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The juridification of sport: A comparative analysis of children's rugby and cricket in England and South Africa[1]

Summary

This article takes as its point of departure the notion of juridification in sport and, in particular, the perspective that the term has previously often been used in sport and law literature in a too narrow and limiting sense. Using the work of Ken Foster as a platform, the article examines a more nuanced notion of juridification. It does this by first unpacking two levels of juridification – the more well-known notion of increased legal intervention is considered before moving on to a more sophisticated application of the idea in terms of its impact upon rules and practices in sport. Foster termed this juridification as domestication. The article then applies these ideas in a practical context by examining two applications of the two children's sports (rugby and cricket) in England and South Africa. The article concludes as to the future developments that are likely to occur. Despite the economic and cultural differences it seems likely that South Africa will continue to follow England, as is the case with the first level of juridification, and that the rules and their enforcement will themselves become more domesticated. It is likely that coaches and educators will find themselves under increased pressure to conform from both a general fear of litigation and a changing internal regulatory regime of sport codes.

Juridifikasie in sport: 'n Vergelykende analise van sportdeelname van kinders in rugby en krieket in Engeland en Suid-Afrika

Hierdie artikel het as uitgangspunt die begrip *juridifikasie* in sport, en in die besonder die perspektief dat die term in die verlede dikwels in sport- en regsliteratuur in 'n te eng en beperkende sin gebruik is. Met die werk van Ken Foster as basis, ondersoek die artikel 'n meer genuanseerde siening van juridifikasie. Dit word gedoen deur eerstens twee vlakke van juridifikasie te ondersoek: die meer bekende begrip van verhoogde intervensie van die reg in sport, opgevolg met 'n meer gesofistikeerde toepassing van die idee in terme van sy impak op reëls en gebruike tydens sportbeoefening. Dit is wat Foster getipeer het as juridifikasie as 'n vorm van '*domestication*': die opname van regsbeginsels in die huishoudelike reëls, regulasies en bestuur van sportsoorte. Die artikel pas daarna hierdie idees in die praktiese konteks toe, deur twee toepassings in sportdeelname (rugby en krieket) van kinders in Engeland en Suid-Afrika te ondersoek.

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Die artikel sluit af met 'n bespreking van die verwagte toekomstige ontwikkelings. Ondanks die ekonomiese en kulturele verskille skyn dit asof Suid-Afrika steeds Engeland gaan volg, soos met die eerste vlak van juridifikasie, en dat die huishoudelike reëls, en die afdwinging daarvan, volgens regsbeginsels benader sal word. Afrigters en opvoeders sal toenemende druk ervaar om hierby aan te pas, op grond van sowel die vrees vir litigasie, as die veranderende interne reguleringsbenadering van sportsoorte.

1. Introduction

In both England and South Africa, sport and law have traditionally operated independently of each other with limited points of interaction. Effectively, sport historically regulated its own sphere, although in recent years the impact of the law has become more prominent. For example, the civil law has had a greater impact on sport, most notably at the elite level, as the increasing commercialisation of sport has led to contractual and intellectual property disputes as well as injury claims which are explored below. Prominent examples of the first can be found across a number of sports, including football, boxing and cricket.[2] Aside from individual disputes over registered trademarks, such as with the Arsenal case,[3] there have been significant disputes over other commercial rights such as the exclusivity of broadcasting agreements.[4] The influence of the criminal law has been less apparent, although issues relating to corruption and match-fixing have arisen. This has been of particular relevance in cricket with the late Hansie Cronjé, the South African cricket captain, banned for life from all cricket activities in 2000 and, more recently, allegations of match-fixing blighted the Pakistan tour of England in 2010. There have been numerous investigations into alleged match-fixing carried out by the Cricket Authorities across the world.[5] The importance of sport to both British and South African society must also be stressed, with both countries awarded key major international events that made much of potential legacy impacts and the possible impetus these might offer for children's involvement in sport.

As policy initiatives have been developed to encourage participation, in concert with the promotion of global sporting events, greater legalisation of sport is taking place that has the potential to restrict involvement. This process goes beyond a greater or more invasive application of legal rules but also an alteration of the internal regulation of sport. This article illustrates the stages

2 See, for example; *Warren v Mendy* 1989 3 All ER 103; *Watson v Prager* 1991 3 All ER 487 (boxing), *Greig v Insole* 1978 1 WLR 308 (cricket); *Union Royale Belge des Sociétés de Football Association ASBL and Others v Jean-Marc Bosman and Others* (Case C-415/93) 1995 ECR I-4921, CAS 2007/A/1298 Webster, Heart of Midlothian and Wigan Athletic FC (football). For a general overview of contractual issues see Greenfield and Osborn 1998. See also Majani 2009; Manville 2009; Miettinen 2008.

3 *Arsenal Football Club v Matthew Reed* 2003 RPC 39, 2003 3 All ER 865. See Shemtov 2007.

4 *Football Association Premier League Ltd v QC Leisure and Ors* 2008 EWHC 1411 (Ch); *Murphy v Media Protection Services Ltd.* 2007 EWHC 3091; Advocate General's Opinion in Joined cases C-403/08 and C-429/08). See also Van Rompey 2009.

5 King Commission 2000; Condon 2001.

of juridification within sport in England and South Africa, and examines, in particular, the impact upon children's sport. There are two particular elements. First, there is a greater application of existing legal regulation to sporting activities most notably in the sphere of negligence. Secondly, there is clear evidence of alterations to both the administration of sport and even the rules of the games themselves that are grounded upon a fear of litigation. It is not clear whether this fear is based on a realistic appraisal of the likelihood of litigation occurring, or a broader concern about the operation of law within sport. This article considers these two aspects of juridification with respect to the practice of children's sport in England and South Africa. First we discuss the theory of juridification, and follow this with an analysis of the increasing involvement of law with sport across both countries. Finally, there is the question of how the administration and rules of both rugby union and cricket have been altered for children and the extent to which this is driven by legal concerns.

2. Juridification: The forms and scope of legal impact

As Foster noted:

> Law in liberal democracies is increasingly invasive. The realm of what is outside legal regulation annually grows smaller. Law now regulates many areas of social life that historically have appeared immune from law. The household, the workplace, the army, the prison and the hospital have all come under the gaze and surveillance of law.[6]

Sport is an area where this trend is highly visible and a field worth analysing,[7] but it is important to appreciate such legal incursion from a sophisticated perspective. Teubner[8] notes: "Juridification is an ugly word - as ugly as the reality which it describes" and refers to the phenomenon as a kind of legal pollution. He attributes the phrase to Ehrlich,[9] but uses the phrase, in part, to equate such pollution to the increased bureaucratisation of the world. In legal terms, it is often used to describe growth or expansion of the legal field. However, this understanding of juridification is something of a simplification and rather crude. Some earlier work in sport and law applied this narrow definition. For example, Gardiner and Felix[10] specifically analysed the then increasing trend for players to resort to litigation against fellow players following injury, and discussed this colonisation in terms of juridification. This aspect is nonetheless an important one and a number of examples from both jurisdictions can be seen below. This usually involves the incursion of law, or an imposition of external legal norms, into new areas, and is often accompanied by increasing commercialisation.

However a more significant aspect of juridification can be seen not in terms of *overt* legal intervention but rather a more indirect incorporation of

6 Foster 2006:155.
7 Foster and Osborn 2010.
8 Teubner 1987b:3.
9 Ehrlich 1976.
10 Gardiner and Felix 1995.

legal norms. Here the issue can be described, to use Foster's term, as a process of *domestication.*

Rather than being focussed upon direct legal incursion, this approach considers the voluntary imposition of external norms and an increasing resort to thinking and acting in a legal way without the imposition of case law or statute. An obvious example can be seen in the rules that govern sports:

> ... the internal regulatory regime may already have many elements of 'law' in a legal pluralist sense. A regulating sports body will have a constitutive document, the rulebook, a disciplinary regime to enforce the rules, and often a private system of dispute resolution that is legalistic, in that it is procedurally protective of the 'defendant' and administered by a lawyer.[11]

This can be viewed as an incorporation of external legal standards into the governance of sport. Vamplew provides a broad examination of the historical process of rule advancement and describes a scheme of constitutive rule development that could be mapped onto specific sports. He argues that "primacy (but not exclusivity) in the formation and progression of rules can be attributed to gambling ... at later stages, economic factors have had more importance and, at times, fair-play ideology has also played a role".[12] Arguably the law, in its broadest sense, has an impact that could be added to his approach. This *domestication* of law has an important impact that may be implicit, as in the scheme above, but could also be evidenced *explicitly.* This process has previously been outlined with respect to boxing, illustrating how the internal regulations have responded to external pressure, including that of "the law".[13] Vamplew also cites boxing, but sees the codification, certainly around the times of the Broughton Rules, largely as a result of the need to have certainty within the betting market. Foster provides a further example within what was the Zurich Premiership in Rugby Union where the 'Definitions' section of the Rules directly copies the *Interpretation Act* 1978. Rule books have become increasingly codified and legal in nature, a point similarly made by Campos with respect to college sports in the United States.[14] There has also been a rise of quasi-legal mechanisms and specific administrative bodies, notably the Court of Arbitration for Sport (CAS).

There are then two distinct aspects of juridification that require analysis. First, the increased application of legal principles to sport is examined. This is largely achieved through an analysis of relevant case law in each country. Secondly, we need to consider how the specific sports we have identified have sought to interpret the perceived threat caused by legal intervention, as part of this process of domestication. Here specifically we analyse how rugby union and cricket have acted to change their administration and practices with respect to the participation of children.

11 Foster 2006:158.
12 Vamplew 2007:844.
13 Greenfield and Osborn 2010.
14 Campos 2000.

3. Juridification I: Increasing legal intervention in sport in England and South Africa

As the relationship between sport and law has become more entwined this has extended to increased regulation of the participation of children in physical activities. Of greatest concern, because of its immediacy, has been the protection of children from physical abuse by adults, notably those involved in coaching or administration of the sport. Abuse need not be confined to girls,[15] or indeed children.[16] Swimming became the original focal point for concerns about abuse of participants in numerous countries around the world as high-profile swimming coaches received prison sentences.[17] Policies and procedures within sport have developed as society has become more concerned about the abuse of children generally.[18] Thus protection of children involved in physical activity has become a primary concern for those involved in administration, governance and policymaking.

The growth in the involvement of law within sport can be seen in numerous countries such as the United States[19] and Australia.[20] This trend is primarily evidenced by the growth of case law that has directly impacted upon sport, and these instances have taken a variety of forms. Here we outline the extent and applicability of law to sport in both jurisdictions, with particular reference to the regulation of children's sport, although we provide some broader examples of law's incursion into sport to give some understanding of its potential application. It should be noted at the outset that the location of children's sport may vary which can alter the nature of the regulatory regime. For example, in the UK private sports clubs have an important role in delivering sport beyond the school day, whilst in countries such as South Africa the concentration of activity is within the school environment. The mechanism and processes may differ even though the ultimate aim, of keeping children safe, is the same. Similarly, different sports may, because of their specific nature, require alternative strategies. An obvious distinction would be between individual and team sports. Our focus in this article is on two team sports that are common to both countries, namely Rugby Union and Cricket. Team sports may have a different dimension to individual sports and a clear element of concern here is the capacity in both sports to inflict physical harm as a consequence of participation. These are also sports where protective clothing and rule changes have been introduced to protect younger players. The emphasis is on comparisons between the different regulatory regimes in the two countries in these sports, although there are obviously wider universal principles identified.

15 Harthill 2009.
16 Farsting *et al.* 2011.
17 In the USA Brian Hindson was sentenced to 33 years imprisonment and in the UK Mike Drew to 8 years imprisonment. See also Fung *et al.* 2004 and Downes 2002.
18 Green 2010.
19 Gray 2002; Biedzynski 1993-1994.
20 Kelly 1989.

3.1 England

Although the primary mechanism for regulating behaviour in relation to sport is the common law, a number of statutes have been introduced, in particular to deal with issues of safety and public order.[21] However, it is with regard to the tort of negligence and, to a lesser extent, the imposition of criminal liability, where the greatest effect has been seen, certainly in terms of participation. The question of liability for on-field matters has always been problematic. First, the relationship between players and the identification of the point at which the infliction of physical harm becomes actionable has proved difficult to evaluate.[22] This aspect is less of a concern here as our fundamental area of analysis is children's sport, and of more significance here is the potential liability for those selecting the players, coaching, refereeing the match or even organising the event.

It is possible for injuries to be sustained in 'informal' play outside of organised sport. In one such instance, for example, facial injuries were suffered during a game of football taking place before school.[23] A pertinent legal analysis would examine the nature of the activity and the responsibility for it. In a more formalised environment there are cases such as *Fowles*[24] where a young gymnast was injured whilst attempting a front somersault. The incident occurred at a council-run youth facility and, even though the gymnast was unsupervised at the time of the accident, he successfully sued the council. Hartley noted that:

> [s]upervision is a common theme illustrated in the judged cases on negligence in sport, recreation and physical education contexts. It can be of a more general kind such as supervising school playgrounds, changing rooms or buses, coaching or refereeing sports team or match or of a very specific kind such as physically supporting a gymnast on a 1:1 basis in a difficult move.[25]

The case of *Watson*[26] is an example of liability being attached to the highest level of administration, the governing body. This is understandable, given the British Boxing Board of Control's widespread licensing function, and the need to protect boxers from undue physical injury.[27] Supervision can clearly take place on a number of different levels ranging from overall control of a sport, as in *Watson,* to an individual level of supervision such as that noted above by Hartley.

In terms of restrictions on liability, the *Compensation Act* 2006 permits a court, when determining a negligence claim, to consider the activity being undertaken and whether it has any social benefit and the likelihood of deterring participation. James makes the point that the *Act* may alter how judges view

21 Greenfield and Osborn 2001.
22 Anderson 2008; McArdle and James 2005.
23 Ruff 2003.
24 *Fowles v Bedfordshire County Council* 1996 ELR 51.
25 Hartley 2009:60.
26 *Watson v BBBC* 2001 2 WLR 1256.
27 George 2002.

cases: "Although judges rarely refer to the Act as a reason for their decisions, there has been a clear indication that by the use of phrases like 'responsibility for their own personal autonomy' and 'personal responsibility for the risks they have run', the judiciary does not want to see sport litigated out of existence".[28] One compromise would be to permit the activity, but require the strict enforcement of the regulations around the more dangerous aspects of the game, or even prohibit the more risky elements. This debate has arisen through a series of rugby cases where players have suffered serious injury as a result of a collapsing scrum.[29]

In both *Vowles*[30] and *Smoldon*[31], the referees were found liable in negligence for their handling of the game that led to a player's injury. An alternate outcome occurred in *Allport*[32] with the injured hooker, who suffered a severe disablement at a scrummage, losing his claim for negligence against the referee. Irrespective of negligence claims, the seriousness of injuries arising from the scrum has led to periodic calls from the medical community for contested scrums to be removed from the game. Following a study into the incidence of Rugby Union injuries in Scottish schools,[33] one of the authors, Prof. Allyson Pollock, called for scrums in rugby to be banned, something that was given short shrift by the sport.[34] In fact, the research by Nicol *et al.* (2010) indicated that the most problematic area in rugby was actually the tackle, and it was this area of the game that provided the basis for the claim in *Mountford*.[35] The contact was within the laws of game but carried out by a player who was over the normal age to be playing under-15 school rugby. One question was whether the age requirement was a guideline or an absolute rule, and one of the two experts indicated that for over 50 years the custom had been to prohibit movement of players between age groups. The overage boy who caused the injury was some 9 inches taller and almost twice the weight of the injured claimant. However, it would be possible to find such a disparity in size within an age group, and the larger child of the same age would not be prohibited from playing against less powerful players. However, the schoolmaster who selected the child, and the school vicariously, were found liable for the failure to consider and apply the rule. Furthermore, in *Affutu-Nartey*,[36] during a game between teachers and students, a school teacher tackled a 15-year-old schoolboy, causing serious injury, and was found negligent. One consequence of the problems caused by 'mismatching' is the ending of competitive matches between staff and pupils and pupils and

28 James 2010:89.

29 Whilst only persuasive, in two joined Australian cases, *Agar v Hyde* and *Agar v Worsley* 2000 HCA 41, the High Court ruled that members of the International Rugby Board were not liable in negligence for the injuries suffered for their role in overseeing the regulations of the game. While the rule makers escaped liability those who police the game itself, the referees have incurred legal responsibility.

30 *Vowles v Evans* 2003 EWCA Civ 318.

31 *Smoldon v Whitworth and Nolan* 1997 ELR 249.

32 *Allport v Wilbraham* 2004 EWCA Civ 1668.

33 Nicol *et al.* 2010.

34 Mourant 2010.

35 *Mountford v Newlands School and another* 2007 EWCA Civ 21.

36 *Affutu-Nartey v Clark and Another* 1984 9 February, High Court transcript.

ex pupils. It is apparent that there is the potential for the tort of negligence to apply to a wide range of individuals, and even organisations, that are not playing but are indirectly involved. Selectors, coaches and referees who fail to meet the requisite standards could, along with their employers (who may be clubs or schools or governing bodies), see a claim for damages upheld.

3.2 Republic of South Africa

Whilst England, and indeed other jurisdictions such as the Unites States of America, has a more highly developed conception of sports law, there is an increasing interest in the area within South Africa that can be seen in the production of a greater number of academic works.[37] In a broad sense, sports law in South Africa can be viewed as an amalgam of various disciplines or areas which all have a common denominator of sport.[38] It comprises an area of existing law and practice related to or affected by sport. Since the dawning of the new democracy in South Africa, an increased number of court cases have been heard concerning the large variety of human rights that are enshrined within the Bill of Rights, which form part of the *Constitution of South Africa* 108 of 1994. The South African Constitutional Court exclusively addresses human rights issues that have to be clarified through the interpretation of this relatively new Constitution. In spite of new legislation being constantly developed on the grounds of the principles and values of the Constitution, issues such as sport- and recreation-related injuries to students are still decided in the South African courts applying primarily the principles of the law of delict. This is similar to the tort liability approach of the UK and other countries, but based on the Roman-Dutch common law. Neethling and Potgieter defines a delict as "the act of a person that in a wrongul and culpable way causes harm to another".[39] They also refer to the basic difference between the English law of delict (tort law), with its casuistic approach, and the South African law of delict, that has adopted a generalising approach. The South African law of delict "is governed by a generalizing approach. This means that general principles or requirements regulate delictual liability".[40] This leads to the fact that the South African law of delict is, according to Neethling and Potgieter flexible and pliable, and "is able to accommodate changing circumstances and new situations more easily than one that adopts a casuistic approach".[41]

Reasonable supervision and care is expected from educators during sporting and recreational activities facilitated by schools. The case law is somewhat limited, but generally, the courts do not think it reasonable to require continuous supervision of all children during unstructured play or in other situations where some level of supervision is required. Thus teachers and coaches in South Africa are not held liable if it can be shown that injuries would

37 See, for example, the publications of Cloete and Cornelius 2005; Singh and Surujlal 2010; Rossouw 2004; Louw 2010.
38 Rossouw 2006:8.
39 Neethling and Potgieter 2010:4.
40 Neethling and Potgieter 2010:4.
41 Neethling and Potgieter 2010:5.

still have occurred had they been present, because the conduct of children cannot always be anticipated. This approach is illustrated by two cases. First, *Lubbe*[42] highlights the level of supervision required of an educator-coach in the instance where a 12-year-old girl suffered an injury during a mini hockey tournament. Several matches were played simultaneously, crosswise over the field, and plastic cones were put in place as temporary goal posts, with no nets or other kind of barrier to stop the hockey ball. The child was not playing at the time of the incident, but suffered facial injuries when struck by a deflecting ball. It was argued that the teacher had been negligent by allowing the game to be played in such an environment and without making the necessary arrangements to ensure the students' safety. The court found the teacher was not negligent:

> One would expect Nadia to approach the bags, knowing that they were behind the goal posts, with the necessary caution. She was old enough to appreciate the dangers inherent in the game of hockey and Mrs Van Biljon was entitled to accept it.[43]

In *Hawekwa*[44] a different approach was followed by the Supreme Court of Appeal, where the educators had supervisory duties during a two-day excursion to a youth camp. Whilst there a 9-year-old boy sustained severe injuries when he fell from a bunk bed in his sleep and fractured his skull. The appeal by the Minister of Education was rejected on the grounds that the level of supervision was inadequate. It was argued that such an injury was both foreseeable and preventable. One example, providing a clear comparison to the English position, outlined in *Mountford*,[45] was unearthed by the authors. Here during a school match of under-15 rugby, in Western Province, an overage player caused an injury to another player. The case was apparently settled, but it became apparent that numerous problems have emanated from the use of overage players. In particular, in the less affluent areas, the coaching and management is less well-maintained especially as regards registration and controlling age groups when selecting teams.[46] This is one area where the English position is quite distinct.

In terms of the liability of referees and other match officials, Cornelius argued that there may be a possibility of "judicial and other intervention in decisions taken by event officials ..."[47]. Taking Cornelius's point that match officials, apart from the referee, might be potentially liable, it is interesting to consider the research of Singh and Surujlal[48] who found that around 12% of coaches and administrators were not even aware that they could be potentially liable if rules regarding equipment were not followed. Cornelius[49] also notes

42 *Lubbe v Jacobs* 2002 High Court of South Africa: Transvaal Provincial Division, case no. 1225/2001.
43 Rossouw 2004:35.
44 *Hawekwa Youth Camp v Byrne (615/2008)* 2009 ZASCA.
45 *Mountford v Newlands School and another* 2007 EWCA Civ 21.
46 Kleynhans 2011.
47 Cornelius 2002:631.
48 Singh and Surujlal 2010.
49 Cornelius 2002.

that it is impossible to draw conclusions due to the paucity of case law in the area. Indeed, when discussing the area of referee liability for participant injury reference is made to the English case law and specifically the case of *Smoldon,* rather than any South African precedent, although he argues that in South Africa an official would be under a similar legal duty to prevent injury.

The Constitution has played a central role in the protection of human rights for the past 15 years, and this influence has also been visible in the area of sports coaching. One prominent fundamental right is contained within section 28(2) which provides that the child's best interests are "... of paramount importance in every matter concerning the child". It should first be noted that participation in children's sport in South Africa is to a large extent regulated by means of school structures. Though privately owned junior clubs do exist, normally located in larger towns and cities, the majority of children are coached by qualified teachers who may have additional qualifications as coaches or referees. Many schools, especially those in more affluent areas, require from all teachers involved in sport to be well qualified in coaching.[50] These teachers are also responsible for refereeing, organising events, and often form the backbone of provincial junior sport structures. The South African *Schools Act*[51] that regulates public education is a prominent instrument in cases of injuries or other forms of damage to participants in public schools. The State, being responsible for the provision of education, is also held liable in terms of section 60 of the *Schools Act* in cases of injuries to students sustained during school activities. Teachers, coaching as part of their regular duties, are not sued in their personal capacity in cases of negligence. This liability is not linked to vicarious liability, but rather to the fact that the injury is normally linked to school activities. In the case of *Louw*[52] the Supreme Court of Appeal ruled that it was the State and not the School Governing Body as employer, who should be held liable for the brain damage when a young child almost drowned during obligatory swimming activities supervised by an educator employed by the Ficksburg Primary School. The *Schools Act* includes, as addendum, the *Regulations for safety measures at public schools*[53] that specify in detail how various types of educational, cultural, sporting or social activities of the school within or outside the premises should be conducted, and defines supervision as "the management and control of learners at school and during school activities". As part of this legal framework regulating junior sport participation, the *Employment of Educators Act*[54] provides for the safety of participants by specifying that it is a form of misconduct if a teacher "in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations". The South African *Council for Educators Act*[55] also regulates the conduct of teachers through its Code of Professional Ethics, specifying in section 3.11 that a teacher

50 Rossouw and Karstens 2009; Doubell 2011.
51 *Schools Act* 84/1996, hereafter referred to as the *Schools Act*.
52 *Louw en 'n ander v Lid van die Uitvoerende Raad, Vrystaat, Onderwys en Kultuur en ander* 2006 4 All SA 282 (O).
53 Government Notice 1040 (Government Gazette 22754) of 12 October 2001.
54 *Employment of Educators Act* 76/1998.
55 *Council for Educators Act* 31/2000.

should take "reasonable steps to ensure the safety of the learner". This Code is also very clear on psychological forms of damage in that it instructs the teacher to avoid "any form of humiliation, and refrain from any form of abuse, physical or psychological" (section 3.5) and to refrain from "improper physical contact with learners" (section 3.6), "any form of sexual harassment (physical or otherwise)" (section 3.8), or "any form of sexual relationship with learners at a school" (section 3.9). Offences in this regard, causing damage, would be regarded as serious misconduct and treated accordingly. Unfortunately, the sphere of sport coaching is internationally notorious regarding improper relationships, abuse and harassment, and South Africa is no exception.

Whilst there appears to be some additional recourse to the law, the structure of children's sport and more specifically the location within schools, provides more of a shield than in England. The fear of litigation may, however, be just as important even if this fear is not supported by the evidence. This concern to protect individuals and organisation from legal claims may be seen in changing some of the aspects of the sports themselves.

4. Juridification II: Domestication and the case of children's sport

The previous section broadly illustrated the extent to which juridification has taken place in terms of the incursion of law into areas of sport and children's sport. A further impact is how the sporting rules have altered and changed to reflect such changes, that is to say juridification in terms of *domestication.* This section deals with the shifts that have occurred within the rules, again focussing on children's sport. Foster argued that "the rules of major sports are codes. Lawyers often originally drafted them, and they named them the laws of cricket or whatever. They have the characteristics of formal legal rules; they appear precise, clear and unambiguous".[56] There may be a distinction between the rules or laws of the game itself and the administrative rules that govern the sport. Both will need to contain flexibility to be able to respond to new circumstances. *Watson*[57] is an example of such a response to a legal stimulus, in this case a finding of negligence against the governing body for acute injuries suffered by a boxer. The level of damages awarded effectively bankrupted the organisation. The existing practice that had been found wanting was subsequently amended by an alteration of the rule book. Effectively, this is an exercise in risk aversion, and an attempt to avoid future liability. This recent example is part of a long-term trend in boxing and an example of how legal principles or rules become domesticated:

> In particular an increasing move towards a rule-based sport is evidenced as boxing becomes more regulated internally; witness the Broughton Rules, the London Prize Ring Rules, and the Queensbury Rules which

56 Foster 2006:159.
57 *Watson v BBBC* 2001 2 WLR 1256.

> responded, in part, to perceived threats to the sport. These rules were seen as civilizing the sport, or at least making it safer'[58]

The *Watson* case demonstrates a change in response to a specific legal finding. The next sections indicate alterations to both the administration and the rules of the game based on a more general concern about the role of law and its potential for intervention. This is dealt with by examining how two sports, rugby union and cricket, have responded to these developments.

4.1 England

The protection of children participating in sport and other physical activities became a high priority for two key reasons. First, increased legal intervention led to a fear of litigation.[59] Secondly, the panic concerning sexual abuse of children during sports, particularly swimming noted above, severely affected sports as parents refused to permit children to take part for fear of harm. This issue has been dealt with in depth in England by Brackenridge *et al*.[60] Consequently, comprehensive safeguards have been introduced.[61] The different concerns may be interlinked, as failure to properly regulate coaching behaviour might also lead not only to a criminal prosecution but also to a civil action for damages against the organising body if the level of control is deemed insufficient. Sport has adopted a number of defensive practices to both protect children and prevent legal intervention.

These can be divided into two broad areas. First, the regulations governing play itself as well as the requirements and restrictions imposed on participation. Secondly, there is an increasing bureaucratisation of the administration of the sport, the fundamental element being the relationship of adults to children. The introduction of 'good practices' will also allow a sport to attract funding and at a lower level be a requirement for participation in, for example, leagues. This article is primarily concerned with the question of participation rather than administration. One obvious aspect of child safety is the introduction of protective equipment that may be required in a number of team sports where there is physical contact of some description – for example, shin pads in football, mouth guards in rugby, and helmets, pads, gloves, and abdominal boxes in cricket. The fundamental issue is whether these are compulsory or at the discretion of the coach and/or parent and whether their introduction is to any extent because of a fear of the legal consequences of an injury.

In Rugby Union there are two specific protective issues for participating children. With respect to mouth guards the Governing Body, the Rugby Football Union "strongly recommends that when young players are playing contact games or are participating in contact training sessions that they wear a mouth guard". The second issue is the development of contact rugby itself that is introduced at the age of nine. Prior to this players may have experienced

58 Greenfield and Osborn 2010:368.
59 Furedi 2008; Hopps 2002.
60 Brackenridge *et al*. 2007.
61 Child Protection in Sport Unit 2003.

mini tag rugby where players are 'tackled' through the removal of a tag held in place on a Velcro belt. The aim of non-contact mini tag rugby is to introduce children to rugby without the fear of physical contact and it is also regarded as a way of encouraging girls to play. Mouth guards are accordingly strongly recommended by the RFU for both games and training sessions where contact is involved. Furthermore, this extends to mini tag rugby where there is no direct physical contact. It is interesting to note that clubs will often make this an absolute requirement and prohibit participation unless a mouth guard is worn. However, the same strict approach does not apply to shin guards.

With respect to cricket, in 2000 the England and Wales Cricket Board (ECB) issued guidance on the wearing of protective kit by players under the age of 18. It required that junior players should wear the full range of protective equipment in both matches and practice sessions where a hard ball is used; this included for batsmen a helmet with a face grill, and an abdominal protector for boys. However, there was the option at this point for parents to give consent for the player *not* to have to wear a helmet. In a 2010 alteration to the regulations it was determined that the parental waiver should no longer apply and "... that young players are not allowed to bat or stand up to the stumps when keeping wicket against a hard ball without wearing appropriate protection". The ECB also introduced fielding regulations that cover the minimum distances that a young player must be away from the wicket.

In addition, there is a limitation on the number of overs a young player, who is classed as a fast bowler, may bowl in one spell and also in total in a match. In 2010 the Directive was modified, allowing a modest increase in overs for those up to 16 years old but the total number of overs that those in the U18 and U19 category can bowl was reduced from 21 to 18. This is a protective measure to prevent young bowlers placing undue strain on their developing bodies through over bowling. There is no limit on slow bowlers who are not putting the same level of stress on their physique. The Directive also recommends that in any 7-day period a fast bowler should not bowl for more than 4 days in that period and for a maximum of two days in a row. However, given the truncated nature of the season, fixtures may get congested. Responsibility for enforcing the directive is shared equally between captains, team managers and umpires. More controversially, in December 2009 the ECB introduced rules on participation of young players in 'open age' cricket. Open age effectively refers to adult cricket and the Directive excludes any player below the under-13 age group from participating. This has caused some consternation among clubs who used adult cricket at the lower levels as a means of young player development.

4.2 Republic of South Africa

Similar issues to those outlined above have been noted in South Africa, although their incidence is not as marked nor the regulations as prominent. Singh examined the child-protection regime and noted that the South African Constitution provides children with a right to appropriate care and protection, but that sport, for all its positive attributes, does offer possible opportunity

for abuse: "From the social to the elite levels, sport can provide a breeding ground for those who like to prey on children".[62] Junior sport participation in South Africa is closely linked to the school system, and the creation and maintenance of a safe and protected environment for children is usually a prominent objective of every school.

By its very nature, participation in many kinds of school sport is riskier than most classroom activities. However, Rossouw and Karstens[63] as well as Doubell[64] found empirically that teacher-coaches, in the absence of adequate legal training, are only vaguely aware of the potential legal consequences with respect to student injuries. They do, however, fear litigation, and realise that applying proper risk management to their coaching endeavours is important. As part of the emerging human rights culture some parents, who were traditionally reluctant to sue the Department of Education, school or a specific educator in cases of injuries to learners, have changed their approach. This can be evidenced in the increasing number of court cases in which schools (via governing bodies) and departments of education have become involved.[65]

Simultaneously, national sport authorities have become aware of the importance of making sport safer. In rugby, the main thrust was the increase in serious injuries to players. Singh argues that risk management should form an essential part of the sports industry of the 21st century:

> The law expects sports managers to develop risk management and loss control programmes to ensure a safe environment for all who participate in sport. Risk management has become as important a function as budgeting, scheduling, contracting, financial management, and other related duties. [66]

In terms of rugby, Terblanche[67] noted that in 1989 a national plan for the prevention of serious rugby injuries was envisaged. All stakeholders, such as coaches, school principals, departments of education, medical staff, trauma units and match officials were involved. The measures taken then were, however, not enforced.[68] Two decades later the South African Rugby Union[69] published statistics indicating regular incidences of acute spinal cord and head injuries in schoolboy rugby, reaching a climax in 2005-2006 with 24 serious injuries in this 24-month period.

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62 Singh 2003:54.
63 Rossouw and Karstens 2009.
64 Doubell 2011.
65 *Minister of Education and Culture (House of Delegates) v Azel* 1995 (1) SA 30 (A); *Lubbe v Jacobs* 2002 (High Court of South Africa: Transvaal Provincial Division, case no. 1225/2001); *Peter Wynkwart v Minister of Education, Highlands Primary School* 2002 (High Court of SA: Cape of Good Hope); *Louw en 'n ander v Lid van die Uitvoerende Raad, Vrystaat, Onderwys en Kultuur en ander* 2006 4 All SA 282 (O); *Hawekwa Youth Camp v Byrne (615/2008)* 2009 ZASCA.
66 Singh 2005:123.
67 Terblanche 1989.
68 Terblanche 1989.
69 South African Rugby Union 2010:2.

The upshot of this was the Boksmart Rugby Safety Programme which had an immediate effect. In 2009 there were nine incidents, and in the first 6 months of 2010 only two serious injuries at this level. The Boksmart initiative aims to provide "coaches, referees, players and administrators with the knowledge skills and leadership abilities to ensure that safety and best practice principles are incorporated into all aspects of contact rugby".[70] Contrary to 1989, these measures are mandatory and actually enforced. As from January 2011 rugby games in South Africa may only be played if both the coach and match officials have Boksmart qualifications.[71] This applies to all levels of rugby, including schools. Interestingly, the Boksmart regulations also provide details of necessary safety equipment and medical care that should be supplied during matches, but no mention is made of any protective equipment for players. Indeed, the South African approach to safety equipment in rugby is in sharp distinction to the position in England. In South Africa, primary school rugby players (this includes children up to Under-13 level) do not wear boots, and mouth guards are not mandatory. It is interesting to note that research on the protection provided by mouth guards at adult and junior level has been carried out specifically in South Africa.[72] Once the children move to secondary school the wearing of boots becomes compulsory but still the use of mouth guards is discretionary and coaches are given no direct instruction in terms of use of mouth guards.

Cricket appears at first glance to be much more in line with the position in England. For example, for the South African Schools Week 2010-2011, a national cricket week for various age groups, Cricket South Africa (CSA) issued very specific documentation regarding the use of helmets for the week. Law 41.1, for example, stipulated that all batsmen must wear a helmet and any batsman arriving at the crease without a helmet would be viewed as a refusal to play and given out accordingly. Interestingly this regulation is followed up by "The CSA and or any of its affiliates indemnify itself from any recourse failing the implementation of this provision".[73] This provides a clear example of the governing body being acutely aware of the possibility of litigation and illustrates an explicit attempt to domesticate their rules/laws. Tragically, a terrible incident occurred in September 2010 where a 13-year-old schoolboy died after being struck by a full toss.[74] This may bring the issue of junior cricket and protective provisions back into focus. However, in terms of the issue of over-bowling, no mention is made in their regulations about placing limits on the number of overs bowled. In South Africa it is left to the *discretion* of the coaches, and perhaps medical staff in the case of national or provincial level representative leagues. For example, in the Western Province there is a compulsory requirement for batsmen, wicketkeepers and close to the wicketfielders to wear helmets. There is also a limitation on overs for fast bowlers.[75] At school level only the educator coach would be involved in

70 Boksmart 2011.
71 Sport Editorial Board, *Beeld* 2010.
72 De Wet *et al.* 1981; Blignaut *et al.* 1987.
73 CSA 2010.
74 Viljoen 2010:3.
75 Western Province Cricket, undated.

making this decision. Coaches are an essential element in making sure that preventable injuries are avoided. Milsom *et al.*,[76] in a survey of elite South African schoolboy cricketers, found that fast bowlers suffered a greater incidence of injury than other players, and some of this can be attributed to poor technique which can be corrected with good coaching.

5. Conclusion

Both countries offer interesting material as to the impact of law upon children's sport. Our original hypothesis was that the two countries would be quite distinct, but our analysis has shown that at points the approaches are broadly similar, although protection is more marked and uniform in England. In terms of the first notion of juridification, it is clear that this is more prominent in England. This is perhaps not surprising, given the acknowledgment that the English situation is used as a benchmark by South Africa[77]. This further illustrates the broad influence of English case law and legislation within this area. In terms of the second aspect of juridification, there are more interesting findings. In both countries there is some evidence of risk averse policies, and there have been attempts to implement safety measures that not only aim to protect children but also to protect coaches, and others, from being held liable or to at least limit their liability.[78] However, in the Republic of South Africa this is far less developed and less enforced. It was noted above that some of the requirements regarding equipment, such as mouth guards and boots in rugby, are either not required or not strictly enforced in RSA.

Much more leeway is given to the educator as coach and indeed many of the requirements that are mandatory in England are in fact discretionary in South Africa. A key point is that coaches in England take a very cautious position making advisory policies to the point of refusing to allow participation. For example, some research has indicated that there are potential side effects caused by the wearing of Protective Athletic Mouth guards (PAMs): "The results of this study confirm the wearing of PAMs has a significant influence in producing oral lesions and may have a significant influence in producing oral disease".[79] Despite the economic and cultural differences, it seems likely that South Africa will continue to follow England as is the case with the first level of juridification, and that the rules, and their enforcement, will themselves become more domesticated. The more high profile examples come to the fore and they are newsworthy, the more likely that this process will accelerate and greater 'protection' will be apparent even if not mandatory at a national level. In addition, it is likely that coaches and educators will find themselves under increased pressure to conform from both a general fear of litigation and a changing internal regulatory regime.

76 Milsom *et al.* 2007.
77 Cornelius 2002.
78 Gaskin 2005, 2006; Boksmart 2011.
79 Glass *et al.* 2009:415.

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