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Former St Kilda coach kicks a goal for his statutory entitlements

NIGEL INGLIS

In a recent case in the Victorian County Court, Judge Bourke found that sacked St Kilda AFL coach Grant Thomas was entitled to $90,000 in annual leave entitlements and a $100,000 severance payment.

Thomas was employed as the Club's senior coach between July 2001 and March 2005. There were three personal coaching agreements between the Club and Thomas covering the period between July 2001 and the commencement of a fourth agreement between Thomas' company and the Club in April 2005.

From April 2005, Thomas ceased to be employed by the Club and instead provided his coaching services through his company.

The Court found there were two discrete issues for consideration.

The first was the claim by Thomas in relation to accrued annual leave entitlements outstanding pursuant to the first, second and third personal coaching agreements.

The second was the claim by his company in relation to the payment of $100,000 under a termination agreement dated 12 September 2006.

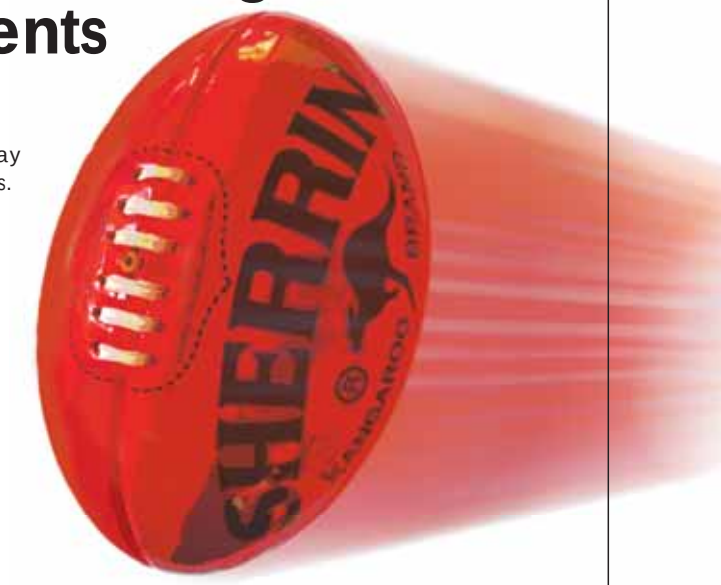
The club was also ordered to pay more than $20,000 in legal costs.

This case is a timely reminder for all employers that even if an agreement may be reached with your employee to compromise annual leave entitlements, such an agreement may not be enforceable due to the statutory force given to such entitlements.

This means that even if you have otherwise set-off or paid more to an employee (eg perhaps via a bonus or you have paid higher than normal wages) that you could still be liable for accrued annual leave entitlements.

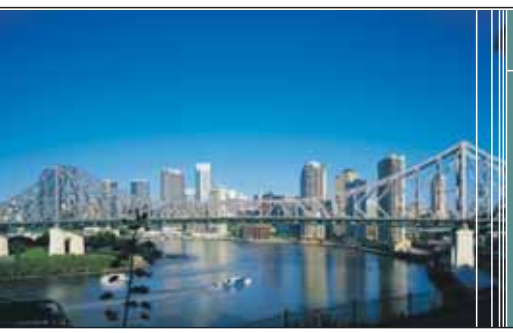
In the St Kilda case, Thomas had gone as far as signing what he and the Club thought was a statutory declaration that expressly stated that Thomas had taken all his annual leave and that the balance owing to him was 'nil'. The Club relied on this document as evidence that the annual leave claim should be dismissed.

Even though the court held that the document signed by Thomas was not a proper statutory declaration, the court did find that there was an agreement between Thomas and the Club to compromise his annual leave. The compromise was to set off his outstanding annual leave entitlements against his liability to pay a $15,000 fine to the AFL that the Club had paid for him.



However, even though the agreement was upheld, the court found the Club could not enforce it. This was because Thomas could not contract out of what was an award entitlement in relation to his annual leave because it is not possible to contract out of award entitlements, either during or after the period of employment.

Also the Club could not enforce the set-off of Thomas' statutory annual leave entitlement against the liability for the fine to the AFL because the payment could not, expressly or impliedly, be referred to the award obligation.



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Cocaine drug ban overturned for Paralympian

MATTHEW BRADFORD

In an unusual set of circumstances, Canadian Paralympian Jeff Adams recently had his two year ban for an anti-doping violation overturned by the Court of Arbitration for Sport ('CAS'). Adams was reportedly at a bar one night in May 2006 when an unknown woman stuffed her fingers and an amount of cocaine into his mouth.

A week later, Adams won the Ottawa Wheelchair Marathon and was subjected to a urine test. Instead of using a fresh catheter, Adams re-used the same catheter from the night the cocaine was stuffed into his mouth. The urine sample showed a positive result for a cocaine metabolite, which is a prohibited substance on the WADA list.

Adams argued that the result was caused by the cocaine residue left in the catheter but he was unsuccessful and was found to have committed an anti-doping violation, received a two year ban until August 2008 and was ineligible for financial support from the Canadian government.

Adams subsequently appealed to CAS and, in its May 2008 decision, CAS accepted that the positive result occurred because of the contaminated catheter. Despite this, CAS was bound to follow the 'strict liability' principle and confirmed that an anti-doping violation had occurred.

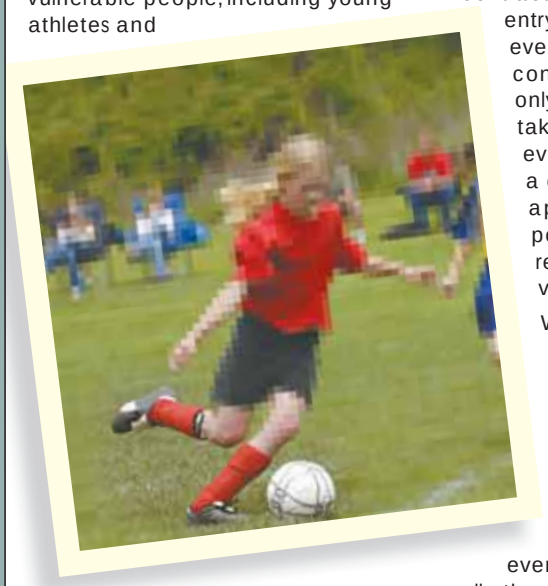
However, CAS was satisfied that there was 'No Fault or Negligence' by Adams. It over-turned the two year ban and ruled that Adams was eligible to receive government funding.

Adams can consider himself lucky, as the ability to have a penalty over-turned on the grounds of 'No Fault or Negligence' requires a very high threshold to be reached. It seems obvious that he should have used a clean catheter for his drug test. Whilst Adams' two year ban was set to expire in a few months anyway, the decision gives Adams the chance to qualify for the 2008 Paralympics.

Through the Lens

ANDREW NICHOLSON

In May this year controversial artist Bill Henson had photographs which he had taken of young models seized from a Sydney art gallery. There was much public debate and criticism over the images. One of the issues which arises out of the debate is to what extent should people be able to take and publish photographs of others and what application, if any, is there in the context of organised sports. For example, it is incumbent on sporting bodies and administrators to ensure that more vulnerable people, including young athletes and



children, can enjoy their sport without fear of having their photograph taken and published by an unauthorised person. Do Clubs and Associations owe a duty of care to their members?

Currently, the general common law position in Australia does not recognise the right of an individual to prevent publication of their image. There are, however, a limited number of exceptions particularly where those photographs are being used for a commercial purpose, including:

1 Where the images amount to defamation of the person – such as the Andrew Ettinghshausen case where he successfully claimed damages after a naked photograph of him taken after a match in the dressing room was published; and

2 Where the images deceive the public into believing that a person has endorsed a product when in fact it is an unauthorised use of their image (which may also amount to a breach of the Trade Practices Act) – both Kieren Perkins and Tracy Wickham have succeeded in actions where their image was used to promote a product without their consent.

While those cases apply to celebrities, what protection is there for junior athletes given that taking photographs of people in public places is generally permitted?

There are measures which sporting bodies can take in order to prevent people from taking photographs where the event is being hosted in a private/closed setting, such as within a stadium. In that case contractual terms and conditions of entry can be imposed on the event. For example, a term or condition of entry may be that only authorised people may take photographs during the event. These terms may form a condition of entry and may appear on the ticket or at the point of entry and may be reinforced by signage at the venue.

Where the sport is being played in a public space, such as in a park, there are still steps which can be taken. Parents may be asked (perhaps as a term of their child's registration) to agree that they will not take photographs of any event without the consent of all other parents. But that may be difficult to police. Most clubs appoint ground officials for organised fixtures to assist in the orderly conduct of an event. The conduct of unauthorised persons taking photos at an event ought to be monitored by parents and officials. The police have powers to investigate unwanted persons and there are of course criminal sanctions that can be imposed if the conduct is of that nature.

While it may be practically difficult to prevent the unauthorised use of images in some circumstances, it is a growing issue. It is incumbent on sporting bodies and clubs to be alive to the issue and, where reasonable and warranted, to take some (relatively simple) measures to protect their (junior) members. It is not too difficult to foresee a claim arising as a result of a failure to take adequate measures to prevent an unauthorised image being published, which has caused loss.

Yeronga Park proposed expansion dashed

ANTHONY O'DWYER

Objectors have been successful in thwarting plans to expand facilities for Souths Rugby Union and the Queensland Blind Cricket Association (QBCA) in Yeronga Park. The Planning & Environment Court upheld the objectors' appeal against Brisbane City Council's decision to allow Souths and the QBCA to enlarge the existing cricket oval in Yeronga Park to accommodate rugby games during winter, and to better serve blind cricketers over the summer season.

At first glance, it might seem odd that the expansion of an oval within a park could be refused.

Yeronga Park is included in the Sport and Recreation Area of the Brisbane City Council's planning scheme. This would tend to support the expansion of the sporting activities within the park, subject to some constraints. Yeronga Park is a heritage place under the provisions of the Heritage Place Code of the Brisbane City Council's planning scheme. It is listed on the Queensland Heritage Register. From a planning point of view, Yeronga Park could not be viewed simply as a park - it is a place of cultural heritage. To add to the layers of planning instruments relating to the land, the Council had produced the Yeronga Park Conservation Management Plan which recounted the history of the park and set up proposals for the management of the park. Those proposals did not provide support for the expansion of sporting activities.

Souths had occupied Yeronga Park since the 1970s and QBCA had formally used the park since 1964, although blind cricketers had been using the park since 1924. The oval had been untouched for about 30 years. Yeronga Park was established informally in the 19th century. Memorial gates and a freestanding memorial pavilion were installed to commemorate the lives lost in the First World War along with Honour Avenue, a tree lined avenue within the park. The park also includes Anzac Avenue which comprises rows of palms thought to be planted by servicemen returning from the Middle East.

The outcome of the appeal to the Planning & Environment Court depended largely on the likely impact of the extension of the cricket oval on the landscape and heritage values of Yeronga Park. The court preferred the evidence of the landscape architect who had been involved in the preparation of the Conservation Management Plan. That evidence established that the values of the existing cricket oval, an oval in a grassed parkland, were of heritage significance which would be diminished by the proposed extension into a formalised sports field. The court found that the character of the park would be changed as would its setting. The court went on to accept evidence that the proposed extension of the cricket oval would detract from the cultural heritage significance of the park, including that the proposal would intrude significantly on the peaceful contemplative setting of Honour Avenue.

Despite the fact that it is desirable to assist organised sport, the court was not able to find that there were sufficient planning grounds to overcome the Council's expressed intentions for the park.

Public liability insurance for incorporated associations

MATTHEW BRADFORD

Recent changes to the Associations Incorporation Act mean incorporated associations are no longer compulsorily required to take out public liability insurance. Management committees must now simply review the association's insurance requirements on an annual basis. However, there is an exception and any association that owns or leases land must still maintain public liability insurance.

Public liability insurance provides protection for an association if someone sustains a personal injury or damage to their property from any incident occurring at the association's premises or as a result of the actions of the association.

If a management committee is considering not taking out public liability insurance, we strongly recommend they first obtain suitable advice...

Whilst members are generally protected from liability, this may not be absolute. If the association is negligent in its actions, the association and its members may be considered liable, particularly the committee members.

Of equal importance is the need to ensure that, in the event a member is injured at a club event due to the club's negligence, there is adequate insurance to compensate the injured party.

If a management committee is considering not taking out public liability insurance, we strongly recommend they first obtain suitable advice, including quotes from an insurance broker. They may find that the insurance is relatively inexpensive compared to the potential liability.

FOOTBALLERS BEHAVING BADLY

Argy Bargy or Criminal Acts?

ANDREA TOWSON

In recent years Australian football players across all codes have been making the headlines for all of the wrong reasons. As such, it comes as no surprise that players' off-field bad behaviour is often subject to criminal prosecution and criminal penalties. However, the recent Queensland District Court case of *Wells v Dunning*[1] is the first case where a player has been awarded criminal compensation, not civil compensation, for an on-field assault.

Facts

This case involved an application pursuant to section 24 of the Criminal Offences Victims Act for an order for Mr Dunning to pay compensation to Mr Wells.

The relevant facts considered by the Court were:

- Dunning and Wells were players on opposing teams, in positions where they marked one another;
- During the course of the AFL game Dunning 'king-hit' Wells;
- Prior to the offence occurring Dunning and Wells engaged in 'argy-bargy' (sledging, pushing and shoving);
- Wells suffered a broken nose, as well as cuts and abrasions to his nose and left eye as a result;
- Dunning entered a plea of guilty on the agreed basis that he hit Wells with a palm (not a closed fist), in the context of some on-field 'argy-bargy' (not that he 'king-hit' him unawares); and
- Dunning had played 289 games as a senior and 180 games as a junior and this was his first offence.

The Court's decision

It appears from Judge Kingham's judgment that a common-sense approach prevailed in this case.

Judge Kingham was of the view that Wells had contributed to his injuries by "sustained insulting and confrontational behaviour" towards Dunning immediately prior to the offence. To reflect this, Judge Kingham reduced the award of damages payable to Wells by 40%, from $9,050 to $5,430.

What does this mean for players?

There is now a precedent in Queensland that makes it clear that the Courts will not tolerate acts of deliberate force outside the parameters of the game, even where there is provocation. Players at all levels should be aware of this.

Furthermore, the Court's lack of tolerance for acts of deliberate force outside of the scope of the game is not limited to Queensland Judges. There is now also precedent in Victoria for even harsher criminal penalties to be imposed against players than those imposed by the Queensland Courts. On 2 July 2008 a Magistrate sentenced a country AFL footballer to two months jail for misbehaviour on field. In this Victorian case the player in question punched an opposing player, and as a result, the opposing player was knocked unconscious, his teeth were driven through his lips and he suffered permanent scarring. This Victorian case is now the subject of an appeal.

The case of *Wells v Dunning* re-ignites the debate over whether the Law should play a role in the regulation of sport, particularly sports where physical contact is simply part of the game. Notably in both the UK (Premier League Football) and America (Hockey and NFL), where there is a more established body of case law dealing with players being charged with criminal offences for on-field conduct, it is still rare for a sports person to be charged for on-field behaviour. It will be interesting to see the direction this area of the law takes in Australia, particularly in light of the outcome of the appeal of the recent Victorian case.

1 [2008] QDC 113

JOHN MULLINS
EDITORIAL

About a week prior to finalising this publication, the Sonny Bill Williams affair hit the press. This news story reached hysterical levels with some reports suggesting that Sonny Bill Williams could be jailed. I think it's a long time since someone in Australia has been jailed for quitting their job.

The issue raises a large number of complex legal issues. The first surrounds the right of an employer to injunct an employee from earning an income elsewhere. The second is the ability to enforce such an injunction in another country. The third is the ability for one sport to stop a player playing another sport.

The NRL bosses have been talking about the sanctity of the contract. Wikipedia says that sanctity is the state of being holy or sacred. It is hardly a new phenomena that employees sometimes do not live up to all their obligations, as equally do employers, and whilst the relationship is important, it is hardly holy or sacred. It is suggested that because it involves a high profile sportsman, then it is very different.

I am not for one moment suggesting that Sonny Bill Williams has done the right thing. But in these days, where sport has become a job, we will see both employers and employees exhibiting behaviours that are not necessarily reflective of the higher status traditionally attributed to sport.

In this edition of Mullins Sport we look at all sorts of courts dealing with sporting issues. In particular we look at the Court of Arbitration for Sport, the Queensland District Court in its criminal jurisdiction and the Queensland Planning and Environment Court. In the Queensland District Court an award was made for criminal compensation arising out of an on-field incident. Criminal charges arising out of on-field behaviour are not new and perhaps the criminal compensation that flows from that is simply a natural extension.

We also talk about the Planning and Environment Court action on Souths Rugby Union in Brisbane, who lost their application to enlarge an adjoining oval. In this case the rugby club lost out to local residents, limiting the club to one field and leaving it with a large legal bill.

We also talk about the thorny issue of photography. These days virtually everyone with a mobile phone has a camera and the ability to take photographs, and indeed inappropriate photographs of children at sporting events. It is an issue that sports are grappling with. How does a sport differentiate between parents and friends taking appropriate photographs and paedophiles taking inappropriate photographs of children?

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