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Golfers: Playing the Liability Game

By: James Woodgate

Unless you are a professional golfer, mishitting the ball will always be part of the game of golf. Who is responsible when a mishit shot causes damage to person or property? In the last edition of Mullins Sport we considered the liability of golf clubs when stray shots caused damage to neighbouring properties. In this article we continue that theme by considering who is responsible when a golf ball injures another player or spectator on the golf course.

According to the recent Queensland Court of Appeal case of *Ollier v Magnetic Island Country Club Inc and Shanahan* a golfer will be liable for injury caused by his own shot. The defendant was ordered to pay $2.6 million in damages after his tee shot hit the head of another golfer who was playing further down the fairway. He was negligent because he failed to adequately look ahead before playing his shot. This was a breach of the "safety rule" which required him to ensure that no one was standing close by or in a position to be hit by the ball prior to playing his shot. He also breached the rule requiring him "not to play his shot until the players in front were out of range". Also, in *McVety v Mahoney* a golfer was liable for injury he caused to another player. The golfer drove off from the tee before the party in front of him had cleared the green, striking and injuring another player.

Before you start to worry about all the lawsuits that will arise because of your bad shots, a player will not always be liable for injury to another golfer. There is a risk of injury inherent in any game and golf is no exception. Fortunately, the courts have recognised this and in the game of golf spectators and players must accept that, in certain circumstances, wayward shots by others on the golf course are part and parcel of the game. In *Clark v Welsh* a player was not liable when the ball flew off the toe of his club and injured another player. In *Woods v Rogers*, Woods' playing partner waved through Rogers to play his shot. Woods was hit and injured by Rogers shot. Woods playing partner had not made him aware that Rogers was going to hit past them. The Court held that, based on a golfing convention, Rogers was entitled to assume that he was being called through on behalf of the group and that both golfers would maintain an adequate lookout and be able to protect themselves from being hit. As a result he was not liable for the injury he caused to Woods. As *Ollier's Case* and *McVety's Case* demonstrate, despite the inherent risk of injury in golf, a player will still be liable where they have failed to take reasonable care, particularly by breaching the rules of golf which require them to be safe and considerate of others on the golf course.

So, will a golf club also be liable for an injury on the golf course? In *Ollier's Case* the Court of Appeal did not consider the liability of the golf club. However, at trial Cullinane J found that the golf club was not liable for Ollier's injury. His Honour held that the club was not required to provide marshals to supervise tee-offs as this would not have been practical. Nor was it required to warn visitors to the golf course as to the specific risks associated with hitting a tee shot when another player was still on the fairway. The defendant golfer was already aware of this rule and therefore any warning by the club would have made no difference. This is a good decision for golf clubs as it relieves them of the onerous task of safeguarding against the negligence of players using their golf course. Golf clubs will still owe a duty of care in such circumstances and may be negligent if, for example, a player is injured as a result of inadequate protection between tees, greens and fairways.

> INDIVIDUAL PLAYERS RATHER THAN GOLF CLUBS WILL ULTIMATELY BE RESPONSIBLE FOR ENSURING THAT THEY DO NOT INJURE OTHER PLAYERS ON THE GOLF COURSE

Individual players rather than golf clubs will ultimately be responsible for ensuring that they do not injure other players on the golf course. However, like in any sport, there is a risk of injury in golf, which cannot be avoided despite both players and golf clubs taking precautions. In order to avoid injuring other players, golfers should always comply with safety rules and ensure that no one is within their hitting range before playing a shot.

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EDITORIAL

By: John Mullins

There has been plenty happening in the world of Sports Law. As is often the case around Olympic time, because of the way Olympic teams are selected, the ability to appeal against selection raises its head, as has the issues of drugs in sport. The difficulty in commenting on these cases is that we inevitably become reliant somewhat upon what we read in the press.

Bernie Grosse QC in the case involving Sean Eadie said that the Court of Arbitration for Sport did not want to make any determination as to the appropriateness of the selection but referred the matter back to Cycling Australia for review of their decision. It appears then that Cycling Australia reviewed its decision and put Eadie back in the team. This all seems very peculiar.

The main point which I take from this is whether or not sporting bodies are adequately advised and take into consideration sufficiently, all aspects in making determinations. It is difficult for any of us to say whether Eadie should be in the team or not. What is relatively easy to say is that Cycling Australia has suffered significant damage arising from the decisions made.

On another front, the NRL Judiciary adjourned the hearing against Danny Williams because of the medical evidence. What has traditionally occurred in Judiciaries is that the Judiciary Panel acts as prosecutor as well as Tribunal. I'm strongly of the view and widely recommend that there is a need for the competition organiser to be represented at the Tribunal and to proffer the evidence, thus relieving the Tribunal of the obligation to prosecute. In the Williams matter if this occurred then the prosecutor would have been able to respond to the medical evidence and to adduce its own medical evidence. The Prosecutor or presenter as is more commonly named is becoming more frequent in judiciaries and in my view should be involved in all judiciaries.

The case that we reported in our last newsletter in relation to the neighbour to the golf course has gone on appeal and we await with interest the outcome of the Court of Appeal into this case. In this edition we talk about the case of the golfer injuring the other golfer and the liability and principles which arise from that.

Junior sports are receiving a lot of airplay in recent times are the issues in junior sport. Two aspects are continuing to make headlines. Firstly the ugly parental behaviour and secondly whether children are playing in the right division because of the size disparity between them and their fellow competitors. We include articles on these topics.

I believe that the sports need to take greater responsibility in managing these situations due to the obligation they owe to their sport and the children who play the sport, and the obvious risk management and potential liability issues. It is not sufficient to have Codes of Conduct (which most sports now have). It is necessary to enforce the Codes of Conduct and have effective judiciary structures to deal with these run by appropriately qualified people and have the support of the governing body of the sport.

RULES OR RESTRAINTS? the Tricks of the Trade

By: James Woodgate

WHETHER IT IS SALARY CAPS, PLAYER DRAFTS OR TRANSFER RULES, SPORTING CODES HAVE WAYS OF REGULATING CONTRACTUAL NEGOTIATIONS BETWEEN PLAYERS AND CLUBS.

Why is it that sporting governing bodies go to such great lengths to regulate who players can play for, how much they get paid or when and how they can negotiate new contracts? Essentially their motivation is maintaining an even competition where the richest clubs don't always win because they can afford the best players. However, even though sporting governing bodies claim that such rules and regulations are for the good of the game they are often illegal under the common law doctrine of restraint of trade.

So why is it that we rarely see the rules of sporting codes challenged by players and clubs? Players and clubs will often accept that the rules are for the good of the game and do not challenge them. Challenges do occur as the recent case of *Avellino v All Australian Netball Association Ltd* demonstrates. In *Avellino's case* a rule requiring players to reside in the State in which they played was declared invalid because it was a restraint on the players freedom to contract. Avellino was a Sydney based netball player who decided to play for Adelaide after she was not picked for either of the Sydney teams. She wished to retain her corporate sales job in Sydney so she decided to live in Sydney 3 days a week and Adelaide 4 days a week while playing for the Adelaide team. The Netball Association would not let her play for Adelaide because they did not believe she was a permanent resident of Adelaide.

SPORTING GOVERNING BODIES WILL CONTINUE TO IMPOSE RULES UPON PLAYERS WHICH RESTRAIN THEIR FREEDOM TO CONTRACT

Because Avellino was not selected for the netball teams in Sydney she would have either had to resign from her job in Sydney or give up playing netball in the premier competition. Therefore, the residency rule was a restraint because it restricted her from playing for the club of her choice and it caused her to suffer economic consequences such as being deprived of her chosen field of civilian employment and match, coaching and endorsement fees.

Avellino received a significantly higher wage in her part time job as a corporate sales co-ordinator than she did playing netball. The court held that she was still a professional netballer and covered by the law of restraint of trade. Interestingly, the law of restraint of trade will also apply to amateur players who receive sponsorship and promotional income through their sport.

Even though there was clearly a restraint in Avellino's Case it was still open to the Netball Association to rebut this by proving that the restraint was reasonably related to its objectives. The objectives of Netball Australia in implementing the residency rule were to even out the competition by preventing rich clubs poaching other clubs players and developing community involvement by maintaining State and team loyalties. The court believed that the residency rule was not reasonably related to achieving these objectives. The Netball Association could not reasonably justify restraining Avellino from playing where she wanted and the rule in question was declared void as a restraint of trade.

Sporting governing bodies will continue to impose rules upon players which restrain their freedom to contract because they believe that such rules create an even competition and are therefore in the best interests of the sport.

The **Weight Debate**

By: Roland Davies

The size disparity of players in junior contact sports has sparked heated debate amongst administrators about whether these sports should be segregated according to weight or age. Some administrators argue that separating players according to weight would prevent teams with a player who is much bigger than the rest of the participants from dominating the competition.

An important benefit of junior sport is that it encourages players to interact socially with each other. Participation rates would fall if competitions were segregated according to weight because the players would be of varying ages and different maturity levels. Contact sports by their very nature require players of different sizes. A competition segregated by weight would result in the absurd situation of a prop being the same size as a halfback. All Queensland sporting enthusiasts who have marvelled at the talents of Queensland halfback Allan Langer would agree that bigger is not always better.

A COMPETITION SEGREGATED BY WEIGHT WOULD RESULT IN THE ABSURD SITUATION...

In extreme situations this size disparity between players in the same age group is dangerous and may be a basis for legal action if a player is injured. It has long been recognised that sporting bodies owe a duty of care to take steps to prevent reasonably foreseeable injuries occurring. This duty of care would require sporting bodies to devise a risk management policy that would be followed when a player's size is likely to pose a risk of injury to other players. A risk management policy may provide that a player who reaches a certain size should be elevated into the next age group.

The Queensland *Anti-Discrimination Act 1991* permits sporting bodies to restrict participation in a sporting activity "to people who can effectively compete". This section enables sporting bodies to implement "size policies" that provide for bigger participants to be elevated to higher age groups. The adoption of size policies would reduce the risk of sporting bodies, coaches and umpires being sued for negligence as a result of sporting injuries. Size policies should also be utilised to ensure the safety of participants.

The difficult task for sporting bodies is determining the cut-off size for "oversized" players. This task is even more onerous because it could result in obese players participating in a higher age group against players with more muscular physiques. There is no definitive answer as to what size parameters should be assigned to each age group and therefore sporting bodies should make their decision using the objective of player safety as their main concern.

CUTTING the Cost of Fame

By: Jonathan Broughton

HIGH-PROFILE CELEBRITIES AND SPORTS STARS WILL GAIN MORE PROTECTION OF THEIR PRIVATE LIVES WITH THE INCREASING EVOLUTION OF BREACH OF PRIVACY

High-profile celebrities and sports stars will gain more protection of their private lives with the increasing evolution of breach of privacy. A recent New Zealand Court of Appeal decision in Hosking v Runting established the existence of breach of privacy in New Zealand. In this case the Hoskings, celebrities in New Zealand, sought a permanent injunction to prevent the publication of photos of family members.

Justice Gault found there are two fundamental requirements for a successful claim for interference with privacy. These are:

1. The existence of facts in which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts would be considered highly offensive to an objective reasonable person.

GROWING TREND TOWARDS THE GREATER RECOGNITION OF THE RIGHT TO PROTECTION AGAINST PUBLICATION OF PRIVATE FACTS

Gault also found that a defence of legitimate public concern was available.

In Australia for the past thirty years the decision of Victoria Park Racing v Taylor has been accepted as the authority for the notion that a separate tort of invasion of privacy did not exist. In this case, it was held that a racecourse owner had no general right of privacy to prevent another from broadcasting races observed from a platform on an adjacent land. However in 2001, the High Court case of Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd indicated that a tort of invasion of privacy might develop in Australian law, notwithstanding the decision of Victoria Park Racing v Taylor.

More recently in Grosse v Purvis the District Court of Queensland recognised for the first time in Australia a separate common law cause of action for invasion of privacy. In this case the Plaintiff, Ms Grosse, a prominent Queensland political figure suffered post traumatic stress disorder as a result of the defendant's stalking behaviour. She was awarded damages for, amongst other things, invasion of privacy.

A guest at the Shane Warne's private wedding in 1995 took photographs of the wedding. An employee of the company developing the film recognised Shane Warne and sold the prints to a national magazine. The Warnes' sued, but the matter was settled out of court. If this situation arose today, it is arguable that publishing these photos would constitute a breach of the tort of privacy. The photos would amount to a private fact and depending on the content, may also be highly offensive if published. The well known case of Andrew Ettingshausen was an action for defamation which today may have been extended to breach of privacy.

These cases illustrate the growing trend towards the greater recognition of the right to protection against publication of private facts. Sports stars who are increasingly placed in the spotlight will benefit from the development of this tort as they attempt to maintain their privacy in the face of growing media intrusion.

Affirmative Action - A level playing field or prejudice

By: Michelle Wilde

After more than three centuries of white domination and almost 50 years of apartheid, South Africa had its first democratic elections just ten years ago. In 1997 the Republic of South Africa created a Constitution and a Bill of Rights which implemented an affirmative action policy to address the imbalance of opportunity for the 38 million black and coloured majority in South Africa.

In sport, particularly in cricket and rugby, affirmative action has been implemented in the form of a quota system used in the selection of teams. The creation of equal opportunity in South African society is a complex process which may take generations to achieve. The quota system is a simplistic measure designed to accelerate the development of equal opportunity, which has so far been more controversial than successful.

THE CREATION OF EQUAL OPPORTUNITY IN SOUTH AFRICAN SOCIETY IS A COMPLEX PROCESS WHICH MAY TAKE GENERATIONS TO ACHIEVE

In 2002 the President of the United Cricket Board of South Africa (UCBSA) created furore when he stated that all provincial teams were required to include a minimum of three black or coloured players with further increases in the following year. This policy was never extended to selection of the national team and last month the UCBSA decided to scrap the quota system in the selection process altogether.

Rugby it seems is heading in the same direction. Brian van Rooyen, president of the South African Rugby Football Union, has also endorsed a decision to scrap the quota system in senior level rugby. Whilst van Rooyen supports the increase of black and coloured players at a national level, he believes that the implementation of the quota system implies that black players cannot make it on their own and that many blacks detest the quota system. He went on to say that every player needs to know they can make a team on merit and that is why SA Rugby should end its use of the quota system.

South Africa's objective is to be in the top three rugby teams in the world. But as van Rooyen states, affirmative action "cannot happen to the detriment of all else".

WARNING All Referees

By: Jonathan Broughton

Referees may be found liable for negligence if they make a serious mistake in applying the rules of the game. In a Belgian soccer match a professional referee was found to be negligent when he mistakenly decided to progress directly to a penalty shootout after a soccer match was drawn at full-time. The rules of the game provided for extra time to be played prior to a penalty shoot out. An award of damages was made against the referee. The Judge found that the referee's decision not to play the extra time constituted a significant error with regard to applying the rules of the game.

...THE REFEREE'S DECISION NOT TO PLAY THE EXTRA TIME CONSTITUTED A SIGNIFICANT ERROR WITH REGARD TO APPLYING THE RULES OF THE GAME.

Although this case has no authority in Australia, it is arguable that a professional referee who fails to correctly apply the rules of the game could also be found liable for breaching his/her duty of care in accurately enforcing and applying the rules of the game. Sporting organisations employing professional referees would be prudent to insert an indemnity clause in the contracts of service.

An amateur referee may also be found liable for not correctly applying the rules of the game. If, for instance, a club suffered economic loss as a result of the referee's failure to properly apply the rules of the game, it may seek recourse from the offending referee. However, it is likely that a different standard of care would be imposed on an amateur referee. Given the large numbers of amateur referees, sporting clubs should ensure that referees are accredited, as the negligent actions of a referee which lead to injury, will certainly include the organisation who appointed the referee.

Parents Behaving Badly

By: Stephanie Smith

It is a well known fact that children are particularly vulnerable to harm and abuse whilst participating in sport. The Queensland government has clearly recognised there are special obligations owed children, as evidenced by its enactment of the *Commission for Young People Act 2000*, (the Act).

Since the Act came into effect, sporting bodies have generally acted in good faith to ensure the standards set down in the legislation have been achieved. For example any adult working as a paid employee or as a volunteer for a school, community group, club or association, which involves the teaching, coaching or tutoring of children, is now required to undergo a criminal history check. Once a criminal check has been conducted, the QLD Commission for Children and Young People will assess a person's suitability and issue a notice stating whether a person is "suitable" to work with children together with a 'Blue Card'.

From a risk management perspective, officials and those involved in the day to day administration of sport for children should understand the seriousness of their responsibilities.

Adults who behave badly when children play sport are seldom disciplined for their conduct. The result is that bad conduct remains uncorrected. It is not sufficient to require 'Blue Cards'. Adults in children's sport need monitoring, supervision, training and, where necessary, disciplinary hearings.

Commonsense dictates that sporting entities should control the behaviour of troublesome adults when children play sport. The implementation of procedures to discipline adults who partake in inappropriate conduct during children's sport should be part of a sporting entity's risk management policies.

Risk management policies concerning troublesome adults would not only improve the current situation for children who play sport, it would also assist in reducing liability if a matter went to Court. Simple procedures can be implemented by sporting bodies to help educate and enforce appropriate behavioural standards for adults.

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