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 Hickeringill* 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 préparatoir 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 spectaculars 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 étreint.

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*".