HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

A E AGAR & ORS APPELLANTS

AND

LUKE DOUGLAS HYDE RESPONDENT

Agar v Hyde [2000] HCA 41
3 August 2000
S159/1999

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Court of Appeal of New South Wales on 19 October 1998 and, in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

P J Deakin QC with A S Bell for the appellants (instructed by Garrett Walmsley Madgwick)

D F Jackson QC with M L Brabazon for the respondent (instructed by McClellands)

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CATCHWORDS

Agar v Hyde
Agar v Worsley

Negligence – Duty of care – Particular relationships – Sport – Administrators and players – Whether duty of care owed by rugby union rule-making body to players.

Private international law – Service out of jurisdiction – Service pursuant to Rules of Court – Discretion – Whether necessary to show a good arguable case – Setting aside service – Refusal to exercise jurisdiction.

Supreme Court Rules 1970 (NSW), Pt 10 rr 1A, 2 and 6A, Pt 11 r 8.

1 GLEESON CJ. These appeals raise the question whether a member of the board of a voluntary sporting association, which has the capacity to make and alter the rules of a sporting contest, is under a legal duty of care to players in relation to the risk of injury.

2 The appellants were individual members of the Board (or, in the case of one appellant, a corporation which was a member of the Union) of an international Union, formed in relation to the sport of rugby football. One of the functions of the International Rugby Football Board ("the Board" or "the IRFB") was to frame and interpret the rules of the sport, called the "Laws of the Game". The Board met once a year, usually, although not invariably, in London. The individual appellants attended annual Board meetings as representatives of national member unions.

3 The respondents are both men who, whilst playing the sport in local competitions in Australia, suffered serious injury. At the time of their injuries they were aged 19 and 18 respectively. They have sued various people, and organisations, (including the respective match referees, and local authorities involved with the control and management of the sport), in respect of those injuries, for damages for negligence. The present appeals are not concerned with those claims.

4 The respondents contend that the rules in force at the time they suffered their injuries were such that they were exposed to unnecessary risk. The particular deficiencies in the rules, of which complaint is made, are said to relate to the formation of scrums.

5 Fundamental to the claims made against the appellants is the contention that, by reason of the capacity of the Board to make and change the rules of the game of rugby football, each appellant owed a duty of care to all players of the sport, including the respondents. The content of that duty was formulated in oral argument as a duty to take reasonable care in monitoring the operation of the rules of the game to avoid the risk of unnecessary harm to players. In the course of further argument, the reference to monitoring the operation of the rules was altered to taking reasonable care to ensure that the rules did not provide for circumstances where risks of serious injury were taken unnecessarily.

6 In the argument for the respondents, references to "injury" were often made as references to "serious injury". On any view, the injuries suffered by the respondents were serious. However, if there is a duty of care related to risk of injury, there is no reason in principle to limit it to serious injury, and there are practical difficulties in seeking to do so. Depending upon the circumstances, what might be a minor injury to one person might have serious consequences, physical or economic, for another. It may be that the risk of injury from playing rugby football is so obvious, and the occurrence of injury to players so common, that unqualified references to injury were regarded as forensically embarrassing.

Whether a solution can be found in the concept of "unnecessary risk" is a matter that will be considered below.

7 The existence of the asserted duty of care forms the central issue in these appeals. The context in which the issue arises, and the facts of each case, are explained in the reasons for judgment of other members of the Court.

8 The outcome of the appeals does not turn upon competing views as to the meaning and operation of Pt 10 of the Supreme Court Rules 1970 (NSW). I see no error in the approach to the relevant rules taken by the Court of Appeal in the present case[1]. The Court of Appeal stressed that, when considering, on an application for leave to proceed under Pt 10 r 2, whether there is a good arguable case, the test is to be related to the jurisdictional nexus required by Pt 10 r 1A, not the merits of the claim for relief[2]. It held that, in the present case, the test was clearly satisfied[3]. On the discretionary aspects of Pt 10 r 2, Pt 10 r 6A and Pt 11 r 8, the Court of Appeal attached no practical significance, adverse to the respondents, to assertions that the jurisdiction invoked was exorbitant, and that restraint was appropriate[4].

9 The important point of difference between Grove J, at first instance, and the Court of Appeal, concerned Grove J's conclusion, expressed in terms of proximity, that the material before the court justified and required the conclusion, even at this interlocutory stage, that there was no duty of care of the kind alleged by the respondents to be owed to them by the appellants. The Court of Appeal disagreed with that conclusion, but acknowledged that, if the conclusion were correct, Grove J was right in refusing to grant leave under Pt 10 r 2[5]. By implication, the Court of Appeal also approved the further order made by Grove J, setting aside service of process on the appellants, under Pt 10 r 6A. It does not matter for present purposes whether the rubric of Pt 10 r 2 or Pt 10 r 6A is invoked. If Grove J was correct in holding that the present is a case where, even in the absence of a hearing on the facts, it is proper to conclude that the claims made against the appellants are bound to fail, then the respondents should not be permitted to proceed with those claims. For the reasons which follow, I consider that Grove J was correct. The appellants did not owe the respondents a duty of care of the kind upon which the claims against them depend. That

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1 *Hyde v Agar* (1998) 45 NSWLR 487.

2 (1998) 45 NSWLR 487 at 504.

3 (1998) 45 NSWLR 487 at 511.

4 (1998) 45 NSWLR 487 at 509-510.

5 (1998) 45 NSWLR 487 at 511-512.

appears from the material already before the Court, which consists of the pleadings and undisputed evidence explaining a number of the matters referred to in the pleadings. There is no reason to suppose that evidence might emerge at a trial which would alter that position.

10 The question which arises is not whether those who are, in one way or another, concerned with making, altering, and interpreting the rules of the game of rugby football are, or should be, interested in the safety of players. They would probably all agree that they should be, and would probably all maintain that they are. It is common ground that, from time to time, rules are changed with considerations of safety in mind. What is in issue is not a matter of moral obligation, or social responsibility, but a legal duty of care, breach of which might result in liability in damages to any participant in the sport, anywhere in the world, for any injury suffered in consequence of the breach.

11 The Court of Appeal pointed out that claims for damages by people engaged in sport are not novel. Their Honours said (omitting references to authorities)[6]:

> "After all, opposing players can already sue each other for intentionally and negligently inflicted injuries; they can sue the referee for negligent failure to enforce the rules; and the sports administrator that dons the mantle of an occupier assumes well-established duties of care towards players, spectators and (in the case of golf clubs) neighbours. A duty of care is not negated merely because participation in the sport is voluntary."

12 Whilst declining to express any concluded view, especially in the light of the significance of issues of policy which it was thought would require elucidation and examination at a final hearing, the members of the Court of Appeal (Spigelman CJ, Mason P and Stein JA) identified control and reliance as the key to any potential duty of care. They said[7]:

> "There are clear indications that the IRFB saw itself as the law-giver for the sport of rugby and that it regarded the safety of players as an important factor. Serious injuries are not uncommon. There is evidence of assumption of control by the members of the IRFB board and tenable allegations of reliance by players of the sport. This is arguably the basis of an assumption of responsibility giving rise to a prima facie duty of care, albeit one that may be relatively easy to discharge. The class of potentially affected persons may be very large, but it is finite and readily identifiable."

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6 (1998) 45 NSWLR 487 at 513.

7 (1998) 45 NSWLR 487 at 512-513.

13 It will be necessary to return to the nature of the control which is here said to exist. It is to be noted, however, that it is not control of the kind that might exist where the participants in the risky activity concerned are subject to legal compulsion, or are in a relationship involving protective care of a parental or educational kind. We are not dealing, for example, with children playing compulsory sport at school, or with people in an employer-employee relationship. We are concerned with adults participating voluntarily in amateur sport. The concept of control requires closer analysis in a context such as the present.

14 Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity[8]. That, however, is not to deny the significance of voluntary participation in determining the existence and content, in a given case, or category of cases, of an asserted duty of care.

15 People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged. Sport commonly involves competition, either between individuals or teams. A sporting contest might involve body contact where physical injury is an obvious risk, or the undertaking by individual competitors of efforts which test the limits of their capabilities in circumstances where failure is likely to result in physical harm. Rules are of the essence of sporting competition. Individuals, or teams, wishing to compete must agree, personally or through membership of some form of association, upon the rules which will govern their competition. In the case of rugby football, as in the case of many other sports, there are layers of voluntary associations, from a local to an international level, which provide facilities for individuals who wish to enjoy the game to participate in contests, and which, as part of providing those facilities, make, amend, interpret and enforce the rules of the game. Making and changing the rules may require giving weight to many considerations, some conflicting. It is not in dispute that they may include considerations relating to the safety of participants in the sport. It is at this point, and in this context, that the question of a legal duty of care arises.

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

16 The Court of Appeal said that the IRFB is a law-giver, and controls the game. The appellants are sued as individuals; and the essence of the respondents' complaints is that the Board did not change the rules which were in force at the time of the matches in which they were injured. The respondents claim that the rules about scrummaging which were then in force, (and, by inference, the rules as they had been in force for a long time), required amendment in the interests of the safety of players. No individual appellant could amend the rules. No individual appellant controlled the game internationally. No individual appellant was a law-giver. The most that can be said is that each appellant was one of a number of participants in a process by which, from time to time, the rules of the sport at an international level could be made and changed. There were other participants in the same process who have not been sued, but that simply serves to emphasise that it is individual responsibility that is in question, even though it is said that the appellants had that responsibility as members of a group. To speak of persons who were sent once a year to London, as representatives of national unions, as controlling a game of football played in a Sydney suburb, or a country town, by reason of their collective capacity to alter the international rules, is to speak of a remote form of control.

17 The content of the suggested duty is elusive. Reasonableness is the ultimate test, but reasonableness can only be determined in a context. The obligation, it is argued, is to see that the rules of the game do not expose players to unnecessary risk of serious injury. The risk of young men having their necks broken is a matter to be taken seriously; but some would say the same about other, and lesser, risks associated with rugby football. The game is based on activities such as tackling, scrummaging, rucking and mauling which, by the standards of most members of the community, are obviously dangerous, and which regularly result in injuries which many people, even if not all footballers, would regard as serious. By reference to what standards are such risks to be classified as necessary or unnecessary? What is an unnecessary risk in an inherently dangerous sport? When an obviously risky activity is engaged in, voluntarily, for pleasure, by an adult, how does a court determine whether a certain level of risk is unnecessary?

18 The qualification, "unnecessary", is of critical importance to the respondents' argument. If it were removed, the contention would be manifestly implausible. But ideas of what is an unnecessary risk in playing a sport vary widely. It is probably the case that most people in the community would not play rugby football, and would regard any possible pleasure associated with the game as being outweighed by the risk of injury. Even amongst enthusiasts, there would be differing views as to the degree of risk that is acceptable. Individuals playing in the one match might have different levels of risk they are personally willing to accept. There are sports, including some codes of football, which carry much less risk of injury to players than rugby football. There is no objective standard by reference to which it is possible to decide that a given level of risk involved in rugby is acceptable, but that beyond that level, it is

"unnecessary". The high degree of subjectivity of an assessment as to what level of risk inherent in the sport, as played according to a certain set of rules, is unnecessary, is a factor which weighs against a conclusion that there is a legal duty which, in its practical application, depends upon such an assessment. Furthermore, the risks involved in playing a body-contact sport arise from various sources. A risk might be inherent to an individual player with a particular vulnerability. Or it might result from the vigour with which an opponent, or a team-mate, plays. It cannot be the case that all avoidable risks have to be eliminated. The only way to avoid risk of injury is not to play. No doubt the rules of the game could be altered in many respects to make it safer, but people who enjoy playing, or watching, rugby football have other priorities.

19 Although the Court of Appeal denied that this would be a case of indeterminate liability, the extent of the potential liability is confined only by the number of people who choose to play the sport anywhere in the world. According to the Bye-Laws of the IRFB, at the relevant time, the first of the stated purposes for which the Board existed was to determine and safeguard the principles relating to amateurism in rugby football. Such an amateur sport may be played in many countries, in widely different circumstances, ranging from organised competitions to casual games, by people of different ages, physical abilities, vulnerabilities, and degrees of skill, enthusiasm, recklessness and courage. It is said that there is a duty, in relation to the rules of the sport, to take reasonable care to protect them all against unnecessary risk of injury. For practical purposes, the liability is indeterminate.

20 It cannot be denied that, to paraphrase the words of Lord Atkin in *Donoghue v Stevenson*[9], players of rugby football are so closely and directly affected by what the IRFB does that members of the Board ought to have them in contemplation as being so affected, but neighbourhood in that sense is not the issue in the present case. Of course, the rules of the game affect the players of the game. It is equally clear that the rules will expose the players to the risk of injury in the sense that they will lay down the conditions of a physical contest in which some people are likely to be hurt. In that respect, harm is foreseeable. It does not follow that the members of the Board were under a legal duty of care to the players of the game of the kind presently alleged. No existing category of case in which a duty of care has been held, in this Court, to exist, covers the present. That is not determinative, but it is significant. The Australian cases in which a duty of care has been found to exist in a sporting context are distinguishable from the present, and no attempt is made to argue that they are directly in point.

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9 [1932] AC 562 at 580.

21 The Court of Appeal said that, if a duty exists, its foundation is the combination of control and reliance. As appears from what has been said above, the control attributed to the members of the Board was remote from the respondents, and extended only to participating, or having the capacity to participate, in a process of laying down the conditions of a sporting contest in which people might voluntarily engage. As to reliance, the sporting contest involved an obvious risk of injury; a risk that would be affected by a number of factors, including the attitudes, capacities, and propensities of individual players, which are beyond the influence of the appellants. The suggested duty is of uncertain content. The liability sought to be imposed upon people in the position of the appellants is practically indeterminate in extent.

22 In *Donoghue v Stevenson*[10], Lord Macmillan said:

> "In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life."

23 I am unable to accept that the circumstances of life in this community are such that the conception of legal responsibility should be applied to the relation which existed between the appellants and all people who played the game of rugby football and were, on that account, affected by their action or inaction in relation to the rules of the game. Undertaking the function of participating in a process of making and altering the rules according to which adult people, for their own enjoyment, may choose to engage in a hazardous sporting contest, does not, of itself, carry with it potential legal liability for injury sustained in such a contest.

24 I would allow the appeals with costs, set aside the orders of the Court of Appeal and order that the appeals to that Court be dismissed with costs.

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10 [1932] AC 562 at 619.

25 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. These two appeals raise questions about the assumption and exercise of jurisdiction by the Supreme Court of New South Wales over defendants who have been served with originating process outside Australia. Both appeals are brought by defendants who were served outside Australia with a Statement of Claim by which (in each case) the plaintiff claimed damages for personal injuries he sustained when playing rugby union football in a match conducted in New South Wales. The immediate question is whether the Court of Appeal of New South Wales (Spigelman CJ, Mason P and Stein JA) was correct in allowing an appeal from the orders of the primary judge (Grove J) and concluding (in effect) that there should be orders in both actions refusing to set aside service of the process outside the jurisdiction; granting leave to proceed against those defendants who had been served outside the jurisdiction; extending the limitation period up to and including the date upon which the defendants were, by the order, deemed to have been served; and making certain consequential orders[11].

The claims in *Hyde v Agar*

26 The plaintiff, Mr Hyde, who is the respondent to one of the present two appeals, alleges in the Further Amended Statement of Claim which was served on the overseas defendants that, on 23 August 1986, he was playing rugby football in the position of hooker for the team from the Warringah Rugby Club Ltd in a first grade Colts game against a team from the Gordon Rugby Club Ltd. Paragraph 14 of the plaintiff's pleading alleges that:

> "Shortly after half time a scrum was directed to be formed by the Fifth Defendant [the referee of the match]. The front row of the scrum which comprised the Plaintiff and the two props supporting him had not formed into position when the players from the Seventh Defendant's [the Gordon team's] scrum which had then formed charged into the Plaintiff. The Plaintiff's neck was positioned at such an angle that when it was struck by the force then exerted by the opposing players the Plaintiff's neck was broken and he suffered severe spinal injuries."

27 Nine defendants, or groups of defendants, are sued. The first group, referred to collectively as the "first defendants", comprises 12 individuals (of whom several are now dead) who, it is alleged, were "representatives of the Member Unions on the Council" of the International Rugby Football Board ("the IRFB") and who attended meetings of that Council held in April 1986. These

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11 *Hyde v Agar* (1998) 45 NSWLR 487 at 519.

individuals are said to have been members, at all material times, of the executive or governing councils of unincorporated Member Unions on the Council of the IRFB.

28 The reference to a "Council" of the IRFB is not wholly accurate. The "Bye-Laws of the International Rugby Football Board", which were in force at the relevant time and were tendered in evidence on the hearing before the primary judge, provided for no body known as the "Council". They referred to "the Board", and defined that term as "the Representatives appointed by Member Unions". The term "Council" was introduced in bye-laws made in March 1991 and the pleader appears to have used this term in preference to "Board" to distinguish between the IRFB and those who attend its meetings.

29 The Australian Rugby Football Union Ltd ("the Australian Union") and the New Zealand Rugby Football Union Incorporated ("the New Zealand Union") are sued (as the second and ninth defendants respectively) and the plaintiff alleges that those corporations were, at all material times, "Member Unions on the Council of the IRFB". Four other individuals (the eighth defendants) are also alleged to have been representatives of Member Unions on the Council of the IRFB and it may be that the pleading is to be understood as asserting that they were representatives of the Australian Union and the New Zealand Union. In any event, we were informed that two of these individuals were ordinarily resident in Australia at the time of service of the process in this matter.

30 Finally, the proceeding names the New South Wales Rugby Union Ltd, the Sydney Rugby Union, the match referee, the Sydney Rugby Referees Association, and the company which fielded the opposing team, as the third, fourth, fifth, sixth, and seventh defendants respectively.

31 The appellants in this Court, in Mr Hyde's matter, are the surviving first defendants, all of whom were served outside Australia, the eighth defendants (who were all served outside Australia notwithstanding that two were ordinarily resident in this country) and the ninth defendant (the New Zealand Union).

32 It is convenient to notice the allegations made in Mr Hyde's pleading against the first and eighth defendants (the individuals who, it is alleged, were representatives of the Member Unions on the Council of the IRFB) and against the ninth defendant (the New Zealand Union). Omitting some particulars given in the pleading, the allegations are:

> "1 At all material times an unincorporated association known as the International Rugby Football Board ('IRFB') has made and changed

the laws of the game of the sport of Rugby Football at international level and, in certain respects hereafter appearing, in Australia.

1A At all material times the First and Eighth Defendants were representatives of the Member Unions on the Council of the IRFB and attended meetings of the Council with voting rights in that capacity.

1B As such representatives the First and Eighth Defendants could cause changes to be made to the laws of the game of Rugby Football.

…

2C At all material times the First Defendants were members of the executive or governing councils of unincorporated Member Unions of the Council of the IRFB.

…

9 The Council of the IRFB made and from time to time amended the Laws of the game of Rugby Football.

9A At all material times the persons who were responsible for the conduct of the Council of the IRFB in making, not making, changing or not changing the Laws of the game of Rugby Football were:-

(i) The First Defendants and the Eighth Defendants, and/or

(ii) The First Defendants, the Second Defendant and the Ninth Defendant.

…

15 The injury to the Plaintiff was caused by the negligence of the persons responsible for the conduct of the Council of the IRFB referred to in paragraph 9A above."

It will be necessary to return to consider some other aspects of the plaintiff's pleading in the action, including the particulars he gives of the allegation of negligence. For the moment, however, it is sufficient to note that the pleading alleges that the injury sustained by the plaintiff (in New South Wales) was caused by the negligence of the individuals who are named as the first and eighth defendants or by the negligence of those who are named as the first defendants, the Australian Union and the New Zealand Union.

The claims in *Worsley v Australian Rugby Football Union Ltd*

33 In his action, Mr Worsley alleges that, on 19 August 1987, at Wagga Wagga, he was playing a first grade game of rugby football in the position of hooker for the Wagga Agricultural College Rugby Union Football Club against a team fielded by the Rivcoll Rugby Union Football Club. Shortly before full time, a scrum was formed and the Rivcoll forward pack engaged before the plaintiff and his pack were ready to receive them. The plaintiff's head was so positioned that, when the scrum engaged, his neck was broken and he suffered severe spinal injury.

34 The Australian Union is named as first defendant in the action. The second defendants are individuals who, it is alleged

> "were members of the executive of the Rugby Football Union, the Scottish Rugby Football Union or the Welsh Rugby Football Union in 1987. At all material times each of the said associations was a Member Union of the IRFB. At all material times the Second Defendants were representatives from their respective Member Unions on the Board of the IRFB."

The New Zealand Union is named as twelfth defendant

> "as representative of itself and:
>
> (a) all other members of the executives of unincorporated Member Unions (other than the Second Defendants) and;
>
> (b) all other incorporated Member Unions other than incorporated the First Defendant [sic]
>
> of the International Rugby Football Board as in 1987".

Paragraph 19 of the pleading (omitting particulars) alleges that:

> "The Plaintiff's injury was caused by the negligence of the Member Unions of the IRFB as in 1987 which were bodies corporate (including the ARFU, the Twelfth Defendant and the corporate persons [represented] by the Twelfth Defendant) and the members of the executives of the Member Unions of the IRFB which were not bodies corporate (including the Second Defendants and the natural persons represented by the Twelfth Defendant or alternatively, of the representatives of the Member Unions on the Board of the IRFB (including the Second Defendants)."

Again it will be necessary to return to consider some further aspects of the pleading in this action but, as in Mr Hyde's matter, this pleading alleges that the injury sustained by the plaintiff (in New South Wales) was caused by the negligence of the second defendants and (among others) the natural persons represented by the twelfth defendant and by the negligence of the twelfth defendant itself.

35 The appellants in Mr Worsley's matter are the surviving second defendants and the twelfth defendant.

The applications at first instance and in the Court of Appeal

36 In each action the plaintiff applied for an order giving leave to proceed against the defendants who had been served outside Australia and for an order that the limitation period for the plaintiff's cause of action against those defendants be extended pursuant to the *Limitation Act* 1969 (NSW). The defendants who had been served outside Australia did not enter an appearance. They applied for various orders: notably, that service of the originating process be set aside; that the Court declare that it has no jurisdiction over those defendants, or that the Court decline to exercise its jurisdiction in the proceedings in respect of those defendants; or that it determine that it was an inappropriate forum for the trial of the proceedings.

37 These applications came on for hearing before Grove J who dismissed the plaintiffs' applications and set aside the service outside Australia of the originating process[12].

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12 (1998) 45 NSWLR 487 at 501.

38 The plaintiffs appealed to the Court of Appeal. The appeals were allowed and the orders we have mentioned earlier were made. It is from these orders that the present appeals are brought.

The applicable Rules of Court

39 Service of originating process of the Supreme Court of New South Wales on defendants outside Australia is regulated by Pt 10 of the Rules of that Court. It is necessary to pay close attention to the terms of those Rules and to notice the several ways in which the present Rules differ from rules that apply, and have been considered, in other jurisdictions. Learning that has developed in connection with those other rules cannot automatically be applied to the Rules which govern the proceedings which are the subject of the present appeals.

40 Four features of Pt 10 of the Rules (in the form in which they stood at the time relevant to these proceedings) should be noted at the outset. First, r 1A of Pt 10 provided that

> "[s]ubject to rule 2 and rule 2A, originating process may be served outside Australia in the following cases"

and there then followed 24 paragraphs describing those cases. Secondly, r 2 (to which r 1A was expressly subject) provided that:

> "(1) Where an originating process is served on the defendant outside Australia and the defendant does not enter an appearance within the time limited for appearance, the plaintiff shall not proceed against that defendant except with the leave of the Court.
>
> (2) A motion for leave under subrule (1) may be made without serving notice of the motion on the defendant."

Thirdly, r 2A (to which r 1A was also expressly subject) provided that "[w]here an originating process is served outside Australia, a notice in the prescribed form shall be served with the originating process". That notice informed the person who was served that he or she was liable to suffer judgment, or an order against him or her, unless Notice of Appearance was received in the Registry within a specified number of days. It also informed the person served that the Court may set aside service where service was not authorised by the Rules or the Court was an inappropriate forum for the trial of the proceedings.

41 The latter aspects of the notice reflected the fourth feature of Pt 10 of the Rules which should be noticed. Rule 6A provided that:

"(1) The Court may make an order of a kind referred to in Part 11 rule 8 (which relates to setting aside etc originating process) on application by a person on whom an originating process is served outside Australia.

(2) Without limiting subrule (1), the Court may make an order under this rule on the ground:

(a) that the service of the originating process is not authorised by these rules; or

(b) that this Court is an inappropriate forum for the trial of the proceedings."

The rule to which Pt 10 r 6A referred (Pt 11 r 8) provided (so far as relevant) that:

"(1) The Court may, on application made by a defendant to any originating process on notice of motion filed within the time fixed by subrule (2), by order:

(a) set aside the originating process;

(b) set aside the service of the originating process on the defendant;

(c) declare that the originating process has not been duly served on the defendant;

(d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State;

…

(g) declare that the Court has no jurisdiction over the defendant in respect of the subject matter of the proceedings;

(h) decline in its discretion to exercise its jurisdiction in the proceedings;

(i) grant such other relief as it thinks appropriate.

(2) Notice of motion under subrule (1):

(a) may be filed without entering an appearance;

…

(3) The making of an application under subrule (1) shall not be treated as a voluntary submission to the jurisdiction of the Court."

Service out of the jurisdiction – an exorbitant jurisdiction?

42 In *Amin Rasheed Corpn v Kuwait Insurance*[13], Lord Diplock said that jurisdiction exercised by an English court over a foreign corporation which has no place of business in England, as a result of granting leave under the relevant rule of court to serve out of the jurisdiction[14]:

> "is an exorbitant jurisdiction, ie, it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph [of the rules] should be exercised with circumspection in cases where there exists an alternative forum, viz the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules."

Considerations of comity, and consequent restraint, have informed many of the reported decisions about service out of the jurisdiction[15]. It is, however, important to notice that rules of court, or local statutes, providing for service outside the jurisdiction are now commonplace – at least in jurisdictions whose legal systems have been formed or influenced by common law traditions. Further, as the Court of Appeal rightly noted in its reasons in these matters, contemporary developments in communications and transport make the degree of

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13 [1984] AC 50.

14 [1984] AC 50 at 65-66.

15 See, for example, *Contender 1 Ltd v LEP International* (1988) 63 ALJR 26 at 28-29 per Brennan J; 82 ALR 394 at 398-399; *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869 at 877 per Lord Simonds; *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 481 per Lord Goff of Chieveley.

"inconvenience and annoyance"[16] to which a foreign defendant would be put, if brought into the courts of this jurisdiction, "of a qualitatively different order to that which existed in 1885"[17].

43 The considerations of comity and restraint, to which reference has so often been made in cases concerning service out of the jurisdiction, will often be of greatest relevance in considering questions of forum non conveniens[18]. The starting point for the present inquiry, however, must be the terms of the Rules, not any general considerations of the kind just mentioned.

44 Before the commencement of the new regime established by the *Supreme Court Act* 1970 (NSW) ("the 1970 Act"), different provision with respect to service outside the jurisdiction was made on the equity side and on the common law side of the Supreme Court. Rule 90 of the Consolidated Equity Rules of 1902 required applications to be supported by an affidavit that, in the belief of the deponent, the applicant had good grounds for relief. In the leading practice work[19], it was stated that an applicant under r 90 "must make out a *prima facie* case":

> "In this State where the Court has before it the statement of claim, it would probably be sufficient for the solicitor to state that he believes his client will be able to prove the necessary facts to support the case made by the statement of claim, and the Court would look at the statement of claim to see that it discloses a probable cause of action."

The observation was offered, by way of contrast, that, in England, "the affidavits necessarily enter into considerable detail".

45 On the common law side, in the *Common Law Procedure Act* 1899 (NSW), provision was made, without the need for a prior application, for writs of summons in personal actions against British subjects residing out of the jurisdiction (s 18) and against foreigners residing out of the jurisdiction (s 19). Leave to proceed was necessary before a final or interlocutory judgment might

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16 *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 at 243 per Pearson J.

17 (1998) 45 NSWLR 487 at 507.

18 Pt 10 r 6A(2)(b).

19 *Parker's Practice in Equity (New South Wales),* 2nd ed (1949) at 204.

be signed. The *Supreme Court Procedure Act* 1957 (NSW) repealed ss 18 and 19 and inserted a new s 18 covering all defendants not within the jurisdiction, but again requiring leave to proceed to sign final or interlocutory judgment[20].

46 Part 10 of the New South Wales Rules in force at the time relevant to these proceedings ("the applicable Rules") followed the pre-1970 Act practice on the common law side and did not provide that leave was required to serve originating process out of the jurisdiction. Nor did Pt 10 of those Rules provide for the kind of evidence which must be adduced in support of an application for leave to proceed. In these respects Pt 10 of the applicable Rules stands in sharp contrast to the provisions practised in the equity jurisdiction of the Supreme Court and with other rules based on the English 1875 rules and 1883 Rules[21]. Those models derived from the previous Chancery practice[22] and rules based on them provided that the court's leave was required to serve out of the jurisdiction and that an application for leave to serve out of the jurisdiction be supported by an affidavit[23]

> "stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made".

Moreover, those Rules provided that[24]

> "no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order".

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20 Walker, *The Practice of the Supreme Court of New South Wales at Common Law*, 4th ed (1958) at 23-24.

21 *Judicature Act* 1875 (Imp), First Sched, O 11; The Rules of the Supreme Court 1883, O 11.

22 *Maclean v Dawson* (1859) 4 De G & J 150 [45 ER 58]; *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 at 243.

23 The Rules of the Supreme Court 1883, O 11 r 4.

24 The Rules of the Supreme Court 1883, O 11 r 4.

Provisions of this kind found analogies in Pt 10 of the Supreme Court Rules 1970 (NSW) as originally enacted in the Fourth Sched to the 1970 Act ("the 1970 Rules"). Part 10 r 2 of the 1970 Rules provided that unless service outside the State was in accordance with the prior leave of the Court, or the Court confirmed the service, or the person served waived objection by entering an appearance, service outside the State was not valid under that Part. Part 10 r 2(2) of the 1970 Rules provided that leave might be granted "[w]here the Court is satisfied on the following matters … (b) that the applicant has a prima facie case for the relief which he seeks".

47 The applicable Rules, however, mark the departure from the models based on the Chancery practice and do not require leave to serve out of the jurisdiction and do not require that the party seeking to serve out demonstrate a prima facie entitlement to the relief sought in the originating process. All that the applicable Rules say is that "the plaintiff shall not *proceed* against [a defendant served outside Australia who has not entered appearance] except with the leave of the Court"[25]. The applicable Rules are silent about what matters can or should be taken into account in granting or refusing that leave.

48 Part 10 r 1A of the applicable Rules permits the service of originating process outside Australia only in certain specified cases. If a defendant served outside Australia has not entered an appearance, an applicant for leave to proceed must demonstrate that one or more of the cases set out in r 1A applies. Those cases are described either as "where the proceedings are founded on" a particular kind of claim, or as "where the subject matter of the proceedings" is of a particular kind.

49 To take the particular paragraphs which the respondents relied on in these matters, it was said that the originating process in each action might be served outside Australia because:

> "(a) … the proceedings are founded on a cause of action arising in the State;
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> …
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> (d) … the proceedings are founded on a tort committed in the State;

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25 Pt 10 r 2(1).

(e) … the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring;

…

(i) … the proceedings are properly brought against a person served or to be served in the State and the person to be served outside the State is properly joined as a party to the proceedings".

50 In deciding whether Pt 10 r 1A applied, and thus permitted service outside Australia of the originating process in these two actions, attention must be directed to the way in which the claims made by the respondents are framed. The paragraphs speak of "proceedings [which] are founded on" a specified matter such as a cause of action arising in the State or a tort committed in the State. That focuses attention upon the nature of the claim which is made. That is, is the claim a claim in which the plaintiff *alleges* that he has a cause of action which, *according to those allegations,* is a cause of action arising in the State?

51 The inquiry just described neither requires nor permits an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim. The Court of Appeal was wrong to make such an assessment in deciding whether the Rules permitted service out. In so far as the contrary was held in *Bank of America v Bank of New York*[26] it should be overruled. The application of these paragraphs of r 1A depends on the nature of the allegations which the plaintiff makes, not on whether those allegations will be made good at trial. Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph or paragraphs of Pt 10 r 1A, service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed.

52 Often enough, the statement of claim will reveal all that it is necessary to know to assess whether a plaintiff's claim is of the requisite kind. But that may not always be so. For example, the place of making of a contract, or the place of breach of a contract, may not appear from the pleading and some evidence may be required to establish that a relevant paragraph of Pt 10 r 1A[27] is engaged. And where, as here, a plaintiff relies on Pt 10 r 1A(1)(i), which provides for service outside the State on a person who is properly joined as a party to proceedings

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26 (1995) ATPR ¶41-390.

27 In the examples given, pars (c)(i) and (iii).

"*properly* brought against a person served or to be served in the State", other considerations may arise in deciding both whether the joinder is proper and whether the action is "properly brought". Those questions may, however, be left to one side in the present cases because (subject to one consideration to which it will be necessary to return) it is clear that each of the proceedings is "wholly or partly … founded on, or [is] for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring"[28]. The claim in each of the present matters is framed in negligence and alleges that tortious acts or omissions caused the damage which the respondent suffered when injured in New South Wales.

The intersection of applications for leave to proceed and applications to set aside service

53 In some cases, an application for leave to proceed will not be opposed. It is an application which may be made without serving notice of the motion on the defendant[29]. Where the application is made without notice to a defendant, there will be no occasion to consider any question about the strength of the plaintiff's claim. If, however, as was the case in each of these matters, the application for leave to proceed is opposed, and is joined with an application by parties served outside Australia to set aside service or to have the Court decline to exercise its jurisdiction[30], other considerations arise. It is necessary, in such a case, to recall that there are different issues raised on the hearing of an application for leave to proceed from those that arise on the hearing of applications to set aside service or to decline to exercise jurisdiction.

54 Central to the inquiry on an application for leave to proceed is whether the originating process makes claims of a kind which one or more of the paragraphs in Pt 10 r 1A mention. If the originating process makes such a claim, r 1A provides that the process may be served outside Australia and, on proof of service of the process, the Court's jurisdiction is, prima facie, properly invoked over the party who has been served. In the absence of some countervailing consideration, leave to proceed should then be given.

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28 Pt 10 r 1A(1)(e).

29 Pt 10 r 2(2).

30 Under Pt 10 r 6A.

55 On an application to set aside service, or to have the Court decline to exercise jurisdiction, attention might be directed to any of a number of features of the proceeding, the claims made in it, or the parties to it, in aid of the proposition that the Court should not exercise jurisdiction. Part 10 r 6A is cast in general terms and it would be wrong to attempt some exhaustive description of the grounds upon which the rule might be invoked. Nevertheless, it may be expected that three common bases for doing so are first, that the claims made are not claims of a kind which are described in Pt 10 r 1A[31], secondly, that the Court is an inappropriate forum for the trial of the proceeding[32] and thirdly, that the claims made have insufficient prospects of success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims. Whether the Rules prescribe a different test for determining questions of inappropriate forum from that developed at common law[33] is a question which we need not stay to consider. In these cases, it is necessary to deal only with the last of the bases we have mentioned. It was on this that the appellants chiefly relied.

Insufficient prospects

56 If service was authorised by the Rules, and has been properly effected, the Court's authority to determine the issues that are raised by the proceeding has been regularly invoked. If the Court is *not* persuaded that it is an inappropriate forum for trial of the proceedings, it will have reached that conclusion having given due weight to the considerations of comity and restraint which we mentioned earlier. Only then do the prospects of success of a claim made in originating process served outside Australia fall for consideration.

57 It is, of course, well accepted that a court whose jurisdiction is regularly invoked in respect of a local defendant (most often by service of process on that defendant within the geographic limitations of the court's jurisdiction) should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in

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31 Pt 10 r 6A(2)(a).

32 Pt 10 r 6A(2)(b).

33 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

various ways[34], but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

58 It was suggested, in the present matters, that some less demanding test should be adopted in cases where a defendant served overseas seeks to have that service set aside. There are at least two reasons why that should not be done. First, and most fundamentally, what is the criterion which is to be applied? Are proceedings to be terminated upon a prediction (on what almost invariably will be less evidence and argument than would be available at trial) of the "likely" or "probable" outcome of the proceeding? That cannot be so. It would be wrong to deny a plaintiff resort to the ordinary processes of a court on the basis of a prediction made at the outset of a proceeding if that prediction is to be made simply on a preponderance of probabilities. And if it is not to be enough to persuade the court that it is more probable than not that the case against a defendant will fail, and some higher test (less than that now applied in applications for summary judgment) is to be applied, how is that test to be described? The attachment of intensifying epithets, such as "very" or "highly", offers little useful guidance for those judicial officers who would have to apply the test and who would have to do so, often enough, in a busy practice list. Such a test would be unworkable.

59 Secondly, as the present proceedings show, the application of some different, and lower, test in favour of overseas defendants would lead to unacceptable results. It would mean that proceedings must continue to trial against those defendants who happen to have been served with the originating process within the jurisdiction, but can be brought to a summary end by those who are served overseas even where the claims against the local and overseas defendants are identical.

60 For these reasons, the same test should be applied in deciding whether originating process served outside Australia makes claims which have such poor prospects of success that the proceeding should not go to trial as is applied in an application for summary judgment by a defendant served locally.

61 The appellants submitted that the respondents' claims against them were doomed to fail: first, because the claims made were statute barred and secondly,

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34 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 per Barwick CJ.

because the appellants owed no duty of care to the respondents. We deal first with the appellants' alleged duty of care.

Duty of care

62 Reduced to essentials, each respondent's claim makes the following contentions:

(a) the Board of the IRFB made, and from time to time amended, the laws of the game of rugby football;

(b) the individual appellants who attended the meetings of the Board that were held in the year or so before the respondent was injured (or the corporate or unincorporated bodies who nominated persons to attend those meetings) could cause changes to be made to the laws of the game;

(c) the persons who attended those meetings (or those who nominated them to attend) owed a duty of care to all players who played the game.

63 The respondents emphasised evidence, adduced on the primary hearing of the applications, which it was submitted demonstrated that injuries of the kind they sustained were not uncommon in rugby games played in Australia according to the laws of the game in force at the time that they were injured. The risk of injury was, therefore, so the respondents submitted, reasonably foreseeable[35]. They submitted that, as the Court of Appeal said[36], "the IRFB saw itself as the law-giver for the sport of rugby and that it regarded the safety of players as an important factor". These considerations, coupled with the Court of Appeal's conclusion[37] that "[t]here is evidence of assumption of control by the members of the IRFB board and tenable allegations of reliance by players of the sport", were sufficient, so the respondents contended, to reveal an arguable case that the appellants owed each a duty of care of the kind alleged or implied in his pleading.

64 It may be difficult for a court to say from the pleadings that a claim by a plaintiff that the defendant is liable in negligence is bound to fail because it is not

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35 cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

36 (1998) 45 NSWLR 487 at 512.

37 (1998) 45 NSWLR 487 at 513.

arguable that the defendant owed the plaintiff a duty of care. Such cases do arise. In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[38], this Court held that the statement of claim did not disclose a cause of action in negligence against the defendant auditors. In *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[39], the Privy Council held that the declaration in that case was demurrable because it did not describe a relationship which imposed upon the defendants a duty of care in giving advice to the plaintiff. However, as Barwick CJ observed in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*[40]:

> "[In] fact pleading as it was introduced in the judicature system, there is no necessity to assert or identify a legal category of action or suit which the facts asserted may illustrate, involve or demonstrate and on which the particular relief claimed is based or to which it is relevant."

The result is that frequently the conventional form of pleading in an action of negligence will not reveal the alleged duty with sufficient clarity for a court considering an application for summary termination of the proceeding to be sure that all of the possible nuances of the plaintiff's case are revealed by the pleading. Further, and no less importantly, any finding about duty of care will often depend upon the evidence which is given at trial. Questions of reliance or knowledge of risk are two obvious examples of the kinds of question in which the evidence given at trial may take on considerable importance in determining whether a defendant owed the plaintiff a duty of care.

65 In these cases, however, we are persuaded that it is not arguable that the appellants in either case owed the respondent a duty of care.

66 First, duties of care are owed to individuals and must be considered in relation to the facts of that individual's case[41]. That does not mean that the conduct of a person cannot give rise to a duty of care to many persons. Nor does it mean that a person cannot owe a duty to someone whom he or she does not know or cannot identify.

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38 (1997) 188 CLR 241.

39 (1970) 122 CLR 628; [1971] AC 793.

40 (1981) 148 CLR 457 at 473.

41 *Paris v Stepney Borough Council* [1951] AC 367 at 388.

67 Nevertheless, the basic rule of the law of negligence is that it is "incumbent on a claimant to establish breach of an independent duty to himself as a particular individual"[42]. If the appellants owed a duty to these respondents, they must have owed a similar duty to the many thousands, perhaps hundreds of thousands, of persons who played rugby union throughout the world under the laws of the game which the IRFB had made. To hold that each of the individual appellants owed a duty of care to each person who played rugby under those laws strikes us as so unreal as to border on the absurd.

68 Further, from the earliest times, the common law has drawn a distinction between a positive act causing damage and a failure to act which results in damage. The common law does not ordinarily impose a duty on a person to take action where no positive conduct of that person has created a risk of injury to another person.

69 Here the appellants were members of the IRFB, an institution which "saw itself as the law-giver for the sport of rugby"[43]. But they have done nothing that increased the risk of harm to either of the respondents. The complaint is that they failed to alter the status quo, failed to alter the rules under which the respondents voluntarily played the game. In our view, they no more owed a duty of care to each rugby player to alter the laws of rugby than parliamentarians owe a duty of care to factory workers to amend the factories legislation.

70 In our opinion, when an appellant attended meetings of the Board, the law of negligence did not require him to conclude that thousands, perhaps hundreds of thousands, of rugby players were so closely and directly affected by his presence as a Board member that he ought to consider whether he should propose an amendment to the laws of the game to protect each player from injury[44]. Unless it did, no duty of care to the respondents could arise.

71 The duty was said to concern the rule-making function of the Board, but its exact content was not entirely clear. In Mr Hyde's case, one of the particulars of negligence described the duty as "to exercise reasonable care in the rules made for the playing of the game to ensure that the foreseeable risk of injury to players, particularly, for scrummaging, was avoided". But what was meant by saying that

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42 Fleming, *The Law of Torts*, 9th ed (1998) at 160.

43 *Hyde v Agar* (1998) 45 NSWLR 487 at 512.

44 cf *Donoghue v Stevenson* [1932] AC 562 at 580.

the duty was to "exercise … *care in the rules*" is obscure. Further, if the words "risk of injury" were intended to refer to any and every kind of injury (as the words of the particulars suggest) then they are clearly too wide when used in the context of a vigorous, sometimes violent, body contact sport like rugby union football.

72 In Mr Worsley's case, there is no allegation or particular which expressly states the duty alleged. But the general tenor of the duty can be understood from the particulars of negligence "of the Member Unions of the IRFB" that are given in his pleading. Those particulars refer to "[a]dopting and retaining rules regulating scrummaging which created an unreasonable risk of spinal injury" and "[f]ailing to amend the Laws of the Game to reduce the risk of spinal injury, as could reasonable [sic] have been done".

73 Each respondent, then, asserts that the appellants failed to cause a change in the laws of the game and that this failure was a breach of duty which caused the respondent injury. This statement of the argument tends to obscure the fact that it is an argument which has several discrete steps in it. It is necessary to give close attention to each of those steps.

Changing the laws of the game

74 If the negligence of the appellants consisted in their failure to change the laws of the game, it is important to consider their power to change those laws. How were they to "cause a change in the laws of the game"?

75 As has already been mentioned, the IRFB is an unincorporated association. Its bye-laws provided at the relevant time for a body, called "The Board", which "shall consist of two Representatives from each of the Member Unions who shall manage and exercise full control over the affairs" of the IRFB. The Board existed for the purpose (among others) of "Framing and Interpreting the Laws of the Game". The bye-laws provided that the laws of the game "shall be promulgated by the Board … and shall be binding and uniformly observed in all matches" subject to two exceptions. The first concerned certain experimental variations of the laws and the second related to the continued use by the Australian Union and the New Zealand Union "in domestic matches" of a particular variation of the laws about the replacement of injured players.

76 Bye-law 11 provided:

> "No alterations … in the Laws of the Game shall be made except at the Annual Meeting of the Board, or at a Meeting specially convened for that

purpose, and unless carried by a majority of at least three-fourths of the Representatives present."

The bye-laws prohibited alteration to the laws of the game (other than alterations consequential upon some proposed alteration) without notice having been given either by a Member Union or by a Committee of the Board through its Chairman.

77 It follows that any alteration to the laws of the game required both a proposal (of which notice was given) and assent to that proposal by at least three-fourths of those present at the relevant meeting. Only if those steps were taken could the Board have "caused a change to the laws of the game". And no individual member of the Board could bring about a change without the assent of others. The most that an individual appellant could do was make a proposal to a Member Union or a Committee of the Board and vote in favour of any proposal that was put to the Board. So the case against each member of the IRFB must be that he owed a duty of care to every person who played the game to propose an amendment that would protect that player from injury and, when such an amendment was proposed, to vote for it. Presumably, the IRFB member would have discharged his duty of care by voting for the amendment even though it was rejected by the majority of members. Moreover, if the members of the IRFB who are sued in this litigation owed a duty to the respondents, so did earlier members of the IRFB.

78 Further, the IRFB's bye-laws defined it as "the association of national Rugby Football Unions in membership therewith in accordance with these Bye-Laws and comprises Member Unions and Associate Member Unions as hereinafter defined". The appellants therefore attended IRFB meetings as representatives of their Member Unions, not in a personal capacity. They had no authority to propose changes to the laws of the game except in the ways earlier mentioned and, because they were representatives, even to make a proposal to a Committee of the Board may have required some prior approval by the Member Union they represented.

79 Not only did no individual member of the IRFB have the power to change the laws of the game, the IRFB itself did not have the power to ensure that the rules it promulgated were adopted. The participation of individuals in any particular match was regulated by whatever association organised the match. Whether that association chose to adopt, without modification, the laws of the game promulgated by the Board of the IRFB was for it to say, perhaps influenced (even very probably influenced) by whatever affiliations that particular association had with state, national or international associations. The bye-laws of the IRFB expressly acknowledged that local variations were not unknown. The decisions about what rules would be adopted were, therefore, made at each level

of this process (club, regional, state and national level) by groups of part-time volunteers, many of whom were doing nothing more than trying to give something back to a sport from which they believed they had derived benefit as youths and young men.

80 The laws of a game like rugby football differ from norms of conduct enforced by the courts. The application of the rules embodied in the laws of the game in any particular rugby match is, in very important respects, a matter for the skill and judgment of the particular officials who controlled the match. Often enough (and always if the bystander on the touch line is to be believed) those judgments turn on individual and qualitative assessments made by the officials which have to be made instantly, no matter what the speed of play. Should every infraction of the rules be penalised? When should advantage be allowed? Should the game be allowed to flow with as little interruption as possible? What is "*unduly*" rough play in a body contact sport? What is "*dangerous*" play? All these and many other judgments must be made by the officials.

81 It follows that in no relevant sense did the Board of the IRFB, or those who attended its meetings as delegates, control what happened in the matches in which the respondents were injured. The IRFB did not organise either of these matches. It did not decide whether the laws of the game which it promulgated would be adopted in these matches. The highest point to which the respondents' contentions could rise was to assert that the IRFB "influenced" the way in which rugby football would be played in Australia. But it is not arguable that the influence amounted to control over the sport: at least at the level at which the respondents played. In particular, they were not subject to any *legal* control by the IRFB or the delegates to its meetings. Nor can it be argued that they were subject to control in any *practical* sense. There were too many intervening levels of decision-making between the promulgation by the IRFB of laws of the game and the conduct of the individual matches in which the respondents were injured. What happened depended to a greater or lesser extent upon the several decisions of the national union, the local union and the association which organised the competition and on the decisions of the referees who acted in those matches.

82 The respondents were not participating as employees, whether of the IRFB or any of its constituent bodies or of any more local club or association. They were not subject to any legally binding obligation to accept direction from anyone else about their participation. Neither the Board nor the delegates invited, let alone directed or required, either respondent to play in the match in which he was injured. In this respect the cases which the respondents seek to make differ fundamentally from the case of an employee injured at work. An employer can direct the employee to go in harm's way and to do so in circumstances over which the employer can exercise control. They differ equally

radically from the relationship between the statutory authority and waterside worker considered in *Crimmins v Stevedoring Industry Finance Committee*[45] in which the authority could, and did, direct the worker where to work, and in which the authority had power to regulate the safety of the working environment.

83 The IRFB's lack of control over the matches in which the respondents were injured is important. The respondents contend that the appellants should have changed the laws of the game to reduce the risk of players being hurt by the conduct of other players. That is, they contend that the appellants should have acted to control, or at least influence, the conduct of third parties (the other players) which was the immediate cause of the injury to each respondent. The short answer to the contention is that the appellants did not have power to do so. There are, however, further aspects of the matters that require the conclusion that the appellants did not owe the respondents a duty of care.

A breach of existing laws?

84 If the duty alleged is a duty to alter the laws of the game, is it alleged that what happened to each respondent resulted from a breach of the then existing laws or is it alleged that it happened notwithstanding that there was no breach of those laws? Would different laws have prevented the injuries suffered by the respondents? Which of the many different possible variations to the laws should have been adopted?

85 In Mr Hyde's case it is clear that he alleges that he suffered his injury when, in breach of the law forbidding opposing packs of forwards to engage in a scrum by one charging the other, the forwards of the opposing team charged his pack.

86 That breach of the laws may be relevant to claims he makes against other parties, but what is it alleged that the law-makers should have done? Although not spelled out in Mr Hyde's pleading, it may be argued that the law-makers should have altered the laws by providing such severe penalties for conduct of the kind in which his opponents engaged as to deter its occurrence or made new rules governing the formation of scrums. But what is there to say that even then the changed law would have been obeyed?

87 The IRFB, as law-maker, did nothing which facilitated or encouraged the breach of the rules by Mr Hyde's opponents. The most that can be said is that it did not sufficiently deter its breach. To hold that the appellants owed a duty to

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45 (1999) 74 ALJR 1; 167 ALR 1.

propose and join in making a law of the game which would have better deterred breach of the existing rules is to extend notions of duty of care too far. It would cast a positive duty to act on individuals who could not control the voluntary conduct of others (the opposing players) which was the immediate cause of harm to the respondent. It is not necessary to go so far as to decide that, as a general rule, a person owes no duty with respect to the acts of a third party[46]. But to cast a positive duty on the appellants to change the laws of the game would provide for compensation of a person who was injured, not because of anything which the appellants did, but because of the wrongful act of other players. To impose such a duty would attribute to the appellants a capacity to control the conduct of the players which they did not have. It would deflect attention from those who were responsible and it would dilute the notion of individual responsibility which lies at the core of the law of negligence[47].

Autonomy and responsibility

88 Mr Worsley makes no allegation of any breach of the laws of the game. If there was no breach of the laws, Mr Worsley would have no claim against his opponents. Each participant in the match was adult and must be taken to have consented to the application of physical force in accordance with the laws of the game. And not only would there be no actionable trespass in the opposing team doing what it did, there is nothing which would suggest that any player conducted himself, in playing *within* the laws of the game, so as to have broken any duty of care which *he* owed to the respondent[48].

89 If that is so, why should the law-makers be liable when the player who inflicted the injury is not? If the laws of the game define the conduct to which an adult participant consents, the law-makers should not be liable because they could have made the activity that the participant chose to undertake less dangerous. The absurdity of this proposition is highlighted by the fact that, in many activities, the danger is part of the activity's attraction. The participant may therefore not have chosen to engage in the activity at all if it was less dangerous.

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46 See, for example, *Smith v Littlewoods Ltd* [1987] AC 241 at 278 per Lord Goff of Chieveley; cf *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 517-518 per Mason CJ.

47 See Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 *Law Quarterly Review* 301 at 312.

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

90 The decision to participate is made freely. That freedom, or autonomy, is not to be diminished. But with autonomy comes responsibility. To hold that the appellants owed a duty of care to Mr Worsley would diminish the autonomy of all who choose, for whatever reason, to engage voluntarily in this, or any other, physically dangerous pastime. It would do so because it would deter those who fulfil the kind of role played by the IRFB and the appellants in regulating that pastime from continuing to do so lest they be held liable for the consequences of the individual's free choice. The choices available to all would thus be diminished.

91 Separate questions may arise about school age children whose decisions are made or affected by others but those questions need not be considered in this case.

92 We consider that it is not arguable that the appellants owed the respondents a duty of care. It follows that it is not necessary to consider the limitation questions which were argued. It is as well, however, to say that we doubt the appellants' contention that if a limitation period has run, and the party whose claim is prima facie barred has applied for extension of time, or indicated an intention to do so, it would nevertheless be right to set aside service of process overseas without first having decided whether an extension should be allowed.

93 The appeals to this Court should each be allowed with costs. The orders of the Court of Appeal should, in each case, be set aside and in lieu there be an order that the appeal to that Court is dismissed with costs.

94 CALLINAN J. These appeals raise questions as to the meaning and application of the Rules of the Supreme Court of New South Wales with respect to service of proceedings upon persons out of Australia, which in turn involve other, important questions, including, as to the nature of the duty of care (if any) owed by sporting administrators to players.

Facts and Previous Proceedings

95 The respondent, Mr Hyde ("Hyde"), was injured during a rugby union match in Sydney on 23 August 1986. He commenced proceedings against a number of defendants (not including the current appellants) on 5 August 1988. A Further Amended Statement of Claim joining the appellants, and the New Zealand Rugby Football Union Incorporated ("the NZRFU"), was filed in May 1994, about 21 months after the expiration of the limitation period, and more than eight years after the 1986 London annual meeting of the International Rugby Football Board ("the IRFB"), the occasion upon which he alleges the appellants to have been negligent.

96 The respondent, Mr Worsley ("Worsley"), suffered injuries in a rugby union match in Wagga Wagga in New South Wales on 19 August 1987. He started proceedings against a number of defendants exactly six years later on 19 August 1993. The Amended Statement of Claim upon which he now relies and which alleges liability against, among others, the appellants and the NZRFU, was filed on 4 August 1994, almost 12 months after the expiry of the limitation period, and more than seven years after the 1987 annual meeting of the IRFB, the relevant occasion in his case.

97 Save as to the different dates involved the respondents' cases are the same in all relevant respects but one[49]. The appellants are, with the exception of the NZRFU, all natural persons representing the major rugby union playing nations of the world who attended in a voluntary capacity the annual meeting of the IRFB in London in April 1986 as alleged in the Hyde matter, and, in 1987 as alleged in Worsley[50]. The allegation made against the appellants is that they were negligent in failing to amend the Laws of the Game of Rugby Football at the meetings in order to "depower" the engagement of the forwards in a rugby scrum the meaning of which will appear from the Law that was later adopted and the substance of which is set out in par 15 of the respondent Hyde's pleading reproduced below: and, that their failure to adopt such an amendment caused the

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49 See at [126] of these reasons.

50 Hyde – par 1A; Worsley – pars 2 and 19.

respondents' injuries[51]. It is necessarily implicit in the claims that each of the appellants owed a duty of care to the respondents.

98 One Bye-Law of the IRFB of particular importance in the context of the current proceedings is Bye-Law 11[52] which provided that no alterations to the Laws of the Game could be made except at the annual meeting of the Board, or at a meeting specially convened for that purpose, and provided the alteration be supported by a majority of no fewer than three-fourths of the representatives present at the meeting. An alteration could only be made on notice and could not be initiated at such a meeting itself (Bye-Law 12)[53]. The latter also provided that an alteration to the Laws of the Game could not be initiated by any of the individual appellants but only by a Member Union or Associate Member Union (as defined), or by a Committee of the Board.

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51 This may be achieved (as has been done in Rule 20 of the current Laws of the Game of Rugby Football) by a phased engagement of the two opposing front-rows of the scrum in a regulated sequence in which each of the front-rows crouch, touch, pause and only then engage.

52 "**ALTERATIONS TO BYE-LAWS REGULATIONS AND LAWS**

No alterations in the Bye-Laws of the Board, or in the Regulations relating to Amateurism, or in the Laws of the Game shall be made except at the Annual Meeting of the Board, or at a Meeting specially convened for that purpose, and unless carried by a majority of at least three-fourths of the Representatives present."

53 "**NOTICE OF PROPOSED ALTERATIONS TO BYE-LAWS, REGULATIONS AND LAWS**

Notice of any proposed alterations in the Bye-Laws of the Board, or in the Regulations relating to Amateurism, or in the Laws of the Game, to be dealt with at the Annual Meeting of the Board shall be sent by the Union or a Committee of the Board through its Chairman proposing such alteration to the Secretary … Any amendment to such proposals must reach the Secretary of the Board not later than 1st January and be forwarded by him to the other Unions within one fortnight from that date.

…

No alterations ... in the Laws of the Game shall be made without due notice as provided for herein, unless it is an alteration consequential on or arising from some other proposed alteration of which due notice has been given, and unless three-fourths of the Representatives present consent to the matter being considered."

99 Following the amendments to the respective Statements of Claim to which I have referred, and purported service upon them[54], the appellants filed notices of motion pursuant to Pt 11 r 8 of the Rules of the Supreme Court of New South Wales ("the Rules"). Thereafter, the respondents filed motions seeking leave to proceed against the appellants pursuant to Pt 10 r 2 of the Rules. These motions were heard together by Grove J in July 1996. At no time before the judgment of the Court of Appeal of New South Wales to which the matter proceeded had either of the respondents obtained an order granting an extension of the relevant limitation periods.

100 On 22 July 1996, Grove J dismissed the respondents' applications for leave to proceed against the appellants and set aside service on the appellants. His Honour made these orders on the basis that the respondents had failed to establish that there was a good, arguable case against the appellants in negligence. His Honour said that, in any event, in the exercise of the discretion vested in him by Pt 10 r 2, he would refuse leave to proceed in all of the circumstances of the case including the fact that the proceedings were statute barred against the appellants. In the course of his reasons, Grove J also found that the tortious conduct alleged against the appellants did not take place in New South Wales.

101 The respondents applied for leave to appeal to the Court of Appeal of New South Wales (Spigelman CJ, Mason P and Stein JA). Their applications were granted and their appeals allowed. In allowing them the Court of Appeal:

(i) said that a matter which in fact was seriously in contention, that service was authorised (and thereby that the Court had jurisdiction) under Pt 10 r 1A(1)(i)[55], was common ground;

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54 For example, some of the amended Statements of Claim were served on the following dates:

Worsley – twelfth defendant (NZRFU) 28 September 1994, second defendants (Agar, Rowlands, Connon, Treharne and Easby) 10 July 1995, (Smith) 21 July 1995; and

Hyde – first defendants (Agar, Connon, McKibbin, Dawson, Treharne, Rowlands, Eloff, Ferrasse and Martin) and eighth defendants (Blazey, Stuart and Vanderfield) 11 May 1995, first defendant (Smith) 21 July 1995.

55 *Hyde v Agar* (1998) 45 NSWLR 487 at 506.

(ii) purported to adopt the same "good arguable case" test as was applied by Grove J in determining whether the conduct alleged against the foreign defendants was tortious[56];

(iii) by a majority (Mason P dissenting) decided that the tort or torts as alleged in the respondents' pleading were located in New South Wales because the respondents suffered their injuries there[57];

(iv) but in any event, held, unanimously that there was a good arguable case that the facts pleaded included a "local tort"[58]; and

(v) in exercising their discretion under Pt 10 r 2 said that:

(a) it was not appropriate, at least on the facts of the cases, to exercise any particular caution or restraint in recognition of the fact that the foreign defendants against whom leave to proceed was sought owe no allegiance to this country[59]; and

(b) that, in the exercise of the Court's discretion, the strength of the plaintiffs' claims against the foreign defendants should not be taken into account other than upon the basis that the threshold over which the respondents had to pass was no higher than that required to meet an application to strike out a claim[60].

The Appeal to this Court

102 It is the appellants' contention that in reaching each of the conclusions to which I have referred the Court of Appeal fell into error. Their contention with respect to the first matter is not disputed in this Court but that does not however dispose of the appeals.

103 The Rule to which attention must first be directed is Pt 10 r 1A(1), in particular r 1A(1)(a), (d), (e) and (i). This and other relevant Rules provide as follows:

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56 (1998) 45 NSWLR 487 at 503-504.

57 (1998) 45 NSWLR 487 at 515.

58 (1998) 45 NSWLR 487 at 516.

59 (1998) 45 NSWLR 487 at 506-507.

60 (1998) 45 NSWLR 487 at 507, 511, 513-514.

"**Cases for service of originating process**

10.1A (1) Subject to rule 2 and rule 2A, originating process may be served outside Australia in the following cases:

(a) where the proceedings are founded on a cause of action arising in the State;

…

(d) where the proceedings are founded on a tort committed in the State;

(e) where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring;

…

(i) where the proceedings are properly brought against a person served or to be served in the State and the person to be served outside the State is properly joined as a party to the proceedings;

…

Leave to proceed where no appearance

10.2 (1) Where an originating process is served on the defendant outside Australia and the defendant does not enter an appearance within the time limited for appearance, the plaintiff shall not proceed against that defendant except with the leave of the Court.

(2) A motion for leave under subrule (1) may be made without serving notice of the motion on the defendant.

…

Setting aside originating process etc.

11.8 (1) The Court may, on application made by a defendant to any originating process on notice of motion filed within the time fixed by subrule (2), by order:

(a) set aside the originating process;

(b) set aside the service of the originating process on the defendant;

(c) declare that the originating process has not been duly served on the defendant;

(d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State;

(e) discharge any order extending the validity for service of the originating process;

(f) protect or release:

(i) property seized, or threatened with seizure, in the proceedings; or

(ii) property subject to an order restraining its disposition or disposal or in relation to which such an order is sought;

(g) declare that the Court has no jurisdiction over the defendant in respect of the subject matter of the proceedings;

(h) decline in its discretion to exercise its jurisdiction in the proceedings;

(i) grant such other relief as it thinks appropriate.

(2) Notice of motion under subrule (1):

(a) may be filed without entering an appearance;

(b) shall bear a note 'The defendant's address for service is' and state the address;

(c) shall be filed within the time limited for entering an appearance.

(3) The making of an application under subrule (1) shall not be treated as a voluntary submission to the jurisdiction of the Court."

104 Four matters may be noticed about Pt 10 r 1A. By its very existence, Pt 10 r 1A(1) indicates that service out of the jurisdiction is an exceptional matter in that special rules have been enacted to govern it. Its object, discernible from its

text is that defendants should only be amenable to process in New South Wales by service upon them overseas if there be some connexion between the proceedings and the jurisdiction. The Rule by its terms requires some examination of the facts of the case and that is so whether there be an application either by a plaintiff under Pt 10 r 2 or a challenge to the service by a person served outside Australia under Pt 10 r 6A. And, fourthly, the satisfaction of some of the conditions for service under the Rule might require some exploration of factual matters beyond the facts alleged in the Statement of Claim[61]. In this case the respondents did not allege the times and places which would have provided opportunities for amendment of the Laws of the Game, and these were proved by an affidavit filed on behalf of the appellants.

105 I do not think the first question which was raised by the appellants presents any difficulty. The onus lies upon the moving party, in this case, the respondents, who were obliged by reason of the non-appearance of the appellants, to obtain leave to proceed, on their application under Pt 10 r 2, and the appellants, on their application under Pt 10 r 6A, to the extent that that application might require consideration of matters that did not need to be addressed by the respondents on their application.

106 The language of the Rules is not without ambiguity. Take Pt 10 r 1A(1)(a) and (d). Does the word "founded" mean having a real foundation on a cause of action (tort) arising in the State? How firm a foundation is required? Does the expression "cause" mean an actual cause of action, that is to say, facts stated which if proved would definitely, necessarily, or only, arguably establish a right to relief? The Rules do not use the words "prima facie" or "arguable" but it could hardly have been intended that a plaintiff at this early stage should be obliged to

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61 For example, see Pt 10 r 1A(1)(g), (p) and (w):

> "(g) where the person to be served is domiciled or ordinarily resident in the State;
>
> …
>
> (p) where the proceedings are for the administration of the estate of a person who dies domiciled in the State or are for relief which might be granted in proceedings for administration of such an estate;
>
> …
>
> (w) where the proceedings are for relief relating to the custody, guardianship, protection or welfare of a minor, whether or not he is in the State, which relief the Court has, apart from service, jurisdiction to grant".

prove a case. Nor do the Rules use the language of any of the formulations discussed by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[62] in which his Honour settled upon a test of "manifestly groundless", for a strike-out application to succeed.

107 *Contender 1 Ltd v LEP International Pty Ltd*[63] throws light on the issues here. There the Court was asked to give meaning to the New South Wales Rule in Pt 10 r 1(1)(a) and (b) which was then in force and which stated conditions as follows:

> "(a) where the proceedings are founded on a cause of action arising in the State;
>
> (b) where the proceedings are founded on a breach in the State of a contract wherever made, whether or not the breach is preceded or accompanied by a breach wherever occurring that renders impossible the performance of any part of the contract which ought to be performed in the State".

108 The appellant in that case did not challenge the application of the test adopted by Clarke J, at first instance, who had referred to a statement of Lord Radcliffe in *Vitkovice Horni a Hutni Tezirstvo v Korner*[64] that, "on consideration of all admissible material there remains a strong argument for the opinion that the qualifying conditions are indeed satisfied". Wilson, Dawson, Toohey and Gaudron JJ on appeal did not disapprove that test[65] and Brennan J (as he then was) said this in apparent approval of it[66]:

> "The Court was required to determine at the outset whether the case falls within Pt 10 r 1: if the case does not fall within that rule there is no jurisdiction to conduct a trial. In *Vitkovice Horni a Hutni Tezirstvo v Korner*[67], Lord Radcliffe[68] propounded the test for determining whether

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62 (1964) 112 CLR 125 at 129.

63 (1988) 63 ALJR 26; 82 ALR 394.

64 [1951] AC 869 at 883.

65 (1988) 63 ALJR 26 at 27; 82 ALR 394 at 396-397.

66 (1988) 63 ALJR 26 at 29; 82 ALR 394 at 399.

67 [1951] AC 869.

68 [1951] AC 869 at 883.

statutory conditions for service out of the jurisdiction are satisfied: on consideration of all admissible material, is there a strong argument for the opinion that the qualifying conditions are satisfied? The parties in this case agree that that is the appropriate test. It is, of course, a test appropriate to the resolution of the question of jurisdiction at the very beginning of the case, not after the trial. At that stage, as his Lordship noted[69]:

> 'the existence of the conditions that govern the authority cannot be ascertained with the same finality as would be appropriate at a trial, in which evidence and argument could be exhaustively deployed.'

In this case, if the Court's jurisdiction depended on issues of law alone, the trial would not place the Court of Appeal in any better position to deal with the relevant legal principles. And, to the extent that jurisdiction depended on issues of fact, the appropriate test was the test stated by Lord Radcliffe. It was erroneous in principle for the Court of Appeal to decide to wait for finality in the ascertainment of the facts at trial before deciding an application which called for determination before the jurisdiction of the Court over a foreign defendant is asserted."

109 The Rules to be construed here are capable of being construed broadly or narrowly. There is no authority that would compel the Court to go to either of these extremes. I would therefore adopt and apply the test of "strong argument for the opinion", propounded by Lord Radcliffe in *Vitkovice*, keeping in mind his Lordship's caution that the existence of the relevant conditions cannot be ascertained with the same finality as on a trial after the exhaustive deployment of evidence and argument.

110 I will deal first with pars (a) and (d) of Pt 10 r 1A(1). Differences in wording between them are immaterial in the circumstances of this case.

111 In *Distillers Co (Biochemicals) Ltd v Thompson*[70] the Privy Council advised that in deciding where the tort occurred it is appropriate "to look back over the series of events … and ask the question, where in substance did this cause of action arise?"[71]. Another way of putting the question is to ask where "the act on the part of the defendant which gives the plaintiff his cause of complaint

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69 [1951] AC 869 at 885.

70 [1971] AC 458 at 468.

71 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567.

[occurred]"[72]. The omission on the part of the appellants which the respondents alleged against them is their failure to change the Laws of the Game which could only be effected at the annual meetings, in these instances, held in the United Kingdom. I accept the appellants' submission (contrary to the conclusion of the Court of Appeal[73]), that the omission to act in the present cases is clearly to be, and indeed is located at the place of the meetings and therefore in the United Kingdom[74].

112 This Court in *Voth v Manildra Flour Mills Pty Ltd*[75] said that "[t]he act of providing accountancy services was an act complete in itself, or, if not complete in itself, one that was initiated and completed in the one place"[76]. The omission here was of a like kind, complete in one place, in the United Kingdom.

113 What the holding of the majority in the Court of Appeal involved was the conclusion that the failure to act (presumably unanimously, and notwithstanding the absence of earlier notice as required to effect a change in the Laws of the Game[77]), at a meeting or meetings in London by nine persons eight of whom were not Australian nationals or residents constituted a legal wrong in New South Wales in August 1986 and August 1987.

114 There are obvious practical difficulties about such a conclusion. It implies that all of the delegates were bound so to act even though the Bye-Laws of the IRFB do not require unanimity. It assumes that these appellants owed an independent duty to the respondents notwithstanding that the Unions they represented may have directed or requested them to act in a different way.

115 In the joint judgment, Spigelman CJ and Stein JA sought to draw an analogy between these cases and the torts of misrepresentation and defamation, inferring that the Bye-Laws of the IRFB contained "[i]n effect" an "injunction …

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72 *Jackson v Spitall* (1870) LR 5 CP 542 at 552 quoted in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567.

73 (1998) 45 NSWLR 487 at 515.

74 See par 15 of the respondent Hyde's Further Amended Statement of Claim; and as to the 1986 annual meeting, the Affidavit of Stephen John Maffey filed 29 June 1992.

75 (1990) 171 CLR 538.

76 (1990) 171 CLR 538 at 569.

77 "Alterations to Bye-Laws Regulations and Laws", Bye-Law 11 of the IRFB, April 1986.

to play the game … according to the laws it lays down". Their Honours said that the "conduct travelled through time and space from the meeting to New South Wales, where it was to be applied and observed"[78]. The use of the word "injunction" implies far more than the circumstances of the case and the Bye-Laws of the IRFB would allow. The appellants had no means of enforcing, by mandatory injunction, other legal process or indeed non-curial, other than coercive measures, the implementation of its Bye-Laws. The majority's reference to time and space repeats the language of Mason CJ, Deane, Dawson and Gaudron JJ in *Voth*[79] but as their Honours in that case pointed out a little later in their reasons[80], there is not, and cannot be a general rule that the substance of the tort of negligent misstatement is committed where the statement is received and acted upon, as a statement may be received in one place and acted upon in another.

116 The majority in the Court of Appeal here said that the "cause of action should be regarded as having arisen where the relevant conduct had its natural and intended effects"[81]. That is another way of saying that the cause of action arose where the injury or damage was sustained. Such a proposition places too much emphasis upon the consequences of conduct. Assume a negligent statement be made on the telephone by a valuer in London to a Venezuelan investor whilst the latter is in Spain, with respect to the value of real property in Australia which the Venezuelan then purchases at an overvalue and sells for much less than the purchase price. I would find it difficult to accept that the tort of negligent misstatement was committed in Australia "where the relevant conduct had its natural and intended effects". But in any event such a case will be covered by Pt 10 r 1A(1)(e) of the Rules which might otherwise be largely or wholly otiose. It seems to me with respect that the analogies cannot properly be drawn. Misrepresentation and defamation are both torts of a quite different kind from the tort of negligence, particularly one based upon an omission to do an act of the kind alleged here. Defamation is governed by rules peculiar to itself, not only as to publication, but also as to participation in publication. Here, to repeat the language of *Voth*, the relevant acts (or omissions) of the appellants were "complete in themselves" in London, and had no greater connexion with games of rugby in New South Wales than with an incalculable number of other games played all over the world at every level. To adopt the view of the majority in the Court of Appeal could produce the result that the appellants' failure to alter the Laws of the Game constituted an actionable tort in every country and on every

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78 (1998) 45 NSWLR 487 at 515.

79 (1990) 171 CLR 538 at 567.

80 (1990) 171 CLR 538 at 568.

81 (1998) 45 NSWLR 487 at 515.

occasion when a player was injured in circumstances in which injury could arguably have been avoided by a change in the Laws.

117 In my opinion if the conduct alleged by the respondents against the appellants was tortious it was in substance a tort committed in the United Kingdom.

118 Notwithstanding that their Honours in the Court of Appeal were divided on the question whether what had largely occurred overseas (and what in substance was the case pleaded by the respondents), could be regarded as a tort located in New South Wales, they unanimously held, without clearly identifying its geographical elements, that there was a "good arguable case" that a "local tort" had been committed[82] in the sense discussed in *Voth*. My holding in the previous paragraph is to the contrary, and, absent identification of the relevant "local" elements by the Court of Appeal, requires no further discussion.

119 These reasons have so far proceeded upon the assumption that on the facts alleged in the Statements of Claim (which are materially the same in content) the tort of negligence has, or has arguably been committed, whether in New South Wales or the United Kingdom. The correctness of that assumption must now be examined because, if it is correctly made, the conditions of Pt 10 r 1A(1)(e) have been satisfied as there can be no doubt that damage and injury were suffered in New South Wales.

120 I turn then to the Further Amended Statement of Claim filed on behalf of Hyde. Those paragraphs that are relevant to the appellants should be reproduced:

> "1. At all material times an unincorporated association known as the International Rugby Football Board ('IRFB') has made and changed the laws of the game of the sport of Rugby Football at international level and, in certain respects hereafter appearing, in Australia.
>
> 1A. At all material times the First and Eighth Defendants were representatives of the Member Unions on the Council of the IRFB and attended meetings of the Council with voting rights in that capacity.
>
> PARTICULARS
>
> Meetings on or about 11, 21, 22 and 23 April, 1986. There may have been other relevant meetings but these are the best particulars that the Plaintiff can give at this stage of the proceedings.

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82 (1998) 45 NSWLR 487 at 516.

1B. As such representative's [sic] the First and Eighth Defendants could cause changes to be made to the laws of the game of Rugby Football.

2. At all material times the Second Defendant was a company duly incorporated and liable to be sued in and by its name and style.

2A. The Ninth Defendant is duly incorporated under the laws of New Zealand and is liable to be sued in its corporate name and style.

2B. At all material times the Second and Ninth Defendants were Member Unions on the Council of the IRFB.

2C. At all material times the First Defendants were members of the executive or governing councils of unincorporated Member Unions of the Council of the IRFB.

PARTICULARS

Countries	Names of the Parties
England	A E Agar J Mac G Kendall-Carpenter
Scotland	G K Smith W L Connon
Ireland	K R McKibbin CBE A R Dawson
Wales	G S Treharne K A Rowlands
South Africa	D M Craven Professor F C Eloff
France	A Ferrasse M M Martin

3. At all material times the Third Defendant was a company duly incorporated and liable to be sued in and by its said corporate name and style.

4. At all material times the Fourth Defendant was a company duly incorporated and liable to be sued in and by its said corporate name and style.

5. At all material times the Sixth Defendant was a company duly incorporated and liable to be sued in and by its said corporate name and style.

6. At all material times the Seventh Defendant was a company duly incorporated and liable to be sued in and by its said corporate name and style.

7. On or about 23rd August, 1986 the Plaintiff was playing a game of Rugby Football in the position of Hooker for the Warringah Rugby Club Limited in a game against the team from the Seventh Defendant in the First Grade Colts match then being played at Warringah Rugby Park, Sydney in the State of New South Wales.

8. The conduct of scrummaging in that game was as set out in Law 20 of the Laws of the game of Rugby Football and is as follows:–

'LAW 20. SCRUMMAGE

A scrummage, which can take place only in the field-of-play, is formed by players from each team closing up in readiness to allow the ball to be put on the ground between them but is not to be formed within five metres of the touch line.

The middle player in each front row is the hooker, and the players on either side of him are the props. The middle line means an imaginary line on the ground directly beneath the line formed by the junction of the shoulders of the two front rows.

FORMING A SCRUMMAGE

(1) A team must not wilfully delay the forming of a scrummage.

(2) Every scrummage shall be formed at the place of infringement or as near thereto as is practicable within the field-of-play. It must be stationary with the middle line parallel to the goal lines until the ball has been put in.

Before commencing engagement each front row must be in a crouched position with their heads and shoulders no lower than their hips and so that they are no more than one arm's length from their opponents' shoulders.

(3) It is dangerous play for a front row to form down some distance from its opponents and rush against them.

(4) A minimum of five players from each team shall be required to form a scrummage. Each front row of scrummage shall have three players in it at all times. The head of a player in a front row shall not be next to the head of a player of the same team.

(5) (a) While a scrummage is forming:–

– the shoulders of each player in the front row must not be lower than his hips;

– all players in each front row must adopt a normal stance;

– both feet must be on the ground and not crossed;

– the hookers must be in a hooking position;

– a hooker's foot must not be in front of the forward feet of his props.

(b) while the scrummage is taking place, players in each front row must have their weight firmly on at least one foot and be in a position for an effective forward above.

BINDING OF PLAYERS

(6) (a) The players of each front row shall bind firmly and continuously while the scrummage is forming, while the ball is being put in and while it is in the scrummage.

(b) The hooker may bind either over or under the arms of his props but, in either case, he must bind firmly around their bodies at or below the level of the armpits. The props must bind the hooker similarly. The hooker must be supported so that he is not carrying any weight on either foot.

(c) The outside (loose head) prop must either

(i) bind his opposing (tight-head) prop with his left arm inside the right arm of his opponent, or

(ii) place his left hand or forearm on his left thigh. The tight-head prop must bind with his right arm outside the left upper arm of his opposing loose-head prop. He may grip the jersey of his

opposing loose-head prop with his right hand but only to keep himself and the scrummage steady and he must not exert a downward pull.

(d) All players in a scrummage, other than those in a front row, must bind with at least one arm and hand around the body of another player of the same team.

(e) No outside player other than a prop may hold an opponent with his outer arm.

PUTTING THE BALL INTO THE SCRUMMAGE

(7) When an infringement occurs the team not responsible shall put in the ball. In all other circumstances the ball shall be put in by the team which was moving forward prior to the stoppage or, if neither team was moving forward, by the attacking team.

(8) The ball shall be put in without delay as soon as the two front rows have closed together. A team must put in the ball when ordered to do so and on the side first chosen.

(9) The player putting in the ball shall

(a) stand one metre from the scrummage and midway between the two front rows;

(b) hold the ball with both hands midway between the two front rows at a level midway between his knee and ankle;

(c) from that position put in the ball

– without any delay or without feint or backward movement i.e. with a single forward movement, and

– at a quick speed straight along the middle line so that it first touches the ground immediately beyond the width of the nearer prop's shoulders.

(10) Play in the scrummage begins when the ball leaves the hands of the player putting it in.

(11) If the ball is put in and it comes out at either end of the tunnel, it shall be put in again, unless a free kick or penalty kick has

been awarded. If the ball comes out otherwise than at either end of the tunnel and if a penalty kick has not been awarded play shall proceed.

RESTRICTIONS ON FRONT ROW PLAYERS

(12) All front row players must place their feet so as to allow a clear tunnel. A player must not prevent the ball from being put into the scrummage, or from touching the ground at the required place.

(13) No front row player may raise or advance a foot until the ball has touched the ground.

(14) When the ball has touched the ground, any foot of any player in either front row may be used in an attempt to gain possession of the ball subject to the following:–

Players in the front rows must not at any time during the scrummage:–

(a) raise both feet off the ground at the same time, or

(b) wilfully adopt any position or wilfully take any action, by twisting or lowering the body or by pulling on an opponent's dress, which is likely to cause the scrummage to collapse, or

(c) wilfully kick the ball out of the tunnel in the direction from which it is put in.

RESTRICTIONS ON ALL PLAYERS

(15) Any player who is not in either front row must not play the ball whilst it is in the tunnel.

(16) A player must not:–

(a) return the ball into the scrummage, or

(b) handle the ball in the scrummage except in the act of obtaining a "push over" try or touchdown, or

(c) pick up the ball in the scrummage by hand or legs, or

(d) wilfully collapse the scrummage, or

(e) wilfully fall or kneel in the scrummage, or

(f) attempt to gain possession of the ball in the scrummage with any part of the body except the foot or lower leg.

(17) The player putting in the ball and his immediate opponent must not kick the ball while it is in the scrummage.

Penalty:–

(a) For an infringement of paragraphs (2), (5), (8), (9), (12), (13) and (15), a free kick at the place of infringement.

(b) For an infringement of paragraphs (1), (3), (4), (6), (14), (16) and (17), a penalty kick at the place of infringement.'

9. The Council of the IRFB made and from time to time amended the Laws of the game of Rugby Football.

9A. At all material times the persons who were responsible for the conduct of the Council of the IRFB in making, not making, changing or not changing the Laws of the game of Rugby Football were:–

(i) The First Defendants and the Eighth Defendants, and/or

(ii) The First Defendants, the Second Defendant and the Ninth Defendant.

10. The Second, Third and Fourth Defendants were responsible for the administration of the sport of Rugby Union in Australia and New South Wales.

11. The Fifth Defendant was the referee of the match in which the Plaintiff was participating at the time of his injury.

12. The Sixth Defendant was the association of which the Fifth Defendant belonged.

13. The Seventh Defendant was the club to which players in the team opposing the Plaintiff belonged.

14. Shortly after half time a scrum was directed to be formed by the Fifth Defendant. The front row of the scrum which comprised the Plaintiff and the two props supporting him had not formed into position when

the players from the Seventh Defendant's scrum which had then formed charged into the Plaintiff. The Plaintiff's neck was positioned at such an angle that when it was struck by the force then exerted by the opposing players the Plaintiff's neck was broken and he suffered severe spinal injuries.

15. The injury to the Plaintiff was caused by the negligence of the persons responsible for the conduct of the Council of the IRFB referred to in paragraph 9A above.

PARTICULARS OF NEGLIGENCE

(a) Failing to change the Rules of the game so as to provide for opposing front rows to lock together while stationary then the second row then the lock and break-aways to take their positions rather than rules whereby scrums could come together in circumstances where both opposite packs are formed and move with force against one another.

(aa) In the alternative, by failing to amend the Laws of the Game by providing that opposing forward packs should not engage without a process designed to prepare them for the force of engagement and to bring them as close together as possible, such as the 'crouch-touch-pause-engage' rule adopted by the IRFB in 1988.

(b) Failing to amend the rules to provide for severe penalties such as immediately being sent off the field of play if any player or players tried to or forcefully engaged the head or neck of other players in the course of packing down for a scrum.

(c) The persons referred to in paragraph 9A above as the makers of the Rules of the game owed a duty of care to all players who played the game of Rugby Union Football and that duty was to exercise reasonable care in the rules made for the playing of the game to ensure that the foreseeable risk of injury to players, particularly, for scrummaging, was avoided.

(d) Failing to do each of (a), (aa), (b) or (c) above in circumstances where the persons referred to in paragraph 9A above knew or ought to have known by reason of the available medical evidence of the risk of severe spinal injury created by having the rules as they were at the time when the Plaintiff suffered injury."

121 The balance of the Further Amended Statement of Claim alleges negligence in various respects against the other defendants in the case, the referee and other corporations and natural persons involved in a number of places in the administration of the sport and matters going to damages.

122 There is no reason to assume that the respondents have not put their cases as high as they could in their Statements of Claim and the particulars of negligence alleged in them.

123 In my opinion the natural persons who are appellants, who represented their home Rugby Unions from time to time (and not at every meeting) on the Council[83] of the IRFB, who could change the Laws for the purposes of the IRFB and seek to influence, but not compel the home Unions to adopt them, who could only do so if 75% of the members of one Council so resolved after notice had been duly given, and who were voluntary members of a voluntary organisation, did not fail to discharge any duty of care to these unfortunate respondents to change the rules as alleged to make scrummaging safer, and safer in such a way as would necessarily or realistically have reduced the risk of injury to the respondents in these cases. The NZRFU is in the same situation as the other appellants except that it could have adopted its own rules in New Zealand, a matter of no relevance to these appeals.

124 The case can be sharply contrasted with *Crimmins v Stevedoring Industry Finance Committee*[84] which was decided in a context in which duties were imposed, and functions conferred by legislation upon a statutory body occupying a special, supervisory position over workers and their employees in a uniquely organised industry. But some of the questions there posed, and indeed the answers to them, serve to demonstrate how far this case is from a case in which a relevant duty of care may be established. There Gaudron J asked[85]:

> "first, whether the powers and functions conferred on the Authority are compatible with the existence of that duty; and secondly, whether there was a relationship between the Authority and Mr Crimmins of a kind that gave rise to such a duty".

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83 The term Council was not introduced into the Bye-Laws until 1991 but the term is apparently used to distinguish the Board from those who actually attended the meetings.

84 (1999) 74 ALJR 1; 167 ALR 1.

85 (1999) 74 ALJR 1 at 5 [18]; 167 ALR 1 at 5-6.

Here such powers and functions as these appellants possessed were entirely voluntary and not compatible with any duty to the respondents. As Gaudron J said in *Crimmins*[86], "[l]iability will arise in negligence in relation to [a] failure to exercise a power or function only if there is, in the circumstances, a duty to act[87]". No such duty can be discerned here.

125 One submission of the respondents was that they relied, and were entitled to rely upon these appellants collectively to make Laws that would make the game, in this case, scrummaging, safer.

126 Rugby union is notoriously a dangerous game. It is a game, often of quite violent bodily contact. Everyone who plays it is vulnerable. Some positions, such as the front row, are almost equally notoriously more dangerous than others, for example, the three-quarters, especially the wings. The respondents here could not possibly have been ignorant of any of these matters. And, in any event, in one of the cases, the injuries resulted from an infringement of the Laws then current, by opposing players, in no different way from those which could have been inflicted as a result of infringements of the amended Laws[88]. This last matter could raise an issue of causation in Hyde's case also, but it is unnecessary to pursue that.

127 It is relevant however to refer to some other matters which bear upon the question of a duty of care. Sport, particularly amateur sport, stands in an entirely different position from the workplace, the roads, the marketplace, and other areas into which people must venture. When adults voluntarily participate in sport they may be assumed to know the rules and to have an appreciation of the risks of the game. In practically every sport safer rules could be adopted. Should the international body controlling cricket have been held liable for not prescribing the wearing of helmets by batsmen before the West Indian cricket selectors unleashed upon the cricketing world their aggressive fast attack of the 1970s? Should cricket be played with a soft, rather than a hard ball? Should hockey sticks be made of semi-rigid materials only? Rugby union, particularly that with which the appellants might primarily be thought to be concerned, the international game between national sides, is not just a game for players. It is also a game for spectators. The very existence and continuation of the international competition might well depend upon their interest and attendance at

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86 (1999) 74 ALJR 1 at 6 [25]; 167 ALR 1 at 7.

87 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443-445 per Gibbs CJ (Wilson J agreeing), 460-461 per Mason J, 478 per Brennan J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 368-369 [102] per McHugh J.

88 Report of referee, Mr B M Kinsey, dated 25 August 1986.

matches. No doubt many spectators attend because of the vigorous nature of the contest. Furthermore, at both the representative and lower levels of the game there can be no doubt that fit, usually young men are attracted to, and play the game because it involves an opportunity to dominate physically other like young men in circumstances in which injuries of various kinds will be inevitable. Fitness, technique, familiarity with the Laws, flexibility, strength, physical shape, weight, and skill, and disparities in these between opposing sides, will all as well have a part to play in the avoiding and sustaining of injuries. Not only is the number of rugby matches played world-wide incalculable, but even more so is the number of scrums set during those matches, scrums in which six people are always engaged in the front row. This matter may give rise to the spectre of an indeterminate number of claims by an indeterminate number of people throughout the world, a factor which, taken with others provides reason to hold that no relevant duty of care arises in the circumstances. Those others, I would summarise as: the respondents were engaged in amateur sport; the voluntary participation of the appellants; the unenforceability of the IRFB's Laws; the voluntary nature of the IRFB itself; the absence of reliance; the notoriety of the dangers the game presented; the appellants' answerability to and relationship with their home Unions; and, the distance in time, place, and contemplation between the respondents playing in the games in which they were injured and the appellants.

128 It follows that none of the relevant conditions for service outside Australia prescribed by the Rules have been satisfied here. On any test, neither the one that I would prefer, nor the one at the lowest end of the spectrum for the continuation of this action against the appellants, the test propounded by Barwick CJ in *General Steel*, should the respondents have succeeded in the Court of Appeal. It would also follow that if it were necessary to consider the appellants' application under Pt 10 r 6A and Pt 11 r 8, I would set aside the originating process against the appellants.

129 It is not necessary to go further in order to dispose of these appeals but something should, I think, be said about the exercise of the discretion which, it is common ground, on an application under Pt 10 r 6A(2)(b) still exists to set service aside if the conditions for service overseas are not satisfied.

130 The Court of Appeal thought that its discretion should be exercised essentially for these reasons: that the statutory criteria existed; New South Wales was not an inconvenient forum; all of the issues involving all defendants should be tried together; the appellants might have unassailable limitation defences in the United Kingdom; and although the respondents' claims were statute barred in New South Wales, they had applied for extensions of time which the Court thought should be granted.

131 I do have some serious reservations about the relevance, in favour of the respondents, that the Court of Appeal gave to the availability of unassailable

limitation defences in the United Kingdom. It amounts to this: because actions are barred in both possible jurisdictions time to bring an action should be extended in the jurisdiction in which an extension may be granted. Limitations statutes are enacted to put an end to uncertainty. They confer rights upon defendants and encourage the expeditious commencement of proceedings. Exceptions to enable time to be enlarged should not, in my opinion, be construed with any predisposition either way, that is, towards strictness or liberality. However, it is unnecessary to reach any concluded view about the exercise of the discretion of the Court of Appeal.

132 I would allow each appeal with costs, order that the respondents pay the appellants' costs of the appeal to the Court of Appeal and restore the orders of Grove J.