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<b>Title</b>	Are you experienced? 'Playing cultures', sporting rules and personal injury litigation after Caldwell v Maguire
<b>Authors</b>	McArdle, D and James, MD
<b>Publication title</b>	Tort Law Review
<b>Publisher</b>	Thomson Sweet & Maxwell
<b>Type</b>	Article
<b>USIR URL</b>	This version is available at: <a href="http://usir.salford.ac.uk/id/eprint/1055/">http://usir.salford.ac.uk/id/eprint/1055/</a>
<b>Published Date</b>	2005

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## Are you experienced? “Playing cultures”, sporting rules and personal injury litigation after *Caldwell v Maguire*

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*This article considers the impact on the development of the law of negligence of a series of recent cases involving injured sports participants. In particular, it focuses on the perceived and potential influences on this area of law of the English Court of Appeal’s decision in *Caldwell v Maguire* [2002] PIQR 6. It revisits two rulings from cases involving rugby union, locating them within the context of *Caldwell*, before analyzing the impact of the court’s decision on three more recent judgments arising out of sports injuries. As a result of *Caldwell* there is now a requirement that courts take into account the “playing culture” of a sport when determining a defendant’s liability, with the playing culture being the manner of playing the game that is accepted as reasonable by the sport’s participants. Consequently, the defence of *volenti non fit injuria* is no longer applicable to sports torts and *Caldwell* has introduced a variable standard of care dependent upon the level at which a game is being played within its organizational structure.*

### INTRODUCTION

In England and Wales, the tortious liability of sports players for causing injury to their co-participants has seen a massive growth in recourse to the law and in jurisprudential development in the 20 years since *Condon v Basi* [1985] 1 WLR 866; [1985] 2 All ER 453. This initial Court of Appeal judgment, of just two pages in length, established that a sports participant could be liable in tort to another player if injury was caused by negligent challenge. However it also posed as many questions for future courts as it answered. In the intervening period, cases have discussed variously whether reckless disregard is the appropriate standard of care to be applied, whether *volenti* can be raised as a defence and whether a variable standard of care applies in these “sports torts”. The Court of Appeal’s decision in *Caldwell* was supposed to answer these remaining questions but once again may have created more ambiguity than it has solved.

This article begins by tracing the development of the application of the law of negligence to sports torts. It then analyses *Caldwell*, demonstrating that the question of reckless disregard has been relegated to the status of an evidential guideline rather than a rule of law. Further, it will be shown that because of the requirements of the third element of the test for sporting negligence laid down in *Caldwell*, it is inherently impossible to plead *volenti* in sports cases and that a variable standard of care has been introduced through the need to examine a sport’s “playing culture”. In the context of this analysis, the cases of *Smolden v Whitworth* [1997] PIQR 133 and *Vowles v Evans* [2003] 1 WLR 1607; [2003] EWCA Civ 318 are revisited, highlighting that the concept of games being played within their playing culture where decisions made and actions performed in the heat of the contest extends to the non-playing match officials.

The article concludes by arguing that although the concept of playing culture allows courts to take into consideration the way that a sport is actually played, rather than, perhaps, the way that it ought to be played, the lack of clarification of what “playing culture” is and who is to define it remains especially problematic. The result may be to place a much greater emphasis on the governing bodies of sport to control the behaviours of those that play its game, which in turn may lead to a greater number of these governing bodies becoming the focus of negligence actions in the future.

## SPORTS, TORTS AND THE UNITED KINGDOM COURTS

In the 20 years prior to *Caldwell*, elite-level sports participants have litigated against their fellow players,<sup>1</sup> referees,<sup>2</sup> sports clubs<sup>3</sup> and sports governing authorities<sup>4</sup> in order to seek recompense for injuries that comprised their ability to earn a living. In other cases, notably *Smoldon* and *Vowles*, amateur participants sought compensation for the infliction of devastating injuries in the course of sport participation.

In each of these cases the starting-point was the truism that, in law, negligence occurs when an individual fails to exercise the reasonable standard of care that is expected in the circumstances. Thus, the claimant must establish that the defendant owed a duty of care; that the duty was breached; and that the breach of duty caused unforeseeable injury.<sup>5</sup> This general principle of negligence, developed by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 was first applied in the United Kingdom to a case of on-field sporting injury in *Condon*. That case established that co-participants owe each other a duty to take reasonable care to avoid causing injury to other players but that the defendant in such a case cannot raise the defence of *volenti* based on the mere fact that the injury was sustained during the course of sports participation.

However, the application of the Lord Atkin’s “neighbour principle” to sports cases is more problematic because although it is not difficult to establish who is a player’s “neighbour”, the difficulty emerges in attempting to define how poor a player’s standard of play must be before it is considered to be negligent. In *Condon*, the facts of the case were such that establishing that a negligent act had occurred posed little difficulty for the courts as the claimant’s leg was broken by a late, sliding tackle, contrary to the Laws of Game for football,<sup>6</sup> for which the defendant had been “sent off”. In upholding the decision that Basi had breached his duty of care, the High Court had applied the ordinary principles of negligence. Neither the judge at first instance nor the Court of Appeal was of the opinion that negligent acts occurring within a sports context were to be treated differently simply because the incident occurred during play. Sir John Donaldson MR approved the trial judge’s approach in holding that:

It is not for me in this court to define exhaustively the duty of care between players in a football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant’s duty of care towards the claimant. He was clearly guilty, as I find the facts, of serious and dangerous foul play which showed a reckless disregard of the claimant’s safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game.<sup>7</sup>

The finding was not one that could be disputed because on the facts the act was clearly negligent.<sup>8</sup> Furthermore, it was unnecessary for the court to lay down detailed guidelines on when an injury-causing act occurring in a football match or other sporting event would be regarded as a negligent one, and in any event it was neither feasible nor desirable for the courts to draw a line in the sand delineating that which would be acceptable from that which would not in an attempt to assist the deliberations of courts in subsequent cases. The Court of Appeal was of the view that it would always be preferable to consider the individual circumstances of each case and in the subsequent cases the courts have thus been able to take a pragmatic approach and decide each on its merits. The court inferred that a different standard might apply in professional sports compared to amateur ones, and although this contention was rejected in *Elliott v Saunders and Liverpool Football Club* (unreported, QBD, Drake J, 10 June 1994) and in *Smoldon*, it raised its head again, almost unnoticed, in *Caldwell*. In the interim, the courts’ approach was simply to take into consideration all of the relevant circumstances of an incident and while the

<sup>1</sup> *McCord v Swansea City AFC Ltd*, The Times (11 February 1997).

<sup>2</sup> *Vowles v Evans* [2003] 1 WLR 1607; [2003] EWCA Civ 318.

<sup>3</sup> *Elliott v Saunders and Liverpool Football Club* (unreported, QBD, Drake J, 10 June 1994).

<sup>4</sup> *Watson v British Boxing Board of Control Ltd* [2001] QB 1134.

<sup>5</sup> Gardiner S et al, *Sports Law* (2<sup>nd</sup> ed, Cavendish Publishing, 2001) p 685.

<sup>6</sup> Specifically Law 12(4)(2), which governs violent conduct, of the Federation International de Football Association’s Laws of the Game. See further <http://www.fifa.com/en/regulations/regulation/o,1584,3,00.html> viewed 4 October 2005.

<sup>7</sup> *Condon v Basi* [1985] 1 WLR 866 at 870 per Wooton J; [1985] 2 All ER 453.

<sup>8</sup> *Condon v Basi* [1985] 1 WLR 866 at 870; [1985] 2 All ER 453 at 455.

approach in *Caldwell* is certainly not inconsistent with this, its explicit regard to a sport’s playing culture will require courts specially to consider whether a different standard of care should pertain to elite competition as opposed to recreational events.

## THE RULING IN CALDWELL

The claimant in *Caldwell* was a professional jockey who was involved in an accident during a race. His injuries were sustained when the two defendants suddenly moved closer to the inside rail, riding across the path of a horse that was slightly behind theirs but in front of the claimant’s. This horse fell, bringing down the claimant’s horse in turn and causing his career-ending injuries. Both defendants were found guilty by the race stewards of careless riding and banned for three days; they had been careless in not leaving sufficient room between their horses and the horse behind them, which held the inside line and therefore ought not to have been impeded. Under r 153 of the British Jockey Club’s Rules of Racing a jockey is deemed to have ridden carelessly if he or she fails to take reasonable steps to avoid causing interference with another horse, or if he or she causes interference through misjudgement or inattention.<sup>9</sup> The court heard that there were approximately 130 hearings each year in which stewards decided r 153 had been breached, while distinguished former jockeys attested that such incidents would occur five or six times nationwide during a day’s racing. The three-day ban imposed in this case is at the lower end of the punishment scale for careless riding. The trial judge found that, although the defendants had certainly been careless and had been in breach of the Rules of Racing, they were not liable in negligence for the claimant’s injuries. What was unusual about the incident was not its occurrence, he said, but the severity of the injuries sustained.<sup>10</sup>

The Court of Appeal affirmed this decision and approved<sup>11</sup> the trial judge’s articulation of certain principles that courts ought to consider in determining whether the duty of care has been breached in a sports negligence case. The principles to be borne in mind are:

- That each participant in a lawful sporting contest owes a duty of care to all other participants;
- That duty is to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to other participants;
- The prevailing circumstances include the sport’s objectives, the demands it makes upon contestants, its inherent dangers, its rules, conventions and customs and the standards, skill and judgement that may be reasonably expected of a participant;
- Bearing in mind the nature of sport and the test outlined above, the threshold of liability will be high. Proof of mere error of judgement or a lapse of skill or care will not be sufficient to establish breach of duty; and
- In practice, it may be difficult to prove a breach of duty unless there is proof that the defendant’s actions amounted to a reckless disregard for another’s safety.

On appeal, it was submitted on behalf of the defendants that the last two points were “unduly restrictive”, and although that criticism was rejected, the Court of Appeal was at pains to point out that the threshold for liability was a high one. Judge LJ held that there was a distinction in sporting contests between conduct that could properly be regarded as negligent and that amounting to “errors of judgement, oversights or lapses of attention” of which any participant might be guilty.<sup>12</sup> This reflects the observations of di Nicola and Mendeloff that “much of sport’s appeal comes from its unrestrained qualities, the delight of its unpredictability, the exploitation of human

<sup>9</sup> The British Jockey Club’s Rules of Racing and an explanation of how Rule 153 should be applied can be found at <http://www.thejockeyclub.co.uk/rules/rulesframeset.html> viewed 4 October 2005.

<sup>10</sup> For a similar conclusion, see *Pitcher v Huddersfield Town FC* (unreported, QBD, Hallett J, 17 July 2001), discussed briefly below.

<sup>11</sup> *Caldwell v Maguire* [2002] PIQR 6 at [30]-[41] per Judge LJ.

<sup>12</sup> *Caldwell v Maguire* [2002] PIQR 6 at [37] per Judge LJ.

error, and the thrill of its sheer physicalness [sic].<sup>13</sup> Thus, some mistakes are an inherent part of playing the game and should not result in legal liability.

In relation to the last of the five points, the Court of Appeal stressed that this is an expression of the degree of evidence required to prove a breach and did not perceive it as the creation of a new legal standard of care. Despite what the Court of Appeal subsequently said in *Blake v Galloway* [2004] 1 WLR 2844; [2004] 3 All ER 315; [2004] EWCA Civ 814, *Caldwell* is certainly not authority for the proposition that the standard of care is “reckless disregard” in the sense of that which has mistakenly been taken to pertain to cases that concern injuries inflicted by participants upon non-participants – a confusion that has arisen primarily because *Wooldridge v Sumner* [1963] 2 QB 43 has been misinterpreted, not only in the United Kingdom<sup>14</sup> but in Canada too, with far more grievous results.<sup>15</sup> Rather, courts still need to consider whether the defendant had been negligent in all the circumstances but, precisely what this means has undergone a subtle change because of *Caldwell*. While the defendants had made errors of judgement and had displayed lapses of skill, this did not amount to negligence in all the circumstances even though their conduct had clearly breached the Rules of Racing. Although the Jockey Club’s Rules and its findings “[were] of course relevant matters to be taken into account .... the finding that the defendants were guilty of careless riding is not determinative of negligence”.<sup>16</sup> They were held to have committed merely an “error of judgement, an oversight or lapse which any participant might be guilty of in the context of a race of this kind”.<sup>17</sup> Neither defendant’s lack of care was “of sufficient magnitude to constitute a breach of the duty of care ... owed to the claimant, that is, to surmount the threshold for liability”.<sup>18</sup>

Accordingly, while breaching the rules of the sport may be indicative of negligence, it is not the only factor to consider – the playing culture of the game is also relevant. Given that the type of incident that occurred in *Caldwell* was one that occurred very frequently within national hunt racing, it could be seen as an integral part of the sport’s playing culture. As such, it represented an inherent risk to which all participants were deemed to have acquiesced.<sup>19</sup>

On an initial reading, it seems that *Caldwell* amounts perhaps to a re-emergence of a volenti defence, albeit one appearing in the guise of a pragmatic approach to the standard of care so that “only those challenges that are clearly unacceptable and beyond the ‘playing culture’ of the sport will be considered to be unlawful”.<sup>20</sup> However, volenti in the context of sports negligence was otiose in the wake of *Smoldon* and *Caldwell* and has no impact upon that state of affairs. A preferred reading is that *Caldwell* is tantamount to saying that the standard of care was not breached because the act of careless riding was acceptable under the playing culture of national hunt racing even though it was outside of the Rules of Racing. The case is one that could easily have been decided in the claimant’s favour, either on the ground that breaching the playing, or safety, rules outweighed the playing culture of the sport, or alternatively that breaking the rules of the game by definition amounted to a breach of the standard of care. The latter approach seemed to meet with the approval of the judge in the subsequent case of *Lyon v Maidment* [2002] EWHC 1227, but it is not one that can be easily reconciled with either the judgement in *Caldwell* or the cases that preceded it.

Further evidence of the significance of the decision lay in the fact that by considering the *Caldwell* criteria in tandem with the discussion on liability in *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, an argument can be made for bringing an action in negligence against a governing body for its failure to provide a

<sup>13</sup> di Nicola R and Mendeloff S, “Controlling Violence in Professional Sport: Rules Reform and the Federal Sports Violence Commission” (1983) 21 *Dusquesne LR* 845.

<sup>14</sup> See, eg *Harrison v Vincent* [1982] RTR 8; *Breeden v Lampard* (unreported, CA, Oliver and Lloyd LJH and Sir George Waller, 21 March 1985).

<sup>15</sup> *Unruh v Weber* (1994) 88 BCLR (2d) 353.

<sup>16</sup> *Caldwell v Maguire* [2002] PIQR 6 at [28] per Tuckey LJ.

<sup>17</sup> *Caldwell v Maguire* [2002] PIQR 6 at [28] per Tuckey LJ.

<sup>18</sup> *Caldwell v Maguire* [2002] PIQR 6 at [12].

<sup>19</sup> James M and Deeley F, “The Standard of Care in Sports Negligence Cases” (2002) 1 (1) *Entertainment Law*, 104.

<sup>20</sup> James and Deeley, n 19 at 108.

reasonably safe system of work/play for those who participate in the game that it governs. This could be based on either

- a) A failure of the governing body to apply or develop appropriate safety rules;
- b) A failure to operate an effective disciplinary process; or
- c) A failure to provide appropriate training for players, officials and other administrators.

Proper consideration of those issues is beyond the scope of this article but they will be mentioned briefly below and, as has been explored elsewhere,<sup>21</sup> the third aspect seems particularly pertinent especially in the wake of the rugby cases and the clarification of the common law doctrine of vicarious liability in *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

## THE DEMISE OF VOLENTI

That the volenti principle will not come to the aid of a negligent defendant simply because the incident occurred in the course of sport will occasion little surprise to those with even a passing knowledge of legal principles, but those who play or administer sport – and to a lesser extent their legal advisors – often seem surprised to hear that persons who are injured in the course of sports participation may have redress in negligence. Historically, the relationship between volenti and the sports torts has been a problematic one, with volenti routinely being trotted out as a defence even in cases where it is manifestly inappropriate.<sup>22</sup>

This has been due in no small part to the reliance traditionally placed upon the ruling of Barwick CJ in the Australian case of *Rootes v Shelton* (1967) 116 CLR 383; [1968] ALR 33 where he stated that “by engaging in a sport ... the participants may be held to have accepted risks which are inherent in that sport”<sup>23</sup> and went on to say that volenti operated to exclude the duty of care. As has been outlined elsewhere,<sup>24</sup> the difficulty with this lies in this assertion that volenti “excludes” the duty owed. This statement is erroneous because volenti operates to exonerate a defendant from liability for what otherwise would have been an actionable breach of duty: it prevents the breach from occurring – not the duty from applying – and as Lord Denning rightly put it in *Nettleship v Weston* [1971] 2 QB 681, volenti means that the claimant has waived his right to pursue an action for an act of negligence that has occurred. To do this,

[t]he [claimant] must agree, either expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant, or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.<sup>25</sup>

Or, as Lord Diplock put it in *Wooldridge*, “[t]he consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk ... and requires on the part of the claimant at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran”.<sup>26</sup> There is no basis in law for saying that a sports participant must be regarded as accepting the risk of injury that is caused by negligence of another player. In such a case, the breach of the duty of care has still occurred and, as the rugby cases in particular illustrate, volenti does not give defendants a “get out of jail free” card to be deployed in cases where the negligent act occurs in the course of a sporting event. If the act that caused the injury was one that contravened the playing culture of the sport, the claimant cannot be deemed to have consented to it because the act was either unforeseeable or an unreasonable manner of playing the game. Likewise, the defendant cannot rely on a defence of volenti because the claimant will either not have consented to an act of which he had no prior

<sup>21</sup> See James M and McArdle D, “Player Violence, or Violent Players? Vicarious Liability for Sports Participants” (2004) 12 Tort L Rev 131.

<sup>22</sup> For example, *Smoldon v Whitworth* and (extending the notion of what is a “sport” to breaking point) *Blake v Galloway*, both of which are discussed below.

<sup>23</sup> *Rootes v Shelton* (1967) 116 CLR 383 at 385; [1968] ALR 33 (emphasis added).

<sup>24</sup> James and McArdle, n 21 at 132.

<sup>25</sup> *Nettleship v Weston* [1971] 2 QB 691 at 701.

<sup>26</sup> *Wooldridge v Sumner* [1963] 2 QB 43 at 69.

knowledge because its performance was unforeseeable or because it was unreasonable for the defendant to act in such a manner according to the sport’s playing culture.

By the same principle, if neither the rules nor the playing culture have been transgressed, then the duty of care has not been breached and the issue of *volenti* cannot arise. It may be that in the future the law’s starting-point will be that, by virtue of the playing culture consideration, there is an implied consent to all the inherent or integral risks involved in sports participation, but if this is the case it is certainly a rebuttable presumption because all sports have limits on what is acceptable under the formal, codified rules of the game and there will also be limits upon what is legally tolerable as part of a sport’s playing culture. The difficulty, of course, lies in delineating the bounds of acceptable conduct within any playing culture and, after *Caldwell*, the particular circumstances of each case will be hugely significant because each claim will stand or fall on consideration of the wider aspects surrounding the incident complained of rather than just the actions of the protagonists at the time. Relevant factors might include: competitors’ experience; their actual skill levels; the level of ability they purport to have; the weather conditions; the quality of their equipment; the quality of the playing surface; and the part played by teammates, spectators and officials. These will all go towards the issue of liability under the “playing culture” head.

Clear examples of the duty of care being breached because a defendant breaks both the rules and the playing culture would include a golfer who, while playing a tee shot, hits another player playing from the fairway on the same hole (see *Pearson v Lightning* (1998) 95 (20) LSG 33 for discussion of a broadly similar incident) or a skier travelling downhill at speed who runs into another skier further down the slope as in *Lyon v Maidment*. Neither the rules nor the playing culture of the sports of golf and skiing allow, respectively, for a player who deliberately hits the ball forward, in the direction of another player, or a skier who leaves him or herself with no escape route while travelling downhill and who hits another.<sup>27</sup> But what, for example, of the novice golfer who, while practicing on a designated practice area, hits and injures somebody close by? Does the novice player owe a different standard of care to others than does an experienced low handicap golfer, or do both hold themselves out as being able to hit the ball straight rather than to the side? Does the injured party voluntarily run the risk of injury even though she has no knowledge of the level of ability possessed by others on the practice area? Is the standard of care on a practice area different to that on the golf course proper? To return to the skiing analogy, in *Lyon* the judge pointed out that “when one skier is following another down a slope, the burden is on the uphill skier to take care to avoid the downhill skier. The downhill skier does not have eyes in the back of his head”.<sup>28</sup> Interestingly, the judge also suggested, obiter, that breaking the “10 Rules for Conduct” for skiers as laid down by the International Ski Federation<sup>29</sup> “would result in civil liability for any injuries caused by such breach”.<sup>30</sup> Particularly after *Caldwell*, one can no longer say with certainty that this would be the position in all sports unless it could be demonstrated that the rules of the sport and its playing culture were coextensive.

All that being said, it is feasible that *Caldwell’s* impact may be limited in practice because, even in cases where challenges resulting in injury have not accorded with the rules of the game, the courts have historically displayed a marked reluctance to hold individuals liable for injuries inflicted. The rationale is that in determining whether the duty of care has been breached in all the circumstances, the threshold of liability is a high one and participants ought not to be penalized for heat-of-the-moment errors of judgement that all participants are prone to making regardless of the level at which they play. In *Pitcher v Huddersfield Town Football Club Pitcher v Huddersfield Town FC* (unreported, QBD, Hallett J, 17 July 2001), for example, the judge concluded that a late<sup>31</sup> and clumsy tackle was not one that amounted to a breach of the defendant’s duty of care towards his opponent and could not lead to a finding of negligence on his part because such misjudged tackles were inherent in the game of professional football. Arguing that the duty of care has *not* been breached now affords the only legally sustainable defence to a

<sup>27</sup> *Lyon v Maidment* [2002] EWHC 1227.

<sup>28</sup> *Lyon v Maidment* [2002] EWHC 1227 at [16].

<sup>29</sup> International Ski Federation, “10 Rules for Conduct” <http://www.fis-ski.com/rulesandpublications/10fisrulesforconduct/> viewed 5 May 2005.

<sup>30</sup> *Lyon v Maidment* [2002] EWHC 1227 at [29].

<sup>31</sup> The risk of injury being sustained by a late tackle is such that the laws of the game now require referees to caution a player who commits one, even if contact is made only just after the ball is played. A particularly late tackle, which carried with it no likelihood of contact being made with the ball, should result in the offender being dismissed from the field of play.

sports tort. Asserting that the duty *has* been breached but that *volenti* absolves the defendant from liability in respect of it cannot follow in the light of *Caldwell*, although it will almost certainly continue to be pleaded.

## REAPPRAISING THE “RUGBY CASES”

The cases of *Smoldon* and *Vowles* both involved negligence on the part of a match official rather than a participant. While *Caldwell* tacitly affirms that officials’ decisions made in the heat of the moment are an inherent aspect of sports participation and no less part of the playing culture than are the “heat of the moment” actions of the players, the rugby cases are authority for the proposition that the same does not apply in situations where officials do not properly avail themselves of an opportunity for reflection before they make a decision that subsequently results in injury to a player.

### Smoldon v Whitworth

In *Smoldon* the Court of Appeal upheld a High Court ruling that the referee was liable in damages to a player who was seriously injured when a scrum collapsed. The match was a colts’ game, meaning that all players were under the age of 19. Five years prior to the incident, the International Rugby Board (IRB), the game’s global governing body, had responded to concerns about the number of young players injured in scrums by introducing rules that applied specifically to scrums in colts’ games, and every national governing body, in this case England’s Rugby Football Union, was required to ensure compliance with this rule in competitions played under its auspices. The avowed intention of the rule change was to reduce the risk to young players of sustaining injury in the scrum. Scrums are inherently dangerous and involve eight players from each team<sup>32</sup> pushing against each other in a contest for possession of the ball. The players involved in the scrum are collectively referred to as forwards, while those positioned in the front three of the scrum, and who absorb the bulk of the pressure, are the two prop forwards, between whom is the hooker. These are specialized positions requiring technical skills and physical strength.

The new IRB provisions for scrums in colts’ games required referees to implement a “crouch-touch-pause-engage” (CTPE) sequence prior to the ball being fed into the scrum. The game was described as an ill-tempered one and the referee had repeatedly failed to take action to prevent scrums from collapsing. Specifically he had not followed the CTPE procedure and most scrums had to be “set” two or three times before the ball could be played. Further, the two packs of forwards were unbalanced, with only seven on the opposing team to *Smoldon* as one of their players had been sent off. This imbalance caused the scrums to rotate and to put the necks of the front row forwards under additional stress. After 30 minutes of play the hooker on the claimant’s team sustained a neck injury when the scrum collapsed. He exchanged positions with the claimant, who had little recent experience of playing in that position. There were numerous collapses of the scrum over the next 40 minutes of play and 10 minutes from the end of the game the scrum collapsed once more and the claimant sustained a broken neck, resulting in his complete tetraplegia. The court held that the referee had breached his duty of care in allowing an inordinate amount of faulty scrums; in failing to uphold the safety rules of the game by ignoring the CTPE procedure; having uneven numbers of forwards in the opposing packs; and allowing the scrum to degenerate into a melee. In upholding that decision, the Court of Appeal found that the scrum collapsed on “at least twenty” occasions and that the referee had ignored repeated warnings from touch judges and others to the effect that a player was likely to be injured if scrums continued to collapse.

The referee pleaded *volenti non fit injuria*. He argued that, since the claimant was fully aware of the dangers involved in playing as a forward and had voluntarily played in the front row of the scrum, *Smoldon* had consented to the risk of injury. In a judgment that can now be regarded as confirming the irrelevance of *volenti* in sports cases, the court dismissed that line of defence as “unsustainable”:

The claimant had of course consented to *the ordinary incidents* of a game of rugby football of the kind in which he was taking part. Given, however that the rules were framed for the protection of him and other

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<sup>32</sup> Rugby Union involves 15 players per side. In rugby league (where there are far fewer scrums) each side consists of 13 players with only six players in the scrum.



players in the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure so far as possible that they were observed.<sup>33</sup>

The Court of Appeal indicated that a defence of *volenti non fit injuria* might have been available “if the claimant were identified as a prime culprit in causing the collapse of the scrums”<sup>34</sup> but in any event a better view would be that this would raise the question of contributory negligence rather than *volenti*. The general perception was that the significance of *Smoldon* lay in its establishing that referees owe a duty of care to players under their control. In retrospect, its real significance was that it paved the way for the court in *Caldwell* to introduce the concept of playing culture through its reference to “the ordinary incidents of a game.”<sup>35</sup> *Smoldon* succeeded because the referee had failed to apply safety rules that had been introduced specifically to protect colts’ players and because he had failed to use his authority to deal with the repeated collapsing of the scrum. This failure to referee the game in accordance with its rules and playing culture is what led to the official’s liability.

The decision should not cause undue consternation to those who referee sports, either at the amateur or professional level, or for those who act as administrators or officiate in some other capacity: if one properly applies the rules of the game as laid down by the governing body, the law will expect no more.<sup>35</sup> So far as the breach of the duty of care is concerned, the Court of Appeal emphasized once again that the threshold of liability is a high one and that the courts will remain loath to hold any participant, including a referee, liable for injuries sustained through errors of judgment, oversights or spur-of-the-moment lapses when playing in, or adjudicating, a fast-moving collision sport such as rugby.

### **Vowles v Evans**

This case was heard by the Court of Appeal in March 2003. It upheld the decision of Morland J at first instance<sup>36</sup> that during an amateur rugby match between Llanharan and Tondur, Mr David Evans, the match referee, was liable in negligence because he failed to enforce the Laws of the Game of rugby union and his failure to do so contributed to the collapse of a scrum, which in turn resulted in injury to the claimant.<sup>37</sup> This was the first case in which an amateur referee was found to have breached his duty of care in an adult rugby game. Although this was an amateur match involving the clubs’ second or reserve grade teams, the participants were highly skilled, the members of the first teams of both sides were professional or semi-professional and many of the participants in this match had played, or would expect subsequently to play, at that level. Approximately 30 minutes into the first half of the game, a Llanharan front row player dislocated his shoulder and thus had to leave the playing field. Llanharan did not have a substitute with front-row experience and one Jones, a flanker who had last played in the front row as a schoolboy, opted to take his injured colleague’s place in the scrum. The game continued and the scrum collapsed on most occasions that it was set, primarily because Jones had neither the technical ability nor the physique to bind properly with his opposite number. In the last moments of the game the scrum collapsed once more and Vowles, who was playing in Llanharan’s front row alongside Jones, sustained severe neck injuries that resulted in permanent incomplete tetraplegia.

This case had chilling similarities with *Smoldon*, although in *Vowles* it was never suggested that the referee, ironically a personal injury solicitor employed by a teachers’ trade union, had been negligent in his refereeing of scrummages or of the match as a whole. Indeed, at first instance the judge stressed that the referee’s overall control of the match was not in question. He was an experienced referee who had played the game at a high level prior to retirement and had a reputation for being zealous in ensuring players’ safety when refereeing games. His mistake was to make one crucial error in his interpretation of the Laws of the Game, in that he allowed Llanharan

<sup>33</sup> *Smoldon v Whitworth* [1997] PIQR 133 at 147 (emphasis added).

<sup>34</sup> *Smoldon v Whitworth* [1997] PIQR 133 at 147.

<sup>35</sup> In future it may ask more of the governing body.

<sup>36</sup> *Vowles v Evans* [2002] EWHC 2612.

<sup>37</sup> Specifically Laws 3.5 and 20 of the International Rugby Board’s Laws of the Game. See further <http://www.irb.com/Laws/Laws/LawsoftheGame/> viewed 4 October 2005.

to decide to continue playing with contested scrums after a specialist front-row player was injured when there was no specialist to take his place.<sup>38</sup>

Under the Laws of the Game he should have ordered that the match be continued with uncontested scrums in which no pushing is allowed. Like the CTPE procedure, this rule was introduced expressly to protect players in the scrum and they are to be applied in all situations where a side does not have enough trained front row forwards available to form a scrum – a situation that gives rise to an increased risk of injury because an untrained player like Jones will invariably volunteer to play in the potentially dangerous front-row position so that a “proper” game can be played. If scrums are uncontested, both teams form their pack of eight players as normal, but they do not push at one another and the team that puts the ball in the scrum must win it.<sup>39</sup> Consequently, in situations where there are not enough trained front-row players available, neither the teams nor the referee should have any discretion about how the game should proceed – It can only continue with uncontested scrums. Should this happen in a league fixture, the team that causes scrums to be uncontested<sup>40</sup> forfeits the points it would otherwise have received if it wins the game. Of course, the risk of losing points provides another incentive for an untrained player to volunteer to play in one of the scrum’s front row positions, which is exactly what happened here. Morland J stated that it was not unreasonable to expect the referee to effectively prevent the risk of injury coming to pass by properly applying the laws of the game.<sup>41</sup> By failing to take the only decision, the Laws of the Game allowed him to take in those circumstances he was in breach of his duty of care and liable for the injuries sustained by Vowles. The Welsh Rugby Union, like its English counterpart in *Smoldon*, accepted it would be vicariously liable in the event of the court holding the referee liable in damages.

The Court of Appeal’s judgment stressed that the negligent act of the referee was in affording the Llanharan players the option of uncontested scrums and it emphasised, following *Elliott*, that there were no reasons to differentiate between an amateur and a professional rugby game. Neither were there grounds for differentiating between an adults’ and a colts’ game, as the defendant had argued.<sup>42</sup> Nor did the nature of the game, a physically aggressive collision sport in which the risk of injury was inherent even when the rules and playing culture of the game were properly adhered to, release the referee of his responsibilities.

Rugby football is an inherently dangerous sport. Some of the rules are specifically designed to minimize the inherent dangers. Players are dependant for their safety on the due enforcement of the rules. The role of the referee is to enforce the rules. Where a referee undertakes to perform that role, it seems to us manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care in so doing ... [Counsel for the defendant] has failed to persuade us that there are good reasons for treating rugby football as an exceptional case. A referee of a game of rugby football owes a duty of care to the players.<sup>43</sup>

Damages of £1.8 million were awarded against the Welsh Rugby Football Union.<sup>44</sup>

These two cases taken in isolation would appear to be authority for the proposition that the duty of care owed to participants in sporting contests will be breached if injury is caused by a referee acting in a manner that is inconsistent with the rules of the game, particularly the relevant safety rules. If the cases are considered within the context of *Caldwell*, however, that proposition can be refined somewhat because split-second decisions taken

<sup>38</sup> *Vowles v Evans* [2002] EWHC 2612 at [74].

<sup>39</sup> The Laws of the Game, Law 3(13), <http://www.irb.com/Laws/Laws/LawsOfTheGame/> viewed 4 October 2005.

<sup>40</sup> It will usually occur because a team does not have enough trained forwards available to make up the full complement of eight in the event of one forward being injured.

<sup>41</sup> *Vowles v Evans* [2002] EWHC 2612 at [24].

<sup>42</sup> “[W]e do not consider that the distinction between a colts game and an adults game can affect the answer to the question of whether a referee owes a duty of care to the players”: *Vowles v Evans* [2003] 1 WLR 1607 at [24]; [2003] EWCA Civ 318. There will be circumstances in which both this aspect and the amateur/professional distinction will have to be revisited in the light of *Caldwell*, but liability in respect of negligent refereeing will not be among them.

<sup>43</sup> *Vowles v Evans* [2002] EWHC 2612 at [25].

<sup>44</sup> At the time, the Welsh Rugby Football Union had only £1 million personal liability cover.

while the game is in progress will not attract liability even in circumstances where a referee has failed to follow the rules; the playing culture accepts that referees will commit errors when spur-of-the-moment decisions have to be made, particularly when they are allowed some degree of discretion in interpreting the rules. A distinction will arise if the referee’s erroneous act follows his having an opportunity to pause, reflect and consider what action to take but he either takes no action or follows an inappropriate course of action. For example, if a player is injured by a dangerous tackle perpetrated by an opponent who has tackled dangerously throughout the match and ought to have been sent off for earlier transgressions, a pause in play after an earlier foul providing the referee with the opportunity to consider how best to proceed, the referee may be in breach of his duty of care by failing to avail himself of the opportunity for quiet reflection. Similarly, while the decisions in cases such as *Condon* and *McCord v Swansea City AFC Ltd*, *The Times* (11 February 1997) suggested that players could be liable for injuries sustained by another if the challenge was of such severity that it fell outside the rules of the game, the emphasis in *Caldwell* upon the playing culture means the goalposts have shifted in that context too. The playing culture consideration may exonerate a referee, but this is because of the difficulty in proving the duty of care was breached rather than because match officials are somehow immune.

### CASES SUBSEQUENT TO CALDWELL

The fluid state of the law that has been precipitated by *Caldwell*, and the potential ramifications of that rules, are apparent from the recent Court of Appeal judgment in *Blake v Galloway*. Here, the claimant, aged 15, was injured after being struck in the eye by a 4cm-long piece of bark thrown by his friend, also aged 15. Both boys played in a jazz quintet and the incident occurred during a lunchtime break in rehearsals. All five boys were involved in an activity described by the judge at first instance as “high-spirited and good-natured horseplay ... there was general messing around by all the participants”.<sup>45</sup> The boys were not specifically aiming the bark, twigs and other debris at one another’s heads but at their bodies generally and the court was at pains to stress that more dangerous objects such as stones were not being thrown by any of them. At first instance the judge held the injury was caused by the negligence of the defendant, rejected a defence of volenti but reduced the damages, in the agreed sum of £23,500 by 50% to reflect contributory negligence. On the issue of negligence the judge held:

I do not think that ... the defendant took sufficient care to make sure that injury to the claimant’s head did not take place .... In the particular circumstance of this case there was, although consent to participate in a game which might have caused injury, no consent to the injury to the claimant’s face.<sup>46</sup>

On appeal, the Court of Appeal overturned the judge’s finding that the injury had been caused by a negligent act: “this was a most unfortunate accident, but it was just that”.<sup>47</sup> The judge at first instance had not addressed specifically the duty of care issue, having been invited by counsel for the defendant to proceed on the basis that the key issue was one of consent, but in any event the judge’s ruling was “clearly wrong”.<sup>48</sup> The duty of care had not been breached and it was for this reason alone that the defendant was to be held not liable in negligence. That being the decision, there was no reason to consider either volenti or contributory negligence.

While no criticism can be leveled at the Court of Appeal’s decision, difficulties arise through its references to the earlier sports torts cases and the use it made of *Caldwell* in particular. The court’s decision to proceed on the basis that what happened here was analogous with cases arising from sporting injury, while perfectly understandable, is of itself worthy of comment. Dyson LJ stated that “no authority has been cited to us dealing with negligence in relation to injury caused in the course of horseplay<sup>49</sup>, as opposed to a formal sport or game”, but said the

<sup>45</sup> *Blake v Galloway* [2004] 1 WLR 2844 at 2847; [2004] 3 All ER 315; [2004] EWCA Civ 814.

<sup>46</sup> *Blake v Galloway* [2004] 1 WLR 2844 at 2848; [2004] 3 All ER 315; [2004] EWCA Civ 814.

<sup>47</sup> *Blake v Galloway* [2004] 1 WLR 2844 at 2854 per Dyson LJ; [2004] 3 All ER 315; [2004] EWCA Civ 814.

<sup>48</sup> *Blake v Galloway* [2004] 1 WLR 2844 at 2853 per Dyson LJ; [2004] 3 All ER 315; [2004] EWCA Civ 814.

<sup>49</sup> Perhaps counsel could have looked a little further afield for assistance, starting with the Scottish case of *Hunter v Perth and Kinross Council* [2001] SCLR 856. The recent Irish judgment of *Murphy v Wexford VEC* [2004] IESC 51 will also be of interest to those involved in future “horseplay” cases, as is the Australian case of *McHale v Watson* (1966) 115 CLR 199 where the High Court of Australia, on facts similar to *Blake v Galloway*, held that the appropriate cause of action was either trespass to the person or negligence in all the circumstances.

similarities between the two – physical contact or the risk thereof; the making of instinctive decisions by participants in response to the actions of other participants; and the possibility that the physical activity results in a risk of physical harm – rendered the analogy a valid one.

While not disagreeing with the logic of this reasoning, the authors would contend *sotto voce* that what defines whether a particular activity is a sporting activity does not reside in those factors that the Court of Appeal enunciated. Although it is tempting to regard an activity as a sport simply by virtue of the fact that it is played in accordance with rules that may or may not be written down, an alternative is to consider the motivations, risks and rewards that attend its practitioners. What “makes” a sport is the production of physical capital through physical exertion: physical capital embodies a social, cultural and economic value and has the capacity for “the social formation of bodies by individuals through sporting, leisure and other activities in ways that express a class location and are accorded symbolic value”.<sup>50</sup> Those of us who favour the latter definition of sport would make the point that engagement in “high spirited horseplay” does not possess these real or deferred benefits and, even on the basis of the “codified rules” definition, is not as closely akin to sports practices as may first appear. “Horseplay” has more in common with traditional street games like hide-and-seek, “bulldog” and “tag” than it has with sports practices and the rationale behind the Court of Appeal’s drawing in *Blake* upon such cases as *Condon*, *Caldwell* and *Rootes*, while attractive on its face, is not altogether convincing.

Perhaps more worthy of comment, given its potential impact upon subsequent cases, is the Court of Appeal’s reliance upon *Wooldridge*, which Dyson LJ regarded as authority for the proposition that “there is a breach of duty of care owed by participant A to participant B only where A’s conduct amounts to recklessness or a very high degree of carelessness”.<sup>51</sup> Precisely what this means has the potential to confuse because “negligence in all the circumstances” remains the appropriate test and *Wooldridge* did not change that. If “horseplay” does bear analogy with organised sports practices in which one participant injures another, then “negligence in all the circumstances” remains the appropriate standard in both scenarios and *Blake* ought not to operate in conjunction with a misreading of *Wooldridge* to form the basis of an argument for the imposition of an impossibly high threshold of liability in any subsequent “horseplay cases”.

The difficulties that even an apparently straightforward case like *Blake* gives rise to illustrate that although *Caldwell* appears to have clarified the law of negligence as it relates to cases involving sports injuries, it has, in actuality created subtle shifts in the focus of sports torts. These may, in the future, change quite dramatically the way in which such cases are argued and decided. The least controversial outcome of the decision is that all sports participant, broadly defined, always owe a duty of care towards all other participants in the game. This now means that the focus of all such cases will be on whether a breach of the duty can be established, thereby placing a much greater emphasis on the applicable standard of care. This focus is reinforced by a sports-defendant’s inability to sustain a valid claim of *volenti*. Thus, the definition of the appropriate standard of care becomes of paramount importance.

*Caldwell* makes it clear that the standard of care to be applied is negligence in all the relevant circumstances, not that the defendant must have shown a reckless disregard for the safety of the claimant. Reckless disregard is a good evidential guide in that it is a sufficient, but not a necessary, standard of misbehavior. The apparent distinction between the degree of carelessness required to establish a sportsperson’s negligence in respect of the injuries caused to others has been much overstated.<sup>52</sup> Those seeking to establish reckless disregard as the appropriate standard draw support for their theory from the judgments of Sellers and Diplock LJ in *Wooldridge*.<sup>53</sup> Those same passages should instead be read as forerunners of *Caldwell* because they oblige participants to achieve the “standards which might reasonably be expected” of them in competition and provide that to prove negligence, the threshold that must be crossed is higher than a “lapse of error or skill” and the defendant’s conduct may perhaps evince “a reckless disregard” for the claimant’s safety.

<sup>50</sup> Shilling C, “Educating the Body: Physical Capital and the Production of Social Inequalities” (1991) 25 *Sociology* 653 at 654.

<sup>51</sup> *Blake v Galloway* [2004] 1 WLR 2844 at 2851-2852 per Dyson LJ; [2004] 3 All ER 315; [2004] EWCA Civ 814.

<sup>52</sup> McArdle D, “The enduring legacy of reckless disregard” (2005) 34(3) *CLWR* 365.

<sup>53</sup> *Wooldridge v Sumner* [1963] 2 QB 43 at 56 and 68 respectively.

More important, however, is the court’s expansion of acceptable conduct to include not only acts that are within the rules of a sport but also those that are within its playing culture, as part of the third limb of the *Caldwell* test. The pragmatic effect of this is to allow a defendant to introduce evidence that the injury-causing act was an acceptable manner of playing the game and therefore that the duty has not been breached. This should mean that injuries caused by risks considered to be inherent in a particular sport should not lead to liability. Reference to the playing culture of a sport should, therefore, ensure that “what everybody knows” to be acceptable conduct becomes the benchmark by which cases will be judged.

The problem, as always, lies in the proving of the case. Whom is best placed to determine “what everybody knows” will vary depending upon whether one is a claimant or defendant, player or referee, spectator or governing body official, elite participant or recreational player. All those with a vested interest in the outcome of the case will have their own idea of what is “acceptable conduct” and what is not. In most cases, this differing interpretation of playing culture will require reference to a variety of pundits and other “experts”, adding complexity to an already inexact science. Perhaps the most meaningful and appropriate definition of the playing culture of a sport should come from the relevant governing body or international federation. As the overseer of the game, it should, in theory, be best place to determine what is, and is not, acceptable conduct.

### **TOWARDS A VARIABLE STANDARD OF CARE?**

A further problem that arises with the use of the playing culture concept is that, implicitly, it invites the court to draw greater distinctions between the myriad levels, be it amateur and professional, recreational or highly organized, at which sport is played. The third limb of the *Caldwell* test requires the court to take into account all relevant, prevailing circumstances which includes the “standards, skills and judgement” of a contestant. In *Caldwell* itself, this was held to include the fact that the jockey was a professional riding against other professionals. Thus, the court is directed specifically to take into account the level of participation of the participants in determining liability, particularly whether or not they are professionals. The difficulty is that, prima facie, this introduces a variable standard of care into sports torts and that would be contrary to the general rule in *Nettleship v Weston*.

In reality, that is not the case and there is no conflict with *Nettleship*. Participation in sport is very different from driving on public roads, the course of conduct at issue in *Nettleship*. A generally applicable test was justifiable in *Nettleship* because all road users must be judged by the same basic level of skill and safety by virtue of the inherent dangers involved in driving. The public highways can be seen as one complete and closed system. There can be no variable standard as there can be no distinction between road users. A certain basic level of skill has to be required of all road users, including learners, because of the dangers associated with driving but a sport cannot be seen in the same light. The standards, skills and judgement possessed and exhibited by an international footballer, for example, are very different from those of the recreational player. The closed system is not the sport of football as a whole but the specific point in the “pyramid of sporting ability” at which the game takes place. Potentially, a sport could contain as many separate closed systems as there are formal and informal levels within the framework of participation. In her summing up in *Pitcher*, Hallett J not only referred to the standard of care applicable to professional footballers but went as far as to say that “First Division footballers are far from infallible”, thereby expressly distinguishing First Division footballers from those playing elsewhere in football’s hierarchy and positing a variable standard of care even among those who should be regarded as elite competitors simply by virtue of their professional status, regardless of what club they play for or the league in which that club participates.

This does not mean a player in a pub team is allowed to play more negligently than a professional player. His lower degree of skill would mean that he would not be expected to perform certain challenges that would be an integral part of playing elite football. Instead, each player would be judged by the standards, skills and judgements of his peers at that level of the game. However, although there is no conflict with *Nettleship* if the “closed system” approach to defining playing culture is followed, this interpretation of *Caldwell* still has the potential to be far-reaching because its impact is something that appears not to have been considered fully either by the court in this case or in subsequent judgements where *Caldwell* has been cited. Eventually a *Bolam*-style professional

negligence test may apply to sport;<sup>54</sup> however, after *Pitcher*, greater degrees of variability may be introduced than simply between professional and amateur participation.

This may place the governing body, perhaps through affiliated regional or county associations, under an obligation to hold itself out as the final arbiter of acceptable conduct in sporting contests. Of course, a consequence of imposing a more specific and more onerous duty of care on the governing body of a sport to define explicitly the playing culture of that sport with a view to ensuring the safety of those who play it, would be that governing bodies themselves may become the focus of an increasing number of civil actions. In *Watson v British Boxing Board of Control Ltd*, the Court of Appeal held that the governing body of boxing (hereafter BBBC) was liable for the exacerbation of the in-game injuries caused to a fighter because of its inadequate and outdated medical guidelines. All licensed promoters of boxing bouts in the UK had to follow the guidance laid down by the BBBC. The BBBC’s failure to recommend that promoters have in place neurosurgical provision in accordance with then current best practice was held to be a cause of Watson’s injuries. It was held that because all boxers relied on the BBBC to create a safe environment in which they could box, including post-fight safety provisions, its failure to provide such a reasonable degree of safety was negligent.

This potential liability of a national governing body for its safety procedures is also apparent from the decision in *Wattleworth v Goodwood Road Racing* [2004] EWHC 140. Here, the court held that the second of three defendants, the Royal Automobile Club Motor Sport Association (hereafter “MSA”)(which is the governing body of motor sport in the United Kingdom), owed a duty to all drivers to take reasonable care to ensure that the tracks it licensed for racing were reasonably safe for this purpose. Although the personal injury claim was dismissed, this was on the grounds that the MSA had acted reasonably when carrying out its inspections and therefore had discharged the duty that it owed to Wattleworth, not because a duty did not exist. The court also held that the final defendant (the International Autosport Federation), despite its being in overall charge of motor racing worldwide, was not liable as its regulations provided specifically for national governing bodies to be charged with responsibility for the safety licensing of race tracks.

Three important points emerge from *Watson* and *Wattleworth*. First, the fact that *Caldwell* was not even cited in the latter judgement suggests that not all lawyers practicing in this field have appreciated its significance – a state of affairs that beggars belief. Second, a national governing body can be responsible for the safety rules pertaining to the sport over which it proclaims jurisdiction. Third and implicitly, the international federation or world governing body can in principle also be liable if it determines the safety rules of its sport and obliges its constituent national level members to enforce them, as is the case with the International Rugby Board’s promulgation of crouch-touch-pause-engage.<sup>55</sup> It is not a great extension of these principles to declare that a governing body or international federation, as the case may be, should be liable not only for inadequate post-match medical safety and arena licensing provisions, but also for in-game safety rules that do not adequately protect the participants. If this is the case, and a greater degree of emphasis is placed upon governing bodies to define and enforce the playing culture of a sport, then such bodies may find themselves the subject of negligence actions based on their failure to provide a safe system of rules under which the sport is played.

## CONCLUSION

If all this seems far-fetched given the current state of the law, then an appreciation of the speed of development of the law of the last 20 years will show that in fact these are this season’s possibilities. The number of cases in which *Caldwell* has been of relevance, even though not discussed in all of them, illustrate that the law in this area continues to develop apace and that this is no mere academic debate.

In the sports torts, *volenti* is now obsolete, its inherent meaning subsumed within that of the playing culture of a sport. Playing culture should now become the focus for these cases as it is only by examining this concept in detail that a breach of duty can be established. Also inherent within this concept is the introduction of a variable standard of care that, after *Pitcher* and *Caldwell*, may even be determinable on a league-by-league basis. If

<sup>54</sup> *Balam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118.

<sup>55</sup> *Agar v Hyde* (2000) CLR 552.

governing bodies continue to encourage foul and violent play, whether tacitly by a failure to punish it or explicitly through rules that are poorly-drafted and incomplete, these self-proclaimed guardians of sport will be joined as defendants to negligence actions alongside those whose behavior they seek to control and, in the case of professional participation, their employees.

One final issue that emerges from these cases is the relationship between risk, reward and liability within the context of sports participation. Detailed consideration of that relationship is beyond the scope of this article, save for two concluding thoughts that will perhaps serve to highlight the authors’ ongoing research into this area. First, it should be borne in mind that with all sports practices it is the participants’ bodies that are put into play, and necessarily put into danger. Accordingly, the justifications for the existence of fault-based personal injury schemes that are valid in respect of other areas of personal injury law do not sit comfortably with sports situations where the risk of injurious conduct sustained through the failings of another needs to be balanced against the courts’ awareness of the putative social utility of sports participation,<sup>56</sup> especially in the light of the difficult issues of proof discussed above. Second, and on a more prosaic note, situations in which injured sports participants desperately seek someone to sue<sup>57</sup> in the hope of achieving some degree of financial solace to help them cope with injuries that are, on occasion, traumatic or life-threatening are unedifying. They reflect badly on both sport and the law and the authors would advocate the extension of no-fault compensation schemes at all levels of the sporting pyramid, paid for either by a levy on players’ subscriptions or from the proceeds of media and sponsorship deals. The English Rugby Football Union introduced such a scheme in the wake of *Smoldon* but their Welsh counterparts failed to do so, preferring instead to rely on an insurance policy that required proof of fault and in any event limited payouts for personal injuries to £1 million. If the Welsh Rugby Football Union had introduced a no-fault policy of its own there would have been no need for Mr Vowles to take his turn in the lottery that is the law of sports negligence.

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<sup>56</sup> Goodhart A, “The Sportsman’s Charter” (1968) 78 LQR 490.

<sup>57</sup> *Agar v Hyde* (2000) 201 CLR 552.