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A Pregnant Pause – protection or discrimination

By Samantha Kane

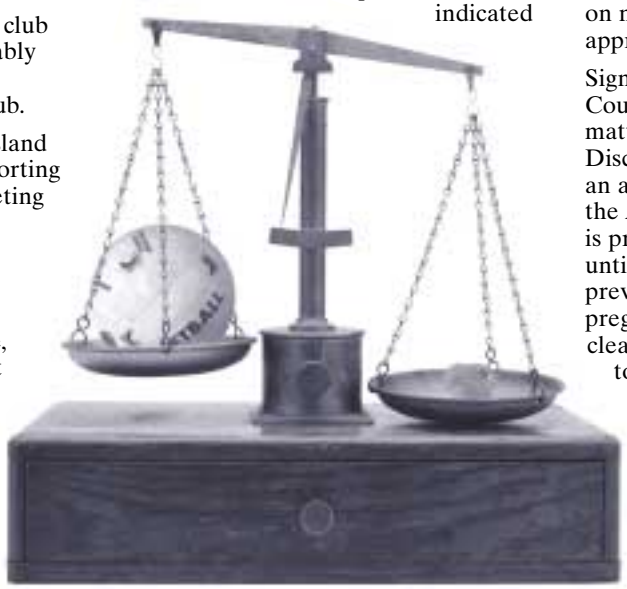
Netball Australia's recent decision to ban pregnant women from playing in its competitions has received much attention, with some commentators touching briefly on the issue that the decision may bring with it claims of discrimination. In light of the existence of anti-discrimination laws at both a State and Federal level it is imperative that the issue be given further scrutiny.

Certainly in Queensland, discrimination on the basis of pregnancy is unlawful if it occurs within one of the areas prohibited under the Act. Under the Anti-Discrimination Act 1991 (Qld) discrimination is unlawful in the club membership and affairs area. "Club" is defined to include those established for sporting purposes. Discrimination is unlawful if it involves denying or limiting access to any benefit arising from membership that is supplied by the club or if a member is treated unfavourably in any way in connection with the membership or the affairs of the club.

At first glance therefore, in Queensland at least, it may be unlawful for a sporting club to prevent players from competing whilst pregnant.

Certain exemptions exist under the Act, including an exemption relating to sporting activity in certain circumstances. For example, under the Act a person may restrict participation in a competitor's sporting activity to people who can "effectively compete". The question arises as to whether pregnant players are able to "effectively compete". It is important to note at this stage that pregnancy is not an impairment within the meaning of the Act, and exemptions relating to impairment discrimination will not apply in these circumstances.

In order to establish whether pregnant players are in fact able to "effectively compete" it is simply common sense that expert advice and discussion be sought as to the medical implications of pregnant women playing netball. It would seem that organisations such as Sports Medicine Australia and the Australian Medical Association do not support the decision of Netball Australia to impose a blanket ban, and one would assume that medical advice in consultation with professional bodies should have been sought before making such a decision. It seems however, that the decision has been a "knee jerk reaction" to the perceived threat of litigation in the event of injury. Recent decisions in the field of sports law have indicated that the net is often cast widely in terms of who will be named as defendents in cases of sporting injuries. It is clear that Netball Australia is protecting its own position, which in turn may make the position of state bodies imposing such bans untennable in terms of anti-discrimination laws.



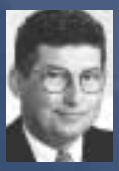
Sensibly, Netball Victoria has announced that it will not follow the directive of Netball Australia to ban pregnant players until a forum is held investigating the risks of pregnancy in sport. In light of the potential liabilities for local and state netball and other sporting clubs under anti-discrimination laws, which may arise notwithstanding a club's reliance upon a directive of a national association such as Netball Australia, it is essential that there be medical and expert advice to justify a blanket ban on pregnant players. A common sense approach taken on a case by case basis for each player and on medical advice is the more advisable approach.

Significantly, the Federal Magistrates Court, which has jurisdication to hear matters under the Federal Sex Discrimination Act, has recently upheld an application brought by the Captain of the Adelaide Ravens Netball team, who is pregnant, for an interim injunction until the end of the current season, preventing the ban from playing whilst pregnant. The player had a medical clearance from her medical practitioner to play.

Clearly, the current ban imposed by Netball Australia will not be able to be sustained in light of anti-discrimination laws and local clubs may face liability in the event that they enforce Netball Australia's directive.

Editorial

by John Mullins



What an exciting time for sport. We have just witnessed the extraordinary British Lions Rugby Tour of Australia, are in the midst of another Aussie trashing in the Ashes Test Series (as well as a successful Womens' Ashes Series) and are watching in awe, the great Ian Thorpe.

Last night there was a graphic illustration of rules and regulations in sport with the disqualification of the Australian 4x200 metre womens' relay team. Sport has always had rules and now more and more into the future the rules are being challenged and appealed. South Sydney did not accept the application of the rules and kept appealing until they were ultimately successful and now back in the competition.

The legislature is making more rules for sport, a significant one being the child protection legislation which we write about in this edition which is going to have a significant administrative effect on all sports in Australia.

The converse of this is where the anti-discrimination law is telling sporting bodies that some rules they introduce are unlawful. We will see a lot more on this as heads of sporting bodies seek to avoid liability on issues such as personal injury, sexual harassment and the new child protection laws.

We report on a number of recent cases which have interesting and at times inconsistent results for the participants. The finding that a sporting club was liable for the acts of its players in a similar way to the relationship of employer/employee is a particularly interesting case with obviously far-reaching effect.

Sport and the law will roll on and we will try to keep you up to date with lots of interesting material through this newsletter. If there is any topic which you would like to see covered, please feel free to telephone or email us with your suggestions. As always, we welcome feedback from you. This sports newsletter now has a distribution of approximately 6,000. We thank Sports Medicine Australia for whom we act for allowing us to insert this newsletter with their material to members.

Shielding the Innocent

By Elizabeth Sheehan

The Australian Sports Commission recently launched guidelines for sporting organisations entitled *Harassment-free Sport: Protecting Children from Abuse in Sport*. Children can be particularly vulnerable in sport as it involves close relationships between children and adults, where adults are in a position of trust and authority. Although the majority of people carry out this role responsibly and give up their time generously, some people seek out and take advantage of this position.

The release of the Guidelines coincides with the introduction of screening requirements for employees and volunteers who work with children with the commencement of the *Commission for Children and Young People Act 2000 (Qld)*. All schools and sporting organisation should be aware of their obligations under this new Act.

Organisations have a responsibility to protect children from abuse. Where an organisation implements policies to do this, not only are children better protected, but the organisation has a defence against claims of liability if a complaint of abuse is made.

Abuse includes physical abuse which results in non-accidental damage; emotional abuse which causes psychological or emotional damage; neglect which results in ill health; and sexual abuse, which includes a range of sexual activity and exploitation of children that can result in physical or psychological damage. Abuse in sport can take both subtle and obvious forms.

The Guidelines

The Guidelines recommend that sporting organisations take the following steps to minimise the risk of child abuse:

1 use only accredited coaches and officials, and include information regarding the correct treatment of children in accreditation;

2 adopt a code of ethics/conduct for all personnel and give the children a copy of the code;

3 use a screening procedure *(this is now compulsory in Queensland)*;

4 make a clear statement that child abuse is not acceptable and develop procedures directed to both adults and children to increase awareness of child abuse in sport;

5 appoint a contact officer and develop procedures to ensure that allegations of abuse are dealt with appropriately and effectively;

6 adopt thorough recruitment practices.

Organisations such as *Surf Life Saving Australia, Little Athletics New South Wales* and *Softball Australia* have policies in place to deal with this issue. The Guidelines recognise that each organisation's ability to implement these processes depend on its resources. However, the Guidelines offer practical advice for all sporting organisations to address this issue of abuse, regardless of their size.

The Guidelines are available from the Australian Sports Commission at www.ausport.gov.au.

Screening

Regardless of whether an organisation chooses to be proactive in relation to preventing child abuse, with the introduction of the *Commission for Children and Young People Act 2000*, all sporting organisations are required to screen employees and volunteers who work with children. The

SPORTS SHORTS

Safeguarding Sir Don

The Corporations Law can now be added to the extensive list of sporting and historical literature containing a reference to the late Sir Donald Bradman. Rule 6203 (e) of the Corporations Law Rules has been amended to ensure that no company uses a name that suggests a connection with Sir Donald where no such connection exists.

The Rule now states that a company name is unacceptable for registration if "in the context which is it proposed to be used, suggests a connection with:

i) a member of the Royal Family;

ii) the receipt of Royal Patronage;

iii) an ex-servicemen's organisation; or

iv) Sir Donald Bradman

if that connection does not exist".

The amending regulation has been prompted by a string of recent legal challenges by the Bradman Foundation to businesses proposing to incorporate the Bradman name into their business name.

Although the amendment ensures that the Bradman name cannot be used to suggest a connection with Sir Donald by corporations and unincorporated businesses, existing company names are unaffected by the regulation. These entitites do, however, still remain open to challenges on common law grounds.

Qld Gymnastics not liable in injury case

On 17 November last year, the Court of Appeal of Queensland, found the Queensland Gymnastics Assocation Inc, not liable for spinal injuries sustained by a participant in a trampoline coaching accreditation

- Children in Sport

screening provisions commenced on 1 May this year for paid employees and will commence in 1 May 2002 for volunteers.

Employers covered include boarding facilities at schools, schools (other than registered teachers and parents), churches, clubs and associations involving children, counsellors and support services, private teaching, coaching or tutoring (other than registered teachers).

An organisation which proposes to employ a person in child related employment must apply to the Commissioner for a notice stating whether the employee is a suitable person for child related employment. The application must be in the prescribed form. A fee of $40.00 is payable in relation to paid employees. A prospective employee's consent must be obtained before making the application.

The employment screening provisions apply to both paid employees and volunteers. Volunteers under the age of 18 years and parent volunteers who provide assistance in relation to an activity in which their child is involved (for example, a parent coaching a sporting team in which their child plays) are exempt.

Also, the Act does not apply to persons working on a "one off" or sporadic basis. The requirement to screen only applies to employees who have been engaged at least once a week over the course of one month, or at least once a fortnight over the course of two months, or at least once a month over the course of 6 months.

The provision does not apply to a person employed before the Act commenced. However, if the employer knows or suspects an existing employee has a criminal history that may make them unsuitable, they can apply to the Commissioner for a suitability notice. An existing employee has a duty to advise his/her employer to advise in any change in criminal history.

Penalties apply for employers who do not obtain suitability notices and also employees who are deemed unsuitable and engage in child related employment. Further, an organisation would have a poor defence and potentially be held liable if an employee they neglected to screen subsequently abused a child. Information on screening procedures can be found at *www.childcomm.qld.gov.au.*

We recommend that all sporting organisations consider the implications of the Act and Guidelines for their organisation.

course. 19-year-old Terry Wight, a trampolinist and gymnast since he was five years old and state and national representative, injured himself when he volunteered to do some demonstrations at the course. When exercising a manoeuvre, instead of landing on the trampoline on his feet, he landed head first.

Wight argued that a 'throw-in mat' made of foam some 10cm deep should have been used to absorb some of the impact. In response, the Court heard that the manoeuvre in question was widely considered to be extremely basic and was taught to children as young as four or five.

Considering the evidence, the Court found that no reasonable person in the instructor's position would have had any recourse to throw in the mats, when Wight, a very experienced trampolinist and gymnast, was performing what was widely perceived to be a basic routine. Furthermore, there was no evidence to suggest that experienced gymnasts made use of the mats when performing or varying an established routine.

In finding for Queensland Gymnastics, the case highlighted the fact that while sporting organisations may owe a duty of care to participants in their activities, if the organisation is found to have taken all reasonable safety precautions, no liability will be incurred.

Souths Back

On 6 July, the South Sydney Rabbitohs won their Federal Court appeal against a previous decision that had excluded them from the National Rugby League (NRL) competition.

After deliberating for six weeks, the Court decided 2-1 to overturn the previous ruling. It found that News Limited's actions in excluding Souths, had in fact contravened section 45 of the Trade Practices Act, because the "fourteen team" rule had the purpose of excluding clubs that otherwise met the 2000 NRL competition criteria.

Following discussions with the NRL, Souths will return to the league in next year's competition.

Stand Name Not Offensive

The Trustees of the Toowoomba Sports Ground Trust have successfully defended a racial vilification claim brought by an aboriginal man over the naming of a Toowoomba Athletic Oval "The ES 'Nigger' Brown Stand".

The stand was named after a prominent local football player whose nick name was "Nigger". The Applicant sought compensation in the Federal Court because he found the name of the stand insulting. The trustees had refused to change the name. Evidence was lead at hearing by the trustees that their decision not to remove the name of the stand was formed after consultation with the local indigenous community, who expressed the view that the sign was not offensive.

Violence & Hooliganism:
The New Sporting Dilemma?

By Alicia Hill

Increasingly, comments are being made on the way violence and hooliganism seem to be spreading and affecting sport. Control of players and their actions both on and off the field is being regulated, but there is also a need to control the conduct of the supporters and attendees. The key questions being asked are whose duty is it and more importantly what must be done to fulfil the duty? Some recent incidents which have sparked comment include:

NRL - Bulldogs v Eels

Supporters of the Canterbury Bulldogs clashed with opposing Eels supporters and police at a match at Parramatta Stadium causing mayhem and injuries. Numerous cautions were given, 23 supporters were ejected from the stadium, and arrests made. The ejectees were reported to have later committed acts of violence in the area surrounding the stadium before dispersing. In response the Bulldogs Club imposed life bans on fifteen supporters, the Club faced a fine from the NRL Management Committee for bringing the game into disrepute, and a meeting was called between the NRL, the Bulldogs board and local police and security officials, to map out a crowd behaviour control plan.

Soccer

UK soccer supporters are notorious worldwide for their violent behaviour. However in recent times, Swiss soccer has also been looking at how their league matches are conducted, after games were marred by a series of acts culminating in riots and a goalkeeper being struck by firecrackers. In response, Swiss officials ordered matches to be replayed behind closed doors, with only 100 people permitted to watch and security guards with dogs drafted to prevent others from gaining access.

Soccer Australia also recently had to address an incident where Melbourne Knights fans attacked Perth Glory players in a game in Victoria. Soccer Australia charged Bobby Despotovski, a Knights player, and the Knights club, with bringing the game into disrepute.

Union Field Invasion

Rugby Union officials had to determine how to react to an incident that occurred in a game between the Queensland Reds and the Sharks at Ballymore, where a spectator ran onto the field and crash-tackled a Sharks player from behind during play. An $800 fine was imposed on the fan. This is in contrast with the $5,500 maximum fine that can be imposed for pitch invasion at the Sydney Cricket Ground.

Whose Duty is it and what must be done to fulfil the Duty?

Violence associated with sports has seen an increasing number of people being injured or killed, increasing costs of property damage and more entities being held responsible in the aftermath.

Many parties have a vested interest in trying to resolve these issues to fulfil their respective legal obligations. For example:

- Sports clubs and associations who organise games need to attract fans and sponsors for financial survival. Where an entity organises a sporting contest then that entity owes a duty of care to the participants to ensure their safety in circumstances where it is reasonably foreseeable that they may suffer an injury. This is especially the case where the entity is in a position to prevent the injury from occurring.
- Venue owners need to ensure crowds are admitted in safety to fulfil their obligations as occupiers of a venue which is suitable for respective events. A suitable venue extends beyond the mere physical condition of the playing surface to include security measures, facilities such as emergency exits, medical aid stations, fire extinguishers and rest room availability.
- Security forces contracted by venue owners and organisers of events need to control crowd behaviour to meet their contractual obligations or be in breach of their contract.

Some steps suggested to alleviate the problem include:

- implementing legislation. For example the UK Football Disorder Act and legislation by Australian states to impose fines on individuals for pitch invasions;
- development of related Government policies;
- education campaigns and public statements of the unacceptable nature of these incidents; and
- introducing zero tolerance policies including banning certain areas at sporting venues, segregating opposing fans and life bans for attending matches.

All levels of sport are affected and policies should be developed and implemented early so that everyone knows exactly what will and won't be tolerated and the consequences involved.

If you are going to regulate on field behaviour, then what is acceptable behaviour around the field should also be considered and clearly stated. This may assist in defending legal claims, ensuring compliance with insurance requirements and controlling risk.

Prevention as the saying goes is better than cure.

Amateur Club Tackled for On-Field Foul

By Michael Highfield

On 8 February this year, Chief Judge Blanche of the NSW District Court held an amateur Rugby League Club liable for on-field foul play.

This judgment has significant ramifications for all amateur sporting clubs.

The case stemmed from an on-field incident where Bega Roosters' centre Darren Kennedy received a late head high tackle by Narooma Club centre Gary Pender, resulting in a broken jaw.

Notwithstanding that Narooma was an amateur club, Blanche J found that by "...encouraging Mr Pender to carry out the aims and ambitions of the Club, the Club is...in no different position to an employer".

He found that an employee relationship may be a voluntary relationship where someone obeys orders for the benefit of a master, and that the relationship between Mr Pender and the Narooma Club would still be employment within that broad definition.

Further, he found that although there was no regular payment to the players and it was made clear to the players that this was the case, there were a number of benefits that players received, which when taken as a whole were significant enough to form a relationship of employment.

Among the benefits he listed were player jerseys, petrol money to travel to matches, a player injury fund, away game mini-bus, meals after home games and player registration fees.

Mullins & Mullins
LAWYERS AND NOTARY
Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: jmullins@mullins-mullins.com.au

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Postscript: The information contained herein whilst accurate is of a general nature. If you have any queries in relation to the information contained herein we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter we would like to hear from you.