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Professional Negligence

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Case Comment

"It's just not cricket". Or is it?

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Case:

[Bartlett v English Cricket Board Association of Cricket Officials \(CC \(Wolverhampton\)\)](#)

***P.N. 77 Introduction**

At first glance, the recent judgment delivered by HHJ Lopez in *Bartlett v English Cricket Board Association of Cricket Officials*,¹ appears unremarkable. This is a first instance decision, made in the County Court at Birmingham, thereby lacking the authority of a higher court judgment and, somewhat straightforwardly, merely reinforcing the fact that the ordinary principles of the law of negligence are applicable in the context of sport.² Claimants suffering personal injury caused by the carelessness of defendants may bring an action in negligence where the alleged breach of duty was committed by co-participants,³ coaches,⁴ instructors,⁵ and, of direct relevance to *Bartlett*, officials and referees.⁶

What is arguably more remarkable is the number of recent reported cases where the reasonableness of the conduct of amateurs, or volunteers, was a determining legal issue. For instance, cases involving a sports coach,⁷ scout leaders,⁸ rugby referees,⁹ and now, cricket umpires. No doubt, for many enthusiasts and purists of the frequently termed 'gentleman's game', traditionally underpinned by the ethos of muscular Christianity, suing a cricket umpire for personal injury may be regarded as repugnant - 'It's just not cricket'.

Nevertheless, since the functions of cricket officials require special skill, not ordinarily possessed by the average reasonable person on top of the 'Clapham omnibus', the legal principles of professional liability would appear to be applicable when determining liability in negligence. In citing *Bolam v Friern Hospital Management Committee*,¹⁰ and *Bolitho v City of Hackney Health Authority*,¹¹ this certainly appears to be the approach adopted by HHJ Lopez in *Bartlett* when fashioning the legal test, or standard of care, incumbent on the two ***P.N. 78** umpires. Curiously, in *Bartlett*, it would appear that the court was essentially tasked with determining what might be termed the 'professional liability of an amateur'.¹²

Facts

This was a Warwickshire Cricket League Second Division match played between Moseley Ashfield Cricket Club and Solihull Municipal Cricket Club on 7 July 2012. The standard of play was high, but all of the players were amateur. In short, the umpires, faced with conflicting representations made by the opposing team captains/vice-captain, and in accordance with the Laws of Cricket,¹³ were responsible for deciding if play should proceed following a period of heavy rain. Interestingly, one of the umpires was a qualified English Cricket Board (ECB) level 2 umpire at the time of the accident, the other umpire holding the lower level 1 qualification. As part of their duties and responsibilities as presiding officials, the umpires inspected the cricket ground (the square, the infield and outfield), and following a delayed start and change of square, ultimately concluded that the conditions were safe to allow play to proceed. On the fifth ball of the first over, the claimant executed a 'sliding stop' when fielding, suffering injury to his left leg when performing this technique. By particulars of claim, dated 9 October 2013, the claimant alleged that his accident was caused or contributed to by the negligence of the umpires.¹⁴ Since the two umpires were members of the defendant, the English Cricket Board

Association of Cricket Officials accepted that it would be vicariously liable in respect of the alleged tortious acts or omissions of the umpires in the course of their umpiring the match in question.¹⁵

Decision

HHJ Lopez heard this case on 9, 10 and 31 July 2015, before handing down judgment on 27 August 2015. The judge concluded that:

"the decision that it was safe to play - albeit on a different square and with a delayed start, was their own [the umpires] and reached after a careful and considered evaluation of all of the relevant factors ... In short, it was neither dangerous nor unreasonable to sanction play because of the state of the outfield".¹⁶

Further, in ruling that the condition of the outfield was not a material contributing factor, or the cause of the claimant's injury, the court held that the claimant's incorrect technique when conducting the "sliding stop", being contrary to safe practice, caused his injury.¹⁷

*P.N. 79 Commentary

The reasoning of the court in *Bartlett* is detailed, cogent and convincing. Moreover, it is contended that the judgment of HHJ Lopez presents a sensible answer to an unresolved question posed by *Vowles v Evans*. In delivering the Court of Appeal's judgment in *Vowles*, Lord Phillips MR stated:

"There is scope for argument as to the extent to which the degree of skill to be expected of a referee depends upon the grade of the referee or of the match that he has agreed to referee. In the course of argument it was pointed out that sometimes in the case of amateur sport, the referee fails to turn up, or is injured in the course of the game, and a volunteer referee is called for from the spectators. In such circumstances the volunteer cannot reasonably be expected to show the skill of one who holds himself out as referee, or perhaps even to be fully conversant with the laws of the game."¹⁸

This raises two significant points of interest on which analysis of *Bartlett* may prove instructive. First, the decision of the umpires regarding the playing conditions at the time was made jointly. Although not suggested by counsel for the claimant, following *Vowles* there may have been some scope to argue that the standard of care owed by the level 2 umpire was higher than that owed by the level 1 umpire. Unattractively, this implies variable standards of care in the same circumstances. In sensibly discounting such a possible submission, HHJ Lopez stated that:

"[t]here is no suggestion the standard of care which [the level 2 umpire] owed was higher than that owed by [the level 1 umpire] as he was a more experienced and better qualified umpire. ... both [were] qualified umpires with more than adequate qualifications and experience to umpire the match in question in the second division of the Warwickshire Cricket League".¹⁹

The emphasis by the circuit judge appears to be on the level of the particular competition in question and for the umpires to be ordinarily competent for the specific demands of the precise role or post. Following *Wilsher v Essex Area Health Authority*,²⁰ this approach appears correct.

Secondly, though perhaps intended to provide reassurance to volunteers involved in the provision and delivery of sporting activities, the second limb of Lord Phillips' statement in *Vowles*, concerning volunteers in amateur sport, appears problematic. This seems to conceal the fact that an individual assuming a duty requiring the exercise of a special skill would, in fact, be subject to the ordinary principles of the law of negligence if sued. In short, an individual volunteering to step in at short notice to referee, in an effort *P.N. 80 to prevent cancellation of a fixture, would appear to be under a duty to do so properly.²¹ As such, the principles of professional liability would essentially be engaged, regardless of whether or not the defendant may be an amateur. In citing the following passage from *Bolam*, the court's judgment in *Bartlett* would appear to concur with this submission:

"[W]here you get the situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."²²

Further, although the threshold of negligence liability for sports officials will be a high one, recognising that the specific circumstances of sport will often require officials to make decisions in the context of "a fast moving and vigorous contest",²³ this is by no means conclusive. For instance, scrutiny of the full factual matrix of *Bartlett* revealed that the umpires could take as long as they deemed necessary to reach a balanced and considered decision. Accordingly, in the circumstances of this case,²⁴ the threshold of liability was "far more readily crossed than in the context of [a] split second decision made in the course of a fast moving game".²⁵

Concluding remarks

This is a robust judgment offering some further clarity regarding the intersection between the law of negligence and sports officiating (and coaching). Indeed, the court's detailed analysis should prove instructive to legal practitioners, national governing bodies of sport, and individual officials. Significantly, this County Court decision provides a stark reminder to amateur volunteers in sport of the importance of assuming tasks only at levels commensurate with their qualifications and experience and, being mindful of potential limitations. Simply applied, the standard of skill and care exercised by, for instance, (often volunteer) officials and coaches, should be consistent with that expected of the ordinarily competent official or coach in the same circumstances.

Importantly, since games are "obviously desirable activities within the meaning of section 1 of the Compensation Act 2006",²⁶ it is somewhat curious why section 1 was not engaged in this case. This is especially surprising given the Senior Executive Officer called on behalf of the defendant highlighted that, "[t]he amateur game is short of officials with many games not served by qualified officials and so those who officiate are to be *P.N. 81 treasured and not pilloried".²⁷ Correspondingly, it will be interesting to note the impact of the recently enacted Social Action, Responsibility and Heroism Act 2015 on this emerging area of the law. On its facts, *Bartlett* would have provided an interesting test case for interpretation by the courts of the somewhat ambiguous and opaque wording of the 2015 Act regarding "the benefit of society" and a "predominantly responsible approach". Nonetheless, thanks to the common sense approach adopted by HHJ Lopez, following a highly successful cricketing summer, the ECB will probably regard this decision as representing another instance where "cricket won".

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1. *Bartlett v English Cricket Board Association of Cricket Officials* (unreported), County Court (Birmingham), 27 August 2015.
 2. See generally, D Griffith-Jones, "Civil Liability Arising Out of Participation in Sport" in A Lewis and J Taylor *Sport: Law and Practice* (2nd edn, Haywards Heath: Tottel, 2008) at pp 711-52.
 3. *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054; *Condon v Basi* (1985) 2 All ER 453.
 4. *Davenport v Farrow* [2010] EWHC 550; *Cox v Dundee City Council* [2014] CSOH 3; *Fowles v Bedfordshire County Council* [1996] ELR 51.
 5. *Anderson v Lyotier* [2008] EWHC 2790; *MacIntyre v Ministry of Defence* [2011] EWHC 1690; *Woodroffe-Hedley v Cuthbertson* (unreported), Queen's Bench Division 20 June 1997; *Morrow v Dungannon* [2012] NIQB 50.
 6. *Smoldon v Whitworth* [1997] ELR 249; *Vowles v Evans* [2003] EWCA Civ 318.
 7. *Petrou v Bertoncello* [2012] EWHC 2286.
 8. *Scout Association v Barnes* [2010] EWCA Civ 1476.
 9. Eg *Allport v Wilbraham* [2004] EWCA Civ 1668.
 10. [1957] 1 WLR 582.
 11. [1998] AC 232.

12. See further, N Partington, 'Professional Liability of Amateurs: The Context of Sports Coaching' (2015) 4 *JPIIL* 232.
13. Specifically, Laws 3.8 - headed 'Fitness for Play'; Law 3.9 - headed 'Suspension of Play in Dangerous or Unreasonable Conditions'; Law 7.2; and Law 11.1. See n 1, [57]-[60].
14. Note 1, [28].
15. *Ibid* at [31].
16. *Ibid* at [212] and [222].
17. *Ibid* at [230]-[232].
18. *Vowles v Evans* [2003] EWCA Civ 318 at [28]. The defendant (first appellant) in *Vowles* was a rugby union referee.
19. Note (1), [189].
20. [1987] QB 730. Also see, *Pitcher v Huddersfield Town Football Club* (unreported), Queen's Bench Division 17 July 2001, Hallet J citing with approval *Wilsher* for authority that the level of performance (in this instance, a Nationwide Division 1 professional footballer) is a factor to be taken into account in assessing all the circumstances when determining the standard of care and skill expected.
21. *Fowles v Bedfordshire County Council* [1996] ELR 51.
22. Note 10, 586 per McNair J.
23. *Smoldon v Whitworth* [1997] ELR 249, 256.
24. Similarly, in *Vowles v Evans* [2003] EWCA Civ 318 at [38], the Court of Appeal stressed that scrutiny of the referee's decision, ultimately found to amount to a breach of duty, was taken during a stoppage in play. This enabled time for considered thought. Accordingly, '[v]ery 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'.
25. Note 1, [188].
26. *Sutton v Syston RFC Limited* [2011] EWCA Civ 1182 at [13] per Longmore LJ; n 8, [29] per Jackson LJ.
27. Note 1, [179].