SPORT GOVERNING BODIES AND THE DUTY OF CARE

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ABSTRACT

A duty of care exists between various levels of sport, such as organisers to competitors, with governing bodies also owing a duty of care to competitors. Cricket's ball-tampering incident in Australia's test match against South Africa at The Wanderers, Cape Town, raised issues as to the culture and governance of cricket in Australia. Cricket Australia subsequently commissioned The Ethics Centre to conduct a report into the specific incident and the more general culture of Australian cricket. One of the comments made in the subsequent report, A Matter of Balance, was that a duty of care may be owed in regard to providing a balance between winning and ensuring a safe environment. Sport governing bodies, meanwhile, have had to face legal challenges regarding potential breaches of a duty of care in relation to serious spinal injuries suffered by players at various levels. However, the biggest challenge facing sport governing bodies is the issue of the long-term effects of concussion and it is suggested that the protocols introduced by various sports fulfils the duty of care in regard to this issue. It is also suggested that it is unlikely sports governing bodies in Australia will be held liable for historical concussion cases due to the fact they did not know of the long-term effects, and also should not have been expected to know.

I INTRODUCTION

It is well established that a duty of care exists between various parties within sport, including sport governing bodies. The ball-tampering incident at Cape Town during the Australian cricket team's tour of South Africa in 2018 resulted in Cricket Australia (CA) commissioning a report into the incident which raised, amongst other things, the question of a duty of care being required of a governing body, such as CA. The issue of concussion in sport was recently highlighted by Australian batsman, Steve Smith, being the first international batsman to be substituted because of concussion. The issue of governing bodies owing a duty of care has also been raised in other situations, such as those involving serious spinal injuries.

This paper will therefore examine the issue of the duty of care within the sporting context by examining its application to governing bodies in relation to four specific situations. These are ball-tampering, spot and match-fixing in cricket, serious spinal injuries within the rugby codes, and concussion

II THE DUTY OF CARE AND SPORT

Injuries suffered during a sporting contest can result in a claim based on negligence. Negligence is a defined tort that has three elements, namely that the defendant must

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owe the plaintiff a duty of care; there must a breach of that duty; and this breach must have caused damage to the plaintiff.

The law imposes a duty of care between parties to whom the law considers that such a duty should exist, and within sport, a duty of care may, and usually does, arise between the various groups involved. Competitors, for instance, owe a duty of care to avoid a foreseeable risk of injury to other competitors. In *Ollier v Magnetic Island Country Club*[1], for instance, a golfer was held to be in breach of his duty of care when he hit another golfer with his tee shot.[2] In *Dodge v Snell*[3], a case involving an incident in a horse race, it was held that there had been a breach of a duty of care by Snell which caused career-ending injuries to Dodge, with damages of $772,895 being awarded.[4] As well as owing a duty of care to other competitors, a competitor also owes a duty of care to the spectators though, usually, voluntary assumption of risk will be a defence.

Spectators are also owed a duty of care by the occupier, or organiser of a sporting event, and in *Langham v Connell Point Rovers Soccer Club*[5], for instance, a spectator was awarded $233,758 in damages after tripping over rope in a car park when attending a soccer match.[6] Usually it is the owners who owe a duty of care in regard to the state of the playing area, and in *Nowak v Waverley Municipal Council*[7], for instance, damages were awarded after the plaintiff suffered a broken leg when he tripped over a protruding water sprinkler on the Waverley Council owned sporting field.[8] Similarly, in *Williams v Latrobe Council*[9] an Australian football player was awarded damages after badly injuring his ankle during a match played on a ground owned by the Latrobe Council, the injury being caused when his ankle landed on a sprinkler head, the cover of which was not flush with the surrounding soil.[10]

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[1] [2004] Aust Tort Reports 81,743.
[2] Ibid [48]. In *Pollard v Trude* [2009] 2 Qd R 248 there was held to be no breach of a duty of care where a player lost the sight in one eye after being struck by a player in his own group: [33]. For further discussion see Chris Davies 'Golf: A Beautiful or Dangerous Game', (2010) 6 *Malaysian Journal of Sport Science and Recreation* 21.
[3] [2011] TASSC 19.
[4] Ibid [498].
[5] [2005] NSWCA 461
[6] Ibid [59].
[7] (1984) Aust Torts Reports 80-200,
[8] Ibid 67,803.
[9] [2007] TASSC 2, [69]. In the original trial the club for which Williams was playing, East Devonport, and the host club, Latrobe, had also been found to be in breach of a duty of care. On appeal, the clubs were held not to be liable as a 'reasonable inspection … did not require the degree of close inspection thought to be necessary by the [original judge]': *Latrobe Council v Williams* [2007] TASSC 77, [49].
[10] Ibid [66]. Note, however, that in *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, [19]-[20], the council was not held to be liable in regard to a knee injury sustained in a game of Oztag. Falvo's injury occurred when he ran from a grassed area to one of the bare patches on the ground which the council had topped up with sand and his claim was that the injury was caused by the poor state of the ground. It was acknowledged that the surface at Miller's Reserve was not as good as the 'top-class' playing surface at Brookvale Oval, also controlled by Warringah Council and used for NRL matches. It was held, however, that the surface was adequate for amateur sport, such as Oztag, and that it was similar to the standard of other grounds provided by local councils throughout the state. The surface was therefore of a community accepted standard and it was impractical to require sports grounds to have perfectly level and smooth surfaces.

Foscolos v Footscray Youth Club[11] meanwhile illustrates the fact that a coach can also be held liable for injuries sustained by competitors. In that case an experienced wrestler was matched against an inexperienced wrestler and used a throw that is only allowed against experienced wrestlers. Foscolos was left a quadriplegic. He was awarded $5.7m in damages, with the coach being held to be in breach of his duty of care.[12]

Schools, too, have been held liable for breach of a duty of care in regard to sporting events. For instance in *Bujnowicz v Trustees of the Roman Catholic Church of the Archdiocese of Sydney*,[13] the occupier was held liable when a student injured his ankle after stepping into a pothole on a school playing field, the court noting that a weekly check of the area would only have taken a few hours and may have prevented the injury.[14]

In *Watson v Haines,*[15] the plaintiff was a 15 year old schoolboy who was selected to play hooker for his school, Figtree High School, a position that he was not suited to because of his long, thin neck. Watson became a quadriplegic when he fractured his cervical spine when a scrum collapsed. He then claimed that the Education Department was negligent for not giving him appropriate neck strengthening exercises, and that the teachers should have been aware that, because of his physique, he should not have been playing hooker.[16] An audio-visual education kit had been developed by the Spinal Research Foundation that highlighted the dangers of high school students playing in positions that did not suit their physiques, specifically those like Watson with long, thin necks playing in the front and second row.[17] The Education Department was made aware of these kits and some were placed in centres so that they could be borrowed by schools.[18] However, virtually no advertising was made in regard to the kits and they 'remained on the shelves, unnoticed and almost forgotten,' while no message was given to the teachers about such dangers.[19]

In regard to liability of the teachers, it was held there was no breach of a duty of care as the two teachers involved did not know, and could not reasonably have been expected to know, of the problems with Watson's physique.[20] The Education Department, was, however, liable since a failure within its administration system resulted in Watson not receiving reasonable care for his safety and this resulted in his injury. The Education Department had received an appropriate warning in regard to the dangers of long, thin-necked students playing in the front or second row, and it had failed to ensure that reasonable care was taken for the safety of players.[21]

[11] [2002] VSC 148; [2002] Aust Torts Reports 81-658.
[12] Ibid [25].
[13] [2005] NSWCA 457; [2005] Aust Torts Reports 81-824.
[14] Ibid [59].
[15] (1987) Aust Tort Reports 80-094.
[16] Ibid 68, 557.
[17] Ibid 68, 559.
[18] Ibid 68, 561.
[19] Ibid 68, 564.
[20] Ibid 68, 558.
[21] Ibid 68, 572-3.

The case highlights that there can be multiple layers in regard to a duty of care, the highest level here being the Education Department. While the school was not held liable, it could have been if, for example, it had been adequately informed about the medical problems, but then failed to pass this information onto the teachers. It is suggested, too, that the Education Department was in a position similar to that of a governing body in sport. As Opie[22] suggests claims can be made against governing and/or rule-making bodies, pointing out that in *Watson v British Boxing Board of Control*[23] it had been held that the governing body of professional boxing in Britain owed a boxer a duty of care in relation to the imposition of certain rules. In this case Watson sued the British Boxing Board of Control (BBBC) after collapsing in the ring. He underwent brain surgery but remained paralysed on his left side. It was held that the BBBC 'assumes the responsibility of determining the nature of the medical facilities and assistance to be provided.'[24] It was then stated that 'boxer members of the board, including Mr Watson, could reasonably rely upon the board to have taken reasonable care in making provision for their safety.'[25] Thus the BBBC 'was under a duty of care to Mr Watson.'[26] This had been breached by failing to provide adequate guidelines on what medical personnel and equipment should be present at a bout which meant the immediate medical treatment Watson required at the ring was not available, causing foreseeable harm by exacerbating a serious brain injury that had incurred during the course of the bout.[27]

What will now be examined is the issue of breaches of a duty of care by sports governing bodies in relation to four specific situations, namely, ball tampering, spot and match-fixing in cricket, serious spinal injuries and concussion.

III CRICKET: BALL TAMPERING, SPOT AND MATCH FIXING

A *Ball Tampering*

During the lunch break on the third day of the Third Test between Australia and South Africa at Cape Town Australia's vice-captain, David Warner, approached Cameron Bancroft to implement his idea to use sandpaper to tamper with the ball.[28] When Bancroft became aware his actions were being captured on television, he hid the offending piece of sandpaper in his underpants.[29]

The following morning Warner was forced to stand down as vice-captain and Steve Smith as captain with the captaincy being given to wicketkeeper, Tim Paine, who took

[22] Hayden Opie, 'The sport administrators' charter: Agar v Hyde', (2001 9 *Torts Law Review* 131-151, 149.
[23] [2001] QB 1134.
[24] Ibid 1161.
[25] Ibid 1162.
[26] Ibid 1163.
[27] Ibid 1167.
[28] 'Not what it seams: How the plan to tamper with the ball was hatched', *The Sydney Morning Herald*, 26 March 2018, 46.
[29] 'The big cheat', *The Australian*, 26 March 2018, 1.

over literally moments before the start of the day's play.[30] Sanctions were then imposed by the International Cricket Council (ICC) with Smith and Warner receiving a one match ban and fined their match fees, while Bancroft was fined 75 per cent of his match fee.[31] Cricket Australia (CA), however, imposed much harsher sanctions, announcing twelve months bans for both Smith and Warner, and nine for Bancroft.[32]

CA then commissioned a report from The Ethics Centre, entitled 'Australian Cricket: A Matter of Balance' (the Report)[33], which was released in October 2018. The Report raised the issue of a winning-at-all costs culture, concluding that 'CA had made the fateful mistake of enacting a program that would lead to winning without counting the costs.'[34] It also stated that the 'broad consensus amongst the stakeholders is that CA does not consistently live its values and principles' and 'is perceived to say one thing and do another.'[35] Thus, the report raised serious issues as to how CA governed the sport, and suggested one of the reasons for the ball-tampering incident was the inherent culture within Australian cricket.

Another feature of the Report was the suggestion a duty of care was owed, with the following quote being included in the Report:

> We have a duty of care to make sure we have that balance between winning and ensuring it's a safe environment that respects them and allows them to grow as people. Maybe that balance has not been right.[36]

The quote came from the CEO of Sport New Zealand, Peter Miskimmin, in relation to the fact that 'the current approach to high performance is not fit for purpose' and that 'the principal cause for concern has been the drive for performance at the expense of athletes' general welfare – and not just physical fitness.'[37] One of CA's members of staff also made a similar comment, suggesting that 'the issues within Australian Cricket are hard to diagnose. We are obsessed with being number 1, but its fool's gold. We should be striving to be the sport that every Australian can be proud of.'[38]

The Report also stated that two former players had:

> [J]ustifiably asked if the drive for performance has been at the expense of CA exercising a proper duty of care. This is not just a matter of effects on team culture or ultimately the reputation and standing of Australian cricket. There are also profound issues to do with the way in which individuals are being asked to pay a psychological and physical price for CA's success.[39]

[30] Chris Barrett, 'Smith, Warner stood down amid cheating revelations', *The Sydney Morning Herald*, 26 March 2018, 4.
[31] Peter Lalor, 'Smith's Shame', *The Australian*, 26 March 2018, 1.
[32] Peter Lalor, 'Banned players ready for a fight,' *The Australian*, 29 March 2018, 32.
[33] The Ethics Centre, 'Australian Cricket: A Matter of Balance'.
[34] Ibid 8.
[35] Ibid 11.
[36] Ibid 69.
[37] Ibid 77.
[38] Ibid 68.
[39] Ibid 77.

In the author's opinion a governing body like CA owes a general duty of care to provide an environment that does cater for the well-being of all its employees. This obviously includes the cricketers, with there being a need to provide the support to maximise individual achievements and team results. However, in regard to the latter, it is suggested this has to be at a level which does not reach a winning-at-all costs mentality which, the author believes, was a principal reason the Cape Town incident occurred.

Perhaps another question arising from this incident is whether a more specific duty of care was also breached by not providing Cameron Bancroft with the means to report what vice-captain, David Warner, had suggested to him, rather than feeling he had no choice but agree to do what was being requested. It is suggested that the question is answered by the fact that David Warner was only the vice-captain which meant that, in this specific case, Bancroft could have raised any doubts about what he was being asked to do with the captain, Steve Smith. The author therefore disagrees with a 'Senior State Administrator' who was quoted in the Report as saying that Bancroft 'should have said no, but he had no foundation on which to say no whatsoever.' [40]

B *Spot and Match-Fixing*

One of the most infamous incidents of spot-fixing occurred during Pakistan's 2010 tour of England. At the Oval test, captain Salmon Butt deliberately batted out a maiden over, while at Lords the fix involved the deliberate bowling of no-balls 'on order' that is, on a given ball of a given over. The two bowlers who were asked to carry out the spot-fixing were Mohamad Amir and Mohammad Asif.

Butt, Asif and Amir, were all subsequently charged with conspiracy to accept corrupt payments under s 1 of the *Prevention of Corruption Act 1906* (UK), and conspiracy to cheat at gambling under s 42 of the *Gambling Act 2005* (UK).[41] At the criminal trial, Butt received a two year sentence, Asif, 12 months,[42] while Amir received a six month sentence at the Feltham Young Offenders Institute as he was just 18. Former England captain, Michael Atherton, was one who was critical of the need to send young Amir to a young offenders' institution.[43] The three players were also sanctioned by an ICC Tribunal in regard to breaches of Articles 2.1.1, 2.2.3 and 2.4.2 of the Code of Conduct. The Tribunal then imposed a sanction of ten years ineligibility on Butt, five of which was suspended pending no further breaches,[44] and imposed seven-year sanctions on Amir and Asif, with two years suspended on the condition that there were no further breaches.[45] When Butt appealed the severity of the sanction to the Court of Arbitration for Sport (CAS), the view of the CAS Panel was that it 'could reasonably be described

[40] Ibid 83.
[41] CAS 2011/A/2364 *Salman Butt v International Cricket Council* [36].
[42] *R v Amir and Butt* [2011] EWCA Crim 2914.
[43] Mike Atherton, 'Frightened and confused: the young Pakistani trapped by the underworld', *The Weekend Australian*, 5 November, 2011.
[44] CAS 2011/A/2364 *Salman Butt v International Cricket Council*, [35].
[45] Ibid [19].

as lenient.' This was because he was captain of Pakistan and had been the orchestrator of the no-balls during the Lords Test.[46]

In regard to whether there had been any breaches of a duty of care, the fact that Butt was the captain and instigator, indicates he was fully responsible for his actions. However, there is an argument that Asif, and even more so, Amir, given his young age, were owed a duty for care, and that there should have been systems in place to allow them to report the instances. In fact the ICC did implement such measures after this incident, setting up an Integrity Unit to oversee the issue of spot and match- fixing in cricket. More significantly, it set up a hotline, providing a means for players to report approaches to fix matches with signs containing the relevant phone number now being displayed in prominent positions, such as on the door of the team dressing rooms.[47] Furthermore, it is now an offence under the ICC' Code of Conduct not to report any approach involving spot or match-fixing.

Thus, while it can be argued the ICC was in breach of its duty of care to Asif and Amir, it could say in its defence that it was not fully aware of the risk at that time and, once it was aware, took appropriate remedial action.

The issue whether the various governing bodies of the football codes played in Australia owe a duty of care to the players has arisen a number of times over the years in regard to serious spinal injuries, and more recently, in relation to the issue of concussion.

IV SERIOUS SPINAL INJURIES AND CONCUSSION

A *Serious Spinal Injuries*

The plaintiff in *Green v Country Rugby Football League of NSW Inc*[48] was a 16 year old who played rugby league for Laurieton United's reserve grade team in the Country Rugby League's (CRL) Group Three competition on the mid north coast of NSW. He was selected as hooker for a match against the Old Bar Pirates, a team that had a front row significantly bigger than Laurieton's. Green himself was described as being around 175cm in height, weighing 57kg, and being slight in build. Another significant factor was that he had a neck that was considered to be slightly longer than average. During the match a scrum collapsed which left Green a permanent tetraplegic, with the issue then being whether the CRL was negligent in allowing someone with a long neck to play in the position of hooker.[49]

It was held that the CRL was ultimately responsible for the administration of country rugby league in NSW, and it therefore owed a duty of care to Green. The question then was whether there had been a breach of that duty, with a number of potential breaches being argued, one being the lack of medical examinations of the players. It was held, however, that while a medical examination would be of benefit to the coach and the

[46] Ibid [74].
[47] The author had observed this at the Sydney Cricket Ground with the same sign also on display near the practice nets at the ground.
[48] [2008] NSWSC 26.
[49] Ibid.

club to establish whether a player was suitable to play in the front row or not, the CRL was not in breach of its duty of care for not arranging such examinations.[50] The court also accepted that the accredited coaching system the CRL had in place, and the limited financial resources of the CRL, meant that it had taken a reasonable response to the risk of injuries to players of Green's physique. This was despite the fact that this meant the responsibility had been left to the coaching system and development officers.[51] It had also not breached its duty of care by failing to have a warning on the registration form and an acknowledgement that the player, or guardian, had seen the warning. Nor had it breached its duty for failing to ensure that all players involved in the scrums performed appropriate neck strengthening exercises, as the CRL had acted reasonably in leaving the matter to the clubs and coaches.[52] The CRL was therefore held not be negligent.[53]

It should be noted that Green had earlier failed in having New South Wales Rugby League (NSWRL), the governing body above the CRL, joined as another defendant as it had been held Green did not have a real case to advance against the NSWRL as there was no evidence it was liable.[54] It should also be noted that rugby league has since moved to non-contested scrums where both sides no longer push in the scrums, greatly reducing the likelihood of injuries like that suffered by Green. Rugby union, however, still retains contested scrums and there have been a number of cases involving situations where players had been seriously injured after collapsed scrums.

The plaintiff in *Haylen v New South Wales Rugby Union Ltd*[55] was a hooker who became a quadriplegic after a scrum collapsed. He then sued the New South Wales Rugby Union (NSWRU) for failing to control and regulate rugby union and eliminate unnecessary risk of injury. Justice Einstein held that there was no duty on the part of the NSWRU to make changes to eliminate injuries, and to impose a duty of care on a rule-maker to alter the rules, as had been suggested, was extending the notions of a duty of care too far. It was also held that no evidence had been produced to indicate that the NSWRU had control in respect of the match in which the plaintiff was injured.[56]

In *Agar v Hyde*,[57] Hyde had been left a quadriplegic after suffering serious spinal injuries in a first grade Colts match between Warringah and Gordon in the Sydney rugby union competition, and claimed the opponent club had breached the rules of the game. In the co-reported decision, *Agar v Worsley,*[58] the plaintiff had also become a quadriplegic after being injured in a first grade match at Wagga Wagga. Both players were hookers, and were injured when scrums collapsed, with both plaintiffs claiming against the match referee, the Sydney Rugby Referees Association the NSWRU, the Sydney Rugby Union, the International Rugby Board (IRB) and the New Zealand

[50] Ibid [146].
[51] Ibid [174].
[52] Ibid [216].
[53] Ibid [235].
[54] *Green v Australian Rugby Football League* [2003] NSWSC 749 [4].
[55] [2002] NSWCA 114.
[56] Ibid [52] - [55].
[57] (2000) 201 CLR 552; [2000] HCA 41.
[58] Ibid.

Rugby Football Union. The latter defendants were joined in relation to their law-making responsibilities within rugby union.

The High Court, however, held that the various Australian governing bodies in the sport did not owe a duty of care to the defendants. One reason was that they were not in a position to amend the rules to make rugby union safer, while the IRB could not require local bodies to adopt rule changes. There were simply too many intervening levels of decision-making between the formation by the IRB of the laws of the game and the conduct of the individual matches in which Agar and Worsley were injured.[59]

It should also be noted that the IRB subsequently amended its scrum rules in an effort to prevent the type of spinal injuries that Hyde and Worsley had suffered, and referees are now required to set the front rowers in their positions before instructing them to engage in the scrum.

Despite that, in 2018 there were four instances in the Brisbane Greater Public School (GPS)'s rugby union competition that resulted in spinal-related injuries. An investigation found there was 'no common link' and that all four had arisen from accepted aspects of the game, such as a legal tackle and clearing out in the rucks.[60] While it is possible legal action may occur, it is unlikely, given the circumstances, that a governing body will be held liable for breach of a duty of care. The GPS competition has also implemented recommended safety measures from the review, such as introducing a 'front row passport' requirement. This is based on a successful model run in France for players aged 15 and over with the programme requiring front row players to achieve a series of skills and knowledge based benchmarks before they can play in that position.[61]

The case involving NRL player, Alex McKinnon involved a spear tackle where the player is lifted up past the horizontal, and then speared towards the ground. It is an illegal tackle in rugby league, as it is in rugby union. McKinnon suffered serious career-ending injuries. It is suggested that the question of who owes a duty of care in this situation has been answered by previous cases with *Green*, *Haylen*, *Hyde* and *Worsley* all indicating it is unlikely that the governing body, the NRL, would be liable. However, the case does have similarities to *McCracken v Melbourne Storm Rugby League Football Club*[62] which also involved a spear tackle that caused a career-ending injury, though it was not as serious as McKinnon's. It was held that the two players involved in the tackle were in breach of their duty of care, as well as having committed an

[59] Ibid 581.
[60] Georgina Robertson, 'Front row passbook to make schoolboy rugby safer', 18 January 2019, https://www.smh.com.au.
[61] Ibid. Rugby front-rowers also have had a long established safety code of their own whereby players concerned about their safety in a scrum can all out 'neck' and the opposing front rowers will immediately stop pushing. The highest profile incident of this occurring was during the Rugby World Cup 2003 where Australian front-rower, Ben Darwin, needed to resort to this call during the semi-final against New Zealand. The All Black front row immediately stopped pushing and although Darwin was still seriously injured and never played rugby again, the All Black front-rows adherence to this 'code, even in a World Cup semi-final, ensured that Darwin was not left with any permanent disability.
[62] [2005] NSWSC 107.

intentional tort, with the club being vicariously liable for the actions of its employee.[63] To date there has been no trial in McKinnon's case, and it should also be noted both the NRL and his club, the Newcastle Knights, have, to some degree, mitigated his losses. The Knights paid out the rest of his contract, and also the two year extension he was about to sign, while the NRL has given him a job for life.

Thus, the decided cases indicate that the governing bodies are unlikely to be liable for breach of a duty of care in relation to serious spinal related injuries, though the duty of care may be breached by other parties, particularly the players if they breach the rules of that sport. However, another identifiable risk for players is that of concussion. Since it involves player welfare, the question arises whether a duty of care is owed and, if so, by whom.

B *Concussion*

It was in the National Football League (NFL) that the long-term effects of concussion first became apparent as a serious medical issue.[64] That was after autopsies on deceased players began revealing they had been suffering from chronic traumatic encephalopathy (CTE). The first case involved former Pittsburgh Steelers' centre, Mike Webster, in 2002, after he had committed suicide at the age of 50.[65]

The NFL had created the Mild Traumatic Brian Injury Committee (MTBI) eight years earlier in 1994, but controversially it had appointed Dr Elliot Pellman as its chairman, despite the fact he was a rheumatologist, 'not a neurologist or neuropsychologist and often admitted ignorance about head injuries.'[66] It has also been suggested that the concussion data that the NFL collected from 1996 to 2001 underestimated the number of concussions,[67] with Robert Cantu of the American College of Sports Medicine suggesting there was a bias in the small sample that the MTBI Committee used.[68] Even as late as 2005, the MTBI Committee was still claiming that returning to play after sustaining a concussion 'does not involve significant risk of a second injury either in the same game or during the season.'[69]

However, further autopsies in 2005 and 2006 revealed two more former Pittsburgh Steelers players, Terry Long and Andre Waters, had CTE. The NFL then held a medical conference on concussion in June 2007, formalizing new concussion guidelines in August 2007,[70] though this did not prevent the threat of litigation from former players.

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[63] Ibid [37].
[64] For further discussion see Annette Greehow, 'Concussion Policies of the National Football League: Revisiting the "Sports Administrative Charter" and the Role of the Australian Football League and National Football League in Concussion Management' [2011] *Bond Sports Law eJournal* 13.
[65] David Thorpe, Antonio Buti, Chris Davies and Paul Jonson, *Sports Law*, Oxford University Press, 3rd edition, 2017, 281. ('Thorpe et al').
[66] Peter Keating, 'Elliot Pellman, the NFL's top medical advisor claims it's okay for players with concussion to get back in the game. Time for a second choice.' https://sports.espn.go.com
[67] Alan Schwarz, Walt Bogdanich and Jacqueline Williams, 'In NFL, Deeply Flawed Concussion Research and Ties to Big Tobacco, *The New York Times*, 24 March 2016.
[68] Peter Keating, (n 66).
[69] NFL Concussion Fast Facts, https://edition.cnn.com.
[70] Ibid.

By 2012, the number had risen to over 3000, leading to the NFL agreeing to a $765m settlement to provide former players with medical help.[71] The settlement, however, stated it was not an admission of legal liability by the NFL.[72]

The issue of concussion has also been present in the football codes in Australia and it is now apparent there are former rugby league and Australian football players with long-term health problems that are due to multiple concussions during their careers.[73] Rugby league, rugby union and Australian football have all responded to the now-known problem in a number of ways, one being to change the rules, or to re-inforce an already existing rule. Rugby league banned the shoulder charge, that is, tackles without using arms, due to the risks of head contact. These tackles have never been allowed in rugby union, and always result in an on-field penalty, if not a yellow card. However, if the hit also causes significant contact to the head, it is now an automatic red card, as recently illustrated by New Zealand's Scott Barrett being sent from the field for such contact during the 2019 Bledisloe Cup match in Perth.[74]

The enforcement of the rule continued in the 2019 Rugby World Cup in Japan with a record number of yellow and red cards being issued. For example, Argentinian lock, Tomas Lavanini, was red-carded in the group stage match against England after a similar hit to an opponent's head.[75] Even players who escaped penalty on the field were later cited, with Australia's Reece Hodge being suspended for three matches after failing to use his arms in a tackle that led to Fijian player, Peceli Yato, leaving the field with concussion.[76] Even the ball-carriers have found themselves being penalised for making contact with the head of the tackler because World Rugby research 'indicates that in 75 per cent of the cases, it is the tackler rather than the ball-carrier who is concussed.'[77]

This attention to the hitting of the tackler is also enforced in the AFL as any head contact results in a free kick. The AFL still allows bumps to the shoulders of opposition players, but now implements a stricter interpretation of this rule. Players who choose to use the bump and who make even inadvertent contact with the head face possible suspensions, with one of the considerations being the impact on the other player. Thus, while taking account of the consequences in deciding the penalty is new in rugby union, it has been implemented for many seasons in the AFL.

Cricket, too, has had to respond to the issue of concussion, and has recently implemented a concussion substitute rule. While cricket has always allowed substitute

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[71] John Martin, 'NFL ex-players reach $765 million deal in concussion case.' http://articles.philly.com
[72] 'NFL, Retired Players Resolve Concussion Litigation: Court Appointed Mediator Hails Historic Agreement' Alternative Dispute Resolution Center, 29 August 2013. http://nfllabor.files.wordpress.com. Note the settlement was not concluded until 2016 due to some players not being happy with it: Thorpe et al (n 64), 283.
[73] Thorpe et al (n 65), 283.
[74] Australia v New Zealand, 10 August 2019, Optus Stadium, Perth.
[75] Stephen Jones, 'England fall short of convincing after Pumas rocked by red card' *The Australian*, 7 October 2019, 28.
[76] Wayne Smith, 'Hodge left reeling by World Cup ban' *The Australian*, 26 September 2019, 32.
[77] Wayne Smith, 'I might as well play NRL, says Kerevi' *The Australian*, 1 October 2019, 32.

fieldsmen in the case of injuries, it has only recently allowed substitutes for batsmen and bowlers who are concussed during a game. The first implementation of this new rule in international cricket occurred during the Second Test in the 2019 Ashes series after Australian batsman, Steve Smith, was hit in the neck area. He was not allowed to bat in the second innings due to the effects of a delayed concussion, with Marnus Labuschagne taking his place. Smith was also ruled out of the next test as he was assessed as not having fully recovered.

Thus, concussion protocols have now been implemented by various sports,[78] including by ensuring players suffering head knocks are removed from the field and undertake a medically-supervised Head Injury Assessment (HIA). Depending on the result of this assessment a player may not be allowed back onto the ground for the remainder of that match, will be monitored after the match and may be forced to miss subsequent games, as Smith was forced to do. The duty of care owed by governing bodies in regard to concussion can therefore be met by appropriate risk management strategies. Arguably, those implemented by the governing bodies of professional leagues in Australia are sufficient to fulfil the legal requirements, with perhaps one exception. That is the use of club doctors to assess the players — because it could create a conflict of interest between the duty to protect the health of the player and the club's need to have its best players on the field. The use of independent medical assessors at games with authority to call any player for a concussion assessment, which already applies in the NFL, may be the more appropriate measure.

While these measures should safeguard governing bodies from potential future liability, there is still the presently unanswered question whether there will be liability to past players now suffering from the long-term effects of concussion. The NRL is presently facing legal action, with opinion split as to the players' chances of success in court.[79] There is no doubt that at the relevant time the NRL was not aware of the long-term effects of concussion. However, there is also no doubt that a governing body can be held liable if it *should* have known about a particular risk. In *Challen v The Macleod Country Golf Club*[80] for instance it was held that the club was liable in nuisance 'only from that point in time it knew or ought to have known of the nuisance.'[81] While that case involved nuisance rather than negligence, the same principle applies.

So, should the governing bodies of rugby league have known about the long-term effects of concussion? It is suggested that prior to the issue being raised in the NFL there was no known medical evidence that there were long-term effects from concussion. If it is considered that the NRL should have been aware of the long-term effects of concussion from what was known in the NFL, the question then is when should it have known?

[78] Thorpe et al (n 65), 287.
[79] See for instance Brett Read, 'NRL class action 'has no chance'' *The Australian*, 5 July 2019.
[80] [2004] QCA 358.
[81] Ibid [35].

It is suggested that perhaps the earliest possible date that potential plaintiffs could argue is 2002 when the death of Mike Webster highlighted the possible long term issues in contact sport. However, this was just one player, and it is unlikely a court would hold that the NRL was liable for not having a concussion protocol back in 2002. Another possible date is August 2007 when the NFL introduced new concussion guidelines, with a potential plaintiff having an argument that the NRL should have implemented a similar concussion protocol at this time. It is suggested, however, that the NRL can argue in its defence that American football is a different sport to rugby league, with far more head contact than occurs in competitions like the NRL. The NRL could then argue it should not be liable until it became aware of the long-term effects of concussion within its competition and that, once it did became aware, it implemented suitable concussion protocols. Thus, it can be argued that it is unlikely that sports governing bodies in Australia will be held liable for historical concussion cases due to fact that they were not only unaware of the long-term effects at the time, but also should not have been expected to know.

V CONCLUSION

A duty of care exists at multiple layers within sport, with one being the governing bodies. It includes ensuring the rules make the sport as safe as it can be, and that appropriate medical assistance is available at the matches and events. What is needed to fulfil the duty can, and has, changed over time in light of new medical evidence with the need to implement concussion protocols being a good recent example. Even where there has not been an actual breach of the duty of care, governing bodies still need to be aware of potential risks and use what is known to help reduce those risks.