in the final chapter.

The key analysis in these areas again falls back to the type of test that was examined in *Watson v British Board of Boxing*:¹⁷ to what extent has the Defendant assumed responsibility and to what extent does the player rely on free will.¹⁸ It is evident that an employer owes some duties to their employee.¹⁹ In other situations, however, this will not be as clear, and the further from clarity that the situation moves, the harder it is, currently, to establish liability.²⁰

The general approach of the common law in sporting cases can be epitomised by *Sutton v Syston Rugby Football Club Ltd*.²¹ Here, the Claimant injured himself when tripping over an obstacle on the pitch. He claimed that the employer had been negligent in failing to inspect the pitch before the session. The court agreed that an inspection was required but also ruled that only a “reasonable walking inspection”²² was required. The court found that this would not have revealed the obstacle and therefore the employer had not been negligent. The court emphasised, in ruling that the duty was not to prevent injury, or even take comprehensive efforts to prevent injury, that “It was important that standards were not laid down that were too difficult for ordinary coaches and match organisers to meet.”²³ Already with this case it can be seen that there is a significant deference to the employers in considering their

¹⁷ [2001] Q.B. 1134 CA.

¹⁸ William Norris QC, ‘A duty of care in sport: what it actually means’ (2017) 3 JPI Law 154.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ [2011] EWCA Civ 1182.

²² *Ibid.*

²³ *Ibid.*

responsibilities, even lower than the requirement in statute that it be reasonably practicable. If the statutory standard had been applied, it is unlikely that the Defendant would have succeeded as it could easily be seen to be reasonably practicable that an employer ensure that the pitch is free of obstacles that might cause injury.

This approach has at times been justified by reference to section 1 of the Compensation Act 2006 which states that:

“A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might–

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity.”²⁴

In *Sutton*²⁵ the court held that rugby was a desirable activity, and Longmore LJ went further in expressing that the result was unfortunate for the Claimant but that it was important to consider the wider importance of rugby as a sport.²⁶ This defers to the traditional approach which has permeated through this thesis; the idea that sport is special, that it serves a special service and that the individuals participating should have a higher burden placed upon them than in another field of activity.

These arguments have not been uniformly accepted and do not appear to coalesce with the purpose of the Compensation Act 2006, a point that is noted by Ettinger who emphasises that “it was common ground that no further point should be taken regarding s.1 and that this did

²⁴ Compensation Act 2006, s 1.

²⁵ *Ibid* n. 21.

²⁶ “I recognise that this will be a great disappointment to Mr Sutton but hope that he can appreciate that this court has to look at the case from a wider perspective than just his own injury and must not be too astute to impose duties of care which would make rugby playing as a whole more subject to interference from the courts than it should be.” *Ibid* per Longmore LJ.

not undermine, in any way, the common law duty of care imposed in this particular case,”²⁷ effectively therefore it was not part of the case determination and it was surprising that the court had taken it into account in the determination of the case. Williams goes further to note the background of the Act, as the then Prime Minister Tony Blair fought a battle against a perceived compensation culture,²⁸ a point also made in *Wilkin-Shaw v Fuller*.²⁹ The Act itself, therefore, was born from a very specific atmosphere which does not seem to accord with the facts of *Sutton*.³⁰

It is difficult to draw a parallel between someone ignoring signs and diving into a shallow pool, which was the case in *Tomlinson v Congleton BC*³¹ with an employee carrying out his job, and necessary functions in order to prepare effectively for that job. Yet the approach in *Sutton*³² does underscore the concern that the courts have with scrutinising too closely the actions of clubs as employers, even though the legislation that is used as an excuse is barely designed for that purpose.

Specific Areas of Common Law: Raising Concerns with Players

There are, of course, some absolutes where employers will be liable for injuries, or worse, to their employees. It has been established that when a club carries out a specific action, they are deemed to have assumed responsibility for the competence of that action. This was demonstrated in *Hamed v Mills*,³³ aptly described by Hickinbottom J as a case of “tragedy writ large”³⁴ where the medical department of Tottenham Hotspur football club failed to follow appropriate procedures upon accepting a young player into their Academy, leading to potential heart disease not being identified to both the parents of the player and the player

²⁷ Colin Ettinger, ‘*Sutton v Syston Rugby Football Club Ltd: personal injury - liability – causation*’ (2012) JPI Law 2012, 1, C20-22.

²⁸ Kenneth Williams ‘Politics, the media and refining the notion of fault: section 1 of the Compensation Act 2006 Liability fears and real-world effects’ (2006) J.P.I. Law 2006, 4, 347.

²⁹ [2012] EWHC 1777 (QB).

³⁰ *Ibid* n. 21

³¹ *Tomlinson v Congleton BC* [2003] UKHL 47.

³² *Ibid* n. 21.

³³ [2015] EWHC 298 (QB).

³⁴ *Ibid*.

himself. Shortly after joining the Academy the player suffered long term catastrophic brain damage following a cardiac arrest.

The claim, brought by the victim's parents, was based on negligence both as an employer to an employee and a doctor to a patient,³⁵ and in neither case did the court have difficulty in establishing that there had been a breach of duty. The court were at pains to note that the duty of the employer to the employee is to take all reasonable steps to protect him from reasonably foreseeable injury during the course of the employment,³⁶ and emphasised that the more serious the potential injury the greater the burden upon the employer to respond to that risk. The case of *Hamed*³⁷ is one that could potentially be of concern to employer clubs in the context of concussion injury because the factual matrix can be seen as analogous. In both situations there was a potential risk to an employee-player; in the determined case one specific player and with concussion, all players at the club. In both situations, the club has a decision to make as to what they do with the information that they had. In the case, they chose to keep the information to themselves, actions which meant that in respect of their duties as a club, they had "singularly failed."³⁸ In doing so they had failed to allow the victim, and his family, to make an informed decision.

The question therefore is whether, if a case were brought, the courts would take the view that this duty applies only when an individual player has specific, identified concerns, as in the *Hamed*³⁹ case, or whether this duty would apply if a risk applied to all players, or all players with particular vulnerability to the situation. Neither are a precise replica of the situation, but both have significant similarities, and it is certainly arguable that the clubs could be required to provide their employees with informed consent of the potential dangers of concussion, with additional and individual information being provided to players where medical scans demonstrate a particular vulnerability. It must be said, however, that this is untested territory, as *Hamed*⁴⁰ is a first instance decision that was not appealed, and the

³⁵ With any liability arising from this being traceable to the club in any event through vicarious liability.

³⁶ *Wilson and Clyde Coal Co v English* [1938] AC 57 and *Harris v Brights Asphalt Contractors* [1953] 1 QB 617).

³⁷ *Ibid* n. 33.

³⁸ *Ibid* [84 (ii)].

³⁹ *Ibid*.

⁴⁰ *Ibid*.

nature of sports means that these points have not been discussed in the higher courts; as has already been discussed, in sports the injuries are normally clear and obvious rather than insidious.

Specific Areas of Common Law: Competence of Coaches in Training

In the context of the coaches, it is clear that there is also a professional standard to be adhered to, certainly in the higher echelons of sport. The normal principles of negligence would inevitably apply, with the test being to demonstrate that the conduct of the coaches had not met the required standard in guarding against reasonably foreseeable risk. Partington emphasises that the particular skill set of coaches would likely push them into the professional category⁴¹ which would require them to meet the standards of a person with their skill set as opposed to an ordinary person carrying out those duties.⁴² This is emphasised by *Anderson v Lyotier*⁴³ where the court assessed the decision making process of a ski instructor following the tragic injuries to the claimant attempting to ski down a slope that was beyond his capabilities. It is clear from the judgment that Foskett J did not believe that the instructor was a bad instructor and emphasised that this was a momentary loss of judgement or “taking his eye off the ball.”⁴⁴ Yet the question was whether in that incident the injury was reasonably foreseeable, and the court found that it was.⁴⁵

This creates a cascade effect of liability that is normal within such an environment, with the club being responsible to their employees to ensure that the staff hired to train them are

⁴¹ Pat Duffy et al., ‘Sport coaching as a ‘profession’: challenges and future directions’ (2011) 5(2) International Journal of Coaching Science 93; Bill Taylor and Dean Garratt, ‘The Professionalisation of Sports Coaching: Relations of Power, Resistance and Compliance’ (2010) 15(1) Sport, Education and Society 121.

⁴² J Powell J and R Stewart *Jackson and Powell on professional liability*, (7th edn. Sweet and Maxwell 2012); *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 586 per McNair J.

⁴³ [2008] EWHC 2790 (QB).

⁴⁴ Ibid.

⁴⁵ the test is whether, looked at prospectively and objectively, the terrain in the condition that it was in was a reasonably safe piece of terrain for all members of this group. Was it reasonably foreseeable that any one of these three individuals would have fallen or lost control of their skis when negotiating this terrain? The answer is “yes”. That, of course, is not a determinative factor in relation to breach of duty: even the most skilled skier will fall from time to time. However, the next issue, in my judgment, is determinative in this case. If, as I have concluded, it was reasonably foreseeable that a member of the group might fall or lose control of their skis, was there a reasonably foreseeable risk of impacting with a tree in consequence? The answer too is plainly “yes” given the presence of the trees as the evidence demonstrates. *Anderson* Ibid.

competent, and the coaches being responsible to carry out their duties with an appropriate standard of care. Obviously, the cascade then completes a full circle as vicarious liability for the actions of the employees would attach, in most circumstances, to the employer.

This duty becomes particularly relevant as they have a clear duty to comply with the rules of the sport. If, for example, the sporting governing bodies were to implement a rule change, along the lines of those that were sought in the previous chapter, then the club would clearly be failing in their duty to their employees if they still insisted on preparing them for challenges that no longer exist.

This, however, leaves a significant gap for if the rules remain the same, then the same question must be asked as was asked of the governing bodies. Can the clubs make the situation safer for their players and, if so, how can they do it, and should they be compelled to do so? The balance of this Chapter will argue that under the current test and given the same level of awareness that the governing bodies have, it is an inescapable conclusion that the tests enumerated should be construed in a stricter fashion than they currently are.

The Rugby World Cup in 2019 saw an interesting argument between the Australian captain Michael Hooper and the referee in charge of their match against Wales, Roman Poite. In the game, Wales player Rhys Patchell attempted to tackle Samu Kerevi and the latter ended up making contact with the Welshman's head. The referee chose to penalise the Australian, with Hooper arguing that "That is just terrible tackle technique and he's just done a very good carry."⁴⁶ The argument was that although contact had been made by the Australian, the reason was that Patchell lacked the ability to tackle correctly, or at least had failed to execute his knowledge correctly. Had he used the correct technique then there would have been no risk to his head, and consequently no penalty.

Irrespective of the merits in that particular case, the broader point raises a critical question which is whether there are any requirements that the players who take to the pitch are

⁴⁶ Nathan Williamson, Rugby World Cup 2019: Greats blow up after 'embarrassing' refereeing decisions', (*Sporting News*, 29 September 2019).

competent to perform their duties. This is a point that is already embraced by the governing bodies in certain, so-called specialist positions, where a lack of understanding can cause significant injuries. Therefore, in the event of a front row forward being taken off for whatever reason, the team must, if they can, replace that player with a specialist front row forward. If they do not have such a specialist, then the rules state that scrums from that point on will be uncontested.⁴⁷ It can be argued that teams have sought to use this to their advantage if they find themselves weaker in the scrummage area, but crucially World Rugby has accepted that there are situations of considerable risk, where players must be fit for purpose.

This position, at amateur level, has been supported by the law; if a referee fails to ensure that the correct levels of expertise are present, then they risk liability in tort for negligence.⁴⁸ In this case, the referee in question was found to be liable and as such vicarious liability would obviously attach, but it is important to consider whether it would be possible to go one step further. If a player takes to the pitch and is incompetent to carry out their duties effectively, should liability attach to them, or to the person who was responsible for training them? In the context of a player who injures another, the law is clear that liability would attach to the player who has committed the injury. However, as in the case of Patchell, the player who, according to Hooper, used an incorrect technique was also the player who suffered the injury. Clearly the player cannot hold himself liable in law, so the question becomes can a player who suffers injuries because he has not been trained properly claim against the coaches, and by extension the employer club, who had the responsibility of training him.

There is no question that coaches must assume reasonable care when assuming their duties, obviously within the context of their specific role.⁴⁹ This has previously been seen in the context of *Fowles v Bedfordshire County Council*⁵⁰ where the court emphasised that where an individual has placed themselves in a position to train someone, and to raise awareness of the dangers, then they have a legal obligation to fulfil that duty. If a player can demonstrate

⁴⁷ Laws of Rugby Union, 2021, Rule 3.8.

⁴⁸ *Voyles v Evans and Others* [2002] EWHC 2612 (QB).

⁴⁹ Michael Beloff et al *Sports law* (2nd Ed Hart 2012); Adam Lewis and Jonathan Taylor *Sport: Law and Practice* (Haywards Heath: Tottel), 711-752. Mark James *Sports Law* (Palgrave-Macmillan 2017), *Fowles v Bedfordshire County Council* [1996] ELR 51; *Anderson v Lyotier* [2008] EWHC 2790; *Morrow v Dungannon and South Tyrone Borough Council* [2012] NIQB 50.

⁵⁰ [1996] ELR 51.

that they have either not been taught how to carry out a sporting action correctly, whether that is to head the ball in football or to tackle correctly in rugby, and they suffer injury because of that failing, then they will have a legal action.

The specific question here, however, is whether it can be said that the coaches have any specific responsibility in respect of concussion injuries. A crucial problem that the clubs, and the coaches that the clubs hire, have here is that, as has been argued consistently in this thesis, carrying out the action correctly may reduce the chances of concussion injuries, but it is the actions themselves that need to be addressed.

This creates a paradox. On the one hand the employer is responsible for creating a safe working environment. On the other hand, it is not practicable for them to instruct their players not to follow a key rule of the game that they are playing. As the law stands, it is not possible to argue that coaches can be liable if a player suffers a concussion injury because of training that adequately instructs the player on how to carry out a manoeuvre.

There is, however, a crucial aspect that is missing from this equation, and that is the motivation of the player. In theory, it is possible to see sport as a mathematical calculation. An attacking player is running towards the try line with the ball. The defender player is 10 metres away from him. If he runs as fast as he can then he will get in front of the attacking player and be able to make a try saving tackle in accordance with the training manual. The tackle will be around the legs, with no contact to the head and therefore there is a very limited chance of suffering or causing a concussion injury. The player therefore carries out the manoeuvre.

The problem with this analysis, of course, is that it is utopian and unrealistic. By the time the player has made those calculations, the attacker will have scored the try, it will have been converted and celebrated. Therefore, the player will be relying on instinct rather than calculation; is the priority health and safety or is the priority to prevent the score? The balance of this chapter will argue that the courts need to be far more robust in such situations, and that a reliance on 'survival of the fittest,' a concept that is glorified by film and television productions, should not be tolerated by the courts and that liability should attach when it is

established that the employer club have been fostering an atmosphere of ‘winning at all costs’.

Why this is Weak

The fundamental weakness of the existing framework is that it has “yet to be fully scrutinised, allowing only speculative conclusion”⁵¹ with Gardiner discussing how the principles have yet to be developed with any substance.⁵² This is consistent with much of this area of law, where it is necessary to consider a test, that on the face of it seems appropriate, facts that, on the face of it seem to fit, and an absence of precedent that seems to fly in the face of reason. It is trite to say that an untested law is, by definition, weak, even if it has potential strength, representing the “age old problem”⁵³ of predicting what conduct would be seen as negligent and what would not.⁵⁴ It has already been seen with the NFL litigation⁵⁵ that there are many reasons for a case not reaching court, whether because of settlement or a lack of resources to pursue a case. Yet, in the absence of supportive authority, it must be considered whether or not a stronger weapon is needed to protect players from the unreasonable conduct of their employers.

Even the case of *Anderson*,⁵⁶ which appears to be of some assistance, is of less value than at first glance, as it has been noted that permission to appeal the decision of Foskett J was granted and that the case was settled before the appeal was heard⁵⁷ with the value of the decision being described as “limited”⁵⁸ given its status as both a decision at first instance, and so non-binding, and having had leave to appeal against the decision granted.⁵⁹

⁵¹ Neil Partington ‘Legal Liability of coaches: a UK perspective’, (2014) 14 In Sports Law J 232.

⁵² Simon Gardiner et al *Sports Law* (3rd Edition, Cavendish Press 2006).

⁵³ Annette Morris, ‘Common sense common safety: the compensation culture perspective’ (2011) 27(2) Journal of Professional Negligence 82.

⁵⁴ Ibid.

⁵⁵ Ibid 141.

⁵⁶ Ibid n. 43.

⁵⁷ ML ‘The duty of care owed by instructors in a sporting context’ (2010) 4 JPI Law 184.

⁵⁸ Ibid.

⁵⁹ Leave to appeal specifically referred to whether the test that was applied was too low: "1. It is arguable that Foskett J may not have applied the correct legal test for negligence. 2. The test he applied was to ask [118] "Was it reasonably foreseeable that any one of these three individuals would have fallen or lost control of their skis when negotiating this terrain" and, if so, "was there a reasonably foreseeable risk of impacting with a

The articles discussion of this approach focussed on the need to distinguish between medical negligence cases, where it will normally be clear that a wrong decision will lead to significant problems,⁶⁰ and sporting cases where this may not be the case. In this particular case it was contended that there was no particular additional risk; there might have been an additional risk of losing control, but this was a risk on any slope, regardless of difficulty.⁶¹ Marshalling various cases in support of this contention,⁶² the article concludes that the correct test would be whether the actions were likely to result in injury or whether it created an additional risk of injury.⁶³

Crucially, of course, this was never determined; the result of the first trial and the possibility of a successful appeal led to settlement.⁶⁴ Yet it underlines the uncertainty that exists within the law, and this uncertainty needs to be rectified, although it is only recently that it has been suggested that this is unlikely.⁶⁵

The Scope for Additional Liability

It is an inevitable reality of sport that participation will lead to injury.⁶⁶ Sometimes this will be through the fault of the players, sometimes the coaches,⁶⁷ sometimes sheer dumb luck, or

tree in consequence". He answered both questions in the affirmative and further held [133] that "there was a foreseeable risk of serious injury if anyone fell on this slope in the vicinity of the trees". On that basis Foskett J found that there had been a breach of duty from which liability followed. 3. The Appellant asserts that reasonable foreseeability is on its own too low a threshold for determining whether a duty has been breached and submits [skeleton, para 17] instead that "The proper question for the learned judge was: did bringing the claimant to the accident slope carry with it an unacceptably high risk of serious injury?" 4. It is arguable that in the context of a sport involving a risk of injury the judge's test imposes too low a threshold." ML 'The duty of care owed by instructors in a sporting context' (2010) 4 JPI Law 184-185.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *Morris v West Hartlepool Steam Navigation Co* [1956] A.C. 552, *Bolton v Stone* [1951] A.C. 850, *Whippey v Jones* [2009] EWCA Civ 452, *Orchard v Lee* [2009] EWCA Civ 295, *Perry v Harris* [2008] EWCA Civ 907.

⁶³ Ibid n. 51.

⁶⁴ Lord Dyson, Master of the Rolls. 'Compensation Culture: Fact or Fantasy?' Holdsworth Club Lecture 2013), Patrick Atiyah *The damages lottery* (Hart 1997).

⁶⁵ Neil Partington 'Sports coaching and the law of negligence: implications for coaching practice' (2017) 6:1 Sports Coaching Review 36-56.

⁶⁶ Robyn Jones and Kieran Kingstin (Eds) *An introduction to sports coaching: Connecting theory to practice* (London: Routledge, 2013) 187.

⁶⁷ Ibid n. 65

lack of this elusive quality. An argument cannot be sustained that it is the responsibility of employer clubs to prevent all injuries, nor can it be argued that they are responsible for asking their players to do anything other than follow the rules of the game. If the governing bodies keep the relevant element of the game, then a different path must be considered to argue that the clubs can be liable.

To consider this, the logical starting point is to ask where their spheres of influence exist. It has already been seen that there may be a broader duty on them to inform and educate their players, and to ensure that their coaches coach in a competent and professional fashion. Both of these have not been established in respect of concussion injuries specifically but are not a significant jump from the existing situation.

There is, however, an additional area that is more novel, but is potentially very important. Sports are not an automated system whereby the coaches feed information into a machine and the players produce output. There is a prevalent atmosphere around the club, instructions to players, and a mentality that is fostered. This has been touched on in Chapter Two when analysing the consequences of concussion injuries but can be developed here as an argument that clubs should be liable if they do not promote, and ensure that they implement, the importance of player welfare over the desire to win.

Norris notes that this has not been addressed by the courts to any great extent and discusses situations where a representative of the club⁶⁸ instructs the player to do an act, “without much regard for the harmful consequences.”⁶⁹ Potential examples of these are given by Rudkin who cites the return of Australian flanker George Smith to the field, groggy, after a large collision, and Chelsea goalkeeper Thibaut Courtois playing on for fourteen minutes after suffering a concussion.⁷⁰ The influence of the sporting competitor over the medical professional can be seen from the now infamous conflict between then Chelsea manager Jose Mourinho and then Chelsea physio Eve Carneiro. Carneiro went onto the pitch to treat an

⁶⁸ This vague language is used to reflect the complicated hierarchy within a sporting organisation, whereby in Club A instructions may be given by a manager, in Club B a coach, in Club C a doctor, and in Club D the Chairperson.

⁶⁹ William Norris QC ‘A duty of care in sport: what it actually means’ (2017) 3 J.P.I. Law 154.

⁷⁰ Thomas Rudkin ‘Keeping your head - concussion in sport’ (2015) 26 Ent. L.R. 37.

injured player, necessitating his removal and the reduction of the team to nine players. Mourinho later called her “naive”⁷¹ and, it was alleged, removed her from her primary duties.

In all three of these cases, the need to win outweighed the need to heal, and although Carneiro received vindication following an employment tribunal case and settlement, the question of the player’s wellbeing was not addressed through the courts.

This scenario, in a wider context, has also been the subject of academic discussion considering the different ways in which a player can be pushed into a danger zone for their own health. Kavanagh’s study of maltreatment in sport noted that “physical abuse and Forced Physical Exertion”⁷² was one of six identifiable mistreatments of athletes, and describes situations where coaches “pushed performers beyond their capabilities,”⁷³ in the case of the athlete in question leading to a career ending injury. Kavanagh’s research also discusses how the players react to this, suggesting that from a competitive perspective the tactic works, with another player noting a “male ego sort of thing, you go for it, you push yourselves because out of pride and determination you don't want to sort of see him beat you.”⁷⁴ Logically, this is reaction rewards the coaching tactics and further moves the athlete away from the safe zone and close to physical danger and harm. The assertion is that players will, and are encouraged to, play through the pain to achieve the goals of the team.

The examples that were provided earlier demonstrated a culture of winning at all costs, possibly embracing the accusations of fictional President Bartlett by his Director of Communications who warned of the dangers of the competitive drive, saying of the President that, “Let the poets write that he had the tools for greatness, but that his better angels were driven down by his incessant need to win.”⁷⁵ This eloquently summarises the constant athletic conundrum whereby there is a very fine line between best practice, poor practice, and illegal

⁷¹ BBC News, ‘Eva Carneiro: Chelsea doctor leaves after Jose Mourinho row’, (*BBC News* 22 Sep 2015).

⁷² Emma Kavanagh ‘The Dark Side of Sport: Athlete Narratives of Maltreatment in High Performance Environments’ (Phd Thesis Bournemouth 2014).

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ *The West Wing*, Season One Episode Five ‘The Crackpots and These Women’ Directed by Aaron Sorkin, Produced by John Wells Productions (1999-2006).

activity.⁷⁶ Without dwelling on the fictional setting, in that scene, the challenged action, using a ringer, was deployed by a character who otherwise is seen to have a strong moral code and who robustly defended his actions, even when it was pointed out that he had form for previously carrying out the same action and had no sporting acumen whatsoever, yet the competitiveness, the need to win, was prevalent. There are numerous possible reasons for this occurring, but Lyle makes particular reference to the absence of “empathy with or care and concern for the wellbeing of the other person”⁷⁷ or, as Lord Atkin might have put it, a lack of concern for his or her neighbour.⁷⁸ Partingdon⁷⁹ summarises a significant number of examples of coaches turning a blind eye to over-commitment,⁸⁰ demand a ‘win at all costs’ mentality in order to gain an edge on rivals,⁸¹ and utilise tactics that in other industries would be considered to be “grossly negligent.”⁸²

It would be reasonable to question whether it can be established as a matter of fact that this happens, as while conclusions can be drawn from spectators, only the participants themselves can know precisely what goes on behind closed doors. It is only when things go wrong that revelations tend to emerge, as occurred with the Bloodgate scandal.⁸³ Yet, some indication of the situation can be seen by one of the examples that is currently proceeding through the courts in France, involving the Canadian former rugby player, Jamie Cudmore.

Cudmore is suing his former employer, French elite club Clermont Auvergne, for whom he played between 2005 and 2016, alleging that they failed to properly safeguard his well-being and that they asked him to return to the field after suffering a head injury, due to another player in his position being unable to continue on the field. This occurred after they had initially told him that having failed a Head Injury Assessment (HIA) he would not be continuing.

⁷⁶ N Mahler ‘Medikamentenmissbrauch im Breitensport’ (2001) 58 *Ther Umsch* 226.

⁷⁷ Neville Cross and John Lyle (Eds) *The Coaching Process: principles and practice for sport* (Philadelphia: Butterworth-Heinemann 1999), 43.

⁷⁸ *Donoghue v Stevenson* [1932] AC 562.

⁷⁹ *Ibid* n. 65.

⁸⁰ Jay Coakley and Elizabeth Pike *Sports in Society: Issues and Controversies* (Berkshire: McGrawHill Education 2014), 160.

⁸¹ Lynn Jamieson and Thomas Orr *Sport and Violence: A Critical Examination of Sport* (Oxford: Elsevier 2009).

⁸² Thomas Hurst and James Knight ‘Coaches’ liability for athletes’ injuries and deaths.’ (2003) *Seton Hall Journal of Sports Law*, 13, 28.

⁸³ Helen Carter, ‘Bloodgate scandal doctor ‘pressured into cutting rugby player’s lip’ (*The Guardian* 23 August 2010).

Moving this from a French jurisdiction to a domestic setting, Cudmore would have two possible arguments. The strongest argument would be to say that there was a simple breach of the rules set down by World Rugby, which requires that “Any clear or suspected signs or symptoms of concussion MUST result in immediate and permanent player removal.”⁸⁴ The first part of the test would be preferable, as if it can be established that there was a clear concussion, then it would be difficult to see how the employer could argue that there was no negligence on their part. The difficulty is that, as has already been demonstrated, concussion symptoms can replicate other conditions and, as it is an internal injury, it is difficult to distinguish between other symptoms. It is difficult to argue that a concussion is clear, particularly in a very short examination. The second part of the test is far less obvious to interpret with any degree of certainty. A strict interpretation of the test would require that a player who has any of the possible symptoms to be removed, including a headache, blurred vision (including possibly because of the loss of a contact lens), or any of the other symptoms that can, but are not always, a precursor of concussion.

The test, as set down by World Rugby, is therefore exceptionally vague and gives a great deal of scope for subjective determination depending on the incident in question. Cudmore, now a coach, argues that the strict letter of the rule should apply, and that even a suspicion should result in the player being removed. However, at this current moment, the clubs can allow other factors to influence their decisions and, based on Cudmore’s experience, they do just that. In his case, faced with the choice of continuing with 14 players or fielding a fifteenth player with suspected concussion, they chose to play for the win, at the expense of the player.⁸⁵

Kirby refers to another incident, caught on video, where a Toulouse rugby player, Florian Fritz, left the field following a collision displaying “clear signs of concussion” including needing to be supported by other players as he left the field.⁸⁶ Following discussions with his coach, he

⁸⁴ Laws of Rugby 2021, Rule 3.10.

⁸⁵ Arthur James O’Dea, ‘I was puking in the changing room and told to go out to play again’ (*OTB Sports* 9 Dec 2020).

⁸⁶ *Ibid* n. 7.

returned to the field of play, without being prevented from doing so by either medical or coaching staff, and seemingly with the express consent of the head coach.

It is well established that certain activities fall clearly in the latter category, through doping offences, and these are already illegal within sports and thus any action by the clubs to encourage or mandate such actions would be, at best, negligent, if not fraudulent. Scholl et al considered this in discussing the dangers of using drugs that are not on the World Anti-Drug Agency Prohibited List⁸⁷ emphasising that the use of these drugs, for any purpose, could have the potential to cause serious side-effects.⁸⁸

Scholl's analysis of six international football events revealed an average of 0.63 substances being used per player per match, or approximately half of every team in every single game.⁸⁹ Scholl acknowledges that medicine has a key role in respect of rehabilitating players from injury and seeking to prevent injury,⁹⁰ but the question must be asked, who are these drugs aiding? A painkiller, by definition, exists to dull pain and allows the taker to continue with their normal activities. This does not mean that it is the best long-term solution for the body of the recipient. In the same way that giving a concussion sufferer aspirin may remove the headache symptom while not doing a thing to help the underlying cause, so the proliferation of painkillers can be seen to demonstrate the willingness of the club or, in that case national organisation, to play their player through the pain barrier, without sufficient regard for the long-term consequences.

Vick goes on to argue that there is an inevitable conflict between the club who want their best players to be playing as quickly as possible and the safety of the player, both in the short and long term, attributing this to the "amalgamation of sportspeople and revenue."⁹¹

⁸⁷ Phillipe Tscholl et al 'The Use and Abuse of Painkillers in International Soccer: Data from 6 FIFA Tournaments for Female and Youth Players.' (2009) 37(2) *The American Journal of Sports Medicine* 260.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Laurence Vick 'Sports injuries and the liability of doctor and club' (2015) 20(1) *Cov. LJ* 33.

It is not contended that this without the knowledge of the players, indeed Tricker's study into the use of drugs in basketball makes it clear that players took painkillers in order to play through the pain barrier and be able to continue performing.⁹² The question of the relevance of the players' consent will be considered in the final chapter, but the question here is whether this is an acceptable approach for the club to take and whether it is consistent with their duties as an employer. Indeed, in *Hamed v Mills*,⁹³ when the Dr Mills, the doctor with overall responsibility for the medical department of the football club, was asked by the parents of the player why they had not been informed of the cardiac risk, he allegedly replied⁹⁴ that "I couldn't take away a young boy's dream."⁹⁵

It could be said, perhaps, that this places too extreme a measure on the situation, playing to hyperbole rather than a more grounded explanation. Partington notes that "much contemporary coaching practice appears to be underpinned by emulation, intuition and tradition, or 'uncritical inertia'"⁹⁶ and that methods of coaching are followed because that is how they have been done for years, or because the coach has an instinct that this works for that player, with a form of "collective knowledge"⁹⁷ gathering that legitimises the practices of the coaching staff. Lines goes further in suggesting that it is "comprehensible" that coaches who are charged with pushing players to the limits of their abilities, both mentally and physically, might be "reluctant to take extra (reasonable) precautions in practice."⁹⁸ Other suggestions include the typical isolation of coaches, with many operating within their own fiefdom and thus being unable to unwilling to look beyond their own sphere.⁹⁹

⁹² Ray Tricker 'Painkilling Drugs in Collegiate Athletics: Knowledge, Attitudes, and Use of Student Athletes.' (2000) 30(3) *Journal of Drug Education* 313.

⁹³ *Ibid* n. 33.

⁹⁴ The court noted that this was the evidence of the player's mother, but that Dr Mills accepted that "he might have responded; thus, but it was in the context of a risk-benefit balance that he understood he was being asked to opine upon as a cardiologist." *Hamid* *Ibid* n. 33.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* n. 65.

⁹⁷ Christopher Cushion and Mark Partington 'A critical analysis of the conceptualisation of 'coaching philosophy' (2014) *Sport, Education and Society*, 7.

⁹⁸ Kris Lines 'Thinking outside the box (-ing ring): The implications for sport's governing bodies following Watson' (2007) *ISR*, 4, 64.

⁹⁹ John Lyle and Christopher Cushion (Eds.) *Sports coaching: Professionalisation and practice* (Edinburgh: Churchill Livingstone Elsevier 2015) 135.

This however, while explaining, possibly, the actions of the coaches, cannot come close to excusing it. They are charged with preparing their players for a particular activity. The fact that this activity is competitive does not negate the requirements of safety and well-being. It is inconceivable that such an excuse would be tolerated in any other industry.

An interesting side-effect of this thesis has been to re-evaluate sporting films that have the traditional coach-protagonist who persuades his or her players to push on through the pain to achieve their goals. Partington refers to a few of these films,¹⁰⁰ by discussing 'Coach Carter',¹⁰¹ 'Remember the Titans',¹⁰² and 'Best Shot'.¹⁰³ In 'Coach Carter',¹⁰⁴ the eponymous coach compels his students to run the disturbingly named 'suicides' in order to raise their fitness levels; when one player fails to meet the required level, he cuts him from the team. Because the subsequent message of team unity, as the teammates offer to do the remaining exercises for him. In this the lasting message, the image of the player, broken on the floor, is often overlooked.

In the climax of 'Remember the Titans'¹⁰⁵ the coach screams at his players "I don't want you to give another yard. They cross that line and I will take every single one of you down!"¹⁰⁶ The message fires up his team, as such a threat might, and subsequent shots show the opposition being decimated. In John Grisham's lesser-known work 'Bleachers',¹⁰⁷ which focuses on the dubious Svengali hold that a legendary small town football coach has over his players, the coach's career finally comes to an end after running his team so hard that a player dies. A high school player. A child. Not only is his firing a hotly contested matter, but there appear to be no criminal repercussions, with one supporter commenting that "that boy wasn't strong enough to be a Titan."¹⁰⁸

¹⁰⁰ Neil Partington 'Sports coaching and the law of negligence: implications for coaching practice' (2017) *Sports Coaching Review*, 6:1, 36.

¹⁰¹ 'Coach Carter' MTV Films, Thomas Carter (Dir).

¹⁰² 'Remember The Titans' Walt Disney Pictures, Boaz Yakin (Dir).

¹⁰³ 'Best Shot' Twentieth Century Fox, David Anspaugh (Dir).

¹⁰⁴ Ibid n. 101.

¹⁰⁵ Ibid n. 102.

¹⁰⁶ Ibid n. 103.

¹⁰⁷ John Grisham *Bleachers* (Arrow Books 2003).

¹⁰⁸ Ibid 63.

These are, of course, fictional examples, albeit many of the characteristics of the films or series are based on real life examples, including the exercise regimes, but they are examples that seek to promote the athletes giving their all as a positive example, and they all underscore the crucial point; in no other job would this level of competitiveness be accepted, much less actively promoted, and yet the legal canvas is blank. So, if the conduct of the coaches in these situations were to come under scrutiny, what would the arguments be against liability being found?

There is an obvious defence, which would be that the employee-player has consented to the risks and that as such the club should not be responsible for the consequences; this will be discussed in the wider context in the final chapter. There are evidential difficulties, which might go some way to explaining why Cudmore's case is novel; as with the Bloodgate scandal involving the Harlequins it is unlikely that the actions are limited to his situation, and yet the actions are by their definition covert. Absent a player willing to take his or her grievances public, or a whistle-blower within the club, it would be difficult to establish a case, particularly in the circumstances described by Cudmore where the conversations were one-to-one rather than public or to multiple players at a time. However, evidential issues do not impact on the question of whether such a duty should be imposed.

A stronger argument against the potential for liability here replicates the arguments present against establishing liability for governing bodies; why should concussion injuries be treated any differently to the physical injuries that have been around since sport's inception? There are two crucial points here to counter this point. The first is the simple fact that permeates throughout this chapter, which is that the question as to whether such a duty of care has existed or not has not been established; it has simply not been put before a court. One likely reason for this is that most physical injuries are, at worst, career ending, and as such the impact of the injuries have not been seen as something that can be dealt with other than by insurance.

The second response is reflected in the assertion, albeit in a statutory context, that the greater the injury that is risked, the greater the responsibility of the club. As has already been

established, the risks of concussion injuries are considerably beyond the average physical injury and as such the corresponding duty must be more rigidly applied.

Possibly the strongest argument against imposing such a duty is that it is contrary to the heart of the activity itself. While concussion injuries, or indeed injuries of any sort, are not part of sport, competitiveness is, as is the will to win. It is an accepted part of sports law jurisprudence that players are expected to be competitive, and that in doing so they will be excused actions that happen at speed and on the spur of the moment. However, this does not work as a direct analogy to this situation.

An argument that is linked to this is the difficulty of defining the duty; it is unrealistic to consider whether a duty can be imposed by the court unless it is one that is capable of definition. It is, as indicated, unquestioned that participants are expected to compete with their opponents; this is the very definition of competitiveness. Likewise, they are expected to seek to defeat the opponents, and this is something that a club is entitled to expect from their employees. Likewise, those charged with devising the strategies for the matches will look for tactics that maximise the chances of winning. A crucial part of this is how to get the maximum out of their own players, as well as minimising the effectiveness of the opposition. So, the question must arise; to what extent should employers be allowed to demand, as the cliché would have it, 110% out of their players, seeking more than the maximum physical capacity of the players.

There is some helpful precedent in an analogous area, also involving employment law and negligence, involving situations where an employer has neglected a specific environmental situation and has been found liable for injuries arising from the consequences of that decision. In *Intel Corporation (UK) Ltd v Daw*¹⁰⁹ the Court of Appeal upheld the initial decision of the High Court which found that the employer had insisted that the Claimant work excessive hours despite being aware of an underlying condition of post-natal depression. Crucially, liability was established in spite of the fact that the employer argued that they have attempted to provide assistance through a Counselling service to the Claimant; the court

¹⁰⁹ [2007] EWCA Civ 70.

found that in this case it was not enough. The only way to deal appropriately with the situation would have been to manage it by reducing her expected workload.¹¹⁰

This area of law has been developed more thoroughly by the House of Lords in *Sutherland v Hatton*¹¹¹ with the court emphasising that a crucial aspect was the establishing of foreseeability, endorsing *Walker v Northumberland County Council*¹¹² where the court found that the first breakdown by the Claimant was not foreseeable but the subsequent breakdown after his return to work was foreseeable. However, the court also made additional comments, noting that there was no intrinsically stressful job and that unless there is a pre-existing or underlying condition that the employer is aware of, they are entitled to assume that they can withstand the normal pressures of the job.¹¹³

Wheat argued that the test for succeeding in a claim was a high one for the Claimant to clear, emphasising that the only one of the Claimants who succeeded in *Sutherland*¹¹⁴ was one who had worked “grossly excessive hours over the contracted 37 hours.”¹¹⁵ In reaching this conclusion the court stated that “it will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances unreasonable”¹¹⁶ but the court also emphasised that while it is relevant that “there are signs that others who are doing the same work are under harmful levels of stress”¹¹⁷ the most important signs that must be considered by the employer come from the employer themselves.¹¹⁸ It is in this context that the test is particularly limiting given the assumption that a certain amount of stress is to be expected. In the case itself, only one claimant, Mrs Jones, succeeded, and this was on the basis of an admission that “it was a gamble to expect one person to do the work of two or three.”¹¹⁹ In the other three cases within the appeal, one

¹¹⁰ Ibid.

¹¹¹ [2002] WL 45314.

¹¹² [1995] 1 All ER 737.

¹¹³ Ibid [29].

¹¹⁴ Ibid n. 111.

¹¹⁵ Kay Wheat ‘Mental Health in the Workplace (1) – ‘Stress’ Claims and Workplace Standards and the European Framework Directive on Health and Safety at Work’ (2014) (No 14 2006) IJMHCL, 63.

¹¹⁶ Ibid n. 111.

¹¹⁷ Ibid [26].

¹¹⁸ Ibid [27].

¹¹⁹ Ibid [61].

was found to have been unable to cope with a change in the working pattern, one contained circumstances where it was found to be impossible for the courts to determine causation, and in the final case it was found that the long term nature of the difficulties meant that while the claimant was suffering from over-work, this was no different from other employees and it was impossible for the court to identify a point when the duty was breached.

It is clear that while the hurdles remain high, the courts have had no difficulty in adapting the tort of negligence to render a duty, albeit one that is broader than the specific topic that it has been applied to. In *Sutherland*,¹²⁰ the court adopted an older test¹²¹ to state that employers “have a duty to take reasonable care is to provide them with a safe place of work, safe tools and equipment, and a safe system of working.”¹²² This can be taken as a starting point for an argument that expecting players to play beyond their maximum capacity is not compliant with the employer’s duty of care and can lead to liability being established. This is emphasised by Morgan’s consideration of the *Sutherland*¹²³ jurisprudence as he argues that a consequence of the cases concerning stress related injuries is that employers need to be far more aware of medical developments, and the potential impact that their working practices can have on their employees.¹²⁴ Taking this into account, sports employers would be expected to keep up to date with the medical developments, and to consider whether their own working practices, which can easily be seen as applicable to the atmosphere fostered around commitment on the field, do enough to keep their players safe.

There are difficulties with the analogy, and the transference is not absolute. In the cases, it has been clear that the decisions are conditional upon the employer being made aware of the situation affecting the players. The negligence arises not because of the initial decision but because of a failure to adjust upon being informed. A crucial issue with concussion injuries is that the risk is present, but it is a general risk that is applicable to every game that is played rather than something that arises out of a specific incident. It could be that there are cases

¹²⁰ Ibid.

¹²¹ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

¹²² Ibid n. 111 [19].

¹²³ Ibid.

¹²⁴ Brian Morgan ‘Stress in the workplace- Employers should be alert to the claims which can arise’ (*Morgan McManus.com* 2004).

where a player would raise a concern with the situation, but has already been seen there is a strong element of secrecy and absence of dissent within the dressing room.¹²⁵ It is, therefore, entirely likely that in the past issues would not have been raised because of a lack of knowledge about concussion as a potential consequence, while now, players may not appreciate the link between the mentality that is being fostered by the club and the increased likelihood of concussion injury.

However, this distinction is not insurmountable. The courts were keen to note in *Sutherland*¹²⁶ that stress was something that every employee should be expected to be able to deal with at a certain level and that the key was the escalation of stress beyond that which is expected. This can be justified; it is reasonable to say that any job will have a level of stress; this can be equated to a sport's player's expectation that there will be physical injuries, for example hamstring strains or even broken bones. However, it is not reasonable to say that in any job, even one involving physical labour, that there is a level of concussive injury that is acceptable. Therefore, while stress cases can be helpful in establishing a baseline for liability, it is important to distinguish the seriousness of stress and concussion at their starting points. When applying the principles of the stress cases to concussion injury the question would be whether it would be foreseeable for the club to anticipate that prioritising competitiveness over player welfare would lead to an increase on the likelihood of concussion injuries for their players.

It can therefore be argued cogently that there is a potential path for clubs to be found liable for actions where the players are expected to go above the normal competitiveness within the game.

Specific Strict Liability

One key issue that can be considered in respect of the clubs is that of strict liability. It was seen in Chapter Four¹²⁷ that the normal standard is that of reasonableness. Imposing a

¹²⁵ Ibid 50.

¹²⁶ Ibid n. 111.

¹²⁷ Ibid 194

requirement of strict liability would be by far the more severe test for a governing body to meet. Its meaning is straightforward- once the specified actions have taken place, liability will follow as night follows day. Defences of reasonableness, good faith or honesty would all be irrelevant. There would be no need to establish any mental element to the tort and as such many of the hurdles would be far easier to clear than in a negligence claim.

Situations where strict liability regulates the actions of the Defendant are primarily established within relevant legislation and therefore will almost always be statute based as opposed to common law based. There is no precedent for suggesting that the common law should develop in this way and this thesis is not proposing it. However, it is worth mentioning because of the possibility, albeit criticised, that was earlier noted of legislative action. While it seems unlikely that there will be any widespread action, it is possible that smaller steps may be taken to protect individuals in certain situations, whether minors or specific instances within the sports that can be easily and readily identified. In these situations, and if the actions were sufficiently identified, then a strict liability test would go a considerable way to assisting in the safety and protection of the players. This could arise from, for example, a requirement that players only participate in a certain number of games in a season, or, as with the various 'Lystedt Laws' that have been imposed in the United States, a requirement that once a concussive event has been identified, the player cannot return to the pitch, in that game or another, until there is a written medical report attesting to that player's recovery.

Strict liability has the advantage in these situations of removing ambiguity. In the former example, once a player has played in their quota of games for a season, they are banned from playing again. If they play, then the club will be liable, and no defence would be permissible. This certainty would maximise the potential for compliance, but there are obvious weaknesses, including the likely need for it to be introduced by legislation as opposed to jurisprudential development, and the comparatively limited number of situations that it could be applied to.

Summary

The current situation with employer clubs can be seen as very similar to that of governing bodies insofar as there is a dormant potential for liability, where the courts could develop a jurisprudence, but to date they have not taken that opportunity. This inactivity by itself is less significant as the question has not arisen rather than it has been addressed and rejected.

In this situation, there are two potential avenues for the employer clubs to be liable. Within the statutory framework it is hard to see that the more significant burdens that could be placed upon the clubs would be seen as practicable, although there are a raft of lesser adjustments that could be made, as suggested by Kirby¹²⁸ which follow naturally from the existing jurisprudence.

This is less clear within the context of negligence, partially because of the paucity of jurisprudence. It is certainly possible to see how there could be extensions of *Hamid*¹²⁹ to require additional education to be provided to players, and greater scrutiny to be applied to the efforts of coaches, possibly with an expectation of specific attention to training players to prevent concussion injuries where possible.

The most controversial aspect of the discussion is the mentality of the clubs when approaching games. There is little precedent to support such a move, but when framed appropriately, it is reasonable to suggest that there should be a legal duty for clubs to ensure that the player's welfare is the primary concern.

¹²⁸ *Ibid* n. 7.

¹²⁹ *Ibid* n. 111.

Chapter Six- The Conundrum of Concussion and Consent

Introduction

In early 2020, the football season in the United Kingdom should have been coming to a close. The Rugby Union World Cup had finished, and the climax of the annual Six Nations competition was imminent. Yet were a player to seek to pull on his or her boots to play in these events, they would have been prevented from doing so, no matter how keen they were, following the global pandemic of Covid 19.¹ That the player consented to the risks was irrelevant. That they might wish to play in an empty stadium, with no thought of their own life, was irrelevant. The sporting governing bodies, following the example of many other Associations, had postponed professional sports, in accordance with government advice, though not government regulation.²

Later, on the 13 May 2020, the clubs were permitted to start training again. But again, the freedom of the players was curtailed in the interests of their health.³ They were not permitted to tackle, and the nature of their training sessions were limited to five players per group. They could consent to the risks, and do so persistently, yet their health, the health of their colleagues, and of the nation was deemed to be too important. Once again, their freedom to consent to the risks was overridden. Nor could they choose to train in public parks, to maintain their fitness in this fashion and indeed those who disregarded the public lockdown were both disciplined and criticised publicly.⁴

¹ BBC Sport 'Coronavirus: Premier League and EFL suspended in England - Scotland, Wales and Northern Ireland halt games' (13 March 2020).

² FA 'Postponement of Professional Game Extended After Update From FA, Premier League and EFL' 19 March 2020.

³ Dan Roan 'Premier League: Restrictions in place for team training under 'Project Restart' (BBC Sport 12 May 2020).

⁴ Barnaby Lane 'Elite soccer players are recklessly breaking coronavirus lockdown rules across Europe, and some could face being fired or even jail time' (Insider Sport, March 27 2020), Avreek Chakroborty, 'Footballers who broke coronavirus rules' (MyKhel Football, May 18 2020), Sky News 'Serge Aurier: Tottenham investigating defender for lockdown breach' 20 May 2020, Sky News, 'Coronavirus: Manchester City's Kyle Walker complains of 'harassment' after breaking lockdown rules again' May 8 2020, Metro, 'Chelsea warn staff after two academy signings secured during coronavirus lockdown' 20 May 2020.

It is clear, from this tragic situation, that the individual desire to play, regardless of the risks, was, in this case, not paramount and this is relevant as it is a frequent response to arguments that sports should be banned, either in their entirety or in part, because of the risks,⁵ that the participants have the freedom of choice, and they should have the freedom to make their own choices. Covid is an extreme example, and one that has had an overwhelming impact on global society, not merely sports. However, in the early stages of the pandemic, it was not merely that matches were played behind closed doors, which would alleviate the risk to the public, but that sports were not permitted to continue at all that is relevant. The relevant governments took a view that the risk was not capable of being consented to by the players, and this sets the scene for the analysis of consent and its relevance to concussion, that follows.

It has been argued, throughout this thesis, that responsibility and liability should attach to governing bodies and employer-clubs if they fail to put in place adequate protections for participants from injuries of a particular nature, specifically concussive and sub-concussive events.⁶ One of the strongest arguments that can be raised against such a move is that the autonomy of the individual must be respected, and a player can choose to accept these risks.

In establishing that liability is a viable option, there were specific issues that needed to be resolved,⁷ but this is a wider and more general argument, and it has therefore been left for this Chapter and will be dealt with now. Historically, English common law has respected the autonomy of the individual and allowed some consensual force between individuals.⁸ The use of violence to others, short of permanent maiming, has been traditionally justified on the precise basis already noted, that people should be able to consent to activities that include this violence.⁹ In sporting events themselves, individuals are permitted to inflict injuries on

⁵ Michael Beloff QC 'Editorial' (2012) ISLR 11-12, Thomas Aquinas, *Summa Theologiae* (Blackfriars Edition 1963 - 1975, Vol. 28, Thomas Gilbey OP) Taken from Simon Lee, *Law And Morality*, (Oxford University Press 1986); Bruce Gardiner 'Liability for sporting injuries' (2008) 1 JPI Law 16.

⁶ Ibid 184, 216.

⁷ Ibid 106.

⁸ *R. v Donovan (John George)* [1934] 2 KB 498; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 amongst others, Simon Gardiner 'The law and the sports field' (1994) Crim. LR 513.

⁹ Hawkins, *Pleas of the Crown* (8th ed.), vol. 1.

each other, so long as they do so within reasonable limits, and the participants are taken to have consented to these acts.¹⁰

The obvious question that must be answered for this thesis to be persuasive is why should consent not be permitted in the circumstances discussed, for it is not the contention of the thesis that all sports that involve contact should be subject to liability, only those aspects of the sports that give rise to concussive or sub-concussive events. Why is it that a player can consent to a tackle that can cause injury, but should not be permitted to consent to a rule that requires them to 'head a football' or to be tackled in such a way as to cause a concussive or sub-concussive event? The seriousness, and central nature, of this question will be reflected in the arguments that will be put forward to contend that, in fact, refusing to allow participants to consent to these actions can be seen as consistent with the law as it has developed and, more importantly, that it is consistent with the law as it is developing. To demonstrate this, the Chapter will first argue that the principles of paternalism are appropriate for this particular type of injury within sports, before arguing first that true informed consent is not possible and secondly that even if it is, it should not override paternalism. Finally, having established that paternalism is an appropriate principle to utilise in respect of consent, it will be argued that it is consistent with the developing law in this field.

Consent as a Concept

In order to place consent in its proper context, it is necessary to analyse why consent is relevant. It has already been seen¹¹ that in rugby union, the rules that are being scrutinised are said to be harmful to others on the pitch, that is to say that a player can cause injury to another. In football, the injury is, typically, being done by the player to themselves, by the action of heading the ball. In both of these cases, however, the individual can be said to be consenting to the harm being caused by these actions, through their decision to play the game. This raises the question: to what extent is society entitled to overrule an individual's autonomous decision to take a course of action, even if it places themselves in the path of

¹⁰ *R v Barnes (Mark)* [2004] EWCA Crim 3246.

¹¹ *Ibid* 37

harm. Before considering the black letter law in both sports cases and medical cases, this section will first analyse the role that informed consent and paternalism has to play in the question of autonomy.

The starting point of autonomy is that “I am autonomous if I rule me, and no one else rules I,”¹² meaning that the decision-making process of an individual’s life is theirs and theirs alone to take, so long as it does not cause harm to another, although of course that person, on this interpretation, is free to accept that harm. In particular, Wolff argues that an individual is free to do what another has commanded but, crucially, not because they have been told to do it. In accepting the constraints of authority, Wolff contends that the individual sacrifices their autonomy.¹³

This is not controversial, nor is the fact that even those who hold to the purest form of autonomy do not contend that it applies without exception. Mill accepts that no-one “is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it.”¹⁴ Any uncertainty of the phrase ‘ripe years’ is clarified by Wolff who uses a more modern word to make the same point:

“Children finally pass to the level of autonomy when they appreciate that rules are alterable, that they can be criticised and should be accepted or rejected based on a basis of reciprocity and fairness.”¹⁵

It can be said with some ease then that the issue of autonomy is not relevant to that of minors playing sport, as the principles of autonomy do not apply; the principle of

¹² Joel Feinberg, *The Idea of a Free Man in Education and the Development of Reason* (Taylor and Francis group), 161

¹³ Robert Wolff, *In defence of Anarchism* (New York Harper and Row 1970) 14, 41

¹⁴ John Mill, *Mill on Liberty* Oxford Clarendon Press 1980

¹⁵ Robert Wolff, *In defence of Anarchism* New York Harper and Row 1970 14, 14

paternalism, whereby another is able to make decisions on their behalf, is clearly applicable in these cases.

This, however, does not assist in considering those who have reached majority, and here it is necessary to consider paternalism, and whether there are any situations where it can be justified for this to overcome the presumption of autonomy.

Informed Consent

The concept of informed consent is not new although Plato used different terms when comparing the idea of the “slave doctor”¹⁶ and the “freeman doctor”- the former prescribes what must be done and then departs. The latter “enters into a discourse with the patient and his friends and he will not prescribe for him until he has first convinced him: at last when he has brought the patient more and more under his persuasive influences and set him on the road to health, he attempts to effect a cure.”¹⁷ The latter effectively represents the principle of informed consent as it represents a dialogue between experts and non-experts leading to the non-expert making a decision based on the information provided by the expert.

The theory of informed consent, as described by Capron states that it has two parts, “first that sufficient information be disclosed to the patient so that he can arrive at an intelligent opinion and second that the patient agrees to the intervention being performed.”¹⁸ Meisel notes that the basis of informed consent is supported by several concepts. First “to protect his physical and psychic integrity against unwarranted invasions and to permit the patient to act as an autonomous, self-determining being”¹⁹ and secondly:

¹⁶ Plato *The Laws*

¹⁷ *Ibid*

¹⁸ Alexander Capron ‘Informed Consent in Catastrophic Disease Research and Treatment’ *University of Pennsylvania Law Review* 123 (December 1974) 365

¹⁹ A Meisel ‘The Exceptions to the Informed Consent Doctrine: Striking a Balance between Competing Values in Medical Decision Making’ *Wisconsin Law Review* 1979 No 2 420

“every man’s right to forego treatment or even cure if it entails what for him are intolerable consequences of the risks, however warped or perverted his sense of values may be in the eyes of the medical profession, or even some of the community, so long as any distortion falls short of what the law regards as incompetency”²⁰

Crucially, then, the principle of informed consent, as set out, would state that once this level has been reached, there is no justification for interference with the autonomous decisions of the individual. In the context of this thesis, this would mean that it would be unacceptable for the courts or legislature to prevent a participant from taking part under the current rules. They can choose not to participate, having received fully informed consent, but there is no legitimate ground for preventing them from doing so.

This of course does provide one clear answer to the question of informed consent, which is whether it can be said that the individuals to have informed consent. It will be argued later, with reference to black letter law, that there is a strong argument that in these situations informed consent is not feasible, and therefore there is no objection based on consent to the autonomy being interfered with.²¹

Overriding Consent

It would be feasible to accept the previous perspective, but it is also necessary to consider the possibility that informed consent is possible, at least for adults. If that is established, it is then necessary to consider how the issue of informed consent can be overcome. This is particularly important because of the relevant stakes that are involved. A common theme of this thesis has been that action is imperative because of the significant health issues that are involved and on the one hand this can be seen as supporting the idea that interfering with the autonomy of the individual is justifiable. While Dworkin accepts this, he adds that although the risks are higher, so is the invasion of autonomy. Comparing it to an architect’s

²⁰ Fowler Harper and Fleming James, *The Laws of Torts Suppl* (Little Brown and Co 1956), 61

²¹ See 258

errors, Dworkin notes that the individual can sell the house and move if an intervention is made that the individual does not approve of, but they are stuck with the body that they have.²² In that situation, however, Dworkin was referring to medical surgery which carries with it significant risks of invasion of autonomy, while in this case the loss of an ability to play a game in a particular way does not reach the same levels.

In spite of this, it is clear that there is some invasion of autonomy. It is accepted that there are exceptions to the principle of autonomy, but only one approaches a rational justification for interrupting the autonomy of the individual in this case and that is paternalism.²³ This is described as “interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, happiness, needs, interests, or values of the person being coerced.”²⁴ Dworkin summarises it as a “usurpation of decision making either by preventing people from doing what they have decided or by interfering with the way in which they arrive at their decisions.”²⁵ In this case, the individual should be prevented from participating in the action because of the risk to their health. The difficulty is that if we accept that they have informed consent, then they are aware of the risks and have chosen to accept them, in the same way that they can choose to cross the road without waiting for the designated crossing areas or climb a tall ladder to fix a tile on the roof of their house. It is necessary to seek to justify why in this particular case paternalism would be appropriate whereas in those situations it is not.

Justifications for Paternalism

It is contended that there are two ways in which paternalism in this particular case can be satisfied. An argument of Dworkin is that persons “who are injured or killed because of their risky behaviours impose costs on the rest of us.”²⁶ His immediate response is that the logical

²² Gerald Dworkin. *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 113

²³ Paternalism was listed by Feinberg as two of the six liberty limiting principles,²³ being broken down into moral and legal paternalism. Feinberg, *Harm to Others*, p. xiii.

²⁴ Gerald Dworkin, ‘Paternalism’ *The Monist* 56 (January 1972) 65

²⁵ *Ibid* n. 22, 123

²⁶ *Ibid*, 126.

approach is to require medical insurance but not to require them not to get injured. However, his final summary of the point is that the risk of harm is minimised at the cost of a minor interference with their freedom. He does raise the other question which is the unexpected risk- “people have to bear the knowledge that they have caused harm “perhaps death to another.”²⁷ This would seem to go beyond legal paternalism and focus on moral paternalism. Dworkin uses dwarf-tossing as an example of this, noting that the intervention is justified as it has prevented the individual from taking part in a ‘bad’ activity.²⁸ This does have potential applicability in this situation as there are potentially significant impacts on the individual who has, inadvertently, caused the issues to occur. For example, a rugby player tackles another leading to a concussive event. A result of this, although not immediate, is that the player loses the memory of his family, and other significant events.²⁹ Even if it is accepted that the victim was able to consent to this risk, it is far less likely that the player who has caused the harm has been able to anticipate the potential feelings of guilt. While not a direct injury, these are the consequences of the action that are far harder to attribute potential consent to.

However, while this has the potential to reconcile the conflict, it isn’t entirely satisfactory. As Dworkin notes, the pure economic situation can be resolved by insurance, while this thesis is concerned with prevention. The latter argument has greater merit, but the evidence is not currently as compelling as the medical arguments supporting the significant impact of the injuries themselves. In short, this might in the future be an answer to this particular dilemma, but for now it is not enough; it is necessary to go further.

Importantly, paternalism is not absolute, and Dworkin differentiates between soft and hard paternalism³⁰ emphasising Feinberg’s view of paternalism that paternalism is sometimes justified and it is a necessary condition of this that the person who is being subjected to the

²⁷ Ibid n. 22, 127

²⁸ Gerald Dworkin, ‘Moral Paternalism’ *24 Law & Phil.* 305 (2005) 307

²⁹ BBC News ‘Joe Marler: England prop ‘scared’ by risks in wake of ‘awful’ Ryan Jones news’, (*BBC News*) 19 July 2022

³⁰ Ibid n. 22, 124

paternalism is in some way not competent.³¹ This does require some aspect of non-voluntary conduct on their part while the perspective of hard paternalism is that it can be justified even if the act is completely voluntary.³² Dworkin attempted to reconcile cases such as allowing individuals to become slaves and seat-belt legislation on the basis that their actions lacked rationality but conceded that this was too ad hoc, lacking the necessary objective rationale of a consistent approach.³³ This is certainly an argument that could be used for the current situation. A person with full knowledge and understanding of the situation would not put themselves in the situation and therefore one of two possible explanations must exist. Either they do not have sufficient knowledge to give full informed consent, in which case the issue of paternalism does not arise, or they do have that knowledge and they are behaving irrationally so as to nullify that consent.

Again, this approach requires justification, and the rationale from it flows from the concept, previously noted as uncontroversial, which is that paternalism is entirely justified in the case of minors. Dworkin explains this as justifiable because “they lack some of the emotional and cognitive capacities required in order to make fully rational decisions.”³⁴ He takes it further by stating that the decision maker takes the view that the child will come to prefer the road taken rather than what the road not taken would have brought. Therefore, because the decision-making process is not, or may not be, fully formed, the decision maker is accepted as being able to make the decision for them.

The challenge therefore is deceptively simple. Is it possible to identify a situation that the individual has interests which are put in jeopardy by the situation, with which they are faced, that are such that their decision making process may not be capable of handling the decision at the time that it is made, and which is “difficult or impossible to return to anything like the initial state at which the decision was made,”³⁵ for in these situations,

³¹ Joel Feinberg ‘Legal Paternalism’ *Canadian Journal of Philosophy* 1 (1977) 106-24

³² *Ibid* n. 22, 124

³³ *Ibid*, 125

³⁴ Gerald Dworkin, ‘Paternalism’ in Richard Wasserstrom *Morality and the Law* Wadsworth Publishing (1970), VI

³⁵ *Ibid*

Dworkin notes that there are significant similarities with the state of a minor for whom it is accepted that paternalistic decisions can be made. In such situations, Dworkin argues that interfering with the autonomy of the individual can be justified by paternalism because with hindsight it would be the decision that the individual would make.

Clearly, then, there are two questions to be considered. The first is whether it is possible for true informed consent to be given to these injuries. The second is whether paternalism justifies overriding that informed consent, if it indeed does exist.

Can There Be True Informed Consent?

It will be argued in the later parts of this Chapter, that as a matter of law and policy consent should not be a permissible defence in acts that cause concussive and sub-concussive injuries, due to a plethora of reasons.³⁶ However, even if it were to be accepted that the status quo should continue to be followed, for the reasons set out above, it can be argued that consent still cannot be given in respect of concussive and sub-concussive events, as in order for consent to be valid, it must be given by one who is capable of consent, and if they are, then it must be informed consent.³⁷

Minors

The idea that an individual may consent to an act that has negative consequences has never been, in any situation, completely without shade and in sports this has been particularly acute when considering that sporting activity has no restriction of age.³⁸ In the event that the Tokyo Olympics had taken place as expected, it was anticipated that ten year old Hend Zaza would become the youngest athlete to participate at an Olympic Games, albeit in the relatively

³⁶ See Page 252.

³⁷ *Montgomery v Lanarkshire Health Board* [2015] SC 11.

³⁸ Some sports have age categories for minors, but this does not, as a general rule, prevent minors from 'playing up' at an older category. This has caused particular questions when analysing liability after younger players are allowed to play against those older than them, *Mountford v Newlands Manor School and Another* [2007] EWCA Civ 21.

uncontroversial sport of table tennis.³⁹ She would be replacing in holding that record gymnast Dimitrios Loundras who set the record at the very first Olympic Games in Athens in 1896.⁴⁰ Clearly, when competing in adult competitions, these athletes are subject to the same rules, the potential dangers of this will be returned to later. However, there is a key question, which is whether minors are capable of consenting to the potential injuries, to the same extent as an adult. Typically, most countries that play the sport of Rugby Union start off their youngest teams playing a non-contact version and gradually build those player up⁴¹ while Pollock and Kirkwood argued recently that tackling in Rugby Union should be completely banned in school sports.⁴² This feeds in to the narrative that while consent may be a significant hurdle to overcome for participants above the age of majority, it is not even a question for those under the age of majority, as they are incapable of providing their consent, and if liability were to attach under the principles of the previous Chapters, then it would not be an applicable defence.

The inevitable consequence is that for minors, consent cannot be a direct defence. There is, however, an additional point which potentially makes this applicable to minors who continue to play sports as adults. All the sports that are under discussion are skills, or an amalgamation of skills, and like any skill, they develop over time. There is a correct way to head the football and an incorrect way.⁴³ More critically there is a correct way to tackle a player in Rugby Union, and an incorrect way to tackle; although the risk of a concussive or sub-concussive event is present with both, there is a greater risk with the latter. If the allure of consent proves decisive for those over the age of majority, then banning it for those under that age raises the potential that they will be ill-equipped to transition into adulthood. This was summarised in a 2016 analysis of the possibility, which acknowledged the face value advantages of such an approach, but then emphasised that “it would deny the need and opportunity...to begin learning a skill set which evidence suggests is both effective (for performance) and protective

³⁹ Tokyo 2020 Olympics, ‘Syria’s Hend Zaza set to be youngest Olympian at Tokyo 2020 aged 11’ (7 March 2020).

⁴⁰ Ibid.

⁴¹ The New Zealand model for example, prohibits tackling for the first age group and then gradually brings it into the game. Small Blacks Website (13th July 2020).

⁴² Allyson Pollock and Graham Kirkwood ‘Tackle and Scrum should be banned in school rugby’ (Sep 25, 2017).

⁴³ Ross Tucker et al ‘Injury risk and a tackle ban in youth Rugby Union: evaluating the evidence and searching for targeted, effective interventions’ (2016) British Journal of Sports Medicine, 50.

later in their rugby playing careers.”⁴⁴ Of course, one simple answer is that this should be prevented by banning the act throughout the game.

However, even if it is not, then the objection is not overwhelming. It was seen that the potential targets would be both the governing bodies and the clubs themselves, and therefore they would be against players who are in the same position as they are. Therefore no one player would have an advantage over another. The argument makes sense if the ban applies only to school and community practice, but its effectiveness fails if the overall change of rules is to remove the tackling aspect from the game of rugby, as the analysis by Tucker et al acknowledged.⁴⁵

Do/Can players understand?

There is, however a more subtle argument that needs to be considered here, and that is, to what extent do players, at the start of their career, or indeed at any point in their career, understand the risks that they are taking? This is the primary basis for minors being unable to consent; it is presumed that they lack the ability to give informed consent, and the ability to give informed consent is at the heart of the principle of consent in sport, that players consent to the actions of their counterparts, and thus implicitly consent to the consequences and Vahrenwald writes that the clear understanding of the consequences is one of the key principles of the doctrine of consent.⁴⁶ This has been endorsed in jurisprudence, with Lord Bingham writing that the purpose of consent is “to enable adult patients of sound mind to make for themselves decisions intimately affecting their own lives and bodies”⁴⁷

The question as to how much the players actually understand was addressed in the previously discussed *Watson*⁴⁸ case where the Court of Appeal noted that the judge as first instance had inferred that professional boxers would be unlikely to have an innate amount of well-

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Arnold Vahrenwald ‘Should athletes sign waiver of liability forms?’ (1997) Ent. LR. 1997, 8(5), 160.

⁴⁷ *Chester v Afshar* [2004] UKHL 41.

⁴⁸ [2001] QB 1134.

informed concern about safety.⁴⁹ It was also a factor in *R v Brown*⁵⁰ where the court made reference to the contrasting ages of the Defendants and victims and the use of intoxicants to “obtain consent and increase enthusiasm”⁵¹ While it was not one of the central points of the judgment, it was a factor in determining whether or not it would be appropriate to permit consent in that particular case⁵² and reinforces the uncontroversial point that for consent to be relevant, it must be informed consent.⁵³ These authorities underline the relevance of any consent being informed and not uninformed.

In considering this, it is necessary to look at two particular aspects. The first is the overt, and represented one of the allegations against the NFL, that was previously discussed;⁵⁴ the idea that they had identified a link between contact sports and concussion, and that they were deliberately withholding that information in order to reap financial benefits.⁵⁵ It is not hard to see that this would negate consent; the logic is clear and if participants are not being given the appropriate information then they cannot be said to consent. This is particularly the case in light of the current evolution of consent in medical law, which is an appropriate parallel.⁵⁶ The normal situation before an operation, or other medical action, is that the patient must give consent and that the consent will only be informed consent if they have been given answers to what they want to know rather than what the doctor believes they should know.⁵⁷ This was later clarified as meaning that the doctor is required to inform the patient of reasonable risks, and that there will not be liability for a risk that was not reasonable to indicate which later has a negative consequence.⁵⁸ The difference that the recent case made,

⁴⁹ Douglas Brodie ‘Assumption of responsibility: boxing and the regulator’ (2001) SLT, 17, 153.

⁵⁰ [UKHL] 19

⁵¹ Ibid.

⁵² Jeremy Bentham ‘Crossing the line: morality, society, and the criminal law’ (2009) 1781 CSLR. 2009, 5(1), 187.

⁵³ This principle is continued in sporting cases where the rules have not been followed resulting in injuries. *R v Barnes* confirms that players can only consent to the actions that would reasonably have been anticipated, excluding those that would not have been in their contemplation.

⁵⁴ Ibid 142

⁵⁵ *Maxwell and Others v NFL and Others* (Filed 19th July 2011; In re National Football League: No 2:12-md-02323-AB Players Concussion: Injury Litigation Civil Action No: 14-cv-0029).

⁵⁶ See Page 264.

⁵⁷ Sarah Chan et al ‘Montgomery and informed consent: where are we now?’ (2017) BMJ 357:2224.

⁵⁸ *Mrs A v East Kent Hospitals University NHS Foundation Trust* [2015] EWHC 1038 (QB).

in rejecting the previous *Sidaway*⁵⁹ ruling was to place a greater burden on the medical profession to ensure that the consent is informed.

In one sense, of course, there should be even higher standards in sport than in medical procedures. It was noted that an important caveat for medical procedures is that the person carrying out the procedure should be appropriately qualified. It does not matter how effective the consent of an individual is, if they are trusting themselves to an unqualified person and therefore the patient need not consider the qualifications of the practitioner; they are a prerequisite. This can be compared unfavourably to a sporting environment. There is no requirement that an individual be appropriately trained and indeed traditionally ice-hockey has had players who, while possessing sufficient ability to play at a high level, were primarily played based on their physique. Likewise, football, more in the past than present, have had enforcers, whose role is to disrupt rather than to out-skill.⁶⁰ While rugby does not have such a tradition, it can be said, reasonably, that the increased size of players⁶¹ renders them all capable of being enforcers, and yet there is no guarantee that the players will have been trained in the appropriate tackling skill or, more likely, they will have been trained for the purpose of stopping the opposition, rather than stopping them safely. This matters, because while in medical procedures, the skill of the doctor is present to aid the patient, in sport the skill of the opponent is present to stop the opponent, in much the same way that in boxing, there may be no actual animus between the participants, but the goal is to knock the opponent down. The only difference is that in boxing the ultimate goal is that they do not get up again, while in these sports, this is not a requirement of the sport.

This distinction is relevant because it should be taken as necessary to increase the scrutiny of the consent that is being given by the player, and any deference that may be afforded in medical practice, based on the judgement of the practitioner, should be removed, so as to require an even greater awareness of the dangers that they are subjecting themselves to. This would mandate that before the giving of consent, the player is fully aware of the risks of the

⁵⁹ *Sidaway v Board of Governors of the Bethlem Royal Hospital and others* [1985] 871 AC.

⁶⁰ Carwyn Jones and Scott Fleming 'The 'Enforcer' in Elite-Level Sport: A Conceptual Critique', (2010) *Sport, Ethics and Philosophy*, 4(3), 306.

⁶¹ *Ibid* 27.

game, the lack of preventative measures, the short-term and long-term risks, and that the actions that may cause these consequences are not in the hands of a medical professional.

This is central to the question of consent for two reasons. First, the nature of consent and secondly, the delivery of the necessary information. First, consent in medical decisions has very much been moving in one direction, which is towards the increase of information that the patient must receive. It has never been enough for the patient to be given no information, and this was established in the *Sidaway*⁶² case where Lord Scarman confirmed that there was a duty to explain risks to a patient in certain situations, but until recently it was considered appropriate for them to receive some information,⁶³ on the basis that they were trusting the trained professional and placing themselves in their care. Even on this basis, it is arguable that sportsmen and women were given less protection than a patient in this field, as a patient knows some of the risks, while there is no requirement that a sporting participant receives any information about the consequences of his or her actions, unless there is a particular medical issue affecting the player that makes them more vulnerable to the developments.⁶⁴

However, medical law has evolved so that in the recent years, the requirement of informed consent has grown ever stronger. Ooi⁶⁵ emphasises that “there has been a major paradigm shift in the doctor-patient relationship away from medical paternalism.”⁶⁶ He emphasised that there was a difference, post-Montgomery, between decisional negligence and operational negligence, whereby the former has become a stricter test, placing the medical profession under a greater obligation to ensure that the patient is placed in the best possible position to assess the risks before making a decision, particularly one that has significant consequences.

⁶² *Sidaway v Board of Governors of the Bethlem Royal Hospital and others* [1985] 871 AC, Jeffrey McIlwain, ‘Consent in clinical practice’ (2005) CR 11 2 (75).

⁶³ In *Sidaway*, the question as to what the situation would be was left open, but a “less than 1% chance where the consequences would be serious” was not seen as sufficient, *Ibid* n. 62.

⁶⁴ *Hamed v Mills* [2015] EWHC 298 (QB).

⁶⁵ Vincent Ooi, “Decisional” and “Operational” negligence’, (2018) P.N. 2018, 34(4), 171-189.

⁶⁶ *Ibid*, 174.

In *Pearce v United Bristol Health Care*,⁶⁷ the risk that was not disclosed was said to be around 1%, but the consequences were potentially serious, including brain injury. Lord Woolf MR ruled that where there was a “a significant risk which would affect the judgment of a reasonable patient”⁶⁸ it was necessary for the professional to inform the patient of the risks, even if they were not asked specifically about the risks. In *Montgomery v Lanarkshire Health Board*⁶⁹ itself, the lower court had ruled that the risks would only need to be explained by way of an answer to a specific question from the victim, which can translate here to ‘is there a risk that I will suffer concussion?’ However, the Supreme Court ruled that it is not enough for doctors to inform their patients of the probable risks, or even the possible risks, it is now a requirement that they inform them of all the risks that the reasonable patient would consider to be relevant.⁷⁰ Failure to do this results in the consent being deemed to be uninformed, and as such consent is negated.⁷¹ This approach recognises the central point which is that the basis for informed consent was the right to self-determination, which includes the right to know the options for treatment and information on the risks and benefits of options.⁷²

This, of course, sits dangerously with the approach in sports.⁷³ If a similar approach were to be taken, then it would be necessary for a player who takes part in the activity to be aware of potential risks, and the likely consequences. It has already been seen that some risks are seen as obvious, and this forms part of the test for existing liability in sports where players will not be able to claim for injuries that arise out of the likely consequences of the game. However, concussive events and sub-concussive events are by their very definition difficult to define,

⁶⁷ *Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* n. 37.

⁷⁰ “The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it” (*Montgomery v Lanarkshire Health Board* [2015] SC 11 [2015]).

⁷¹ *Ibid*

⁷² Lauren Sutherland QC, ‘Montgomery: myths, misconceptions and misunderstandings’ (2019) J.P.I Law 2019, 3, 160

⁷³ It is noteworthy that it is not merely the law that has adjusted in this context. The court noted in *Montgomery* that the Hippocratic Oath expressly prevented physicians from informing the patient of the possible future, yet the court found that society and the professions place in society had changed, much as sports has.

complicated to explain, as Chapter 2 demonstrates,⁷⁴ and elusive to predict. Even more, while the effect of the game might be determinable, the medical research has shown that while it can be said that there are negative effects of the collisions, they are not all known. It is, therefore, impossible, to say for certain what risks a player may be taking.

There is a possible argument to counter this based on the idea that the matter can be resolved by education, and that if a player is informed as to the possible consequences, then they can make the appropriate decision and that while there may be uncertainty as to whether an eighteen year old can appreciate the long term consequences of such injuries when weighed, at the top level, against an attractive pay packet, this is no different to any other employment or activity.⁷⁵

However, this argument only applies to a breed of player that is unusual since the professional era, the player who takes to the sport later in life. The reality is that most players begin their sporting life much earlier, when they are in their early teens, or even earlier in their life. The decision to take part in sports is therefore made before they would be said to be capable of giving consent, and at an age where it has already been seen that they cannot consent. By the time they reach the age of majority, they have likely already determined the career that they wish to pursue, and this decision was made at a time before they would have been made aware of the consequences. An example can be made whereby a cancer patient makes a decision to submit to a course of chemotherapy, spends considerable time preparing and having treatment, and is then told, after a significant period of time, that there are health risks. Of course, they can change course, but is this an informed decision, when they have invested so much into this course of action?

The potential for education to resolve the situation has additional problems, which have also been observed in the medical profession, which concerns the difficulty of conveying the necessary information to provide informed consent. To qualify as a doctor with knowledge of the area in which they are providing consent requires significant education which it is

⁷⁴ Ibid 62.

⁷⁵ Grant Gillett 'Concussion in Sport' (2018) Cambridge Quarterly of Healthcare Ethics (2018), 27, 710.

reasonable to say that the average patient/athlete does not have. Laing suggests that not only is the level of information that must be conveyed to the patient high⁷⁶ but there are challenges in conveying the data. For example, proving a medical textbook on concussion may well meet the criteria of providing the patient with information, but if it is not realistically accessible to the lay-person then it is debateable at the very least as to whether the required level of informed consent is reached. Laing goes further to cite recent cases that are applicable here which state that that medical professionals are expected to set out emerging research, even if it is incomplete.⁷⁷ This only confirms the incredibly high standards of information that must be provided in order to ensure that informed consent is provided.

Education, therefore, is less of a viable alternative than it may seem, and although Gillett does advocate this, as opposed to a mass ban of contact sports, he goes further to emphasise that in any risky endeavour, citing mining and window cleaning, it is incumbent upon those who can effect change to make “some reasonable and realistic provisions”⁷⁸ to minimise injuries. Education is a start, but it is not and cannot be the end; it is best seen as an appropriate means of assisting, as even with appropriate measures being taken, there remains a risk, albeit a lesser risk, of concussive and sub-concussive events.

Consent to These Risks Should Not Be Possible.

It would be possible to let the argument rest with the previous section, as it has established that minors cannot consent, and that those who have reached the age of majority should not be seen as capable of consenting. However, this by itself is not satisfactory, as it could be argued that appropriate education would deal with the latter point, together with a reluctance to impose a hard rather than soft form of paternalism, and the possibility of *Gillick*⁷⁹ competence does present a possible loophole for minors under the age of sixteen.⁸⁰

⁷⁶ Dr Judy M Laing, ‘Delivering Informed Consent Post-Montgomery: implications for medical practice and professionalism’, (2017) P.N. 2017, 33(2), 128-152

⁷⁷ *Webster (A Child) v Burton Hospitals NHS Foundation* [2017] EWCA Civ 62 [40]

⁷⁸ *Ibid.*

⁷⁹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7.

⁸⁰ *Ibid.*, per Lord Scarman “As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves sufficient

Therefore, the balance of this Chapter will argue that that contrary to the existing approach, it should not be possible to consent to this type of injury in this context and that this falls into one of the situations that have been discussed earlier, where an individual's will can be overridden by a paternalistic act.⁸¹ It should be stressed, that while the arguments are, in many cases, applicable to a wider range of sports and injuries outside the concussive and sub-concussive field, this thesis is focusing specifically on these types of injuries, and it is only where there is a risk of these types of injuries that the thesis argues there must be adjustments.

The arguments are divided between a critique of the current public policy approach, an argument that analogous developments where consent has not been permitted lead to this being a logical extension, and an argument that this particular type of injury is fundamentally different. It is not being argued that consent should be nullified for all actions on the pitch, rather that the particular type of these injuries lead to the view that it should not be possible to consent to an activity that inevitably will lead to concussive and sub-concussive events.

The result of this analysis will see an alternative analogy discussed, and one that would be seen as more appropriate in these circumstances, that of entertainment, which is in a similar position insofar as there has been little by way of challenge to the status quo, but where there is a strong potential for this to occur.

Concussion and Sub-Concussive events are different

Throughout this thesis, it has been clearly stated that the argument being made is not that all contact sports should be treated differently because of the risk of physical injuries, instead focusing specifically on concussive and sub-concussive events. Why is the brain different? To

understanding and intelligence to understand fully what is proposed." In fact, this would likely have a very limited impact on the status quo as this is typically limited to medical treatment, and the analogy would be a difficult one to sustain, and it has already been argued that establishing a sufficient level of understanding of these consequences is unlikely.

⁸¹ Ibid 255

put it simply, it is! It was seen earlier⁸² that players understood that there may be consequences for their knees but the difference between the knees of a player and the brain of a player are numerous. It may sound simplistic, but the knee, and every other external organ, is visible and a player can be said to have a reasonable awareness of it. The brain, by contrast, is internal and is an organ that no player, or indeed non-player without specialist education, will have any real understanding of. It exists, it is there, and it continues to be there until one day it stops. But by the very nature of it being internal, it is difficult for an individual to fully comprehend in the same way that a heart is difficult to comprehend. We know what its function is; to pump blood around the body, but if any reasonable person were to be asked to estimate the condition of their heart at a given point, they would be hard pressed to give an answer that was remotely accurate.

The analogy is appropriate to the seriousness of these hidden organs, most of which benefit from additional protection because they are hidden, and it is when these fail that some of the most serious consequences occur, whether it is a heart attack, a stroke, kidney failure, or liver failure. Even against all of these, the brain must be considered at peak risk; if the brain fails then at best there will be a lapse into a serious related illness⁸³ and worst the result will be death. This is one difference between a player anticipating difficulty with their knees, for which there are medical options, even if they are not a like for like replacement and anticipating problems with their brains.

Helpfully, there is an excellent example, provided by Football, as to the practical impact of this. In 2012, during a football match between Tottenham Hotspur and Bolton Wanderers, midfielder Fabrice Muamba collapsed on the pitch after suffering a cardiac arrest.⁸⁴ Following the horrendous event, which had nothing to do with the nature of the game, the sport immediately required that defibrillators be present at every pitch. It is noteworthy that one of the reasons for his survival was the presence of additional medics at the ground, which had become common place after a 2003 incident where Chelsea goalkeeper Petr Cech fractured his skull and was compelled to drag himself to the side-lines in order to get medical treatment.

⁸² Ibid 48.

⁸³ Ibid 21.

⁸⁴ BBC News 'Bolton's Fabrice Muamba collapses during Spurs-Bolton match' (17 March 2012).

Had this been the case in 2012, it is highly likely that Fabrice Muamba would have died that day.

The obvious question is, if sports do react to incidences of serious ill-effect, such as the case of Fabrice Muamba, why have they not done so with concussion injuries? The logical answer is that the Muamba case was an example of an immediate reaction. His heart failed and he collapsed. The sheer suddenness of this inevitably encourages reaction. My contrast, while the consequences of concussive and sub-concussive events are equally severe, they are incremental. It has been seen that sub-concussive events are not detectable, and even concussive events may not be obvious until further down the line. It is only recently, with players long since retired, that the investigations have begun to bring to light the issues with these sporting events. Yet this only underlines the argument for players being incapable of consenting to these actions. *R v Barnes*⁸⁵ only makes sense if it is taken that the potential consequences of the actions are conceivable, even if they are not immediately obvious. Therefore, a player can consent to a tackle being “slightly mistimed” because they can appreciate the range of possible consequences. They know, or ought to know, that there is a risk that they might end up with a broken leg. This of course is serious; potentially it could end their career. However, they can understand that risk. However, it is unrealistic to expect a player, or indeed any average eighteen-year-old, to be able to appreciate the potential risk of an action that currently are only being discovered. This is where the previous discussion becomes important, because even very small risks are now being ones that must be consented to, and the simple fact is that players are not capable of giving adequate and informed consent in these situations.

The second reason, of course, for the sport taking such significant steps, is that they were steps that did not interfere in the slightest with the game as it was being played. Requiring organisations to have a specified set of medical equipment at the grounds did not require any alteration to the rules of the game, let alone significant changes. In this light, what they were doing was facilitating treatment over prevention. In this context this is reasonable; the incident involving Muamba was one that happened to take place at a sporting event. In one

⁸⁵ Ibid n. 10.

sense it is the epitome of Grayson's old argument that it was merely something that happened to take place there; it doesn't make it a uniquely sporting situation.⁸⁶ It is, effectively, what the sports have sought to do; the HEA requirements in Rugby Union, and the enhanced protocols in football. All the measures can be incorporated into the game, to one extent or another, without significant interference, nor with any significant change to the rules being necessary. Manifestly, what is being sought here, cannot be so seamlessly integrated. Requiring football to abolish heading of the ball would require significant changes to the laws of the game. Removing tackling from rugby would effectively change the game to tag rugby, a small off set of the game. Yet these changes flow from the fact that players are incapable of consenting to the risks that they are currently taking.

This is a central point of paternalism and links back to Dworkin's requirement that there be a decision that the participant is incapable of handling, and potentially irretrievable consequences. This argument suggests strongly that both of these tests are satisfied, and that paternalism can be justified in the circumstances. This would suggest a clear answer to the paternalism question, that of course it can override the consent of the players. However, black letter law does not match this position, as will be seen in the next section, and therefore it is necessary not only to advance a strong case for paternalism, but also to address the issues that have been presented by the courts.

How Have the Courts Dealt With Consent?

Unlike many jurisdictions, the domestic approach has kept consent away from statute books,⁸⁷ and has therefore developed in a winding and complicated fashion. In pursuit of clarity, the law has had to seek to balance the freedom of those who wish to carry out actions

⁸⁶ Edward Grayson *Sport and The Law* (Butterworths Third Edition).

⁸⁷ Criminal Law Consent in the Criminal Law, A Consultation Paper, Law Commission Consultation Paper No 139, Appendix B, including Denmark, Finland, France, Germany, Greece, Italy, Norway, Sweden, Turkey. The crucial legislation, the Offences Against the Persons Act 1861 makes no reference to the defence.

that put themselves into harms' way against the need to protect people from such actions.⁸⁸ The weight of this obligation, and the burden on the courts to answer the question, is magnified by its seriousness. Consent has been described Stannard as a "magic bullet"⁸⁹ in law, a mechanism that distinguishes between identical conduct in separate situations and gives them different natures, with different consequences,⁹⁰ which explains, for example, why a boxer who punches someone in a street brawl is liable, but the same boxer carrying out identical actions in a boxing ring will not be. The difference is that in one the combatants' consent is deemed to be relevant, in the other it is not. The key argument in this thesis is that in respect of actions that cause concussive or sub-concussive events consent should not be relevant, and the consequences, previously established, should not be blocked by consent.⁹¹

The legal and factual problems posed by consent are significant, leading to inconsistent answers in the analysis and results,⁹² and the courts have examined both the circumstances in which it is possible to consent to harm (a question of law), and whether the victim has in fact consented to that harm (a question of fact). Where implied consent is argued, for example when playing sports, divining its existence, and delineating its scope, has proven particularly problematic.⁹³ The difficulties have been seen to extend across both criminal law and civil law, and while there is a difference in implication, the application derives from the same question; is the activity one that the individual should be allowed to consent to? If the answer to this question is affirmative, then consent prevents a criminal conviction or civil liability. If the answer is no, then the liability can attach to the perpetrator. While the focus of this thesis is on one aspect of sports, it is necessary to examine consent in a wider context as there has been very limited judicial comment as to the specific question of whether a

⁸⁸ Rebecca Williams 'Body modification and the limits of consent to injury' (2019) 135 LQR 17

⁸⁹ John E. Stannard 'The emotional dynamics of consent' (2015) 79 J. Crim. L. 423.

⁹⁰ Miller and Wertheimer give examples of this as "the difference between slavery and employment, permissible sexual relations and rape, borrowing or selling and theft, medical treatment and battery, participation in research and being a human guinea pig" (F.G. Miller, and A. Wertheimer, *The Ethics of Consent* (OUP: New York, 2009), preview.)

⁹¹ Ibid 16

⁹² A.P. Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, (4th Edition, Oxford 2010), 749.

⁹³ Ben Livings' A different ball game - why the nature of consent in contact sports undermines a unitary approach' (2007) 71 J. Crim. L. 542.

participant should be capable of consenting to the rules of sports, with the focus being on actions that take place outside the permitted rules of sport.⁹⁴

The analysis that will follow can be summarised by two, true, positions that set out the markers for this discussion, both of which are in typically broad language. The first statement is that it is unquestionable that there are restrictions as to what an individual may give their consent to be done to them, and thus limitations on the defence that can be raised in either a civil or criminal action.⁹⁵ The second, is a judgment in *Stratton v Hughes*⁹⁶ where Swinton Thomas L.J. said that "Many sports, such as motor racing, rafting, mountaineering, rock climbing and many others have innate dangers. That is part of their appeal."⁹⁷ These represent the accurate statements that the law will not allow unlimited freedom but also that the dangers of activities are ones that induce, in part, people to carry out those activities.⁹⁸ The question is where the line should be drawn, and the extent to which it should be drawn to allow participants in Football, Rugby Union and American Football to pursue claims set out in previous Chapters. It will be argued, on several fronts, that under the current law consent should not succeed in blocking these claims, and that the arguments that it should, are not sufficient to overcome the arguments against.⁹⁹

Consent and Sports

To Box or not to Box that is the question

⁹⁴ Ibid n. 10.

⁹⁵ Ibid n. 93. This has also been confirmed as far back as 1882 in *R v Coney* (1882) 8 QBD 534.

⁹⁶ *Stratton v Hughes and Cumberland Sporting Car Club Ltd and Royal Automobile Club Motor Sports Association Ltd (RAC)* (unreported 22nd May 1998 QBD Lexis Citation 1991).

⁹⁷ Ibid.

⁹⁸ One key distinction between many of the examples given by Swinton Thomas LJ and the sports under discussion is that those sports involve individuals both assuming the risk and inflicting the risk. A rafter may accept risks that nature may do them, a mountaineer may accept the risks of the mountain, but it is a very different matter for the law to permit one person to impose the risk on another, even if that person consents.

⁹⁹ As previous chapters have made clear, we are primarily concerned with the civil law rather than criminal. However, much of the relevant discussion of consent as a concept has emerged through criminal law, and Fafinski has noted that as between civil and criminal law in this area they are "so similar that it is difficult to see any meaningful delineation between the basis for civil and criminal liability" Stefan Fafinski, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) 69 JCL 414. Livings has gone on to say that "There is considerable overlap between the criminal and civil offences that can be committed in relation to offences against the person during sport" Ibid n. 93.

Consent, in a sporting context, is the bedrock of the game; when a player takes to the field, they are doing so of their own free will, or by virtue of a contract of employment.¹⁰⁰ The only logical explanation for the lack of consideration by the courts is because it is a question that is seen as implicit in sport, a point that will be considered in the next section. However, it has been given a historical treatment, in respect of boxing and a brief summary of the approach taken provides a useful foundation for the development of this approach.¹⁰¹

The relevant cases are *R v Young*¹⁰² and *R v Coney*.¹⁰³ In *R v Young*,¹⁰⁴ the court held that the death of one fighter at the hands of another was not manslaughter. This was based on several circumstances, including the private nature of the bout,¹⁰⁵ and that medical evidence was found to indicate that boxing with gloves was not inherently dangerous.¹⁰⁶ The court also found that sparring, which was what the bout was said to be,¹⁰⁷ was not illegal, on the understanding of permitted activities, and that this had been a display of skill.¹⁰⁸ This analysis left open the possibility that if on an objective view the activity was dangerous, then an offence could have been committed. This very situation occurred in *R v Coney*¹⁰⁹ as “one of the very few extended judicial analyses of the relationship between violence and consent.”¹¹⁰ Here, the question was of a secondary nature as the Defendants were part of a crowd watching the prize fight. The question was whether they were guilty of aiding and abetting a criminal offence. Inevitably, it was necessary to decide whether the prize fight was a criminal offence. A key part of the decision in *R v Young*¹¹¹ had been that the bout was a practice session, rather than a fight open to the public. This was particularly important in the higher

¹⁰⁰ “I agree that in an ordinary fight with fists there is no cause of action to either of them for any injury suffered. The reason is that each of the participants in a fight voluntarily takes upon himself the risk of incidental injuries to himself. Volenti non fit injuria.” *Lane v Holloway* [1968] 1 QB. 379, 386–387 per Lord Denning MR.

¹⁰¹ Boxing has deliberately been excluded from this submission, as the thesis topic focuses on sports where the purpose of the action is not to injure, but that these can occur incidentally. For an in-depth analysis of injuries arising from boxing, see Jack Anderson *The Legality of Boxing A Punch Drunk Love* (Routledge Cavendish).

¹⁰² (1866) 10 Cox CC 371.

¹⁰³ (1882) 8 QBD 534.

¹⁰⁴ *Ibid* n. 102.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* n. 103.

¹¹⁰ *R v Brown* [1994] 1 AC 212 per Lord Mustill.

¹¹¹ *Ibid* n. 102.

courts finding that the fight in *R v Coney*¹¹² was an illegal act, as both Hawkins J and Lord Coleridge relied heavily on the potential breach of peace¹¹³ and the presence of spectators¹¹⁴ to demonstrate that the lower court had been correct to direct that the fight was an offence.

It appears that the court in *R v Coney*¹¹⁵ took a more restrictive interpretation of consent, and certainly this was true in terms of the outcome with the actions being deemed illegal. However, the rationale that was taken was crucial as the emphasis was on those observing rather than those competing. Sithamparanathan¹¹⁶ has emphasised that the reason for the court taking this particular approach was less the potential for causing injury within the bout, and more the potential effect on the crowd, going so far as to say that the focus of the judgment was on the crowd rather than the protagonists.¹¹⁷ Crucially, in so doing, the court was addressing, at least in passing, one of the points that had been important in *R v Young*¹¹⁸ where the court had taken the view that the private nature of the activity was an important factor in the legality of the act. In so doing, both the court in *Coney*¹¹⁹ and in *Young*¹²⁰ were following the principles of Aquinas who effectively argued that an individual was free to practice his "wickedness" so long as he did it in private.¹²¹

It appears that the main reasoning of the *R v Coney*¹²² court in banning prize-fights was the fear of the breach of the peace caused by working class people who were drunk, disorderly, gambled and often fought amongst themselves,¹²³ a paternalistic approach which can be seen

¹¹² Ibid n. 103.

¹¹³ "It is not in the power of any man to give an effectual consent to that which amounts to or has any direct tendency to create, a breach of the peace; so as to bar criminal prosecution" (Ibid n. 103 per Hawkins J).

¹¹⁴ "In such a case as this the spectators really make the fight; without them and in the absence of anyone to look on and encourage, no two men, having no cause of personal quarrel, would meet together in solitary to knock one another about for an hour or two. The brutalising effects of prize-fights are chiefly due to the crowd who resort to them." (Ibid n. 103, per Lord Coleridge).

¹¹⁵ Ibid n. 103.

¹¹⁶ Ambi Sithamparanathan Ent. 'Noble art of self-defence or unlawful barbarism?' (2002) LR 2002, 13(8), 183.

¹¹⁷ Ibid.

¹¹⁸ Ibid n. 102.

¹¹⁹ Ibid n. 103.

¹²⁰ Ibid n. 102.

¹²¹ "Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself and does not offend against the rules of public decency, he is out of reach of human law." Thomas Aquinas, *Summa Theologiae* (Blackfriars edition 1963 - 1975, Vol. 28, Thomas Gilbey OP), question 96, article 2, reply. Taken from Simon Lee, *Law And Morality*, (Oxford University Press, 1986.)

¹²² Ibid n. 103.

¹²³ Ibid n. 103.

as echoed in *R v Brown*.¹²⁴ In theory, this is helpful to this thesis, as all of the sporting events that are being considered are public; they are not restricted to the underground, but are conducted in the open, if rarely free, air. However, the public/private debate has been given less weight in other consent cases of more recent times,¹²⁵ and the specific reference to public order must, reasonably, be seen as the key rationale presented by Lord Coleridge and Hawkins J. It could be argued, in some sporting situations, possibly concerning ground safety and policy questions of infrastructure, that public disorder would negate consent, but it cannot logically be sustained in the context of concussion injuries, and so this part of the judgment is of little assistance in modern society, with the time-specific nature of the cases possibly giving one explanation as to why the authorities have received so little attention.

The more relevant question, that is at the heart and soul of this thesis, is the well-being of the participants,¹²⁶ and this, in these cases, was limited to an *obiter* discussion in the judgment of Stephen J who did refer to the “health of the combatants”¹²⁷ with the discussion of public safety being a secondary consideration. It was clear that for Stephen J, it was necessary to consider the extent to which a consenting individual was being injured, and that there was a line where it would become unacceptable. Stephen J went further in stating that “the injuries given and received in prize-fights are injurious to the public.”¹²⁸ In stating this he explained that this was partially because it was not in the public interest for two participants to be endangered by the actions within the activity, as well as the point that was emphasised by the other judges in the majority who focused on the public interest in avoiding disorder. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults.¹²⁹ This line of analysis has survived and will be considered later in its more modern form.¹³⁰

¹²⁴ Ibid n. 110

¹²⁵ Ibid.

¹²⁶ Ibid 20.

¹²⁷ Ibid n. 103. per Stephen J.

¹²⁸ Ibid.

¹²⁹ Stephen J went on to suggest that there was a difference between activities where there was considerable force and those where there were considerable injuries: “In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick (sic), sparring with gloves, football, and the like” Ibid n. 103, per Stephen J.

¹³⁰ See Page 286.

There are also two broader, but crucial, points that can be gleaned from the results of the cases. First, they demonstrate that a sporting activity can survive even when specific aspects of that sport are prohibited. While *R v Coney*¹³¹ drew a line in the sand and disallowed prize fighting, the pursuit of punching an opponent with an aim of knocking them out continued and continues to this day. The sport adapted. The sport evolved. The sport, as boxing, with new rules, survived.¹³²

Secondly, it is clear that a sport, or one incarnation of a sport, can develop to a stage where it ceases to be tolerable and that the mere identification of an activity as a sport is not sufficient to render it sacrosanct. It is worth noting that fist-fights as a sporting activity had survived,¹³³ with no more than the usual ebbs and flows, through the Middle Ages, even at a point when ball sports were banned in order to encourage more warlike activities, to better prepare participants for armed conflicts.¹³⁴ It cannot be said, therefore, that the decision in *R v Coney*¹³⁵ was inevitable, nor can it be said that the decision of the court led to the death of fist fights as a general sport, although as Anderson writes, this is not necessarily a positive outcome.¹³⁶ The prosperity of boxing, at an amateur and professional level, having survived the death of prize-fighting, suggests that ultimately there may come a point when the justification of 'it's always been done that way' is no longer sufficient. It will be argued that aspects of the three sports under discussion have indeed reached that point and that it is time for them to evolve or face legal scrutiny.

Sport is Special...Apparently!

The lack of precedent surrounding sport and consent requires consideration of jurisprudence in other areas of consent, and it is in this context that sport has been mentioned, in an

¹³¹ Ibid n. 103.

¹³² Governed, domestically, by the British Board of Boxing Commission (BBBC).

¹³³ Jack Anderson *The Legality of Boxing: A Punch-Drunk Love?* (Birkbeck Law Press 2007) 10.

¹³⁴ Ibid.

¹³⁵ Ibid n. 103.

¹³⁶ Ibid n. 133.

ancillary fashion, normally by way of reassurance that sport is treated differently¹³⁷ and that the courts are not on the brink of criminalising these activities. Before looking at these separate comments, however, it is important to see how consent has been adapted in everyday situations, to give a clear indication as to the difference in the test for sports.

A trilogy of cases, in the sixty-year period between 1934 and 1994, did not provide a consistent approach, instead leaving the law lacking clarity and coherence.¹³⁸ The first of these cases, *R v Donovan*¹³⁹ involved the defendant caning the victim¹⁴⁰ on her buttocks, with consent, for sexual gratification. The second, *Attorney-General's Reference (No 6 of 1980)*¹⁴¹ involved two youths, aged seventeen and eighteen, engaging in a fight in public, with a view to settling an argument. In both cases, the court ruled the consent was inadequate. In *R v Donovan*¹⁴² the decision was on the basis that consent was immaterial where the infliction of violence was such that bodily harm was a probable consequence¹⁴³ and in *Attorney-General's Reference (No 6 of 1980)*¹⁴⁴ it was on the basis that it was not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason.¹⁴⁵ The former case appears to move away from the previously discussed cases,¹⁴⁶ with an emphasis on the degree of harm,¹⁴⁷ and the latter is more consistent with that analysis, with a focus on public interests and morality.¹⁴⁸

To this point, sports involving potential concussion or sub-concussive injury would seem to be on tenuous grounds, as it has been seen that there is a significant risk of serious injury,¹⁴⁹ certainly sufficient to reach the levels seen in *R v Donovan*,¹⁵⁰ and it is difficult to argue, on

¹³⁷ Ibid n. 110.

¹³⁸ Stephen Leake 'Contact sports: application of defence of consent' (2005) Crim. LR 2005, May, 383-384.

¹³⁹ [1934] 2 KB 498.

¹⁴⁰ For the avoidance of doubt, the person upon whom the injuries have been inflicted in these cases will be called the victim, irrespective of the result of the case.

¹⁴¹ [1981] QB 715.

¹⁴² Ibid n. 139.

¹⁴³ Ibid.

¹⁴⁴ Ibid n. 141141, per Swift J.

¹⁴⁵ Ibid, per Lord Lane CJ.

¹⁴⁶ Although unlike the prize-fighting cases, this case took place in private, and therefore it would have been harder to adhere to the public order line of reasoning.

¹⁴⁷ Ibid n. 139.

¹⁴⁸ Ibid n. 141.

¹⁴⁹ Ibid 20.

¹⁵⁰ Ibid n. 139.

face value at least, that a sporting contest to split a prize fund, or determine who is the better team, is a better reason for violence than the pugilists in *Attorney-General's Reference (No 6 of 1980)*.¹⁵¹ It is important to note that in the former case, there could be no question that violence was a primary motivator, as the court expressly noted that the purpose was for sexual gratification.¹⁵² In the latter, more of an argument could be made for violence as a motive, but clearly the purpose was to settle the dispute, not to injure each other.¹⁵³ Yet, in neither case did the court suggest that sports could potentially be at risk, indeed they expressly stated the opposite.¹⁵⁴ To find out why, it is necessary to look at the third of these cases, that of *R v Brown*.¹⁵⁵

The nature of the acts in *R v Brown*¹⁵⁶ were more dramatic than the other two cases but the issues were similar. Here, a group of consenting adults took part in sadomasochistic activities including causing bodily harm to each other using a variety of methods, with the harm being sufficient to rise to bodily harm but which, in theory at least, did not strictly require medical¹⁵⁷ attention.¹⁵⁸ In theory, stripping back the sensational aspects of the acts, this had two of the factors that, based on older law, could have assisted the Defendants, and one that would not. The acts took place in private rather than public, and they contended that the acts were for the purpose of sexual gratification rather than violence. The former had been considered favourably in *R v Young*¹⁵⁹ while the latter had at least weighed upon the minds of the court in the previous two cases.¹⁶⁰ Clearly, the acts did rise to the levels of harm that were detailed in *R v Donovan*,¹⁶¹ although this is of course a paradox, as if they had not risen to a level of harm, then there would have been no case for the Defendant to answer.¹⁶²

¹⁵¹ Ibid n. 141.

¹⁵² Ibid n. 139.

¹⁵³ Ibid n. 141.

¹⁵⁴ Ibid n. 139. and Ibid n. 141.

¹⁵⁵ Ibid n. 50

¹⁵⁶ Ibid.

¹⁵⁷ There is a distinction here between what should objectively require medical care and what subjectively was not the subject of medical care- nailing body parts to a wall would objectively be seen as requiring medical treatment even if in the circumstances such care was not sought.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid n. 102.

¹⁶⁰ Ibid n. 139. and Ibid n. 141.

¹⁶¹ Ibid n. 139.

¹⁶² The contention in *R v Donovan* was that simple battery would not be of a sufficient level, but that Actual Bodily Harm or Grievous Bodily Harm would be. However, given that the definition of ABH is "more than

In respect of the former, the courts had little difficulty¹⁶³ in disposing of this argument on the basis of the court's decision in *Attorney-General's Reference (No 6 of 1980)*¹⁶⁴ which had made it clear that an act that took place in private was no less capable of being a threat to public order than an act in public,¹⁶⁵ although this analysis was not clearly developed and appears to run counter to the previous decisions. However, as has already been stated, the thesis is not based on sporting events being public or private, but on the nature of consent.

The second, of course, is relevant, because the court found that the consent was not valid which would suggest that they rejected the idea that consent was possible so long as violence was not the intention. However, instead, they expressly accepted the principle, on the basis that in sports any injuries are a by-product of the purpose of the activity.¹⁶⁶ Their rejection of the defence in this case was on the basis that the acts were those of violence with sexual overtones as opposed to sexual acts with violent overtones, as the Defendants had attempted to argue.¹⁶⁷

Whether this decision was right or wrong is, for the purposes of this thesis, irrelevant. Certainly, as the weight of critical opinion demonstrates,¹⁶⁸ it was controversial. It is arguable

transient or trifling" (Ibid n 139) any injury of the level that we are discussing would fall logically into at least that category.

¹⁶³ Ibid n. 139.

¹⁶⁴ Ibid n. 141.

¹⁶⁵ "It is not in the public interest that people should try to cause each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgement, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent."

¹⁶⁶ "the public interest limits the extent to which an individual may consent to infliction upon himself by another of bodily harm and that such public interest does not intervene in the case of sports where any infliction of injury is merely incidental to the purpose of the main activity." *R v Brown* per Lord Jauncey.

¹⁶⁷ Ibid n. 50

¹⁶⁸ This decision has been roundly criticised on the basis that the court took a moral as opposed to a legal perspective, and that the Lords simply disapproved of the activities that were taking place. See Samantha Pegg 'Not so clear cut: the lawfulness of body modifications' (2019) *Crim. LR* 2019, 7, 579, Nicoletta Bakolas 'Pretty tied up: the case against the presumption of illegality for consensual bodily harm' (2019) *Bristol LR*, 6, 35, Bethany Simpson 'Why has the concept of consent proven so difficult to clarify?' (2016) *J. Crim. L* 80(2), 97, Richard Easton 'Fifty shades of Brown' *S.J.* 2015, 159(9), 17, Amy Kerr 'Consensual sadomasochism and the public interest: distinguishing morality and legality' (2014) *NELR*. 2(1), 51, Sally Ramage 'Risky sexual practices and the doctrine of public policy' (2012) *Crim. LN*.47(Sep), 2, Peter Murphy 'Flogging live complainants and dead horses: we may no longer need to be in bondage to Brown' (2011) *Crim. L.R* 10, 758.

that the decision would not be made in the same way were it to be made in 2020.¹⁶⁹ However, there are sufficient threads running through the jurisprudence to say that the courts did follow an established path, by considering whether the focus was violence or this was a by-product, by considering the level of harm, and, following the most recent decisions at the time, by ignoring the private nature of the acts.

Where the case loses its clarity, for the purpose of this thesis, is in the side-issue of the case that was treated as an aside, which is allowing consent as a defence in sporting cases. It will be remembered that in the prize-fighting cases, the courts took a very bright line approach, and the principles that were used in *R v Brown*¹⁷⁰ had their roots in those cases. It was not specifically suggested that sports were part of a special category that stood them apart from non-sporting cases, indeed, there could not have been, as in the second of those cases, a sporting activity was indeed deemed incapable of being consented to. This was seemingly accepted by Burnett CJ who stated that “the exceptions are laid down there to preserve the law as it was at that time.”¹⁷¹ Foley has picked up on this, stating that the approach to sport has been made “without offering a reasoned understanding of its legality or otherwise within the framework of the law of assault”¹⁷² a view supported by other academics describing them as “historico-cultural artefacts created without further theoretical consideration.”¹⁷³

Anderson responded to Foley arguing the opposite on two grounds. The first is that “properly organised sports”¹⁷⁴ have traditionally been deemed to be in the public interest¹⁷⁵ while the second is that “boxing is one of the few contact sports held expressly to be in the public interest.”¹⁷⁶ Anderson’s analysis references a legal compromise in the relevant jurisdictions, effectively treating *R v Coney*¹⁷⁷ as an exclusionary rule; rather than setting out what is lawful,

¹⁶⁹ Ibid, Peter Murphy.

¹⁷⁰ Ibid n. 50.

¹⁷¹ Ibid.

¹⁷² Brian Foley ‘Boxing, the Common Law and the Non-Fatal Offences against the Person Act 1997’ (2002) 12 ICLJ 15.

¹⁷³ Samuel Walker ‘R v BM: Errors in the Judicial Interpretation of Body Modification’ (2019) JCL 83 (245).

¹⁷⁴ Ibid n. 133, 94.

¹⁷⁵ Citing Coke, Hale and Foster.

¹⁷⁶ Ibid n. 133, 95.

¹⁷⁷ Ibid n. 103.

that case was seen as carving out a rare exception to sports that is illegal, this preserving the legality of all other organised sports.¹⁷⁸

The decision of Lord Jauncey in *R v Brown*¹⁷⁹ continued this line of reasoning, arguing that all sports would be permissible, as the violence caused in that activity would always be a by-product of the activity rather than its intention, which is a sweeping statement without considering the precise details of the sport, particularly in respect of sports where injuries are very much intended, in particular contact sports such as boxing and Mixed Martial Arts, but also where it is impossible to play the sport under its current guise, without subjecting the athletes to a very high risk of injury, if not an inevitable risk. This is the case with the three sports in question and has been demonstrated previously.¹⁸⁰

Lord Jauncey's comments do have some clear application to sports. There are some sports where it can truly be said that any injury inflicted is a by-product of the activity, in particular non-contact sports. So, chess, to take an extreme example, while acknowledging the controversy of an activity that may or may not be a sport, has no physical contact. A player may trip over the table and injure themselves, but clearly injury is not part of the game. Likewise, croquet, snooker, and darts, despite the use of dangerous weapons, cannot be said to have violence at their heart. If a player while throwing the dart loses his grip so that it falls and injures the referee's toe, then this would remain entirely separate from the actual game. Yet, as Chapter Two demonstrated¹⁸¹ violence and sports have often gone hand in hand. While games may be regulated to a far greater degree now than in the past, it cannot be said that violence is unforeseeable, or unexpected, or even unanticipated. In ice hockey, fights are an acknowledged part of the game.¹⁸² In Rugby Union, spear tackles have only recently been outlawed,¹⁸³ and players are hurled into the ground on a regular basis. Physical contact, and an element of violence, is the game, it is not a by-product of the game, and as such, it is

¹⁷⁸ Ibid n. 133, 95.

¹⁷⁹ Ibid n. 50.

¹⁸⁰ Ibid 20.

¹⁸¹ Ibid 66.

¹⁸² NBC Sports, January 30th, 2009.

¹⁸³ Laws of Rugby 10.4j "Lifting a player from the ground and dropping or driving that player into the ground whilst that player's head and/or upper body come into contact with the ground is dangerous play".

difficult to assert, as Lord Jauncey did, that violence is not a central part of sport merely because there is no express ill-will or hostility in the actions.

Lord Jauncey's words did not escape even the case without challenge. Lord Mustill, who dissented, had grave concerns over the distinction that had been drawn Lord Jauncey between sports and the actions in question. When considering boxing and attempting to reconcile the statement of Lord Jauncey with the realities of that particular sport, he wrote that "It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it."¹⁸⁴ Taking the sporting exception in this context necessitates a completely different perspective on the area of consent when considering sports. Lord Mustill's assessment of boxing was not that there was a clear legal reason for its existence, but that society wanted it and therefore it was purely a matter of public policy, something that was not hidden greatly by the majority.¹⁸⁵ Lord Mustill did not even go so far as to suggest that this could be analysed using public policy, which has been dealt with in Chapter 3,¹⁸⁶ instead the question was simply disposed of as one that could not be answered. Lord Mustill's reservations were acknowledged by Anderson in spite of his rejection of Foley's argument, stating that the reasoning was not satisfactory¹⁸⁷ and describing the *R v Conney*¹⁸⁸ analysis as a "dubious and frustrating thread on which to hang the legality of sport, but it nevertheless exists and must be recognised."¹⁸⁹ Anderson did, however, place emphasis on the time at which concern was absent for injuries caused by boxing, and later argued that the situation has changed.¹⁹⁰ This will be of relevance later in this Chapter.

This then is the problem that must be faced. It has been seen that in the event that informed consent can be said to be present, paternalism provides a justification for overriding that consent. It has been seen that there is a strong argument for paternalism in these situations. Yet in the limited jurisprudence available, albeit *obiter*, the courts have maintained that sport

¹⁸⁴ Ibid n. 50.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 121.

¹⁸⁷ Ibid n. 133, 95.

¹⁸⁸ (1882) 8 QBD 534.

¹⁸⁹ Ibid n. 133, 95.

¹⁹⁰ Ibid n. 133, 95.

is special and should be protected. The remainder of this thesis will focus on arguing that this is not a viable obstacle to paternalism.

The provenance of the exception is unclear

It has already been observed that a crucial point that underpins the approach to sports in consent is the idea that there is a particular exception, whereby sports are treated differently, yet Lord Mustill's dissent concluded that efforts to reach an "intellectually satisfying"¹⁹¹ justification of the exception were not satisfactory¹⁹² while Beloff doubted "that even superhuman efforts could provide a more coherent justification for mixed martial arts."¹⁹³ This reflects the fact that the idea of a particular exception, whereby sports should be granted preferential treatment does not appear to have derived from a clear jurisprudential basis.

This is an important question, as if there is a well-established, robustly argued, and defensible exception for sports then it becomes harder to contend that a particular injury within a sport should be deemed to be incapable of being consented to. Academic comment, however, has supported scepticism of this point,¹⁹⁴ with emphasis being placed on the contradiction between the social utility that underpins the need for assault to be a crime¹⁹⁵ and fighting sports where points are given for the inflicting of punches, often to the head and other areas than may lack suitable protection.¹⁹⁶

¹⁹¹ Ibid n. 50.

¹⁹² "The heroic efforts" of an Australian judge "to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible. It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it." Ibid, per Lord Mustill.

¹⁹³ Michael J Beloff QC 'Good at games - does law help or hinder sport?' (2019) ISLR. 2019, 1, 5.

¹⁹⁴ Brian Bix, "Assault, Sodomasochism and Consent" (1993) 109 LQR. 540; David Kell, 'Social Disutility and Consent' (1994) 14 OJLS. 121; and Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 OJLS. 389.

¹⁹⁵ Jack Anderson 'No licence for thuggery: violence, sport and the criminal law: Implied sporting consent' (2008) Criminal Law Review (10) 10 754.

¹⁹⁶ Michael Gunn and David Ormerod, 'The Legality of Boxing' (1995) 15 L.S. 181.

One possible defence of the peculiar approach was suggested by Ashworth¹⁹⁷ in a summary of the criminal law generally, when it was contended that boxing was a unique situation, and the inexplicable nature of its continued legality was simply something that must be seen on its own merits.¹⁹⁸ The peculiarity, presumably shared with other fighting sports that have developed, such as Mixed Martial Arts, is that this is the only sporting category where the infliction of damage is intended, and therefore the only one where the acceptance of it is difficult to reconcile with the principles of criminal law.

An acceptance of Ashworth's contention, which adopts Lord Mustill's implied frustration as to the Gordian knot of jurisprudence, would suggest that the exception, though lacking in foundation, would continue to apply to other contact sports where the intention is not to injure but to make contact, or assault, the other individual. However, an exception is only as strong as the foundations upon which it is built, and Leake notes that in *R v Barnes*¹⁹⁹ Lord Woolf made a transparent declaration, which was that the decision to categorise an action as an exception or otherwise is a matter of public policy, which "renders it unnecessary to find a separate jurisprudential basis application of the defence in various different factual contexts in which an offence could be committed"²⁰⁰ The inevitable conclusion must be, as argued by Pegg, that there is no clarity as to what actions may be permitted or excluded in the future.²⁰¹

This is particularly important, because in the *R v Brown*²⁰² dissent, Lord Mustill made it clear that the line is malleable, and that in situations where harm is particularly serious and significant, even contact sports and lawful correction, two of the aspects of consent that traditionally fell outside the normal tests, would potentially be subject to the same rules as normal.²⁰³ Lord Mustill's departure from the majority was not on this point but on the question as to whether the actions in the case were of such a different nature as to render the approach that was taken by the majority.

¹⁹⁷ Andrew Ashworth, *Principles of Criminal Law*, (Oxford University Press 5th edn 2006).

¹⁹⁸ *Ibid*, 321.

¹⁹⁹ "the rule and the exceptions to the rule that a person cannot consent to his being caused actual harm, are based on public policy." *R v Barnes*, *ibid* n. 1.

²⁰⁰ *Ibid* n. 50.

²⁰¹ Samantha Pegg 'Not so clear cut: the lawfulness of body modifications' (2019) *Crim. L.R.* 2019, 7, 582.

²⁰² *Ibid* n. 50.

²⁰³ *Ibid* n. 159, 543.

It is worth considering the other exceptions and how they have fared in the time since *R v Brown*,²⁰⁴ with the best list of exceptions being provided by the dissent of Lord Slynn, identifying surgical operations, sports, chastisement of children, and jostling in a crowd.²⁰⁵ From this list of exceptions, it can be seen that it is no more than a grouping of unrelated activities that are tolerated for one reason or another; there is nothing on the face of it that links the four, indeed they all have different characteristics entirely. Chastisement of children, it has been accepted, is not even consent; it is assault that is sanctioned for reasons of discipline and yet it is useful, as it was included in the list, to see that even by the time of *R v Brown*²⁰⁶ this exception had been limited. Traditionally, physical chastisement could be conducted by a range of parties, but by the time of this decision, it was limited to parents. Since that time there has been significant debate, and in Wales it has been banned. This by itself suggests that the appropriate body for changing the status quo is the legislature rather than the judiciary, but given the unique place that sports have in the public consciousness, it will be argued that this has particular problems that warrant judicial intervention. The law regarding parents inflicting corporal punishment has also evolved over this period culminating in the current position under section 58 of the Children Act 2004 whereby it may only be administered if it will not amount to actual bodily harm. It is noteworthy that in *R v Williamson*²⁰⁷ Baroness Hale wrote that "Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society."²⁰⁸

The exception of jostling is also unhelpful to this discussion, as the injuries that can be sustained in such a situation are, by definition, minimal. The jurisprudence behind this exception revolves around mild injuries that would be not life changing.

The third exception is perhaps the most analogous to sport, being surgery. This is comparable because the individual has a desire, there is a risk, and the individual can over-ride the risk to

²⁰⁴ *Ibid* n. 50.

²⁰⁵ *Ibid* per Lord Slynn.

²⁰⁶ *Ibid*.

²⁰⁷ [2005] UKHL 15.

²⁰⁸ *Ibid* [71].

exercise their freedom of choice. However, this runs into two obstacles when being compared to sport. The first has already been noted, which is that the knowledge and understanding that is necessary to allow surgery to be consented to has been drawn in a more rigorous fashion in recent years. Whereas once it would have been acceptable for the surgeon or doctor to make the appropriate decisions, now a far greater explanation of the risks is necessary. This, it has already been argued, simply cannot be met in respect of concussive and sub-concussive events.

Secondly, surgery can be seen to have a far greater public interest than sport. Sport is of interest to the public, and from an employment perspective to the individual, but medical treatments are necessary for health. Whereas there may be evidence of sporting activity assisting in the general health of the participant, surgery is specifically necessary for this purpose. Evidence supporting this distinction can be seen from the point of view of cosmetic actions that are not supported on the basis of health but aesthetics. It will be seen that the court has drawn a line on activities that would not be carried out by medical professionals and instead are carried out by artists,²⁰⁹ whether extreme body modification or other cosmetic surgery that leads to life changing injuries, whether the victim considers them to be injuries or not. The inescapable conclusion is that while surgery remains an exception, the benefits are more relevant than in sport, and even here the requirement for surgery to be capable of being consented to have been drawn far tighter, while in sport the requirements of understanding have apparently remained static.

Several points can be taken from the confused state of the origins of the seemingly powerful sporting exception. First, it can be said that in respect of sports like boxing, the only passable explanation is that it is a unique situation. Secondly, the decision to allow contact sports to sit outside the traditional approach is a decision of public policy and that where there is sufficient harm, an aspect of consent that has always been crucial,²¹⁰ public policy may shift against allowing consent to be a defence.

²⁰⁹ *R v BM* [2018] EWCA Crim 560, 12.

²¹⁰ *Ibid* n. 50.

Sport is not a magical concept

As has been seen in the previous section, sports have been traditionally seen as different, somehow distinct from the normal order of things. There are two aspects here. The first is the idea that sports have “their own disciplinary procedures for enforcing their particular rules and standards of conduct”²¹¹ and that it is inappropriate for court action when there is a separate mechanism for dealing with issues of this nature. This has potential specific issues, for example, Livings noted that not all sports have such a body, and the extent to which such a body goes is often uncertain, referring to “low level amateur football”²¹² and disorganised park games. Livings notes that in respect of the former, there are issues with evidence, and most of the lower leagues are simply insufficiently scrutinised for this is to be a logical alternative to the rule of law.²¹³

There is also the question of how effective self-regulation is. Even on its own merits, it does not seek to compensate for injuries. Therefore, it can replace, conceivably, the criminal courts but not the civil courts, and so the question of consent is still crucial, simply in a different context. Secondly, self-regulation has already been considered,²¹⁴ and it has been seen that sports have been largely ineffective when given the opportunity to tidy up their activity.

But let us assume for a moment, that self-regulation is an acceptable way for an activity to be outside the parameters of the law. If so, then it is necessary to ask whether this is an approach that would be considered for other activities. For example, it will be seen that body modification is not permitted because of the seriousness of the consequences. In *R v BM*²¹⁵ the court observed that the actions were not ones that would have been conducted by a surgeon, because the aesthetic purpose was not proportionate to the risks.²¹⁶ Pegg asks

²¹¹ Ibid n. 10 per Lord Woolf.

²¹² Ben Livings ‘Legitimate sport" or criminal assault? What are the roles of the rules and the rule makers in determining criminal liability for violence on the sports field?’ (2006) J. Crim. L, 70(6), 501.

²¹³ Ibid.

²¹⁴ Ibid 73.

²¹⁵ Ibid n. 209.

²¹⁶ Ibid.

whether the industry self-regulating would be sufficient to permit body modification.²¹⁷ Based on the approach to sports it would seem that this would cure the concerns of the court, yet based on the discussion in *R v BM*,²¹⁸ where the courts disregarded the fact that the Defendant appeared to be doing a strong job of self-regulating, ensuring that his apparatus was sterile, it seems unlikely that the court would find this to be an acceptable approach.

Once again, therefore, it appears that sports are being given a far wider ambit than other activities for no other reason than perceived popularity. However, when the question becomes one of, potentially, life and death²¹⁹ it cannot be said that this is something that the sporting bodies are competent to deal with, particularly when they are the authorities who have the power to change the rules and make the consequences less draconian.

The second aspect is that sports, like, for example, religion is an activity that is appropriate and proper. Gurnham draws on Lord Templeman's consideration of behaviour in the cases, stating that it leads:

“the courts to adopt a different standard when the motivation for the dangerous behaviour is clearly sexual gratification, compared to those cases where no sexual motivation was accepted. Where the motivation for running a risk is merely sexual, as opposed to, say, religious, it is considered to be feckless, unproductive and not conducive to a civilised society.”²²⁰

The logical extension of this is that sports cannot be feckless, unproductive, and not conducive to a civilised society and therefore actions should be tolerated.

This however is an analogy that is strained for several reasons. First, there is an acknowledged right to religion that transcends other activities; it is a right that is global and accepted. This does not apply to sports, regardless of the common mantras that suggest it is of a particular

²¹⁷ Ibid n. 201.

²¹⁸ Ibid n. 209.

²¹⁹ Ibid 20.

²²⁰ David Gurnham 'Legal authority and savagery in judicial rhetoric: sexual violence and the criminal courts' (2011) *Int. J.L.C.* 2011, 7(2), 130.

level. Secondly, the right to religion is not unabridged, any more than other protected rights are unfettered. Actions that are done in the name of religion will be sanctioned only if they meet with society's approval.²²¹ Self-scarification in the name of religion may be permissible, but to do it to another will be considered assault. Human sacrifice may be consented to by a true believer of the faith, but it will still be considered murder. The Law Commission made this very clear in respect of sports by starting that "even if an activity is in the form of a 'sport', that cannot be allowed to inhibit the criminal law from holding that the rules of the sport permit unreasonably dangerous conduct"²²²

There is a final issue which works effectively with the question of religion. As a hypothetical, imagine that in *R v Brown*,²²³ the Defendants had claimed that their actions were not motivated by violence or sexual gratification, but by religious faith. How would the court have resolved this? They could, feasibly, have said that recognised faiths do not encourage such actions, although religious text is sufficiently wide that some feasible interpretation could have been located. But what if they had relied on an unrecognised faith? A religion to a deity not yet recognised by census or society. How would the courts then have dealt with it in view of Lord Templeman's deference to religion?

This is relevant, because one of the paradoxes of sport is that there is no clear definition, at least one that has been recognised by the courts. The simple fact is that if a case comes before the court, say arguing that a football tackle was sufficiently reckless as to vitiate consent and lead to criminal sanctions, the court need not spend significant time debating whether football is a sport. If they did, they would simply take judicial notice of the fact. Likewise, they would do the same for Rugby Union, or football, or any of the other sports that have been discussed in this thesis.

²²¹ Male circumcision, for example, is a technical assault on the person, and an invasive one, but it is one that is considered to be appropriate within a religious context. Even this, though, has been seen to have a limit, with female genital mutilation being illegal in the UK; Female Genital Mutilation Act 2003.

²²² Law Commission, *Criminal Law: Consent and Offences against the Person* (CP 134) (HMSO: 1994), 65.

²²³ *Ibid* n. 50.

But this is not always easy. In other cases, normally focusing on tax law, there have been genuine questions asked as to whether the activity is a sport or a hobby.²²⁴ One of the central answers to this has been the importance of the activity being of a physical nature, or at least having a physical element to it, and this thesis is not concerned with questions of whether darts and snooker are sufficiently physical to fit into this category while chess and bridge are not.

But if physical activity is the key to a sport existing, then this poses a problem. It is not unusual in law for individuals to attempt to evade regulation by seeking to pass illicit activities off as something else, from leases and licences,²²⁵ through shell corporations,²²⁶ and all the way back to Prohibition in the United States of America. There are new activities that have never been regulated by the courts and may be assumed to be sports but have never been classified as such. Take, for example, quadball (formerly quidditch), based on the Harry Potter series, where individuals hurl different sized balls at each other, and hop around with broomsticks tied between their legs.²²⁷ It may well be that this is a sport, but the criteria for establishing this is unclear, and yet under the existing authority, this is important. Imagine a situation, on a night out, where two individuals start throwing heavy objects at each other. They will likely be arrested and charged, and consent is not likely to assist. Yet, if quadball is a sport then their actions will be protected by the sporting exception, so long as it fits within the existing criteria. The Law Commission has expressed concern, before quadball became popular, as to the consequences where "any informal group of people can invent their own entertainment ad hoc, and then simply claim to have been playing a game".²²⁸ The Commission attempted to allay fears on the matter, stating somewhat unconvincingly: "we do not think that in practice the court will have any difficulty in identifying what is and what is not a sport".²²⁹

This may seem extreme, but the lack of clarity in determining what a sport is, is crucial as activities that would normally be banned can be dressed up in this manner to protect them.

²²⁴ *United Kingdom* (Case C-90/16 The English Bridge Union).

²²⁵ *Street v Mountford* (1985) UKHL, 4.

²²⁶ *Salomon v A Salomon* [1897] AC 22.

²²⁷ Quadball Rules of Sport, 2022.

²²⁸ Law Commission, Consultation Paper No. 134, Criminal Law: Consent and Offences against the Person (HMSO: 1994) 65.

²²⁹ *Ibid*, 66.

As an example, the film 'Death Race'²³⁰ and its sequels featured immensely violent driving with the goal of finishing a race, with no concern for life or welfare. If this were created by an enterprising entrepreneur and an organisation formed to establish some parameters, for example, that the individuals may not use firearms, this would potentially be a sport; possibly marketed as Turbo Racing. Activities that are completely alien to civilised societies can be dressed up as sport, because of the lack of guidance as to what is and is not a sport. Kristol took this approach in arguing that while gladiatorial contests may meet many of the criterion of sports, it would be absurd to argue that these should be permitted in civilised society.²³¹

It could be argued, of course, that this is absurd, and that the courts would not allow such protection. Yet even if that were the case, there would be little to prevent an evolution of that activity until it civilised itself sufficiently to just fall within the limits of what is acceptable, which is something that has precedent in Mixed Martial Arts. This is not a new sport and traces its roots to *Leitai* in ancient China and *pankration* in Ancient Greece but involved prize fighters as recently as 1852. It is true that the regulations have been amended since them to try to civilise the activity, but it remains very much a free for all, with ground, clinch and stand-up styles all being mixed into one, with the subsequent lack of specialisation in all styles. There is a referee, but if the aforementioned Turbo Racing were to have a referee it cannot be said that this would make it any less of a sport than without a referee.

The Evolving Times

Evolution is a constant theme of this thesis and has been discussed at various points. However, it is crucial here to take a hard look at the reasons for this public policy in favour of

²³⁰ 'Death Race', Dir Paul W.S. Anderson (Universal Studios).

²³¹ "I know of no one, no matter how free in spirit, who argues that we ought to permit gladiatorial contests in Yankee Stadium, similar to those once performed in the Colosseum at Rome--even if only consenting adults were involved." Irving Kristol, 'Pornography, Obscenity, and the Case for Censorship,' (1971) *New York Times Magazine*, Mar. 28, 1971, 24. One difficulty with Kristol's argument is that sporting developments since 1971 have included MMA which can be seen as gladiatorial combat without weapons, although as seen when discussing the development of athletes' physiques, it could be argued that their fists and feet are as dangerous as a sword, shield or net. Again, a key distinction here is that the risks of gladiatorial combat, as described by Kristol, were clear; two fighters attacking each other with weapons could lead to visible bodily injury or death whereas the risks of concussion are insidious and, often hidden. As this thesis discusses incidentally violent as opposed to inherently violent sports, the point is not key, but when considering fighting sports, it would be a more central point.

sports, and the potential violence. It was seen in Chapter One that while violence has been a part of sports since time immemorial,²³² it has refined itself over time, with a consistent movement away from chaos towards regulation, away from the unruly, towards order. It has already been seen that where the courts have stepped in, they have been motivated by factors that are relevant to the discussions of benefits of sport. When prize fighting was banned, a guiding principle was the potential danger to the spectators, but there was also obiter comment that suggested that the safety of the participants was paramount. Beyond the express judicial comments, it can be implied from the change between the two cases; in the first case the court found that there was no evidence supporting the possibility of harm, while in the latter, the possibility and probability, of harm was manifest.

This then is one of the crucial points. It may have been arguable twenty years ago that the possibility of concussive and sub-concussive events was not troubling, but the medical evidence in Chapter Two makes it clear that this is no longer the case. In his text on the subject, Anderson argues that in respect of boxing, the arguments that had previously been used to support the noble art were no longer germane and it is contended that when dealing with concussion and sub-concussive events, the same analysis must hold true. Reed has added a different dimension to this by arguing that were a sport to introduce a new rule that led to a high frequency of serious injuries, then the courts would be free to deny consent as a defence.²³³ It must therefore be logically the case that if an existing rule is proved to be an equal cause of injuries, then the court would also be free to deny consent as a defence. This section will examine in more detail why the evolving times make it appropriate for the balance of public policy, for concussive and sub-concussive injuries, to fall against consent being an appropriate defence.

This is not novel

²³² In the lay rather than legal meaning.

²³³ Alan Reed 'Sport: crime and consent' (2005) *Crim. Law.* 2005, 149, 1.

Consent is a populist notion that has been echoed by protests during the global pandemic of 2020. A constant theme of those protests has been the notion that governments are stealing liberty from the people, and that the individual has the right to determine their own path. It is true, of course, that there is no direct analogy between this thesis and the pandemic, as consent is seen as irrelevant in that case because the risk is not only to the individual but of the individual passing the risk on to others.²³⁴

However, the fact remains that society is not truly free to consent to all ills and absolute liberty remains a utopian ideal rather than a social norm. Wilson, in his text on criminal law, emphasised this, observing that there are always lines drawn by the courts or Parliament, to make it clear that certain activities are not permitted.²³⁵ This section will examine several situations where individuals have, in the past, been free to commit themselves to danger and have had that freedom curtailed, and it will be argued that none of these situations are as grave as those that are currently in discussion. These situations have been chosen based on the approximation of choice with sports, situations where people have always been prevented from consenting to risks, or where they have in the past been permitted to consent to the risks, but society has evolved to say that this is no longer permitted.

Bodily mutilation and suicide

At first blush it seems strange to combine these two, but there is a point to it, as in both cases, absolute freedom would dictate that an individual can do to themselves as they wish, but in both cases the law and society has mandated that the freedom to do this should be limited.

²³⁴ There is an argument that in rugby union, the player consenting to play must also be consenting to inflict violence on another, which could be seen as a parallel, on the basis that if a player doesn't want to be subject to violence they could simply not play (or in the case of the pandemic leave the house) but this is not equivalent, because in the pandemic situation the person who leaves the house may pass it on to a third party who could then pass it on to the person not leaving the house. In sport, the direct injury is limited to the two consenting participants, although of course there are numerous other secondary victims, including the family of the victim.

²³⁵ "Clearly there is room, within a reasonably civilised society, for people to consent to the infliction of injury. Sometimes personal autonomy may be enhanced by the suffering of injury. Cosmetic surgery is a topical example...But there is also room for criminalising harm-causing activities, for example euthanasia, or duelling, or fighting in public, which may harm public as well as private interests," William Wilson, *Criminal Law*, (London: Pearson, 7th edition), 303.

In one sense, suicide is a particularly apt point, as it has been very much part of the social debate in recent times. Traditionally suicide, and more relevantly attempted suicide and assisted suicide, have been illegal.²³⁶ In recent times, there has been a trend against this, and it could be argued that this is indicative of society moving away from a restrictive approach and towards a more liberal approach. However, this would be premature, as it is not contended that there should be a complete freedom to end your own life, rather the debate has focused on questions of relief of pain in cases of terminal illness and, with the involvement of others, to ensure that the individual lives as long as possible rather than having to commit the act while they are able.

The public interest in allowing this is quite clear. It is not a question of profit, or entertainment, but rather it is about human dignity and relief from pain. Despite contentions from prominent figures in sporting history and society that place sports on a higher level than life, it cannot be satisfactorily argued that the public interest in one person suffering life changing injuries is the same as relieving the pain of one who is. It is an interesting, and disturbing, point to note that as the law stands, a player can be free to engage in activities that lead to a lifetime of pain, suffering and misery, but then forced by the state to continue to experience that pain, suffering and misery; the freedom to consent to the consequences but not to consent to them stopping.

It is clear that the state does step in, and that there is a limit to the freedom of the individual. However, it cannot be said that this is limited to the continued existence of the individual for the courts have been quite clear in their recent analysis of the boundaries of consent, that they will not allow an individual to maim another by way of bodily mutilations. Thus, the court has held that while tattoos are permissible, and piercings are acceptable, an individual may not cut out pieces of a human tongue to create an aesthetic impact, nor can they mutilate the body in other ways. This was held in the case of *R v BM*²³⁷ which involved an individual who

²³⁶ Although Reed notes that “there is nothing to stop an individual refusing to accept medical treatment. Alan Reed ‘Offences Against the Person Act 1861, s.20: footballing injury’ (2005) J. Crim. L. 2005, 69(3), 201-205, and emphasises the distinction between an act and an omission.

²³⁷ Ibid n. 209.

had carried out body modification to a client, at the request of the client. The body modification was significant and involved the removal of ears and nipples, and the forking of a tongue.²³⁸ The medical evidence, which was described as “uncontroversial” was that medical professionals would not perform these on the basis that the Defendant was performing them, for aesthetic purposes.²³⁹ The argument that was put forward by the appellant was straightforward; that to decline to recognise the consent that had been provided by the victim would interfere unreasonably with their personal autonomy.

The court rejected this argument, taking a “resolutely paternalistic approach”²⁴⁰ and ruling that body modifications could not be placed into their own special category as was occupied by sports, because to do so would lead to a serious risk to the public.²⁴¹ In so doing, Pegg notes that the court was taking a similar approach to the court in *R v Brown*²⁴² by emphasising the potential for serious harm, although of course it was noted in that case that the violence was at the heart of the activity, while here there was no suggestion that this was the case, and it was accepted that the intention was to provide body decoration, although it went further than many other cases.²⁴³

This provides an excellent example of a situation where the courts will intervene and prevent the individual from carrying out acts that cause harm, even with express consent. It is noteworthy that this case had several features that would normally favour the Defendant. Although he was not a medical professional, it was accepted that he made a conscious effort to ensure that the relevant tools were sterile,²⁴⁴ and his working practices were considered in a favourable light by the Court.²⁴⁵ It is arguable that an analogy can be drawn to sports that have made an effort to provide a supportive environment, such as Rugby Union. Yet, it was

²³⁸ Ibid.

²³⁹ Samantha Pegg ‘Not so clear cut: the lawfulness of body modifications’ (2019) Crim. LR 2019, 7, 579.

²⁴⁰ Ibid.

²⁴¹ Per Burnett LJ “risk of unwanted injury, disease or even death” which may flow from the consensual infliction of serious injury and which “may impose on society as a whole substantial cost”.

²⁴² Ibid n. 50.

²⁴³ This was particularly key in the decision of Lord Burnett CJ who equated body modification at this level to surgery and therefore noted that in a surgery the qualified professionals would be able to consider other matters including potential issues of mental wellbeing and psychological issues.

²⁴⁴ Ibid n. 209.

²⁴⁵ Ibid.

not sufficient to save the Defendant in this case. This was despite a previous authority that had suggested that amateur actions of this sort would be permitted.²⁴⁶

The crucial difference between the two cases was seen in the interpretation of the damage. In *R v Wilson*²⁴⁷ the Court of Appeal, held that where the injuries were "no more dangerous or painful than tattooing"²⁴⁸ it should not be a matter for prosecution. Setting aside the fact that the Court appeared to be confusing the discretion of the Crown Prosecution Service to bring a case with the question of whether the component parts of the case were made out, the suggestion was that the determining factor was the extent of the damage. This is consistent with the subsequent case, as by any standard the damage caused in *R v BM*²⁴⁹ was significant. But this does support the argument that concussive and sub-concussive injuries should be treated with additional care. It has been established that these injuries can be unpredictable and exceptionally serious with long term effects. If physical alterations, as seen in *R v BM*²⁵⁰ are excessive, then it must follow that concussive and sub-concussive injuries are also excessive, as they fall well beyond the damage and harm in *Wilson*.²⁵¹

It is also important to note that the attempts that have been made by the sporting bodies, particularly in Rugby Union, to assist in the treatment of the consequences, and to, for want of a better phrase, make the surrounding circumstances more acceptable, would not assist based on these judgments. The court did not deny that the artist in question kept a clean facility and was conscientious in ensuring that there was an appropriate degree of sanitation. This was, in the eyes of the court, irrelevant. This was an act that was sufficiently grotesque for the court to revert to the determinations in *R v Brown*.²⁵²

Again, it is necessary to return to what is the fundamental issue which is that the courts seem more willing to condemn actions that are visibly grotesque, and even exaggerated. Yet the brutality of the results is not the essence of the harm. That removing a chunk of a human

²⁴⁶ *R v Wilson* [1996] Crim LR 573.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid* n. 209.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid* n. 246.

²⁵² *Ibid* n. 50.

tongue is unpalatable to many, though not all, is one point of the argument. Yet, time and time again, it is the subtle points that are referred to by the courts as they talk about the risks of infection, and the risks of long-term harm. This is the area that is most compelling, for it is also the area that is most relevant for concussive and sub-concussive events. It has been seen, and reiterated for such is its importance, that concussion is not immediately dramatic, nor bloody, not even violent. But the long-term consequences are insidious, and it has already been seen, through the Muamba incident, that if the immediate effects were more obvious, it is likely that sports would already be acting, not to improve treatment, but to seek prevention. It is the consequences that are relevant, and the consequences of this injury are far more serious than those in incidents where the courts have already ruled that consent is not possible.²⁵³

Asbestos litigation

Although asbestos was recognised by the Romans as posing risks to their slaves,²⁵⁴ it was only at the end of the nineteenth century that the potential risks became apparent in the United Kingdom²⁵⁵ and now it is widely recognised that individuals who suffer from asbestosis are at serious risk from a variety of cancers.²⁵⁶ In spite of this, asbestos has been widely used in industries throughout the twentieth century.²⁵⁷ There are many similarities to the concussive and sub-concussive risks that are inherent in sport²⁵⁸ with the real risk of asbestos being that it might break into a form of dust which then becomes airborne, can be inhaled, or can attach itself to clothing.²⁵⁹ It is therefore, an “unseen killer.”²⁶⁰ It can further be described as a

²⁵³ The Law Commission did consider a change in the law in 1995 to allow individuals to consent to seriously disabling injury, but Livings notes that this would not have greatly assisted in *R v BM [12]* or in these cases, as “loss of a bodily member or organ or permanent bodily injury or permanent functional impairment or serious or permanent disfigurement or severe and prolonged pain, or serious impairment of mental health or prolonged unconsciousness” would still have been incapable of being consented to (Law Commission 1995).

²⁵⁴ Arthur Frank, ‘Global use of asbestos - legitimate and illegitimate issues.’ (2020) *J Occup Med Toxicol* 15, 16 (2020).

²⁵⁵ Annual Report of Her Majesty’s Chief Inspector of Factories. 1898; London: H.M.S.O.

²⁵⁶ *Ibid* n. 228.

²⁵⁷ Gianni Origani et al, ‘Asbestos liability: managing the risks’ (*Practical Law*, 1 August 2004).

²⁵⁸ *Ibid* 16.

²⁵⁹ Nico van Zandwijk, Glen Reid & Arthur L. Frank ‘Asbestos-related cancers: the ‘Hidden Killer’ remains a global threat’ (2020) *Expert Review of Anticancer Therapy*, 20:4, 271.

²⁶⁰ *Ibid*.

delayed killer, as the diseases typically have “long latency periods”²⁶¹ of between twenty and fifty years.²⁶² Frank’s analysis of the disease has also indicated an additional similarity, as it cannot be said with certainty in any case what exposure will cause the consequences. It is possible that the effects can be caused after one day of exposure,²⁶³ but it may also be that that a longer exposure does not lead to illness.

The parallel between asbestos and concussive and sub-concussive injuries can be taken further into the field of consent. Since 1986 it has been banned in the United Kingdom²⁶⁴ and since 1992 it has been defined as a “controlled waste”²⁶⁵ but before 1986, an individual who agreed to work for a company within this industry would know, logically, that there were significant dangers. Indeed, Lemen’s work²⁶⁶ made it clear that there was a link to cancer, and the scientific community has been described as “consistent”²⁶⁷ in its approach to the dangers of this substance with established medical evidence dating back to the 1930s.²⁶⁸ Yet they would choose to work for that company with at least a general awareness of the risk. Applying the logical approach of sports, they would have implicitly consented to the reasonable risks. Given that there was a published document setting out the potential risks of asbestos, it would be logical to say that the employee had consented to the activity. Yet, the Supreme Court²⁶⁹ confirmed that liability was possible, and consent was not even argued in that case, with the question being limited to one of causation.²⁷⁰

The logical answer might be that the importance of the asbestos as a building material is not comparable to the social importance of sport to the community. As has been emphasised already, this is a dubious argument at best when considered dispassionately, but it is also a

²⁶¹ Ibid n. 259.

²⁶² Ibid.

²⁶³ J.C Wagner JC et al ‘The effects of the inhalation of asbestos in rats.’ (1974) Br J Ca; 29:252, M Greenberg et al ‘Mesothelioma register 1967-68.’ (1975) Br J Ind Med; 31:94, Arthur Frank ‘Global use of asbestos - legitimate and illegitimate issues.’ (2020) J Occup Med Toxicol 15, 16.

²⁶⁴ Asbestos (Prohibitions) Regulations 1984.

²⁶⁵ Annex I of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal [1992].

²⁶⁶ RA Lemen et al ‘Epidemiology of asbestos-related diseases.’ (1980) Environ Health Perspect;34 (Feb):1–11.

²⁶⁷ Ibid n. 266

²⁶⁸ Sonja Klebe et al (2020) Int. J. Environ. Res. Public Health, 17(1),

²⁶⁹ *Knowsley Metropolitan Borough Council v Willmore* [2011] UKSC 10.

²⁷⁰ This question of causation would also exist if claims were made against employers but not if they were made against the governing body.

faulty analogy. A better analogy would be to say that the building industry, which relied heavily on asbestos²⁷¹ was considered to be of less value than the social importance of sport. Removal of asbestos, and the ability to consent to the use of asbestos did not destroy the building industry, because the industry found other materials that could be used. Likewise, the emendation of rules within a sport would not destroy sport as a whole, or the individual sport.

The reality is that asbestos was once considered to be essential for the building industry, just as the three sports under discussion are to sport and society. There was an overlap between this situation and awareness of the medical dangers of the activity, just as the NFL litigation has demonstrated is the case in these sports. The difference is that asbestos is now banned, and litigation is resolving the significant claims by ex-employees, or more likely their estates, in the courts, and consent has not even been an issue. Meanwhile, sports continue to expose their athletes to these significant risks.

One other difference, of course, is that in terms of the time delay between exposure and consequences, asbestos is generally considered to have reached the peak of consequences. With the ban taking place twenty-five years ago, and the likely time-lag being twenty years, it is reasonable to believe that this is the peak. Sports are not at that peak, and the activity is continuing which leads to a high probability to a plateau rather than a peak in the future. Currently it is estimated asbestos leads to 255,000 deaths a year.²⁷² This is based on far more exposures than will occur in sports, but even 1% of that number would be 2,550 deaths a year caused by the injuries that are being tolerated by sports. If the question was rephrased from ‘should an individual be able to consent to potential sporting injury’ to ‘should an individual be able to consent to being one of 2,550 who die every year’, the argument that it is in any way in the public interest to allow consent to these activities becomes an impossible one.

Other Sports

²⁷¹ Ibid n. 263.

²⁷² A Aryal et al. ‘Call for a global ban policy on and scientific management of asbestos to eliminate asbestos-related diseases’ (2020) J Public Health Pol.

This was partially dealt with in Chapter Two,²⁷³ and has been placed last because it is difficult to qualify the reasons for some of the more archaic sports that have been banned, but it is worth noting that over time sports that have once been considered acceptable have been banned while others have been banned without ever reaching legality in the first place. Some were banned because of an evolving understanding of animal cruelty,²⁷⁴ while prize-fights were banned because, alternatively, of the safety of the individuals or the dangers of public disorder.²⁷⁵ Other sports have been banned because of the danger to the public, including streetcar racing,²⁷⁶ although while it is most likely that this was banned because of the danger to others, there is a strong argument that it should be banned because of the unpredictable dangers to themselves. In other activities, legislatures have taken a secondary approach by banning the items that are used. Therefore, shock fighting which involves tasers in the gloves of boxers, has not strictly been banned, but the ownership of tasers has been,²⁷⁷ thus rendering the specific question of whether the sport is legal moot. All of this demonstrates that consent in sports is not an absolute inevitability but rather a question of degree.

Risk of injury versus risk of consequences

It is also often pointed out that the awareness of a sports participant of the possible consequences of his participation in a sport cannot be regarded as his consent to such negative consequences. In other words, the sports participant is aware of the objectively higher risk of injury during the practice of a sporting activity, such awareness, however, does not imply his consent to interferences with his physical integrity (i.e., harm to his health).²⁷⁸

There is also a significant difference between the types of injuries when thinking about the risk of injury against the risk of occurrences. A broken leg may or may not occur in a game, a season, or even a career. Yet an individual will be tackled many times during a single game, and more so over the course of a season and career. There is a risk of injury, and this is

²⁷³ Ibid 77.

²⁷⁴ Cockfighting, bear baiting, and dog fighting.

²⁷⁵ Ibid 234.

²⁷⁶ Road Traffic Act 1988, s12.

²⁷⁷ Prevention of Crime Act 1953, S 1(1).

²⁷⁸ Michal Kralik 'Civil liability of sports participants for sports-related injuries in Europe and in the Czech Republic' (2013) ISLR, 3, 65.

something that the player is competent to comprehend. Concussion, and sub-concussive events, by contrast are different. As Chapter Two demonstrated every time the head is bumped, or there is a whiplash effect, there is a knock-on effect on the brain. The risk is not to injury, for the brain is injured every time an active player participates, assuming they participate and do not simply stand still, but instead the risk is to consequences. The question that emerges in every situation is, will this occasion lead to significant consequences or to what degree will this occasion increase the possibility of a long-term injury or illness.

There is a critical distinction between taking a risk of the various, potentially adverse, and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease.²⁷⁹ It could of course be argued that there is a connection, based on what amounts to a 'wear and tear' argument, and that is that parts of a player's body are subject to wear and tear. A tennis player, for example, will likely put excessive strain on their serving arm and shoulder, for example, because of the repetitive movement throughout the game. A football player will place wear and tear on their legs because of the distances that they must run, as for that matter will a participant in athletics, or even a casual marathon runner. This is a valid point and although the body typically has a clearer warning system for a participant who suffers from this than concussion, there are two clear points that can be used to counter.

The first is that the severity of the long-term injuries are known, whereas with concussion only the severity is known, and they are operable, while concussion is not. Concussion, as has been already stated, cannot be cured, and the comparative severity by itself is enough to draw a distinction. The second point, on a practical level, is that this severity is not sufficient, or sufficiently new, to warrant the remedy which would be to ban the sport. Theoretically the sports could all be played at a walking pace, but that would be a disproportionate adjustment. By comparison, the sports in question can be adjusted to adapt to significantly reduce the levels of concussion.

²⁷⁹ *R v Konzani* [2005] EWCA Crim 706 per LJ Judge.

It is in the Public Interest, or is it that it is Interesting to the Public?

The final argument is a key battlefield, and that is that sports are in the public interest.²⁸⁰ This has been defined, more or less, on the basis of public policy, that sports are in the interest of the public. Yet, far from being a strong argument in favour of allowing consent, it will be argued that while it may be interesting to the public for players to risk being seriously injured, the public interest is not satisfied by these acts.

The law has long recognised the social utility of sport in enhancing the fitness of the population. A number of principles seem to have developed. First, although by playing the sport the victim consents to whatever the rules permit, if the rules permit an unacceptably dangerous act, the law need not recognise the validity of the victim's consent. That is a matter of public policy. However, boxing continues to be lawful despite the life-threatening injury and participants' intention to cause grievous bodily harm. Secondly, where unlike boxing and martial arts, playing within the rules of the particular sport does not necessarily involve D causing actual bodily harm, but D intentionally inflicts injury, the consent of the victim can be seen as irrelevant, and D commits the offence.²⁸¹ This underlines the idea that there should be a different consideration for sports where the direct attacks are not a necessary part of the game.

Public policy is, by its very nature, vague and unhelpful, regardless of the specific context, although in this context Livings has specifically said that it "len[ds] the doctrine great uncertainty in the criminal law."²⁸² However, in rebutting contrary analysis, Anderson has emphasised that the existence of the concept is inevitable, and that a degree of naivete must

²⁸⁰ Livings observes that this shouldn't be a fundamental issue in civil law as the focus of the law is compensatory as opposed to imposing sanctions: "Such constraints do not exist in the realm of tort law, concerned as it is with compensatory judgments, and consent is available as a defence to negligence, essentially unconstrained by public policy." Ben Livings 'A different ball game - why the nature of consent in contact sports undermines a unitary approach' (2007) J. Crim. L, 71(6), 542. However, has already been seen (Ibid at) public policy is a central aspect of tort law in this area, and therefore if nothing else consent forms a part of that analysis. The main difference seems to be in the burden of proof as in civil law it will typically fall on the Claimant to show an absence of consent (*Christopherson v Bare* (1848) 11 QB 473) while in criminal law the burden will normally fall on the Defendant to assert it.

²⁸¹ Stephen Leake 'Contact sports: application of defence of consent' (2005) Crim. L.R. May, 383-384

²⁸² Ibid n. 212.

exist in seeking to deny the courts' reliance on it.²⁸³ The tenuous nature of it was seen in Chapter Three arguing that it defies definition,²⁸⁴ but here there will be specific arguments as to why using it to establish an exception to the basic rules to consent should be treated with particular scepticism in the sporting field.

The arguments for the sporting exception were noted earlier, yet these can be challenged on their own terms, and this can be done using the reasoning in *R v Brown*.²⁸⁵ Although the court analysed consent outside the special exception, the reasoning behind the refusal to allow consent in that case provides a useful backdrop for demonstrating that it should not be used for sport. Analysing that case Sithamparanthan identified five crucial policy reasons for the court making the decision that it did. These were that the extent of the injury was unknown, there were insufficient controls and the possibility of long-term injury, there was the possibility of transmission of blood diseases, there was potential for the corruption of youth, and that legally they could not be consented to by the parties.²⁸⁶

Excluding the fifth of these, which as has already been seen is a regularly repeating circular argument, the court found that all four policy grounds weighed against allowing consent. It would be difficult, if this find was paralleled in sports, to argue that sports should be treated differently and it can be seen that on all four, the sports in question, and in particular the consequences of the injuries in particular, must lead to an identical answer as the court gave in that case.

The court found that the extent of the injury was unknown, which is logical. The participants were not medically trained, there was no doctor present,²⁸⁷ and there was no way for the participants to know the precise lengths to which they were going. If the cuts were too deep, then a victim may bleed out. If the appropriate procedures were not carried out on a blade to sterilise it, then there may be an infection. They chose to use hot wax, the consequences

²⁸³ Jack Anderson *The Legality of Boxing: A Punch Drunk Love?* (Birkbeck Press 2007).

²⁸⁴ *Ibid* 121.

²⁸⁵ *Ibid* n. 50.

²⁸⁶ *Ibid* n. 116, 186-187.

²⁸⁷ It is relevant that a requirement for duelling was that there should be a medical practitioner available to add an element of expertise to the proceedings.

of which could be varied, and there were many other actions, the ultimate conclusion of which could not be easily determined. What is clear, is that in this assessment, the court focused on the consequences of the actions rather than the actions themselves, building in the argument already made which is that an individual can only consent to actions where they are aware of the consequences, or at least the possible consequences. It has already been established that internal injuries of this sort are far harder to detect, and that the end result of the injuries remains very uncertain. Clearly, if the extent of the injuries in *R v Brown*²⁸⁸ could not be determined, it stands to reason that this is also the case with concussive and sub-concussive events.

The second point made was that there were insufficient controls, which appears to draw a parallel with sports where there is a referee who is able to intervene and control proceedings, and links to the idea that a regulated activity is safer and thus consent is viable.²⁸⁹ Again, however, this is only effective insofar as the person exercising the control has sufficient awareness of the situation. With concussive and sub-concussive events, there may be signals that allow the referee to intervene, particularly with video technology assisting, but the ultimate control mechanisms in sports are the rules of the game. This only acts as an effective control mechanism if it seeks to prevent the excessive injuries. For example, in *R v Brown*,²⁹⁰ the participants could, hypothetically, have been subject to a rule which states that they must not inflict the injuries upon the head. This would be a control mechanism, and there may have been sanctions if it were breached, but it is inconceivable that the court would have allowed this to be used to argue that this led to consent. The very argument in this situation is that the control mechanism does not go far enough, its mere existence, on some level, cannot be sufficient to sustain consent as a defence.

The third point that was discussed was the risk of infection. This was one of the crucial points that was noted by Sithamparanthan in his analysis of *R v Brown*²⁹¹ in respect of boxing, as he

²⁸⁸ Ibid n. 50.

²⁸⁹ Jauncey LJ drew a clear parallel, stating that "there was, of course, no referee present, as there would be in a boxing or football match'.

²⁹⁰ Ibid n. 50.

²⁹¹ Ibid.

contended that there is a significant risk of cross-infection.²⁹² While this is not relevant to these types of injuries, Sithamparanthan goes on to equate the long-term dangers of infection with the long-term injuries that can occur, including the types of injuries being discussed here.²⁹³ The principle is the same; the injuries cannot be clearly identified, and there is a significant risk to the victim that should not be capable of being consented to. This was emphasised by the majority of the Lords in *R v Brown* who argued that a crucial point was that the severity of the actions was unpredictable.²⁹⁴

The fourth point that was referred to in the judgment was the potential for the corruption of youth, which Sithamparanthan implicitly rejects, suggesting that the “flawed”²⁹⁵ judgment merely teaches young people that “boxers are permitted to beat each other senseless within the sanction of the law whilst consenting homosexuals are not allowed to participate in their chosen sexual activities within the privacy of their own homes.”²⁹⁶ The difficulty with the approach taken is that it was very much a subjective question, with the Lords who sat on the case taking the view that the former was a good influence on youth while the latter was not. Bix suggests that there are different ways of characterising the activities, and that it would be just as simple to argue that many would see boxing as an “activity where the purpose is to cause extreme injury, which is also treated by some, perversely, as a sport.”²⁹⁷ There was no objective reason given for this distinction, there was no basis for the moral judgment, and nothing to suggest that this was a moral judgement that would be shared by a majority, and therefore a significant danger that “people will simply choose whichever characterisation supports the conclusion they wish to reach.”²⁹⁸

The matter has been debated in a wider context, which perhaps raises the question of what is it that the court are concerned might corrupt young people? Weait has argued that the attitude of the law in this context incentivises behaviour²⁹⁹ and while this has an obvious

²⁹² Ibid n. 116.

²⁹³ Ibid.

²⁹⁴ Ibid n. 34.

²⁹⁵ Ibid n. 50.

²⁹⁶ Ibid.

²⁹⁷ Ibid n. 194, 543.

²⁹⁸ Ibid.

²⁹⁹ Matthew Weait, ‘Knowledge, Autonomy and Consent: *R v Konzani*’ [2005] Crim L R. 763.

implication for boxing, it has a more subtle and insidious danger in concussive injuries. If a football player is able to head the ball, and the courts say that no rule is required to limit the potential damage, then the message, intentionally or not, is that this is behaviour that is appropriate. It is not suggested that heading a football is inappropriate as the court in *R v Brown*³⁰⁰ saw the actions of the Defendants as being,³⁰¹ but it is suggested, indeed stated, that it is dangerous, and yet young people would have no reason to see it in this light.

One of the most oft cited justifications for sports, specifically boxing, although it does apply to all sports, is that it promotes health and exercise and the values of sporting conduct with Beloff simply stating that “Sport is good for you.”³⁰² Indeed, Cooper and James, in rejecting the analogy between sport and entertainment, state that “being stabbed with a dart or hit on the head with a piece of wood, does not promote health or exercise, nor does it promote associated values of sporting conduct.”³⁰³ This is unquestionably true, but if the consequence of a sporting activity is long term injury, or a significantly increased chance of long-term injury, then it is difficult to see how this can be countered by an argument that the sport promotes health. A better formulation might be that it promotes health up to the point where it destroys it. This formulation makes it far harder to argue that it is in the interests of the public, particularly if it is assumed, as we have established that it must be, that the players have some understanding of the consequences of their actions. This may just about assist, but what of the people who are influenced by these sports and encouraged to take it up at a casual level, where there will not be the information available because it is not regulated by any league with responsibility. Therefore, it is harder to argue that health is a legitimate reason to allow sport to be treated as an exception to the traditional rules of consent.

It is of course true that this does not directly contradict the second limb which is that it promotes the value of sporting conduct. However, this is an argument that would seem to be more at home in an older, different era of sports, before professionalism. Sports, at the level that can influence, and certainly in the three sports under discussion here, are not based on

³⁰⁰ Ibid n. 50.

³⁰¹ Ibid.

³⁰² Michael Beloff QC ‘Editorial’ (2012) ISLR, 2, 11-12.

³⁰³ Simon Cooper and Mark James ‘Entertainment - the painful process of rethinking consent’ (2012) Crim. LR. 3, 193-4.

the Corinthian ideal, and while the sporting ethos may be present at times,³⁰⁴ it is difficult to see how such a speculative and illusory concept can be of any great assistance when weighed against the potential for long term injury, mental suffering, and death.

It could be argued that this is not a concern of the court, and that whether their decision encourages such actions or not is irrelevant. However, Burris et al have argued³⁰⁵ that the law is not neutral. It is either conducive or obstructive to preventing an action from occurring; in that case disease transmission.³⁰⁶ Just so, in the case of these types of injuries, a court permitting consent is being obstructive in the cause of preventing concussion injuries and the long-term consequences. It is entirely possible that had the case never come to court, the actions of the Defendants would have never been publicised, as opposed to being required reading for every law student in a common-law country. It can be argued cogently that there was no danger of corruption of the youth because there would have been no exposure. This is not the case with sports, and the public nature of the activity means that it should be treated with a far greater degree of scrutiny than the Defendants in *R v Brown*,³⁰⁷ or, as Reed put it if “the law has to strike a balance between acceptable and unacceptable risks” then there is a strong argument to say that the interest of the public would now see this as an unacceptable risk.³⁰⁸

The Arguments For The Status Quo

Regardless of the provenance of the special exception, there are arguments that support being treated differently, and these will be considered and analysed.

Danger of being driven underground

³⁰⁴ Trish Bradbury and Ian O’Boyle (Eds), *Understanding Sport Management: International perspectives*, (Routledge 2017) Chapter 16.

³⁰⁵ Scott Burris et al ‘Do criminal laws influence HIV risk behaviour?’ (2007) 39 *Arizona St. L.J.* 467.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid* n. 50.

³⁰⁸ Alan Reed ‘Offences Against the Person Act 1861, s.20: footballing injury’ (2005) *J. Crim. L.* 2005, 69(3), 201

Adventure is part of the game, and it must be accepted that if individuals are told that they cannot do something, it will only increase the likelihood that they will want to do so, as immortalised in fiction by *Fight Club*.³⁰⁹ This is particularly in light of the nature of this activity, where the participants are risktakers, and, for many, it may be something that they are fully used to doing, possibly without any consequences. It is also relevant that the previous chapters have focused on the civil law, as that is the most likely source of progress; by holding the rule makers or the clubs to account for the way in which they regulate their players. By extension, they cannot be responsible for those who engage in the activity outside of their jurisdiction, i.e., in parks and fields, as part of casual play.

It is easy to dismiss this as unsustainable on the basis that allowing events that are socially unacceptable to be conducted simply because they will be hidden from society otherwise is counter-intuitive; were this to be the case then *R v Brown*³¹⁰ would have been decided differently. However, in this context there is a clear distinction. The argument is that when carried out as they are, there is at least some regulation, leaving to one side the effectiveness of that regulation. By driving it underground that regulation would likely disappear, and with it the prospect of rendering the game safer.

However, this is an approach that the courts have typically been reluctant to endorse. A similar point was made in *R v BM*³¹¹ dealing with bodily mutilation and will be considered later.

The Danger is the Excitement

This argument is based on the idea that the pursuit of an unrestrained culture of blame and compensation' would interfere with people's liberty to enjoy themselves, and that a "dull, grey' safety regime should never be imposed³¹² while Braithwaite acknowledges that "... one has to recognise that people are entitled to run risks in their pursuit of pleasure."³¹³ Certainly,

³⁰⁹ 'Fight Club' (Fox 2000 Pictures) David Fincher (Dir).

³¹⁰ Ibid n. 50.

³¹¹ Ibid n. 209 **Error! Bookmark not defined.**

³¹² *Tomlinson v Congleton BC* [2003] UKHL 47.

³¹³ Bill Braithwaite, 'Disastrous Diving' (2003) *Solicitors Journal*, Vol. 147(33), 5 December 2003.

this is a valid point, and an element of danger is a reality of life. An existence that is reduced to activities with a 100% level of safety would, if possible, be dull.

However, there are two issues with this argument. First, the sports that are being discussed are not, typically, adrenaline based. Earlier, the reasons for sport's existence were discussed, and it is clear that 'excitement' and 'adrenaline' were irrelevant. The primary purpose was either religious, preparatory, or for the diversion of the players.³¹⁴ Yet, in the modern era, sports, and particularly the sports that are being discussed, are for the benefit of spectators, and is necessary for the spectators to be drawn to the event, as they do in their hundreds of thousands every week.³¹⁵

For sports that are not spectator sports, there remains the concern of Swinton Thomas L.J in *Stratton v Hughes*³¹⁶ who said that "Many sports, such as motor racing, rafting, mountaineering, rock climbing, and many others have innate dangers. That is part of their appeal."³¹⁷ The inevitable conclusion to this statement is that if you remove the danger, you remove the excitement, and remove the likelihood of participants taking part in these activities and spectators viewing them.

However, this can be dealt with by the nature of the tort of negligence, which is where the discussion has focused, by extension involves more than one person. In Rugby Union and in American Football, a player impacts upon another, causing injuries. This is a very different situation to an 'adrenaline activity' where one individual is taking on an activity for their own excitement. It is accepted that there are likely sub-concussive and concussive injury risks inherent in some extreme activities; a free climber who falls off a mountain will likely die, but if they do not there will likely be an element of concussion. Yet, this is not inflicted upon him by anyone else nor is there anyone who is responsible for governing the activities of the athlete. Whether or not there should be legislation preventing such activities, and certain 'highs' are banned for public policy reasons, including recreational drugs, may be a discussion,

³¹⁴ Ibid 64.

³¹⁵ Francis McManus, 'The Sports Arena and the Law of Delict' (2001) 5(4) CIL 298.

³¹⁶ Ibid n. 96.

³¹⁷ Ibid.

but it is not relevant to this thesis. This thesis is concerned with activities that are regulated, and whether there should be a responsibility upon organisations within that activity to regulate it more stringently.

This was raised as a concern in the latter part of the twentieth century when discussing the sport of cricket. The West Indies favoured fast bowlers, all of whom were able to “to bowl fast enough to intimidate even the best batsmen.”³¹⁸ Clearly this was not against the rules; as long as they complied with the bowling action, they were entitled to play to their strengths, and from a competition perspective this was very much their prerogative. Yet, there were concerns about the dangers to the batsmen, and two measures were taken to aid in their protection. First, the rules required additional protection,³¹⁹ to protect the batsmen from these forms of bowling. This is similar to the approach that the sports under discussion have taken to deal with concussion, adding protection but not adjusting the rules.

Critically, this was not the only response, and a former cricketing umpire, Dickie Bird, notes that the rules, and particularly Laws 42,³²⁰ were drafted widely to allow the umpire to penalise the bowler in the event that there was perceived to be unfair play that could endanger the batsman’s safety, irrespective of protective equipment that was being worn, and considering the relative quality of the batsman.³²¹

This is important, because from an entertainment perspective, watching a bowler pepper a batsman with unplayable deliveries at in excess of 95mph can be seen as a positive feature. But the Laws of cricket specify that the player’s safety, not the ability of a team to play to their strengths, and not the entertainment of the spectators, is the determining factor.³²²

³¹⁸ Michael Gunn, ‘The Impact of the Law on Sport with Specific Reference to the Way Sport is Played’ (1998) 3(4) CIL 221.

³¹⁹ Steve Greenfield and Guy Osborn, *Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven* (Routledge 1998).

³²⁰ Lords, ‘The Laws of Cricket’ <https://www.lords.org/mcc/the-laws-of-cricket>, Law 42.

³²¹ Dickie Bird, *Dickie Bird: My Autobiography* (Hodder Paperbacks 1997), chapter 7.

³²² This is replicated in other areas of the Laws. For example, when the light is fading, an umpire will be more likely to end the day’s play if pace bowlers are used as opposed to spin bowlers.

The Court is the wrong forum

This is a stronger argument as regards the process of reform which boils down a perspective that if reform is needed, then the appropriate body is Parliament rather than the judiciary. There is significant academic analysis concerning the dangers of judicial over-reaching³²³ and there has been discussion both in the Court of Appeal³²⁴ and in academic commentary³²⁵ to suggest that where there is a question of paternalism to be weighed against liberalism, then that is “a question for the democratic process.”³²⁶ This effectively builds upon the counter-majoritarian difficulty which contends that where the majority have made a determination that an action is to be legal, it is not for the judiciary to oppose this by adjusting the law themselves, to avoid becoming an unelected legislature. This is a very topical debate with attacks on the judiciary becoming ever more frequent.

Weight can be added to this perspective because the Law Commission have recognised the contradictions in the status quo and have commented on it but without any laws being passed. Therefore, the argument can be made that not only has Parliament not legislated on the matter, but the matter has been discussed and action has not been taken, rendering a possible counter argument, that silence does not equate to legislation as dubious.

However, the argument does not strike with any great strength, when the better counterarguments are maintained. The first, is the counter-majoritarian difficulty most often arises in states with a written Constitution and indeed the argument was first forwarded in the United States of America. The United Kingdom has an unwritten Constitution, where the ability of the courts to interpret the law has always been an important power, as represented, until recently, by the identification of the highest court with the Upper Chamber of Parliament. This argument has particular resonance in this situation because, as was noted

³²³ Sidharth Sharma ‘Myth of Judicial Overreach.’ (2008) *Economic and Political Weekly*, vol. 43, no. 10, 15, Paul Craig ‘Judicial Power, The Judicial Power Project, and the UK’ (2017) 36 *U. Queensland LJ* 355, Mark Elliott ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) 36 *U. Queensland LJ* 273.

³²⁴ *Ibid* n. **Error! Bookmark not defined.**

³²⁵ Rebecca Williams ‘Body modification and the limits of consent to injury’ (2019) *LQR*, 135(Jan), 20-21.

³²⁶ *Ibid*.

earlier, Parliament has not acted in the area of consent. They have left a vacuum, which gives greater power to the courts to intervene.

Secondly, even in states where the counter-majoritarian difficulty is more clearly defined, there has always been an argument which embraces the authority of the judiciary in these situations, as they are acting to protect the minority from the power of the majority.

Finally, and as a matter of practical common sense, the question must be asked as to whether there is any realistic possibility of Parliament seeking to amend the Offences Against the Person Act 1861, given the long criticisms of the Act³²⁷ and the consistent approach of the Law Commission suggesting that changes are needed.³²⁸ While Parliament could legislate on a narrower question, there is nothing to indicate that there is any appetite for such a decision that would, at the very best, be of unclear popularity and, at worst, completely divisive.

Sport is entertainment

It has been seen that the traditional view of sport is far removed from the realities and that while sport can still be of benefit to society, it cannot legitimately be said to be of such central importance to society as to permit the wide-ranging tolerance that has hitherto been attributed to it. This departure is important as other activities, that do not have the same structure as sport, can be argued to be outside this protected area, and this argument has been applied to entertainment.

Cooper and James³²⁹ discuss this concept when considering how the law of consent might be applied to entertainment using activities that has a strong chance of injury. They use an example of the 'Human Dartboard', from the show 'Balls of Steel'³³⁰ where participants

³²⁷ Samuel Walker 'R v BM: Errors in the Judicial Interpretation of Body Modification' (2019) JCL 83 (245).

³²⁸ Law Commission, Criminal Law: Consent and Offences Against the Person CP No 134 (1994); Law Commission, Consent in the Criminal Law CP No 139 (1995); Law Commission, Reform of the Offences Against the Person Com No 361 (2015).

³²⁹ Simon Cooper and Mark James 'Entertainment - the painful process of rethinking consent' (2012) Crim. LR. 3, 189-190.

³³⁰ Ibid.

purport to consent to throwing darts at each other's naked buttocks.³³¹ This along with other games in a similar vein are described by Cooper and James as "one human being stabbing or beating another for the amusement of the viewers in the live studio audience and at home"³³² and the analysis focuses on whether the participants in this type of activity, as an issue as yet not considered by the courts, would be capable of consenting, were prosecutions to be considered.

In assessing the situation, they have little difficulty in coming to the view that the activity "does not promote health or exercise, nor does it promote associated values of sporting conduct"³³³ and that it cannot therefore be seen as analogous to boxing. It is, objectively, popular, and has, objectively, been around for a period of time that could in certain circumstances be sufficient to see it as tolerated by society, possibly encouraged by the lack of action taken to bring it before the courts. Yet, based on the analysis that has been shown in this chapter, can it really be said that the frail justifications for sports are that far removed from these actions? On the Human Dartboard, comparatively minor injuries are risked, and players must follow the rules, while safety measures are taken to ensure that the more vulnerable parts of the body are not risked. Society can be said to have accepted it, based on the viewing figures. By comparison, in boxing, the combatants can inflict far worse injuries, with far wider reaching consequences, and in the sports that are being discussed in this thesis, the potential severity of the injuries directly rebut the suggestion that health and exercise are promoted. Sporting participants are far closer to those participants of 'Balls of Steel' than it may first seem. These few are paid, to put their bodies on the line, protected by rules that do not go far to protect them for the entertainment of the many. Indeed, the conclusion of Cooper and James that there is no analogy between sports and this entertainment is, in fact, accurate. There is far more reason to allow consent for these shows than for the far more brutal and dangerous activities of sport.

It is conceivable that a hypothetical Supreme Court dealing with this type of case might struggle to understand the attraction of the activity, in the same way that the court in *R v*

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

*Brown*³³⁴ struggled with the activities that they were dealing with. However, if they had to draw a distinction between sport and these activities, fully informed by the facts and science, it is unlikely that they would do better than to echo Lord Mustill's dissent in that case, suggesting that sport has been around for longer, and thus should continue. This line of reasoning cannot be sufficient.

Summary

Sport has a long and powerful presence in history, but it is a violent presence. History supports the idea that its origins were based around fundamental and central aspects of life and culture, primarily religious.³³⁵ Over time, this shifted to a focus on health and preparation for service to the country.³³⁶ In the contemporary era, however, neither of these can be said to apply. Sport, at the organised level, where these questions become relevant, is a mix between a professional action and entertainment. This is the context to which scrutiny must be applied, and the protected status of sports, which is in any event of dubious provenance, cannot be sustained in view of this context. Where there is potential for liability, consent, in the case of concussive and sub-concussive events, cannot be a defence. The victim cannot be said to have the necessary understanding to give informed consent, and if they have the necessary understanding, then in any event, there is no adequate public interest that can permit an individual to take such extreme risks, when there is so little social utility.

³³⁴ *Ibid* n. 110.

³³⁵ *Ibid* 66. History of Violence

³³⁶ *Ibid*.

Conclusion

Concussion is a significant problem for contact sports. The evidence that is been presented during this thesis emphasises that it is both a short-term problem and a long-term problem, a problem for the players who are suffering the ill-effects now, and those who will suffer them in the future. The medical evidence can objectively be stated as demonstrating that this problem does exist in sport, and that it is getting worse. The two questions that were at the heart of this thesis were can something be done and should something be done. It has been seen that these two questions are, to a significant degree, inter-related as any extension of the doctrine of negligence will be based around the extent to which such a development is appropriate in the public policy.

In answering these two questions, the argument has been put forward that there is a capacity for the courts to find that there is a duty of care owed by sporting governing bodies and by employer clubs to the players for whom they have responsibility. The greatest challenge in making this argument has been the dearth of direct authority on the point. There simply has not been an attempt to argue that such sweeping duties of care exist, since it was rejected in *Agar v Hyde*.¹ The situation has been brought to a head with the recent threats of a class action against World Rugby, and unless the case can be settled, as occurred in *Maxwell*,² the courts are unlikely to be able to avoid this issue, and the question will then become, if it is accepted that the courts can act, should they act, or should sports continue to be provided with the special protections that they have enjoyed.

In his autobiography, former Welsh rugby captain, Sam Warburton wrote that “people are dying on rugby pitches...and if something isn’t done soon then a professional player will die during a game in front of TV cameras, and only then will people demand that steps must be taken.”³ This is not good enough, when there are organisations who have the ability to make

¹ [2000] HCA 41.

² *Maxwell and Others v NFL and Others* filed July 19th 2011, In re National Football League: No 2:12-md-02323-AB Players Concussion: Injury Litigation Civil Action No: 14-cv-0029.

³³ ESPN ‘Warburton: Rugby Players will die during games unless safety is improved’, (*ESPN*, September 11, 2019).

changes, it is not good enough to say that significant action will be taken when public emotions are sufficiently triggered to demand change. This thesis has demonstrated that while sports have, to varying degrees, implemented measures to mitigate the situation, there has been an absence of serious attempts to prevent concussive injuries from occurring in the first place. This is the area in which the courts can and, it is argued, should set the line of minimum standards for the sporting authorities to adhere to.

Over the course of the thesis, it has been argued that there is scope for a duty of care to be imposed that would place a burden on governing bodies to address the situation. It is inevitable, when dealing with the concept of reasonableness, that this will not be a bright line rule, but certain points have been clearly set out that would demonstrate compliance by the governing bodies. Obviously, the clearest way that they could do so would be to abolish contact, or abolish the sport, but it has been conceded that these may be seen as changing the nature of the sports too significantly. It has also been conceded that the governing bodies are entitled to follow the science, so long as they do recognise the growing picture that is being painted, and do not allow certainty to become the master or mistress of necessity. Some steps have been set out that would enable them to, as things stand, comply with the stated duty of care, including minimising workload, lowering tackle height, and enforcing rest periods between games.

It has already been argued that consent is not sufficient to vitiate legal responsibility, but that does not mean that it lacks a place. There should be mandatory education of players as to the medical science, at the earliest possible stage, and certainly before they sign their first professional contract. This should be supplemented on a regular basis by Continuing Professional Development training that is conducted by an independent body of medical experts, to ensure that players are fully aware of the risks and the responsibilities that the clubs have to them in this respect.

The second point concerns minors. Intentional contact should be removed in respect of those below the age of majority, including heading in football, and tackling in rugby.

Continuing to the clubs, it was demonstrated that there is less scope for action here. However, there are still possible ways in which they can be required to change their approaches in order to improve player safety. The first of these is to require the clubs to carry out a risk assessment of the player and set a maximum number of games that they are permitted to compete in over the course of the season, with reference to their concussion history and the likelihood of incurring a concussive event. This would be done in conjunction with one of the duties imposed upon the governing body, to set out broad categories, but with the ability to adjust for the individual player. This would mean that there would be individual attention paid to the capacity of a player and would ensure that every season the player would be given a clear indication of the likely involvement in the game. Where necessary, this would have to be done in conjunction with the international organisation to ensure that the player does not exceed the threshold because of international fixtures.

Secondly, the clubs must be required to have a safety-first approach to risk management, meaning that practices involving 'winning at all costs' should be prohibited.

It is not suggested that this thesis provides a complete answer to the difficult questions that are inevitably posed by a new duty of care. Inevitably, if the courts do choose to follow the path laid out here, there will be new questions that will emerge and that will have to be dealt with. The thesis has already considered the question of causation and breach of duty in passing, and these are fact specific questions that will inevitably pose questions in individual cases, including the potential group action that is currently going through the courts.

This thesis has focused on domestic law in England and Wales, while sport is a global phenomenon, and it is inevitable that new questions will arise over time. If the England and Wales courts find that there is a duty, it cannot be said that the approach will be emulated by other jurisdictions, which could lead to an asymmetry of duties. There will be inevitable questions that need to be asked about causation, that were touched upon earlier, and, as with all common law doctrines, there will be questions about the precise actions that must be taken, and the dangers of inconsistencies between individual sports. These are all valid points that will need to be addressed by the judiciary and legislatures in the future, in the same way that any new development leads, not to complete resolution of existing questions

but to new queries of different situations. However, establishing a duty of care will help to make sports participants safer in the games that they play to entertain others, and the safety and welfare of the players is at the heart of this thesis.

Having said that, it is not suggested that these proposals will abolish concussive events from contact sport, and the seriousness of the potential impact is such that constant vigilance will be needed in order to ensure that the players' welfare remains at a high level. However, they put a framework in place that seeks to ensure that the players who are putting their bodies and minds on the line for their job have a better, if not a clear, understanding, of the consequences that their decisions will have in both the short term and the long-term future. At the same time, it does not mean the abolition of the sports themselves. They can continue in an evolved fashion, for they cannot be allowed to continue in the way that they have done.

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