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HEYWOOD, R. and CHARLISH, P. <http://orcid.org/0000-0002-3733-7374>

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Rob Heywood and Peter Charlish*

This article provides a critical analysis of Mountford v Newlands School [2007] EWCA Civ 21, the latest decision emanating from the English Court of Appeal regarding the liability of a schoolmaster for injuries caused on the rugby field. First, it explores the rationale for imposing liability and analyses the legal questions pertaining to the breach of duty. Second, the article explores the complex question of causation inherent in the case. The article concludes by discussing the legal status of guidelines in sport and highlights the potential public policy implications of this ruling on youth sport at all levels, with a particular emphasis on junior rugby.

INTRODUCTION

Tort law is playing an increasing role in sport. This is evident both in the professional arena[1] and at amateur level.[2] Within the sport of rugby union, two recent decisions from the English Court of Appeal concerning the liability of referees have caused a certain amount of unease among competitors, referees and sports enthusiasts alike.[3] It is against this background that one should view with interest the latest decision emanating from the Court of Appeal regarding liability for injuries caused on the rugby field. In *Mountford v Newlands School* [2007] EWCA Civ 21 a schoolmaster in charge of the opposing team was held liable, and his employer school vicariously so, for the injuries caused to a 14-year-old schoolboy who was tackled legally by an opposition player who was over the age of 15 at the time and therefore ineligible to play in the match under the England Rugby Football Schools' Union (ERFSU) guidelines. The ruling has implications for youth rugby at all levels, in particular inter-school and college competitions. This is because an overly restrictive view of the ERFSU guidelines, coupled with the difficulties associated with the "school-year", makes it difficult for certain juniors to play within their allotted age-group. This article criticises the Court of Appeal's overly restrictive interpretation of the ERFSU guidelines. First, it explores the rationale for imposing liability and analyses the legal questions pertaining to the breach of duty. Second, the article explores the complex question of causation inherent in the case. The article concludes by discussing the legal status of guidelines in sport and highlights the potential public policy implications of this ruling on youth sport at all levels, with a particular emphasis on junior rugby. While the article deals predominantly with a problem which arose in England as a result of legal construction of the ERFSU guidelines, the issues raised are nonetheless capable of application to all sports, in England, Australia or elsewhere.

MOUNTFORD V NEWLANDS SCHOOL

The facts

The claimant in *Mountford v Newlands School* [2007] EWCA Civ 21, a 14-year-old schoolboy, broke his elbow as a result of a tackle made during an inter-school seven-a-side under-15 rugby match between Shoreham College, Sussex, and Newlands Manor School. To be eligible to play in the

* Rob Heywood, Lecturer in Law, University of East Anglia; Peter Charlish, Acting Head of Law, Sheffield Hallam University. The authors would like to thank Kevin Williams, Jim Hanlon and Craig Chivers for comments on an earlier draft of this article.

[1] *Gaynor v Blackpool FC* [2002] CLY 3280; *Caldwell v Maguire* [2002] PIQR P6; [2001] EWCA Civ 1054; *Pitcher v Huddersfield Town Football Club* (unrep, QBD, 2001); *Watson v Gray* (unrep, Eng CA, 1999); *McCord v Swansea Football Club, The Times* (11 February 1997); *Elliott v Saunders* (unrep, QBD, 1994).

[2] *Richardson v Davies* (unrep, Medway County Court, 11 March 2005); *Sharp v Highlands and Islands Fire Board* [2005] SLT 855; *Elshafey v Seth Clay* (High Court of Justice, Case No MA 091509, 2001); *Parry v McGuckin* (unrep, QBD, 1990); *Condon v Basi* [1985] 1 WLR 866.

[3] See *Smoldon v Whitworth* [1997] PIQR 133; *Vowles v Evans* [2003] 1 WLR 1607; [2003] EWCA Civ 318. For discussion see Charlish P, "Richard Vowles – Rugby Case" (2003) 2 JPIL 85.

under-15 age group, any player must be under the age of 15 as at 1 September in any given year.[4] The tackle which resulted in the injury was made by a player from the opposing team who, on the relevant date, was over this age (at [1]). The defendants were the schoolmaster in charge of the opposing team and his employer, Newlands Manor School.

At first instance there was some controversy surrounding this selection, with the claimant alleging that the older player had been deliberately fielded because of his reputation as "Newlands' exocet missile" (at [2]). The schoolmaster, on the other hand, maintained that he did not know the older boy's actual age. This issue was resolved in favour of the schoolmaster, the trial judge concluding that the admission of not knowing the age was so much against his interests that he believed it and thus any allegation of deliberately playing an over-age child failed (at [2]). Two further issues were raised at trial. First, the claimant suggested that the tackle itself was dangerous and that he had been deliberately swung round with the intention of putting him out of the game (at [2]). Second, it was argued that even if the older child had fallen within the boundaries of the age-group, his size and height were such that he should not have been allowed to play and that the schoolmaster, who was also the referee, ought to have withdrawn him because of the physical threat he posed to the other players (at [2]). Once again, the trial judge sided with the schoolmaster on both of the above points, preferring his evidence as the referee of the game that the tackle was lawful, and accepting the evidence of the joint experts that the physical disparity between the over-age boy and the other players was not objectionable as rugby is a game designed for players of various statures (at [3]).[5] Notwithstanding this, the conclusion of the judge was that the schoolmaster was in breach of his duty of care in selecting the over-age player and that the breach had caused the injury. Accordingly, Newlands Manor School was held vicariously liable for the actions of its employee. The school appealed on two grounds; the first pertaining to the breach of duty, the second relating to causation.

Establishing liability: The question of breach

The outcome of the case, on a cursory reading at least, seems sensible. Yet, when one delves deeper, there is more to it than meets the eye. While the finding of liability by the trial judge was perhaps correct, it is how he got there which was the source of controversy and which provided the two grounds for appeal. The first of these avenues concerned the issue of liability. The school argued that since there was no absolute rule against playing a boy over age, and since the judge found that it would not have been a breach of duty to select the player taking account of his size and weight if he had been under 15, then, despite the schoolmaster not realising the player was over age, he could properly have selected him and, as a result, there was no breach of duty.

In determining the breach at first instance, the judge considered the guidelines for junior rugby issued by the ERFSU, specifically Rule 5. This provides that "players should not normally be allowed to play other than in their own junior age grouping" (at [4]). There was conflicting evidence as to the application of this rule. One of the experts took an absolutist stance, suggesting that since the early 1950s the rule had never been interpreted as allowing a schoolboy player to move down a group (at [5]).[6] The other expert, correctly it is submitted, considered the rule as relative and indicated it was there as a mere guideline, the phrase "should not *normally*" allowing for a certain amount of flexibility that would not appear in a mandatory rule expressed as "*must not*" (at [5]). The judge was convinced by the latter interpretation, accepting there were cogent reasons for flexibility based on educational considerations such as the need to allow a boy who is in a school year below his ERFSU age group to

[4] England Rugby Football Schools' Union, *Guidelines for Junior Rugby*.

[5] The trial judge stressed that the allegation of negligence concerning the schoolmaster's capacity as a referee was a separate and free-standing allegation of fault, which could not be sustained based on the expert evidence as to the unobjectionable size of the older child.

[6] The trial judge rejected the evidence of the expert who took the absolutist view of Rule 5, due to the internal inconsistency of his testimony. While he stated categorically that Rule 5 should not be interpreted so as to move a boy down, he conceded that Rule 5 did allow a boy to play up. On this basis, the absolutist stance seems untenable. The idea that a boy should be allowed to play up raises an interesting legal question in itself. See below n 31.

"play down" because otherwise it would be impossible for him to get a game.[7] Accepting this as the correct understanding of the rule, the judge proceeded to consider how it ought to be applied in practice. He found that the schoolmaster should have been aware that Rule 5 was material and consciously applied it, that he should have known and thought about the player's age, that he should have considered whether there was any sound reason to disapply the norm so as to allow the player to "play down" and, if so, he should have carried out a risk assessment before permitting it (at [7]). The judge concluded (at [10]):

> [T]here was nothing in [the older player's] case to take him out of the norm, he was not eligible to play down and the stage of risk assessment was not reached. The fact that viewed in isolation the physical disparity between [the older player] and other players was not objectionable may have been a reason not to re-apply the norm, but it cannot have been a reason to disapply it in the first place.

Up until this point, the analysis of the judge had been both logical and coherent. However, this statement is confused and, by his own admission, the finding of liability was "curious", given that the physique of the over-age player was not in itself an issue and in this sense the rule preventing the fielding of older players in junior rugby seems arbitrary in its effect (at [11]). It was the latter part of the above statement which was in need of clarification.

The Court of Appeal stated (at [12]) that the judge's ruling on liability was "not as clear as it might be". In an attempt to unravel what was truly meant, Waller LJ suggested the judge appeared to be saying that if there was a legitimate reason for fielding the older boy, the joint evidence as to there being no objection to his physique would have meant that it was acceptable for him to play. This explanation was identified as problematic by the defendants in the sense that if the schoolmaster could have played the older child without being in breach of duty, any breach in failing to be aware of his age had no causative effect (at [12]). Immediately this blurs the distinction between breach and causation but, that aside, it seems clear the Court of Appeal was not prepared to accept this interpretation by the judge as correct. In the opinion of Waller LJ, the correct understanding of the joint expert evidence was that only if the boys were in the correct age bands would the physical size of the larger boy not preclude him from playing. He stated (at [14]):

> There will be some boys who grow more quickly and, subject to them not being so large that they will be dangerous, they should be allowed to play in their age group, but it does not follow as it seems to me that reasoning along the following lines is acceptable. "Since a 15 year old might have been of height X and of weight Y, it is permissible to bring down someone over the age band who is of height X and weight Y." The boy who is older is the size he is and the weight he is because he is more mature.

Accordingly, the Court of Appeal agreed with the finding of liability albeit on a different basis. The court conceded that Rule 5 did provide for some discretion. Nonetheless, the fact that the older boy had been brought down a level increased the risk of injury because it brought a bigger and more mature player onto the field who should not have been there. In short, there were no special circumstances to bring the older boy out of the norm which may have allowed him to be considered for selection. The very fact that he was played when he should not have been was enough to establish a breach. Rule 5, while random in one sense, still has an objective: that is, to protect smaller, less mature boys from being injured by larger boys irrespective of the legality of tackles (at [17]).[8] As was succinctly pointed out (at [14]): "Under 15 means under 15, and schools playing one another would not expect over 15s to be playing." The breach point seems to have been sealed because the teacher never considered the age at all and (perhaps foolishly) owned up to this. If he had said, "I knew he was slightly over age but my risk assessment was that he presented no greater a danger than any game in which boys of different sizes compete", then the outcome may well have been different and presumably he would have escaped liability. The finding of causation, however, is more contentious, as discussed below.

[7] This was the situation in relation to the older player in this case although it was clear there were no special circumstances which would prevent him from otherwise getting a game: *Mountford v Newlands School* [2007] EWCA Civ 21 at [16].

[8] Waller LJ recognised the arbitrary nature of Rule 5 in suggesting that "only a few days, even hours can make the difference once one selects one date in the year as dictating the age band".

There are a number of other significant points. It seems a little strange that the issue of the schoolmaster's liability as a referee was dealt with in such a straightforward manner. In breaching his duty as a team selector, one may logically argue that he was also at fault in his capacity as a referee. This seemed not to be the case. It has been stated by the courts that the threshold for liability of match referees is high.[9] The issue was not one which was raised as a substantive ground for appeal. However, Waller LJ did refer to the finding of the trial judge who was convinced by the evidence of the joint expert witnesses that the physical disparity between the boys was not so dissimilar as to warrant a finding of fault in his capacity as a referee (at [2]). There may well be policy considerations underlying this view in addition to the practicalities of placing an unworkable duty on match officials. It is unrealistic to expect referees to investigate the age of every single player before a match and, unless the size is so disproportionate so as to alert the referee to the possibility of an older player, the finding of no liability in this regard seems sensible. However, of course, one may argue that the content of the duty as a referee may be couched in terms of a duty to take reasonable steps to ascertain the age of players before a game and, if phrased in this way, the expectation becomes more realistic. Irrespective of this, these considerations should not have carried any great weight in *Mountford* as the referee was also the selector and should have known, or at least thought about, the larger boy's age.

There is also the question of volenti.[10] This defence is one which has taken a reduced role generally within the tort of negligence over the years, and it has been suggested by Fulbrook that it plays little if any part in a sporting context.[11] In respect of sport, a most confusing aspect of this defence is the interchangeable way in which the terms "volenti" and "consent" are used.[12] As Jones has suggested, "consent" is sometimes misused to justify a lower measure of the standard of care. Conduct that will be sufficient to satisfy the legal standard of reasonableness will vary with the circumstances and the fact that the behaviour which caused the harm occurred in the course of a competitive sport is relevant to this question.[13] This is perhaps best exemplified in this manner: players only consent to the inherent risks in a properly played and run game; if they are injured as a result of conduct that falls within this bracket, such as a hard but fair tackle in rugby, there can be no negligence for the defence of volenti to bite on. If, however, they are injured as a result of behaviour that is clearly beyond what is reasonably expected within the rules and customs of the game, they cannot be said to have "voluntarily assumed" this risk and thus the defence of volenti is negated.

Two further issues arise in the context of the present case. First, the essence of the volenti defence is that the claimant is fully aware of the risk and willingly accepts it.[14] The claimant (and the other players) would not have known of the risk of playing against the older competitor and, perhaps more significantly, it is possible that the players were denied the freedom of choice. In the context of schoolboy sport, it is highly likely that players are selected to play and *told* to "get on with it", something which clearly runs contrary to any notion of voluntary assumption of risk.

Second, it is arguable, at least, that consent is not a meaningful concept in the framework of junior rugby. Policy considerations ought to dictate that schoolchildren are too young to consent to the risk of significant injury and the role of the law is to prevent this from happening. While in the present case the children involved were, in all probability, sufficiently mature to understand the nature and

[9] *Smoldon v Whitworth* [1997] PIQR 133 at 139.

[10] Volenti non fit injuria is a voluntary agreement by the claimant to absolve the defendant from the legal consequences of an unreasonable risk of harm created by the defendant, where the claimant has full knowledge of both the nature and extent of the risk. For discussion see Jones MA, *Textbook on Torts* (8th ed, Oxford University Press, 2002) p 591.

[11] See Fulbrook J, *Outdoor Activities, Negligence and the Law* (Ashgate Publishing, 2005) p 178. See also *Smoldon v Whitworth* [1997] PIQR 133 at 147; *Wooldridge v Sumner* [1963] 2 QB 43 at 56 (Lord Diplock). For further discussion see Kevan T, "Sports Personal Injury'" (2005) 3 ISLR 61. The limited application of volenti is sometimes attributed to the development of contributory negligence. For a general discussion of the reduced role of volenti and of the increased role of contributory negligence see Rogers WVH, *Winfield & Jolowicz on Tort* (17th ed, Sweet & Maxwell, 2006) pp 1063-1080.

[12] For discussion see Jones, n 10, pp 598-599.

[13] Jones, n 10, pp 598-599.

[14] Fulbrook, n 11, p 178.

magnitude of the risks involved in the game, the point remains that they should still be precluded from consenting to grave risks caused by wanton lack of care.

Causation

As to the second ground of appeal, it was suggested that the trial judge was not entitled to make a finding of causation. This was because, even if there was a breach of duty, since a boy of the over-age player's size and weight could have played and performed the lawful tackle, and since the size and weight of the player did not contribute to causing the claimant's injury, there was no causal link established (at [1]). The judge dealt with the issue rather briefly and it was submitted by counsel for the appellant that his ruling was tantamount to suggesting that, based on what the experts agreed in relation to the older player's physique, a mere breach of the rule as to age established causation (at [21]). It was submitted that, if the judge had intended to hold that the player's size and weight had materially contributed to the injury, he would have said so in explicit terms, something which he clearly did not do (at [21]). If this were to be the case, in one sense the decision of the trial judge could be described as one which held the schoolmaster liable in negligence merely because he breached his duty and, as such, a fundamental requirement of the tort was overlooked.

The Court of Appeal perhaps sought to guard against this by agreeing with counsel for the respondents. Waller LJ relied on the House of Lords decision in *Chester v Afshar* [2005] 1 AC 134 at [95] to set out the rule:

> The fact that the risk eventuated at a particular time or place by reason of the conduct of the defendant does not itself materially contribute to the claimant's injury unless the fact of that particular time or place increased the risk of the injury occurring.[15]

On the Court of Appeal's interpretation of the facts, it was established that the tackle which was performed, despite being lawful, was the kind of physical tackle which a bigger boy does perform on a smaller boy (at [21]).[16] The increased risk that the rule was meant to guard against transpired and the older player's physical maturity contributed materially to the injury the claimant suffered. Waller LJ did concede, however, that if the case had "concerned some incident which could have nothing to do with the size and weight there might be some doubt about this conclusion" (at [23]). What seems evident from this is that the finding of causation was connected very much to the nature of the tackle itself and could only be upheld if the Court of Appeal were prepared to interpret this generously, in a way that size and weight became a "live" issue. While they did just that, what is of interest here is that this seems at odds with the evidence that was presented at trial. Essentially the tackle was deemed to be legal and, as the physical size and weight of the older boy was not objectionable, was one that could have been made in the normal course of play between boys in the same age group (at [3]). On this analysis, one which is supported by the evidence accepted at trial, it becomes very difficult to reconcile the finding of causation with the traditional legal principles which govern this aspect of the tort.

The teacher appears to have been his own worst enemy by suggesting that if he had known of the older boy's age he would not have played him (at [15]). On one interpretation, this is perfect "but for" causation. Alternatively, the teacher may just have been intimating that, with the benefit of hindsight, knowing what he knows now, he wished he had not played him. That aside, the notion of *increasing* the risk of harm stems from *McGhee v National Coal Board* [1973] 1 WLR 1 and is a lesser and different standard than normally applies.[17] It is available only in cases where scientific uncertainty denies the claimant the chance to meet the conventional standard. In this regard, arguably, Waller LJ

[15] Citing McHugh J in *Chappel v Hart* (1998) 195 CLR 232.

[16] The tackle was described as one which was not round the legs and that the older player got hold of the claimant and physically twisted him to the ground.

[17] For a general discussion see Rogers, n 11, pp 279-286; Hoffmann L, "Causation" (2005) 121 LQR 592; Stapleton J, "Loss of the Chance of Cure from Cancer" (2005) 68 MLR 996.

was in error citing *Chester v Afshar*. That case, among others,[18] is in a special category with a special causation rule; it was decided as it was in order to give meaningful content to a very specific duty and to avoid perpetrating a grave injustice.[19] The claimant must usually prove, on the balance of probabilities, that the defendant's breach actually *caused* the claimant's damage. In the present case, this was not done. Ultimately, all that happened was that the claimant was grabbed and thrown to the ground, something which anyone on the opposing team might have done. Neither the nature of the tackle, the player's age, size or weight were causally material. The only issue that did seem to be of significance was his maturity, an ambiguous concept conceivably covering a range of factors such as him being stronger, wiser or perhaps even less (or maybe even more) reckless. It certainly seems evident that the court imposed a lower standard of causation here; the question is why. What are the justifications for this? There were no complicated aspects involving scientific and medical uncertainty, and where was the manifest injustice? Possibly the only injustice here is that the school was held liable in a case that should have been dealt with using the traditional principles of causation.

SPORT, LAW AND SOCIETY

The law and sport: Rules, guidelines and questions of interpretation

In one sense, the Court of Appeal took a pragmatic and commonsense approach to the question of liability. Given that there were no special circumstances, it seems only fair that the school was vicariously liable for the careless actions of one of its employees in fielding an older player which resulted in injury to one of the younger competitors. While the Court of Appeal attempted to clarify the decision of the trial judge, this case raises a number of interesting questions regarding the legal status of guidelines in sport.

It has been stressed time and again by both the courts and commentators that guidelines are precisely that, and ought not to be confused with steadfast rules of law.[20] Waller LJ, discussing the nature of Rule 5, suggested that "the rule is not a rule of law such that a breach will bring about an automatic finding of liability. The guidance does however inform as to the content of a duty" (at [8]). It was accepted by both the trial judge and the Court of Appeal that the correct interpretation of Rule 5 was that it was not absolute and did provide some scope for flexibility. It was essentially there to provide guidance but it was qualified by the word "normally". The basis for this discretion was where there were some special circumstances present. This point was unproblematic for the Court of Appeal as it was clear that such special circumstances did not exist and, on the facts, there was no legitimate reason for selecting the older player. However, this allowed the appellate court to skirt around the issue of discretion and how it ought to be exercised.

In comments made obiter, it was suggested that even if there had been the presence of some special circumstances which would give cause to disapply the norm, if the schoolmaster had known the boy was older and had also taken account of his superior size, weight and maturity, then he should not have selected him without making a risk assessment.[21] In this regard, it appears the Court of Appeal overlooked the nature of the joint expert evidence that the size was not objectionable and that

[18] For example, *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32. For further discussion see Jones MA, "Proving Causation – Beyond the But-For Test" (2006) 22 PN 251; Porat A and Stein A, "Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen and Fairchild" (2003) 23 OJLS 667; Miller C, "Judicial Approaches to Contested Causation: Fairchild in Context" (2002) 1 *Law, Probability and Risk* 119.

[19] Some commentators, one of the present authors included, perceive *Chester* as a departure from the traditional rules of causation in order to give true effect to the right of autonomy. For discussion see Devaney S, "Autonomy Rules OK" (2005) 13 Med L Rev 102; Heywood R, "Informed Consent Through the Back Door" (2005) 56 NILQ 266.

[20] This has recently been discussed in relation to formulating the standard of care in clinical negligence. Guidelines from the General Medical Council (GMC) and the Department of Health (DOH) are acknowledged as having no legal force, but they do help to dictate reasonable professional practice. For discussion see Samanta A et al, "The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the Bolam Standard" (2006) 14 Med L Rev 321; Jones MA, "Informed Consent and Other Fairy Stories" (1999) 7 Med L Rev 103 at 125.

[21] Organisers, coaches and referees may find themselves in high-pressure situation where both sets of players, coaches and perhaps even supporters want the game to go ahead. This raises an interesting question about the extent of such a risk assessment and how effectively it can be performed on the "spur of the moment". Clearly, the duty cannot be too onerous and the officials

"players of similar disparities have played together in a safe manner at under 15 and under 16 levels" (at [3]). Thus, interpreting the evidence as meaning that *only* if the boys were in the correct age group then the physical size would not preclude the larger boy from playing is strange. It seems to defeat the very discretion that Rule 5 seeks to provide. For example, if there had been something special which would have made it impossible for the older player to otherwise get a game, the schoolmaster, being aware of his age, *may* have been entitled to select him as long as his physique was not so disproportionate so as to create a danger to the other players.[22] Clearly, a risk assessment should be undertaken before selecting such a player but, if the evidence suggests that the difference in size is acceptable and not dangerous (as the expert testimony seemed to suggest here), there is the theoretical possibility at least of legitimately "playing down". This seems to be the very premise upon which Rule 5 is built, and it is contended that the obiter comments made by Waller LJ in the Court of Appeal are inconsistent with the flexibility required in its application. Even though the trial judge was far from clear in the manner of his expression, it is possible that, without realising it, he was actually closer to an accurate explanation of Rule 5 than his counterparts in the Court of Appeal. If the guidance provided by Rule 5 is construed as narrowly as the appellate court suggests, this may have a knock-on effect for junior rugby at all levels.

Reflections on the educational benefits of sport in society

There is a wealth of literature highlighting the benefits of encouraging and developing sport within society.[23] Some of these include improved physical fitness and health; reduced risk of stress, anxiety and depression; increased quality of social interaction; and enhanced self-discipline and responsibility. Nevertheless, there are certain aspects of sport which could be viewed negatively. While some of the advantages of being involved in sport are that it engenders social status, social acclaim, respect and admiration,[24] there are a number of potential drawbacks which are highlighted by feminist writers.[25] There have been studies which suggest that participation at school level can lead to the encouragement of violence, aggression and control in certain male-dominated sports.[26] Rugby is a classic example of a game which stimulates this attitude. Light and Kirk recently suggested that schoolboy rugby was taught in a way which produced a "class specific form of masculinity connected to ideals of physical domination, competitiveness and toughness"[27] and that it "encouraged notions of appropriate masculine behaviour connected to domination through physical force and intimidation".[28] This has knock-on effects as it can lead to institutionalised bullying and the exclusion of certain groups of participants from the sport based on class, social status and gender. If these attitudes are carried over into other areas of everyday life, such as the workplace, they may have a detrimental effect on society in a wider context.

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can only be expected to make a reasonable assessment of the risks inherent in playing older individuals. The surrounding circumstances must be taken into account. However, it ought to be noted that in the present case there was no "agony of the moment decision", given the role of the defendant as a selector.

[22] In order to make this decision it is, of course, essential to engage in a suitable risk assessment as was stressed by the trial judge (at [7]). While it was not an issue in the present case due to the absence of special circumstances, the expert evidence suggested that the older player should have been played on a trial basis (at [10]).

[23] For discussion, see ACHPER, *Australian Fitness Education Award* (Australian Council for Health, Physical Education and Recreation, 1996). Both the European Union Amsterdam (Declaration (No 29) on Sport, annexed to the final Act of the Treaty of Amsterdam [1997] OJ C340/136) and Nice (annex to the Conclusions of the Nice European Council, Bulletin EU, 12-2000) Treaties pay specific attention to the importance of sport in society.

[24] For discussion, see Malaxos S and Wedgwood N, *Teenage Girls' Perceptions of Participation in Sport* (Women's Sport Foundation of Western Australia, 1998).

[25] See Hargreaves J, *Sporting Females: Critical Issues in the History and Sociology of Women's Sport* (Routledge, 1994); Hargreaves J, "Sex, Gender and the Body in Sport and Leisure: Has There Been a Civilising Process?" in Rojek C et al, *Sport and Leisure in the Civilising Process* (Macmillan, 1992).

[26] For discussion see Connell RW, *Masculinities* (Allen & Unwin, 1995); Gramsci A, *Selections from Prison Notebooks* (Lawrence & Wishart, 1971).

[27] See Light R and Kirk D, "High School Rugby, the Body and the Reproduction of Hegemonic Masculinity" (2000) 5 *Sport, Education and Society* 163 at 174.

[28] Light and Kirk, n 27 at 174.

A feminist perspective does not necessarily demand that individuals should refrain from taking part in violent and aggressive sports, as taken to the extreme this could mean that girls should be prevented from playing hockey because it is too rough. Rather, it might seek to promote different, more liberal and accepting attitudes within such sports.

In order to eradicate entrenched cultural attitudes within male-dominated sports such as rugby, what is needed is a fresh approach to coaching and development from the grass-roots upwards. This will inevitably come from the attitudes of those who are involved in the organisation and administration of sport. Rugby, in addition to other sports, requires open-minded individuals to take the game into the modern era by encouraging a range of participants from varied backgrounds who are of different genders.[29] One potential drawback with the decision in *Mountford v Newlands School* [2007] EWCA Civ 21 is that it may well discourage the organisation of mixed-team games because some women involved may be at risk in the same way as the younger boys in the case. It has been voiced strongly that the threat of litigation should not be used to curb the development of sport and the wider social benefits it brings.[30] However, *Mountford v Newlands School* carries potential implications for the organisers of junior sport and could serve to deter the very individuals that sports like rugby need in order to develop contemporary attitudes within the game itself and within society generally.

The law, public policy and junior sport

The ramifications of this decision will be apparent to those who have been involved in junior sports at all levels be it as player, coach or even referee. It is impossible to say with any certainty the degree to which older players are selected to play down as teams will be reluctant to admit to this practice. However, while it remains conjecture, anybody who has ever played sport at junior level may suggest that this is a frequent occurrence, more so than most realise. The fact that it will often go unnoticed proves this very point. Coaches and team organisers may not do this with any malicious intent and may not be tainted with improper motives such as the need to win at all costs; circumstances may well dictate that it is necessary to play a competitor down (or indeed up)[31] in order to encourage participation and maintain interest in their sport. This applies to all team sports, especially to rugby. Rugby is a classic example of a sport that has traditionally suffered at schoolboy level and also at junior club level because it is not as popular as other team games. This and a number of other sports are undoubtedly "catching up" in popularity stakes but it has been a slow progression.[32] For example, there are more junior football teams in terms of both schools and clubs, thus making it easier not only for children to get a game, but also for coaches to field a side given that they have a wider pool of players from which to select.[33] It is not always this easy for rugby, a sport which requires more team members with fewer people to choose from. This problem is further compounded by a recent alteration to the scrummaging rules. The laws of rugby union are now framed very specifically with

[29] It has been suggested in a recent study that more schoolgirls would take part in rugby if it was fun, exciting, offered positive social team interaction and was safe: see Adamson D et al, "Perceptions of Secondary School Girls Towards Playing Rugby Union" (2004) 51 *ACHPER Healthy Lifestyles Journal* 28.

[30] Blair A, *A Sporting Future for All* (Department for Culture, Media and Sport, 2000) p 2.

[31] There is an interesting legal issue here that is perhaps worthy of note. Liability in this case hinged on the decision to play a boy "down". However, once again those who have played rugby at junior level will acknowledge that often if there is a younger player who is very talented and physical, he will often be "played up". Notwithstanding the acknowledgment from both experts that Rule 5 allows this to happen (at [5]), a strict interpretation may prevent this. What would be the situation if the younger player was then played up and got injured as a result of a tackle from an older player? This problem is further compounded by Rule 6 of the ERFSU guidelines which states no junior can play against adults, ever. Would the injured younger player have a claim against the selectors? It seems possible, subject to the defence of volenti. However, in practice it seems that the defence has little or no practical application, certainly where participant-on-participant injuries are concerned. See discussion above.

[32] The Rugby Football Union (RFU) *Annual Report 2006* states there are 2,944 schools which have ERFSU membership and 450 and 550 schools taking part in the Under 18 and Under 15 Daily Mail Schools Cup respectively. In 2005 there were 79,000 youth players and the objective is to increase this to 93,000 by the year 2013, a 2% increase per year over the planned period. See http://www.rfu.com viewed 2 March 2007.

[33] In comparison to the numbers cited in n 32, the official website of the English Football Association (FA) suggests that four million children play football in England. There are 123,000 affiliated teams, over 2,000 sanctioned leagues and over 45,000 pitches. See http://www.thefa.com/TheFA/TheOrganisation viewed 2 March 2007.

the aim of minimising danger for participants playing in the front row. This can only be viewed as a good thing. However, the new rules dictate that each player in the front row and any potential replacements must be suitably trained and experienced.[34] In the variations provided for play among Under 19s, the laws are even more restrictive. If a team nominates 22 players, it *must* have at least six players who can play in the front row in order that there is replacement cover for the loose head prop, hooker and tight head prop.[35] The consequences are that many games face the danger of being cancelled due to a lack of reserve coverage in the front row.[36] Selectors are often faced with the difficulty of not being able to locate enough players to raise a team, and sometimes, in order to find the required numbers and necessary experience for a squad, it is necessary for individuals to be "played down", as well as "played up".

The organisers of junior rugby are faced with a difficult situation here, and one may be forgiven for showing them a degree of sympathy. If they are confronted with a choice of cancelling the game altogether due to lack of players, or allowing the game to go ahead with a mixture of players from different age groups, some higher and some lower, which should they opt for? It is submitted that in order for the game to develop at youth level, it should be the latter, subject to the caveat that it does not create any unreasonable danger. A liberal interpretation of Rule 5 would allow this to happen, and this may well have been one of the reasons why the ERFSU left some room for discretion in its drafting. The special circumstances which take the rule out of the norm could well be where games have to be cancelled due to lack of numbers altogether; this will not only preclude an older player from getting a game, but also those who are in the correct age band. It is not the purpose or indeed the intent of the authors to suggest the importance of fielding a team should take priority over player safety, particularly at junior and schoolboy level. The argument is simply that as long as the referee and everyone involved is made aware of the situation beforehand,[37] and agrees to it, and subject to there being a suitable risk assessment carried out, it would more often than not be acceptable for games to proceed involving players of mixed age groups. An overly restrictive interpretation of Rule 5, seemingly encouraged by the Court of Appeal, may deter organisers from exercising a degree of welcome flexibility.

There is, of course, the counter-argument that it is not necessary to abandon matches altogether and that they could be played with reduced numbers on each side, uncontested scrums and/or the imposition of a non-contact "touch" match. This, to most, may appear the safer and more sensible option. Yet it runs contrary to the true nature of rugby, stifling its development at higher levels and ignoring its competitive spirit. First, in order to raise the profile of less popular sports it is sometimes necessary to promote a competitive spirit and rugby is a classic example of a sport with a renewed infrastructure at junior level aimed at achieving this.[38] Juniors will more often than not wish to play competitively against other teams in a league environment or cup tournament as this stimulates interest. If this is not allowed to happen because matches are being cancelled altogether, or because they are being played with reduced numbers in a manner that does not reflect truly the way in which

[34] International Rugby Board (IRB), *Laws of the Game* (2007) Law 3.5(b).

[35] International Rugby Board, n 34, Law 3.5(c).

[36] Recently there has been a campaign by the RFU to attract both old and new front row players to the game. See Jones S, "Wanted: Big Lads to Prop Up Game", *Sunday Times* (20 Jan 2002). The article states: "The problem is: no props, no game. It is dangerous for the unwary and the untrained to play in the front row, because of the safety issues of collapsed scrums. 'Sometimes', says James Winterbottom, coordinating the campaign for the RFU, 'you could get 12 players hanging round and not getting a game because there are no props for their team.' The estimated 20% drop-off in numbers playing rugby is judged to be partly down to the prop shortage."

[37] There is a point of contention here. Occasionally, both teams and individual players at junior level may attempt to deceive a match official in relation to age in order to gain an advantage. Clearly there are some situations where it is easy to determine that players are above or below their relevant age group. However, this will sometimes be very difficult to do. What steps does a referee have to take to establish a player's actual age? In the heat of the moment it is more or less impossible to prove this point with any degree of certainty, and some players are physically advanced for their age. It seems this would form part of the referee's overall risk assessment as discussed in n 21 and all that can be expected is that reasonable steps are taken to ascertain a child's true age. What would constitute reasonable steps remains very difficult to define.

[38] The RFU's *Annual Report 2006* suggests a growth in competition rugby. Throughout the RFU junior knock-out cup rounds there was an increase in matches played of 12.5% compared with 2004-2005. In the leagues, over 96% of matches were played

the sport should be played, interest may dwindle. Second, the suggestion of reverting to "touch" rugby or "uncontested" scrums arguably negates two of the most important skills inherent in the game, namely tackling and scrummaging. This creates a problem. These skills need to be developed at junior level in order that they can be executed correctly at senior level; to deny juniors the opportunity to do this in a match situation creates the real danger that, upon entering the adult game, they will cause injury to themselves and others due to their lack of experience and technique. Thus, arguments in relation to modifying the way in which junior rugby is played instead of permitting players to move up and down an age bracket in order to play the game correctly potentially create real dangers for the expansion of the sport, but also for players themselves.

CONCLUSIONS

The significance of the decision may well be undermined by the fact that it took so long to come to fruition. Eight years for a relatively trivial case such as this to come to trial surely calls into question the effectiveness of the Woolf reforms.[39] Nonetheless, once this case becomes known to the organisers of junior rugby and junior sport in general, it may cause ripples among those who give up their free time to become involved in such activities.[40] There is some evidence that this decision may already be taking effect, as it was recently reported that a 17-year-old boy who was paralysed after breaking his neck while playing in an adult game, reached a confidential out-of-court settlement without an admission of liability following a claim for damages worth five million pounds.[41] If this trend continues, it could have the effect of deterring volunteers or, at the very least, it may encourage organisers to interpret guidelines in relation to age groups in a way that could stifle the development of their sport. Cause and effect arguments of this nature are difficult to demonstrate as there are a whole host of other factors which may affect junior sport and it is impossible to attribute any change directly to the law.[42] However, if the perception of this ruling is that guidelines issued by sports governing bodies are to be interpreted restrictively, coaches, mangers and administrators may be reluctant to exercise discretion, which in turn may have a negative effect on the organisation and operation of junior sport in a wider context, particularly insofar as widening participation among different gender groups and different social classes in order to promote a change of mind-set within certain male-dominated sports is concerned.[43] This is something which society should not welcome and something which the courts ought to guard against.

(11,602) and participation levels were at a record of 1,243 teams. See http://www.rfu.com viewed 2 March 2007. For further discussion of the game's renewed appetite and future strategic plans to develop "competition" rugby, see England Rugby Football Union, *The Way Forward*, Discussion Document (9 February 2007).

[39] See The Right Hon the Lord Woolf, Master of the Rolls, *Access to Justice: Final Report* (July 1996).

[40] There is an argument that legal judgments are perhaps not disseminated as effectively as they should be. If this is the case, it may indeed never "filter" down to the appropriate people and, if it is not known, its effect will be limited. However, it was evident from the previous Court of Appeal decisions (n 3) that the governing bodies of rugby union took note. In relation to the *Vowles* case, the Welsh Rugby Union issued a press statement on the day of the decision saying, "We are concerned about the judgment which has today been delivered by Mr Justice Holland (sic) and the implications for the game of rugby union" (Press Release from the Welsh Rugby Union, 13 December 2002). There is the added complication that, as a result of this ruling, people may become conscious of "protecting" themselves and the cost of self and third party insurance premiums may increase.

[41] News Bulletin, *The Daily Telegraph* (19 April 2007) p 2.

[42] Similar cause and effect arguments are sometimes raised in medico-legal debate. It has been suggested that the effect of the law has encouraged "defensive medicine". A number of commentators have frowned upon this, highlighting the lack of evidence establishing a direct link between the law and medical practice and also the range of different factors which may affect how medical professionals carry out their duties. For discussion see Baker T, *The Medical Malpractice Myth* (University of Chicago Press, 2005).

[43] See n 29 for discussion.