

# **THE LAW OF SPORT**

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## The Characterization of Sports Law

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In communities such as our own, sport is central to the culture. The measure of that role is not simply the extent of active or vicarious participation but also the depth and ubiquity of institutional penetration. As a consequence of that ubiquity, sport is touched by almost every branch of the law. Except for the occasional enactment to set up a sporting body or prescribe the regime for a sporting occasion, very little of the applicable law is particular to sport. As a general rule, also, the law is applied to sport in exactly the same way as to other activities and in other situations. “Sports law” may suggest an authentic legal topic but cannot purport to designate a distinct legal discipline. The parameters are more modest but also bolder, not restricted by conventions of classification and flexibly accommodating functional convenience. Labels of the kind are nowadays quite common. Sports medicine, industrial psychology and sex education are, as current usage, equally transparent and unexceptionable.

Requirements of coverage are dauntingly formidable. That aggravates the tendency for commentary to reflect immediate professional interests and needs. Two distinct approaches can be identified. Most sports law analysis, understandably, follows the familiar paths of the core legal disciplines: torts, contracts, taxation, insurance and criminal law, restraint of trade doctrine and so on. Just as usefully, a systematic or special issue approach is often taken, as with sports drugs, tribunals, sponsorship and marketing and legal issues relating to the Olympic Movement. As with Cleopatra, there is an infinite variety that elevates the allure. At a time when sports law is not much developed as an autonomous topic, discussion within these two categories would appear to be of most benefit to practising lawyers who share in the increasing professional contribution to resolving legal issues arising from sport.

For two reasons, an approach centring on case chasing and the rehearsing of fashionable issues is unlikely to establish sports law as a respected professional study. The first arises from the special character of English law. Despite modern inclinations toward great leaps forward by way of statute, it is still right to emphasise the fundamental role of organic development typified in the doctrine of precedent. Even torts, so recently accredited as a distinct branch of the law, reaches back to its own historical legitimacy—the inscrutable complexity of post-medieval forms of action. If sports law is to have an honourable future, it should take the trouble to acquire its past.

The second reason relates to profound changes that have occurred in the concept of sport since the mid-19th century. It is enough to mention the appropriation and regimentation of particular pastimes by the English middle class, the gigantism imposed by urbanisation, commercial exploitation and the everywhere capacity of the electronic media and in addition the latter-day rush to sports industrialisation. These developments have thrown up legal issues scarcely less novel and important than those imposed by some

branches of modern science. In the result, if sports law needs its history, the law needs more insight into the sociology of sports law. That suggests legal theory. If, in the further unfolding of the strangely epic destiny of modern sport, community control is to incorporate adequately informed and imaginative legal perspectives, there ought to be a jurisprudence of sports law.

### Characterization

In everyday language, “characterization” is taken to mean something between description and classification. It is more familiar in the legal language of states with written constitutions. In that setting, characterization is a term of art designating the process of determining whether a law is within a subject of constitutional power. In Canadian and Australian law, characterization proceeds by way of a paradigm whose first element is to fix the meaning of the subject-matter. After that, the question is whether a law is one with respect to the subject-matter as so defined.

The important Australian sporting case of *R v Federal Court of Australia and Adamson; Ex parte Western Australian National Football League* (1979) 143 CLR 190 may serve to illustrate. That case arose when Adamson, a player of Australian Rules football for a Perth club, sought to transfer to Adelaide and was refused a clearance by his club and the W. A. Association. He applied to the Federal Court for injunctions, alleging contraventions of the Trade Practices Act 1974 (Cth). The injunctions, if granted, would have ensured his right to a clearance. As relevant, the Federal Court had jurisdiction only in respect of “trading corporations”, an expression which the Act defined by reference to s 51(xx) of the Australian Constitution. The defendants argued that they were not “trading corporations”. The expression was considered in the High Court of Australia.

As a matter of normal statutory interpretation, the relevant meaning was the meaning ascribed when the Constitution was enacted in 1900. Since the defendant bodies operated in a sporting and commercial setting unknown to the fathers of the Constitution, that could be ominous for Adamson unless the concept of “trading corporation” could be taken as in some way travelling to meet new circumstances. The courts have usually reached that result by considering meaning in terms of “connotation” and “denotation”. The former fixes the essential or core qualities of the subject-matter and the latter specifies the objects or classes that have the qualities. That interaction has been epitomised by Windeyer J in the *Professional Engineers* case (1959) 107 CLR 208,267:

We must not, in interpreting the constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the constitution the connotation or connotations of its words should remain constant.

That approach was important in keeping the *Adamson* case alive. It once enabled the Privy Council to hold that “telegraphs” in the Canadian Constitution was apt to include radio broadcasting, and the High Court to conclude that the Commonwealth power with respect to “postal, telegraphic, telephonic and other like services” extended to radio broadcasting services. It is worth adding incidentally that the issues raised by such cases are by no means foreign to New Zealand. When a court or the Waitangi Tribunal is asked to decide

whether the thermal resource, or even the radio frequency spectrum, falls under the taonga of rangatiratanga in Article II of the Treaty, the relevant questions are neither fanciful nor unique. All that is called for is the very familiar task of characterization.

It is fair to add, also, that the dichotomy of connotation and denotation nowadays lacks the blessing of the purists, not only because the historical assumption of an essence or core meaning is necessarily subjective, but more cogently because the relationship is quite likely to be inductive rather than deductive. That is, the notion of the concept may well be formed from the instances. Provided the limitations are appreciated, notwithstanding, the dichotomy remains a useful tool of analysis.

For present purposes, it is less necessary to explain how characterization operates once a subject-matter has been defined. Many conundrums arise. What view is to be taken if the real purpose of the relevant law is not the ostensible purpose within power? Where several purposes appear, does the matter turn on which is found to be paramount? How far, in any event, is purpose relevant to characterization? What is to be said where the achievement of a purpose within power requires a resort to incidental powers? All such issues resolve themselves into the broad question whether there is sufficient correlation or correspondence to justify the recognition of a kind of legal equation.

### **Sport as a forgotten factor**

For the sports law enthusiast, it is an obvious—and commendable—adventure to browse through law digests and similar legal works of reference. The results are likely to be perplexing. Suppose *Halsbury's Laws of England* (4th ed, 1981 reissue) is the starting point. There is no title “Sport”. For the popular sports specifically, the situation is still bleaker. Volume 11 runs from Cremation and Burial to Criminal Law. Despite *Bolton v Stone* [1951] AC 850, *Miller v Jackson* [1977] QB 966 and all that, it is silent on cricket. From Food, Dairies and Slaughterhouses to Fraudulent and Voidable Conveyances (vol. 18), there is no mention of football. A separate title is included on cockfighting (mercifully short), but none on rugby. The dividend from the index and the words and phrases section is not much better. Cribbage appears, but not cricket. The eye alights on rugby, only to be repelled by “see Public School”. Sports ground entails a detour to the title Public Health, but nearly all the references relate to the Safety of Sports Ground Act 1975 (UK).

In most other traditional reference works on the law, equally, sport is a well kept secret. With exceptions, that applies even in the United States. Thus *American Jurisprudence* 2d treats Prizefighting under its own heading but dismisses Sports with a direction to see Amusements and Exhibitions. That ignores much relevant law, but at least there is considerable common ground. *Corpus Juris Secundum* (1977 ed) is at first sight just as opaque. Sport yields only a cross-reference to Gaming. Less venerable but more attuned to a present day wave length, the Current Law Index (California) comes as a relief. It treats sport generally and under a number of subheadings as well as setting out cross-references to particular sports.

Australian resources suggest adjustment to modern idiom. The *Australian Digest* still makes no distinct provision for sport. Neither, to be precise, does Australian Current Law,

its main competitor, Until 1990, that publication subsumed sporting matters under torts, trade practices and so on—but also included separate entries for sports and pastimes within the title on Health, Housing and Social Welfare. From 1990, a new title on Entertainment, Sport and Tourism has been created. *Halsbury's Laws of Australia*—now in preparation (and in part published)—is to include the new Australian Current Law title in Volume 11. Finally, the Attorney-General's Information Service (AGIS, Canberra) should not be overlooked. It does provide a separate heading for sport, but cross-referencing to the heading is sometimes incomplete.

The suspicion that legalistic archaism has been suppressing the claims of sport is strengthened by some of the dictionaries. *Stroud's Judicial Dictionary* (5th ed, 1986), for example, does list Sporting but continues simpliciter, as lawyers used to say, “see Hunting”. The archaism is not confined to the legal publishers. Fairly recently, *Webster's International Dictionary* defined sportsman as “one who practices the sports of the field, especially hunting or fishing”. *Funk and Wagnall* (also good property in American courts) elucidates the same term as “a person who engages in field sports; also a hunter of big game”. Reputable English and American dictionaries are of course more expansive on sport, typically taken to cover a spectrum of meanings from entertainment to a freak of nature or a prostitute.

Recurrent reference to field sports is the real clue to the low profile of sport in the legal materials. In contemporary times, sport has been used as a generic term applying to a great diversity of activities. To recall the constitutional paradigm, the connotation is extremely broad and the denotations are numerous. Is that a modern development? The evidence is suggestive. According to *Oxford*, the first recorded occurrence of “sport” was about 1472—“Yomen, and other Comyners, have used the occupation of shotyng for their myrthes and sportes with Bowes of Ewe”. The sense is already cognate, but the word did not at once take the language by storm. Gay (in the *Beggar's Opera*) used it in rather the modern sense and so did Gibbon in the *Decline and Fall*. As early as 1796, quite surprisingly, a person was described in a periodical as an “accomplished sports-woman”—but one swallow does not make a summer. Sports editor, sports shop and sportswear, not to mention sportscaster, are all neologisms of this century.

Some activities we would now place instinctively within the generic category of sport would have been much less likely to be characterised in that way at an earlier time. In the long established reference texts, headings such as Game, Fish and Game, Gaming (to include betting), Hunting and so on indicate strong traditional interest in the pastimes of the field—and self-sufficiency of the ordinary descriptions. To the hunting, shooting, fishing set of the 18th century (a large proportion of the rural population in rural England), submergence of such descriptions in an inclusive collective term would doubtless have been regarded as pointless, and perhaps demeaning. To this day, in any event, the field sports mainly persist in older authorities as stand alone entries. As a base for current characterization, notwithstanding, it is sensible to depend on the broad connotation of sport that has entered into general usage in modern times.

Changing sports habits obviously affect denotation. In the heyday of the field sports, cricket, rugby, tennis, skiing and so on were unknown in anything like the modern form.



For that sort of reason, the denotation of sport has expanded. Have there been disappearances as well? One class of activities causes difficulty if the modern connotation is relied on. What is to be said of prizefighting, cockfighting and bull and bear baiting? All were widely practised until the 19th century. All except the first were prohibited by statute more than a hundred years ago, when prizefighting was already outlawed as a public nuisance and a breach of the peace at common law. The better course probably is not to characterise them as sports at all. “Unlawful sports”, for all that, would be a fairly accurate *historical* label. Historical perspective also recalls some pastimes or activities spawned in the brutalities of peasant hamlets that did not survive the long march to the industrial cities and happily became extinct.

### **The longevity of sports law**

The preceding analysis fatally undermines the commonly held view that sport was once conducted more or less in insulation from the legal system without recourse to the courts and that, more or less out of the blue, legal disputes surfaced and innocence was defiled. There are two related reasons why this has been made to seem colourable. First, sports law discussion has been narrowly preoccupied with the most visible problems of the present, which means a focus on competitive team sports and also on the activities of professionals. In those spheres, the incidence and dimensions of legal activity have certainly escalated. It is another matter to hark back to a golden age in which legal confrontation did not occur. The case books of the larger jurisdictions, especially those of the United States, tell a different story.

The second point relates more to the British Commonwealth jurisdictions, where the sports law traffic has always been lighter. There insulating mechanisms did develop, because the amateur tradition was a British invention and acquired a very strong hold. The touchstone of the tradition was class cohesion. Its aspect was inward, intent on privacy. Its institutional form was the unincorporated association. Almost from the very beginning, despite what was manifest, the courts decreed that such a body was not a body. By denying legal personality, the judges fitted up the unincorporated association with an effective shield. By the time that began to be breached, the amateur code had entrenched the collective credo that gentlemen don't cry. That conception of the relation between sport and the law eroded more slowly than the structures on which it had depended.

The Victorian sports ethos, and its legal consequences, flourished on what was really an exceptional basis during what was really an interlude. The conditioning imparted, however, was very strong. Even in an era when professionalism and industrialisation are the dominant sport trends, the Victorian legacy continues to fuel notions that sport is so special as to merit privileges and immunities at the hands of the law. It also fuels notions that the application of the law to sport is new. That approach would be less plausible if longer continuities were appreciated. They are not appreciated mainly because the denotation of sport is incomplete. The contemporary is enlarged so that the vision of the past is obscured. The present is taken for the permanent. That distorts the perspectives of sports law. If denotation adequately accommodated the past, rather different ideas as to the sport-law relationship would emerge.

The upshot is that current limitations in the connotation and denotation of sport have been

blocking valuable sports law inquiry. A huge treasure trove remains largely undiscovered. The very inadequacies of most of the traditional reference works, fortunately, provide clues as to where it might be. Different times, different denotations. That thought leads from activities suitable to the human compaction of the present to the secular pursuits of a more spacious rural society. Is it conceivable that such a society functioned under an elaborate regime of sports law? The concern of the reference works for field sports indicates how the proposition might be tested.

To begin episodically, one of the notorious cases surfaced during the recent New York litigation in relation to the America's Cup. *Pierson v Post* 3 Caines 175 (1805) arose when a huntsman on public land was in hot pursuit of a fox. An interloper snaffled the fox, killed it and made off with the carcass. The question was whether the plaintiff had acquired a property in the fox as against the interloper. The judges traversed a formidable body of English and American law in holding that the plaintiff had no remedy. The case was exhumed in the America's Cup appeal proceedings to demonstrate that a favourable legal ruling could not be given solely on the basis of what constitutes good sportsmanship (apparently taken to be the New Zealand case). The Mercury Bay submission was in fact quite different—that by virtue of intrinsic indications and extrinsic evidence, the Deed of Gift had to be construed in a spirit of sportsmanship. All that, however, is now water under the bowsprit.

In short compass, it is difficult to do justice to the elaborate corpus of law on matters such as hunting, refined as it was by an abundant miscellany of cases suggesting that the leisured life of the squirearchy allowed plenty of opportunity for litigation. Hunting and similar rights occupied much attention and were held both at English and at American law to be an interest in realty in the nature of an incorporeal hereditament. Since the owner derived a tangible benefit, such a right could not be classed as an easement, or even as an easement in gross, but was taken to be a profit à prendre. All this doctrine was developed progressively in terms of common law.

In practice, such engaging simplicity did not carry through to the courts, as a citation from *Sutton v Moody* (1699) Comb 4581; 90 ER 590 indicates:

If A starts a hare in the ground of B and hunts it and kills it there, the property continues all the while in B. But if A starts a hare in the ground of B and hunts it into the ground of C and there kills it the property is in A the hunter but A is liable to an action of trespass for hunting in the grounds as well of C as of B. But if A starts a hare in a forest or warren of B and hunts it into the ground of C and there kills it, the property remains all the while in B, the proprietor of the warren, because the privilege continues.

Hunting and similar rights were strictly construed but disputes were legion. In the United Kingdom, the definition of game, and thus the extent of a right, caused problems that were partly resolved when hares and rabbits (whose inclusion was disputed as being doubtfully “subjects of sport”) were expressly targeted under the Ground Game Act 1880 (UK). The grantee of a right had no remedy if the owner diminished its value by clearing or draining land in good faith, but could not maintain his equity by stocking game if that caused damage to the owner's crops. Careful rules existed in relation to alluring game or spoiling

the sport of others. *Keeble v Hickingill* 11 East 574n; 103 ER 1127 was decided for the plaintiff when the defendant discharged guns near neighbouring property “with design to damnify the owner by frightening wild fowl”. As conveyancers would expect, instruments of grant also caused difficulties. Under English law, they were valid only if by deed under seal. For Scotland, written agreement was sufficient. *Adams v Clutterbuck* (1883) 10 QBD 403 considered the question whether a mere agreement by Englishmen in England over grouse shooting rights in Scotland could be enforced in English courts.

The incidents of English and American law in these matters were similar, but the two systems operated upon very different foundations. In respect of hunting and fishing, the English law foundation was prescription. The American emphasis was on rights in common. The difference was epitomised as follows by Champlin J. in the leading case of *Sterling v Jackson* 69 Mich 488; 37 NW 845:

The forest and game laws of England have always been treated under a separate code, distinguished for its tyrannical inhibition of the common rights of the subject, and detestable for the cruel punishments inflicted for trivial offenses. The common law, which recognised the right of hunting and of property in wild animals to be a royal prerogative, and to vest in the king, has no existence in this country where no king and no royal prerogative exists. Here the sovereign power is in the people, and the principle, founded upon reason and justice, obtains, that by the law of nature every man, of whatever rank or station, has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as they do no injury to another’s rights.

All this lifts the veil on what is no more than a relatively small segment of sports law in the pre-modern period. The range indicated by the sample is extensive—from fundamental questions relating to constitutional assumptions and liberties to minutiae of procedure. Some terms and concepts are obscurantist or outmoded by current standards but a surprising proportion of the issues find at least a loud echo in latter-day law. The sample is introduced here, however, by way of illustration only. Comparative analysis must be left for another day.

One further example of the pre-modern vitality of sports law is irresistible. This time, there is rather less emphasis on civil law. When sports bosses intone indignantly about “destroying” sport by prosecutions, one response is that sport and the criminal law have travelled in double harness for several hundred years. Records from various activities in society would be apt to demonstrate that theme. One of them is religion.

In a suddenly secular age, younger people could scarcely imagine the vanished world of never on Sunday. Sunday laws rested on the biblical commandment prohibiting work on the seventh day. Restrictive regimes acquired great momentum and severity in consequence of 17th century Puritanism in England. When the Puritans crossed the water to North America to ensure purity of doctrine and practice, American law soon outdid that of the mother country in rigidity and ambit. Especially in the northeastern states, the puritan impulse also lasted longer. Relevant law in both countries came to include elaborate precautions against profane conduct or desecration of the Sabbath and any acts that might be construed as serious interruptions of the repose and religious liberty of the community. Predictably, Sunday sports came under the ban.

The Scottish Reformation was the bellwether in these developments. As early as 1592, the Town Council of Edinburgh prohibited golf on Sundays. That alternative faith was responsible for many transgressions even among the clergy, several of whom were deposed for breaches of the regulation. Later, apparently at the instances of early Stuart royalty, the ban was relaxed to apply to “time of Sermonis” only. As Duke of York, James II played a famous Sunday match partnered by the Edinburgh shoemaker John Paterson. Paterson was able to build an elegant mansion with his winnings and was granted a crest with dexter hand gripping a golf club over the legend “Far and Sure”.

Sunday laws rarely generated such a happy ending, though English statutes from the time of the Restoration were relatively moderate. The Sunday Observance Act 1780 (UK), to summarise, mainly prohibited work in public or entertainment for the public and lasted until the modern age. It was in force in New Zealand until 1952, from which year Sunday entertainments (including public sport) became lawful in this country provided they were approved by local authority.

There is more colour in the abundant jurisprudence on the subject originating in the United States. In many State jurisdictions, criminal codes prohibited Sunday sport absolutely, whether or not in public, but in some cases specifying particular activities. Particularisation invoked the *sui generis* rule. Where the wording specified “horse racing, cockfighting or playing at cards or games of any kind” (Missouri), did the prohibition encompass baseball? Reasons were sometimes incorporated, which led to debate whether they should be construed substantively or dismissed as if preambular words. In late 19th century New York State, the formula covered “shooting, hunting, fishing, playing... and all noise disturbing the peace of the day”. In 1885, it was held that three men playing ball on private grounds had committed no offence because there was no evidence the peace had been disturbed. Seven years later, strict liability was (temporarily) restored. A person fishing quietly on a secluded stretch of water on private land was made amenable to the provision.

Rather predictably, efforts were made in the 19th century to overturn State law by invoking the Constitution of the United States. The question was whether Sunday restrictions were in violation of the 14th Amendment, which prohibits States from making or enforcing laws abridging the privileges or immunities of citizens. Where restrictions had been enacted before the adoption of the Constitution and were founded on control of private morality, there was serious difficulty and appropriate amendment was imperative. Even on revised formulations, however, the issues were aired comprehensively in the Supreme Court, but Sunday laws were sustained against repeated assaults. The reasoning was, in brief, that situations threatening the peace and quiet of the citizen, or public order, might be regulated or restrained by the people through their legislatures without violation of the Constitution.

More recently, some American judges proved robustly restive in face of the persistence of legal restrictions on Sunday sport. One rather implied that the Bible was not suitable for admission among *travaux préparatoire* in religious issues before New York courts, but added anyway that Sunday (the Lord’s Day) was not in fact the Biblical Sabbath. Physical exercises and games were not forbidden by the Ten Commandments and “in the New

Testament there is no Sunday law at all". *People v Poole* 89 NYS 773 continues:

Not long ago, a complaint was made to the Archbishop of Canterbury that Mr Balfour, the Prime Minister of England, played the game of golf on Sunday. The Archbishop's official response in writing was that "it is certain that the Christian Church has never laid down detailed directions affecting the actions of individuals in this matter. Each of them is responsible to God for so using the Lord's day as to fit him for the working days that follow".

In States where puritan or fundamentalist doctrines have been entrenched, legislators have been very slow to loosen the religious bonds of the past.

### **Sport and context**

To this point, analysis has indicated that sport has ranked as a poor relation in the setting up of most of the respected legal reference texts. That situation largely relates to problems of meaning. As a matter of connotation, "sport" has acquired only recently its present extensive generic power. That sports in the modern sense are still commonly classified only under other and more specific descriptions testifies to that point. As a matter of denotation, the intense focus of contemporary sport has resulted in longer perspectives—and archaic sporting activities—being more or less ignored, not least for the purposes of sports law. Without those activities, the categorisation of sport and the ambit of sports law are incomplete. Consideration of those activities usefully adjusts the focus and enlarges the perspectives of inquiry.

One further dimension of the meaning of sport remains to be explored. Because circumstances alter cases, the term cannot have a meaning that is absolutely fixed. Suppose a professional person with no previous record of athletic activity suffers a cardiac infarction. During the recovery, his medical advisers urge him to adopt the slogan, "run for your life". Our convalescent lurches into motion, at first in short stages but soon covering distances that are more implacable. After each session, pulse rate and so on are checked. This activity, clearly, is not sport but exercise. Jogging, however, is addictive. Restored to health, our subject extends his schedules; he calls this rehabilitation, but it is partly for pleasure. Semantically, the activity now becomes dubious but is best described as recreation. Next, the jogger is induced to answer the call of the fun run—an organised contest for prizes. The objective changes the label. Emerging from a no-man's-land of medical misadventure, our subject is now in the realm of sport. In many cases, it will be far from easy to identify just where and why the point of departure occurs.

Horseracing offers equal dilemmas for the meaning of sport. Athletic activity is one acknowledged test, and in this instance the horses get most of it. Animals, however, are merely the means to constituting sport. Jockeys come next on the activity scale, but the jockey is not quite regarded as the sportsman of the occasion and in a sense is also incidental. For racegoers generally, the sport consists not so much in physical aptitude and skill as in the skill to select skill. The punter is the real sportsman. That produces the result that a spectator at a sporting event should be taken as pursuing the sport and therefore as a sportsman.

Physical activity, apparently, is not an essential test for sport. The uncertain position of

the jockey indicates another aspect of the fluidity of the concept. In the Victorian tradition, participation for reward was close to being beyond the boundary of sport. The implied issues are not easy. If sport is considered in accordance with that tradition as a relaxation or play element or an escape distinguished from the world of work, questions arise as to the characterization of occupational sport. Sir Edmund Hillary climbed Everest—in the amateur tradition; Tenzing Norgay went with him—as a paid sherpa guide. In relation to the feat, are they to be classified as equally sportsmen? If a guide is within the pale, moreover, what is to be said of a porter? Does the objective change the characterization of the activity? That thought is a little dangerous. In an era of professionalism, sport as occupation dominates sport, but there are hard questions to be faced in drawing the line. At what point does the aura of sport fade so that what remains must be characterized as business?

One apparent difference between an exclusively present-day connotation of sport and the wider meaning suggested relates to the factor of competition. When competition is not an element in the activity, there is something of a tendency to write it off as a recreation or a pastime. That, incidentally, would be a further impetus to shutting out much of the past. Society is tyrannised by market forces; professionalism and commercialisation are deeply entrenched in sport; liberation from previous constraints of time, locality and audience size give new weight to spectator (or anyway non-participant) attitudes and preferences. Sport as an entertainment business results, with television and video as the key vehicles of display. That puts the emphasis on contests and the big drawcards are team contests. It is quite possible that these trends could change the very meaning of sport, with strangely paradoxical results. What brings media spectacles to the viewer is industry; industry in effect would be claiming the mantle of sport. That would be repugnant to the traditional or Victorian approach to the matter and the converse of logical expectation.

The preceding commentary does not arrive at a definition of sport. The ground is shifting steadily. In a general sense, the reasonable person still knows more or less what he or she means by sport; for everyday purposes, unless some of the dilemmas obtrude, that is enough. The law, however, is condemned to precision. In that event, examination of the concept of sport in terms of connotation and denotation usefully brings some aspects of sports law from the shadows and illuminates the semantic foundations of the subject. To some extent, nevertheless, the examination is bound to conclude as a cautionary tale. As a matter of meaning, sports law is not established on a rock, and it is sometimes in quicksands.

### **The sport-law equation**

The argument turns now to adaptation of the second limb of the constitutional paradigm outlined. When may a case or statute or other manifestation of the law be considered as “with respect to” sport? The facile answer is, whenever a sporting connection appears. That answer begs some questions and ignores others. A mere reference to a sporting activity, common sense suggests, would not be enough. Must sport, then, be the central theme? If ancillary inclusion is to count, how directly related to the theme, and how significant, should the sport element be? Is there to be a rule of remoteness? If several “connections” seem more or less in balance, which is to be master? Some of the difficulties are much more formidable than casual consideration would suggest.

Almost any law on sport (inclusive of case law) is also—and more fundamentally—“with respect to” something else. That is so because subject-matter is subordinate to legal principle. Legal principle is the key factor in decisions and the basis of legal classification. The well known Court of Appeal decision in *Finnigan and Recordan v The New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 may be taken to illustrate where that leaves sports law. As is familiar, the case was a response to concern about a projected All Black tour of South Africa. The plaintiffs claimed in particular that the tour would be contrary to the objects of the Union. The question on appeal was whether they had standing to make the complaint—not being directly members of, or in contractual relationship with, the Union.

Two English law authorities substantially determined the outcome. In the field of administrative law, jurisdictional rules in relation to statutory bodies had been progressively liberalised by the courts and that precedent was spreading. In *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, Lord Denning MR had envisaged that such developments should be applied to voluntary associations, at least where they had importance and power in the community and might exercise national influence. That kind of approach opened the door but did not determine who could come in. The next step in the reasoning followed *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, in which the House of Lords had to determine whether applicants for judicial review had a “sufficient interest” within the meaning of the relevant statutory order. Lord Wilberforce made especially clear that the matter might be considered more generally. Sufficient interest should not be considered as an isolated point but in the legal and factual context. These strands of authority had been applied separately in New Zealand before the *All Black Tour* case. The strength of the Court of Appeal judgment was to marry them ingeniously, with the ultimate result that the All Blacks stayed at home.

That litigation may be termed an issue in sports law, but the label is to an extent a misnomer. Sport is the subject-matter, but that is about all. As case analysis makes clear, no sport related case or doctrine particular to sport has assisted the judgment in any way. The subject-matter of the two key authorities is quite different, since *Breen* arose from a trade union dispute and *Small Businesses* concerned a matter of commerce. The commonality is of legal principle—in what circumstances is jurisdiction available in the affairs of voluntary associations?

This situation has implications, and suggests a warning, in relation to sports law as a subject of study. The collection or classification of law on the basis of sport subject-matter may be intrinsically interesting but has next to no value in fostering legal knowledge. It may in fact be dangerous. An anecdote is worth recalling. Some time in 1988, the writer received an unsolicited letter and other material from a person who had suffered serious and permanent injury from a flying golf ball while playing golf on a public course. The principal issue was course design. An enclosed opinion by counsel was not optimistic about the chances in a damages action. The opinion was drafted on the footing of the special common law rules as to invitees, licensees and so on in relation to premises. That law had prevailed in New South Wales for many years and no Occupiers’ Liability Act had been enacted. The victim, however, had consulted a recent legal text in one of the

public libraries and reached the view that Her Majesty's Counsel was in error. That indeed was the case. In a line of authority culminating in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) ALJR 180, the High Court of Australia had abandoned the special rules and established that all such cases should be decided in accordance with the general principles of negligence.

If the most recent "sporting" case on occupiers' liability had been in point, the opinion of counsel would have been correct. However, none of the landmark cases in the departure from the special common law rules had any connection with sport. At the denouement, Mrs Zaluzna was a migrant who slipped on wet tiles in the foyer of a supermarket. In the result, the opinion badly missed the bus.

The extreme logic of this position might seem to be the suggestion that, whatever may pass muster in ordinary language, there is essentially no methodological justification for characterising legal matters as sports law. That suggestion is disavowed. For the consideration of a legal issue, the focus on sport as the subject-matter may have advantages in establishing a distinct framework to which authority must be fitted. That implies—what is in any case the task of the common law—testing the correlation of authority to context. The interplay between the context of sport and legal authority may be conveniently examined within the debatable territory of exclusion clauses.

The courts of the common law world have as a general rule examined exclusion clauses critically and construed them narrowly. Unlike courts in some of the United States jurisdictions—see *Wagenblast* 758 P 2d 968 (1988)—they have not been inclined to outlaw such clauses on grounds of public policy. In *Darlington Futures Ltd v Delco Australia Pty Ltd* (1987) 5 ACLC 132, the High Court of Australia confirmed that professional persons might limit their liability for negligence by including a specific clause in a contract to that effect. As in *Securicor* (1980) AC 827 before the House of Lords, the decision took account of the fact that the contract concerned "business men capable of looking after their own interests".

The scene shifts to sport. In 1986, a New South Wales schoolboy became a paraplegic as the result of an accident in a rugby union scrum. In default of a relevant accident compensation scheme, the matter was litigated in *Watson v Haines* (unreported, 1987). Sports administrators "recoiled" when an award of damages in negligence amounting to \$A2.1 million was made against the Education Department. How were sports authorities to be spared financial catastrophe of this kind? In the 1989 season, all rugby union players were instructed, as a condition of registration, and thus participation, to sign a form releasing other participants, coaches, officials, referees and unions from legal liability for injury or damage.

There was some concern that the exemption clause was unfair. An English Law Commission report, it was recalled, had recently concluded that clauses or notices exempting from liability for negligence "are in many cases a serious social evil". The question was whether the *Darlington v Delco* doctrine would be applicable. Some possible grounds of distinction were specifically related to the circumstances of sport:

—would precedents for experienced businessmen extend to legally innocent



footballers (and their parents);

—would doctrine allowing financial redress in commercial disputes be extended to liability for sports injury;

—since some classes of persons (eg referees) covered by the agreement were not parties to it, would the courts regard them as strangers to the contract;

—since the Australian Rugby Union had a kind of monopoly over club rugby and there was obvious inequality in the bargaining position of the players, could the agreement be challenged successfully at common law;

—since some States had enacted legislation in terms similar to those of the Unfair Contract Terms Act 1977 (UK), the agreement might be struck down by reference to statutory provisions.

To the regret of some observers, the exemption clause was not tested, partly because the ARU softened the effect by concurrently launching a compulsory accident insurance plan. The episode demonstrates that the focus on subject-matter or context may usefully expose uncertainties in legal rules that seem settled.

Notices of warning or disclaiming liability are a cognate issue. Under occupiers' liability rules (statutory or otherwise), it is a crucial question how far the occupier is free to restrict or exclude the common duty of care—especially of course where a common law system in respect of liability still operates. Where payment is made for admission, a contract is created. An entrance ticket is the usual contractual document. As against a mere lawful visitor, the contractual visitor may be taken to have a special status.

In *White v Blackmore* [1972] 2 QB 651, Lord Denning MR set out the implications. The cases made clear that a disclaimer or condition must be printed on, or referred to (eg for conditions, see reverse side), on the face of the ticket. Otherwise, the notification would be defective. Notices posted around the ground were another matter because they were extrinsic to the contract. His Lordship rather doubted whether they could be satisfactorily incorporated by reference. In any event, a person would not be bound by an extrinsic document unless his or her attention had been specifically drawn to it and the person had assented to it. That must be right, Lord Denning concluded. Otherwise, promoters could “snap their fingers at the law” by plastering a venue with disclaimers. That would suit insurance companies, which could confidently pocket their premiums.

The argument went further. The majority in *White v Blackmore* took it that, in the case of a lawful visitor, the right to impose conditions was virtually unrestricted. Lord Denning disagreed. Regardless of status, in his view, there is a basic obligation to make the premises reasonably safe. The Australian cases (see *Nowak v Waverley Municipal Council & Ors* (1984) Aust Torts Rep 67,801) have mainly favoured that approach, to the effect that a notice of disclaimer would be effective to bar recovery only if, in the formulation of Professor Brian Coote, “an irreducible minimum of humanity” had been observed. That would mean reading down a notice of disclaimer to the extent of an indefeasible duty of care.

It is idle to suppose that the fashion for market ideology will not eventually affect custodial or paternalistic mechanisms designed to assure to the citizen a sufficient standard of protection under the law. Beside a resurgent caveat emptor, caveat visitor may

emerge in the interests of the level playing field so egregiously venerated in the dogma of the radical right. Recent decisions relating to contracts of bailment suggest that New Zealand's current cultural shift may be obtruding in the courts. In *Livingstone v Classic Car Stable* (1992) 4 NZBLC 102,640, the question was whether a notice stating (as material) "all care taken: no responsibility" exonerated the dealer from liability in respect of negligence resulting in the theft of a car entrusted to his keeping. The dealer argued that the notice was a term of the contract but that issue, regrettably, was not considered exhaustively. Thomas J decided for the plaintiff on the related grounds that the notice was ambiguous (and should thus be construed against the dealer) and that a disclaimer of responsibility extending even to negligence "would not accord with commonly held notions of fairness"—unless drawn specifically to the customer's attention and agreed to. That approach is fully consistent with authority.

In *Shipbuilders v Benson* (1992) 4 NZBLC 102,677, the Court of Appeal would appear to have taken a very different tack. That case concerned a launch stored with the defendants which was destroyed by an unexplained fire. Chilwell J found in favour of the owner (who had died before trial) on the ground that Shipbuilders had failed to discharge the special onus of a bailee to establish that it had taken reasonable care. The Court of Appeal expressed some uneasiness over the finding of liability but allowed the appeal on the different ground that statements excluding the liability of the bailee should be given their effect. It was common ground that a bailee may exclude liability for negligence if that is done by a clear and unambiguous contractual term.

Although the hauling out slip embodying the relevant contract could not be found, Chilwell J had drawn the inference that the owner knew the conditions habitually imposed, including that Shipbuilders did not carry insurance on stored goods and that storage was at owner's risk. In that connection, his Honour accepted evidence of a signboard close to the relevant boat on which was printed "vessel stored at owner's risk". Virtually without argument, the Court of Appeal accepted Chilwell J's findings and went on to criticise the position taken by Thomas J in *Classic Cars*. To the average non-lawyer, an expression such as "all care and no responsibility" would convey just what it said. "It is the very antithesis of acceptance of a legal obligation to take reasonable care". On that basis, the court held that the evidence established a term of the contract excluding the bailee's liability in negligence.

While bailment and admission to sports grounds are very different activities, it is inconceivable that exclusion clauses should apply differently. In such a matter, it is right to insist on the seamless fabric of the law. On that footing, *Shipbuilders* could have considerable—and onerous—importance for sport as undermining a regime previously taken to be well settled. That regime, it should be noted, depended substantially on case law involving venues for sport and entertainment and was not primarily derived from decisions on other subject-matter. The point is not that subject-matter should drive the law but to demonstrate the destructive consequences that may follow when law relating to sport is subverted from "outside".

*Shipbuilders* was decided on the footing that the owner knew about the habitual rules and must have seen the relevant notice. On earlier reasoning, that would be far from sufficient

for the incorporation of extrinsic material into a contract. It is one thing to infer the formation of a contract; to infer (apparently on the same tests) the incorporation of extrinsic terms is something else. In two respects, requirements of proof have been dramatically reduced. On the *White v Blackmore* view, the first thing to be shown is that the exclusion clause was expressly made known to the plaintiff by the defendant, not simply that the plaintiff knew about it. The second point goes even more to the meeting of minds that is fundamental to the formation of contract. It has to be demonstrated that the plaintiff assented to the extrinsic term. A third factor (probably not material in *Shipbuilders*) needs to be borne in mind. Unless an exclusion is crystal clear (and possibly even if it is), it is right to emphasise the modern equitable doctrine of fairness and the indefeasible duty of care. In a jurisdiction where no enactment such as the Unfair Contract Terms Act (UK) is in force (even if injury cases are excluded), there are particular grounds for holding the line on these principles.

In common sense as in law, there are sound reasons why the incorporation of extrinsic material into contracts should be strictly confined. The dangers of liberalisation are patently apparent in the sporting circumstance where standard form contracts may be applicable to thousands and the evidential problems of attributing representation, knowledge and consent in respect of warnings and notices are well-nigh insuperable. If *Shipbuilders* is to generate new law for exclusion clauses in relation to a sporting venue, the nightmare of public exposure to risk which Lord Denning envisaged is inescapable. The public interest would not be served by turning over the turnstiles to a promoters' and insurers' charter.

Two issues arising from consideration of the semantics and methodological plausibility of sports law remain to be briefly canvassed. First, is sport a "special" pursuit to which the usual norms of society should not apply? The suggested reconstitution of the denotation of sport and the resultant increased focus on the past suggest one response: in the eyes of the law, sport never was special. Why should it have that status now? More accurately, perhaps, there is one exception. Certain types of sporting bodies enjoyed certain protections for a limited time. Now that the circumstances and ethos which created that situation have vanished, why should its legacy be generalised? Sport, moreover, has no frontiers. As discussion has demonstrated, there is no way of defining satisfactorily the ambit to which any legal privileges and immunities would apply. Behind these considerations looms the very awkward fact that law relating to sport is law "with respect to" sport only in a secondary sense. Since legal principle dominates, the argument that it should do so consistently is irresistible, especially at a time when industrialised professional sports rather than leisured recreational pursuits are making the rules. With rare exceptions, community interests are best served by a legal system that is indivisible.

The approach canvassed also has implications for the practice of law. It has been noticeable for some years in Australia, and is beginning to happen here, that solicitors are setting themselves to specialise in sports law. In part, of course, the inclination derives from interest in sport. In part, it answers to the expectation that sport will provide, as it does already, good business. It is no criticism of those objectives to suggest that to some extent the gravitation may be misconceived. For the reasons given, "sport" merely focuses on a subject-matter and does not characterise a conceptually related body of law.

Where a “sporting” action is on foot, the whole of the relevant law and not just sporting precedent is in issue. Because facts are important, subject-matter may colour the process of legal decision making, as previously discussed, but that influence is really marginal and comes into play only within the parameters fixed by legal concepts. Whatever the subject-matter, it is law that dominates. The implications are all more cogent at a time when specialisation is taking place rapidly and inescapably within the legal profession. As a field of legal activity, sport would thus appear to be dubious conceptually and is in any event just too large. *Qui trop embrasse, mal étirent*.

To make all these points is not to disparage or discourage an interest in the law relating to sport. In the sometimes less than glamorous purlieus of the law, it is a tonic when professional and leisure interests happily converge. This analysis would suggest, however, that vaulting ambitions for a new field of sports law should be viewed with some caution and that interest may be about the right word. My own pioneering text slipped into general usage in referring to “sports law”, but significantly preferred as its title the less leading and suggestive “Sport *and* the Law”. It is appropriate to conclude by commending the methodological propriety of the title of another recent contribution—“Caught in Court: A Selection of Cases *with Cricketing Connections*”.

## **The Role and Conduct of Private Sporting Tribunals —The Tribunal's Perspective**

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### **Introduction**

Sport has progressively become more commercial, more professional (both on and off the field) and more technological. Sponsorships apply to individuals, teams, clubs and provincial and national bodies. There is often much more at stake than simply participating in the game, race or event.

The rapid growth of the business of sport in New Zealand and its effect on judicial procedures, was perhaps illustrated with the suspension in October 1992 of Richard Loe by the New Zealand Rugby Football Union Disciplinary Committee. He was allowed by the Committee to commence his suspension at a later date which would enable him to meet his commitments to play and coach overseas.

If an amateur sportsperson is suspended from play he/she loses out on the enjoyment of participation, and their team or crew miss out on the particular skills of the person. For the professional sportsperson a suspension means the loss of a match fee or earnings. With the inexorable moves towards professionalism in a range of sporting codes it is therefore timely to reflect on the role of private sporting tribunals as they form part of the growing business of sport.

As a member of the New Zealand Rugby Football Union Disciplinary Committee, I have had some experience from the perspective of the tribunal in the discipline of New Zealand Rugby Union players. Accordingly, I propose to examine the role of a private sporting tribunal from that perspective. I will discuss first the role of private sporting tribunals and their relationships with the courts, and second the procedure and conduct of a hearing before a sporting tribunal.

### **The role**

The role of a private sporting tribunal is to adjudicate upon disputes and impose discipline within the rules or constitution of the organisation concerned.

Tribunals can be called upon to deal with two basic issues. The first relates to administrative matters which deal with the way in which the particular sport is structured and administered, eg rules of competition including eligibility for teams or events. The second issue relates to dealing with persons who have breached the rules of the game.

The rules and procedures of the tribunal can generally be found in the constitution of the sports organisation. The form of the rules and procedures should be appropriate to the

particular sport. For example, you would not expect the disciplinary rules of a bowling or croquet club to be the same as for an organisation whose members are involved in body contact sports such as rugby and rugby league.

However, the basic disciplinary structure used should be the same. The rules should establish the tribunal and provide the jurisdiction for it to deal with complaints and disputes within the particular sport concerned. tribunals must act within the rules and also be sensitive enough to ensure that sporting practices and community standards are compatible.

A tribunal has to strike a balance between providing a prompt, practical and accessible forum for dealing with complaints and disputes and ensuring that the individual “accused” is given a fair hearing and dealt with in accordance with the principles of natural justice.

Traditionally, tribunals have comprised, in the main, lay persons who have not been expected to measure up to the substantive and procedural requirements of the public judicial system. However, at least in the body contact sports, the early procedures typified as “Kangaroo Courts” or “rough justice” have certainly been overhauled in recent years in response to the demands arising from violence on the sports field and to public expectation.

The distinction between the role of the tribunal and the role of the court should be recognised. On occasions both forums may be involved in proceedings which result from the same incident, eg an assault on the field of play. However the two systems are quite distinct and each forum is controlled by different rules. The rules and law in each are established for different purposes. Essentially the tribunal deals with private procedures which have been accepted by the participants as members of the organisation.

However, overseas there have been many examples of players who have indulged in on-field violence ending up in Court as well as having been dealt with by their sporting organisation. Some examples are:

(i) *Rogers v Budgen* (Supreme Court of New South Wales, 14 December 1990, Lee J) in which Steve Rogers, a great international rugby league player, was awarded \$68,000 in damages as a result of a head-high tackle received in a club game (Cronulla) by Mark Budgen (Canterbury-Bankstown). Rogers had his jaw broken, which meant he could not tour England with the Kangaroos, and he also missed a significant part of his Winfield Cup season. He sued Budgen for assault and negligence and also Budgen’s club which was also found liable for the damages.

(ii) *R v Heke* (Supreme Court of Queensland, 6 February 1992). The jury found Heke guilty of manslaughter arising out of an incident which occurred during a subdistrict game of rugby league in Brisbane. A player in the opposing team was injured and subsequently died following a head-high tackle.

(iii) *R v Birkin* (1988) 10 Cr App R(S) 303 and *R v Shervill* (1989) 11 Cr App R(S) 284. In each case soccer players had kicked an opposing player and were convicted on a charge of assault occasioning actual bodily harm. Shervill received a sentence of imprisonment

for eight months which was reduced by the Appeal Court to six months. Birken was sentenced to eight months reduced on appeal to two months.

(iv) *R v Tevaga* [1991] 1 NZLR 296. The Court of Appeal allowed an appeal by Tevaga against his sentence of periodic detention imposed following a conviction for assault during a game of rugby. The Manawatu Rugby Football Union suspended him for eight matches as well. The Court reduced his sentence to one of community service.

(v) *Crichton v Police*, an unreported decision of Tipping J, High Court, Christchurch, AP 32/92. His Honour Mr Justice Tipping upheld the conviction of Crichton, who in a game of rugby league had grabbed an opponent by the testicles causing him considerable pain for some while and an inability to walk properly for a week or so. The act was described by the Judge as being “well outside the range of fair play. It was a deliberate piece of foul play of a particularly unpleasant kind”. His Honour however reduced the term of imprisonment from five to three months.

### **Procedures**

The New Zealand Rugby Football Union has developed a detailed Code of Rules for Disciplinary Hearings, known as the “Black Book”. The initiative was taken because it was apparent from appeals heard by the Disciplinary Committee against decisions of provincial unions, that the standard of documentation was poor. Many administrators were lacking in experience and expertise in dealing with disciplinary matters and there were considerable differences among unions as to the procedures used and the approach taken to the imposition of penalties.

During the period of research and preparation of the Code, it was found that there was little in the way of documented procedures available in rugby either in New Zealand or internationally. The procedures for other sporting codes were in a similar position.

I am pleased to say that generally the Code has been well received throughout rugby circles in New Zealand and overseas. The Code has been amended several times so that it is very comprehensive and easy to understand. While no doubt it is not yet perfect, it does represent a significant improvement for all parties.

As a domestic private body, the procedures of the NZRFU are not as strict as those required in a court of law. The foreword to the Code states that it is “a fundamental principle of our system of justice that anyone charged with an offence shall have a fair hearing before any decision is made”.

In the preface to the Code it states that the procedures have been devised “to ensure that firstly, disciplinary hearings will be conducted expeditiously, fairly and in compliance with the rules of natural justice”.

### **The principle of natural justice**

The rules of “natural justice” give protection to the accused in the following three ways:

- (i) the accused must know the nature of the charge or accusation made;
- (ii) the accused should be given an opportunity to state his or her case; and

(iii) the tribunal must act in good faith.

### 1 *Notification of charge and proceedings*

The first two of these rules mean that the accused must have a proper hearing, which must be conducted within the rules of the organisation. Before an accused can have the opportunity to state his or her case, they must know in advance the details of the actual charge or charges and the rules to which those charges relate.

It is not satisfactory to refer in a general way to the fact that the player has for example “brought the game into disrepute” unless there is some reference to the specific conduct to which such a charge relates.

The accused must be given proper notice of the hearing. The period of notice is often specified in the body’s rules and the details of that notice must be properly complied with. That is: the notice should include a time and place and date for the hearing, and full details of the charge which has been laid. It is not sufficient for one charge to be set out in a notice within the requisite period before a hearing and then for a second charge to be brought to the attention of the accused at the date of hearing.

This situation occurred in the A J Whetton hearing which was the first major test of the public citing provisions in the NZRFU Code. In his case A J Whetton was given notice of the hearing on the basis of one charge and then at the hearing he was told of another separate charge. The hearing proceeded with the consent of Mr Whetton’s lawyer because he was equipped to deal with the new charge, on the spot. However with an unrepresented accused, to proceed with a second charge notified on the day in my opinion would be a clear breach of natural justice.

While tribunals should not become entangled in the nets of legal technicalities and procedure, the importance of ensuring that the accused has adequate notice of the charges brought against him or her is fundamental to the principle of natural justice.

If the period of notice is not given in the rules, what amounts to proper notice will depend upon the circumstances of the particular case. In the Loe case, the incident occurred on a Sunday, notice of the hearing was given on the following Tuesday and the hearing took place the following Thursday. The “Black Book” does not detail a set period. The important point is that tribunals are designed to be prompt but at the same time allowing appropriate time for preparation and therefore a fair hearing.

### 2 *Opportunity to state case*

A further element of natural justice requires that the accused be given an opportunity to state his or her case. This is also known as the right to a fair and proper hearing. The right to a fair hearing requires the tribunal to ensure that the appropriate evidence is before it and that all parties are aware of that evidence.

This means that in any contentious case the referee, touch judge, umpire or judge involved in the game should be present at the hearing. Officials’ reports and medical reports must be made available to the accused, and in a contentious case it is advisable to make them available to the accused in advance of the hearing.



(i) Evidence

The rules of evidence applied in the courts are not necessarily binding on tribunals and there is often no objection to hearsay evidence in its strict sense. The NZRFU Code states “hearsay evidence, that is second-hand accounts of what occurred, and evidence not given at a hearing should not be admitted and not be considered by the Committee in reaching its decision”.

I doubt anyone would argue that a tribunal should be able to take into account evidence which it did not hear. However not everyone would agree with the NZRFU that hearsay evidence should be excluded. For some organisations, such a rule may be considered unduly legalistic. However in a sport which receives a remarkable amount of media coverage, I believe it is prudent not to admit hearsay evidence.

The tribunal must however control the evidence carefully, and give appropriate weight to the evidence put before it. The introduction of video records of an incident has greatly assisted the fact-finding role of tribunals. The traditional evidence of referees’ reports, doctors’ reports and recollections by the player is now readily susceptible to invalidation or validation. Video evidence has been used in the disciplinary hearing of the NSWRL for some time. Richard Conti QC the former Chairman of the NSWRL Judiciary Committee in an address to the 1991 Australian and New Zealand Sports Law Association Conference said:

... experience also demonstrates that video evidence is sometimes inconclusive, or indeed of no value at all, due often to the angle from which the video happened to have been operated, or because of the video’s own range of visionary operation was at least partially obscured.

In these circumstances the weight of the video evidence must be assessed in line with all the other evidence before the tribunal. The “Black Book” contains rules relating to the use of videotape evidence. Such evidence has been the basis for complaints from members of the public to the NZRFU Disciplinary Committee arising out of incidents of alleged foul play which have not been observed by the referee or linesperson during the match.

(ii) Cross-examination

Another aspect of the right to a fair hearing may include the right of cross-examination. The Court of Appeal in *Perry v Feilding Club Incorporation* [1929] NZLR 529 found that the fact that a club member whose conduct was being investigated was denied an opportunity of cross-examining witnesses was not a breach of the natural justice principle.

However the right to ask questions of witnesses may be made available. In the “Black Book” questions through the Chairman are allowed and with the increased number of accused with legal representation this has certainly been permitted.

(iii) Legal representation

A further aspect of the right to a fair hearing is the question of whether the accused may be legally represented. In some organisations this may be a requirement in the rules, and in others not mentioned at all. The Courts have generally concluded that where a case

concerns a matter of a person's livelihood and the person charged is inexperienced, a tribunal exercising its discretion will usually be wise to accede to representation. The "Black Book" provides for representation by legal counsel as a right. This right is increasingly being exercised even by players at club level.

(iv) Reasons for decision

It has been contended that it is a principle of natural justice that the accused be given reasons for the decision made by the tribunal.

While this may not, in a strict sense, affect the fair hearing, I believe it is an important part of the whole process. The "Black Book" requires brief reasons to be given initially and a written report must be given to the defendant within 48 hours of the decision.

### 3 *Unbiased tribunal*

The final requirement for compliance with the principle of natural justice is the right to an unbiased tribunal. Members of a tribunal must enter into a hearing with an open mind and without predetermined views or with a bias. It would be improper, for example, for an adjudicator to be the person who made the complaint or to give evidence in the proceedings. The body must be independent from the incident and the people involved, and each member must honestly be able to say that they have given the matter an objective assessment.

The "Black Book" has rules specifically prohibiting a member of any Disciplinary Committee from taking part in a case if they are a member of the same club or province as the player in the hearing.

The NZRFU decided in August last year to give its Disciplinary and Appeals Committee the power to co-opt persons with judicial/legal backgrounds. That decision was unable to be implemented until this year's AGM.

I believe the Richard Loe case has shown the wisdom in future of having such independent and trained persons available for the hearing of contentious cases involving high profile players.

As stated previously, Disciplinary Committees are generally made up of lay persons, although on occasions a local lawyer involved in the sport will serve on such committees. Lord Denning, referring to private tribunals, observed in *Enderby Town Football Club v Football Association Ltd* [1971] Ch 591:

Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise and it is all part of the proper regulation of the game.

With great respect to Lord Denning I believe that this statement has become outdated. Good lawyers are increasingly appearing on behalf of players. Lawyers citing the Bill of Rights Act 1990 can make the determination of judicial matters by a lay person very difficult. Therefore, I believe it is important for Disciplinary Committees to have the

expertise and experience of lawyers available as independent committee members in contentious and high profile cases.

### **Conclusion**

In summary, it is the role of the tribunal to ensure that the principles of natural justice are complied with. Failure to do so may result in the accused seeking judicial review of the decision. This undermines the purpose of the tribunal in the sense that at the heart of its rules is the desire to allow individuals to enjoy a particular sport.

The growth of sport as a business means that sports organisations need to set up the appropriate bodies to determine disciplinary matters in an environment where justice can be done. The tribunals then need to ensure that the principles of natural justice are complied with so that any disciplinary action is able to be implemented quickly, and is of a form which is appropriate to the specific sport. The ultimate role of the tribunal is to ensure that the practice of the particular game or pastime can continue in an appropriate and proper manner.

## 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.

## Protecting the Commercial Interests of Sportspeople

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The mere fact that we are today discussing this topic indicates the distance that sport has come in New Zealand over the past few years. It is often quoted that in societal attitudes and activities, New Zealand is at least ten years behind the Northern Hemisphere and, in sport, that has been no exception. Partly that has been due to the overwhelming amateur ethic that has prevailed in sport in this country, partly it has been because funds to support sport have been limited. In more recent times, however, New Zealand has made strides to catch up with the way in which sport operates in the wider world and the benefits to sportspeople have increased. Greater protection has therefore become important.

The sports market has exploded in the past 15–20 years and is still exploding. It is true that millions still play for fun. Under the rules of many international sports bodies, “earnings” or “winnings” for competitors go into trust funds, supposedly. The Olympic Games are still “amateur” in that they offer no fees nor prize moneys. But the competitors are not. In all sports, anywhere near the top, such phrases are whitewash. Few even bother to use them, except perhaps in rugby and then, maybe, only its administrators. The Olympic motto “*citius, altius, fortius*” is meant for athletes. It applies still better to the flow of money around them. And why should the competitors not benefit? We must remember the sporting lives or careers of most sports people are limited and their opportunities for gain from their undoubted skills are therefore similarly limited. It is important therefore in their interests for that gain to be turned to as many dollars as possible.

Loosely speaking, we can say that the western world is based on a system of work for reward. Money is the normal recompense and there is no longer justification for the view that sport is special and different from other vocations. Long has it been argued that its physical, mental and, perhaps even spiritual rewards were all important and that financial returns for participants would take and undermine sport’s intrinsic goodness and values.

This “amateur ethic” has been defended vigorously by some sports, in particular against the wave of commercialism and professionalism. But if talent can usually demand a fee, why is a sportsman or woman treated any differently? Some of the bitterest arguments in sport lie in the amateur/professional discussion and New Zealand has certainly been to the fore in that arena. Only now in the rugby world is there a debate again festering as to “payments” for players representing South African provinces.

The Hillary Commission recently commissioned a report on the business of sport and leisure in New Zealand. The study was undertaken because although sport, fitness and leisure have played a major role in the lives of most New Zealanders, it had never before been measured in terms of its social and economic outcomes. The report revealed that

investment in sport and leisure pays a double dividend, “it is an investment both in the economy and in the well-being of New Zealanders”. The findings included:

- (i) Sport and leisure is a \$4.5 million-a-day business.
- (ii) New Zealand’s sport and leisure industry supports 22,745 jobs.
- (iii) Sport and leisure pays \$300 million a year in taxes.
- (iv) Sport and leisure directly and indirectly contributes \$1,648 million to New Zealand’s gross domestic product.
- (v) Tourism generated by sport and leisure contributed \$210 million and supported 4,013 jobs in 1991.
- (vi) Sport and leisure benefits from \$200 million of free volunteer effort every year.
- (vii) Membership of sport and leisure organisations totals 1.4 million people.

So sport is a big business now in New Zealand. Sport and money are now married or, at least, living together. Their union may be still regarded as an uneasy one with the two partners striving to protect separate codes, interests and priorities. Sports business is a complex mix of activities and enterprises. With the financial opportunities that sport has provided for the entrepreneurs of the world there are very interesting people that the sportsperson must deal with in his or her business. The list is long—agents, coaches, managers, public relations consultants, promoters, manufacturers, sponsors of all kinds, clubs, associations, national sports bodies, the media and many others. It is important for the sportsperson entering into this business world to be properly and carefully advised.

The job of the sports lawyer is to give that careful advice, to remain professional, a lawyer not an agent and to provide the legal guidance required by sportspeople to appropriately benefit from their business. Today in New Zealand there are individual sports stars who can earn substantial incomes from playing sport. It is important when looking at the range of those individuals and those others in the sports business to understand several distinctions—that between amateur and professional, as it still exists or tries to exist for instance in the world of rugby union and athletics, the distinction between team sports and individual sports, and the differences encountered by individuals who belong to clubs or organisations where there are international rules, national rules, and local rules relating to their sports.

To return to the topic of protecting the commercial interests of sportspeople in New Zealand it is important that the lawyer representing such individuals has a full and working knowledge of the sporting code in which that individual participates, or competes, the constitution and rules pertaining to that code on an international and national, and sometimes local level, the rules relating to the competition in which the individual may be participating, and the contracts that that individual might already be a party to, or the contracts that the association to which he or she is affiliated might already be a party to. The background information can be vital and should not be ignored.

Already we are entering into an age where sponsorship contracts are providing disputes because an individual might have a different sponsorship contract from the one later entered into by his or her team. In that respect there was a recent dispute that the Cronulla Sutherland rugby league team in Sydney and their new team sponsor “Reebok” had with

one of its star players, Andrew Ettinghausen, who had a separate boot and clothing contract with another sporting manufacturer.

There are several areas of commercial protection that lawyers should be alerted to when representing sportspeople. Generally speaking, there is no different law or legal concepts which apply to sportspeople as opposed to others, and as a basic premise one should not have to adopt any different stance when representing sports stars as opposed to any other client. It is the high profile of the sports star, the personality politics that come to the fore in New Zealand in sport, the major attention the media pay to our sports stars, and perhaps even the involvement in an area of law which provides novelty and enjoyment which has created a higher interest in the work.

There are a number of areas in which the lawyer can give proper and appropriate advice to a sportsperson and thereby protect commercial interests. They include any contact the sportsperson has with business, the operations of the sports and in particular from my experience:

- (i) sponsorship contracts
- (ii) endorsement contracts
- (iii) player contracts
- (iv) team contracts
- (v) taxation advice
- (vi) advice in relation to disciplinary issues
- (vii) advice in relation to the general rules of competition.

### **Sponsorship and endorsements**

It is vital for a sportsperson to be aware of reasons apart from money for involving themselves in sponsorship or endorsement deals. They must focus on the reputation and integrity they enjoy and the way in which that will be enhanced by linking with some product or goods. Does the endorsement suit the individual? Is there a conflict with any other endorsement? Does it suit the sportsperson's image? Will the endorsement preclude any involvement in any event or any other future endorsement or sponsorship? Are there any restraints imposed by the body to which the individual is a member?

In dealing with sponsorship and endorsement there is a major sub-issue relating to "agents". In the United States of America there have been several major contract disputes between sportsperson and agent, notable are those involving Kareem Abdul-Jabbar and Eric Dickerson. Also prominent in terms of agent disputes was the change made by Stefan Edberg from one agent to another only a few years ago. Lawyers in this country are not agents and should be wary of participating as such. They should however have a working knowledge of the agents who participate in sport in New Zealand, the contracts which they ask individuals to sign, and the terms and conditions of such contracts.

Few people in sport have to take such a hammering as sports agents, although their main crime appears to be to make more money for their clients and take a large commission for themselves. One of the more major complaints in relation to agents is that they wear more

than one hat and thereby create conflicts of interest. For example, IMG is often criticized in the tennis world for owning tournaments, and owning the players who participate in such tournaments. A similar criticism has been made in relation to IMG golf tournaments. There are some well known sports agents in New Zealand and, certainly, their contribution to the business of sport has been very useful and has assisted in advancing sport fairly and squarely into the 20th century. But the sportsperson should be wary of throwing his or her lot in with an agent without having a very complete agreement.

The key for the protection of the commercial interests of the sportsperson is that the agency contract must be clear and plain. There are many examples of contracts going wrong, one of the most famous being the Kevin Keegan case in the UK when he sued his former public relations and promotion company shortly after the 1982 World Soccer Cup.

One key issue went to the heart of the case. Keegan admitted in evidence that he had wrongly believed a written agreement for five years lasted for only three. He lost (*Public Eye Enterprises Ltd v Keegan* (1982) *The Times* 28 October 1982).

Of course, the agent can only succeed for the sportsperson if there is a market. The best agent can make few bricks when there is not much straw. For example, the England 1990 World Cup footballers earned about £30,000 per player from commercial activities and their 1992 cricket equivalents only £4,000.

In endorsement or sponsorship contracts, the lawyer should be alerted to fine detail. It is better included to prevent later misunderstandings. This comment is made although the prevalence in New Zealand is for simple documentation and often non-legal style documents, such as the exchanging of letters. It is perhaps indicative of the amateur ethic and the urge to be non-legal which still prevails. This should be moved to the more professional approach to ensure that the athlete is properly protected.

In endorsement contracts, one should be extremely careful to ensure that the sportsperson is, in fact, going to be portrayed in the way that he or she anticipates. It is often useful to include terms relating to photograph approval, use of name approval, and even some editorial content approval before final documentation is achieved. In conducting sponsorship deals for individuals, one needs to be extremely wary of the prevailing sponsorship deals already reached by his or her association, club or team to ensure there is no conflict.

In the area of endorsements, there are still signs of innocence in the New Zealand market. The range of activities in which a sportsperson could be involved range from cameo roles in commercials at one extreme, to the position where the sportsperson acts as a spokesperson for the company's products. In between are a wide range of opportunities for the sportsperson including:

- (a) tools of trade endorsements;
- (b) tools of trade licensing;
- (c) non-tools of trade endorsements;
- (d) non-tools of trade licensing; and
- (e) group endorsements.



In addition there are other sources of marketing or commercial opportunities for sportspersons such as club and resort affiliations, corporate spokespersons, instructional books and videos, in addition to a greater availability of name product and royalty arrangements, especially in tool of trade type endorsements.

Robert Dowling, former editor of *Sports Marketing News*, gave the following advice on athletes' endorsements:

- (a) individual sports are more popular for endorsement than team sports, golf and tennis being the most popular;
- (b) corporate advertisers prefer to equate their images with individual winners rather than team sport winners;
- (c) winning with style is important to corporate advertisers;
- (d) athletes turn down many endorsements. They either don't believe in the products or they don't want to become overexposed;
- (e) protecting the integrity, name and long term value of the athlete's personality is important;
- (f) it is important not to over-expose the athlete in an endorsement sense. The agent should not be giving the player away, monetarily;
- (g) successful athlete endorsers should earn three times off the field what they earn on the field;
- (h) protect your athlete from over-saturation.

There are key contract provisions in relation to endorsement contracts including, it is suggested:

- (i) **The endorsed products:** any loose definition of endorsed products may result in a wider agreement than required and, thereby, preclude competitive endorsements with other companies. This is obvious in the area of sporting goods.
- (ii) **Contract territory:** this is particularly vital in the realm of international sport when sportspeople are, in fact, competing in many countries around the world. The obvious benefits in having a product endorsement with a company that operates internationally become clear. On the other hand, it is also clear that should a company not operate internationally, then perhaps the endorsement of it should be limited to the country in which it does operate.
- (iii) **Warranties and grants of right:** as mentioned above, it is important that the rights given by the athlete are expressed fully. For example, the right to use the name, nickname, initials, autograph, signature, photograph and the like should be spelled out. Normally there is a requirement relating to exclusivity in relation to the use of the sportsperson's endorsement in relation to the advertising of the product.
- (iv) **Promotional appearances and activities:** it is important for these to be spelled out carefully rather than too generally. There needs to be consideration of reimbursement of out-of-pocket expenses and a restriction on scheduling so that the appearances required do not conflict with the sportsperson's performance or his obligations as a player.

- (v) **Right of approval to promotional material:** there are two matters which arise in this category. One relates to the sportsperson's need to test the equipment that he or she is endorsing, and the other is to approve of the way in which the endorsement is conveyed whether it be by way of advertisement or otherwise.
- (vi) **Compensation:** no need to expand further.
- (vii) **Increase or reduction in compensation:** this clause is important in case there is failure by the athlete to be selected in a certain team, the failure by an athlete to compete and the like.
- (viii) **Bonuses:** are there to be bonuses for performance in the sports sense? This is often used, for instance, in tennis players' endorsement contracts.
- (ix) **Inducement:** is there to be a signing-on fee which may be categorized as a capital payment and, therefore, have tax advantages?
- (x) **In kind compensation:** are there to be such contra deals?
- (xi) **Term of the contract:** this is vital and should be explicit, perhaps with the option clauses as are normally contained in any commercial contract.
- (xii) **Termination of contract;**
- (xiii) **Conduct clauses;**
- (xiv) **Morality and drug use clauses;**
- (xv) **Indemnity and insurance matters;**
- (xvi) **Dispute resolution clause.**

### **Player contracts**

There are obviously two sides to this coin. If one is representing the individual, then there needs to be some care to ensure that some commercial benefits that might otherwise accrue to a player are not eroded by stern or strict clauses in the playing contract. This is an area of negotiation but includes such areas as the ability to participate in any sponsorship deals which conflict with the team's sponsors, bonus fees, clauses which deal with conduct or misconduct, morality or drug use clauses and, of course, termination clauses. In New Zealand, of course, the Employment Contracts Act 1991 means that one must be very careful to determine whether the sportsperson is an employee or an independent contractor, and the implications relating to all issues such as accident compensation, tax and the like are obvious and need not be expounded within this paper.

Similar issues arise in relation to team contracts.

In the Federal Court of Australia in *Honey v Australian Airlines* (1989-1990) 18 IPR 185, the Court held that Gary Honey, the well-known Australian long jumper, could not prevent Australian Airlines and a publishing company from publishing a photograph of him on posters and on the cover of a religious book and magazine. The Court reasoned that the poster did not constitute a representation that Australian Airlines was connected with Gary Honey, that it was permitted or licensed by him in respect of his name and photograph, that its services were sponsored or approved by him or that it was sponsored, approved by or affiliated with Gary Honey. The Court regarded the poster as merely a

piece of artwork supporting participation and excellence in sport, and one that did not represent any connection between the parties. Honey therefore failed to show that the Australian Trade Practices Act 1974 (the equivalent New Zealand provisions being ss 9 and 13(e) and (f) of the Fair Trading Act 1986) had been contravened.

Honey also claimed that without his permission, Australian Airlines and the publishers had exploited his name and identity and that this constituted passing-off. Unfortunately, he failed, the Court saying that he had failed to establish that a reasonably significant number of persons seeing the poster, the magazine or the book would draw or be likely to draw from them the message that Honey had given his endorsement in some way. That seems to be a strange result, but, at present, represents the state of the law in Australia.

Clearly in New Zealand one would need to take particular care if representing any sportsperson to ensure that a similar disaster did not occur. Without commenting on the likely path a New Zealand Court would take it is easy to say that a sportsperson has at present much to lose. The Fair Trading Act in New Zealand is a vehicle that all sports lawyers should be familiar with.

### **Taxation**

This paper has not been written by a taxation expert. It would be wrong however to ignore the area. Below are simple reminders of two or three areas in which taxation matters are vital.

There are occasions in which payments to sportspersons can be regarded as capital payments and therefore not liable for taxation. In this category fall inducement payments, bonus payments, and perhaps benefit payments. Cases in this area include *Jarrold v Boustead* [1964] 3 All ER 76, where an inducement fee to a player to turn to rugby league from rugby union was treated as a capital payment and therefore not subject to income tax. In *Commissioner of Taxation v Woite* (1982) 31 SASR 223, where a football player was made a payment of \$10,000 by the North Melbourne Football Team not to play for any other club, the payment was also regarded by the Court as capital payment. Finally, the bonus payments made to the English Soccer Team in 1966, following their victory in the World Soccer Cup were also regarded as capital payments and therefore not subject to taxation.

A second part of the taxation syndrome in New Zealand is the GST factor and yet a third relates to the individual's tax status. Some international sportspersons are not New Zealanders for taxation purposes. Care must be taken when asking those who compete overseas for much of their income—golfers and tennis players are obvious candidates.

### **Disciplinary matters**

It is very important when acting for any sportsperson in a disciplinary issue to realize the impact that mandatory disqualification, suspension or the like will have on that person's business. The example that the Richard Loe saga sets in that respect needs no amplification. When acting for an individual in such a circumstance it is suggested that one must not only have regard to the playing implications of any disqualification or suspension but must also very carefully consider the results upon business matters. The reason that this

head is raised within the paper as being yet another impact upon a sportsperson's livelihood is exemplified in the case of Martin Vinnicombe in Australia. Vinnicombe was banned from competing in cycling events as a result of a positive drug test taken in Canada under the auspices of the Australian Sports Drug Agency. Litigation has ensued as a result of Vinnicombe's contention that the correct procedures were not followed and huge damages have been claimed by Vinnicombe against a number of sporting organizations as a result of his ban. He claims that the disciplinary action that resulted has prevented him from earning money he would otherwise have earned as a cyclist, and if the ban was defective because the drug test had not been taken properly then he was entitled to sue for the resultant loss of income. A better message could not be sent to all sporting organisations in this country.

Restraint of trade is a topic which has filled many previous articles and has been the subject of two important cases in New Zealand, namely *Blackler v The New Zealand Rugby Football League* [1968] NZLR 547 (CA), and *Kemp v The New Zealand Rugby Football League* [1989] 3 NZLR 463. It is not intended to go into this area at any depth within this paper, but it is useful to be fully aware of restraint matters which could arise following disciplinary hearings.

One must be very careful to ensure that disciplinary proceedings are conducted properly bearing in mind the rules of natural justice and the like and that action when taken, is done according to the rules of the sporting code. If a player is restrained improperly or illegally then sporting bodies might expect claims for big damages.

In addition all sporting organizations should look carefully at their rules, constitutions or by-laws which affect players and the ability that sportspersons have to compete in that code. Quite clearly in New Zealand a number of sports have rules or constitutions which were formulated in the earlier part of this century. They are now much outmoded and require not piecemeal amendments but wholesale changes to ensure the code is meeting with the needs of the sport at this time. There are many sports which have not moved with the times and which would currently leave themselves open to claims such as restraint of trade if their rules or constitutions are not amended. Change has occurred rapidly in society, and sport is moving with such change in this country but still at a slower rate. The sooner this is realised the sooner the interests of the sportspersons will be better protected. Further, sports organizations will be alert to the fact that with the increased business nature of sport, the awareness of the need to be professional and legal, the chances of being wrong and being sued are multiplying. It is in the interests of all sportspersons that certainty is achieved in business arrangements and that disputes are minimised.

## **Conclusion**

The two languages of sport and business have not always merged. At the local level, sport remains the corner shop, run by the family. When it gets bigger it becomes a self-help co-operative staffed by volunteers. It has got bigger still now and must be seen as the high-rise department store run by professionals. As Bob Dylan said, "money doesn't talk, it swears". Sport and business are inextricably entwined and the need for professional assistance is obvious. Sporting individuals must be given high quality high class professional advice to ensure that their limited life at the top is properly compensated.







