

# SPORT AND THE LAW: A GUIDE TO RECENT DEVELOPMENTS

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More legal cases appear in the sports pages than elsewhere in the daily press. A detailed study of articles in the *Age* between October 1984 and July 1985 revealed that on average there were about three articles a day on the sports pages which had reference to the law or legal issues. This article utilises the material studied to provide an overview of recent developments in the relationship between sport and the law and offers some personal comments on the situation.

## CRIMINAL LAW (Except Assault)

Crimes, other than assault, have involved conspiracy, soliciting and drug offences. The most significant recent incident as regards conspiracy (which invariably affects the *racing* industry) was the *Fine Cotton* case in Queensland. The essence of conspiracy is that two or more people conspire together to commit a crime. In this case, four men charged with having conspired to defraud the Queensland Turf Club chairman and others of money, by falsely pretending that the horse, *Bold Personality*, was in fact the horse, *Fine Cotton*. There was an enquiry, and ultimately the defendants were committed for trial on those counts. A similar case involved four men who substituted a much superior horse called *Nordica* in place of one called *Foden* at Broken Hill in the last race of a meeting at St. Patrick's Race Club. *Nordica* went on to win the last race, and \$55,000 for its backers. After an enquiry, the men were charged at the Broken Hill District Court. The jury of 11 (one fell ill) found two of the accused guilty, acquitted one, and could not make up its mind about the fourth. A jury is not permitted to know of any previous convictions of the accused (unless the accused puts his good character in evidence). It turned out that one of the conspirators had been guilty of a previous offence in 1972. He was sentenced to two and a half years' jail and his co-conspirators ordered to carry out 300 hours of community service.

What is disturbing is that the papers tend to cover sporting

disputes such as these in enormous, and not always accurate, detail while the matter is *sub judice*. How is it possible to find an unbiased jury in cases such as these? The Chamberlain and Murphy cases have brought to the fore criticisms of the jury system, and one of these criticisms relates to this problem. The time has come, it seems to me, to consider whether the jury is an overrated institution, as Dostoevsky thought it was.<sup>2</sup> I would be much more confident that a judge alone would be able to distinguish between the *evidence presented* on the one hand and *his own knowledge*, gained by extra-judicial reading.

A most interesting American criminal case involving a sportsman was that of a black athlete, Edwin Moses, who was charged with soliciting, i.e., seeking illicit sex. In fact, he was framed in Los Angeles by a policewoman simulating a prostitute. He allegedly offered her \$100 for oral and ordinary sex. He was ultimately acquitted. But what a Pyrrhic victory! He would have been liable to pay a maximum \$1000 fine if he had been convicted. As it was, his legal fees amounted to \$100,000. But that was not all. Acting on the principle, "No smoke without fire", some seven or eight companies, including 7-11 and Coca Cola, cancelled negotiations for endorsements and he lost these lucrative contracts.

What can sportsmen do in such circumstances? If there is already a contract, it will invariably contain a clause requiring the sportsman to behave himself in a way that benefits the products. It is not clear from the newspaper reports whether the sponsors claimed that simply to be accused of a crime was a breach of such a term. This might be arguable. In any case, there is no remedy if no contract has been concluded. A possible remedy is the tort action of *malicious prosecution* against the Police, but it is very difficult to prove malice. Really a sportman with a lucrative contract must behave like Caesar's wife. This is also exemplified by the much publicized Botham cannabis case, which does not seem to have any special interest for sportsmen, except to accentuate the point that otherwise routine legal cases will become *causes celebres* if famous sportsmen are involved.

#### ASSAULTS (Criminal and Civil)

Laypersons are often unsure of the difference between a tort

and a crime. A crime is a wrong against society and hence *punishable*, whereas a tort is a civil wrong, for which a person may be sued and is liable to pay *compensation* or damages. So is an assault a tort or crime? The answer is, it is both. The assault is the threat or raising of an apprehension of a battery i.e., you can commit an assault without touching a person. The battery is the actual use of wrongful force. So a sportsman who uses wrongful force can be both prosecuted in a criminal court and sued for damages in a civil court.

In an incredible brawl, the ball nowhere in sight, during an Australian Rules match between Hawthorn and Geelong, Neville Bruns of Geelong suffered two broken bones in his jaw. He gave nearly as good as he got, apparently, for Leight Matthews, his assailant, finished up with a broken nose and concussion! At all events the football world in Victoria was startled when the police pre-empted any action by the V.F.L. by prosecuting Matthews. There was an outcry in the press. Sports editors thundered that the law had nothing to do with sport. There was also an article in which an anonymous Queen's Counsel opined that the sporting authorities could deal with these matters better than the courts. In any case, he said, boxers committed assaults every time they went into the ring. The law would be brought into contempt if boxers could be sued. Well, certainly the Queen's Counsel who arrived at that conclusion had not read the recent English case, *Condon v Bari* [1985] 2 All E.R. 453. Nor had he read McInerney J. 's judgment in *Pallante v Stadiums Pty. Ltd.* [1976] V.R. 331. These cases leave no doubt that a sportsman can be both sued and prosecuted for a wilful or even a reckless assault, outside the rules of the game. The analogy with boxing is patently false, for a boxer impliedly consents to physical blows within the Queensberry or other rules.

Moreover, it is right that the police prosecuted Matthews. They showed much wisdom. And why? Well, the answer was forcibly provided in *The Age's* next issue, when it was reported that in a junior football game in Frankston, three boys were taken to hospital after a brawl, one of them with a fractured skull. The children of today are entitled to a better example than that set by some of their idols in the Hawthorn-Geelong game.

The law is perfectly set out in a recent article by an English barrister, sportsman and author, Edward Grayson Q.C. - who writes, a propos *Condon's* case.

It emphasizes for law breakers in games on the field of play, in boardrooms and committee and dressing rooms that the great God sport with its hero-worshipping hysteria has never been above the law of the land. The sooner this is recognized then the world of sport will once more set a proper example to the community and especially to its idolizing younger generation which the traditional ideals of *mens sana in corpore sano* used to portray.<sup>3</sup>

There are some other recent sporting cases reported in *The Age* involving civil suits for assaults. Andrew Smith, a Collingwood defender, suffered a blow to the head, a broken jaw, facial swelling and numbness, malocclusion, loss of a wisdom tooth, concussion, shock, pain and suffering, all in the name of sport. He was reported to be suing his professional colleague who inflicted these terrible injuries - for \$100,000. It was reported that this sum included a claim for exemplary damages. It is hard to understand the basis on which to justify these, which are punitive in character and granted usually only in a limited number of torts, not including assault. One of the irritating aspects of sports reporting of law is that often there is no follow-up to intriguing information and I have not been able to ascertain the result of this case.

#### NEGLIGENCE (including Vicarious Liability)

This is the most common tort. It requires no deliberate misconduct, only that the defendant failed to carry out a duty of care to someone who he could reasonably foresee would be injured by this failure. One might think that such errors of judgment on the sporting arena would not be actionable, but that would be wrong.

There is a huge potential liability in negligence in respect of two great soccer tragedies reported in the last year, one in Bradford, and other in Brussels. Sporting promoters and administrators must be clearly apprised of the fact that they owe a duty of care to spectators. The duty is quite high, though not an absolute one. Spectators at a motor-race in 1933 were held to consent to some risk of injury. (*Hall v Brooklands Racing Club* [1933] 1 K.B. 205). But spectators at a football match do not consent to be burnt to

death. I suspect that *Hall v Brooklands Racing Club* might be decided differently today if inadequate precautions for spectators had been taken. It may even be that a club would be liable for failing to prevent a riot if this were reasonably foreseeable. If there were a ban on spectators bringing alcohol into a ground, and this were inadequately policed, the club might be liable to a spectator injured as a result of alcohol-induced behaviour!

Several cases in *The Age* concern jockeys. They show how *participants* can also sue for negligence. Thus, in July 1985, a jockey sued his former employer for damages resulting from a fall. He claimed that a fellow-employee had been negligent in saddling the horse. This is an example of *vicarious* liability. Several other jockeys also reported injured in falls may well be looking for someone to sue. It appears from one report that jockeys are often inadequately covered by insurance, especially while racing interstate.

A fascinating potential negligence case seems to be under consideration in Queensland. The Queensland Trotting Club conducted dope tests which, it appears, were found to be faulty. Some horses were disqualified. The owners and trainers were reported to be contemplating a massive legal action against the testers, and presumably the club. The potential for liability is enormous, and, although it may be hard to quantify the damages, this of itself would not prevent a suit.

## NUISANCE

Can you *stop* a club from continuing a sport which might cause damage? An injunction might be sought to prevent it, if it amounts to a legal "nuisance". A delicate judicial wisdom is needed in all cases involving possible or actual damages - to sustain a balance between recreational interest and private proprietary interest. Some sports feature in applications by neighbours for *injunctions*, to stop an alleged public nuisance, such as cricket and golf. On the whole the sports have won the day.<sup>4</sup>

## DEFAMATION

The law of defamation is divided into libel and slander. Most people think that the difference between them is that libel is

written, slander is spoken. This is wrong. A broadcast, though spoken, is libellous. The true distinction is that libel is in permanent, slander is transient, form.

Sportsmen clearly cannot rush into the courts every time a journalist says something unpleasant about them for there are defences to defamation including truth (a defence in some, but not all, Australian States), fair comment, and qualified privilege. An apology may either reduce damages or even in some cases defeat the action, but the apology has to be sincere and well publicized. The most spectacular recent action as regards this tort is that involving Clive Lloyd, the captain of the West Indian team which, it was suggested by a journalist, deliberately lost a game in a Triangular One-Day tournament in order to allow Australia into the Finals. Originally all the West Indian players sued, but eventually only Lloyd pressed the action in New South Wales. He won, a jury awarding him \$100,000. But he lost on appeal. A further appeal has been brought to the Judicial Committee of the Privy Council, a court which sits in London. Most Australians would have thought that appeals to this court had been abolished. But there is a small residue of cases which can still be brought on appeal from State courts.<sup>5</sup>

Other sporting defamation actions have included the case involving Evonne Cawley, who sued for the vicious remark that she had done nothing for aborigines.<sup>6</sup> Jeff Thomson also brought a defamation case.<sup>7</sup> He brought it under the Trade Practices Act, alleging that the unfair comments were misleading and deceptive within the meaning of that legislation. He won, but this Act has been amended, so as to prevent its use in this way. Another interesting case involved a Sydney first grade Rugby player named Bond who sued Mirror Newspapers for an imputation that he was so fat and slow that he could not play properly in his position.<sup>8</sup> The jury thought that that was not defamatory!

#### APARTHEID

An issue which was productive of much legal or quasi-legal activity during the last year was sporting contact with South Africa. Two cases reached the courts. One concerned the New Zealand All Black Rugby tour, the other the rebel Australians' cricket tour.

Neither has been well reported in the Press, and I am particularly mystified by the New Zealand case, where two solicitors sought an injunction restraining the New Zealand Rugby Association from allowing the tour. The first difficulty, I should have thought, was that of *Locus Standi*. What special interest did these two gentlemen have that entitled them to invoke the law? At any rate they appear to have lost initially, but then they seem to have changed their attack, by claiming that the tour was in breach of one of the objects of the Rugby Association's constitution viz., to foster harmony amongst rugby players. It sounds a very spurious argument to me. But they won, and the tour was cancelled. I shall be intrigued to read the reasons why in the Law Reports.

In the other case the Australian Cricket Board brought an action in the Victorian courts against several players who were under contract with them. After some jurisdictional issues had been dealt with in favour of the Board, the case reached the Victorian Supreme Court, only to be settled on the day of the hearing. The terms of the settlement appeared to the confused public as quite strange, especially as both sides claimed a victory. I strongly suspect that the A.C.B. had a weak case. They could huff and puff all they liked but a court will never grant specific performance of a contract for personal services. That would be tantamount to slavery. The A.C.B., however, were entitled to sue the players for damages for the *breach* of their contracts. But what damages had the A.C.B. suffered? So Hughes and the other cricketers were allowed to go to South Africa though the contracts are valid, according to Mr. David Richards, the Secretary of the A.C.B. They may well be so. They seem to be valid but unenforceable!<sup>9</sup>

A way round the inability to obtain specific performance of a contract for personal service is to seek an injunction restraining a person from breaking a term. If the contract is not in restraint of trade, then the effect of such an injunction is to say: "Well, we can't force you to play for us, but we can stop you playing cricket for anyone else. You can, of course, earn your living selling insurance, or washing cars, but you won't be permitted to play cricket for anyone else!" It is not clear whether that was pleaded by the A.C.B. nor am I sure whether the Board invoked the *tort* of inducing another to break a contract. What, it seemed, pleased the

A.C.B. was that the restraining clauses in their contract, unlike those in the famous *Greig V Insole* case ([1977] 3ALL ER 449), were not declared invalid. But that is also enigmatic joy, for so far as I could glean, this point was not argued in court. Neither the doctrine of *res judicata*, nor indeed that of *judicial precedent*, can apply to a *settlement* by consent as opposed to a judgment of court.

## CONTRACT

An area of law which is becoming highly relevant to sportsmen is that of the law of contract. Two types of contract are particularly significant: employment and sponsorship. The high relevance of this law is illustrated by the fact that in the period studied at least eighteen major sponsorship deals were reported. Moreover, sporting bodies are subject to "take-overs", as shown by Dr. Edlestons's purchase of the Sydney Swans. It need hardly be said that the issues considered here take on dramatic proportions when private ownership of sporting clubs is sanctioned. This is an area where lawyers have a positive role, not the "negative" one of sorting out affairs when things have gone wrong. The lawyer who drafts a contract must be aware of all the possible ramifications of it, especially what will happen if the other contracting party reneges on it. There have been some reported recent instances of breach of contract or at least interpretation of sporting contracts. The Moses case is one, perhaps. The World Series Cricket cases are another type. The emergence of the sportsman's and the sporting club lawyer is largely connected with this role.

Particular important questions are raised by the restraint of trade doctrine, are applied to professional sport. The Trade Practices Act 1974 is particularly relevant, following the spate of reported cases involving the West Australian footballer, Adamson. The Courts are hostile to restraints such as zoning and transfer restrictions, as shown by several cases, especially the *Foschini* case.<sup>10</sup> Tax aspects are important too, and so are questions of workers' compensation, insurance and superannuation.

## ADMINISTRATIVE LAW

Administrative law is a nebulous term covering a multitude of rights and duties. Essentially it is that which is administered in non-curial tribunals or other bodies, i.e., outside the courts.

Clearly sporting clubs and bodies will have to deal with Town Planning applications, etc., for extension of premises, installation of lights, etc. *The Age* has reported the saga of two spectacular grandiose schemes in the period covered - the lights on the Melbourne Cricket Ground and the proposed new Synthetic Tennis Stadium to replace Kooyong as the venue of the Australian Open. But sporting clubs make many applications for extensions of their facilities, and knowledge of this branch of law is imperative for the lawyer advising clubs.

An even more important area of administrative law is that of the powers of clubs or sporting associations to discipline miscreants. Indeed, every major decision taken by a committee of a club is a potential administrative law issue. Committees must act in a judicious, if not judicial, way. Essentially, this means that proper procedures, such as notice, minutes and the correct method of voting must be observed. Moreover, if any government money supports a club, it has the potential to be a *prescribed authority* within the Freedom of Information Acts, and so is liable to produce its documents to aggrieved persons. Even if not within the Act, it may be ordered to reveal its relevant documentation by a court. Most importantly, it must normally apply rules of *natural justice*. If it does not, its decisions can be subjected to review by the courts. This is particularly crucial to Tribunals called upon to adjudicate on the conduct of players. Some of the reported instances, however, lamentably bespeak of rough justice handed out by Kangaroo courts. Now one of the footballers suspended, one Krakouer, had the temerity (as viewed by the Victorian Football League) to take the matter to the Supreme Court of Victoria. As the case was initially reported in *The Age*, he seemed to have two grounds for complaint. First he was not permitted legal representation and, second, an official of the Victorian Football League with some sympathies for a rival club, was present, and so might have influenced the decision of what should be an independent tribunal. He sought an interim injunction permitting him to play temporarily until his case could be heard. O'Bryan J. refused this injunction, commenting that he did not think that Krakouer would win his case. The following day Krakouer's solicitors announced that he would not pursue the case. The reason is unclear. There was no reference to the lack of legal represent-

ation, which, I should have thought, was in these circumstances the more serious lapse from standards of natural justice. When a substantial sum of earnings might be lost, I submit that natural justice would require almost a right to counsel. The *players' advocate*, not a lawyer, is surely no substitute for skilled counsel. The amount at stake is far greater than in most magistrates' courts cases, where it would be unthinkable to deny a litigant legal representation. I should have thought that when a man who, if he is like the average professional sportsman in general and footballers in particular, is inarticulate and stands to lose a four-figure sum, he must be permitted the services of a legal advocate.

It is perhaps a pity that Krakouer did not pursue his case. Courts have been too reluctant in the past to interfere with the rough justice which is meted out in the Victorian Football League Tribunal on Monday nights. My suspicion is that often umpires have not been "supported" by the Tribunal, who have accepted totally spurious explanations from players. Paradoxically, this must make the injustice to those who are censured seem all the greater. Aristotle claimed that the essence of justice was that it should be *distributive*, i.e., that like cases should be treated alike. In this area, where, as in Melville's "*Billy Budd*", a huge sentence may be inflicted by an informal tribunal, the courts will have to abandon their coy attitudes to sporting discipline if substantial injustices are not to continue. I do not wish to condone for one moment the offence (kicking an umpire) for which David Bourke was given a ten year suspension, but really this sentence is so severe that at least minimum safeguards of a criminal trial should have been observed - right to counsel, burden of proof on the prosecution to prove beyond reasonable doubt, the applicability of the rules of evidence etc.

I would also submit that the rules of *natural justice* apply to selection committees also. I consider that it behoves selectors to work scientifically on factual evidence, not on subjective opinion. Before long, a disgruntled player will sue a selection committee. Selectors should keep records of discussions and be prepared to make careful use of players' averages and other statistics. I am prepared to forecast that one day players will brief lawyers to plead their case for selection!

## SEX EQUALITY

The final area which features regularly in *The Age* is the discrimination, real or imaginary and usually against women, which is practised by various sports. I speak as one who abhors lack of gallantry to women but equally as one who considers that the lady weightlifter featured recently on Channel 9's "60 Minutes" is a traitor to her sex. I will be frank. I do not think that girls should be encouraged to play body-contact sport with boys. At least, children's views should be sought on this topic before some further clumsy legislation is passed compelling inter-sexual or bisexual or multi-sexual rugby! I suspect that most rugby-playing boys would feel acutely embarrassed by the presence of a girl in their team. At the same time, women's sport and recreation should be given as much encouragement as befits them.

Both the Federal Parliament and the State Parliaments have passed legislation forbidding discrimination on the grounds of sex. Generally, this legislation affects sport, but there are exceptions where the sport is one in which the average woman would be physically disadvantaged by playing against the average man. I have considered the comparable English legislation at length.<sup>11</sup> The relevant Australian legislation differs materially from the English. That it is causing difficulties is clear from the high number of reported instances.

### NOTES:

1. I wish warmly to thank Miss Tania Chambers, a student at the Faculty of Law, Monash University, for her assistance in the preparation of this article.
2. See J.N. Turner, 'Dostoevsky: The Trial in the *Brothers Karamazov*', 8, *University of Tasmania Law Review* (1985), 62.
3. E. Grayson, 'Revisiting the Field of Play', *New Law Journal* 135 (1985), 629.
4. See *Bolton v Stone* [1951] A.C. 850; *Miller v Jackson* [1977] 3 W.L.R. 30.

5. Since this paper was written, it has been announced that all jurisdiction of the Judicial Committee over Australian cases has been abrogated.
6. *Cawley v Australian Press* [1981] 1 N.S.W. L.R. 225.
7. *Global Sportsmen Pty. Ltd. v Mirror Newspapers* [1980] 55 A.L.R. 25.
8. *Boyd v Mirror Newspapers* [1980] 2 N.S.W. L.R. 449.
9. For a detailed explanation of this litigation see J.N. Turner, 'The A.C.B.'s Player Contract and the Litigation Resulting Therefrom', *Australian Cricket Journal* 1.2 (1985), 3-7.
10. See B. Dabscheck, 'Sporting Labour Markets and the Courts' *Sporting Traditions* 2.1 (1985), 18-20.
11. See J.N. Turner, 'Sex Sport and the Law' in J.N. Turner & C. Jenkins (ed.), *Sport and the Law* (University of Birmingham, 1978).