LEVEL III
MAJOR PROJECT

THE LAW & REFEREES

An examination of the obligations imposed on Rugby Union referees by the law of negligence

BY

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Rugby it's a contact sport isn't it? Injuries occur. Some injuries are the result of an immovable object striking an irresistible force. Some though are more serious. With the dramatic increase in litigation throughout America and also due to the American influence throughout the world, it is necessary to examine what role the law has in contact sports.

Some injuries will give rise to an "actionable" right in litigation. These are called torts. These generally fall into two categories. The first is the tort of assault and the second is the tort of negligence. I do not plan to deal with the tort of assault as it is a more criminal than civil matter. Criminal assault needs a definite intent to cause an injury. It takes us out of the realm of the mere accident in a contact sport into a thuggery that is not necessary in a professional or amateur sport.

I the most disturbing development in the last three years has been the increase potential for referees to be held liable. People have become accustomed to the fact that players could be held liable for an injury, which they had directly inflicted on another player. However the referee, both in his or her own eyes and in the eyes of many spectators has been beyond this.

The referee or umpire has fallen from his pedestal and found himself sitting in the Court room along side everyone else. The English Court of Appeal in Smoldon v Whitworth & Nolan in 1996 held that a referee may be held liable for the injuries suffered by a player in a game under that referees control. Not every injury will give rise to a claim against a referee. However, it is now important that referees are aware of their duties and obligations which are imposed upon them by the law. To understand this it is first necessary to understand the general law of negligence. Then we will examine the particular circumstances of the case of Smoldon v Whitworth & Nolan. We will then examine how the duty of care of the law of negligence impacts upon referees.

The law of negligence

The law of negligence can be divided into four requisite parts:

1. Duty of care;
2. Breach of the duty of care;
3. Causation; and
4. Damages.

Duty of Care

For any action in negligence to be established it is necessary to show that the injured person was owed duty of care by the person who "caused the injury" . The modern law relies on the "neighbour principle" which was laid down by Lord Atkin in Donoghue v Stevenson. Under the neighbour principle the injured person must show that there is some relationship or proximity between himself and the person who caused the injury. The lawyers question becomes "who is my neighbour"? The central question is "are these people so closely and directly affected by my act (or omission) that I ought to have them in contemplation"? It is necessary for every person to take reasonable care to avoid acts and omissions which he can reasonable foresee would injure his neighbour.

Breach of the duty of care

Once it is established that there is a duty of care it is necessary for the injured person to show that there has been a breach of that duty. To do this it is necessary to examine what the standard of care is. That is, how much care should the person who caused or is responsible for the injury have

taken? Rugby is a contact sport and obviously there will be certain inevitable risks from the contact. Where injuries arise from a normal and reasonable practice in the ordinary course of the game there will be no liability. To establish the claim of negligence it is necessary for an injured player to establish that, if the referee owed him a duty of care, that the referee's performance on this occasion fell below the standard of care.

The Standard of Care

This is perhaps the most important concept in the law of negligence. It is the question upon which most important cases are decided. Establishing a duty of care is quite easy under the normal proximity test. However the standard of care imposes upon us the level of care which we are required to meet. Referees are not able, nor required, to prevent all injures. Of course some injuries cannot be prevented. The law does not require you to account for the safety of other people, but only for your own behaviour in respect to their safety. This difference is more than legal semantics: It means that the ability to protect yourself against legal liability lies within your own hands.

The Reasonable Person Test

The "reasonable person test" has been developed as the bench mark for the standard of care. It is not only a question of whether your actions contributed to the injury (see below) but rather whether a reasonable person placed in the same circumstances would have exercised the same or more caution.

In relation to referees it is not really appropriate to use reasonable person test. For specialised skills, the test is modified. The reasonable person is replaced by the reasonable referee. The question is then "what would the reasonable referee have done in the same circumstances?". If an ordinary reasonable referee would have seen the danger and would been capable of preventing it, then the referee in question should be held to a similar standard of behaviour. This provides some comfort that it will be a test of the referees peers that will weigh either for or against the referee.

Causation

Even if the first three factors have been satisfied it is still necessary to establish a link between the breach of duty by the referee and the injury sustained by the player. It is necessary for the acts of the referee to have caused the injury or the damage suffered by the injured player. This is perhaps a crucial element especially in the case of a referee. So often it can be said that there are intervening acts which would break a chain reaction or a link between the referee's actions and the injury to the player. With referees it is normally the actions of other players which cause the injury; this is perhaps the most interesting section of the law. However, it will be no protection to say that some other player has caused the injury if it was within the referees duty and within the standard of the reasonable referee to have prevented that action by the other player.

Damage

Damages is the amount of liability for which the referee will be liable. Under criminal law a penalty is imposed for various reasons including punishing wrong doing and as a deterrent effect. Damages are the civil law to a criminal penalty equivalent. Damages are designed to return the injured person to the position that they would be in had the injury not incurred. Quite often it is a case of monetary value. The damages themselves are normally broken up in several categories including:

a) compensation for pain and suffering;
b) past economic loss, which is usually the wages lost by a person between the injury and the court case;
c) future economic loss - being wage loss from the time of the court case until the age at which the person would have ceased employment; and
d) out of pocket expenses being the actual expenses which the injured person has incurred as a result of the injury.

Defences

There are two major defences to any action in negligence. These are:

1. contributory negligence; and
2. voluntary assumption of risk.

It is not my intention to deal with either of these defences in depth. However, in Smoldon v Whitworth & Nolan neither of these arguments were successful.

It is difficult to imagine situations where a defence of contributory negligence could be raised. The only circumstances in which this may happen is if the player who was injured was deliberately playing outside the laws and, even if this was the case, it is questionable whether a referee or a reasonable referee should have taken any action to prevent the injury happening.

A voluntary assumption of risk is unlikely to be accepted as a valid defence. Given the numerous safety changes and law changes to promote safety as a major factor in the game, the Court is unlikely to find that a player voluntary assumes the risks involved when they step on to a football field. Although the Courts will often find that there is some level of injury that is reasonable in a contact sport the question is, if negligence has been established, whether a voluntary assumption of risk would be a reasonable defence? In my opinion the Court would not find the defence of voluntary assumption of risk.

Impact on referees

The question really is what does the law mean to the reasonable referee? The law states that it is not the duty of the referees to prevent all injuries; it is only that they must do those things which are reasonably possible to ensure the safety of the players. Again it may seem a case of semantics but there is a distinction between the two. The referee has a legal responsibility to exercise reasonable care to eliminate foreseeable hazards in the conduct of the game and to ensure the safety of the environmental conditions under which it is played. The responsibility is derived from both the laws of rugby and the referee's general authority to control the flow of the game itself. There are perhaps four basic duties which are essential for referee to understand:

1. the duty to enforce the rules;
2. the duty to protect participants;
3. the duty to anticipate reasonably foreseeable dangers; and
4. the duty to control and supervise the game.

Perhaps the best way to illustrate the duties upon the rugby referees is to have a look at a case study. In early 1996 the case of Smoldon v Whitworth and Nolan was decided in the United Kingdom Court of Appeal. Benjamin Smoldon was a hooker involved in a "Colts" or under 19's rugby union game in England. Thomas Whitworth was the tighthead prop for the opposition and Michael Nolan was the referee of the game. Mr Nolan had a grading of C1, which normally meant

that he refereed senior games. A trial Judge found that during the course of the game there had been at least 20 collapsed scrums, with most of the scrums being having to be reset more than once. Approximately 5 minutes from the end of the game there was a scrum. The scrum was packed and immediately went down. The teams regained their feet reset the scrum and prior to the scrum going down the plaintiff, Mr Smoldon, said to his team mates to calm things down. The scrum was re-packed and went down immediately. It was in this collapsed scrum. that the plaintiff suffered serious spinal injuries and was left paralysed.

The referee in the circumstances was found to be liable. As the game was an under 19's game there was specific laws in place to ensure the safety of the players. This required the referee to call an engagement sequence of "crouch-touch-pause-engage" to manage the scrum engagement. The referee was a senior referee and was not accustomed to refereeing the under 19 variations to the laws. The requirement for the "crouch-touch-pause-engage" sequence is not required under the senior laws. The referee failed to use the correct scrum engagement sequence. The Court found that this failure to use the proper sequence combined with the high number of collapsed scrums, was a breach of the duty of care. A reasonable referee would have found the number of collapsed scrums highly unusual, as the Court found to take appropriate measures to ensure that the scrums did not collapse further, including using the proper scrum engagement sequence.

This case is perhaps interesting because it shows that first a referee may indeed be found to be liable and, secondly, it shows the type of circumstances during which a referee will be found liable.

In discussing this case with both the referees in my local association and the referees that I have met on tours, nearly every referee I have spoken to is amazed by the high number of collapse scrums and feels that the referee was negligent. The Court's decision is not in itself that severe a decision. However, it does open up referees to the potential of liability. The trial Judge examined the case the law and established that the duty of a referee had always existed. However, this is the first time that the duty had been established in a public case and the referee found liable.

As you can see this case shows three of the four duties which I said are the duties on the referee. The forth duty, the duty to anticipate reasonably foreseeable dangers which is also quite important. This is perhaps most easily shown by the duty upon a referee to see danger. A good example of this is sprinkler heads or dangerous items on the field of play. It is necessary for a referee, when he gets to the ground, to have a wander around and see if the field is safe. If there is a sprinkler head popping up through the ground it may be necessary for you to get some sand and cover up the sprinkler heads. Also, it is necessary to see whether there is anything rough such as a bottle, a can or fence post, of which I have seen on some playing fields on the field itself. It will probably only take you 5 or 10 minutes to do this but in checking the field to ensure that you know the local variations in the field of play you can also do a quick check and satisfy yourself that the field is safe. It is not necessary for you to look over blade of grass but to at least make the effort and do what a "reasonable referee" would do. That is, to examine the field and take away any obvious dangers. Again you cannot prevent all injuries. However, you can prevent those that are readily and easily foreseeable.

The most difficult situations arise where the laws say one thing should be done and the referee in order to manage the game properly goes slightly outside these laws. A good example of this is where a scrum collapses but the ball is at the no. 8's feet and ready to be removed from the scrum. Most referees would prefer to talk to the half back and call him to pass the ball out of the scrum immediately, rather than to blow their whistle, bring the scrum up and repack another scrum. Most serious rugby injuries occur at the scrum engagement. Therefore in an attempt to minimise the scrum engagements most referees will allow the half back to remove the ball from the base of the scrum, when the front rows have collapsed, provided this is done immediately. This is outside the

laws which require the referees to blow his whistle immediately upon a scrum collapsing. The advantage of the reasonable referee test is that it is test of the referee's peers. Most referees would deem it reasonable to, and therefore the reasonable referee would, allow the halfback to clear the ball immediately rather than requiring another scrum. The Courts would be unlikely to find a referee negligent in this situation, as a reasonable referee would act in the same way.

The law should therefore not make us pedantic in the enforcement of the laws of rugby union, and will not be unreasonable in the duties that it imposes upon referees.

Looking Ahead

I suppose the $64,000 question is: How will the law of negligence change in the next couple of years? Will it effect referees more or less? It is hard to answer that question. We are only now experiencing the first cases of a referee being sued for negligence. However, the referee is not any different to any other person in society. The law of negligence will apply the same to that referee. Referees must exercise reasonable care towards their neighbours. For the referee the group of neighbours is defined. These are the players on the field. It may also extend to spectators who are along the side to ensure that nothing spills out over the field into the spectators. However, once a referee steps on that field and takes control of that game he must exercise reasonable care for the safety of those players. Society is becoming more litigious. People now need to blame someone else for the events that happen. Fortunately, the Australian courts are less likely than the American courts at least, to hold a referee liable just for the sake of needing to apportion blame. However, if you can exercise the duty of care to the standard of a reasonable referee then you have nothing to fear.

If the referee follows the laws of the game and does not blindly ignore events the referee will not be found negligent. In most cases the referee will not have anything to fear.

Insurance Protection

Another point which may give rise referees some comfort is that within Australia all referees are covered by the Australian Rugby Union Insurance coverage. The insurance will cover referees for claims of up to $10m. It will also cover the legal costs associated with defending the claim. It is reassuring that an activity that most, referees do for no financial reward will not cost them their houses.

Pocket Guide to Liability

A: A duty to enforce the rules

Referees cannot prevent all rule violations. However, referees have a duty of care to use reasonable care to see that the rules of the game, including safety rules, are followed. This is particularly important if you are refereeing junior or under 19 games. Safety is the primary aspect of the laws in relation to under 19 rugby. Ensure that you referee precisely the laws in relation to safety aspects of under 19 rugby. These including the scrum engagements, the wheeling in the scrum, all dangerous and potentially dangerous events.

B. The duty to protect participants

As a referee you have a duty to provide non-negligent supervision to protect participants. This does not mean that you have a duty to protect any players from dangers that are inherent in rugby. There is the occasional head clash or the serious contact between players, to prevent injuries which are outside readily foreseeable and can be prevented. However the referee is under a duty.

C. Duty to warn

I have not examined this duty closely. This duty will come up only rarely. A good example is where a field has no goal post pads. Most referees will let the game start for the sake of the game. However, the referee would be wise to warn the players of the danger and to tell them that he or she will stop play if it gets too close to the unprotected goal posts.

D. Duty to anticipate reasonably foreseeable dangers

This is the dangers that are inherent in the field of play. Always have a look for sprinkler heads or something that may be protruding from the ground which could case a serious injury if someone was to fall on it or be tackled on it. This is an easy and quick 5 minute walk around the field.

E. Duty to control and supervise the game

As a referee you have a duty to detect and control the use of illegal and dangerous manoeuvres. The laws of rugby are fortunate in that they provide specific powers for the referee to prevent anything that is illegal or dangerous.

We do not want to make referees pedantic in their enforcement of the law and we want the game to flow and it is perhaps a comfort that the test is still the reasonable referee. What would the reasonable referee do in this circumstance? Therefore, don't go overboard in trying to answer each one of these questions, to observe each one of these duties. It is sufficient that you do what a reasonable referee would have done. However, I do invite you to think about how you referee the games. To think about the laws and the duties that the law imposes upon you. If anyone would like to discuss anything in this paper they can contact me.

Acknowledgements/ Bibliography:

In structuring this paper I have relied heavily upon the paper presented by James Paterson of the Sports Commission. This paper is called "The Sports Official and the Law: A transcript of a paper delivered to the National Officiating Conference." If anyone wants to examine this topic further I would recommend this paper to them.