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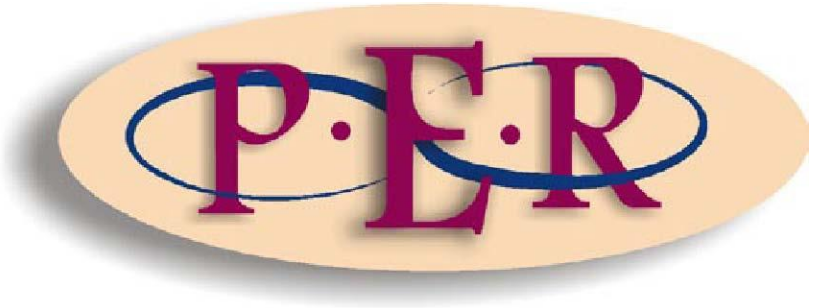

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RECONCEPTUALISING THE STANDARD OF CARE IN SPORT: THE CASE OF YOUTH RUGBY IN ENGLAND AND SOUTH AFRICA

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1 Introduction

This article is broadly concerned with the relationship between sport and personal injury and, specifically, compares how rugby is regulated by the tort of negligence in England and delict in South Africa respectively. Sport is an important area of civil society in both South Africa and England and, aside from the health benefits, can be used to develop and deliver a wide range of policies.[1] At the same time, the interaction of sport and law has become increasingly significant across a number of legal fields including contract, copyright, and a range of specific commercial issues.[2] These disputes tend to operate at the elite level of sport, the professional game. At the recreational and junior level the prime area of legal intervention relates to injuries and the application of negligence and delict. As Lord Templeman wryly noted in 1985, "a fashionable plaintiff alleges negligence" and there is concern for the consequences to sport of an expanded legal responsibility.[3] Whilst the general principles and approach to ascribing liability are of course applicable, for sport there are additional factors that need to be taken into account. These can be categorised into two contexts; a) the broader context of sport as an important social and cultural activity and b) the specific sporting context that includes not just the actual rules or

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1 UN 2015 http://www.un.org/wcm/webdav/site/sport/shared/sport/SDP%20IWG/Chapter7_DevelopingEffectivePoliciesandPrograms.pdf.

2 See for example the issue of the screening of Premier League football that ended in the European Court. *Football Association Premier League Ltd v QC Leisure (No 2)* [2008] EWHC 1411 (Ch); *Murphy v Media Protection Services* [2012] FSR 1.

3 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013. In *Smoldon v Whitworth and Nolan* [1997] PIQR P133 2 Lord Bingham noted that the outcome of the case was "of concern to many who fear that the judgment for the plaintiff will emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions".

laws of the game but also the playing culture.[4] The aim of this article is to consider how these aspects can be incorporated into the traditional legal principles, and this aim is achieved by a critical and comparative analysis of how the standards of care in sport have been developed in both jurisdictions. An important element of such a comparative analysis is to contextualise the various discussions in the light of the differences between the tort of negligence, as applied in England, and the South African law of delict. In so doing it suggests that the context and specificity of rugby should be more explicitly taken into account when evaluating potential liability.

The article first outlines the crucial issue of the standard of care in English tort law considering the concept of the "prevailing circumstances" drawn from *Caldwell v Maguire.*[5] This structure is then applied to rugby in England and South Africa, and considers the internal norms and external factors that form part of the process of evaluating both the existence and the extent of liability under both frameworks. The issue of the standard of care is a fundamental one and the question of a move away from the traditional objective reasonableness test has a broader application beyond sport. As Nolan notes,

> The most recent example of an assault on the objective standard of reasonable care in English law has been in the public authority liability context.[6]

The standard of care is extremely fact sensitive and difficult to define, particularly when the very specific context and protocols of the sport in question are considered.[7] Interestingly, as regards sport Norris has suggested that the standard will be "generously interpreted", alluding to the public policy considerations that pervade the area.[8]

Although this article is focussed on rugby specifically, it also raises important questions for the relationship between sport and negligence or delict more generally.

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4 Numerous examples are given in the text that follows, but it is salutary to note that "the EU Work Plan for Sport for 2014-2017 further consolidates the social utility of sport" and "[u]ndoubtedly, sport is progressively seen in the EU as a medium to achieve social policy objectives". Partington 2014 *ISLJ* 232-234.

5 *Caldwell v Maguire* [2001] EWCA Civ 1054 (hereafter *Caldwell*).

6 Nolan 2013 *CLJ* 651-652.

7 Partington 2014 *ISLJ* 232.

8 Norris 2009 *JPIL* 117.

2 Sport injuries; negligence and delict

In legal terms the key question is whether injuries sustained on the sports field, in matches or in training can give rise to liability. The intersection of law and sport in the area of personal injuries has become increasingly visible, although this may merely reflect trends in society more generally.[9] It has been clear for some time that a *duty of care* exists within a number of sporting relationships covering participants, organisers, fellow players, match officials and governing bodies.[10] There is, as Anderson notes, no need to utilise broader tests of establishing whether a "duty situation" arises, given that specific categories of negligence relating to these sporting actors already exist.[11] These claims relate to *personal injury*, the apotheosis of tort law, and further support the use of tort as a *legal* mechanism to tackle such incidents.[12] Similarly, the law of delict is the established legal instrument in cases of personal damage in the South African context. In the UK the question has, however, been asked whether tort is an appropriate vehicle, and what the long-term consequences for sport might be. This is a contentious but separate issue beyond the scope of this article.[13]

In tort, in some ways the attribution of negligence can be seen as a hurdle race, where the various constituents of the tort need to be made out in order that a finding of negligence is established. However it is often unhelpful to separate the tort of negligence into these discrete elements, although tort orthodoxy supports such an approach. In addition, the elements are not always easily distinguished;

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9 Material in the *Tort Law Review* indicates how areas of sport have been covered in recent years, including personal injury liability (Anderson 2008 *Tort L Rev* 95) and vicarious liability for participants (James and McArdle 2004 *Tort L Rev* 3). More specifically for the purposes of our piece, there has also been an extended case study on liability of a schoolmaster for injuries caused on the sports field (Heywood and Charlish 2007 *Tort L Rev* 162).

10 Between players see *Condon v Basi* [1985] 1 WLR 866; on referees see *Smoldon v Whitworth and Nolan* [1997] PIQR P133 (*Smoldon*) and *Vowles v Evans* [2003] EWCA Civ 318. Also Caddell 2004 *Marq Sport L Rev* 415. For the liability of governing bodies see *Watson v BBBC* [2001] QB 1134 (*Watson*) and George 2002 *MLR* 106.

11 Anderson 2008 *Tort L Rev* 99 and see notes above regarding *Smoldon* (referee) and *Watson* (governing body) for example.

12 For more on sport injuries case law and liability, see Gardiner 2008 *JPIL* 16.

13 Successive UK Governments have been concerned about the potential effects of the growth in a "compensation culture", though it is not clear that such a culture has developed. However the perception itself may have consequences for sport and volunteers. See Greenfield 2013 *Sports Coaching Review* 114-123.

> …there is not always a perfectly clear dividing line between the theoretically different concepts of *duty* and *standard of care*. That is because it is also necessary to consider the *extent* of the duty of care, and there may well be an overlap.[14]

Dividing them does, however, permit an easier in-depth analysis of the constituent parts. The problem of the definition and scope of these tortious elements is further compounded when "language" is used ambiguously or interchangeably. For example the Child Protection in Sport Unit (CPSU), in a Briefing Paper, muddles the terms somewhat, noting for example that:

> In essence, duty of care means that a sports body needs to take such measures as are reasonable in the circumstances to ensure that individuals will be safe to participate in an activity to which they are invited or which is permitted.[15]

Whilst academic debate is often centred upon the existence of a duty in new situations that arise, in reality the essential question is whether the duty was breached. It is the question of breach and the "standard of care" owed to the injured party in the particular circumstances that is crucial. "Duty" in the briefing noted above is being used in a more general way to describe potential liability.

From the perspective of the South African law of delict, it can firstly be stated that in delict the focus is not primarily on negligence but on the five fundamental elements, which include fault, under which negligence is classified as one form of fault.[16] Whilst these elements are equally considered in delict claims, wrongfulness and fault are of specific relevance for the purpose of this comparison. Under the law of delict there is a clear distinction between negligence and a duty of care, and they are separately determined. The existence of a legal duty forms part of the fundamental element of wrongfulness, and if such a duty does exist but is breached, it renders the harmful act as being wrongful. The standard of care forms part of the element of fault, and comes into play in the reasonable person test to determine negligence. Whilst the cause of action is framed differently, the original English common law approach to negligence, as inherited and developed in the South African context, is still valid and has persuasive power for delict claims in South Africa.

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14 Morris 2010 *JPIL* 184.

15 The CPSU is a partnership between the National Society for the Protection of Cruelty to Children (NSPCC) and Sport England, Sport NI and Sport Wales. See further CPSU 2014 https://thecpsu.org.uk/about-us/.

16 Intent is the other form of fault.

The South African common law is also closely related to the Roman-Dutch legal system as originally inherited in the 17th century.[17] As compared to the "existence of a duty" discussed above, wrongfulness is determined through the application of one of three possible tests: the *boni mores* test, which relates to the legal convictions that prevail in a specific community, the infringement of a subjective right of a person, and the failure or neglect to fulfil a legal duty.[18] In the absence of an established duty, an omission to act, thus refraining from preventing damage to another person, normally does not constitute wrongful behaviour. In addition to the wrongfulness of the act that caused the damage or injury, the element of fault has to be proven. Fault refers to either the negligent or the intentional nature of the act, and in any delictual action only one of the two can be present. To determine negligence, the reasonable person test is utilised whereby questions related to the foreseeability and preventability by a reasonable person acting in the same context are asked.[19]

In a refinement of the reasonable person test, the reasonable expert test can lead to the setting of a specific higher standard of care, based on the facts of the case. The application in South African law of the *culpae adnumerator* principle should be noted here. This provides a neat example of how UK procedure and policy can impact on the SA position and is instructive in our argument that the approach to liability in sport in RSA can learn much from the contextual approach we illustrate below. South African law is rooted in a variety of legal systems, amongst others that of Great Britain;[20] therefore the English case of *Nettleship v Weston* [21] can be used as a reference in the South African context for a wider understanding of the *imperitia* principle. Ignorance or incompetence on the part of the supervisor or coach will

17 Neethling and Potgieter *Law of Delict* 256.
18 Neethling and Potgieter *Law of Delict* 61-75.
19 Neethling and Potgieter *Law of Delict* 141.
20 Because of this heritage of South African law, a constitutional imperative exists in s 39 under the provisions regarding the interpretation of Bill of Rights (s 39 of the *Constitution of the Republic of South Africa*, 1996) to consider international as well as foreign law, which are not regarded as binding but as persuasive authority. South African Government 2015 http://www.gov.za/about-government/judicial-system.
21 *Nettleship v Weston* [1971] 2 QB 691, where the standard of care of a learner driver was held by the Court of Appeal (notably Salmon LJ dissented in this case and it is arguably a decision riven with public policy considerations) to be equivalent to a reasonably competent and experienced driver.

normally not automatically imply negligence.[22] This common law principle may be misleading if, as originally applied, a person is deemed negligent merely because of a lack of knowledge or competence that causes injury or damage. The negligence can be ascribed to the fact that an individual committed an action "knowing that he or she is not capable, qualified or experienced enough to perform an action".[23] In sport this element of fault becomes applicable when someone acts beyond his or her competence or experience. In high-risk activities, movements or skills, this is of importance. In many cases the younger participants call for a higher standard of care from those responsible for supervising the activity.

Negligence is applicable not only to coaches, but also to the players, even at junior level. In the South African *Hattingh* case, an under 19 rugby player Ryand Hattingh sustained serious neck injuries after his opponent, Alex Roux, deliberately inflicted the injury through a jack-knife manoeuvre, thus acting contrary to the laws of the game.[24] Roux's appeal was dismissed with costs and Brand JJA explained the expected player-on-player standard of care in the following words:

> I believe that conduct which constitutes a flagrant contravention of the rules of rugby and which is aimed at causing serious injury or which is accompanied by full awareness that serious injury may ensue, will be regarded as wrongful and hence attract legal liability for the resulting harm.[25]

The key issue to establish liability will, however, ordinarily not be whether a duty existed but whether the respective duty of care was breached, a fact which necessitates an analysis of the standard of care owed.[26]

3 The standard of care in sport

In England, evaluating the standard of care appears, at the outset, to be simple. Locating sport within the traditional approach necessitates determining the requisite standard before ascertaining whether the defendant's behaviour fell below this standard. However, this is a rather nebulous issue and as Nolan observes, the

22 Neethling and Potgieter *Law of Delict* 150.
23 Neethling and Potgieter *Law of Delict* 151.
24 *Hattingh v Roux* 2011 5 SA 135 (WCC).
25 *Roux v Hattingh* 2012 6 SA 428 (SCA).
26 See though the recent tragic case of *Wall v British Canoe Union* 2015 WL 5037758 where the claim failed on the absence of any duty being owed by the Government.

standard may be varied.[27] The standard of care is ostensibly objective[28] but, as Beever notes, it does not remain fixed:

> The law of negligence judges the defendant's behaviour in accordance with an objective standard. Moreover, though the standard is sometimes adjusted, it remains objective.[29]

The case of *Bolam v Friern Hospital Management Committee* established that the role of the court is to ascertain what the reasonable person with the same level of expertise and skill would have done *in the circumstances*.[30] In terms of sport the preeminent case is *Condon v Basi.*[31] In addition to establishing that participants in a football game owed a duty of care to one another, *Condon* set out the legal test for the standard of care. Whilst the principle of objectivity was preserved it was qualified:

> [t]he standard is objective but objective in a different set of circumstances. Thus there will of course be a higher degree of care required of a player in a First division match than of a player in a local league football match.[32]

This latter point, which appeared to introduce an element of subjectivity, was *obiter dicta*, and has been subject to critique.[33] There have since been other cases that have considered this issue and, as James and McArdle note, since *Condon*

> …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".[34]

This is an allusion to the fact that *Condon* failed to adequately take account of *Woolridge v Sumner,* where Diplock LJ had argued that the duty owed by

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27 Nolan 2013 *CLJ* 651.

28 *Glasgow Corporation v Muir* [1943] AC 448. Also see *Nettleship v Weston* [1971] 2 QB 691.

29 Beever 2008 *OJLS* 475.

30 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

31 *Condon v Basi* [1985] 1 WLR 866. The importance of the earlier case of *Woolridge v Sumner* [1963] 2 QB 43 should be acknowledged, though.

32 *Condon v Basi* [1985] 1 WLR 866 868. It should also be noted that this judgement was set down before the advent of the FA Premier League, and by reference to "First Division" the judge is alluding to the highest level of professional football in England and Wales at the time. For more on the reaction to the decision at the time, see Hudson 1986 *LQR* 11.

33 See for example Kevan 2005 *ISLR* 61.

34 James and McArdle 2005 *Tort L Rev* 1.

participants to spectators was not to endanger them by "recklessness".[35] Whilst not directly related to sport participation, the cases are important in terms of understanding how the law becomes cognisant and responds to the specificities of sport, and particularly rugby.

The most relevant exposition of the current approach to the standard of care in sport is that outlined in *Caldwell v Maguire*.[36] The case concerned an action brought by a professional jockey against two other jockeys for injuries suffered during a race. The two defendants had been found guilty of careless riding under The Jockey Club rules. This was covered at the time by Rule 153, that provided for situations where a rider was deemed to have ridden carelessly or caused interference through misjudgement or inattention. Following a revision of the rules, this is now provided by Rule 54. In addition Rule 53 provides that

> 53.1 A Rider is guilty of dangerous riding if he causes serious interference by 53.1.1 purposely interfering with another horse or Rider, or 53.1.2 riding in a way that is far below that of a competent and careful Rider and where it would be obvious to such a competent and careful Rider that riding in that way was likely to endanger the safety of a horse or Rider.[37]

The case considered the extent of the duty owed and outlined the relevant factors when determining whether or not the duty had been breached. The Court of Appeal noted that the duty is

> …to exercise in the course of the contest all care that is *objectively reasonable in the prevailing circumstances* for the avoidance of infliction of injury to such fellow contestants" (our emphasis).[38]

The Court went on to define what these prevailing circumstances might be and an analysis of these factors forms the basis for the following section. These circumstances are applied to sport generally, but using the case study of rugby in South Africa and England to illustrate the difficulty courts have in understanding and

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35 See Hudson 1986 *LQR* 11 and also Goodhart 1962 *LQR* 490. On the argument that there had been a return to the reckless disregard standard that had arguably been posited in *Woolridge v Sumner* [1963] 2 QB 43 in cases such as *Blake v Galloway* [2004] EWCA Civ 814; see Charlish 2004 *JPIL* 291 and James and McArdle 2005 *Tort L Rev* 1.

36 *Caldwell v Maguire* [2001] EWCA Civ 1054.

37 The BHA Rules of Racing are available online: BHA 2012 http://rules.britishhorseracing.com/Home. The Rules appear to have been renumbered in 2009. A table providing for the "conversion" from the old numbers of the rules to the new ones is available on the same website.

38 *Caldwell* para 11(2).

applying these issues. Further, some contemporary issues are identified that could be factored into the matrix of "prevailing circumstances". Whilst this is important within the context of liability in sport, it also illustrates the need for a more sophisticated approach to ascribing and defining the standard of care more generally.[39]

4 The prevailing circumstances of sport: the case of rugby

The case of *Caldwell* illustrated the five aspects, noted below, that contribute to the evaluation of the prevailing circumstances.[40] Essentially such an evaluation would involve considering "all such circumstances properly attendant on the contest", and include; (i) its object; (ii) the demands inevitably made on its contestants; (iii) its inherent dangers; (iv) its rules, conventions and customs; and (v) the standards, skills and judgement reasonably to be expected. Each of these is examined in turn, commencing with the *object* of the activity.

4.1 The object(s) of sport

Traditionally, one of the key approaches to evaluate the standard of care owed is to consider the utility of the act complained of. Its value is judged, in part, in relation to the likelihood of harm occurring and the potential severity. In cases such as *Bolton v Stone* and *Miller v Jackson* courts have considered the social utility of sport and incorporated that perspective into the legal analysis.[41] This draws more broadly upon the public policy element that could be applied to promote sport more generally. The alternative view, upholding claims, has the capacity to negatively impact upon participation.[42] The common law approach was given statutory effect in section 1 of

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39 See generally here, in a broader context outside of sport, the arguments of Nolan 2013 *CLJ* 651.

40 There may of course be other relevant factors such as the role and existence of insurance. See Stapleton 1995 *MLR* 820 and Merkin 2012 *MLR* 301.

41 *Bolton v Stone* [1951] AC 850; *Miller v Jackson* [1977] QB 966. See Greenfield and Osborn 1994 *Denning LJ* 53. This issue of social utility has permitted certain activities that would otherwise be problematic to be performed in certain circumstances. See for example *Daborn v Bath Tramways* [1946] 2 All ER 333; *Watt v Hertfordshire County Council* [1954] 1 WLR 835.

42 See Greenfield and Osborn 1996 *PN* 63. Writing in the immediate aftermath of *Smoldon* the authors argued that "[t]he long-term consequences are clearly uncertain. The games of Colts and school rugby are bound to be affected even in the short term with both higher insurance policies for referees, clubs and school and a reticence to become involved … the likely result" (Greenfield and Osborn 1996 *PN* 65). On its implications for cricket, see Greenfield and Osborn 1997 *PN* 9.

the *Compensation Act* 2006, which provides that in terms of the "Deterrent effect of potential liability";

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might-
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity.

This permits the court to take into account the utility of the activity at the centre of the complaint, though it is doubtful that the statute has made a significant difference.[43] Sports generally, and rugby specifically, are significant social activities in both the United Kingdom and South Africa. Rugby is an integral part of the sporting culture of both nations, although it has to compete with football as the traditional winter school sport in parts of the United Kingdom and in South Africa. Global statistics are indicative of the level of interest rugby generates in the 120 countries where the sport is being played, with 7.23 million players involved, including young children and women.[44] Table 1 gives an indication of the number of registered players in those countries that qualified for participation in the Rugby World Cup of 2015. [45]

Table 1: Registered players: Nations that participated in the Rugby World Cup 2015

1	S Africa	342316		8	Ireland	96880		15	Samoa	20845
2	England	340347		9	Italy	82143		16	Tonga	13968
3	France	291202		10	Wales	73444		17	Namibia	11610
4	Australia	230663		11	Fiji	65980		18	Romania	7605

[43] That the Act has in fact had little effect is discussed in Hunter-Jones 2006 *Education* 223. Also see the criticisms in Morris 2011 *PN* 82-96.

[44] Anon 2015 http://pulse-static-files.s3.amazonaws.com/worldrugby/photo/2015/03/05/61b7a966-a65a-4952-8b71-74bed89a8d7c/WR_2014_Player_Numbers.jpg.

[45] Anon 2015 http://pulse-static-files.s3.amazonaws.com/worldrugby/photo/2015/03/05/61b7a966-a65a-4952-8b71-74bed89a8d7c/WR_2014_Player_Numbers.jpg.

5	N Zealand	148483		12	Argentina	56998		19	Georgia	7113
6	USA	110385		13	Scotland	49305		20	Uruguay	6069
7	Japan	107673		14	Canada	26883				

Rugby in South Africa, despite the fact that it has a smaller number of participants and supporters than soccer, is regarded as one of the most prominent national sport codes.[46] Rugby in both countries is predicated on a strong sense of values. In England the RFU lists a set of core values that are central to rugby union, namely teamwork, respect, discipline, enjoyment and sportsmanship. This latter value is described as:

> …the foundation upon which rugby union is built. We uphold the rugby tradition of camaraderie with teammates and opposition. We observe fair play both on and off the pitch and are generous in victory and dignified in defeat. We play to win but not at all costs and recognise both endeavour and achievement. We ensure that the wellbeing and development of individual players is central to all rugby activity.[47]

Similarly, the South African Rugby Union's values reflect the values of the country as a whole, and the history of the sport:

> Four key imperatives underpin SARU's values: Transformation, growth, winning and financial sustainability. These are based on the needs of all SARU's stakeholders and are inter-dependent. Therefore, success is only possible if all four are equally realized. In a country that thrives on sunshine and sport, SARU is providing light to an arena previously shadowed by political challenges. As the teams get stronger and fans fill the stadiums, the whole country is a little better off for the spirit generated when a South African hero scores a try.[48]

It would appear on the face of it that rugby espouses a set of fundamental ideals and skills that provide a valuable social benefit; something that delivers or supports the delivery of key policy objectives such as health and community cohesion. Given the history of South Africa and its developing democracy, it is clear that sport[49] goes beyond mere physical activities to focus on the value sport can add to nation

46 Lambert and Durandt 2010 *SAJSM* 67.
47 2014 http://www.rfu.com/thegame/corevalues.
48 SARU 2015 http://www.sarugby.co.za/default.aspx.
49 SouthAfrica.info 2012 http://www.southafrica.info/about/sport/sportsa.htm#.VITAPsnRiUk#ixzz3LFSvu5KL.

building:[50] "It's the national religion. Transcending race, politics or language group, sport unites the country."[51] However, Coalter[52], writing from a British point of view, and Grundlingh,[53] from a South-African perspective, warn against the perception of sport and structured sport development as "an apolitical, neutral and inherently integrative set of social practices that can deliver a wide range of positive outcomes." Such an idealised perception of the value of sport is often divorced from reality.

It is too simplistic to view sport from a solely positive perspective and recently in England there have been claims that rugby is too dangerous for children to play, with the risk of injury outweighing the benefits.[54] This critique extends beyond the playing field to the culture of rugby, which is undoubtedly strongly masculine, and its historic development from the English public school system has been subject to criticism.[55] The link between rugby, particularly at amateur level, and a culture of heavy drinking has also been subject to censure.[56] Furthermore, recent examples in the UK of Student University rugby clubs promoting homophobic, misogynist and other unacceptable behaviour have been widely publicised.[57] These are, however, isolated examples of offensive conduct set against a sport that provides enjoyment and other benefits to a wide group, and it is clearly arguable that the positive aspects outweigh the negative ones.[58] In terms of the participants themselves, one

50 Department of Sport and Recreation 2012 http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/23%20WHITE%20PAPER%20FINAL%20August%202012.pdf 14.

51 Also see the White Paper definition, as discussed.

52. Coalter 2010 *Int Rev Sociol Sport* 295.

53. Grundlingh 2013 http://www.srsa.gov.za/pebble.asp?relid=1670.

54 See Pollock *Tackling Rugby*.

55 See Anderson and McGuire 2010 *Journal of Gender Studies* 249-261, who comment: "Rugby therefore exists in English culture as a leading reproducer of gendered myths and prejudices about the variations between men and women, and participation influences men to exhibit, value and reproduce orthodox notions of masculinity".

56 See Prentice, Stannard and Barnes 2014a *J Sci Med Sport* 244-248.

57 Wilkinson 2012 http://www.independent.co.uk/news/uk/home-news/durham-university-student-rugby-club-banned-from-playing-after-members-dressed-up-as-jimmy-savile-8343713.html; Cresci 2014 http://www.theguardian.com/education/2014/oct/06/university-rugby-club-apologises-for-misogynist-homophobic-leaflet; Walker, Weale and Young-Powell 2014 http://www.theguardian.com/education/2014/oct/09/lse-rugby-club-racism-misogyny.

58 Rugby has sought to provide opportunities for older players and there is a Golden Oldies international rugby festival. Golden Oldies 2015 http://www.goldenoldiessports.com/site/webpages/golden-oldies-rugby.

issue that could conceivably count as a negative element is the risk of injury and indeed the seriousness of injury and this is considered further below.

4.2 The demands made

In circumstances such as *Caldwell* jockeys have a contractual obligation to ride their horses over a specific course and to compete with fellow riders in order to obtain the best placing possible. As Judge LJ explained:

> We are here concerned with a split-second, virtually instantaneous, decision made by professional sportsmen entrusted with powerful animals, paid and required by the rules of their sport to ride them, at speed to victory or, failing victory, to the best possible placing: in other words, to beat all the other horses in the race, or endeavour to do so.[59]

The Court argued that performance depends on experience, intuition and instinct and the very nature of the activity makes the risk of injury, or accidents, almost inevitable. So whilst a duty of care was owed in *Caldwell* the liability threshold would be high, given that the jockeys were striving to win a race that in itself created "danger".

Rugby players, particularly at the higher level, may often find themselves in a similar position to jockeys with little time to think before acting. Referees also have to make difficult instant decisions, although in *Smoldon v Whitworth* there was a series of scrums that collapsed before the crucial one that injured the plaintiff rendering it more difficult to consider it as an instantaneous, one-off decision. There may be some period of reflection, though arguably "rethinking" during the course of a match can be difficult.[60] Infringements at the scrummage that lead to a collapse are particularly dangerous. At the highest level of the professional game a referee may

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59 *Caldwell* para 31.

60 One creative response to deal with this is the two referee system, trialled by Professor Justus Potgieter of Stellenbosch University and a provincial referee, in 1987 at the University. The following benefits of the dual system have been claimed: "...a decrease in the number of infringements, an increase in the effective identification of infringements, better player-management and control, better application of the off-side law, greater prevention of deliberate infringements and an increase in players' acceptance and trust. An obvious area where two pairs of eyes are most useful is at the scrummage, where it is advisable to have an official on both sides, as is the case with the involvement of assistant referees, previously called touch judges". Seneviratne 2003 http://www.rugby.com.au/Portals/18/Files/Refereeing/level3papers/Major_Project_Chandra_Senerviratne.pdf 14.

also have assistance from a television match official (TMO) to aid his decision-making. Well-qualified, reflective referees are an important part of the equation to keep players safe during rugby matches, where there are a number of possibilities for injuries to occur. This is obviously more problematic in the amateur game.

4.3 The dangers

In assessing breach, the notion of risk is a key factor that needs to be reviewed. As Lord Macmillan noted in *Read v Lyons*, "The law in all cases exacts a degree of care commensurate with the risk created".[61] It is a balancing act of probability, risk and likely cost, and indeed a balancing act that has proved difficult to delineate. In the Australian case of *Woods v Multi-Sport Holdings Pty Ltd* the question was whether Multi-Sport should have provided indoor cricketers with helmets, and further whether they should have warned players of the inherent dangers of the game.[62] On the latter point Justice Callinan noted that such games have an obvious risk, and that sport and recreation are different to other spheres of social activity and should not be approached in the same way, and with the same criteria, as might be applied in other areas. He went on to note that:

> …for the reasons that I have given, that of the ultimate objective of most sports, of the achievement of physical superiority or domination of one form or another by one person or team over another, promoters and organisers of sport will rarely, if ever, be obliged to warn prospective participants that they might be hurt if they choose to play the game.[63]

In the case of *Miller v Jackson* the court reasoned, when refusing an injunction, that the dangers might be outweighed by assessing the likelihood of harm occurring, the potential damage and particularly here, the social utility of the act itself. Within a sporting contest players may get injured. This is a consequence of participation and may represent an inherent risk to which players have implicitly or even explicitly acquiesced.[64]

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61 *Read v Lyons* [1947] AC 156 173.

62 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

63 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 509. See more generally Corkery 2011 *Bond U Sport L eJ*. Corkery discusses tort law reform in Australia, the impact of the *Civil Liability Act*, 2003, and the possible impact upon cricket. Also see Amirthalingam 2002 *Tort L Rev* 163.

64 See James and Deeley 2002 *Entertainment Law* 104. This obviously also relates to the interrelated issue of *volenti non fit injuria*.

Rugby is a physical contact team sport that has a number of potential points where a risk of injury exists. Although it is the scrummage that is largely responsible for the catastrophic neck injuries that get publicised, it is the tackle area where the majority of injuries occur.[65] Different parts of the body are more likely to be injured in different areas of play, for example shoulders can be more exposed in the tackle situation whilst in the ruck it may be the head.[66] The Nicol *et al* study of rugby injuries in Scottish schools confirmed the tackle area as the largest contributor to injuries.[67] Governing bodies across the world have sought to address concerns about injuries and improve safety through a greater level of coach education. For example, in 2009 the South African Rugby Union (SARU) implemented BokSmart, a rugby safety programme.[68] In New Zealand the similar RugbySmart initiative aims at "lifting team performance by ensuring players are physically and technically at their peak before they put their bodies on the line".[69] It was intended for coaches to guide them with the latest methods regarding skills and techniques for the enhancement of safer rugby.

4.4 Rules, conventions and customs

It is clear from *Caldwell* that a breach of the rules under which the sport is played does not necessarily equate to a breach of duty. However, any such breach is relevant in terms of the broader evaluation of liability, as it would form part of the evidence base of "prevailing circumstances". The culture of sport is far more nuanced, though, and there are a number of different frameworks and norms that exist within each particular sport. In a recent golf case it was argued that the relevant documents included the Rules of Golf and the Guidelines on Etiquette. Lord Jones also referred to the rules of the Tournament that the defendant was playing in when the injury occurred. What is of particular interest is Lord Jones' comment on the analysis of the contextual documents:

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65 On neck injuries see Swain et al 2011 *J Sci Med Sport* 383-389.

66 See Carter and Muller 2008 *J Sci Med Sport*.

67 They note the importance of gathering and failure to gather systematic data on injuries that can inform the understanding of the risks associated with participation. Nicol *et al* 2010 *Journal of Public Health* 256-261.

68 SARU *BokSmart Rugby Safety Programme*.

69 New Zealand Rugby Union 2015 http://www.coachingtoolbox.co.nz/rugbysmart/introduction/.

> I am conscious that, in searching for the meaning of the safety guidelines, I am not performing the same task as I would be if construing a statute or interpreting a contract. What I need to do is determine, as a matter of fact and in practical terms, what the golfer ought to do during the round, if following the guidance.[70]

One possible interpretation of *Caldwell* is that whilst the riders' actions were in breach of the rules, they were still well within the working (or playing) culture of the sport, and were thus within the limits of reasonableness. As James and McArdle note:

> …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.[71]

This notion of a playing culture is particularly important in terms of framing our understanding of expectations and standards in rugby. Somewhat frustratingly, the phrase is not fully explained in the case, and nor is it further outlined in the case law generally. However it is commonly understood to refer to a normative system inside of and parallel to the formal regulatory framework of the sport. The "working culture" of sport is synonymous with the "playing culture", and it is crucial that this cultural understanding is explicitly dealt with in terms of ascribing legal liability. Thus the ways in which sport is regulated is also affected by a culture outside of the rules or laws of the sport, but also outside of the criminal or civil law, reflecting a normative structure that all participants are versed in and expect.[72] "Playing culture" as a concept has been developed in Canadian case law, as illustrated by the ice hockey case of *Cey*.[73] It was argued that the violent actions of the defendant were to be expected and indeed were quite ordinary within ice hockey, notwithstanding that they were outside of the formal rules. In the context of violent behaviour the principles in *Cey* have been applied in cases such as *R v Barnes*.[74] These cases

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70 In *McMahon v Dear* 2014 Rep LR 71 para 217.

71 James and McArdle 2005 *The Tort L Rev* 4.

72 See Greenfield and Osborn 2003 http://www.idrottsforum.org/articles/greenfield_osborn/greenfield_osborn.html.

73 *R v Cey* (1989) 48 CCC 3d 480 (Sask CA), the criteria from this have been approved in *R v Ciccarelli* [1989] 54 CCC (3d) 121.

74 *R v Barnes* [2004] EWCA Crim 3246. Here the Court was looking primarily at the factors that made up the issue of consent, although some of the considerations are similar to that utilised in

suggest that certain acts that might technically be against the rules (or Laws) of the sport or even theoretically contrary to the criminal law can be both expected and accepted. However as was noted nearly 50 years ago in the Australian case of *Rootes v Shelton*, non-compliance with such rules, conventions or customs (where they exist) is but one consideration to determine the question of reasonableness and it may carry a varying degree of weight depending upon the specific circumstances.[75]

4.5 The standards, skills and judgement reasonably to be expected

At their best, sporting contests are unpredictable and uncertain. Within team sports there may be individual 'duels' where repeated interactions occur and where judgements may be made without time for considered thought and reflection. Instantaneous decision-making under pressure is part of the highest level of skill and forms part of the attraction to both audience and participants.[76] Inevitably mistakes occur. These are integral to the game and indeed form part of its allure.[77] At the same time, it is also possible that mistakes and misjudgements are also the cause of injuries, and the legal question is one of which 'mistakes' should be penalised by a finding of legal liability. As James and McArdle note, a consideration of this element might invite an introduction of a variable standard of care into the equation.[78] Under this limb, the court can consider the standards, skills and judgement of individuals and thus could potentially come into conflict with the general rule in *Nettleship*, noted above. However, such an evaluation would not actually cause problems for the *Nettleship* principle. Given the various levels and standards that sport is played at, the behaviour of an individual would be measured and judged by the standards that ought to be exhibited by his or her peers. As noted by Lord Bingham LCJ in *Smoldon*;

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establishing the ambit of the prevailing circumstances. On consent in sport generally see Livings 2007 *JCL* 534.

75 *Rootes v Shelton* (1967) 116 CLR 383.

76 One of the most outstanding examples is surely Jonny Wilkinson's last minute drop goal to win the 2003 Rugby World Cup. All the more astonishing was that it came from his right foot rather than his notoriously accurate left.

77 For example the 2013-4 English Premier League season is best remembered for the "slip" made by Liverpool captain Steven Gerard that effectively lost Liverpool the title.

78 James and McArdle 2005 *Tort L Rev* 12.

> The level of care required was that which was appropriate in all the circumstances and the circumstances were of crucial importance. Full account had to be taken of the factual context in which he exercised his functions and he could not be properly held liable for errors of judgment, oversight or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability was a high one. It would not easily be crossed.[79]

This has to be seen within the framework of the playing culture discussion above. What can be reasonably expected of officials can be referenced to external requirements imposed by Governing Bodies or Professional Associations. Education has been a vital component for all those involved in junior rugby except for perhaps the most important group, parents. Coaches and referees are expected to have the requisite level of knowledge and skill gained through attendance and assessment on a variety of courses with the application of continuing professional development.[80] As coaches gain more experience and develop higher level of courses are available.[81] Coaches are therefore expected to put into practice the contemporary knowledge that is available, and this continuous professional development is a means of extending and improving knowledge, particularly in areas where problems have arisen. Marx's empirical study [82] found that the BOKSMART safety course, in combination with the IRB Level 1 coaching course (which includes Rugby Ready), can add much value to the basic technical knowledge and security awareness of coaches at junior level. However there is also a lack of legal knowledge amongst coaches, and that none of abovementioned courses include any proper exposition of the basics of delictual liability of coaches in cases of injuries to players under their supervision. Increased knowledge and understanding of the safety regime raises the required standard of care that is expected to be demonstrated, and is something that should from part of all coach and organiser education.[83]

A standard of care higher than that of the basic "reasonable person" is expected from experienced and better qualified coaches, an argument which is consistent with

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79 *Smoldon* 139.

80 Jurgens *Onderwysregtelike Perspektief*.

81 The RFU has a developmental structure starting with a Foundation course and then through Level 1, 2, 3 and 4. http://www.rfu.com/takingpart/coach/becomingacoach. There is also a range of continuing professional development courses that cover specific elements. http://www.rfu.com/takingpart/coach/coachdevelopmentprogrammes/continuouspersonaldevelopment.

82 Marx *Education Law Perspective* v.

83 Marx *Education Law Perspective* v.

the notion of a reasonable expert. The more experienced coach should know and anticipate the risks attached to a specific sport-related situation better than the "man in the street", or in the British context, the "man on the Clapham omnibus", denoting the judicial personification of the reasonable man against which, in some cases, to judge the actions of real people. In *Cerny v Cedar Bluffs Junior/Senior High School* 628 NW2d 697 (Neb 2001) the Supreme Court of Nebraska found that coaches who have coaching endorsements to their teaching certificates that represent specialised training in athletic injuries can be held to a heightened standard of care. The same expectation is applicable to older children (as opposed to younger, relatively immature ones). The age of the learner, among other factors regarding the coach's expected standard of care, stands out as a critical element in *Lubbe v Jacobs*.[84] In this case a 12 year old girl was injured by a hockey ball during the course of a mini hockey tournament. Her father sued the school and argued that the coach, Van Biljon, had been negligent. However Hartzenberg J ruled in favour of the educator and dismissed the claim with costs:

> In this case, the children under the supervision of Mrs van Biljon were not babies. They were girls and were twelve years and older. It was accordingly not unreasonable for Van Biljon to accept that they would act responsibly. One would expect Nadia to approach the bags, knowing that they were behind the goal posts, with the necessary caution. She was old enough to appreciate the dangers inherent in the game of hockey and Mrs Van Biljon was entitled to accept that.[85]

The judge reached his decision on the basis that hockey players who are twelve or thirteen years old know the game, and that the educator in this case could not be held liable for Nadia's injuries. *Lubbe* points out that only reasonable supervision and care is expected during sports activities and play at schools.[86] It is not reasonable to require continuous supervision, and an injury may occur when children are running, pushing and shoving. Hamman states that

> ...the standard set will depend on the probability of the injury, the seriousness of the consequences of the injury, and the ability to eliminate the risk.[87]

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84 *Lubbe v Jacobs* (TPD) unreported case number 1225/2001.
85 *Lubbe v Jacobs* (TPD) unreported case number 1225/2001 para 11.
86 Basson and Loubser *Sport and the Law* 28.
87 Hamman "Banning Pregnant Netballers" 3.

The subsections above have considered the five aspects of the prevailing circumstances outlined in *Caldwell* and have illustrated how these might be applied in the context of rugby, using both South African and English examples. What is clearly evident is that within the context of sport such an evaluation is incredibly difficult, and already embraces a potentially extremely broad set of factors as part of this calculation. As the conclusion makes clear, this evaluation is likely to become even more problematic in the future.

5 Conclusion

As the arguments above have noted evaluating the standard of care for sport is far from easy, with many factors to be taken into account and balanced against one another. In the *McMahon* case[88] Lord Jones observed that imposing too high a requirement in one set of rules could breach another. In this instance the example was spending longer making sure no one was in the vicinity before playing a shot, against the tournament rules on "slow play". In addition, sport has many unique attributes and norms which make it a particularly fruitful vehicle to examine standards of care within civil liability more generally. The law of negligence/delict needs to be adaptable and flexible to resolve new situations where injuries have occurred.

However, even in established situations where liability has been previously determined novel events occur and knowledge develops that requires a reconsideration of the principles that govern liability. Where sport is concerned, and particularly youth sport, there is a strong imperative to encourage and support participation both for players and the volunteers (whether coaches or administrators) who are the lifeblood of the amateur game.[89] The risk of injuries is in fact small, the extent of injury rarely serious, and the law needs to tread a cautious path through liability, ensuring it is a vehicle that promotes sport rather than that creates barriers to its enjoyment and practice. A greater understanding of sport, informed by detailed research, can unearth new areas of potential liability that will

88 Noted above under Rules, conventions and customs.

89 See Greenfield 2013 *Sports Coaching Review* 114-123.

need to be considered in the future. All contact sports are currently grappling with the problem of concussive injury and considerations of how best to reduce and manage such injuries. This has led to a cognisance of potential liability in the area and how this aspect is best managed by governing bodies has come under the microscope. There have already been well publicised claims from ex NFL players and the estates of deceased players in the USA,[90] and the issue is of concern at all levels of rugby and is highly likely to be considered in the future as part of a negligence or delictual evaluation.

A less publicised, but nevertheless important example of a possible future issue to be considered concerns the extent to which coaches might be liable for mismatches between players in terms of size and weight. It is clear that within an annual cohort of players there can be very large differences in size and weight between players of the same age.[91] The Boksmart document "Age vs Weight Category Rugby" noted a number of developments emanating from the increased competitiveness of schoolboy rugby, and in particular the competitive advantage that heavier players exhibited.[92] However Krause *et al* note:

> Specifically, being physically larger does not simultaneously account for performance advantages; a common misconception in adolescent sport.[93]

This suggests a more complex picture than that identified by Boksmart. However, imbalance in size may deter smaller players, who may elect to play other sports where size is not so important, and potentially valuable players might be lost to rugby. Secondly, where these smaller players play rugby they may be at an increased risk of injury. Boksmart envisaged two possible ways of dealing with this: either the laws could be changed to minimise the impact of size variation, or matches could be played with teams defined by weight rather than age. The issue of mismatched players arose in *Mountford v Newlands School* (2007), although in this

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90 See generally Anderson 2015 http://nflconcussionlitigation.com/; Wolohan 2014 http://www.lawinsport.com/articles/regulation-a-governance/item/sports-governing-bodies-and-player-welfare-examining-the-proposed-nfl-and-ncaa-concussion-settlements?highlight=WyJjb25jdXNzaW9uIiwiJ2NvbmN1c3Npb24iLCJjb25jdXNzaW9uJywiXQ.

91 See Krause *et al* 2015 *J Sci Med Sport* 358-363.

92 SARU 2010 http://www.sarugby.co.za/boksmart/pdf/BokSmart%202010-Age%20vs%20Weight%20Category%20Rugby.pdf.

93 Krause *et al* 2015 *J Sci Med Sport* 362.

case there was a breach of the relevant operating guidelines. This was a case of two players within different age bands, not mismatched players within the same age group. It is not a huge leap, however, to foresee a requirement for greater consideration for the safety of players within the same age group if there are significant power differentials. Greater knowledge about the nature, type and cause of injuries should be incorporated into practice through increased and more sophisticated coach education. Thus a more detailed and textured approach to coach education, coupled with a more nuanced judicial appreciation of the importance of sport to society and a positive interpretation of the "prevailing circumstances" may help prevent the widespread expansion of liability both in rugby and in sport more generally.

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LIST OF ABBREVIATIONS

BHA	British Racing Authority
Bond U Sport L eJ	Bond University Sports Law eJournal
Br J Sport Med	British Journal of Sports Medicine
Clin J Sport Med	Clinical Journal of Sport Medicine
CLJ	Cambridge Law Journal
CPSU	Child Protection in Sport Unit
Denning LJ	Denning Law Journal
EU	European Union
Int Rev Sociol Sport	International Review for the Sociology of Sport
IRB	International Rugby Board
ISLJ	International Sports Law Journal
ISLR	International Sports Law Review
J Sci Med Sport	Journal of Science and Medicine in Sport
JCL	Journal of Criminal Law
JPIL	Journal of Personal Injury Law
JPS	Journal of the Philosophy of Sport
LQR	Law Quarterly Review
Marq Sport L Rev	Marquette Sports Law Review
MLR	Modern Law Review
NFL	National Football League
NSPCC	National Society for the Protection of Cruelty to Children
OJLS	Oxford Journal of Legal Studies
PN	Professional Negligence
SAJSM	South African Journal of Sports Medicine
SARU	South African Rugby Union
TMO	Television Match Official

Tort L Rev	Tort Law Review
UN	United Nations

RECONCEPTUALISING THE STANDARD OF CARE IN SPORT: THE CASE OF YOUTH RUGBY IN ENGLAND AND SOUTH AFRICA

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SUMMARY

Sport is an important area of civil society in both South Africa and England, and this article is broadly concerned with the relationship between sport and personal injury. More specifically, the article compares how rugby is regulated by the tort of negligence in England and delict in South Africa respectively. Regarding liability, for sport there are very specific factors that need to be taken into account. The article is concerned with, firstly, the broader context of sport as an important social and cultural activity, and secondly the specific sporting context that includes the rules of the game as well as the playing culture, with a focus on rugby at junior level. Through a critical and comparative analysis of how the standards of care in sport have been developed in both jurisdictions, the aim of this article is to consider how sport specific elements can be incorporated into the traditional legal principles. This comparative analysis contextualises the various discussions in the light of the differences between the English tort of negligence and the South African law of delict. Our argument is that the context and specificity of rugby should be more explicitly taken into account when evaluating potential liability. To establish a standard of care for sport is complex, with many factors to be taken into account and balanced against one another. The law of negligence/delict therefore needs to be adaptable and flexible to resolve new situations where injuries have occurred. Even in established situations where liability has been previously determined, novel events do occur and knowledge develops that requires a reconsideration of the principles that govern liability. In junior rugby, the

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risk of very serious injuries is relatively small and the law needs to tread a cautious path through liability, ensuring it is a vehicle that promotes sport rather than creating barriers to its enjoyment and practice. A greater understanding of sport, informed by detailed research, can unearth new areas of potential liability that will need to be considered in the future.

KEYWORDS: Negligence; Delict; Standards of care; Sport; South Africa; England; Public Policy; Litigation; Youth Rugby.