Liability For Rugby Related Neuro-Degenerative Disease: A Question of Tort

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Abstract

This article examines the potential liability of rugby governing bodies in negligence for their alleged past failures to protect players from known risks associated with the neurodegenerative consequences of rugby-related traumatic brain injury. Not only is there a strong public interest in the claims given the impact it could have on the game, but the claims raise novel issues in tort law and legal medicine. We consider the action in negligence in light of recent developments such as scientific advances in relation to both causes and diagnoses of neurodegenerative disease, criticism of the industry from independent committees, and increased readiness of the courts to hold sporting bodies to account. The article sets out the barriers a claimant would face and the doctrinal advances that would be required to overcome them. While other writers have been sceptical of the chances of claimant success, the argument put forward in this article is that barriers to a claim are not insurmountable, provided the claim is carefully articulated taking account of both doctrine and the developing evidence base.

Introduction

This article examines the potential liability of rugby governing bodies in negligence for alleged past failures to reasonably protect players from known risks associated with the neurodegenerative consequences of rugby-related traumatic brain injury (TBI). This phenomenon, which often presents in players' 40s, has been described as "an epidemic and an existential crisis" for rugby.[1] As we shall see, class actions (collective claims in a single case)

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are mounting. While other writers have been sceptical of the chances of claimant success,[2] we argue that barriers to a claim are not insurmountable. This is due in part to recent developments including scientific advances in relation to both causes and diagnoses of neurodegenerative disease which we examine below, criticism of the industry from independent committees questioning governing bodies' commitment to player welfare,[3] and increased readiness of the courts to hold sporting bodies to account.[4]

Although some writers have considered some discrete applications of the law to rugby in this area, such as the law on duty of care,[5] this article makes a distinct contribution to the literature by considering the action in negligence as a whole. The tendency for class actions to be settled before the legal principles have been clarified[6] renders an examination of the liability for governing bodies in negligence both timely and important. We begin by describing the extent and impact of rugby-related neuro-degenerative injury and establishing rugby governing bodies as the most likely defendant. We then turn to the barriers a claimant would face and the doctrinal advances that would be required to overcome them. We analyse their merit and consider the types of claim and claimant most likely to succeed. Given pressures of space, we focus predominantly on men's elite Rugby Union, but aspects of our commentary are of broader relevance to other forms and levels of rugby and, indeed, other contact sports.

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[1] S. Agini and J. Noble, "Rugby Union's Existential Crisis" *Financial Times* (October 23, 2022) (quoting Richard Boardman). B. Cisneros, "Concussion Litigation in Rugby – Part II: Breach of Duty" (August 27, 2021) at https://rugbyandthelaw.com/2021/0 8/27/concussion-litigation-rugby-union-part-ii-breach-of-duty-negligence-world-rugby-rfu-wru/ [accessed December 8, 2023].

[2] Eg R. 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.

[3] Baroness T. Grey-Thompson, DBE DL *Duty of Care in Sport: Independent Report to Government* (2017) 4 [available at https://assets.publishing.service.gov.uk/media/5a81ff3c40f0b62305b91ed9/Duty_of_Care_Review_-_April_2017__2.pdf [accessed December 8, 2023].

[4] M. James, *Sports Law,* 3rd edn (London: Palgrave, 2017), at p. 99 noting the law "continues to extend legal liability to new contexts and new defendants who had not previously considered themselves to be at risk from litigation." Examples include R. Heywood and P. Charlish, "Schoolmaster tackled hard over rugby incident" (2007) 15 *Tort Law Review* 162 and, more recently, *Czernuszka v King* [2023] EWHC 380 (KB); [2023] 4 W.L.R. 26.

[5] E.g. M. Parry, *Collisions and Concussion in Sport: Time for a Duty of Care* (PhD thesis, Cardiff University 2021).

[6] Rylands Garth, the firm representing around 250 ex rugby players with brain injuries states that they are "pushing for an early settlement and hope to achieve that sooner than any trial", at https://rylandsgarth.com/brain-injury-lawsuit-faq/ [accessed December 8, 2023].

The claimants

Current and potential claimants are former rugby players with neuro-degenerative disease allegedly linked to head injuries incurred playing rugby. An ever increasing number of testimonials report devastating impacts[7] allegedly flowing from collisions and acceleration-deceleration[8] which can cause acute and chronic physical problems related to intracranial hematoma, diffuse vascular injury and injury to cranial nerves and the pituitary stalk.[9] Mild to moderate TBIs may present as "concussion", a term that describes the history and presentation of the TBI, but does not diagnose the injury itself.[10] "Sub-concussion", which is not immediately symptomatic, can also be damaging, particularly if it is repeated.[11] The incidence of concussion and sub-concussion in rugby has increased dramatically[12] as rugby has become faster and the body mass and height of players has increased, resulting in the application of greater forces when bodies collide.[13]

TBI in rugby is associated with enhanced risks of neurological damage including mental health issues such as severe depression[14] and degenerative conditions including Motor Neurone

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[7] See, for example, the cases of Bobbie Goulding: W. Manger, "Rugby League Stars Stricken by Brain Damage Launch Legal Claim for Millions" *Mirror* (October 8, 2022); Michael Lipman: M. Lipman and F. Lipman, *Concussion* (Crows Nest, N.S.W.: Allen & Unwin, 2022); Ryan Jones: PA Media ""My World is Falling Apart": Former Lion Ryan Jones reveals dementia diagnosis aged 41" *Guardian* (July 17, 2022); Mike Edwards: J. Gant "'You're Used like an Unwanted Broken Toy'" *Mail* (October 27, 2021), Dane Haylett-Petty, "Editorial: 'Wallabies Back Haylett-Petty Retires After Concussion Battles" *News24* (November 8, 2021); S. Peters, *Concussed: Sport's Uncomfortable Truth* (London: Allen & Unwin, 2023).

[8] Which can cause the brain to collide with the internal surface at the front of the skull ("coup") and then also rebound against the back of the skull ("contracoup").

[9] J. Silver, T. McAllister and S. Yodofsky (eds), *Textbook of Traumatic Brain Injury* (Washington, D.C: American Psychiatric Publishing, 2005), pp. 27-39.

[10] E. Toman, S. Hodgson, M. Rilet et al, "Concussion in the UK: A Contemporary Narrative Review" (2022) 19 Trauma Surg. Acute Care Open e000929.

[11] C. McNabb, T. Reha, J. Georgieva, et al, "The Effect of Sub-Concussive Impacts During a Rugby Tackling Drill on Brain Function" (2020) 10 *Brain Science* 960.

[12] See, for example, England Rugby, *Professional Rugby Injury Surveillance and Prevention Project (PRISP) Season Report 2020-21*, viii. Concussion is the most common injury at premiership rugby matches (131 incidences, 28 per cent of all injuries).

[13] N. Hill, S. Rilstone, M. Stacey et al, "Changes in Northern Hemisphere Male International Rugby Union Players" Body Mass and Height Between 1955 and 2015" (2018) 4 B.M.J. Open Sport Exerc. Med. e000459.

[14] K. Hind, N. Konerth, I. Entwistle et al, "Mental Health and Wellbeing of Retired Elite and Amateur Rugby Players and Non-Contact Athletes and Associations with Sports-Related

Disease (MND), Parkinson's Disease and Traumatic Encephalopathy Syndrome (TES).[15] TES is a clinical umbrella term that encompasses the effects of mild, moderate and severe acute TBIs.[16] One condition associated with TES is Chronic Traumatic Encephalopathy (CTE).[17] CTE is a neurodegenerative disease linked to repeated head injuries. It is similar to, but distinct from, other forms of dementia such as Alzheimer's Disease. It often starts with mood, behaviour and personality changes and progresses to problems with memory, planning and movement.[18] Whilst cognitive rehabilitation can slow decline, there is no effective treatment.

The public might instinctively hold participants responsible for risks associated with something as "frivolous" as a sport. The law, however, is clear that a claimant may recover damages in negligence if their harm results from the failure of a defendant who owes them a duty of care to take reasonable care. Indeed, this principle was set out nearly 100 years ago in *Cleghorn v Oldham*:

> "Games might be and are the serious business of life to many people. It would be extraordinary to say that people could not recover from injuries sustained in the business of life, whether that was football, or motor racing, or any other of those pursuits which are instinctively classed as games but which everyone knew quite well to be serious business transactions for the persons engaged therein."[19]

Concussion: The UK Rugby Health Project" (2022) 52 *Sports Medicine* 1419. And see J. Davies "Wales Rugby Star Links Dementia to Mental Health Issues" *BBC News* (April 4, 2023).

[15] E. R. Russell, D. F. Mackay, D. Lyall, et al, "Neurodegenerative Disease Risk Among Former International Rugby Union Players" (2022) 93 *Journal of Neurology, Neurosurgery & Psychiatry* 1262.

[16] O. Bennet and J. Hammers, "Letter: Traumatic Encephalopathy Syndrome [TES] is Not Chronic Traumatic Encephalopathy [CTE]" (2021) 89 *Neurosurgery* E205.

[17] See B. Omalu, *Truth Doesn't Have a Side: My Alarming Discovery about the Danger of Contact Sports* (Grand Rapids, Michigan: Zondervan, 2017); J. M. Laskas, *Concussion* (London: Penguin, 2015) and see I. Freckleton, "Concussion, by Jeanne Marie Laskas" (2016) 23 *Psychiatry, Psychology and the Law* 483. For incidence see P. McCrory, T. Zazryn and P. Cameron, "The Evidence for Chronic Traumatic Encephalopathy in Boxing" (2007) 37 Sports Med. 467.

[18] NHS *Chronic Traumatic Encephalopathy,* at https://www.nhs.uk/conditions/chronic-traumatic-encephalopathy/ [accessed December 8, 2023].

[19] *Cleghorn v Oldham* [1927] 43 T.L.R. 465.

Before assessing the feasibility of a claim in negligence, we begin by considering against whom it should be made.

Selecting an appropriate defendant

The law of negligence compensates claimants who have suffered loss or damage because of a breach of a duty of care by a defendant. Where neurodegenerative disease results, the range of potential defendants is bewildering, including the international and national governing bodies – private[20] regulatory bodies that set down bylaws and guidance – employers, coaches and referees and fellow players. Employers and governing bodies may be vicariously liable[21] for the tortious actions of their employees,[22] and, in the unlikely event a non-delegable duty of care was held to exist, possibly even liable for the acts of independent contractors, such as self-employed coaches.[23] To date, the focus in cases against clubs, coaches and other players is on damage that can be linked to a tortious act within, or closely associated with, a game. Whilst this may include damage that results from head injuries,[24] there have been no cases establishing liability for TBI resulting in "long tail" degenerative conditions. This is principally because both the tortfeasor and the causes of damage are difficult to identify, but it is also because the rules designed to reduce the risk of concussion have historically been absent or vague, making it difficult to establish breach on the part of a club, coach or referee.

Claimants have turned instead to rugby governing bodies and their historic development, or failure to develop, safety rules.[25] International governing bodies, predominantly World Rugby and International Rugby League, issue "laws of the game": by-laws that set out minimum

[20] See *R v Jockey Club ex parte Aga Khan* [1992] EWCA Civ 7; [1993] 1 W.L.R. 909 per Lord Hoffmann (Though the Jockey Club's powers were exercised in the interest of the public, its function did not fulfil a governmental role).

[21] *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607. See J. Brown, "The Vicarious Liability of Sports Governing Bodies and Competition Organisers" 43(2) (2023) *Legal Studies* 221.

[22] Or those in a relationship akin to employment: *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660. Defendants will not be *vicariously* liable for the torts of independent contractors see *Barclays Bank v Various Claimants plc* [2020] UKSC 13; [2020] A.C. 973.

[23] Though we consider it unlikely that a non-delegable duty would be established under the test in *Woodland v Essex County Council* [2013] UKSC 66; [2014] A.C. 537 at [7] per Lord Sumption.

[24] See for example N. Parker, "Hankin Settles £3million Claim after Being Hit on Head with fire extinguisher" *The Sun* (January 13, 2022).

[25] As such we engage with the substantial body of literature on inter-participant litigation only insofar as it assists in relation to liability of governing bodies.

standards.[26] The rules are applied and supplemented by national governing bodies which must comply with relevant domestic legislation. The rules now address safety issues including risk assessments, first aid, reporting of injuries and foul play. From 2015, World Rugby incorporated a Head Injury Assessment protocol into the laws of the game for adult elite players to identify, diagnose and manage head impacts where there is potential for concussion.[27] For players at all levels who suffer concussion or suspected concussion, guidance recommends a period of rest followed by graduated return to play.[28]

Claimants argue that more could reasonably have been done as information on neurocognitive risk came to light. Class actions are mounting against governing bodies.[29] Rylands Garth represents more than 250 players who have neurological impairments that claimants allege to be caused by TBI incurred in rugby. In one such action, former elite players have initiated a claim against World Rugby, Rugby Football Union and the Welsh Rugby Union.[30] In another, 100 elite rugby league players are claiming against Rugby Football League, reportedly making 53 allegations including failure to respond to changes in the game by adapting the rules to enhance safety.[31] And a lawsuit involving 55 former amateur male and female players and youth players was announced in January 2023 against Rugby Football Union, the Welsh Rugby Union and World Rugby.[32]

Claimants face several barriers which are the focus of this article. First, the statute of limitations generally requires that claims are made within three years of injury. Second it is not clear that

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[26] World Rugby, *Laws of the Game Rugby Union* (2023); Rugby League, International *Laws of the Game* (2022).
[27] World Rugby, *HIA Protocol* (2015), updated 2019.
[28] World Rugby, *Concussion Guidance* (2017); *Transformational Six-point Plan* (2021); *Contact Training Load Guidelines* (2021); and *Return to Play Guidelines* (2022) at https://www.world.rugby [accessed December 8, 2023]. For national guidance see for example UK Government, *UK Concussion Guidelines for Grassroots Sport* (UK Gov, 2023).
[29] See I. Tugcu, "Dementia in Sports: An Ongoing Headache" (2022) 165 SJ 14; R. Booth, "Rugby Union Players' Legal Action Over Head Injuries to be Heard in High Court" *The Guardian* (November 19, 2023).
[30] C. McLaughlin, "Steve Thompson in Group of Ex-Rugby Union Internationals to Sue for Brain Damage" *BBC News* (December 8, 2020) and see BBC2, *Head On: Rugby, Dementia and Me* (October 21, 2022).
[31] A. Bower, "100 Former Rugby League Players Start Legal Fight with RFL over Brain Injuries" *Guardian* (April 4, 2023).
[32] A. Bull, "Amateur Players Launch Lawsuit Against Rugby Authorities over Brain Injuries" *Guardian* (January 19, 2023).

governing bodies owe a duty of care to players, especially as head injury might be considered an obvious risk of rugby which players willingly take on. A third barrier is that the duty of care, if shown to exist, may not have been breached given the scientific uncertainties as to the correlation between TBI and neurodegenerative disease at the relevant time. Fourth, proving a causal link between the alleged omission with respect to rule change and the injury is challenging given the multiple potential causes of neurodegenerative disease. And finally, governing bodies might allege that the claimants consented to the risks. Cumulatively, the barriers seem insurmountable, but we consider how they might be overcome and where the most compelling cases lie.

Doctrinal innovations required to establish liability

Statute of limitations

The first hurdle can be swiftly dealt with. Personal injury claims must usually be made within three years of the date of actual damage,[33] but if the claimant is not immediately aware of the injury, as is likely to be the case with progressive neurological damage, the three years starts to run from the discovery date.[34] Judges also have discretionary powers to disapply the limitation period where justice requires it.[35] Finally, we note that the Limitation Act 1980 accommodates situations where the neurological damage itself impacts on the claimant's ability to proceed in a timely manner.[36] The limitation period therefore provides claimants with an incentive to act promptly but also contains safeguards that protect those with degenerative diseases that are slow to manifest.

Duty of care

To establish a duty of care, the focus of the courts is now on whether the circumstances fit within an established category of liability.[37] The modern framework in physical damage cases distinguishes between "acts" and "omissions" but the Supreme Court has preferred the labels "causing harm (making things worse)" and "failing to confer a benefit (not making things

[33] Limitation Act 1980 s.11.
[34] Limitation Act 1980, s.14(1). Eg *Ali v Courtaulds Textiles Ltd* [1999] 5 WLUK 417; (1999) *Times*, 28 May 1999 (CA). And see *Ministry of Defence v AB* [2012] UKSC 9; [2013] 1 A.C. 78 at [12] per Lord Wilson.
[35] Limitation Act 1980 s.33. And see *Sniezek v Bundy* [2000] EWCA Civ 212; [2000] 7 WLUK 168.
[36] Limitation Act 1980, s.28.
[37] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736 at [26] per Lord Reed.

better)".[38] Whichever terminology is adopted, the former will normally be a situation where a duty of care is imposed, whereas the latter will not attract a duty of care in the absence of special circumstances, which we also consider below.[39]

It is not always easy to determine when conduct will be regarded as causing harm and or merely failing to benefit. As Rachael Mulheron states, "what is a pure omission to one judge can be a scenario of a positive act to another."[40] Deploring the "semantic bickering"[41] involved in this type of case, Coulson LJ said, in *Rushbond PLC v The JS Design Partnership LLP,* that all negligence claims involve both acts and omissions.[42] He maintained that where the defendant has "critical involvement in the activity which gave rise to the loss" this would not be a "pure omissions" case.[43] In *Stovin v Wise*, Lord Hoffmann believed that the distinction is used "to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity".[44] At first sight, it might seem that governing bodies have "critical involvement" in the activity giving rise to the loss and so an argument might be made that they have caused harm by a positive act. Despite this, it is more likely that such claims will be regarded as a failure to confer a benefit.

Consider the case of *Sutradhar v Natural Environment Research Council*,[45] which Nicholas McBride argues illustrates the difference between acts and omissions.[46] The claimant lived in Bangladesh and had suffered injuries from arsenic poisoning after drinking contaminated water. His claim that the defendants had been negligent in conducting a geological survey, which had induced the authorities in Bangladesh not to take steps to stop people drinking the

[38] *Poole Borough Council v GN* [2019] UKSC 25; [2020] A.C. 780 at [28] per Lord Reed.
[39] *Poole* [2019] UKSC 25 at [63]. The most relevant "special circumstance" for our purposes is assumption of responsibility, where D assumes responsibility toward C sufficient to oblige D to confer a benefit on C.
[40] R. Mulheron, "*HXA v Surrey* [2022] EWCA Civ 1196" (2022) 4 J.P.I.L. C196, C199. For analysis of some of the difficulties in this area of law see S. Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L.Q.R. 485.
[41] *Rushbond PLC v The JS Design Partnership LLP* [2021] EWCA Civ 1889 at [53] per Coulson L.J.
[42] *Rushbond* [2021] EWCA Civ 1889 at [53].
[43] *Rushbond* [2021] EWCA Civ at [44].
[44] *Stovin v Wise* [1996] A.C. 923 at 945; [1996] 3 W.L.R. 388 at 945.
[45] *Sutradhar v Natural Environment Research Council* [2006] UKHL; [2006] 4 All E.R. 490; [2006] 7 W.L.U.K. 104, 33.
[46] N. McBride, "Negligence Liability for Omissions: Some Fundamental Distinctions" (2006) 2 C.S.L.R. 10 at 10.

water, was rejected in the House of Lords due to a lack of proximity. According to McBride, the defendants had not caused harm by making things worse. There had been no evidence that had the government not received the report, it would have detected the arsenic and saved the claimant from drinking it:

> "So – before the defendants conducted their survey and filed their report, the status quo was that the claimant would at some point in the future be poisoned from drinking the water in his area. The defendants' survey and report did not alter that status quo in any respect. So the defendants did not make the claimant worse off. In acting as they did, the defendants merely missed an opportunity to save the claimant from being poisoned."[47]

Before rugby governing bodies amended their guidance, the status quo was that adequate protections against concussion had not been implemented. Failing to amend the guidance, by analogy, is therefore a missed opportunity to save claimants from suffering TBIs. Further support for this view can be derived from the fact that the most direct cause of any claimant's injuries will be the actions of fellow players, whether tortious or not. A defendant's failure to prevent a third party from causing harm is regarded as a failure to benefit.[48] Indeed, the application for a group litigation order from the 55 former amateur players reportedly contends that the defendants failed "to take reasonable action in order to protect players from permanent injury caused by repetitive concussive and sub-concussive blows".[49] The players allege that the governing bodies did not take the steps needed to improve safety, such as reducing contact in training, reducing games per season and monitoring players effectively.[50] Failing to take active steps to protect a claimant would be considered a failure to provide a benefit.

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[47] N. McBride, "Negligence Liability for Omissions: Some Fundamental Distinctions" (2006) 2 C.S.L.R. 10 at 10.
[48] *Poole Borough Council v GN* [2019] UKSC 25; [2020] A.C. 780 at [64] per Lord Reed.
[49] "Rylands Garth Statement: Latest Step in Brain Injury Legal Case" *Rugby Pass* (23 November 2022) at https://www.rugbypass.com/news/rylands-garth-statement-latest-step-in-brain-injury-legal-case/ [accessed December 8, 2023].
[50] "Rylands Garth Statement: Latest Step in Brain Injury Legal Case" *Rugby Pass* (23 November 2022) at https://www.rugbypass.com/news/rylands-garth-statement-latest-step-in-brain-injury-legal-case/ [accessed December 8, 2023].

This was also the position taken by the High Court of Australia in *Agar v Hyde*,[51] which found that the International Rugby Football Board (IRFB, now World Rugby) did not owe a duty of care to certain amateur players who had suffered spinal injuries in scrums. It was held that there was no positive act by the IRFB creating a risk of injury. Instead, they had omitted to amend the rules, so maintaining the status quo.[52]

Agar may have influenced the failure of a 2021 claim by Australian Rugby League player James McManus for concussion related injury when he alleged that he had been asked to play on or return prematurely after head injuries. He is reportedly suffering from CTE-related dementia as well as headaches, anxiety, depression and rage.[53] The case was settled in the National Rugby Union's favour without compensation.[54]

It should be emphasised, however, that *Agar* does not mean that UK claims for neurodegenerative disease are doomed to defeat.[55] There are well-established circumstances where a defendant can be held liable for failure to provide a benefit. Examples of such circumstances include those where the defendant has created the source of the danger, or where the defendant has assumed responsibility to the claimant.[56]

The modern approach of the courts to questions of "assumption of responsibility", originally developed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[57] has often been contradictory.[58] Assumptions of responsibility have been held to exist when the defendant and claimant had no pre-tort relationship or interaction with one another and even where the defendant has explicitly

[51] *Agar v Hyde* [2000] HCA 41; 173 A.L.R. 665.
[52] *Agar v Hyde* [2000] HCA 41; [2000] 173 A.L.R. 665 at [68] per Gaudron J., McHugh J., Gummow J., and Hayne J.
[53] A. Proszenko, "McManus Sought $1 million in Landmark Court Case, but will Walk Away Empty-Handed" *Sydney Morning Herald* (September 18, 2021).
[54] A. Proszenko, "McManus Sought $1 million in Landmark Court Case, but will Walk Away Empty-Handed" *Sydney Morning Herald* (September 18, 2021).
[55] Note, for example that *Agar* was distinguished in *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607 at [20] per Lord Phillips M.R. where a referee failed to enforce rugby rules designed to protect players.
[56] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736 at [65] per Lord Reed.
[57] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; [1963] 2 All E.R. 575.
[58] K. Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461.

declared that they are not assuming responsibility to the claimant.[59] There have also been debates about whether it requires a voluntary agreement or is a duty imposed by law.[60]

Recent commentaries have sought to shed light on the concept. Sandy Steel outlines four potential versions:

> "*Reliance.* If A knows or ought to know that A's conduct may lead B reasonably to rely upon A to do an act and that this reliance may result in detriment to B, and B has in fact relied upon A's conduct, A will be under a duty of care to protect B from suffering detriment in reliance upon A's conduct.[61]
>
> *Promise.* If A promises B that A will do an act, A will be under a tortious duty of care to do that act.
>
> *Taking on a task.* If A takes on a task for B the careful performance of which A knows or ought to know will affect whether physical harm to B is prevented, A will be under a duty of care to perform that task carefully.
>
> *Role or relationship duty.* If A accepts a specific role or enters into a specific relationship with B, where the role or relationship makes A especially well placed to protect B's physical safety, then the law may sometimes be justified in imposing a positive duty of care in the performance of that role or relationship."[62]

Steel maintains that the law has not taken a clear position on *Reliance*; has rejected *Promise* and *Taking on a task* and endorsed *Role or relationship duty* (though he acknowledges that determining which roles attract legal enforcement requires further analysis).[63]

By way of contrast, Donal Nolan's survey of the law concludes that assumption of responsibility involves A taking on a job or task for B.[64] A different definition is favoured by Lord Sales. In an extra-judicial speech, he considered that the "central unifying feature" of the "core category of case" where the principle applies is: "that the parties had a relationship in which it was open to the defendant to have bargained in respect of the risk involved in taking

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[59] See *White v Jones* [1995] 2 A.C. 207; [1995] 1 All E.R. 691 and *Smith v Eric S Bush* [1990] 1 A.C. 831; [1989] 2 All E.R. 514.
[60] *Smith v Eric S Bush* [1990] 1 A.C. 831 at 862; [1989] 2 All E.R. 514 at 534 per Lord Griffith.
[61] S. Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L.Q.R. 485 at 495.
[62] Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L.Q.R. 485 at 498.
[63] Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L.Q.R. 485 at 501.
[64] D. Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 C.L.P. 123.

on a task for the claimant, in a context in which the defendant invited the claimant to rely on the due performance of the task."[65]

These differences in opinion are reflected in the case law. While assumption of responsibility has been recognised as the touchstone of liability in cases of pure economic loss and omissions, the courts have often seemed reluctant to adopt any single definition of the concept. For example, in *Poole Borough Council v GN*, Lord Reed stated, "The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, *usually* from the reasonable foreseeability of reliance on the exercise of such care."[66] This seems to be an endorsement of Steel's *Reliance* definition, but the word "usually" leaves the door open for different definitions to be utilised. Elsewhere in the same judgment Lord Reed appeared to endorse other definitions, such as *Taking on a task* and also where "the claimant entrusts the defendant with the conduct of his affairs, in general or in particular".[67] He concluded that an assumption of responsibility "can be highly dependent on the facts of a particular case".[68] This view is bolstered by the recent case of *HXA v Surrey County Council* where the Court of Appeal described this as "still an evolving area of the law"[69] and allowed a claim to go to trial despite there being scant evidence of an assumption of responsibility under *any* of the above definitions.

Given these ambiguities, it would be premature for us to adopt any single definition for the purposes of this article. That said, it would only be Steel's *Promise* definition that would be completely fatal to the type of claim we are considering. There is no evidence of governing bodies making specific promises to players to take care for their welfare. An arguable case can be made for an assumption of responsibility existing under the other main understandings of the concept. First, governing bodies *take on the task* of providing guidance which they know will affect whether physical harm to players is prevented. Second, they have taken on a specific *role* in providing guidance which renders them well placed to protect the safety of players.

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[65] Lord Sales, "Pure Economic Loss in The Law of Tort: The History and Theory of Assumption of Responsibility" The Annual Tort Law Research Group Lecture, 26 September 2022 at https://www.supremecourt.uk/docs/pure-economic-loss-in-the-law-of-tort-lord-sales.pdf [accessed December 8, 2023].
[66] *Poole Borough Council v GN* [2019] UKSC 25; [2020] A.C. 780 at [80] (emphasis added).
[67] *Poole Borough Council v GN* [2019] UKSC 25; [2020] A.C. 780 at [89].
[68] *Poole Borough Council v GN* [2019] UKSC 25; [2020] A.C. 780.
[69] *HXA v Surrey County Council* [2022] EWCA Civ 1196; [2023] 1 W.L.R. 116; at [105] per Baker L.J.

Finally, their conduct in providing and updating guidance could lead players to *rely* on governing bodies to their detriment. By setting safety standards centrally, governing bodies control the way in which matches are conducted, and so limit the measures which individual rugby players can take to ensure their own safety.

Let us now consider the relevant case law that supports this conclusion in more detail. A helpful case for our purposes is *Watson v British Boxing Board of Control.*[70] It established that a duty of care was owed by the governing body of professional boxing to provide appropriate preliminary medical care at the ringside. Watson successfully argued that provision of such care would have prevented him sustaining permanent brain damage when he was knocked out in a fight. A duty of care was established on the basis that the Boxing Board had already made several stipulations around medical care and might therefore be reasonably expected to govern care at the ringside. There is a parallel here with World Rugby's and national governing bodies' current and historical role in setting safety rules.

Lord Phillips made an analogy with the duty of an employer to make provision for its employees to receive appropriate medical attention when its activities involve a particular health risk. Distinguishing the police and fire service, on whom there is generally no duty of care to provide a benefit, he held: "the injuries which are sustained by professional boxers are the foreseeable, indeed inevitable, consequence of an activity which the Board sponsors, encourages and controls."[71] In rugby too, encouraging and controlling the activity could mean that the defendant is treated as creating a source of danger.

An assumption of responsibility was also present, with Lord Phillips maintaining 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."[72] In such circumstances, "A's conduct can accurately be

[70] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134. And see *Wattleworth v Goodwood Road Racing Company & Others* [2004] EWHC 140 (QB); [2004] P.I.Q.R. P25 (which suggests a duty on governing bodies to ensure the grounds are reasonably safe for a sporting activity, though the duty was discharged in this case).
[71] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [78].
[72] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [49].

described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning."[73] Furthermore, it was said that: "undertaking to cater for the medical needs of a victim of illness or injury will generally carry with it the duty to exercise reasonable care in addressing those needs."[74]

Nevertheless, care needs to be taken with some of the reasoning in *Watson*, not only because there are features which made it "extraordinary, if not unique".[75] Decided before the "three-stage universal test" approach to duty of care identified with *Caparo v Dickman*[76] was rejected,[77] "proximity" and "policy" would not be the focus of the courts today.

Hayden Opie points to several ways in which *Watson* could be distinguished.[78] The majority in *Agar* was concerned that there could be a risk of indeterminate liability given the international reach of the I.R.F.B.[79] The risk of indeterminate liability was absent in *Watson* given the relatively small number of professional boxers under their remit. In light of the delegation of responsibilities for the laws of the game to governing bodies, the court was mindful of the subjective nature of the assessment of the acceptable level of risk across different sports[80] and the potential to open a floodgate of claims. In rugby, risks of neuro-degenerative injury apply to both men and (possibly particularly) women,[81] at club and international level, and to elite, grassroots and younger players whose brains are still developing,[82] potentially risking indeterminate liability.

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[73] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134.
[74] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [57].
[75] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [8] (Lord Phillips MR).
[76] Exemplified by *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 1 All E.R. 568.
[77] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736 at [21] per Lord Reed.
[78] H. Opie, "The Sport Administrator's Charter: *Agar v Hyde*" (2001) 9 Torts L.J. 131.
[79] *Agar v Hyde* [2000] HCA 41; [2000] 173 A.L.R. 665 at [19] per Gleeson C.J.
[80] *Agar v Hyde* [2000] HCA 41; [2000] 173 A.L.R. 665 at [18] per Gleeson C.J.
[81] I. Gilmore, "Concussion Risks in Rugby may be even Greater for Women than for Men" *Guardian* (December 24, 2020); L. T. Starling, N. Gabb, S. Williams, et. al. "Longitudinal Study of Six Seasons of Match Injuries in Elite Female Rugby Union" (2023) 57 *British Journal of Sports Medicine* 212. Whilst women's rugby is now ubiquitous, our focus is on an era when it was less common.
[82] For example, S. W. West, I. J. Shill, S. Sick et al, "It Takes Two to Tango: High Rates of Injury and Concussion in Ball Carriers and Tacklers in High School Boys" Rugby" (2023) Jan

That said, it is not difficult to envisage a rugby claim that is analogous to *Watson*. As in *Watson* where the focus was on the ringside medical care rather than the injury sustained in the fight,[83] the rugby claim might focus on the failure of the rules to require reasonable steps thereafter such as ensuring the claimant had suitable recovery time before returning to play. Doing so could also limit the potential field of claimants to those able to demonstrate return to play after proven or likely concussions. The emphasis would not be on the initial concussion, which could risk indeterminate liability, but on the failure to confer the benefit of recovery from what the claimant will argue is a known and significant risk. This does, however, bring with it causational difficulties, for the claimant must show that recovery would have been probable had the appropriate action been taken.[84] We return to that issue below.

Additional reasons to distinguish *Watson* need to be considered. One is that where the risk of injury is considered obvious, the courts have shown reluctance to find a duty of care.[85] Claimants might counter that, notwithstanding the obviousness of physical injury, the specific risk of neurodegenerative disease whilst known or knowable to the governing bodies, was unclear to players.[86] Another is that, when the Court of Appeal in *Watson* was invited to consider the impact of the case on sports such as Rugby Union,[87] Lord Phillips MR responded "It does not follow that the decision in this case is the thin end of a wedge. The facts of this case are not common to other sports."[88] Accordingly, *Watson* might be distinguished on the basis that rugby and boxing are fundamentally different.

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12 Clin. J. Sport Med. doi: 10.1097/JSM.0000000000001118; A. Bull, "Death of a Schoolboy: Why Concussion is Rugby Union's Dirty Secret" *The Guardian* (December 13, 2013).

[83] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [7] at [44] per Lord Phillips M.R.

[84] See *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176, where a claim for mere loss of a chance of a better outcome was denied.

[85] *Tomlinson v Congleton Borough Council* [2004] UKHL 47; [2004] 1 A.C. 46.

[86] See for example M. Palmer, "Informed Consent can Save Rugby Amid Safety Concerns" *The Times* (February 21, 2023) arguing that players were not and are still not sufficiently informed of the risks: "They didn't tell the players the truth. How do I feel about it [the legal action] now? Pure cause and effect. Everything that is taking place now is a result of the actions of rugby's authorities, or the lack of action. It's unfolding the only way that it could."

[87] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [90] per Lord Phillips M.R.

[88] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [91].

It is true that the courts have historically held "manly sports" such as rugby in high regard, separating them in policy terms from the "harmful" sport of boxing, notwithstanding the enduring legality of the latter.[89] It is difficult, however, to identify a principled rationale for treating rugby and boxing differently in this way. Like rugby, boxing is a sport with a long tradition of grass-roots participation, open to all ages and abilities. It is true that in boxing the infliction of an aggravated assault is an intrinsic object of participation,[90] but rugby players might also act with the (oblique) intent of causing harm to their opponents as a means of lawfully achieving an objective of the game. For example, a player with a considerable weight advantage who drops their shoulder to plough through their opponent at high speed will often know that the collision is likely to harm to their opponent, even if it falls short of a foul, but proceeds anyway, on the basis that this will enable them to advance the ball further towards the try line of the opposing team.

Since *Watson* there are signs of a change of approach which brings the sports of boxing and rugby into greater alignment. We see this in cases establishing the negligence of rugby referees[91] and fellow players.[92] This reflects changes in the way rugby is played and the enhanced risk of neurological damage, which was first recognised in boxing in 1928[93] but, as we consider below, was not made clear in rugby until much later. Given there is estimated to be about one brain injury per match in professional rugby,[94] much like the British Boxing Board of Control in *Watson,* the governing bodies of rugby might well have assumed responsibility "for the control of an activity" the essence of which is "that personal injuries should be sustained by those participating."[95]

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[89] See *East's Pleas of the Crown* 1 East P.C. (1803) ch v, §§ 41–42, 268–270; *R v Brown* [1994] 1 A.C. 212; [1993] 2 All E.R. 75 per Lord Mustill; M. Gunn and D. Ormerod, "The Legality of Boxing" (1995) 15 *Legal Studies* 181.

[90] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [10] per Lord Phillips M.R.; *R v Brown* [1994] 1 A.C. 212 at 265; [1993] 2 All E.R. 75 at 108 per Lord Mustill.

[91] E.g. *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607.

[92] E.g. *Czernuszka v King* [2023] EWHC 380 (KB); [2023] 4 W.L.R. 26..

[93] H. Martland, "Punch Drunk" (1928) 91(15) J.A.M.A. 1103.

[94] Oral evidence of Professor William Stewart *Concussion in Sport*, H.C. 1177, 9 March 2021.

[95] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134; at [43] per Lord Phillips M.R.. See Bunworth, "Egg-Shell Skulls or Institutional Negligence?" (2016) 16 Int. Sports Law J. 82 at 86.

Given the conflicting authorities, the existence of a duty of care is finely balanced and difficult to predict and so remains an open question in any future case. We would suggest that the strongest case for establishing an analogy with *Watson* will focus on the failure to act appropriately when a concussion occurs rather than failures to prevent concussion/s.[96] We note that Lord Phillips MR did not rule out the establishment of a duty of care on analogous facts:

> "In any event it would be quite wrong to … [formulate] a principle of general policy that sporting regulatory bodies should owe no duty of care in respect of the formulation of their rules and regulations."[97]

There are, as we have argued above, marked differences between *Agar* and historical rugby concussion cases where awareness of the risks amongst players was limited and underplayed. This may allay some of the concerns over indeterminate liability and strengthen the case for establishing a duty of care. Claimants might alternatively seek to draw an analogy with *Watson* in relation to alleged failures to define, limit or respond appropriately to foul play or to limit match time and contact.

Breach

Unlike cases involving inter-participant liability[98] there is a lack of authority on the standard of care for rugby governing bodies. In relation to the former, categorisation of negligent acts versus inherent risks in the sport have tended to favour defendants by looking for evidence of disregard for safety rather than mere errors of judgement.[99] Donal Nolan argues that, whilst there are cases, such as occupiers liability and public authorities, where the standard of care is altered to favour the defendant, sporting cases are not and should not fall within this category. A lower standard of care is not appropriate merely because there are inherent risks in sport

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[96] Contrast with Parry, M. Parry, *Collisions and Concussion in Sport: Time for a Duty of Care* (PhD thesis, Cardiff University 2021) at 196 who proposes a duty to "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."

[97] *Watson v British Board of Control Ltd & Anor* [2000] EWCA Civ 2116; [2001] Q.B. 1134 at [91].

[98] See eg *Condon v Basi* [1985] 1 W.L.R. 866; [1985] 2 All E.R. 453, *Czernuszka v King* [2023] EWHC 380 (KB); [2023] 4 W.L.R. 26.

[99] *Wooldridge v Sumner* [1963] 2 Q.B. 43; [1962] 2 All E.R. 978.

because, as we explore below, negligent conduct cannot be consented to.[100] As such the normal principles on breach of duty will need to be applied and the claimants will need to establish that the governing body failed to exercise an appropriate degree of care in relation to their advice on potential risks and / or mitigation of the risks by amending the rules.

This can be a complex undertaking. First, the risk of injury must have been reasonably foreseeable at the time of the alleged negligence and the courts will be wary of hindsight.[101] The court will assess at what point a reasonable governing body would have been aware of and acted upon the risk, rather than when the issue was first documented by scientists.[102]

The risks associated with TBI in contact sports have been known for some time, though knowledge as to the precise causes and effects continues to evolve. A report in 1997 from the American Academy of Neurology reported that repeated concussion could lead to cumulative neurological damage.[103] However, the first concussion protocols were not introduced until 2003 and, even then, were vague and relied on subjective assessments. In 2009 researchers suggested that

> "[b]y instituting and following proper guidelines for return to play after a concussion or mild traumatic brain injury, it is possible that the frequency of sports-related CTE could be dramatically reduced or perhaps, entirely prevented."[104]

[100] D. Nolan, "Varying the Standard of Care in Negligence" (2013) 72(3) C.L.J. 651 at 656. We are grateful to Rob Heywood for directing us to this point.
[101] *Roe v Minister of Health* [1954] Q.B. 66 at 84; [1954] 2 W.L.R. 915 at 924: "We must not look at the 1947 incident with 1954 spectacles" per Denning L.J.
[102] *Roe v Minister of Health* [1954] Q.B. 66 at 77; [1954] 2 W.L.R. 915 at 918 per Somervell L.J.
[103] "Practice Parameter [RETIRED]: The Management of Concussion in Sports (Summary Statement)" (1997) 48(3) *Neurology* 581. Pre-1997 see e.g. D. Gronwall, P. Wrightson, "Cumulative Effect of Concussion" (1975) 2 *Lancet* 995 and discussion in B. Cisneros, "Concussion Litigation in Rugby – Part II: Breach of Duty" (August 27, 2021).
[104] A. C. McKee et al, "Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy after Repetitive Head Injury" (2009) 68 J. Neuropathol Exp. Neurol. 709. Cited in B. Cisneros, "Concussion Litigation in Rugby – Part II: Breach of Duty" (August 27, 2021).

Once a risk is reasonably foreseeable, a balancing exercise is undertaken where the reasonable person weighs up the probability of injury, its severity, the cost of taking precautions, and the social value of the activity.[105]

There is no doubt that concussion and sub-concussion can lead to severe chronic injury. The probability of injury is difficult to generalise but, as we explore below, steadily more amenable to correlation with particular risks the rules might seek to mitigate. We know, for instance, that the damage can be particularly severe if a second concussion occurs before the first concussion has had time to subside: so-called "second-impact syndrome".[106]

The costs in amending the rules of the game to prevent concussion must also be acknowledged. Changes to the rules that seek to limit TBI and its effects also impact on the enjoyment of playing and watching the game.[107] Establishing liability would also have financial implications for the governing bodies and, if it results in the clarification of rules to further limit injury, for clubs, coaches, schools and universities at all levels of the game if they breach those rules.

This issue might be linked to the social value of the activity. Consideration of this factor has long been a requirement at common law,[108] and has also been emphasised in the statutory interventions including the Compensation Act 2003, which asks the court to consider whether requiring a defendant to take certain steps prevent or discourage desirable activities,[109] and Social Action, Responsibility and Heroism Act 2015 (SARAH), which among other things, asks the court to consider whether a defendant was acting for the benefit of society.[110] Taken together with the common law, they indicate that the courts will be mindful of the need to balance risk mitigation and the social value of the game.

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[105] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [34] per Lord Hoffmann.
[106] First described by R.L. Saunders and R.E. Harbaugh "The Second Impact in Catastrophic Contact-Sports Head Trauma" (1984) 252 J.A.M.A. 538.
[107] E.g. G. Meagher, "Johnny Sexton Criticises RFU for Lowering Tackle Height for Amateurs" *Guardian* (January 23, 2023).
[108] *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All E.R. 333; [1946] 7 WLUK 17; *The Scout Association v Barnes* [2010] EWCA Civ 1476; [2010] All ER 284.
[109] Compensation Act 2006, s.1.
[110] Compensation Act 2006, s.2.

Common practice is also a relevant factor.[111] Defendants must keep up-to-date "but the court must be slow to blame him for not ploughing a lone furrow."[112] How other sports governing bodies have responded to these risks may guide the court but will not be determinative.[113] Ultimately, though, there is no scientific method for balancing these factors against one another and so the conclusions of the judge on breach will ultimately be a value judgement.[114]

That said, there are grounds for believing that the governing bodies may not have met the standard of care. The Concussion in Sports Group is an international group that reviews the latest research into concussion and sets out statements every few years on how best to diagnose and treat it. The first consensus statement was issued in 2001, and subsequent versions have appeared approximately every four years.[115] Previous iterations have enhanced recognition of TBI and its impacts but concerns have been expressed that it did not do more to link concussion and long-term injury such as CTE. Ben Cisneros says:

> "In 2002, the First Consensus Statement of the CISG made no specific mention of the long-term impact of concussion, other than that further research was needed.
>
> By 2009, several years after the discovery of CTE in the brains of deceased [US National Football League] NFL players, the CISG's Third Consensus Statement acknowledged the suggested association between sports concussions and late-life cognitive impairment, but no consensus was reached on the significance of the NFL cases. Still, it was agreed that clinicians 'need to be mindful of the potential for long-term problems in the management of all athletes'. …

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[111] *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1776 [1968] 10 W.L.U.K. 16, 1783 per Swanwick J.
[112] *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405 at 416; [1984] 1 All E.R. 881 at 889 per Mustill J.
[113] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 at [82] per Lord Mance.
[114] *Glasgow Corp v Muir* [1943] A.C. 448 at 457; [1943] 2 All E.R. 44 at 48 per Lord Macmillan. See also J. Conaghan and W. Mansell, *The Wrongs of Tort Law*, 2nd edn (London: Pluto Press, 1998), p. 60.
[115] P. McCrory, W. Meeuwisse, J. Dvorak et al, "Consensus Statement on Concussion in Sport—The 5th International Conference on Concussion in Sport" (2017) 51 *British Journal of Sports Medicine* 838.

> By 2013, the CISG accepted the existence of CTE but found that a 'cause and effect relationship" had not yet been demonstrated between CTE and concussions or exposure to contact sports. That conclusion was reiterated by the same group in 2017, albeit that it was then acknowledged that the "potential for developing [CTE] must be a consideration'."[116]

How might this influence the question of breach? The court might consider that governing bodies justifiably reflect this cautious position. On the other hand, it might take into consideration ethical and methodological criticisms of the consensus statements[117] and find that the standard of care was not met. The chair of the Group resigned in 2022 amid allegations of plagiarism and misquotation.[118] Concerns have been expressed that the allegations against him could impact on confidence in the multi-authored concussion statements.[119]

Separately, in other countries and sports, there have been unproven allegations that governing bodies intimidated researchers to attempt to undermine evidence of the link between the sport and neurodegenerative damage.[120]

It is therefore hard to predict in advance how the courts would decide this issue against governing bodies but it is possible that breach of duty may be established.

Another potential avenue for establishing breach should be considered. We note that a second claim made in one of the group litigation orders reportedly contends that the governing bodies did not give sufficient warnings or education to the claimants about the risks of neurological

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[116] B. Cisneros, "Concussion Litigation in Rugby – Part II: Breach of Duty" (27 August 2021).
[117] See M. McNamee, L. C. Anderson, P. Borry et al "Sport-Related Concussion Research Agenda Beyond Medical Science: Culture, Ethics, Science, Policy" (2023) J.M.E. doi 10.1136/jme-2022-108812.
[118] A. Bull, "A New Consensus? Change in the Air as Concussion Conference Begins" *Guardian* (October 27, 2022); Z. Kmietowicz, "Former British Journal of Sports Medicine Editor is Subject of a Slew of Retractions" (2022) 379 B.M.J. o2442.
[119] S. T. Casper, A. M. Finkel, "Did a Misquotation Warp the Concussion Narrative?" (2022) 5 *British Journal of Sports Medicine* 1334.
[120] *In Re: National Football League Players" Concussion Injury Litigation, Mdl 2323, Class Action Settlement Agreement* as of June 25, 2014, recitals B and G (settled without admission of liability); L. Ezell, "Timeline: The NFL's Concussion Crisis" *Frontline* (October 8, 2013).

impairment.[121] The two claims are interlinked insofar as evidence that claimants were not so warned lends weight to the argument that the risks could not be considered obvious to claimants, even if they should have been known by the governing bodies and hence the governing bodies should have issued rules to keep players reasonably safe. In *Woods v Multi-Sport Holdings Pty Ltd,*[122] the majority in the High Court of Australia found that indoor cricket without a helmet and absent warnings of the specific risk of injury to the eye did not breach the duty of care because the risk *to any part of the body* was obvious. But there are strong grounds to distinguish this persuasive authority in concussion cases where the risk was (and to an extent remains) more obscure.[123]

Could the failure to warn also constitute a separate cause of action? Could players argue that they would have avoided damage had they been properly warned of the risks, even if the rules were not changed? Allegations of failures to warn players of the risks of neurodegenerative impairment, and to actively conceal the risks, were made to the US National Football League which settled without admission of liability in 2016.[124] In England and Wales a claim for negligent non-disclosure of risk arises if the defendant failed to exercise reasonable care.[125]

Causation

Claimants who surmount the hurdles of duty and breach face their biggest challenge establishing causation. A settlement of an estimated $1bn was reached in the USA between the National Football League (NFL) and retired American football players in 2016.[126] It has been

[121] "Rylands Garth Statement: Latest Step in Brain Injury Legal Case" *Rugby Pass* (23 November 2022) at https://www.rugbypass.com/news/rylands-garth-statement-latest-step-in-brain-injury-legal-case/ [accessed 8 December 2023].

[122] *Woods v Multi-Sport Holdings Pty Ltd* 2002] HCA 9; 208 C.L.R. 460.

[123] There is no duty to warn of risks of which one cannot be reasonably be expected to be aware. See *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307; [2018] 6 WLUK 96, endorsed by the Supreme Court in *McCulloch v Forth Valley* [2023] UKSC 26; [2023] 3 W.L.R. 321.

[124] *In re: National Football League Players" Concussion Injury Litigation* No 2 L120md002323 (ED Pa), at https://www.nflconcussionsettlement.com [accessed December 8, 2023].

[125] We note that the elevated standard set out in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430 to protect the patient's right to know is unlikely to apply to governing bodies as there is no analogous focus on inter-personal dialogue and communication. There is a greater prospect of it applying to intermediaries such as clubs or coaches who fail to pass on warnings, but this is beyond the scope of this paper.

[126] Russell et al, "Neurodegenerative Disease Risk Among Former International Rugby Union Players" (2022) 93 *Journal of Neurology, Neurosurgery & Psychiatry* 1262.

alleged that difficulties of proving both that their neurological impairments were caused by concussion and that the concussions were caused by the NFL "kept this settlement from reaching the billions".[127] The evidence base has moved on since 2016. The UK Rugby Health Project has shown that elite players are more likely to be adversely affected than amateur players.[128] The Glasgow FIELD study indicates that former international rugby players are at double the risk of developing dementia and ten times the risk of developing Motor Neurone Disease compared to the general population.[129]

Rugby claimants must show a causal link between the alleged negligence of the governing bodies and the injury, demonstrating both factual and legal causation. There will be no legal causation if intervening acts break the chain of causation. The type of damage must be within the scope of the duty,[130] and a reasonably foreseeable consequence of the breach.[131] Legal causation is unlikely to cause difficulties for rugby claimants and so our focus will be on factual causation.

In most cases, factual causation is decided on the but-for test, determined on the balance of probabilities. If it is found that the injury would likely as not have occurred regardless of the governing body changing the rules, then there will be no causation.[132] Claimants may struggle to prove causation due the difficulty in translating heightened risk of neurodegenerative disease to proof of its cause. A claimant with MND or Parkinson's may be able to point to evidence of return to play after concussion in the relevant period, structural changes in their brain and scientific research indicating elevated TBI-associated risk, but this will not of itself prove that

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[127] M. Morris, P. W. Breaux, "Mediated Settlement between NFL and Former Players a Win-Win" (2014) 61 *Louisiana Bar Journal*, at https://www.lsba.org/documents/publications/BarJournal/Journal-FebMarch2014.pdf [accessed December 8, 2023].

[128] Hind et al, "Mental Health and Wellbeing of Retired Elite and Amateur Rugby Players" (2022) 52 *Sports Medicine* 1419

[129] Russell et al, "Neurodegenerative Disease Risk Among Former International Rugby Union Players" (2022) 93 *Journal of Neurology, Neurosurgery & Psychiatry* 1262.

[130] *Khan v Meadows* [2021] UKSC 21; [2022] A.C. 852.

[131] *The Wagon Mound (No 1)* [1961] A.C. 388; [1961] 2 W.L.R. 126; *Hughes v Lord Advocate* [1963] A.C. 837; [1963] 2 W.L.R. 779.

[132] *Barnett v Chelsea & Kensington Hospital* [1969] 1 Q.B. 428; [1968] 1 All E.R. 1068. It would not be enough for a claimant to establish that the defendant's breach merely deprived them of a chance of avoiding a bad outcome, if that outcome was more probable than not. See *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.

but-for the governing body's failure to act the disease would not have naturally occurred,[133] occurred in any event,[134] or that other TBIs within and outside rugby are not the whole or partial cause.

We will concentrate on the case alleging that the governing body is the sole tortfeasor as this seems to be the focus of the class actions. Where there are several competing or cumulative causes, the law on causation has developed to avoid injustice. This is particularly so in cases of occupational disease and evidential complexities such as where the disease is slow to manifest and there are evidential barriers to establishing proof of causation. The rugby case we envisage would be defended by a governing body rather than an employer.

Three principal mechanisms are employed by the court. The first concerns multiple discrete competing causes. Here the claimant must show which of the alternatives caused the injury. The second involves a modification of the but-for test where cumulative effects to which the defendant materially contributed make a more than negligible impact to the injury. The third, more limited exception is when the claimant cannot prove material contribution to injury but can show that the defendant has materially increased the risk of injury. Depending on the facts, each of these categories could be relevant in a rugby case. At this stage readers may wish to apply a cold flannel to their heads. In the passages that follow, we offer an overview of how a claim might be constructed.

Double the risk

In most cases where a claimant suffers injury it is possible to precisely link that injury to the act that caused it. Where science is not sufficiently advanced to make this connection, the law allows epidemiological (statistical) evidence to establish a link, without requiring a detailed scientific account of the link.[135] This approach will not apply if multiple causes operate cumulatively.[136] But if the rugby-related injury is framed as either consecutive exposures where one is innocent (such as non-tortious TBIs) and another tortious (where it relates to the omission to amend the rules), or as alternative rather than cumulative causes, then statistical evidence might be compiled to show that one of these causes was more than twice as likely as

[133] *Wilsher v Essex Area Health Authority* [1988] 1 A.C. 1074; [1988] 1 All E.R. 871.
[134] *Hotson v East Berkshire Health Authority* [1987] A.C. 750; [1987] 2 All E.R. 909.
[135] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [6] per Lord Phillips.
[136] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [90] per Lord Phillips.

all the others put together to have caused the disease.[137] Imagine that the judge accepts expert evidence that the damage may have been caused by the negligent omission to amend the rules, but might have been caused by other factors such as player-on-player injury, undocumented non-tortious impacts, or environmental factors. If there is epidemiological evidence that the failure to amend the rules is more than twice as likely as the other factors to have caused the disease the claimant may establish causation,[138] at least if there is evidence that the disease is linked to the governing body's negligence. The doubling of the risk approach is used with caution: "A doubled tiny risk will still be very small".[139] But the growing evidence base raises the potential for epidemiologists to measure the association between exposure to rugby during the relevant period and the incidence of neurological disease by assessing risk relative to the general population. Two recent scientific advances will aid claimants. Whilst until recently, diagnosis of CTE was only possible post mortem[140] due to limited investment in longitudinal research,[141] a 2021 consensus statement sets out criteria for ante mortem diagnosis of TES, which is associated with CTE.[142] The diagnosis relies on exposure to repetitive head impacts, impairment on memory or other neurobehavioral compromise and "that clinical features not be accounted for completely by any other neurologic, medical, or psychiatric condition".[143] Additionally, studies have demonstrated the link between repeated concussions and enhanced

[137] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [91]-[92] per Lord Phillips.
[138] *Novartis Grimsby Ltd v Cookson* [2007] EWCA Civ 1216; [2007] 11 W.L.U.K. 761; *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [10] per Lord Phillips and Lord Dyson but contrast Lord Kerr at [206]; *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036 at [55] per Sales L.J..
[139] *Williams v Bermuda Hospitals Board* [2016] U.K.P.C. 4; [2016] A.C. 888 at [48] per Lord Toulson.
[140] H. C. Murray, C. Osterman, P. Bell, et al, "Neuropathology in Chronic Traumatic Encephalopathy: A Systematic Review of Comparative Post-Mortem Histology Literature" (2022) 10 *Acta Neuropathologica Communications* doi 10.1186/s40478-022-01413-9.
[141] An issue the ENIGMA working group seek to remedy. See IK Koerte, C Esopenko, SR Hinds, et al "The ENIGMA Sports Injury Working Group:– An International Collaboration to Further our Understanding of Sport-Related Brain Injury" (2021) 15 *Brain Imaging and Behavior* 576.
[142] D. I. Katz, C. Bernick, D. W. Dodick et al, "National Institute of Neurological Disorders and Stroke Consensus Diagnostic Criteria for Traumatic Encephalopathy Syndrome" (2021) 96 *Neurology* (March 15, 2021).
[143] Katz et al, "National Institute of Neurological Disorders and Stroke Consensus Diagnostic Criteria for Traumatic Encephalopathy Syndrome" (2021) 96 *Neurology* (March 15, 2021).

risk of long-term cognitive deficits.[144] As such, a case might be established that indivisible injury such as CTE is caused by the governing body's alleged omissions.

Material contribution to damage

Claimants may alternatively argue that their neurodegenerative disease has cumulative causes that built up over time with repeated exposure to TBIs. Rather than seeking to show that but-for the rule changes no TBIs would have occurred, claimants might argue that failures to amend the rules materially contributed to the damage. The Imperial College London Drake Rugby Biomarker Study has linked elite rugby with changes in brain structure.[145] There is potential then to argue that elite rugby causes a degree of damage and that amending the rules to enhance safety could have eliminated some of the TBIs and, crucially, prevented harmful second impacts by keeping injured players from the pitch. Even if the cause of injury is partially "innocent" (such as non-tortious TBIs or environmental factors), the "guilty" omission to amend the rules arguably materially contributed to the indivisible degenerative disease.

That said, their claim would not be straightforward. *Bonnington Castings v Wardlaw,*[146] where the material contribution exception originated, applied in circumstances where the indivisible damage would not have occurred but-for the existence of the "guilty" cause. Stephen Bailey therefore argues that, properly understood, *Bonnington* can be explained on the but-for test.[147] The case law establishing an alternative claim on the basis of material contribution to damage is complex and confused.[148] Causation was established in *Bailey v Ministry of Defence,*[149] but there is ambiguity as to whether this was on the basis of the but-for test[150] which can be applied

[144] M. J. Lennon, H. Brooker, B. Creese, et al, "Lifetime Traumatic Brain Injury and Cognitive Domain Deficits in Late Life: The PROTECT-TBI Cohort Study" (2023) *Journal of Neurotrauma* doi 10.1089/neu.2022.0360.
[145] K. A. Zimmerman, E. Laverse, R. Samra et al "White Matter Abnormalities in Active Elite Adult Rugby Players" (2021) 3 *Brain Communications* fcab133.
[146] *Bonnington Castings v Wardlaw* [1956] AC 613; [1956] 1 All E.R. 615.
[147] S. H. Bailey, "Causation in Negligence: What is a Material Contribution?" (2010) 30 *Legal Studies* 167.
[148] S. Steel, *Proof of Causation in Tort Law* (Cambridge: CUP, 2015), pp. 244-246; G. Turton, *Evidential Uncertainty in Causation in Negligence* (Oxford: Hart, 2016), pp. 66–79; *Holmes v Poeton Holdings Limited* [2023] EWCA Civ 1377; [2023] 11 W.L.U.K. 339 at [30] per Stuart-Smith L.J.
[149] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.
[150] E.g. *Davies v Frimley NHS Foundation Trust* [2021] EWHC 169 (QB); [2021] 1 W.L.U.K. 445.

to an indeterminate aspect of the injury, or as seems more likely,[151] by applying the material contribution test to brain injury that flowed from a single causative agent, namely the patient's weakened state, which resulted in the indivisible cumulative effect of both her medical condition and the defendant's negligence. The latter possibility has found favour in several cases,[152] but until recently it was thought the indivisible nature of degenerative disease would bar use of the material contribution exception.[153]

This changed in *Holmes v Poeton Holdings Limited*[154] where the Court of Appeal held that the material contribution test applies to indivisible as well as divisible injuries. Whilst this is positive for rugby claimants, the case also demonstrated the difficulties of establishing evidence of causality. Mr Holmes contracted Parkinson's disease, which the parties agreed was indivisible. It was established that the defendant employer had breached their duty of care in exposing him to unsafe levels of neurotoxic Trichloroethylene (TCE). Mr Holmes had successfully argued at first instance that the exposure to TCE materially contributed to the damage, but this was overturned on appeal. The Court of Appeal divided causation into two stages. "Generic Causation" could not be established because the quality of the scientific evidence was not sufficient to show that it had caused or materially contributed to the cause of Parkinson's disease. There was a gap between animal studies and application in humans which rendered the cause-effect relationship one of increased *risk* rather than increased damage. At the second, 'Individual Causation' stage, the claimant had been exposed to environmental factors that increased the risk of him developing Parkinson's. Applying *Wilsher v Essex Area Health Authority*,[155] it could not be shown that the exposure to TCE rather than the natural and environmental causes led to the damage.

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[151] See *Bailey* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052; at [46] per Walker L.J and S. Steel, "Material Contribution to Damage, Again" (2022) 138 L.Q.R. 540.
[152] See *Williams v Bermuda Hospitals Board* [2016] U.K.P.C. 4; [2016] A.C. 888 critiqued in S. H. Bailey, "'Material contribution' after *Williams v The Bermuda Hospitals Board*" (2018) 38(3) *Legal Studies* 411; *John v Central Manchester and Manchester Children's University Hospitals NHS FT* [2016] EWHC 407 (QB); [2016] 4 W.L.R. 54.
[153] See *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036 and *Thorley v Sandwell & West Birmingham Hospitals NHS Trust* [2021] EWHC 2604 (QB); [2021] 9 W.L.U.K. 361.
[154] *Holmes v Poeton Holdings Limited* [2023] EWCA Civ 1377; [2023] 11 W.L.U.K. 339.
[155] *Wilsher v Essex Area Health Authority* [1988] AC 1074; [1988] 1 All E.R. 871, in *Holmes v Poeton Holdings Limited* [2023] EWCA Civ 1377; [2023] 11 W.L.U.K. 339 at [65] per Stuart-Smith LJ.

Subject to appeal or further development of this contested area of law rugby claimants will seek to build on the potential claim for indivisible injury and argue that the evidence base is more substantial than was the case in *Holmes*. They would argue that (1) The clinical diagnosis of CTE is based on repetitive sequential TBIs, ruling out environmental factors as the probable cause; (2) the evidence on second impact syndrome and / or risk of TBIs is sufficient to make out a more than negligible contribution of the governing body omissions to the injury; and (3) medical science cannot establish whether the injury would not have occurred but-for the negligent omission. If all three are satisfied there is a case for modifying the but-for test. This is so even if more than one causative agent is identified.[156]

Mr Holmes did not seek to establish epidemiological evidence of causation (examined above) or material contribution to risk,[157] to which we now turn.

Material contribution to risk

Whilst claimants might conceivably overcome barriers relating to the indivisible nature of their resulting injury, defendants might argue that there was not a single agent, but rather the injury resulted from consecutive or alternative events. An additional and alternative plea would seek to apply the exception to the but-for test set out in *Fairchild v Glenhaven Funeral Services Ltd.*[158] The evidence suggests that repeated TBIs enhance the risk of long-term cognitive deficits, but the PROTECT study[159] also indicated that just one concussion can cause a long-term impact on brain function.[160] If claimants are defeated in their assertion that declining neurocognitive function is cumulative, those of whom can document second impact syndrome in the relevant time period might assert that their resulting indivisible neurodegenerative disease could have been avoided by rule change, and that the omission might have caused the

[156] S. H. Bailey, "'Material contribution' after *Williams v The Bermuda Hospitals Board*" (2018) 38(3) *Legal Studies* 41, 426 notes that "what counts as a "single" causal agent may well depend on the generality of language used to describe causes, an inherently uncertain process."
[157] A claim he might now advance: see *Holmes v Poeton Holdings Limited* [2023] EWCA Civ 1377; [2023] 11 W.L.U.K. 339 at [3 per Stuart Smith L.J.
[158] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32; [2002] 3 All E.R. 305.
[159] M. J. Lennon, H. Brooker, B. Creese, et al, "Lifetime Traumatic Brain Injury and Cognitive Domain Deficits in Late Life: The PROTECT-TBI Cohort Study" (2023) *Journal of Neurotrauma* doi 10.1089/neu.2022.0360.
[160] House of Commons Digital, Culture, Media and Sport Committee *Concussion in Sport* Third Report of Session 2021–22, HC 46, 22 July 2021 (2021) para 61.

totality of their injury. In *Fairchild*, claimants contracted mesothelioma because of exposure to asbestos at an undefinable point during various periods of employment. At the time,[161] it was believed that a single fibre could cause mesothelioma and repeated exposure did not impact its severity. The claimants could not establish that any individual employer had caused or contributed to the injury but liability was established on the basis that each employer materially contributed to the *risk* of injury (short of doubling the risk).

Rugby claimants might cite the exceptional nature of their case and, for elite players at least, its employment context. Indeed, some judges have indicated that the principle can apply outside of mesothelioma cases,[162] and this would also be supported by the fact that *McGhee v British Coal Board*,[163] the case from which the material increase in risk test in *Fairchild* was first established, involved dermatitis. But other judges are reluctant to extend application of the principle. In *Ministry of Defence v AB* the Court of Appeal rejected application of *Fairchild* in relation to claims that nuclear testing in the Pacific in the 1950s led to a range of harms, including cancer. There were multiple possible causes not all of which could be identified.[164] In the words of Lord Brown in *Sienkiewicz*, "Save only for mesothelioma cases, claimants should henceforth expect little flexibility from the courts in their approach to causation."[165] While certainly not impossible, this test might be difficult to establish in cases of rugby-related neurodegenerative disease.

As the evidence mounts there is an increasing prospect of rugby claimants demonstrating that the historical failure to amend the rules either doubled their risk of neurodegenerative disease or that neurodegenerative disease could be attributed to cumulative causes to which the governing bodies' omissions materially contributed.

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[161] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [102] per Lord Phillips.
[162] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [39] per Lord Phillips. See also *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036; [2016] 2 WLUK 376 which applied the test to a different type of lung cancer caused by asbestos.
[163] *McGhee v British Coal Board* [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008.
[164] See *Ministry of Defence v AB* [2012] UKSC 9; [2013] 1 A.C. 78 at [75] per Lord Brown.
[165] *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [187] per Lord Phillips. And see *Holmes v Poeton Holdings Limited* [2023] EWCA Civ 1377; [2023] 11 WLUK 339 at [3] where Stuart-Smith L.J. describes such as claim in the context of long-tail exposure to neurotoxic chemicals as work as "perhaps optimistic".

Much would depend on the specifics of the class of claimants seeking redress, on whether injuries are framed as indivisible or divisible, cumulative or multiple competing causes. In this brief section we have argued that the case, whilst challenging, is not hopeless and articulated the relative benefits and pitfalls of the different approaches. We agree with Simon Deakin and Zoe Adams that cumulative causes deserve "a broad reading" in relation to diseases that are slow to manifest, to occupational diseases with inter-related causes and to other multiple causal factor cases.[166] The scientific evidence is fast developing. We note that in *Heneghan*, an expert said that:

> "if he had been asked the same questions now as he had been asked during the *Fairchild* case, he would have said that it was probable that the asbestos fibres from each source had contributed to the carcinogenic process. This would mean that there was no need for the *Fairchild* exception at all: in a claim arising from mesothelioma, the claimant should succeed 100% on the basis of the material contribution to damage principle."[167]

Defences

The defence of *volenti non fit injuria* will apply where the claimant voluntarily assumes, rather than merely knows of, the risk.[168] Though it was relied upon in the Australian case of *Agar*,[169] referred to above, this was based on a conception of *volenti* that excluded a duty of care.[170] Subsequently, in *Woods v Multi-Sport Holdings Pty Ltd,*[171] the High Court of Australia preferred to focus on the obviousness of the risk and thus the reasonableness of a failure to warn (breach) rather than the defence of *volenti*.

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[166] S. Deakin and Z. Adams, *Markesinis & Deakin's Tort Law,* 8th edn (Oxford: OUP, 2019), p. 216.
[167] *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036 at [36] per Lord Dyson M.R.
[168] *Thomas v Quartermaine* (1887) 18 Q.B.D. 685 at 700-701, 703 per Fry L.J.
[169] [2000] HCA 41; 173 A.L.R. 665. Flowing from reliance on *volenti* in *Rootes v Shelton* [1967] 1 W.L.U.K. 15; (1967) 116 C.L.R. 383 per Barwick C.J. See critique: Opie, "The Sport Administrator's Charter: *Agar v Hyde*" (2001) 9 Torts L.J. 131.
[170] See D. McArdle, M. D. James, "Are you Experienced? 'Playing Cultures', Sporting Rules and Personal Injury Litigation after Caldwell v Maguire" (2005) 13(3) Tort L.Rev. 193.
[171] *Woods v Multi-Sport Holdings Pty Ltd* 2002] HCA 9; 208 C.L.R. 460.

Much of the case law on *volenti* has developed in relation to trespass rather than negligence. The once-popular defence is much harder to satisfy in negligence, where the consent must be *to the negligence*.[172] In *Watson*[173] it was held that a boxer did not consent to injury resulting from poor safety arrangements put in place by the governing body. Consequently, if duty, breach and causation are shown in a UK rugby TBI case, the defence of *volenti* will not come to the governing body's aid,[174] notwithstanding that rugby is known to carry a high risk of injury and a small risk of catastrophic injury. This is for the simple reason that the claimant cannot consent to negligence of which they have no prior knowledge. This will hold even if (as is likely) players sought to continue or resume play after concussive injury in absence of a rule requiring that they stop for a stated time to protect their health.

Nor is it likely that damages awarded to the claimant would be reduced due to contributory negligence,[175] even if the player elected to play on after a TBI. It would be unlikely that the court would consider it just and equitable to reduce damages given the impacts on voluntariness and information in the heat and adrenaline of the moment, particularly if the claimant has shown they were subject to a TBI when they made the decision.

Conclusion

We have set out an argument that certain neurodegenerative conditions suffered by some rugby players could be linked to historical failures by governing bodies to give adequate warnings of the risks and to amend the rules to reduce known risks. And we have argued that recent scientific developments, criticism by independent committees and growing willingness of the courts to hold sporting bodies to account enhance the potential of certain categories of claimant to establish liability in negligence.

The challenges remain considerable. Whilst the establishment of duty now focuses less (overtly) on policy issues and more on its principled and incremental development,[176] there is

[172] *Nettleship v Weston* [1971] 2 Q.B. 791 at 701; [1971] 3 All E.R. 581 at 587 per Lord Denning MR. And see J. Steele, *Tort Law: Text, Cases and Materials*, 5th edn (Oxford: OUP, 2022), pp. 475 and 477.

[173] The inherent dangers of rugby were found to elevate the importance of the rules being followed to minimise risks in *Vowles* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607

[174] For a discussion of the limited role of the defence see J. Gardner, "Rethinking Risk-Taking: The Death of *Volenti*" (2023) 82 C.L.J. 110.

[175] Under the Law Reform (Contributory Negligence) Act 1945, s.1(1).

[176] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736.

considerable opacity as to the degree of incremental change that will be tolerated, particularly given new emphasis on the importance of the distinction between causing harm and failing to confer a benefit.[177] The vagueness of rugby rules that could prevent injury also make it difficult to show that governing bodies have breached their duty of care when injury occurs. And notwithstanding significant advances in research linking TBI and neurodegenerative disease, the incentives to conduct it are limited given its potential to result in future liability or restrictions that some feel would spoil the game. Whilst causation could potentially be established by modifying the but-for test where a proven second impact can be shown to have made a more than negligible contribution to the injury, the ability to establish a duty of care may, as in *Watson*, require the claimant to show that had they been removed from play they would not have suffered the relevant harm.

We have seen that several doctrinal advances would be required to establish liability and we have outlined features that would enhance claimants' cases. First, the relevant timeframe should combine three factors: evidence that the risks associated with repeated TBIs was in the public domain; evidence that players were insufficiently informed of this risk; and evidence of failure of governing bodies to confer the benefit to safety that a reasonable response would assure. The first and last elements are integral to establishing a duty of care given that the focus is on a failure to confer a benefit. Establishing that the governing bodies created or assumed responsibility for the risk would demonstrate the relevant special circumstances. The second factor would insulate claimants from the argument that the risk of latent neurodegenerative disease was "obvious". The combination of all three would help to allay fears of indeterminate liability.

Our focus is on principle rather than its detailed application to particular clinical cases, but we would postulate that those suffering repetitive TBIs between the early 2000s and mid 2010s when enhanced safety features were introduced may have an advantage. In establishing whether the governing bodies met the standard of care an argument must be advanced that the risk was reasonably foreseeable at the time the decisions were made and that the response to that risk was unreasonable. Whilst there is evidence of neurological damage resulting from repeated blows preceding these dates, it was not widely accepted and the causative relationship between injury and consequences was poorly understood. Claimants whose injuries occurred

[177] J. Morgan, "Nonfeasance and the End of Policy?" (2019) 35 P.N. 32 at 53.

after those dates will face an additional hurdle because enhanced safety mechanisms were arguably proportionate to the risk as then understood. This is, however, a crude categorisation and individual cases will be assessed on their merits according to accounts of measures taken by international and national bodies which we have not examined in the confines of this article.

Second, there are two subsets of players who might have an advantage if they can show they were subjected to repeated TBIs in the relevant timeframe and have gone on to suffer neurodegenerative disease. One is elite players, who can demonstrate extensive time on pitch, contact time during training and the emphasis on excellence and achievement during which focus "on the safety of those athletes can easily be lost".[178] This group may also have a practical advantage of being able to prove incidences of post concussion engagement in matches that were televised or recorded, even if records of TBIs were incomplete. Another potential group is people injured in their youth. We have not focussed on this group in this article for reasons of space and because they are likely to be fewer in number. It is conceivable, however that a school or university rugby player who subsequently gives up rugby or seeks to demonstrate cumulative causation might claim that governing bodies owed them special protections by virtue of their vulnerability. Indeed, in *Agar* the court left open whether a duty of care might arise in the case of children.[179]

Third, in relation to the duty of care that governing bodies would be held to, we have argued that a focus on the duty to issue rules or guidance to keep players safe from repeated concussive injury could assist claimants by establishing an analogy with the post-injury response in *Watson*. However, claimants would need to be able to show that by taking action their injuries might have been avoided which is likely to be considerably more difficult in a long tail rugby injury claim than in *Watson*, where the boxing injury put the claimant in a coma for over a month. The alternative is to show that a duty of care exists to prevent or mitigate physical injuries.

[178] House of Commons Digital, Culture, Media and Sport Committee, *Concussion in Sport*, para 29.
[179] *Agar v Hyde* [2000] HCA 41; [2000] 173 A.L.R. 665 at [91] per Gaudron J., McHugh J., Gummow J. and Hayne J.

Finally, we note that the US National Football League settlement in 2016 excluded future cases of CTE, though awards would be made for neurocognitive impairments associated with it.[180] Since this time, there has since been progress in diagnosis ante mortem.[181] If on the basis of expert evidence this diagnosis is accepted by the courts as being suitably robust, then diagnosis of TSE and related CTE could actually have an advantage over conditions that are not specific to repeated head injuries (such as MND and Parkinson's) when proving causation. As diagnosis is based in part on brain scans and in part on evidence of repetitive head injuries (such as from rugby) then one of the evidential barriers is overcome.

[180] *In re: National Football League Players' Concussion Injury Litigation* No 2.
[181] D. I. Katz, C. Bernick, D. W. Dodick et al, "National Institute of Neurological Disorders and Stroke Consensus Diagnostic Criteria for Traumatic Encephalopathy Syndrome" (2021) 96 *Neurology* (March 15, 2021).