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Newsletter of **Mullins Lawyers** | Issue Number 17 | December 2003

Contracts with Kids. Child's Play?

By Roland Davies

The emergence of young professional athletes means that sporting bodies and corporate sponsors must be aware of the legal consequences of contracting with minors. The ability to enforce a contract involving a minor is highly restricted to ensure that the contract is largely for the minor's benefit.

The restricted ability to enforce contracts involving minors reflects the perception that minors often do not have the maturity to appreciate the effects of entering into contracts. The inability to contract with young athletes poses significant problems for sporting organisations that recruit young athletes. Sporting teams that invest substantial resources into young athletes may not be able to recoup their investment if the athlete fails to fulfill their obligations.

The Courts have ruled that in certain circumstances a contract with a minor may be binding. The Courts have shown a willingness to enforce contracts for the provision of "necessary goods or services" which are in the minor's best interest. Contracts in a sporting context include playing contracts, sponsorship contracts, endorsement contracts and waivers.

PLAYING CONTRACTS

Playing contracts involving a minor are generally enforceable providing the contract is for the overall benefit of the minor.

In the case of *Roberts v Gray (1913)* the Court held a playing contract between a minor and an adult was enforceable. The minor was an aspiring billiards player who entered into a contract with a notable billiards player to accompany him on a billiards tour. The minor did not fulfill the contract. The Court ruled the contract was enforceable as *"playing billiards in company with a noted player ... must be instruction of the most valuable kind ... and for the benefit of the infant".*

Sporting contracts involving minors will not always be regarded as beneficial. The Canadian case of *Toronto Marlboro Major Junior "A" Hockey Club v Tonelli (1979)* is an example of a contract that was found to be overly onerous and unenforceable at law. In this instance a 16 year old hockey player was contracted for four years with an ice hockey club. The contract stipulated the minor was required to pay the club a proportion of any future income earned in the event he played professional ice hockey. The Court refused to enforce the contract on the basis that it was not of benefit to the minor.

SPONSORSHIP AND ENDORSEMENT CONTRACTS

In recent times organisations have used young athletes to market their products. Six year old American Skateboarder, Mitch Brusco, has eleven corporate sponsors and has recently hired an agent to negotiate further contracts.

Sponsorship contracts and endorsement contracts are "contracts for services". These contracts will generally not be binding unless the Court believes the contract is beneficial to the minor. An endorsement contract with a minor will only be binding if the terms of the contract are not overly onerous and the duration of the contract is not excessive.

PLAYING CONTRACTS INVOLVING A MINOR ARE GENERALLY ENFORCEABLE PROVIDING THE CONTRACT IS FOR THE OVERALL BENEFIT OF THE MINOR.

Minors may also be able to use a trust or company to enter into contractual relations with a corporate sponsor. This method removes many of the problems associated with the minor's diminished capacity to enter into contracts.

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ENABLING & DISENABLING:

The Anti- Discrimination Act 1991 Qld and how it applies to disabled and able bodied sporting participants.

By: Stephanie Smith

HAVING A DISABILITY DOES NOT PREVENT A PERSON FROM PARTICIPATING IN SPORT. AS EVIDENCED BY EVENTS SUCH AS THE PARA-OLYMPICS, THE NUMBER OF DISABLED PERSONS PARTICIPATING IN SPORTING EVENTS IS INCREASING.

The increase of disabled participants in sport however is not without issue. Disabled and impaired persons are, and will likely remain, subject to legislation which authorises their lawful exclusion from the use of certain facilities and the participation in events otherwise available to able bodied people.

Discrimination laws in Queensland are governed by the *Qld Anti-Discrimination Act 1991* (the Act). By the terms of the Act, discrimination is the "less favourable treatment of a person on the basis of an attribute". Section 7 of the Act specifies that an "impairment" is an attribute for which "discrimination" is prohibited. Discrimination however will be lawful under the Act if one of the exemptions contained in the Act applies.

...IT IS *NOT* UNLAWFUL TO DISCRIMINATE AGAINST AN IMPAIRED PERSON WHERE THE IMPAIRED PERSON REQUIRES THE PROVISION OF SPECIAL SERVICES OR FACILITIES...

Section 51 of the Act authorises those who provide goods and services to exclude impaired persons from using a facility or participating in an activity. According to section 51 it is *not* unlawful to discriminate against an impaired person where the impaired person requires the provision of special services or facilities, and the supply such special services and facilities imposes an "unjustifiable hardship" on the person providing the goods and services.

Clubs are also specifically authorized in Section 100 of the Act to discriminate when accepting a person's application for membership. Section 100 specifies that where an individual requires the supply of special services or facilities, membership may be denied where the club can prove that to do so would impose an unjustifiable hardship on a club.

The Act stipulates many factors need to be considered when determining whether an "unjustifiable" hardship exists. Factors to be taken into account include the nature of the service or facility, the cost of providing the service, the financial circumstances of the club or entity, the levels of disruption that supplying the service may cause and the nature of any benefits or detriments.

For example, if a floor/court of a local gym needs to resurfaced to accommodate the use of the facility by a disabled person, this might give rise to the club or body suffering an "unjustified" hardship. The time and cost of the re-development would arguably be an unjustifiable hardship suffered by the body, depending upon the financial circumstances of the club or body.

Section 111 of the Act deals specifically with the participation of people in competitive sport. This provision stipulates that any participation in a competitive sporting activity can be restricted to those who can effectively compete, or to those people who possess a specific or general "impairment".

The purpose Section 111 of the Act is two-fold. Section 111 authorizes the exclusion of disabled and impaired people in certain competitive sports as they cannot effectively compete. However the section also works to exclude the participation of able bodied persons in events specifically organised for impaired people.

CLUBS WHICH DEVISE A SET OF GUIDELINES FOR THE TREATMENT OF IMPAIRED PARTICIPANTS IN SPORT REDUCE THE RISK OF THE ASSOCIATION BEEN FOUND DISCRIMINATORY.

Policies should be devised by sports associations to assist in determining who shall be excluded from participating and utilising their services on the basis of impairment. Clubs which devise a set of guidelines for the treatment of impaired participants in sport reduce the risk of the association being found discriminatory.

Story continued from page 1.

CONTRACTS WITH KIDS. CHILD'S PLAY?

WAIVERS AND EXCLUSION CLAUSES

The increase in litigation arising from sporting fixtures has sparked the introduction of exclusion clauses and indemnity clauses into participators' agreements to prevent or reduce liability for negligence arising from sporting accidents. It is unlikely a Court would construe a contract absolving another party of liability for negligence as in the minor's best interest. Therefore it is likely exclusion clauses would not be enforceable.

INDEMNITY

Sporting organisations may seek to obtain an indemnity from a young athlete's guardians to ensure the athlete fulfills the contract. An indemnity signed by the young athlete's guardians allows a sporting organisation to recover monies directly from the guardian in the event the minor fails to fulfill the contract.

The recent Court action against entertainer Holly Valance involved a situation where she entered into a contract with her manager using an affiliated company. Ms Valance was a minor at the time the contract was executed. The contract contained an indemnity clause which enabled the manager to recover monies from the company in the event Ms Valance did not fulfill her obligations under the contract.

STATE LEGISLATION

New South Wales, Victoria and South Australia have all introduced legislation to provide parties with some certainty when contracting with minors. Parties to a contract will generally be governed by the law of the State in which the contract was made. Contracts made in Queensland are still governed by case law rather than legislation.

The laws regulating contracts with minors are necessary to prevent unscrupulous sporting and corporate organisations from exploiting young athletes. However the emergence of a new breed of successful young athletes has necessitated a need for law reform in this area. Professional young athletes are now in a position to earn a significant income from sport and corporate sponsorship. Legislation is required to ensure that young athletes with sufficient maturity honour their contractual obligations to sporting bodies and corporate sponsors.

Security Alert

By: Kate Williams

If you were one of the 400,000 people who ploughed through the turnstiles at Suncorp Stadium for a Rugby World Cup game, it is possible you were searched by security guards who were exercising 'special powers' under the *Police Powers and Responsibilities Act (2000).*

In Queensland, under normal circumstances, security guards, are private employees of stadium management and have no greater powers than those of ordinary citizens. Whilst they are hired to protect property, maintain security and enforce regulations and standards of conduct, they are unable to compel you to answer any questions they ask you, and you are under no obligation to give them your name and address when requested.

THEY ARE NOT ALLOWED TO SEARCH YOUR BELONGINGS, EVEN IF A PROMINENT SIGN STATES THIS IS A CONDITION OF ENTRY...

They are not allowed to search your belongings, even if a prominent sign states that this is a condition of entry to the premises. In such a case, the guard is only able to ask you to leave the premises. If you refuse, you are trespassing and the guard can legally use reasonable force to remove you from the site.

This all changes where an occasion is deemed a "Special Event" by the Minister under the *Police Powers and Responsibilities Act (2000)* such as The Rugby World Cup. These special powers were introduced in 2000, ahead of the Olympic soccer games in Brisbane, and apply to games sites, airports, team accommodation and training sites.

Under the Act, security guards are authorised to:-

1. ELECTRONICALLY SCREEN PEOPLE;
2. SEARCH VEHICLES ENTERING A SITE;
3. SEARCH BELONGINGS OF THOSE ENTERING A SITE;
4. REFUSE ENTRY IF A PERSON REFUSES TO ALLOW THE SEARCH; AND
5. REFUSE ENTRY IF A PERSON ATTEMPTS TO ENTER A SITE CARRYING A PROHIBITED ITEM. ITEMS PROHIBITED FROM THE RUGBY WORLD CUP GAMES INCLUDE ROCKS, STONES, FIREARMS AND REPLICA FIREARMS, EXPLOSIVES, SPEAR GUNS, CERTAIN KNIVES, GLASS CONTAINERS AND COMMERCIAL FOOD ITEMS.

The special powers applied until 11 November 2003, the day after the last team left Brisbane.

Civil libertarians had criticised the increased powers, concerned that there could be widespread misuse of power if security personnel were not carefully supervised. To date however, these fears have been unfounded.

WARNING SIGNS – unnecessary or a sign of the times?

By: Michelle Wilde

If you have visited Suncorp Stadium recently you may have heard various risk management announcements helpfully advising that your seat will retract when you stand up. The risk of injury caused from such seating may seem agonizingly obvious to most and recent Hight Court decisions have clarified the law in this area of negligence.

The High Court supports the view that it is not necessary to place warning signs where the risk is obvious or apparent, yet despite this, various public sporting and cultural venues across the nation are escalating their efforts to warn their patrons of any risk of injury.

THE HIGH COURT SUPPORTS THE VIEW THAT IT IS NOT NECESSARY TO PLACE WARNING SIGNS WHERE THE RISK IS OBVIOUS OR APPARENT, YET DESPITE THIS,...

Injury which may result from retractable seating and the issue of negligence where there were no warning signs was discussed in the High Court decision of *Hoyts Pty Limited v Burns (2003) HCA 61.* In this case Mrs Burns had attended the cinema with a group of disabled children when she moved to contain a child and then attempted to take her seat, which had retracted, resulting in her hitting the metal bar with her coccyx and suffering injury.

Mrs Burns was unsuccessful against Hoyts appeal, which upheld the primary judge's findings that even if a warning sign had been visible regarding the retractable seating, no amount of exposure to warning signs or announcements would have changed the outcome or her injury. It was unnecessary for Hoyts to place warning signs regarding the retractable seating.

The case of *University of Wollongong v Mitchell (2003) NSWCA 94* was similarly decided. Mrs Mitchell was attending her son's graduation in the theatre of the University and stood to take a photograph, upon resuming her seat, which had retracted, she fell and struck the metal pedestal of the seat and suffered injury.

Meagher JA (along with Giles JA who allowed the appeal) stated that whilst "failure to erect signage may amount to actionable negligence, it must be the law that there is no need to warn against any danger whose existence is glaringly obvious (and) since every object can in some circumstances be dangerous, it would be inconvenient if it had to carry its own warning notice".

These cases demonstrate the opinion by the courts that signs warning of blatant risks to patrons or visitors at venues and stadiums are simply unnecessary, as liability will not be attributed for failure to erect such safety warnings. Regardless of this, warning signs and safety announcements have become a sign of the times as various establishments increasingly utilise safety awareness at events by stating the painfully and annoyingly obvious. Perhaps venues and sports stadiums will continue to "play it safe" and sit on the side of caution.

Public Image Ltd

In the last fifteen years, the world has witnessed a significant increase in the level of marketing and advertising involving sport. This increase has led to the likes of some athletes, such as Michael Jordan, Tiger Woods and David Beckham, being recognised as individual 'brands' in themselves, renowned as much for the products they endorse as their sporting achievements. Whilst such global marketing of one's image is perhaps unlikely in the foreseeable future for Australian rugby league players, the issue of image rights control has recently been raised by the NRL Player's Association. Although the elite players have requested greater control over their image rights, there is some confusion amongst the public as to what these rights entail and what remedies are presently available to the players if these rights are breached.

By: Joseph Carey

Image rights are the rights attributed to a person to prevent the unauthorised use of that person's image for commercial exploitation by someone else. Players in team sports, such as elite NRL players should be mindful of the fact that when their image is used with other members of the team, it may no longer be the use of the player's image as opposed to the use of the team's image.

Typically, disputes concerning a breach of image rights will arise when an elite athletes image is used without their consent for commercial purposes. As Australian law is unlike the US legal system which contains a right of publicity, athletes who feel aggrieved by the misuse of their image have used a variety of legal methods to seek a remedy.

Section 52 of the Trade Practices Act provides a remedy to athletes whose image has been exploited as it prohibits commercial conduct which misleads consumers. To be successful under this provision, the athlete must be known to endorse products so the publication of the image, without consent, would lead consumers to believe the athlete *had* endorsed the product. An example of this remedy can be viewed in *Talmax Pty Ltd v Telstra Corporation Ltd (1996) 36 IPR 46.* In this case, Telstra placed an advertisement featuring Kieren Perkins in a Telstra swimming cap, without his permission, at the time of the Optus/Telstra ballot. The Court granted an injunction against Telstra publishing the advertisement further as it led the public to believe that Perkins was sponsored by Telstra, had consented to Telstra's use of his name, and generally endorsed the products offered by Telstra over those of Optus.

Another remedy available to athletes to protect their image rights is defamation. An example of defamation being used to protect an athletes image can be seen in the decision of *Ettinghausen v Australian Consolidated Press.* Therein, the plaintiff rugby league player took legal action after a magazine had published a photograph of the player naked in the shower. Ettinghausen argued that the publication of the image was an imputation that he was the kind of person who would voluntarily consent to the taking and publication of a naked photograph of himself. The Court held that the publication of the photo was defamatory to Ettinghausen's image and the player was entitled to damages.

Issues concerning intellectual property and sportsmen recently arose in the Federal court decision of *Torpedoes Sportswear Pty Ltd v Thorpedo Enterprises Pty Ltd (2003) FCA 901.* The case involved a review of a decision by the Trade Marks Office to allow a company associated with Ian Thorpe to register the trade mark 'Thorpedo' due to its similarity with another trade mark 'Torpedo'. While noting a similarity between the two trade marks, the Court held there were apparent visual and aural distinctions, and allowed 'Thorpedo' to be registered.

These cases demonstrate that court action can assist players when their image is used in the commercial world without their consent. With the level of marketing of sportspeople increasing, it is important that players be afforded the opportunity to control how their image is used, so they may enjoy the financial rewards of that 'image'.

EDITORIAL

By: John Mullins

Our lead article on contracting with children outlines the current thinking in relation to contracts with children without producing any certain answer. The issue of whether you can contract with children and in what capacity is extremely complex and is probably more pertinent in the area of sport than any other pursuit. I suspect that the answer lies in a highly subjective view of the Judge who is determining the matter and I would be concerned if I was contracting with a minor that the courts will tend to favour the child over the large powerful organisation it is contracting with. There may be circumstances in which it is prudent to ensure that appropriate advice has been given to the child to obtain certificates which are very prevalent in lending matters to confirm that the advice has been given.

There are a couple of articles on venues relating to warning signs and security which have been evoked by the recent successful opening of Suncorp Stadium and the fabulous Rugby World Cup 2003. Anyone who has attended Suncorp Stadium is no doubt extremely impressed and the quality of the surface is now equal to the quality of the stadium in general.

The article on the application of the Anti Discrimination Act to sport is particularly interesting. This is another extremely difficult area but one which recognises that certain segregation is necessary for all of the participants including the disabled athletes. The value of the images and reputations of high profile players is ever increasing. The players and their sponsors are vigilant to protect this. We will see more litigation in this area.

Summer time means sport in Australia with the choice quite staggering. I hope you enjoy your Christmas diet of sport and have a Happy Christmas and prosperous New Year.

mullins LAWYERS

Level 22, Central Plaza One,
345 Queen Street,
Brisbane, Q 4000

GPO Box 2026,
Brisbane Q 4001 DX 306

Telephone 07 3224 0222
Facsimile 07 3224 0333
email: jmullins@mullinslaw.com.au
www.mullinslaw.com.au