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Published version

CHARLISH, P. (2003). Richard Vowles: rugby case. Journal of personal injury law.

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The recently decided case, *Vowles v Evans*[1], in which the Welsh Rugby Union, (WRU), was held liable for the injuries received by a participant following a scrummage during a game of rugby union between Llanharan Second XV and Tondu Second XV, in January 1998, has once again given food for thought to those who participate in contact sports, be that as players, referees or administrators. The WRU accepted vicarious liability for the referee of the day, Mr David Evans, (rather ironically a practising solicitor, specialising in personal injury), for the injuries received by Mr Vowles. It was the first case in which an amateur referee in any sport has been held liable in the context of an adult amateur game.

The facts of the case were that there was an injury to the Llanharan Second XV, (Mr Vowles's team), loose-head prop[2], in the thirtieth minute of the game, necessitating a replacement prop forward. There was no suitably experienced/qualified player to replace the injured loose-head prop and so Christopher Jones acted as replacement. Llanharan then declined the referee's invitation to proceed for the rest of the game with uncontested scrums, (a safety measure designed to account for the presence of inexperienced front row forwards). In the final moments of the game, there was a faulty engagement of the scrum resulting in the injuries received by the plaintiff. Although this case broke some new ground, comparisons can clearly be drawn with another rugby union case, *Smoldon v Whitworth and another*[3], where the match referee, in a game at Colts level, was held liable for the injuries received by Ben Smoldon[4], following a collapsed scrum[5]. Smoldon, like Vowles was playing in the

[1] Vowles v Evans: [2002] EWHC 2612 (QB)
[2] International Rugby Board "The Laws of the Game of Rugby Union" 2002, Law 20 – Scrum, Definitions - The loose-head prop is described thus by the International Board, (IRB) "The players on either side of the hooker are the props. The left-side props are the loose-head props. The right-side props are the tight-head props"
[3] Smoldon v Whitworth [1997] E.L.R 249
[4] Colts are defined as those players under the age of 19
[5] International Rugby Board "The Laws of the Game of Rugby Union" 2002, Law 20 – Scrum, Definitions

position of hooker[6] and as such, bore the full force of the competing packs when the scrums went down. In Smoldon's case, the referee failed to deal with persistent collapses and furthermore failed to enforce the new rules designed specifically to maintain safety in scrums for junior players; namely the crouch-touch-pause-engage routine; where the ball is put into the scrum only after the afore-mentioned sequence is followed. The consequences of this failure were the catastrophic injuries, (paralysis from the neck down), received by Ben Smoldon.

The laws of rugby union are quite categorical in their provision for scrummage competition: all players who participate in the front row must be experienced in the position. The game was played under the auspices of the Welsh Rugby, their version of the 1997 Laws of the game being applicable to the match in question. Law 3, (12) stated[7]:

> In the event of a front row forward being ordered off or injured or both, the referee, in the interests of safety, will confer with the captain of his team to determine whether another player is suitably trained/experienced to take his position; if not the captain shall nominate one other forward to leave the playing area and the referee will permit a substitute front row forward to replace him. This may take place immediately or after another player has been tried in the position.
> **Where there is no other front row forward available due to a sequence of players ordered off or injured or both then the game will continue with non-contestable scrummages** … (emphasis added)

Furthermore, there is clear authority contained within the laws of rugby union, empowering the referee to abandon the game if he or she considers that it would be dangerous to continue. Law 6(A) (3) Note (iii) states[8]:

> The referee has the power to declare no side before time has expired if in his opinion, the full time cannot for

[6] International Rugby Board "The Laws of the Game of Rugby Union 2002" defines hooker as the middle front row player in a scrum
[7] Welsh Rugby Union "The Laws of the Game of Rugby Football" 1997
[8] Welsh Rugby Union "The Laws of the Game of Rugby Football" 1997

> any reason be played or continuance of play would be dangerous.

The importance of these provisions cannot be overstated. A well-known danger in rugby union is the occurrence of collapsed or faulty scrums. In such an event, a clear and again, known risk, is that of serious neck injury. Particularly vulnerable are the opposing front row forwards, especially the hookers who are in effect trapped by the props on either side of them. It is for these reasons that the above-mentioned safety provisions have been implemented. The consequences of the failure of the referee to apply these provisions effectively were the disastrous injuries received by Richard Vowles, (incomplete tetraplegia). The injury occurred in the dying seconds of the game, in what was to be the last scrum contested. It is interesting to note that the injuries received by Ben Smoldon following a collapsed scrum also occurred virtually at the end of the match, providing some evidence of a confirmation of the words of Curtis J. in that case, who stated[9]:

> I have no doubt that ten minutes from no-side the constant scrummaging which had characterised this game plus the abnormal number of collapses, had caused the packs to be physically weary. This is when young limbs are at their more vulnerable.

Llanharan had played on a wet muddy pitch, with an inexperienced loosehead prop since the 30th minute of the game. It was never suggested that Mr Evans, (the referee), had been negligent in his control of the scrums or the match in general. However, the crucial actions in establishing liability occurred not when the injury actually happened, but when Mr Evans gave Llanharan the *option* of uncontested scrums, following the injury to their loosehead prop and their inability to provide a suitably experienced replacement. In leaving the players to decide for themselves whether or not to proceed with uncontested scrums, Mr Evans was abdicating his primary responsibility towards the players – that of maintaining their safety at all

[9] Smoldon v Whitworth [1997] ELR 115 at p129C-F – p9 of transcript I have

times, even to the extent of, when necessary, protecting the players from themselves. The English Rugby Football Union referee's manual, (of which the defendant had a copy), states[10]:

> It cannot be stressed too often that the primary role of the referee is to protect the players. You cannot always protect them from themselves, if they are determined to place themselves in danger, but you must be there to make sure that they are protected from the consequences of their actions, however judicious they may have been. … you will need to play uncontested scrummages if either side cannot raise a qualified front row.

The appropriate law governing the situation, (and backed by explicit advice from the RFU), where there is no suitably experienced front row forward is quite clear, the game must continue with uncontested scrums. In failing to enforce this at that point or any subsequent point in the game, the referee fell below the standard of care required. Morland J. continues[11]:

> As I find, the evidence is clear that the first defendant effectively abdicated his responsibility leaving it to Llanharan to decide whether to play non-contested scrums. He made no enquiries of Christopher Jones as to whether he was suitably trained and experienced. **The decision not to have non-contested scrums was not taken in the heat of the moment during fast moving play. It was taken when play had stopped and after discussion but without any interrogation of Christopher Jones as to his training and experience as a prop by the first defendant.** (emphasis added)
> … I am satisfied that Christopher Jones's lack of technique and experience as a prop was a significant contributory cause of the unsatisfactory nature of set scrummages, not only collapses which were not a cause of the claimants accident but also mistimed engagement which was.

[10] The English Rugby Football Union referee's manual
[11] Vowles v Evans: [2002] EWHC 2612 (QB), p12 of transcript

In stressing that the fateful decision taken by the referee did not happen *in the heat of the moment*, the court was drawing parallels with *Harrison v Vincent*[12], where an accident occurred in a motorcycle and sidecar race. It was found that the accident was caused by faulty brake installation and inspection. It was stressed that as this action had taken place in the in the relative calm of the workshop rather than during the excitement of the race, the standard of *ordinary negligence* rather than the assumed *modified standard of care*[13] was appropriate. Similarly in the case in hand, it may have been excusable for the referee to have taken the decision he did in the heat of the moment, but not where, as the court acknowledged, there was an opportunity for reflection and thought as was the case in this scenario. In any question raised concerning possible liability, this would have been a necessary circumstance taken into account by the court. The referee had the opportunity to take a balanced and considered decision in line with the official laws of the game but failed to follow those relevant laws. This failure to take that single correct decision, and to keep the situation under review during the game when it was clear, as the court heard, that there was an increasing number of badly set scrummages[14], appears to have been crucial in the finding of liability. Other factors had played some part in the unfortunate events, but it was the decision to offer Llanharan the *option* of uncontested scrums that was to be the most important factor in the finding of liability. Morland J. commented[15]:

> Although I am satisfied that the first defendant's refereeing during play was up to standard, in my judgment he had been in breach of duty in leaving Llanharan to decide whether scrums were non-contested and thus Christopher Jones became loose head in set scrums. Jones's lack of technique, training and experience as a prop was, I am satisfied a

[12] Harrison v Vincent [1982] RTR 8
[13] Effectively that of reckless disregard as raised in Wooldridge v Sumner [1963] 2 QB 43
[14] P14 of unreported transcript
[15] Vowles v Evans: [2002] EWHC 2612 (QB), p13 of transcript

> significant cause of the mistiming on engagement and the claimant's accident.

It is clear from the decision that a referee's duty extends even as far as over-ruling what in effect were consenting adults. The players, it could be argued, by declining the referee's offer of continuing with uncontested scrums, had expressly assumed the risk of injury, in effect they had agreed to play according to locally modified laws of the game. The players would all have been aware of the dangers involved particularly in the front row and they had expressly agreed to carry on confronting that danger, knowing that the loosehead prop was inexperienced in that position. There was no notion of *implied consent* to be argued. This was clearly *express consent*, which the judge chose to either ignore or overlook. However, as we have already seen, official communication from the RFU stated that at times a referee may have to protect players from themselves, and therefore the onus remains on the match officials to maintain due diligence with regards to participant safety at all times.

Concerns have been raised subsequent to this case about the possible effects of the decision on the future of contact sports in general and rugby football in particular. The Welsh Rugby Union issued a press release on the day of the decision in which they stated[16]:

> We are concerned about the judgment which has today been delivered by Mr Justice Holland [sic] and the implications for the game of rugby union.

Similarly, Mr Nigel Hook, senior technical officer of the Central Council of Physical Recreation opined[17]:

> This is a landmark case which will cause all our members to look again very closely at their regulations

[16] Press release from the Welsh Rugby Union 13th December 2002, 11:43am
[17] Hook N. in "Officials held liable for rugby player's paralysis", Goodbody J. The Times 14 December 2002 p11

> and insurance policies. We will be alerting the national governing bodies as to the consequences of this case.

So what are the consequences of this case?

Smoldon v Whitworth[18] had already established that a referee owed a duty of care to youth level players. It is hardly a great leap of legal principle to extend this duty to apply to amateur adult players. Moreover, there was no question of Mr Evans failing to reach the appropriate standard of care over the course of the game. Rather, he simply failed to implement one specific law, opting to leave the matter of uncontested scrums to the players' discretion rather than imposing the ruling himself. Whether this decision was taken by Mr Jones out of ignorance of the appropriate law or whether he simply chose to interpret it in his own manner is unclear. It may be a worry to referees of rugby union however that it is now clear that they must have detailed knowledge of all laws of the game, particularly laws related to safety. It may well be that this will prove to be a deterrent to referees in a sport where the official laws of the game currently run to 176 pages. It would appear that *Smoldon* established that players may accept the ordinary risks of the game and that one of those ordinary risks was the occurrence of collapsed scrums. However they do not accept the risk of an unreasonable number of collapsed scrums as seen in *Smoldon*, and that the referee was negligent in failing to control this aspect of the game to a reasonable level. The fact that in the case in hand, it was the players themselves who expressly chose the option of continuing the game with contested scrums, despite knowing that one of the front row forwards was inexperienced in the position is surely the issue of most interest arising from this case rather than the extension of referee's liability to adult rugby union.

[18] Smoldon v Whitworth [1997] E.L.R. 249

The extension of referees liability from colts, (under 19s), as was the case in *Smoldon*, to adults, as in *Vowles* may be equated with the Canadian case *Smith v Horizon Aero Sports Ltd*[19], where it was held that the legal implications of the teacher/pupil relationship do not significantly differ where the pupil is an adult. In that particular case, a parachute instructor failed to ensure that the correct techniques were learnt by his adult pupil, with suitably disastrous consequences. A teacher owes a duty of care to their pupils whether they are children or adults. In terms of the case in hand it must also be just that a referee will owe a duty of care to players whether they are youngsters or adults.

The question that must be raised is whether or not Mr Vowles, by being part of the Llanharan team that expressly elected to continue with contested scrums, therefore consented to the legal risk of being the victim of the tort. He had clear knowledge of the dangers associated with the set scrummage and yet agreed to pack down alongside a player whom he knew had very little experience in the position. Furthermore, he would be similarly aware of the provisions in the laws of the game that all players in the front row should be experienced in that position, and that this was clearly a safety measure. A reasonable, alternative option was open to the Llanharan players, the game could have easily continued with uncontested scrums. There was no sense that without agreement to play with the inexperienced player the game could not continue, (although technically it is arguable that the match would be unable to continue as a *competitive* game due to the provision in the league rules which would have prevented points being awarded to Llanharan, had they won the match). In contrast, in *Smith v Baker [1891]*[20], the claimant, who was injured when a stone fell on him from a crane, had been told by his employer to work underneath the crane. It was held in this particular case that the employee kept working in that

[19] Smith v Horizon Aero Sports Ltd 130 D.L.R. 3d 91
[20] Smith v Baker [1891] AC 325

dangerous position to keep his job rather than because he consented to the risk and that therefore his apparent acquiescence was not real consent and that therefore the defence of *volenti* could not apply as his assumption of the risk was not voluntary. In contrast however, in *ICI v Shatwell [1965]*[21], two employees, (brothers), agreed to disobey their employer's orders so that they could finish a job more quickly. As a result of their actions, they were injured and one of the brothers sued the employers for damages. It was held that the defence of *volenti* would have been available to the brother had he been sued and therefore it should be available to the employers, therefore exonerating them of liability. The brothers were not forced into the situation, they had a free choice and in effect consented to the injury they subsequently suffered, therefore preventing them from gaining any compensation, much, it could be argued, like Mr Vowles.

In the case in hand, the claimant clearly took an express decision to continue to participate in the game, knowing that he was at risk due to the inexperience of the replacement loosehead prop and therefore it is arguable that the defence of *volenti non fit injuria* should apply, thereby absolving the referee and hence the Welsh Rugby Union of legal responsibility. It is of course arguable that Mr Vowles did not have *real* consent due to the nature of the league rules, which prevented the award of points to a team where they were responsible for the imposition of uncontested scrums. Therefore all players would have been under immense peer pressure to retain the use of contested scrums rather than lose the opportunity for league points. However, even if the court is unwilling to apply *volenti* as a complete defence then there is clearly an argument that at the very least, Mr Vowles must by his actions bear some responsibility for his injuries and that therefore a finding of contributory

[21] ICI v Shatwell [1965] AC 656

negligence may be appropriate, and would thus lead to a reduction in the level of damages that Mr Vowles will receive.

An issue worthy of note but which, was unfortunately left unexplored by the court, was the provision in the rules of the competition in which Llanharan and Tondu were playing. In the event of uncontested scrums being utilised by the teams, it seems that league points would not be awarded, in the event of a victory, to the side that caused the uncontested scrums to be implemented. Mr Evans, in his match report wrote[22]:

> In approx the 30 minute of the game Llanharan indicated to me – that their prop was injured and could not continue. They also indicated to me that they did not have a prop forward replacement. In discussion I explained to them that the decision was theirs. The prop replacement need not be on the bench but could be on the field. It was their decision. I also explained that as far as I was aware if they requested non-contestable scrums as far as league points were concerned they could not be awarded even if they win.

It is clear that this rule[23] had an effect on the decision by the Llanharan players to reject the referee's offer of uncontested scrums. Ultimately though, we must return to the fact that the referee has the final duty of safety towards all participants and he is obligated to do whatever is necessary to maintain a safe playing environment, a matter of which Mr Evans, as a practising solicitor was painfully aware[24].

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[22] Vowles R. match report at p9 of unreported transcript

[23] Confirmed by Morland J. when he stated that "in my judgment the coach and captain of Llanharan were wrong in allowing the desire not to forfeit points to override considerations of safety", p12 of unreported transcript

[24] Such a duty was very clearly acknowledged by the first defendant in an earlier match, (a youth game), which he had cancelled because the goal posts had no protective padding. He was subsequently heavily criticised by the WRU for this decision, (taken at a time when there were no laws necessitating such padding), but stood by it explaining that although not a requirement according to the laws of the game, he saw it as part of the legal duty owed to the players.

Ultimately, of far greater interest to the rugby community may be the words of the court in discussing, (obiter), the potential liability of other participants. Morland J. commented[25]:

> It can be said against Derek Brown, the Llanharan 2nd XV forwards coach, Kevin Jones, the team captain and Christopher Jones the pack leader, that they in their personal capacities May [sic] have been in breach of any duty of care that they Play [sic] have owed the claimant, as hooker, when deciding to decline the option of non-contested scrums. They have not been sued. Their decision was an ad hoc decision made in the course of the match.

It is surely a novel approach to surmise that players may be held liable for taking a decision, which in effect, was subsequently "retaken" at each succeeding set scrummage. All players will be aware of the provision in the laws of the game that all front row forwards must be of sufficient experience and furthermore, it is clear from the referee's report cited in court that the opposing packs, although not directly involved in the discussion which led to the fateful decision to continue with contested scrums, were at least aware of the predicament Llanharan were in. Morland J., cited the referee's report in his judgment[26]:

> After approximately 32 minutes, the Llanharan loosehead indicated an injury to his shoulder which I believe was caused in a tackle. Llanharan players stated to me that they did not have a prop on their replacement bench. **Accordingly, I conferred with their captain and forwards** (emphasis added). … Before the first scrummage with that player in the front row however, I called aside the Tondu tighthead and their captain. I informed them that I expected common sense to prevail. Although the scrummages remained a contest, I did not expect them to seek to put undue pressure on the player being tried in that position. The game continued. I ensured that I kept special watch on the Llanharan loosehead side. I felt that by doing so, the players were aware of my presence and the contest could continue safely.

[25] P14 of unreported transcript
[26] P11 of unreported transcript – Evans referee report

It is clear from this report, (accepted by Morland J., as an accurate record of the events of the match), that the Llanharan pack, (of which Mr Vowles was a member), was consulted by the referee before he came to the decision to continue with contested scrums. We can therefore assume that Mr Vowles was in full possession of all of the facts of the situation and thus agreed to the conditions under which it was decided the match should continue. By sidelining these issues, the court is ignoring what was on the facts before us full, informed voluntary consent by Mr Vowles, which should have absolved Mr Evans and therefore the Welsh Rugby Union from responsibility.

There is nothing new in the particulars of this case. Broadly similar facts were seen in *Smoldon*[27]. What is new however, is the courts extraordinarily paternal approach in holding Mr Evans and therefore the WRU responsible and therefore absolving Mr Vowles, a consenting adult in full possession of all the relevant information from any responsibility at all for his injuries.

Vowles v Evans – Court of Appeal Decision

The Court of Appeal confirmed the decision of Morland J. in the High Court who had found the appellants, Evans primarily liable and the Welsh Rugby Union, (W.R.U.), vicariously liable for the injuries received by Richard Vowles following the faulty scrummage engagement in the match.

[27] Smoldon v Whitworth and Another [1997] ELR 249

Whilst affirming the judgment of Morland J., the Court, (Phillips MR, Clarke LJ and Sedley LJ), did nevertheless emphasise the negligence of the referee in allowing the players to *choose* to continue with contested scrums rather than *imposing* this on them as the laws stated he should have. The Court emphasised that Morland J. had been correct in his finding that the referee had in effect abdicated his responsibility in offering the players the option rather than imposing the uncontested scrums upon them. It was clear that this law was specifically designed to maintain player safety and in not upholding it, the referee had been in breach of his duty of care. The Court could find no reason why it would not be fair, just and reasonable to impose such a duty, dismissing arguments from counsel, previously raised in *Smoldon v Whitworth*[28], that to impose a duty would discourage volunteers from officiating in certain sports. Furthermore, the referee was suitably qualified for the match that he was officiating and his decision had been taken after some thought, rather than in the heat of the moment. The report from the Court of Appeal states[29]:

> That constituted a breach of his duty to exercise reasonable care for the safety of the players. That decision was taken while play was stopped and there was time to give considerable thought to it. Very different considerations would be likely to apply where it was alleged that the referee was negligent because of a decision made during play.

What the Court nevertheless has failed to address is the contribution of the claimant to his own misfortune. It is unquestionable that the duty owed to junior players was properly extended to adult players and that the referee was in breach of this duty. However, this surely does not, as explained above, absolve Vowles from all responsibility for his injuries, particularly as the Court of Appeal found that there was considerable time devoted to the decision to continue with contested scrums. Equally, the competition rule preventing the team responsible for the uncontested

[28] Smoldon v Whitworth [1997] E.L.R. 249
[29] [2003] EWCA Civ 318, The Times, March 13, 2003 Unreported transcript p2

scrums from gaining victory points is in urgent need of discussion, particularly as that very issue has just reared its head again in the recent Leicester v Gloucester Powergen Cup semi-final. In that contest, Gloucester were awarded a very controversial victory despite being responsible for the imposition of uncontested scrums right at the end of the game and therefore according to the letter of the law necessitating their forfeiting of the match.

For the time being however, that safety law remains in place and it is clear that referees disregard it at their peril.