Rugby and the Law

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Introduction

Noswaith dda.

It is my great pleasure to be here in the Principality this evening, to talk about some of the legal entanglements of the sport with which Wales is most closely associated. This is far from my first rugby-related trip to Cardiff, and I would ask you to note that in this photograph of one of my visits, with my Welsh wife who is a graduate of this university, and my eldest son, I am supporting the home team against France. But I must confess that when it comes to rugby, I answer Ireland's Call. For that reason, I understand the Rugby World Cup to be a tournament which uniquely comes to an end at the quarter-final stage, with eight winners.

Rugby is, of course, a game which began as an amateur sport, endured a professional break-away and a period of shamateurism as it became increasingly difficult to reconcile its commercial values and the demands on its players with the amateur ethos, and now operates in two codes, each with amateur, semi-professional and professional tiers. The cases which I am going to discuss trace rugby's path on that sometimes painful evolution.

Amateurs, shamateurs and professionals

The first set of cases I want to consider concern the issue of paying players, or allegedly doing so. As is well-known, the Northern Unions broke from the RFU in 1895 to form the Rugby League over the payment of players – so-called "broken time payments" to players for wages lost while training and playing. By the 1960s, Rugby League had become a well-established sport enjoying large crowds, and it had become common place for Rugby League clubs to pay large signing-on bonuses to attract amateur Union players to their ranks. The tax treatment of these payments became a bone of contention with the Inland Revenue. The issue was whether these fees were a capital inducement to give up amateur status, and not taxable, or remuneration for their services as professional players and taxable as income. Challenges were brought in relation to various sign-on fees, including £3,000 paid to the Newport and Cross Keys centre, Dick Boustead – looking suitably fearsome in the accompanying photograph - when he signed for Hull FC. Differing decisions on the point were reached by the Special Commissioners, who favoured the income analysis, and Mr Justice Pennycuick, who held that the payment was properly to be characterised as capital.[1] The point went to the Court of Appeal in *Jarrold v Boustead*.[2]

Lord Denning began with a pencil sketch of the two codes, with an appropriate acknowledgement of Wales' particular connection with the 15-person game:

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[1] *Jarrold (Inspector of Taxes) v Boustead* [1963] 42 STC 518.
[2] *Jarrold (Inspector of Taxes) v Boustead* [1964] 1 WLR 1357.

> "I must first explain that Rugby Union football is exclusively an amateur game. It is played much in Wales. But Rugby League football is played by professionals as well as amateurs. It is played mostly in the north of England."

He was satisfied that the payment was made as consolation for Boustead relinquishing his amateur status, and the disadvantages that brought: Boustead had been prevented from running for his college at a university athletic meeting of several universities in Hull University, when it was discovered that he was a professional player and ordered off the ground, and he was not allowed to visit Rugby Union grounds, even as a spectator. In Boustead's case, his Rugby League career was only to last 14 games, before he sustained a serious injury.

However, in *Riley v Coglan*,[3] amateur rugby league player Bob Coglan - seen here ball in hand, driving forward trying to break a tackle - had been paid £500 when signing professional forms for York, on the basis that it would have to be repaid pro rata if he did not spend his professional career or at least 12 years of it at York for reasons other than injury. Ungoed-Thomas J rejected the suggestion that this was a capital payment in return for Coglan giving up his amateur status, and held that the sum was a running payment covering the whole period of the contract, irrespective of when it was received, and hence taxable as remuneration.

So engrained was the amateur-professional divide that it was defamatory to accuse someone with amateur status of making money from playing rugby. Now there are some three initial acronyms which instantly send a chill down your spine. In 1999, Defence Secretary Michael Portillo told the Conservative Party conference that those letters were S-A-S. For me, for many years, they were V-A-T. But for English rugby players in the 1970s, they were definitely J-P-R, the shorthand by which the late and great Welsh fullback John Peter Rhys Williams was universally known. In the late 1970s, newspaper reports accused Williams of making money from his rugby playing through the profits from an autobiography, and doing so in breach of International Rugby Board ("IRB") regulations. Williams claimed that he had intended to donate the proceeds to a sports injury charity, the Bridgend Sports Injury clinic.[4] He obtained a settlement from *The Sun* but his case against the *Daily Telegraph* went to trial. He can be seen here outside on of the hearings in an impressive sheepskin jacket. Williams recalls:

> "Instead of standing as a full-back fielding high balls from the opposition, I found myself tackling questions from a quick-witted QC who had been hired by the *Daily Telegraph* at great expense."[5]

After what Williams described as "a very sensible and heartening summing up" from Mr Justice Russell, the jury found for Williams and awarded him £20,000. However the *Daily Telegraph* appealed,[6] complaining that Russell had not fairly directed the jury on its defence that the allegations were substantially true. At the outset of the appeal, the paper sought to adduce new evidence from Mr Young, a former Adidas sales' representative, that Williams had been paid cash payments for wearing their boots – so-called "Boot money" – in breach of

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[3] *Riley v Coglan* [1967] 1 WLR 1300.
[4] JPR Williams, *JPR Given the Breaks: My Life in Rugby* (2007), 104.
[5] JPR Williams, *JPR Given the Breaks: My Life in Rugby* (2007), 130.
[6] *Williams v Reason* [1988] 1 WLR 96.

a different IRB regulation. After hearing evidence from Mr Reason, the journalist who had written the story, and Mr Sykes, the paper's solicitor, the Court of Appeal indicated it was minded to receive the evidence and order a new trial, on the basis that the *Ladd v Marshall* test was satisfied. However, Williams' counsel then put in evidence intended to show that Young's evidence could have been obtained for the trial. Further live evidence followed from Mr Young, the paper conceding that Mr Young could have been found before the original trial had due diligence been exercised, but denying that he would have been willing to give evidence at that point. As Stephenson LJ explained:

> "The defendants had, therefore, the difficult task of proving that, if Mr. Young had been traced before the trial and had been asked if he would give the evidence that he now proffered, he would not have been willing to give it. In discharging this heavy burden the defendants were considerably assisted by Mr. Youngs d enial that he would have been willing to give it to them then. The force of that denial was, however, weakened, in my judgment, by his admission that he had spent the evening before his appearance in court dining with Mr. Reason and Mr. Sykes."

On that basis, the fresh evidence was excluded from the appeal, because the first *Ladd v Marshall* condition – that the evidence could not, by the exercise of due diligence, have been available at the trial – was not satisfied. However, the court had decided to order a new trial for other reasons, and the Court went on to consider whether the statement about writing the book could be justified by evidence about boot money, which would make the evidence admissible at the retrial. The Court held that because "the sting of the libel" here was "shamateurism", evidence of the payment of boot money might have influenced the jury in finding that Williams had written the book for money and/or that a more general allegation of "shamateurism" was true. That new trial was ordered because the interpretation of the IRB regulation which the judge had put to the jury was erroneous, and the Judge had inadequately summarised the *Telegraph*'s case that Williams had not originally intended to give the proceeds of the book to charity in the course of a distinctly pro-plaintiff summing up. Stephenson LJ finished his judgment by quoting Lord Atkin:[7]

> "Finality is a good thing, but justice is a better."

Williams appears to have decided on finality, listening to family advice "to walk away". He later said:

> "My advice for anyone tempted to bring a libel action is to think carefully and to think twice about what your lawyers say. Remember, they are the only ones who are certain to make money out of it."[8]

"A Hooligan's game played by gentlemen"

The description of rugby as a "hooligan's game played by gentlemen", which appears to have originated with an unidentified Chancellor of Cambridge University in the late 1800s, captures the brutality which can so often accompany the grace and the flair of the oval ball game. Certain types of violence in rugby are celebrated – the juddering tackle, the "99" call by which Wille John McBride's 1974 Lions called the whole team into combat. In this next

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[7] *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2.
[8] JPR Williams, *JPR Given the Breaks: My Life in Rugby* (2007), 135.

section of the talk, I want to look at a number of cases where on-pitch violence has been sufficiently extreme to engage the criminal law.[9] The suggestion that an injury inflicted on the field of play might involve a criminal offence has a long pedigree. In *R v Bradshaw*[10] a death in a game of Association Rules football after a collision led to a charge of manslaughter. Lord Justice Bramwell observed that "[n]o rules or practice of any game whatever can make lawful that which is unlawful by the law of the land", but gently steered the jury to an acquittal, stating:

> "No doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended by more or less danger."

In 1978, in *R v Billinghurst*[11], a player was convicted at Newport Crown Court of inflicting grievous bodily harm for punching another player and fracturing his jaw in an off-the-ball incident, the jury convicting notwithstanding evidence from former Wales international "Merve the Swerve" Davies that punching was now the rule in rugby rather than the exception. *R v Gingell*[12] concerned what was mis-described as a friendly between the Wimbledon Strollers and the Centaurs. The Lord Chief Justice observed rather delicately that "the two teams were not in the first blush of youth", the object of the exercise being "to give rather more senior rugby players a gentler game than had they been playing younger opponents." The Centaurs were a man short, even after co-opting a photographer into the side. However, after a disorderly line-out, 40-year old Chris Gingell struck another player, John Crabtree, several times while he was on the ground, fracturing his nose, cheekbone and jaw. Gingell pleaded guilty to assault. The Court of Appeal held that a sentence of immediate imprisonment was inevitable, but reduced the sentence from 6 months to two.

Police officer Richard Johnson[13] received 6 months imprisonment for biting off part of an opposing player's ear lobe during a match between, of all teams, South Wales Police and Newport Police. This was an incident of "blue on blue" violence, Johnson wounding another police officer, Ken Jones, after a struggle following a hard tackle which ended with Jones shouting "that bastard's bit my ear". In *R v Lloyd*,[14] a sentence of 18 months was imposed on Lloyd following an assault in a match between Bishopston and Dings Crusaders in Bristol. After a tackle in which he was not involved, Lloyd had run up to the player on the ground and kicked him with great force in the face. Cardiff-born Mr Justice Pill observed:

> "Rugby Union Football is a game involving physical contact between players. Forceful contact is permitted by the rules. The game is not however what the learned recorder called a licence for thuggery. In the course of the game opportunity for thuggery may present itself. It is essential that players show self-control at all times and play within the spirit and letter of the rules."

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[9] HARDMAN, RORY,MATTHEW (2019) `Deviant Or Criminal? On -field `Sports Violence and the Involvement Of Criminal Law In English Rugby Union , Durham theses, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/13351/

[10] *R v Bradshaw* (1878) Cox CC 83.

[11] *R v Billinghurst* [1978] Crim LR 553.

[12] *R v Gingell* (1980) 2 Cr App R (S) 198.

[13] *R v Johnson* (1986) 8 Cr App R (S) 343.

[14] *R v Lloyd (Steven)* (1989) 11 Cr App R(S) 36.

This and other cases[15] show longer sentences being imposed for so-called "off the ball" incidents, where the connection between the assault and the contact nature of the sport is more tenuous, and any mitigation offered by the adrenalin rush of play much diminished. As the Court of Appeal noted in *R v Brown*,[16] a case which concerned an off-the-ball assault in a match between West Park and Leeds Lions thirds' teams:

> "Rugby is a contact sport and injuries quite frequently happen through perfectly normal and unintentional play. Nevertheless, unprovoked assault of the kind of which Paul Brown was convicted, is not only unacceptable but must be dealt with in the way that such assaults have to be in these courts."

The frequency of criminal convictions for on-field rugby violence appears to have reduced over the last two decades. That may be the result of the deterrent effect of the immediate sentences of custody imposed for offences of this type, and perhaps the changed culture within the game, reflected in a much more rigorous internal disciplinary process.

Guarding the guards

It is to legal challenges to that disciplinary system I now want to turn, and in particular to challenges brought to the disciplinary process of the Welsh Rugby Union in *Mark Jones v Welsh Rugby Union*.[17] The case concerned Wales forward, Mark Jones. In a match between Ebbw Vale and Swansea, he was sent off for fighting with his former Neath colleague (now playing for Swansea), Stuart Evans. The distinguished former player Gerald Davies[18] wrote that mayhem broke out in the game, but he was critical of the decision to send Jones off. Following a disciplinary process in the President Suite of Cardiff Arms Park in which Jones appeared without legal representation, Jones was banned for 30 days. The disciplinary process permitted the player to be accompanied at a hearing by a club official, but in language redolent of the scrum, not as an advocate but as "a shoulder to lean on". Jones brought proceedings seeking an order requiring the WRU to lift the ban, and requiring the disciplinary process to be re-conducted with certain safeguards, alleging that the process was fundamentally unfair.

Mrs Justice Ebsworth said it could not realistically be argued that the WRU had not complied with its own rules. However, she thought the committee's decision to refuse to allow Mr Jones to comment on the video of the incident when it was played at the hearing was unfair, as was the fact that the system did not allow the player effectively to challenge the evidence placed before the disciplinary committee. She concluded that the rules of the WRU formed part of Jones' and Ebbw Vales' contracts with the Union, and that the WRU was arguably in breach of an obligation of fairness imposed by the rules. Offering hints of a childhood as a rugby orphan watching mudded oafs at play, she observed:

> "There are likely to be many people who take the view that the processes of the law have no place in sport and the bodies which run sport should be able to conduct their own affairs as they see fit and that by and large they have done so successfully and fairly over the years. It is a tempting and attractive view in many ways, particularly to

[15] E.g. *R v Moss* [2000] 1 Cr App R(S) 307; *R v Bowyer* [2001] EWCA Crim 1853.
[16] *R v Brown* [2011] EWCA Crim 786.
[17] *Jones v WRFU* [1997] 1 WLUK 498, [1997] Lexis Citation 2499; [1997] 12 WLUK 425.
[18] *The Times* 11 November 1996.

> those (and I almost said those of us) who grew up on windy and often half deserted touchlines. However, sport today is big business. Many people earn their living from it in one way or another. It would, I fear, be naive to pretend that the modern world of sport can be conducted as it used to be not very many years ago."

Applying the *American Cyanamid* test and considering whether the effect of the suspension on Jones' club could be compensated in damages, she noted there was "an air of unreality about a court sitting down to decide whether a player would have made a difference between his team winning or losing a particular match or whether or not he would have been selected for a particular game". She granted Jones, but not the club, an injunction lifting the suspension until the disciplinary process had been reconducted on a basis which permitted Jones to have legal representation and to call and challenge evidence.

The WRU changed its rules to address the Judge's concerns, and invited Jones to attend a further hearing. Jones refused to attend until the legal action was resolved by settlement, but the hearing went ahead, and a 28-day suspension was imposed. Mr Justice Potts granted an injunction preventing the WRU from acting on that suspension, concluding that the effect of Mrs Justice Ebsworth's order was that the consent of both parties was required for the disciplinary process to be re-run.

The WRU sought to appeal both Mrs Justice Ebsworth's and Mr Justice Pott's judgments. The appeal against Mrs Justice Ebsworth's judgment failed, Potter LJ noting that it was arguable "that, in the days of professional sport now upon us, the requirements of natural justice in relation to disciplinary proceedings may well require further development." The appeal against Mr Justice Potts' order succeeded. No challenge was made to the fairness of that procedure, and Mrs Justice Ebsworth's order had not precluded the WRU from conducting it. The result was a victory for Jones and the club on the issue of principle, which led to the revision of the disciplinary process, but a costly one. As Mrs Justice Ebsworth noted:

> "because of the combination of a strike by referees and inclement weather, had the plaintiffs not commenced these proceedings, Mr Jones would probably have served the suspension period without loss of a game."

The 31st player on the pitch

This is a photograph of Wayne Barnes, before his retirement perhaps Rugby Union's most famous referee, and a criminal lawyer who specialises in both sports law and complex criminal investigations. I have long been struck by the parallels between on-field sport adjudicators and judges, although at least we do not have to listen to songs in court asking who the – er – "person" in the red is. However, there is at least one significant difference between the two roles: while the worst the trial judge who makes errors faces is a dressing-down from the Court of Appeal, the rugby referee owes a duty of care to the players, and can be sued for breaching it.

That proposition was established by the Court of Appeal in *Smoldon v Whitworth*,[19] when a referee was held liable in damages for the catastrophic injuries caused to a 17-year old player

[19] *Smoldon v Whitworth* [1996] EWCA Civ 1225.

following a collapsed scrum during a game between Burton and Sutton Coldfield Colts. At first instance,[20] Mr Justice Curtis held that the referee owed the players a duty of care to enforce the laws of the game which included, in the case of under-19 matches, careful control of the setting of the scrum using the "crouch-touch-pause-engage" sequence to avoid the scrum collapsing. The judge found that the referee had failed sufficiently to instruct the players to follow the required sequence, which had led to an abnormally high level of collapsed scrums in the game.

Lord Bingham CJ in the Court of Appeal noted that this was the first case in which the court had cause to consider the duty owed by a referee to the players, observing:

> "The case is one of obvious importance to the plaintiff, whose capacity for active and independent life has been blighted in the flower of his youth; it is also of concern to many who fear that the judgment for the plaintiff will emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions. But we cannot resolve the issues argued before us on the basis of sympathy or personal predilection."

He noted the importance of the context of the game – "not a game for the timid or the fragile" - and of the laws and directives which governed it, with their detailed regulation of the setting of the scrum and the special provision for under-19 players. The Court upheld Curtis J's decision that the referee owed the players a duty to enforce laws of the game, to effect control of the match so as to ensure that the players were not exposed to unnecessary risk of injury, and to have particular regard to age of the players. In determining the level of care required, "full account must be taken of the factual context in which a referee exercises his functions", so that the referee could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest.

The Court was confident that the decision would not "open the door to a plethora of claims by players against referees, and it would be deplorable if that were the result." However, some of the contemporary responses to the decision suggested that this might be its effect.[21] 25 years on, the game of rugby union has prospered at both amateur and professional level. Subsequent claims against referees have met with mixed outcomes. In *Vowles v Evans*,[22] the claimant was injured in a local derby between Llanharan Seconds and Tondu Seconds. The Llanharan loose-head prop had to go off injured, raising the issue of whether a suitable replacement was available, or the game should continue with uncontested scrums. The referee gave Llanharan the option of how to proceed, although under League rules if the match proceeded on the basis of non-contested scrums and Llanharan won, they would not receive any points. Llanharan chose to put a flanker, with no experience of the front row, in as a replacement, leading to a series of problems with collapsed scrums, in the course of one of which the claimant was very seriously injured. Mr Justice Morland found that there was no reason to distinguish between amateur and professional referees so far as the duty of care to the players was concerned, observing:

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[20] *Smoldon v Whitworth* [1996] 4 WLUK 175 | [1997] E.L.R. 115.
[21] See for example, Andrew Roach, "Is the Game Over for Referees?"1998 (500) LLID 7.
[22] *Vowles v Evans* [2002] EWHC 2612 (QB); [2003]1 WLR 318; [2003] EWCA Civ 318, [2003] 1 WLR 1607.

> "Rugby is an important part of Welsh culture and I am very mindful of its future development which in my judgment will in no way be harmed by the imposition of such a duty."

He held that the referee had been negligent in allowing the game to continue with contested scrums. The referee was required to satisfy himself that any replacement was suitably trained and experienced. Those conclusions were upheld by the Court of Appeal. The Court considered the decision of the High Court of Australia in *Agar v Hyde*[23] holding that it was not arguable that the IRB owed rugby players a duty of care when framing the laws of the game, the High Court observing:

> "The laws of a game like rugby football differ from norms of conduct enforced by the courts. The application of the rules embodied in the laws of the game in any particular rugby match is, in very important respects, a matter for the skill and judgment of the particular officials who controlled the match. Often enough (and always if the bystander on the touch line is to be believed) those judgments turn on individual and qualitative assessments made by the officials which have to be made instantly, no matter what the speed of play."

The Court was not persuaded that there were good reasons for exempting rugby union referees from a duty of care to players when administering rules designed to minimise the inherent dangers of the game. However, it reiterated that the standard of care owed had to reflect the fast-moving nature of the game, and "the threshold of liability must properly be a high one." The Court further emphasised:

> "We stress that in reaching that conclusion we have well in mind that … this is a case in which the decision of the referee, which has been under scrutiny and which we have concluded amounted to a breach of duty, was taken while play was stopped and there was time to give considered thought to it. Very different considerations would be likely to apply in a case in which it was alleged that the referee was negligent because of a decision made during play."

By contrast, a claim against a referee failed in *Allport v Wilbraham*.[24] In that case, the claimant was catastrophically injured while playing as the hooker for Stourbridge thirds against Cheltenham thirds, when the scrums engaged. He alleged that the referee had failed adequately to control the contact of the scrums. The Judge found that the referee had talked both scrums through the appropriate engagement process, and that the opposing hooker had raised his head after the scrums had been told to engage. The Court of Appeal rejected a challenge to these findings, Neuberger LJ concluding:

> "I am acutely conscious that this rather detached and cold analysis of the causes of the horrific injury suffered by Mr Allport must seem positively heartless to him and his family. Like the judge, I am very sorry to be piling further misery on them following the tragedy which occurred on 3rd October 1998. Nonetheless, I am satisfied that the judge reached the proper conclusion as a matter of law on the findings which he properly made and properly explained in his judgment."

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[23] *Agar v Hyde* (2000) 201 CLR 552.
[24] *Allport v Wilbraham* [2004] EWCA Civ 1668.

The fraught relationship of the Unions and the clubs

The advent of professionalism in rugby union in the mid-1990s generated a series of valuable and sometimes conflicting legal relationships: between professional rugby clubs and their players, between centrally-contracted players and their Unions, and between the Unions and the clubs. Those conflicts have brought the game of rugby into the courts in a number of new contexts, and I now want to look now at a number of court cases involving clubs and their unions.

The first, *Williams v Pugh*,[25] involved proceedings brought by the Cardiff and Ebbw Vale clubs against the WRU. The WRU required member clubs to undertake a number of commitments, including a 10-year commitment to membership, in return for being eligible to participate in the Heineken Cup European competition, the Premier League and to receive an equitable share in TV and other revenues worth £500,000 to each club. Cardiff and Ebbw Vale were not willing to commit to more than a 4-5 year deal, and brought proceedings contending that the 10-year rule involved an unreasonable restraint of trade, a breach of contract and a breach of Articles 85 and 86 of the Treaty of Rome. They sought injunctive relief from Mr Justice Popplewell. The Judge noted that:

> "Having been on the receiving end of the Court's decision in *Greig v Insole*, the Packer case, which caused nothing but trouble to the cricket authorities, I confess a strong personal reluctance to intervene."

He held that the clubs had an arguable case, and that it was very difficult to calculate the amount of loss which the clubs would suffer by being deprived of the opportunity to play in Europe or the Premier League. However, with apologies to any supporters of "The Steelmen" present, he noted:

> "It is conceded that Cardiff's prospects of success in Europe are appreciably greater than that of Ebbw Vale."

By contrast, he was persuaded that a payment under the undertaking in damages would be an adequate remedy for the WRU on those two issues, and granted an injunction which, for one-playing season, prevented the WRU from preventing the clubs from playing in the Heineken Cup or the Premier League. No doubt in doing so, he refreshed the parts that other court orders could not reach. He held, however, that damages would be an adequate remedy for the clubs' claims relating to the non-payment of the equitable share.

The clubs appealed against that last ruling, contending that the judge should have ordered the WRU to make periodic interim payments of the equitable share.[26] Beldam LJ set the scene for the dispute by noting:

> "In 1995 rugby football conceded defeat in its efforts to remain an entirely amateur game and yielded to the blandishment of powerful commercial interests to accept professionalism at least in part. As is now well known, this development has produced substantial teething troubles and has caused conflict between some Clubs and players on the one hand and the bodies who manage the game in the home countries on the

[25] *Williams v Pugh* [1997] 7 WLUK 488.
[26] *Williams v Pugh* [1997] Lexis Citation 2035.

> other. Wales, with its magnificent tradition and national pride in the game, has understandably also experienced the tensions between the interest of the leading Clubs and the wider national interests of promoting the game among less fortunate and well-known Clubs and among the young."

He also celebrated the achievements of both sets of parties, observing:

> "Neither of the Clubs require any introduction from me for wherever those who are fond of the game are gathered their names will be among the foremost mentioned, nor does the Welsh Rugby Union require any introduction for it is renowned throughout the rugby world north and south of the equator."

However, that is where the clubs' enjoyment of the judgment would have ended. The appeal was dismissed, both because there had been no summary judgment application for payment of the funds, and for the reasons given by Mr Justice Popplewell.[27]

Similar tensions in the English game were manifest in *Hearn v Rugby Football Union*,[28] which involved proceedings brought by New Brighton against the RFU and Nuneaton Rugby Club. Nuneaton had fielded the Tongan international, Elisi Vunipola when securing one of two promotion slots to National Division 2. The other promoted club secured its spot by winning a playoff, and you will not be surprised that the loser of that playoff was New Brighton. New Brighton decided that what their promotion campaign needed was Elisi Vunipola, and the club attempted to recruit him. In the course of their negotiations, New Brighton discovered that Vunipola's work permit had expired in May 2002, and he had signed for Nuneaton as an amateur. They alleged that Nuneaton had fielded an illegal player in their promotion-winning season and asked the RFU to reverse the promotion and give them the Division 2 spot. When the RFU refused to do so, New Brighton sought an injunction to prevent Nuneaton from competing in Division 2 and declarations intended to bind the RFU as to the underlying facts.

Mr Justice Pumphrey held that the court was able to exercise a supervisory jurisdiction on the issues of whether the RFU had the powers it had purported to exercise, and whether they had been exercised in a rational way. After an extensive review of the relevant rules and regulations, he concluded that the RFU did have power to reject New Brighton's challenge to Nuneaton's promotion, and that it could not be said to have acted irrationally in doing so. He also held that the challenge had been brought too late.

Nuneaton finished third in National Division 2 in 2003/2004, narrowly missing promotion, while New Brighton finished fifth in National Division 3 North. But sometimes, justice can be delayed without being denied. Nuneaton were relegated the following season.[29]

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[27] For another legal battle in the conflict between the leading Welsh clubs and the WRU see *Williams v Welsh Rugby Union* [1999] Eu LR.

[28] *Hearn v RFU* [2003] EWHC 2690 (Ch)

[29] For dismissal on a summary basis of a claim by Aberavon and Port Talbot Rugby Club that it was wrongly denied promotion see *Aberavon and Port Talbot Rugby Club v WRU* [2003] EWCA Civ 584. For a failed challenge by Pontypool Rugby Football Club to the WRU's decision to deny it the A classification necessary to secure a place in the Premier League see *Park Promotion Ltd (t/a Pontypool Rugby Football Club) v Welsh Rugby Union Ltd* [2012] EWHC 1919 (QB).

We return to Wales for our final club versus Union case: the litigation commenced by the WRU against four Welsh teams in 2008 in a classic club-v-country conflict.[30] In advance of the Wales-South Africa game on 8 November 2008, the WRU asked 29 players from those four clubs to attend for training as part of a planned 13-days pre-match training – the overwhelming proportion of the squad of 32. That request came at a time of sensitive commercial discussions between the clubs and the Union and in that context, the clubs refused to release the players for more than five days. The WRU then sought injunctions against the four clubs - the Cardiff Blues, Newport Gwent Dragons, Llanelli Scarlets and Neath-Swansea Ospreys – to prevent the clubs from preventing, hindering or obstructing requests made to players by the WRU to attend national training sessions.

After reviewing the agreements between the WRU and the clubs, His Honour Judge Havelock-Allan KC held that the WRU had shown a triable issue that the clubs were contractually obliged to make the players available for training, and a strong probability of success at trial. Turning to the next stage of the *American Cyanamid* test, he observed:

> "So far as the Welsh Rugby Union is concerned, the damage that might result from the failure of the clubs to release their players for three days of training next week would be likely to be a loss of prestige, to the Welsh Rugby Union and indeed to Welsh Rugby as a whole. That kind of loss would be very hard to prove. It might be reflected in an unsuccessful result in the match against South Africa on 8th November. But how could it be established that losing the match had stemmed from the lack of three additional days training with the national squad in the course of next week? How would it be possible to show that a defeat by South Africa had injured the Welsh Rugby Union financially?"

Damages would not, therefore, be an adequate remedy for the WRU. By contrast, there was a "distinct possibility, if not a probability" that the clubs would suffer no loss if the players attended for training. He found the balance of convenience justified granting the injunction.

There is one thing we can now be sure of. Losing the players from training would not have caused Wales to lose the game. Because even with the benefit of those 29 players training, Wales lost anyway – by 20 points to 15.

The clubs, the players and the coaches

The final set of contractual relationships in rugby transformed by the professionalisation of rugby were those between the clubs, the players and the coaches. I want to look at three cases arising from these contracts.

Bristol Rugby Club – now the Bristol Bears, but then the Shoguns - found itself in a dispute with tighthead prop Julian White, in *White v Bristol Rugby Ltd*.[31] White was signed from Saracens on a three-year contract. However, White proved keener to play for Bristol's bitter local rivals, Bath, and he commenced proceedings against the club arguing that the contract was subject to an express oral option to terminate if he returned the advance he had been paid, alternatively seeking to rescind the contract for misrepresentation or a declaration that

[30] *Welsh RU v Cardiff Blues* [2008] EWHC 3399 (QB).

[31] *White v Bristol Rugby Ltd* [2002] IRLR 204.

the contract had been terminated by Bristol for repudiation. Much of the dispute turned on what had happened at a meeting at the Bath Spa Hotel at which the contract was signed. His Honour Judge Havelock-Allan KC found that White had not discharged the heavy burden of establishing the existence of an additional oral term to an agreement otherwise concluded in writing, and in any event, held that the contention was precluded by the entire agreement clause in the written contract. He also rejected the allegation that Bristol had accepted White's conduct as terminating the contract or that Bristol had itself repudiated the contract.

So White played for Bristol for the 2002/2003 season, where his efforts to sign for Bath had not made him a fan's favourite. The Shoguns were relegated at the end of the season, narrowly beating Bath to the wooden spoon on a points differential. White moved to Leicester Tigers.

The Shoguns found themselves involved in another contractual dispute shortly afterwards, with the former South African player Joel Stransky, famous for scoring all of the Springboks' points in the 1995 Rugby World Cup final. Stransky claimed that in April 2000, the Chief Executive of the club - Nick De Scossa - had offered him the position of Director of Rugby. The offer was alleged to have made in that most dangerous of contracting contexts, a relaxing lunch in a good restaurant – in this case Le Beaujolais in Bath. De Scossa denied that there had been a meeting, that he had had lunch with Stransky or that there had been a contract, although he accepted being at the restaurant on the relevant date. Stransky sued for wrongful repudiation of the contract.

The case was tried by Mr Justice Eady.[32] He noted that Mr de Scossa's credit card showed that he had paid over £75 for lunch that day, which de Scossa said included a £10 tip and a couple of bottles of Côtes du Rhône, "(his usual tipple) … for his own consumption". Mr Justice Eady had little difficulty in preferring Stransky's account of events, observing:

> "Mr de Scossa himself described Mr Stransky as a 'sporting icon', whose performance for South Africa in the 1995 World Cup was, for rugby fans, as memorable as that of Geoff Hurst in the 1996 Soccer World Cup Final. He had never met him until that day in Bath, and yet he is unable to say whether or not he had lunch with him for one and a half to two hours - or merely shook hands with him on his way out."

He noted that "the possibility that his haziness might be connected with the two bottles of Côtes du Rhône" was explored, but that "Mr de Scossa said that was nothing so far as he was concerned, since he had the constitution of a horse." The Judge observed that the suggestion Stransky "ambushed Mr de Scossa over his bottles of Côtes du Rhône carries no conviction."

For our last case in this category, we move from Bristol to Leeds, and from rugby union to rugby league. Leeds had signed the Wales rugby league international, Iestyn Harris.[33] In 2001, Harris wanted to play rugby union for Cardiff and Wales. A transfer was arranged, by which Cardiff paid Leeds £750,000 and gave Leeds the use of a hospitality box at the Millennium Stadium for 2 years. Leeds also insisted on a clause giving them an option over Harris if he left Cardiff, in return for remuneration which was to be no less than Harris had received from Cardiff. However, in 2004 Mr Harris signed an option to return to League with

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[32] *Stransky v Bristol Rugby Ltd* [2002] All ER (D) 144.
[33] *Leeds Rugby Ltd v Harris* [2005] EWHC 1591 (QB).

Bradford Bulls, and in due course a 4-year contract. This led Leeds to commence proceedings against Harris for breach of the option agreement, and against Bradford Bulls for procuring that breach.

Harris and the Bulls defended the claim on the basis that the option agreement was unenforceable for uncertainty and/or in restraint of trade. Mr Justice Gray had no difficulty in rejecting both arguments. So far as the restraint of trade issue was concerned, it was perfectly reasonable for Leeds to want to re-acquire the services of their former player if he returned to play rugby league, and in the context of the release package in which it was agreed, reasonable for Harris as well. His advisers were more than willing to accept the option as part of the price to be paid for Harris being free to pursue his dream of playing rugby union for Wales.

A rose by any other name

This is a legendary photograph of England prop Fran Cotton, the "mud man", playing for the British and Irish Lions against the junior All Blacks in 1977. The photograph was taken by Colin Elsey, and is one of the sport's enduring images, one which has adorned many t-shirts and rugby clubhouse walls. In 1987, Cotton and two other former England rugby players, Steve Smith and Tony Neary, formed Cotton Traders Ltd, a sports kit and leisurewear company. In 2012, Cotton Traders found themselves facing a challenge to the use on their clothing of the, more precisely "an", English rose emblem. As Mr Justice Lloyd explained in *The Rugby Football Union, Nike European Operations Netherlands B.V. v Cotton Traders Limited*:[34]

> **"**Since 1871 the members of the England Rugby team have worn a red rose on their rugby jerseys. Before 1920 the form of the rose was not standard, and each players version depended on who embroidered it for him. In about 1920 a standard design of rose was introduced, and was worn by team members until 1998. In that year a new rose was designed, a variant of the previous rose, which has been used since then. This case is about the use on clothing of the rose as worn between 1920 and 1998."

Between 1991 and 1997, Cotton Traders sold a white England rugby jersey with that traditional rose. They then obtained an RFU licence to produce the re-designed kit with the re-worked logo. When that licence came to an end, and a new licence was granted to Nike, Cotton Traders reverted to producing the traditional strip, and the RFU sought to prevent them from doing so, relying on contractual rights, its registered trademark in the English rugby rose and the tort of passing off.

Mr Justice Lloyd rejected all three grounds. The contracts did not limited Cotton Trader's right to sell the traditional English rugby jersey. So far as the trademark claim was concerned, he held that at the relevant time, the rose was not regarded as a sign of trade origin but a national symbol. He noted that "it is clear from the evidence of all witnesses who had anything to say on this subject that the primary association of the rose (whichever version was in question) is with England in general or with the England rugby team." The passing-off

[34] *Rugby Football Union v Cotton Traders Ltd* [2002] EWHC 467 (Ch).

claim failed for the same reason. For relevant purposes, Gertrude Stein had been correct to observe:

"A rose is a rose is a rose."[35]

Touts out

Part of the ritual of attending most sporting events is making your way to the ground past individuals – usually men – leaning against street lights shouting "any tickets – buy or sell". I am sure you had to make your way past a number of them to get into this event this evening! However, these now form a rather small part of the ticket resale market, when compared with websites. One such website was operated by Viagogo Ltd, on which holders of tickets could sell them for whatever people were prepared to pay, with Viagogo getting commission on each sale. The website had a privacy policy, but it was a condition of registration that the Viagogo might disclose financial or personal information if required to do so by law, a court order or a law enforcement authority. The website had advertised tickets for the 2010 Autumn and 2011 Six Nations internationals at Twickenham. The RFU, the original source for all tickets for England home rugby internationals, issued tickets on the condition that they were not sold for more than their face value, with the rights embodied by the ticket becoming void if this was done, and the ticket at all times remaining the property of the RFU. Most tickets for international matches were distributed by the RFU to participants in the sport, via affiliated rugby clubs, referee societies, schools and other bodies which organise rugby. The RFU sought *Norwich Pharmacal* relief against the operators of the website seeking disclosure of the names and addresses of the persons who had advertised for sale and/or sold via the website, and full details of all the tickets advertised for sale on the websites.

On 30 March 2011 Tugendhat J granted the order sought,[36] finding that there was a good arguable case that those who had received tickets from the RFU and the subsequent sellers and buyers of the tickets had been guilty of breach of contract and/or conversion. He also held that those who entered the stadium by using a ticket obtained in contravention of RFU conditions were arguably guilty of trespass. The judge found that the information sought was necessary to achieve redress for those claims; and that it was appropriate to exercise his discretion to grant the relief sought. The website operators appealed on the ground, inter alia, that the order would constitute an unnecessary and disproportionate interference with the rights of those who had sold or purchased tickets on the website to the protection of personal data under article 8 of the Charter of Fundamental Rights of the European Union and the UK and EU Data Protection Regimes.

The Court of Appeal dismissed the appeal, holding that any interference with the right to the protection of personal data which would follow from by the order was proportionate in the light of the claimants legitimate objective in obtaining redress for arguable wrongs . There was then an appeal to the Supreme Court.[37] The operator's principal point on the appeal was that the court "should confine its consideration to the individual transaction and ask, 'What value will the information about this particular individual have to the RFU?'".

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[35] "Sacred Emily" (1922).
[36] *Rugby Football Union v Viagogo Ltd* [2011] EWHC 764 (QB).
[37] *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55.

The Supreme Court held that disclosure would only be ordered where it was a necessary and proportionate response in all the circumstances, but that the test of necessity did not require the remedy to be one of last resort. The essential purpose of *Norwich Pharmacal* relief was to do justice, which involved the exercise of a discretion by a careful and fair weighing up of all relevant factors. The court was not limited to weighing the particular benefit to the applicant against the detriment to the individual data subject, but could have regard to the applicant's overall aim in seeking the information, including any deterrent effect. On that basis, the order was necessary and proportionate:

> "All that will be revealed is the identity of those who have, apparently, engaged in the sale and purchase of tickets in stark breach of the terms on which those tickets have been supplied by the RFU. The entirely worthy motive of the RFU in seeking to maintain the price of tickets at a reasonable level not only promotes the sport of rugby, it is in the interests of all those members of the public who wish to avail of the chance to attend international matches. The only possible outcome of the weighing exercise in this case, in my view, is in favour of the grant of the order sought."

The WRU has also been seeking to tackle ticket websites. In *WRU v VU Ltd*,[38] the WRU sought pre-action disclosure against the defendant, who provided hospitality at sporting events, and who they believed had been buying and selling tickets for Wales home internationals. VU was chaired by and named after former England rugby international, Victor Ubogu, and its packages included not simply hospitality at the ground, but "a special train from Paddington to Cardiff." Master Eastman ordered the disclosure, but VU appealed to Mr Justice Dingemans. I hope that the now Lord Justice Dingemans will not mind me mentioning that he has an Oxford Blue in rugby union and a half-blue in rugby league, he is a former player for Ealing RFC, was the first Independent Head of Judiciary at the RFU in which capacity he sat on over 100 disciplinary hearings, and he was a judicial officer at the Rugby World Cups in 2015 and 2019. In 2022, the RFU awarded him an RFU Rose Award for an outstanding contribution to rugby. In short, his knowledge of the game is unrivalled on the bench.

VU argued that there was "no evidence to show that VU had offered tickets for sale or supplied tickets for the relevant match", it being suggested that all VU was offering was the seat on the train and hospitality at the ground. The Judge noted that the webpage also offered "fun, banter and a smashing game of bruising rugby" and that "VU Ltd offer tickets, travel and rugby hospitality to all matches of the RBS 6 Nations." When the website was amended to make it clear that tickets were not provided, the package price was reduced by £449. On that basis, he concluded that the WRU's case that "VU was selling and supplying tickets is a very long way from being weak and hopeless". The fact that WRU already had sufficient to plead a claim did not preclude an order "because pre-action disclosure is likely to answer the point whether VUs denials that it was involved in supplying or selling tickets are well-founded and that is very likely to save costs." That year, the WRU obtained an injunction against VU Ltd in relation to the sale of tickets. However, like Six Nations tournaments and World Cups, cases arising from the Unions' attempts to control ticket resales will surely remain a permanent feature of the rugby landscape.

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[38] *WRU v VU Ltd* [2018] EWHC 931 (QB).

Conclusion

One of the many attractive features of rugby is that the game does not end while the ball is still in play, however many minutes may have elapsed since the opening whistle.[39] That allows for heroic attempts at a last-ditch score, and herculean efforts to keep the ball from crossing the touchlines. It is not, however, a rule which we should transpose to court proceedings, which already have a sufficiently timeless quality for the judge, nor, you will be pleased to here, to judicial speeches, which have a similar quality for the audience. It is time for the hooter to sound, and for the ice baths.

Thank you for your time.

[39] Rugby Union Laws of the Game (2023) Law 5(7): "A half ends when the ball becomes dead after time has expired."