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Newsletter of
Mullins & Mullins
Solicitors & Notary

M&M Sport

Editorial

by John Mullins

It gives us great pleasure to introduce to you our new newsletter - M & M Sport. As much as the history of sport permeates the very fabric of our Australian society so more and more does the law impact upon all aspects of sport. The influence of the law is not just confined to the actual playing of sport, but extends to issues of coaching, administration, sponsorship and financial management.

Law in sport cannot easily be encapsulated in one sector of the law. The law has application to sport for a range of issues such as players contracts, intellectual property, sponsorship agreements, ground lease agreements, personal injuries, judicial committees and appeals, liabilities of directors of sporting organisations, taxation, borrowing of money, securities and guarantees, and an ongoing list of issues.

This is an area which requires experience and specialised knowledge and competence. Our firm has practised in the areas of sports law for many years. Our founder Mr Pat Mullins Senior is a life member of Queensland Cricket and the Queensland Cricketers' Club. He incorporated the Queensland Rugby League and has practised in this area for most of his 50 years in practice. The firm has continued this expertise and in particular its Partners Mr John Mullins, Mr Bob Lette and Mr Curt Schatz have a wide range of sports law experience.

The firm acts for high profile sportsmen and women, organisations, clubs and sports management companies and the partners are directly involved in sports

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The Sponsorship Games

Commercial competition is as much a part of the Olympic Games as sporting competition. Therefore, the potential to "cash in" on the Olympics is highly regulated. So serious is the Olympic movement in guarding control of its indicia, images and sponsorships, in the lead up to the 1992 Games it spent approximately four times as much policing its intellectual property as it did on enforcing its ban on performance enhancing drugs. Australia now has its own regulatory regime, the *Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth)*. This Act is important for anyone involved in Olympic related commercial activities.

The object of the Act is a financial one. It aims to facilitate the raising of licensing revenue in relation to the Sydney 2000 Olympics through the regulation of the commercial use of the indicia and images associated with the Games. The Sydney Organising Committee for the Olympic Games (SOCOG) will need to raise in the vicinity of $700 million in sponsorship to meet budgetary targets.

The real purpose of the Act is to eliminate ambush marketing. This is the unauthorised association of businesses with the marketing of an event, such as the Sydney Games, without paying for the marketing rights. Ambush marketing can dissuade official sponsors from continuing their association with the Games, and seriously undermine the value of marketing rights.

The Act provides protection to indicia and images which encompass words and expressions associated with the Olympic Games. The phrases protected include "Olympic", "Olympiad", Paralympic", "Sydney 2000", "Sydney Games", as well as combination of words such as "Olympian" with "Gold", "Medals", "two thousand", "Sydney" or "Sponsor". Aside from such indicia, images which suggests a connection with the 2000 Games are also protected.

The object of the Act is that the Sydney Olympic phrases may not be used for commercial purposes by any entity except SOCOG or a licensed user.

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administration through board and committee appointments.

The purpose of this newsletter is to communicate with you on a regular basis (initially twice yearly) on a range of topical matters which involve the sport and the law. Also we will seek to bring you stories on some of the people involved in the sporting industry other than the players. The managers, the accountants and advisors, the consultants, the co-ordinators and the coaches and trainers. People who are involved in the business of sport.

We trust that you will find this newsletter interesting and informative and we welcome your response. If any of your friends and associates would also like to receive M & M Sport, please contact me and we will place them on our mailing list.

The Sponsorship Games

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The Act contains provisions relating to licensing and registration of users which is open to the public. The Act seeks to strike a fair balance between protecting free speech and fair comment and, maximising Olympics revenue. Therefore, the reporting of news, presentation of current affairs, or criticism or review in a newspaper, periodical broadcast or film does not offend the Act.

Both SOCOG and a licensed user with SOCOG's written consent may commence proceedings against an unauthorised user and may seek a range of remedies against an offender which include an injunction, corrective advertising and damages. The Act does not regulate the use of Olympic logos and insignia. These are the subject of specific protective legislation - the *Olympic Insignia Protection Act 1987 (Cth)*.

Any attempt to use the Olympics in marketing should be avoided unless a business is a licensed supporter of the Sydney Games. The regulation extends to the unfortunate extreme that Olympic athletes, who are the essence of the games, need to exercise caution in the way their image is used by their individual sponsors. Such sponsors are unable to make reference to the athlete's Olympic involvement and success.

Unfair contracts. When

The kick-off of the National Rugby League saw the end of the battle between News Limited and the ARL for control of Rugby League. Whilst the impact on the game remains to be seen, the lessons that remain for administrators, players and managers of all sports are significant. The rush by both sides to secure players in April 1995 has been the subject of a number of legal proceedings in the past 3 years. The avenue used by a number of players to challenge the validity of their contracts has been the provisions of the Industrial Relations Act (NSW).

Unfair Contracts - Jurisdiction

This act gives the Industrial Relations Commission of New South Wales the discretion to declare a contract void or varied if the Commission finds the contract to be unfair. An unfair contract is defined as one which is *"unfair, harsh or unconscionable"*. This applies whether the contract was unfair at the time it was entered into or subsequently became unfair. This permits any unfair part of the contract to be severed or varied. If the contract is unfair in its entirety then it can be declared void. In Queensland there is a near identical provision in the Workplace Relations Act 1997 and also at the Federal level.

Contracts with the ARL and Superleague were made subject to the law of New South Wales and accordingly the New South Wales act was considered when determining their validity. However given the similarity between the provisions, in Queensland and federally the principles to be applied would be similar.

Whether a contract will be found to be unfair depends upon the circumstances of each contract. An example of this is a case last year involving seven players who were attempting to avoid their ARL contracts. Four of the players were found to be entitled to avoid their contracts, whilst three were not.

When will the commission exercise it discretion?

Although no set rule can be established, a number of factors can be identified as being relevant. The gravity of each factor is considered in the circumstances and no particular factor in itself is conclusive in finding a contract to be unfair.

Legal advice

The opportunity to obtain independent legal advice in relation to the contract is crucial. A means of attempting to satisfy this requirement is to include a term whereby the player acknowledges that they received independent

The liability of Referees

In 1997 *The Times* reported that during a rugby match in England, when a player became dissatisfied with the referee's performance, he threatened to sue the referee if any injury occurred. The referee stopped the game until he could be convinced that he was insured against liability. This is an extreme example of the law's impact upon sport but illustrates the increasing attention being given to the potential liability of referees for their decisions.

A recent English case, *Smolden v Whitworth*, considered the issue. The case involved a rugby match at the club level. About ten minutes before the conclusion of the game, a scrum collapsed. The hooker's neck was broken and he suffered catastrophic paralysis.

The applicable area of the law in this instance was negligence. Proof of negligence requires the establishment of a duty of care owed to the injured person, and proof that damage or injury resulted from a breach of that duty. It was undisputed that the referee was under a duty of care to take care for the safety of participants in the match. The issue was the level of care required.

It was held that an ordinary standard of care applies. The referee was said to be under a duty to take all reasonable care taking account of the circumstances in which he/she is placed. *Taking account of the circumstances* accommodates the rules, customs and inherent risks involved in different sports. The riskier the sport, the lower the standard of care might be.

The act of negligence relied on in finding against the referee was that at the time the hooker was injured, he allowed the scrum to engage without enforcing the crouch-touch-pause-engage rule (CTPE rule). It was held

will relief be available?

legal advice. However, the inclusion of this clause is not sufficient if the player is not afforded the opportunity to read the entire agreement or this acknowledgement is not pointed out to them. The actual fact of whether this advice was obtained or the opportunity to do so was presented to the player will be considered. A clause of this nature will be of no use where the player is acknowledging something that did not occur. In this case the clause may be deleted and the fairness of the contract considered in that context.

An understanding of the agreement and its obligations

The absence of legal advice is in itself, not fatal to the contract. The issue then becomes whether the player, either in person or through its representative has read, or had the opportunity to read, the agreement and can be said to understand its meaning or effect. This is determined by consideration of such factors as whether the player consults their manager, the amount of time between receiving the contract and signing it and whether any unusual terms of the contract such as loyalty provisions are fully explained to the player.

Extent of negotiations

The degree and extent of negotiations the player had the opportunity to engage in is considered. If the player negotiated a number of variations to the agreement, it will be difficult to show the contract is unfair.

Representations

Any representations made throughout negotiations in relation to matters not included in the contract or as to the effect of matters that are included are critical. Throughout the Superleague war there were a number of these representations made by both sides. These related to the viability of the opposing competition, the opportunity to play representative football, their prospects of receiving their payments in the other competition, the future of their club in a competition and the quality of the competition. The Commission will consider the effect that these representations had on the player and whether they were influential in the player signing the agreement.

Whilst these legislative provisions are aimed at creating fairness in terms of employment agreements, their effect on sporting contracts cannot be denied. Managers and officials should ensure that in their haste to secure a signature, they are not entering an agreement which the player will subsequently be able to avoid on the grounds of unfairness.

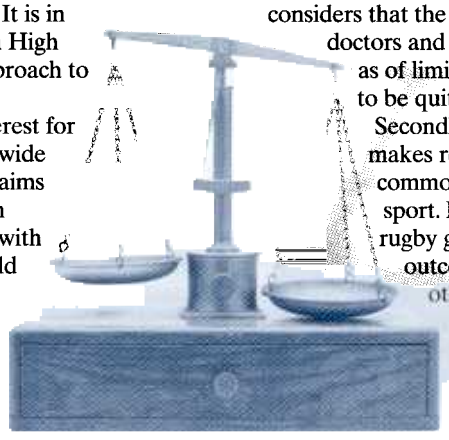
that without this departure from the rules, the scrum would not have collapsed and the injury would not have occurred.

One instance of failure to enforce the rules would be unlikely to render a referee negligent in the performance of their officiating duties. However, the facts revealed repeated non-compliance with the CTPE rule leading to the collapse of at least 20 scrums during the match and it was this which led to the finding. This is by no means a revolutionary decision. It is in line with the Australian High Court's generalised approach to negligence.

The decision is of interest for two reasons. It evoked wide media coverage with claims made that from now on referees, already faced with a demanding task, would have their authority challenged by the possibility of legal liability for on-field decisions.

It is not expected that this decision will open the door to a flood of claims by players against referees. It will be difficult for any plaintiff to establish that a referee failed to exercise such care and skill as was reasonably to be expected in the circumstances of a hotly-contested game of rugby. The judge stressed that his decision was on the particular facts of the case. However, this is of little reassurance to referees when one considers that the standards today required of doctors and employers were once seen as of limited scope but have proven to be quite wide over time.

Secondly, the decision potentially makes referees scapegoats for the common occurrence of injuries in sport. If the situation in the club rugby game was as serious as the outcome suggests, surely the other officials, players and coaches, were responsible to some degree.



Is your name, image or reputation being exploited?

Can sponsors exploit a name, image or reputation to promote their product? The Queensland Court of Appeal's answer is no. In the decision of *Talmax v Telstra* on 25 October 1996 (the *Kieran Perkins* case) the Court awarded damages to a personality which had been used to promote products without consent.

Facts of the Case: Telstra placed a telecommunications advertising supplement in the *Courier Mail*. It included a picture of Perkins in a swimming cap with the Telstra logo under the headline "Kieran Leads Charge by Telecom Dolphins". The article mentioned that Perkins had been named Telecom Australian Swimmer of the Year. The article was a paid advertisement in the form of an editorial. Perkins' action against Telstra was to establish that Telstra had represented an association with Perkins by the use of his name and image.

Australian Law: Under the Trade Practices Act the use of a person's name, image or reputation for commercial advertisement is unlawful if a significant section of the public would be misled or deceived that a commercial relationship existed between the personality and the advertiser.

The Decision: The Court granted an injunction against Telstra from further publication of the advertisement and awarded Perkins $15,000 damages. The central issue was whether Telstra's advertisement conveyed the impression to the ordinary reader that Perkins endorsed or supported Telstra or had consented to the advertisement.

The Court held in the affirmative deciding that Telstra had contravened the Act and that Telstra had misled and deceived the public into thinking that Perkins was sponsored by it and had consented to the use of his name, image and reputation. Therefore, Perkins's claim was based on the premise that the advertisement diminished the opportunity for him to commercially exploit his name, image and reputation.

Implications: The case highlights firstly that a remedy exists for the protection of personalities in Australia. However, there exists the need for a clear set of rules rather than relying on a case by case subjective assessment of the material facts. Secondly, it is a clear warning to sponsors who seek to use the name, image or reputation of a sporting personality without consent in the promotion of products.

Contributors

The stories for this Newsletter have been researched and contributed by some of the outstanding law graduates who are currently articled to the firm. These contributors are:-
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Some of you may be aware that Mr Pat Mullins Senior, our consultant, established the biggest and best cricket books collection in Australia. Due to failing eyesight in recent times, this library is now housed as part of the Melbourne Cricket Club Library at the MCG and a photograph of Mr Mullins proudly hangs in the library. In continuation of this close nexus between the firm, sport and literature, we intend to include a regular book review prepared by our client Mary Ryan Bookshops as part of M & M Sport.

Book Review

'Choose to Win' by Susie O'Neill

Macmillan Publishers
$19.95 - Trade paperback

It is not often we seek life's wisdom and answers from one so young, but Susie O'Neill gives us a new look at achieving your goals and fulfiling your dreams through her book, "Choose to Win", published recently by Macmillan.

This book is a fascinating insight into one of Australia's greatest swimmers and how she overcame her hurdles using specific methods of motivational thinking, confidence-building and goal setting. It is essential reading for anyone who faces challenges. Susie shows you in her down-to-earth, pragmatic strategies, how to confront any obstacle - and make your choice to win.

This book tells both Susie's personal story of how she has achieved her dreams and also gives a Chapter Focus at the end of each chapter to help relate to your own personal experiences. Discover the secrets to how this young woman became the first Australian woman to win an Olympic swimming gold medal in 16 years.

Beyond the rules of competition

Where injury is suffered by sports participants there may be no cause attributable other than the inherent risk of the activity. However, there also exists a myriad of ways a participant may suffer injury at the hands of referees, coaches and other participants, to which the participant has legal redress.

This legal redress does not derive from any special rules or statutory provisions governing a sporting activity but from traditional legal principles of the common law. The law that governs compensation for sporting injuries also governs everyday interactions.

This article illustrates that legal obligations are owed between two participants in a sporting activity in particular where there is direct application of force, that is, trespass to person. Trespass to person is based on obligations created by traditional common law principles and not those prescribed by the rules of the game.

Trespass

Trespass is available when injury arises as a consequence of a direct application of force by one participant against the other where the other has not consented to the application of the direct force. Therefore, consent to force under the rules of the game renders the sporting activity which causes injury acceptable. This is known as the inherent risk of a sport which occurs when contact is made during the ordinary course of sporting activity. However, a deliberate or dangerous infliction of force if not consented to would be considered trespass. For example, a punch thrown during a netball game is trespass where as punch in a boxing match is not.

An example of this rule as it applies to sport is the case of *Sibley v Milutinovic.* In this case Sibley during a training match executed two "slide tackles" on Milutinovic before Milutinovic could score each goal. On the second occasion Mulitinovic rose and punched Sibley in the face, fracturing his jaw. Sibley sued Milutinovic in trespass for his broken jaw. Milutinovic cross-claimed for trespass incurred by the "slide tackles".

The Court found that each competitor was liable to pay compensation in trespass and highlighted that the following considerations are relevant to trespass in sporting activities.

1. A participant consents to contact within the rules of the game and even accidental fouls (ie. the inherent risk of the game) but does not consent to deliberate or dangerous inflictions of harm.
2. The level at which the game is played. Firstly, whether the activity is friendly or for training purposes is relevant. Reckless conduct such as a "slide tackle" in a training match which is likely to result in injury is not justifiable. Secondly, the grade or level of skill at which the participants compete is also relevant.
3. Whether an intention existed to inflict injury is irrelevant.

Criminal Liability

The evidence concerning an injury may justify law enforcement authorities to prosecute for criminal liability. If prosecuted under both a trespass and criminal action the accused participant may find him/herself compensating the plaintiff via trespass (civil law) and also being convicted (criminal law).

An example of this is *Re Lenfield.* In this case the Court considered a "spear tackle" was outside the rules of a game of "tackle" in a school ground. Further the Court held that the force of the tackle was beyond the consent of the plaintiff and compensation should be awarded even though there was no intention to cause injury.

The Court also considered the spear tackle was assault occasioning grievous bodily harm therefore the accused participant was also charged with a criminal offence.

Implications for sporting participants

The implications for sports participants are as follows:

1. A participant's legal obligations owed to other participants do not stop once a sporting activity starts.
2. These legal obligations are consistent with the traditional common law principles used to govern everyday interactions.
3. Any direct force applied to another participant
   a. Outside the rules of the game;
   b. Without consent;
   c. Is deliberate and/or dangerous;
   is considered trespass to person and has the potential to be a criminal offence.

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