The court as referee in sport

What are the limits?

By Deborah Healey

There have been many changes in the way that the law has been applied to sport over the last few years.

The days of bemusement over legal proceedings relating to on-field injury or violence have given way to a general acceptance of litigation of many kinds in the sporting arena. Sports participants can now expect to protect many of their rights in court, and sporting organisations use the law to reinforce and advantage their positions, in the same way as other businesses.

Increased professionalism and commerciality have seen routine legal activity in areas such as sponsorship and other types of contracts, broadcasting and employment disputes. Even complex commercial legal areas, such as competition law, have been used in a number of significant sports-related cases.[1]

The on-field role of the umpire

Significant structural changes have also occurred over the last few years within sports decision-making itself. Traditionally, the referee or umpire was the final arbiter of on-field sports disputes. Changes to decision-making powers by referees or umpires in a number of sports have eroded their power as the ultimate judge. The introduction of the video referee in the National Rugby League (NRL), the third umpire in cricket and the technical match official in rugby have taken sole match control from their hands. In the US, for example. National Football League (NFL) referees are able to stop the match and walk to the sideline to review on-field incidents before making decisions. In addition, many professional sports have instituted post-match review processes for on-field discipline, which involve consideration of match day tapes and the potential to cite participants and bring them before a disciplinary tribunal.

All of these examples have impacted on the position of referee as sole decision-maker.

Should the courts become involved?

Against this background, however, there are a number of areas in which the courts have generally declined to adjudicate. These decisions have, in the main, been based on whether it was appropriate for the court to decide on an issue, and whether there existed alternate structures and processes which the courts could identify as resulting in fair and appropriate outcomes.

As was stated in the context of one Australian Football League (AFL) disciplinary dispute by Tadgell J, sometimes the courts are reluctant to interfere because they recognise that there are some kinds of dispute:

> '... which are much better decided by non-lawyers or people who have special knowledge of or expertise in the matters giving rise to the dispute than a lawyer was likely to have.'[2]

His Honour recognised that not every aspect of community life is conducted under the auspices of the state, and that it is appropriate that state-appointed judges stay out of those disputes for which a domestic tribunal has been appointed to decide. While the courts are more likely to intervene to protect private rights, including property rights, and ultimately there is no decision of a private or domestic tribunal with which the courts will refuse to interfere if it is necessary for the attainment of justice, his Honour noted that there is a long line of cases of this nature where the courts have refused review on the merits..

In another case involving a broken nose in an AFL match which went to court following the dismissal of a tribunal disciplinary claim

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for technical reasons, an appeal court found a criminal assault proven but exercised its discretion to dismiss the charge without recording a conviction. This was found to be an appropriate outcome because as one of the appeal judges recognised, such matters were heard weekly in various football associations by tribunals set up to do so. [3]

Some of the areas in which courts are less willing to adjudicate are discussed below.

Selection disputes

△ Sports participants can now expect to protect many of their rights in court. △

Prior to the 1996 Olympics, and despite the absence of a contract between the parties, the Australian Yachting Federation was in the courts in relation to the selection of athletes. The sport had tried to formulate clear and fair criteria for selection but these were drafted with little discretion. They were later amended by the organisation to 'improve' them. Disadvantaged athletes complained in the Federal Court. Despite the failure of their substantive action, and despite the fact that the ultimate selections were upheld, the court found that the athletes had relied on the superseded criteria to their disadvantage. The court ordered compensation to the athletes based on the principles of equitable estoppel; that is, the athletes had wasted money in reliance on the old criteria and the organisation was forced to compensate for that loss.[4]

Fearing the uncertainty and loss accruing from the prospect of similar disputes, administrators sought to provide an alternative system which would minimise disputes of this kind. Prior to the 2000 Olympics, the Australian Olympic Committee (AOC) implemented a new standardised approach to the selection process for Olympic Games. The AOC assisted Olympic sports with a compulsory template for selection criteria, which also involved an internal appeal process followed by an appeal to the Court of Arbitration for Sport (CAS). This system was implemented in conjunction with a standard Athlete Agreement which included a term by which the athlete agreed to the process—that is, the jurisdiction of the courts was ousted by substituting the appeal process.

Despite negative press and suggestions that lawyers were selecting the Olympic team, the CAS heard only 12 appeals on selection issues and only three appeals were ultimately upheld. The jurisdiction of the CAS as final arbiter was challenged in *Raguz v Sullivan*.[5] There, the issue was who should compete in the Olympics in the under 52kg class for women's judo. Raguz was originally nominated by the Judo Federation of Australia and an internal appeal upheld that nomination. Sullivan appealed to the CAS, and following a hearing in which Raguz was represented, the CAS found that Sullivan should represent. Raguz went to the Supreme Court challenging the CAS award. The defendants were Sullivan, the Judo Federation of Australia, the Tribunal and the CAS.

Raguz had signed the Olympic Team Membership Agreement which contained a term referring all selection disputes 'solely and exclusively' to the CAS, and which also expressly surrendered other rights to appeal, including those under the *Commercial Arbitration Act*. Under the CAS rules, the 'seat' or place of arbitration was Switzerland. Awards of the CAS are final and binding under its Rules. The Court found that its jurisdiction was effectively excluded based on its analysis of the relevant agreements and the CAS rules. The arbitration agreement constituted by the documents was not a domestic agreement because the seat (or legal place of the arbitration) of the CAS and its Panel of Arbitrators was Lausanne, Switzerland.

In this case, a system of carefully drafted contracts coupled with a recognised alternative forum successfully precluded the intervention of the courts.

Subsequent to the Sydney Olympics, the AOC commissioned a review and further refined these processes. Prior to the 2004 Olympics and the 2006 Commonwealth Games there were few reported selection appeals.

Disciplinary hearings

The Courts have also been reluctant to take over the role of sporting tribunals in areas such as disciplining participants. As stated at the outset, the courts are more prepared to become involved in disputes where livelihood is at stake or where there has been a flagrant breach of the principles of procedural fairness (natural justice). The principles of procedural fairness demand that the person accused of misconduct under rules should know the nature of the accusation made, have the opportunity to state a case, and that the tribunal should act in good faith. Even where the courts do become involved they usually refer the matter back to the internal tribunal for determination rather than decide the outcome.

The limits of the court's power to intervene in circumstances where documentation purported to oust court jurisdiction were tested in the Williams case.[6] There, a player was dissatisfied with the outcome of disciplinary proceedings conducted by the AFL Tribunal in which he was suspended for nine weeks (for interfering with an umpire on the field), and appealed to the Supreme Court. The trial judge overruled the Tribunal's finding.

On appeal, all three judges indicated that it was appropriate for a court to intervene in a limited way despite the fact that the player contract, signed by the athlete, contained terms which provided that the athlete would be bound by various rules and regulations of the AFL and determinations of the AFL Tribunal, and that findings of the AFL Tribunal would be final and binding. A majority of the Court of Appeal reversed the trial judge's decision and reinstated the determination of the Tribunal. Tadgell JA stated that when a tribunal is given the task of applying a criterion to the facts, a court is entitled to substitute its own opinion only if the tribunal's decision is so aberrant that it cannot be classed as rational. That was not the case here. Hayne JA found that the tribunal did not misconstrue the rule, and even on a favourable construction of the rule in question there was evidence for a tribunal to find a breach.[7]

The principles of procedural fairness, in this context, include a set of rules which should ensure a fair outcome. The practicality of the matter is that the courts are prepared to police the rules of fairness but not decide the outcome except in a limited range of circumstances.

Anti-doping

Another area that comprises a 'parallel' justice system, by a combination of statute and agreement, is that of anti-doping. Following the adoption of the World Anti Doping Code (WADA Code) in 2003 by all Olympic and most non-Olympic sports, and the adoption of the WADA Code-compliant anti-doping policies by most sports, both here and overseas, a system for doping discipline has been created. All organisations funded by the Australian Sports Commission need to have the WADA Code-compliant anti-doping policies as a condition of funding. The WADA Code provides for the out-of-competition testing of athletes, standardised penalties for positive results and referral of most doping-related proceedings to the CAS as arbiter. Onerous athlete whereabouts information must be supplied and kept up to date by athletes in relevant national and international testing pools to facilitate out-of-competition testing. There are significant penalties for others involved in contraventions by an athlete. CAS interprets the anti-doping policies in line with other similar policies.

Traditionally, the Australian Sports Drug Agency (ASDA), set up by legislation in 1991, collected samples from athletes and arranged testing of Australian athletes both here and overseas. ASDA also provided advice to organisations and athletes and fulfilled an educational function.

Following well publicised and controversial doping investigations conducted at around the time of the 2004 Olympics, ASDA has been superseded in 2006 by another organisation, the Australian Sports Anti-Doping Authority (ASADA), under legislation passed recently. In addition to the functions of ASDA and the existing Australian Sports Drug Medical Advisory Committee, ASADA will also investigate allegations of anti-doping violations, present cases before sporting tribunals and publish findings, and undertake the monitoring role previously filled by the Australian Sports Commission.

Sporting organisations are required, in most cases as a condition of further funding by government, to submit their functions of investigation and presentation of cases to ASADA. ASADA will also recommend the format of anti-doping policies for sports, and monitor their compliance with anti-doping policies.

The legislation thus builds upon the existing system by implementing uniform investigation, prosecution and enforcement processes in anti-doping. It thus operates, in most cases outside the ambit of the court system, in a well established specialist tribunal which the parties—involved as participants, referees, trainers, coaches, doctors and other officials—have agreed to use as part of their involvement in a sport. It is unlikely that the courts will become involved except in very limited circumstances.[8]

The future

A number of areas have been identified in this article where the courts have little or no involvement. A general theme in each of the

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△ There are significant penalties for others involved in contraventions by an athlete. △

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10. See <www.democrats.org.au>.
11. Pitman et al. *Profile of Young Australians*, 5.
12. Pitman et al. *Profile of Young Australians*, 3.
13. Adele Horin and Alexa Moses. 'The class of '91 grows up'. *Sydney Morning Herald*, June 18 2003.
14. The attitudes and behaviours of Y'ers to the world of work present a particular challenge to trade unions. Because Y'ers move in and out of professions and workplaces and are employed in hard-to-unionise sectors, they are difficult for unions to reach and retain. Their acceptance of job insecurity and dog-eat-dog attitude to career success doesn't help. The statistics are evidence of this. Only 18 per cent of young people joined a union in 2002. Pitman et al, *Profile of Y Australians*, 35.
15. See <www.pophouse.com.au>.
16. Brigid Delaney. 'The Young and the Restless'. *Sydney Morning Herald*. 23 October 2004.
17. Bonnie Malkin. 'Generation flex'. *Sydney Morning Herald*. July 26 2003.
18. Mark McCrindle. 'Understanding Generation Y'. *Prime Focus*, May 2003.
19. Annabel Stafford. 'A Generation so good at saying no'. *Australian Financial Review*. 22 March 2005. That being said, a survey of 7500 people by recruitment firm Hudson found that it was Xers who nominated 'more interesting work' as the single biggest motivating factor in terms of employment, whereas Generation Y were 'more materialistic' and were inspired to work for 'better money'. Jackie Woods. *Sydney Morning Herald*. July 28 2004. My view if given a choice, is that some Y'ers might opt for more money for boring work and find fun and stimulation outside the office.

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areas is the erection of a well-documented and fair contractual process which is known and agreed to by those concerned, or imposed as a condition of involvement in the activity. Another theme is the recurrent nature of the type of dispute and the expertise which has been developed within sport to deal with it. In addition, each of the areas is confined to a sporting context—they do not have the general commercial flavour that would attract the routine interest of the courts.

It is likely that the courts will maintain this 'demarcation' between areas in which they will and will not become generally involved. The legal/sporting landscape is one of change, and one can envisage that other areas may emerge to join this group.

Endnotes

1. See, for example, *News Limited v Australian Football League* (1996) ATPR 41–521; *News Limited v South Sydney District Rugby League Football Club Limited* [2003] HCA 45; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) ATPR 41 831; current 'C7' litigation.
2. *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 549–550. The reasons of the three appeal court judges varied widely. A majority appeared to believe that the trial judge went further than was necessary in reviewing a determination of an internal tribunal and overturning it.
3. *Watherston v Woolven* (unreported, South Australian Supreme Court, 21 October 1987), noted in *The Australian*, 9 November 1987, 4.
4. *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241.
5. *Raguz v Sullivan* [2000] 50 NSWLR 236.
6. *Australian Football League v Carlton Football Club* [1998] 2 VR 546 (Tadgell and Hayne JJA; Ashley JA dissenting).
7. Hedigan J at first instance and Ashley JA in dissent on appeal would have given the court a broader role.
8. A competitor does have the right to apply to the Administrative Appeals Tribunal for a review of a decision to place his or her name on the register.