

MY BALL: WHO OWNS THE CRICKET BALL ONCE IT CROSSES THE BOUNDARY?

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There is a gap in Australian, New Zealand and English law that leaves untested the question of who rightfully owns balls knocked or kicked into a stand or over a fence during professional sporting competitions. Tradition, in most cases, dictates the balls be returned. Certainly that is true in cricket, which is the focus of this article. But the sports memorabilia market and the uncertain state of the law may tempt spectators to assert a right to keep errant balls. It is a possibility sporting organisations, the legal community, collectors and society in general would do well to consider.

Introduction

*Finders keepers, losers weepers.*¹ Folk saying – Anon

In November 2007, in a match against Sri Lanka, the Australian cricketer, Adam Gilchrist, nearing the end of his remarkable Test career, knocked a huge six right out of Bellerive Oval in Hobart. The ball ended up in an adjacent street under a car where, newspaper reports suggest, it was recovered by a man who did not immediately return it.² The six was the popular Gilchrist's 100th in test cricket and, as London's *Daily Telegraph* observed, 'while not in the Barry Bonds [US baseball player] league, the ball would still be a valuable piece of cricket memorabilia.'³ After about three weeks a man, reportedly a hospital worker in Melbourne, returned a ball to Cricket Australia which accepted it and declared it was indeed Gilchrist's history-making ball.⁴

Cricket Australia got the ball back without seeking a police investigation or publicly threatening legal action and it made no public accusations of theft.

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¹ The Oxford English Dictionary 2nd Edition, 924 cites early recorded use as (1825) J.T. Brockett *Gloss. N. Country Words* 89 'No halfers-findee keepee, losses seekee.'

² Philip Young 'Ball hog caught out', *The Mercury* (Hobart), 21 November, 2007, 1. Angus Morgan 'Historic ball returned', (News Release, *cricket.com.au* 5 December, 2007), <<http://cricket.com.au/default.aspx?s=newsdisplay&id=40264>> at 20 March, 2008.

³ Nick Hoult, 'Adam Gilchrist's six appeal', *Daily Telegraph* (London), 19 November, 2007. <www.telegraph.co.uk/core/Content/displayPrintable.jhtml;jsessionid=EWWO1> at 22 November, 2007.

⁴ 'Ball hog caught out' above n 2.

When the ball was returned, all was forgotten. Was this conduct a masterful piece of public relations, or a de facto acknowledgment that Cricket Australia's rights of possession were not especially strong? Which raises other questions: Could the man have legally kept the ball? And, if he had caught it while in the stand and kept it, what would his legal position have been? These possibilities illuminate a legal question which has never been tested in Anglo/Australian courts. In professional cricket, who rightfully owns balls habitually knocked into the stand or those sent right out of a playing facility? It raises fundamental and often conflicting legal issues about abandonment and possession as well as touching on worldwide sporting convention which appears to be in a state of flux.

The ownership of cricket balls – a survey

In almost all sports when balls are either accidentally or intentionally kicked or hit into the crowd, they are returned. There is a widely held, though imprecise public belief, not necessarily based in law, that the ball is the property of the players, or perhaps the team, or possibly the league or association to which the team belongs, and therefore it should be given back. It is a belief that may be waning perhaps fuelled by a sports souvenir market, which until the current financial crisis, was booming.⁵ There is the case of Gilchrist's Test ball discussed here, but in contrast there are growing demands to allow tennis spectators to keep errant balls.⁶ The United States Tennis Association has recently begun limited experimentation in that direction permitting spectators to keep balls at some US Open matches.⁷ There are the persistent debates over the ownership of lost golf balls and even the much honoured tradition of the crowd returning soccer⁸ balls is under attack. In 2004, Everton FC of Liverpool, one

⁵ Bonnie Malkin, 'Credit crunch hits Sir Donald Bradman memorabilia sale' *Telegraph.co.uk* (London) 16 December 2008. Bradman's cap from Australia's famous 1948 tour of Britain received no bids at a Melbourne auction. It later sold privately for about A\$400,000, a considerable sum but less than the price paid three years before. <<http://www.Telegraph.co.uk/news/worldnews/australiaandthepacific/australia/3793172/Credit-crunch-hits-Sir-Donald-Bradman-memorabilia-sale.html>> at 3 March 2009.

⁶ Paul Finkelman, 'Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?' (2002) 23:5 *Cardozo Law Review* 1622. Ben Walker, 'Tennis faces unique controversy over foul balls' *USA Today* (McLean, VA), 9 July 2004. <http://www.usatoday.com/sports/tennis/open/2004-09-07-foul-balls_x.htm?POE=click> at 24 March, 2008.

⁷ USTA.com, 'Improve Your Game – Choosing/replacing balls' (News Release, 11 February 2009). <http://www.usta.com/USTA/Global/Improve_Your_Game/Archive/Tennis_Tips/Equipment_and_Gear/Choosing_and_Replacing_Balls.aspx> at 29 April 2009.

⁸ This paper will use the term soccer to describe the game known as football around the world except in Australia and North America. In Australia, depending on the state, football can mean Australian Rules (Victoria, South Australia) or Rugby League (Queensland, NSW), Rugby Union (Queensland, NSW) or soccer, though the meaning appears to fluctuate depending on context. In North America, both in Canada and the US, football means gridiron. In the Republic of Ireland football is often used to describe both Gaelic Football and soccer.

of the biggest and richest soccer clubs in Europe⁹ found it necessary to appeal to its supporters to return balls kicked by then-Everton player Wayne Rooney.¹⁰ Furthermore, it is not uncommon in European soccer to see a winning player, in an act of ecstatic abandonment, kick a ball into the club supporters' stand at the conclusion of the game.

In amateur and lower-grade professional sport, the return of balls may be important because the cost of replacement can strain the finances of such organisations. The right to recover balls hit into adjoining property by an amateur cricket club, with the club clearly claiming ownership, has even been before an English court in *Horton v Tidd*.¹¹ But for fully professional organisations, Everton aside, the cost of lost balls is usually incidental, nevertheless for various reasons some sports do specifically demand the return of balls. In spite of the USTA initiatives, ball return remains the norm in professional tennis where there is scientific evidence that balls undergo minute changes in pressure during a set.¹² Before serving, players will choose two balls from several balls in play and select those that best suit their game. A ball kept by a spectator would diminish a tennis player's options, which is one reason why the United States Tennis Association advises umpires to carry a supply of used balls. Under certain circumstances the umpire can replace a lost or damaged tennis ball with one showing the same degree of wear.¹³ Of course at the end of play, should a player hit the ball into the stand, the spectators are allowed to keep the 'abandoned' ball.¹⁴ In cricket, where balls are intentionally knocked from the field of play, the wear on the ball is also a subtlety of the game. Engineering studies have confirmed what every cricket aficionado knows, as the ball wears, its trajectory and elasticity are significantly affected.¹⁵ By convention, cricket spectators are expected to return the balls to the field, even though the rules under

⁹ *Everton Football Company Limited Annual Report and Accounts 2008*. Financial Review 5. Everton had total income including broadcasting rights, gate receipts and other revenues of more than 75 million British pounds in 2008. <www.evertonfc.com/assets/_files/documents/dec_08/efc_1229522006_EFC_Report_and_Account_2008.pdf> at 20 September 2009.

¹⁰ 'Give Us Our Balls Back', (News Release *evertonfc.com* 26 January, 2004). <<http://evertonfc.com/news/give-us-our-balls-back.html>> at 24 March, 2008.

¹¹ [1965] 196 Estates Gazette 697. In this case the cricket club unsuccessfully claimed an easement on the property of Tidd which permitted the club access to recover lost balls. See John Scott, *Caught In Court* (1st ed, 1989) 232. Also 'Cricketers Easement Claim Fails', *The Times*, (London), 23 October 1965, 6.

¹² Jan Magnus, Franc Klaassen, 'The effect of new balls in tennis: four years at Wimbledon' (1999) 48:2 *Statistician* 239. The authors conclude new balls do not influence serves but affect the way points are played.

¹³ *USTA Chair Umpire Handbook*. 'If a ball is lost or becomes unplayable during the warm-up or before the 3rd game begins after a ball change, you may replace it with a new ball. If a ball is lost or becomes unplayable at any other time, you may replace it with a ball of like wear.' <<http://www.usta.com/GetInvolved/~media/USTA/Document%20Assets/2008/07/17/ChairUmpireHandbook.ashx>> at 19 March 2009.

¹⁴ Ben Walker, above n 6.

¹⁵ Franz Konstantin Fuss, 'Cricket Balls: construction, non-linear visco-elastic properties, quality control and implications for the game' (2008) 1 *Sports Technology Journal* 41, 54. The author, a mechanical engineer at the University of Adelaide, found significant inconsistencies among different makes of cricket balls.

the *Melbourne Cricket Ground Act* (Vic) state in Part 4 s 15 (e) that a person must not ‘throw any object in a manner which may cause danger ...’ Arguably hurling a cricket ball back onto the pitch would fall within this prohibition. Similar prohibitions may be found at other major cricket venues.¹⁶ In cricket, should a ball become lost (a rarity though not unheard of in professional cricket) or ‘irrecoverable’, as the *Laws of Cricket* describe it, it is declared dead and replaced by the umpire with a ball exhibiting a comparable degree of wear to the ball that was in play.¹⁷

In cricket, soccer, Rugby Union, Rugby League, Australian Rules football, basketball, gridiron, tennis (with the exceptions noted above), hockey, netball, lacrosse and most other ball games – with the significant exception of baseball and golf-balls which leave the playing area, even those intentionally hit or kicked there as in cricket, Rugby, Australian Rules or gridiron football,¹⁸ are expected to be returned. In golf, of course, it is fundamental to the rules of the game that the ball must not be moved or even intentionally touched by a spectator provided the ball remains in bounds.¹⁹ Balls knocked out of bounds in golf result in a one-stroke penalty and a new ball may be introduced.²⁰

Lost balls, golf and the law

Golf is the one area where the courts in England and Canada²¹ have specifically addressed the ownership of lost or abandoned balls. The issue does not appear to have penetrated either the Australian or New Zealand courts. In two of the best known English golf cases, the much-cited *Hibbert v McKiernan*²² and the more recent *R v Rostron*,²³ the accused were found on the golf courses at night in possession of golf balls. In *Hibbert* a man was arrested with eight balls in his possession, and in *Rostron* the accused (there were two) were found in diving gear near a water hazard in possession of a sack, as the court observed [at 1],

¹⁶ Section 12 (2) (g) of the *Sydney Cricket Ground and Sydney Football Stadium By-Law 2004* states ‘a person must not...throw or project any stone or other missile...except as a normal incident of a sporting event...’ Arguably ‘a normal incident of a sporting event’ might include returning a ball, but it is open to interpretation. There is a tighter prohibition in Cricket Australia’s own *2008–09 Conditions of Entry to the Venue* 16 (d) which says patrons must not ‘throw or attempt to throw any stone, bottle, projectile or other object’.

¹⁷ *Laws of Cricket* Rule 20-2. < <http://www.lords.org/laws-and-spirit/laws-of-cricket/laws/>> at 19 March 2009.

¹⁸ In the United States, teams in the National Football League and the NCAA (College football) run up temporary nets to prevent balls kicked towards the goalposts from going into the crowd. In the Canadian Football League such precautions are rarely taken.

¹⁹ *R&A Rules of Golf 2008-2011* Rule 13-1 ‘A ball must be played as it lies’. <http://www.randa.org/flash/rules/PDF/WEB_ROG_spreads.pdf> at 19 March 2009.

²⁰ *Ibid.* Rule 27-1-b.

²¹ *R v KAA* (1993) BCPC 1. Davis J departed from *Hibbert* and declined to accept the prosecution’s premise that the golfers had abandoned the balls. As a consequence the accused was found not guilty.

²² *Hibbert v McKiernan* [1948] 1 All ER 860.

²³ *R v Rostron and Collinson* [2003] EWCA Crim 2206, [2003] All ER (D) 269.

‘of very wet golf balls’.²⁴ In both *Rostron* and *Hibbert* the courts agreed that the balls had been abandoned by their original owners, the golfers. In *Hibbert*, Lord Goddard CJ in his judgment reached the important conclusion on the abandonment of the balls on the basis of the decision of the court below.²⁵

Whether the justices [in the court below] meant that the balls had been abandoned so that the owners never intended to recover them if they could, as would be the case if they had thrown them away as useless, or whether they meant no more than the search for them had been abandoned, may be an open question. We must assume, however, that the finding means that the owners had renounced both their possession of and property in the balls.²⁶

But in order to sustain a prosecution for larceny²⁷ in the case of abandoned property it was necessary that the balls have an owner who could rank before a finder.²⁸ In reaching a decision on that point the judges in *Hibbert* considered the well known line of cases regarding the rights of someone finding a chattel on land which the finder does not own. The examinations included such staples as *Armory v Delamirie* (1722)²⁹, *Bridges v Hawkesworth* (1851),³⁰ *Elwes v Brigg Gas Co* (1886),³¹ *South Staffordshire Water Co v Sharman* (1896),³² and *Hanna v Peel* [1945].³³ In the end the court accepted that the Club owned the balls because it owned the property upon which the abandoned balls lay and it hired a special constable, Frederick McKiernan, to protect the Club’s interests. It was McKiernan who arrested Hibbert on the course with the golf balls in his pocket.

While endorsed in *Hibbert*, and relied upon subsequently in *Rostron*³⁴ and other cases, the legal recognition of the golf clubs’ unilateral assertion of ownership, and the Court’s acceptance of the proposition the balls are abandoned, has

²⁴ *R v Rostron and Collinson* [2003] EWCA Crim 2206, [2003] All ER (D) 269. And see, Loudon, Andrew, ‘Fairway to prison – Diver is jailed for retrieving golf balls’ *Daily Mail* (London), 26 April, 2002 6. Terry Rostron got a conditional discharge, but Mark Collinson, the leader of the expedition, was sentenced to six months. After serving ten days he was released and the six month sentence was later quashed, but clearly the court took his offence very seriously.

²⁵ *Hibbert v McKiernan* [1948] 1 All ER 860 at 862.

²⁶ [1948] 1 All ER 860, 862.

²⁷ *Hibbert* was charged under the *Larceny Act 1916* replaced in England and Wales by the *Theft Act 1968* under which the charges in *Rostron* were laid.

²⁸ Some of the complexities in this proposition are elegantly explored in Robin Hickey, ‘Stealing abandoned goods: possessory title in proceedings for theft’ (2006) 26:4 *Legal Studies* 584, 5844-584-587.

²⁹ *Armory v Delamirie* (1722) 1 Str 505; 93 ER 664.

³⁰ *Bridges v Hawkesworth* (1851) 21 LJQB 75.

³¹ *Elwes v Brigg Gas Co* (1886) 33 ChD 562.

³² *South Staffordshire Water Co v Sharman* (1896) 2 QB 44.

³³ *Hanna v Peel* [1945] 2 All ER 288.

³⁴ [2003] EWCA Crim 2206, [2003] All ER (D) Mantell LJ at para [16].

attracted critical attention.³⁵ In *Rostron*³⁶ Mantell LJ relied on the evidence at trial of the Club professional that, if after five minutes a golfer could not find a ball ‘not surprisingly you are deemed to have surrendered it to the club’.³⁷ The *Rules of Golf* were not specifically cited in either case, but they do indeed stipulate that a ball is considered lost if a player cannot find it within five minutes.³⁸ Subsequently the Club’s groundskeepers or a contractor usually retrieve the ball and then quite remarkably offer it for sale, possibly to the very golfers forced to abandon it in the first place.

So how do these cases bear on the issue of who owns a lost cricket ball? They clearly suggest that the courts can contemplate a circumstance under which a ball once hit is abandoned. But the cases also affirm the doctrine that ownership of such balls lies with active owners intent on protecting their property rights. They also underline the rights of an honest finder on another’s property. But as Humphrey J wrote [at 863] in *Hibbert*:

The appellant [Hibbert] was not an honest finder. Indeed he was not a ‘finder’ at all except in the sense in which a burglar may be said to ‘find’ ‘jewellery’ on the dressing table of the householder, when the object of the entry into the house it to steal it.³⁹

So *Hibbert*, and *Rostron* would suggest that if a golf club is not to be numbered among dishonest finders and jewellery thieves, then the law is prepared under certain circumstances to countenance the swift abandonment of an ownership right by compliant golfers. Now, consider a ball hit out-of-bounds. Like a ball lost in the golf course rough, players have five minutes to search for it.⁴⁰ However, in practise, players rarely make a thorough search for such balls, discouraged perhaps by the need to scale a fence, or enter private property, or unnecessarily delay their partners, or some other impediment. Many golfers simply take a penalty stroke and play another ball. This situation is directly analogous to a Test cricket ball knocked over a fence, and replaced by the umpire. If, like the golfers, no effort is made to retrieve the lost ball, can it legitimately be considered abandoned and is the abandonment immediate? The question of how long it takes to abandon a chattel is one of great debate in the law, but in *Re Jigrose*⁴¹ Kiefel J, then on the New South Wales Supreme Court now of the High Court of Australia, economically reviews the controversies and defines abandonment “[a]s a general proposition, if I throw something away I

³⁵ Hickey, above n 28, at 587. Hickey vigorously criticises *Rostron* arguing it was ‘unacceptable’ that the court never adequately established that the golf course was the owner of the balls.

³⁶ *R v Rostron and Collinson* [2003] EWCA Crim 2206, [2003] All ER (D) 269 at [9].

³⁷ [2003] EWCA Crim 2206, [2003] All ER (D).

³⁸ *R&A Rules of Golf 2008* Definitions 28. ‘A ball is deemed lost if it is not found or identified as his by the player within five minutes...[of having] begun to search for it...’.

³⁹ *Hibbert v McKiernan* [1948] 1 All ER 860, 863.

⁴⁰ *R&A Rules of Golf 2008*, above n 38.

⁴¹ *Re Jigrose Pty Ltd* [1994] 1 Qd R 382.

truly abandon it. I intend no longer to retain possession. I do not seek it out and I have no further interest in ownership.” This definition excludes losing something or, as in the case of a Sydney author, leaving a manuscript with a publisher for over six years.⁴² The court found in that case the author did not abandon the material. But Kiefel J does not exclude the possibility, under certain circumstances, of immediate abandonment.

When abandonment is endorsed – ice hockey and baseball

A strategy of immediate abandonment has been adopted by two major professional sports, baseball and ice hockey. In ice hockey, when the puck goes into the crowd, it is kept.⁴³ This is true in professional hockey leagues in North America, Europe and Asia. It is not clear how this practice developed but it possibly grew out of the fear that people throwing the frozen puck back on the ice could strike other spectators or players. Certainly there is considerable evidence that pucks shot or deflected into the crowd from the ice can cause serious and sometimes fatal injury.⁴⁴ In addition, even at the top professional level pucks are simply small hardened rubber discs of only incidental value. Another factor is that pucks that might become important to collectors always end up in the net and as a consequence are not abandoned.

Baseball – is it a special case legally?

Given that keeping the ball has been a sometimes controversial part of US professional baseball, for more than 100 years,⁴⁵ American jurisprudence on the issue is surprisingly underdeveloped. The decision by the majority of

⁴² *Moorhouse v Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700. For an analysis of the law on finding see Joyce Tooher “Jubilant Jamie and the Elephant Egg” (1998) 6 *Australian Property Law Journal* 117.

⁴³ The *National Hockey League Official Rules 2008–2009* do not specifically mention this issue, but Rule 13.2 states that the home team ‘shall be responsible for providing an adequate supply of official pucks which shall be kept in a frozen condition’. This suggests an official acknowledgement that some pucks will be lost during a game. < <http://www.nhl.com/rules/index.html> > at 19 March 2009. The issue also goes unmentioned in the *International Ice Hockey Federation Official Rule Book 2006-2010*. < http://www.iihf.com/fileadmin/user_upload/PDF/rules_table.pdf > at 19 March 2009.

⁴⁴ James E. Winslow and Adam O. Goldstein, ‘Spectator Risks at Sporting Events:’ *The Internet Journal of Law, Healthcare and Ethics* (2007) Volume 4, Number 1. < <http://www.ispub.com> > at 19 February 2009. See also Phil Taylor, ‘Death of a Fan’ *Sports Illustrated* 1 April 2002. In 2003 the National Hockey League introduced nylon mesh nets to protect spectators following the death of a 13-year-old spectator struck in the temple by a puck during an NHL game in Columbus, Ohio. See also *Tragedy Should Spur Action*, (News Release Canada Safety Council. Vol. XLVI, No. 2, April 2002) < <http://www.safety-council.org/news/sc/2002/pucks.html> > at 19 February 2009.

⁴⁵ ‘Must Not Keep Balls. Polo Grounds Might Well Have Fans Arrested Who Steal Them’ *New York Times* (New York), 13 July 1907, 8; ‘Summer and Winter Greet the Giants’ *New York Times* (New York), 29 February 1916, 8 the article contains a review of spectator ball-return practices around the league; ‘Fans May Keep Baseballs. Pittsburgh Official Rules That Police Are Not to Interfere’ *New York Times* (New York), 10 July, 1921 86; ‘Offers Passes for Returning Balls Hit Into Grandstand’ *New York Times* (New York), 22 July 1921, 15.

owners of the major baseball clubs to allow spectators to keep balls hit into the stands or out of the park has been linked to a dispute at a New York Giants and Cincinnati Reds baseball game in New York City 'on or about 16 May 1921'⁴⁶. A fan, Reuben Berman (1890–1975) refused to give up a foul ball he had caught despite being repeatedly asked for it by an usher. The issue had been unresolved around US ballparks for decades. Some professional teams allowed spectators to keep balls, others, such as the Giants, did not.⁴⁷ That day at Polo Park Berman ended the heated stand-off with the attendant by tossing the ball into the crowd. He was removed from the stand, interrogated in the office and finally his admission ticket was refunded and he was ejected from the ballpark. Berman sued on the grounds he had been 'wrongfully and unlawfully imprisoned ... and threatened'. He demanded US\$20,000 for injury to his 'character and reputation and ... physical health' and complained he had been 'greatly humiliated before a large crowd of people'.⁴⁸ In reply the Defendant asserted a ticket only granted a holder a limited right, and that they reserved the right to eject anyone who did not 'conduct himself in a gentlemanly and orderly manner, and comply with all reasonable and proper requests, rules and regulations of this defendant'. However, Berman won the case and was awarded US\$100 by the jury. According to Berman's own account, the judge 'turned it down saying I should have gotten more or nothing'.⁴⁹ According to Berman he later settled with the National Exhibition Company, the owners of the Giants, for US\$500, though his handwriting is unclear and the settlement may have been for US\$50.⁵⁰

But the muddled outcome was really incidental. The suit was about false imprisonment and did not deal specifically with the issue of who owns a baseball hit from the field of play. However, sometime soon after the suit Major League baseball clubs, with the exception of a period during the Second World War⁵¹ and on one or two other notable occasions, adopted a policy of permitting spectators to keep the balls. How much this decision relied on *Berman* is

⁴⁶ *Berman v National Exhibition Company* 46447 (New York Supreme Court, County of New York) 1923. The citation is incomplete and appears on a copy of the proceedings in the author's possession. Similar incomplete citations appear on copies held in the Berman Family Papers and also in the Library of the Baseball Hall of Fame in Copperstown, NY. The New York Giants did play Cincinnati on 16 May 1921 winning 7-4. <http://www.baseball-reference.com/teams/CIN/1921-schedule-scores.shtml> at 23 April 2009.

⁴⁷ Peter Sgroi, 'How It Became Legal To Keep Souvenir Baseballs', *Baseball Digest* (Evanston IL), August 1995, 35.

⁴⁸ David Mandell, 'Reuben Berman's foul ball' (2005) 25 *The National Pastime* 25, 106.

⁴⁹ Letter from Reuben Berman to his son, Lennie, 28 August 1975. Berman Family Papers. A copy of the letter is in the author's possession.

⁵⁰ *Ibid.* In the handwritten note, sent when he was 85-years-old, Berman says, 'We won the case and they settled soon after for 500 [or perhaps 50, the last 0 in 500 is blackened and the blackening may have been intentional]. Since then all balls batted into the stand were kept by the fans.'

⁵¹ Peter Sgroi, above n 47 at 36. During the War spectators were asked to return balls. They were told "that the reclaimed balls would be sent overseas to US servicemen for recreational purposes. Fans would boo people who were indecisive about the practice." See also Roscoe McGowan 'Strange Happenings at Ball Park: Man Who Pockets a Foul is Booed' *New York Times* (New York), 15 August 1942, 28.

a matter of conjecture. While there has been a lot of litigation surrounding baseball in the United States, the question of who owns the baseball when it is hit into the stands during a game appears to have only been an issue before a US court on a single occasion. In *Popov v Hayashi*⁵² a celebrated 2002 case in Oakland, California, two men disputed who should be allowed to keep and sell a record breaking home-run ball hit by Barry Bonds⁵³ which they had struggled over in the stands. In his judgment Judge McCarthy of the Superior Court of California, wrote: ‘Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came into possession of the ball became the new owner.’⁵⁴

In the end Judge McCarthy ruled it was impossible to determine which of the parties before the court had a superior claim of possession, suggesting the facts he had to decide were more in the province of ‘...a psychic, not a judge.’⁵⁵ As a consequence, in a decision that excited considerable academic debate in the US,⁵⁶ he relied on the doctrine of equitable division and ordered the ball sold and the proceeds split. Concerns were expressed that it might spark spectator violence and free-for-alls. It is worth noting that six years later in August 2007, when the same Barry Bonds hit his 756th home run, thus becoming the most prolific home run hitter in major league baseball history, there was an extended melee as fans scrabbled for several minutes to win possession of the ball. In the end Matt Murphy, a young man from New York, was escorted from the stands by police ‘... bloodied, dishevelled and an estimated half a million dollars richer.’⁵⁷

As intriguing as these cases are in themselves they are germane to the present discussion about ‘lost’ cricket balls, because *Popov v Hayashi* is the first judicial affirmation anywhere that a baseball, once hit, according to McCarthy J’s formulation, is abandoned⁵⁸. Concluding that a baseball is abandoned the moment it leaves the bat was arguably a too narrow formulation in light of

⁵² *Popov v Hayashi*, 2002 WL 31833731 (Cal. Superior) 2002.

⁵³ Gerald Eskenazi, ‘Breaking the Record, Time and Again’ *New York Times* (New York), 13 October 2001, 23. Bonds’ 73rd homer in a single season broke all previous records.

⁵⁴ *Popov v Hayashi*, above n 52.

⁵⁵ *Ibid.* In reaching his decision McCarthy J made an extensive survey of such well known cases as, *Pierson v Post* 3 Cai. R.175, 2 Am. (NY 1805), *Young v Hitchens* (1844) 6 QB 606, and *State v Shaw* 67 Ohio St 157 (1902), as well as delving into the laws governing whaling and maritime wrecks.

⁵⁶ Gideon Parchomovsky, Peter Siegelman and Steve Thel ‘Of Equal Wrongs and Half Rights’ 2006 U of Penn Law School, Public Law Working Paper No. 06-34 <http://ssrn.com/abstract=926097> at 11 August, 2007. A list of other papers can be found at 2 of the article.

⁵⁷ Peter Lalor, ‘\$500,000 fly ball heads our way’, *The Australian* (Sydney), 9 August 2007, 3. A month later the ball was sold at auction for US\$752,000. Rich Schapiro ‘Barry Bonds’ homer ball sold at auction’, *The Daily Telegraph* (Sydney), 16 September 2007. < <http://www.news.com.au/dailytelegraph/story/0,22049,22427216-5001023,00.html>> at 20 March 2009.

⁵⁸ The view is controversial. Steven Semeraro, ‘An Essay On Property Rights in Milestone Home Run Baseballs’ (2003) 56 *SMU Law Review* 2281. He criticizes McCarthy J’s decision, arguing the claim of abandonment is tenuous and not well founded in law.

events described below, but it is a ruling of great interest and some academic controversy. Professor Steven Semeraro, who stands very much in the minority among US legal thinkers,⁵⁹ has concluded that (under US law) 'If the home team decided not to give away or abandon the ball, there is no recognized doctrine of property law that would compel the team to do so'.⁶⁰ Following the 2002 California ruling, there was another occasion in which the ownership of a baseball came tantalizingly close to adjudication before a US court. In 2004, the Boston Red Sox won the World Series for the first time in 86 years. The player who made the final out kept the ball, perhaps relying on Judge McCarthy's ruling in *Popov v Hayashi*. The Red Sox launched a suit arguing the player 'obtained the baseball through the course of his employment, that he acquired no ownership interest and that the Red Sox are the rightful owners of the baseball'.⁶¹ However, the matter was settled out-of-court, eliminating the possibility of a judicial re-examination of the principles of baseball ownership.⁶²

Prior to Judge McCarthy's ruling in San Francisco a case emerged in New York which was also settled without court action. In 2001, a player for the New York Mets hit his 300th home run. Attendants were sent into the stands to retrieve the ball. The spectator who caught it claimed he was roughed up by security guards and tricked into surrendering the ball.⁶³ The man sought legal advice, and the Club admitted the man 'was under no obligation to return it'.⁶⁴ In the end the spectator dropped the threat of action and relinquished his claim on the ball in exchange for a meeting with the star player. Once again an opportunity for judicial scrutiny of the issue of who actually owns a baseball hit out of the field of play was missed. It is worth noting that the practice in Major League Baseball in the United States of allowing spectators to keep balls has extended in the last few years to Nippon Professional Baseball in Japan.⁶⁵

So is baseball a special legal case in world sport? The important distinguishing difference from most other sports is that owners of major professional baseball teams in the US and Japan are willing, generally, to abandon ownership of balls caught by spectators or hit out of the park. It is one of professional baseball's

⁵⁹ Ibid. 2281 see footnote 2.

⁶⁰ Steven Semeraro above n 58, 2299.

⁶¹ *Boston Red Sox Baseball Limited Partnership v Doug Mientkiewicz* (Suffolk Super) 2005.

⁶² 'Mientkiewicz, Red Sox agree to send World Series ball to Hall of Fame' *Boston Globe* (Boston) 23 April 2006. <http://www.boston.com/sports/baseball/articles/2006/04/23/mientkiewicz_sox_make_agreement_on_ball/> 19 March 2009. See also Jonathan Saltzman, 'Sox play tough on memento Lawyers file suit for '04 Series ball' *Boston Globe* (Boston) 1 December 2005 which details several other incidents in which MLB players kept and subsequently sold mementos. < www.boston.com/sports/baseball/redsox/articles/2005/12/01/sox_play_tough_on_memento/> 20 September 2009.

⁶³ Andrea Peyser, 'Piazza's Playing Hardball with 6-Year-Old Fan', *New York Post* (New York), 2 August 2001 25.

⁶⁴ Dave Howard, New York Mets' senior vice-president, legal affairs as quoted in Andrea Peyser, 'Just Give Her The Ball, Mike!' *New York Post* (New York), 1 August 2001, 4.

⁶⁵ Finkelman, above n 6, 1621.

many attendance-building strategies and it is driven more by entrepreneurial creativity and cultural expectation than legal precedent. Though as we have seen, there is legal authority for the proposition that in the major leagues, baseballs once hit are abandoned.

The practice of Major League Baseball, and the judicial support it has received, could be influential on Australian courts to the extent that, if an organisation or individual shows an habitual tendency to abandon or give something away, then the receiver or finder's rights are superior to any other claim. That is the premise, for example, that the free-distribution newspaper and magazine business is based on. It is, as we have seen, the legal foundation for golf clubs to keep balls found on their courses. It is also an underlying principle in a recent Supreme Court of Canada ruling that household garbage once put out for collection is abandoned.⁶⁶

Who could claim ownership of the Gilchrist ball?

Some of the issues canvassed above can be illustrated in a close examination of the Adam Gilchrist case noted above, in which a cricket ball was temporarily 'lost' after Gilchrist hit it out of the Bellerive Oval in Tasmania.

Does Adam Gilchrist, the player who struck the ball, have a claim?

Certainly, based on the publicity released by Cricket Australia ('CA'), one might justifiably conclude that Adam Gilchrist did indeed own the ball. A CA news release on the day the ball disappeared carries the headline 'Gilly wants his ball back'⁶⁷. It contains a quote from Gilchrist, presumably officially endorsed by CA, '[t]his is a unique item so I would love to get it back so whoever has got it I would be more than grateful if they gave it back.' Now, at the time Gilchrist may have believed the ball was his and even in his autobiography written sometime after the incident he says, 'as I was the only player to have hit a hundred Test sixes it would be nice if *I* [emphasis added] could have the ball back.'⁶⁸ Conceivably Cricket Australia may have concluded the best strategy for winning the return of the ball was to characterise it as belonging to the popular cricketer, rather than an impersonal body such as Cricket Australia. Whatever the reason, Cricket Australia's repeated protestations that the ball belonged to 'Gilly' might fuel arguments that the organisation had relinquished any ownership claim on its own part by asserting so frequently and so publicly that it belonged to Gilchrist. The newspapers certainly picked up on the theme,

⁶⁶ *R v Patrick* [2009] SCC 17.

⁶⁷ Paul Gough, 'Gilly wants his ball back' (Press Release, Cricket Australia 17 November 2007).

⁶⁸ Adam Gilchrist, *True Colours, My Life* (2008), 567.

repeatedly referring to the missing ball as Gilchrist's.⁶⁹ It was not until two weeks after the ball disappeared that Cricket Australia began very gently and somewhat equivocally to assert its ownership.

At the end of November (the ball vanished on 17 November) the organisation issued a news release under the beseeching headline, 'Please give our ball back, says CA'.⁷⁰ So Gilchrist's ball was becoming 'our ball'. They ask the man suspected of having the ball to return it 'in the spirit of cricket'. But apparently unwilling to break the popular link with Gilchrist altogether they add 'Adam would like to lend the ball for public display so that the public can feel part of the history and tradition of Australian cricket'. By using the phrase '... Adam would like to lend the ball' the news release clearly suggests that the ball is 'Adam's'. In a note at the end of the news release CA reminds the public, '[c]ricket does not share the Major League Baseball tradition of spectator souveniring of match balls.'⁷¹

Cricket Australia was quick to take charge of the ball when it was finally returned. There was no more mention of 'Gilly's ball' in the news releases. The ball was described as being 'now returned home to Melbourne'.⁷² Melbourne is the home of Cricket Australia, not Adam Gilchrist, who was born in New South Wales and played most of his career in Perth.⁷³ Curiously enough, Gilchrist's account of the return of the ball differs somewhat from Cricket Australia's. CA said the ball was brought to its office by a man (his name has never been publicly released) who gave it to them 'to share the enjoyment with other people'.⁷⁴ In Gilchrist's version, the ball was presented to him by the 'mystery' man and it was in a placenta bucket! Gilchrist says in his autobiography that the man, 'John', was a midwife and he had used the bucket to bury the ball because he said his neighbour, a lawyer, had advised him to hide it in case it attracted the interest of thieves. In Gilchrist's version the man said 'it was for me [Gilchrist] to decide what happened to [the ball]'.⁷⁵

Whichever version is closest to the truth, events suggest Cricket Australia never really believed Gilchrist was the owner of the ball, but it did make that assertion

⁶⁹ Attached a sample of an overwhelming trend. Philip Young, 'Who souveniring Adam Gilchrist's ball?', *Perth Now* (Perth) November 21 2007, Philip Young, 'Gilchrist's cricket ball mystery' *The Australian* (Sydney) November 21 2007, Brett A Stubbs 'Gilchrist ball breakthrough' *The Courier Mail* (Brisbane) November 26 2007, Pater Lalor, 'Gilchrist's missing ball tracked down' *The Australian* (Sydney) November 30 2007, 20.

⁷⁰ 'Please give our ball back, says CA' (News Release, 30 November 2007) <<http://cricket.com.au/default.aspx?s=newsdisplay&id=40218>> at 20 March 2008.

⁷¹ Ibid.

⁷² Matt Cenin, "'That ball' returns' (News Release, Cricket Australia 13 December 2007. <<http://cricket.com.au/default.aspx?s=newsdisplay&id=40346>> at 20 March 2008.

⁷³ A brief biography of Gilchrist appears on his website. <<http://www.adamgilchrist.com/About-Adam/Adams-Bio.aspx>> at 16 March 2009.

⁷⁴ Angus Morgan, 'Historic ball returned', cricket.com.au <http://cricket.com.au/default.aspx?s=newsdisplay&id=40264> at 20 March 2008.

⁷⁵ Adam Gilchrist, above n 68, 567-568.

over and over again in public. If Gilchrist were to claim ownership he might well point to CA repeatedly telling the world that the ball belonged to him. This would clearly suggest it had abandoned any claim of possession. In Keifel J's judgment in *Re Jigrose*, she writes 'But what if the owner has really proclaimed to the world at large that he or she has no interest in the chattels, desires neither possession nor ownership. For my part I do not consider that there is a difficulty at law with the notion of abandonment divesting ownership.'⁷⁶ That proposition might help Gilchrist overcome the difficulty that as a player he is under contract to Cricket Australia and as such is a servant of the organisation. However, the players are continuously provided with new equipment which it appears they are allowed to keep or give away, because it is effectively abandoned by the cricket organising body. It is worth noting that Gilchrist offered to exchange a signed bat, presumably CA's property, for the return of the ball.⁷⁷ Giving away a bat that does not belong to him, could be viewed at the very least as abuse of equipment. But there was certainly no suggestion such an action would attract any form of discipline under Cricket Australia's *Code of Behaviour*. At 1.1 the *Code* cites 'abuse cricket equipment' as a Level 1 Offence subject on first offence to a fine of \$5750.

Is Cricket Australia the owner of the ball and is it entitled to its return?

On the face of it, Cricket Australia would appear to have the best claim on the ball. CA buys the balls and says at least a dozen new balls are presented to the umpires prior to a five-day Test.⁷⁸ In Australia the balls used are generally Kookaburra Turf Reds. Unlike the balls for any other grade of cricket they are hand stitched and as such, CA says, can be identified definitely as Test balls.⁷⁹ But if CA is the owner, plain and simple, why did it take nearly two weeks of equivocation, ambiguities and soft selling before CA's spokesperson, Peter Young, finally directly asserted ownership? 'The ball is our property' he told *The Sydney Morning Herald*, 'there's no finder's keeper's rule in international cricket.'⁸⁰ But at the same time CA was still publicly suggesting the ball was 'Gilly's ball' and continued with that approach until the ball was returned in mid-December. However, it does appear clear that CA paid for the balls, transported them to the ground and handed them over to the umpires. Until the balls passed into the hands of the umpires they were entirely in the possession and control of CA. CA could argue that giving the balls to the umpires is no more than a bailment and '...the bailee is obliged to return the goods upon demand to the

⁷⁶ *Re Jigrose Pty Ltd* [1994] 1 Qd R 382 at 386.

⁷⁷ Adam Gilchrist, above n 68, 567.

⁷⁸ 'Please give our ball back, says CA' (Cricket Australia News Release, 30 November, 2007) "A five-day Test match might have an allocation of 12 new balls to last the game, based on a replacement new ball being available after 80 overs in each innings."

⁷⁹ Rod Nicholson, 'Gilly's ball stitched up' *Sunday Herald Sun* (Melbourne) 9 December 2007, 11.

⁸⁰ Alex Brown, Chloe Saltau, 'C'mon Johnny, c'mon, c'mon hand it over', *The Sydney Morning Herald* (Sydney) 30 November 2007, 32.

true owner or his or her nominee.⁸¹ However in this case the property is used by the bailee, and in fact in the course of that usage it becomes so worn it is no longer serviceable for further competition. After the Test match, balls are placed in the custody of the match referee, an International Cricket Council (ICC) appointee. Presumably the umpires must receive some of the used balls to enable them to comply with the *Laws of Cricket* 20-2 and be able to replace a lost ball with one exhibiting a similar degree of wear. It is not clear if CA ever seeks the return of the balls after the Test, nor is there any public record of CA ever making any complaint or taking any action because balls were not returned by the ICC. So, besides the specific issue in the Gilchrist case of CA publicly and persistently claiming that the ball in fact belongs to the player, there are also clear grounds to argue that CA voluntarily relinquishes its property rights to the balls when it hands them to the umpires. Effectively it could be argued they are abandoned.

Does the International Cricket Council (ICC) have ownership?

There seems little argument that the balls are the property of CA up until they deliver them to the match umpires. But according to Law 5 of the *Laws of Cricket* it is quite clear who controls the cricket ball during play:

2. Approval and control of balls

- (a) All balls to be used in the match, having been approved by the umpires and captains, shall be in the possession of the umpires before the toss and shall remain under their control throughout the match.
- (b) The umpire shall take possession of the ball in use at the fall of each wicket, at the start of any interval and at any interruption of play.⁸²

Umpires take possession of the balls for the duration of the match, and for a period after play, as detailed above. So, can it be argued that the ball Gilchrist sent out of Bellerive Oval in fact was effectively owned by the ICC? There is no mention in the *Laws* about the return of balls and CA which is fully aware of the *Laws* knowingly and willingly places them in the possession of the umpires. The umpires in test cricket are the servants of the ICC, so it would appear that the ICC is in possession of the property until, if ever, they are requested to release it. Certainly the 'laws' of a game carry some weight in a court of law. In *Rostron* the British courts appear to have based their crucial judgment that lost golf balls become the property of the golf course on little more than evidence about the 'five minute' rule from the club professional who in turn appears to

⁸¹ Halsbury's Laws of Australia *Gratuitous Bailment*.

⁸² Marylebone Cricket Club, *The Laws of Cricket*, Law 5 s 2(a)(b).

have been relying on the *Rules of Golf*.⁸³ It might also be noted that in several cases involving liability for injury during a sporting contest, the courts have relied significantly on the rules of various games to guide their decisions.⁸⁴ Now, while cases regarding injury may not be directly analogous to property questions they do exhibit an intellectual willingness on the part of the courts to at least consider sporting convention when reaching their judgments. If it could be successfully argued that CA gives the balls to the umpires before the game without any expectation or concern about their return, then there would be grounds to persuasively argue that the ball hit by Gilchrist was, at the time, owned by the ICC. This is despite the fact that in this case, beyond controlling the balls during the contest, neither the ICC nor the Umpires ever asserted or had any interest in, asserting ownership. In other words, they too abandoned the lost ball.

Does Clarence City Council have a legitimate claim?

Bellerive Oval is just five minutes from Hobart's CBD, but it is located across the Derwent River in the City of Clarence which is part of Greater Hobart. Clarence owns and operates Bellerive Oval. The ball which was knocked out of the Oval according to newspaper accounts ended up in Church Street, which is public land. Clarence City Council have control over the land, they actively police it, the council taxes users, controls access and has a mechanism for retrieving and disposing of abandoned property.⁸⁵ The City might argue that in claiming ownership of any object found on its property it would stand behind only the rightful owner or an honest finder. An honest finder would, case law suggests, stand second only to the rightful owner. Should Clarence Council wish to assert ownership it could argue the unidentified man alleged to have retrieved the ball was not an honest finder, rather he had a guilty mind and believed he was stealing the ball. This was the approach the court took in *Hibbert* to grant the golf club superior title over the abandoned golf balls.

Could the man who retrieved the ball have a legal ownership claim?

The answer to the key question above is two-fold and depends in my view on where John was when he recovered the ball. First, I will examine John's legal position if he picked up the ball outside the Oval. 'John' was not a trespasser on Church Street. As a citizen going about his business he had a legal right to be on the land. He found an unattached chattel on the land, and therefore would have a superior claim against all but the rightful owner. Though the facts differ somewhat, John might rely in support of any claim of ownership

⁸³ *R&A Rules of Golf 2008* Definitions 28. Above n 38.

⁸⁴ *Vowles v Evans* [2003] EWCA Civ318, *McCracken v Melbourne Storm Rugby League Football Club* [2003] NSWSC 107, *Unruk v Webber* (1994) 112 DLR (4th) 83. See also Jack Anderson 'Personal injury liability in sport: Emerging trends' (2008) 16/No 2 *Tort Law Review*.

⁸⁵ *City of Clarence Public Places and Permits By-Law* (2007) s 20(3)(4).

on such staples as *Bridges v. Hawkesworth*⁸⁶, where a man visiting a shop found a lost packet of money on the floor was ultimately the successful claimant or *Armory v Delamirie*⁸⁷, where the court confirmed the general right of the finder, in this case a chimney sweep, to any article which has been lost, as against all the world, except the true owner. He might also rely on *Bird v Fort Frances*⁸⁸ a Canadian case in which a boy who discovered a tin of money under a house was found to have superior title, or the more recent New Zealand case of *Tamworth*.⁸⁹ But he would have to establish he was an honest finder. Evidence of that might be found in a photograph taken by a spectator⁹⁰ which shows a security guard passively watching⁹¹ as the man purported to have taken the ball appears to be running into the Oval. In the photo the finder is making no effort to conceal a ball which is clearly visible in his right hand. According to a newspaper report the man, a cricket fanatic, wanted to see the rest of the match and stayed watching the Test for another two days.⁹² This certainly suggests an honest state of mind. His actions were anything but furtive, or clandestine. He appears to have openly returned to the Oval and resumed his place in the crowd. The fact he made no effort to determine the rightful owner could weaken this argument. However, if he was truly of the opinion that a ball knocked out of the ground was abandoned and 'fair game', the thought of returning it might not have crossed his mind.

In the Gilchrist case, CA officials appear to have made no initial attempt to recover the ball. There is no evidence anyone was sent out of the Oval to retrieve it, or that security guards were instructed to retain balls knocked into the street. In fact there is some evidence that CA habitually abandoned balls knocked out of the ground.⁹³ An unidentified CA official is quoted in a Hobart newspaper soon after the incident as saying, 'Once it goes out of the ground its pretty much fair game. It's not something we've had to give a lot of thought to about [sic] to be honest. Normally it wouldn't bother us ...'.⁹⁴ The *Daily Telegraph* (Sydney) reporter, Nick Walshaw, wrote that '... cricket officials do abandon balls. Regularly.'⁹⁵ He pointed to a situation a few days after the Gilchrist

⁸⁶ (1851) 21 LJQB 75; 15 Jur. 1079.

⁸⁷ (1722) 1 Stra. 505.

⁸⁸ *Bird v Fort Frances* [1949] 2 DLR 791.

⁸⁹ *Tamworth Industries Ltd v Attorney-General* [1991] 3 NZLR 616.

⁹⁰ The picture was widely published see Sam Edmund, 'Mystery man six 'n' outed at Test match', *Herald Sun* (Melbourne), 21 November, 2007, 9.

⁹¹ Philip Young 'Who souvenired Adam Gilchrist's ball?', *Perth Now* (Perth) ex Australian Associated Press, 21 November 2007. An unidentified spokesperson for Dyson Corporate Security is reported to have said "...one of its staff had seen the man retrieve the ball and re-enter the ground."

⁹² Brett Stubbs, 'Gilchrist ball breakthrough' *The Courier Mail* (Brisbane), 26 November 2007, www.news.com.au/couriermail/story/0,23739,22822418-5003413,00.html at 13 February 2009.

⁹³ Nick Walshaw, 'Gilly's Test ball returned' *Daily Telegraph* (Sydney) 5 December 2007 2.

⁹⁴ Philip Young, 'Ball snatcher can probably keep it' *The Mercury* (Hobart) 21 November, 2007 <<http://www.news.com.au/mercury/story/0,22884,22795898-13222,00.html>> at 22 November 2007.

⁹⁵ Nick Walshaw, n 93 above.

incident in which a NSW's batsman knocked a ball out of the North Sydney Oval and no one 'was worried about its fate.'

If indeed Cricket Australia has habitually failed to pursue balls knocked out of ovals, there may well be a corporate pattern of abandonment which could point to a lack of manifest intention to control what it now asserts is its property. In *Halsbury's Laws of England* Lord Hailsham in exploring the meaning of possession under the law cautiously notes: 'Possession may mean legal possession: that possession which is recognised and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with the amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering.'⁹⁶ Someone picking up the ball might also point to *Parker*⁹⁷ and *Waverly Borough Council v Fletcher*⁹⁸ or *Chairman, National Crime Authority v Flack*⁹⁹ as well as Blackstone who writes that 'a man who scatters his treasure ... upon the public surface of the earth is construed to have absolutely abandoned his property, and returned it to the common stock.'¹⁰⁰

An additional problem for CA if it sought criminal rather than civil sanctions against 'John' is the difficulty of proving beyond a reasonable doubt that the ball handed in by the man was actually the ball Gilchrist hit. CA described the ball as '...your average 156g, four-piece, hand-stitched, red, leather cricket ball ...'¹⁰¹ In fact, beyond the hand stitching showing it is a Test ball, it is so singularly unidentifiable that CA's General Manager of Public Affairs, Peter Young, had to rely on 'John' to identify it. 'John is a very straight guy,' Young is quoted as saying in a Cricket Australia news release, 'he's sworn to me that this is the ball.'¹⁰² Therefore the provenance of the ball relies crucially on the statement of the man who, according to CA, took the ball in the first place. John may well have returned a ball found outside Bellerive Oval, but there is no way of ascertaining if it was the ball Gilchrist hit. Could it have been some other ball that somehow found its way under a car on Church Street outside the Oval?

Ownership of the ball would also be an issue. The *Criminal Code Act 1924* (TAS) at 226 (1) states that anyone taking anything capable of being stolen 'without the consent of the owner' and with the 'intent permanently to deprive the owner thereof, steals such a thing.' Including at s 226(2)(iv) 'by finding, if at the time of the finding the taker believes that the owner can be discovered by reasonable means'. 'Owner' is subsequently defined at s 226(2)(b) as 'any

⁹⁶ Butterworths, *Halsbury's Laws of England*, vol 35 Possession 1211 732.

⁹⁷ *Parker v British Airways Board* [1982] QB 1004.

⁹⁸ *Waverly Borough Council v Fletcher* [1996] QB 334.

⁹⁹ *Chairman, National Crime Authority v Flack* (1998) 932 FCA.

¹⁰⁰ William Blackstone *Blackstone's Commentaries* (reprint 2001) Book 1, Ch 8, XIII 223.

¹⁰¹ Matt Cenin "'That ball' returns' (Cricket Australia News Release, 13 December 2007).

¹⁰² Angus Morgan, 'Historic ball returned' (Cricket Australia News Release, 5 December 2007).

part owner or person having possession or control of, or a special property in, anything capable of being stolen.' Establishing who owned or part owned or was in possession of the ball at the time it vanished outside the Oval would be central to a successful prosecution. As outlined above, there are a variety of possible owners but who showed the manifest intention found necessary in *Parker*¹⁰³ to assert that ownership? *Hibbert* and *Rostron* suggest a successful prosecution requires the identification of an owner because without an owner to grant or withhold consent then 'John' according to the *Act* could not commit the crime. A secondary issue here would be whether 'John' believed he was doing something wrong. On the face of it he acted like an honest and rather excited finder. He even had an innocent explanation for burying the ball. In Gilchrist's autobiography the cricketer says the man told him he buried the ball because '[s]omeone might think it was worth a lot of money and break into his house to steal it.'¹⁰⁴

It is worth emphasising at this point that the situation being considered here concerns cricket balls knocked out of the oval by *professional* teams. There are several cricket cases that have found their way before the courts in England concerning balls that have done damage once they cleared the confines of a cricket ground. They include *Bolton v Stone*¹⁰⁵ in which a woman was struck outside her house by a ball hit from an adjacent cricket oval, and *Miller v Jackson*¹⁰⁶ in which homeowners sought to have a neighboring club enjoined from playing cricket because of balls landing on their property. Ownership of the balls in these cases was never in dispute, it lay with the amateur teams whose players had hit them because it was players and club officials who sought the return of the balls from the aggrieved homeowners.

In the Gilchrist episode, CA was slow to claim unequivocal ownership. This raises a key question: Can an owner who has abandoned goods later reassert ownership? In *Re Jigrose Pty Ltd*¹⁰⁷ the court ruled in favour of a land owner who refused a previous owner's demands for the return of hay bales he (the previous owner) had abandoned on the property. The new owner had also locked the gate to the field in which the hay was standing clearly defending his ownership. Given this ruling and CA's less than forthright assertions of ownership, Australian courts may well have looked favourably on an ownership claim by 'John' and I argue the courts in similar cases could be sympathetic to other honest finders of balls knocked out of a professional cricket ground. The finder may well be a legal keeper.

¹⁰³ *Parker v British Airways Board* [1982] QB 1004. The court found a claim of ownership relies on the manifestation of an intention to exercise control.

¹⁰⁴ Adam Gilchrist, above n 68, 568.

¹⁰⁵ [1949] 1 AER 237.

¹⁰⁶ [1977] QB 966.

¹⁰⁷ *Re Jigrose, Pty Ltd* [1994] 1 Qd R 382.

If 'John' had kept a ball knocked into the spectators' area of the Oval could he legally claim ownership?

This second part of the issue of ownership of balls knocked over the boundary concerns social norms as much as black letter law. There is no doubt that in Australia, New Zealand and the broader cricket world the custom is for spectators to return any balls that come into the stand, even though the rules, regulations and Acts variously governing public behaviour in most major sporting venues prohibits the throwing of objects on to the field.¹⁰⁸ However, those regulations do not specifically mention balls, or the return of balls. One of the few Australian High Court cases to explore the rights of ticket holders at a sporting spectacle is *Cowell v Rosehill Racecourse*.¹⁰⁹ It involved a man who having purchased a ticket, objected to being forcibly put off the site by officials. In the case, the court concluded that someone holding a ticket to a spectacle had entered into a contract with the owner/operator of the event, the ticket holder did not acquire a proprietary right when paying an admission price. Therefore either party could break the contract at the risk of having to compensate the other. As Latham CJ observed in a majority decision: '[f]ifty thousand people who pay to see a football match do not obtain fifty thousand interests in the football ground.'¹¹⁰ Any argument that a spectator who has paid for admission to a game would have a claim on an object falling into their rented space would be very difficult to run. And of course, any claim by the spectator would always be second to that of the true owner.

As detailed above, determining whether the true owner, part owner or person in possession of the ball at a Test match is the ICC, or CA or the player who hit the ball is one for debate. Inside the ground, however, the issue of abandonment vanishes. Ushers, security guards and other officials would approach anyone holding a cricket ball hit from the pitch and demand its return. This is a crucial distinction from the situation facing the finder of a ball hit out of the ground. In *Hibbert v McKiernan*,¹¹¹ Lord Goddard CJ wrote of the difficulties faced by any court in sorting out the issue of 'title to chattels found on the land of a person who is neither the finder nor the original owner ...' and observed how 'these cases have long been the delight of professors and text writers, whose task it often is to attempt to reconcile the irreconcilable'. He then rather modestly adds 'it is still for wiser heads than mine to end a controversy which will, no doubt, continue to form an appropriate subject for moots till the House of Lords lays it to rest for all time.' The issue has not reached the House of Lords but in 1982 it got as far as the Court of Appeal in the case *Parker v British Airways Board*.¹¹²

¹⁰⁸ *Melbourne Cricket Ground Act* 1993 (Vic), Melbourne Cricket Ground Regulations (1994) pt 4 s 15 (e) and the *Sydney Cricket Ground and Sydney Football Stadium By-Law 2004* s 12(2)(g).

¹⁰⁹ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605. Also see *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.

¹¹⁰ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

¹¹¹ *Hibbert v McKiernan* [1948] 1 All ER 860 at 861.

¹¹² *Parker v British Airways Board* [1982] QB 1004 at 1017 H.

The well-known case involved a man finding a gold bracelet on the floor of a British Airways first-class lounge at Heathrow in London. He handed it to an airline employee along with his name and address and requested it be returned to him if not claimed. It was not claimed and the airline sold it. Parker sued on the grounds as an honest finder he could claim the bracelet against the whole world except for the true owner. The airline argued as occupier of a restricted admission lounge it had precedence over Parker. In finding for Parker, Donaldson LJ outlined the rights of an occupier to a chattel found on the occupier's land:

– An occupier of a building has rights superior to those of a finder over chattels upon or in it, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it or in it.

In Donaldson LJ's view an occupier displays that manifest intention by ensuring 'that lost chattels are found and, upon their being found, whether by him [the occupier] or by a third party, to acquaint the true owner of the finding ...'¹¹³

So ushers or security guards promptly requesting the return of a cricket ball from spectators would seem to fulfil that requirement. *Parker v British Airways Board* suggests that the occupier of a stadium in Australia which 'manifests an intention to exercise control' over a facility and to fetch any errant balls would probably retain ownership of such balls if they are hit or kicked into the stand, if they did, in fact, own the ball in the first place. But the test laid down in *Parker* is rigorous. Just like a cricket oval, British Airways could control who came in and who left their executive lounge. The owner/occupier of the facility can claim possession of any fixed chattel, but where does that leave balls? It would be obvious to anyone in the oval where the ball came from, so if they did gain control of it, and were indeed honest finders, they would have to make reasonable efforts to return it to the owner, though they would have the right to ascertain who the owner was, and the nature of their claim. If they were not satisfied that the claimant was the true owner they could retain the property until satisfied, or surrender it to police, for example, for safekeeping if they preferred.

Neither CA, nor the ICC owns the facilities where Test matches are played. The Melbourne Cricket Ground, for example, is owned by the state government, the Sydney Cricket Ground is also owned by the state and managed by a trust under the terms of the *Sydney Cricket and Sports Ground Act 1978 No 72* (NSW). The Adelaide Oval is owned by the Corporation of the City of Adelaide and by statute is leased to, and controlled by, Trustees for the South Australian Cricket Association Incorporated.¹¹⁴ Bellerive Oval is managed and operated by the

¹¹³ *Ibid*, at 1018 B.

¹¹⁴ *Recreation Grounds Regulations 1996* (SA). Schedule – Recreation Grounds Adelaide Oval.

City of Clarence.¹¹⁵ But certainly some organisation is the legal occupier of the facilities and no doubt it is the occupier who arranges for ushers and security staff to manifest an intention to control the building.

Given *Parker*, common law precedents and existing statutes there seems little prospect of making out a successful case for the retention of an errant cricket ball by a spectator. But if spectators began keeping balls and the occupier for some reason failed to exercise the manifest intention to require their return a situation could develop in which, like baseball, a ball knocked into the crowd would become a souvenir.

Conclusion: What can sports bodies do?

One might argue that in most of the world returning a cricket (or any sport) ball is a culturally engrained behaviour so fundamental that no law is required to enforce it. Most people say please and thank you without compulsion, or queue for the bus, or voluntarily hold open a door for an encumbered stranger or engage in dozens of other acts of civility enforced by no more than a common culture and common sense. A decent person, it could be argued, returns a ball to the players without question or thought of reward. That may well be true in amateur or lower-grade games. But regrettably, that ethic of civility wears thin when it meets the abrasive atmosphere of professional Test cricket, with expensive tickets, highly paid sometimes petulant players, disingenuous publicity, advertising, television, sponsorships, corporate boxes and all the other trappings of cricket as a commercial product.¹¹⁶ Add to that the attractions of the sports memorabilia market, admittedly somewhat cooled by the global economic crisis, and the possibility of a legal dispute over the ownership of lost or errant balls becomes a reality. So what can sports officials do? First, they can stick with the status quo. Australian Rules already has sideline staff who are vigilant about the return of balls kicked into the stand, tennis has ushers who retrieve balls knocked into the crowd except in the case of the USTA's limited experiment with spectators being allowed to keep balls on show courts at the US Open. Golf spectators are extraordinarily careful about not intentionally touching balls hit into the rough and at big tournaments are very closely monitored by marshals. In the United States the NFL has installed nets to stop balls going into the end zone seats; baseball and ice hockey willingly abandon their balls and pucks. Soccer and Rugby Union seem to have accepted a certain amount of loss because most balls are returned. Basketball and other major ball games appear to have no problem. Certainly in cricket, balls knocked into the crowd are almost always returned. The return of those knocked clear of the ground is, as we have seen, less certain. So there is no widespread and flagrant flouting of

¹¹⁵ *City of Clarence Public Places and Permits By-Law* (2007).

¹¹⁶ In fairness it must be noted that complaints about the decline of cricket are nothing new. See Derek Bailey *A Social History of English Cricket*, (1st ed, 1999) 191; Keith A.P. Sandiford, 'England' in Brian Stoddart, Keith A.P. Sandiford (eds) *The Imperial Game* (1998) 9, 25.

the ball return conventions of individual sports. Nevertheless, as the Gilchrist episode illustrates, the potential for a problem exists.

Among the strategies sports organisations could consider would be a more public assertion of their claim of ownership over the balls they use. They could brand them to clearly identify them as their property, something already done in many sports. This would be more difficult in cricket because printing on the ball tends to wear off during play, although in Australia the hand-stitching signifies a ball is verifiably a Test ball, but that is a coded rather than explicit claim of ownership. Perhaps a computer chip could be implanted or some indelible mark devised or a mark could be more deeply imprinted on the ball's cover, though that might raise concerns similar to those associated with tampering. In an effort to further enhance any future claim of ownership with evidence of 'manifest intention' officials could also post signs and print a notice on the back of all tickets. The legislation governing sporting grounds could be amended to specifically deal with the ownership and return of balls. These measures would be designed to exhibit ownership and show active control over the balls. In addition, clubs could have attendants monitor the return of balls, something as noted above, AFL and tennis have instituted. Of course these costly and possibly irksome measures could be entirely avoided by simply doing nothing and maintaining the status quo, which means some balls will inevitably be lost. A more pro active approach might be for professional sport as a public relations measure to simply allow the public to keep any ball that comes into an individual's hands in the course of a game. That was the decision of Major League baseball back in the 1920s, and it is a decision which has proved to be good business. As for concerns in tennis and cricket about the wear on balls, officials could simply maintain a stock of used balls, somewhat larger than they already do, and replace a 'lost' ball with one exhibiting similar wear as detailed in *Laws of Cricket* Rule 20-2.

While the Gilchrist ball incident never went to court, bodies which oversee sport might do well to review the incident and decide how they wish to respond to a similar situation. As for who owns balls within stadia, Australian observers might conclude that *Popov v Hayashi* could 'only happen in America'. However we share many of the common law principles regarding property which form the foundation of the San Francisco dispute. We also have an intense sporting culture and, in the recent past have had a very hot sports memorabilia market. Given these ingredients it is not unreasonable to contemplate the possibility of a similar dispute arising in Australia or New Zealand.

At the moment, all that prevents disputes is the purely customary practice among spectators of voluntarily returning the ball. Sports administrators appear to be blithely relying on spectator goodwill in what is an untested and unexplored legal area surrounding who owns a ball purposely dispatched from the playing

area.¹¹⁷ If that ball somehow figures in the career of a popular player such as Adam Gilchrist it, like many other potential sporting souvenirs, could be worth thousands, possibly hundreds of thousands, of dollars. Sports officials would do well to remember we live in a globalised world closely attuned to US culture. Witness the rapidity with which trends popular in New York or San Francisco can be adopted by the public in Australia or New Zealand. The Gilchrist case and *Popov v Hayashi* may be much more than mere curiosities, they may well be clear, if unheeded warnings, of what could quickly develop into a major challenge for Australian and New Zealand sports.

¹¹⁷ Finkelman above n 6 1621-1623.