

## The Role of the Advocate in Sporting Tribunals

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### Introduction

The control of sporting activity by domestic tribunals is attracting greater legal involvement. It has certainly become more common over the last five years to see players with legal representation before sporting disciplinary tribunals in New Zealand. In the last couple of seasons Alan Whetton, Andy Earl and, of course, Richard Loe were all represented by lawyers in disciplinary hearings. This is part of the overall trend for sporting disputes to be approached more formally and, ultimately, litigated. The trend can be seen as a natural consequence of both the increasing social and commercial significance of sport and an increasing awareness by individuals of their individual rights. While there will always be voices of dissent to the imposition of legal norms to sporting activity,<sup>2</sup> there is no holding back this movement. I doubt whether judicial self-restraint in the area is warranted where sport is now so much bound up with livelihood.

A supporter of a Winfield Cup team would not immediately think of High Court judges when the word “judiciary” is mentioned, but rather the “judiciary” which sits every Monday night after the weekend’s rugby league games and dispenses justice in the form of suspensions etc to those rugby league players who have been cited. In New Zealand sport has not quite reached this level, but the overall trend in that direction is clear. The advent of increasing professionalism in rugby union and the entry of the Auckland Warriors to the Winfield Cup will no doubt see increasingly publicised and important judicial appearances as well as, perhaps, video-conferenced appearances before the NSWRL judiciary sitting in Sydney.

The aim of this paper is to examine the make-up of internal domestic sporting tribunals, offer some comment on rules and procedure and consider the role of the advocate before such tribunals in dispute resolution. A lawyer instructed to appear before such tribunals becomes involved at an early stage in the decision-making process in an unfamiliar environment. In most of the reported cases concerning the review of domestic bodies, whether in a sporting or other context, lawyers only became involved when something had “gone wrong” in the tribunal process which had affected an individual’s livelihood, property or standing and review proceedings had been brought to court. Nowadays, it is much more likely that an individual facing an important tribunal hearing will seek legal advice, especially if the result will impact upon his professional livelihood. Lawyers have

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2 See, eg Megarry VC in *McInnes v Onslow-Fane* [1978] 1 WLR 1520 at 1535 and *Gasser v Stinson*, unreported, High Court, QB Div, June 15 1988.

an important role to play in the conduct of sporting tribunals. In my view, those who preside over such tribunals need not necessarily fear that lawyers will “spoil” the system.

The main area in which sporting tribunals function is in the sphere of misconduct. Misconduct takes two main forms:

- (a) “on-field” or “on track” misconduct;
- (b) the taking or administering of banned substances.

While the criminal law will always be the final sanction for misconduct of the worst kind, most major sports have developed internal tribunal structures for dealing with misconduct. The racing industry has long had a well developed tribunal structure for dealing with breaches of the rules, and contact sports have traditionally generated a significant volume of disciplinary or “judicial” business. Other sports (eg cricket, tennis, golf, etc) have hearing systems to deal with breaches of the codes which bind players.

A lawyer will not necessarily be welcomed with open arms by a sports tribunal. It is important that he or she gives some thought as to how to go about the effective presentation of a case in such a forum. In the normal run of events a lawyer will be briefed where a disciplinary matter involving, say, foul play or a breach of a code of conduct, or a breach of drugs regulations threatens a competitor’s livelihood. I would suggest that there are four main areas to consider:

- (a) Is the lawyer entitled to attend and represent a player before the tribunal?
- (b) If the lawyer is permitted to attend, should he be the player’s advocate, or should it be some other person?
- (c) What are the rules governing the hearing and how should it be conducted?
- (d) In the event of an unsuccessful outcome, should the decision be challenged? If so, what are the best avenues for such a challenge?

### **New Zealand disciplinary procedures—the overall approach**

A review of disciplinary procedures laid down by various sporting governing bodies in New Zealand shows a wide range of approaches. Some disciplinary procedures are relatively detailed (eg NZRFU) while others are schematic in the extreme (eg NZFA). Most procedures use words which are reminiscent of the criminal process like “accused”, “charged” and “guilty” or “not guilty”. The lawyer should not be misled by the terminology. Most sporting tribunals are informal with little by way of set procedure. Notwithstanding the criminal terminology, none of the codes I have seen has any formulation covering the standard to which violations have to be proven. While lawyers ought not to adopt too formal an approach, sporting codes ought perhaps to recognise that the more there is at stake, the more adversarial the process will inevitably become. Some guidance as to standard of proof required might be helpful. Those codes without detailed procedures or with outdated rules must expect more difficulty when lawyers appear and bear an increased risk of applications to the courts for review. Natural justice has a flexible character and a simple provision that a decision making process should be in accordance with “natural justice” with no detail has an openness which may not be that effective.

### Right to legal representation

Many tribunals specifically allow for legal representation (eg NZRFU disciplinary rules, Surf Life Saving Association of New Zealand Inc, and Surf Life Saving Queensland Inc). Others are silent as to whether a player can attend with a lawyer. Some bar lawyers from the tribunal. Although the legal position is not free from doubt,<sup>3</sup> I would suggest that where a decision by a tribunal has a potentially serious effect and will affect the livelihood of a player, then he ought to be permitted to be accompanied by a lawyer if he wishes. While the Bill of Rights Act 1990 cannot directly apply to proceedings before a sporting tribunal, it will be surprising if the rights contained in the Act do not have a powerful influence upon the law in this area.<sup>4</sup> Certainly our thinking as a society and as individuals will be greatly influenced by the Bill of Rights Act.

Even if the rules of a sporting code allow lawyers to be excluded, there are great risks for the administrators in doing this. If a player was unhappy with the procedure and decision in an important matter, it would be highly likely that the decision to bar a lawyer would be one of the grounds for the review of the decision. I note, in any event, that there is an increasing awareness on the part of those who run sporting bodies of the need for natural justice and fair play to prevail. This attitude makes it extremely unlikely that lawyers will be barred if a player wants to be represented.

### A modern approach

Many modern codes and procedures cannot be criticised because they lay down a framework for fair decision making. By way of example, the disciplinary and judiciary procedures of Surf Life Saving Queensland Inc specifically refer, in a section entitled "Principles of Natural Justice" to the decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40. The preamble to the procedures then sets out, in detail, what natural justice means and includes the following passage on legal representation:

... the right to legal representation is usually a matter of discretion for the judiciary. One test to apply, is whether the offender is able to adequately present his own case. Legal representation may, in fact, result in the tribunal being ASSISTED. Generally, in this day and age, legal representation should be allowed.

While this may seem heretical to those who would wish sport to be set apart from the law and wish to allow "dictatorial" decision making, for me the whole document sets out an admirable framework which, if followed, would ensure that disciplinary matters are dealt with fairly.

### The role of lawyers sitting on the tribunal

Before passing to the role of the lawyer appearing before the tribunal, one should not lose sight of the significant role of lawyers sitting on a tribunal. In the past, sporting tribunals would normally have been composed of those amateur administrators who could spend the time on disciplinary matters. Nowadays in many contact sports in Australia a tribunal

3 See *Pett v The Greyhound Racing Association Limited* [1969] 1 QB 125 and *Enderby Town Football Club v Football Association* [1978] 1 Ch 591,606. See also the cases at section 1337 in Taylor, *Judicial Review* (1991).

4 See sections 24 and 25 of the Bill of Rights Act 1990.

will have a legally qualified chairman.<sup>5</sup> The New South Wales Rugby League judiciary is, perhaps, the best example. Such a composition, together with appropriate rules, means that the tribunal ought never to have the rules of natural justice and fairness far from mind. Indeed, where relatively complicated procedures and rules have been drafted for a disciplinary tribunal, it is perhaps a good thing to have a legal chairman to apply them. Certainly, the presence of a legal chairman on the NSWRL judiciary does not appear to have resulted in delay or other problems often associated with the courts. I would suggest that any sport with a significant volume of disciplinary business follows suit. The prospect of something “going wrong” and attracting court review proceedings is diminished by such an appointment.

### **Should the lawyer attend?**

This question is an important one which lawyers do not often ask. It is important for the lawyer to examine carefully how best to obtain the desired result for his client. Often attendance by the client and a club representative may be sufficient to present the case effectively. Most sportsmen and women in New Zealand are still amateur in the true sense of that word. It can sometimes make little sense for an amateur to be represented at a disciplinary hearing by a lawyer when the offence is not of the most serious nature (eg a routine sending off for, say, dissent). Of course, there will always be exceptions to that and the client’s wishes must come first and one must not forget that today’s amateur is tomorrow’s highly paid professional.

Sometimes the presence of the lawyer can make things appear more serious than they really are. Players are often very effective advocates in their own cause and with a little guidance as to procedures and rules and, perhaps, the assistance of a senior manager from the club to speak as to good character etc, can produce results which any lawyer would be envious of. Although an advocate’s instinct is to appear and represent his client, I would suggest that each case needs to be looked at carefully before a decision on whether to appear is made, particularly in amateur sport.

### **The hearing**

Assuming that the lawyer is entitled to attend, his client wants him to and it is in the client’s interests for him to do so, the next stage to consider is the hearing itself. Any sporting tribunal where important decisions are to be made functions against the legal backdrop of the principles of natural justice and its own rules. Broadly speaking a breach in either area may result in the tribunal’s finding being overturned by the court. I do not propose to review the cases, but there is a significant body of case law relating to the review of the decisions of private tribunals. The juridical basis for challenging the decisions of a private tribunal has been said to be contractual and this can adequately explain most of the decided cases. However, that approach is, in reality, a legal fiction. It is perhaps truer to say that an individual whose status, reputation or livelihood is affected by a decision can challenge a decision of a private body if the decision has been arrived at by reason of a breach of the rules of natural justice or a breach of the rules governing the tribunal’s decision making process.

5 For example the Australian Football League, NSWRL and many racing sports.

In addition, the boundaries of judicial review on public law principles such as *Wednesbury* unreasonableness, proportionality, substantive fairness, etc are expanding throughout the common law world. I can see no reason why, for example, a wholly disproportionate penalty might not be struck down by the Court or a decision set aside if it was reached for perverse, irrelevant reasons. In any event, New Zealand would appear to favour a more flexible approach to review based on substance rather than form.<sup>6</sup> Whether by implied contract, or a broader approach based on “fairness” it is likely that proceedings to review the decisions of sporting tribunals will be more common in the courts. Certainly if something has “gone wrong” with the proceedings of a domestic tribunal, it is unlikely that the High Court in New Zealand would decline jurisdiction to review that decision if it significantly affected the livelihood or status or standing of the player or a significant section of the public.<sup>7</sup> Given the social significance of sport in New Zealand, it seems likely that the flexible attitude to review will lead to an increase rather than a decrease in applications to review the decisions of sporting tribunals. This places an increased emphasis on tribunals getting it right. Where a sport has vague general rules and ill-defined procedures, the chances of an important decision being the subject of review are that much higher.

In the present climate, administrators have the obligation to act in accordance with the rules of the association, rationally, reasonably and fairly when making all decisions. There is nothing wrong with this and in my knowledge most sports administrators have these obligations in mind anyway. Most are reasonably well versed in the requirements of natural justice and fairness in decision making. The attendance of lawyers can only lead to better decision making with less likelihood of review by the courts. Associations must adopt and operate rules which are fair. In the disciplinary context the rules must state the nature of prohibited conduct and the possible penalties; adequately inform any accused competitor of any charge; and give the competitor a proper opportunity to answer the charge at a hearing before an independent adjudicator. The final obligation must be to give a reasoned ruling after allowing the competitor to make representations as to penalty.

### Advantages

From the tribunal’s point of view the presence of a lawyer ought to mean that there is less chance of things going wrong so as to attract the review jurisdiction of the High Court. This is another reason why sporting bodies should not discourage representation at their hearings. Nor should the benefit of review by the court be lost sight of. The intervention of the courts leads to better and fairer decision making which commands greater general support. There is now no room for summary justice with scant regard for individual rights.<sup>8</sup>

6 See *Finnigan v NZRFU Inc* [1985] 2 NZLR 159 (CA) which takes up the theme of Lord Denning’s speech in *Breen v AEU* [1971] 2 QB 175, 190. See also the article “Fairness” (1989) 19 VUWLR 421 by Cooke P.

7 Michael Beloff QC, “Pitch Pool Rink ... Court? Judicial Review in the Sporting World” [1989] *Public Law* 95.

8 See eg, *Keighley Football Club v Cunningham The Times*, May 25, 1960. In this case a player was suspended after being sent off, although neither he nor his club were given notice that his case was to be considered.

### The lawyer's view

From the lawyer's perspective it will be important to:

- (a) know well the rules by which the tribunal operates;<sup>9</sup>
- (b) where appropriate procedures are not established, propose fair and efficient procedures;
- (c) lodge and have recorded any objections to the procedures adopted;
- (d) present the case in a realistic manner without, say, adopting a rigid approach which shows little common sense;
- (e) be sympathetic to the aim of administrators, which will be to keep matters as straightforward as possible and dispense fair rulings within the timeframe allowed.

### Natural justice and fair play in action

Of course, throughout any hearing the general principles of natural justice must be borne in mind by any advocate.<sup>10</sup> Like the possibility of review, the rules cannot be excluded in some form in this day and age. Flexibility is the main feature of these principles of fairness. In outline they will normally cover the following:

- (a) the right to know the allegation against the player within a reasonable time before the hearing;
- (b) the right to be heard by an impartial tribunal;
- (c) the right to present evidence;
- (d) the right to be heard on the question of penalty, if the charge is proven.<sup>11</sup>

Some disciplinary procedures might be taken to task for not being as fair as they ought to be. While tribunals are not courts and "we must not force disciplinary bodies to become entrammelled in nets of legal procedure"<sup>12</sup> and a tribunal must dispense justice economically without lengthy quasi-legal proceedings, a rule, for example, limiting a player to one witness or preventing cross-examination of witnesses, in support of the complaint or stating that the matter cannot be taken further when the domestic avenues have been exhausted may not stand scrutiny where a serious matter is being considered. It must only be a matter of time before, in a significant and important case, such rules are challenged.

The procedural rules adopted by the New Zealand Rugby Union are of interest. The rules are recent and drafted in detail with an admirable preamble. The Rules quite properly seek to uphold the authority of the referee (see Rule 9). I have some concern as to how this rule might work in practice. What if a video recording shows that a referee may be wrong about

9 A breach of the rules will, of course, give rise to a simple claim for review see eg, *Davis v Carew - Pole* [1956] 2 All ER 524.

10 For example, *Calvin v Carr* [1979] 1 NSWLR1 (PC) and *Kioa v West* (1985) 159 CLR 550. For a recent New Zealand decision see *Stewart v Judicial Committee of the Auckland Racing Club Inc* [1992] 3 NZLR 693 (HC).

11 It is important to note that the right to be heard extends to being given the opportunity to make representations as to the appropriate penalty if found guilty, see *Malone v Marr* [1981] 2 NSWLR 894.

12 *Ward v Bradford Corp* (1971) 70 LGR 27 (CA).

what happened but the referee opts to stick to his report? The overall position under the rules might seem unfair to a player. He may be stuck with the referee's report in spite of video evidence. If a spectator or television viewer spots misconduct overlooked by the referee the player can be cited and suspended. With the latter I have no problem, but surely at a disciplinary hearing the tribunal should be entitled to review what happened and decide on the best available evidence whether the charge has been made out unhindered by any presumption in favour of the referee. It is undesirable that the authority of the referee *on the field* be undermined, but a finding that the referee made a mistake need not necessarily undermine that authority and would, in all probability, increase confidence in the overall disciplinary system. After all, umpires in cricket are now having to accept that the video camera can make more accurate decisions than they can.

### **Role of video evidence**

The presence of TV cameras at most major sporting occasions significantly reduces the fact-finding aspects of, in particular, judicial hearings. Where there is no video recording considerable uncertainty about what actually happened may still be the order of the day. Where there is such a record, the tribunal, player and his representative will normally be confronted squarely with what the camera sees. The questions for any enquiry will often be narrowed to:

- (a) Was the referee correct? Did he get the right player?
- (b) What was the player's intent in acting as he did?
- (c) What is the appropriate penalty?

With clear video evidence, there can be little point in disputing the basic facts. The enquiry will often turn upon the player's intention in acting as he did and any relevant history. There can now seldom be any chance of claiming that the case was one of mistaken identity! Advocates may also have to deal with the prejudicial effect of a slow-motion video of any incident.

### **Drug testing**

Of course, drug and dope testing has been part of horse racing for many years. In recent years it is in the field of human, particularly athletic, endeavour that the great controversial and headline-catching incidents have occurred. There is a natural strong desire to stamp out any drug taking from sport. Accordingly, most national sports have adopted rules for testing with dire consequences for breach. Given the potential earning of our athletes it is hardly surprising that positive drug tests now lead almost inevitably to lawsuits. Hearings will usually centre on the procedures, and are bound to be technical and adversarial, perhaps even "quasi-criminal" in nature. The analogy with the drunken driver is an obvious one. Recent cases in the USA and Australia illustrate the nature of such proceedings. I would suggest that this will be a growth area for lawyers.

Perhaps the most celebrated recent case is that of Harry "Butch" Reynolds, the 400 metres world record holder. Reynolds persuaded the Federal and Supreme Courts to compel the governing body of US athletics to allow him to compete in the trial for the Barcelona Olympics. Reynolds failed to make the team, but his legal suit against the IAAF continued and he was awarded substantial damages by the Ohio State Courts. The battle with the

IAAF continues.<sup>13</sup> Reynolds, like other athletes who have been held to have given a positive drugs test, disputed both the result of the test and the adequacy of procedures.

The Australian cyclist Martin Vinnecombe similarly challenged a ban for a positive test.<sup>14</sup> Litigation was commenced by Vinnecombe against the Australian Sports Drug Agency, the Australian Professional Cycling Council, the Australian Cycle Federation and the Australian Sports Commission as a result of the two year ban imposed on him after he tested positive for an anabolic steroid while in the United States. The litigation was referred to arbitration before a QC. In the arbitration it was held that procedures had not been followed when Vinnecombe had been tested, so that he could not be taken to have returned a positive result. As a result of that finding Vinnecombe's ban was lifted and the court proceedings against the ATCC, ACF and AFC settled. The action between Vinnecombe and the ASDA remains and has not yet been heard. That litigation will now be concerned with Vinnecombe's entry on the registry of defaulting competitors which was a consequence of a positive drug test under the Australia Sports Drug Agency Regulations 1991. It should be noted that Australia has a statutory framework for drug testing. Similar legislation is planned in New Zealand. Individual sports must be careful to adopt and maintain consistent procedures which are adequate and will not lead to a positive test being set aside. Where testing is done overseas under binding collateral agreements, standards and procedures must match up. One of the important issues in the area is whether the full consequences of a positive drugs test should flow when an athlete has not knowingly taken a prohibited substance.

This is one area where proceedings will be essentially adversarial and a technical approach to testing procedures must be adopted. Any lawyer involved must be thoroughly familiar with the testing procedures and be prepared for proceedings of a highly adversarial nature both at tribunal level and, possibly, before the courts.

### **Mediation/arbitration—options on review**

The Vinnecombe litigation also illustrates one way in which sporting disputes can be resolved outside the courts. There is a growing general trend in favour of arbitration and mediation, and those procedures are eminently suitable for resolving sporting disputes. In Australia there are moves afoot to set up some kind of central sporting arbitration tribunal. Perhaps something similar will be established in New Zealand. I, for my part, would always wish to see the courts with the final word because the issues raised by sporting disputes are often of fundamental importance. However, mediation and arbitration are certainly alternatives to proceedings for review which advocates should have in mind. In addition, most domestic tribunals have appeal avenues which can be considered before any court action (eg NZRFU has a four-stage appeal process).

### **Summary**

Those who administer sport will have to accept that lawyers have a role to play. There is

13 See *The Times* Newspaper January 25, 1993.

14 See *Vinnicombe v Australian Drug Agency*, Federal Court of Australia, NSW District Registry, No G0065 of 1992; and *Robertson v Australian Professional Cycling Council Inc*, Supreme Court, NSW, Waddell CJ in EQ 10 Sept 1992, No 3357/92 where a cyclist successfully overturned a two year ban for steroid use as being an unreasonable restraint of trade.



a need for legal input in the drafting of rules governing domestic sporting tribunals. Lawyers should be welcomed both as members of disciplinary committees and representatives of “accused” players. If the right balance is struck, legal representation can lead to better decision making and greater confidence in sporting regulatory systems on the part of both players and officials. I would also suggest that the expectation of those participating in sport demands that the final arbiter for disputes remains the law of the land as applied by the courts. However, fair rules and procedure, (“fair play in action”), coupled, if necessary, with good legal representation at a domestic level will serve to uphold confidence in the decisions of sporting tribunals. Lawyers working in the area as advocates must be sensitive to the attitudes of those involved in the sport and the need to get on with the next game, competition or Games. A balance must be struck between the need for rapid resolution and individual rights. The individual competitor will be the “winner” if the overall effect of legal input is to produce fairer systems of swift internal dispute resolution which all have confidence in. The application of legal principles to sports activities represents a significant challenge to the legal profession whether as advocates or draftsmen. Lawyers will, I am sure, show that they are up to the task and convince any sceptical administrators by performance that increasing involvement will lead to better decision making.