



Drugs in Sport

Recent cases considered

The issue of drugs in sport has never been more prominent in the minds of sports followers than in recent times.

The high profile cases involving the Brisbane Lions' Alastair Lynch and Newcastle's Robbie O'Davis have sparked much public discussion in regard to the rights and wrongs of the various outcomes. The Testing Procedure Explained

A common means of challenging a positive result has been to challenge the testing procedure and the accuracy of the test. In light of that, the sample collection process is now designed in such a way that the athlete is the only person who handles the sample container before the sample is given, and once the sample is given, the only person who handles it up until it is sealed. The testing procedure is carried out by the Australian Sports Drug Agency (ASDA).

Once selected for a test, an athlete has the testing procedure and his or her rights explained. These include a right to have a representative of his or her choice with him or her throughout the procedure. The athlete is required to give details of any medication he or she has taken in the 7 days prior to the test including vitamins, herbal products and food supplements.

Two samples, an "A" and "B" sample, are taken. The "A" sample is tested and the "B" sample is frozen. If the "A" sample is positive, the athlete, and in some cases his or her sporting federation are notified. The athlete then has the right to attend personally or have a representative attend the unsealing and testing of the "B" sample. If the "B" sample is positive, ASDA will give written notice to the athlete. The athlete then has the right to write to ASDA within 7 days stating any reasons why he or she believes the test may be invalid. If ASDA do

not accept the reasons, then the athlete's sporting organisation will be notified.

ASDA's involvement in the testing process finishes once the sporting organisation is notified. The matter is then in the hands of the individual sporting body. Most major professional sports have a drugs policy in place. This policy sets out the procedure for a hearing of the matter and the penalties involved. Whilst these penalties are determined by the sport itself, the Australian Sports Commission sets minimum standards for penalties. Future funding from the Australian Sports Commission may be dependant on the sport adopting these penalties.

Before any sanction is imposed on the athlete, they should be:

1. Told about the charge against him or her;
2. Given the chance to present his or her case against the charge; and
3. Given a hearing by an unbiased panel of persons chosen by the Sporting Organisations.

Alastair Lynch Case v Robbie O'Davis Case

Both these cases involved an admission by the respective players that they had taken a substance that they claimed they did not know was banned. However, the important distinction was the absence of a positive test in the Lynch case. The AFL tribunal acknowledged that Lynch's case was a unique one, dependant upon a number of particular facts and circumstances that the tribunal found difficult to believe could ever be repeated.

Lynch had been taking a substance known as DHEA as treatment for chronic fatigue syndrome since February 1996. At the time he commenced taking the drug, his club doctor contacted ASDA to enquire whether the drug was prohibited. The tribunal found



that the advice received from ASDA at that time was that it was not. The tribunal determined that the drug was not actually added to the banned list until May 1997 and the Brisbane Lions Football club was not informed of this until April 1998.

Lynch discovered by chance that the substance was banned in February 1998 and contacted ASDA directly. He received a letter from an ASDA official which he interpreted to mean that provided his level of testosterone stayed below a certain level, it was okay to continue taking the substance. The tribunal specifically stated that this is not the case. Lynch's belief was confirmed by 2 subsequent negative tests. Lynch however, authorised his club to inform the AFL that he was taking the substance.

In light of all these events, the tribunal found that despite the strict and absolute nature of the AFL Anti Doping Code it would be contrary to the spirit and objectives to find that he had breached it.

The Robbie O'Davis case provided a distinctly different set of facts. The first point in relation to this case was the initial hearing which found that the NRL had no jurisdiction to hear the matter. This was based on the fact that O'Davis was not validly registered with the NRL. The registration form signed by O'Davis did not have the Australian Company Number (ACN) of the NRL on it. As O'Davis

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was still registered with the ARL, the matter was then subject to a hearing by that body. The importance of this distinction was the penalties that could be imposed. The new NRL penalty was a compulsory 2 year ban, whilst the ARL provided only for a 22 week suspension.

The judiciary considered the first issue to be whether there was a deliberate use of a banned substance for performance enhancement? The judiciary found this to be fairly clear cut. By definition the substance was banned and by O'Davis' own admission he had taken it to improve his energy levels.

The judiciary then raised the issue of whether it was necessary to determine if O'Davis actually knew the substance was banned. Without confirming that, this was an element of the offence the judiciary concluded that in any event, O'Davis did know it was a banned substance. This conclusion was based on a consideration of all the circumstances that led to the taking of the drug. The relevant circumstances were:

- The need to obtain the drug from a gymnasium manager and the fact that it could only be obtained from a source in New Zealand. The judiciary found that O'Davis should have been alerted by the suspicious nature of this.
- O'Davis' failure to include the drug on the list of drugs he had taken in the 7 days prior to testing.
- His failure to check with ASDA as to the legality of the drug.
- Discrepancies in the amount of the drug that he claimed he had taken.
- The fact that if he had apparently found a substance that he believed to be legal and had improved his energy levels, why he had not disclosed this to any of his teammates.

The clear distinction between these two cases is the relevant inquiries that each player made in regard to the legality of the drug. The bottom line is that O'Davis should have at least enquired of ASDA as to whether this drug was legal. If such an inquiry was made he would have been informed that it was in fact banned.

Drugs in sport is a complex issue that involves a number of considerations from the area of sport, medicine, law and society in general. In the lead up to Sydney 2000, the emphasis on cracking down on "drug cheats" will only grow. It is important that all athletes take every precaution to adequately ensure they are fully aware of the legality of any medication they are using.

Who do you Sue?

In our previous Sports Newsletter, we touched on the liability of referees and claims that could arise by a player against his opponent on the sporting field.

This article generally addresses other areas of potential liability on a wider dimension.

When persons are injured, they normally, first, consider action against the immediate wrongdoer. Particularly in a sporting situation, it may be that other parties are liable and much more able, financially, to pay out any compensation for the injuries. Sporting clubs and associations have more recently been the target of this wider ambit of liability.

Where an injury is caused to a player, by for example, another player on the golf course, it may be that no action lies against the player who hit the offending golf ball, but in fact against the golf club itself. Such a situation arose in Western Australia. In that case, the injured player (the plaintiff) was a member of the Albany Golf Club. On the golf course, a practice tee and fairway ran alongside the 10th hole, separated by a line of trees and bushes which substantially hid the 10th hole from golfers using the practice tee.

On the day in question, the plaintiff was lining up to putt his ball on the 10th tee when he was struck in his right eye by a ball. The injured party was a 34 year old Radiologist. As a result of the injury to his right eye, he suffered a 96% loss of vision.

The plaintiff sued the golf club, alleging it had been negligent in the design of the golf course, in that the practice tee and fairway

were dangerously close to the 10th fairway and green. He contended that an alternative positioning of the course, which would have avoided the danger, had been open to the club. Experienced golfers, involved in the design of golf courses, gave evidence that the practice fairway was not adequate because it was not wide enough and was too close to the fairway and green at the 10th hole. They gave evidence that at a modest cost of \$3,000, the 10th green could have been moved to a safer position, taking it beyond the hitting range of top class golfers using the practice tee.

The Court found in the plaintiff's favour. The trial Judge found, on the balance of probabilities, that the ball which struck the injured player, originated from the practice tee. He found that injury to players using the 10th hole was foreseeable and that reasonable alternatives had been available to the club. The 10th green could have been resited, or the hours for use of the practice tee could have been restricted.

Despite the facts being of a somewhat novel nature, the actual legal basis for this decision is nothing new. Clubs owe a duty of care to players and probably spectators to take reasonable care to avoid the foreseeable risk of injury to those players or spectators. A risk may be foreseeable, even though the eventuality is unlikely to occur. The key issue in these cases is whether the club has neglected its duty of care. What needs to be examined is what a reasonable person in the position of the club would have done by way

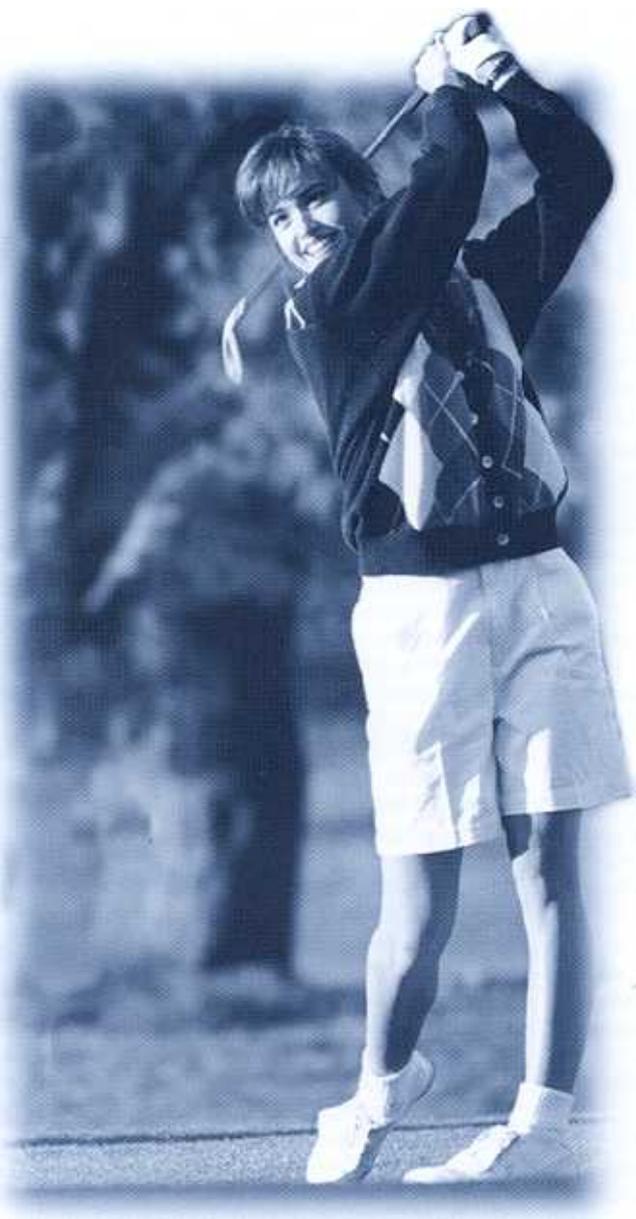
Sexual Harassmen

Sexual harassment is most commonly associated with the workplace and the stereotypical image of the "yobbo" male boss giving his female secretary a cheeky slap. However, sexual harassment is also an issue in the sporting arena. There are alarmingly frequent revelations of sexual harassment in sport both nationally and internationally. It has been suggested that sport and sexual harassment are not unlikely partners, particularly in the coaching realm where there are close physical and emotional relationships and unequal power relations.

This has prompted the Australian Sports Commission to develop a strategy to prevent all kinds of harassment, including sexual harassment, from occurring in sport and to ensure that, where it does occur, it is addressed appropriately. The strategy consists of a set of guidelines for sporting organisations and a training and education program. The guidelines include a main policy document called "Harassment-free Sport: Guidelines for Sport and Recreational

Organisations" and also specific guidelines for Sports Administrators, Coaches and Athletes. The implementation of the anti-harassment policy will be one of the criteria required for sports to receive critical government funding. This will cleverly ensure compliance. The policy and guidelines were released by the Australian Sports Commission on 2 July, 1998.

These developments highlight the importance of an understanding of the basic principles of sexual harassment to clubs, coaches, athletes and sporting organisations. Sexual harassment is regulated by both State and Commonwealth legislation. The Commonwealth Act limits the prohibition to certain areas such as employment, education, the provision of goods and services and accommodation. It has limited application to sport. The New South Wales legislation prohibits a person engaged in a sporting activity from sexually harassing another person engaged in a sporting activity. The Queensland legislation is



of response to the potential risk (e.g. erection of fencing along the practice tee, resiting of the practice tee etc.).

It is important for club officials to do a safety audit and examine what steps (which take into account cost constraints) can be taken to ensure the safety of players and spectators.

Another example of where a club was found liable, was in a New South Wales decision involving the Eastern Suburbs District Rugby League Football Club. In that case, the plaintiff was injured while playing in a competition game organised by the club. The player stubbed his foot on one of the many protruding water sprinklers on the football field and broke his leg. Prior to the game in which he was injured, the player had inspected the field. He saw the sprinklers and knew the dangers to those who would be playing on the field. Subsequently, he and his team mates voted to play on the field. If they did not play, they would forfeit the game.

Notwithstanding the fact that the plaintiff knew of the presence of the sprinklers, the New South Wales Court of Appeal still found that the club had been negligent. The club

argued that the plaintiff had a knowledge and appreciation of the dangers of playing on the field with the sprinklers being present. The Court of Appeal held, however, that in certain circumstances, a club such as in this case, could still be liable, even though the injured player had a warning, knowledge or appreciation of the danger.

The Court of Appeal saw it as important that the club was involved in a competition. The Court held that the club should be seen as indicating to a player that in the club's opinion, the field was appropriate for the game and the plaintiff to play on it. The grounds were organised through the club and the relevant league. As stated earlier, there was a sanction if the team did not play. The Court held that in such circumstances where a club invites and presses a player to subject himself to the dangers of this kind, the club then cannot be relieved of its duty to the injured player.

The Court did go on to say, however, that there may be circumstances in which, whatever be the urgings and pressures of a club, a player may not sensibly play. The Court thought, however, that this was not the case and found in favour of the injured player.

It will also be important in these types of situations where injuries occur on grounds, to check whether the ultimate owner and controller of the ground is a local Council. There may be liability attaching to the Council and also to the club who actually leases the ground.

In summary, when examining against whom action may be taken, it is important not to confine ones enquiries to the actual immediate and apparent wrong-doer.

in Sport

unique in that it contains an overall ban on sexual harassment in the State. Therefore the Queensland Anti-Discrimination Act 1991 is the law most relevant for our purposes.

What is sexual harassment?

Sexual harassment is unwelcome conduct of a sexual nature in circumstances where the harasser did or should have realised that the person harassed would be offended, humiliated or intimidated. Sexual harassment covers a range of behaviour and occurs where a person:

- subjects another person to an unsolicited act of physical intimacy;
- makes an unsolicited demand or request (directly or by implication) for sexual favours from the other person;
- makes a remark with sexual connotations relating to another person;
- engages in any other unwelcome conduct of a sexual nature in relation to the other person.



One of the purposes of the Act is to promote equality of opportunity for all. This is achieved by making a person civilly liable for a contravention of the Act by his or her workers or agents. It is a defence to a proceeding for a contravention of the Act if a respondent can prove that he or she took

reasonable steps to prevent the worker or agent contravening the Act.

Complaints about alleged sexual harassment are made to the Anti-discrimination Commissioner in writing. The anonymity of the complainant will be protected where necessary. Complaints must be made within one year of the alleged incident of sexual harassment unless there is a good reason for a complaint to be made after a longer period.

What must Sporting Organisations do to prevent harassment?

Both legally and as a matter of good management, professional and voluntary sporting organisations should take positive steps to prevent harassment. Such steps should include the development of:

- an anti-harassment policy;
- complaints handling procedures; and
- the provision of awareness training for staff and members.

The new policy guidelines developed by the Australian Sporting Commission will be invaluable in assisting Sporting Organisations with this task. The onus is on sporting organisations to protect their members and in turn protect themselves.

by John Mullins



The first edition of M&M Sport was warmly received and this edition will go to an even wider readership.

Almost by the day, the complexities of sport law intensify. In this edition, we feature articles on topical issues such as drugs in sport, sexual harassment in sport, litigation for personal injuries in sport. Space has prevented us from running articles on the recent decision of the Australian Government to tax sporting grants and the issue of how minors enter into legally binding Contracts for playing of sport and sponsorship agreements. These will be run in the next edition.

Throughout the football season in particular, the issue of judiciaries and suspensions are in the news almost daily. Sports Tonight even features a round up of Monday night AFL Judiciary as an important part of its program.

I am involved in four different Rugby Judiciaries. It is extremely important that appropriate procedural fairness (natural justice) is applied and that the Judiciaries have appropriate guidelines for operation and appropriate guidelines for penalties. Whilst the AFL and NRL Judiciaries have the benefit of video tape, often judiciaries of amateur codes and less senior games have to act without the benefit of the video, in which case the rules of the game, in terms of the referee being the sole judge of fact, need to be closely considered.

Submissions before Judiciaries which relate to the financial penalty to be suffered by the player, are becoming more and more common, given that most playing contracts provide for penalties if they are suspended. The responsibility of the Judiciary therefore is to make correct and appropriate decisions is becoming more intense.

This edition of our newsletter is going to a large sector of the sports medical community. We would welcome feedback from all of our readers as to articles which you would like to see featured in this publication. Please contact me if we can be of assistance to you in the area of sports law.

International Quarterback

Few images embrace a nation like those special moments in sporting history where an athlete stands on the dias with a gold medal round his or her neck and a tear in his or her eye.

Australians thrive on the spectacle of an athlete's success, however, limited years at the highest level generally means young athletes need to maximise their earning potential at this critical time in their lives.

With Olympic Games, Commonwealth Games, World Cups, World Championships and National Titles now dominating the sporting calendar, athletes are required to commit themselves to their sport 24 hours a day. As a result, the 1990's have seen the emergence of the professional athlete, a necessary move to meet the demands of the public to continue to provide the sporting entertainment they crave.

As one of Australia's leading sports management agencies, International Quarterback, a valued client of Mullins and Mullins, is at the forefront of the sporting industry. International Quarterback's roster reads like a 'Who's Who' of Australian sport and encompasses the accomplished champions and the young, up and coming athletes. Names like Trevor Hendy, Samantha Riley, Lisa Curry, Brad Beven, Clint Robinson and John Eales sit alongside Linda Halfweg, Ian Thorpe, Grant Hackett and Ben Tune.

International Quarterback specialises in providing a management service which covers every facet of an athlete's life. The comprehensive range of services provided is designed to maximise an athletes' professional, promotional and commercial potential both during and after his or her sporting careers: Career advice and direction; Contract negotiation; Sponsorship; Marketing strategies; Extensive financial planning; and Investment advice

In helping athletes achieve their short and long term goals, International Quarterback is committed to and specialises in providing expert career advice and direction with the aim of ensuring that the athletes' potential is maximised both on and off the playing field.

Contract negotiation is an integral part of the service provided, with a focus on balancing stability with flexibility. Through an intimate knowledge of a client's individual needs and the current market trends and conditions, International Quarterback can secure

sponsorship deals and other contractual opportunities with the view of a win/win philosophy for the athlete and the sponsoring company alike.

Sponsorship has become essential to modern sport and the lifeblood on which many athletes rely to succeed in their chosen sport. International Quarterback is renowned for its success in securing sponsorships. There is also a heavy emphasis on, and an extensive implementation of public relations and promotional and marketing strategies. International Quarterback strives to heighten the commercial viability of all clients and their image in the marketplace.

International Quarterback continues to forge very strong relationships with the largest sponsors in sport. Seven years ago International Quarterback, Trevor Hendy and Uncle Tobys commenced one of the most successful, lucrative associations in the history of Australian sport. This relationship has grown considerably and opened many cross-promotional opportunities for Trevor, with K-mart, York Barbell, H2O Sports, Healthworld, Oakley and a number of other companies. He is now working with Samantha Riley on a complete health and fitness concept to be released in 1999 titled 'Shape Up Australia.'

Critical to every athletes' career plan is a desire not only to succeed in his or her sport but to cement a future beyond his or her competitive years. International Quarterback provides full financial planning and investment advice, with the aim of ensuring financial viability before, during and after an athlete's career.

A new service being provided by International Quarterback is the provision of reports, used in litigation, on the future economic loss of star sports people who have career ending accidents before they have realised their earning.



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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.