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Lawyers and Notary

M&M Sport

Is *Segregation* Discrimination?

By Roland Davies

The inclusion of Annika Sorenstam in the recent Bank of America Colonial Golf Tournament has sparked community debate about female participation in male sporting events. Some viewed Sorenstam's inclusion in the tournament as a media stunt that degraded the male participants. Others viewed Sorenstam's participation as a victory for women's sport and evidence that women could participate at the highest level in traditional male sporting events.

Pursuant to section 111 of the *Anti-Discrimination Act 1991 (QLD)* and section 42 of the *Sex Discrimination Act 1984 (Cth)* sporting associations and organisations are currently allowed to restrict participation in competitive sporting activities on the basis of gender, providing the restriction is reasonable *having regard to the strength, stamina or physique requirements of the activity.*

In *South v The Royal Victorian Bowls Association* the Victorian Civil and Administrative Tribunal was asked to determine whether a lawn bowls association could legally exclude females from its competition. The Tribunal held that lawn bowls is not a sport where strength, stamina or physique is relevant to effectively competing and that women who play with men are neither advantaged nor disadvantaged by being female. Harness racing is an example of another sport where the Court has ruled that an association is not allowed to exclude participants on the basis of gender.

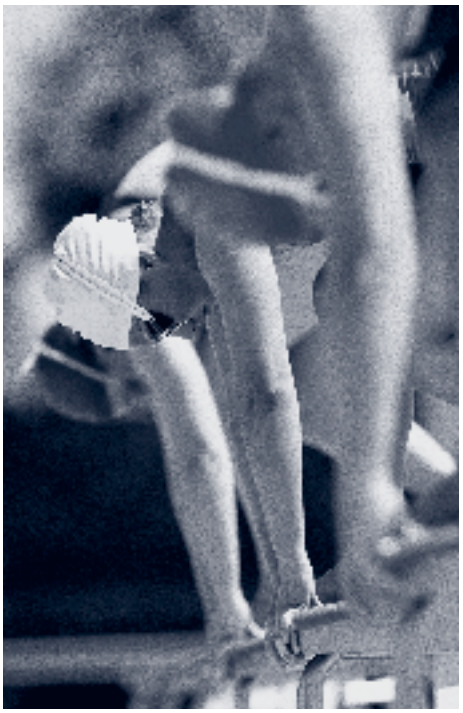
There is no specific legislative provision which directs a sporting organisation to restrict female participation in male sporting teams involved in contact sports. Females regularly participate in male sporting teams involved in contact sports. On Christmas day 2002, Katie Hnida, became the first women to play an American College Football Game. Hnida weighed 68 kilograms and was competing against men more than twice her size.

Organisations charged with the control of sporting events have to be mindful of their responsibilities to the individual player when deciding to permit a female to participate in male sporting teams. It has long been recognised that sporting authorities owe participants a duty of care to take reasonable steps to avoid the risk of injury to players. There is a possibility that a sporting organisation may be found negligent in permitting mixed teams to participate in a sport where contact is involved. School authorities that organise sporting events will be judged more strictly due to the control they have over the students.

Pursuant to national and state legislation, sporting organisations are prohibited from restricting the participation of females in any sporting team up until the age of twelve. The national sporting bodies, Australian Football League (AFL) and Australian Rugby League (ARL), permit the participation of females in male sporting teams up to the age of 12 years. After the age of twelve, females are encouraged to participate in women's teams. From a risk management perspective, sporting organisations should consider whether their sport warrants separate competitions on the basis of gender after the age of twelve.

The legislation also provides that sporting bodies are not permitted to restrict persons from coaching, umpiring or administering any sporting activity on the basis of gender. Unfortunately this provision has not resulted in a proportionate number of females involved in the administration of traditionally male sports at the highest level. Traditional male sports like rugby league, soccer and rugby union are dominated by male coaching, umpiring and administrative staff. The AFL has recently reversed this trend by promoting a number of female goal umpires to senior level.

The provisions relating to gender segregation in sport were not designed to stifle women's sport but to foster it. The separation allows females who are not as physiologically suited to some sports as males to participate at an elite level. Swimming, cycling, triathlon and athletics are just a few sports where gender segregation has benefited female participants. Female athletes like Cathy Freeman may not match the results of their male counterparts yet they can still participate at an international level and earn a living from their sport.



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Parents Behaving Badly

By Kate Williams

Most sporting organisations have codes of conduct written into each player's contract which specify what constitutes an infringement of the code and determines penalties for same.

But who controls the parent's conduct? What right's does a club have to discipline an unruly parent on the sidelines?

Last year, the AFL in Queensland introduced a "Parents in AFL" Program aimed at curbing ugly behaviour. The program consisted of compulsory parent information sessions, a mandatory parental code of conduct which had to be signed by the parent prior to any junior footballer being allowed to participate, designated spectator-free areas at coaches boxes and a zero-tolerance policy on umpire abuse. Where a parent has behaved inappropriately, a three stage process is begun. The focus of this process is counselling the parent and finally, in the event that the parent does not adhere to the code, the parent's membership is withdrawn as a last resort.

But what does this actually mean? Can the parent be ejected from the grounds? Can they be prevented from watching their child participate? Can they be given a ban from coming within 500 metres of the ground? The short answer is no. In theory, if the ground was a private park or part of someone's residence or estate, the individual owner of the property would be well within his/her rights to prevent that parent from coming onto their property. Any attempt to do so by the parent could constitute trespass. However, where the ground is a public facility, the sporting club has no legal power to effectively expel a person from the grounds for failure to comply with their code of conduct.

So is this a problem? It would appear not to be. Whilst the AFL parental code of conduct does not provide for any formal sanctions to be taken against the parent, Queensland AFL has reported that the reform has greatly reduced the number of violent incidents at junior games. Whilst legally the club may have its hands tied vis a vis banning parents from area, practically the parental code of conduct identifies and clarifies the range of parental expectations and reminds parents that sport is fun and participation is everything.

Day Tripper

By Joe Carey

In the recent State of Origin series, the season ending knee injury suffered by Justin Hodges proved the catalyst for a media circus concerning the possibility of the player taking legal action against Suncorp Stadium management. While the player has ruled out any such action, the incident does raise the issue of what standard of care is owed when it comes to the condition of sporting fields. This question is particularly pertinent when it comes to fields supervised by amateur sporting bodies who obviously do not have the resources to ensure their grounds are in the condition of fields such as the Gabba. To avoid the costs of litigation, what measures can these bodies put in place to discharge their duty of care concerning the quality of the field?

This issue was recently examined in the ACT Supreme Court decision of *Abazovic v ACT (2003) ACTSC 15*. In this case, the Plaintiff suffered a fractured ankle at soccer training, when he inadvertently stepped in a hole on the training field. In his pleadings, the plaintiff claimed that the officers of the Defendant had negligently failed to detect a hole in their inspections which was approximately 30 cm by 10 cm. Further, it was this negligence on the part of the Inspectors which caused the Plaintiffs injury.

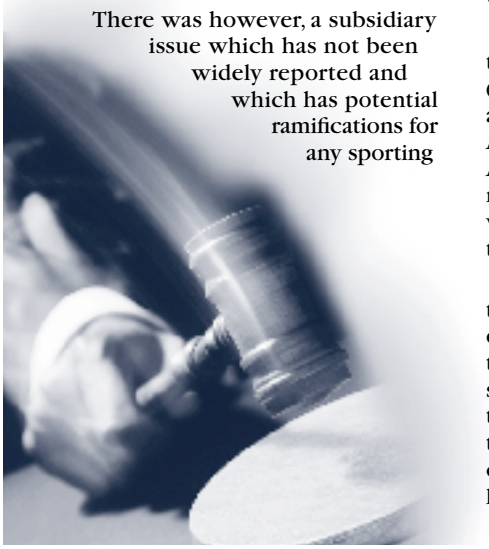
In deciding the matter, Crispin J acknowledged that the Defendant had a duty to take reasonable steps to ascertain the existence of latent dangers which may arise in public sporting fields. The ultimate question then was whether the Defendant's inspection system satisfied this duty. Evidence was presented that formal inspections of the ground occurred every four weeks, and informal inspections took place on an almost daily basis. However, no evidence was able to be presented as to how long the hole in the field had existed for. While Crispin J conceded the ground condition was poor, he could not see any evidence that the defendant had acted negligently in failing to detect a hole which may not have even existed on the day prior to the accident. For this reason, the Plaintiff's claim was dismissed.

While the ACT Supreme Court decisions are not binding on Queensland Courts, the rationale does accord with decisions made by Queensland Justices. The leading case on point is *Lanyon v Noosa District Rugby League Club (2002) QCA 163* Inc, which involved a coach who tripped on a field and ruptured his achilles tendon. Likewise to Abazovic, Lanyon argued that the football club had been negligent in failing to detect the depression which caused Lanyon to trip. The Queensland Court of Appeal though,

When is a memb

By Kate Williams

Banning a pregnant player from competition is discrimination according to the recent decision of *Gardner v All Australian Netball Assoc. Ltd ("Gardner's case").*



There was however, a subsidiary issue which has not been widely reported and which has potential ramifications for any sporting organisation which operates above a membership structure of state and territory associations that govern sports in their respective states. That is, could Netball Australia impose a ban on Gardner competing in the national competition when Gardner was not a direct member of Netball Australia?

In Gardner's case, Netball Australia listed the South Australian Netball Association ("SANA") as one of its members. Consequently, any rule or regulation imposed by Netball Australia was enforceable against the State Association. Trudy Gardner was neither a member of Netball Australia nor SANA. So where did this leave Netball Australia's ability to discipline her actions?

Until this decision, it was generally regarded that national sporting associations with direct membership limited to only state and territory associations did "catch all" members so to speak. If a player was a member of the local Netball Club then due to the fact that the local Netball Club was a member of Netball Queensland which in turn was listed as a member of Netball Australia, the

ruled that the Defendant had not breached its duty as it would be unreasonable to have a football field maintained to the same standard of evenness as a lawn bowls or croquet field. Given the Noosa Shire Council conducted regular inspections of the field, the Court concluded that the Council had taken all reasonable steps to ensure the ground was depression free.

From these cases and others such as *Bartels v Bankstown City Council (1999) NSWCA 129*, it would appear persons seeking damages for injuries suffered due to the condition of local football parks will have difficulty in proving negligence. Given the difficulties in finding all depressions within 650 square metres of grass, Courts have indicated that authorities in charge of such fields will discharge their obligations by conducting regular inspections and removing any potential hazards found. While the Courts have acknowledged that the world is not flat and plaintiffs should be wary of that fact, bodies responsible for fields upon which amateur sporting events occur should remain diligent to ensure any potential risks are negated.

er not a member?

player would fall within the ambit of Netball Australia's powers.

Gardner's case reversed this assumption. It was held that an organisation has jurisdiction over its direct members ONLY and as such, Netball Australia had no power to impose any restriction on Gardner's ability to compete. As has been foreshadowed, this decision creates a potential minefield for governing bodies of sport.

Take, for example, the issue of drug testing and anti-doping policy practices in Australia. It is likely that there are a number of sporting organisations around Australia who in accordance with their constitution have the power to implement and administer policy only in relation to their direct members; namely state associations. Lets look at Netball Australia again. Suppose Netball Australia selected a special World Cup team and one of the team members (a member of a local team only) was randomly tested prior to the season commencing and returned a positive test result. Initial selection of the player gives rise to an employment contract with Netball Australia. Accordingly, Netball Australia would have authority to sack the player from the World Cup team as a result of the positive drug test. Netball Australia would be powerless though, to prohibit the participation of the player from either State or local competition. This leaves us with a most unsatisfactory situation whereby the identified drug cheat can continue participating at a State level as a consequence of this loophole.

Obviously this outcome would not only be detrimental to the sporting organisation in question for appearing powerless to reprimand or otherwise deal with the situation, but to Australia's sporting reputation in general in the eyes of the international community. In light of this potential problem, sporting organisations need to be carefully peruse their constitution, determine its direct members and assess whether there exist any other members not covered under the jurisdiction of the organisation. Failure to do so, may prove to be both embarrassing and costly.

Volunteers

By Jason Walsh

Following from our last edition of Mullins & Mullins Sport where the Queensland *Civil Liability Act 2003* was placed under the microscope, in this issue we turn our focus towards the recent legislative changes made at the Federal level in relation to claims of negligence against volunteers.

The Federal Parliament has enacted the *Commonwealth Volunteers Protection Act 2003*, which is aimed at protecting volunteers for negligence liability when providing their services to the Commonwealth. To be afforded the protection under the legislation, persons must be providing their services to the Commonwealth or Commonwealth Agency on a voluntary basis. This means that a volunteer must not be remunerated for the services they are performing, other than those ancillary costs associated with the service.

The *Civil Liability Act 2003* and the *Commonwealth Volunteers Protection Act 2003* are similar in that a volunteer is protected if they are acting in good faith. A volunteer will not be protected from negligence liability under the Act if at the time they were providing their services, they were under the influence of drugs or were acting outside the scope of authority or instructions issued by the Commonwealth. This provision is extended to include those situations where the volunteer ought to have known they were acting beyond the scope of the activities authorised.

Another feature of the *Commonwealth Volunteers Protection Act 2003* is that the Commonwealth or incurs any liability that would attach to a volunteer. This is a major deviation from the Queensland Act. What this provision effectively does is place the Commonwealth in the position of the volunteer, if an injured party commences an action for negligence liability against the volunteer. The Commonwealth will be the body against whom the claim for negligence will be brought.

Interestingly, the *Commonwealth Volunteers Protection Act 2003* comes in what has been labelled "the year of the official". "The year of the official" has been launched by the Federal Government in an attempt to arrest the decline of officials who volunteer their services to sporting organisations. It is hoped that this campaign, coupled with the recent legislative changes enacted by the Federal Parliament, will increase the number of volunteers who provide their services to the Commonwealth and will ensure that the sporting livelihood of the nation is maintained.

Defamation in Sport

By Michelle Wilde

Australia has an implied constitutional right to free speech. That means a right to speech that is not regulated by the State. There are various restrictions of this malleable term within our legal system and one is the law of defamation. It seeks to protect the reputation of individuals or groups whose reputation has been injured or diminished in the eyes of others.

This article aims to discuss forms and defences to defamation actions in Queensland within the context of sports broadcasts, particularly speech made by sports commentators.

Common law governs the ACT, New South Wales, Northern Territory, Victoria and Western Australia. Queensland and Tasmania have codified the law of defamation and defamatory matter in Queensland is defined in section 4 of the Defamation Act 1889 (Queensland) ("the Act") as:

> *"any imputation concerning any person, or any member of the persons family, whether living or dead, by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise the person"*

Justification for defamation in Queensland suggests that truth alone is not a sufficient defence and requires the element of the publication being for the "public benefit". In cases where an opinion is published, the defence of fair comment may apply.

Fair comment under section 14 (1) (g) of the Act specifically relates to sports figures and states: -

> *"to publish a fair comment respecting any public entertainment or sports, or respecting the character of any person conducting or taking part therein, so far as the person's character appears from the matter of the entertainment or sports, or the manner of conducting the same" is lawful.*

Sports figures are so often criticized in the media by commentators for mistakes during games or matches, for under performance or being at the bottom of their game. All of us can think of examples where a commentator has decimated a sports figure and it is apparent that as long as the publication is deemed to be fair, as in regarding their performance and not a personal attack, then a sports person may have to 'wear' any negative publication.

An action in defamation may be taken to seek damages, injunctive relief or alternatively, a charge of criminal defamation. If a person is suing for damages, the proceedings are likely to be expensive and lengthy. Having a Court issue an injunction to stop the publication is an expedient process until a final decision can be made of the parties' rights at trial. In the case of criminal defamation in Queensland, consent to charge a person must be obtained by a court order or judge's sanction and the penalties imposed on a person found guilty of defamation range from a fine up to three years imprisonment. Essentially, when a person is considering taking action against someone who published defamatory material it is prudent to consider how much the sports person valued defending their reputation publicly and whether they regard the publication to be so damaging to their reputation that it would seem unsportsmanlike not to pursue an action in defamation.

Editorial

By John Mullins

It would seem that we are on the cusp of a new era in sport related litigation. In this edition we refer to a number of current events, the majority of which have or may give rise to litigation. The action by the Rugby Union Players Association against the ARU is an example of how sports related issues are finding their way into the Courts. Our article on defamation is motivated by the fact that sports people are starting to react badly to criticism by commentators to a point where they are not just firing back, but threatening legal action. Scenes of plaintiff lawyers clambering over themselves to act for Justin Hodges in an action against Suncorp Stadium could not sit well with any sports lover.

Sport, as we all know, is extremely dynamic. Players have bright but relatively short careers. Behaviours of players and officials trigger great emotion and whilst this emotion subsides quickly, the furore which is created often exceeds any political scandal or crisis or heinous crime. The recent findings of the SANZAR Disciplinary Tribunal in relation to the South African Rugby Players is an example of furore that is created. The bounds of defamation were being pushed by Australian players and administrators in this incident.

The actions by RUPA against the ARU, the claim by the player and coach arising from tripping and the litigation commenced by the injured surfer, are all examples of failures. Litigation did not help these claimants and there is no doubt it would have proved costly for all parties. In the world of commerce, alternate dispute resolution is now taking over from court based litigation with litigation being a last resort. It is important that sports plaintiffs realise that mediation and dispute resolution probably offers a great deal more than litigation.

Sporting administrators should seek to have mediation clauses inserted in their event agreements, venue hire agreements, player agreements, sponsorship agreements and any other commercial arrangement in sport to require the parties to mediate before litigating. Litigation will bring no credit to the sport and there is no finer example of this than the Super League fiasco.

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