WESTS TIGERS RUGBY LEAGUE FOOTBALL v NATIONAL RUGBY LEAGUE – THE CASE THAT COULD HAVE STOPPED THE NRL

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'It could cost us £30 million but what can we do? He's given a goal.'

This was Tottenham Hotspur manager Harry Redknapp speaking after a refereeing error resulted in a goal being awarded against his team when the ball clearly didn't cross the goal line. It was in a crucial end of season match against Chelsea in the English Premier League. Spurs lost the match 2–1, negatively affecting their prospects of qualifying for the European Champions League in the following season.[1]

'What can we do' asks Harry?

'You can't sue a referee' I hear you say. Why not? Everyone else is liable for their mistakes. Why not a referee? Is there any principle of law which prevents a referee from being sued?

This article attempts to examine what Harry Redknapp, and those in similar situations, can do. It examines the possibility of taking action to correct an incorrect refereeing decision. It also considers, in a far briefer and more general sense, the possibility of recovering damages in circumstances where the decision can't be corrected.

Wests Tigers found themselves in a similar situation to Tottenham Hotspur when a refereeing error cost them the chance of playing in the 2010 National Rugby League ('NRL') Grand Final.

This is what they could have done.

Introduction

On 25 September 2010, Wests Tigers played against St George Illawarra Dragons at ANZ Stadium in Sydney, in the preliminary final of the National Rugby League Competition.

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[1] Tom Smithies, 'Goal' reignites technology row', *The Daily Telegraph* (Sydney), 2 May 2011, 59.

St George Illawarra Dragons came into the game having finished first at the end of the 26 rounds of the home and away section of the competition. Wests Tigers had finished third.

St George Illawarra won their first semi-final comfortably. Wests Tigers, in the first week of the finals series, were left to rue the fickleness of refereeing decisions, after losing their match to Sydney Roosters on the final play of the game through a blatantly incorrect refereeing decision. Wests Tigers beat Canberra Raiders in the following week to set up a match against St George Illawarra for a place in the NRL Grand Final.

The St George Illawarra Dragons were the popular favourites for the game. They were coached by Wayne Bennett, a former coach of the Australian national team, who had come to the club with the task of turning promise and expectation into premiership victory. They were seeking what would be their first premiership in many years. They had a history of superior performance, having won 11 straight competitions in the 1950s and 1960s with a high profile, flashy team, full of star performers.

Wests Tigers, on the other hand, were a joint venture club formed from a combination of two of the grittiest, working class clubs in rugby league history, Balmain and Western Suburbs.

Ironically, in 2010, it was the Dragons who were known for the grit of their performance and the Tigers who were the flashy performers, having within their playing ranks players such as Benji Marshall, Lote Tuqiri and Robbie Farah, three of the most unpredictable and talented attacking players in the game.

The vast majority of the experts tipped a comfortable Dragons victory.

It was what unfolded which gives rise to the problem which is now in issue. An incorrect referring decision, at a critical point late in the game, arguably cost Wests Tigers the match. They lamented the decision, but what could they do about it? They wrote a letter of complaint to the NRL but did little else. What they could have done about it, is that they could have commenced legal proceedings. If they had commenced proceedings, this is how it may have unfolded.

Wests Tigers Rugby League Football v National Rugby League – The case that could have stopped the NRL

The factual background

After seventeen minutes, despite an avalanche of penalties against them, Wests Tigers led the match 6–0. Wests Tigers were not finding favour with the referees.

Three quarters of the way through the first half, St George Illawarra had received five penalties and Wests Tigers none. After thirty six minutes, and then at the halftime break, Wests Tigers led 12–6.

After fifty minutes, it was 12–12 and for the next twenty minutes, the game developed into a tense battle for field position. The circuit breaker came in the seventy first minute of the match. The star Tigers winger, Lote Tuqiri, was kneed in the back by Dragon's player, Jeremy Smith, as he fell to the ground after being tackled.[2] There was some debate at the time about whether the kneeing was deliberate or accidental. There was no debate about whether or not Tuqiri had been kneed. Everyone accepted that this had occurred.

Section 15 of the Rules of Rugby League reads as follows:

> 15. A player is guilty of misconduct if he:
>
> (a) trips, kicks or strikes another player;
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> (b) when effecting or attempting the effect a tackle makes contact with the head or neck of an **opponent intentionally, recklessly or carelessly**;
>
> (c) drops knees first to an opponent who is on the ground;
>
> (d) uses any dangerous throw when effecting a tackle;
>
> (e) **deliberately** and continuously breaks the Laws of the Game;
>
> (f) uses offensive or obscene language;
>
> (g) disputes a decision of a Referee or Touch Judge;
>
> (h) re-enters the field of play without the permission of the Referee or a Touch Judge having previously temporarily retired from the game;
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> (i) behaves in a way contrary to the true spirit of the game;
>
> (j) **deliberately** obstructs an opponent who is not in possession.[3]

[2] See generally Matt Encarnacion, 'Review – 2nd Preliminary Final' *Big League Grand Final Souvenir Program* (Sydney), 3 October 2010, 42.

[3] See section 15 of the *Rules of Rugby League*, 38 (emphasis added).

It is a matter of some significance that the rule contained in Section 15 quite clearly distinguishes between some types of misconduct which require a level of intention for a breach of the rule to be made out (sub-paragraphs (b), (e) and (j)) and other types of misconduct whereby the rule is breached without it being necessary to have any intent to breach the rule. This proposition can be inferred from the drafting of the rule, which includes words on intent in some sub-paragraphs, but not others. Tripping, kicking (sub-paragraph (a)) and kneeing (sub-paragraph (c)) are acts of misconduct, and breaches of the relevant rule, without it being necessary to establish intention on the part of the offender.[4] The act of Jeremy Smith kneeing Lote Tuqiri in the back therefore breached Section 15 of the Rules and should have resulted in a penalty to Wests Tigers whether it was intentional or accidental.

The field position at which the incident occurred was well within the kicking range of Tigers goal kicker Benji Marshall. A penalty for the foul play would have given Marshall the opportunity to kick for goal to give the Tigers a 14–12 lead, with less than ten minutes remaining in the match. It is highly likely that from there, Wests Tigers would have hung on for victory.

The on-field referees referred the incident to the video referee for assistance. The referee replayed the incident a number of times. Each time the referee replayed the incident, it was also played on two large screens which were viewed by the crowd of seventy thousand. Hundreds of thousands of television viewers also watched around the country. So convinced were the Tigers coaching staff that the play would be penalised that assistant coach, Royce Simmons, signalled to his bench to send a message to captain Robbie Farah to take a shot for goal.[5]

> Simmons said he immediately sent a message to fellow assistant coach Peter Gentle to take the two points. 'It never even crossed my mind that it wasn't going to be a penalty.'[6]

Whilst the video referee was reviewing the incident, Lote Tuqiri was being treated by medical staff for the injury caused to his back and his ribs by the kneeing.

Present in the video referee box were two other referee officials. Unconfirmed reports suggest that the video referee decided that a penalty should be awarded

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[4] Against this argument on the specific wording of the rule, the standard directions to the NRL Judiciary Committee state that 'there can be no liability for 'dropping the knees' if contact is accidental or even careless.' See; *NRL Rules*, sch 4 (NRL Judiciary Code of Procedure). Although this direction seems to conflict with the specific wording of the rule, the issue of intent became irrelevant with Jeremy Smith's plea of guilty to the Judiciary.

[5] See generally Jackson, below nn 10–11.

[6] Glenn Jackson, 'Smith charged but free to play in decider', *Sydney Morning Herald* (Sydney), 27 September 2010.

to Wests Tigers, but apparently, after some discussion with the other two people in the referees' box, he reconsidered his position and decided that a penalty was not warranted.[7] He advised the on-field referees of this view.

Play continued and in the ensuing play, Tigers player Benji Marshall made a mistake, giving possession to St George Dragons. Dragons' player Jamie Soward kicked a field goal and the match was in the Dragons' keeping. They won 13–12.[8]

Having won the match, the Dragons progressed to the grand final and the Tigers were eliminated from the competition. Tigers coach Tim Sheens commented rather cryptically:

> We weren't supposed to win the game – we weren't even supposed to be close. To the credit of the guys we led until the last few minutes. I am very proud of them.[9]

The consequences for the Tigers were significant. Having won the competition in 2005, they had not qualified for a final series in any of the subsequent seasons. They had missed out on lucrative merchandising and endorsement opportunities which arise from a successful season which culminates in a grand final appearance. It is fair to say that the opportunity of winning the competition, which was denied to them, could have cost them merchandising, sponsorship and endorsement opportunities in the region of some millions of dollars.

Incredibly, although the NRL referee's officials decided that no offence against the Rules of the game had been committed, on the following day, the same body which governs the game and employs all of the officials, the NRL, through their match review committee, charged Jeremy Smith with a dangerous contact charge. They were acting on exactly the same evidence as was before the on-field referees and the video referees, and interpreting exactly the same rules. Even more incredibly, Jeremy Smith agreed with their assessment, and pleaded guilty to the charge.

> Wests Tigers boss Stephen Humphreys has expressed bewilderment at the match official's refusal to penalise St George Illawarra forward Jeremy Smith for a knees first tackle on winger Lote Tuqiri that yesterday became the subject of a judiciary charge … The Smith

[7] Wests Tigers made a written complaint to the NRL complaining that the opinion of the video referee had been improperly influenced by others in the video referee's box. They did not receive any formal response to the complaint although they received an informal response from the NRL to the effect that 'it wasn't unusual for the video referee to canvas the views of others in the video referees box.'

[8] See generally Encarnacion, above n 2.

[9] Adrian Proszenko, 'Smith in Benny's thoughts already', *Sun Herald* (Sydney), 26 September 2010.

> challenge has left the NRL in a bind. If it was worthy of a charge perhaps it should have been penalised, which may have altered the result of the second preliminary final on Saturday night … I am not surprised that the player was charged, Humphreys said. But we remain perplexed as to why the on field officials didn't take the appropriate action and at least award us a penalty. It seems to have continued the trend that we have seen throughout the year – when things get tight near the end of the game, they just seem unwilling to deal with the incidents that come up.[10]
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> Former Balmain hooker Ben Elias attacked the decision not to penalise Smith calling it "the biggest joke of all times". It was disgraceful and there is no doubt it lost them the game. It was just blatant. If you saw the same tackle ten times over, he would be penalised ten times. Now the season's gone. Fair dinkum, I find that disgusting.[11]

St George Illawarra won the grand final the following week, again benefitting from another questionable referring decision.

The position in summary

Wests Tigers think that the officials made a catastrophic mistake.[12] The NRL, in charge of running the competition, agree with them.[13] The Dragons, their opponents, agree with them (based on the plea of guilty by Jeremy Smith to the misconduct charge). The mistake potentially cost Wests Tigers some millions of dollars. If Wests Tigers did not have a remedy for such a circumstance, that would seem patently unfair and plainly unsatisfactory. So who do they sue?

The reaction of the NRL

The job of defending the call was left to the NRL Chief Operating Officer, Graham Annesley, who would not concede the officials had erred, instead saying there had simply been a difference of views.

It is not unusual for the match review committee to take action on matters that weren't acted upon by the match officials he said. Apparently at the time, the officials involved considered it to be nothing more than an accident. The match review committee formed a different view.[14]

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[10] Jackson, above n 6.
[11] Ibid.
[12] See comments of Steve Humphreys; Jackson, above n 6.
[13] The NRL charged Smith over the incident.
[14] Ibid.

Such an analysis, by the Chief Operating Officer of the NRL,[15] appears to fundamentally misunderstand the rule which was to be applied to the incident. It also suggests that the referees fundamentally misunderstood the nature of the rule themselves. The referees and Mr Annesley seem to think that it was necessary for the kneeing to be intentional for the rule to be breached. According to the wording of the rule, intention is not necessary for there to be a breach of the rules. It appears the officials did not know the rule which they were applying.

The General Background Philosophies to be Considered

The importance of rules in sport

Willing adherence to, and compliance with, a set of predetermined and agreed rules is the distinctive thing which separates our society from anarchy. The rule of law and the judicial system which supports and enforces it is fundamental to our society.

Sport is no different from society. For all sports, it is only possible for the sport to exist and prosper through the existence of a number of rules, and also through the existence of a referee or umpire to make judgments upon those rules in order to enforce them. The rules in some sports are more formal than in others. However, all sports have rules, and they must be enforced for the sport to exist.

It's not whether you win or lose. It's how you play the game[16]

In the beginnings of sport, games were largely played by amateurs according to the Corinthian ethic, 'It's not whether you win or lose. It's how you play the game'.[17] No commercial consequences flowed from decisions which were made by referees or umpires in the course of the recreation which was sport. Refereeing and umpiring controversies however, always loomed large, and always figured prominently as discussion topics. In those early times, refereeing and umpiring decisions were inviolate, and this attitude was never more evident than in the sport of cricket. For example:

> The man in white is always right.[18]
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> One of the oldest and most treasured traditions of cricket is, and must always be, the immediate and unqualified acceptance of the umpire's decision.[19]

[15] Annesley is a former referee and is now the New South Wales Minister for Sport.
[16] See generally Kristen L Saravese, 'Judging the Judges: Dispute Resolution at the Olympic Games' (2005) 30 *Brooklyn J. Int'l L*. 1107, 1135.
[17] Ibid.
[18] A common cricketing expression and the name of a book; David Fraser, *The Man in White is Always Right – Cricket and the Law* (The Institute of Criminology Monograph Series, No 4, 1993).
[19] Ibid 60.

These comments typified the attitudes of the day and reflected the role which sport played in social endeavour.

On the rare occasions on which courts were ever asked to intervene in a sporting dispute, they were invariably reluctant to do so. The regulation of sport was left to the sports themselves.[20] Those times were, philosophically, more non-interventionalist and laissez-faire than today. Sporting rules were made against the background of the social philosophies of the time. Sport was recreation, not business. Typically, section 16 rule 2 of the *Australian Rugby League Laws of the Game and Notes on the Laws* (February 2010), reads as follows:

> The Referees shall enforce the Laws of the Game and may impose penalties for any deliberate breach of the Laws. He shall be the sole judge on matters of fact except those relating to touch and touch in goal.

Most sports have similar provisions relating to the finality of the umpires' or referees' decision. Consistent with the philosophy of sport as a recreation, the human frailties of referees were accepted as 'part of the game'.

'Refs are flawed, messy – and usually pretty good at their jobs, just like athletes. Plus, if we eliminate the human factor, we might lose one of the inalienable joys of being a fan: blaming the ref when the game doesn't go our way.'[21]

Blaming the ref when 'the game doesn't go our way' may be satisfactory for a recreational activity upon which no commercial consequences hang. However, modern day elite sport has progressed way beyond that point, to the point where one could rhetorically ask whether in modern times, sport even exists at all or has it been replaced by an entertainment industry?[22]

Elite sports, in modern times, are more of a business than they are a competitive recreational activity. The finances involved are huge, to the point where some professional sporting leagues are constructed by media companies for the purposes of entertainment, rather than for the purpose of pure sport.[23]

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[20] Lord Denning in *Enderby Town Football Club v The Football Associated Ltd* [1971] Ch 591 observed that 'Justice can often be done in them (that is, domestic tribunals) better by a good layman than by a bad lawyer. This is especially so in activity like football and other sports where no points of law are likely to arise, and it is all part of the proper regulation of the game'.

[21] Originally quoted from Luke Cyphers, 'In the Crosshairs: Roboref', *ESPN The Magazine*, 23 December 2002, 122–123; Jake Locklear, 'Arbitration in Olympic Disputes: Should Arbitrators Review the Field of play Decisions of Officials?' (2003) 4 *Texas Review of Entertainment & Sports Law* 199.

[22] See generally James B. Perrine, 'International Sports Law Perspectives: Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century' (2002) 12 *Marquette Sports Law Review* 703.

[23] Ibid.

Sport: Recreation or Business? 'For the Murdoch's and the Disney's, sport is no game. It's a hot, global entertainment product.'[24]

The climate in which elite sport is now played has changed all of the ground rules, and the Corinthian ethic of 'it's not whether you win or lose, but how you play the game' is looking decidedly outdated. For the victim of a refereeing error which has significant commercial consequences, 'blaming the ref when the game doesn't go our way …' is a grossly unsatisfactory remedy for the referee getting it wrong.

Elite sport as a business rather than a recreation

Commercially, economic theories predominate regarding the desirability of competitive balance within an elite sporting league in order to maximise the financial success of the league.[25] Competitive balance ensures an even distribution of talent amongst different teams in a league and provides a higher possibility of uncertainty of outcome in each game which is played. Uncertainty of outcome, in turn, increases spectator appeal in the product which is being offered to them. Sporting leagues structure their rules to ensure competitive balance.[26]

There are ways a sporting league may attempt to achieve competitive balance. Some methods of assisting competitive balance are labour market control mechanisms such as salary caps, skill caps and player drafts. Some other ways of assisting competitive balance are prohibitions against performance enhancing drugs (and rigorous testing regimes to ensure compliance with the rules). These rules have both competitive balance and also health and player welfare objectives.

When competitive balance is at the heart of the rules of sporting leagues (including the NRL), is elite sport a recreation in which the courts should be reluctant to intervene, or a business, which should have the same legal standards applied to them as any other business?

Sport in the social context

Sport has increased significantly in cultural, social and governmental importance. Most governments, these days, have a sports portfolio; such is the importance of sport. Our governments are becoming increasingly paternalistic,

[24] Ibid 703.
[25] See generally Nicola Giocoli, 'Competitive Balance When Teams have Different Goals' (2007) 54(13) *International Review of Economics* 345.
[26] Relevantly in this instance, the NRL has a salary cap which is designed to ensure competitive balance in the league.

and less inclined to avoid involvement in the private concerns of individuals.[27] As this trend towards paternalism on the part of the state increases, are we heading to a point where judicial authorities will be more inclined to intervene in the private affairs of sports people and sporting games, and ultimately become involved in consideration of the consequences of errors made by referees?

Fair play in business and in sport

Players are required to uphold standards of fair play. Rules to this effect are contained in the NRL Rules,[28] FIFA fair play systems[29] and spirit of cricket systems.[30] The test for elite sports, both commercially and philosophically, is one of fairness.[31] Accordingly, is it not inevitable that the concept of fairness and balance extends to ensuring absolute accuracy of refereeing and umpiring decisions? The advent of video replay technology would certainly suggest that this is the direction in which sport is travelling. Video replay technology arguably raises the bar for referees, and increases balance and fairness by reducing the prospect of refereeing error. The technology may also provide the ground work for judicial intervention in review of referees' decisions.

What type of refereeing errors should be reviewed by a court?

Is a factual or legal error, made by a referee instantaneously, without video reply technology and with a requirement for immediacy, in a different position from a referee who makes an error, having viewed and reviewed a video many times, with a substantially lower expectation of immediacy in decision making? Are those two referees in the same position? Or is the standard of the second referee expected to be significantly higher than the first? Is an error made by the second referee substantially more culpable than an error made by the first? Is there a greater possibility of a court review made by the second referee than there is of an error made by the first? Could the failure by a referee (having access to video technology) to use video technology be a negligent omission in itself? The trend towards reliance on replay technology will only become greater in the future.

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[27] Governments are increasingly intervening legislative in areas such as alcohol advertising, cigarette advertising and harm minimization with things such as poker machines when not too long ago, having a drink, having a smoke and playing the pokies would have been considered to be the exclusively private concern of the individual.

[28] See *NRL Rules* sch 1. Cl 17 obliges players to play in a 'sportsmanlike, disciplined and professional manner', 'accept and observe the authority and decisions of match officials' and 'ensure that the spirit of the International Laws of the Game is upheld'.

[29] At every World Cup Finals series for football (soccer), FIFA awards a Fair Play Award for the team which best observes the rules of the game according to a points system and associated criteria.

[30] Sydney Grade Cricket has a system where at the conclusion of each match, teams in their match report are required to award points for the level of 'Spirit of Cricket' displayed by the opposition. Awards are made at the end of the season according to the points awarded during the season.

[31] See James AR Nafziger, 'Symposium: International Sports Law & Business in the 21st Century: Avoiding and Resolving Disputes During Sports Competition: Of Cameras and Computers' (2004) 15 *Marquette Sport Law Review* 13, 15.

> As the NRL continues to support transparency in referee's use of video technology, its time to fill in the remaining gaps … These calls are too big to be allowed to be continued to be made without backing them up with hard video evidence.[32]

Why should a court not review a referee's decision if the referee makes an error?

> I don't understand why, in a democratic society, where government and all accepted standards in every walk of life are being questioned, umpires should be immune.[33]

So why is it that a decision of a referee or umpire should be immune from review by a court? Is it because of the fact that most sports have rules which say, in essence, that the decision of the referee or umpire is final? I doubt it. The concept of immediate and total finality of a referee's decision, in the vast majority of elite sports, is long gone. It went with the advent of video replay technology. In almost every sport of significance with the exception of football (soccer) video replays are a common feature of the game. In rugby league, Rule 1.44 of National Rugby League Operations Manual deals with video referees. The Rules set out, in eleven separate paragraphs, circumstances in which an on-field referee can call on a video referee to rule on certain incidents, to clarify other incidents, and to advise on a further category of incidents.[34]

It is difficult to recall a rugby league match in recent history where a video referee has not been called upon to rule on an incident. Such is the frequency of the use of the video replay. The use of video replays in rugby league is typical of the use of video technology in other sports. Accordingly, the proposition that a decision of an on-field referee should not be questioned at any subsequent time, for reason of a rule of the sport regarding the immediacy and finality of a referee's call, is a philosophy of a bygone era.

Is the reluctance of courts to intervene in on field decisions to do with the need for finality in the decision making process?

Without any doubt, there are practical reasons why finality of decision making carries a good deal of importance. There is a widespread and logical view to the effect that match officials need to be able to perform their task in an independent and competent manner, without any threat of administrative review or litigation because of their calls. It is suggested, with some justification, that sport would be thrown into chaos if judgment calls could be appealed and overturned.

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[32] Nigel Wall, 'I Reckon', *Big League* (Sydney), Round 7, 2011, 3.
[33] Former Pakistani cricketer Asif Iqbal quoted in David Fraser, 'The Man in White is Always Right – Cricket and the Law', (1993) 4 *The Institute of Criminology Monograph Series* 1.
[34] *NRL Rules* sch 8.

Despite the logical, practical appeal of this proposition, the advantages of finality could not be said to be absolute. It is possible to see a circumstance where the error made by a match official was so grave, and the consequences of the error so great, that the desirability of reviewing and overturning it could outweigh the practical advantages of the needs for finality in the decision making process.

Do judges reviewing a referee's decision have a greater degree of expertise than umpires or referees?

Umpires or referees are in a position which is analogous to that of an expert arbitrator.[35] It could only be very rarely said that a judge, in a court of law, would have greater expertise in reaching a decision regarding an incident in a game than the expertise of a referee or umpire who has significant experience in making exactly those types of decisions and with particular expertise in that regard as well. Often, making the judgment call in relation to an incident in a match is an art rather than a science, and it is not able to be easily and objectively reviewed.[36] Additionally, immediate reactions of match officials, made on the spot and in close proximity to the incident itself, are often decisions which have the greatest likelihood to produce an accurate outcome.[37] However, the advent of video replay technology may have changed the landscape in this regard.[38] It is now possible for a judge, sitting in a court which is quite remote from the playing field, to have a more detailed view of the incident than the referee himself or herself and for that reason, the argument in favour of expert, on the spot, decision making is possibly reduced.[39]

Is the specificity of sport a reason to preclude judges and courts interfering with referee's decisions?

The concept of specificity of sport, the proposition that sport is not a normal sector of business activity and therefore cannot be subject to ordinary business norms, should not be a reason for courts not becoming involved in analysis of field-of-play decisions. To the cynical, 'specificity' is an excuse for sport not to have to comply with the law[40] – for sport to put itself above the law. Notwithstanding this, in so many areas of sporting activity, sport has had the same standards applied to it as other areas of social endeavour. The criminal

[35] A court will only overturn the findings of an arbitrator or expert referee in a very limited set of circumstances. See generally *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1.
[36] Bennett Liebman, 'Reversing the Refs', (2005) 6 *Texas Review of Entertainment & Sports Law* 23, 28.
[37] Ibid 27.
[38] S Christopher Szczerban, 'Tackling Instant Reply: A Proposal to Protect the Competitive Judgments of Sports Officials', (2007) 6 *Virginia Sports and Entertainment Law Journal* 277, 280.
[39] Ibid 293; see also generally, Liebman, above n 36, 23.
[40] Keith Newman, 'How Sports Break the Law all the Time', (2011) 30 *SportsPro Magazine*.

law has been applied to acts on the sporting field.[41] Courts have interfered with labour market rules as they apply in the sporting context.[42] Courts have applied competition law to sporting context.[43] Many participants in sporting endeavour have been the subject of personal injury actions by those injured as a result of incidents involving them.[44] If most other aspects of sporting endeavour are properly reviewable by courts, then why not review the actions of referees?

As a matter of policy, why should sporting officials be immune from having their decisions scrutinised by courts?

Other professionals such as doctors, accountants and lawyers are subject to judicial scrutiny of their mistakes. Indeed, discrete areas of law and expert areas of professional practice have grown around the fields of professional negligence, particularly with medical malpractice. Doctors operate without the legal protection that rugby league referees arguably enjoy. Is it suggested that rugby league referees are a more critical component of social endeavour, worthy of greater protection, than our medical practitioners? Against that background, the arguments in favour of protection for referees and umpires from judicial review look rather inadequate.

The notion of the infallibility of a referee or umpire is a myth. When a referee or umpire makes a horrible blunder, and the blunder is replayed and highlighted in the media time and again, and the blunder causes someone to suffer considerable loss, it seems questionable that the law should offer no remedy to an aggrieved person. In almost every other walk of life, the law would offer such a remedy. However, for some reason, there seems to be a widely held view that a referee or umpire enjoys a legal immunity. Such a view is a misconception, and although it is true to say that courts have always been extremely reluctant to intervene in reviewing an umpire or a referee's field-of-play decision, it is also true to say that no court has ever said that referees enjoy immunity.

Never say never.

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[41] Many instances have arisen in Australian courts relating to on field assaults. One of the most recent related to the conviction of Gordon Graff (a Wentworthville player in the NSW State Cup) who was convicted at Downing Centre Local Court, Sydney for an assault on Luke Millward (a Newtown player) following the use of an elbow in a tackle in a match at Leichhardt Oval, Sydney.

[42] Court decisions regarding sporting labour market decisions about as well with arguably the most important being the High Court decision of *Buckley v Tutty* (1971) 125 CLR 353.

[43] See *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10; *Adamson v West Perth Football Cluh Inc* (1979) 27 ALR 475; *Adamson v New South Wales Rugby League* (1991) 27 FCR 535.

[44] Actions for damages for personal injuries have been reasonably commonplace as well. One of the first decision of its kind was *Canterbury Bankstown Rugby League Football Club v Rogers* (1993) Aust Torts Reports 181, 246.

The common law is a moving feast

Donoghue v Stevenson[45] was a landmark decision which changed the law forever. Ever since that decision, the law of negligence has been evolving, and the categories of negligence have never been finalised. As sport becomes more about entertainment and business, and less about recreation; as ownership of sporting franchises become more private equity based and less community based; and as video replay technology allows more objective determination of judgment calls, it is not entirely far-fetched to foresee a situation in the future where an Australian court is asked to review a field-of-play decision. If such a situation arose, what authorities would a court turn to?

The Law as it Stands at the Moment

The Australian experience

Not surprisingly, there are a limited number of authorities directly on the issue in Australia. Equally unsurprisingly, the authorities centre on the sport of horse racing. Unsurprising, because horse racing has always had a commercial aspect to it and, for that reason, the financial motivation to take court proceedings on the part of an aggrieved person has always existed in the sport of horse racing, whilst for other sports that motivation might only now be becoming apparent.

On April 12 1880, the Full Court of the Supreme Court of Victoria decided the matter of *Cole v Chirnside*.[46] The plaintiff owned a horse, Lillydale, and the defendants were the stewards of the Wyndham Racing Club. They conducted a race meeting on 10 January 1879 and the plaintiff entered his horse in a hurdle race. He paid entrance money and was racing for prize money. His horse and others competed in the race. His horse came first and was placed first by the judge. No other horse was placed and no protest was entered by anyone. However, half an hour after the race was run and won, the secretary of the race club informed the plaintiff's trainer that the stewards directed the race to be run again, owing to the unsatisfactory manner in which the race had been run (it took 20 minutes for the horses to complete the distance). The plaintiff refused to run the race over again and claimed the stakes as the first placegetter. Other horses ran the race a second time but stewards declared the second race 'no race' and did not pay prize money to anyone. At the hearing, the matter was determined in favour of the stewards on the basis that the decision of the stewards was final and conclusive under the rules of the VRC.

The significance of the case seems to be only in the fact that it was the first case of its type in Australian courts in that it questioned the decision of an umpire or

[45] [1932] AC 562.
[46] (1880) 6 VLR (L) 68.

a referee (or in this case a steward). The decision turned almost entirely on its facts and did not involve any important question of legal principle.

In 1938, a similar case was decided in Queensland in *Williams v Rockhampton Jockey Club* (decided on 2 December, 1938).[47] Again, the plaintiff was a racehorse owner who had entered his horse for two races which were run at two meetings by the Rockhampton Jockey Club. In each race, his horse was placed second and in both of the races, another horse named 'Tommy' was placed first. Some months later, it was discovered that Tommy was in fact unregistered, and the plaintiff took an action against the Rockhampton Jockey Club to recover the prize money which should have been paid to his horse for first place. The action was taken alleging both negligence and also a breach of a contract which the plaintiff had with the Rockhampton Jockey Club. The plaintiff was unsuccessful before a Magistrate and appealed. On appeal, the Court declined to make any finding of negligence and suggested that the real cause of action was based on contract. The Court found that there was no breach of contact either (the prize money having been paid over before any objection was lodged).

Although unsuccessful, the action based on negligence and also breach of contract, was probably coming closer to the type of action which may, in the future, have some prospect for success.

The case of *Sinclair v Cleary & Ors*[48] is arguably the most important decision of its type in Australia. Once again, the plaintiff was a racehorse owner and the defendants were the members of the committee of the Toowoomba Turf Club and also the judge appointed by them. The owner commenced the proceedings against the race judge, alleging negligent judging, and against the club and its members, alleging, firstly, that they were vicariously liable for the negligence of the judge and, secondly, that they were negligent in their act of appointing the judge. The plaintiff also alleged a contract with the race club which had been breached. Dealing with the latter issue first, the Court found that the owner had contracted to be bound by the rules of racing which provided, amongst other things, that a race could only be decided by a judge and that the judge's decision was final.

In relation to the issue of a vicarious liability, the court held that the race judge occupied a position which was independent of the race club and, for that reason, the club could not be vicariously liable for any error which the judge was guilty of. Additionally, they found that the race judge had no contract with the plaintiff on which the plaintiff could found an action against him.

[47] [1939] QWN 7.
[48] [1946] St R Qd 74.

In relation to the allegation to negligence, the fact that the claim alleged a loss of prize money and bets, rather than physical damage, was fatal to the claim of the plaintiff.

> In my opinion, on the authorities, there was no such duty. It appears to me that the authorities restricted duty to take to acts in which physical damage to person or property is likely to be caused and that there is not a general duty to take care by any person performing any act from the performance of which somebody else may in some way be directly or indirectly damnified … that mere negligence without more does not give rise to cause of action is clear from the cases in which attempts have been made to establish a cause of action based upon negligent misrepresentation.[49]

Although referred to by some commentators as the 'locus classicus' in this area of Australian law,[50] it is clear that the decision did not close off, once and for all, court challenges to incorrect refereeing decisions. The decision is now 65 years old. Much has changed in the law in that time, much has changed in society and much has changed in judicial attitudes towards applications of the law. Would a court, hearing the same matter today, come to the same view regarding the independence of the judge in avoiding the vicarious liability of the race club? The application of the organisation test for vicarious liability and the concept of the non-delegable duty may lead to a different conclusion.[51] In relation to the question of monetary loss rather than physical damage, it is worth bearing in mind that the case was decided long before *Hedley Byrne & Co v Heller & Partners Ltd*[52] and the line of authority which followed, and although to extend that line of authority to reach the concept of negligent adjudication by a referee might still be a significant leap, it is not as big a leap as suggesting that such a conclusion is beyond the realms of possibility.[53]

In interpretation of a contract, it is also entirely possible that a court may take a different view to that in *Sinclair v Cleary & Ors*, with courts of today appearing to be significantly less literal in their interpretation of contracts, more inclined to imply terms regarding reasonably effective performance of contractual obligation, and courts also being more inclined to intervene in the private affairs of a body where there is a public interest reason for doing so, consistent with governments and society in general taking a more paternalistic attitude to life.[54] A court today may be less inclined to emphasise a contractual term which asserted that the decision of the referee was final.

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[49] Ibid 78 (Macrossan CJ).
[50] GM Kelly, 'Prospective Liability of Sports Supervisor's (1989) 63 *Australian Law Journal* 669.
[51] Ibid.
[52] [1964] AC 465.
[53] Kelly, above n 50. See generally the comments in this article in relation to all of the propositions in this paragraph.
[54] Ibid.

Sixty-five years on, the possibilities for reinvestigation of the area against a background of contemporary social and legal standards are ripe.

The International Position

Overseas authority will be persuasive rather than binding on Australian courts. The most fertile source of authority does not come from a court constituted in the accepted fashion of judicial bodies but from the Court of Arbitration for Sport.

Court of Arbitration for Sport

Many appeals against field-of-play decisions of a referee or umpire are, presently, dealt with by the Court of Arbitration for Sport ('CAS') which has provided the most consistent body of jurisprudence in relation to the area of field-of-play decisions.

The Court of Arbitration for Sport was created in the early 1980s on the initiative of the then IOC President, Juan Antonio Samaranch with the idea of creating a sports specific jurisdiction authorised to pronounce binding decisions on sport related disputes. The dispute generally arises out of an arbitration clause inserted in a contract for a particular sporting federation or association or, alternatively, for a sportsperson. Disputes are wide ranging and may involve matters of principle relating to sport or matters of pecuniary or other interests connected with sport.[55] The CAS is quite unlike the common law in that there is no principle of binding precedent as there is in the common law.[56] However, in relation to field-of-play decisions, there is a consistent line of authority in CAS decisions to the effect that in the absence of direct evidence of bad faith, CAS Tribunals will not review a field-of-play decision. There must be some evidence of preference, or prejudice against a particular team or individual in order for the CAS to review a field-of-play decision. Whilst accepting that this is a high hurdle, the CAS has reached a policy view that if this hurdle were to be lower, the floodgates would be opened and any dissatisfied participant would be able to seek a review of a field-of-play decision.

> But there is a more fundamental reason for not permitting trial, by television or otherwise, of technical, judgemental decisions by referees. Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his

[55] See Darren Kane, 'Twenty Years On: An Evaluation of the Court of Arbitration of Sport', (2003) 4(2) *Melbourne Journal of International Law* 611.

[56] Matthew J Mitten and Hayden Opie, 'Sports Law, Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution', (2010) 85(2) *Tulane Law Review* 269, 287.

> decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are by players. This is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about at field of play decision simply because he or she disagrees that decision. [57]

CAS jurisprudence does, however, make distinctions relating to compliance with a game rule. Even in the absence of bad faith, a referee or umpire does not enjoy free discretion to control the game. He must comply with a game rule. A deviation by a referee or umpire from a mandatory game rule will undermine the utility of the rule and, moreover, may affect the outcome of the game or tournament.[58]

Accordingly, on the basis of the CAS line of jurisprudence, the door for reviewing a referee's on-field decision, in the absence of bad faith, is only barely open.

United States of America

United States of America courts often provide fertile ground if you are looking for a precedent to support a novel legal concept. However, in relation to setting aside erroneous decisions by sports officials, the USA courts provide surprisingly little support for the proposition that erroneous decisions of sports officials are able to be reviewed by a court.

In *Georgia High School Association v Waddell*,[59] an action was taken in 1981 to review a decision of a high school football referee who had clearly misapplied the rules of the game. In the game, between Osborne and Lithia Springs High School, Osborne led 7–6 with seven minutes to play. Osborne punted downfield and a 'roughing the kicker' penalty was awarded in their favour. Instead of the penalty providing them with an advance of fifteen yards and automatic first down, they were given a fifteen-yard penalty making a fourth down and six yards to go. Additionally, they should have kept possession of the ball. Instead, they were required to punt. Consequently, Lithia Springs took possession of the ball and drove a field goal to put them ahead by a score of 9–7. They eventually won the game 16–7.

The trial judge ordered the game to be replayed for the reason that the referee had denied the school its proprietary right to have the game played according to the rules. However, the decision was overturned in the Georgia Supreme Court with the Court commenting

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[57] *Korean Olympic Committee v International Skating Union* CAS OG/02/007.
[58] CAS 93/103 *SC Langnau v Ligue Suisse de Hockey sur Glace* and CAS 2001/A/354 *Irish Hockey Association v Lithuanian Hockey Federation.*
[59] 285 S.E. 2d 7 (Ga. 1981).

> [W]e now go further and hold that courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies.[60]

The decision was followed in *Bain v Gillespie*[61] with the following comment:

> This is a case where the undisputed facts are of such a nature that a rational fact finder could only reach one conclusion – no foreseeability, no duty, no liability. Heaven knows what unchartered morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind-boggling … It is bad enough when Iowa loses without transforming a loss into a litigation field day for Monday quarterbacks. There is no tortious doctrine of athletics official's malpractice that would give credence to the Gillespie's counter claim.[62]

The 2000 United States of America Greco Roman Wrestling Olympic trials also produced a number of different pieces of litigation with no clear matter of principle emerging.

Interestingly, USA wrestling rules draw a fine line as to what is reversible in a protest regarding an official's field of play decision between what is considered a 'judgement call' (which is not reversible) and a 'misapplication of the rules' (which is reversible). Cynical commentators have suggested that if the protest committee wants to support an official's decision, then they label it a judgment call, and if they want to overturn the decision, then they label it a misapplication of the rules.[63]

The Netherlands

The 1991 Dutch Soccer Cup final also provided litigation in relation to a referee's decision. The match took place between Feyenoord and BVV Den Bosch. Feyenoord scored the only goal of the game in the first half but the game was regularly disrupted by crowd trouble. Ultimately, the referee ended the match with eight minutes to go because of the crowd trouble. The Cup was decided in favour of Feyenoord and BVV Den Bosch protested the decision because of the early completion of the game.

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[60] Liebman, above n 36, 32.
[61] 357 N.W. 2d 47 (1984).
[62] Liebman, above n 36, 33.
[63] R. Jake Locklear, 'Arbitration in Olympic Disputes: Should Arbitrators Review the Field of play Decisions of Officials?' (2003) 4 *Texas Review of Entertainment & Sports Law* 213.

BVV Den Bosch took the matter to court. The Civil Court in Utrecht found in their favour and, amongst other things, ordered the second half of the game to be replayed. Feyenoord appealed. The court, in part, upheld the appeal but still ordered that the game be replayed. A further appeal was lodged and ultimately, the Court of Appeal in Amsterdam found that the original result should stand finding, again amongst other things, that the referee is the sole authority for events on the pitch, therefore his decision as to when the match ended must be final.[64]

The existing law in summary

Many of the decisions of courts to decline to review a referee's decision have been criticised as being based 'in social convenience rather than rigorous legal reasoning'[65], another example, perhaps, of the specificity of sport. If that comment is well made (and it appears to be) then circumstances may well arise in the future whereby a referee's decision is successfully challenged in court before a judge who is more concerned with rigorous legal reasoning than social convenience.

If there is to be an accepted basis of legal reasoning found for a court not interfering with a referee's decision, it may be that it is found in two principles which are well known to Australian courts from both the common law and the criminal law.

In New South Wales, courts will only in rare circumstances overturn the decision of an expert arbitrator.[66] One instance in which they will do so is where the decision will involve an error of law (as opposed to a judgment of facts). Courts will rarely, if ever, interfere with a factual conclusion of an arbitrator or expert. This philosophy is arguably similar to the philosophy which says that one should not interfere with the decision of an expert (referee) in relation to judgments of fact. Similarly, in an application of the criminal law, juries make decisions as to the facts and judges make rulings as to the law. No appeal will generally lie in relation to a jury decision as to the facts. However, a right of appeal will lie in relation to a misapplication of the law by a judge. There is a similarity in the proposition that a court should not review a judgment of a referee as to a fact, for the same reason as one should not interfere with a judgment of fact by a jury. (These contentions are matters of speculation by the author rather than examples of legal reasoning on the part of our courts).

It is difficult to advocate for judicial interference of judgment calls by a referee or umpire in relation to strictly factual matters. Coaches, players and officials

[64] See Raymond Farrell, 'The Dutch Cup Final 1991 and its Aftermath', (1992) 2(2) *ANZSLA Newsletter* 9.
[65] GM Kelly, 'Prospective Liability of Sports Supervisors' (1989) 63 *Australian Law Journal* 669.
[66] See above n 35.

all know the rules and all understand the intended application of the rules, yet often disagree on the application of a rule in a particular factual circumstance, because the facts may be seen differently by different people.[67] It is difficult to identify who is right and who is wrong.

However an error by a referee as to a law (rather than a judgment of fact), may well be a different matter. Borrowing from the principles of the criminal law and rules relating to the court's use of experts and arbitrators, an argument can be made in favour of a court overturning a mistake by a referee or umpire as to a rule (or a law), if not a judgment made by the referee or umpire as to the facts before him.

Although it is difficult to find authority in any superior court for the proposition that a match result should be set aside for a poor call on the part of a referee or umpire, the door is not entirely closed. After all, at least one trial judge in the United States[68] and two in the Netherlands[69] have found support for the proposition. Furthermore, the reluctance to interfere with the on-field decisions of a referee or umpire is a far cry from suggesting the referees and umpire have no liability whatsoever for their decisions. Whilst the cases to which I have made reference provide little support for the proposition that it is possible to obtain an injunctive relief to set aside a game result, that is a long way from the proposition that referees and umpires have no liability at all (in negligence for instance) for their actions.

A summary of the relevant principles

(1) If an action was to be taken in relation to a refereeing error, it is likely that it would be based in contract and also in negligence.

(2) In the absence of bad faith, there will be reluctance on the part of a court to intervene in a referee's field of play decision.

(3) There may be a distinction between a judgment call on the part of a referee (which is not reviewable) and a misapplication of the rules by a referee (which may be reviewable).

(4) There is no established legal principle (as against an argument of social convenience) which would prevent a court intervening to review a refereeing error.

[67] Locklear, above n 63, 200.
[68] *Georgia State High School Assn v Waddell* 248 Ga. 542, 285 S.E.2d 7 (1981).
[69] The first two decisions in the *Feyenoord* and *BVV Den Bosch*.

Wests Tigers v NRL – the action based on contract – applying the general principles and the law to the agreed facts

What is the contract which is relied upon?

Wests Tigers contract to play in the NRL by way of a Club Agreement, which is effectively a licence agreement for the club to play in the NRL. Pursuant to the Agreement, the club is obliged to comply with the rules of the NRL.[70] Indeed, the rules form part of the Agreement.[71] The NRL manages and operates the NRL competition.[72] They are responsible for the organisation of the competition and[73] the NRL is said to have no liability to a club under the Agreement.[74]

The NRL Rules are detailed. The purpose of the rules is to regulate, organise, manage and administer the competition.[75] Schedule Four to the NRL Rules is the Judiciary Code of Procedure. Part 2.3 of Schedule Four establishes a Match Review Committee. One of the functions of the Match Review Committee is to examine any conduct by a player that may constitute an offence.[76] Clause 1.44 of Schedule Eight to the NRL Rules (The Operations Manual) provides for the appointment of a video referee. The NRL appoints the video referee.[77] The video referee may be used in an advisory capacity to assist match officials.[78] Access to the video referee booth is highly restricted and no person is permitted access to the booth without approval.[79] Clearly, the reason for this rule is to prevent the decisions of the video referee from being improperly influenced.

The contract, therefore, between Wests Tigers and the NRL is to be found in the Club Agreement and the NRL Rules. Wests Tigers would argue that the NRL would have either an express obligation or an implied obligation to control their matches in accordance with the rules of rugby league[80] and the NRL Rules.[81]

Has there been a breach of the rules and a breach of contract?

Given that the NRL Match Review Committee charged Jeremy Smith with dangerous contact, and given that he pleaded guilty to the charge, it would seem fairly clear that there has been a breach of the rules of rugby league.

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[70] Cl 9.8 of the *Club Agreement*.
[71] Cl 9.9 of the *Club Agreement*.
[72] Recital B of the *Club Agreement*.
[73] Cl 7.1 of the *Club Agreement*.
[74] Cl 5.1 of the *Club Agreement*.
[75] Rule 6(2) of the *NRL Rules*.
[76] Rule 19(3) of sch 4 to the *NRL Rules*.
[77] Cl 1.44.1 of sch 8 to the *NRL Rules*.
[78] Cl 1.44.6 of sch 8 to the *NRL Rules*.
[79] Cl 1.44.11 of sch 8 to the *NRL Rules*.
[80] Cl 7.1 of the *Club Agreement*.
[81] See Kelly, above n 65, who reaches the view that courts are becoming increasing more likely to imply such terms.

Given that the rules of rugby league were breached, but not penalised by the referee, it would seem to be at least arguable that the contract between Wests Tigers and the NRL was breached in that the NRL did not comply with their contractual obligation to Wests Tigers (either express or implied) to control their matches in accordance with the rules of rugby league and the NRL Rules.

If there has been a breach of contract, is the breach justiciable?

Yes, although there is a real issue as to whether non-compliance with the rules of an association amounts to a justiciable issue. This obstacle arises from the longstanding High Court authority of *Cameron v Hogan*.[82] That case was a 1934 decision concerning the rules of the Australian Labor Party. In the action, nominal damages were sought and injunctive relief was sought as well.

> The organisation is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interests suitable for protection by injunction …The basis of ascertainable and enforceable legal right is lacking. The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment.

Although the decision has been regularly applied, and although there is no High Court authority to the contrary, the values upon which the decision was reached are interesting.

> Such associations are established upon a consensual basis, but, unless there were some clear positive indication of the members contemplating the creation of legal relations inter se, the rules adopted for the governance would not be treated as amounting to an enforceable contract.

Cameron v Hogan was applied in *Scandrett v Dowling*[83] in the Supreme Court of New South Wales. That case related to the constitution of the Anglican Church in New South Wales. The Court held that the terms of the constitution were a consensual document without contractual force. That decision was also applied in a number of other New South Wales Supreme Court decisions. However, the decision is readily distinguishable on the basis that there may be rules of other associations which are intended to give rise to legal rights. In such a situation, it would seem clear that those rules are enforceable. Additionally, and as a general, social observation, the philosophy of non-interference in the private affairs of

[82] (1934) 51 CLR 358, 378, 371.
[83] (1992) 27 NSWLR 483.

individuals is possibly a philosophy of a bygone era, which, in appropriate circumstances in current times, might be decided differently.[84]

In *Australian Racing Drivers Club Ltd v Grice*,[85] Allan Grice challenged the ARDC upon the basis that they had provided winning prize money for a racing competition to another driver, notwithstanding his successful appeal in relation to one of the races which would have rendered him the winner of the series. In the District Court of New South Wales, Taylor J found that a contract existed between the plaintiff and the ARDC and that the rules of racing were part of that contract.

> Looking at the correspondence between those interested, the matrix of contractual relationships, the conduct of the parties, particularly their discrete functions as overall organiser, sponsor, entrant, drivers and promoter, the court has concluded there was a binding contract between the plaintiff and ARDC.[86]

The finding of the existence of a contract was not seriously challenged on appeal and the majority of the New South Wales Court of Appeal agreed with the finding of the contract. It was clear, in that case, being one of professional sport, that the parties intended that the rules (and other documents between them) would form a contractual relationship which could be enforced at law.

In *North Sydney District Cricket Club Inc v Sydney Cricket Association & Anor*,[87] Grove J was barely concerned about the concept of justiciable issue.

The case concerned the outcome of a match in the Sydney Grade Cricket Competition. It was alleged that the result of the match was contrived, causing one team to qualify for the semi-final series when another team should have so qualified. Although it related to the elite level of cricket competition in New South Wales, it was not professional cricket by any stretch of the imagination. Against that background, the comments of the judge are interesting:

> I reject the defendant's submission that North Sydney District Cricket Club Inc lacks standing to bring this action. I need not pause to describe in detail the history of the plaintiff's participation

[84] See the comments of Hayne JJA in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546; 'This appeal is not to be determined according to some a priori classification of football as a game, a business, or, as some would have it, a religion. It is not to be determined according to whether "sporting disputes" should be played out in the courts, left on the playing field or decided in club.' See also the comments of Palmer J in *Carter v NSW Netball Association* [2004] NSWSC 737 at [100] in relation to *Cameron v Hogan*; 'I should observe that the law in this area has moved on a little in the last seventy years.'

[85] *Australian Racing Drivers Club Ltd v Grice* [1996] NSWCA 40587 (12 August 1998).

[86] *Australian Racing Drivers Club v Grice* [1998] NSWCA 25.

[87] *North Sydney District Cricket Club Inc v Sydney Cricket Association & Anor* [1996] NSWSC 30016 (31 March 1996).

> and its affiliation as a member of the Sydney Cricket Association. Both rights and obligations flow in the relationship. I consider the defendant's submission that there were not contractual relations between the parties is incorrect. In any event, I hold that the plaintiff has locus standi deriving from a real and genuine interest in raising the issue of the treatment of one of its constituent teams in the grade competition.[88]

That statement seems to be a fairly summary dismissal of the proposition that to challenge the referee or an umpire, or other official may not be a justiciable issue.

In *Goodwin v VVMC Club Australia (NSW Chapter)*,[89] White J found that expulsion from membership of a bike club was justiciable. In *Carter v NSW Netball Association*,[90] Palmer J found that the internal affairs of a netball association were justiciable. In the circumstances of those cases, it would be surprising if the Supreme Court of New South Wales found that the Wests Tigers dispute was not justiciable involving, as it does, property rights on their part.

Is there any clause in the contract between Wests Tigers and the NRL which would prevent the dispute from being justiciable?

Clause 27 of the Club agreement provides as follows:

> This Agreement will be governed by and construed in accordance with the law from time to time in force in New South Wales, and the parties submit to the non-exclusive jurisdiction of the Courts of that State.

Far from the contract between Wests Tigers and the NRL being the private domain of the parties, it appears that the parties themselves actively contemplate that circumstances may arise which would require intervention by a court. Notwithstanding this provision, clause 5.1 of the Club Agreement provides that the NRL can have no liability to a club and there are various sections of the NRL rules which provide that various decisions of the NRL are not justiciable.[91] There is no provision in the NRL rules which would allow a club to appeal against a decision of a referee and because no appeal provision exists within the rules, there is equally no provision in the rules which says that a decision in relation to such an appeal by a club is not justiciable. In any event, to the extent

[88] Ibid, 12.
[89] [2008] NSWSC 154.
[90] [2004] NSWSC 737.
[91] See Rule 13 *NRL Rules* sch 5 – Appeals Committee Procedural Rules – "No Review and No Suit".

that provisions exist in the contractual documents between Wests Tigers and the NRL, which purport to make the argument non justiciable, a court could well find such provisions to be void as an ouster of the court's jurisdiction.[92]

Was the referee's decision a judgment call or a misapplication of the rules?

It is possible to make a strong submission that the error of the referee was not a judgment call, but a misapplication of the rules. It seems at least possible that those who were sitting in judgement on the decision were of the view that the kneeing had to be intentional to be in breach of the rules.[93] If this view held by the referees is incorrect (and it seems to be), then there was a misapplication of the rules (rather than a judgement as to a fact) and there is authority for the proposition that such a circumstance is more likely to lead to a review by a judge than simply an argument arising from a factual judgement over which there is disagreement.[94]

Was there any bad faith in the referee's decision?

There is no evidence of any bad faith in the decision of the referee, but the fact that the view of the video referee was influenced by someone else may be enough to taint his decision. Clearly, the reason for rule 1.44.11 of schedule eight to the NRL Rules is to prevent the video referee being influenced by others.[95] Against that background, it is illuminating to consider the impact that an opinion of someone other than the video referee may have had on the video referee. In a tribunal hearing (sporting or otherwise), the presence of a person who is not a member of the tribunal (and not otherwise necessary for the proceedings) may create a suspicion of improper influence and lead to the decision of the tribunal being invalidated.[96] Although no bad faith can be alleged in this case, the propriety of the process is clearly in question and if, as GM Kelly asserts, 'it is an underlying principle that justice should be seen to be done',[97] then a court may just be minded to review the decision of a video referee made in circumstances where it is questionable that justice was seen to be done. If the decision of the video referee in the Wests Tigers v St George Illawarra match was not unambiguously his, but influenced by someone else, that fact may be just enough to get a court interested in reviewing it. It is not evidence of bad faith, but it may be just far enough along the road of procedural impropriety to taint the decision.

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[92] See the comments of Ashley AJA in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.
[93] See general discussion on p 4 and p 7 above.
[94] See general discussion on pp 16–21 above.
[95] See above n 79.
[96] See generally GM Kelly, *Sport and the Law – An Australian Perspective* (Law Book Company, 1987); the discussion on this topic under the heading 'Presence of a non-member at a tribunal hearing', 83.
[97] Ibid.

In summary

(1) There is a contract between Wests Tigers and the NRL.

(2) The contract was breached.

(3) The breach of contract is a justiciable issue.

(4) The refereeing error was a misapplication of the rules, rather than a judgement call over which there could be many differing and equally valid opinions. The referees mistakenly thought that the rule was only breached if there was intentional kneeing.

(5) Moreover, there was a procedural irregularity with the process of the video referee making the decision, which has the effect of tainting the decision.

(6) There is no principle of law which should preclude Wests Tigers from having a remedy for the breach of contract.

(7) Elite sport is now a multi-million dollar business in which the courts should properly intervene where necessary.

(8) Fairness demands a remedy for Wests Tigers.

What further action would a Court take if it formed the view referred to above?

It goes without saying that a party aggrieved by an incorrect refereeing decision would only be motivated to challenge the decision in court if it was clear that they believed that the result of the match would have been different if the decision had not been incorrectly made. Court challenges would not revolve around every refereeing decision, only those which have a critical impact on the result of the match. That being the case, it is difficult to imagine that a court which found that a referee had erred in those circumstances could do anything other than order that the match be replayed, either in full or from the time of the incorrect decision onwards. This may not be as impractical as some might expect. Trial judges in two cases have already decided that such an outcome should prevail.[98]

A football match in the English FA Cup in 1999 was replayed after a goal was allowed to one team, which was not scored in breach of any rule of the game, but was scored in breach of an accepted convention for restarting the match after an injury to a player. The match was between Arsenal and Sheffield United and it was felt that Arsenal won the match 2–1 on an immoral basis, if not an

[98] The trial judge in *Georgia State High School v Waddell* referred to above n 56 ordered that the game be replayed and the trial judge in the *Feyenoord* and *BVV Den Bosch* referred above n 65 ordered that the remaining part of the game following the incorrect decision be replayed.

illegal basis. The Arsenal coach Arsene Wegner said 'We feel that it is not right. We feel that we didn't win the game like we want to win our games. The best we can do now is to offer Sheffield United to replay the match.'[99]

Cynical commentators suggested that to replay the game would set a dangerous precedent and 'would encourage cheats to push for any loophole and seek endless causes to have their defeats overturned.'[100] The reference to 'cheats' is as insightful as it is ironic. The very reason for the replay is that one team was cheated, not that they themselves cheated. Others were more generous in their assessment of why a replay was desirable – 'there is a good reason. It is called fair play or, from a half-forgotten era, the Corinthian spirit.'[101]

Arsenal won the replay. Floodgates have not opened to 'cheats' (there have been no other games replayed in similar circumstances)[102] and those who believed in the level playing field being promoted by fair play were buoyed by the match being replayed.

What the game proved is that in the rare circumstances where a court overturns a referee's decision, a replay of the match is a perfectly workable solution to the problem of the incorrect refereeing decision. After all, if fair play is being facilitated and promoted by a replay, are we not adhering to the 'test' for elite sports, both commercially and philosophically, being one of fairness?[103]

Wests Tigers v NRL – the action based on negligence

If an action to have a match replayed based on breach of contract failed, what about an action in negligence? An action alleging negligence on the part of the referee would not result in the game being replayed, but may result in an award of damages for the aggrieved party.

Whilst the USA Courts found a little more than twenty-five years ago that there was no tort of referee malpractice,[104] the categories of tort are far from closed. Indeed to suggest otherwise is to ignore the history of the development of the law of negligence. The following does not purport to be an exhaustive treatment of the 'tort of referee negligence', but a brief consideration of the possible issues which are raised.

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[99] Rob Hughes, 'Fair Play Returns to the Playing Fields of England', *New York Times* (New York), 17 February 1999.
[100] Ibid.
[101] Ibid.
[102] FIFA resisted calls from Ireland to replay a World Cup finals qualification match after France won a match 2–1 (on aggregate) in second leg extra time when a hand ball was not detected by the referee.
[103] See above n 31.
[104] *Bain v Gillespie* 357 N.W. 2d 47 (1984).

Is the law of negligence capable of extending far enough to find a tort of referee's negligence?

David Ipp, then a Judge of the New South Wales Court of Appeal, commented as follows in relation to the law negligence:

> Some principles are of the law remain immutable, but not those that govern negligence.
>
> The law of negligence is especially prone to influence by moral, social, economic and political values.
>
> As society becomes more complex and technologically advanced, novel circumstances giving rise to negligence claims arise. Policy then becomes determinative. It is this influence of policy that explains the uncertainty and changes to the law of negligence in recent times.[105]

While it is true to say that the High Court of Australia does not readily find new categories of negligence, it is also true to say that the law continually evolves.

> Today, it would be difficult to find a judge who thinks that, if authority cannot be found in the cases, the law cannot be changed. But a view does exist that, if principles derived from established authority are capable of application to a novel case, they must, of necessity, apply to that case; on this view, established principles could not be nullified by policy. Thereby, without reference to broad policy implications, the law of negligence widens its reach to new and complex situations.[106]

Applying that proposition to the current issue, if the principles of negligence deriving from established authority are capable of application to the question of a referee's negligence, then those principles should be applied, ignoring any policy considerations which might otherwise flow.

Anyone who thinks that sport has immunity from the application of the law of negligence should read the judgment of Kitto J in *Rootes v Shelton*:

> I cannot think there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older than the common law itself.[107]

[105] DA Ipp, 'Policy and the Swing of the Negligence Pendulum, Supreme Court of NSW', 15 September, 2003. Paper delivered at Government Risk Management Conference, Perth, available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_15093.
[106] Ibid.
[107] *Rootes v Shelton* (1967) 116 C.L.R. 383, 387.

The liability of a referee in negligence

There is clear authority for the proposition that a referee may be liable in negligence to the participants in a match. In the English case of *Smolden v Whitworth*[108] a referee in a rugby match was found to be negligent when a scrum collapsed and the neck of one of the players was broken. Curtis J held that a referee owes a duty of care to the participants on the field of play and can be liable for injuries sustained by a player as a result of his failure to exercise the required degree of control over proceedings. Curtis J was not of the view that there were any public policy considerations which should preclude him from imposing a duty on a referee.

Commentators have formed the view that the decision was a correct application of the law of negligence.[109]

Referee Liability in Australia

A referee, amongst other administrators, was sued in *Agar v Hyde*, a case in which two rugby union players suffered serious neck injuries. The case went all the way to the High Court. The New South Wales Court of Appeal[110] made some interesting comments regarding the liability of sporting administrators in negligence (including referees). The court commented as follows (in summary):

- The determination of whether sporting administrators owe a duty of care to participants in a sport in the formulation of the rules of their respective games is, as the parties have stated, a matter of novelty. It plainly raises significant issues of policy.
- Sports administration in the modern era has many of the trappings of big business, such as corporate controlling bodies, paid fulltime executives and administrators, insurance and marketing sponsorship arrangements designed to attract viewers rather than merely enable the game to be played for the enjoyment of players.
- [I]n argument, counsel for the respondents raised the spectre of the popular sport that prices itself out of its existence as its rule making administration is crushed by legal claims by athletes. Like all floodgates submissions, this needs to be taken with a grain of salt. After all, opposing players can already sue each other for intentionally and negligently inflicted injuries, they can sue the referee for negligent failure to enforce the rules and the sports

[108] *Smolden v Whitworth* (Eng QBD, Curtis J, 19 April, 1996, unreported).
[109] Hayden Opie, 'Referee Liability in Sport' (1997) 5 *Torts Law Journal* 16. Opie thought that the decision was 'quite predictable as a matter of principle'.
[110] (1999) *Australian Torts Reports* [81–495].

> administrator that dons the mantle of occupier and assumes well established duty of care to each player.[111]

Accordingly, there seems no reason why Australian courts would not continue to hold that referees will be liable in negligence for their decisions.

Is an action in negligence possible by a club when they have suffered pure economic loss?

When the issue came before the Queensland courts in *Sinclair v Cleary*,[112] Macrossan CJ commented 'It appears to me that the authorities restrict the duty to take care to acts in which physical damage to a person or property is caused …'

The difficulty for Wests Tigers in suing the referee in this case is that no physical damage to a person or property was caused by the actions of the referee. However, the decision in *Sinclair v Cleary* was many years ago and was well before the decision in *Hedley Byrne v Heller*[113] and the concept of recovery for pure economic loss now seems to be firmly entrenched.

There seems to be no clear outline of the circumstances in which a duty may be owed to a plaintiff who suffers pure economic loss. However, it is equally clear that there is no prohibition on damages being recoverable for economic loss if there is no consequential loss to persons or property. In those circumstances, the attitude of the Courts to such a novel proposition is very difficult to predict.

The finding of a duty is often said to depend on the concepts of foreseeability and proximity, neither of which would seem to be an impediment to Wests Tigers recovering from the NRL.

What is the nature of the duty?

If it is found that a referee owes a duty of care to a team participating in a match controlled by the referee, a question then arises as to the nature of the duty which is owed. Indeed, the duty may be different in different cases. For instance, one could easily imagine a circumstance in which the duty imposed on a referee, making an instantaneous decision, without the benefit of video replay technology, might not be as great as the duty imposed on a referee who makes a decision, having had the benefit of assistance of a number of video replays of an incident. The referee, without the benefit of video technology, required to make split second decisions, may well be in the same position as the barrister

[111] Ibid.
[112] [1946] St. R. Qd 74.
[113] [1964] A.C. 465.

who enjoys an immunity in relation to his in court decisions. The video referee is in no such position.

A number of commentators propose that the duty on referees should be similar to a business judgement rule which often operates in the corporate world to the effect that there would be a presumption that in making an officiating decision, a sports official acts on an informed basis, in good faith, and in the honest belief that the action taken was in accordance with the rules of the game and the best interests of the sport. Burden of proof would then fall on a party challenging the decision to prove bad faith, corruption or gross negligence.[114] However, this proposition seems to be at odds with legal principles established in Australian courts which would impose a standard on the referee based on the concept of reasonableness.

What is the level of damage to be recovered?

It seems that only immediately ascertainable losses would be recoverable and an aggrieved party could not claim contingent profits.[115]

Do Wests Tigers win the negligence action?

(1) There is authority for the proposition that a referee owes a duty of care to a participant in a match.

(2) The refereeing error would be held to be in breach of the duty of care.

(3) That Wests Tigers would suffer a loss as a result of referee negligence is foreseeable.

(4) The fact that Wests Tigers have suffered pure economic loss does not make the loss irrecoverable.

(5) There is no principle of law which should preclude Wests Tigers from having a remedy in negligence.

Conclusion

Wests Tigers did not take action against the NRL for the refereeing error but if they had taken such an action, it is not far-fetched to suggest that they may have succeeded, both in contract and in negligence.

[114] See S Christopher Szczerban, 'Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials', (2007) 6 *Virginia Sports and Entertainment Law Journal* 277. See especially 316.
[115] See GM Kelly, 'Prospective Liability of Sports Supervisors' (1989) 63 *Australian Law Journal* 669.

Nathan Tinkler has just committed an investment of one hundred million dollars to the Newcastle Knights over the next ten years in their quest for NRL glory. If his team loses a grand final on a refereeing error, will he be content to simply 'blame the ref when the game doesn't go our way' or will he seek the advice of his lawyer?

One day soon, there will be someone who is sufficiently aggrieved by a refereeing decision and sufficiently well-resourced to go to court about it. More fundamentally, sports administrators should never become complacent about the need to maintain high refereeing standards to ensure that refereeing mistakes are not regularly made. If they do become complacent, someone may well take the issue out of their hands and put it in the hands of a court.

Never say never.