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"I Expected Common Sense to Prevail": *Vowles v. Evans*, Amateur Rugby, and Referee Liability in the U.K.

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“I EXPECTED COMMON SENSE TO PREVAIL”: VOWLES V. EVANS, AMATEUR RUGBY, AND REFEREE NEGLIGENCE IN THE U.K.

I. INTRODUCTION

On a boggy field in 1998, Welsh Rugby Union referee David Evans made a fateful decision to allow amateur rugby players to proceed with a risky maneuver known as an uncontested scrum.² The “long, but hard-fought” match between Tondy and Llanharan teams saw several collapsed scrums which left players piled on top of one another.³ Llanharan was up by three points and replaced one of their experienced players in the front row of the scrum with an inexperienced player, thus violating official rugby rules. Evans did not object to an inexperienced Tondy player’s inclusion in the risky maneuver⁴ and the Llanharan coaches perceived no danger to

1. Referee David Evans informed the Tondy team that he “expected common sense to prevail” in the game that brought about the case that this Note will address. Peter Charlish, *Richard Vowles – Rugby Case*, 2 J.P.I. LAW 85 (2003).

2. The rules of rugby are complex and have undergone changes in the last decade. An exhaustive discussion of the game’s rules is beyond the scope of this Note. However, the Welsh Rugby Union website has excellent diagrams and glossaries for the novice rugby player or spectator. The Welsh Rugby Union at <http://www.wru.co.uk>.

3. James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb. 25, 2003

At the end of a hard-fought game in wet and muddy conditions when Tondy were pressing on the Llanharan line in an attempt to erase a 3-0 deficit, a series of collapsed scrums occurred. At the final scrum, well into injury time, Richard suffered life-threatening back injuries as the opposing packs engaged. As a result of his injuries, he is left paralysed and will be confined to a wheelchair for the rest of his life.

Id.

4. Since 1997, inexperienced “props” have been forbidden from playing in the front row during a contested scrum. See *Rugby Player Hopes for Safer Game*, THE WESTERN MAIL, Feb. 26, 2003, available at IC Wales: The National Website of Wales, at <http://icwales.icnetword.co.uk/0100news/0200wales> (33-year-old Chris Jones of the Tondy team had played prop only twice in his career before he volunteered to in the *Vowles* match.).

the players.⁵ As a result of Evans's deference to the team captains, 24-year-old Richard Vowles broke his neck in the scrum and sustained paralyzing spinal injuries.⁶ Vowles sued the Llanharan team, Evans, and the WRU in negligence and prevailed in his claims against Evans and the WRU.⁷ *Vowles* was the first British case which held that referees owe a duty of care to adult, amateur rugby players to protect players' safety.

Vowles was, like all high-profile tort cases, controversial and polarizing. Tort enjoys what one scholar calls "residual status."⁸ It is a catchall field where actions that do not ring in contract, criminal, or property law may be heard.⁹ Tort encompasses large, multi-party cases with enormous damages at stake as well as ordinary slip-and-fall cases.¹⁰ The specter of compensatory and punitive damages in civil actions reveals the competing goals within tort law: is tort primarily intended to compensate injured plaintiffs? Or to punish and deter tortfeasors? Or both? Several scholars have explored the inherent politics of tort law because it determines whether a plaintiff will be compensated for his or her injury, who should compensate the

5. *Crippled Player's Coach Testifies*, THE WESTERN MAIL, Feb. 26, 2003 available at IC Wales: The National Website of Wales at <http://icwales.icnetwork.co.uk/0100news/0200wales> ("...Derrick Brown, who was Llanharan...coach at the time of the accident said yesterday that he did not think there was any danger to the players."). Interestingly, players on both teams experienced Jones's entry into the game differently: Tondy player Gareth Davies said that scrums had "descended into a joke" after Jones entered the game and that he could "twist [Jones] and bring him down low. He clearly did not have any experience as a prop and we said to the ref that we should have unopposed scrums." Robin Turner, *Legal Claim a Threat to Amateur Rugby*, THE WESTERN MAIL, Oct. 17, 2002 (Vowles testified that "The ideal prop has a bull neck...with plenty of upper body strength...Chris Jones was thinner than the average prop...").

6. *Injured Hooer Awaits Verdict*, THE WESTERN MAIL, Nov. 7, 2002

According to Mr. Vowles, a pushover attempt was repeatedly held up by scrum collapses and, when the two teams finally 'rammed together,' his back 'turned to jelly.' The game was abandoned and he was taken to a hospital. Two vertebrae had been dislocated, leading to serious spinal damage and paralysis of [t]he [sic] legs.

Id.

7. *Vowles v. Evans*, [2003] E.C.C. 240 (Eng.).

8. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 291 (2003).

9. *Id.*

10. *See id.*

plaintiff, and how much that plaintiff's injuries are worth.¹¹ Negligence is particularly fertile ground for such speculation because its elements – duty, breach, cause, proximate cause – require broad discretion by judges and, in the U.S., juries.¹² These elements are not static, rather, their determinations are infused with public opinion and policy considerations. What constitutes a compensable injury has transformed over time and continues to generate public debate about attendant reallocations of risk and cost.¹³

Vowles is no exception to this spirited legacy. Sports law in the U.S. and U.K. is an appropriate locus for such inquiries because of sports' enormous popularity and cultural resonance. An exploration of *Vowles*'s particular circumstances is important to understand *Vowles*'s, and any injured athlete's, stake in the case. The *Vowles* court was explicit in its decision regarding who should bear the cost of *Vowles*'s injuries. Like all tort cases, *Vowles* was not rendered in a historical or cultural vacuum. The *Vowles* court did not blindly apply legal doctrine to the facts but asked the age-old torts question: who will, and should, pay?¹⁴ Exploring the nuances of *Vowles*'s personal

11. See generally JOANNE CONAGHAN & WADE MANSELL, *THE WRONGS OF TORT* 3 (2d ed. 1999). Another tort expert argues that in the U.K. "At bottom, the rules of tort law reflect policy decisions by the judiciary about the interests that are protected and the type of conduct that is sanctioned." JANE WRIGHT, *TORT LAW AND HUMAN RIGHTS* 13 (2001). Wright argues, further, that because the U.K. lacks a bill of rights, that tort law has been a locus for determining which rights to protect. *Id.*

12. See WHITE, *supra* note 8, at 332

Implicit in a collective decision by courts and commentators that tort law should be a vehicle for assessing claims for compensations for certain classes of injuries is a judgment that the costs of those injuries need not invariably lie on those who suffered them, and that some activities have a responsibility for contributing to the costs of injuries they create.

Id.

13. Tobacco litigation is an excellent example of injuries' transformation over time from non-compensable to compensable. See generally Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 *DEPAUL L. REV.* 331 (2001).

14. Robert Rabin argues that cases that "stand the test of time" raise the question of who should pay for "bizarre injuries" such as Mrs. Palsgraf's in *Palsgraf v. Long Island Railroad*. See *TORTS STORIES* 2 (Robert L. Rabin & Stephen D. Sugarman eds., 2003). Rabin's explication of *Palsgraf* reveals that

situation against the backdrop of Welsh rugby's troubled road to professionalization and the nation's widespread economic depression is crucial to understanding the Court's decision to compensate Vowles at the WRU's expense.¹⁵

That Vowles's injuries were emotionally and physically devastating does not distinguish him from any catastrophically injured plaintiff. His loss of livelihood, however, was three-fold: Vowles was a Commonwealth Games boxer who had gone professional in addition to amateur rugby.¹⁶ Like many amateur rugby players, Vowles also had a day job to support himself.¹⁷ His club, Llanharan, was semi-professional which meant that it ranked just below Wales's top leagues.¹⁸ If Vowles received any compensation from the WRU at all, it was insufficient to support himself.¹⁹

The *Vowles* decision emerged amidst widespread criticism of the UK's "compensation culture."²⁰ "Compensation culture" en-

Mrs. Palsgraf was far more seriously injured, both physically and emotionally, than any first-year torts student would infer from reading the case. *See id.* at 2-9.

15. Rabin argues that "Behind each notable case are a host of concerns and considerations that are hidden even from the discerning eye...much more can be learned from digging beneath the surface to find out more about the parties, the events giving rise to the claimed injury, and the corresponding context of socio-economic circumstances in which the case arose. *Id.* at 1.

16. *WRU Wins Right to Appeal Claim*, THE WESTERN MAIL, Feb. 18, 2003.

17. E.g., Vowles was an upholsterer. *See Turner, supra* note 5.

18. *Id.*

19. During the trial, Justice Morland, who had played rugby in his youth, asked whether Vowles received "boot money," meaning a nominal sum to cover his expenses. Vowles responded jokingly, "No, your Honour, I was not that good." *Id.*

20. During the summer of 2003, for example, the U.K. government unveiled a redress plan for victims of clinical negligence, known as medical malpractice in the U.S. *See* Jon Robins, *The Government is Hoping to Dig Itself Out of a Hole with its New 30K NHS Redress Scheme. But Will Victims of Negligence Get Short Changed?*, THE LAWYER, July 21, 2003, available at 2003 WL 61848856. The package of reforms offers payments of up to £30,000 for victims of clinical negligence without litigation. *Id.* While proponents of the reforms claim that foregoing litigation is not a prerequisite to recovering the £30,000, a Nottingham personal injury lawyers said that "...you can bet your bottom dollar the first thing that will happen is that all legal aid is withdrawn, on the basis that you have to go through with the scheme." *Id.* Many personal injury lawyers and victims' rights activists were outraged by the reforms. *See id.* Peter Walsh, chief executive of Action for Victims of Medical Accidents, pointed out that those injured in car accidents or at work have "no

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tered British parlance after the actuarial profession published "The Cost of Compensation Culture" in 2002. Its authors maintained that plaintiffs' recovery had increased fifteen percent annually in recent history.²¹ *Vowles* seemed, to some, an emblem of the erosion of the legal profession generally.²² The report attributed the disappearance of Britons' "stiff upper lip" to litigation and lamented the "rich tapestry of life" that would be "dumbed down and reduced to bland humourless interactions, which is not what we won a war for."²³ Personal injury lawyers, conversely, argued that actuaries, as "well-heeled professionals," value the "rich tapestry of life" while "others...cannot afford that luxury."²⁴

A decade earlier, in the United States similar debates abounded amidst lawsuits against sports officials. States and Congress enacted laws protecting volunteer referees from plaintiffs seeking a windfall.²⁵ The U.K. faces a similar dilemma in

restrictions on...access to justice," yet those injured by clinical negligence have limited recovery. *Id.* A personal injury lawyer who specializes in child plaintiffs argued that how a child sustained an injury does not matter to a child and yet if it is from clinical negligence "they could get diddly squat by comparison." *Id.*

21. *PI and Clinical Negligence – Actuaries Take Swipe at Claimants*, THE LAWYER, March 3, 2003, available at 2003 WL 8525768. See also David Marshall, *Compensation Culture*, J. PERS. INJ. L. 79 (2003).

22. The WRU's lawyer lamented the High Court's decision partly because "It is not difficult to see a legal advert going in a local papers saying, 'Have you been injured in a rugby match – then come to us.'" James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb 25, 2003, available at <http://icwales.icnetwork.co.uk/0100news/0200wales>.

23. Marshall, *supra* note 21, at 83.

24. *Id.* Marshall argues that "...the whole point of health and safety law and of proper risk assessment is to require those responsible to think about how to reduce risk to the lowest achievable level by the taking of all reasonable precautions...society expects the wrongdoer to compensate the victims." *Id.* at 87 n.16.

25. See Volunteer Protection Act of 1997, Pub. L. No. 105-19, 1997 U.S.C.C.A.N. (111 Stat. 218) 152.

The litigation craze is hurting the spirit of volunteerism that is an integral part of American society. From school chaperones to Girl Scout and Boy Scout troop leaders to Big Brothers and Big Sisters, volunteers perform valuable services. But rather than thanking these volunteers, our current legal system allows them to be dragged into court and subjected to needless and unfair lawsuits....Until the

the wake of *Vowles*, which raises the question of whether the U.S.'s legislative solutions should be instructive. Although these debates share similar rhetoric and philosophies, this Note argues that U.S. laws protecting volunteer referees from liability would not result in just decisions for plaintiffs like *Vowles*. U.S. statutes focus on the social utility of volunteer referees, which would not address the difficulties that amateur British rugby players endured during the sport's troubled transition to professionalization over the past five years. Perhaps more important, the Welsh Rugby Union is a far more prosperous organization than the non-profit organizations U.S. volunteering laws seek to protect.

This Note considers *Vowles* in a comparative legal context by testing the viability of U.S. state and federal laws that limit volunteer referees liability. First, it will trace the history of Welsh rugby's painful road to professionalization in the late 1990's. Second, it will chart the genesis of U.K. and U.S. referee liability and their respective standards of care. Third, it will examine the limited success of the assumption of risk defense in *Vowles* and analogous sports cases in the U.K. and U.S. Fourth, it will set out U.S. state law efforts to limit referee liability in amateur competitions. The Note will conclude by arguing that U.S. state and federal law is not an appropriate model for amateur referee liability in the U.K. because of the specific dilemmas inherent to Welsh rugby at the time of *Vowles*'s injury.

mid-1980's, the number of lawsuits filed against volunteers might have been counted on one hand.

Id.

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II. THE PROFESSIONALIZATION OF RUGBY IN ENGLAND
AND WALES²⁶

A. *The International Rugby Board's Decision to
Professionalize Rugby Union*

The International Rugby Board professionalized rugby union in August, 1995.²⁷ The English Rugby Football Union (“RFU”) experienced this change unevenly. Despite being an amateur organization, the RFU paid its administrators to keep abreast of developments in rugby worldwide.²⁸ Until 1995, the RFU adhered strictly to its constitution’s Bylaw 4, which prohibited direct or indirect payment or material gain for rugby-playing.²⁹ Taking its cue from football’s success with satellite television and strategic marketing, the RFU sought sponsorship from a large British brewing conglomerate and a financial services group.³⁰

Although one scholar described amateurism in rugby as an “increasingly flimsy pretence,” most English rugby clubs paid its players only travel expenses.³¹ Players found notoriety and financial security at the national rather than the league level.³² In Wales, even the greatest players traditionally were employed

26. This Note recognizes the rich distinctions between England and Wales but also appreciates the utility of discussing them simultaneously. From a legal perspective, England and Wales share legal doctrine and case law. *See generally* TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* (9th ed. 2001). That their rugby cultures are intertwined is evident in various histories of British sports history which discuss the two nations interchangeably. *See generally* ADRIAN SMITH, *CIVIL WAR IN ENGLAND: THE CLUBS, THE RFU, AND THE IMPACT OF PROFESSIONALISM ON RUGBY UNION, IN AMATEURS AND PROFESSIONALS IN POST-WAR BRITISH SPORT* 178 (2000).

27. *See* SMITH, *supra* note 26, at 146. The International Rugby Football Board declared in 1995 that

Rugby will become an open game and there will be no prohibition on payments or the provision of other material benefit to any person involved in the game. It was also agreed that (1) payment might be made at any level of participation; (2) there should be no pay ceiling imposed by the council; (3) payment for results is not prohibited.

Id.

28. *Id.* at 147.

29. *Id.* at 149.

30. *Id.* at 147-48.

31. *Id.* at 146-47.

32. *Id.*

outside of the sport to support themselves.³³ Historically, amateur rugby players who accepted compensation ruined their careers in the sport or tarnished their reputations considerably.³⁴ By the late 1980's, however, the RFU recognized that many high-profile rugby union players resented amateurism.³⁵ While the 1991 World Cup drew 13.6 million viewers, most of the English team continued to work for wages in addition to rugby.³⁶

B. The Welsh Rugby Union and Professionalization

Unlike English rugby players, Welsh players were notorious for "shamateurism" by accepting inflated "expenses."³⁷ The Welsh Rugby Union turned a blind eye to these practices for fear of losing its most talented players to more lucrative prospects in England's rugby league.³⁸ This fear was likely justified since Welsh players were recruited into English league rugby far more frequently than RFU players.³⁹

33. *Id.* at 149.

34. *Id.*

35. *Id.* at 149. The players' resentment was, no doubt, rooted in the prevalence of rugby players in New Zealand and South Africa who supported themselves through endorsements. *Id.*

36. *Id.* One player collected unemployment to prepare for the World Cup in South Africa in 1995. *Id.* The RFU did not, however, object to lead players working as clubs' "rugby development officers." *Id.*

37. *Id.*

38. *Id.* at 149-50. Players usually found themselves ostracized by the WRU after "switching codes." *Id.* at 150. Contracts in English league rugby were considerably more generous than the WRU: in the 1990's, Martin Offiah left WRU and received £435,000 per annum as an English league player. See generally GEOFFREY MOORHOUSE, A PEOPLE'S GAME: THE OFFICIAL HISTORY OF RUGBY LEAGUE 338 (1996). Some players denounced the WRU's hypocritical "shamateurism": Scott Gibbs, who left Swansea for St. Helens, said that

It grates me that I am called a prostitute while players and officials keep on covering up what's going on in union. Every player in Wales knows that when you play on a Saturday, if you win you can get a few quid. Players get the cash after the game.

Id.

John Duncan & Ian Malin, *Kicked Into Touch*, THE GUARDIAN, May 25, 1995 at 12, available at 1995 WL 7603805.

39. SMITH, *supra* note 26, at 181.

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The last twenty-three years have been pivotal for Welsh rugby.⁴⁰ Two rugby historians deemed those years “decades of doubt, desperation, and near disintegration...” characterized by countless losses and administrative troubles.⁴¹ The 1980’s and 1990’s were particularly painful after the sport’s success in the 1970’s.⁴² Moreover, rugby was fractured on an international scale because of South African rugby’s centennial celebrations which some teams refused to attend because of the persistence of apartheid.⁴³ The WRU left the decision to play to individual players, which proved calamitous to the organization.⁴⁴ Secretary David East resigned in 1989.⁴⁵ By 1993 the entire general committee walked out and had to be replaced.⁴⁶ The WRU had six secretaries within eleven years.⁴⁷ Further, the WRU capped seventy-five players and fired four national coaches between 1988-92.⁴⁸ Instability governed the game at an administrative and playing level.

1. Wales’s 1980’s Economic Crisis and the WRU’s Resistance to Professionalization

This instability reverberated beyond the playing field. In the 1980’s, Wales suffered Depression-era reductions in manufac-

40. See generally Dai Smith & Gareth Williams, *Beyond the Fields of Praise: Welsh Rugby 1980-99*, in MORE HEART AND SOUL: THE CHARACTER OF WELSH RUGBY 207-32 (Huw Richards et al. eds., 1999). (“In 1980-1 Welsh rugby, walking tall, crossed the threshold of its second century...The next twenty years would see it flailing to stay upright, when it was not flat on its face.”). For an account of Welsh rugby’s early 20th Century history, see DAVID PARRY-JONES, PRINCE GWYN: GWYN NICHOLLS AND THE FIRST GOLDEN ERA OF WELSH RUGBY (1999).

41. Smith & Williams, *supra* note 40, at 208-9.

42. *Id.* at 210. Smith and Williams attribute much of the decade’s success to WRU secretary Ray Williams who urged the WRU to establish a national league rather than “small group[s] of clubs putting up barriers and saying that things must always stay the same.” *Id.*

43. *Id.* at 211. Wales attended the fetes in South Africa and internal disputes consumed the WRU. *Id.* The New Zealand Rugby Union faced the same divisiveness. *Id.* See also SMITH, *supra* note 26, at 150-52.

44. Smith & Williams, *supra* note 40, at 211.

45. *Id.* at 212.

46. *Id.*

47. *Id.*

48. *Id.*

turing and mining.⁴⁹ In 1981, there were 27,000 Welsh coal miners employed in 36 pits nationwide. By 1989, there was a single operating coal mine in Wales.⁵⁰ The steel industry was similarly decimated: by 1991, the steel workforce was one-third what it was in 1979.⁵¹ While manufacturing troubles plagued the entire U.K., many Welsh people felt abandoned by their more powerful and prosperous neighbors.⁵² This resentment seethed in Welsh rugby because of the sport's working-class roots.⁵³ As coal mines closed and workers struck, rugby's fan base was either forced to migrate to areas where coal had never been the primary economy or remain and live in isolation and poverty.⁵⁴ Likewise, many Welsh rugby players migrated to English teams for larger salaries and, presumably, a more stable profession.⁵⁵

Welsh fear of being dwarfed by England was exacerbated by the International Rugby Board's 1995 decision to go professional after nearly a century of amateurism.⁵⁶ The WRU did not support the IRB's decision and distributed a 23-point document arguing against professionalization.⁵⁷ While many high-profile rugby players decried the inequity of "shamateurism" and their inability to make a living solely from playing the sport, professionalization posed a serious threat to WRU's finances and morale.⁵⁸

Further, the decision to professionalize occurred against the backdrop of physical education reforms in Welsh grammar schools, which were the traditional spawning grounds for rugby

49. *Id.* at 213.

50. *Id.*

51. *Id.*

52. *Id.* ("In the 1980s when you left the train at Paddington you almost tasted the indifference of prosperity to deprivation.")

53. In 1978, national coach Phil Bennett listed various ways in which England had oppressed Wales to urge his team to victory against England. *Id.*

54. *Id.* at 214.

55. *Id.* Between 1980 and 1991, eighteen Welsh players migrated to English teams. *Id.*

56. *Id.* at 207-8.

57. *Id.* at 208. Interestingly, the International Rugby Board's chairperson at the time of the decision was Welsh. *Id.* at 207.

58. Six months after professionalization, Llanelli lost £900,000 and sold Stradey Park to WRU for £1.5 million. *Id.* at 221. The majority of Welsh clubs continue to operate at a deficit. *Id.* at 221.

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talent.⁵⁹ Welsh education, including physical education programs, became more nationalized and exam-driven and less devoted to extra-curricular and team sports.⁶⁰ As a result, the rhythm of Welsh schoolchildren's weeks changed drastically because of the national curriculum as they directed their free time toward national exams. By the early 1990's, fewer than thirty public schools in the south of Wales played rugby at the traditional Saturday morning time.⁶¹ These reforms narrowed Welsh rugby's recruiting base considerably.⁶²

C. Rugby's Troubled post-1995 Transition to Professionalization in the United Kingdom

The earliest years of professionalization were troublesome to Welsh rugby, and to Wales generally, though rugby historians consider the Welsh victory over South Africa in the summer of 1999 a national watershed.⁶³ The national team brought the nation six international victories by the summer of 1999 and heralded the newly-christened Millenium Stadium.⁶⁴ Historians consider 1999 a pivotal year in Welsh history, generally. The establishment of the National Assembly for Wales in 1999 gave the nation symbolic and actual autonomy from England – indeed, the Welsh victory over England in Wembley stadium that spring embodied the nation's fighting spirit.⁶⁵

The Rugby Football Union ("RFU") in England was always a stalwart supporter of amateur sport – indeed, there is still resistance to professionalization within the organization.⁶⁶ The movement toward professionalization signaled a shift in focus from players' needs to those of spectators.⁶⁷ Rugby union had

59. *Id.* at 219-20.

60. *Id.* at 220.

61. *Id.* at 220.

62. *Id.* at 220-21. ("For Wales, like eighteenth-century Holland, a country with too narrow a demographic base for it to remain naturally competitive in rugby terms...").

63. *Id.*

64. *Id.* at 231.

65. *Id.* at 6-7.

66. *Id.* at 123.

67. *Id.* at 152. "Television is, of course, the key to understanding why...the International Rugby Board...made its surprise announcement that: 'Rugby will become an open game and there will be no prohibition on payments...'" *Id.* A British legal scholar points out that referee interference often means that

never matched the fan base of soccer or rugby league.⁶⁸ Through professionalization, the RFU hoped to improve playing standards to compete with South American teams, to serve commercial interests by participating in more formal competitions, and, perhaps most important to *Vowles*, to support the RFU's dependence on revenue from gate receipts, media coverage, advertising, and sponsorship.⁶⁹

The road to professionalization created enormous rifts between England and the "Celtic nations" of Wales, Scotland, and Ireland.⁷⁰ Within a year of the IRFB's decision to professionalize, the elite English clubs formed the English Professional Rugby Union Clubs and pushed unilaterally for enormous television contracts.⁷¹ The RFU eventually compromised with Wales, Scotland, and Ireland by compensating their respective Unions and promising not to execute its next television contract unilaterally.⁷² This RFU decision was particularly devastating to the WRU since professionalization had nearly bankrupted it.⁷³ The Chair of the RFU Management Board ultimately convinced the WRU to accept the RFU's decision by conceding that widely-broadcasted games would improve the sport's financial situation immensely.⁷⁴

"Spectators are disappointed, pundits frustrated, and competitors endangered by inconsistent application of ineffective rules...the careful player is a bore..." Paul Rice, *Fair Play or Spoiled Sport: The Legal Obligations of the Referee*, 28 LIVERPOOL L. REV. 81, 89 (1996).

68. SMITH, *supra* note 26, at 174.

69. *Id.*

70. *Id.* at 193.

71. The clubs encouraged the RFU to sign a contract with the British Broadcasting Company, giving it the sole rights to broadcast games between 1996-2001. SMITH, *supra* note 26, at 154. This decision was made without negotiating with other Home Nations and Scottish, Welsh, and Irish Rugby Unions were outraged. *Id.* at 155. Most of the RFU was also angry because scarcely any RFU members were EPRUC members. *Id.* The root of their anger was the possibility of exclusive pay-per-view access to a game that had always prided itself on free access for its fan base. *Id.*

72. *Id.*

73. *Id.*

74. IAN MALIN, MUD, BLOOD AND MONEY: ENGLISH RUGBY UNION GOES PROFESSIONAL 36-37 (1997).

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D. Professionalization's Effect on Individual Rugby Players

The centrality of television broadcasting put immense pressure on professional and amateur players because broadcasters would only cover club rugby games with high-profile players.⁷⁵ Top players could not be injured lest they lose their opportunity to reap the benefits of television revenue.⁷⁶ By 1998, there were two new trends in British rugby union: more frequent rugby code swaps between league and union players and increased recruitment of foreign players to English club rugby.⁷⁷ In 1998, rugby clubs were “desperate for success” and were willing to pay foreign players exorbitant sums of money at the expense of aging or injured players.⁷⁸ After professionalization, rugby league players who switched to Welsh rugby union for the possibility of compensation faced uncertain futures.⁷⁹ Within a year, only half of them were playing for top Welsh teams.⁸⁰ During that year, two English clubs went bankrupt and many clubs began canceling player contracts.⁸¹ Welsh rugby was particularly vulnerable, with only two of its clubs financially capable of maintaining professional status.⁸²

These financial afflictions within Welsh rugby encouraged bitter rifts within WRU, particularly because the national team's disappointing 1997-98 season dragged morale to an “all-time low.”⁸³ The two highest-profile Welsh clubs broke off from the national Premier Division to play in the English Premiership to attract larger crowds and higher revenue.⁸⁴ Further, the dissident clubs argued that Welsh rugby had a lower playing

75. SMITH, *supra* note 26, at 157.

76. MALIN, *supra* note 74, at 34.

77. *Id.*

78. SMITH, *supra* note 26, at 163.

79. *Id.*

80. *Id.* at 184.

81. *Id.* For more on the financially precarious state of rugby clubs in the U.K. in the late 1990's, see Peter Bills, *Players Pay Price as Family Silver Sold Off*, SUNDAY TIMES (London), Mar. 15 1998, at 45. See also Ian Malin, *Moseley Left on Rugby's Back Burner*, THE GUARDIAN, Mar. 14 1998, available at 1998 WL 3083644. See also MALIN, *supra* note 74, at 166-7.

82. The Cardiff and Swansea clubs were scarcely able to remain afloat in 1998. SMITH, *supra* note 26, at 157.

83. *Id.* at 167. See also Owen Slot, *Wales Hit Crisis Point as World Cup Looms*, SUNDAY TELEGRAPH, Oct. 4, 1998, at 31.

84. SMITH, *supra* note 26, at 167.

standard than English rugby.⁸⁵ The WRU imposed hefty fines and the renegade clubs returned to the WRU in 1999.⁸⁶ The conflict between elite and struggling clubs continued through the 1999 World Cup, which illuminated the disparities between the “stars and journeymen” of professional rugby.⁸⁷ Players who could propel teams to global success could potentially triple their salaries while others sought team vacancies because their squads had dissolved.⁸⁸

While professionalization gave a select few players the potential for high earnings, rugby salaries continued to lag far behind those of soccer players in the U.K.⁸⁹ The highest-paid English rugby player was ranked 100th in 1999 listing of the U.K.’s top-earning athletes.⁹⁰ Clubs also began recruiting star players from the southern hemisphere for costly short-term contracts, thus constricting opportunities for players in the Home Nations.⁹¹ Clubs renegotiated and capped their local players’ salaries to fund transitory foreign players.⁹² By 1999, British rugby union’s treatment of its players was “too often demeaning” in the transition to professionalization.⁹³

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. An English World Cup victory would increase a player’s salary from £32,000 to £90,000. *Id.* This compensation is about twice what an English cricket player in a similar position would earn. *Id.* For athlete compensation rankings in the U.K., see Julia Finch, *Chelsea Fuel Wage Explosion*, THE GUARDIAN, Apr. 30, 1999, available at 24 1999 WL 16877888.

91. SMITH, *supra* note 26, at 172.

92. *Id.* In response to the caps, the Professional Rugby Players Association charged the elite English First Division Rugby organization with “restraint of trade” under EU law. Ian Malin, *Players May Go to Law Over Rugby Wage Cap*, THE GUARDIAN, Mar. 27, 1999, at 13, available at 1999 WL 14125761.

93. SMITH, *supra* note 26, at 172 (“Clubs’ treatment of individual players...merely contributed to the appalling image professional rugby had acquired after four years of incessant squabbling and near universal malevolence.”).

E. The Link Between Professionalization and Higher Incidence of Injury

Perhaps not surprisingly, increased professionalization and commercialization of rugby led to a higher incidence of injury.⁹⁴ Vowles' particular injury had been prevalent in rugby football for decades but has increased dramatically within the past thirty years.⁹⁵ The reason for this increase in spinal injuries is curious since many of the sport's governing bodies have created laws to "depower the scrum."⁹⁶ Studies of the injury, and of rugby injuries generally, reveal that higher skill level increases the likelihood of injury.⁹⁷ British sports medicine experts agree that the IRB's decision to professionalize rugby union has increased the likelihood of injury for professional and amateur players alike,⁹⁸ but disagree about whether to attribute this increase to greater physical force within the game or an increased emphasis on players' strength and speed.⁹⁹ An ethnographer recently interviewed players on a Welsh rugby team during

94. Dominic Malcolm and Kenneth Sheard, "Pain in the Assets": *The Effects of Commercialization and Professionalization on the Management of Injury in English Rugby Union*, 19 SOC. OF SPORT J. 149, 152 (2002).

95. J.R. Silver, *The Impact of the 21st Century on Rugby Injuries*, 40 SPINAL CORD 552 (2002) ("I became concerned when I began to see players with tetraplegia as a result of rugby accidents...between 1965 and 1970...There was a dramatic increase...from 1970 onwards."). Silver is a physician at the National Spinal Injuries Centre, Stoke Mandeville Hospital in the U.K. *Id.* He has also been an expert witness in three rugby injury cases. *Id.* at 558.

96. *Id.* at 556. (These efforts included the uncontested scrum's advent.)

97. *Id.* ("My limited figures suggest that greater skill does not protect [players]..."). Silver's study of schoolboy rugby revealed that skilled rugby players were four times more likely to sustain injury than unskilled players. *Id.* A study of Scottish rugby found that between 1993-94, when rugby union was entirely amateur, and 1997-98, when the sport turned professional, injuries doubled even though the number of hours played was lower. See also Garraway WM, *Impact of Professionalism on Injuries in Rugby Union*, BR. J. SPORTS MED. 348, 348-51 (2000). Thirty percent of professional rugby players injured between 1997-98 abstained from playing for the rest of the season. Silver, *supra* note 95, at 556.

98. Silver, *supra* note 95, at 556 ("The penalties for accepting the financial and other rewards accompanying professionalism in rugby union appear to include a major increase in player morbidity.")

99. For the argument that increased injuries are a result of more forceful tackles, see Garraway, *supra* note 97, at 173. Silver argues that his studies reveal that an increased emphasis on strength and speed is the reason for increased injuries. Silver, *supra* note 95, at 557.

their professionalization process which increased training time and injuries.¹⁰⁰ As a result, players were more prone to injury and, yet, less likely to disclose pain and injury.¹⁰¹ Professional rugby union players face the two-fold pressure of performing for their club and the prospect of being recruited for the Welsh national team, as revealed by a high-profile player's comment that "[t]he fact that I am paid to play the game places great stress on me...It would be devastating when Wales comes calling if I am out with an injury."¹⁰²

Clearly, rugby in the U.K., and Wales in particular, is in flux. Its players and clubs face uncertain futures. Players also grapple with the cultural and financial pressure accompanying the RFU's decision to go professional. The following discussion of case law in the U.S. and U.K. concerning referee liability will ground *Vowles* in a broader historical and jurisdictional context.

III. CASE LAW IN THE U.S. AND U.K.

The U.S. shares the U.K.'s longstanding reticence toward holding sports officials liable for personal injuries.¹⁰³ Cases concerning amateur referees and players raise similar controversies in the two nations. Unsurprisingly, the U.K. and U.S. have intertwined legal histories, particularly in tort law. For clarity, this section will first discuss U.K. case law and proceed to a discussion of U.S. case law.

100. P. David Howe, *An Ethnography of Pain and Injury in Professional Rugby Union: The Case of Pontypridd RFC*, 36 INT'L REV. FOR THE SOC. OF SPORT 289, 292 (2001).

101. *Id.* at 295. Howe conducted several revealing interviews with rugby players and their troubled road to professionalism. *Id.* at 289. One player confided to Howe that "You may think I'm thick, but the pressure for me to play is unbelievable. When no fracture showed [on the X-ray] I thought hell it [the pain] must be in my mind...Now with the injury like it is I may lose my spot on the Welsh squad." *Id.* at 297.

102. *Id.* at 298.

103. "On the whole, although referees are often included as defendants in personal injury suits resulting from sporting activities, they are rarely found negligent." WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW §4:1 (2004).

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A. Vowles v. Evans

1. Events Leading to Vowles' Injury

Vowles sustained his injury while playing hooker for the Llanharan Rugby Football Club 2nd against the Tondu Rugby Football Club 2nd XV on a boggy field in the winter of 1998.¹⁰⁴ The players and Evans, the referee, were all amateurs and the match was "hard fought" but "fair."¹⁰⁵ The muddy field caused a large number of set scrums and, within thirty minutes of play, the Llanharan opposing loosehead prop dislocated his shoulder.¹⁰⁶ Llanharan had only an untrained front row forward to replace their injured player and had nobody trained as a front row forward in the second or back row of their pack.¹⁰⁷

Evans knew that Llanharan had no replacement on the bench and told the team forward that he could either replace the front row forward from a player within the scrum or have non-contestable scrummages for the rest of the game.¹⁰⁸ An inexperienced player within the scrum said he would "give it a go" as a front row forward since he had played the position a few years earlier.¹⁰⁹ Evans accepted Llanharan's decision and did not ask about the replacement's previous experience.¹¹⁰ During a scrum later in the game, Vowles collapsed and suffered permanent incomplete tetraplegia and was confined to a wheelchair.¹¹¹

104. *Vowles*, E.C.C. 240 at 243.

105. *Id.* at 243.

106. *Id.* at 243. A loosehead is the prop in a scrum because his head is outside the other team's tighthead prop's shoulder. Scrum.com: The Perfect Pitch for Rugby, at <http://www.scrum.com/dictionary> (last visited June 25, 2004).

107. *Vowles*, E.C.C. 240 at 243-44.

108. *Id.* at 244. A non-contestable scrum is the same as a scrum except that there is "no contest for the ball, the team putting in the ball must win it, and neither team is permitted to push." *Id.* at 245. Evans's course of action is promulgated by the 1997 version of the "Laws of the Game" of the Council of the International Rugby Football Board, which mandate that "in the event of a front row forward being ordered off, the referee...will confer with the captain...to determine whether another player is suitably trained/experience to take his position...when there is no other front row forward available...then the game will continue with non-contestable scrummages." *Id.* at 245.

109. *Id.*

110. *Id.*

111. *Id.*

2. The Court's Decision in *Vowles v. Evans*

In rendering its decision, the Court applied the test of duty used in *Caparo Plc. v. Dickman* to *Vowles* and asserted that the relationship between Vowles and Evans was sufficiently proximate and that it was reasonably foreseeable that Evans' failure to exercise reasonable care may have resulted in Vowles' injury. Evans breached this duty when he failed to take reasonable care for the safety of the Tondy and Llanharan players by "sensible and appropriate application of the laws of rugby."¹¹² The debate centered on whether it was reasonable to impose a duty of care on an amateur referee for rugby players.¹¹³ In determining what was reasonable, the lower court did not consider Evans' amateur status relevant because he was extensively trained and because an amateur front row forward is more likely to sustain serious injuries than his professional counterpart.¹¹⁴ The court held, further, that amateur rugby players are "young men mostly with limited income" who should not have to bear the cost of their injuries due to a referee's negligence.¹¹⁵ In response to the defense's arguments, the court contended that imposing a duty on Evans was "consistent with the spirit of the laws of rugby" which is "an important part of Welsh culture."¹¹⁶

3. United Kingdom Referee Negligence Case Law

Vowles had two high-profile precedents concerning severe rugby injuries: *Agar v. Hyde*, and *Smoldon v. Whitworth & Nolan*.¹¹⁷ The Welsh Rugby Union relied on *Agar*, where the High Court of Australia held that the International Rugby Football Board owed no duty of care to frame the rules of the game to reduce the risk of severe spinal injuries during

112. *Id.* "The threshold of liability must properly be a high one." *Id.* at 252.

113. *Id.*

114. *Id.* at 247.

115. *Id.* The court maintained that the Welsh Rugby Union was well-funded enough to insure itself and its referees in the event of players' claims despite the defense's insistence that the Union was so heavily in debt that public liability insurers were contemplating discontinuing sporting injury coverage *Id.*

116. *Id.*

117. See *Agar v. Hyde* [2000] H.C.A. 41, available at 2000 WL 1249551; see *Smoldon v. Whitworth & Nolan* [1997] P.I.Q.R. P133.

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scrums.¹¹⁸ *Vowles* looked, also, to the *Smoldon* holding which imposed a duty of care on a referee to enforce the rules and “...ensure that the players were not exposed to unnecessary risk of injury” when a seventeen-year-old rugby player broke his neck during a collapsed scrum.¹¹⁹ The *Agar* and *Smoldon* decisions questioned whether a rugby player assumes the risk of his or her injuries by engaging in high-risk play.¹²⁰ The *Agar* court discussed the confusion of determining whether a rugby play is “rough” or “dangerous” and a concurring judge contended that the plaintiffs “could not possibly have been ignorant” of the possibility of injury.¹²¹

The WRU pointed to these cases to absolve itself of duty, yet the *Vowles* court found that the *Agar* decision turned on the attenuated relationship between the plaintiffs and the defendants.¹²² The court distinguished *Vowles* from *Agar* because the relationship between Evans and *Vowles* was far closer than that of the *Agar* plaintiffs and the Board.¹²³ In rendering its decision, the *Vowles* court contended that the *Agar* court did not want to find that the Board, as promulgator of rules, owed a duty to each rugby player in the world.¹²⁴ The court contended that *Vowles* was more analogous to *Smoldon* because it established a duty of care for rugby referees with liability grounded in “full account...of the factual context in which a referee exercises his functions.”¹²⁵ Thus, the liability threshold that the *Vowles* court inherited from *Smoldon* was high and would not

118. See *Agar*, H.C.A. 41 at 60.

119. See *Smoldon*, P.I.Q.R. at P140.

120. “[Rugby] is a tough, highly physical game, probably more so than any other game widely played in this country. It is not a game for the timid or fragile. Anyone participating in serious competitive games of rugby football must expect to receive his or her fair share of knocks, bruises, strains, abrasions, and minor bony [sic] injuries.” *Smoldon*, P.I.Q.R. at P135.

121. See *Agar*, H.C.A. 41 at 46.

122. *Id.*

123. *Id.*

124. See *Vowles*, E.C.C. 240 at 250.

125. *Smoldon*, P.I.Q.R. at P138-39. The Union attempted to distinguish *Smoldon* because the players were very young, but to no avail. *Vowles*, E.C.C. 240 at 250. The Court held that the age difference of the players does not determine whether a referee owes any duty of care to the players. *Id.*

hold a referee liable for errors of judgment or oversights “in the context of a fast-moving and vigorous contest.”¹²⁶

B. United States Referee Negligence Case Law

The standard of care in the U.S. and the U.K. is similar: a referee has a duty to supervise a game properly and to enforce safety rules.¹²⁷ By far the most high-profile U.S. case involving referee negligence in professional sports is *Brown v. National Football League*, where the referee threw a penalty flag weighted with pellets which hit Brown in the eye and ended his career.¹²⁸ Less publicized, though fiercely contested, in the U.S. are cases like *Vowles* brought by amateur athletes against volunteer referees. In *Vowles*, the dissenting judges maintained that it was in the public interest to shield amateur referees from liability in negligence so as to encourage voluntarism in officiating.¹²⁹ Fearing the same, many states in the U.S. have

126. *Vowles*, E.C.C. 240 at 250.

127. See CHAMPION *supra*, note 103, §4.1. See *Vowles*, E.C.C. 240 at 251-52.

128. *Brown v. National Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002). Brown, unlike Vowles, brought his action unsuccessfully in contract, yet the opinion suggests that he potentially could prevail in state court under a negligence theory against the referee and the NFL. *Id.* at 389-90. The circumstances and extent of Brown's and Vowles's injuries differ greatly. While both Brown and Vowles lost their careers in sports because of their injuries, Brown's injury was far less severe than Vowles's. His sight loss prevents him from playing professional football, but not from a broad swath of employment, unlike Vowles who is, confined to a wheelchair. Further, Brown's injury was the direct result of a referee's momentary carelessness while Vowles's resulted from a series of decisions in which he, his team captain, and fellow players were complicit. See also Darrell M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L. J. 263 (2002). There are additional circumstantial differences between *Brown* and *Vowles* rooted largely in the distinctions between American and British sports culture. Brown was a highly-compensated, unionized, professional football player suing an enormously profitable sports league. Questions of contract and workers compensation governed the holding in *Brown* without addressing the action's viability in tort. Vowles was a modestly-compensated amateur rugby player suing a profitable sports league with an enormous fan base. In rendering his decision, Lord Phillips noted that “Amateur rugby players will be young men mostly with very limited income” and that the Welsh Rugby Union, with its gate receipts and television contracts, was the best party to bear the cost of Vowles injury. *Vowles*, E.C.C. 240 at 248.

129. *Vowles*, E.C.C. 240 at 248.

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adopted a gross negligence or recklessness standard for amateur referee liability.¹³⁰

The notion of referee negligence, at times called “malpractice,” is a less recent phenomenon in the U.S. While this Note concentrates on referee liability for players’ personal injuries, several commentators identify a broad range of emotional and economic injuries resulting from officials’ carelessness.¹³¹ U.S. courts are generally hesitant to allow plaintiffs to recover in referee liability actions, though some courts have recognized the grave impact careless refereeing can have on players and coaches.¹³² Typically, players in the U.S. bring actions against referees in negligence, though players may also allege criminal and statutory violations or breach of contract.¹³³

Carabba v. Anacortes School District sets the standard of care for sports officials in the U.S. The *Carabba* court held a wrestling referee liable for negligently supervising a match where the plaintiff was paralyzed by his opponent’s illegal move.¹³⁴ The standard of care in *Carabba* was that of an ordinary pru-

130. This Note uses “amateur” fluidly as it is defined fluidly in the U.S.: in some states, a referee must not receive any compensation to have amateur status while other states permit nominal compensation within the amateur category. See generally Lewis, *supra* note 129.

131. See generally Scott Parven, *Judgment Calls – Sports Officials in Court*, 9 ENT. & SPORTS LAW, 9 (1991). Interesting cases claiming economic injuries include Georgia High School Association v. Waddell, 285 S.E.2d 7 (Ga. 1991) (defendant verdict on appeal in action brought by players’ parents for referee negligently imposing a penalty that cost the team their spot in the state playoffs) and Bain v. Gillespie, 357 N.W.2d 47 (Iowa Ct. App. 1984) (defendant verdict on appeal in action where store owner who sold University of Iowa apparel and souvenirs sued a referee for losses he sustained because of the referee’s bad call that resulted in Iowa’s loss to Purdue University).

132. In *Tilelli v. Christenberry*, the court held that a boxer who alleged negligent officiating had standing to sue because the referee’s action “affect[ed] his record so prejudicially...[that it] impair[ed] economic rights and interests sufficiently to give petitioner legal standing to sue.” *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 699 (1953).

133. See Shlomi Feiner, *The Personal Liability of Sports Officials: Don’t Take the Game into Your Own Hands, Take Them to Court!*, 4 SPORTS L. J. 213, 214-15 (1997).

134. *Carabba v. Anacortes School Dist. No. 103*, 72 Wash.2d 939 (1967) (referee glanced away from the match while he was tending to a mat that went askew, a task within his enumerated duties, when the plaintiff’s opponent used a “full-Nelson” in violation of the rules and paralyzed the plaintiff).

dent referee.¹³⁵ Officials may be liable for negligence when their conduct does not comport to this standard of care and injures participants.¹³⁶ A referee's scope of duty includes assessing whether a field is suitable for playing, whether inclement weather poses a risk to players, equipment inspection, and determining whether equipment is being worn or used properly by players.¹³⁷ A referee's primary duties, however, are to enforce the rules of the game and control players' conduct.¹³⁸ The *Vowles* decision also identifies these twin duties as primary for officials in the U.K.¹³⁹ These duties are intertwined because referees have authority over players' conduct by virtue of their duty to enforce rules.¹⁴⁰

Though longstanding, *Carabba's* "prudent referee" standard has been widely contested. Many courts and commentators advocate, instead, for a recklessness or gross negligence liability threshold.¹⁴¹ Liability in contact sports is a complicated question because of inherent participatory risks.¹⁴² Many state laws hold referees liable only in gross negligence, recklessness, or intentional conduct.¹⁴³ The public policy for an ordinary negligence standard is preventive in that it encourages officials to be cautious in executing their duties.¹⁴⁴ A gross negligence standard risks barring recovery to plaintiffs who sustain injury for a referee's deviation from the standard of care that falls short of gross negligence.¹⁴⁵ Conversely, a negligence standard for liability may impose substantial liability on a volunteer or amateur referee who officiates simply for the love of the sport.¹⁴⁶

135. See CHAMPION, *supra* note 103, at §4.1.

136. See Feiner, *supra* note 133, at 215.

137. *Id.* at 218.

138. See ROBERT C. BERRY & GLENN M. WONG, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 512 (2d ed. 1993).

139. *Vowles*, E.C.C. 240 at 251.

140. See Feiner *supra* note 133, at 218.

141. See *id.* at 219.

142. See *id.* at 220.

143. See Kenneth W. Biedzynski, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 376 (1994) [hereinafter Biedzynski, *Is That the Right Call?*].

144. Feiner, *supra* note 133, at 220.

145. *Id.*

146. *Id.* at 221.

Defendant's counsel in *Vowles* expressed the same concern that amateur referees would stop volunteering their time to avoid liability.¹⁴⁷ The court dismissed this concern and noted that the injury in *Vowles* was the result of Evans's failure to implement a rule and that such a failure would be rare, particularly in a game with many inherent risks taking place during play.¹⁴⁸ A referee's conduct during and apart from play are held to different standards in the U.K.¹⁴⁹ Evans' decision was deliberate and outside of the context of play, unlike the wrestling referee in *Carabba*.¹⁵⁰ A U.S. expert on referee liability has advocated making this distinction in his argument for grounding referee liability in recklessness.¹⁵¹ He suggests a two-tiered approach for recovery: a player must prove that a referee acted in reckless disregard for his or her safety and make a separate determination of whether the defendant's conduct was "part of the game."¹⁵² In doing so, courts would reduce the threshold for referee liability from simple negligence without equating the duty referees owe to players with the duty players owe to one another.¹⁵³

These standards govern who should take care in sporting events by imposing tort liability on the party responsible for players' injuries. The importance of this determination is not confined to athletes, coaches, spectators, or fans but articulates the boundaries of individual responsibility in risky endeavors. In *Vowles*, the players were engaged in what the dissent described as an "inherently risky" sport and chose a dangerous play to maximize their ability to earn points. The assumption of

147. See Paul Cullen, *Sports Litigation a "Growing Trend,"* 6/14/03 IR. TIMES 8, 2003, available at WL 56611675.

148. *Id.* at 4.

149. *Vowles*, E.C.C. 240 at 253.

150. Cullen, *supra* note 147.

151. Mel Narol, *Sports Participant with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29, 30 (1991).

152. See *id.* at 39-40.

153. In the U.S., players have a duty not to act with reckless disregard of another player's safety. See CHAMPION, *supra* note 103, §4:1. Whether a player acts with reckless disregard is heavily contested, particularly in the context of inherently dangerous sports like rugby. The duty of care a player owes a referee is the same as his or her duty to another player. *Id.* Thus, in some states and in the U.K., the referee is the only person on the field who faces potential liability for negligence.

risk defense and *volenti non fit injuria* defenses in the U.S. and the U.K., respectively, have a potent history in sports law, yet the *Vowles* majority did not give that traditional defense much credence. In placing the responsibility to protect players from one another in the referee's hands, rather than the players', the *Vowles* court articulates the value of physically risky competition to British culture. Several scholars have explored the inherent politics of tort law because it determines whether a plaintiff will be compensated for their injury, who should compensate the plaintiff, and how much that plaintiff's injuries are worth.¹⁵⁴ Sports law in the U.S. and U.K. is particularly fertile ground for such inquiries.

C. The Absence of Traditional Tort Defenses in Agar, Smoldon, and Vowles

Despite different holdings, *Agar*, *Smoldon*, and *Vowles* share similar factual circumstances. A particularly curious trait these cases share is that no plaintiff brought an action against a fellow player or captain despite the fact that each claimant sustained injuries because of rough bodily contact and captains' decisions.¹⁵⁵ In this sense, claimants locate the cause, both in fact and proximate, with agents who are not team-affiliated. This relocation of cause is particularly interesting because the flip side of referee negligence when players hurt each other is, of course, assumption of risk and contributory negligence. These defenses were unsuccessful in *Vowles*, curiously, even though a series of decisions led to *Vowles*'s injury. Why hold a referee negligent when there are, potentially, several tortfeasors? The court's lack of attention to these defenses suggests a broader policy reason for hesitating to hold athletes responsible for the

154. See generally CONAGHAN & MANSELL, *supra* note 11, at 3. One tort expert argues that in the U.K. "At bottom, the rules of tort law reflect policy decisions by the judiciary about the interests that are protected and the type of conduct that is sanctioned." WRIGHT, *supra* note 11, at 3. Wright argues, further, that, because the U.K. lacks a bill of rights, tort law has been a locus for determining which rights to protect. *Id.*

155. A player injured because of a deliberate and unprovoked assault may recover from the Criminal Injuries Compensation Board. *Silver*, *supra* note 95, at 557. A player cannot receive double compensation, meaning that if a player prevails in a civil action against another player, the damages he or she receives will offset Board compensation. *Id.*

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harm they do to one another. A historical and comparative overview of the defenses in British and American law is instructive in probing this broad policy in each country.

IV. *VOLENTI NON FIT INJURIA*, ASSUMPTION OF RISK, AND CONTRIBUTORY NEGLIGENCE DEFENSES IN THE U.K. AND U.S.

A. *Volenti Non Fit Injuria and Contributory Negligence in the U.K.*

Tort defenses in the U.K. typically fall into three categories: those based on plaintiff conduct that proportionally relieve the defendant of liability, those based on defendant's contention that the plaintiff assumed the risk of injury, and those excusing the defendant's conduct.¹⁵⁶ The first type of defense is called contributory negligence and was codified by the Law Reform Act, 1945.¹⁵⁷ Under the Act, the court must apportion liability.¹⁵⁸ Contributory negligence is available when a plaintiff's carelessness contributes to his or her injury, even if a defendant is entirely responsible for the events leading to the plaintiff's injuries.¹⁵⁹ A particularly delicate aspect of contributory negligence

156. CLERK & LINDSELL ON TORTS §3-57 (Anthony Dugdale, ed., 18th ed. 2000). This Note will be concerned with the first two types of defenses.

157. The Law Reform Act maintains that

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable...

Law Reform (Contributory Negligence) Act, 1945, 8 & 9, Geo. 6, c. 28, §1(1) (Eng.). The Act broadened the use of the defense beyond nuisance on the highway and statutory duty, which had been the exclusive torts for which the contributory negligence defense was available. *Id.* at §3-28.

158. CLERK AND LINDSELL, *supra* note 156, §3-23.

159. *Id.* A classic example of when a plaintiff contributes to injuries rather than to tortious conduct occurs most frequently when a plaintiff sustains injuries in a car accident caused entirely by the defendant's negligence, yet the extent of the plaintiff's injuries was lengthened by his or her not wearing a seatbelt. *Id.* If a plaintiff sustains an injury where his or her negligence would not have affected the injury, such as if he or she was burned when a car exploded while not wearing a seat belt, then a contributory negligence defense does not apply. *Id.*

is causation, which many scholars merge.¹⁶⁰ The 1945 Act applies the following principles with respect to causation and contributory negligence: the same rules of causation should apply to determining whether the plaintiff's carelessness contributed to her injury and whether the defendant caused the injuries. Whether the plaintiff's carelessness preceded or followed the defendant's wrongdoing is irrelevant. Foreseeability of the manner of injury is also irrelevant.¹⁶¹

Plaintiffs' potential culpability extends to intentional torts. A plaintiff's carelessness must be sufficiently careless as compared to the defendant's wrongdoing to result in fault on the plaintiff's part. Under the 1945 Act, "fault" includes the plaintiff's intentional acts where the defendant is duty-bound to prevent the plaintiff's self-inflicted harm.¹⁶² Contributory negligence, in this context, turns on foreseeability of harm to oneself.¹⁶³ If a plaintiff should have foreseen that he may suffer injury through his carelessness and proceeds nonetheless, he is contributorily negligent.¹⁶⁴ A potentially negligent plaintiff is held to an objectively reasonable standard,¹⁶⁵ which includes taking precautions to guard against others' carelessness.¹⁶⁶ A plaintiff taken by surprise by a defendant's conduct who believed, reasonably, that she may proceed safely is held to a lower standard of care.¹⁶⁷

160. *Id.*

161. *Id.* §3-26. ("Broad common sense should be used to judge cause and effect on the facts of each particular case.")

162. *Id.* *Reeves v. Commissioner of Police for the Metropolis* illustrated this aspect of the 1945 Act when the House of Lords held a decedent who committed suicide in police custody contributorily negligent after he had been declared a suicide risk. Although the police had a duty to protect the decedent from himself, the decedent was sane when he killed himself and, thus, had some responsibility for his death. *See Reeves v. Commissioner of Police for the Metropolis*, [1999] 3 W.L.R. 365 (Eng.).

163. CLERK AND LINDSELL, *supra* note 156, §3-37.

164. *Id.*

165. *Id.*

166. *Id.* §3-39.

167. *Id.*

1. The Failure of *Volenti* and Contributory Negligence
Defenses in *Vowles*

The nuances of contributory negligence defenses are particularly important in contact sports cases. A fast-moving game with constant risk of injury presents a host of possible tortfeasors depending on the moment when the injury took place. In a sense, imposing liability under such circumstances is a temporal decision. In *Vowles*, Evans's decision to allow the team captains to proceed with an uncontested scrum occurred apart from the game and, thus, was not subject to a lower standard of care. In eschewing contributory negligence and assumption of risk defenses, the Court broadened the temporal span and deemed Evans's decision the cause-in-fact and proximate cause of Vowles's injuries. Had the Court constricted its analysis to the moment of injury, it could have found cause-in-fact and proximate cause in the captains' decision to engage in a more dangerous game or with the Tondu player's decision to play regardless of his inexperience.

The broadest temporal approach the Court could take would, of course, consider rugby players' decision to engage in an inherently risky game as *volenti non fit injuria*, or assumption of risk. The Nineteenth Century *Smith v. Baker* case declared that "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."¹⁶⁸ The *Vowles* defendants would have had to prove three things to bring a successful *volenti* defense: first, that Vowles agreed to absolve the Rugby Union from legal responsibility for its negligence, second, that Vowles acted freely and voluntarily, and, third, that Vowles had full knowledge of the risks.

This high threshold makes a defendant's successful use of *volenti* rare and difficult – and perhaps rightfully so. *Volenti non fit injuria* differs from the defense of contributory negligence in that a *volenti* defense denies, rather than apportions, liability and damages. Defendants' reliance on *volenti* defenses has decreased significantly since the 1945 Act's enactment because courts could apportion culpability rather than take an all-or-

168. *Smith v. Baker*, [1891] A.C. 325, 360 (Eng.).

nothing approach to liability and damages.¹⁶⁹ In contact sports like rugby, players are typically taken to consent impliedly to bodily contact occurring within the context of the game.¹⁷⁰ This becomes a murkier question, however, in sports as inherently risky as rugby.

Vowles illuminates this tension between consent and *volenti* defenses. In *Vowles*, the central question was whether Evans had a duty to amateur players and whether Evans breached that duty by not insisting on non-contestable scrums.¹⁷¹ The absence of a strong contributory negligence defense is curious under *Vowles's* circumstances.¹⁷² Evans attempted, unsuccessfully, to balance his duty as guardian of the players with allowing players to compete as heartily as they wished. Evans' post-match notes asserted that "In discussion, I explained to them that the decision was theirs" and that he "did not want them to try to put [Johnson] under undue pressure but appreciated that it was still a contest."¹⁷³ Evans's assessment of the events leading to Vowles' injury reveals much about the policy articulated by the *Vowles* court.

A dissenting lower court judge maintained that Evans was not liable because the Llanharan coach and captain improperly "allow[ed] the desire not to forfeit points to override considerations of safety" and that the majority was wrong in holding that Evans breached his duty by not asking Tondu's substitute player whether he was properly trained and experienced.¹⁷⁴ On appeal, after intense scrutiny of the moments leading to Vowles's injury, the Court held that there was sufficient evidence to support a judge's finding that Evans was the cause of the accident.¹⁷⁵ The appellate court found Evans "the" cause, rather than "a" cause, of Vowles's injury, yet a glance through the events leading to the ill-fated scrum reveals a range of po-

169. CLERK AND LINDSELL, *supra* note 156, §3-72.

170. *Id.* §3-97.

171. *Vowles*, E.C.C. 240 at 255.

172. Determining referee liability is a case-by-case endeavor in which "full account must be taken of the factual context in which a referee exercises his functions, and he could not properly be held liable for errors of judgment, oversights, or lapses of which any referee might be guilty...The threshold of liability is a high one. It will not easily be crossed." *Id.* at 250.

173. *Id.* at 253.

174. *Id.*

175. *Id.*

tential tortfeasors.¹⁷⁶ Indeed, the appellate court closes its opinion by pointing out that serious injuries are among the game's risks that "those who play rugby believe [are] worth taking."¹⁷⁷

Why would the court acknowledge strong potential for contributory negligence and assumption of risk defenses and still hold Evans solely responsible? A torts scholar in England asked the same question and considered the court's refusal to consider negligence on the part of Vowles, his team captain, and inexperienced teammate "extraordinarily paternal" since participants in the contest were consenting adults.¹⁷⁸ The same scholar analyzes Vowles's potential liability through the lens of employment law and explores holding Vowles partially liable because he had free will and chose to engage in what he knew to be dangerous play and, thus, consented to his injury.¹⁷⁹ Conversely, the scholar considers the possibility of Vowles not having the option to consent because of the intense pressure he would have felt to engage in a contested scrum to avoid forfeiting points.¹⁸⁰

A brief comparative glance at the success and failure of similar defenses in the U.S. where, historically, sports participants assumed all inherent risks. U.S. courts have not been as willing to hold amateur referees liable. Because this Note tests the viability of U.S. solutions to referee liability, the next section will address assumption of risk and contributory negligence defenses in the U.S.

176. *Id.*

177. *Id.* at 259-60.

178. Charlish, *supra* note 1, at 85. "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." *Id.* Charlish also raised the provocative point that the game rules refusing points for an uncontested scrum could have provided another ground for liability because "It is clear that this rule had an effect on the decision by the Llanharan players to reject the referee's offer of uncontested scrums." *Id.*

179. *Id.* For examples of the success and failure of the volenti defense see *Baker*, [1891] A.C. at 325 (defense failed in case where worker was injured when stone fell on him from a crane after his employer told him to work under the crane) and *ICI v. Shatwell* [1965] A.C. 656 (defense successful where employee disobeyed employer's orders to finish work more quickly and subsequently sustained injury).

180. Charlish, *supra* note 1, at 87.

B. Assumption of Risk and Contributory Negligence in the U.S.

The defenses of *volenti non fit injuria*, assumption of risk, and contributory negligence in the U.K. and U.S. are, for the most part, similar historically and practically. Historically, a U.S. plaintiff's contributory negligence was a complete defense which barred a careless plaintiff from recovery.¹⁸¹ Modern comparative fault regimes permit a careless plaintiff's recovery if a defendant's harm was intentional, wanton, or reckless, if the defendant had the last clear chance to avoid harm, and if the defendant was duty-bound to protect the plaintiff from his or her own risky behavior.¹⁸² Comparative fault reduces a careless plaintiff's recovery in proportion to her culpability and is followed by most U.S. states as well as the U.K., Australia, Canada, and New Zealand.¹⁸³

Like *volenti non fit injuria*, assumption of risk in the U.S. bears a strong resemblance to, and is invoked far less often than, contributory negligence.¹⁸⁴ Traditionally, plaintiffs who assumed the risk of a defendant's negligence could not recover, regardless of age.¹⁸⁵ Courts in the U.S. distinguish between con-

181. DAN B. DOBBS, *THE LAW OF TORTS* 494 (2000).

182. *Id.* at 498.

183. *Id.* at 504. If a plaintiff's damages are estimated to be \$10,000 and the plaintiff is 25% at fault for her injuries, then the plaintiff recovers \$7,500. *See id.* Historically, the same plaintiff would not have been able to recover any of her damages. *Id.* at 498. There are variations of systems of comparative fault in the U.S., however, so there is not a systematic national approach to damages. *Id.* at 505. In a pure comparative fault state, a plaintiff is never barred from recovery because of contributory negligence. *Id.* Under modified comparative fault, a plaintiff is barred from recovery if his fault exceeds that of the defendant or if his fault is equal to or exceeds the defendant's. *Id.* In a modified comparative fault state, a plaintiff who is 51% negligent would be barred from recovery. Legislators and commentators differ on their views of which system is more just. *Id.* at 505-06.

184. *Id.* at 534. Cases that were traditionally analyzed under the assumption of risk doctrine are now resolved with comparative fault rules by holding that the defendant had no duty or that the defendant did not breach that duty. *Id.* Assumption of risk is sometimes referred to as *volenti non fit injuria* in the U.S., as well. *Id.* at 535. Scholars and judges hold widely that assumption of risk should be collapsed within comparative fault and abolished entirely as a defense. *See generally* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 *UCLA L. REV.* 481, 482 (2002).

185. DOBBS, *supra* note 181, at 535. In the Minnesota case *Greaves v. Galchutt*, eleven and twelve-year-old plaintiffs were barred from recovery because

tributory negligence and assumption of risk because the former concerns a plaintiff's carelessness while the latter concerns a plaintiff's risky conduct.¹⁸⁶ Many commentators question this distinction because it does not account for the necessity of a plaintiff's consent to a known risk in raising an assumption of risk defense.¹⁸⁷ Since the 1950's, several states have stopped struggling with the distinction between the two defenses by merging assumed risk into comparative negligence and avoiding the harsh outcome of a plaintiff being barred from recovery when he is determined to have assumed the risk.¹⁸⁸

In the sports context, players historically assumed the risk of all inherent dangers.¹⁸⁹ Courts today typically apply the limited duty rule, which holds players liable to one another only in the event of recklessly or intentionally-inflicted injuries.¹⁹⁰ The limited duty rule posits the negligence of competitive athletes as an inherent sporting risk.¹⁹¹ Under the limited duty rule, even a rule violation does not result in liability per se if such a violation is typical.¹⁹² The limited duty rule requires consent and analysis of the reasonable expectations of the parties involved, which raises questions with rugby injuries where participants' reasonable expectation may include intense physical aggression and force.¹⁹³

In the U.S. and the U.K., assumption of risk, *volenti*, and contributory negligence defenses have become limited. In the U.S., state legislatures and Congress enacted laws protecting volunteer referees from liability as these defenses became less available.

they assumed the risk of a gun being loaded that they thought was unloaded. *See generally* Greaves v. Galchutt, 184 N.W.2d 26 (1971).

186. DOBBS, *supra* note 181, at 536.

187. *Id.*

188. *Id.* at 539.

189. *Id.* at 548.

190. *Id.*

191. *Id.* at 548-49. In the U.S., the limited duty rule has been applied to football, hockey, horseracing, soccer, softball, and informal games. *Id.* at 549. Commentators suggest, however, that the limited duty rule should be confined to professional sports. *See generally* Stephen D. Sugarman, *Assumption of the Risk*, 31 VAL. U. L. REV. 833 (1997).

192. *Id.* at 549.

193. *Id.* at 550.

V. U.S. STATE AND FEDERAL EFFORTS TO LIMIT VOLUNTEER
REFEREE LIABILITY

A. *State Law and the Federal Volunteer Protection Act*

A referee's "amateur" status in the U.S. is a more complicated question than in the U.K. Evans was an "amateur" in the eyes of the *Vowles* court because he was officiating an amateur match. The National Collegiate Athletic Association ("NCAA") defines amateurism as the "clear line of demarcation between college athletics and professional sports."¹⁹⁴ The NCAA's definition pivots on an athlete's non-acceptance of pay or the promise of pay.¹⁹⁵ Beyond collegiate sports, whether an "amateur" referee is an employee differs from state to state for workers compensation purposes.¹⁹⁶ Some states determine a referee's employment status by whether he or she gets paid or by whether the match itself is amateur.¹⁹⁷

State and federal laws limit their applicability to volunteer sports officials and do not address the ambiguity of whether an official is an amateur. Generally, volunteer referees get far less press exposure and recognition than their professional counterparts.¹⁹⁸ In the late 1980's, however, lawsuits aimed at volunteer referees increased significantly¹⁹⁹ and officials began considering their inherent liability.²⁰⁰ The two actions most frequently brought against volunteer officials in the U.S. are

194. National Collegiate Athletic Association Manual, 2002-03, art. 12.01.2. Available at http://www.ncaa.org/library/membership/division_i_manual/2003-4_d1_manual.pdf (last visited June 25, 2004).

195. *Id.* at art. 12.02.3. ("Pay is the receipt of funds, awards, or benefits not permitted by the governing legislation of the Association for participation in athletics.")

196. See Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L. J. 249, 254 (1998).

197. *Id.*

198. Parven, *supra* note 131, at 13. See also Tomsho, *More Referees Play Defense – In the Courts*, WALL ST. J. Aug. 11, 1989, at B1.

199. See generally Lewis & Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673 (1990).

200. Mel Narol, *Protecting the Rights of Sports Officials*, TRIAL, Jan., 1987, at 65. Interestingly, sports officials in the early 1980's became more common as plaintiffs, bringing suits in contract, libel, and slander. See Mel Narol and Dedepoulos, *Potential Liability: A Guide to the Referee's Rights*, TRIAL, March, 1980, at 42.

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claims in negligence for players' personal injuries and for "bad calls."²⁰¹ While this Note concentrates on personal injury claims, it is interesting to note that courts rarely find for plaintiffs in "bad call" cases, suggesting that courts uphold referee discretion and expertise as an important social policy.²⁰² Courts are not as deferential, however, when referee negligence results in personal injuries.²⁰³ As one official complained, "[w]e're supposed to be out there being impartial arbiters of the game. Now referees spend much of their time thinking about risk awareness."²⁰⁴

In response to officials' fears of liability, many states passed statutes requiring plaintiffs to prove at least gross negligence in suits against volunteer or professional referees.²⁰⁵ Such statutes were enacted because of larger national concerns with declining voluntarism.²⁰⁶ Statutes immunizing, or limiting liability of, volunteers reflected the centrality of voluntarism to recrea-

201. *Id.*

202. Lewis & Forbes, *supra* note 199, at 676. In New York, courts' reluctance to question referees' judgments has a longer history: "In more than one sense, such officials are truly judges of the facts, since they are closer to the actual situation and characters involved, at the time." *Shapiro v. Queens County Jockey Club*, 53 N.Y.S.2d at 135 (1945). "Surely, their immediate reactions and decisions of the questions which arose during the conduct of the sport should receive greater credence and consideration than possibly the remote, subsequent matter-of-fact observation by a court in litigation." *Id.* at 138. *See also Tilleli*, 120 N.Y.S.2d at 698 (boxer's victory revoked after the New York Athletic Commission reviewed referee's challenged records and court held that "...judges and referees possess specialized skills and experience which are essential, because the scoring of a prize fight is not a routine nor mathematical process, but instead one which is influenced by numerous factors.").

203. Parvin, *supra* note 131, at 31.

204. Tomsho, *supra* note 198, at B1.

205. Parvin, *supra* note 131, at 53. Among the earliest statutes was Tennessee's, which immunized officials from suit so long as they were acting within the scope of their responsibilities: "A sports official who administers or supervises a sports event at any level of competition should not be liable to any person or entity in any civil action for damages to a player, participant, or spectators as a result of the sports' official's duties or activities." Tenn. Code Ann. §49-7-2101 (1979).

206. *See generally* Lede E. Dunn, "Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?, 61 *FORDHAM L. REV.* 451, 452 n.13 (1992) (discusses declining rates of voluntarism).

tional sports in the U.S.²⁰⁷ Despite state legislatures' views that volunteer officials were essential to the success of recreational sports, there are vast inconsistencies among state laws governing voluntarism.²⁰⁸ Some states provide total immunity to volunteer sports officials while others provide qualified immunity.²⁰⁹ Intrastate volunteer liability may vary.²¹⁰ Further, many state laws have internal inconsistencies.²¹¹

These variations, along with scant statutory interpretation, spurred Congress to enact the Federal Volunteer Protection Act ("FVPA"), which sought to safeguard volunteers and non-profit organizations from liability. The FVPA immunizes volunteers from liability who act within the scope of their activities without committing a crime of violence, a hate crime, a sex offense under state law, a civil rights violation, or acting under the influence of drugs or alcohol.²¹² The FVPA also eliminated joint and several liability for non-economic damages²¹³ and limited punitive damages.²¹⁴ Many commentators welcomed Congress's initiative because the FVPA includes a lucid definition of "volunteer."²¹⁵

Most important in light of *Vowles* is the FVPA's focus on declining voluntarism as a national problem which outweighed the competing social policy of compensating injured participants

207. See generally Joseph H. King Jr., *Exculpatory Agreements for Volunteers in Youth Activities – the Alternative to “Nerf” Tiddlywinks*, 53 OHIO ST. L. J. 683, 686-87 (1992) (“It is unthinkable that we could afford to pay for the services currently provided by volunteers.”). For an interesting article arguing against immunity for Little League coaches, see Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune from Tort Liability*, 7 SETON HALL J. OF SPORT L. 559, 569 (1997).

208. Parvin, *supra* note 131, at 327-28.

209. *Id.* at 327.

210. *Id.* at 326.

211. Kenneth Biedzynski, *The Federal Volunteer Protect Act: Does Congress Want to Play Ball?*, 23 SETON HALL. LEGIS. J. 319 (1999) [hereinafter Biedzynski, *Does Congress Want to Play Ball?*].

212. Federal Volunteer Protection Act of 1997, 42 U.S.C.A. §14503(a)(1) (1997).

213. *Id.*

214. *Id.* §14503(e)(1). Under the FVPA, a plaintiff may not recover punitive damages unless he or she “establishes by clear and convincing evidence that the harm was proximately caused by...willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.” *Id.*

215. Biedzynski, *Does Congress Want to Play Ball?*, *supra* note 211, at 344.

in recreational sports. As one commentator points out, the FVPA may unfairly bar plaintiffs bringing meritorious claims from recovering.²¹⁶ The FVPA and state statutes emphasize the centrality of volunteers to recreational sports in the U.S., yet fail to address the possibility of a decline in sports participation if players are barred from compensation because of a referee's negligence. The Act's blind spot is particularly curious because state and federal legislation is aimed largely at youth sports.²¹⁷

This distinction is important in considering the applicability of U.S. law to referee liability in the *Vowles* context: the stakes for an amateur rugby player with potentially professional aspirations are very different from those in U.S. youth sports.²¹⁸ The performative aspects of rugby in the U.K. are crucial to its commercial success. Conversely, amateur sports in the U.S., outside of the context of college sports, generate far less publicity and revenue.²¹⁹ Individual participants in amateur sports in the U.S. may enjoy a riskier game, but the level of risk does not enhance a participant's national reputation or livelihood. In *Vowles*, rugby was in such a state of flux that a judgment in the WRU's favor would have left Vowles bereft of a potential future in professional rugby after he took risks necessary to securing WRU's fan base.

VI. CONCLUSION

In both the U.S. and the U.K., sports have enormous cultural resonance that exceed the boundaries of the playing field. Referees play a unique role in sports in both nations as they are, presumably, the single entity not invested in which team pre-

216. See generally Henry Cohen, *The Volunteer Protection Act of 1997*, 45 FED. LAW. 40 (1998).

217. See generally Biedzynski, *Is That the Right Call?*, *supra* note 143.

218. See generally Hayden Opie, *The Sport Administrator's Charter: Agar v. Hyde*, 12 SETON HALL LEGIS. J. 199 (2001) (Opie explores alternative motives for the *Agar* court's decision not to hold the IRFB liable, all stemming from international sports bodies' desire to increase spectatorship.).

219. Of course, there have been highly-publicized incidents of violence in youth sports in the U.S. See generally Douglas E. Abrams, *The Challenge Facing Parents and Coaches in Youth Sports: Assuring Children Fun and Equal Opportunity*, 8 VILL. SPORTS & ENT. L. J. 253 (2002). One cannot deny, however, that these skirmishes, though violent, do not approach the magnitude of spectator melees in the U.K. which led, ultimately, to legislation curtailing spectator violence. Football Spectators Act 1989, c. 37 (Eng.).

vails. In contact sports, they are simultaneously participant and spectator, active when they run up and down the field alongside players, yet detached when they make swift, impartial decisions in the midst of intense competition. Whether referees are held to a professional standard of liability, as in *Vowles*, or whether their tort liability is relaxed for public policy reasons under U.S. state law determines who will bear the cost of players' personal injuries.

The WRU's legal team criticized *Vowles* because of its risk to the WRU and, they argued, the Court's designation of the WRU as the appropriate cost-bearer was inappropriate in an amateur context.²²⁰ This distinction between amateurism and professionalism should not, however, determine the standard of care that the WRU and referees must meet. Professionalization placed an enormous amount of pressure on professional and amateur rugby players to win and risk grave injury in the process.²²¹ The WRU's history of shortchanging players and mismanaging teams suggests their historical reluctance to protect players, both amateur and professional, from injury. The fluidity between amateur and professional rugby and the ascent of amateurs to professional status requires a uniform standard of care to protect rugby players at all levels.

Further, since the *Vowles* "windfall," few of the WRU's fears have been realized. For example, no amateur rugby players have sued the WRU successfully since *Vowles*.²²² The WRU's fears of bankruptcy also never came to pass. After *Vowles*, sev-

220. James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb. 25, 2003 ("...Mr. Leighton-Williams started the appeal against...[the] ruling...in [the Court's] judgment [they] concluded that as the game was funded by gate receipts and television revenues, there was no reason the WRU could not pay increased premiums to insure their referees. But for second team rugby at this level, I have to say there is not a lot by way of gate receipts.").

221. *Id.*

222. In the recent *Allport v. Wilbraham* case heard in the Birmingham County Court in December of 2003, a catastrophically injured amateur rugby player failed in his claim against the referee, prompting the RFU to note that "Notwithstanding the high profile decisions of Smolden and Vowles, these claims remain difficult to prove and with the appropriate evidence a successful defence can be maintained." *Allport v. Wilbraham* is unreported, but details about the case are available at the Rugby Football Union's website at http://www.rfu.com/index.cfm/fuseaction/RFUHome.Refereeing_Detail/StoryID/5522 (last visited June 27, 2004).

eral Welsh junior games were cancelled because referees hesitated to officiate for fear of being sued.²²³ Interestingly, parents' fears of their children playing a violent game also contributed to the cancellations.²²⁴ As a result, the Sports Council for Wales provided grants for referee training.²²⁵ To date, the WRU has increased the training of nearly 800 referees.²²⁶ One commentator regards these post-*Vowles* measures as a "boost for Welsh rugby" rather than the death knell the WRU heralded.²²⁷

Though amateur players like *Vowles* still shoulder a heavy burden, the WRU, along with other rugby unions, has taken significant measures to shield themselves from liability by insuring player safety.²²⁸ Unlike the FVPA in the United States, Wales has managed, in the wake of *Vowles*, to support voluntarism without barring amateur rugby players from suing in tort. Such organizational nuances mean that amateur British rugby is not amenable, at present, to U.S. legislative solutions. Although voluntarism is a concern in Wales, the nation's approach to resolving this conundrum has been to insure player safety and referee training rather than simply to shield amateur refe-

223. After *Vowles*, many junior games in Wales were cancelled because referees hesitated to officiate in a hostile legal climate. S. Thomas, *Litigation Fear Brings Shortage of Refs*, THE WESTERN MAIL, Jan. 15, 2003 ("Teachers who voluntarily referee school matches at all age groups up to second-year sixth levels are becoming increasingly loathe to officiate – such is their concern they may be open to increasing litigation."). Evans himself vowed never to referee again after the House of Lords denied the WRU's appeal. *Vowles Official: I'll Never Referee Again*, THE WESTERN MAIL, Aug. 1, 2003 ("I would never pick up a whistle again. I wouldn't want to put myself or my family through this again.").

224. Thomas, *supra* note 223 ("Parents, too, are becoming anxious and are asking themselves if they should let their sons play a game of sometimes violent contact.").

225. *Id.* ("With the WRU being more than £73 m. in debt and strapped for cash, the SCW agreed to fund the training programme to the tune of £39,600.").

226. *Id.*

227. *Id.* (Rob Yeman, the WRU's referee director noted that "For many years, recruitment and retention of referees has been one of our biggest problems. There was a lot of concern with the verdict in the *Vowles* case. But now we can ensure referees are covered by the WRU umbrella.").

228. The Irish RFU ordered passive, rather than contested, scrums after *Vowles*. See *Passive Scrums Order for Ireland*, THE WESTERN MAIL, Mar. 14, 2003.

rees and organizations from liability.²²⁹ At this stage of professionalization, the WRU is the most appropriate bearer of injured players' costs. Immunizing volunteer referees from suit would leave injured players little recourse while permitting the WRU to reap the financial benefits of the spectacle of competitive, aggressive rugby play.

In this sense, contrary to public outcry in both the U.S. and U.K., the tort system benefited all parties in the wake of *Vowles*. At this pivotal moment in Welsh rugby and national history, *Vowles* provides the most just approach to determining compensation for gravely injured amateur athletes.

Erin Elizabeth McMurray*

229. The Sports Council and Wales's Director of National Development noted that

The Sports Council is committed to supporting sports volunteers in Wales. They encourage young people, and others, to take part in sport. We are almost entirely dependent on volunteers. We were concerned a number of junior fixtures had to be cancelled at the end of last season, so we looked at the best way to increase the number of qualified referees as soon as possible."

Andy Howell, *Council Boost for Referees' Training*, THE WESTERN MAIL, Sept. 5, 2003.

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