

SPORT AND THE LAW JOURNAL

VOLUME 9 • ISSUE ONE • 2001



BRITISH ASSOCIATION FOR SPORT AND LAW

THE MANCHESTER METROPOLITAN UNIVERSITY
SCHOOL OF LAW • ELIZABETH GASKELL CAMPUS
HATHERSAGE ROAD • MANCHESTER M13 0JA
TELEPHONE: 0161-247 6445 • FACSIMILE: 0161-247 6309

ADVISORY BOARD

Professor Sir John Wood
Hon. Michael Beloff QC
Professor Sir Roland Smith

C. F. Woodhouse

E. M. Watkins

E. Grayson

H.R.H. Stinson

G. Boon

Kuldip Singh QC

M. D. Goldberg

A. Felix

A. Mitton

N. Bitel

K. Vleck

A. Duff

P. Stinson

F. Reid

P. McNerney

T. Kerr

S. Rush

N. Stewart QC

~

EDITOR

Raymond Farrell

~

ASSISTANT EDITOR

Mark James

~

OFFICERS

E. M. Watkins: President

N. Bitel: Chairman

R. Farrell: Hon. Secretary

H.R.H. Stinson: Hon. Treasurer

M. D. Goldberg: Deputy Chairman

E. Grayson

Kuldip Singh QC

G. Boon

D. Bailey

N. Bitel

K. Vleck

A. Duff

A. Felix

F. Reid

P. McNerney

T. Kerr

S. Rush

N. Stewart QC

~



BRITISH
ASSOCIATION
FOR SPORT
AND LAW

THE MANCHESTER
METROPOLITAN UNIVERSITY
SCHOOL OF LAW
ELIZABETH GASKELL CAMPUS
HATHERSAGE ROAD
MANCHESTER M13 0JA

Colloquy

Extreme Sports - Sportsmen going extreme: Seeking the limits

June 20 and 21, 2001

Geneva, Switzerland

AISTS

(International Academy Of Sciences And Technologies Of Sport)
and

The Universities Of Geneva And Lausanne,
The Swiss Federal Institute Of Technology (EPFL) and
The Institute Of Advanced Studies In Public Administration (IDHEAP)

On the first day, several sportsmen with an international reputation will express their point of view on extreme sports and their personal experience in dealing with limits of all kinds. Their speeches will be followed by a panel discussion.

On the second day, various fields related to sport will be represented, the speakers being experts in e.g. law, economics, sociology, medicine, psychology, technology and public administration. Discussions will take place in both plenary sessions and working parties by field of study. The speakers may express themselves in French or English.

For more information, please contact:

Prof. Margareta Baddeley, Faculty of Law, University of Geneva 40, Bd. du Pont d'Arve, CH-1211 Geneva, Switzerland
Tel: 004122 7058485 Fax: 004122 7058467 e-mail: Margareta.Baddeley@droit.unige.ch

Contents

2

SPORTS LAW CURRENT SURVEY - ISSUE No.1 - 2001

WALTER CAIRNS

78

IS SPORT SPECIAL?

TIM KERR

80

THE REFORM OF FIFA RULES GOVERNING INTERNATIONAL TRANSFERS

88

THE ROLE OF MEDIA COMPANIES IN ENGLISH FOOTBALL CLUBS AND THEIR PARTICIPATION IN UEFA CONTROLLED COMPETITIONS

EDWARD BROOME

95

TWO HIGH PROFILE SPORTS CASES - A VIEW FROM THE BENCH

HIS HONOUR JOHN A. BAKER

103

AMATEUR FOOTBALL AND THE LAW

STEVEN HARVEY

107

AN OWN GOAL, OR MERELY EXTRA TIME?

JAMES WHITTAKER AND NICK RUDGARD

110

DIANE MODAHL v THE LAW OF CONTRACT

RAYMOND FARRELL

115

SCOTTISH UPDATE

ALISTAIR M. DUFF

123

WHAT IS THE PROPOSED RECONSTITUTION OF THE FOOTBALL LICENSING AUTHORITY AND IS THE CHANGE DESIRABLE?

CHRISTOPHER PARTINGTON

The opinions expressed by the individual contributors in the Journal are not necessarily those of the British Association for Sport and Law
Copyright 2001 British Association for Sport and Law

Sports Law Current Survey - Issue No.1 - 2001

Walter Cairns

The Current Survey of the *Sport and the Law Journal* examines current world-wide developments in the field of sports law, in accordance with the following structure:

1. General
2. Criminal law
3. Contracts (including employment law)
4. Torts and insurance
5. Public law
6. Administrative law
7. Property law (including intellectual property law)
8. Competition law
9. EU law (excluding competition law)
10. Company law (including sports associations)
11. Procedural law and Evidence
12. International private law
13. Fiscal law
14. Human rights/Civil liberties (including race and gender issues)
15. Drugs legislation and related issues
16. Issues specific to individual sports (including disciplinary proceedings)

1. GENERAL

Leading Northern law firm sponsor Japanese Rugby League side¹

Rugby League may seem as typical a Japanese sport as Sumo wrestling is typically British. However, Japan felt sufficiently confident in this sport to enter a national team in the recent Rugby League Emerging Nations World Championships. In so doing, they were sponsored by Manchester-based law firm Addleshaw Booth & Co.

New balls please - Boris Becker's marital misadventures

Never a stranger to controversy on or off court, the four-times Wimbledon champion hit the headlines earlier this year on account of various legal implications of his somewhat hectic private life - more particularly the acrimonious split-up with his wife Barbara.

Initially, the difficulties concerned mainly the custody of their children, an issue which was complicated by the fact that the family had previously divided its time between Florida and Bavaria. In early December 2000, Barbara Becker had sued her husband for alimony and custody of the children. This was followed by a counter-application from Becker seeking to have the action dismissed. His petition claimed, *inter alia*, that the couple had always resided in Germany, that Barbara had abandoned the matrimonial home in Germany, and that she had placed their eldest son in a Florida school without consulting him².

Becker's lawyers also petitioned the Chief Federal Prosecutor of Germany to seek enforcement of the International Convention of The Hague, which states that all children who are the subject-matter of cross-frontier custody disputes should be returned to the country in which they were normally resident at the time when the parents' relationship broke down³. US courts do not recognise German law and, since Mrs. Becker and her children had dual nationality - German and US - Becker would have to convince a US court to compel her to return the children.

Cases of this nature have often created diplomatic difficulties between Germany and the US. The latter - as well as other countries - have frequently accused the German courts of unfairly siding with the German partner. In fact, this very issue had been discussed by President Clinton and the German Chancellor earlier that year. The pre-nuptial agreement had stated that, in the event of a divorce, custody of the children would be shared, but that they would primarily be living with Mrs. Becker. However, if either partner left Germany this arrangement would be subject to renegotiations.

In the event, the custody battle was settled out of court. Under the agreement, the couple would share custody of the children - who would live primarily with Barbara Becker, but with unlimited visiting rights for the father - and she would be paid £10 million by way of alimony⁴. She was also awarded the holiday home which she shared with her husband on Fisher Island, near Miami⁵.

However, this did not put an end to the legal complications arising from the break-up of Becker's marriage. Soon afterwards, the former champion found himself on the wrong end of a paternity suit brought by Russian model Angela Remake. The latter claimed that, during the summer of 1999, she and Becker had sex in a broom cupboard at the Metropolitan Hotel in London's Park Lane. On 22/3/2000, she gave birth to a daughter Anna and informed Becker that he was the child's father. However, despite the marked resemblance of the baby to Becker, the latter denied paternity. His lawyers claimed that Ms. Remake had inseminated herself with his sperm after oral sex. An even more bizarre allegation was made by the German newspaper *Bild Zeitung*, which claimed that this deception was part of a blackmail plot engineered by the Russian mafia⁶.

However, in the course of January 2001 Becker agreed to submit to DNA tests in order to establish whether or not he was the father, and subsequently accepted that the results confirmed the claim made by the Russian model. Accordingly, the legal battle drew to a swift conclusion after lawyers representing the two sides met at the High Court⁷.

Leading figure in US sports law dies⁸

Al McGuire, one of the original members of the Board of Advisors to the National Sports Law Institute, who was its Master of the Game Award winner for 1992, died on 26/1/2001. An eminent figure in the world of sport itself, McGuire played basketball for St. John's University and competed in the National Basketball Association with the New York Knicks (1951-52) and the Baltimore Bullets (1954). His playing days over, he acted as head basketball coach at Marquette University between 1964 and 1977, in the course of which he was twice named as National Coach of the Year.

He then turned to broadcasting, picking up two Emmy nominations in the process. He also served as Chairman of the US President's Council on Physical Fitness, and was invited to stand for US Senate and gubernatorial positions.

Netherlands colloquium on sport and the law⁹

On 20/3/2001, a one-day colloquium on sport and the law was held at the Erasmus University of Rotterdam. The subject areas dealt with included the free movement of athletes, the utilisation of sports personality rights, broadcasting rights, the European dimension, as well as issues of competition law and of tort liability. The main speakers were J.D. Loorbach, barrister in Rotterdam and head of the Olympic Games 2000 task force; Professor H.T. van Staveren, Professor of Sport and the Law at the Free University of Amsterdam, and M.G. Wezenbeek-Geuje, barrister established in Brussels.

Irish lawyer becomes Rugby League professional¹⁰

It is rare to find any Irish nationals in any top English Rugby League side, and even rarer for them to have a law degree under their belt. However, both feats were accomplished recently by Wigan Warriors wing Brian Carney. Carney, whose sporting ambition was initially to play soccer for the Republic, started playing the League code of rugby football for amateur side Dublin Blues whilst reading law there. His first Super League contract was with Hull, from whom he was transferred to Wigan just before Christmas 2000.

New work on Hillsborough: lest we forget¹¹

The Hillsborough tragedy of April 1989, in which nearly 100 people lost their lives on the terraces of the Sheffield Wednesday football ground, continues to produce reverberations, which are well documented in many publications - including this organ. A new book by Professor Phil Scraton, entitled *Hillsborough: The Truth*, loses nothing in either power or substance for appearing over 11 years after the event. This work represents an attempt to establish a definitive narrative of the true course of events on that tragic day. Although much of the evidence has been buried or lost, the author has succeeded in piecing together, using material much of which has not surfaced before, an account which makes disturbing reading, and teaches us that the victims and their families must never be forgotten.

NSLI Conference on Sports Facilities and Development (US)¹²

In September 2000, the National Sports Law Institute (NSLI) joined forces with the law firm of Foley and Lardner to sponsor a conference on "Sports Facilities and Development" at Marquette University. The conference broke down into three panels which debated various issues arising from the process of sports facilities development - from its economic and political implications to innovations and technologies in facility construction. The Sports and Entertainment Law section of the State Bar of Wisconsin sponsored a conference luncheon. The 140-strong audience included club and league representatives, developers and architects, lawyers, academics and law students.

Tottenham director's murky legal past revealed (UK)¹³

The many supporters of soccer Premiership club Tottenham Hotspur FC will be somewhat concerned to learn about some of the past activities of the firm owned by one of its executive directors. It appears that the firm in question was at a certain point publicly rebuked by both the courts and by Parliament over fees charged for its work as insolvency experts.

The director involved is David Buchler, who returned to Tottenham earlier this year under ENIC, the club's new owners. Mr. Buchler's firm undoubtedly were experts in rescuing football clubs from their dire financial plight, numbering Millwall, Swindon, Oxford, Luton and Barnet amongst their clientèle. Each of these customers were charged £750,000 for the work carried out.

Buchler's company was also involved in clearing up the financial mess left by the late Robert Maxwell. They succeeded in recovering assets worth £1.67 million, and charged £1.63 million for this work. This earned the company a sharp rebuke from the House of Commons Social Security Committee and from the High Court, Lord Justice Ferris describing these fees as "profoundly shocking".

Lawyers have the last word at Wembley¹⁴

Subject to any further twists in the already bizarre chronicle of events surrounding the fate of the national stadium (for full story see below, p. 37 et seq.), it seems that the last ball to be kicked in anger on the hallowed turf at Wembley was propelled by a team of solicitors, clients and guests from Blackburn law firm Farleys, facing a squad of former professional players. The match was accompanied by all the trappings of the big match, albeit in recorded form, including crowd noise and the playing of the national anthem. The match ended in a 1-1 draw.

Major US work on youth sport and the law published¹⁵

Sport being an activity which is engaged in primarily by the young, it has given rise to a number of legal issues which specifically affect this particular group of people. The author of the work under review ambitiously attempts to cover all these issues, but focuses particularly on tort liability for injuries suffered by players and spectators, legal issues arising from the use of sporting facilities, disabled and HIV-afflicted students, and sports medicine. The information provided by the author is aimed mainly at those outside the legal profession.

Following a general introduction which chronicles the historical aspects of youth sports, the author proceeds to focus on litigation in youth sports. In so doing, he speculates on the factors underlying the increase in litigation in the US, but offers no insights in this field. This is followed by a general induction in the world of negligence, liability and the assumption of risk. Being aimed mainly at non-lawyers, this chapter tends to over-simplify the issues, but has the virtue of providing a readable and eminently digestible exposé on the rights and responsibilities of those injured by another person's action or omission.

Most of the 13 chapters contained in the work follow the same pattern: first, a general presentation of a specific area of sports law involving youth, followed by summaries of cases decided under the area in question. However, there are some chapters which unaccountably fail to provide any information on the relevant case law, such as that dealing with sports medicine.

The final chapter of this book provides a wide range of samples of forms used in youth sports - including application forms, checklists for athletics trainers, accident reports, emergency contact information, insurance forms and emergency contact forms. As a necessary complement to the information needed by readers in order to protect themselves against liability claims, the inclusion of these forms is an extremely useful attribute of this work.

To what extent can sports advisers resist the involvement of lawyers? Article in German professional journal¹⁶

The increasing commercialisation of sport has undoubtedly also raised the number of service industries attached to it - including the sports advisory sector. The author of the paper asks the question why this industry has to date not witnessed a high degree of involvement of practising lawyers. He accordingly provides a thorough examination of the extent to which sports advisers may ply their trade without actually falling foul of German legislation on the provision of legal advice.

The author points out that in fact sports advisers have already felt the legal profession breathing down their necks under German competition legislation. This occurred on the occasion of the *Fahrian* case of 1996, in which the Legal Practitioners Association of Cologne (Köln) had brought an action against Wolfgang Fahrian, a FIFA-licensed player's agent. The case ended with an undertaking on the part of Fahrian that he would refrain from giving legal representation to licensed players in their relations with the footballing federations.

He goes on to point out that this is an area which is tightly controlled and circumscribed by a Law of 1935, and is aimed at protecting the public against unprofessional and inadequate exponents of legal advice, as well as giving some protection to legal practitioners against persons who operate without the invigilation and constraints to which qualified legal advisors are subject. The only hope for sports advisers to remain on the right side of this legislation is to fall within the scope of one of the exceptions provided in Article 1(5) of the 1935 Law.

This would require the legal aspect of the advice provided to be of an ancillary nature. The author concludes that, since so much depends on the factual circumstances of each case, this is an area fraught with legal uncertainty. It is precisely this element of uncertainty which makes it all the more desirable to involve qualified legal practitioners in this service. The main deterrent to legal practitioners here is the sheer range of the services which a sports adviser is expected to provide, for which most qualified lawyers have neither the time nor the ability.

Sweden hosts international lawyers' skiing competition¹⁷

Skilex is the name of an international skiing competition for lawyers of all types and levels of sporting ability, and from all parts of the globe. On late March 2001, it was Sweden which hosted this event. The programme of events also included seminars on sport and the law.

2. CRIMINAL LAW

British rower charged with murder of designer in France¹⁸

During the final week of the year 2000, Marcello Minale, Chairman of a leading design company, and a former Olympic rower, was stabbed to death - allegedly by a rower whom he had helped to coach. Both men were members of a party from the Chiswick-based Tideway Scullers School rowing club, and were taking part in a training trip near Cannes, France. Mr. Minale had been President of the club for the past three years. A 23-year-old British man was later charged with his murder.

We will keep readers informed of further details of this sad case as and when the matter comes to court.

Football shows crime the red card¹⁹

Two police officers have reduced youth crime in their area by organising a football league in which teams have points deducted where players commit offences off the field. PCs Jon Owen and David Morgan set up the league comprising 10 six-a-side teams in October 2000 in order to curb vandalism, theft and abuse. Ten points are deducted for an arrest, five for anti-social behaviour or vandalism, and three for any other offence.

The teams of boys from the Patchway and Bradley Stoke areas of Bristol play once per week, scoring 10 points for a win and five for a draw. One arrest is therefore capable of eliminating a team's victory points. Police report that none of the 60 youngsters involved had committed a fresh offence since the league was started. Overall crime in the area concerned has dropped by 20 per cent.

Former wrestler convicted of assaulting neighbour²⁰

In the course of the summer of 1999, retired woman wrestler Sandra Lace kept a neighbour captive in her home, frequently assaulted him and stole more than £20,000 in cash from him. For these offences she was convicted of theft and assault at Canterbury Crown Court in January 2001.

The court heard how Lace had invited her neighbour, Michael Hill, to her flat where she punched and kicked him until drawing blood. She kept him prisoner for 10 weeks, forcing him to make frequent shopping trips and pay for presents including jewellery and clothes. Both had originally planned to run away to Scotland with the proceeds of the sale of Mr. Hill's house, which he kept in a cash envelope under his bed. However, he escaped following a shopping trip in September. Lace then took this cash and ran off with another neighbour, David Ford, to start a new life in Margate.

What's his excuse this time - David Beckham fined again for speeding (UK)²¹

In February 2000, Manchester United and England footballer David Beckham was issued with a £60 ticket by a West Midlands police motorway patrol for driving at a significantly higher speed than the

70 mph limit. Beckham was returning home following a charity event. As he has already 10 penalty points on his licence, he faces a driving ban.

It will be recalled by readers that last year, "Becks" won an appeal against an eight-month ban, claiming that he had feared for his safety when driving over the speed limit in Stockport (Manchester), pursued by someone whom he mistook for a paparazzo.

Formula One sponsor has criminal past, British newspaper reveals²²

Towards the end of 2000, two men sought to obtain the support of leading football clubs such as Manchester United, Arsenal, Chelsea and Liverpool for the "Premier 1" scheme, an ambitious £100 million-per-year plan for a Formula One-style motor racing competition, in which teams would race under soccer club colours. Top clubs from other European countries were also approached. One of these men was former Football Association Chief Executive Graham Kelly. The other was an Essex property dealer called Colin Sullivan.

However, Mr. Sullivan's credentials as a sponsor for this event appear to have been somewhat compromised by revelations in a Sunday newspaper about his chequered business career. Not only has he been involved in a long list of failed business ventures, but in 1985 he also held the dubious distinction of becoming Britain's first man to be sentenced for endangering workers' lives. The Health and Safety Executive were compelled to arrest him in order to be able to serve the legal documents starting the prosecution. A safety inspector had found lethal asbestos lagging left in the open instead of being placed in sealed containers, as required. Sullivan ignored a prohibition order banning further demolition and failed to provide his workers carrying out this dangerous work with protective clothing. For this, he was given a suspended sentence.

In 1994, Sullivan was made bankrupt by the National Mortgage Bank, whom he owed £1 million, other creditors being owed over £2.6 million. He was arrested in Guernsey and held in custody for several days after having unlawfully removed files concerning an off-shore company, which had been concealed from his creditors and used to buy two yachts. The London Bankruptcy Court described his actions as being in breach of his obligations as a bankrupt to creditors.

Sydney (Australia) police foil Bradman bats scam²³

Just before the year 2000 ended, Sydney police succeeded in nipping in the bud a fraudulent attempt to cash in on the name and reputation of the late cricketing legend Sir Donald Bradman. They impounded 26 bats and 29 wall plaques bearing Sir Donald's signature before they could be placed on the market for large sums.

Australia's Minister of Justice, Amanda Vanstone, stated that the sales had not been authorised and described the foiled exercise as a "rip-off". Later, police questioned a man over the seizure.

Liverpool fans stabbed in Rome²⁴

Both before and during the UEFA Cup match in Rome between Liverpool FC and AS Roma, local "ultras" ambushed several Liverpool supporters as they arrived at the Olympic Stadium, slashing their victims across the buttocks before turning on the police. Police also fired teargas before baton-charging the rioting Roma fans, who fought back with bottles, stones and branches. These incidents occurred in spite of one of the tightest security clampdowns since Italy hosted the World Cup in 1990.

(On the legal implications of the match result, see below p. 72).

Man accused of raping teenage groom cleared (UK)²⁵

In February 2001, David Stephens, a racing stable owner, was cleared of raping a teenage groom in a horsebox at Plymouth Crown Court after the police offered no evidence. On the second day of the trial, Barry Van den Berg, prosecuting, informed the jurors that nobody having heard the evidence

provided by the teenager would be certain that to convict Mr. Stephens was the appropriate verdict.

Football hooliganism rears its head again in England...

Although considerable efforts have been made to curb the hooliganism which has disfigured English football over the past three decades, recent incidents have shown that this cancer is far from having been defeated.

In early November, the first Sheffield derby for six years was marred by violence in injury time at Hillsborough (home of Sheffield Wednesday), when United conceded the winning goal to their hosts in the Worthington Cup²⁶. On 16/12/2000, the two sides met again at Bramall Lane (United's ground), and rival supporters clashed again. Police arrested 33 people and used CS gas to disperse a 300-strong crowd.

On the same day, Home Secretary Jack Straw had a first-hand opportunity of experiencing the "yob culture" which he has been attempting to tackle when he became caught up in rioting by fans of Burnley FC after a home defeat by their bitter local rivals Blackburn Rovers (Blackburn being Mr. Straw's constituency)²⁷. Within minutes of the conclusion of the game, the streets surrounding Turf Moor were filled with wailing sirens and the whirring blades of helicopters as police attempted to contain Burnley fans taking out their frustration by trying to smash up the town centre.

A few weeks later, Leeds and Manchester United fans, en route to Maine Road (Manchester City's ground) and Bradford respectively, met and conducted a pitched battle on "neutral ground" in Rochdale. That same day, two coachloads of fans from Bishop Auckland invaded Burton Albion's pitch twice during an FA Trophy tie²⁸.

On 27/1/2001, Manchester City met Coventry at Maine Road in the FA Cup. Although Coventry dominated the game, City striker Shaun Goater snatched a late winner for City. This sparked anger among the visiting fans, of whom around 100 waded through the stewards to attack rival supporters²⁹. Missiles were thrown when police moved in with truncheons. Three people were arrested, with video evidence being studied in order to identify other troublemakers.

New proposals to deal with the renewal of hooliganism in football are discussed in the Public Law section (below, p. 36).

.... and abroad

Unfortunately, this country has not been the only one to be afflicted by a resurgence in this anti-social by-product of the game. Thus in March of this year, fighting in the stands between rival fans compelled the players to leave the field during Paris St. Germain's victory over Galatasaray Istanbul at the Parc des Princes, France. With PSG leading 2-0, supporters of the home side moved towards an unsegregated area containing Turkish supporters, which led to serious fighting³⁰.

Earlier, in December 2000, fighting between fans caused an incident in Brazil which but for a good deal of fortune could have reached Hillsborough-like proportions³¹. During the play-off for the national title between Vasco da Gama and Sao Caetano in Rio de Janeiro, the fencing broke following scuffles between rival fans shortly after World Cup striker Romario was substituted because of a leg strain. People were pushed forward, and the incident turned into a massive crush. A child of five was amongst three people seriously injured as hundreds of supporters spilled onto the pitch as part of the metal perimeter barrier gave way. A total of 109 spectators were injured. The match was abandoned.

Finally, a revival of hooliganism seems to be threatening the survival of the Russian league championship. On 31/3/2001, over 500 supporters clashed in the Moscow city centre before the local derby between Spartak and CSKA. Three arrests were made as riot police took charge³².

Bridgend Rugby lock forward escapes prison sentence³³

In mid-December 2000, Chris Stephens, the Bridgend lock forward, evaded a prison sentence after

having punched an opponent with such force that he was compelled to retire from the game. Instead Stephens, who at an earlier court hearing had admitted committing grievous bodily harm, was sentenced to 200 hours' community service and ordered to pay £2,000 compensation to former Cross Keys full back Ian Bebb.

The incident had occurred in the course of the first Welsh/Scottish league game of the season at Cross Keys on 26/8/2000. Stephens's punch dislodged the retina in Bebb's right eye as well as breaking his nose. He later was forced to undergo surgery at Bristol Eye Hospital in order to save the sight in his damaged eye. Doctors subsequently advised him that he risked blindness if he continued to compete.

Several videos of the match were watched by Blackwood magistrates in the course of the hearing. The Chairman of the Court, John Gaydon, informed Stephens that his good character and previous clean record had saved him from a jail sentence.

Bebb later called upon the Welsh Rugby Union to ban Stephens from playing for Bridgend and Wales.

Hoax bomb scare disrupts racing at Uttoxeter (UK)³⁴

On 6/1/2001, some 5,000 racegoers were evacuated at the Uttoxeter racing track following a security alert. This followed a call received from someone claiming to represent an Irish terrorist group, stating that a bomb had been planted in the stands. The final race had to be abandoned; however, an extensive search by Staffordshire police and their sniffer dogs revealed nothing, and the time limit set by the caller passed without incident.

This is not the first occasion on which racing has been vulnerable to this kind of hoax. Thus in 1997, the Grand National at Aintree was cancelled on account of a security alert. The race had to be rescheduled for two days later.

French football international targeted by Basque terrorists³⁵

Bixente Lizarazu, the French football international, has recently been approached by the Basque terrorist organisation ETA for payment of a "revolutionary tax" for "playing under the colours of an enemy state". According to French police, this is the first occasion on which ETA has attempted to extort money from a French citizen, as well as being the first time that the group has extended its campaign of extortion to a leading sporting figure.

Lizarazu, a Basque who currently plays for Bayern Munich, was issued with the threat in a letter received in December 2000 at his parents' home in Hendaye, in the French Basque country. It was written in Basque and posted from Paris, and demanded that the footballer should hand over all the money which he had received from playing for the French national side to ETA. Lizarazu was a member of the 1998 World Cup and 2000 European Championship squads.

In view of the presence of several Basque players in the Spanish national team, there is concern that these too may become targeted by ETA.

Leeds fans jailed as a result of attack on shop³⁶

On 7/2/2001, two businessmen were jailed by Leeds Crown Court for smashing to pieces an Asian-owned corner shop during the tense UEFA Cup match between Leeds United and Turkish club Galatasaray. Patrick McVeigh, who at the time was advertising sales director at the *Yorkshire Post*, and his brother Terence, who worked for a mobile telephone company in Leeds, were given jail sentences of nine months each for the attack.

The court heard how the two men went mad in the Holbeck Wines off-licence on 20/4/2000, hours before the kick-off of the fixture at Elland Road. Tensions were running high at the time because of the deaths of two Leeds fans two weeks earlier in Istanbul, during violence which preceded the first leg of the fixture. The McVeighs were members of a gang which invaded the shop in front of the terrified owners, and tore it apart.

Both were also ordered to pay £300 each by way of compensation.

Assault case against Leeds United players collapses (UK)

Just before going to press it was reported that the trial involving two Leeds United footballers, Jonathan Woodgate and Ian Bowyer, had collapsed on account of an article which appeared in a Sunday newspaper during the trial. The case arose from an incident outside Majestyk's, a fashionable club in Leeds, in which a young Asian student, Sarfraz Najeib, had sustained serious injuries following an assault.

Initially, proceedings had been initiated against these two players and reserve player Tony Hackworth and Michael Duberry, as well as their friends Paul Clifford and Neale Caveney. Woodgate, Bowyer, Hackworth, Caveney and Clifford had been accused of affray and causing grievous bodily harm with intent, whereas Duberry, Woodgate, Caveney and Clifford were charged with conspiracy to pervert the course of justice. All the accused denied the charges.

Earlier in the trial, Tony Hackworth had been cleared on the instructions of the trial judge. On Thursday, 5 April, the jury cleared Duberry, Woodgate, Clifford and Caveney of the conspiracy charge.

The jury had been sent home on Friday, 6 April, after it was learned that they had still not succeeded in reaching a verdict on the remaining charges. Two days later, the *Sunday Mirror* published an interview with the victim's father on issues which were crucial to the jury's deliberations³⁷. More particularly Mr. Najeib Sr. Seemed to indicate that he disagreed with the judge's direction to the jury that the attack had not been racially motivated³⁸. This caused the judge, Mr. Justice Poole, to rule that the article, which he described as "highly emotive", struck at the heart of a delicate attempt to keep the issue of racism away from the jury.

It was later learned that the Counsel for the prosecution had successfully applied for a retrial, and that the editor of the *Sunday Mirror*, Colin Myler, was to be charged with contempt of court. In addition, the Najeib family are understood to have approached the Press Complaints Commission about the *Sunday Mirror* article³⁹.

A study of criminal violence in sport. Article in US academic journal⁴⁰

The issue of the extent to which violence in the sporting arena is unacceptable under the criminal law is an issue which has been adumbrated in the pages of this organ by such illustrated exponents of this area as Parpworth⁴¹, Miller⁴², Lennon⁴³ and Radley⁴⁴. Writing in a leading US publication on sport and the law, Jack Anderson, Professor of Law at the University of Limerick, Ireland, provides us with a thorough analysis of the issues involved from an Anglo-Irish perspective, in particular in the light of the attempts made by the Irish Law Reform Commission (LRC) to overhaul this area of the law.

The author first of all introduces the reader to that which he identifies as the ideal starting point in contemporary legal attitudes to violence in sport, which is the "prize-fighting" case of *R. v. Coney*⁴⁵. This case, which dates from late Victorian times, arose from an incident at the Ascot races when two men, Mitchell and Burke, were seen engaging in a prize fight in the presence of a large crowd. Not only the two fighters, but also their "seconds" and a number of spectators were charged with assault, riot and rout. The two fighters and their seconds were convicted. The spectators charged were also found guilty, but the jury made it clear that this was only so because of the direction of the judge, who had informed them that those who were present at an illegal fight were also guilty of assault (in fact, the spectators' convictions were later set aside on appeal).

The most significant part of the *Coney* decision, however, lay in the finding in the majority verdict that

"there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted (...) and that which is done by consent is no assault at all".

This made the element of consent a consideration which has dominated the criminal issues involved in sporting violence ever since. Equally significant was the moralistic test applied by the majority verdict, which held that "friendly encounters" not calculated to produce any real injury or rouse violent passions did not contradict the general finding of the court that every fight was by its nature capable of constituting a breach of the peace. This exempted boxing and martial arts from the

criminal nature of fighting, depending on whether these activities were socially acceptable or not, a judgment which was for the jury to make in the light of the circumstances of the case.

Analysing the notion of "consent" in this context more closely, Prof. Anderson arrives at the conclusion that this was intended to cover not only organised games played within the rules, but also "youthful horseplay" which did not exceed certain bounds. He goes on to demonstrate how, particularly in recent years, the courts have endeavoured to prevent this element of consent from degenerating into a "licence for thuggery".

Particularly the dissenting view of Lord Mustill in *R. v. Brown*⁴⁶ has had a profound effect, where he held the present legal position to be that no-one can consent to serious bodily harm, and that the participant cannot, therefore, consent to the fact that he might be seriously injured. The implicit distinction made between consent to injury and consent to *serious* injury has tended to dominate policy-makers' thinking on this issue ever since. The Irish LRC has also recently reviewed the issue of "sporting consent", although the latter's attitude continues to display what the author describes as a "somewhat laissez-faire attitude".

The author concludes that the Irish LRC approach is quite reasonable in the light of his analysis, always bearing in mind that injury, violence and mishap have historically been an integral part of contact sports.

Cambridge Blue cleared of drunken fracas assault (UK)⁴⁷

In February 2001, a Cambridge golf Blue was cleared of wounding the steward of a University sports club after a court ruled that the witnesses in question were too drunk to provide reliable evidence. Paul Burling, the steward concerned, required 14 stitches in his face after he had allegedly been struck with a pint glass during a coach trip returning from a University boxing match in Oxford.

Robert Thomas, a graduate of Magdalen College, had been charged with unlawfully wounding Mr. Burling, but walked free from Oxford Crown Court after the Recorder decided that all the witnesses were too drunk at the time for the case to be continued. The club, however, has banned Mr. Thomas from its premises for five years and ordered him not to wear its colours.

Motor racing star receives death threats⁴⁸

Top motor racer Stirling Martin received death threats after fans blamed him for Dale Earnhardt's fatal accident in the opening fixture in February 2001. Marlin stated that several threats had been issued by telephone, fax, and to his own website following the crash, which happened shortly after the two racers touched whilst competing for position at the final corner.

Former boxing champion electronically tagged (UK)⁴⁹

Herbie Hide, a former world heavyweight boxing champion, was recently ordered by a judge to wear an electronic tag after having been convicted of assaulting a civil servant in a Norwich nightclub in May 2000.

Duncan Ferguson praised after tackling burglars⁵⁰

Everton striker Duncan Ferguson is no stranger to the criminal law - after all, in 1995 he served a 44-day jail sentence in Barlinnie Prison after headbutting John McStay whilst playing for Glasgow Rangers in 1994, making him the first footballer to be jailed for an offence on the field. Previously, he had done full justice to his nickname of "Duncan Disorderly" outside the football grounds, by headbutting a policeman in Stirling, resulting in a £125 fine, and assaulting a postman on crutches the following year.

However, in January 2001, he was on the right side of the criminal authorities when he tackled two burglars who broke into his home in the early hours of the morning. After having been interviewed by

Lancashire police about the incident, the latter expressed their satisfaction that Ferguson acted both bravely and responsibly when tackling these intruders.

Later, a man admitted stealing pictures and CDs from Ferguson's home. He was committed to Ormskirk Crown Court for sentencing⁵¹.

Australian footballer convicted of armed robbery, but allowed to join national squad⁵²

In late March 2001, South Melbourne striker Con Boutsianis was invited to join the Australian soccer squad less than a week before being sentenced for his part in an armed robbery. He acted as getaway driver in a raid on a Chinese restaurant in Melbourne three years ago.

Boutsianis, who had a trial with Bolton Wanderers in 2000, was arrested just before the 1998 domestic League Grand Final, but played nevertheless, scoring the winning goal for South Melbourne. National coach Frank Farina resisted pressure from Soccer Australia, the national football governing body, who wanted Boutsianis omitted from the squad.

More criminal law implications of the "Battle of Beverwijk"⁵³

In a previous issue there appeared a report on a Netherlands court decision arising from the "Battle of Beverwijk" which took place in March 1997, when a serious confrontation between supporters of football rivals Feijenoord (Rotterdam) and Ajax (Amsterdam) resulted in the death of a man⁵⁴. In that case, it will be remembered, one of the defendants sought to mitigate his liability by arguing that participation by the victim in the incident vested the latter with partial liability. The Netherlands Supreme Court (*Hoge Raad*) dismissed this argument.

However, this sad case continues to give rise to litigation before the Supreme Court. In the case under review, the defendant pleaded innocence as to his alleged criminal liability. On the tort liability issues arising from this case, the defendant also sought to overturn the ruling by the Court of Appeal (*Gerechtshof*) which rejected the notion that the victim shared liability for his fate by taking part in the incident.

On the plea of innocence under the criminal charges, the defendant argued that participation in a fight was only punishable where the accused actually took part in the attack or the fighting, and was active as such on the "battlefield". Rejecting this argument, the Supreme Court referred to the defendant's own statement to the Court of Appeal providing his version of the events. A Feijenoord supporter, he described how he and fellow-supporters were travelling to a match between the Rotterdam club and AZ67 (a Premier Division team from Alkmaar), but stopped at Beverwijk having heard a strong rumour that a confrontation with Ajax supporters was to take place there. He also informed the Court that, armed with an iron bar, he had been running towards the battle area, where a car was already in flames. He ran back with the other Feijenoord supporters when the fighting had finished.

Other evidence showed that the incident had assumed the form of a "primitive battle" on a piece of land acting as a well-defined battlefield. This prompted the Court to conclude that

*"the accused proceeded towards the scene of the battle as part of a group. He thus lined up with one of the battling sides. By his very presence, he took part in the fight, this presence being a factor contributing towards the numerical strength and for the morale of his side. The rear troops also play a significant part in preventing a breakthrough and countering an attack by the other side. The accused must have been aware of his involvement and accepted it as such."*⁵⁵

As to the tort law issues arising from this offence, the defendant pleaded contributory negligence on the part of the deceased, on the basis of Article 6:101 of the Civil Code. This provision provides that contributory negligence on the part of the victim may proportionately reduce the amount payable by way of damages; however, the obligation to pay damages may be entirely cancelled or be maintained where considerations of equity so require. The Court of Appeal had dismissed this argument by stating that, although the victim had to take account of the possibility of becoming injured in the fight, he could not be expected to foresee fatal injury.

The Supreme Court considered that this ruling had only taken account of the equity requirement of Article 6:101, but not its requirement that the causation between the victim's actions and the loss incurred be reflected in the ruling on damages. The Supreme Court also held that the latter requirement was a primary criterion, whereas the equity requirement was only a possible correction to this primary requirement. The Court of Appeal had failed to give adequate expression to its view on this primary requirement. The tort liability issues were therefore referred to a different Court of Appeal for a new ruling.

Cricket corruption scandal - an update

Condon takes charge of investigation - sets deadline to free cricket from sleaze.

Having been appointed to head the International Cricket Council's anti-corruption unit, former Metropolitan Police commissioner Sir Paul Condon spent a week in early December 2000 conducting a thorough investigation into this matter in India, which remains the main focal point for the scandal. On his return, he committed himself to a two-year deadline to restore integrity to cricket by 2003 - in time for the next World Cup. He added that guilty cricketers would "have a great deal to fear"⁵⁶.

However, the task facing the ex-police chief appears to be enormous, particularly in view of the increasingly evident involvement of organised crime in this affair. He provided an insight into this when he informed the Press that the Indian investigating authorities had

*"moved on to links with organised crime, and these links will not be exclusive to the Indian sub-continent (....) There is so much money in world cricket, so much lawful and unlawful betting - and those involved with organised crime want to deal with the best commodities they can get to (....)"*⁵⁷

To emphasise the difficult task awaiting him, Sir Paul returned from the International Cricket Council Board meeting in Melbourne in February 2001 to find fresh match-fixing allegations in his in-tray. This took the form of a 13-page document containing a series of accusations regarding matches involving Australia, New Zealand, Pakistan, India and the West Indies. The allegations included a claim that four West Indian batsmen threw away their wickets in one-day internationals. In addition, other players are named as having been paid for providing information to bookmakers⁵⁸.

Earlier, Sir Paul and senior members of his investigating team had interviewed England wicketkeeper/batsman Alec Stewart, who had been accused by former Test player Manoj Prabhakar of having accepted \$5,000 from an Indian bookmaker for having provided team and pitch information when England last toured India in 1993. At the time of writing, the anti-corruption unit had not as yet arrived at any conclusions about the accusations levelled against Stewart, who strongly denied them⁵⁹.

It has also emerged that Sir Paul may be invited to consider World Cup matches going back to 1996, including the West Indies' shock defeat by Kenya, as well as two matches during the 1999 World Cup involving South Africa - more particularly the defeat by Zimbabwe, which effectively removed England from further contention in the competition⁶⁰.

Just before going to press, it was learned that Sir Paul's unit was about to question England Cricket Board chairman Lord McLaurin over the latter's allegation that former England captain Alec Stewart had admitted to him that he, Stewart, had passed on information about England team selection and pitch conditions⁶¹. Stewart himself, who denies allegations made in a report by the Indian Criminal Bureau of Investigation that he received \$5,000 from bookmaker Mukesh Gupta for information on

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited.
Contributions should be supplied on disk (Mac or PC) and saved as ASCII format.
Disk should also be accompanied by a hard copy of the article.
Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

Articles should be forwarded to
R. Farrell, Hon. Secretary,
British Association for Sport and Law,
The Manchester Metropolitan University, School of Law,
Hathersage Road, Manchester M13 0JA.

certain matches, has been asked to attend a second meeting with Sir Paul's men on his return from England's tour of Sri Lanka, and to bring his lawyer.

The Mark Waugh affair

One of the many difficulties facing the cricketing authorities in their attempts to find out the extent of the match-fixing cancer in their midst has been the reluctance of some players to co-operate with the inquiry. This issue was thrown into sharp relief by the Mark Waugh affair.

It is said that, because of the length of time which it took him to emerge from the shadow of his illustrious brother Steve, Mark Waugh was for a long time known in the dressing rooms as "Afghanistan" (the forgotten Waugh). The prominent middle-order batsmen may have been forgiven for wishing that similar anonymity might prevail as regards his rôle in this affair. In mid-January 2001, it emerged that the International Cricket Council, and the independent Australian Cricket Board investigator, wished to question the prolific Test batsman over claims that he had taken money from an illegal Indian bookmaker⁶². However, Waugh at first refused to co-operate with the ICC anti-corruption unit unless his lawyers were first provided with an agenda and terms of reference for the interview⁶³. Waugh later changed his mind - but only after having been issued with a 24-hour deadline by the Australian Cricket Board (ACB) warning him that, unless he co-operated with the inquiry, he would be left out of the Australian one-day side meeting the West Indies in Adelaide⁶⁴.

Although Waugh denies the allegations made against him, it should be recalled that both he and Test spinner Shane Warne were fined in 1995 after admitting that they had accepted money from a bookmaker in 1994 in exchange for information about pitch and weather conditions⁶⁵.

Azharuddin goes to law over ban

It will be recalled from the previous issue⁶⁶ that former Indian Test captain Mohammad Azharuddin was banned for life for his involvement in the match-fixing scandal in December 2000. This ban has now been challenged by Azharuddin before the Indian civil courts. His legal representative, H.R. Bharadwaj, a former federal Law Minister, is dealing with case⁶⁷.

A few weeks later, Azharuddin publicly provided some of the reasons underlying his decision. He claimed that the investigators made a mistake in failing to follow up what he alleged to be clear indications of involvement by other former players. More particularly, he pointed the finger at two other former Test batsmen, Sunil Gavaskar and Ravi Shastri. According to Azharuddin, raids by the Indian investigating authorities on lockers in Bombay's Gymkhana Club resulted in a large sum of cash being impounded from the one owned by Gavaskar, whilst Shastri owns a large and costly farmhouse as well as other properties - the implication being that in normal conditions such acquisitions would be out of range of the owner⁶⁸.

However, lawyers acting for the inquiry dismissed Azharuddin's allegations as "baseless" when filing their replies to the court hearing the action. The court set the hearing for 7/3/2001 after Azharuddin's lawyers sought time to study the replies. The former Test player's petition named the Board, its chief, and anti-corruption investigator K. Madhavan as respondents and challenged the alleged "irregularities" in the match-fixing enquiry⁶⁹. At the time of going to press, the outcome of the case was as yet unknown.

Other developments

In the meantime, revelations and accusations exposing the extent of corruption in first-class cricket have continued to proliferate. In January 2001, former Essex bowler Don Topley claimed that Essex and Lancashire deliberately traded results in 1991, when Sunday League fixtures were still arranged in the middle of County Championship matches. However, Gerald Elias, Chairman of the English and Wales Cricket Board (ECB) Disciplinary Committee, stated that, despite the various efforts engaged in by the ECB, both the Metropolitan Police and Greater Manchester Police had decided there was still insufficient evidence to take any action. He did, however, recommend that a confidential hotline be established to enable players to communicate their concerns directly to him without bringing the game into disrepute⁷⁰. Topley describes the ECB reaction as a "whitewash"⁷¹.

Earlier, former West Indies test captain Clive Lloyd was appointed to head a panel investigating claims of match-fixing in Sharjah, widely believed to be a focal point for cricket corruption. The United Arab Emirates venue regularly stages one-day internationals, and was named in the recent Indian Central Bureau of Investigation (CBI) federal police report as a centre for match-fixing by Indian bookmakers⁷².

Top US athletes continue to make the criminal headlines - an update

Regular readers of this column will have noted the increasing regularity with which top exponents of American sport are making the news headlines for the wrong reasons - ie because of their criminal activities. It gives the present author no pleasure to report that there are but few signs of this trend abating.

The Rae Carruth case, reported in an earlier issue⁷³, reached a definite conclusion in late January 2001, when the former National Football League star was sentenced to a minimum term of imprisonment of 18 years for the killing of his girlfriend, Cherica Adams, in 1999⁷⁴. Carruth had arranged for Ms. Adams to be shot by "triggerman" Van Brett Watkins⁷⁵. Carruth, who was the "wide receiver" for the Carolina Panthers, evaded a possible death sentence by being acquitted of first degree murder, but was convicted of a conspiracy to kill her. Some commentators feel that the verdict is unusual. Following two months of testimony, the jury of seven men and five women were deadlocked on the murder charge. The final verdict may have been a compromise aimed at ending the deadlock⁷⁶.

In North Carolina, Riddick Bowe, the former world heavyweight champion, was returned to prison in February 2001 for alleged breach of parole. The former boxer had last year been sentenced to 30 days' imprisonment for abducting his wife and their five children from their home in February 1998. He had been arrested outside a restaurant in Virginia after his wife alleged he had jabbed at her with a knife.

Earlier, in January 2001, former NFL player Sherman Williams, who had already been jailed for a marijuana trafficking offence, pleaded guilty to charges of passing counterfeit currency. It appeared that Williams and some of his friends had paid a striptease dancer \$1,000 in forged \$100 notes. A search of Williams's home revealed a further \$3,850 in counterfeit cash⁷⁷.

At the time of going to press, Mark Chmura, a former Green Bay Packers footballer, was about to stand trial on charges of third-degree sexual assault and child enticement following an incident which occurred in a bathroom after he had attended a high school prom⁷⁸.

One particular area of concern arising from this trend is the regular appearance of college athletes in the wrong kind of headlines. This issue once again reared its head in January 2001, when two Boston College basketball players faced charges of assault and battery using a dangerous weapon, following a brawl in a bar room which came just hours after their team had taken the field against arch-rivals Connecticut. Forward Andrew Bryant and guard Kenny Harley were the players charged⁷⁹.

Former footballer O.J. Simpson once again hit trouble in February 2001, when he faced charges relating to an incident in which he is alleged to have reached into a car and pulled off the driver's spectacles in the course of a road-rage argument in December 2000. Arising from this incident, he is being charged with the burglary of a car and with misdemeanor battery, which could result in a 16-year jail sentence. However, the prosecutor, Katherine Fernandez Rundle, stated that Simpson would probably not serve any time if convicted⁸⁰.

False passports and nationalities scandal hits football

When commentators have been claiming that football was suffering from an identity crisis, they could not anticipate that it was the players' legal identities that would give rise to a scandal which has not only plunged the game into crisis, but could also reveal a high level of criminal involvement in one of the sport's more vulnerable areas.

Under current rules, English clubs may employ players emanating from anywhere in the European

Union. Players of other nationalities are not prohibited, but may only play in England where they are proven and regular internationals. This has exposed lesser non-EU players to the temptation of acquiring documents wrongly showing them to have European connections⁸¹. As a result, many players became registered with English clubs on the basis of dual nationality.

This is in fact a problem which is not restricted to this country, and has raised its head in other EU countries. Thus in France, over 70 such players are currently under investigation. At a certain point, top club Saint Etienne had seven league points deducted when it was discovered that Ukrainian goalkeeper Maxim Levitsky and Brazilian striker Alex held inadequate identity papers⁸².

Because of rising concern over this problem, the English Premier League contacted all its clubs, providing them with guidance on identifying players holding false passports, and instructing them to obtain advice from the Immigration Service should they entertain doubts over certain players⁸³. Thus investigations conducted by the Immigration Service confirmed that the passports of two Arsenal players, Lithuanian Tomas Danilevicius and Brazilian Edu, were genuine, the former holding a Greek and the latter a Portuguese passport.

At a certain point, Gordon Taylor, Chief Executive of the players' union, urged the Football Association (FA) to deduct Premiership points from clubs who sign players holding false passports⁸⁴. In fact, in February 2001, the FA gave clubs a two-week deadline to clear up any possible problems arising from passports held by non-EU players⁸⁵.

However, the entire issue assumed even more unfortunate overtones when suspicions arose of growing involvement by organised crime syndicates. In Britain, the criminal investigation authorities have also started to take action over this issue. Cases such as that of Nolberto Solano, Newcastle United's "Peruvian Greek", have caused considerable concern, to the point that, in early February, detectives at the National Criminal Investigation Service (NCIS) had initiated investigations, following a meeting between Sports Minister Kate Hoey, the Home Office and police chiefs⁸⁶.

Then in late February 2001, English investigators probing this issue examined the passports and documents of 80 footballers, including 21 operating in the Premiership. They claimed to have uncovered evidence questioning the lawfulness of passports used by five players, as well as revealing the involvement of organised crime gangs operating in Europe, Russia and South America⁸⁷. It appears that for sums ranging from £14,000 to £30,000 Portuguese or Italian passports can be obtained through a syndicate based in Lisbon. Other syndicates were claimed to be operating on a similar basis in other European countries.

The issue surrounding the Arsenal player Edu resurfaced in March 2001 when it appeared that he may have been carrying false documentation after all⁸⁸. At a top-level meeting involving European football administrators in Paris, doubts were raised about a player described as holding joint Portuguese/South American (sic) nationality. Although he was not specifically named, the indications are that the player concerned is Edu. The former Corinthians (Sao Paulo) player had been refused entry to Britain in July 2000, but joined Arsenal for £6 million after having been issued with a Portuguese passport on account of his father's nationality.

However, there sometimes arises the suspicion that negligence by the public authorities may also have played a certain part in this saga. This aspect was recently highlighted by Belgian Liberal senator Jean-Marie De Decker, who had compiled a report on fraud in sport⁸⁹. Taking as an example the controversy surrounding Luis Oliveira, a Brazilian footballer who has now assumed Belgian nationality, the senator said that the whole story

*"began with a birth certificate bearing a forged date of birth. That document definitely bore the stamps and signatures of the Brazilian Ministry of the Interior. It is on the basis of these documents that the Belgian Consulate, and therefore also the (Belgian) Football Association, have acted, and that the naturalisation of Oliveira is approved. The fault clearly lies with the Brazilian authorities."*⁹⁰

In the event, Oliveira married a Belgian national and automatically qualified for Belgian citizenship, thus removing any lingering doubts in this matter.

This is clearly an issue which is far from being resolved. This column intends to monitor developments in this area closely over the next few months.

Robber betrayed by football shirt (UK)⁹¹

In January 2001, a robber was jailed for six years after having been caught because he wore a distinctive football shirt in the course of a raid on a shop. Glen Heathcote, of Salford, Greater Manchester, wore a balaclava during the raid, but his victim was able to inform the police that the robber's shirt had the name of the Brazilian footballer Ronaldo inscribed on it. He (the robber, not Ronaldo) was arrested 20 minutes after escaping with £80.

Skier jailed in US for death on the slopes⁹²

Nathan Hall, a ski-lift operator, made unenviable history in February 2001 when he became the first person to be convicted by an American jury for causing death whilst skiing. In 1997, Hall, of Vail Colorado, was careering down the slopes at high speed when he slammed into Alan Cobb, who was also skiing in the company of his fiancée Christie Neville. The unfortunate Cobb died of head injuries on his way to hospital.

Although the judge, David Lass, took Hall's age (22) and hitherto clean record into account when passing sentence, the latter was jailed for 90 days and ordered to perform 240 hours of community service. He was also found guilty of possessing marijuana and under-age drinking.

Members of Sri Lankan cricketing family face arrest after assault claims⁹³

Shortly before going to press, it was learned that Arjuna Ranatunga, the former Sri Lankan Test captain, was to be arrested following an alleged assault at the family home, as a result of which several students required hospital treatment, and street protests involving thousands of demonstrators have taken place. His brother Prasanna, a politician, also faced police inquiries.

The issue arose from an incident whereby youths aged between 14 and 18 scaled the wall of the Ranatunga home in order to recover a ball which had landed in the garden. Arjuna's mother claimed that she had refused to return the ball because of damage caused to the wall, and that she had consequently been subjected to "unbearable abuse" from the boys, who had also taunted and thrown sticks at a 72-year-old deaf servant.

Watch this space for further details.

Is betting shop violence a cause for concern? Article in British professional journal⁹⁴

That betting shops should from time to time give rise to the odd incident involving violence is not a proposition which should cause undue concern amongst policy-makers. However, the authors of the piece under review claim that, in spite of the limited data, available research evidence suggests that betting shops experience higher rates of violence as compared to other business ventures.

This phenomenon they attribute to a number of "lifestyle" characteristics which generate abuse and violence. They then proceed to identify some of these characteristics - for example, the circumstance that betting shops very often attract relatively high numbers of offenders to their premises, which in turn can trigger off violence as customers give vent to their frustration over losing money on unsuccessful bets, or become involved in disputes with staff members over stake money or odds given on bets.

The authors also identify a number of environmental elements which may assist in generating incidents, such as the general appearance of the shop, the untidy state of the premises, etc. In addition, the behaviour and attitude by betting shop staff can also under certain conditions serve to increase the incidence of violence.

Although the data analysed and presented are of obvious interest to this problem, there are gaps in the available research which need to be filled. Thus more data are needed on the nature and extent of the abuse and violence committed against betting shops; in-depth analysis is required in order to

establish exactly how incidents are set off, and factors capable of preventing such incidents need to be identified. Until such time as this type of research has been completed, it will be impossible to assess the true levels of abuse and violence against betting shops, and to determine how the problem can be mitigated.

Maradona ordered to compensate air-rifle victim⁹⁵

Former Argentina international Diego Maradona was recently ordered by a court in Buenos Aires to pay \$15,000 to an Argentine photographer whom he shot with an air rifle in 1994. Raul Moleon, who was part of a "media stake-out" team of a country residence in Moreno, had been injured in the hand and ribs. In 1998, Maradona was sentenced to a two-year term of imprisonment for the shooting; the sentence was, however, suspended.

Racehorse trainer jailed for drink-drive death⁹⁶

In March 2001, a racing trainer received a four-year jail sentence for having caused the death of his head stable girl by driving a car whilst being over the drink-drive limit. Catherine Marr was killed when the vehicle driven by Jeffrey Pearce, returning to Newmarket from a meeting in May 2000, hit a tree whilst overtaking on a Cambridgeshire road.

The accused, who has trained over 200 winning racehorses, admitted causing death by careless driving whilst over the alcoholic limit. It was established that Ms. Marr was in the habit of refusing to wear a seatbelt - as was the case on this occasion. A few hours after the accident, Pearce's alcohol reading was established at 51mg per 100ml of blood. According to the court-appointed scientists, this figure would have been around 112mg at the time of the accident. The legal limit is 80mg.

Ipswich Town fans top bootleg league, claim tobacco researchers (UK)⁹⁷

The followers of Ipswich Town Football Club are the most assiduous purchasers of bootleg cigarettes - at least according to an analysis carried out on discarded packets outside Premiership football grounds. Research carried out on behalf of the Tobacco Manufacturers' Association concluded that 41 per cent of packs encountered outside Town's Portman Road stadium had avoided excise duty.

Everton footballer on trial for assault⁹⁸

In late February 2001, Everton star Danny Cadamarteri was sent for trial, accused of assaulting a woman in Liverpool city centre, as a result of which she sustained a broken cheekbone. The case had not been decided at the time of going to press.

Brazilian Grand Prix marred by muggings of Formula One managers⁹⁹

Increased protection was demanded by Formula One bosses after a series of assaults in Sao Paulo during the run-up to the Brazilian Grand Prix in April 2001. The English manager of the Minardi team had been mugged at gunpoint after visiting a bank at the Interlagos track, whereas members of the Williams/BMW team were threatened by an armed assailant as they waited at traffic lights on their way to the circuit. Minardi also had seven wheel rims stolen from their garage.

Sri Lankan cricket board members summonsed on contempt of court charge¹⁰⁰

Just before the final match of England's tour of Sri Lanka, the cricketing administration of the host country was thrown into fresh turmoil. Thilanga Sumathipala, President of the Board of Control for Cricket in Sri Lanka (BCCSL), whose energy ensured the completion of the controversial new stadium in Dambulla at a greater cost than the sum officially claimed, has been summonsed, along with seven other members of the Board, to explain to the Court why they should not be charged with contempt of court.

The summons, which was issued by the District Court of Colombo, gives them until 4 May to explain why they ignored an injunction issued last year by Sumathilapa's main rival for the BCCLS presidency, Clifford Ratwatte. The dispute between these two became judicial last year following a stormy annual meeting. The Government appointed a temporary committee to govern Sri Lankan cricket when Ratwatte obtained an interim injunction of which he claims that it remains applicable.

A copy of the BCCLS audited accounts has revealed that 21 members of the Board - not including the President - had failed to confirm whether or not they had any interests in contracts concluded with the Board. The audit estimated that the cost of the stadium was 300 million rupees, considerably more than the official figure. It also makes reference to a missing amount of \$1 million from an agreement with the television production company, World Tel, relating to the tour of Sri Lanka by India in 1997. In addition, the sum of \$1.5 million is owed to the Board by SET Satellite of Singapore for an agreement on television rights which expired in December 2000, before the commencement of the 27.1 million deal with WSG Nimbus for all rights for the next three years.

3. CONTRACTS

GENERAL ISSUES

Law firm advises in motor racing deal¹⁰¹

Leading law firm Baker & McKenzie acted for the British Racing Drivers' Club (BRDC) and Silverstone Circuits in a recently concluded deal with Brands Hatch Leisure Group (BHL), which will own the UK Grand Prix licence next year. Under this deal, the Silverstone motor racing circuit has been let to BHL for 15 years, since Brands Hatch does not itself have the required facilities. Bird & Bird (corporate) and Paisners (property) acted for BHL. Eversheds acted for the HSBC bank, lender to the BRDC and has a charge on the Silverstone Circuit.

Schuberth's unfinished business with Schumacher - which helmet did he agree to wear? Court action commenced¹⁰²

No stranger to controversy on the racing track, Michael Schumacher now finds himself embroiled in a dispute where the protagonists wear wigs rather than helmets. The German rider won his last three world titles sporting a Bell helmet, as does his younger brother Ralf who drives for a different team. Schumacher claims that his decision is based on safety, rather than financial, considerations.

This change of headgear was much to the displeasure of German manufacturers Schuberth, who claim that they had an agreement with him that he should wear their headgear. For this purpose they have sued him before the Belgian courts for a seven-figure sum. The outcome of the dispute was not known at the time of going to press.

Nike contract did not compel me to play in World Cup (soccer) final, claims Ronaldo¹⁰³

One of the less happy memories from the 1998 World Cup final is the poor performance of one of the world's finest players, Brazil's Ronaldo, amid speculation that he was not truly fit to play and that he only took the field because of outside pressures. The questions raised over this affair prompted a congressional inquiry in Brazil, since a number of MPs in that country had alleged that the player's appearance was influenced not only by a personal contract with sportswear manufacturers Nike, but also by a 10-year, \$100 million deal struck by the Brazilian Football Confederation.

SUBSCRIBERS

Anyone wishing to subscribe to the journal may do so at a cost of £40.00 per annum.

Further details from

Hammicks Bookshops Ltd,

Browells Lane, Feltham, Middlesex TW13 7EE

Ronaldo dismissed all such allegations. More particularly he asserts that he was given medical clearance for the match, and that he felt well on the day. The only requirement made by Nike was that he should wear the latter's boots. This is in spite of the fact that Ronaldo had actually collapsed hours before the game, as well as his pallid performance.

The inquiry in question also saw the appearance of World Cup player Romario, suspected of having evaded taxes whilst playing for Barcelona.

Football club held contractually liable for injury to football supporter. French Court of Appeal decision¹⁰⁴

At the conclusion of a local derby in the French Premier Division (soccer), a supporter of the local team had been injured in the head by a missile emanating from a stand which contained supporters of the other team, and had to be taken to hospital. The victim sued the football club for damages.

The Court of Appeal ruled that the organiser of sporting events is contractually bound to guarantee the safety of the spectators attending matches which he/she organises, and must take adequate precautions to ensure the safety of spectators when entering and leaving the ground. Since the game in question constituted a fixture between two local team which was capable of giving rise to violent incidents, the organiser could not discount the risk of aggression between members of different groups of spectators. The fact that the home club organisers had made a group of supporters wait for more than an hour locked up in a stand whilst the other group, occupying the neighbouring stand, were taking their leave constituted a failure to meet this obligation.

As a result, the organisers in question had to be held liable for the incident resulting in the injury described above, and were ordered by the Court to pay to the victim damages amounting to FF 12,000.

Sponsorship deals for referees to be allowed by FIFA¹⁰⁵

In December 2000, the executive committee of FIFA, the world body governing football, announced that in future, referees would be allowed to wear sponsorship logos advertising companies and products as from March 2001. The Spanish FA has already approached a cable television company for a block sponsorship deal which would also involve referees, and the English FA is said to be interested in concluding similar agreements.

Prominent referees stand to derive the greatest benefit from such deals, since much of the cash in question will find its way into their wallets. This is part of a drive by FIFA to ensure a reduction in the gap between the earnings of referees and players.

Land deal dispute threatens Arsenal's quest for new stadium (UK)¹⁰⁶

For some time now, Arsenal, London's leading football club, have been searching for a new venue to replace their present Highbury ground. In November 2001, its directors unveiled a plan for a 60,000 all-seat stadium to be sited on 20 acres of wasteland not far from the present Arsenal ground. However, part of this land is owned by the Sainsbury supermarket chain. Arsenal have attempted to buy this strip of land off Sainsbury's, but have been outbid by two property companies.

Arsenal want the local council (Islington) to declare its intention to impose a Compulsory Purchase Order on the property. If the council refuses, however, the "Gunners" will be forced to abandon this project.

American basketball player wins court case against English club¹⁰⁷

In December 2000, US-born player John Potter won a lawsuit against his former club, Leicester Riders, which could cost the latter over £50,000. Leicester County Court awarded the action to Potter after the latter had sued the club for cancelling his one-year contract after two months of the previous season. The club had claimed that Potter had concealed an injury.

Court decides preliminary issues in paragliding case (UK)¹⁰⁸

The High Court has recently been called upon to settle a dispute between the claimant, who had sustained injuries whilst taking part in a paragliding course, and her instructor. Before the substantive issues were dealt with, the Court gave a ruling on several preliminary issues, holding that (a) a tandem paraglider was not an "aircraft" within the meaning of the Carriage by Air Acts (Applications of Provisions) Order 1967; (2) for the purpose of the said order, the plaintiff had not been "carried for reward" or carried by an "air transport undertaking", nor had she been a "passenger", and (3) the claimant had a right of action against her instructor despite the fact that the Order did not apply.

This column hopes to report on the substantive ruling in the next issue.

Skilift operator not contractually liable for users' safety. French Court of Appeal decision¹⁰⁹

The skiing holiday of the plaintiff in this case was definitely ruined when one day, using the ski-lift, she slipped, fell off the skilift perch, and slid along the skilift track until she reached a shelf. In order to remove herself from the path of the ski tow, she fell into a gully situated below. As a result, she sustained several personal injuries, and sought damages from the skilift operator. She argued that the latter had committed a fault since he had failed to make the ski tow path safe by securing it by means of safety nets, thus preventing users from falling into the gullies situated in the immediate vicinity of the skilift.

The Court dismissed the action. The skilift operator's obligation to provide safe conditions of usage was an *obligation de moyens*, i.e. an obligation to provide the means rather than secure the result. It also held that the plaintiff had been unable to prove that this type of equipment was necessary at the point where the accident occurred. Moreover, this omission could not constitute a fault on the part of the operator, whose responsibility consisted essentially in keeping the mechanical skilift equipment in a good state of repair, and did not extend to guaranteeing the safety of the skiing area, which was a responsibility falling within the mayor's policing powers which the latter was not allowed to delegate.

The fact that the appendix to the subcontracting and leasing agreement imposed on the operator the obligation to maintain the ski pistes and to mark them out could not have the effect of transferring to the operator the mayor's safety-guaranteeing duties. Quite apart from the fact that contracts have no effects beyond the contracting parties and may neither benefit nor adversely affect the interests of third parties, the clause in question stated that the operator was bound to perform his obligations in full observance of municipal regulations relating to safety. In addition, the affixing of safety nets did not fall within the scope of a mere obligation to mark out ski pistes.

Players' union chief calls for FIFA investigation into Angel deal (UK)¹¹⁰

Since the protracted saga of Jimmy Greaves's career moves in the early sixties, there can have been no transfer deal more complex and controversial than that which saw the signing of Juan Pablo Angel from Rio Plate (Argentina) to Aston Villa earlier this year. Difficulties with the obtaining of work permits, as well as claims by Angel's agent which could have wrecked the deal, were finally overcome when the Argentinian signed a £9.5 million with Aston Villa, enabling him to play in his new side's clash with Liverpool a few days later.

However, controversy continues to affect this transfer. Shortly after its completion, Gordon Taylor, who heads the players' Trade Union, urged world governing body FIFA to hold an inquiry into the deal. More particularly he urged it to investigate the question whether the transfer money will end up in Argentina, believing as he did that the current arrangements were a front to circumvent strict FIFA rules on player registration. Aston Villa are also expected to come under pressure from the Inland Revenue, who will wish to know how the fee will be distributed in Argentina.

Soccer managers' association calls for protocol on contracts following Hoddle switch (UK)¹¹¹

The sudden manner in which former England manager Glenn Hoddle recently changed from

Southampton to Tottenham Hotspur FC had led to calls for an agreement on contracts for managers made by the latter's union. More particularly the League Managers' Association (LMA) wants clubs to sign up for a protocol which would have to be followed every time a manager changes clubs. This would be based on the system currently operating in Italy, where no poaching of a rival club's coach can take place, and a manager cannot be in charge of more than one team per season.

MEDIA RIGHTS AGREEMENTS

Racecourse Association media rights deal is revealed to horseracing authorities¹¹², but is threatened by breakaway group (UK)¹¹³

Until recently, the Racecourse Association (RCA) has been extremely reluctant to reveal any details of the media rights deal it recently struck with the Go Racing consortium of Channel 4, BSkyB and Arena Leisure, worth some \$400 million. However, around the beginning of the year the RCA displayed a modicum of seasonal goodwill by agreeing to reveal particulars of the agreement to the British Horseracing Board.

The earlier refusal by the RCA to share this information had given rise to fears that it had transferred other rights which could impinge on the governance of racing by the BHB, such as the racing programme and fixture list. Even more seriously, there was concern that the RCA may have undermined the main revenue stream of racing, which is the levy replacement deal struck with bookmakers. The RCA's belated sense of co-operation has ensured that these fears were unfounded.

However, by late January the deal in question was put at risk when 25 of the smaller racecourses threatened to negotiate with new broadcasting partners. The reason for this is that smaller courses expected to fare very poorly compared with the larger ones when it comes to allocating the income earned from Go Racing. The smaller courses were attracted by the notion of national lunchtime coverage of their racing on television. This is an idea being canvassed with Channel 5 and Carlton (the party which lost to Go Racing in the bidding process).

Will armchair sportsviewers go digital? Leading commentator predicts chaos (UK)¹¹⁴

It is becoming an unquestioned assumption that the future of television lies in digital transmission. However, many doubts have arisen as to whether the armchair follower of sport will be as eager to make this transition as the policy makers desire or anticipate. One leading commentator in particular, Neil Wilson of the *Daily Mail*, has gone so far as to predict a disastrous year for TV sport. Charting the course to be followed by the changeover during the next few months, he notes that an increasing number of sporting events will only become available on digital television. Apart from continuing to enjoy the events which are safeguarded for the nation by Governmental regulation, analogue viewers will become increasingly left behind when it comes to televised sport. Since virtually all sporting events digitally broadcasted will be only available on subscription or a "pay per view" basis, those neither able nor prepared to pay for these facilities will be the losers.

Radio Five Live retains Formula One rights (UK)¹¹⁵

In February 2001, it was announced that Radio Five Live had won radio broadcasting rights for Formula One racing for a further four years. This will allow it to broadcast exclusive radio commentary for every Grand Prix event throughout the world.

Will World Cup soccer be the preserve of pay-per-view TV (UK)?¹¹⁶

Top matches played on the occasion of the next World Cup may be available to British viewers only on a pay-per-view basis, according to controversial plans to sell the relevant media rights to channels specialising in this type of broadcasting. Kirch Sport, a German company which bought the television rights to the 2002 and 2006 World Cup finals from FIFA for \$2.24 billion, claim that they are immune from British legislation stating that all World Cup matches must be broadcast live on free-to-air channels.

Kirch claims that it bought these rights prior to the decision by the British Government, made under the 1996 Broadcasting Act, to list the World Cup as one of several sporting events of national importance which must be available free of charge to the general public. Chris Smith, the Culture Minister, has informed Kirch of the legal position under the 1996 Act and insisted that the entire World Cup must be shown on either BBC or ITV. The German company, however, has continued to challenge this position and is planning an auction of the broadcasting rights open to all broadcasters. If this move is successful, millions of soccer fans in this country will be deprived of the opportunity to watch the top games of next year's tournament.

In support of its position, Kirch claims that it bought the rights to the 2002 and 2006 World Cups in 1996, i.e. before the introduction of the Broadcasting Act of the same year, and therefore does not fall within the scope of this legislation.

It also appears that this case may have overtones of EU law. Watch this space.

Top Rugby stars could strike it rich if clubs land TV deal (UK)¹¹⁷

The current troubles affecting the Rugby Union Premiership are detailed elsewhere (see below, p.69). However, one of the side-effects of the current dispute could be a television bonus which the clubs currently threatening a breakaway would share with their international players, and which could be worth over £1 million.

As part of the battle for control of the England squad, the plan mooted by these clubs is to include the international players in a television contract by paying them a percentage of the total sum involved. The clubs in question are understood to be willing to pay the same six per cent which their soccer counterparts pay the Professional Footballers' Association (PFA). Applied to rugby, this arrangement would mean that the money would be divided between the top players and the Rugby Players' Association.

This plan threatens to jeopardise attempts by the Rugby Football Union (RFU) to secure over £150 million from television over the next three years in new contracts to take effect from next season. A split with the clubs could leave the Union without a single England player in the Premiership to call its own.

BBC wins rights to next Lennox bout, starts battle for Lewis/Tyson showdown (UK)¹¹⁸

In late January 2001, the BBC announced that it had captured broadcasting rights for Lennox Lewis's title defence against American Hasim Rahman, which takes place on 21/4/2001, as well as four further bouts involving Lewis. However, the "Beeb" faces a tough fight with BSkyB if it wishes to cover the much-hyped showdown. Boxing television coverage is very much "pay-per-view" territory, an area in which BSkyB is firmly established. However, there is a possibility that the BBC could link up with one of the other cable networks and thus form a combined front against Sky - armed in addition with subscription channel money.

EMPLOYMENT LAW

Portsmouth cancel manager's contract on grounds of misconduct (UK)¹¹⁹

In January 2001, Tony Pulis, manager of Portsmouth FC, was dismissed by his club for alleged misconduct. In mid-October 2000, he was placed on four months' suspended leave and replaced by the club's veteran striker Steve Claridge in order to allow him to concentrate on fighting a High Court action against his former club Gillingham and their chairman, Paul Scally (see also below under Section 16 (Football), p.70). However, three months later he had his contract terminated by Portsmouth chairman Milan Mandaric. The nature of this alleged misconduct was not specified.

Pulis had also been dismissed by Gillingham on grounds of misconduct - again unspecified.

Super (Rugby) League clubs impose salary cap (UK)¹²⁰

In January 2001, it was announced by the Super League clubs that they were to impose a spending ceiling of \$1.8 million on players' salaries from 2002 onwards. Currently, clubs are allowed to spend a maximum of \$750,000 or 50 per cent of their "salary cap relevant" income, which in some cases is believed to be in excess of \$2 million. These new restrictions will almost certainly affect high-spending clubs such as Wigan and Bradford, and could help to have a levelling effect on the Super League competition, which in recent years has developed into a four-horse race.

Salary caps, however, can bring their own problems - see Section 16 (American Football) below, p. 73.

Dalglish awarded compensation against Glasgow Celtic (UK)¹²¹

When Kenny Dalglish rejoined the club where he first came to prominence, in order to form a management team with head coach John Barnes, expectations were set at a high level - only to be cruelly dashed in a season during which the "Bhoys" not only finished 21 points behind deadly rivals Rangers in the title race, but also suffered the ignominy of a home defeat in the Scottish Cup against Inverness Caledonian Thistle. As a result, Dalglish was dismissed in June 2000.

This gave rise to an acrimonious dispute which eventually reached the courtroom. The Scottish Court of Session awarded the case to Dalglish and ordered Celtic to pay \$612,000 plus interest and expenses - as against the \$950,000 which Dalglish had originally sought after his dismissal. However, Dalglish then agreed the lesser sum specified above in return for the club dropping a counterclaim against him. Brian Napier, Dalglish's advocate, requested Lord McFadyen for a decree for the reduced amount in return for the waiving of the counterclaim. This decree was granted.

Damages awarded to Irish hospital porter for work injury threatening his ambition to become a professional footballer¹²²

Ciaran O'Connor was a young, married hospital porter with ambitions of becoming a professional footballer, initially on a full-time basis and subsequently in a part-time capacity. He had spells with Everton, Dundalk FC and Linfield in the Irish League, playing in the reserves. He then joined Kilkenny City, playing for them for one season, but discontinuing his playing career there because of his work with the North-Eastern Health Board.

In June 1997, Mr. O'Connor was putting away clean linen when he heard a buzzer calling for attention on the part of the nursing staff. Since no response was forthcoming from the latter, Mr. Connor investigated the cause of the signal, and found that an elderly, confused patient was attempting to get out of bed upon which the cot sides had been raised. Mr. O'Connor attempted to move the patient back into the bed by leaning across and releasing the patient's grip, and putting his right and left hands under the patient's right and left arms, thus attempting to pull the patient back towards him. The patient weighed 13 stone, and in his attempts to move him Mr. O'Connor felt "something go in his back".

Following this incident, Mr. O'Connor experienced a number of physical complaints, including shortness of breath and pain in the ribcage. This was followed by a prolonged period of medical treatment, including admission to hospital for six days and visits to a specialist in low back pain. As a result of this, Mr. O'Connor issued proceedings against his employer for personal injury.

The court ruled that the procedure adopted by Mr. O'Connor in attempting to move the patient had required him to adopt an ergonomically unsafe position. The relevant health and safety regulations issued by the Government required any employer to ensure that all staff member received adequate health and safety training, including information relating to the particular task involved. It noted that Mr. O'Connor had received no such training or information in the matter of patient handling and lifting, and was satisfied that had Mr. O'Connor received even the most elementary instruction in these matters, he would have adopted a different procedure.

The Court therefore ruled that the North-East Health Board was in breach of its duties under the aforementioned rules, and rejected the claim of contributory negligence on Mr. O'Connor's part. In

assessing the damages payable, the Court heard from the consultant who had been treating the claimant that the injuries sustained left Mr. O'Connor in a state of chronic pain, which would preclude him from returning to any work involving lifting, pushing and pulling, and from any sporting activity except for swimming and gentle exercise.

The Court concluded that the accident had rendered Mr. O'Connor unfit to engage in his employment. It had denied him the opportunity of pursuing a career as a professional footballer and prevented him from enjoying football as a recreation. The judge noted that the claimant had suffered intermittently from depression, and, whilst this could be related to other developments in the plaintiff's life, his chronic pain and adaptation to his lifestyle had been a factor playing a part in this condition.

The Court awarded Mr. O'Connor damages totalling £143,000. However, the judge did not include in this sum loss of earnings as a part-time footballer, since Mr. O'Connor would have been compelled to opt between undertaking overtime - which was included in the award - or playing semi-professional football.

Dismissed Graham intends to sue (UK)¹²³

On the morning of 16/3/2001, Spurs manager George Graham was anticipating preparing his team for the FA Cup derby clash with North London arch rivals Arsenal. Before the day was out, he was contemplating court action against the club after having been dismissed summarily, if not entirely unexpectedly. Spurs executive vice-chairman David Buchler announced tersely that Graham had been dismissed for "breach of contract" after having made public comments about Tottenham's financial position which led him to question whether the former Arsenal star had the real interests of the club at heart.

Graham had learned, during a meeting with Buchler the previous day, that he would be given but "limited funds" for transfers, and had communicated this to a press conference. Buchler was annoyed at seeing observations made during a private conversation in the newspapers. His anger was compounded by the fact that these revelations came on the day when he had met player Sol Campbell and his agent in an attempt to remain at the club beyond the summer.

This column will obviously follow any litigation arising from this case with keen interest.

(On George Graham's rapid replacement by Glenn Hoddle, see above p. 21.)

US college sports authority to allow its athletes to turn professional without losing college eligibility¹²⁴

In the US, the National Collegiate Athletics Association (NCAA) has recently approved plans to enable certain college athletes to sign professional contracts without endangering their college eligibility in the same sport. Delegates representing over 260 "Division II" colleges have approved the scheme by a large majority.

The new rules will mean that college athletes may sign professional contracts, play for the club which employed them, accept prize money, whilst remaining eligible to take part in collegiate sports after their professional career is over. However, the players concerned will have the length of their college eligibility restricted by the time which they spent in the professional ranks. Thus if an athlete graduates in 2001 and starts to perform as a professional prior to enrolling at college in 2001, he/she will be required to complete one year's residence at the college concerned and will have three seasons of eligibility remaining.

This plan would enable students to take part in certain activities which for years had been prohibited under NCAA bylaws. The new system enters into effect on 1/8/2001. Division I colleges are currently considering a similar change.

Rugby League player wins reinstatement order (UK)¹²⁵

During the early stages of the 1999/2000 season, Welsh international Paul Sterling, who played for

Leeds Rhinos, had been informed by his coach Dean Lance that he would not be considered for the first team regardless of how well he played. After the Leeds side's defeat in the Silk Cut Challenge Cup final by Bradford in April 2000, however, Sterling, aged 36, had become a regular in the Leeds side. He was released at the end of the season.

These inconsistencies in his treatment caused Sterling to bring an action for unfair dismissal and racial discrimination against the club. The employment tribunal awarded the action to Sterling, who was awarded \$16,000 damages for racial discrimination as well as a reinstatement order.

(For a fuller account of this case and the race issues involved, see Section 14 (Human Rights), below, p. 62.)

Will Britain's athletes go on strike next season?¹²⁶

In late December 2000, Darren Campbell, Britain's Olympic 200 metres silver medal winner, speaking at the launch of a charity established to provide support for athletes, suggested that this country's top athletes may strike next season if UK Athletics (UKA) does not improve its levels of assistance to younger and developing athletes. He was backed in this view by Jamie Baulch, the world indoor 400-metres champion, who only the previous month had helped to negotiate a multi-million pound deal between UKA and sportswear manufacturers Reebok which included a substantial grassroots development programme.

How to draft and negotiate college coaching contracts. Article in US academic journal¹²⁷

The post of college sports coach is one which has changed considerably over the past few decades. Such are the responsibilities and pressures weighing on these professionals that they are currently capable of earning seven-figure incomes. As a result, employment conditions which were once subject to the firm handshake have now become written employment agreements requiring an extensive understanding of relevant federal and state law, as well as various other rules imposed by sporting bodies. It is for this reason that the author offers this "best practice" guide on securing the best deal in this area.

The areas covered include termination provisions - covering both terminations initiated by the institution and coach's buyout clauses - the duration and renewal of the relevant contract, and the "compensation package". The main theme which permeates the recommendations made is that a well-considered, equitable and flexible agreement will provide both the coach and the institution with the opportunity to benefit from the competence and the commitment which each party brings to their respective responsibilities and to each other.

Continued threats of industrial action amongst England's top Rugby players

Since this issue is narrowly linked to the more general legal problems arising from the turmoil currently affecting the world of Rugby Union, the reader is referred to the relevant section under heading 16 below (p. 69 et seq.).

4. TORTS AND INSURANCE

Member has no action in damages against go-karting club for accident. Scottish court decision¹²⁸

The pursuer (i.e. the plaintiff or claimant in Scottish courts) in this case had incurred major injuries in a go-karting accident when colliding with the wall of a building at the karting club of which he was a member. He sued for damages from the club and from five of its office bearers as representatives of the club and as individuals, as well as from the motor sports association as the body responsible for the licensing and inspection of motor racing tracks.

The basis on which the plaintiff held the club and its office bearers liable was that they had been negligent in failing to provide crash protection in the area in which the accident occurred. The basis for the liability of the motor sports association was that they had been negligent in licensing the track in the absence of adequate protection against crashes. The club maintained that a club and its office bearers as representatives of that club could not be held liable in delict (Scottish term for tort) to a club member.

The Outer House of the Court of Session dismissed the action inasmuch as it was directed against the club and its office bearers as club representatives, since a member of a club may not sue that club in tort. On the action against the motor sports association and against the club office bearers as individuals, the court allowed proof before answer, given their knowledge as claimed by the plaintiff coupled with their *de facto* assumption of the responsibility for taking executive decisions on track safety.

Hillsborough policeman awarded post-traumatic stress compensation (UK)¹²⁹

In March 2001, a retired police officer who maintained that he started to suffer post-traumatic stress symptoms several years after the Hillsborough disaster, which claimed 96 lives, has been awarded compensation amounting to £330,000 in an out-of-court settlement, reached just before the case was to be heard by the High Court. Martin Long helped to rescue fans trapped in the crush which led to these deaths.

Three years ago, he had begun to suffer "late onset" stress caused by his experience. The following year, he retired from the South Yorkshire police force on medical grounds with an enhanced pension.

Families of the victims of the Hillsborough disaster denounced the award as evidence of double standards. Many of them had received but a fraction of the sum awarded to Mr. Long.

(Also on the Hillsborough case, see under Section 1 (General), above p. 4.)

Modahl intends to fight on despite losing High Court action (UK)

It will be recalled from the last issue¹³⁰ that Diane Modahl, the former Commonwealth Games athletics champion, had initiated a court action against UK Athletics for the vast sums she was compelled to expend in her efforts to overturn allegations and bans over drug-taking. On 14/12/2000, she learned that the High Court had failed to award the action to her¹³¹.

One of the main arguments used in court by Modahl's counsel was that Martyn Lucking (a member of the British Athletics Federation disciplinary committee, which had banned her for four years after she failed a drugs test at the 1994 Commonwealth Games) had stated that athletes were "essentially dishonest". This, he argued, cast doubts on his impartiality and that of the committee. The judge nevertheless found that the committee had carried out its function conscientiously and fairly.

Overall, the judge found that Modahl had been treated fairly by the British Athletics Federation, which has since gone into administration, and had been given a "fair deal". He refused her leave to appeal. However, in late February 2001, Ms. Modahl appealed direct to the Court of Appeal, who granted her leave¹³².

Toboggan ride not inherently dangerous, rules English court¹³³

The claimant in this case had appealed against the dismissal of his action for damages for personal injuries incurred whilst riding with his young son on a toboggan run owned by the defendant. The appellant claimed that the first court had erred where it concluded that (a) the ride was not inherently dangerous, and (b) whilst the defendant had been in breach of his duty to give oral warning to the applicant to brake in advance of bends, this had not been causative of the accident.

The Court dismissed the appeal. It held first of all that the first court finding that the ride was not inherently dangerous, fitted as it was with brakes and a system in place warning drivers to brake at

bends, could not be reversed, given the nature of the activity which necessarily involved the use of a degree of skill to negotiate the course. The Court also held that the first judge had been correct to conclude that the absence of warnings to brake issued to the plaintiff had not been causative of the accident, in view of the plaintiff's own evidence that instructions would not have made any difference.

Grobbelaar libel award overturned on appeal (UK)¹³⁴

In July 1999, Bruce Grobbelaar, former Liverpool goalkeeper and Zimbabwe international, was awarded the sum of £85,000 by way of damages in a libel suit against the *Sun* newspaper. The latter had alleged that Grobbelaar had been guilty of accepting £40,000 in order to ensure that Liverpool should lose a match against Newcastle United in 1993, which the latter won 3-0. Later, the same paper claimed that he had lost a six-figure sum by making a number of spectacular saves against Manchester United in a match which eventually ended in a 3-3 draw.

However, in January 2001, the Court of Appeal overturned this award, thus making history as the first ruling in which a libel verdict has been set aside on appeal. The judge in question, Lord Justice Simon Brown, described the verdict reached by the libel jury as "perverse" and as an "affront to justice". Another judge went so far as to describe the original ruling as a miscarriage of justice.

All three judges challenged Grobbelaar's integrity. The Court had been informed that the *Sun* had recorded evidence of Grobbelaar discussing match-fixing with his former business partner Chris Vincent.

A bizarre attempt by Grobbelaar's counsel to postpone the full reporting of the Court of Appeal's decision pending a possible appeal to the Law Lords was dismissed by the three judges¹³⁵.

Former jockey loses personal injury claim¹³⁶. Comments on decision (UK)

In February 2001, Peter Caldwell, a former jump jockey lost his action for £1 million damages brought against two leading riders, Mick Fitzgerald and Adrian Maguire, for negligence in connection with a fall which left him with severe head and spinal injuries and effectively ended his career.

The High Court heard that the defendants had cut in front of another rider, Derek Byrne, which led Royal Citizen, the latter's horse, to stumble in the course of the novices' hurdle. Byrne was unseated and in the process brought down Fion Corn, Caldwell's horse, causing the injuries described above. The Jockey Club had found both riders guilty of careless riding and suspended for three days. However, the Court ruled that, although the two defendants had been guilty of lapses of care when riding, this did not amount to a breach of the duty of care which they owed to Mr. Caldwell. This incident, he said,

"reflected the cut and thrust of serious horseracing, in theory avoidable, but in practice something that is bound to occur from time to time. (...) Injury was part of the life he chose and enjoyed - what was unusual and untoward was its seriousness."

The defendants' legal counsel hailed this as

"a very important decision (...) a finding of negligence could have set a dangerous precedent for further claims".

Mr. Caldwell intends to appeal against this ruling¹³⁷.

The racing press, predictably, reacted extremely favourably towards the decision. Fairly typical was the view expressed by *The Daily Telegraph's* John Oaksey, where he stated that

*"if jockeys could be sued for anything short of injury caused by deliberate, malicious foul riding, the sport would collapse in chaos."*¹³⁸

This may very well be the case, but is it justice? Not in the view of James Morton, writing in the *New Law Journal*¹³⁹.

The author opines that the ruling has set “different standards of negligence”. If the race stewards had found there to be no negligent riding, or had they not suspended the defendants, the ruling may have been appropriate. As it was, however, they were in effect convicted by the stewards’ ruling, and in economic terms they were issued with a suspension which could mean a potential loss of income of several thousands of pounds. This is rather more severe, asserts the author, than a penalty imposed on a careless driver in a magistrates’ court. Will this then prompt motorists convicted of careless driving in the criminal courts to argue that such a ruling does not amount to sufficient evidence in a civil court?

As the author rightly notes, this decision sits very uncomfortably alongside the duty of care standards expected of the British Boxing Board of Control in the decision by the Court of Appeal in *Watson* (see below).

Sweet victory for Sugar in libel action (UK)¹⁴⁰

In February 2001, Sir Alan Sugar, Chairman of Tottenham Hotspur FC, was awarded damages amounting to £100,000 in a libel action over a claim made in a national newspaper that his stewardship of the club had been “miserly”. Sugar had sued the *Daily Mail* over an article which appeared in December 1999, exhorting him to emerge from his “counting house” and to provide the club manager with the funds to purchase top players.

Giving evidence, Sugar had denied that the failure by Spurs to win major honours could be blamed on him. He pointed out that during his time at Tottenham, almost £100 million had been expended on the club. In so doing, he had employed George Graham to manage the side because he considered him to be the best manager in England apart from Sir Alex Ferguson. He had at no time turned down any request to purchase a player made by Graham, and the latter had never maintained that he did not have sufficient funds at his disposal.

The *Daily Mail* was granted leave to appeal.

Court of Appeal confirms Watson ruling (UK)¹⁴¹

In the last issue, this column reported that leave to appeal had been granted to the British Boxing Board of Control against the High Court action awarded to boxer Michael Watson in respect of its negligence in providing Watson with inadequate medical treatment during his bout with Chris Eubank in 1991¹⁴². The Court of Appeal confirmed the High Court ruling by a decision issued on 19/12/2000.

Lord Phillips, the Master of the Rolls, stated that the trial judge had been justified in finding that the boxer would have made a better recovery had arrangements been made to provide ringside treatment and take him to the nearest neurological unit. As it was, when Watson became unconscious, seven minutes elapsed before he was examined by a doctor, after which it took almost 30 minutes to convey him to hospital. By the time he was transferred to a neurosurgical hospital, a blood clot had caused severe brain damage. This in turn led Watson to become paralysed on his left side, as well as incurring other physical and mental disabilities.

More particularly on the applicable standards of care, Lord Philips stated that this case presented certain special features which placed it outside any established category of duty of care in negligence. The duty alleged was not a duty to take care to avoid personal injury, but rather a duty to take reasonable care to ensure that personal injuries already incurred were properly treated. In addition, the duty alleged was not directly to provide proper facilities and administer appropriate treatment to those injured, but rather to make regulations imposing on others the duty to achieve such results.

There was no direct legal authority under which a duty of care had been established in relation to the drafting of rules and regulations governing the conduct of third parties towards a claimant; however, there was authority which established that if a defendant had advised a third party as to action to be taken which would directly and foreseeably affect the well-being of a claimant, a situation of sufficient proximity existed to establish a duty of care on the part of the defendant towards the claimant¹⁴³.

The Court of Appeal did emphasise that boxing occupied a unique position in this regard, in that it

was the only sport in which physical injury was the object of the exercise. Lord Philips dismissed the argument that the standards of care set by the High Court were excessive, stating that

"serious brain damage such as that suffered by Mr. Watson, though happily an uncommon consequence of a boxing injury, represented the most serious risk posed by the sport and one that required to be addressed."

The Court accordingly upheld the High Court position that it was the duty of the Board, and of those advising it on medical matters, to be prospective in their thinking and to seek competent advice on how an identifiable danger could best be overcome.

The Board was refused leave to appeal to the House of Lords.

Kevin Keegan wins libel action against News of the World (UK)¹⁴⁴

The European Soccer Championships of 2000 could hardly be described as a roaring success for the hapless England team, who made an early exit from the entire tournament. One of the alleged reasons for this poor performance, according to the *News of the World*, was the regular habit of the England players of gambling late into the night before the vital preliminary matches. The newspaper had also alleged that the players had engaged in this habit with the encouragement of manager Kevin Keegan. The report also claimed that the former England manager acted as bookmaker for such gambling nights at the team's hotel.

This prompted an action for libel before the High Court on the part of the former Liverpool, Hamburg and England striker, which ended in an award amounting to £150,000. The court accepted that there had been nothing untoward in Keegan's behaviour, and that there was no evidence that there had occurred anything more than the normal practice by professional footballers of playing cards and betting amongst themselves as a normal and well-accepted means of passing the time.

The *News of the World* issued an apology to Mr. Keegan for the distress which publication of the article had caused him.

Former boxing champion accepts apology and damages from newspaper (UK)¹⁴⁵

In February 2001, Julius Francis, the former British and Commonwealth heavyweight champion, accepted a public apology and substantial damages from Express newspapers in the High Court, following claims that he had thrown a championship bout with former world champion Mike Tyson the previous year.

London law firm loses libel action against footballers' union (UK)¹⁴⁶

Reid Minty, a leading London law firm, has lost an action against Gordon Taylor, Professional Footballers' Association (PFA) chief, in which they accused the latter of libel. This will leave the firm with a bill estimated at £750,000.

The focus of the action was the accusation made by Taylor that the firm had misled Labour MP Alan Meale into fronting a meeting on footballers' freedom of contract. In the wake of the *Bosman* decision by the European Court of Justice (ECJ), Reid Minty had established the Players Out of Contract Association (POCA), encouraging players to join. Publicising POCA with the assistance of former Wimbledon defender Vinnie Jones, the firm had maintained that a British court would interpret the *Bosman* ruling broadly and apply it to domestic transfers. As part of its publicity drive, the law firm organised a meeting in the House of Commons in November 1996 following an invitation issued by Mr. Meale.

Speaking on Radio 5 Live before the meeting, Mr. Taylor had accused Reid Minty partner Jonathan Ebsworth of attempting to divide the PFA. He also maintained that Mr. Meale had no idea that this was a "PFA-bashing campaign". Following a 12-day hearing before the High Court, the jury returned an unanimous verdict in favour of Mr. Taylor and found that the allegation was substantially true. The

judge, Mr. Justice Gray, also ruled in law that Mr. Taylor was entitled to make his statement about the law firm, provided that he did so in good faith, because he had been responding in defence of himself and of the PFA against attacks by Reid Minty. If this was the case, the statement would enjoy qualified privilege.

Player held not liable for facial injury caused during friendly football fixture. French Supreme Court decision¹⁴⁷

In the course of a friendly football fixture, a player received an elbow in the face. This caused him the loss of several teeth, which caused the victim to bring an action for damages. The Court of Appeal of Nîmes dismissed the action, which gave rise to an application for review before the French Supreme Court (*Cour de Cassation*).

The Court confirmed the Court of Appeal's ruling. It took into consideration the fact that the injury occurred in the course of a football match, and that the witness statements made testified to the fact that the injury-causing event constituted an act of clumsiness which did not reveal any aggressive or malevolent intention on the part of its author towards the victim. Furthermore, the incident in question did not involve any infringement of either the rules of the sport nor of its spirit. The Court of Appeal had therefore correctly absolved the defendant from any tortious liability.

Victim of accident in swimming pool awarded limited damages. Irish High Court decision¹⁴⁸

Whilst 55-year-old Breda Whelan was taking part in a swimming lesson at Glenalbyn pool in October 1996, she was accidentally kicked in the coccyx region. The same day she consulted her medical practitioner, who, despite his patient's complaint that she was suffering from pain in the coccygal and sacro-iliac zones, did not establish any injuries in the areas complained of. He concluded that there was no need to refer her to an orthopaedic surgeon. Her local doctor recommended maintaining a good posture and anti-inflammatory medication.

However, as time went by Mrs. Whelan claimed that her position was not improving, and that she was unable to perform her household chores. She stated that she was never without pain at the base of her spine and in the right hip area. This allegedly gave rise to discomfort at night and difficulties in sleeping. Having consulted her solicitors, she was sent to a consultant orthopaedic surgeon, who concluded that she suffered low-to-medium grade discomfort, probably due to soft-tissue injury to her gluteal muscle and sacro-iliac areas. He recommended physiotherapy.

Whilst undergoing the recommended physiotherapy sessions, Mrs. Whelan also had a bone scan carried out in 1997 which revealed no evidence of fracture or disease. An MRI scan was subsequently performed which revealed early degeneration of discs which, in the consultant's opinion, had nothing to do with her symptoms. She was then seen by a surgeon on behalf of the swimming pool, who established tenderness over the right sacro-iliac joint, but felt that these symptoms, two years after the accident, were quite minor and did not interfere specifically with her activities. He did not consider that there would be any long-term complications.

She was then referred to a specialist in pain management, who recommended a diagnostic facet block injection, which she was reluctant to undergo. The specialist concluded that this unwillingness to undergo any further intervention aimed at establishing the cause of her pain led one to assume that she had nothing more than a soft-tissue complaint. He thereupon stated that he saw no point in any follow-up review examination.

All these medical facts were examined in the course of the action for damages which Mrs. Whelan had brought against the swimming pool operators. One of her main arguments was that the specialist had given her to understand that the diagnostic facet block injection was to relieve pain; therefore the conclusions drawn by the defendant as to the reasons for her reluctance to undergo the injections were wrong.

The judge, having outlined the facts, expressed his reluctance to accept that the doctors had left her in any doubt as to the purpose of the injection, particularly in these litigious times. If Mrs. Whelan

thought that the purpose of the injection was to relieve pain, the judge found her explanation - or rather the lack of it - as to why she would not accept such relatively non-intrusive treatment unconvincing in the extreme.

As to Mrs. Whelan's claim that, prior to the accident, she and her husband were keen set dancers, and that she was now compelled to dance more slowly as well as tiring more easily, the judge held that Mrs. Whelan suffered a moderate to mild soft-tissue injury. Such pain and discomfort diminished with time until it became quite minor and ceased to interfere significantly with her day-to-day activities. He accepted that there may be intermittent episodes of increased pain and discomfort from time to time.

He also ruled that if Mrs. Whelan suffered any significant pain or discomfort, she would not have rejected that which she believed to be pain-relieving injections. Although he did not believe that she was deliberately exaggerating her symptoms, he had to conclude, in the absence of any convincing medical evidence to the contrary, that there had been a considerable subjective element involved in her complaint. He therefore did not accept that she had, either at present or in the future, any significant pain or discomfort associated with the swimming pool incident. She was awarded £10,000 by way of general damages and £1,394 as special damages.

Is it appropriate to apply vicarious liability to rugby clubs for injuries caused by their players? Case note in French academic journal¹⁴⁹

Readers will recall a French court decision reported under this heading in a previous issue, which concerned the liability of a rugby club for injury caused by one of its players¹⁵⁰. The solution applied by the French Supreme Court has given rise to some controversy, as expressed in an annotation to this case featured in a leading French academic journal.

Let us recall the facts. In the course of a rugby match, a player was injured by an opponent, who represented the Aureilhan club (referred to as ASCA). The victim brought two actions for damages: one against the actual perpetrator of the injury, the other against the club, on the basis of Article 1384(1) of the Civil Code which regulates the principle of vicarious liability. The Supreme Court confirmed the decision of the Court of Appeal which held the club vicariously liable, ruling that

*"since sporting associations have the object and purpose of organising, controlling and supervising the activity of their members in the course of sporting fixtures in which they take part, they must be held liable, within the meaning of Article 1384(1) of the Civil Code, for any damage which they cause on such occasions."*¹⁵¹

The author of the annotation is somewhat critical of this ruling, and sets about the task of analysing thoroughly its legal basis. She is particularly unhappy about the manner in which the Supreme Court seems to have redefined the scope of Article 1384(1), and wonders whether the fact of "organising, controlling and supervising" others constitutes an adequate criterion for demarcating the scope of this provision.

The author's unease stems from two considerations. The first relates to the consistency of the Court's approach. She considers the ruling in the ASCA case under review to be inconsistent with the original intent of this provision, which was that it should apply to "dangerous persons". This is particularly the case since the criterion applied in the ASCA decision also appears to sit uneasily with the manner in which the *Cour de Cassation* has interpreted the scope of Article 1384(1) to such "dangerous persons". Thus in a recent decision¹⁵², the Court had refused to apply the principle of vicarious liability to an association which accommodated a handicapped person as a half-boarder, who had caused a fire. The Court had held that once the author of the damage dismounted the bus taking him to his parents, he was no longer under the association's authority at the time when the damage was caused. The author also points out some inconsistencies by the Court when it comes to applying Article 1384(1) to sporting clubs themselves, in that the latter's liability seems only to be engaged in the course of competitive matches, and does not extend to injuries during training sessions or those resulting from altercations in the dressing rooms.

The author is also concerned at the sheer generality of this criterion - in fact, it was this very characteristic that enabled the courts to locate sporting clubs' liability for their players' action within the scope of Article 1384(1). The author considers that this brings the criteria for vesting vicarious

liability very close to those applying to the liability of persons for objects under their control. This is a dubious proposition, given that the degree of control exercised by sporting clubs over their players is often illusory.

For a better solution, the author points to another court decision, which concerned the liability of the famous (or some would say infamous) top football club Olympique Marseille (OM)¹⁵³. Here, the club was made liable for a punch delivered by an OM player to an opponent on the basis of the contract of employment linking the player to the club, which justified a finding that the club was "responsible" for the player within the meaning of Article 1384(1). It could be objected that this would be difficult to apply to amateur clubs, but the author argues that the amateur player has the same relationship of subordination to his/her club as the professional. This would open the way to basing sporting clubs' liability on the fifth, rather than first, paragraph of Article 1384, which refers to the liability of "masters and principles" for their subordinates - a solution which the Supreme Court has applied in other cases.

5. PUBLIC LAW

Livingstone presumes not to underwrite 2005 Athletics World Championships - Kate Hoey and David Moorcroft "unworried" (UK)¹⁵⁴

In March 2001, Ken Livingstone, the newly elected Mayor of London, declined to sign the contract underwriting the 2005 World Athletics Championships. This refusal has, however, been dismissed as an "irrelevance" by Sports Minister Kate Hoey. The contract with the International Amateur Athletics Federation, which will seal Britain's commitment to hosting the championships, is due to be signed in October.

Since Birmingham City Council had underwritten the cost of the Indoor World Championships, due to be held there in 2003, it had been widely assumed that, as mayor of the host city and head of the Greater London Authority, Livingstone would be a co-signatory to the contract with UK Athletics Chief Executive David Moorcroft. Mr. Livingstone explains his position by stating that

"following legal advice, I have decided that I cannot sign this as it would expose the authority to too many liabilities."

David Moorcroft has indicated that Livingstone's refusal to sign did not constitute a threat to the event, and that plans for the championships and for the building of the new purpose-built stadium at Picketts Lock on North London (see below) were forging ahead. It is now understood that the contract will be signed by UK Athletics and one of the Government agencies, such as UK Sport. Sport England have already allocated \$15 million of Lottery money towards the staging of the event.

Invisible striker? How the 1961 Greaves transfer circumvented currency controls, released Treasury papers show (UK)¹⁵⁵

Footballer-turned-pundit Jimmy Greaves used to be known as "the invisible striker" as a result of his ability to appear from nowhere and thus create seemingly impossible scoring opportunities. This sobriquet appears to have taken on a new meaning, judging by Treasury papers released by the Public Record Office.

Following a turbulent period at AC Milan, Greaves moved to Tottenham Hotspur in 1961. The fee was set at the then phenomenal sum of \$99,999, setting a new transfer deal record. This created a potential problem under the strict controls on currency movements applying at the time, which restricted the amount of money which was allowed to be taken out of the country to \$80,000.

Demonstrating that an unhealthy tendency to exempt sport from the rule of law exists amongst our policy makers is nothing new, Treasury officials were anxious to find ways of circumventing these rules, for fear of offending football supporters. The deal was rescued by being classed as an "invisible import" thanks to the ingenuity of an official named William Clowser, who made the following observations:

"The transfer fee paid by one club to another for a player's release represents the means by which

the paying club secures his services and skill, which are of course of little value except as (sic) a member of a football team. This is closely analogous to a royalty payment which might be made by an industrial concern for the use of a patent or know-how. I have told the bank that, on this justifiable analogy, they may approve the application (....) we would no doubt run into trouble if it were refused".

There was a good deal of unease about this sleight of hand - as witness a note sent by a junior minister (Anthony Barber) to the then Chancellor of the Exchequer, John Selwyn Lloyd, in which he conceded that it could seem rather strange to allow this kind of exemption for a professional footballer, whereas remission of a smaller sum for the purpose of creating a business would be refused.

More public record revelations with sporting implications (UK)

The annual release of public records has disclosed further issues of relevance to the world of sport. Thus it was revealed that in 1970, Peter Hain, at present a minister in the Foreign Office, risked prosecution for conspiracy for his rôle in stopping the South African cricket tour of England¹⁵⁶. Mr. Hain was the Chairman of the "Stop the 70 Tour Committee" which campaigned against the planned visit of an all-white South African cricket team until it was selected in a multi-racial basis. Released Government papers show that Mr. Hain's activities were discussed by the Cabinet and that ministers were cautioned not to make any statements which could prejudice legal action against him. In the event, the invitation to the South African team was withdrawn.

Another issue which has emerged from the nether regions of Government secrecy is official reaction to the Bobby Moore Bracelet affair¹⁵⁷ - which appears to have been worthy of a Graham Greene novel.

During the immediate run-up to the 1970 Football World Cup, England captain Bobby Moore was arrested in Colombia for shoplifting an emerald bracelet. He had been questioned initially during the England team's stay in that country for a few warm-up games about the alleged theft of a bracelet from a hotel gift shop. Since Colombia, and in particular its capital Bogota, had become notorious for trumped-up charges against visiting celebrities, the police dismissed the accusations. However, when the England team returned a few weeks later on their way to World Cup venue Mexico, the police arrested Moore after a new witness had apparently come forward.

With a General Election in the offing, Prime Minister Harold Wilson quickly became involved, to the point of requiring British diplomats to exercise considerable pressure on the Columbian authorities, as witness a rash of telegrams issued from the Foreign office to the Bogota embassy. As a result, Tom Rogers, the new British Ambassador, obtained a meeting with a top-ranking official in the Colombian Ministry of Foreign Affairs, who informed him exactly to what lengths the Colombian authorities were prepared to go.

In the event, just six days before England's opening World Cup fixture with Romania, Moore was cleared by the judge, who even said that he hoped the England captain would go on to score many goals. He was never brought to trial. The shop girl who had made the initial accusation fled to the US, and question arose as to the integrity of the second witness.

Belgian Senate committee hears evidence of "slave trade" in young African footballers¹⁵⁸

Official concern has been mounting in Belgium at certain practices by unscrupulous agents, aided and abetted by equally unethical football clubs, which result in untold misery for young and inexperienced African footballers. Every week, it appears that a steady trickle of promising young players arrive in Belgium from West Africa through the agency of some dubious Belgian middlemen. With good fortune, these players may enjoy a few years employed by Belgian clubs. However, once this period is over, they are left high and dry, cast aside by the grasping agents who brought them to Europe in the first place.

These practices are currently being investigated by the Belgian Parliament, whose Senate recently heard evidence from several victims of this vicious exploitation. Particularly the evidence provided by 23-year-old Masu Kanu, originally from Sierra Leone, makes poignant reading.

Mr. Kanu's current activity on the playing field is restricted to a few matches played with some fellow, equally dumped, West Africans on a field owned by an Antwerp abattoir. He also trains regularly on a private basis in the hope of once again being taken on by a club. He now lives exclusively from social security benefits. He was originally invited to come to Belgium by Karel Brocken, a good friend of the Board of Directors of SC Lokeren (a Belgian First Division team), when he was gaining a high reputation with Real Republicans Freetown. The deal was that Brocken would find a Belgian club for Kanu; in return, Brocken would earn 50 per cent of the transfer fee.

Having been with Lokeren for one year, the then 16-year-old Kanu was offered a contract with the club. As per agreement, half the transfer fee went to Brocken, 20 per cent to the Sierra Leone club, and 30 per cent to Kanu himself. However, he was only paid BEF 432,000, although no specific sum was mentioned in the contract. Only later did Kanu, thanks to a club official, have sight of the original contract, which specified a sum of BEF 3 million. This would entitle Kanu to an additional BEF 500,000, which he never received.

Equally revealing were the figures cited by Kanu when asked by the Committee about his earnings whilst at Lokeren. The first year he was paid nothing, on the basis that he was only a "test player". Subsequently he earned BEF 60,000 (\$930) per month before tax, with a bonus of BEF 24,000 (£375) per win. The contract was for three years and was renewed for the same term in 1997. In 2000, the club wished to extend his contract for a further two years, but on condition that he should play on loan to St. Niklaas, a neighbouring club. This Kanu refused. His attempts to find a new club were unsuccessful.

The sheer ruthlessness of the club's approach was also highlighted by their treatment of Kanu when his brother died - also in Belgium. Wishing to transfer his relative's body to the country of his birth, Kanu applied to Lokeren for the air ticket to which he was annually entitled under his contract of employment. Up to that point, Kanu had waived this right because of the war raging in Sierra Leone. Lokeren's chairman Lambrechts made payment of the air ticket conditional upon Kanu agreeing to play on loan to St. Niklaas.

It also transpired that, although the tax owed by Kanu was deducted at source by Lokeren, the latter never issued him with a tax certificate. After he left the club, however, he received several demands from the Belgian Inland Revenue for tax due for the years 1996 to 1998. Clearly, there has been some chicanery in this respect as well.

A spokesman for SC Lokeren later admitted that it frequently employed African players in the hope of later being able to sell them, but maintained that this was the only way in which it could survive. He denied any involvement by his club in illegal practices or deals with dubious agents.

Post-match drinking ban at Twickenham lifted (UK)¹⁵⁹

More than one traditional Rugby follower was distinctly put out when the police ordered the bars of international venue Twickenham to be closed after last year's autumn internationals and the Varsity Match. The Rugby Football Union (RFU) subsequently waged a strenuous campaign to have the ban overturned. This lobbying appears to have paid off, since in late January 2001, the Police Commissioner, Sir John Stevens, gave his support to a two-match experiment under which drinking areas were to remain open for two hours following the final whistle for the games on 3 March and 7 April. In return, the RFU undertook to provide a fleet of shuttle buses in order to ferry post-match drinkers to local railway stations.

However, the drinking ban remained in place for the England international against Italy on 17 February, and for the Tetley Cup final which was played the following Saturday.

England cricket coach refused passport (UK)¹⁶⁰

Duncan Fletcher, the former Zimbabwe international player and current England coach, has been unsuccessful in his attempts to obtain a British passport. His mother's parents were born in Scotland, whereas his father's hailed from England. His parents, brothers and sister all have British passports. However, Fletcher has a Zimbabwean passport, as well as a work permit passport which carries no residential status.

Fletcher has made it known that he wishes to leave his current base in South Africa and settle in Britain. The issue was not yet resolved at the time of going to press.

Will anti-hunt legislation cause the demise of point-to-point racing?

The author of this column has always entertained the greatest of difficulties in accepting hunting as a "sport", which is why he has thus far been loath to report on various developments in this activity. However, it would appear that if the plans for a ban on fox-hunting are ever realised, the legislation in question may have adverse implications for "real" sport - to wit, point-to-point racing.

Writing in the *Daily Telegraph*, Andrew Baker sounds the alarm bells for this sport¹⁶¹. Point-to-point racing depends on hunting for its horses, and all those competing in them must qualify in the hunting field. He concedes that some point-to-points are run by racing clubs rather than hunts, and that the volunteers who run it are aficionados of racing rather than hunting. But there is, in his view, no escaping the link between the two pursuits, which is why a ban on hunting would face this type of event with the prospect of radical restructuring and an administrative crisis.

The same theme is taken up in the same newspaper by commentator John Oaksey¹⁶². He stresses that these races are first-rate kindergartens for young horses and jockeys, but also serve as active retirement homes for old chasers such as *Call It A Day*. In addition, the latter can develop into excellent "schoolmasters", giving novice riders an invaluable "safe jump round".

Belgian authorities monitor application of new football legislation¹⁶³

In an earlier issue¹⁶⁴, this column reported on the new Belgian Law on Safety at Football Matches, which entered into effect in February 1999. Questioned in the Belgian Parliament, the relevant Minister has been giving details of the various measures taken and data collected in application of this new legislation. Thus Minister of the Interior Antoine Duquesne revealed that thus far, 43 persons had been issued with a court order prohibiting access to football grounds, whereas 324 spectators had received administrative stadium bans.

It was also revealed that in Belgium, 2,395 hard-risk fans were known to the police authorities, the most notorious breeding grounds for these anti-social elements being FC Antwerp, Club Brugge, AA Ghent, Standard Liège and Germinal Beerschot.

British athletes face deportation from Australia after outstaying their welcome¹⁶⁵

In January 2001, Australian immigration officials issued warnings to eight Britons and 100 other Olympic and Paralympic team members who have exceeded their visas that they must return home or face deportation. A total of 108 people from 61 countries, most of them officials and coaches, illegally remained in Australia after the Games held last year.

The Immigration Department had received 38 applications for refugee status from Olympic and Paralympic visitors, but had not reached any decisions yet.

Report sets out radical plan to tackle English hooliganism¹⁶⁶

In late December 2000, the Home Office published a report calling for a transformation in the breadth of support for English football, so that women, children and minorities are no longer deterred from attending. Part of this transformation is a new plan to tackle the "yob culture" at the heart of English hooliganism by encouraging the break-up of the England supporters' club, which it alleges to be infested by young, white male hooligans determined to display offensive and distorted perceptions of patriotism.

In addition, the report, compiled by a 26-strong group chaired by Home Office minister Lord Bassam, suggests that tickets for England matches away from home should be diverted away from young, white hooligans, and proposes that uniformed, accredited stewards should travel abroad with fans in

order to liaise with the local population and police. Such stewards would be drawn from a pool of existing stewards, and would have powers to intervene both inside and outside stadia.

In addition, a new England Members Club would require the existing 27,000 members to be vetted anew. Clear criteria for dismissal and non-admission would include past criminal convictions.

(On the “anti-racist code” which official England supporters will be required to sign, see under Section 14 (Human Rights) below, p. 61)

Australian visa refusal causes cancellation of rugby tournament¹⁶⁷

In January 2001, the Australian Government refused to issue visas to the Fijian team due to participate in a Rugby Sevens tournament in Brisbane. This caused the abandonment of the entire tournament.

The ongoing Wembley saga - an update (UK)

General developments

That all was not well with the “New Wembley Project” was already quite apparent from the various developments and reactions described on previous issue of this column¹⁶⁸. Since then, matters have only gone from bad to worse in what is rapidly becoming a farce capable of challenging the talents of Brian Rix at the height of his powers.

It will be recalled that the year 2000 ended with a general agreement to return to the drawing board following the failure of previous efforts to activate the project. In early January, Sir Rodney Walker, Chairman of the Wembley National Stadium Ltd Company, announced that he was willing to halve the \$410 million loan from City banks which had been originally sought for the building of the new Wembley stadium, in an attempt to stimulate financial interest in the project¹⁶⁹. At that time, it was thought that Walker was still interested in the inclusion of athletics in the project, which would have meant an extra injection of cash from National Lottery money.

Then in mid-January, it emerged that a completion date would be put back a further six months since it became clear that, contrary to earlier plans, an athletics track was unlikely to form part of the development¹⁷⁰. Walker, expressed his fears that the target date of autumn 2004 could slip back even further, and that he could not guarantee that the stadium would be completed by the summer of 2005 for the World Athletics Championships. Architects had said that an athletics track could be included within the new Wembley, but that more land would be required. This had prompted Culture Secretary Chris Smith to state that it was highly unlikely that Wembley could accommodate athletics and stage the World Championships.

Attention now focused on the possibility of building two stadia within a short distance of each other. In fact a few days later, Walker made a unilateral decision to site soccer at Wembley and athletics at Picketts Lock in the Lee Valley Regional Park, very close to the Wembley site¹⁷¹. This will have a capacity of 43,000, and preparatory work on the project had moved quietly ahead since it had been named in March 2000 as a recipient of Lottery funds. A design team has been appointed, and a planning application is expected in the course of May 2001. In addition to a warm-up track located outside the stadium which will be for communal use after the World Championships, there will be a 200m indoor running track with spectator accommodation, outside throwing circles and cages, as well as providing headquarters for one of the UK Sports Institute’s high performance centres.

Then on 1/2/2001, a new six-month delay was announced at a press conference held by Walker and Adam Crozier, the FA Chief Executive¹⁷². This means that the venue will only just be completed in time for the 2005 FA Cup Final, and that this season’s Cup Final could have been played at Wembley after all, rather than in Cardiff. Although both were reluctant to go into details, it was understood that Walker had not succeeded in making significant reductions in the cost of the project. The plans to include a hotel and office block surrounding the stadium, in the image of Chelsea Village, remained. Although Walker undertook to “interrogate” all the relevant costs, savings were not thought to be a likely proposition.

Walker's strategy appeared to be to make sure that the FA should make a greater "up-front" commitment. The latter had already pledged £10 million and there could be a guaranteed extra £20 million per year from them. Walker also had to fight off a bid by some of the members of the Wembley Board not to repay the £20 million of National Lottery money which is due to Sport England as a result of the decision not to include an athletics track. Some had thought that if that amount could be saved, this could be crucial to the financial health of the Wembley project.

The Wembley Project Company and the FA were now unlikely to address the City anew for funds until April 2001, which meant that the bulldozers would remain inactive until the summer.

Watch this space for further twists in this already protracted saga.

The Ken Bates affair

In mid-December 2000, the FA decided to assume day-to-day control of the Wembley project after the banks had reported that the funding requirement as it stood then was not sustainable¹⁷³. This was the prelude to the dismissal of Ken Bates as Chairman of the project, following criticism of his handling of the project. In March 2001, he was called upon to give evidence to the Parliamentary Select Committee for Culture, Media and Sport, at which he made various controversial comments on the circumstances surrounding his departure¹⁷⁴.

In the first place, Bates told the Committee that from as far back as 1997, he had invariably held the view that the new stadium should not have been sited at Wembley, but in Manchester or Birmingham - with a preference for the former. In fact, Bates's successor Sir Rodney Walker, also giving evidence, similarly expressed doubts about the suitability of Wembley - his preferred venue was Birmingham. Bates also made sweeping criticisms of the FA staff in Soho Square in connection with the project.

However, the prime target for his criticism was Sports Minister Kate Hoey, informing MPs that her constant interference with the project, as well as her insistence that athletics be part of it, had delayed the rebuilding of Wembley by 19 months and increased costs by £30 million. According to Bates, she had also been one of the main reasons why the Wembley Project company had failed to raise the £410 million required to finance the plan.

Bates attributed this ministerial attitude to the Government not being interested in a London Olympic Games because of the potential cost of the infrastructural improvement this would require. However, Simon Clegge, Chief Executive of the British Olympic Association, was quick to defend the Minister, stating that she had been supportive in all his meetings with her since her appointment in July 1999, and most recently when the BOA had submitted a feasibility study on the way ahead¹⁷⁵.

The Chelsea Chairman also informed the Committee that Ms. Hoey had ceaselessly criticised the project and refused to attend meetings over issues such as the manner in which athletics could be included by building a platform capable of accommodating a track. Bates denied he was responsible for the failure of the project on the grounds that his

"biggest mistake was listening to the Minister and her advisers."

As a result of the criticisms made by Bates of the FA and its staff, he was summoned by a delegation from the FA management board to explain his observations¹⁷⁶. At the time of going to press, it was unclear whether this would mean that Bates would be ousted from the Board, with the Chelsea chairman making all manner of threats of legal action should this course of action be adopted.

Implications of the fiasco

The fall-out from this continuous chapter of accidents have been many and varied, the only factor linking them being the negative.

First of all, all the signs are that this affair has put paid once and for all to any early prospect of staging the Olympic Games, at least if the comments by leading members of the International Olympic Committee (IOC) are anything to go by. Thus IOC member Alex Gilady (Israel), speaking at its

Executive Board meeting in Dakar in early February 2001, required little by way of clarification where he stated that, for Britain to submit a bid,

*"I think 2012 is already too late and Britain may have missed the boat there. Maybe Britain should concentrate on 2016 and get it right. The trick in getting the Olympics is to develop a plan whereby you use the Olympic bid to solve your transport and infrastructure problems, not the other way round. Britain seems to be going about it completely the wrong way. This concentration on Wembley is not helping Britain convince the world it is ready for the Olympics. What you need to stage the Games successfully, as Sydney showed, is a vision, a strategic plan to fulfil the vision and the right people to deliver the plan. I do not see any of these conditions being met in Britain."*¹⁷⁷

This was not the view of an isolated member, but seems to have reflected the opinion held by most members. Francis Nyangweso, one of the more prominent members, was even more explicit than Gilady where he commented that

*"Britain seems to be all talk, talk, talk and no action."*¹⁷⁸

The planned "athletics Wembley" at Picketts Lock (see above) seemed to attract even more criticism from the assembled members.

The politicians too are becoming aware of the damaging impact of this sorry saga, not only on future Olympic bids, but more generally on the country's reputation. Thus former Sports Minister Tony Banks admitted, in March 2001, that the New Wembley disaster had damaged both the country and the Government¹⁷⁹. Giving evidence to the Select Committee on Culture, Media and Sport, the Newham MP also entertained little optimism for the Picketts Lock project, although he professed a large amount of good will towards it. He nevertheless continued to believe that Wembley should host the 2005 World Athletics Championships.

As for the financial implications, it is obviously too early as yet to place a total figure on these. Writing in the *Sunday Telegraph*, commentator Owen Slot has attempted to draw up an interim balance sheet¹⁸⁰. He considers that the amount of money wasted by official indecision will probably prove to be in excess of £2 million, but if all the wasted effort and manhours spent during the past two years is taken into account, the total bill will amount to a great deal more.

Sports Minister establishes working party on safety standards in sport¹⁸¹

UK Sports Minister Kate Hoey may have been the butt of criticism on account of the Wembley fiasco (see above) and the controversy on whether the terraces should return to football (see below, p.42). However, she has taken a number of initiatives which can only be for the general benefit of the sporting world. One such initiative is to set up a powerful working party of experts aimed at laying down, across all sports and at all levels of competition, proper standards for the prevention and treatment of injury in sport.

The working party will be chaired by Sir Oliver Popplewell, the recently retired High Court judge who also serves on the Court of Arbitration of Sport and earlier chaired the key inquiry into the crowd safety and control of sports grounds. Other members will be David Oxley, who chairs the Central Council for Physical Recreation, Dr. Stephanie Cook, general practitioner and Olympic gold medallist at the 2000 Games, Dr. Nick Webborn, medical adviser to the National Sports Institute, Professor Donald McLeod, Vice-President of the Royal College of Surgeons in Edinburgh, Karen Hambley, sports medicine co-ordinator for the UK Sports Institute, and Peter Hamlyn, consultant neurosurgeon and founder of the British Brain and Spine Foundation.

Public measures countering foot-and-mouth disease affect sporting fixtures (UK)

General

It would be insensitive to bewail the recent outbreak of foot-and-mouth disease in terms of the adverse effects it has produced on sporting activity, given the momentous implications of this plague

for farmers and hoteliers - and the animals themselves! It is nevertheless a fact that many sporting fixtures have been badly affected by the public measures adopted in order to attempt to bring the disease under control.

On 28 February, Sports Minister Kate Hoey issued a general statement on the manner in which sports should react to the crisis, saying

*"Sport is prepared to play its part and everyone else is taking a very responsible attitude. Governing bodies of all sports which might be affected are in close contact with the authorities."*¹⁸²

In so doing, however, the Minister appeared to be placing the onus very firmly on sport's governing bodies, an attitude which was not without its critics (see below).

Horse-related sports

Because of the animal element involved, the first obvious sporting victim of these measures has been racing. Its first victim came just a few days after the first symptoms of the disease were established in the North-East of the country, causing the abandonment of the race meeting at Newcastle scheduled for 26 February¹⁸³. In addition, it was decided that at all racecourse yards, disinfected straw was to be used to prevent the disease from spreading.

Then on 27 February, following a meeting with the Ministry of Agriculture, the British Horseracing Board, racing's governing body, and the Jockey Club, its legislators, suspended all meetings for a period of seven days¹⁸⁴, although all parties were keen to stress that horses posed no serious risk of spreading the virus. A week later, on 7 March, the ban was lifted, but the famous Cheltenham Festival was postponed for at least one month¹⁸⁵, after the authorities had discovered that sheep had been grazing on the course within the previous 28 days. The reason for this was that the Ministry of Agriculture had changed the guidelines on grazing from 14 to 28 days¹⁸⁶. It was initially hoped to restage the event after Easter, starting on 17 April, but even this rescheduled date was thrown into doubt following a new outbreak of the disease at nearby Sandhurst, leaving the Cheltenham track perilously close to the Ministry of Agriculture exclusion zone¹⁸⁷.

The resumption of racing was not without its problems. Shortly after the ban was lifted, security had to be increased at Plumpton when racecourse officials received threatening telephone calls from people furious that the meeting was to go ahead¹⁸⁸. Local police investigated at least one call, and assisted staff in devising extra precautions amid fears that protests against the resumption of meetings could turn violent. Pressure continued to build on the British Horseracing Board to show greater responsibility and leadership by reintroducing the ban at least in some areas, but to no avail. In addition, some people expressed criticism of the Government for not taking a more active part in this matter rather than leaving the racing industry authorities, with an obvious personal interest at stake, to take all the major decisions in this regard¹⁸⁹.

However, on 20 March the Jockey Club's Point-to-Point Liaison Committee cancelled all planned meetings for the remainder of the season¹⁹⁰, and the Badminton horse trials, scheduled to take place in early May, were abandoned because the surrounding land was grazed by many sheep and deer¹⁹¹.

One of the reasons behind the domestic pressure for more stringent action, referred to above, was the fact that in other countries, more radical measures had been adopted. In Ireland, all racing was indefinitely abandoned and was still banned at the time of writing. In addition, the Irish Racehorse Trainers Association announced that under no circumstances should Irish-trained horses be sent to

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited.

Contributions should be supplied on disk (Mac or PC) and saved as ASCII format.

Disk should also be accompanied by a hard copy of the article.

Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

Articles should be forwarded to

R. Farrell, Hon. Secretary,

British Association for Sport and Law,

The Manchester Metropolitan University, School of Law,

Hathersage Road, Manchester M13 0JA.

race in the UK¹⁹². Any hopes of an early resumption of racing had been thrown into serious doubt by the first confirmed case of foot-and-mouth disease in the Republic on 22 March¹⁹³.

In France, too, far-reaching measures were taken. The first racing meeting to be abandoned was at Maisons-Lafitte on 5 March, following a suspected outbreak of the disease in the area. This was followed by a 15-day ban on all racing¹⁹⁴. In Australia, the Government announced a suspension of the importation of all horses from the United Kingdom for an indefinite period¹⁹⁵.

At the time of going to press, ten of Britain's 59 racecourses found themselves within the boundaries of an exclusion zone, and more than 150 meetings had been lost because of the disease¹⁹⁶.

Another sport involving horses, ie eventing, also fell victim to the virus¹⁹⁷. In mid-March, British Eventing, the body regulating the sport, cancelled all meetings until 16 April. Those involved in the sport were thought to be extremely annoyed that show jumping events were continuing to go ahead despite the risk posed by the transporting of horses. The British Show Jumping Association had in fact advised members not to stage events, but admitted that, despite the cancellation of the Leicester County Show in May, smaller clubs had continued to go ahead with local shows.

Other sports

The first rugby victim of the disease was the Six Nations Championship match between Wales and Ireland on 3 March¹⁹⁸. A few days later, Ireland cancelled its fixtures against England and Scotland, throwing the entire championship into disarray¹⁹⁹. The Ireland v. England match was rescheduled for 5 May, although there was some uncertainty about the venue, with Rome being suggested as a possibility²⁰⁰. Then on 1 April, it was decided to postpone all Ireland's remaining fixtures, including the England game beyond the end of the season, thus leaving the Championship undecided²⁰¹.

Athletics has also been affected. Thus in early March, it was announced that Ireland had lost the staging of the World Cross-country Championships and the event switched to Brussels²⁰². The championships had originally been scheduled to take place on the Leopardstown racecourse. This cancellation is expected to cost the Irish Athletics Association and the city over £3 million.

In addition, the British Motor Sports Association suspended all events using public highways as part of the competition, as well as all events which take place on or near agricultural land²⁰³. The Rally of Wales, which had been scheduled to start in Wrexham on 10 March, was delayed until the crisis had been brought under control. Other events which were likely to be disrupted were trials, autocross, rallycross and off-road events.

Finally, the British Canoeing Union announced that they were cancelling all events and competitions until such time as the epidemic was over, and the British Open Beach Angling Competition, due to be held on the east coast of Yorkshire the first weekend of March, was also abandoned²⁰⁴.

Britain needs an Olympics Minister, claims Parliamentary Committee²⁰⁵

No British Government should put its weight behind a bid for the Olympic Games to be held in London without appointing a top-ranking Minister prepared to take full political and financial responsibility. This is the conclusion reached by the all-party House of Commons Committee on Culture, Media and Sport following the failure of bids for three Olympics and for the 2006 Soccer World Cup.

The appointment of such a Minister would constitute an unusual event in the Olympic world. It is true that Australia appointed its Transport Minister to a similar role for the Sydney Games, but he was not a national politician and was only appointed in this capacity after Sydney had been awarded the Games.

One of the reasons why the Committee recommends a Ministerial appointment is that a Minister would have sufficient seniority to be accountable for budgetary management and have direct access to the Prime Minister. That would put this role outside the brief of the Minister of Sport.

A report drawn up by the same Committee on the progress made in organising the Commonwealth

Games in Manchester next year, after having travelled to the host city to interview the organisers of the event, seems to underline this point²⁰⁶. The report expressed concern that, with 500 days to go, the largest sporting event to be staged in Britain since the 1966 (football) World Cup was still “almost invisible” outside the host city.

It recommended that merchandising opportunities be put in place as a matter of priority, and called upon the Prime Minister to prove his enthusiasm for the Games by providing the organisers with more funds. Manchester City Council has underwritten the event and thus far raised \$41 million towards the building of new stadia and other facilities. However, the running costs will be \$62 million, and thus far approximately £32 million has been raised by way of sponsorship money. Earlier, Ian McCartney MP, the “Commonwealth Games Minister”, had indicated that the Government would not look favourably on any request for funding.

Making a stand - return to football terraces ruled out by Chris Smith

Just before the year ended, Kate Hoey, the Sports Minister, had caused controversy by advocating a return to standing areas at football matches - a feature of British grounds which disappeared in the wake of the Taylor Report (itself prompted by the Hillsborough disaster). Her observations went against Government policy and angered soccer officials, fellow politicians and relatives of the Hillsborough disaster victims. She suggested that British grounds should adopt techniques attempted in Germany, and commissioned a report on the subject from the Football Licensing Authority (FLA), the Government-appointed body which monitors the safety of English football grounds²⁰⁷.

FLA officials duly visited one of the German grounds in question, to wit the Volkspark in Hamburg, where large standing areas are capable of being converted to seating, with fans being allowed to stand during domestic League games but being required to sit down during European matches. However, the report found a totally different fan culture in Germany compared to England, which minimised the risk of accidents in standing areas. There was no last-minute rush close to the kick-off by fans attempting to gain entry. In addition, rival supporters mixed without any of the hostile chanting, segregation or drunken behaviour which was such an unfortunate feature at English matches.

The report therefore concluded that similar standing areas would not be safe in England. In addition, in the course of their visit to Hamburg, officials encountered serious congestion with spectators standing three-to-four-deep in gangways.

It was mainly on the basis of this report that Chris Smith, the Secretary of State for Culture, Media and Sport, ruled out the reintroduction of standing areas at Premiership matches. He said

*“The Government does not think that German stadiums (sic) are unsafe. However, for good historical reasons, UK grounds have the highest standard of spectator safety in the world. Having considered the Authority’s advice, the Government has concluded that safety must remain the primary consideration and remains convinced that current arrangements are the best.”*²⁰⁸

However, British fans’ refusal to comply with current legislation continues to cause problems. Thus in mid-March 2001, at least five fans were ejected from Old Trafford for standing in defiance of the threat issued by the local council to close sections of the Manchester United ground for the European Champions League quarter final fixture with Bayern Munich²⁰⁹.

US Constitution First Amendment fails to make baseball players union exempt from tort liability. US court decision²¹⁰

The First Amendment to the US Constitution contains a so-called Petition Clause. This protects petitioners - i.e. those who make “concerted effort(s) to influence public officials” from criminal and civil liability. In recent times, the courts have extended the protection afforded by the Petition Clause to activities which, although not in themselves petitions to the Government, nevertheless are similar in their effect to petitioning. However, in the case under review, the Court controversially went against this interpretation and found that the Petition Clause only protects actual petitioners, i.e. lobbyists or litigants who directly address the Government, and declined to extend this protection to

a party who had issued the threat of a suit. The Court based its decision on a definite denial that the Clause is capable of protecting non-petitioners.

Cardtoons is a company which produces parody trading cards. It had made a contract with Champs Marketing Inc. for the printing of cards featuring caricatures of major league baseball players. The Major League Baseball Players Association (MLBPA) wrote to both Cardtoons and Champs, claiming that production of these cards infringed its publicity rights, and threatened to sue if the two firms failed to discontinue this activity. Whereas Champs complied with these instructions, Cardtoons did not; moreover, it brought a court action against the MLBPA. Having obtained a declaratory judgment to the effect that its cards did not infringe MLBPA's rights, Cardtoons sued for damages from the latter for tortious interference with the Champs contract, *prima facie* tort, libel and negligence.

The relevant district court granted summary judgment to the MLBPA. It held that the so-called Noerr-Pennington doctrine, which "provides immunity from antitrust liability for anticompetitive harms that flow from exercising the right to petition" protected the MLBPA against tort liability. On appeal, this ruling was confirmed by the Tenth Circuit, whose panel was, however, divided. The Tenth Circuit granted a motion for a rehearing "en banc" "to determine whether threats of litigation between purely private parties in a non-antitrust setting are immunized from liability under the *Noerr-Pennington* doctrine or under the right to petition clause of the First Amendment."

The "en banc" court overturned the ruling. Judge Kelly, representing the majority view, held that the *Noerr-Pennington* doctrine did not apply beyond the sphere of antitrust law. In the *Noerr-Pennington* anti-trust cases, the Supreme Court had based immunity not only on the First Amendment, but also on the Sherman (antitrust) Act. The ruling appealed against had applied the doctrine outside antitrust law only "by analogy", holding that the defendants were protected against liability only on the basis of the right to petition. The appeal circuits had followed suit, eliminating the Sherman Act rationale outside antitrust law and focusing solely on the petition clause.

On the subject of the petition clause, Judge Kelly refused to acknowledge that the Clause provided the MLBPA with immunity against tort liability for its threats of suit made before the litigation commenced. Relying on what he called the "plain language of the First Amendment", which "protects only those petitions which are made to the Government", he ruled that the defendant's threatening letters were not petitions as they had never been sent to the Government, and "did not ask the government for any response or redress of grievances". Although he conceded the "many persuasive policy arguments in favor of granting immunity to private threats of litigation", he insisted that, where there is no "petition addressed to the government", there can be no Petition Clause protection.

Judges Lucero, Brorby and Briscoe dissented.

Minimum size requirement for skiing schools held unconstitutional by Austrian Constitutional Court²¹¹

As befits a country for which winter sports constitute such an important part of the national psyche and culture - and purse - Austria has an extensive amount of legislation regulating the sport of skiing in all its various aspects. This includes the licensing of skiing schools, for which the most important statute is the 1989 Law on Skiing and Snowboard Schools. Article 8(5) thereof contains a restriction on the licensing of such schools, and states that an unlimited skiing school licence may not be issued in a municipality which already has one or more such schools, and where it could be expected that the issuing of such a licence could seriously endanger the standards inherent in a well-ordered system of skiing schools. This could be the case where (a) the security and undisturbed provision of skiing instruction could not be guaranteed because of specific local conditions, or where

*"(b) it would be impossible to provide skiing instruction in the additional skiing school on a minimum scale which is necessary for the purpose of providing the entire range of skiing instruction facilities to adequate quality standards, taking into account the minimum scale which exists among the existing skiing schools."*²¹²

This minimum scale requirement was held to be unconstitutional by the Austrian Constitutional Court. The Regional Government of Salzburg, defending, had argued that this minimum size

requirement merely amounted to assessing whether there was sufficient demand for skiing instruction services in a given locality to enable the new skiing school to subsist on the minimum scale required.

For the Constitutional Court, however, this argument merely confirmed the unconstitutional nature of the provisions in question. On the basis of a considerable amount of case law on this subject, the Court held that this provision entails that the enterprise risk which is involved in operating a skiing school which meets the minimum scale requirement is not a matter of assessment by the applicant for the school licence, but a matter of forecasting by the administrative authorities, which in certain circumstances could lead to a refusal to issue the unlimited ski school licence applied for. In addition, by making a decision on this matter dependent on the levels of services supplied by existing skiing schools, this provision amounted to unlawful protection against competition.

As a result, this provision infringed the constitutionally guaranteed principle of objective treatment as guaranteed by Article 7 of the Constitution, and that of freedom of enterprise as laid down on the Law on Fundamental Freedoms.

6. ADMINISTRATIVE LAW

Administrative costs of processing grant applications are not part of project support. German administrative court decision²¹³

In Bavaria (Germany), one of the tasks of the *Landessportverband* (State Sports Authority) is to provide financial assistance to various projects operated by its member associations aimed at promoting sporting participation by the disabled. In the case under review, the Bavarian Association had deducted the costs of processing the application for support from the amount of financial assistance awarded. This was challenged before the local Administrative Court, and found its way to the Bavarian Administrative Court of Appeal (*Bayerischer Verwaltungsgerichtshof*).

The Court ruled that financial assistance to projects did not in principle include the administrative costs incurred by the Sports Association for the processing of grant applications. Therefore, although it is in principle unlawful for a *Land* (i.e. regional) authority to deduct administrative costs from financial amounts awarded to its member associations, it is not detrimental to the financial support offered where this deduction merely assumes the form of an accounting procedure by which the authority in question sets off the relevant administrative costs, whilst the member associations in question make up the deduction and allocate the full amount of financial support pledged.

A sports ground does not constitute a “coherent settlement” for the purpose of German planning law. German court decision²¹⁴

When the plaintiffs in the case under review sought planning permission for the construction of a house on an unbuilt plot, this was refused on the grounds that the plot in question constituted an *Außenbereich* (excluded area) for which planning permission is only given in exceptional circumstances. The area was, however, surrounded by areas which were covered by a development plan (*Bebauungsplan*).

The plaintiffs tried to argue that their plot could be slotted into a “coherent settlement” within the meaning of Article 34(1) of the Planning Code (*Baugesetzbuch*) (for which the planning restrictions are less stringent and decisions in this regard are made purely on the basis of the purpose of the area in question). They argued that the coherent settlement in question was one of the surrounding sports grounds. They pleaded that what gave this area the required coherence with the house which they were seeking to build was the fact that the sports ground also had some secondary buildings normally associated with sports grounds, as well as floodlight installations. The Administrative Court of Appeal of Niedersachsen dismissed this claim, as a result of which the matter was taken to the Federal (i.e. Supreme) Administrative Court (*Bundesverwaltungsgericht*).

The Supreme Court also dismissed this argument. It recalled that in a previous case, it had defined the term “coherent settlement” as a complex of buildings within a municipality which in the light of

the number of buildings erected on it has acquired a certain weight and is the expression of an organic settlement structure²¹⁵. There was no way in which the secondary buildings located on the sports ground in question could meet this criterion.

The Supreme Court accordingly confirmed the appeal court's ruling.

Passport restrictions and other measures taken against known hooligans during Euro 2000 were justified, rules German regional appeal court²¹⁶

Soccer fans will recall that, during the run-up to the Euro 2000 Championships, the German authorities adopted a series of measures against a large number of known and registered football hooligans. One of the latter decided to challenge these and other anti-hooligan measures before the administrative courts, and the matter landed before the Administrative Appeal Court of the *Land* Baden-Württemberg.

As to the measures which restricted the countries for which the passports and identity cards of those involved could be used, and thus excluded Belgium and Holland during the championships, these were taken pursuant to Articles 7 and 8 of the Law on Passports. The Court considered that such measures were justified where the passport holders were capable of endangering the internal or external security, or any other interests, of the Federal Republic. It acknowledged that such restrictions adversely affect freedom of action, which is guaranteed by the German Basic Law, but ruled that the measures in question did not constitute a disproportionate restriction of these rights.

The Court also held that the extent to which a German national endangers the interests is exclusively a matter to be determined by the courts. There was a good deal of case law to the effect that a finding that these interests are endangered must be based on facts which are not identical to, but largely similar to, the other two requirements, stated in the relevant legislation, i.e. the jeopardising of the external or internal security of the country. Actions which are capable of damaging the reputation of Germany abroad, such as those traditionally engaged in by football hooligans, fell within this category. The applicant belonged to that group of persons.

The applicant had also objected to the official measure obliging him to report to the local police station at certain times corresponding to match dates. Such measures were based on general policing powers pursuant to Article 1 of the Law on the Police (*Polizeigesetz*), which could not be limited by the rules on passport and identity card restrictions to be found in the relevant legislation. The duty to report to the police was a measure seeking to prevent the person affected from assaulting persons and damaging objects. Such measures therefore serve the purpose of avoiding a public order offence, and this was not covered by Article 7 of the Law on Passports, under which passport restrictions are only allowed on the basis of certain specified offences.

Health and fitness club not eligible for entertainment licence. Scottish court decision²¹⁷

In the case under review, the claimant, a health and fitness club, appealed against the decision of the Aberdeen Licensing Board to refuse to issue them with an entertainment licence. The health club's owners argued that the leisure, recreation, health and beauty facilities which they intended to provide from their premises amounted to "entertainment" in the widely accepted sense, which could be supported by the existence of similar premises in Edinburgh and Falkirk which had been issued with licences. The question whether an activity constituted "entertainment" within a statutory provision of national application could not vary according to local conditions. The licensing board, for its part, argued that it was within their discretion how to define the term entertainment.

The appeal was dismissed. The Sheriff Court held that where no definition of a particular word existed within a statute, words should be given their ordinary meaning. In current English, the facilities of the plaintiff could be described as leisure, recreation, health and beauty facilities, but not as entertainment. In the absence of any statutory definition of the term "public entertainment", it was open to the licensing authority to decide whether the plaintiff's premises could be described as such, and the Court was not persuaded that no reasonable board could have arrived at the conclusion reached by the defendant.

High Court refuses registration of sports and recreation grounds as town green (UK)²¹⁸

In this case, an application had been made for the judicial review of a decision by the licensing committee of the Sunderland City Council not to register a piece of land historically used for sport and recreation by local residents as a town green pursuant to s. 13 of the Commons Registration Act 1965. The City Council had concluded that the use made by the residents of the land had not been as of right but had rather been enjoyed by implied licence from the landowner.

The applicant claimed that (a) an implied licence was inadequate for the purpose of defeating a claim that user was as of right - otherwise an unscrupulous landowner could always allege that he had given an implied permission - and (b) there had to be an intention on the part of the landowner to allow the use together with an expression of that intention as opposed to mere toleration of use.

The High Court dismissed the application. It held (a) that an implied licence was recognised by law, and it followed that a licence or permission inferred from the circumstances of the case could be sufficient to defeat a claim of user as of right, and (b) that where express permission was lacking, the relevant test for user of right was whether it was reasonable to appreciate that the user had the permission of the landowner, or only his acquiescence, taking into account the history and status of the land together with any provision of facilities by the owner. To establish permission would normally require overt acts or evident circumstances, even if the users were oblivious to them.

7. PROPERTY LAW

LAND LAW

Oxford United FC restrictive covenant ruling confirmed by Court of Appeal (UK)²¹⁹

It will be recalled that the previous issue of this column²²⁰ featured a case in which Oxford United FC were sued in their efforts to seek a new stadium, following the closure of the old Manor Ground as a result of the Taylor Report. The site in question had been originally been acquired from the Oxford City Council under a conveyance containing certain restrictive covenants. The first of these (Section 2) was expressed to bind successors in title. The second, by contrast (Section 3(a)) was expressed as a covenant by the council, as vendors, that for the benefit of the land conveyed, the vendors would not at any time allow any land or building to be erected within a half mile radius of the land sold and owned by the vendor, to be used as a brewery, club or licensed premises involving the production, distribution or selling of alcoholic beverages.

Some of the land in question was subsequently resold to a consortium which included Oxford United, for the purpose of building not only a football stadium, but also a hotel and a leisure complex. All three projects were to involve the selling of alcoholic drink. However, the land not sold contained the site of a pub, whose owner became acutely aware of the damaging competition which this new development would represent for his licensed premises. He therefore sued on the basis that the proposals infringed the restrictive covenant contained in Section 3(a) mentioned above, on the basis that Section 79 of the Law of Property Act (LPA) deemed any covenant to be made by the covenantor on behalf of himself, his successors in title, and those deriving title under him or them. The High Court awarded the action to the defendants. The claimants appealed.

The Court of Appeal upheld the High Court decision. It held that, reading the covenant contained in Clause 3(a) in its context, it was intended to, and did, relate only to the use which the council was permitted to make of it, rather than to use by any successor in title. Section 79 of the LPA could not be relied upon by the plaintiff, since that section does not apply where a contrary intention has been expressed in the agreement in question. In this case, the contrary intention was evident from the contrast between the wording of Clause 2 and that of Clause 3(a) of the 1962 conveyance. That contrast was too clear and immediate to be ignored. To read in Clause 3(a) words which were not there, but which appeared in Clause 2, would be inconsistent with the purport of the instrument. It would modify the covenant in Clause 3(a) from that which was intended to something quite different.

INTELLECTUAL PROPERTY LAW

Owners of domain name sued by US National Football League²²¹

In January 2001, the National Football League (NFL) of the US initiated trademark infringement proceedings against real estate broker Melissa Yardley and the Provider Technologies internet company. The subject-matter of the dispute is the website bearing the domain name "superbowlhomes.com", operated by the defendants in order to rent accommodation to those visiting the Tampa Bay area for the Superbowl.

The defendants maintain that the NFL was aware of the site as early last summer, and had at no time lodged any complaint. In fact, they claim that the complaints only came when the NFL concluded a deal with internet service provider E-Bay to promote similar property services. The dispute will revolve round the issue of the defendants' intention and the likely confusion which the website name could cause.

The present author hopes to report on the outcome of this case in the next issue.

Premier League threat to close websites infringing their intellectual property rights (UK)²²²

The English soccer Premiership have issued a threat to close down all unofficial websites unless they pay a fee for the use of their fixtures. Under current arrangements, all Premiership fixtures are copyright of the Premier League. The latter are determined to compel the "fanzine" sites to pay a licence fee believed to be as much as \$250 plus VAT.

However, to track down each of the 10,000 unofficial websites devoted to English Premiership clubs, monitor their daily content and extract payment from them appears to be a somewhat daunting task. The majority of these websites are not profit-making ventures and are designed and operated by enthusiasts to provide a platform for other fans.

IOC successfully objects to inclusion of word "OLYMPIC" in trade mark²²³

When French company attempted to register a word-and-device sign entitled "Family Club Belmont Olympic" in relation to business management services and the distribution, transport and storage of goods, the application was opposed by the International Olympic Committee (IOC), on the basis of the latter's prior international registration of the word OLYMPIC and the registration in France of the trade name COMITE INTERNATIONAL OLYMPIQUE.

The Office for Harmonisation in the Internal Market rejected Belmont's application for all goods and services. Given the high profile of IOC's mark in France, the applicant's use, without due cause, of a mark which included the sign OLYMPIC was likely to take unfair advantage of, or be detrimental to, the distinctiveness and reputation of the IOC's mark, even though the applicant's goods and services were different from those for which the IOC had gained its reputation.

Disney American football broadcasts subject of patent infringement proceedings²²⁴

In January 2001, ACTV, a firm based in New York, initiated patent infringement proceedings against the Disney corporation and its ESPN and SBC subsidiaries, claiming that the "enhanced TV system" used on APC's "Monday Night Football" and ESPN's "Sunday Night Football" broadcasts infringed

SUBSCRIBERS

Anyone wishing to subscribe to the journal may do so at a cost of £40.00 per annum.

Further details from

Hammicks Bookshops Ltd,

Browells Lane, Feltham, Middlesex TW13 7EE

three patents held by ACTV. More particularly, ACTV is seeking a permanent injunction and an undisclosed sum by way of damages.

The case had not yet been resolved at the time of going to press.

Tussle over image rights could prevent return to international rugby by Diego Dominguez (Italy)²²⁵

One of the many advantages of extending the European Rugby championships to include Italy has been the opportunity for a wider rugby audience to witness the skills of its leading player, fly half Diego Dominguez. At the end of the last season, however, Dominguez announced that he was leaving international rugby. Nevertheless, Italian rugby officials are desperately trying to induce him into returning to the national side.

Although Dominguez has been willing to negotiate, there appears to be an obstacle to his return in the shape of his image rights, which his personal sponsor wishes to retain. This comes down to the question of whether it is the player or the sporting body who owns the commercial rights to a picture of a player in his national kit.

This is an issue which last year was the subject-matter of a dispute between Keith Wood and the Irish Rugby Union. Surprisingly, it is a problem which appears to have arisen amongst rugby players more than amongst footballers. According to David Powell, the Bristol lawyer acting for Wood, some players have formed a company and assigned rights, whereas clubs have concluded deals with sponsors, selling rights which they did not own. He accepts that there is a good case for sharing the monies involved, since it is not only the fame of a player which generates the money, but also the team concept.

Name of the game? Japan and South Korea lock horns on whose name appears first on 2002 World Cup Finals material²²⁶

With barely two weeks to go before tickets for the 2002 Soccer World Cup go on sale, the organisers, Japan and South Korea, are locked in an unseemly dispute on the question of whose name should appear first on all official documents, merchandising and promotional materials. The dispute goes back to 1996, when FIFA, the world governing body of soccer, compelled the two countries to share the tournament after the bitterest of bidding competitions between these two long-standing rivals.

Although no detailed records have been kept of the various negotiations which followed that decision, Japan has insisted that a gentleman's agreement was reached which would allow the order in which the two countries' names appeared to be switched when written in the kanji alphabet (Japanese script) for the domestic market. However, following complaints from South Korea, FIFA prohibited Japan from placing its name first in any form on match tickets. Japan has retaliated by omitting the names of both countries from the 675,000 tickets going on sale in February 2001.

The issue still appeared to be unresolved at the time of writing.

Canadian patent disputes with sporting implications

In recent months, there have occurred a number of intellectual property disputes in Canada in which various sporting organisations have become embroiled.

The first two cases involve the Canadian Olympic Association, which opposed the registration of a trade mark by certain firms. In the proceedings brought against Techniquip Ltd,²²⁷ the latter had applied to register a trade mark comprising a stick figure representation of a man, which was opposed by the Association, relying on a family of stick figure marks adopted as official marks under s. 9(1)(n)(iii) of the Trade-marks Act 1985. The registrar had upheld the opposition on the basis of a straight comparison test, excluding evidence of common use of stick figure marks by the general public in trade, business and other fields.

Techniquip appealed to the Trial Division of the Federal Court, which set aside the Registrar's

decision. The trial judge dismissed the straight comparison test, adopting instead the test of resemblance and imperfect recollection. He held that, as the opponent was relying on an alleged family of marks, it had to establish the use made of its official marks. He also considered that the evidence of the state of the register and marketplace showing common use by many others of pictograms was admissible and extremely relevant when comparing the respective marks. He concluded that the mark whose registration had been applied for was not likely to be mistaken for a mark held by the opponent.

The Association appealed against this ruling before the Federal Court of Appeal, who upheld the challenged decision. The Court held that the trial judge had been correct in his analysis, in his selection of the test to be applied in Section 9(1)(n)(iii) cases and in determining the manner in the way he chose to adopt. Having relied on the concept of a family of official marks, the Association was entitled to advance evidence of the state of the register and the marketplace in order to establish that the applicant's human stick figures were common to many marks owned by others. The Court held that there was judicial authority to support the view that if a mark is common to the trade, it cannot be claimed as a family of marks.

The other case was between the Association and the Logo-Motifs Ltd company²²⁸. The design mark in question was similar to that in the previous case, in that it consisted of three human stick figures holding or embracing each other in a circular pose. The Association opposed registration because its alleged similarity to the family of official trade marks comprising pictograms of stick figures engaged in sporting activities.

The Trade Mark registrar had dismissed the opposition. He held that the test to be applied in a case involving an official mark to be a straight comparison of the marks at issue, apart from marketplace considerations. Evidence brought forward by the applicant of over 35 registrations by others of marks comprising or including stick figures, to show that such marks were commonly adopted, was rejected as irrelevant. Applying the straight comparison test, the Registrar found that the applicant's mark was neither identical to, nor almost the same as, the most relevant of the official marks.

The opponent appealed against this decision, alleging that the Registrar had applied the wrong test for comparing the marks.

The Federal Court Trial Division held that the appeal be dismissed. It ruled that the Registrar had admittedly applied the wrong test in assessing resemblance, since, where a "family of official marks" is relied upon, the correct test is one of first impression and imperfect recollection - citing the ruling in the *Techniquip* decision as authority. Furthermore, the "use" of the family of makers had to be established, the state of the register and marketplace being highly relevant factors in considering whether a party is entitled to claim a family of marks.

Applying the first impression and imperfect recollection test, the Court noted dissimilarities in the stance, appearance and arrangement of the figures in issue and concluded that the applicant's mark did not so nearly resemble the opponent's official mark as to be capable of being mistaken for it.

The second case concerned royalties payable for the public performance of musical works at sporting events²²⁹. In accordance with the Canadian Copyright Act, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) had submitted to the Copyright Board a statement of proposed royalties for the public performance of musical works in 1998, 1999 and 2000. This included Tariff 9, which targets the public performance of musical works at sporting events. In effect, the collective society in question was seeking to have the royalty rates doubled from those which were certified for 1997 for each year from 1998 to 2001. An association representing six major league teams and/or their arenas objected to the tariff. It proposed that the proposed change in rates be evaluated in comparison with rate increases in other tariffs.

The collective society submitted limited evidence, whereas the objector filed no evidence. No attempt was made to rationalise the amount of the tariff among the three levels of sport, ie amateur, professional and major. Since 1992, the tariff for sporting events had been based on the number of tickets for the event, subject to both a minimum and a maximum amount.

The Board held that a tariff should be fixed in accordance with the terms and conditions fixed by the Board. It ruled that Tariff 9 grossly undervalued music in comparison with other tariffs dealing with

similar uses, including the circus tariff. Other tariffs revealed rates 32, 64 and higher times the effective rates of Tariff 9. The maximum 100 per cent increase proposed by the collective society was therefore warranted.

The tariff was fixed as a percentage of ticket prices effective as of the 2001 tariff. The rates proposed by the collective society were divided by the corresponding average ticket prices and a single weighted royalty rate of .05 per cent was fixed and made applicable to all three levels of sport. The minimum fee was abolished, which resulted in certain licensees paying less under the new tariff. 50 per cent of the value of complimentary tickets was included in the rate base.

Unofficial Arsenal merchandise legal, rules High Court (UK)²³⁰

English soccer clubs saw their lucrative market in merchandising under threat after a High Court ruling in which Arsenal FC failed to prevent a market trader from using its name on a replica shirt. More particularly, the leading Premiership club had sought court orders aimed at protecting the rights to its name, the club nickname "The Gunners", and the club crest and cannon emblem. The action had been brought against Matthew Reed, himself an Arsenal supporter, who had used the name and logos on scarves, shorts and hats which he retailed from stalls in the vicinity of Arsenal's home ground Highbury.

Rejecting the allegation by the club that the trader was "passing off" his goods as the genuine article, the judge, Mr. Justice Laddie, upheld Mr. Reed's plea that he was using the marks in question as "badges of allegiance" enabling fans to proclaim their support. In court, Mr. Reed's counsel had maintained that there was an established trade in unofficial football club merchandise, and that supporters were aware of the difference.

The Court did, however, qualify its ruling by stating that Mr. Reed's use of the trademarks as badges of allegiance could still constitute an infringement of the club's rights under EU law. This was an issue which could only be settled by the European Court of Justice. In May, the court will resume the case and decide whether or not to apply for a preliminary ruling from the ECJ. In the meantime, Mr. Reed is allowed to continue to ply his trade.

This column will obviously monitor the follow-up to this case very closely.

That judge again - High Court awards internet action to British Horseracing Board (UK)²³¹

Mr. Justice Laddie, the judge involved in the Arsenal merchandising case described above, appears to be specialising in sports-related tussles in the High Court. In February 2001, he allowed the British Horseracing Board (BHB) to take a crucial step towards a radical overhaul of the way in which racing is to be funded in the future when he decided that bookmakers William Hill must pay for the use of pre-race data.

The judge held that William Hill had infringed the copyright held by the BHB in its database, which costs £4 million annually and takes 80 employees to maintain. The Board used this court action as a test case over the question whether bookmakers operating over the Internet were allowed to avail themselves of this information without disbursing the appropriate copyright fee. This decision will therefore enable the BHB to demand payment from other bookmakers who hitherto have refused to enter into licences with the Board for the use of the data referred to above.

At the time of writing, William Hill were considering whether to appeal against this decision.

WIPO Panel dismisses US NBA complaint against use of domain name "www.knicks.com"²³²

In 1995, the Adirondack Software Corporation (ADC) registered the domain name "www.knicks.com" with registrar Network Solutions Inc. NBA Properties, the merchandising arm of the National Basketball Association, complained to NSI that this name infringed their trademark rights as

represented by four federal registrations of trade marks. Three of these trademarks related to the KNICKS trademark as applied to items of clothing and various types of carrier bags, whereas the fourth related to the KNICKS/basketball/triangle ensemble as a trademark applied to various goods, including printed matter, clothing, toys and sporting articles.

As a result of this complaint, the domain name in question was placed in a "hold status" - meaning that it was to remain unused until the dispute had been settled.

In support of its complaint, NBA Properties maintained that it was the exclusive licensee of the federally registered trademarks. It also pointed to the NBA itself, and its webpage at www.nba.com which provided hyperlinks to the home pages of all 29 NBA teams - including the New York Knicks. In respect of the latter, the NBA claimed that it operated the home page of the New York Knicks at www.nba.com/knicks.

The objection by NBA Properties was based on four grounds:

(a) *NBA Properties had rights in the trademark KNICKS.* The panel ruled that in fact the owner of the KNICKS trademark and service marks relied upon had been shown to be Madison Square Garden LP, and not the complainant. In fact, Madison Square Gardens LP was also identified as the owner of the New York Knicks basketball team, which was the source of the fame associated with the KNICKS marks. The Panel also held that the record made it unclear as to what rights in the trademark were actually held by NBA Properties. Moreover, it was a well established rule that the rights held by exclusive licensees were contract rights *with respect to*, and not *in*, the licensed marks. Although in certain circumstances the contract rights possessed by an exclusive licensee vested in the latter all the powers of an owner of the licensed property, the Panel considered that no such circumstances had been shown to exist here.

(b) *the disputed domain name was identical to a trademark in which it had rights.* The Panel found that there was no evidence that the domain name knicks.com was identical or confusingly similar to the KNICKS trademark for which the complainant was a licensing and merchandising agent

(c) *the domain name was registered and being used in bad faith.* On the available evidence, the Panel found that this was not the case.

The request made by the complainants that the domain name in question be transferred to them was therefore dismissed.

8. COMPETITION LAW

NATIONAL COMPETITION LAW

Should anti-trust law be applied more rigorously to the US college sports authority? Article in US academic journal²³³

Intercollegiate athletics in the US have changed considerably from their "salad days". The original purpose of its governing body, the National Collegiate Athletics Association (NCAA) was to organise sport as an extracurricular activity for students who were motivated primarily by educational considerations. However, the NCAA currently presides over something more in the nature of a multi-million dollar entertainment industry, particularly in view of the popularity of such college sports as American football.

The author contends that, as the regulatory body of this money-spinning venture which organises all aspects of on-field and off-field competition amongst its members, the NCAA appears to be functioning as an economic cartel. The NCAA member colleges are economic competitors who possess monopsony power over the supply of college football and basketball games, and often limit or even prohibit market forces from determining various aspects of economic competition among themselves. They are therefore potentially in breach of US anti-trust legislation.

The author's major complaint is that the US competition regulating authorities have been, and

continue to be, far too reluctant to apply the full weight of the Sherman (anti-trust) Act to the NCAA and its activities. They continue to regard it essentially as a non-profit making body, which is also the guardian of certain traditions, and which in principle does not infringe anti-trust law. This is in spite of the fact that the courts have declared illegal agreements among NCAA colleges which directly fix prices in input or output markets for college sports.

A recent decision in which sportswear manufacturer Adidas unsuccessfully complained about the limits on the size of manufacturers' logos on uniforms and playing equipment highlights, in the author's opinion, the continued unwarranted deference in which the courts continue to hold this venerable institution.

EU COMPETITION LAW

Calls for European Commission investigation into Atlantic League ban²³⁴

For some time now, there has been a considerable malaise amongst the top soccer clubs of smaller European nations, who dominate their domestic Leagues with monotonous regularity for want of adequate competition, which weakens their ability to perform well in the European Champions League and other international club competitions²³⁵. This has led to increasingly vocal demands for a new league competition which would bring together the top representatives of the nations thus affected, and towards the conclusion of last year a concrete plan was put forward for an Atlantic League organised along these lines.

This League would consist of top clubs from Scotland, the Netherlands, Portugal, Belgium, Sweden and Denmark. However, when this plan was put to the UEFA, the European body governing soccer, the latter dismissed it out of hand. This led to calls by Toine Manders, a Dutch Liberal MEP, for the European Commission to launch an investigation under EU competition law, claiming that UEFA is acting as a monopoly by not allowing this plan to go ahead.

This column undertakes to monitor closely any further developments in this regard.

Commissioner Monti sets out his views on EU competition rules and sport in major speech²³⁶

As was announced in the previous issue²³⁷, in February 2001, the European Olympic Committee, together with the International Automobile Federation and leading law firm Herbert Smith, organised a conference on "Governance in Sport". Mario Monti, European Commissioner for Competition, took advantage of the opportunity to deliver a landmark speech setting out the Commission's position on the relationship between sport and EU competition law.

Commissioner Monti commenced by setting out the main objectives and fields of action of EU competition law, adding that there was a recognition at the Commission of the difference between sport and other economic sectors when it comes to applying these rules. He then proceeded to explain the manner in which the Commission contributed towards clarifying the applicable legal framework. In this context, Monti recognised that one of the most frequent criticisms levelled at the Commission was the latter's "piecemeal" approach towards the issue, based on some very specific individual cases. He met this criticism by pointing out not only the range of issues covered by the Commission's action in this regard, but also the coherence of its approach in so doing. The main areas covered were:

- the question whether there should be a single federation for each sport;
- the rules on the ownership of sporting clubs;
- restrictions arising from player transfer rules;
- rules restricting activities of professional athletes or their agents;
- restrictions resulting from the conclusion of sponsorship contracts;
- broadcasting of sports events.

Commissioner Monti focused specifically on the last issue. He expressed the Commission's concern about the manner in which television rights on sporting events could affect the structure of the television market, which carried with it the risk of developing oligopolistic market structures. Here, he elaborated at length on the issues of the collective selling and purchasing of broadcasting rights and the exclusivity granted in respect of these rights. As to the former, he focused on two possibilities for making these collective rights compatible with EU competition policy: either issue a block exemption for these arrangements under Article 81(3) of the Treaty, or consider the possibility of less restrictive models for collective selling.

Finally, the Commissioner stressed the role which the various sporting associations, clubs and athletes can play in improving legal certainty in this area. Here, self-regulation or governance had an important part to play.

Ticket distribution and EU competition policy. Article in international sports law journal²³⁸

One of the areas of investigation not mentioned by Commissioner Monti in the speech mentioned above was ticket distribution policy. Yet this area too has already attracted the interest of the EU Executive.

It would be a mistake to think that, for sporting organisers, entrance tickets to sporting events represent nothing more than the profit to be derived from their face value. They also constitute an opportunity to develop and promote the sport, mainly through the manner in which they are distributed. Whatever method is chosen, however, must take account of the constraints of EU competition law. It is this aspect which Adam Lewis, the author of this paper examines in considerable detail.

Lewis starts by examining the objectives which organisers are seeking to achieve by means of their ticket distribution policies. Apart from purely commercial objectives, they may also wish to take into account the need to develop the sport, which is why tickets can be allocated in such a way as to increase the number of people who may be interested in the sport for the future. In addition, they may wish to reward certain people who show great commitment to the sport, whether as players, officials or supporters. They will also in some cases have spectator safety considerations in mind, such as is the case at football matches where there is a need to segregate supporters. All these considerations may prompt distribution systems which deviate from the commercial norm.

The Commission's two major preoccupations in this field have been (a) to protect businesses operating on downstream markets, and (b) to prevent undue discrimination based on nationality between ticket purchasers. The rules on ticket distribution fall within that awkward intermediate category of sporting rules which are neither purely related to the playing of the game or to the commercial operation of sport. Nevertheless, the Commission's general approach has been that this kind of rule is subject to EU competition rules, accepting that the aims of such rules and arrangements are capable of justifying any restrictions contained in them, as long as they do not go beyond that which is necessary to achieve those objectives. The Commission is also faced with problems of market definition in this area.

The author then proceeds to examine the various methods used by organisers in order to achieve their objectives, and the way in which the Commission has reacted to them. Thus on the policy of allocating tickets in such a way as to reward the people having the greatest involvement in the sport, the Commission has tended to take the view that, as long as there are objective and transparent criteria which distinguish a particular target group from the general public, the organisers are free to favour them by offering them privileged access to tickets.

On the issue of the terms on which organisers supply resellers of tickets aimed at the public at large, a potential problem arises where tickets are to be sold only as part of a package which include other services. The Commission's view here is that resellers are free to combine the sale of tickets with other services, but the organisers cannot compel them to do so.

The overall conclusion by the author is that

"the latest ticketing schemes, in football in particular, have learned from errors of the past. The

direct sale of a proportion of tickets to the public (wherever they are) avoids the possibility of discrimination along national lines, whilst still allowing other tickets to be allocated to national federations for distribution to their nationals with the greatest involvement in the sport. The sale of all tickets and the fair allocation of tickets to matches in the later stages of a tournament is achieved by increasingly imaginative ticket systems. In the context of football, organisers are shying away from themselves appointing any official corporate hospitality or travel operators."

However, the author believes that there remains a need for other sports, with different requirements, to enter into a dialogue with the Commission on the competition law aspects of their distribution policies.

European Commission ends investigation into motor racing²³⁹

Towards the end of January 2001, the European Commission signalled that its lengthy anti-trust investigation into motor racing had drawn to a close when Bernie Ecclestone, the power behind Formula One racing, agreed to slacken his hold on this sport. Following a three-year confrontation over the manner in which international motor racing was being operated, focusing particularly on the thorny question whether the F1 world championship adversely affected competition, the two sides reached a compromise deal.

This compromise will remove the sting from the Commission's concern on the question whether the body governing the sport internationally, i.e. the Fédération Internationale Automobile (FIA), had the power to prevent competition by threatening to withdraw the licences of track owners, teams and drivers. This investigation had been conducted following a complaint lodged four years ago by the German television group ARTV about access to the sport.

Essentially, the compromise deal has consisted in Ecclestone giving up - at least nominally - his role as FIA Vice-President for Promotional Affairs. Thus FIA appears to have satisfied the European Commission that it no longer has a commercial interest in the success of Formula One racing. According to an FIA spokesman, this would remove any possibilities of future conflicts of interest, which was one of the reasons behind the Commission investigation. However, some commentators have openly questioned whether anything fundamental has changed as a result of this move.

In addition, the FIA has undertaken to eliminate any obstacles preventing other motor sports from competing with Formula One racing. Here again, many insiders are somewhat sceptical about the practical effects of this pledge. Also, Ecclestone's company has sold its interests in all types of motor sport apart from Formula One, including international rallying. This too is hardly seen as a significant move.

9. EU LAW

Reform on FIFA rules governing transfers finally settled - or has it?

Developments since last issue

Readers may recall that the update on the continuous saga of the consistency of the current soccer transfer system in Europe with EU rules on the free movement of persons contained in the previous issue²⁴⁰ showed the main protagonists - the national, European (UEFA) and world (FIFA) governing bodies of soccer, the European Commission, players' unions and the clubs themselves - to be in a state of deadlock. As the year 2001 dawned, there was little to suggest that this stalemate would be lifted for a considerable period, the headlines "transfer system breakthrough" becoming as frequent as those proclaiming "transfer system deadlock".

The year 2000 ended on a note of crushing pessimism. In late December, representatives from FIFA, UEFA and the international players' union (FIFPRO) met to discuss the latest proposals, but talks broke down after little over 2 hours²⁴¹. According to the players' union General Secretary, Theo van Seggelen, the main obstacle appeared to be the continued restrictions on players' movements which the proposals put by the governing bodies would entail. Opposition from FIFPRO was also

forthcoming on the one issue on which the governing bodies and the European Commission seemed to have reached agreement - to wit, the principle of compensation for players who move under the age of 23, regardless of whether they are in contract or not. Van Seggelen claimed that this would amount to a rule prohibiting the transfer of players under 18, save for exceptional circumstances. "We will not accept that a player will be tied to a club in his youth, with the only possibility of moving if the club sells him", he added.

A further twist which augured ill for a rapid resolution came in January, when FIFA independently submitted its own transfer proposal to the European Commission. This essentially sought to obtain that players should be allowed to move subject to three months' notice²⁴². Although some hailed this as a system which most closely matched the spirit of the *Bosman* decision, it caused widespread anger, particularly with UEFA, causing rumours of a split between the two bodies. Eventually, FIFA withdrew this document and acceded to UEFA demands that the latter should assume full control of working out a way of amending the transfer system to comply with EU law.

However, the first signs of the parties involved being ready to compromise came in January, when the Commission was sending out clear signals that it was coming round to the view that too radical a change in the transfer system would have adverse consequences for the future of European soccer²⁴³. It was felt that some pressure in this direction was emanating from European Commission President Romano Prodi, the former Prime Minister of Italy, who may have been reluctant to see the *Ulivo* governing coalition of Italy, of which he was once a member, suffer unduly in the forthcoming national elections in April. (This was particularly the case since the main Opposition contender, Silvio Berlusconi, also the owner of AC Milan, was widely thought to be attempting to make political capital from this issue by opposing any radical change in the transfer system.)

The first major break in the deadlock came in early February, when the players' trade unions - not only FIFPRO, but also national unions such as the English Professional Footballers Association (PFA) - agreed in principle to the notion of three-year contracts²⁴⁴. Up to that point, the unions had been uncompromising in their insistence on players' rights to terminate contracts at short notice, thus being treated as any other worker would. The unions, governing bodies and top clubs had met in Nyon, Switzerland, and although the meeting ended without formal agreement, there was sufficient good will in evidence to anticipate a constructive way forward.

This was followed by a meeting in Brussels between FIFA and UEFA on the one hand, and the European Commission on the other hand, at which it appeared the parties were very close to agreement on some key points such as²⁴⁵: (a) contracts lasting between one and five years, effectively meaning that players could not move twice in one season; (b) Europe-wide transfer windows to allow movement of players; (c) an arbitration panel would decide how much compensation a club would receive after losing a player, and (d) compensation in the form of training costs was to be paid for players aged under 23, taking into account the amount of time a club has spent on the development of the transferred player. Some issues remained to be solved, but they were not regarded as insuperable.

The optimism generated by this development was short-lived. Barely two days later, the world of football was once again plunged into uncertainty when, at the same Brussels meeting, new proposals were made by FIFA which once again threatened the uneasy peace between the contending parties²⁴⁶. These included: (a) a one-year ban for players who unilaterally broke their contracts (if they became injured during that period, the penalty would be suspended and reinstated once returned to fitness); (b) all players aged 28 or under were to honour contracts for a minimum of three years and for clubs to receive compensation for players who move even where they have fallen out of favour with their club, and (c) any compensation agreed when a player is transferred should allow for a commission fee so that clubs could recover the monies they paid to agents. This caused players' representatives to accuse FIFA/UEFA of attempting to take players back to the "dark ages" by denying them their rights, and prompted threats of court action.

Further bad news came in early March, when FIFA and UEFA warned that unless the European Commission changed its position on two crucial points, no agreement could be reached²⁴⁷. The two contentious matters involved were

- (a) the duration of any penalties which should be imposed on players who unilaterally break their contracts. FIFA/UEFA were seeking a ban for a minimum of 12 months, whereas the

Commission insisted that the appropriate penalty would be for the player concerned to be banned from one of the two allowed "transfer windows" to the next, and

(b) the desire of the Commission to limit the amount of compensation which small clubs should receive for finding and developing players who then move to larger clubs.

Optimism was back on the agenda a few days later, when FIFA President Sepp Blatter, UEFA chief Lennart Johansson and EU officials announced in Brussels that agreement had been reached on a new transfer market which met the requirements of EU law²⁴⁸. However, this is far from being the end of the story, as will be made clear in the section below, which sets out the reactions thus far to the new "agreement".

That "deal" in full

The quotation marks in which the words "deal" and "agreement" have been enclosed above do not represent any attempt at facetiousness on the part of the present writer. They are inspired by two factors. First, a genuine sense of uncertainty on his part - in the face of media headlines hailing this "historic deal" - as to the true nature and scope of this package. The main reason for this reticence is the fact that Mrs. Viviane Reding, the European Commissioner for Sport, carefully avoided these words during her statement to the European Parliament on 13 March. Highly significant in this regard is the line in Mrs. Reding's speech which precedes the details of the "deal", which states: "The discussions have led to *clear progress* in at least three key areas" (my italics).

The present writer makes no apology for entertaining the cynical suspicion that the respected Commissioner was speaking with a forked tongue which would (a) leave her with an escape clause should the "deal" turn sour sooner rather than later, whilst (b) hoping, rightly as it turned out, that the media would unquestioningly hail this as a conclusive agreement and thus make any interested party who opposed its contents - like the players unions who had been sidelined during the final negotiations (see below) - to appear the ones who were reneging on agreed principles and "rocking the boat".

The second reason for the present author's reservations concern the uncertainty which surrounds the actual contents of the "deal", as he hopes will become clear below.

The contents of the "deal", as reported by Mrs. Reding to the European Parliament²⁴⁹:

- **Measures aimed at protecting young players moving within the EU.** These are aimed at guaranteeing them an appropriate level of general and sporting education. Mrs. Reding added in this context that it made "far greater sense to supervise properly the work of these young players rather than prohibit their mobility";

- **Measures aimed at encouraging and compensating the training provided by clubs.** In this connection, FIFA had undertaken to introduce rules dealing with (a) compensation for training costs incurred up to the age of 23 on the basis of real costs, in line with the ECJ decision in *Bosman*, and (b) the institution of a solidarity fund sustained by a 5 per cent levy on each compensation payment for transfer caused by unilateral termination of the contract. This fund is intended for what the Commissioner awkwardly calls "the training clubs" (presumably she means "the clubs providing the training") which will thus receive part of the player's added value;

- **Measures aimed at introducing stability into sporting competitions.** These are aimed particularly at ensuring the fairness and regularity of these competitions, to be achieved by means of two mechanisms: (a) authorising unilateral termination of the contract only at the end of the season, which means that fans will be guaranteed to see the same team play throughout the season, and (b) authorising the imposition of disciplinary measures on players who terminate their contract during its first two seasons without just cause or without valid sporting reasons;

- **Measures aimed at enhancing players' rights:** as a concession to FIFPRO, the following safeguards are to be introduced: (a) FIFA rules will no longer prohibit players from going to

court, and (b) the Court of Arbitration in Sport, based on equal representation and having emergency procedures at its disposal, will settle disputes concerning training fees, transfer fees and disciplinary measures.

Not included in Mrs. Reding's statement were some of the points contained in a press statement by the Commission a week earlier, i.e. on 5 March, which is entitled "Outcome of the discussions between the Commission and FIFA/UEFA in FIFA Regulations and on international football transfers."²⁵⁰ Why were these not featured in Mrs. Reding's statement? Were they considered to be marginal points of detail? (If so, why were at least some of them the subject-matter of contention with the players' unions?) Had they been abandoned since 5 March (bearing in mind that Mrs. Reding had indicated that her statement was made in the same day as the outcome of the discussions with FIFA et al. had been finalised)? Or were they diplomatically left out because of the political consequences? At the time of writing, these issues are as yet unclear²⁵¹.

The additional points contained in the 5 March statement were:

- minimum and maximum duration of contracts of respectively 1 and 5 years;
- contracts to be protected for a period of 3 years up to 28; two years thereafter;
- international transfer of players aged under 18 to be allowed subject to agreed conditions.

The fact that these represent the most bitterly disputed aspects of the "deal" can surely not be ascribed to pure coincidence.

Reactions and implications

On the part of English clubs, the reaction appears to have been one of "muted acceptance"²⁵². Apart from one outspoken dissident in the shape of Arsenal's vice-chairman David Dein, most clubs are reported to have given a muted welcome to the new "rules", whilst stressing that the devil would be in the detail as the system became implemented.

It was felt that the most far-reaching change to affect English clubs would be the imposition of a transfer window, which is an idea which has been repeatedly dismissed by the Premier League. As the "regulations" only apply to international transfers, English football could still decline to introduce them for domestic transfers. However, Peter Ridsdale, the Leeds United chairman, predicted that transfer windows would now be accepted by the Premiership²⁵³. Mr. Ridsdale did, however, add that "it will take something from the game" and feared that transfers being restricted to two per season could slow the growth of the power wielded by agents in the game.

According to the Chairman of the juridical committee of the FIFA task force which played a leading part in the talks, the "agreement" provides for contract stability, and that the combination of sporting penalties and fines for players breaking their contracts would be a significant deterrent. Maurice Watkins will be presenting a report to the Premier League; it will be his task to ensure that the ideas contained therein are approved²⁵⁴.

One prominent critic of the proposed changes had originally been Arsenal manager Arsène Wenger, who had threatened to "give up club football if players can give three months' notice"²⁵⁵. Now that certain safeguards have been introduced which are aimed at acting as a deterrent to players moving clubs on a whim or lucrative offer, it is legitimate to ask whether M. Wenger is maintaining his threat (or, some would argue, promise...).

The strongest opposition to the new arrangements, however, emanated from the players' union FIFPRO²⁵⁶. Claiming to have been sidelined when the "deal" was concluded, the union declared war on the new system. It is planning to challenge it in the courts, and has reportedly identified at least three players who could bring a *Bosman*-type test case. They will claim that their freedom of movement is still being restricted by the new arrangements. Initially, the challenges will be made in the domestic courts, but are likely to land before the European Court of Justice by virtue of the preliminary rulings procedure.

The lawyer who represented Jean-Marie Bosman in the now-famous test case, Jean-Louis Dupont, will

head FIFPRO's challenge, having advised the organisation in the course of the negotiations with the governing bodies and the European Commission. It was as yet unclear whether the union would launch the challenges immediately or wait until the new system entered into effect in the summer²⁵⁷.

It could also be noted that, after she had made her statement to the European Parliament, Mrs. Reding was given a "rough ride" by many Euro-parliamentarians. Interestingly, the critics seemed to be divided almost equally (and not necessarily on ideological grounds) between those who considered that the new arrangements had gone too far, and those who thought they had not gone far enough²⁵⁸.

The present writer also cannot help wondering whether non-European players will be happy at a system which was prompted by a legal order to which they are not subject. This too should give rise to legal challenges if FIFA adopts the system world-wide.

It is obvious that the follow-up to this issue will be as varied as it is prolonged, and this column will monitor future developments with the closest of interest.

"Don't blame me" says Bosman in newspaper interview²⁵⁹

The undistinguished Belgian footballer who changed the European game as we know it - see above! - is currently unemployed and surviving on the compensation awarded to him as a result of his historic court victory six years ago. However, in an interview with a leading British Sunday newspaper, Mr. Bosman claimed he had no regrets and was proud of his achievement. He also disclaimed any blame for the crisis into which his court action has plunged the game, claiming that he himself had never broken his contract with his club, and that this was not the intention behind bringing the action.

When questioned on the reason why he initiated the court action in the first place, changing the face of the game overnight and causing the influx of hundreds of foreign players, Bosman said

*"If I had not defended myself, my career would have been over, with no salary and nowhere to play. I was a nobody, but I stood up to the major powers in football and I'm proud of it. But the judge went further than any of us imagined in allowing any out-of-contract player to move for nothing. I don't make the rules."*²⁶⁰

Mr. Bosman continues to live off the £258,000 awarded to him by way of damages against the Belgian football federation six years ago, but leads a very sober life - far removed from the jet-set lifestyle of many present-day footballers which his action was at least partially instrumental in making possible.

10. COMPANY LAW

Local buyout of Lincoln City FC (UK)²⁶¹

Lincoln City is not one of the more glamorous clubs on the English soccer scene, as confirmed by the fact that early this year it had fallen to the depths of lying 91st in the Football League. This has prompted City fans and local businesses to team up and buy out the club - the first time this has occurred in English soccer history. It now claims to be a community club, owned and run by its supporters. However, at the time of writing it was still uncertain as to whether this move would save the "Imps" from relegation from the Nationwide Football League.

World Cup marketing rights company "on the verge of bankruptcy"²⁶²

Shortly before going to press, it was learned that the company responsible for marketing to rights to next year's soccer World Cup in East Asia had admitted to being on the verge of bankruptcy. The parent company to the firm in question, ISL, announced that its debts exceeded its assets, and that it had appealed to a court to postpone bankruptcy proceedings for three months. This would enable the parent company to sell a majority stakeholding to another large company. Should the court decline, ISL, which has underwritten FIFA since the 1986 World Cup, will be liquidated, thus putting at risk \$1 billion in television and marketing rights expected by FIFA over the next 15 months.

“Saviour” Stephen Brown no longer wanted by troubled Carlisle (UK)²⁶³

Carlisle United are one of the few soccer clubs to have the unenviable distinction of making the journey from the lowest Football League division to the top, only to be relegated to their original position shortly afterwards. Languishing at the bottom of Division Three of the Nationwide League, any helping hand must have been viewed as a Godsend by its long-suffering supporters. So when a Scottish businessman called Stephen Brown announced his willingness to buy 25 per cent of the stake held in the Cumbrian club by its Chairman, the hapless Michael Knighton, he came across as a potential saviour of the club, particularly since he claimed to have millions to invest and that he was a successful hotelier.

This initial enthusiasm has somewhat been tempered by the discovery that Mr. Brown was actually living in sheltered accommodation in Peebles, was dismissed from his former employment as a commercial manager of Gala Fairydean, and drives an H Registration Vauxhall Cavalier rather than the BMW which he claimed to own. It also emerged that he had opened talks with Glasgow club Partick Thistle posing as a Canadian millionaire. As for his links with the hotel trade, these were revealed to have been restricted to working as a barman in Peebles and working at a curry house in the same town - not to mention having been barred from a Peebles hotel for causing “serious trouble”.

When Brown failed to meet the deadline for buying the 25 per cent stake, it seemed that little more harm was done than a lowly League club having narrowly escaped the clutches of a far from subtle conman (although some would argue that Carlisle seem to have a talent for attracting unsubtle conmen...). However, there appears to have been more to this matter than meets the eye. More particularly the question has been raised as to whether Brown merely duped Knighton, or whether he was a frontman handling a takeover. Knighton claimed to have sold a large share of the club to Mann Carr, the Gibraltar-based investors. However, investigations are said to be underway to discover whether in fact Knighton himself was behind that company. It is also perhaps not entirely inappropriate to recall that Knighton himself is banned from being a director of any company for five years as a result of financial irregularities....²⁶⁴

Spanish club has first all-female board in soccer history²⁶⁵

The world of mediterranean professional football is not the first forum which comes to mind for experiments in feminism. Yet by calling a Board meeting consisting of six women directors, Spanish Third Division club Antequera became the first professional football club run by an all-female board in the world. New President Sylvia Gutiez Carillo commented

“There is absolutely no reason why women should not be part of this sport.”

Hull City rescued - for the time being

At the beginning of the year, Hull City became the latest in a long list of soccer clubs to be staring financial ruin, and possibly extinction, in the face. Already the club's administrator's had paid more visits to the High Court than most QCs as part of their continuing battle against insolvency. Matters appeared to have reached crisis point in early February, when former Davis Cup player David Lloyd, landlord and former Chairman of the beleaguered Division Three side, locked the gates of the Boothferry Park ground to all, even to its own players and officials²⁶⁶, threatening the forthcoming match with Leyton Orient.

Lloyd insisted that this was not a prelude to closing the club down, only a final attempt to open the door for survival talks. With debts of over £1.5 million and a weekly loss of £30,000, the club had been placed in the hands of a corporate recovery company, with a two-week deadline to come up with a rescue package. In the event, Lloyd did make a deal with the club's administrators, which allowed the game against Leyton Orient to go ahead. The game attracted an unusually large crowd of 8,782, and saw a number of collections organised²⁶⁷. Thanks to the public spirit of the own's inhabitants, the club appeared to have been saved.... for the time being.

More good news was forthcoming in March 2001, when it was announced that the club's creditors had

accepted a rescue package put forward by an unnamed buyer at a meeting held behind closed doors. The prospective buyer had already invested £85,000 into the club in order to enable it to pay players' wages and to continue to rent the Boothferry Park ground from Lloyd²⁶⁸.

However, the plan could still misfire if the club's former chairman, Nick Buchanan, who owns 64 per cent of the club's shares, declines the offer unless he is informed of the buyer's identity²⁶⁹. At the time of writing it was unclear as to whether this could still be the case.

11. PROCEDURAL LAW AND EVIDENCE

Canadian gymnasium equipment companies in procedural dispute over copyright²⁷⁰

In the case under review, the two parties were involved in, *inter alia*, an alleged infringement of copyright on drawings for a retractable stage assembly. The claimant attempted to amend its statement of claim in two ways. First, by removing a paragraph stating that the author of the drawings was employed by a third party, and that the third party in question had assigned the copyright in the drawings to "SHERIDAN". Second, by adding a paragraph alleging that the plaintiff was the owner of the copyright in the drawing and that the copyright had been registered.

These proposed amendments were challenged by the defendants on the grounds that the amended allegation did not disclose a proper cause of action, and that the amendment would constitute a withdrawal of an admission that the author was employed by a third party at the time of the authorship. The claimant introduced a confirmatory assignment of copyright from the author to a third party, and a confirmatory assignment from the third party to the claimant.

The Federal Court dismissed the defendant's plea. It held that for an amendment to be admissible, it must raise a triable issue which ought to be tried in the interests of justice. The amendment may not result in an injustice to the other party which is not capable of being compensated by an award of costs. Because of the alleged assignment from the third party to the claimant, the latter was entitled to claim for copyright infringement, and this was a triable issue. Any injustice which may have been caused could have been compensated by an award of costs.

13. FISCAL LAW

Chancellor Brown abolishes betting tax (UK)

British betting punters were given a boost in March 2001, when Chancellor of the Exchequer Gordon Brown used his annual Budget Statement to announce the abolition of betting tax²⁷¹. Ladbroke's Chief Executive Officer Chris Bell described this as the best piece of news ever received by all those involved in betting. He confidently predicted that betting turnover would increase by 40 per cent within one year of the abolition.

At present, the Government receives 6.75p from the total 9p/£1 tax rate, with the remainder going partly to the Levy Board, which funds the prize money, and partly to bookmakers for VAT and other duties. The Government are expecting the loss of these amounts to be offset and even overtaken by a direct tax to be levied on gross (!) profits realised by bookmakers²⁷².

The new system is designed to stem the loss in taxable betting turnover to the off-shore market, which had already given punters the opportunity to place tax-free bets²⁷³. There will obviously now be an incentive for bookmakers to abandon these off-shore activities, thus boosting the taxable amount of gross profits. Whether the bookmakers will actually do so remains to be seen, particularly in view of their earlier opposition to the Chancellor's new scheme which was based on the millions they had already spent investing in the lucrative off-shore market²⁷⁴.

This has prompted many commentators to claim that this new tax scheme is itself a gamble!

Maradona owes us £17 million, claim Italian tax authorities

If ever Diego Maradona needed the hand of God it is in his current battle with the Italian tax authorities. In early January 2001, Maradona, who spent some years in Italy playing for top team Napoli, arrived at Rome's Leonardo da Vinci airport in order to appear on a number of television shows and unveil a limited-edition coin engraved with his image, only to be escorted by tax inspectors to their office and given documents to sign.

The Italian tax authorities claim that the former Argentina soccer international owed them 52,000 million lire (approximately £17 million) by way of evaded taxes and interest²⁷⁵.

Netherlands tax investigators probe Westerveld move²⁷⁶

That Dutch goalkeeper Sander Westerveld has proved a worthwhile investment for Liverpool FC is a proposition few would care to challenge. However, Westerveld's £4.5 million transfer from Vitesse Arnhem is raising a few eyebrows in non-sporting circles, in the uncompromising shape of the Netherlands tax authorities.

More particularly, investigators are seeking to establish why the fee for his release from Vitesse was suddenly increased by £1million, and why a mysterious Italian agent should pocket £90,000 from the transaction. In fact the Westerveld deal is one of several transfers currently coming under the scrutiny of the Netherlands tax authorities - including the return of controversial Nottingham Forest player Pierre van Hooijdonck to Vitesse, whence he originally moved to Forest.

Thus far, Vitesse Chief Executive Karel Albers has revealed that he initially agreed a £3.5 million deal for Westerveld with Peter Robinson, Liverpool's former executive. However, Italian agent Vinicio Fioranelli intervened in the negotiations, and, to the consternation of the fiscal authorities, the deal suddenly rose in value by £1 million. Westerveld's agent, Tom van Dalen, admits to having been paid £65,000 by way of professional fee, but Fioranelli is revealed to have received £90,000. The clubs involved, however, insist that the Italian was not a central figure in the negotiations.

Karel Albers has in the meantime been arrested following raids on houses and offices throughout the Netherlands²⁷⁷.

Steffi Graf ends tax dispute with German authorities²⁷⁸

Just before the year 2000 ended, former Wimbledon champion Steffi Graf agreed to terminate a dispute with the German fiscal authorities. A spokesperson for the fiscal administration confirmed a report in the periodical *Der Spiegel* that she had undertaken to withdraw an appeal against a tax demand.

14. HUMAN RIGHTS

England football fans to be required to sign anti-racist code²⁷⁹

Racism has been all too common a phenomenon amongst those who profess their allegiance to the English national soccer squad. Under a new code of conduct, to be introduced as part of a comprehensive shake-up of the national supporters' organisation, England fans will be required to sign up to an anti-racist pledge before they become eligible for the sale of tickets to international matches.

In addition, the sale of tickets will increasingly be targeted towards members of the ethnic and cultural minorities in an attempt to create a more socially inclusive support for the national squad as being more

SUBSCRIBERS

Anyone wishing to subscribe to the journal may do so at a cost of £40.00 per annum.

Further details from
Hammicks Bookshops Ltd,
Browells Lane, Feltham, Middlesex TW13 7EE

representative of a multi-cultural nation. At the local level, managers and referees will be encouraged to attend anti-racism training courses operated by local authorities and race pressure groups.

Australian premier hopes cricket match will help racial reconciliation²⁸⁰

John Howard, Australia's Prime Minister, has announced the staging of a special cricket fixture, played in April 2001, in order to assist the process of reconciliation between black and white people in his country. The match will be between an aborigine side and a team selected by Mr. Howard, and will at the same time mark the centenary of Australia as a federation.

Aborigine cricketers toured England in 1868, long before the first "official" Australian party visited these shores, but since then very few players of Aborigine descent have represented the national side.

Leeds Rhinos ordered to pay £16,000 for "unconscious" racial discrimination (UK)

In December 2000, an English industrial tribunal ruled that a Rugby League player had been the victim of racial discrimination on the part of leading club Leeds Rhinos, and awarded £16,000 by way of damages²⁸¹. The player concerned, Paul Sterling, claimed before the tribunal that the club coach, Dean Lance, had informed him that he would not be considered for the first team regardless of his performances.

The tribunal held that Mr. Sterling's treatment could be attributed solely to discrimination - but stressed that this was done unconsciously, and described Mr. Lance as "professional and honourable". It went on to criticise the club for failing to investigate properly Mr. Sterling's complaints, and ordered it to apologise to the player as well as reinstating him on a year's contract²⁸².

During the hearing, Sterling had informed the tribunal that bringing this case had undermined his attempts to find a new club, and that by doing so he had been branded with the stigma of a "troublemaker". Gary Hetherington, the club's Chief Executive, commented that the ruling could have enormous implications for all coaches of sporting teams and organisations²⁸³. Gordon Taylor, Chief Executive of the Professional Footballers' Association (which has a large black membership) commented that "a lot of advice will be needed in dealing with this one"²⁸⁴.

At the time of writing, the outcome of the club's appeal against this decision was not yet known.

Jockey Club embraces Human Rights Act (UK)²⁸⁵

In February 2001, the Jockey Club, Britain's horseracing regulator, announced a number of reforms of their procedures as part of complying with the new Human Rights Act.

Appeals brought against the decisions of the Disciplinary Committee will be heard by a new appeal board, which will include a legally qualified and independent Chairman as well as two members of the Jockey Club. This new Board will also hear serious "non-trier" cases (i.e. cases where the jockey is accused of giving less than his best) as well as refusals to issue licences on "fit and proper person" grounds. Former High Court judge Sir Edward Cazalet, as well as three QCs - Bruce Blair (no relation), Jeremy Gompertz and Richard Hartley - have agreed to form the panel from which the independent chairman will be selected.

The Jockey Club will also publish guidelines for Disciplinary Committee inquiries and do more to explain their decision. No steps have been taken, however, to open up the Club's disciplinary hearings to the general public and press.

Surrey cricketer alleges racial attack by umpire in Australia²⁸⁶

In January 2001, Michael Carberry, a cricketer who has represented Surrey and played for the England Under-19 squad, left his club in Australia following an alleged attack with racial overtones by an

umpire. Carberry, who was in Australia for five months playing for Portland Colts Cricket Club (Victoria), claims that the attack came in a bar on Christmas Eve where he was enjoying a few drinks with friends.

At a certain point umpire Ken Gadsden is claimed to have entered the bar, and started calling the Surrey player a cheat, as well as telling him "to go back where he came from". The attack is also said to have assumed a more physical dimension when Gadsden allegedly grabbed the player, broke his neckchain and started racially abusing him. The incident apparently arose from a disputed lbw decision during an earlier game.

Craberry is also concerned that the local Cricket Association were not prepared to investigate his allegations against the umpire - who is also the association's president and chairman of the umpiring panel.

The UK Human Rights Act and sporting tribunals. Article in international sports law journal²⁸⁷

When considering the implications of the UK Human Rights Act 1998 for sport, it was inevitable sooner or later attention would focus on the bodies administering sporting justice, i.e. the sporting tribunals. The authors of the paper under review provide a thorough examination of the principal ramifications which this flagship legislation may produce for such bodies.

In the first instance, they ponder the question whether sporting tribunals actually will fall within the scope of the Act. The key provision in this regard is Section 6, which makes it unlawful for any "public authority" to act in a way which is inconsistent with the Act. Section 6(3)(a) identifies "courts and tribunals" as public authorities, and even if it is objected that sports tribunals are not caught by this description, Section 6(3)(b) also brings within the scope of the term "public authority" "any person certain of whose functions are of a public nature". The authors therefore arrive at the broad conclusion that sporting tribunals will definitely be caught by the Act.

In these circumstances, the two requirements which will need to be met by sporting tribunals are that they be "independent" and "impartial". On these two requirements, the authors attempt to provide some guidelines based on the case law (which the authors wrongly describe as "jurisprudence") of the European Court of Human Rights, and draw up a summary checklist of the criteria which on this basis should guide the tribunals concerned. They add that many of these criteria are self-evident and were already part of English law under generally applicable notions of natural justice, but describe them as "instructive" because they are "practical examples of problems that have exercised the judicial brains at Strasbourg and in other Courts".

15. DRUGS LEGISLATION AND RELATED ISSUES

UK launches curb on nandrolone²⁸⁸

The drug nandrolone is a performance-enhancing anabolic steroid which has been identified in many a drugs test. (Readers may recall an extensive feature on this drug in the previous issue of this column²⁸⁹.) In December 2000, the UK Government's Medicines Control Centre announced that it would shortly order the withdrawal from sale, over the counter or by mail order, of supplements containing chemicals which are converted by the body into nandrolone and have the same effect.

The agency conducted a review of all products containing nandrolone and related substances, which amount to approximately 50 made by 20 manufacturers, after receiving a complaint from the Royal Pharmaceutical Society about their availability without prescription.

However, it is not taking any action on creatine, which is another freely available supplement, even though EU scientists have raised concerns about the initially large doses recommended by manufacturers in order to "load" muscles. In fact, in January 2001, the French Medical Safety in Food Agency (AFSSA) has warned that the drug may be carcinogenic²⁹⁰.

Revelations, admissions and recollections about drugs in sport

Over the past few months, a number of leading figures in the world of sport have gone public over past drugs controversies, or made accusatory revelations in this regard.

Heike Drechsler and Katrin Krabbe

From the mid-1960s onwards, the former East Germany (or German Democratic Republic) gained a formidable reputation for its athletes. However, the accusation was often made that this reputation had in many cases been acquired through methods which were at best unorthodox and at worst downright illegal. Thus it was with long jumper Heidi Drechsler and sprinter Katrin Krabbe.

Shortly after the reunification of Germany, a leading specialist in this field, Professor Werner Franke, was appointed by the German Parliament to investigate East German scientific methods in sport. He arrived at the conclusion that Drechsler had been given the same drugs as those which led to Ben Johnson's downfall after the Seoul Olympics. He also discovered Stasi (East German secret police) files documenting drugs abuse and identifying Drechsler by the codename W61²⁹¹.

For a long time after these revelations, Drechsler had refused to admit taking drugs. Nevertheless, in 1995 she was convicted of perjury and ordered to pay £7,500 costs after losing a court action which she had brought against Professor Franke's wife Brigitte Berendonk, who had identified Drechsler as a participant in the East German system. This caused her to shift her stance and claim that, if she had taken drugs, she had done so without her knowledge.

However, in January 2001, she was compelled to yield to the overwhelming evidence against her and admitted that she was given anabolic steroids throughout her career in East Germany. There is clear documentary evidence that this period included the time before she won the 1983 world long jump title as a 17-year-old²⁹².

Sprinter Katrin Krabbe, however, appears to remain in denial about the drugs scandals in which she was involved. In 1991, she won both sprints at the Tokyo world championships and was hailed as a heroic symbol of the new unified Germany. Shortly afterwards, however, she became involved in two drugs controversies, banned for three years, and converted from all-German heroine to living proof that East German athletes were all cheats.

Unlike Heidi Drechsler, Katrin Krabbe no longer competes, and lives a fairly modest existence working part-time in a Berlin sports shop. Equally unlike Drechsler, Krabbe continues to be in a state of denial about the drug scandals which led to her downfall. Interviewed in a leading UK Sunday newspaper²⁹³, she continues to maintain that she was "clean"; in fact, she remains locked in a legal battle aimed at clearing her name. She added that

*"a lot of people, particularly East Germans, thought it was totally unfair and that there was some sort of campaign to make sure that someone from the East couldn't be on top. Back here (i.e. in Eastern Germany), I didn't become a hate figure or anything, no-one challenged me. A lot of people came to me and wanted to talk."*²⁹⁴

It remains to be seen whether the court battle in which she is currently locked will prove her right.

French claims that "Rugby Union is riddled with drugs"

In January 2001, the world of Rugby Union, for so long regarded as the epitome of honour in sport, was thrown into disarray when a number of leading figures in French rugby claimed that drug-taking was endemic in the sport at all levels.

The first to make this claim was former France captain and coach Pierre Berbizier²⁹⁵, who declared that drugs had become "a reality" in the French championship, and that the drugs in question were stronger than Creatine because of the "hellish" timetable imposed on them. He claimed that the physical demands made on players were too great. These accusations were, however, firmly rejected by Serge Blanco, the former international and current President of the French National League²⁹⁶.

Barely a few days later, however, the accusations came from a new, and perhaps more authoritative, source when Dr. Jean-Pierre de Mondenard, a leading authority on drug-taking in sport and the author of a number of works on the subject, left little doubt that Berbizier had "opened a can of worms"²⁹⁷. He claimed that in the 1970s, a French international had informed him that the team doctor had been giving them Captagon, a well-known amphetamine, for five-nations games, telling them that the substance concerned consisted of vitamins. Another international admitted to him that the use of amphetamines was a "common occurrence" during the 1970s. France captain Fabien Pelous seemed to agree with this verdict, albeit in more guarded terms.²⁹⁸

Cycling masseur Voet exposes drug abuse in cycling

Cycling is perhaps the sport in which the controversies surrounding alleged and real drug abuse by its participants have the longest history, with published revelations and accusations to match. In the 1960s, British rider Tom Simpson was one of the first to give the general public an insight into this aspect of the sport in his autobiography - which ultimately cost him his life on the Ventoux in 1967. In spite of subsequent attempts at the official level to rid the sport of this blight, the procession of accusations and disciplinary measures continued.

Following the widespread evidence of drug abuse which marred the 1998 Tour de France, few people could be left in any doubt about the seriousness of the problem in this sport. The man who unwittingly sparked off the spate of arrests and interrogations which surrounded this scandal was the Festina team masseur Willy Voet, when he was arrested on 8/7/1998 by French customs officers whilst carrying the team's supply of testosterone, growth hormone and the blood booster EPO to the Tour de France. The aftermath of this affair, which nearly brought the Tour to a complete standstill, has been traumatic for the sport's followers and practitioners²⁹⁹.

Almost inevitably, a number of publications detailing and analysing these events soon appeared on the market. Willy Voet followed suit when his work *Breaking the Chain*³⁰⁰, appeared on the bookstalls on the Continent. Its publishers delayed its release in this country for two years in order to await the outcome of the trial of those involved in the Festina case (see below) and thus avoid the risk of libel action.

Apart from a (somewhat subjective) account of the author's arrest and interrogation, the work contains a devastating account of the extent to which drug-taking permeates the sport. Thus he tells the reader of a world in which the "Belgian mix" (a mixture of heroin, cocaine, amphetamines, caffeine and painkillers) can be swapped for racing jerseys or a puppy, where the most lethal of drugs casually share the same fridge shelf as carrots, and where drips are hung from picture hooks in hotel rooms to dilute cyclists' blood in order to assist them in passing the blood thickness tests intended to combat EPO use³⁰¹.

The reverberations of this publication both inside and outside the sport can only be guessed at.

Blood testing to be a feature of London marathon ? (UK)³⁰²

In March 2001, organisers of the London Marathon announced that they were joining forces with their colleagues in Berlin, Boston, Chicago and New York in demanding the introduction of blood testing at major road races. They have signed a seven-point statement calling upon the International Amateur Athletic Federation, as well as national governing bodies, to implement the blood testing system which was introduced at the 2000 Olympics in Sydney. The Chief Executive of the London Marathon, Nick Bitel, described this as the only way in which to halt speculation that drugs and other forbidden methods are used for the purpose of enhancing performance in this sport.

WADA closing net on drugs cheats, in spite of uncertain financial future³⁰³

In March 2001, it was announced by the World Anti-Doping Agency (WADA) that the organisation is to intensify its efforts to apprehend those taking prohibited drugs, by carrying out 8,000 tests by the end of the coming year - 3,500 this year and a further 4,500 by the end of 2002.

The organisation continues, however, to be beset with problems of funding. As was reported in this

column at the time³⁰⁴, WADA was established towards the end of 1999, and the initial \$20 million provided by the International Olympic Committee (IOC) will run out in December of this year. Thereafter, national governments will be required to provide 50 per cent of running costs. Canadian sports minister Denis Coderre admitted that the governments in question have yet to agree on how to fund this amount.

Round-up of individual cases

- In March 2001, a federal appeals court in Chicago upheld a decision by a lower court to dismiss the action brought by former Olympic runner Mary Decker Slaney by which she claimed that she was unfairly found to have failed a drugs test in 1996. This led to her being stripped of the silver medal she won at the 1997 World Championships. Ms. Decker claimed that the test was not valid and that the high level of testosterone which caused her to fail it was due to her menstrual cycle and a change in her birth-control pills³⁰⁵.
- In December 2000, jump jockey Dean Gallagher was given clearance to resume riding in Britain as from 1 January, having satisfied the Jockey Club that he was doping-free. Initially, he had been banned for six months by the French horseracing authorities after testing positive for cocaine on three separate racing days in France. He subsequently regained his licence following a meeting with the Jockey Club's licensing committee³⁰⁶.
- In late February 2001, top British sprinter John Skeete withdrew from the national squad for the world indoor athletics championships in March after testing positive for the banned substance stanozol. Nevertheless, the governing body, UK Athletics, did not suspend him, amidst claims by Skeete that he had been the victim of a conspiracy³⁰⁷. One month later, however, Skeete was banned for two years, even though the independent disciplinary committee which sentenced him believed him to be "morally innocent"³⁰⁸.
- Mark Richardson, Britain's top 400 m athlete, was set to return to action in the summer of this year despite a two-year ban by the International Amateur Athletics Federation (IAAF) after having tested positive for nandrolone in October 1999. The British runner, having been cleared by UK Athletics in July 2000, had previously taken his case to the IAAF, which referred the matter back to its arbitration panel. After consultation with UK Athletics in March 2001, he accepted the ban in a bargain of convenience. The IAAF applies an "exceptional circumstances" rule under which Richardson could be reinstated earlier³⁰⁹.
- Shot putter C.J. Hunter, who is also the husband of triple Olympic gold medallist Marion Jones, was suspended in March 2001 for failing a drugs test. He immediately announced his retirement from the sport. The ban by US Track and Field came after Hunter had accepted that traces of nandrolone were found in his system, although he claims that he did not take the drug deliberately³¹⁰.
- Early in the New Year, Scottish Premier League club St. Johnstone (Perth) dismissed players George O'Boyle and Kevin Thomas after they had been accused of using cocaine in a Perth bar. They had their contracts terminated on grounds of gross misconduct³¹¹.
- In February 2001, Springbok prop Cobus Visagie was suspended for two years by an independent South Africa Rugby Football Union tribunal for failing a drugs test. Traces of nandrolone were found in a random test provided by the player after Western Cape's Currie Cup match against Boland in October 2000³¹².
- Marco Pantani, who won the tours of France and Italy in 1998, has become the first athlete to be found guilty under civil law of attempting to manipulate the result of a sporting event by the use of prohibited drugs. In December 2000, a court in Italy gave him a three-month suspended sentence for "sporting fraud". The charge resulted from an investigation by Turin judge Raffaele Guariniello which was sparked off by an incident in which Pantani was dismissed from the Tour of Italy in 1999 after having been found to have taken a haematocrit (solid matter in the blood) of 52 per cent, well over the 50 per cent level permitted in cycling³¹³.

- Just before the year 2000 ended, cyclist Richard Virenque was suspended by the Swiss Cycling Federation after admitting using the banned blood booster EPO. He is currently serving a 9-month ban which took effect in February 2001, thus ruling him out of the 2001 racing season. He was also fined £2,000. Earlier, however, in May 1999, Virenque had been fined \$10,000 by his Italian Polti team after it was alleged that he had admitted to using EPO to the police in France. More recently, he had been cleared by a court in Lille on a charge of supplying drugs to his Festina team (see above, p.65) at a trial during which he confessed to having used EPO³¹⁴.
- In November 2000, French police launched an investigation into alleged drugs use by the Tour de France Postal team, which includes last year's winner Lance Armstrong (US). Armstrong has said he may boycott this year's Tour in protest³¹⁵.
- In February 2001, Matthew Stephan, a youth player with soccer team Bolton Wanderers, tested positive for amphetamines. He has since been charged by the Football Association (FA) with misconduct³¹⁶.
- In March 2001, shot putter Aleksandr Bagach, a bronze medallist for Ukraine in the 1996 Olympics, was banned for life for failing three drugs tests by the IAAF³¹⁷.
- In February 2001, Falk Balzer, Germany's top hurdler who won a silver medal at the 1998 European Championships, failed a drugs test when he tested positive for nandrolone³¹⁸.
- Just after Christmas 2000, Belgian cyclist Nico Mattan was suspended by the French Ministry of Sport and Youth for a period of four months. He had failed an out-of-competition test in January 2000 when traces of heptaminol were found in his urine³¹⁹.
- Mike Tyson became once again the centre of unwanted attention in January 2001 when it was alleged not only that he tested positive for cannabis after his fight with Andrew Golota in Detroit last year, but also that he was involved in a cover-up attempt. Tyson had already agreed to a 90 day suspension and a \$205,000 settlement for failing to take a drugs test before the fight. However, it now appears that Michigan's State Consumer Department agreed the settlement with Neil Kink, Tyson's lawyer, with no mention being made of the failed test³²⁰.
- In January 2001, snooker player Stephen Lee was ordered to forfeit prize money of £7,500 and pay costs amounting to £1,000 by the World Professional Billiards and Snooker Association after having tested positive for marijuana at the Champions Cup in September 2000³²¹.
- Magic Thompson, one of the top Belgian five-year-old racehorses, tested positive for dipyrone and flunixin in France in October 2000. His trainer incurred a fine of FF 15,000 (£230).

16. ISSUES SPECIFIC TO INDIVIDUAL SPORTS

ATHLETICS

Coe upbraids Christie for corruption claims (UK)³²²

In February 2001, a series of exchanges took place between two of Britain's most successful athletes - Sebastian Coe and Linford Christie. It is not the intention here to explore some of the more personal remarks traded by these two former glories of the athletics world, which have been extensively reported and commented on elsewhere, but merely to highlight the legal aspect, which concerned the accusation made by Linford Christie that the sport was essentially "corrupt".

In an article in a leading UK daily newspaper, Coe, who won gold for Britain at the Moscow Olympics in 1980, did little more than refute the allegation point blank before turning his fire on Christie's own misdemeanours - some real, such as his ban over drug taking, some a little far-fetched, such as the accusation that Christie deliberately made himself unintelligible to all those who were not conversant with "jive". However, on the very serious charge of corruption, Coe neither confirmed nor denied the substance of Christie's statements.

RACING

Bookmakers inveigh against new Tattersall's rules (UK)³²³

Until early this year, anyone wishing to place a bet with "rails" bookmakers - i.e. those who stand between Tattersalls and the Members' Enclosure - had to ask for a price and a credit bet was normally struck. However, as from 1 February of this year, the rails bookmakers have been allowed to display their prices. This has increased their turnover considerably, but left the Tattersalls bookmakers aggrieved - particularly those who two years ago purchased prime racecourse pitches at auction - sometimes at a price of hundreds of thousands of pounds - only to see their business threatened by the "revolution on the rails".

Many see the hand of the large bookmaker firms, such as William Hill and Ladbrokes, behind this rule change, as it may lead them to control the market.

Appearance money scheme to come under review (UK)³²⁴

The appearance money scheme recently introduced by the British Horseracing Board (BHB) is to be reviewed after the scheme once again backfired spectacularly for the More Haste Conditions Stakes at Wolverhampton on 11 January. All 13 runners receive £500 for turning up, but instead of producing a competitive race aimed at boosting betting turnover - which the scheme was intended to achieve - it has attracted a field containing a long odds-on favourite and several no-hopers. This had not been the first occasion on which trainers exploited the appearance money scheme in order to obtain some return for horses which would struggle to win any prize money.

Round-up of individual cases

- In early January, Adrian Nicholls had a decidedly mixed day at Southwell, achieving a 29-1 double, but at the same time being found guilty of irresponsible riding of a minor nature when riding Arpeggio. This earned him a three-day suspension³²⁵.
- The owners of the Lingfield course, Arena Leisure, were fined £5,000 by the Jockey Club in late February 2001 arising from the controversial abandonment of the all-weather flat meeting on 30/12/2000. The fixture was abandoned when jockeys complained that the racecourse executive had infringed Rule 80(ii)(a) by not following the inspection protocol after the acting clerk of the course had inspected the track at 6 am on the day of the racing, when it was found that the "pad" under the all-weather surface was frozen. The Jockey Club Committee also found that Arena had broken Rule 220(ii) in that its failure to keep owners, trainers, jockeys and the general public informed of the condition of the track was prejudicial to the good reputation of racing³²⁶.
- Jockey Tony McCoy complained that there appeared to be one rule for him and another for most of his colleagues when he was found to have hit the unplaced horse *Alfs Classic* in the wrong place during the opening meeting at Taunton on 4/1/2001. He claimed that he hit the horse three times, but only once in the back hand position. He received a one-day suspension³²⁷.
- In late January 2001, two jockeys were suspended at Plumpton racecourse when three of the six runners failed to make any attempt at jumping the third flight at the Beacon Selling Hurdle, thus reducing the race to a farce³²⁸.
- Trainer Ian Williams was fined £220 by the Jockey Club's Disciplinary Committee for failing to report that horse *Hors la Loi* blew up during a race at Newcastle on 20/11/2001. However, he was cleared of the charge of schooling the horse in public³²⁹.
- In late February 2001, trainer Micky Hammond was fined £1,600 and jockey Brian Harding suspended for 10 days under the "non-triers" rule at a meeting at Sedgefield. The incident involved the riding of *High Hoyland* in the opening Alphameric Betting Display Systems Novices Hurdle. The stewards considered that *High Hoyland* at no time appeared to be asked for sufficient effort, and interviewed Harding, and Hammond's representative, Martin Foster, a former jockey.

RUGBY UNION

The Martin Johnson affair (UK)

As the old year merged into the new, English rugby union found itself faced with a disciplinary case which ultimately reflected little credit on all parties concerned.

Following a Tetley's Bitter Cup quarter final game between Saracens and Leicester at Welford Road, England and Leicester captain Martin Johnson had two charges of foul conduct brought against him, the most serious of which left Duncan McRae, the "Sarries" outside half, with a broken rib. Neither incident was noticed by the referee, but he was reported to the Rugby Football Union Disciplinary Committee by the opposing club, in accordance with English rugby's citing system. Johnson immediately denigrated this method, calling for it to be replaced by the appointment of an independent citing officer - as indeed other players have done before him³³⁰.

In the event, Johnson also found himself facing a third charge arising from the same fixture, which had been brought by the Rugby Football Union itself, i.e. that of stamping on the Saracens fly half. The panel, chaired by Commodore Jeff Blackett, suspended Johnson for 7 and 21 days arising from the first and second charges respectively, and for 35 days in connection with the third. Both sentences were to run concurrently³³¹ - a somewhat lenient approach given that the three incidents were not related.

To say that everyone was happy at this decision is to understate the position somewhat. In spite of five previous occasions on which Johnson had been involved in stamping or punching incidents, the panel Chairman accompanied the ruling by the observation that his "good disciplinary record" had been taken into account³³². By some amazing coincidence, the ban ended on 2 February, the very day before England's first fixture in the Six Nations Championship against Wales³³³. Equally amazingly, the Leicester Chief Executive, former England international Peter Wheeler, declared himself to be "disappointed with the severity" of the decision³³⁴.

Johnson decided to appeal against this verdict, which produced its own set of bizarre aspects. Regulation 15(2) of the RFU statute book states:

"Where the decision appealed against involves suspension and an appeal is lodged within the period allowed, the suspension shall not take effect pending the determination of the appeal"

This meant that technically, Johnson's suspension was interrupted as from 1 pm on Saturday, 30/12/2000, when Leicester served notice of his appeal on the RFU³³⁵, until such time as the appeal was held, which was on Thursday, 4 January.

On that day, the RFU three-member appeal panel, chaired by former England centre John Spencer, dismissed Johnson's appeal, and with it his contention that he had been harshly treated. The five-week ban was therefore maintained. However, because Johnson had not disputed the penalty he had received for the least serious of the three charges of foul play, the panel took the bizarre view that this meant that Johnson was technically already serving his ban, thus saving him from having the suspension interrupted and taking effect beyond the England fixture with Wales³³⁶. This accordingly gave rise to the suspicion that the panel had been more concerned with ensuring Johnson was available for the Wales game than to see justice done.

Rows, threats, and contracts cause crisis in English rugby

The fact that English rugby has dominated the Six Nations championship this season may come as a surprise when considering the extent of the disagreements which have riven the domestic game for some months.

The main focus for the dissent at the heart of the English game has been a proposed partnership deal between the Rugby Football Union (RFU) and the Premiership clubs. It was proposed to create a Commission with equal representation of the Premiership clubs and the RFU in order to operate the financial aspects of the game. This appeared to favour the Premiership clubs considerably, which is why a number of the lower division clubs were distinctly unhappy with the proposals³³⁷. Nevertheless

the RFU Council, on 9/2/2001, approved the plan by a two-thirds majority. However, this left several hurdles yet to be cleared, including the threat of a special general meeting called by the Reform Group, who oppose the deal, as well as negotiations with the Second Division Clubs³³⁸.

The Premiership clubs then accused the RFU of prevarication and threatened to bring about a complete split between themselves and the game's authorities at Twickenham, thus taking control of their commercial destiny³³⁹. This also led to the players of these top clubs to pledge themselves to the latter in a 10-year contract, which would give the final say over release for international fixtures to the clubs. This too followed a prolonged period of wrangling over the contract between England's internationals and the RFU, which had centred round the weighting of match fees and win bonuses, and led to the players concerned taking industrial action a few months ago. Although that action had been called off and the monies paid in accordance with a peace deal worked out to stave off this industrial action, no contract had actually been signed by January 2001³⁴⁰.

The initial reaction by the RFU was to threaten to give the players who had signed these contracts with the Premiership clubs two months on which to renounce these agreements, or face life bans from the England squad³⁴¹. However, it was soon realised that the prospect of declaring nearly 400 players ineligible for Test duty would throw the international game into chaos and serve no-one's purpose but specialist lawyers. Accordingly, in late March 2001 the RFU issued a statement denying suggestions, ascribed to an unnamed official, that the players faced life bans unless they walked away from the Premiership contracts³⁴². This was particularly urgent, since a few days earlier Lawrence Dallaglio had revealed the extent to which the players who had signed these contracts were prepared to join forces in a massive show of solidarity in the face of any penalties which could be imposed by the Rugby authorities³⁴³.

Another issue which was straining relations amongst those involved in the game was the issue of promotion and relegation to the Premiership. The original proposal was that the bottom club in the Premiership would change places with the top Second Division side for two seasons, after which the door to promotion to the Premiership would be permanently closed³⁴⁴. This was not to the liking of the Second Division, whose organisation initiated a legal challenge before the High Court against this decision, seeking to guarantee promotion to the top flight over the next ten years³⁴⁵.

None of these issues had been definitely settled at the time of going to press, which means that this column will be monitoring developments in this regard closely over the next few months.

FOOTBALL

English lower division clubs' finances come under FA scrutiny

Chesterfield are a team which has never scaled the heights of soccer success. It is therefore unfortunate for its supporters that just as the club is looking to emerge from Third Division status, the footballing authorities have started to investigate the probity of their financial dealings.

Towards the end of January 2001, a delegation from the Football Association (FA) and from the Football League visited Chesterfield after receiving complaints about the business practices engaged in by the club. These centred round allegations that Bristol City had not received their share of the gate money for the FA Cup tie played at Saltergate (Chesterfield's ground) the previous November, and delays in paying the £150,000 transfer fee for Luke Beckett from Chester City³⁴⁶.

Further investigations caused further accusations of financial irregularities - including claims that nearly \$400,000 have been transferred from club funds to the accounts of troubled ice hockey club Sheffield Steelers and basketball team Westfield Sharks³⁴⁷. In late February, these investigations culminated into formal charges of misconduct being issued by the Football League³⁴⁸. The definite outcome of these charges was not known at the time of writing.

Another clubs whose financial operations came under close scrutiny earlier this year was First Division side Gillingham. A private investigator had compiled several files of documents containing allegations of irregularities and illegal payments to players. He claims to have sent them to the FA which showed no interest, following which he turned the file over to publicist Max Clifford who in turn communicated it to a national newspaper³⁴⁹.

Gillingham chairman Paul Scally threatened to take Max Clifford to court over the allegations, but thus far no such action has been forthcoming³⁵⁰. (See also under section 3 (Contracts), above p. 23).

Pressure by FA on players' agents to clean up their act (UK)³⁵¹

In late January 2001, the Football Association outlined a plan to act as a clearing house for player transfers in a bid to rid the game of corruption in this area. Under this plan, agents would be required to disclose all their transactions and have all their payments approved by the FA. The various details of the transfer would be contained in what David Dein, the FA Vice-Chairman, described as a "robust document" so that the transfer would only go ahead once the FA and Premier League were satisfied. Dein went on to stress the necessity of such safeguards in order to put an end to the "Wild West show" which the transfer market had become.

Round-up of individual cases

- In February 2001, Colin Todd, former Swindon manager, was issued with a three-match touchline ban after he was found guilty of misconduct by the FA. This arose from an incident during a game with Exeter City when Todd used foul and abusive language against a match official. Todd, now Assistant Manager at Derby County, was also required to pay a £2,500 fine³⁵².
- Referee Paul Taylor was "completely exonerated" of a misconduct charge brought against him in connection with comments allegedly made by him to Notts County player Sean Farrell during a game against Wigan Athletic on 14/10/2000. In February 2001, the three-member FA disciplinary committee held that the case against Taylor was not proven³⁵³.
- Paul Taylor had also been on the other end of some unorthodox behaviour by Arsenal manager Arsène Wenger at around the same time. This initially led to the Alsatian having a 12-match touchline ban inflicted on him. This was later overturned by the FA Appeal Board, which ruled that although some contact had occurred between Wenger and Taylor at Sunderland in August 2000, this did not amount to violent or threatening behaviour³⁵⁴.
- Middlesbrough player Ugo Ehiogu bore the brunt of a new hard-line approach by the FA Disciplinary Committee when he was suspended in February 2001 for four matches for a second dismissal this season after punching Wimbledon player Mark Williams³⁵⁵.
- In January 2001, FIFA, the world governing body, used video evidence to impose a severe three-month club ban on Trinidadian international Ancil Elcock during a World Cup qualifying match. It came just days after FIFA president Sepp Blatter had demanded a tough crackdown by referees and football authorities on violent play³⁵⁶.
- Manchester United players Ole Gunnar Solskjaer and Ronny Johnsen, as well as Tottenham's Steffen Iversen, have been banned from representing Norway because they failed to sign a sponsorship agreement aimed at raising money for soccer development in their home country³⁵⁷.
- France and Arsenal midfielder Patrick Vieira was suspended for one match and fined £10,000 by an FA Disciplinary Panel in February 2001, for having kicked fellow Frenchman Olivier Davourt in the head as the Leeds United player fell following a tackle. This incident had been missed by the match referee but was revealed on video³⁵⁸.
- Earlier in the season, Vieira had himself been on the receiving end of violent play during a cup tie at Carlisle, at the hands of Richard Prokas. The FA ultimately decided it would not study video evidence of the two-footed tackle that incapacitated Vieira - much to the dismay of Arsenal manager Arsène Wenger, who lamented what he saw as a shortcoming in the FA disciplinary system³⁵⁹.
- In January 2001, Paul Williams, the Coventry defender, had a three match suspension reduced to a one-game ban after an FA disciplinary hearing. He had been charged with bringing the game into disrepute after kicking the fourth official's electronic board in frustration after receiving a red card against Preston in September 2000³⁶⁰.

- During the same month, the Zimbabwe FA suspended Birmingham City winger Peter Ndlovu after he refused to play for the national side in a match against Ghana. The player said his decision had been motivated by the Zimbabwe football authorities' refusal to pay for a large parking fine which he had incurred at Heathrow Airport, parking his car illegally in his desperation to board a flight taking him to a match against the Congo³⁶¹.
- Wycombe Wanderers player Adam Brown must have had mixed feeling about his side's giant-killing win over Leicester City in March 2001, having been sent off after incurring a second yellow card for displaying a vest bearing the name of his sick 15-month-old son. This earned him a four-match ban, including the semi-final against Liverpool³⁶².
- In February 2001, AS Roma's appeal against their UEFA Cup elimination by Liverpool failed. The Italian side had claimed that the referee's actions in awarding them a penalty, only to change his mind and give a corner, was serious enough to warrant the game being replayed³⁶³.

CRICKET

England and Sri Lanka "betray the game's principles" as Jayasuriya is fined³⁶⁴

Even the most tolerant of cricket enthusiasts will admit that this winter's Test series between Sri Lanka and England must go down as one of the most tempestuous since the "Bodyline" series between England and Australia in the 1930s. During the final Test, the on-field abuse and displays of temper on both sides reached such a pitch that referee Hanumant Singh, the former India Test batsman, condemned both sides as having betrayed the principles of the game. Even some of the more dubious decisions by the umpires could not excuse these excesses.

The worst culprit was adjudged to have been Sanath Jayasuriya, who had his match fee docked by 60 per cent and banned for two Tests and two one-day internationals.

English counties face five-run penalties for dissent³⁶⁵

It is widely known that the problems mentioned in the previous item have also entered the domestic game. This appears to have been particularly the case since last season, with the introduction of a two-divisional championship amongst county clubs. This has undoubtedly improved the competitive edge of county cricket, but also led to increased levels of dissent and other forms of unacceptable behaviour.

The English cricketing authorities have therefore made plans to apply a revolutionary scheme whereby counties will be punished for gamesmanship by the imposition of five-run penalties. In fact such penalties had already been written into the game's Laws last autumn, but have not hitherto been implemented, with the International Cricket Council largely choosing to override them with its own playing rules applicable to Tests and internationals. However, Barry Duddleston, the Vice-Chairman of the Umpires' Association, stated in March 2001 that these measures were strongly being considered in order to stamp out dissent and gamesmanship.

RUGBY LEAGUE

Wigan and Warrington escape superleague violence with reprimand (UK)³⁶⁶

Top teams Wigan and Warrington escaped with a reprimand after the Rugby Football League (RFL) Executive Committee investigated the opening fixture in the Super League in March 2001, which was marked by running battles between the players during the second half. Two players were dismissed, whereas two others were subsequently referred to the Disciplinary Committee for fighting. All received two-match suspensions. Warning letters were issued to three other players.

The Executive Committee also recommended that in future, they should have the right to refer players involved on the periphery of incidents to the disciplinary committee under a charge of "behaviour in any way contrary to the true spirit of the game".

Hotline to discipline - St. Helens forward found guilty by phone (UK)³⁶⁷

In late February 2001, St. Helens forward Vila Matautia made history by being found guilty by telephone of a reckless high tackle. The Samoan international had been dismissed during a Challenge Cup match with Whitehaven, but was unable to attend the hearing because of problems on the M62 motorway, and therefore took part in the hearing by phone. He was suspended for four games.

Rhinos' McDermott suspended after video evidence (UK)³⁶⁸

Barrie McDermott, the Leeds Rhinos prop forward, had a four-match ban and £500 fine imposed on him after video evidence showed that he had punched Peter Shiels during the Silk Cut Challenge Cup match with St. Helens on 31/3/2001. BBC cameras had recorded the blow, which left the unfortunate Shiels requiring eight stitches over his right eye.

RFL returns £735,000 after admitting fund mistakes (UK)³⁶⁹

In January 2001, the Rugby Football League (RFL) announced that it would donate £735,000 to its own charity after admitting to mistakes in administering funds. Although it denies any misappropriation, the RFL acknowledged that officials had failed to apply correct procedures in the administration of the Rugby League Foundation. This brings to a close a three-year investigation by the Charity Commissioners into the operation of the Foundation, which had been established in 1986 in order to promote youth rugby.

The Commissioners had started to check the activities of the Foundation in the wake of a newspaper report in 1997 claiming that £890,000 had been removed from the funds without the consent of the trustees.

MOTOR RACING

New safety measures proposed after race marshal loses life in Australian GP³⁷⁰

Tragedy struck at the Australian Grand Prix in March 2001, when Graham Beveridge, a marshal officiating at the event, was struck by a loose wheel after the cars of Jacques Villeneuve and Ralf Schumacher collided at 160 mph. The FIA, which is the sport's world governing body, launched an investigation into the accident. Mr. Beveridge was the second marshal to lose his life at a Grand Prix event in the space of six months.

Cockpit warning lights informing drivers of incidents ahead may be introduced next season in order to reduce the number of trackside officials operating during the race, thus reducing the number of potential race victims amongst them. Speed reductions and higher fences were also measures under consideration by the FIA.

AMERICAN FOOTBALL

Controversy over "slap on the wrist" administered to San Francisco 49ers over salary cap breach³⁷¹

Ever since the National Football League imposed a salary cap on its teams in the 1990s, it has been extremely difficult for clubs to retain the services of their star players, as they lost most of them to "free agency" in order to comply with these restrictions. Except, that is, for the San Francisco 49ers, who seemed to be able to sustain a true dynasty among their top players. However, when the game's investigating authorities probed this apparent mystery, they discovered that the main reason for this effortless retention of star players was the elemental fact that the team's administrators broke the rules.

As from the mid-1990s, the 49ers used creative accounting and under-the-counter deals to retain the services of Pro Bowl quarterback Steve Young and tight end Brent Jones, as well as a number of other,

less renowned, key players. Both the president and the general manager of the club conspired with players' agents to circumvent the salary cap by having the footballers agree to reduced contract fees in return for substantial deferred salaries. This enabled the San Francisco team to sign expensive free agents such as Deion Sanders, as well as retaining their own top players such as Jerry Rice, even though they already had the highest payroll in the NFL.

A similar situation had arisen in basketball, with the Minnesota Timberwolves playing fast and loose with the relevant rules. Severe penalties were administered to the culprits in this case. However, no such rigour was on display in the manner in which the NFL dealt with the 49ers. The club was fined \$300,000 and ordered to forfeit a fifth-round choice in the draft for April 2001 and a third-round pick in 2002. The then president and general manager, who have since taken up employment with the Cleveland Browns, received fines of \$400,000 and \$200,000 respectively. However, it is expected that the Cleveland club would indemnify the culprits for these amounts. The agents in question had fines of \$250,000 and \$100,000 imposed on them.

Some owners of other NFL teams were outraged at the leniency of these penalties. In addition, Al Davis, the outspoken owner of the Oakland Raiders, alleged that other teams had been engaging in similar breaches of the rules.

ICE HOCKEY

Sheffield Steelers banned after Nottingham brawl³⁷²

In February 2001, Sheffield Steelers Scott Allison and Dennis Vial were banned for 14 and six games, and fined £850 and £750 respectively, for their part in the brawl during a fixture in Nottingham. The clubs themselves received a fine of £2,500. Nottingham's Barry Nieckar was banned for five games and received a £700 fine, and their coach Peter Woods was fined £250.

Footnotes

- (1) *Gazette* of 11/1/2001, p. 12.
- (2) *The Guardian* of 27/12/2000, p. 6.
- (3) *The Daily Telegraph* of 28/12/2000, p. 19.
- (4) *The Daily Telegraph* of 15/1/2001, p. 12.
- (5) *Daily Mail* 27/1/2001, p. 3.
- (6) *The Guardian* of 8/2/2001, p. 5.
- (7) *Ibid.*
- (8) *For the Record* (Official newsletter of the National Sports Law Institute) February/March 2001, p. 1.
- (9) *Nederlands Juristenblad* of 2/2/2001, p. 243.
- (10) *Daily Mail* of 29/12/2000, p. 87.
- (11) *The Guardian* of 13/1/2001 (Sports section) p.9.
- (12) *For the Record* (Official Newsletter of the Sports Law Institute) February/March 2001, p. 5.
- (13) *The Mail on Sunday* of 11/3/2001, p. 113.
- (14) *Gazette* of 11/1/2001, p. 12.
- (15) Appenzeller, T., *Youth Sport and the Law: a Guide to the Legal Issues* [2000] Durham, North Carolina, reviewed by Hauser, K., in [2001] 1 *Marquette Sports Law Review*, p. 165-6.
- (16) Buchberger, M., "Rechtliche Grenzen von Beratertätigkeiten im Sport", *Anwaltsblatt*, November 2000, p. 637 et seq.
- (17) *Advokaten* No 1 [2001] p. 9.
- (18) *The Guardian* of 2/1/2001, p. 6.
- (19) *The Daily Telegraph* of 16/12/2000, p. 10.
- (20) *The Guardian* of 20/1/2001, p. 7.
- (21) *The Times* of 9/2/2001, p. 8.
- (22) *The Sunday Express* 17/12/2000, p. 25.
- (23) *The Daily Telegraph* of 27/12/2001, p. 46.
- (24) *The Guardian* of 16/2/2001, p. 2.
- (25) *The Daily Telegraph* of 7/2/2001, p. 6.
- (26) *The Guardian* of 2/2/2001, p. 32.
- (27) *The Guardian* of 18/12/2001, (Sports section) p. 5.
- (28) *The Guardian* of 2/2/2001, p. 32.
- (29) *The Mail on Sunday* of 28/1/2001, p. 125.
- (30) *The Daily Telegraph* of 14/3/2001, p. 33.
- (31) *The Observer* of 31/12/2000, p. 30.
- (32) *Daily Mail* of 2/4/2001, p. 69.
- (33) *The Times* of 19/12/2000, p. 29.
- (34) *The Sunday Telegraph* of 7/1/2001 (Sports section) p. 12.
- (35) *The Daily Telegraph* of 14/12/2000, p. 19.
- (36) *The Guardian* of 8/2/2001, p. 11.
- (37) *The Guardian* of 10/4/2001, p. 1.
- (38) *Ibid.* p. 2.
- (39) *The Daily Telegraph* of 10/4/2001, p. 1.
- (40) Anderson, J., "Citius, Altius, Fortius? A study of criminal violence in sport" [2000] 1 *Marquette Sports Law Review* p. 87 et seq.
- (41) [1994] 1 *Sport and the Law Journal*, p. 5 et seq.
- (42) [1996] 2 *Sport and the Law Journal*, p. 40 et seq.
- (43) [1999] 3 *Sport and the Law Journal*, p. 41 et seq.
- (44) [1995] 3 *Sport and the Law Journal*, p. 47 et seq.
- (45) 8 QBD 534 (1882).
- (46) [1993] 2 *WLR* 556.
- (47) *The Times* of 23/2/2001, p. 3.
- (48) *The Daily Telegraph* of 23/2/2001, p. 42.
- (49) *Daily Mail* of 1/3/2001, p. 85.
- (50) *Daily Mail* of 8/1/2001, p. 19.
- (51) *The Daily Telegraph* of 31/1/2001, p. 6.
- (52) *The Daily Telegraph* of 28/3/2001, p. 44.
- (53) Decision of the Hoge Raad (Netherlands Supreme Court) of 16/1/2001 in Case No. 00874/99, in *Nederlands Juristenblad* of 23/2/2001, p. 358-9.
- (54) [1999] *Sport and the Law Journal*, vol. 3, p. 10.
- (55) Translation by the author.
- (56) *The Daily Telegraph* of 14/12/2000, p. 43.
- (57) *Daily Mail* of 16/12/2000, p. 84.
- (58) *Daily Mail* of 12/2/2001, p. 66.

- (59) *The Guardian* of 12/1/2001, p. 31.
- (60) *The Daily Telegraph* of 12/2/2001 (Sports section) p. 5.
- (61) *The Mail on Sunday* of 25/3/2001, p. 117.
- (62) *Daily Mail* of 17/1/2001, p. 89.
- (63) *The Guardian* of 23/1/2001, p. 32.
- (64) *The Guardian* of 26/1/2001, p. 42.
- (65) *The Daily Telegraph* of 26/1/2001, p. 42.
- (66) [2000] 3 *Sport and the Law Journal* p. 14.
- (67) *The Guardian* of 29/12/2000, p. 24.
- (68) *The Guardian* of 13/1/2001 (Sports section) p. 7.
- (69) *The Guardian* of 27/2/2001, p. 23.
- (70) *The Daily Telegraph* of 1/2/2001, p. 41.
- (71) *The Times* of 9/2/2001, p. 36.
- (72) *The Guardian* of 11/12/2000, (Sports section) p. 9.
- (73) [2000] 1 *Sport and the Law Journal* p. 16.
- (74) *The Guardian* of 23/1/2001, p. 31.
- (75) *The Times* of 21/12/2000, p. 28.
- (76) *Mark's Sportslaw News* (19/1/2001) at <http://sportslawnews.com>
- (77) *Mark's Sportslaw News* (8/1/2001), op. cit.
- (78) See [2000] 3 *Sport and the Law Journal* p. 8; *The Times* of 21/12/2001, p. 28.
- (79) *Mark's Sportslaw News* (8/1/2001) op. cit.
- (80) *The Guardian* of 10/2/2001, p. 20.
- (81) *Daily Mail* of 24/1/2001, p. 93.
- (82) *Ibid.*
- (83) *The Guardian* of 27/1/2001, (Sports section) p. 2.
- (84) *Daily Mail* of 24/1/2001, p. 93.
- (85) *The Guardian* of 13/2/2001, p. 30.
- (86) *Daily Mail* of 9/2/2001, p. 85.
- (87) *Daily Mail* of 23/2/2001, p. 96.
- (88) *The Sunday Telegraph* of 25/3/2001 (Sports section) p. 5.
- (89) *Het Nieuwsblad/De Gentenaar* of 20/3/2001, p. 3.
- (90) Translation by the author
- (91) *The Daily Telegraph* of 20/1/2001, p. 16.
- (92) *The Guardian* of 2/2/2001, p. 18.
- (93) *The Guardian* of 7/3/2001, p. 31.
- (94) Griffith, M. and Hopkins, M., "Betting Shop Violence: a Cause for Concern?" in [2001] 74 *The Police Journal*, p. 55 et seq.
- (95) *Daily Mail* of 24/2/2001, p. 93.
- (96) *The Daily Telegraph* of 7/3/2001, p. 5.
- (97) *The Guardian* of 20/12/2000, p. 10.
- (98) *Daily Mail* of 1/3/2001, p. 13.
- (99) *Daily Mail* of 31/3/2001, p. 88.
- (100) *The Daily Telegraph* of 27/3/2001, p. 42.
- (101) *Gazette* of 5/1/2001, p. 7.
- (102) *Daily Mail* of 26/2/2001, p. 72.
- (103) *Daily Mail* of 11/1/2001, p. 92.
- (104) Decision of the Court of Appeal (*Cour d'Appel*) of Lyon in *Rousset v. Association Olympique lyonnaise* dated 17/2/1999, JCP - *La Semaine Juridique - Edition Générale* of 10/1/2001, p. 106.
- (105) *The Guardian* of 14/12/2000, p. 34.
- (106) *The Observer* of 21/1/2001, p. 5.
- (107) *The Daily Telegraph* of 20/12/2000, p. 33.
- (108) *Disley v. Levine* QBD 9/11/2000, reported in *The Daily Telegraph* of 12/12/2000, p. 17.
- (109) Decision of the Court of Appeal (*Cour d'appel*) of Grenoble in *Lair v. SA Satelam*, dated 27/6/2000, JCP-*La Semaine Juridique - Edition Générale* of 7/3/2001, p. 518.
- (110) *The Mail on Sunday* of 14/1/2001, p. 119.
- (111) *Daily Express* of 3/4/2001, p. 85.
- (112) *The Daily Telegraph* of 10/1/2001, p. 39.
- (113) *Daily Mail* of 24/1/2001, p. 86.
- (114) Wilson, N., "Digital dilemma" in *Daily Mail* of 28/1/2001, p. 67.
- (115) *The Guardian* of 13/2/2001, p. 84.
- (116) *The Guardian* of 12/2/2001, p. 4.
- (117) *Daily Mail* 3/3/2001, p. 79.
- (118) *Daily Mail* of 1/2/2001, p. 88.
- (119) *The Independent* of 4/1/2001, p. 25.
- (120) *The Daily Telegraph* of 12/1/2001, p. 43.
- (121) *The Guardian* of 16/12/2000 (Sports section), p. 2.
- (122) *Ciaran O'Connor v. North Eastern Health Board*, High Court on circuit in Dundalk, judgment of 13/12/1999, *Law Society Gazette* of November 2000, p. 50-51.
- (123) *The Guardian* of 17/3/2001, (Sports section) p. 1.
- (124) *Mark's Sportslaw News* (17/2/2001), op. cit.
- (125) *The Daily Telegraph* of 18/12/2000, p. 11.
- (126) *The Daily Telegraph* of 19/12/2000, p. 28.
- (127) Lattenville, R., "Put me in coach - a game plan for negotiating and drafting college coaching contracts" *For the Record (Official Newsletter of the National Sports Law Institute)* December 2000/January 2001, p. 1 et seq.
- (128) *Harrison v. West of Scotland Kart Club* [2001] Rep. L.R., in *Current Law March Digest* 2001, p. 245-6.
- (129) *Daily Mail* of 2/3/2001, p. 17.
- (130) [2000] 3 *Sport and the Law Journal*, p. 21.
- (131) *The Times* of 15/12/2000, p. 40.
- (132) *Daily Mail* 27/2/2001, p. 87.
- (133) *Robert v. Skillandudno Ltd.* [2001] PIQR p. 5, *Current Law February Digest* [2001] p. 55.
- (134) *The Guardian* of 19/1/2001, p. 1.
- (135) *The Daily Telegraph* of 19/1/2001, p. 5.
- (136) *Daily Mail* of 2/2/2001, p. 86.
- (137) *Daily Mail* of 15/2/2001, p. 84.
- (138) *The Daily Telegraph* of 2/2/2001, p. 33.
- (139) "This sporting muddle", *New Law Journal* 9/2/2001, p. 9.
- (140) *The Guardian* of 17/2/2001, p. 9.
- (141) *The Daily Telegraph* of 20/12/2000, p. 8.
- (142) [2000] 3 *Sport and the Law Journal* p. 21.
- (143) *The Independent* (Review) of 11/2/2001, p. 22.
- (144) *Daily Mail* of 27/1/2001, p. 5.
- (145) *Daily Mail* of 27/2/2001, p. 87.
- (146) *Gazette* of 5/1/2001, p. 3.
- (147) Decision of the French Supreme Court (*Cour de Cassation*) in *Portal v. Rouis*, dated 16/11/2000, JCP-*La Semaine Juridique, Edition Générale* of 10/2/2001, p. 100.
- (148) *Whelan v. Mowlds*, decision of the High Court dated 12/10/2000, *Law Society Gazette* March 2001, p. 38-9.
- (149) *Denoix de Saint-Marc, S.*, "La responsabilité des clubs de rugby fondée sur l'article 1384, alinéa 1er, du code civil: le maintien d'une solution contestable", in *Le Dalloz* [2000], p. 862-64.
- (150) [2000] 2 *Sport and the Law Journal*, p. 23.
- (151) Translation by the author.
- (152) Decision of the Supreme Court of 25/2/1998, JCP - *La Semaine Juridique* II, No. 10149.
- (153) Decision of the District Court (*Tribunal de Grande Instance*) of Marseille dated 6/10/1983, D. 1985, with annotation by J-P Karanquillo.
- (154) *The Daily Telegraph* of 1/3/2001, p. 42.
- (155) *The Guardian* of 27/1/2001, p. 34.
- (156) *The Daily Telegraph* of 1/1/2001, p. 8.
- (157) *The Independent* of 1/1/2001, p. 3.
- (158) *Het Nieuwsblad/De Gentenaar* of 20/3/2001, p. 3.
- (159) *The Sunday Telegraph* of 21/1/2001 (Sports section) p. 1.
- (160) *The Sunday Telegraph* of 17/12/2000, p. 6.
- (161) "Point-to-point racing heading for a fall", *The Daily Telegraph* of 8/1/2001 (Sports section) p. 9.
- (162) "Blair must see the point" *The Daily Telegraph* of 12/1/2001, p. 41.
- (163) *De Gentenaar* of 27/12/2000, p. 1.
- (164) 2 [2000] *Sport and the Law Journal* p. 31.

- (165) *The Daily Telegraph* of 10/1/2001, p. 19.
- (166) *The Guardian* of 29/12/2000, p. 1.
- (167) *The Times* of 22/2/2001, p. 45.
- (168) [2000] 3 *Sport and the Law Journal* p. 17.
- (169) *The Guardian* of 11/1/2001, p. 36.
- (170) *The Guardian* of 18/1/2001, p. 36.
- (171) *Daily Mail* of 19/1/2001, p. 85.
- (172) *The Daily Telegraph* of 2/2/2001, p. 48.
- (173) *The Daily Telegraph* of 16/12/2000, (Sports section) p. 6.
- (174) *The Guardian* of 2/3/2001, p. 35.
- (175) *Daily Mail* of 10/2/2001, p. 92.
- (176) *Daily Mail* of 9/3/2001, p. 92.
- (177) *The Daily Telegraph* of 6/2/2001, p. 44.
- (178) *Ibid.*
- (179) *The Daily Telegraph* of 9/3/2001, p. 42.
- (180) Slot, O., "Counting the Cost of Wembley Fiasco", in *The Sunday Telegraph* of 14/1/2001 (Sports section) p. 7.
- (181) *The Daily Telegraph* of 26/3/2001, (Sports section) p. 5.
- (182) *The Daily Telegraph* of 1/3/2001, p. 43.
- (183) *Daily Mail* of 24/2/2001, p. 89.
- (184) *The Guardian* of 28/2/2001, p. 32.
- (185) *The Daily Telegraph* of 8/3/2001, p. 84.
- (186) *Daily Mail* of 8/3/2001, p. 84.
- (187) *Daily Mail* of 20/3/2001, p. 76.
- (188) *The Mail on Sunday* of 11/3/2001, p. 117.
- (189) See, *inter alia*, Charlie Brooks in *The Daily Telegraph* of 27/3/2001, p. 41.
- (190) *Daily Mail* of 20/3/2001, p. 76.
- (191) *Daily Mail* of 28/3/2001, p. 77.
- (192) *Daily Mail* of 2/3/2001, p. 84.
- (193) *The Guardian* of 23/3/2001, p. 29.
- (194) *Daily Mail* of 6/3/2001, p. 80.
- (195) *The Daily Telegraph* of 14/3/2001, p. 43.
- (196) *The Daily Telegraph* of 28/3/2001, p. 37.
- (197) *The Daily Telegraph* of 13/3/2001, p. 43.
- (198) *The Times* of 28/2/2001, p. 32.
- (199) *The Daily Telegraph* of 5/3/2001 (Sports section) p. 14.
- (200) *Daily Mail* of 14/3/2001, p. 96.
- (201) *Daily Mail* of 2/4/2001, p. 80.
- (202) *The Guardian* of 7/3/2001, p. 31.
- (203) *The Daily Telegraph* of 1/3/2001, p. 43.
- (204) *Ibid.*
- (205) *Daily Mail* of 4/4/2001, p. 87.
- (206) *Ibid.*, p. 5.
- (207) *The Guardian* of 6/3/2001, p. 30.
- (208) *The Daily Telegraph* of 5/3/2001, p. 45.
- (209) *Daily Mail* of 14/3/2001, p. 96.
- (210) *Cardtoons, L.C. v. Major League Baseball Players Ass'n* 208 F.3d 885 (10th Cir.) (en banc), cert. Denied 121 Ct. 175, reported in [2000] *Harvard Law Review* p. 655 et seq.
- (211) Case G 69, 70/99 of 16/12/1999, [2001] *Österreichische Juristenzeitung* p. 31-3.
- (212) Translation by the author.
- (213) Decision of the Bavarian Administrative Court in Case No 19 B 96.3964, dated 28/10/1999, in *Die Öffentliche Verwaltung* of February 2001, p. 177.
- (214) Decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 10/7/2000, in Case 4 B 39.00, in *Die Öffentliche Verwaltung* of December 2000, p. 1010-11.
- (215) Decision of the Federal Administrative Court of 6/11/1968 in case 4 C 2.66, in *BVerwGE* 31, p. 20.
- (216) Decision of the Regional Court of Administrative Appeal (*Verwaltungsgerichtshof*) of Baden-Württemberg dated 14/6/2000, in Case 1 S 1271/00.
- (217) *Bannatyne's Health Club v. Aberdeen City Licensing Board*, Sheriff M.J. Fletcher, Sh Ct (Grampian, Highland and Islands), [2001] *Current Law February Digest* p. 225.
- (218) *R. v. Sunderland City Council, ex p. Beresford*, QBD 16/1/2001, in *Current Law February Digest* 2001, p. 169.
- (219) *Morrells of Oxford Ltd v. Oxford United Football Club and others* Court of Appeal, 21/7/2001, reported in *Estates Gazette* of 27/1/2001.
- (220) [2000] 3 *Sport and the Law Journal* p. 36.
- (221) *Mark's Sportslaw News* (19/1/2001) op. cit.
- (222) *The Daily Telegraph* of 20/12/2000, p. 43.
- (223) *Belmont Olympic SA's Trade Mark Application* [2000] *European Trade Mark Reports* 919, Office for Harmonisation in the Internal Market (Opposition Division), in *Current Law March*, 2001, p. 152.
- (224) *Mark's Sportslaw News* (4/1/2001) op. cit.
- (225) *The Observer* of 21/1/2001, p. 10.
- (226) *The Guardian* of 31/1/2001, p. 33.
- (227) *Canadian Olympic Association v. Techniquip Ltd.*, 10/11/1999, Federal Court of Appeal, 3 *Canadian Patent Reporter* (4th) p. 298 et seq.
- (228) *Canadian Olympic Association v. Logo-Motifs et al.*, 2/12/1999, Federal Court, Trial Division, 3 *Canadian Patent Reporter* (4th) 219 et seq.
- (229) *Re Statement of Royalties to be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (Tariff 9 - Sports Events in 1998, 1999, 2000 and 2001)*, Copyright Board, Decision of 15/9/2000, 9 *Canadian Patent Reporter* (4th) p. 36 et seq.
- (230) *The Guardian* of 7/4/2001, p. 5.
- (231) *The Guardian* of 10/2/2001, p. 10.
- (232) *NBA Properties Inc. v. Adirondack Software Corporation*, Administrative Panel decision of the WIPO Arbitration and Mediation Center in Case No. D2000-1211.
- (233) Mitten, M.J., "Applying anti-trust law to NCAA regulation of 'big time' college athletics: the need to shift from nostalgic 19th and 20th century ideals of amateurism to the economic realities of the 21st century" [2000] 1 *Marquette Sports Law Review* p. 1 et seq.
- (234) *The Guardian* of 12/2/2001, p. 31.
- (235) Some readers may be forgiven for making the acerbic comment "Just like Manchester United, in fact!".
- (236) Speech given at the Conference on "Governance in Sport" in Brussels on 26/2/2001 - ref. SPEECH/01/84.
- (237) [2000] 3 *Sport and the Law Journal* p. 48.
- (238) Lewis, A., "Ticket Distribution: the aims and methods of event organisers and the competition policy of the European Commission" [2000] 2 *International Sports Law Review* p. 56 et seq.
- (239) *The Guardian* of 27/1/2001, (Sports section) p. 7.
- (240) [2000] 3 *Sport and the Law Journal* p. 45.
- (241) *The Guardian* of 21/12/2001, p. 30.
- (242) *The Guardian* of 20/1/2001 (Sports section) p. 2.
- (243) *Daily Mail* of 19/1/2001, p. 93.
- (244) *Daily Mail* of 7/2/2001, p. 95.
- (245) *The Guardian* of 15/2/2001, p. 35.
- (246) *The Guardian* of 17/2/2001, (Sports section) p. 2.
- (247) *The Guardian* of 3/3/2001, (Sports section) p. 2.
- (248) *Daily Mail* of 6/3/2001, p. 84.
- (249) Reference DN: SPEECH/01/117, dated 13/3/2001 (not yet officially published).
- (250) Reference DN: IP/01/314.
- (251) It is also interesting to note that the press release in question is dated 5 March, when the meeting had not yet concluded and in fact had two more days to go. More evidence of media manipulation?
- (252) *The Daily Telegraph* of 7/3/2001, p. 45.
- (253) *Ibid.*
- (254) *Ibid.*

- (255) *The Daily Telegraph* of 13/2/2001, p. 44.
- (256) *The Guardian* of 7/3/2001, p. 34.
- (257) *Ibid.*
- (258) Debates in European Parliament available on the EU website <http://europa.eu.int>. These have not yet been officially published.
- (259) *The Sunday Telegraph* of 18/2/2001, (Sports section) p. 9.
- (260) *Ibid.*
- (261) *The Guardian* of 24/2/2001, (Sports section) p. 8.
- (262) *The Mail on Sunday* of 1/4/2001, p. 91.
- (263) *The Times* of 11/1/2001, p. 26.
- (264) *The Guardian* of 11/1/2001, p. 34.
- (265) *The Daily Telegraph* of 29/12/2000, p. 46.
- (266) *The Daily Telegraph* of 7/2/2001, p. 42.
- (267) *The Daily Telegraph* of 12/2/2001, (Sports section) p. 5.
- (268) *The Guardian* of 9/3/2001, p. 30.
- (269) *Ibid.*
- (270) *Sheridan Gymnasium Equipment Ltd. v. Gymnasium & Health Equipment Ltd. et al*, Federal Court, Trial Division, Decision in case No. T-568-98 dated 28/9/2000, in 9 *Canadian Patent Reporter* p. 26 et seq.
- (271) *Daily Mail* of 8/3/2001, p. 85.
- (272) *Ibid.*
- (273) *The Guardian* of 7/3/2001, p. 31.
- (274) *The Guardian* of 13/1/2001, p. 11.
- (275) *The Guardian* of 12/2/2001, p. 30.
- (276) *The Mail on Sunday* of 4/2/2001, p. 117.
- (277) *The Mail on Sunday* of 25/2/2001, p. 122.
- (278) *The Daily Telegraph* of 30/12/2000 (Sports section) p. 11.
- (279) *Daily Mail* of 22/2/2001, p. 77.
- (280) *The Daily Telegraph* of 4/1/2001, p. 44.
- (281) *The Daily Telegraph* of 16/12/2000, p. 9.
- (282) *Ibid.*
- (283) *The Guardian* of 16/12/2000, p. 5.
- (284) *The Independent* of 5/1/2001, p. 21.
- (285) *The Daily Telegraph* of 20/2/2001, p. 43.
- (286) *The Daily Telegraph* of 9/1/2001, p. 41.
- (287) Mulcahy, J. and Sanderson, R., "The Impact of the Human Rights Act on Sports Tribunals" [2000] 2 *International Sports Law Review*, p. 65 et seq.
- (288) *The Guardian* of 19/12/2000, p. 28.
- (289) [2000] 3 *Sport and the Law Journal* p. 55.
- (290) *Daily Mail* of 25/1/2001, p. 89.
- (291) *The Guardian* of 17/1/2001, p. 34.
- (292) *Ibid.*
- (293) *The Sunday Telegraph* of 21/1/2001 (Sports section) p. 7.
- (294) *Ibid.*
- (295) *Daily Mail* of 9/1/2001, p. 89.
- (296) *Ibid.*
- (297) *Daily Mail* of 11/1/2001, p. 89.
- (298) *Ibid.*
- (299) *The Guardian* of 26/3/2001, p. 6.
- (300) Voet, W., *Breaking the Chain: Drugs and Cycling* (translated by William Fotheringham) Yellow Jersey Press, 2001.
- (301) *The Guardian*, loc. cit.
- (302) *The Daily Telegraph* of 6/3/2001, p. 42.
- (303) *The Daily Telegraph* of 7/3/2001, p. 41.
- (304) [1999] 3 *Sport and the Law Journal* p. 25.
- (305) *The Daily Telegraph* of 29/3/2001, p. 43.
- (306) *Manchester Evening News* of 21/12/2000 (Sports section) p. 5.
- (307) *The Guardian* of 24/2/2001 (Sports section) p. 8.
- (308) *The Guardian* of 30/3/2001, p. 28.
- (309) *The Guardian* of 14/3/2001, p. 30.
- (310) *The Daily Telegraph* of 20/3/2001, p. 42.
- (311) *Daily Mail* of 6/1/2001, p. 91.
- (312) *The Guardian* of 21/2/2001, p. 35.
- (313) *The Guardian* of 12/12/2000, p. 32.
- (314) *The Daily Telegraph* of 30/12/2000 (Sports section) p. 9.
- (315) *The Daily Telegraph* of 14/12/2001, p. 45.
- (316) *Daily Mail* of 8/2/2001, p. 90.
- (317) *The Daily Telegraph* of 14/3/2001, p. 45.
- (318) *The Daily Telegraph* of 23/2/2001, p. 42.
- (319) *Nieuwsblad/De Gentenaar* of 26/12/2000, p. 17.
- (320) *Daily Mail* of 19/1/2001, p. 91.
- (321) *The Guardian* of 9/1/2001, p. 31.
- (322) *The Daily Telegraph* of 14/2/2001, p. 48.
- (323) *The Guardian* of 31/1/2001, p. 31.
- (324) *Daily Mail* 11/1/2001, p. 86.
- (325) *The Guardian* of 6/1/2001 (Sports section) p. 10.
- (326) *The Guardian* of 27/2/2001, p. 31.
- (327) *Daily Mail* of 5/1/2001, p. 87.
- (328) *The Guardian* of 30/1/2001, p. 31.
- (329) *Daily Mail* of 5/1/2001, p. 87.
- (330) *The Daily Telegraph* of 28/12/2000, p. 46.
- (331) *Daily Mail* of 29/12/2000, p. 87.
- (332) *Ibid.*
- (333) *The Daily Telegraph* of 29/12/2000, p. 46.
- (334) *The Guardian* of 29/12/2000, p. 28.
- (335) *Daily Mail* of 4/1/2001, p. 79.
- (336) *The Guardian* of 5/1/2001, p. 32.
- (337) *The Daily Telegraph* of 8/2/2001, p. 45.
- (338) *Daily Mail* of 9/2/2001, p. 82.
- (339) *The Guardian* of 13/3/2001, p. 32.
- (340) *The Daily Telegraph* of 17/1/2001, p. 42.
- (341) *The Guardian* of 20/3/2001, p. 33.
- (342) *The Guardian* of 24/3/2001 (Sports section) p. 5.
- (343) *Daily Mail* of 22/3/2001, p. 81.
- (344) *The Daily Telegraph* of 4/1/2001, p. 41.
- (345) *The Guardian* of 11/1/2001, p. 32.
- (346) *The Guardian* of 26/1/2001, p. 32.
- (347) *Daily Mail* of 26/1/2001, p. 93.
- (348) *The Daily Telegraph* of 23/2/2001, p. 44.
- (349) *The Guardian* of 12/1/2001, p. 32.
- (350) *The Daily Telegraph* of 12/1/2001, p. 44.
- (351) *The Daily Telegraph* of 31/1/2001, p. 44.
- (352) *The Daily Telegraph* of 14/2/2001, p. 42.
- (353) *Daily Mail* of 19/1/2001, p. 88.
- (354) *The Guardian* of 3/2/2001 (Sports section) p. 4.
- (355) *The Guardian* of 21/2/2001, p. 33.
- (356) *The Sunday Express* of 21/1/2001 (Sports section) p. 3.
- (357) *Daily Mail* of 3/1/2001, p. 73.
- (358) *The Times* of 9/2/2001, p. 39.
- (359) *Daily Mail* of 9/1/2001, p. 90.
- (360) *The Independent* of 11/1/2001, p. 26.
- (361) *The Observer* of 21/1/2001, p. 15.
- (362) *The Guardian* of 13/3/2001, p. 30.
- (363) *The Guardian* of 28/2/2001, p. 30.
- (364) *The Guardian* of 10/3/2001 (Sports section) p. 5.
- (365) *The Guardian* of 13/3/2001, p. 37.
- (366) *The Daily Telegraph* of 7/3/2001, p. 45.
- (367) *The Guardian* of 28/2/2001, p. 28.
- (368) *Daily Mail* of 4/4/2001, p. 79.
- (369) *The Guardian* of 13/1/2001, p. 6.
- (370) *The Guardian* of 6/3/2001, p. 28.
- (371) *The Guardian* of 9/12/2000 (Sports section) p. 6.
- (372) *The Guardian* of 15/2/2001, p. 35.

Walter Cairns,
Senior Lecturer in Law and Languages,
Manchester Metropolitan University.

Is Sport Special?

Tim Kerr

I am here to offer some thoughts on why - in my view - sport is particularly special in its interaction with the law because of the unique position it occupies in international jurisprudence. We have probably all by now heard of the argument about whether "sports law" exists. I and others hold that it does now exist and is evolving, in the same way that the law merchant (*lex mercatoria*) evolved among the trading nations as a consequence of the development of international trade.

The thesis advanced in the short book of which I am a co-author is that sports law is best viewed not as ordinary law applying to parties who happen to be involved in the world of sport, but as a developing body of principles applicable to the resolution of disputes in sport. Sport is special in its relation to the law because the *lex sportiva* is fast developing internationally under its own steam, with little impetus from governments, fuelled by a powerful mixture of competitive instinct, commercial interest, insatiable public demand and yes, Corinthian idealism.

Governments (at least in the liberal western democracies) in the main do not intervene because they don't need to except where sport impinges on classic areas of state responsibility: public order, public safety and in some countries, but not Britain, doping control. The role of government is mainly facilitative: drumming up finance for new stadia, promoting dialogue between bodies in dispute and - hopefully but not always - preventing local playing fields from being buried under concrete.

No one seriously advocates wholesale statutory regulation of sport, either nationally or internationally. Sport's international constitutional instruments are not treaties between sovereign states but agreements between international bodies many of which are private limited companies. But that does not mean sport is an entirely private affair; in the present epoch it is fallacious to suppose that public activity is synonymous with state activity.

If you ask your average fan about whether sport is a public matter you will probably get a schizophrenic answer: on the one hand, sport belongs to the people so it is public in the sense that it is "popular", i.e. of the people. On the other hand I doubt whether the average punter wants government interfering in sport. We heartily approve of private interests pumping money into sport, but we don't like it when they ration it for profit unless the product is plentiful and cheaply available, and unless the profits are ploughed back into the game and not into shareholders' pockets.

The development of international sports government brings with it the need for a system of dispute resolution that commands the confidence of the international sporting community and of the fans who pay, directly or indirectly, to watch the game.

One has only to look at the fragmentation of the bodies governing international professional boxing to illustrate this point. One of the reasons why international professional boxing championships have proliferated - leading to what George Orwell once called a plague of initials - is that boxers and their managers do not trust the governing bodies to act in accordance with their rules and in accordance with the rule of law. The prestige of the sport has suffered in consequence. The legendary names of international boxing have had to flourish despite the divisions within the sport engendered by poor government and failure to achieve a reputation for integrity.

Because we do not accept that sport is an exclusively private affair, my co-authors and I have argued in our book for the view shared by a number of senior judges that some decisions of sporting bodies should be amenable to judicial review even applying the existing tests derived from the *Datafin* case. I am glad to see that the British Association's new President appears to agree, according to his article in the last issue of the British Association's Journal.

The possibility also exists that some sporting bodies may be so-called "hybrid bodies" under the Human Rights Act 1998 - that is to say, bodies included in the definition of "public authority" in section 6(3)(b): "any person certain of whose functions are functions of a public nature". If there are such bodies governing sport in this country, they would be obliged not to act in breach of the rights conferred by the Convention when performing public functions. That conclusion, if it is reached,

would probably entail reconsideration of the *Aga Khan* and *Football League* cases as a consequence of incorporation of the European Convention into English law.

Personally I think that is quite likely to happen. In any case, hybrid bodies performing some public functions may not be confined to those whose decisions could be subject to judicial review. Commercial bodies which enter the "public" arena frequently perform acts particularly apt to engage Convention rights: running a railway, banning a footballer, preventing distribution of religious literature in an airport, and so forth.

A purposive construction of section 6(3)(b) could lead to a wider class of so-called hybrid bodies than those whose decisions are amenable to judicial review under the present jurisprudence. And even if all sporting bodies are outside the definition of a public authority in section 6(3)(b), I'm reasonably confident that an obligation on them in practice to observe Convention rights - particularly Article 6 in disciplinary proceedings - will evolve via contract (or subjection to disciplinary jurisdiction without contract) and via the duty of the English courts themselves to observe Convention rights.

I am particularly intrigued by the position of national governing bodies which exercise near monopoly powers over a particular sport: the Rugby Football Union, the Premier League, UK Athletics and so forth. Some of the disciplinary procedures used by some such bodies, for example in doping cases, are of questionable compatibility with Article 6 of the Convention. For example, hearings are often not held in public - sometimes, ironically, to protect the privacy of the accused, but without asking the accused first whether he or she wishes to waive the Article 6 right to a public hearing.

The question has also been raised whether drug testing procedures provided for under the rules of some sporting bodies could breach the Article 8 right to respect for private and family life, for example where the subject is required to permit the tester to enter his or her home. While a breach of Article 8 cannot be ruled out, I myself have advised commercial bodies as well as sporting ones that mandatory drug testing by consent, i.e. by contract, is unlikely to infringe Article 8 or common law rules of public policy, provided no physical force is used and provided that under the relevant disciplinary rules a positive test result does not itself constitute irrefutable proof of guilt, without the right to advance an innocent explanation and have it properly considered.

I've touched on human rights because it's always interesting to consider the impact of the Human Rights Act 1998, and it's hard to hold a seminar these days without doing so; but I do not think the Human Rights Act and its application to sport are what makes sport special. The rights conferred by the Convention are sophisticated political rights; they do not include any rights peculiarly apt to apply in the field of sport. Thus, for example, there is no right to physical self-development comprehended within the limited right to education conferred by Article 2 of the First Protocol to the Convention. Since the Court of Human Rights at Strasbourg opened its doors in 1953, not a single case that has come before it, so far as I am aware, has concerned sport.

So when we ask what makes sport special in the law, we return to the question of international government and dispute resolution in sport. I've spoken of the edifice which is in the course of construction. The edifice is far from complete, and some would even say its foundations are uneven. International sport is in need of greater subjection to the rule of law, particularly in doping cases. The establishment of uniform international jurisdiction exercised by consent, and uniform rules applied by consent, are the goals.

How far we are from achieving them is shown by the recent example of a doping tribunal in Monaco, arising from the nandrolone controversy. The tribunal was established by the International Amateur Athletic Federation under its rules. The IAAF used to be based in London but moved to Monaco after the decision of the English High Court in *Gasser v. Stinson*. Though now based in Monaco, the IAAF is ably represented by Denton Wilde Sapte in London. Its advocate, a distinguished English silk, recently relied before the arbitrators selected by his client on a decision of a court whose jurisdiction his client does not recognise, namely the Court of Arbitration for Sport (CAS) in Lausanne. The regrettable result of this clash of jurisdictions is that international case law spawned by the nandrolone controversy is developing inconsistently.

I would contend that that unbridled self-regulation in sport saps the confidence of the public and the participants in its integrity. The current controversy involving UEFA, FIFA and the European

Commission over transfers is another case in point. The jurisprudence of the European Court of Justice and the *AEK Athens* litigation before the CAS, establish that the practice of international sports government is as much subject to the general law as any other economic activity.

The arguments over transfer fees are now familiar: should players be treated differently from other workers? If not, wage inflation at the top will strangle the clubs at the bottom, which are the fount from which future talent must spring. Yet, why should players fare worse under the law than other workers, and why should they be "taxed", via the transfer system that depresses their wages, for the benefit of the sport in which they engage? Does this not arguably breach their constitutional right to equality before the law? There is no clear consensus on the way forward - until recently there was none even between UEFA and FIFA.

Even in-contract transfer fees are thought by some to contravene the free movement provisions - the so-called Anelka issue. That is doubtful given the international law principle *pacta sunt servanda* (promises are to be kept) and the proposition that contractual rights and remedies are a matter for national law, subject only to the question of proportionality. It is now likely that the European Union - i.e. national governments - will have to step into the breach. This would make sport even more special, for it would be the first ever instance of hard European law specific to sport.

To conclude: sport is indeed special. We have a problem associated with the birth pangs of international sports law, of which dissatisfaction with doping regimes and with transfer regimes are a symptom. The issue is one of power, rights and responsibilities. Many of those who govern or play in top flight international sport insist, rightly, that sport is special because they are purveyors of the most avidly sought commodity on the planet (with the possible exception of sex, at any rate between World Cups). They know a good thing when they see it. They seek to capitalise on it, and why should they not do so?

But as power brings responsibility, sport now needs a powerful constitutional movement so that what is special about sport is used for good ends. The task is to develop an international system of sports government based on the consent of the governed. That must include subjection of even the most powerful interests - players, officials and governing bodies - to the rule of law. Who can lead such a movement? Probably the usual suspects: distinguished ex-players, sports administrators, respected former politicians and public officials, journalists, academics, even (dare I say it?) lawyers.

This is not a Graysonian plea for a return to Corinthian values. They have their place and always will, but we cannot turn the clock back to an exclusively amateur culture in sport. I am in favour of an international commercial marketplace in sport because sport brings peoples together and is a uniting force, and I do not believe that anything other than the mass media can deliver it to the people. We need to deal with the problem of government and dispute resolution. The question is can we fix it? I believe the answer is yes we can, but I think it's going to take quite a long time yet.

Tim Kerr QC, Text of paper delivered at joint BASL/BSLG Seminar 31/1/01.

The Reform Of FIFA Rules Governing International Transfers

Statement to the European Parliament, Strasbourg, 13 March 2001

Viviane Reding

On 7th September 2000, I informed Parliament of the Commission's position concerning the reform of FIFA rules governing international transfers. On that occasion, I announced the Commission's intention to enter into discussions with FIFA and other interested parties, led by my colleague Mario Monti and with the collaboration of Anna Diamantopoulou, in order to bring the principles underlying the rules in question into line with Community law, with due regard for the specific characteristics of sport and the autonomy of sporting organisations.

The Declaration on the specific characteristics of sport, adopted by the European Council in Nice in December 2000, backed up this approach.

Today, following intensive discussions between the Commission departments, FIFA and other interested parties, I am pleased to be able to announce to you the result which we have obtained. This outcome respects the principles which I have just outlined and to which we are committed.

The Commission has frequently been accused of failing to understand sport or, even worse, of wishing to destabilise football. The outcome of the discussions proves that such accusations are unfounded. I believe that these discussions have provided a further opportunity to demonstrate that Community law and the specific characteristics of sport are perfectly compatible. Consequently, I do not believe that it is necessary to amend Community law. In this particular matter, it has shown itself to be sufficiently flexible to incorporate the special characteristics of sport.

The discussions have led to clear progress in at least three key areas:

Firstly, **protecting** young players moving within the European Union, guaranteeing them an appropriate general and sporting education. These principles will be contained in a code of conduct drawn up by the football federations. I attach particular importance to this point.

In my opinion, it makes far greater sense to supervise properly the work of these young players rather than prohibit their mobility because of their age, such a prohibition being moreover incompatible with their right to freedom of movement. Let us not forget that many are called but few are chosen. With these provisions, the Commission hopes to send a strong signal to all those young people who put a lot of effort into football but who will not all make it at the professional level.

Secondly, **encouraging** and compensating the effort made by clubs to train young people and thus give a social dimension to their sporting activity. In this connection, FIFA has undertaken to introduce rules dealing with:

- compensation for training costs incurred up to the age of 23 on the basis of real costs, in line with the Court's judgment in the Bosman case, and
- a solidarity fund to be sustained by a 5% levy on each compensation payment for transfer by unilateral termination of contract. This fund is intended for the training clubs which will thereby receive a part of the player's added value.

It is now up to FIFA to apply these principles in detail. The Commission will, within its sphere of responsibility, ensure that the incorporation of these principles into FIFA's rules is effectively achieved. We are convinced that it is possible to find a balance between a player's mobility and the necessary compensation of the training club within the limits laid down by the Court in the Bosman judgment.

Thirdly, **introducing** elements of stability into sporting competitions in order to ensure their equity and regularity, by means of two mechanisms:

- Authorising unilateral termination of the contract only at the end of the season. This means that a club's fans, for example, are guaranteed to see the same team play throughout the season. After all, they have invested a large sum of money to see this team and not one devoid of its best players.
- Authorising the imposition of disciplinary measures on players who terminate their contract during its first two seasons without just cause or without valid sporting reasons.

These principles are supported by other important points, such as fixed periods for transfers or the duration of contracts (between one and five years).

During these discussions, we met with FIFPRO, which represented players. Some of their requests were met. For example:

- FIFA rules will no longer prohibit players from going to court
- the Court of Arbitration which is based on equal representation and has emergency procedures will be able to settle disputes concerning training fees, transfers and disciplinary measures. I attach particular importance to arbitration being independent and based on equal representation. The creation of an arbitration body of this kind to which matters can be referred by both players and clubs should resolve disputes fairly, quickly and efficiently.

I must point out that, throughout this affair, the Commission has emphasised that the discussions between it, FIFA and the other interested parties in no way affect the compatibility of FIFA's revised rules with national laws in force, and in particular with employment law. It is FIFA's responsibility to ensure that the rules are applied in accordance with national legislation from which they cannot, of course, depart.

FIFA has announced that the principles thus agreed will be implemented by a revision of FIFA rules at its world congress in Buenos Aires in July. The Commission has encouraged FIFA to seek close dialogue with the other interested parties with a view to such implementation, most particularly the players.

In the Commission's opinion, the discussions on transfers have clearly shown that dialogue at all levels is becoming a necessity, and that all possible avenues for organising this should be explored, including collective agreements; it has offered its assistance in supporting dialogue at European level.

To conclude this statement I would remind you that, after the first two years, FIFA will draw up a report on the application of this new system. We will then have quantitative and qualitative information from which we can learn.

In the meantime, I believe that we must be pleased with the outcome of these discussions. Despite considerable pressure from some senior government members, the Commission has held its ground in strict observance of its jurisdiction. As a result of this outcome, my colleague Mario Monti will not need to propose that the Commission adopt a negative decision concerning FIFA transfer rules.

Mrs Viviane Reding Member of the European Commission responsible for Education and Culture The reform of FIFA rules governing international TRANSFERS Statement to the European Parliament Strasbourg, 13 March 2001.

Principles for the amendment of FIFA rules regarding international transfers

PREAMBLE

All players who have reached the end of their contracts are free to move internationally throughout the world subject to the provisions of paragraph 2 below concerning training compensation.

1. PROTECTION OF MINORS

In order to provide a stable environment for the training and education of players, international transfers or first registration of players under the age of 18 shall be permitted subject to the following conditions:

- (a) the family of the player moves for reasons not related to football into the country of the new training club, or
- (b) within the territory of the EU/EEA and in the case of players between the minimum working age in the country of the new training club and 18 suitable arrangements are guaranteed for their sporting training and academic education by the new training club. For this purpose a code of conduct will be established and enforced by the football authorities.

2. TRAINING COMPENSATION FOR YOUNG PLAYERS

In order to promote player talent and stimulate competition in football it is recognised that clubs should have the necessary financial and sporting incentives to invest in training and educating young players. It is further recognised that all clubs which are involved in the training and education process should be rewarded for their contribution according to the following principles:

2.1 The training and education of a player takes place between the ages of 12 and 23. Training compensation shall be payable as a general rule up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 23.

2.2 When a player signs his first contract as a professional a sum of compensation shall be paid to the club(s) involved in the training and education of the player.

2.3 Compensation shall be paid on each occasion the player changes club up to the time his training and education is complete, which as a general rule occurs when the player is 23 years of age.

2.4 The amount of compensation to be paid for training and education shall be calculated in accordance with the parameters set out in Annex 1.

2.5 When a player signs his first contract as a professional, or when a player moves as a professional at the end of his contract but before reaching the age of 23, the amount of compensation shall be limited to compensation for training and education, calculated in accordance with the parameters set out in Annex 1.

2.6 If a player moves during the course of a contract but before reaching the age of 23, compensation for training and education shall be paid and shall be calculated in accordance with the parameters set out in Annex 1. However, in the case of unilateral breach of contract, this provision is without prejudice to the application of paragraph 3.2 below.

2.7 If a link between the player and his former club cannot be established, or if the training club does not make itself known within two years of the player signing his first professional contract, training compensation is paid to the national football association of the country where the player was trained. This compensation shall be earmarked for youth-football development programmes in the country in question.

3. MAINTENANCE OF CONTRACTUAL STABILITY IN FOOTBALL

Contracts shall have a minimum and maximum duration of respectively one and five years, subject to national law.

It is recognised that contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public. Contractual relations between players and clubs must be governed by a regulatory system which responds to the specific needs of football and which strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition.

3.1 Respect for Contracts

(a) In the case of all contracts signed up to the 28th birthday of the player: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions will be applied and compensation shall be payable.

In the case of contracts signed after the 28th birthday, the same principles shall apply but only during the first 2 years.

With regard to contracts as defined in the preceding two paragraphs, unilateral breach without

just cause or sporting just cause is prohibited during the season.

(b) Unilateral breach without just cause or sporting just cause after the first 3 years or 2 years will not result in the application of sanctions, with the exception of possible sports sanctions against a club and/or a player's agent inducing a breach of contract. Compensation shall be payable.

A breach of contract as defined in the preceding paragraph is prohibited during the season.

Disciplinary measures may be applied if appropriate notice is not given.

3.2 Compensation

Unless provided for in the contract, and without prejudice to paragraph 6, compensation for breach of contract (whether by the player or the club) shall be calculated with due respect to applicable national law, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

- (1)** Remuneration and other benefits under the existing contract and/or the new contract,
- (2)** Length of time remaining on the existing contract (up to a maximum of 5 years),
- (3)** Amount of any fee or expense paid by or incurred by the old club, amortized over the length of the contract,
- (4)** Whether the breach occurs during the 'protected period', as defined in 3.1.a, or in the period described in 3.1.b

3.3. Sports sanctions

Other than in exceptional circumstances (such as recurring breach by a club or a player), sports sanctions for unilateral breach of contract without just cause or sporting just cause shall:

In the case of the player:

- If the breach occurs at the end of the first or the second year of contract:

Be a restriction on his eligibility to participate in any official football matches, except for the club to which he was contracted, for an effective period of 4 (four) months as from the beginning of the national championship of the new club.

There will be no sanction for unilateral breach at the end of the third year of contract, except if no notice is given in due time after the last match of the season. In such a case the sanction must be proportionate.

In the case of aggravating circumstances, such as failure to give notice or recurrent breach, sports sanctions may go up to, but not exceed, an effective period of 6 months.

In the case of the club breaching a contract or inducing such breach:

Be a prohibition on registering any new player, either domestically or internationally, until the expiry of the second transfer window following the date on which the breach became effective. In all cases no restriction for unilateral breach of contract shall exceed a period of 12 months following the breach or inducement of the breach.

A club seeking to register a player who has unilaterally breached a contract during the 'protected period' as defined in 3.1.a. will be presumed to have induced a breach of contract.

Without prejudice to the foregoing general rules, other sanctions of a sporting nature may be imposed on clubs where appropriate and may include, but shall not be limited to, the following:

- fines
- deduction of points
- exclusion from competition.

In the case of a players' agent involved in such breach

Sanctions can also be imposed on players' agents being involved in a breach of contract in accordance with FIFA's players' agents regulations.

Sports sanctions shall be imposed by FIFA's Player Status Committee, with a right of appeal to the Football Arbitration Tribunal, referred to under section 6 hereunder.

3.4 Sporting just cause

In addition to termination for just cause, it will also be possible for a player to terminate his contract for a valid sporting reason ('sporting just cause').

Sporting just cause will be established on a case by case basis. Each case will be evaluated on its individual merits taking account of all relevant circumstances (injury, suspension, field position of player, age of player, etc.). Furthermore, it is understood that the existence of sporting just cause shall be examined at the end of the football season and before the expiry of the relevant transfer window.

The arbitration system shall determine whether compensation is payable and the amount of any such compensation when a contract is terminated for sporting just cause.

3.5 Amicable resolution

Any amicable resolution of a contract shall be notified to the national association responsible for the issuance of the international transfer certificate.

4. SOLIDARITY MECHANISM

If a player moves during the course of a contract, after reaching the age of 23 or after his second transfer (whichever comes first), a proportion (5%) of any compensation paid to the previous club will be distributed to the club(s) involved in the training and education of the player. This distribution will be made in proportion to the number of years the player has been registered with the relevant clubs between the age of 12 and 23.

5. TRANSFER WINDOWS

In order to protect the regularity and proper functioning of sporting competition two unified transfer windows per season will apply, with a limit of one transfer per player per season. The mid-season transfer window shall be limited to transfers for strictly sport related reasons, such as technical adjustments of teams or replacement of injured players, or exceptional circumstances.

6. DISPUTE RESOLUTION, DISCIPLINARY AND ARBITRATION SYSTEM

Without prejudice to the right of any player or club to seek redress before a civil court, a dispute resolution and arbitration system shall be established, which shall consist of the following elements:

- Conciliation facilities offered by FIFA, through which a low cost, speedy, confidential and informal resolution of any dispute will be explored with the parties by an independent mediator. If no such solution is found within one month, either party can bring the case before FIFA's Dispute Resolution Chamber.
- Dispute Resolution Chamber, with members chosen in equal numbers by players and clubs and with an independent chairman, instituted within FIFA's Player Status Committee, establishing breach of contract, applying sport sanctions and disciplinary measures as a deterrent to unethical behaviour (e.g. to sanction a club which has procured a breach of contract), determining financial compensation, etc. In addition, the Dispute Resolution Chamber can review disputes concerning training compensation fees and shall have discretion

to adjust the training fee if it is clearly disproportionate in the individual circumstances. Rulings of the Chamber can be appealed by either party to the Football Arbitration Tribunal.

- Football Arbitration Tribunal, with members chosen in equal numbers by players and clubs and with an independent chairman, according to the principles of the New York Convention of 1958.

For the avoidance of doubt, the Dispute Resolution and Arbitration System will take account of all relevant arrangements, laws and/or collective bargaining agreements, which exist at national level, as well as the specificity of sport as recognized recently, for instance, in the relevant Declaration appended to Presidency conclusions of the European Council at Nice in December 2000.

7. ENTRY INTO FORCE

The principles set out above shall enter into full force and effect only for contracts concluded after the date of formal adoption of these principles by the appropriate authority.

8. REVIEW

In the third season following the adoption of these principles FIFA will, as part of a more general review of these principles, analyse in particular the application of training compensation during the first two seasons, and review its findings with the various members of the football family.

ANNEX I to Principles for the amendment of FIFA rules regarding international transfers

Training compensation for young players

A. Principles

1. The training period of a player for which the new club has to pay compensation should start at the age of 12 and end when the player reaches the age of 23 (in order to ensure uniform treatment, for the purposes of calculating compensation, the training period starts at the beginning of the season of his 12th birthday or the later age as the case may be and finishes at the end of the season of his 23rd birthday).

2. Compensation for training is due:

2.1 For the transfer of players (up to the age of 23) who are not under contract or who are at the end of their (training or professional) contract (in the case of the transfer of players (up to the age of 23) who are still under contract, in addition to the compensation for training, the rules regulating contractual stability shall also apply).

2.2 For the first time, when the player acquires non-amateur status (FIFA Regulations), i.e. when he signs his first (professional or training) contract.

2.3 Afterwards, for every transfer up to the age of 23, however according to the status of the player, i.e. :

- from amateur to professional (non-amateur) status
- from professional (non-amateur) status to professional (non-amateur) status

3. Compensation for training is not due:

3.1 For transfers from amateur status to amateur status

3.2 For transfers from professional status to amateur status (reacquisition of amateur status).

3.3 If a club unilaterally terminates a player's contract without just cause.

4. Payment of the compensation for training:

As a general rule, the amount to be paid shall reflect the costs which were necessary to train the player and should be paid for the benefit of all clubs which have contributed to the training of the player in question, starting from the age of 12.

4.1 First payment (as mentioned in 2.2): The amount to be paid is for the benefit of all clubs

which have contributed to the training of the player in question, starting from the age of 12. The money would be distributed on a pro rata basis according to full years of proper and proven training.

4.2 In cases of subsequent transfers (as mentioned in 2.3) from clubs belonging to the third or fourth categories (as defined hereinafter in paragraph B 1 c and d) the new club has to pay and/or reimburse to the old club the 'training costs' incurred or paid by the old club.

In the case of a player moving from a club belonging to the third or fourth categories to a club in a higher category, a cascade principle will apply as defined in paragraph 6 below.

For the avoidance of doubt, in the case of a player moving from a club in category first or second, the amount of training compensation payable shall be the training cost of the previous club.

B. Calculation

1. Since it is impossible to calculate the effective training costs for every single player, flat training rates should be set and the clubs should be categorised in accordance with their financial investments in the training of players.

Establishment of 4 categories:

(a) Category 1 (top level, e.g. high quality training centre):

- all clubs of first division of National Associations investing as an average a similar amount in the training of players. These National Associations will be defined based on effective training costs and this categorisation can be revised on a yearly basis.

(b) Category 2 (still professional, but on a lower level):

- all clubs of second division of the National Associations of category 1
- all clubs of first division of all other countries having professional football

(c) Category 3:

- all clubs of third division the National Associations of category 1
- all clubs of second division of all other countries having professional football

(d) Category 4:

- all clubs of fourth and lower divisions of the National Associations of category 1
- all clubs of third and lower divisions of all other countries having professional football
- all clubs of countries having only amateur football

2. Establishment of the amount which is necessary to 'train' one player in each of these categories for one year (ie. costs for the training of one player multiplied by an average 'player factor')

(a) Category 1 : [to be defined]

(b) Category 2: [to be defined]

(c) Category 3: [to be defined]

(d) Category 4: [to be defined]

The 'player factor' is the ratio between the number of trainees and the number of professional players. FIFA/UEFA will establish and quantify the factors such as categorisation and the player factor, taking into account relevant data and expertise.

For the avoidance of doubt, the salaries paid to any player (no matter what his age is) who has ever played in the first team may not be included for the purposes of calculating training costs.

3. The calculation in case of first contract and/or transfers of young players would be:

The amount fixed under point 2 corresponding to the category of the training club for which the player was registered multiplied by the number of years of training from 12 to 21. For the avoidance of doubt, this amount shall be paid until the season during which the player becomes 23.

In order to ensure that training compensation for very young players is not set at unreasonably high levels, this compensation will always be category 4 for the 12 to 15 years old.

4. General principle: Compensation for training is based on the costs of the category of the new club. However, within the EU/EEA area: Compensation for training is based on the costs of the training club. The following rules apply:

(a) player is transferred from a lower to a higher category: calculation is the average of the training costs for the two categories

(b) player is transferred from a higher to a lower category: calculation based on training costs of lower category club

(c) player is transferred from a club in category 1, 2 or 3 to a club in category 4: no compensation for training is payable.

5. Ceiling: There shall be a ceiling to be defined objectively to ensure that training compensation fees levied by the training clubs are not disproportionate. FIFA in consultation with UEFA will regularly establish and quantify the ceiling for the EU/EEA area.

6. Cascade

(a) In any transfer of a player from a club in the third or fourth categories to a club in a higher category, 75% of the amount exceeding the costs of the category of the 'old' club, shall be redistributed on a pro-rata basis to all the clubs having trained the player from the age of 12 onwards.

(b) In the transfer between two clubs of the same category, 10% of the amount calculated as described under point 3 shall be redistributed on a pro-rata basis to all the clubs having trained the player from the age of 12 onwards.

7. Further, in the EU/EEA, if the training club does not offer the player a contract this should be taken into account in determining the training fee payable by the new club.

The Role Of Media Companies In English Football Clubs And Their Participation In UEFA Controlled Competitions

Edward Broome

1 In a previous article¹ I considered whether English Football clubs were in breach of Premier League rules by reason of their connection with certain media companies². In particular I considered the implications of any such breaches in terms of the domestic game.

2. In this article I will consider the related question of the participation of English Football Clubs in the UEFA³ club competitions and in particular the UEFA Champions League.

3. On 19th May 1998, UEFA adopted the rule entitled, 'Integrity of the UEFA Club Competitions: Independence of the Clubs' – also known hereafter as the 'Contested Rule'.

4. THE CONTESTED RULE:

4.1. The rule reads as follows:

"A. General Principle

It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.

B. Criteria

With regard to admission to the UEFA club competitions, the following criteria are applicable in addition to the respective competition regulations:

1. No club participating in a UEFA club competition may, either directly or indirectly:

- (a) hold or deal in the securities or shares of any other club, or
- (b) be a member of any other club, or
- (c) be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or
- (d) have any power whatsoever to influence the management, administration and/or sporting performance of any other club participating in the same UEFA club competition.

2. No person, may at the same time, either directly or indirectly be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition.

3. In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:

- (a) holds a majority of the shareholders' voting rights, or
- (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or
- (c) is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question.

4. The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition.

4.2 In the UEFA Champions League 2000/2001 two English Premier League clubs have links with the same media company:

(i) Manchester United:

BSkyB maintain a 9.99% share in the plc and they are members of the board at the club. Furthermore, when Martin Edwards⁴ sold some of his shares in October 1999 BSkyB became the largest shareholder in the club. BSkyB also own one third of MUTV.

(ii) Leeds United:

BSkyB maintain a 9.2% share in Leeds Sporting⁵ at a cost of £13.8 million which was approved by shareholders on 11th October 1999.

BSkyB also have 9.9% share in Sunderland, Chelsea and Manchester City⁶:

5. AEK ATHENS AND SLAVIA PRAGUE –v- UEFA⁷:

5.1 In this case the Court of Arbitration for Sport (CAS) considered the legality and applicability of the Contested Rule in relation to two football clubs 'owned' by ENIC. Both AEK Athens⁸ (AEK) and Slavia Prague⁹ (Prague) were due to play in the UEFA Cup in the 1997/98 season. When the UEFA Cup reached the quarter-finals stage both teams were still in the competition and UEFA then decided to consider the implications of this. The result was the Contested Rule. On 25th June 1998, UEFA informed AEK that they could not compete in the following year's competition – 1998/99. This led to the legal challenge considered by CAS.

5.2 Enic also have large stakes in two British clubs¹⁰:

(i) Glasgow Rangers FC:

Enic maintain a 20.2% share in the club.

(ii) Tottenham Hotspur FC:

Enic purchased 27.4 million shares, thereby increasing their shareholding from 3% to 29.9%.

They also have an option to purchase a further 13.2% at a later date. Daniel Levy has taken Alan Sugar's seat on the board, however he will not take over as chairman.

5.3 UEFA argued that the Contested Rule was motivated by their specific duty to protect the **integrity of the game**. One of the central issues of the case was how the **integrity of the game** needed to be defined and characterised in the context of sports in general and football in particular.

5.4 CAS decided that **integrity of the game** is crucially related to the authenticity of results, which has at its core the **public's perception** that clubs try their best to win and, in particular, that clubs make management or coaching decisions based on the single objective of their club winning against any other club. This public perception of the authenticity of results then had to be tested against the question of multiple ownership of clubs competing in the same competition.

5.5 CAS decided that multiple ownership within the same football competition could be publicly perceived as affecting the authenticity of sporting results.

5.6 Under the Contested Rule, UEFA have the power to impose an automatic ban on a club taking part in a UEFA club competition which is under the common ownership with another club in the same competition¹¹. In simple terms 'control' is defined by rule B.3 as a majority shareholding.

5.7 In addition, the Contested Rule is not limited to banning multi-club ownership within the same competition but also forbids any other type of structure or behaviour which could potentially enable a club (or related person) to influence a competitor in the same competition¹².

5.8 CAS likened the above to the rules of the National Basketball Association in the USA, which clearly distinguish between the holding of financial interests in and *control* of more than one club. Only the latter is absolutely forbidden with no provision for derogation.

5.9 Finally, CAS decided that the Contested Rule could be implemented by UEFA from the start of the 2000/2001 football season¹³.

5.10 There are 2 questions that arise:

(i) Are Manchester United and/or Leeds United, by virtue of their media interests, in breach of the UEFA rules?

(ii) If so, what are the possible implications of any such breach(es)?

SUBSCRIBERS

Anyone wishing to subscribe to the journal may do so at a cost of £40.00 per annum.

Further details from
Hammicks Bookshops Ltd,
Browells Lane, Feltham, Middlesex TW13 7EE

5.11 I have previously answered these questions in relation to breaches of Premier League rules,¹⁴ so there will be an element of repetition.

6. BREACH:

6.1 In the case of *AEK Athens and Slavia Prague –v- UEFA*, the two claimant football clubs argued that common ownership did not offend against the principle of the **integrity of the game**. They did this by first considering whether common ownership could lead to match-fixing. They made, *inter alia*, the following points:

(i) it is highly unlikely that a match could be fixed without it being detected sooner or later – and in any event, insofar as match-fixing is possible, it could occur between unrelated clubs;

(ii) it is in the interests of a common owner, especially if it is a listed corporation, that each club does as well as possible, both on the business and sports field – in particular, multi-club owners would put their entire business at risk if they sought to fix matches;

(iii) the existing criminal and sporting penalties are sufficient to deal with the risk of match-fixing as well as the perceived risk thereof;

(iv) the basic premise that common ownership could affect the integrity of the game was unfounded and could be preserved by implementing a code of ethics which commonly owned clubs would have to agree to abide by.

6.2 CAS disagreed with the Claimants' argument and decided that the main problem with multiple ownership did not lie in direct match-fixing. Instead, they decided that when commonly controlled clubs participate in the same competition, the **public's perception** would be that there is a conflict of interest potentially affecting the authenticity of results. This was so fundamental that UEFA had acted lawfully by adopting the Contested Rule and in particular rule B.3.

6.3 Clearly, rule B.3 does not apply to Manchester United or Leeds United as BSkyB does not retain a majority share in either football club. However, there is a clear issue as to whether rules B.1 or B.2 have been breached.

6.4 Whether or not BSkyB's 'interests' in both Manchester United and Leeds United could amount to a breach of rules B.1 or B.2 will depend on whether such an interest enables BSkyB to be directly or indirectly involved in 'any capacity whatsoever' in the 'management, administration and/or sporting performance of the other club' or have 'any power whatsoever' to influence¹⁵ the management, administration or sporting performance of the other club.

6.5 As has already been discussed, the principle under threat is that of the **integrity of the game** – to maintain fair competition in football and avoid suspicions of clubs coming to agreements with each other in relation to fixtures, transfers and finance.

6.6 There are two ways to tackle the issue of integrity. The first is in terms of the performance on the pitch. In *AEK Athens and Slavia Prague –v- UEFA*, CAS concluded that one of the relevant ways of influencing the outcome of a match between commonly owned clubs might be connected with insider information. If, for example, one of the two clubs was doing particularly well, then the common executives could have access to special knowledge or information about the other team, thereby giving that other team an unfair advantage. CAS said that there was clearly a relevant difference between widely available information and confidential information, the latter including for example, unpublicised injuries, training sessions, planned line-up and match tactics.

6.7 There appears to be no reason why the same could not occur where there were common media partners. For example, what if one of the two clubs' results were such that even if they defeated the other club they would not progress through to the next stages of the UEFA Champions League, whilst the other club had every chance of progressing through to the next round, if they won? The public perception as to the outcome might be affected.

6.8 The second way of tackling the issue of integrity lies in the primary source of the considerable

increase in the levels of money in football - the sale of the television rights of the matches. I note the following points:

(i) In the recent case involving the Office of Trading¹⁶ and the Premier League, BSkyB and the BBC, the OFT claimed that the sale of live Premier League television rights was anti-competitive and in restraint of trade. Ferris J held in favour of the collective and exclusive way in which the Premier League sold the rights to the live matches. This case raises a number of relevant points:

- The entire case revolved around the issue of television rights. For the OFT to even consider the need to investigate the issue, let alone consider bringing legal action, indicates the importance of television rights in football;
- Ferris J's decision supported the notion that the collective sale of television rights allowed for the redistribution of money in the game and was in the public interest;
- The strategies of the media companies in buying up stakes in a number of clubs threatens the very notion that Ferris J deemed to require specific protection. The strategic purchasing of stakes in clubs is designed to increase the media companies ability to secure TV rights and could even lead to the break up of collective bargaining.

(ii) BSkyB originally planned to take-over Manchester United. These plans were thwarted following an investigation carried out by the OFT¹⁷. A number of concerns expressed in the OFT's report are of particular relevance with respect to the pay-TV market:

- the merger would be anti-competitive because BSkyB would have an unfair advantage in the negotiation of Premier League and other TV rights;
- the advantages could not be overcome by simply excluding BSkyB from the rights negotiations;
- the merger would give BSkyB an additional influence over Premier League decisions, which would not be for the long term interests of football.

6.9 The fact that the OFT decided that excluding BSkyB from the rights negotiations was inadequate is particularly informative and is in effect in line with CAS's decision in *AEK Athens and Slavia Prague-v- UEFA*, when a code of ethics was deemed insufficient¹⁸.

6.10 It is not enough for Manchester United and Leeds United to simply say that BSkyB hold less than a 10% stake in each club¹⁹. As stated at paragraph 5.6 above, under the Contested Rule, UEFA could take 'appropriate action' against a club which was, 'either directly or indirectly...(c)...involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or (d) [had] any power whatsoever in the management, administration and/or sporting performance of any other club.' Rule B.3 deals with automatic bans on more than club with common owners from competing in the same UEFA club competition and sets out a threshold of control for rule B.3 to be invoked – a majority share holding.

6.11 The use of the word 'whatsoever' in rules B.1 and B.2 precludes the imposition of a percentage to indicate what is and what isn't considered to define a 'capacity' or 'power'. If one then had to consider the Premier League rules²⁰ in the context of rules B.1 and B.2 then one should also consider rule 30 section d of the FA Rules where the 10% rule is specifically restricted to **issued share capital** where, 'those shares are, in the opinion of the Council, held purely for investment purposes only.' Thus it is arguable that the fact that BSkyB hold less than a 10% share in Manchester United and Leeds United is irrelevant and that rule 4 of the Premier League rules is limited to share holdings for investment purposes only.

6.12 The media companies may well argue that their interests do not enable them to exert any influence over the way in which television deals or any other deals are carried out by the individual clubs with whom they are associated. This again is really a question of the integrity of the sport and despite their protests to the contrary, obtaining shares in Manchester United and Leeds United and becoming their media agents is clearly designed to enable BSkyB to gain a seat at the negotiating table when it comes to television rights. It is the public perception, which is relevant.

6.13 In that respect, when one considers the recent upheaval at Tottenham Hotspur, Enic, who currently hold a 29.9% share of the club, were clearly behind the decision to remove George Graham as manager. Whilst they might argue that their shareholding does not offend against the majority share rule B.3 of the Contested Rule, the public perception that Enic have some power over the management and/or administration of the club is overwhelming. This could only add to the general public perception that such planned involvement, by BSkyB in the case of Manchester United and Leeds United, offends against B.1 and B.2 of the Contested Rule.

7. IMPLICATIONS OF A BREACH

7.1 Rule B.4 states:

"The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition."

7.2 This raises the interesting question of whether UEFA could have taken any action during the competition itself. Furthermore, when one considers major European football clubs such as Barcelona, Real Madrid and Juventus, I understand that they all have individually negotiated television deals as a result of which the television companies have not needed to invest in these clubs as they have simply bought the television rights. Would it have been possible therefore for Barcelona, who were in the same group as Leeds United in the first phase of this seasons UEFA Champions League, before being knocked out, to have demanded that UEFA should act to punish Leeds United for their breach of the Contested Rule?

7.3 Rule B.4 refers to UEFA having the power to take action against a club who cease to meet the criteria set out in the Contested Rule, 'in the course of an ongoing competition.'

7.4 In the case of *AEK Athens and Slavia Prague -v- UEFA*, CAS would not allow UEFA to introduce any ban mid-competition because UEFA had violated its duties of procedural fairness with respect to the 1998/99 season. It had modified the participation requirements for the UEFA Cup at an exceedingly late stage, after such requirements had been publicly announced and the clubs entitled to compete had already been designated.

7.5 It could be argued that part of the CAS's reasoning was that the rule had not existed under UEFA rules before, whereas now football clubs are on notice about the Contested Rule. In my opinion the case of *Stevenage Borough Football Club -v- The Football League Ltd*²¹, which took the form of a private law challenge is relevant. In May 1996 Stevenage Borough FC finished top of the Vauxhall Conference, the league of semi-professional clubs immediately below the three divisions of the Football League. In principle that would have entitled them to be promoted to the Third Division. However, under the Football League's rules, promotion depended upon Stevenage satisfying certain admission criteria, including requirements relating to ground capacity, which had to be satisfied at the end of December in the previous year. In addition financial criteria had to be satisfied in respect of accounts for the current and previous years. Stevenage did not satisfy these criteria at the relevant date, although they fully expected to be compliant by the beginning of the new season in August. The Football League refused to allow Stevenage entry into the Third Division and instead, Torquay United who had finished bottom of the Third Division in the 1995/1996 season, were allowed to retain their Football League status. The challenge to the decision of the Football League was unsuccessful. Although the Judge found aspects of the Football League's entry criteria objectionable on the grounds of restraint of trade, he took the view that in any event, Stevenage should not have waited until the end of the season before launching proceedings. The criteria had been in place for over a year and Stevenage had not raised any objections to the rule at general meetings of the Conference.

7.6 There has to be a cut off date, after which a challenge is likely to fail. On the basis of the *Stevenage Borough Football Club -v- The Football League Ltd* it is arguable that Barcelona would not be able to challenge the validity of Leeds United's participation in the competition this season, once the competition had commenced. However, the *Stevenage* case involved a challenge to the validity of a rule, whereas in this case one would simply be seeking to have a rule applied. Rule B.4 refers to UEFA having the power to intervene 'in the course of an ongoing competition'. In addition, in *Stevenage* the club waited until the end of the season before challenging the rule. In this case it could have been argued, by

relying on rule B.4, that a challenge would succeed at least during the first phase of the competition.

7.7 Either way, there appears no reason why the future participation of an English club with media company links in UEFA club competitions, could not be challenged.

7.8 Could UEFA punish either Manchester United or Leeds United in any other way? There seems to be no particular reason why they could not, for example deduct prize monies. In the case of Leeds United, this would be a potentially large blow, especially as qualification for the last stages of this seasons UEFA Champions League has meant that the transfer of Rio Ferdinand has been paid for²².

7.9 At a time when the football transfer market has been under such intense legal scrutiny, the questions posed in this article serve as a further timely reminder to the football authorities and individual clubs that football as a business, cannot operate in a legal vacuum.

Footnotes

(1) *Sport and The Law Journal*, Vol 8 Issue 2, 2000 p. 83.

(2) There are presently 3 media companies with links with football clubs in the Premier League – BSkyB, ntl and Granada Television. See also footnote 5.

(3) Union des Associations Européennes de Football.

(4) Former Chief Executive of Manchester United.

(5) This is the listed parent company of Leeds United.

(6) ntl: Newcastle United: 9.9%; Aston Villa: 9.9%; Middlesbrough: 5%. Granada Television: Liverpool FC:10% a senior Granada Executive would be appointed to the Board at Liverpool. According to Mr. Rick Parry Granada's role in relation to TV rights negotiations would be to "advise, guide and represent". In addition Granada TV work with BSkyB to produce Manchester United's MUTV channel.

(7) CAS 98/200, decision 20 August 1999.

(8) AEK is owned as to 78.4% by ENIC Hellas S.A – a company wholly controlled, through subsidiaries, by the English company ENIC plc. It is now 46%

(9) Prague is owned as to 53.7% by ENIC Management Sarl – a company wholly controlled, through subsidiaries, by the English company ENIC plc. It is now 96.7%.

(10) As well as stakes in FC Basel (11.8%), Vicenza (99.9%)

(11) Rule B.3 – as set out at paragraph 4.1 above

(12) Rules B.1 and B.2, UEFA could take "appropriate action" against a club which was, "either directly or indirectly...(c)...involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or (d) [had] any power whatsoever in the management, administration and/or sporting performance of any other club".

(13) This meant that, in the case of AEK and Prague, both were allowed to compete in the UEFA Cup, CAS having decided that that UEFA had violated its duties of procedural fairness with respect to the 1998/99 season, insofar as it modified the participation requirements for the UEFA Cup at an exceedingly late stage, after such requirements had been publicly announced and the clubs entitled to compete had already been designated.

(14) See footnote 1 above.

(15) Rule A. General Principle.

(16) Re Televising Premier League Football Matches [1999] UKCLR 258. Hereafter, 'OFT'.

(17) The OFT were initially asked to investigate by the Monopolies and Mergers Commission, since re-named the 'Competition Commission'.

(18) The adoption of the public perception test is in many ways akin to the legal principle, that justice must not just be done but also be seen to be done and the concept of the public perception.

(19) The limit under Premier League rules: Section S: Miscellaneous rule 4.

(20) Under Section S: Miscellaneous... of the Rules it states:

"2. Except with the prior written consent of the Board, no Club may either directly or indirectly:

7.1 hold or deal in the securities or shares of another Club or club;

7.2 be a member of another Club or club;

7.3 be involved in any capacity whatsoever in the management or administration of another Club or club;

7.4 have any power whatsoever to influence the management or administration of another Club or club.

8 Except with the prior consent of the Board, no person, by himself or with one or more associates, may at any one time, either directly or indirectly be involved in any capacity whatsoever in the management or administration of more than one club.

9 Except with the prior consent of the Board, no person, by himself or with one or more associates, may directly or indirectly hold or acquire any interest in more than 10 per cent of the issued share capital of a Club or club while he or any associate is a director of, or directly or indirectly holds any interest in the share capital of any other Club or club"

(21) (1996) The Times, 1 August.

(22) It is expected that qualification for the last stages of the competition is worth in the region of \$20 million.

**Edward Broome,
Plowden Buildings, Temple,
London EC4Y 9BU.**

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited.

Contributions should be supplied on disk (Mac or PC) and saved as ASCII format.

Disk should also be accompanied by a hard copy of the article.

Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

Articles should be forwarded to

R. Farrell, Hon. Secretary,

British Association for Sport and Law,

The Manchester Metropolitan University, School of Law,

Hathersage Road, Manchester M13 0JA.

Two High Profile Sports Cases A View From The Bench

His Honour John A. Baker

When an incident involving serious injury occurs at a sporting event and players from opposing sides are involved, unless it is clearly an accident, it becomes a matter of public concern and, usually, considerable press reporting and comment.

Different viewpoints are expressed with some vigour. There are those who contend that the consequences of such an incident should be a matter that should be investigated and resolved within the sport itself through disciplinary bodies with powers to fine and to suspend from taking part for a stated time. Few would dispute that proposition but the crucial question is whether anything else should happen and in particular, should the Courts become involved in such matters.

The jurisdiction of the Court is twofold and not mutually exclusive. There are the Civil Courts which deal with compensation for injuries and losses suffered while the Criminal Courts are concerned with offences which, if proved, result in punishment appropriate to all the circumstances including the character of the accused person.

I have been involved as a Crown Court Judge in two widely reported cases involving Rugby Union football. Before almost any case arrives at a Crown Court for a trial by a Jury, it has to go through a Magistrates' Court. Often this is a formality because it is clear from the written statements of prosecution witnesses that there is a case for the Defendant to answer. The advantages of this procedure are that the Defendant and his advisers are aware of the case they have to meet. In many cases, the Defendant admits the offence and pleads guilty. In so-called sports cases which have been sent for trial, I attach great importance to having a meeting with the prosecutor, the Defendant and their lawyers to sort out the best way of presenting the case to the Jury. It is well known that a Jury of 12 is selected at random from a panel taken from the electoral roll. Nobody knows their occupations or their interests. Some may be sports enthusiasts, others not interested at all.

The first of the two cases concerned an allegation against Gary Rees that on 18 January 1992, he inflicted "grievous bodily harm upon Stefan Walter Marty". It should be noted that it was not alleged that he did this with intent to cause such injury which is a much more serious offence punishable with imprisonment for life. Perhaps rather strangely, the maximum punishment for the lesser offence is 5 years' imprisonment. The Act of Parliament goes back to 1861 and there have been repeated calls for it to be replaced.

On 28th April, the case was committed for trial by the Staines and Sunbury Magistrates' Court. I was anxious to know something about the background and how it was going to be presented to the Jury and on 21st August I held what is called a Plea and Directions hearing. From the papers I had and from what I was told, it seemed that the Nottingham club for whom Rees played and indeed, he was their captain, denied any legal liability whatever though the club and Gary Rees himself expressed regret at what had happened and had sent Stefan Marty their best wishes for a speedy recovery. There was no offer of compensation and no disciplinary hearing by the Rugby Union. Stefan Marty who played for the London Irish, felt he had no alternative but to go to the Police and launch a prosecution. His solicitors indicated that there would also be civil proceedings.

It was clear that there was no dispute on what had happened immediately prior to the incident. The difficulty was to explain to a Jury the relevant rules of the game and the positions of the players especially Rees and Marty. No video or other visual record had been taken. It was not a cup or league match but a 'friendly'. I therefore allowed a large blackboard and easel to be brought into Court. I consider it very important that the Courts are flexible and use any procedures and devices that may be helpful.

Very briefly, what happened was that there was a line out on the side of the pitch where the stand and almost all the spectators were. The other side was open with just a handful of people along the touch line. The London Irish won the ball which went to their scrum half. He did not on this occasion pass

the ball to his fly half as he had been doing during the match but kept it himself and started to go up the blind or narrow side in front of the stand. What happened to him does not matter because meanwhile, to put it neutrally, Rees who as at or towards the back of the line out, became entangled with Marty. Both were back row forwards known as 'flankers'. How this arose was the crux of the case. Marty's solicitors put it as a "deliberate violent act" while Rees said it was an accident that occurred during lawful play. Marty was a schoolteacher and his injuries were summarised as:-

"Broken jaw: one wisdom tooth removed: jaw plated, teeth wired, broken nerve in jaw."

There was some problem in having the medical and dental evidence ready for the trial and an application was made to postpone it which was refused and all was well for the trial to start on 14th September. It was admitted by the defence during the evidence of Stefan Marty that his injuries in law amounted to "grievous bodily harm."

The trial was held in the imposing Victorian Court at Kingston where the Surrey Assizes and Quarter Sessions used to be held. Following the opening of the equally imposing but very different new Courts in 1997, the old one is now used for TV programmes such as Kavanagh Q.C. and the Bill. It was very full for the Gary Rees trial with many blazers and rugby ties and a large number of journalists. I knew I would have a difficult balancing act to do. I did not want to appear ignorant pretending not to know about rugby but if I were too relaxed and appeared to be enjoying it all, the atmosphere could degenerate into flippancy and comedy unworthy of a serious occasion especially for Gary Rees...I had to avoid at all costs expressions like 'blowing the whistle'. So, I did not intervene very often but I did my best to make the witnesses feel at ease and remember to speak up so that the back row of the Jury could hear. I was greatly assisted by Messrs Jeremy and Giret who were most competent barristers for the prosecution and defence respectively. The case was hard but fairly fought on both sides.

The first witness was Stefan Marty and as a schoolmaster, was naturally fluent and gave clear explanations of what had been happening during the game - *"absolutely nothing going on; no niggling."* Then at the line out already mentioned, he thought that his fly half would be receiving a pass from the scrum half so he set off very quickly, then when he realized what was happening, he slowed down. He was aware of Rees standing directly behind him to his right shoulder. Then *"the next instant, I was struck and fell to the floor."* His jaw was moving in all directions. He got up and looked at Rees who was standing with his hands on his hips and Marty said; *"You bastard, you have broken my jaw."* He then left the field.

In cross-examination by the Defence, Marty was asked about why it took two weeks before he went to the Police. He explained that he thought negotiations were taking place and he did not wish the matter to go that far. It was put quite properly to him as it was a part of the Defence case, that he had deliberately obstructed Rees throughout the game and taken up positions to prevent the fly half from being tackled and also that he had been shirt pulling. These allegations were all denied.

The prosecution called the London Irish centre three-quarters, John Keohane and Sean Burns. I thought they were important witnesses because of their closeness to the incident. Keohane was next to Marty some 5 to 10 yards away. One wonders where the fly half was and the perceptive Jury asked where the fly half was but I do not think there was any answer. He remained a man of mystery. Keohane was surprised to see Rees following Marty *"literally behind."* Then, Rees' fist came up and hit Marty on the side of the face who could not see the punch coming and fell to the floor. He could see nothing leading up to the incident to explain it. The Defence suggested he had only a glimpse and an impression and made assumptions. This was denied. One difference with Marty's account was that Keohane said that after the incident, Rees *"jogged back to the Nottingham forwards."*

Sean Burns as the outside centre was further away about 15 metres and had a side-on view. He saw a punch from Rees hit the right cheek of Marty. He was shortly cross-examined but his version of events was not specifically challenged as being wrong or mistaken.

The referee, not surprisingly, did not see the incident but he was called as a witness. He was asked about Gary Rees whom he had refereed before and had no complaint about his play. He was asked about Rees complaining about a number of London Irish players continuously obstructing but he could not recollect it. This answer might have been important in view of Rees' evidence later but, of course, nobody can know what if anything the Jury made of it.

The prosecution called on spectator, Mr J.J. Behan, who was employed by the London Irish club as the manager of the bar and catering facilities. He was in the back row of the stand and said he had a very, very good view from about 20-30 yards. He described it as *"panoramic"*. He saw Rees come from behind Marty and land *"a fair old punch"*. He asked around if anybody else had seen it but nobody had. He could not believe this. It emerged from the officer in charge of the case, Detective Inspector Sheppardson, that appeals had been made at the London Irish ground for players and spectators to come forward but there was no response beyond the witnesses that were called.

Doctor Woodward, a Senior Registrar at Ashford Hospital, described the injuries to Stefan Marty which were not in dispute. He had experience of rugby injuries which could be received in many ways. In this case, "considerable force" was applied to one point. It was consistent with a punch but he could not wholly exclude the flat of an arm or an elbow. There could be considerable force from the swing of an arm. As is often the case with medical evidence, the Doctor cannot say as Doctor Woodward put it *"with absolute certainty"* how an injury occurred. One would think that in view of what Gary Rees was later to say and had said in a lengthy interview by the Police on 26th February, that the defence got some help from the medical evidence - at least, it did not exclusively support the prosecution case.

When he was interviewed, Gary Rees had his solicitor present and the inspector was assisted by D.C. Corbett who had some experience of rugby. Rees cooperated fully and explained that as an open side flanker, he would try and get to the opposing fly half to put pressure on him especially when he was getting the ball from a line out when he would often kick. In trying to do this with which he was very familiar, he was deliberately obstructed by Marty who got between him and the fly half. Rees spoke to the referee about it. He was accustomed to speaking to referees a lot about the rules. The referee in his evidence had agreed there was talking between them which is not surprising as Rees was the Captain. As regards the incident itself, he was again being obstructed by Marty so he pushed him and swept an arm around him; *"there was no intent to cause him any harm whatsoever, merely to push him out of the way and stop him obstructing me"*. He thought he made contact above Marty's shoulders with his open hand as he (Rees) got *"a large bruise on the bottom knuckle of my right hand."* He thought it was the fly half who said something like: *"is that what fucking international flankers do?"* A centre three quarter said something about the action being illegal. Rees denied swinging a punch and had never reacted to foul play; at the end of the interview, the Inspector said that in his opinion, there was sufficient evidence to charge Rees with causing grievous bodily harm.

The strength of the prosecution case was clearly the allegation of an approach by Rees from behind Marty and the throwing of a punch causing a fracture of the jaw. The London Irish fly half was not called as a witness. The Police had tried to see and interview him but were not successful for reasons that were not disclosed. Also, the prosecution were unable to call any witness who was independent from the London Irish Club. It was a low key match with only a small crowd present.

Gary Rees gave evidence in his own Defence. He, modestly, did not say much about his rugby career but clearly, he was a very experienced player at the highest level - England, the Barbarians and a World Team. He had never been cautioned or sent off. He had taken part in violent games. I had to intervene and stop his comments about the All Blacks because they were not in Court to defend themselves! The prosecution said they did not object but I thought there was a danger in introducing incidents in other matches as it was important for everybody and especially the jury, to focus and concentrate on what had happened during the match in question and about which there was a clear dispute. Rees repeated with clarity the gist of what he had said in his statement and that he did not intend to cause any injury. In cross-examination, he did not admit that he had become frustrated. Earlier, he said the thought he would create a situation by becoming entangled with Marty and thus draw the referee's attention to the offence that Marty was committing but he never intended to hit him on the jaw.

Wayne Kilford the Nottingham full back was called. He saw some obstruction between the two flankers in the first half but did not see the particular incident. I wondered why he was called but being a Defence witness, I did not have any statement from him so I did not know whether he was expected to have said more.

The Defence also called Mr Kenneth C. Thomas a senior lecturer at Nottingham University, Chairman of the Selection Committee and first team coach. He was at the match on the touch line opposite the club house and moving up and down. He saw the incident and had a clear view from about 70 metres.

He saw the Nottingham scrum half get the ball from the line out and move back inside. Rees turned as if to go to him. Marty stopped and *"went into Rees' line."* Rees made a movement with his right arm to attempt to pull him away. He did not see Rees throw a punch or make any violent move at all. During the game Rees had been trying to draw the attention of the referee to obstruction on several occasions. The reference to Rees making from the scrum half is at variance with other witnesses and perhaps illustrates how witnesses to a sudden moving incident can genuinely have different recollections and impressions. However, the essential part of the evidence of Mr Thomas would seem to be his account of the clash between the two players. He had known Rees very well for about 14 years and paid tribute to him as a model player who had never caused any concern to the club. He added that Rees had a speciality of a 'dump' or smother tackle by which the player would be enveloped and unable to release the ball.

The Defence called more character witnesses. Fred Howard had been a referee for some 20 years and on the international panel for 9. He had refereed more than 30 games in which Rees had taken part. He also explained some rugby rules and the role of a flanker in relation to the opposing fly half. He would have been *"extremely surprised"* if Rees had thrown a punch.

Alun Davies was the Welsh National coach but before that, he had coached at Nottingham for 15 years. He had known Rees since he was at school and had invited him to Nottingham. He was a fair and not over aggressive player who had a good reputation throughout the world. Mr Davies gave a demonstration of wrapping around a player in a 'dump' tackle which I expect was helpful to the Jury all of whom listened intensely throughout. Some made notes and some written questions were handed up to me.

Finally, the Defence called Mr John Reason the rugby correspondent of the Sunday Telegraph and for 18 years, of the Daily Telegraph. He had never interviewed Gary Rees but he knew him as one of the least aggressive of people who had never retaliated when he had been on the receiving end of foul play.

Counsel then made their closing speeches to the Jury and on the next day which was the fourth one, I summed up. I knew I had to take great care to get it right so I started with what was not in dispute namely, that there was physical contact between Rees and Marty as a result of which, Marty suffered grievous bodily harm, so the issue was whether that harm was inflicted unlawfully and maliciously being the words of the statute.

As regards "unlawfully", I explained that where a sport of physical contact such as rugby is played, there is pushing, shoving and tackling from which injuries can and do result. It is part of the rough and tumble of the game, and then I added a phrase which got some press publicity *"but the law of the land does not stop at the touch line"*, so was a blow struck for which there was no justification being outside the rules of rugby - a deliberate punch aimed at Marty?

If the Jury were sure that there was an unlawful act, the prosecution had also to prove that it was done "maliciously". This is a legal term of art and meant that at the time of the unlawful act, Gary Rees had to foresee, that is understand and appreciate, that what he was doing might cause some physical injury albeit of a minor nature.

I tried to keep it short and use ordinary language but getting across the meaning of "maliciously" is not easy. Repetition, using slightly different words can lead to confusion.

Having explained the elements of the offence, I told the Jury that they must consider the evidence, the speeches and summing up and then they would find out what frame of mind they were in. If they were satisfied and felt sure that the prosecution had proved the case up to that high standard, they must return a verdict of guilty. If they were in any other frame of mind, the verdict had to be Not Guilty. In this case, it was important for me to stress that while the Defence raised the matter of an accident, it was not for them to prove it but for the prosecution to negative it.

I then told the Jury that I would give them a review or summary of the evidence. Of course, I would not go through it all in a mechanical way. There had been much detail about rugby tactics and the positions of players on the field. This was helpful only in relation to the offence alleged. I then compared and contrasted the prosecution and defence cases concentrating on the disputed evidence about the punch. As regards Rees himself, his good character went first to his credit and secondly, as

to whether he was the sort of person who was likely to commit this type of offence.

Finally, I urged the Jury to return a unanimous verdict but if after some long time, they could not achieve that, I would ask them to come back into Court and I would give them further direction. This in fact happened. The Jury retired at 11.30 am. Not having heard anything, it was at 22.01 pm that I asked the Jury to return to Court. The foreman confirmed that no verdict had been reached. As there was only one charge against one Defendant, I told them that I was now prepared to accept a verdict on which at least 10 of them were agreed. so, they retired again and I went back to my room trying not to speculate and worry about what was going to happen. The Jury knocked and returned at 3.05 pm. The foreman told the Clerk that at least 10 had agreed on a verdict. Asked what it was, he replied "*Not Guilty.*" The tension was broken. I had to deal with costs and then I rose and adjourned the Court. I understand there were emotional scenes and the stress on Gary Rees and his family in the eight months from the incident to the verdict must have been considerable.

Having retired as a Judge, I can speak more freely and say that I thought this was a very evenly balanced case which could have gone either way. in fact, I wondered whether the Jury would be so divided that they could not return a verdict. I am glad that did not happen, though perhaps, the prosecution would not have asked for a retrial by another Jury. If the medical evidence tended to support the prosecution, that may have been balanced in the Jury's mind by the undoubted good character and reputation of Gary Rees but, as I well know, it is dangerous though often very interesting, to speculate on the verdict of a Jury.

Equally, I cannot say with any certainty what sentence I would have passed if the verdict had gone the other way. Nobody wants to pass or should pass, a sentence of imprisonment unless the case is so serious that there is no proper alternative. I had a message from the Loughborough Community Service Unit that a place was immediately available should the Defendant be made subject to a Community Service Order. this would not bind me in any way but I knew that the option was available. I knew of the concern about violence in sport and that in a number of cases concerning rugby, prison sentences had been passed. Some had gone to the Court of Appeal which had indicated that prison sentences were to be expected in bad cases of gratuitous violence. It may be that a powerful plea in mitigation with an examination of other cases and perhaps a view from the R.F.U. referring to disciplinary matters might have persuaded me not to pass a prison sentence but beyond that I cannot go.

I understand that after the verdict, there were statements issued to the effect that the case should not have been brought and that the Courts were not the place to deal with such matters. Gary Rees himself read out a prepared statement. I have not got any papers about them but in my view no group of persons can be above the law. One cannot say "*it's only a game*". Of course, the Court must be the place of last resort but if there is nothing done for example, by any disciplinary body or insurance company, what is an injured person like Stefan Marty to do?

For me, the case of Gary Rees has ended in a mystery. I have recently been through the Court file and found a letter dated 5th January 1993 from Gary Rees' solicitors, nearly four months after the verdict, saying that they would like a transcript of the Crown Court proceedings as there were proceedings in the Staines County Court relating to the same incident. I know nothing about them. As far as I know, there have been no press reports so perhaps either the matter never went to trial or it was settled in some way. Presumably, it was a civil claim by Stefan Marty for damages for his losses and injuries. One can only hope that he has fully recovered long ago and been able to resume his career as a schoolmaster.

The case of Simon Devereux was similar to that of Gary Rees in that it concerned a single punch thrown in a game of Rugby Union football which caused severe injuries including a double fracture of the jaw but the circumstances were different especially as the incident occurred after the referee had blown for a penalty which was about to be taken.

The game was between the second fifteens of Rosslyn Park and Gloucester which was played in Richmond Park on 25th February 1995. There was only a handful of spectators. There was no stand or changing facilities. The players had to come from Rosslyn Park's ground in nearby Roehampton Lane.

Devereux was committed for trial at the Kingston Crown Court by the Richmond Magistrates' Court

on 2nd August 1995 charged with inflicting grievous bodily harm with intent to cause it and, alternatively, the lesser charge of inflicting grievous bodily harm which Gary Rees had faced.

A Plea and Directions hearing was heard by Judge Paiba on 12th September and the prosecution did not oppose an application in December for the trial to be adjourned to enable Devereux to go on business to the USA. He was an engineer employed by a firm in Cheltenham. In January 1996, Devereux's solicitors asked for the case to be transferred to what was called a "neutral" Crown Court in view of the proximity of Kingston to Roehampton. I refused this application and pointed out that the Jurors came from a wide catchment area. The solicitors indicated that the matter would be raised again at the beginning of the trial. In fact it was not but I allowed counsel for the Defence, Anthony Heaton-Armstrong, to see, in confidence, the cards of the Jury panel which gave their addresses. He did so and was satisfied so that the trial then began on Monday 19 February 1996, almost a year after the incident. Kingston is a very busy Court and priority has to be given to cases where the Defendant is awaiting trial in custody. Fortunately, the number of Courts has increased from 7 to 12.

I was greatly helped by experienced counsel who proceeded at a brisk pace. Conner opened for the prosecution and said that Devereux was a person of impeccable character who had played for Gloucester for 4-5 seasons, equally for the first and second sides. He was a player of some quality. He outlined the prosecution case which was that after the whistle had blown, Devereux came up to the Rosslyn Park Captain, James Cowie, from behind and to the side and punched him. There was no excuse for this off the ball incident. He added, no doubt having seen the statement of Devereux to the Police, that if self-defence were raised, it was for the prosecution to negative it.

In order to understand the verdict of the Jury which was guilty unanimously on the more serious charge, it is necessary to consider the main features of the evidence and what the crucial issues were. As is often the case, there were sharp differences between the prosecution and defence versions of what happened and why. The first witness for the prosecution was Jamie Cowie. There had been a ruck among the forwards but he had gone beyond it. Two Gloucester players were lying on the wrong side of the ball. The whistle blew and Rosslyn Park were awarded a penalty. Cowie walked back, facing his own posts, clapped his hands and said "*Come on lads, take a quick penalty.*" He then felt a blow to his jaw and fell to the ground. As he fell, he saw the Gloucester No 6 who was Devereux, follow through. He had had no contact with him during the match. The referee asked to speak to both captains but he was on the floor bleeding profusely, then put in a wheelchair and taken to hospital. The medical evidence was not disputed. One difficulty was realigning the jaw and there was considerable dental treatment. He was cross-examined. He left hospital on 1st March. He contacted the Police on the 3rd. A brace was holding his teeth together and he could not speak properly. He knew nothing about the legal system. I do not know and was not concerned at the trial what had happened between the clubs and the Rugby Football Union but clearly, any efforts to deal with the matter other than by criminal proceedings had failed. It was put to him that after the rucking incident, he was punching out at Gloucester players. This was denied and became the central issue in the case.

The second witness called Watson was a linesman. Any hopes of having an independent witness were dashed when he said that he was a Rosslyn Park replacement! He saw the incident. At the ruck there was a bit of a fracas with pushing and shoving on both sides. It happened in rugby quite often. Then he saw the Gloucester No 6 come in from the side and hit Cowie on the jaw. His impression was that Cowie as Captain, was stepping in to calm things. He saw the punch and heard a crack. He put his flag up to show that he had seen an incident and spoke to the referee who waved play on. There was a lot of blood. One important answer came in re-examination when he said that everything had died down before No 6 stepped forward and that Cowie had no chance to defend himself.

Next came Darryl Vas a solicitor was was the Rosslyn Park tight head forward. He remembered the whistle blowing. He was just approaching the ruck as he was the last person to arrive. Cowie turned to come back away from the play when the Gloucester No 6 punched him on the right side. He was not in physical contact with anybody, neither was he making any threats. The witness heard the crack and the play stopped. In cross-examination, he said he had been qualified as a solicitor for six months. He did not do criminal work except for the C.A.B. and had advised Cowie about a civil action. He thought that the Gloucester club would make some compensation. He believed his memory was quite clear on the exact nature of what happened which was a "*one-off hit*" and "*a shocking incident.*" He became more emphatic under cross-examination and very wisely, I thought, Heaton-Armstrong soon stopped but not before the witness added that there was some pushing but that Cowie was not part of it. He was not trying to break things up but was hit from behind.

Linda Methold was the team manager and had been for three years. She was a medical nurse and had a *"relatively neutral interest in the game"*. I said nothing but was a little perplexed about it. Neutrality and team managership seemed a curious concept. However, she gave Rosslyn Park a letter stating what she had seen. Like the previous witness, she became more emphatic in cross-examination. She said it was a nasty incident which had stuck in her mind. She saw the punch and heard the crack. Cowie was not threatening anybody.

Devereux was interviewed by the Police on 3rd April and gave a full account of acting in defence of his team mates who were being attacked by Cowie and he thought, one other player also.

Heaton-Armstrong made a short opening speech to the Jury before calling any witnesses. It is not often done but it was wise I think, in this case so that the Jury could appreciate the nature of the Defence. There was no question that violence was offered by the Defendant which caused the injuries but it was not unlawful. So called self-defence extends to the defence of others. The force used has to be reasonable in the circumstances and a person can be acting reasonably even if he is mistaken about the need for self-defence.

With this in mind, the Defendant gave evidence. He was of good character and came from a good family. He had a *"clean slate"*, never been sent off or had a yellow card. It was a typical hard game without any problems until Cowie came through a ruck in an aggressive manner *"and it all happened from there"*. There was scuffling and punching. He could not see if any punch connected. It happened very quickly. *"I stepped in and threw one punch and stopped it immediately. I had never punched anybody before and was not thinking of the consequences of anything like that."* *"It was quite wild for want of a better word."* Nothing was said by the referee who talked to all the players after speaking to the captains. This is not correct according to Cowie and the linesman. Nothing was said to him afterwards. He did not know there had been an injury and did not see any bleeding. When he first heard about it three weeks later, he went to the Police station and told the truth.

He was closely cross-examined about the accuracy of what he had said especially about James Cowie who he said was swinging out with his arms at him and a team mate. He himself felt threatened. He was upset and had an instantaneous reaction which he did not think about. *"I thought he might turn to me. He did throw a couple of punches."* At a later stage, he said he intended to defend Mr Fowke and that Cowie could have turned on any one of the other seven forwards. Of course, none of this was accepted by the prosecution.

Mr Fowke was then called. He was the Gloucester captain, aged 32, and since retired as a player. The first he knew about proceedings was when the Defendant came to his house in May or June. He recalled the incident. there was a maul and a lot of things going on. A punch was coming straight at him and the person throwing the punch was hit by the Defendant though at the time, he did not realize who it was on his side that had thrown the blow. The referee spoke to him but he did not consider it desirable to speak to the Defendant. When cross-examined, he said that Cowie was coming towards him and he would have been hit if the Defendant had not intervened. Cowie had his fists clenched.

The last player to be called was Hilton Brown. He had come to the UK from South Africa some 15 months earlier and played in the South African national Reserve side. He was aged 25. He remembered Rosslyn Park going over the top and Gloucester players trying to clear them away. Fists were flying around. James Cowie was running and lunged towards him and the Defendant from the side. He gave a demonstration of the lunging and said that the Defendant hit Cowie. *"We all went away. A physio came on. The referee and the players said nothing."* In cross-examination, he said he thought Cowie was coming towards him. He backed off and at the end of his evidence, he added *"I can't say I saw the Defendant hit him."*

Mr Michael J. Nicholls was watching the match. He was aged 54 and had been with Gloucester for 35 years. He had been the captain, coach and an official. He was now the Vice Chairman and Chairman of the Selectors. He spoke highly of Simon Devereux who had never caused the club any problems and was *"a thoroughly nice chap."* Mr Nicholls was on the touchline. There were only about 20 spectators spread out. No one was within a few yards of him. He remembered the ruck and that two Rosslyn Park forwards got offside and two others entered and pushed their way through. There was a general fracas with 5-6 players involved in a fight throwing punches. The referee blew for a penalty to Gloucester. Then he saw an injured player emerge from a group of people. He was standing up and walking

towards him but the physio walked towards him and helped him off the field. Not a word was said by anyone.

Mr Nicholls then introduced a new feature into the evidence. It puzzled me and I wondered what the Jury would make of it after all the other evidence. He said that in the Rosslyn Park Clubhouse afterwards, players and committee members all mixed amicably. There was food and drink and chatting and no mention of any incident. The atmosphere was very friendly as he spoke to a number of Rosslyn Park people. In cross-examination, he said he did not see any punch connect... Very often, there was aimless and wide throwing of punches in an instantaneous reaction.

Mr Michael Teague was called as a character witness. He had been the team manager of Gloucester for over a decade and was a former international and British Lions player. He had known Simon Devereux for about 12 years. He spoke very highly of him as a player and as a person.

Mr David Pointon was the coach. He had travelled with the Gloucester team and watched the match. He remembered the ruck and shouted for a penalty. Arms were flying. There was punching. Brown and Fowke were together and Devereux was to the side of them. A fight occurred and Devereux hit a Rosslyn Park player who had been the aggressor and instigator. The player went to the floor and the trainer attended to him. The referee awarded a penalty to Gloucester for the Rosslyn Park offside. When arms were flying, Fowke and Brown were in the centre trying to get out of the way. Devereux came from behind and at the side of Fowke. It was then that he saw the punch. He did not hear any crack after the blow. He was in the Clubhouse afterwards and nothing was said about the incident.

Apart from Mr Teague, two other character witnesses had their statements read out. One was a Police Officer, the other a dentist. As expected, both of them spoke very highly of the Defendant.

The final speeches followed a predictable course and then I had to do my balancing act about the evidence in my summing up. I followed the framework of the Gary Rees case but I had to deal with the specific intent that was necessary for the graver charge which I suggested the Jury considered first. If they were not satisfied about that, then they had to consider the lesser charge. I had to deal with the matter of self defence. In this case there was no suggestion of accident. Quite rightly, the Jury were told by the prosecutor not to speculate and although I said nothing about it, I was surprised that the referee was not called as a witness. If there was a fracas between a number of players that resulted in a player having to leave the field, even if the seriousness of the injuries were not known, one would have thought that he would have some recollection of that and equally, if there was an off the ball incident about which players had protested to him. Neither in my notes or in the Court file, can I find any reference to him, presumably, there was an effort to contact him to make a statement which failed. I sometimes wish there was a greater judicial involvement in the preparation of a case along continental lines as the French have a juge d'instruction but this is not the place to develop that argument.

The Jury retired at 12 05 pm and came back quite quickly (no need for the majority direction) with a unanimous verdict on the more serious charge. I then had to consider sentence which is often the most difficult task that a Judge has to perform. Much is said at this stage about the Defendant but the Judge has to consider all the circumstances of the offence and in particular, the victim. Offences under section 18 of the Offences against the Person Act 1861 are often met with lengthy terms of imprisonment because of the element of intent. Community penalties are seldom passed. Devereux was a first offender who had acted out of character. After most serious consideration, I decided that in this case, there was no proper alternative to a sentence of imprisonment which I would, as Judges must, keep as short as possible. The fact of the conviction was a severe penalty in itself. I therefore, passed a far lighter sentence than is usual for this offence. It was 9 months' imprisonment.

I was therefore rather unprepared for the strident and if I may say so, sometimes uninformed outburst of criticism that followed. The headline in the Daily Mail was *"Outrage as Devereux goes to jail."* Mike Burton, a former international, spoke of his *"shock and amazement"* and *"a travesty of Justice."* The same report said it was *"the longest imposed for an on-field violence."* This was not correct as Edward Grayson pointed out in a letter to The Times where he referred to a sentence of 18 months. In another newspaper, the Gloucester Chairman, Alan Brinn, was quoted as saying *"This is the severest sentence I have ever known in such a situation. Never in my wildest dreams did I think it would end like this."* The correspondent Simon Barnes was quoted as saying that Devereux's place was in the scrum and not in gaol. There were, however, letters published in my support which contended that in rugby, the time had come when unlawful and severe violence had to result in a prison sentence. A well known referee,

George Crawford, wrote that "a punch in a game of rugby is no different to one thrown outside the Rose & Crown on a Saturday night."

It was therefore to be expected that Devereux would appeal but when the Notice arrived, there was no appeal against sentence but only against conviction on the grounds that I had misdirected the Jury on the question of intent. Clearly, Devereux's advisers must have considered the previous sports cases of violence and concluded that my sentence, contrary to what had been reported, was not out of line with them. The Appeal was heard on April 18th 1996 and at the end of the first paragraph of the Judgment of the Court, Lord Justice Hobhouse, who is now a Law Lord, said *"He was sentenced to 9 months' imprisonment which, it is to be observed is a far from heavy sentence for a section 18 offence, particularly after a trial."* It therefore seems that Devereux's advisers were correct and that an appeal against sentence would have failed. The Judgment went into the different versions of the facts in some detail and set out the answers that Devereux gave in evidence about the time when he threw the punch which I had read out to the Jury and also read out my summary of Devereux's evidence on self-defence. Mr Heaton Armstrong (the same counsel appeared as were at the trial) submitted according to the Judgment, that the case *"gave rise to a difficult issue of intent which required a special direction from the Judge."* The Court disagreed *"unequivocally"* and said *"It was a straightforward case of one man throwing a punch at another and the necessity for the Jury to consider what was the intent of the defendant at the time he threw that punch."* The Court referred to some other cases about intention and then quoted at a little length what I had said to the Jury about it. I was relieved when I read: *"The Jury were properly directed in these simple terms and it thereafter was a matter of fact for the Jury to consider.....There is no basis at all for faulting the conclusion of the Jury or the conduct of the trial."*

The Appeal therefore failed but as far as I know, apart from a report by Edward Grayson in the New Law Journal, there was no mention of it in any newspaper or other journal. I have wondered what the reaction was among rugby players and officials especially at Gloucester. One thing is sure and that is that no one could have done more for Simon Devereux than Anthony Heaton-Johnson but the Jury were clearly convinced by the prosecution evidence. There had been a number of previous cases and when I passed sentence, I said *"Warnings have been given to all sportsmen where there is physical contact particularly in rugby football, that unlawful punching cannot be tolerated."*

As with Stefan Marty, I do not know whether there have been any civil proceedings brought by James Cowie or any disciplinary matters with the RFU. One can only hope that both players have fully recovered and been able to maintain their enthusiasm for the game of Rugby Football.

His Honour John A Baker,

Former Circuit Judge and Resident Judge Kingston - Upon-Thames Crown Court (1982-98.)

Amateur Football And The Law Cubbin -v- Minis

Steven Harvey

INTRODUCTION

The following details are the facts of a real case. The difficulties encountered in pursuing the claim are referred to later. It is hoped that the contents of this article will identify some live issues and will prompt a response either from the governing bodies of amateur football in this country and/or insurance companies who will have an impact upon whether these issues are eventually resolved.

On the 6th October 2000, Cubbin v Minis was tried at Birkenhead County Court. the Judge, Mr Recorder Edis, found in favour of the claimant awarding the amateur footballer damages of \$18,000.00 for the injuries and financial loss suffered following a broken leg sustained in a tackle during a Wirral Sunday League game in December 1996.

THE FACTS

The claimant was at the time a student who had been studying in Spain during term time. Having returned home for the Christmas break he agreed to take part in a game of football on Sunday 12th December 1996. The claimant had played for the Sacred Heart Football Club in the previous summer before going away in the autumn to continue his education. Having agreed to play on the Saturday night the claimant was roused on the Sunday morning by a telephone call confirming that the team was short and that the claimant and his brother were needed to play as others who had also agreed to play had not turned up.

The claimant and his brother eventually arrived 20 minutes after the game had started and immediately took the field against their opponents Premier Brands Football Club. The claimant had only been playing for 10 minutes after coming on as a left back when he received the ball in space in the left back position. Having controlled the ball he made his way forward dribbling over the half way line.

As the claimant crossed the half way line he became aware that he was being chased. The claimant consequently released the ball to his brother who was calling for it in a position in advance of the claimant. The ball travelled a short distance to the claimant's brother. As the ball arrived at the feet of the claimant's brother the claimant was tackled. The tackle resulted in the claimant suffering a broken tibia and fibula. Mr Minis, who had completed the tackle, was shown a straight red card and sent off from the field of play for the tackle.

The game had been played on the field adjacent to Arrowe Park Hospital. Fortunately the claimant only had a short journey to the Accident and Emergency department of the same hospital. Following the game the referee submitted a report to the Cheshire Football Association indicating that Mr Minis had been sent off for the tackle and most importantly indicating that in his view Mr Minis in committing to the tackle had shown no regard for the safety of Mr Cubbin.

The injuries sustained by Mr Cubbin were such that he was unable to complete the academic year causing his studies to fall behind schedule. The claimant lost one year's income as a result of his studies being affected by the injury.

THE ROAD TO TRIAL

The claimant was still in hospital when I first became aware of this case. A telephone call to the offices had been put through to me. The caller was the claimant's mother who was concerned at the injuries sustained by her son.

Having taken brief details the chances of success of a Personal Injury claim seemed remote without obtaining corroborating evidence. I had an interest in Sports Law and had followed with interest the case of *Elliott v Saunders*¹ and further was aware of the case of *Condon v Basi*².

A meeting with the claimant following his discharge from hospital heightened my interest especially as it was during this meeting that I was advised that Mr Minis had been sent off following the tackle.

The claimant as mentioned above was a student with no or very little income and was consequently eligible for Legal Aid. It took some time to obtain a certificate, which was not obtained until further evidence had been gathered. The primary evidence upon which the claimant relied was a statement from the referee confirming the reason for sending off the defendant.

The report submitted by the referee to the Cheshire Football Association was never obtained. Initially the Association refused to release information without a court order. Following pressure they eventually provided the referee's address. Indeed, once proceeding had been issued, an application was made for Third Party disclosure, which proved unsuccessful as by that time the Association had destroyed the reports dating back to 1996.

Having obtained the statement from the referee Legal Aid was obtained. The initial application had been refused by the Board owing to there being insufficient information for them to make a decision. The referee's statement enabled the claimant to pursue the argument that this case was not just one of

negligence, but that if the referee was to be believed in his assessment of the state of mind of Mr Minis, 'that he showed no regard for the safety of the claimant' was akin to recklessness. It was further argued that to be successful the claimant only had to prove negligence on the part of the defendant.

At the same time the claimant also applied to the Criminal Injuries Compensation Board attaching to the claim form a copy of the statement obtained from the Referee. The Application to the CICB was initially refused on the basis that the injury sustained was not sustained as a crime of violence. This decision is under appeal and is yet to be decided.

Having obtained Legal Aid the task then was to obtain further evidence. The players of Sacred Heart were approached for statements and the management was approached for documents and for statements.

The only players who agreed to provide statements were the claimant's brother and the goalkeeper for Sacred Heart. The goalkeeper proved to be a star witness. He was employed by the local radio station as a sports correspondent and was one of their team of match commentators. His evidence was that this tackle was the worst he had seen at the time and that by the time this case reached trial he had not seen a worse one since.

The management of Sacred Heart were reluctant to help and did not provide statements or documentary evidence to assist the claimant in his pursuit of damages.

Medical evidence gave details of the injury as required. The Consultant Orthopaedic Surgeon was asked for a view on the height of the injury and any relevance that might have upon liability. The conclusion reached was that the break showed evidence of being caused by an impact as opposed to some other form of pressure. Further the height of the break was approximately similar to the height of a football.

Proceedings were issued in December 1999 and evidence exchanged. The only evidence eventually obtained from the Cheshire Football Association was that of the defendant's past disciplinary record which did not reveal a long disciplinary record. The defendant had also obtained two statements from his team-mates and a further statement from one of the claimant's team-mates each of whom to differing degrees took the view that the tackle was not unusual in the context of Sunday League Football. In the light of the outcome this view is the most concerning.

Eventually the case was listed for trial before Mr Recorder Edis sitting at Birkenhead County Court on 6th October 2000.

THE TRIAL

The trial was listed for one day during which all of the witnesses gave evidence. The referee admitted to having been influenced in his decision by the extent of the injury suffered by the claimant.

Further the discrepancies in the evidence given by the defendant's witnesses were brought to the fore. Those discrepancies included differences in evidence as to the angle and direction of approach of the defendant, whether the claimant had in fact released the ball at the time of tackle and whether the defendant lunged towards the claimant when entering into the tackle. The judge did not criticise the witnesses. Referring to *Watson -v- Gray*³, the judge supported the view taken by Hooper J who had the benefit of video evidence, which allowed him to accept that honest witnesses do make mistakes. He also indicated that he was not surprised that witnesses looked at the incident and took a view of the same which could not be totally divorced from the views of team members, friends and in this case relatives.

When delivering his judgment he expressed dissatisfaction with the length of time the case had taken to reach trial and the effect that had had upon the quality of evidence and memory of the witnesses especially as there was no video evidence to capture the moment as was the case in *Watson v Gray*.

Having dealt with the evidence the judge referred again to the case of *Watson v Gray*, confirming that a player involved in a football match or any other sporting match owed a duty to take reasonable care. In the sporting context there are however particular circumstances and consequently the test of

negligence is slightly modified. Thus, has the defendant failed to exercise a duty of care in the circumstances? The judge drew a distinction between amateur and professional football further modifying the test to be applied to this case. Finally the judge confirmed that *the final test would be whether a reasonable amateur player would recognise the significant risk in causing serious injury through his actions.*

After careful consideration of the evidence the judge found in favour of the claimant indicating that in his mind he had no doubt that the tackle was very late, very high and very forceful, and that whilst high tackles were a particular football tactic, this tackle was an unlawful act in civil law whereby the defendant took an unjustified risk in causing serious injury to another player. Consequently the claimant had established negligence on the part of the defendant.

The Judge expressed the view that the law does not expect footballers to take risks in causing serious injury to opponents. Further the judge commented upon the extent to which the law can impact upon the individual's everyday life especially in the context of sporting events. Further, whilst there may be surprise at the invasion of the law, nonetheless he was required to decide whether the defendant's actions had been negligent and that based upon the weight of the evidence he was satisfied that that was indeed the case.

THE ISSUES RAISED

1. The Test for the Duty of Care

The true test of negligence in case of sporting injuries is shrouded in controversy. The judge in this case paid particular attention to the judgment in *Watson v Gray*. As a High Court ruling it does not advance those arguments in detail and the area remains ripe for the appeal courts to consider the issue and clarify the appropriate test.

It has recently been reported that George Santos, the Sheffield United FC player, will pursue a claim for damages against his opponent for the facial injuries that he recently suffered. This may be the case that is pursued furthest as the defendant being a professional footballer will be able to plead vicarious liability. Should he do so the club will defend the case. Could this be the case that defines the true test of negligence for this hybrid litigation? The likelihood of such a case coming from the amateur ranks is remote because of the costs implications. The likely source is undoubtedly the professional game.

Thus, there are still arguments as to the appropriate test for the duty of care. The judge as indicated above took great heed of the test adopted by Hooper J in *Watson v Gray*. No doubt the argument as to the appropriate test will continue.

2. Insurance

This case has raised the participants' awareness of the need for insurance. Having lost the case the defendant has made a retrospective claim against his home contents insurance - a claim that is still on going.

It is striking that most amateur sportsmen and women do not pay attention to their insurance position before taking the field. This is of even more concern given the lack of insurance required by the local Football Association for clubs to be allowed to enter amateur leagues. Indeed the insurance required by the Cheshire Football Association provides for minimal cover. The typical cover obtained by an amateur club would provide a benefit only in the event of a loss of life or limb. This is an unacceptable position. If only a minimum level of insurance is required it would seem appropriate for the Football Association to provide written warnings to participants which would not be a huge task and would simply require a standard letter upon the players' registration.

Indeed this is a sufficiently important topic that it should be considered by the Football Association in conjunction with the insurance sector. The Football Association requires a statement of best practice on these matters, which would help insurance companies to develop suitable insurance cover for the amateur footballer. It would not be too difficult for players to obtain insurance protection against

injury and against personal liability by adding a bespoke clause to standard policies like for example a Home Contents Policy. Indeed should an insurance company take up the task such a clause would no doubt provide for an attractive selling point especially to all amateur footballers who unlike their professional counterparts cannot hide behind the veil of vicarious liability.

As an aside Mr Cubbin was not registered to play and consequently was not eligible to claim on his team's insurance policy. During the course of proceedings we failed to obtain a copy of the policy protecting Sacred Heart players. It is obvious that from a practitioner's perspective there is a need to investigate the insurance position whether you act for the claimant or the defendant.

3. Press reaction/Public's appreciation

There was a reaction to the outcome of the case, brought about by the defendant approaching the local paper. What was most amazing was the astonishment that an amateur footballer had been found liable for the injuries sustained by Mr Cubbin and ultimately ordered to pay damages for the injuries sustained and the consequential financial loss.

Sports Litigation of this nature is ripe for further discussion. I would welcome a response from the Football Association in relation to the risk all amateur footballers are expected to take, ignorant of their insurance position. Equally I would welcome a response from the insurance sector on the availability of insurance products that would protect the amateur footballer against accidental injury and a third party claim for injury. How much would it cost? Could it simply be added to a standard insurance policy such as a home contents insurance policy? Could it be arranged better on a collective basis and if so is the co-operation of the Football Association required? Or will we keep going to court to settle these issues?

Footnotes

1) *Elliott -v- Saunders and Liverpool Football Club* [1994] unreported.

(2) *Condon -v- Basi* [1985] 1 WLR 866.

(3) *Watson -v- Gray and Huddersfield Town Football Club* [1998] *The Times* 26th November.

**Steven Harvey, Solicitor,
Cuff Roberts Solicitors, Liverpool.
Copyright of Cuff Roberts Solicitors.**

An Own Goal, Or Merely Extra Time?

Arsenal Football Club Ltd v Matthew Reed

Analysis and practical conclusions for merchandising

James Whittaker and Nick Rudgard

Many of you will have read press reports commenting on the result of the recent case brought by Arsenal Football Club against a street vendor named Matthew Reed. Some of these reports have questioned the very future of clubs' licensing programmes, suggesting that intellectual property rights can now be circumvented with impunity. This article clarifies the position and sets out some practical conclusions that can be reached as a result of the case. Before we explain these, we will put them into context with a resumé and analysis of the case itself.

THE FACTS

Arsenal had brought an action for passing off and registered trade mark infringement against Matthew Reed who had been selling scarves, hats and shirts outside the Highbury Ground since at least 1979. The goods sold were not official Arsenal merchandise because they did not originate from Arsenal themselves. Arsenal's claim had two main limbs. First the club claimed that sales by Mr Reed of unlicensed merchandise would mislead the public into the belief that either the goods he sold were the

products of Arsenal, or were associated with or licensed by them. This was the passing off claim. The club based this claim on the use by Mr Reed on the goods of the words "Arsenal" or "Gunners", or the Arsenal crest and cannon logo. Secondly Arsenal had registered those words and devices as trade marks in a variety of classes covering a wide range of goods including those sold by Mr Reed. They claimed that use of these by Mr Reed without their consent amounted to trade mark infringement.

CASE ANALYSIS

The claim for passing off failed because Arsenal was unable to provide any evidence that potential customers of Mr Reed (usually Arsenal fans) were confused about the origin or trade association of the goods which he was selling. Mr Reed had displayed signs stating that his goods were not linked to the club, and other street vendors who had signed up to Arsenal's official licensing scheme had their own signs confirming that they were sellers of official merchandise. In addition Arsenal could not provide a single witness to state that they had actually been confused. The Judge (Mr. Justice Laddie) decided that customers were well aware that they were not purchasing official goods from Mr Reed. Consequently he held that the club had not proved their case in passing off, and ruled against them on this.

In the claim for registered trade mark infringement, Mr Reed had clearly used the marks without consent. However Mr Reed argued that he was not infringing because he was using the words and devices not as trade marks, but instead as mere "badges of allegiance". In order to deal with this argument the Judge considered both Section 10 of the Trade Marks Act 1994 ("TMA") and related case law.

Ss 10(1) and 2(B) of the TMA provide respectively that "a person infringes a registered trade mark if he uses in the course of trade;

a sign which is identical with the trade mark in relation to goods and services which are identical to those for which it is registered"

and

"a sign where because ... the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark ..."

The issue at stake in this case turns on the meaning of s.10 of the TMA. Do these words mean use of an identical or confusingly similar sign has to be *use as a trade mark*, i.e., as a designation of manufacturing origin, for infringement to occur, which would prevent a very wide monopoly in the words or signs making up the trade mark from arising; or does it allow a very wide interpretation that any use of a sign identical to a trade mark in relation to a product would constitute infringement of that trade mark?

Following this theme, the Judge referred to sponsors' advertising on shirts (e.g. JVC) as an example of non trade mark use for shirts. He said that this use of JVC did not show that the shirts originated from JVC. He then referred back to his findings on the passing off issue and concluded that as a finding of fact, the use of the Arsenal words and signs by Mr Reed also did not indicate trade origin. He said that as used by Mr Reed, they did not indicate that the goods in question were made for or under the licence of Arsenal, and were indeed mere badges of allegiance. Accordingly he found that there was non trade mark use.

The consequence of this finding of fact was that one very important issue of law remained. Could such non trade mark use amount in law to an infringement of registered trade mark rights?

The relevant UK case law on this issue is summarised in *British Sugar Plc v James Robertson & Sons Ltd* (1996) RPC 281 and *Phillips Electronics Ltd v Remington Consumer Products* (1998) RPC 283. In *British Sugar*, Jacob J had stated that use of a trade mark in a non trade mark way could infringe a registration. In *Phillips* he had subsequently doubted that view, but the Court of Appeal then considered the matter [at (1999) RPC 809 paras 48 and 49]. Aldous LJ said in paragraph 49:

"I prefer the submission...in British Sugar...namely that trade mark use is not essential. There is nothing in sections 9 and 10 (of the TMA) which require an infringing use to be trade mark use, and section 11 contains a comprehensive list of the exclusions that were thought appropriate. [the list includes the honest use of indications concerning the quality, quantity, intended purpose, value, geographical origin etc and of a person's own name or address] That being so, any use not falling within that list will infringe, whether or not it is trade mark use. In any case I would expect any use which was not trade mark use to fall within the list."

He therefore found for Phillips on this issue, so that infringing use did not necessarily have to be in a trade mark sense.

If that were settled authority for the Arsenal case, then Mr Reed would infringe. However the Judge decided that notwithstanding the Court of Appeal view, there was still sufficient doubt in the matter to require a higher Court, such as the House of Lords or preferably the European Court of Justice (because UK trade mark law is based on a European Directive) to review the issue.

There will be a further hearing next month to decide which court should review the case. The Judge did not therefore make any ruling on this trade mark issue. He did however decide that because Arsenal had used their trade marks in a trade mark sense by using them to indicate the origin of good in neck labels, swing tickets etc, they were valid trade marks, and he refused to revoke them as requested by Mr Reed.

PRACTICAL CONCLUSIONS

The inconclusive result on the issue of trade mark infringement makes it difficult to assess the impact on the merchandising market. Nevertheless interim views can be stated as follows.

1. Overall, enforcing unregistered trade marks by proving passing off in this type of situation may well be difficult, but registered trade marks are still a powerful weapon in your armoury. Accordingly:-

If you are a club or rights owner and you have any words, signs, logos etc that you are using as club badges or mascots which have not been registered, apply to register them as soon as possible.

2. Registered trade marks must be used properly to keep them valid. In view of this:-

If you own registered trade marks, make sure that they are used clearly on swing tickets, packaging and neck labels in a way that any customer would perceive to be a sign of origin. Do not simply emblazon them on a T shirt or scarf and think that is enough, because it probably is not.

3. Potential customers' general understanding of the difference between goods produced by a club and goods produced elsewhere (i.e. the origin of the goods) is crucial. Therefore if you are a club:-

Consider every available means such as the club programme and catalogues to educate the public about this difference, and stress the value of their custom and support, but be aware that it may be harder for you to stop sales of unauthorised merchandise (certainly on the basis of passing off) if you do.

4. Copyright can be another valuable weapon, which incidentally did not feature in the Arsenal case. Copyright can be used to prevent someone else copying a club crest or logo design. So if you use a crest or logo or if you are intending to commission a new design:-

Locate and retain all original artwork and documentation so that you can prove both ownership and provenance of the copyright work. If you are commissioning a designer to produce a logo, make sure that you obtain a written and signed assignment of copyright from him.

5. Local trading standards officers can be powerful weapons for rights holders:-

Liase carefully therefore with local authorities in order to persuade them of the merits of any case,

remember local by-laws and use them if you can to restrict unauthorised sales. Be aware however that there will now be a genuine uncertainty among Trading Standards Offices as to whether trade mark infringement may have occurred in cases similar to Mr Reed's (until the case is resolved) and whether they have any power to intervene and deal with the case.

Overall each case must clearly be taken on its own merits. The finding of fact as to whether a word, sign or logo has been used as a trade mark is clearly crucial. See if your case can be distinguished on the facts from the Arsenal case. If not, then our interim conclusions ought to be helpful pending a decision on the legal issue by a higher court.

**James Whittaker, Partner, and Nick Rudgard, Solicitor,
of the Sport Unit of Addleshaw Booth & Co.**

Diane Modahl v The Law Of Contract

Raymond Farrell

In December 2000 Mr Justice Douglas Brown handed down his judgment in the long running saga involving Diane Modahl and the now defunct British Athletic Federation (*Diane Modahl v. The British Athletic Federation Ltd. (In Administration)*). The defendant governing body had failed to convince the House of Lords that her action should be struck out and it, therefore, fell to the High Court judge to deal with the issues involved in the case. It will be remembered that following an athletics' meeting held in Portugal in June 1994 she had provided a urine specimen which when analysed indicated a testosterone/epitestosterone ratio of over 40:1 which was massively above the permissible level. She was suspended by BAF on September 6th, prior to a hearing before a BAF disciplinary committee. This 5-member body unanimously found that she had committed a doping offence and imposed a four-year ban on her. An appeal was made against this decision to an Independent Appeal Panel presided over by Robert Reid QC. The panel considered fresh scientific evidence based on the findings of two academics at the University of Manchester Institute of Science and Technology which indicated that it was possible that there could have been degradation of the urine sample as it had been stored at very high temperatures. On the basis of this evidence the Appeal Panel unanimously allowed the appeal (July 1995). The IAAF was unhappy with this decision largely on the basis that the scientific evidence was limited in its scope but nevertheless decided not to challenge the decision by way of arbitration.

The athlete was, naturally, delighted with the outcome but not with expenses which had been incurred by herself, together with the loss of income. Accordingly she issued a writ against BAF alleging that BAF were in breach of contract in a number of respects and claimed damages for expenses and loss of income. In summary her case was that bias, actual or apparent, had vitiated the disciplinary process. This, she alleged, had breached an implied term that all the disciplinary proceedings would be fairly conducted and that her loss and damage flowed from this breach.

The judge summarised the issues as follows:

1. Was there a contract between Mrs Modahl and BAF?
2. If there was a contract was there a duty to act fairly?
3. If there was a contract with a duty to act fairly, was that duty breached?
4. If there were breaches of the implied term, did these cause loss?

The crucial issue, therefore, was whether there was a contractual relationship between the athlete and the governing body (BAF). If there was not a contract then the claim for damages must fail. Mr A. Julius, a solicitor-advocate, acting for Mrs Modahl argued that there was a contract and this case was put in two alternative ways -

(i) through Sale Harriers or participation in games

(ii) submission to the disciplinary jurisdiction.

With regard to (i) Mr Julius accepted that an individual athlete cannot be a member of BAF but argued that Mrs Modahl had a contract with BAF before the disciplinary proceedings began. This arose in one of two ways. Firstly, through her membership of Sale Harriers which was affiliated to BAF which in turn was a member of the IAAF. Secondly, through her participation in events organised by BAF, IAAF and EAA (European Athletics Association).

Anyone wishing to take part in national and international meetings must first become a member of a club which is affiliated to a national federation (which in 1994 in the UK was BAF). In turn, anyone wishing to compete in IAAF events must be a member of a national federation. It was submitted that by joining Sale Harriers Mrs Modahl had entered into a contract with BAF and she had promised expressly or impliedly to comply with the doping control regime imposed on BAF and EAA by IAAF. BAF in turn impliedly represented that the doping disciplinary process would not be contaminated at any stage by bias.

The alternative argument concerned the athlete's extensive participation in meetings run by IAAF, BAF and EAA since 1984. It was contended that a contractual nexus arose between Mrs Modahl, BAF and IAAF when she entered and participated in a meeting run by IAAF, BAF or EAA. At the Lisbon meeting in question she had accepted in advance that she was subject to the disciplinary procedures of BAF which in turn stipulated that the procedures would be fair. The judge found no difficulty in dismissing these arguments. He stated:

"Mr Julius' first basis for a contract is untenable. It is founded on a contract made in 1977 when Mrs Modahl joined Sale Harriers. Even assuming that the application form in use then was in the similar terms as the 1996 form at F1.1 in the papers (as to which there is no evidence), there is no evidence either that the rules of the British Amateur Athletics Board in 1977 were the same as BAF, its successor. However, even if both sets of rules were identical, it is impossible to spell out or enter a contract with consideration and an intention to enter into a legal relationship."

With regard to (ii) - submission to the disciplinary jurisdiction - the judge dealt with a number of cases which, Mr Julius argued, supported Mrs Modahl's claim that a contract existed between her and BAF. In *Davis v. Carew-Pole* [1956] 2 AER 524 the defendants were stewards of the National Hunt Committee and the plaintiff was an unlicensed trainer who had been prevented from entering a horse in a race contrary to the Committee's rules and was declared to be disqualified. Pilcher J had held that in submitting to the Stewards' jurisdiction he had entered into a contractual relationship with the Stewards of the National Hunt Committee.

The next case was *Mundir v. Singapore Amateur Athletic Association* (1992) Singapore Law Reports 18. In this case the plaintiff was an athlete who had accepted an offer from the SAAA to go to Japan for five weeks' training. When he arrived in Japan he was unhappy with the facilities and returned home after a few days. This met with the displeasure of the SAAA and he was later suspended from competition for two years. The judge (Selvan JC) found for the athlete as there had been a breach of an implied term of a contract, which he said existed, that the athlete would have a fair hearing. Selvan JC stated:

"In this case the contract between Plaintiff and Defendant must be implied. It came into being when the Plaintiff accepted the Defendant's offer to go to Japan for training. The contract was confirmed when the Defendants exercised their disciplinary powers over the Plaintiff and the Plaintiff submitted to their jurisdiction."

The final, and principal, authority that Mr Julius relied on was *Korda v. International Tennis Association*, Times Law Reports 4 February 1999 (later heard in the Court of Appeal 21 April 1999 but not reported). Korda suffered a monetary penalty and loss of ranking points having tested positive for a prohibited substance. His claim before the UK court that the penalties should be set aside failed but the ITF challenged the sentence as being unduly lenient before the International Court of Arbitration for Sport. The ITF claimed that their right to do this arose contractually from the terms of their Anti-Doping Programme (March 1998) which the player had assented to. In this case the player argued that there was not a contract. However, the judge in the International Court decided that a contractual relationship had been established albeit that it was inferred rather than written. He rejected the

submission by Korda's counsel (Mr Flint - the same counsel who appeared for BAF against Modahl) that his client's conduct was consistent with merely submitting to the jurisdiction of the appellate body rather than such as to establish in the circumstances the creation of a contractual relationship. The judge found this argument totally unreal and concluded that:

"Any submission to the jurisdiction of the AC [Appeal Committee] must be part of an acceptance of a contractual relationship on the terms of the Programme which defines the status, jurisdiction and procedures of the AC."

When Korda's case reached the Court of Appeal it was conceded that he was contractually bound by the terms of the programme and so the point did not fall for decision then. In the present case Mr Julius for Modahl submitted that Lightman J's decision in *Korda* was on facts which could not be distinguished and the judge was invited to follow it. Mr. Flint QC for BAF submitted that there was no contract between Modahl and BAF. She was not a member of BAF neither did she enter into a contract with BAF by submitting to the dope testing procedure in Lisbon which was not BAF's responsibility (the meeting was organised by EAA).

Douglas Brown J. reviewed a number of cases particularly *Nagle v. Fielden* [1965] 2QBD 633 (CA) in an attempt to deal with the claim that Mrs Modahl did have a contract with BAF. In this case Lord Denning had condemned the decision in *Davis v. Carew-Pole* (supra) as having been based on a legal fiction. He disliked the argument concerning a "contractual nexus." Salmon L.J. stated that the plaintiff's case was in reality a contract or nothing and concluded that it was "plainly nothing." (The plaintiff's case did, of course, succeed eventually on a right to work basis which did not depend on the existence of a contract.) Reference was also made to *Gasser v. Stinson* (1988) (unreported) where an initial claim for damages for breach of contract following a disqualification imposed by the IAAF on the plaintiff, who had failed a drugs test during the 1987 World Championships, was later abandoned. Scott J. in *Gasser* referred to the unreality of a contract in the circumstances of the case and Douglas Brown J. thought that that was close to the concept of the fictitious contract which Lord Denning had deprecated.

In the present case the judge was also unimpressed with *Korda v. ITF* as an authority. He disagreed with Lightman J's comment in that case that submitting

"to the jurisdiction of the Appeal Committee must in the circumstances be part of an acceptance of a contractual relationship on the terms of the Programme....."

and he indicated that this was because *Nagle v. Fielden* had not been cited in *Korda*. In *Nagle* the notion of an artificial contract or "contractual nexus" had been put to rest. In any case there was no consideration nor any clear indications that the parties intended to enter into legal relations.

Douglas Brown J. also considered the case of *Mundir v. Singapore Athletic Association* where on the facts a contract could be inferred as the athlete had accepted an offer made by the SAAA for him to train in Japan. These facts were far removed from the circumstances of the present case.

One final point relating to the existence of an alleged contract was Mr Flint's submission that it was inconsistent with BAF's disciplinary procedures to infer a contract giving rise to damages. His view was that it could not be argued successfully that for the Disciplinary Committee to reach a mistaken decision BAF must be in breach of contract. Douglas Brown J. agreed with this submission and pointed out that apart from an appeal to the Independent Appeal Panel, the athlete's only other remedy would be, after an unsuccessful appeal, in the High Court for a declaration and injunction if the evidence justified that course. He concluded:

"My view is that there was no contract between Mrs Modahl and BAF and this means that her claim for damages fails."

That would appear to be the end of this particular case as Mrs Modahl has indicated that she does not intend to appeal against the decision. From a purely legal viewpoint that is somewhat unfortunate as the Court of Appeal could have decided whether the finding that there was not a contract was right or wrong. There is a clear conflict between Douglas Brown J's view in the present case and that of Lightman J. in *Korda*. It is also interesting to note that when the latter case reached the Court of Appeal it was conceded that a contract did exist. *Korda*, of course, was represented by Mr Charles

Flint QC who in the Modahl case argued strongly that there was no contract. The writer's view is that the decision in Modahl is correct and that the failure to consider the comments of Lord Denning and Salmon L.J. in *Nagle v. Fielden* in the Korda case casts doubt on the finding of Lightman J.

Having decided that there was not a contract between Mrs Modahl and BAF there was no need for the judge to deal with any of the other issues raised in the case, but in view of the fact that the parties had invited him to rule on submissions relating to an alleged implied term imposing a duty to act fairly in disciplinary proceedings he proceeded to do that. He used a memorable phrase which Lewis Carroll could have written:

"It is far from easy, if not impossible, for a court to imply a term in a contract which does not exist."

Mr Julius had argued that at each stage of the process the duty to act fairly existed. This was particularly important as he alleged that the decision of the initial BAF hearing was tainted by bias. The judge strongly disagreed with this argument and pointed out that in cases involving an appeal it was possible for initial defects to be remedied on appeal - *Lloyd v. McMahon* [1987] 1AC 65. In that case Lord Wilberforce had stated:

"What is required is examination of the whole hearing process, original and appeal as a whole, and a decision on the question whether after it has been gone through the complainant has had a fair deal of the kind he had bargained for."

Douglas Brown J. indicated that he would apply that test to the facts in relation to Mrs Modahl's complaint of bias and as to the conduct of the proceedings, particularly the initial Disciplinary Committee hearing. It had been contended for Mrs Modahl that actual bias existed on the part of Dr. Martyn Lucking, the Chairman of the Disciplinary Committee, as well as by Al Guy, another member of the initial body which had heard the case. Acknowledging the difficulty of proving actual bias, Mr Julius contended that there had also existed apparent bias on the part of Dr. Lucking and Mr Guy, as well as by Sir Arthur Gold, the Chairman of BAF Drugs Advisory Committee in the selection of members of the Disciplinary Committee. Lord Goff had laid down in *R. v. Gough* [1993] 2 AER 724 that the court should ask itself:

"...whether ...there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration by him."

As to the issue of apparent bias the judge agreed with Mr Flint that whatever term might be applied as to actual bias it was quite unrealistic to imply a term that the disciplinary process will not show apparent bias as that would involve a subjective assessment by the court as to whether there was a real danger of bias and so it could not possibly be the subject of an implied term. In the opinion of the judge: *"That submission seems to me to be unanswerable."* He, therefore, proceeded to deal with the allegations made against Dr Lucking, Al Guy and Sir Arthur Gold.

It was the allegation against Dr Lucking that caused Mrs Modahl most concern and this revolved around comments allegedly made by Dr Lucking to Linford Christie during the Dairy Crest Games held in Gateshead in 1990 when Dr Lucking was in charge of the Doping Control Testing Centre. There was a great deal of uncertainty as to what was actually said in this so-called "Gateshead Incident." Clearly there had been an altercation between the two men. The judge's view, having listened to several witnesses, was that:

"It is more probable than not that in the heat of argument Dr Lucking did say that all athletes were guilty until proven innocent." He continued: *"I also accept his evidence that if he did say that it did not represent his view, which was that all athletes are under suspicion of taking drugs and that was why the testing procedure was in place."* The judge regarded Dr Lucking as a responsible and sensible man *"rather careless in his phraseology at times, who did not carry into the Disciplinary Committee a belief that all athletes were guilty until proved innocent."*

The matter did not end there as Mr Julius contended that Dr Lucking could not maintain that an athlete was innocent until the charge was proved beyond all reasonable doubt whilst at the same time suspecting all athletes of drug taking. In part this was based on his reported view that the eventual decision of the Appeal Panel was wrong. He was unimpressed by the scientific evidence and felt that

there was only a small element of doubt. The judge for his part was convinced that Dr Lucking was fully aware that the rules required proof by BAF beyond reasonable doubt, that he approached the hearing on that basis and that his suspicions which led to him supporting the testing procedure played no part in the decision making process. He concluded:

"That is an end of actual bias in this case. It is also the end of the apparent bias because I accept that he did not unfairly regard Mrs Modahl's case with disfavour, and accordingly a real danger of bias did not arise."

The gist of the allegations against Al Guy was that because of his official roles in the doping process e.g. he had generally been concerned with doping control on behalf of IAAF and/or EAA since about 1973 and had actually served as the EAA's doping control delegate at EAA's European Championships in Helsinki in August 1994, that he was, therefore, disqualified from sitting on the Disciplinary Committee because to do so would entail him sitting as a judge at his own cause, given the nature of the plaintiff's case before the Disciplinary Committee.

The judge regarded this as a "hopeless allegation." He stated that Al Guy had been selected by Sir Arthur Gold and other members of the Drug Advisory Committee for three reasons (i) he represented a different athletic association (Ireland); (ii) he spoke English; (iii) he was an experienced Doping Control Officer with an excellent knowledge of the procedures. He had no connection with the Lisbon meeting in question and had not even met Mr Santos, the EAA's doping control officer at Lisbon. He concluded:

"I thought that Mr Guy was a truly impressive witness, obviously imbued with a sense of fairness and a suggestion that he was in any way biased fails completely."

With regard to Sir Arthur Gold, Mr Julius argued that as Chairman of BAF's Drug Abuse Advisory Committee and, therefore, involved with the selection of the Disciplinary Committee he had to take all reasonable steps to ensure that those selected would be free from bias. This he had failed to do as the knew of Dr Lucking's involvement with the Gateshead incident involving Linford Christie and this indicated that Sir Arthur himself was actuated by bias. The judge rejected this allegation completely. In particular he referred to a letter from Sir Arthur to Linford Christie dated February 8th 1991 in which he had referred to Dr Lucking's comments at Gateshead and had written:

"....I feel sure that on mature reflection you would agree with me that his remarks were a correct scientific generalisation and were in no circumstances intended as a reflection on your personal integrity."

In fact, the judge was impressed with the care which had been taken in selecting members of the Disciplinary Committee. Normally there would have been only three members but five had been chosen on this occasion. Dr Lucking had been chosen because he was from a different Athletic Federation and spoke English; Christopher Carter because of his all round experience and had completed at the same distance as Mrs Modahl; Mrs Hoyte-Smith because she was a woman and a former Olympic competitor. The final member, Walter Nicholls, a Manchester solicitor with a long experience in administration of athletics had given evidence in the case and the judge had found him a most convincing witness. He had actually raised the question to Sir Arthur Gold of his own impartiality as he knew Mrs Modahl personally but Sir Arthur had considered this to be a good thing as he would be seen as a more sympathetic figure.

The judge concluded that:

"....the allegation that Sir Arthur Gold was biased in any way in chairing the Drugs Advisory Committee which chose the Disciplinary Committee fails."

Turning to the Disciplinary Hearing itself the judge pointed out that in his final oral submissions Mr Julius had actually abandoned the allegation that the Disciplinary Committee did not discharge their duties honestly and impartially and make fair and bona fide findings on the facts. The evidence of Walter Nicholls and Chris Carter was largely instrumental in this change of heart. Nonetheless, the judge still felt compelled to examine how the decision was arrived at and whether the bias contamination allegation had any basis.

Four of the Disciplinary Committee members had given evidence. Dr Lucking acknowledged that he

still suspected all athletes but there had been no presumption of guilt, no rubber-stamping of a decision and the evidence had been given due consideration; BAF had to prove the case beyond reasonable doubt. Al Guy described the process itself. The hearing had lasted most of the first day followed by about two hours' discussion. Deliberations continued the following morning for about an hour after which each gave their decision. Mr Nicholls first, followed by Mrs Hoyte-Smith, Mr Carter, himself and finally Dr Lucking.

Chris Carter, a former police officer for some thirty years had given unchallenged evidence that he had come to his own conclusion and stated:

"I confirm that I and all the members of the Disciplinary Committee carefully considered the evidence and were satisfied beyond a reasonable doubt that the claimant was guilty of a doping offence."

The judge was clearly convinced that the constitution of the Disciplinary Committee had been carefully and fairly chosen to give a balance of skills and representation and that Mrs Modahl had been tried by at least some of her peers. Perhaps most significantly he had followed Lord Wilberforce's requirement for an examination of the *whole* hearing process (*supra*). Bearing in mind that she had actually been cleared by the Independent Appeal panel he was of the opinion that Mrs Modahl had had a fair deal of the kind she had bargained for (assuming that there was such a bargain).

There is, of course, no doubt that disciplinary proceedings must comply with the rules of natural justice but the critical point decided by the case is that even if they do not then the remedy does not lie in the law of contract. Mistakes can be rectified by the courts, not that there were any in the present case, but the remedies involved are those of declarations and injunctions. Maitland's dictum that "*substantive law is secreted in the interstices of procedure*" echoes down the years. Mrs Modahl's innocence had been established by the Independent Appeal Panel (whatever one's views may be of the scientific evidence) but her career and finances lie in tatters as does the now defunct British Athletics Federation. There must surely be a better way to deal with such problems. The Modahl case may be viewed as one involving a colossal waste of time and money (BAF's and Mrs Modahl's) particularly as the judge concluded that even if the bias complained of had been proved, in the light of all the other evidence, he would have concluded that no loss followed.

Raymond Farrell, Senior Lecturer in Law, Manchester Metropolitan University.

Scottish Update A Brief Synopsis Of Newsworthy Matters Concerning Football, Rugby & Others From August 2000 To Date

Alistair M. Duff

1. FOOTBALL

(a) In The Herald of 27 October 2000 it was reported "Celtic fan who threw coin at old firm game jailed". A man who threw coins at the Old Firm game which saw referee Hugh Dallas slump to the ground with a head wound was jailed for three months yesterday, only to be released hours later on bail pending an appeal. Celtic fan, Paul Hodge, 38, threw coins from his seat in Parkhead's West Stand during the May 1999 league decider for season 1998-1999. Glasgow Sheriff Court heard how Hodge's action increased tension at the game, which saw one man fall 50 feet from one of the

ground stands but escape injury. Hodge, of Denbigh Road, Coventry, originally faced a charge of striking Dallas with a coin but the Crown decided not to pursue that charge and Hodge pleaded guilty at an earlier appearance to the reduced charge of throwing coins in the direction of the pitch and placing the people on it in a state of fear and alarm. Further on it is reported that he had received a life ban from watching Celtic play and Sheriff Brian Convery told Hodge that a message had to be sent out to those wanting to cause trouble at Celtic/Rangers matches. Sheriff Convery said a jail sentence was unavoidable and that people must realise that Celtic and Rangers matches can have serious public safety issues. He said

"You went along to an Old Firm match and caused trouble in what was already an inflamed atmosphere. People must realise that this attitude cannot be tolerated by this and other courts. Given the nature of the offence I feel that I am only able to impose a custodial term of three months."

(b) In the Herald of 13 November 2000 it was reported **"Dons complain about referee"**. Aberdeen are so incensed by Mike McCurry's handling of Sunday's 2-1 defeat against Rangers that for the first time in their history the Pittodrie club have made a formal complaint about a referee. Sky television coverage would indicate that McCurry made the wrong decision on at least three incidents, all of which worked to the Ibrox club's benefit. He waved away a penalty claim when Barry Ferguson flattened Arild Stavrum in the area, which, if awarded, could have resulted in a red card for the Rangers captain. He also missed Lorenzo Amoruso clearing the ball in his own box by sweeping it away with an arm, and failing to notice Fernando Ricksen's stamping tackle on Darren Young. Further on in the article it was reported that while an SFA spokesman admits Aberdeen were within their rights to complain about McCurry, he made it clear television cannot be used as evidence against the referee. The spokesman said

"Aberdeen are well within their rights to make a formal written complaint. It is fairly common for some clubs, but we have no recollection of Aberdeen doing it before. The letter will then be put to the Referees' Committee who will probably discuss it at their meeting next month."

(c) In The Herald of 23 November 2000 it was reported that Fernando Ricksen, the Rangers full-back, is likely to receive a double punishment from the Scottish Football Association for his kung-fu kick on Darren Young. The governing body's disciplinary committee have taken the unprecedented step of considering television evidence, ruling the tackle to be an exceptional case of misconduct, and the Dutchman can also expect to be heavily censured by the general purposes committee for quotes in his personal website stating he had deliberately tried to straighten out the Aberdeen midfielder during Rangers 2-1 victory at Pittodrie on 12 November. The disciplinary committee met earlier this week and broke with tradition by using video footage of the incident before reaching a decision to investigate the matter further. A hefty fine can be expected and clearly Ricksen has been made an example of by the SFA, who have highlighted by this move that any serious incidents missed by match officials will be deemed punishable by television evidence in future.

(d) In The Herald of 14 December 2000 it was reported **"Former Tannadice Chairman has his Lawyers on ban alert"**. Jim McLean, the former Dundee United chairman, is ready to fight the Scottish Football Association if they attempt to sentence him to a life ban from the game, as was suggested in a newspaper report yesterday. McLean resigned from the post of chairman of United following an incident between himself and a BBC television reporter after a game at Tannadice. McLean publicly apologised after throwing a punch at his inquisitor and severed his connection with the Tayside club while also insisting that he would be willing to sell his majority shareholding.

(e) In The Herald of 21 December 2000 it was reported that **"EC rule opens door to freedom of expression"**. Scottish football's disciplinary system could be thrown into disarray by new EC legislation that gives every player and manager the right to freedom of expression and an independent disciplinary tribunal. It was reported that Article 10 of the European Convention on

SUBSCRIBERS

Anyone wishing to subscribe to the journal may do so at a cost of £40.00 per annum.

Further details from
Hamicks Bookshops Ltd,
Browells Lane, Feltham, Middlesex TW13 7EE

Human Rights states that everyone has the right to freedom of expression, players, managers, referees even, will be aware that they can have their say without fear of the autocracy. Further, in terms of Article 6, every individual has a right to a fair and public hearing in respect of his civil rights by an independent and impartial tribunal which will throw the current SFA appeal procedure into disorder. Further on it is reported that Tony Higgins of the Players' Union admitted that he has been taking counsel on the effects on the new legislation for some time.

"We told the SFA a few years ago that we felt they would have to change the composition of the disciplinary committees to include representatives of players and managers, too,". He said "We will be writing to the SFA to make this point again because the perception of justice is just as important as justice itself."

(f) In The Herald of 12 January it was reported that a football player has been charged in connection with allegations that he racially abused a black opponent. Steven Hammell, a Motherwell player, has now been formally charged by Tayside Police over an incident at McDiarmid Park more than two weeks ago. He is expected to appear at Perth Sheriff Court in the coming weeks after being charged with a racially aggravated breach of the peace. The teenage midfielder was reported to match police by supporters who allegedly overheard comments he made. The incident centred on an off-the-ball clash he had with Mohammed Sylla, St Johnstone's Guinean star. Further on it was reported that yesterday a Tayside Police spokesman confirmed

"A man has been charged in connection with an incident at McDiarmid Park on December 23. The charge is one of racially aggravated breach of the peace and a report has been passed to the Procurator Fiscal at Perth."

It is believed to be the first time that a Scottish footballer has been charged with racist abuse of a fellow professional.

(g) In The Herald of 12 January it was reported **"Player earns red card for butting"**. A footballer who butted a referee was yesterday banned from football for two years. Samuel McAteer was given a 10-year ban from his amateur football league for his assault on the official but yesterday, at Falkirk Sheriff Court, he was banned from ever going to watch a match. Sheriff Albert Sheehan gave McAteer, 35, 150 hours' community service and ordered him to do it from 3pm to 5pm every Saturday to keep him away from the sport. The Sheriff ordered him to provide the Scottish Football Association with two photographs of himself to alert stadium officials throughout the country to watch out for him. The court heard a match erupted into violence when a referee awarded an equalising goal to McAteer's opponents. Already yellow carded, the player head-butted the official and was arrested on the pitch by the police. The match was abandoned in uproar with the score at 3-3. Further on in the report Sheriff Sheehan told him

"I take a serious view of violence at football matches, whether by players or spectators".

Ordering McAteer to pay his victim £150 compensation and imposing community service on Saturday afternoons, he said

"You will not attend any football match in any capacity either as spectator or player."

(h) In The Scotsman of 9 March 2001 it was reported that **"Sacking of footballers 'badly flawed'"**. Two St Johnstone football players who were alleged to have taken cocaine in the lavatory of a Perth public house were guilty of serious professional misconduct, but should have been warned and not sacked. This is the view of a Scottish Premier League appeal judgement issued yesterday. There was outrage last week from both St Johnstone and anti-drugs campaigners when it was announced that the appeals had been upheld, but no details were released. George O'Boyle, 33, and Kevin Thomas, 25, had their contracts terminated by the club in January following an internal disciplinary hearing. They both appealed and the case went to an SPL commission made up of Advocate Michael Jones, QC, Solicitor Bill Stewart (one of our members!) and advertising executive Jim Faulds. Further on in the report it said it further ruled that notes taken by the club doctor were "unreliable", and that it was unlikely that the players admitted taking cocaine and refused an offer of counselling. Doubt is also cast on whether the use of so-called recreational drugs is covered by the Scottish Football Association's charter against doping. The Commission found that the club was wrong in believing that if it merely disciplined the players and did not sack them it would be sending out the wrong messages

to young people. It then found that the termination of the contract was wholly unreasonable in the circumstances of the case and the decision to terminate both contracts would be quashed.

(i) In The Herald of 30 March 2001 it was reported ***"Fiscal contacts police over Hendry's elbow incident"***. The Procurator Fiscal yesterday asked Strathclyde Police if they intended to take any action following the incident in which Colin Hendry, the Scotland football captain, elbowed a San Marino player in the throat during Wednesday's World Cup qualifying match. A Crown Office spokesman said

"The Procurator-Fiscal in Glasgow has contacted Strathclyde Police and asked if they intend to submit a report in relation to the incident." In a statement last night, the force said "At this time, we have received no complaint from the player who was involved in the incident, nor from the San Marinese football officials."

The incident in the closing moments of the match at Hampden Park resulted in Nicola Albani, who came on a substitute, having to spend the night in hospital.

(j) In The Scotsman of Friday 30 March 2001 their editorial said ***"Hendry must pay the price"***. Colin Hendry, as captain of Scotland, carries a heavy burden. In many ways, he has been the finest of role models to youngsters, never letting Scotland down with performances with often belie difficulties at club level. Further on it is stated playing centre-half at international level is a rough old business. But that can never excuse the elbow he threw at the San Marino substitute, Nicola Albani, in the dying seconds of the World Cup qualifier. It was both vicious and reckless and Hendry deserves to pay a heavy price. The Procurator-Fiscal wants police to investigate. So they should. But the football authorities should step in now and review the video evidence. They will surely conclude he is lucky to escape with merely a caution, and should face suspension for several ties. If that hits our qualification chances, so be it. Thuggery must have no place in football.

(k) In The Herald of 3 April 2001 it was reported ***"Date is set for Hendry's trial by TV"***. Scotland captain Colin Hendry is to be the subject of a FIFA enquiry after his elbowing incident during the World Cup qualifying match against San Marino last week. Hendry will know by the end of the month what his fate will be. FIFA's disciplinary committee meets on April 26 and a ruling will be made then. If the decision goes against him, Hendry faces a suspension, but whether or not it will be so severe as virtually to end his international career is debatable.

(l) In The Herald of 4 April 2001 it was reported that ***"Sacked players lose appeal but vow to fight on"***. The saga involving two sacked St Johnstone footballers is set to continue despite their appeal against dismissal being thrown out at the highest level in Scottish football. An SFA appeals committee yesterday upheld an appeal by the club against the decision made by a premier league-appointed independent commission which last month ruled St Johnstone were wrong to sack the pair. The SPL ruling, described at the time as *"a betrayal of Scotland's youngsters"* by anti-drugs campaigners, prompted the Perth club to lodge an appeal with the SFA - the highest body within Scottish football for such decisions. The SPL ruling said their dismissal was *"excessive"* and added they should have been warned, not sacked. After a two-hour meeting at Hampden Park yesterday the appeals committee unanimously decided that St Johnstone acted correctly after the club's physiotherapist claimed he witnessed the players taking drugs in the lavatory of a public house in Perth just before Christmas. Mr Brown, Chairman of the Perth club, said he could never understand why the players' appeal was upheld in the first instance. He said he had no fears about the players taking the club to an employment tribunal and added

"Hopefully we have rectified what I believe was the wrong message in the first instance and the message now is loud and clear. Drugs are not welcome in football."

Andy Mitchell, SFA spokesman said

"The appeals committee ruled that the actions taken by St Johnstone were correct and therefore upheld their submission. The appeals committee is there as the ultimate body within football for judging any appeal from inside football. That's why the appeal is final and binding."

(It appears to be rather a strange statement given how the SFA appeals committee are only too well aware of the rights of players in a judicial review in the appropriate circumstances. For instance see

the writer's article "Own Goal" arising out of the *Duncan Ferguson* case and the Judicial Review Volume 4 Issue 1).

The writer has not bothered reporting at all about the new proposed transfer system and what is known as Bosman 2. No doubt there will be plenty of other articles about this! But it has obviously been reported fully in the Scottish press.

2. GOLF

It will be remembered that in Volume 8 Issue 2 there was a brief report on the case *Cuthbertson v Merchiston Castle School*. The full Judgement by the Sheriff Principal has now been obtained. This itself has now been appealed to the Court of Session.

Briefly the facts are that in November 1994 the pursuer in this action was a pupil at Merchiston Castle School and on or about 15 November that year he along with some 12 – 14 other boys from the school, attended at the Braid Hills Health Golf Centre Driving Range for instruction in striking golf balls. This visit took place during normal school hours and was part of a golf option offered to pupils by the defenders. The ages of the boys in the group ranged from 12 to 16, and the group was accompanied by a master, Mr Mackintosh-Reid. It appears that a golf professional was also present at the Driving Range in order to provide instruction to the boys. The Driving Range consists of a number of covered bays from each of which a member of the public can practise striking a golf ball onto open ground in front of him. The bays are open at the front and rear, and each one is separated from the adjacent bay by a wall. It is averred that, on the occasion in question, there were insufficient bays to accommodate all of the pupils in the school party at the same time with the consequence that some of the pupils required to wait for a time without instruction and without a bay in which to practise. The pursuer avers that, while he was in the end bay, practising shots, another boy (whom he does not identify) came into the bay and bounced a golf ball on the ground while attempting to hit it with a golf club. The pursuer told him to desist and to leave the bay, which he did. However, the pursuer goes on to aver that thereafter the same boy returned to the bay and continued to attempt to strike a bouncing ball. According to the pursuer, what happened then was that, while he was bending down to place a golf ball on a tee, the other boy swung his club, attempting to hit a bouncing golf ball, and struck the pursuer on the face causing the injuries which are the subject matter of the action. The pursuer avers that at all material times the school master and the golf professional were occupied assisting and instructing other members of the school party in other bays. The pursuer claims firstly that the accident was caused by the fault and negligence of the school master for whom the defenders are vicariously responsible. Putting it shortly for the moment, that fault is said to have consisted in the failure to instruct the pupils not to approach the bays when they were in use by other pupils, and in a failure to supervise the pupils who are not using bays and to ensure so far as is reasonably practicable they did not use clubs involved in an unsafe manner and that they did not approach the bays while they were being used by other pupils. Second, the pursuer claims that the accident was caused directly by fault on the part of the defenders in respect that they failed to provide an additional member of staff to provide supervision for these pupils who were not receiving instruction from Mr Mackintosh-Reid.

In the first instance the action called for debate in respect of preliminary pleas stated on behalf of the defenders and at the conclusion of the debate the Sheriff allowed a Proof before Answer (an evidential hearing) as the defenders were trying to have the case thrown out completely. As previously reported the Sheriff Principal allowed the Appeal and dismissed the action. What was of interest in the Appeal Judgement was the pursuer's Counsel submission that it may be appropriate to distinguish between cases involving local authority schools in cases like the present, where the school in question is a private one. The Sheriff Principal goes on to say that "The submission appeared to be that, in cases involving local authority schools, the availability of resources might be a limiting factor to be taken into account when determining the amount of supervision to be provided for pupils engaged in certain activities, whereas such constraints should not be considered in cases involving a private school. Counsel did not advance any authority in support of the foregoing proposition, and I am not prepared to accept it. I cannot conceive of any reason why the standard of care owed by a school to its pupils should be dependent on a type of school concerned. And I therefore consider that I am entitled to give full consideration to the cases cited by Counsel for the defenders notwithstanding that many of them concerned schools which were run by a local education authority.

3. RELATIONS

It may be remembered that in Volume 7 Issue 1 it was reported that **"BBC takes appeal over race case to Court"**. Finally Mark Souster's case has been dealt with. In The Herald of 12 December it was reported that **"BBC must face anti-English claims"**. A former BBC Rugby Special presenter who claimed his Englishness was a factor in a decision not to renew his contract, has a case under the race relations act, three judges have ruled.

Mark Souster, a journalist of Calne in Wiltshire, can now pursue his claim against BBC Scotland at an employment tribunal.

Lord Marnoch quoted a judgement by Lord Simon of Glaisdale to explain what was covered by the phrase "national origins", in which, in legislation outlawing discrimination, he explained

"Scotsmen constitute a nation by reason of those most powerful elements in the creation of a national spirit - tradition, folk memory and sentiment of community." "To discriminate against Englishmen, Scots or Welsh as such, would, in my opinion, be to discriminate against them on grounds of their national origins."

Along with Lord Cameron and Lord Nimmo Smith at the Court of Session, Lord Marnoch ruled that Mr Souster was entitled to bring a claim against the BBC under the 1976 Race Relations Act. Mr Souster worked at the BBC from 1995 until 1997 but was replaced by Jill Douglas. He said he was told the BBC would prefer a Scot and alleges they discriminated against him on the ground of his national origin. The BBC argued that English and Scots were not distinct racial groups.

The Appeal Court's opinions were issued on 7 December 2000 and the main opinion was that of the Judge in the chair, Lord Cameron, with Lord Marnoch issuing a shorter opinion and Lord Nimmo-Smith agreeing.

It will be remembered from previous articles that the Employment Appeal Tribunal was concerned to address two issues. The first, the principal issue, was whether or not the respondent in making an application on racial discrimination on the grounds that he was English, could relevantly do so as a matter of law under the umbrella of the phrase "national origins". The second, the secondary issue was whether or not, separately, the English should be regarded as following within the definition of "racial group" by reason of the phrase "ethnic origins".

In his Judgement Lord Cameron states

*"In his Answers to the appellant's grounds of appeal the respondent avers that his case extends to a complaint based on an alternative ground, namely that he is discriminated against on the grounds of his English ethnic origins (or not having Scottish ethnic origins). The argument was presented on the basis that if the meaning of nationality was limited to citizenship, that is to say, to its legal sense, then the respondent was entitled to attempt to prove that he was also discriminated on the grounds of his English ethnic origin. Before this Court it was accepted that if it was held that the respondent's principal case was relevant, namely, that based on national origins or nationality, then there was no proper basis for this alternative case. In my opinion, this concession was properly made." Further on in his Opinion it is stated "I consider that the Employment Appeal Tribunal in Power (as it had previously done in **Mark Boyce and Others v British Airways plc** (EAT/358/97) was correct to hold that neither the English nor the Scots as racial groups had the necessary distinctiveness or community by virtue of certain characteristics derived from their origins alone such that they each constituted an ethnic group separately from or additional to their being a racial group measured by their separate distinct national origins. The cohesiveness which in each case serves to identify them as a separate racial group is largely, but not exclusively, derived from history and geography but lacks that particular and individual distinctness of community which is a mark of the characteristics which Lord Fraser viewed as relevant to the constitution of an ethnic group."*

4. GENERAL

(a) In The Herald of 10 November 2000 it was reported that **"Mountain rage brings Scot an Everest**

of a ban". A Scottish mountain guide has been banned for two years from Nepal after being accused of assaulting an American climber in what appears to have been the first ever case of "mountain rage". Henry Todd, 55, of Edinburgh, has been banned by Nepal's Ministry of Tourism after the alleged assault on his client in Everest in May. US writer Finn-Olaf Jones, 37, who was part of Mr Todd's team trying to climb Everest, had to be rescued from the mountain by helicopter after the incident. Mr Todd left Nepal soon afterwards and was never charged. Mr Ganesh Karki, Chief of Nepalese Ministry's Mountaineering Department said yesterday

"We took the action after reviewing the complaint filed by Mr Jones and at least another 15 liaison officials from the Ministry who were based at the Everest base camp at the time."

(b) In The Herald of 15 December 2000 it was reported **"Climbing guide cleared of blame". "Avalanche which killed scouts could not have been foreseen"**. An experienced mountain guide who led a party of six venture scouts into Scotland's worst avalanche disaster was yesterday cleared of any blame for the tragedy. The four who died on Aonach Mor near Ben Nevis two years ago were the victims of a freak accident which their leader, Roger Wild, 47, could not have foreseen, according to Sheriff Kenneth Forbes. His ruling came two weeks after the families of the victims said at the end of a fatal accident enquiry that they did not blame Mr Wild for the tragedy. Sheriff Forbes found that Mr Wild had taken the usual safety precautions and kept a close watch for any danger signs. Further on it was reported the Sheriff wrote

"From the evidence I heard, I find Mr Wild to be a proficient, experienced, careful and well respected mountain guide. The steps he took on this particular day were in accordance with his usual practices and, according to the evidence I heard, in accordance with the practices of other guides operating in Scotland." The Sheriff also said "None of the experienced witnesses at the enquiry levelled any criticism at Mr Wild for taking his group on to the hill and, acknowledging his experience and skills in mountain guiding, I follow and adopt that stance."

He also concluded that there was no evidence that Mr Wild's testing of the snow with his ice axe had triggered the avalanche.

(c) In The Herald of 30 March 2001 it was reported that John Skeete, the Scottish and AAA sprint champion, was described as morally innocent yesterday, in an official statement by UK Athletics, yet was subjected by them to a two-year suspension. Though a disciplinary hearing accepts that his vitamin supplements were spiked by an un-named third party, Skeete is now excluded from all athletic events until 2003. An independent disciplinary committee, under the chairmanship of Colin Ross-Munro, QC decided that Skeete did commit a doping offence when stanozolol was detected in a urine sample taken after his 60 metres victory at the Norwich Union AAA indoor championship on January 27. However, they concluded that he was morally innocent as his supplements had been spiked with stanozolol and suggested that in pursuing an application to the International Amateur Athletic Federation Skeete has a "wholly exceptional case." Further on it is reported in his decision, Ross-Munro stated

"Allegations are easy to make, whereas it is quite exceptional to be able to present such impressive evidence that led us to make such findings of fact in favour of John Skeete."

West Midlands Police confirm that a complaint has been received involving the administration of a controlled substance without consent but declined to state whether any arrest was imminent or what progress their enquiries were making.

5. RUGBY

(a) In The Herald of 3 October 2000 it was reported **"Professor claims protective clothing may be causing more injuries"**. The International Rugby Board yesterday welcomed a Scottish report calling for a moratorium on the development of protective padding after demonstrating that the number of injuries suffered has doubled since the sport went open. Conducted by Aviemore-based Professor Michael Garraway, a team at Edinburgh University's Department of Community Health Sciences, and the Scottish Rugby Union's own Medical Adviser, Donald Macleod, it indicates that equipment supposedly designed to help protect players, may be contributing to burgeoning injury problems. The penalties for accepting financial and other rewards accompanying professionalism in rugby union

appear to include a major increase in player morbidity suggest the authors in a study published today in the British Journal of Sports Medicines. The survey on which the study is based was carried out in the Scottish Borders during the 1997/1998 season and is a repeat of one run in the same region before the game turned professional in 1993/94. Results show an increase in the proportion of players injured during the campaign from 27 to 47 per cent, despite a seven per cent fall in the number of players and fewer competitive matches being played. They also show a higher level of recurrent injuries among professional players in early season, the authors suggesting that a lack of an appropriate pre-season break, over-training or carrying existing injuries into the season, could all be factors. They note, too, that while better access to treatment may explain why professional players spend less time away from training and playing, so too might financial considerations. (*Reports of his previous studies in Volume 3 Issue 2 and Volume 4 Issue 2*).

(b) In The Scotsman of 5 October 2000 it was reported **"Youth rugby violence on the up"**. The SRU admitted yesterday that there is growing concern over the increasing level of violence in youth rugby. Of the 21 cases referred to the SRU's discipline panel this season, nine have involved players at under-18 level, and two young players were yesterday banned for 26 weeks each. Panel Secretary, and SRU referees manager, Iain Goodall, admitted

"The figure is unacceptably high. We will be monitoring the situation at under 18 level very closely within the next few weeks and will take whatever steps are necessary if it does not improve."

The worst offenders this season are Peebles Colts prop William Aitken who was suspended until March 3, 2001 for foul play in the match with Jed Thistle and Gregor Brockbank of Perthshire under-18s who is banned up to March 10 for his part in an incident against a Gala Wanderers player during a 10-a-side tournament. The worst cases in the senior ranks involve prop Fraser Sutherland of Musselburgh and Perthshire lock Peter Hart, both of whom are banned for 26 weeks.

(c) In The Herald of 14 December 2000 it was reported that **"Giant-killers lined up to take on SRU"**. Ardrossan are preparing for a legal battle with SRU chiefs over a controversial 10-week suspension on their most experienced player. Veteran forward Crawford Allison was called before the Murrayfield punishment panel after being cited by Edinburgh University for allegedly throwing a punch during last month's third division match. Despite the fact the referee saw nothing and that Allison denied the offence, with only players and officials from the University claiming to have witnessed the incident, he was unanimously found guilty of violent conduct. Now Ardrossan, who have a giant-killing reputation after defying the odds to reach the last 16 of the BT Cellnet Cup, have brought in their lawyers – claiming the procedure was a legal shambles. Further on it is reported that there appears to be no recognition of the fact that Crawford appeared in front of them with an unblemished record after a career which has lasted more than 15 years.

(d) In The Scotman of 17 January 2001 it was reported that **"Jed player consults lawyers on jaw break"**. A rugby player is to take legal action after he suffered a broken jaw during a training session. It is unclear whether Neil Cook, 21, is pursuing his club, Jed-Forrest, or coach Kevin Barrie, who was alleged to have struck Cook on 1 December. However, the player has been angered by reports emanating from the club which, he believes, suggested he was involved in a fist-fight with Barrie, who has since resigned. In a statement prepared by his lawyers, Cook said

"I have now been made aware of the contents of the various articles in the press. I take exception to two suggestions made in those articles. Firstly, there is a suggestion that I was involved in a fight with my coach, Kevin Barrie. That is untrue. Secondly, there is a suggestion I sustained by broken jaw in an accident involving the scrumming machine. That is also untrue. I was injured as a direct consequence of an unprovoked attack upon me. There is no suggestion that I was guilty of any wrongdoing whatsoever."

Further on it was reported that Jed-Forrest President Neil Tunnah said yesterday

"We took no action at the time because we felt it was a matter between two adults, and believed that they both wanted to deal with it privately. Neil was asked to contribute his opinions to us when we were deliberating over what to do, but he declined, saying he didn't want anything to do with it."

(e) In The Scotsman of 7 February 2001 it was reported **"Kelso ban five after stag night incident."** Five senior players have been suspended by Kelso Rugby Club after a stag night incident with a pool

cue left a fellow player with internal injuries. All five named are leading players with the Division 2 side. Up to six other individuals admitted lesser involvement. Rowley, who required internal stitches after the incident, was married at the weekend, and is now on honeymoon. Last week Margaret Riddell, the Provost of Kelso and sister of former Scotland international Eric Paxton, was reported to have been shocked and disgusted with the incident. Last night, the suspended players declined to comment on their punishment. Scottish Rugby Union spokesman, Graham Law, said that no central action would be taken.

"We will abide by the club's decision on any disciplinary measures"

said Law. Police investigations into the incident are continuing.

(f) In The Herald of 11 April 2001 it was reported that Graham Cheyne, the Garioch prop, has been suspended for 28 weeks by the SRU discipline panel following an incident of foul play in the National League Division 5 North match against Ellon in Inverurie on Sunday 18 March. The severity of the sentence reflected the fact that this was Cheyne's third dismissal in his career.

There have been numerous articles over the past few months in the Scottish press about the state of Scottish rugby and how it could be best served and it appears the old argument of the club versus super team debate still goes on and indeed it is noted that various wrangles in England seem to continue unabated which cannot be good for the overall game.

The writer recollects that as long ago as in the June/July 1996 Issue of Scottish Rugby he questioned whether rugby's administrators were on the right path to professionalism. It was stated that the home unions and the IRFB missed a golden opportunity to take the game and have measured progression into professionalism along with the continuance of the amateur game. On one view, some five years later, nothing has changed there has still been a missed opportunity and the problems continue unabated.

The writer would like to inform readers that the first Scottish book of which he is one of the contributors under the heading "Sport and the Law – a Scot's Perspective" has now been published. It was commissioned by T & T Clark who have now been taken over by Butterworth and W Stewart, a fellow member, was the Editor.

Alistair M Duff, Henderson Boyd Jackson W.S. Solicitors, Edinburgh.

What Is The Proposed Reconstitution Of The Football Licensing Authority And Is The Change Desirable?

Christopher Partington

INTRODUCTION

The Culture and Recreation Bill¹ was introduced in the House of Lords on the 14th December 2000. Once implemented, the Bill will transform the current role of the FLA and this work looks at the proposals, reviewing whether or not the changes are to be welcomed.

This piece of work is, to some degree, an extension of earlier work², which explored the regulations that govern safety at football stadiums in England and Wales today. It was found that the FLA is an integral part of making:

"...the system of safety management in place today...the best that could be achieved with the current legislation and resources available..."³.

As will be reviewed later, the changes that Part 1 of the Bill introduce, will undoubtedly have an impact on that system of safety management and it is to be explored whether or not that impact will be favourable.

WHERE DID IT ALL BEGIN?

The FLA was established in July 1990 under section 8 of the Football Spectators Act 1989⁴. Whilst it would be true to state that the Taylor Report⁵ gave the final recommendations for the formation of the FLA (and, it could be argued, sped up the formation of the quango, which came into being 5 months after the 'Final Report' was published), the idea of an independent safety body came into being after the Heysel disaster in 1985.

After the death of 39 supporters⁶ at Heysel, Prime Minister Margaret Thatcher proposed the introduction of two new quangos to combat the problems of hooliganism - the Football Membership Authority [FMA] (to implement a national football membership scheme) and stadium safety - the FLA (to oversee the implementation of a licensing scheme for football stadiums).

A finding of Lord Justice Taylor in his final report was that:

*"...the lessons of past disasters and the recommendations following them had not been taken sufficiently to heart..."*⁷.

The fact that it took an event, the magnitude of the Hillsborough disaster, to bring about the implementation of the proposals Lady Thatcher had introduced four years earlier in the aftermath of the Heysel disaster, is a prime example of the above point.

The Hillsborough disaster occurred on the 15th April 1989; the Football Spectators Act 1989 was enacted on the 16th November 1989; the 'Final Report' from Lord Justice Taylor was released in January 1990, and section 8 of the 1989 Act established the FLA in July 1990. The role of the FLA includes four key areas:

- (1) operating a licensing scheme for grounds at which designated football matches are played;*
- (2) advising the Government on the introduction of all-seated accommodation;*
- (3) keeping under review the discharge by local authorities of their functions under the Safety of Sports Grounds Act 1975;*
- (4) ensuring that any standing accommodation which is retained at Second and Third Division clubs of the Football League meets the necessary safety standards⁸.*

The FLA is currently undertaking a ten year review to assess whether or not it feels all of its aims have been achieved, but generally anyone attending a Premiership or Division 1 game these days can undoubtedly see the difference. The role of the FLA is to raise the level of safety at football stadiums. It is for the FLA to ensure:

*"...the reasonable safety and management of spectators at Premiership, Football League and international grounds in England and Wales..."*⁹.

It does this through the use of the Green Guide, a non-mandatory 'safety self-help' guide drafted by the FLA themselves. There is a problem with interpretation of the guide for different stadiums, but in general, compliance with this guide is how the safety of a stadium is assessed.

To undertake their duties and fulfil their aims, the FLA set out a number of procedures that they would implement. These included:

- (1) a number of visits to grounds*
- (2) a number of formal meetings with local authorities, clubs, the emergency services and other representative bodies¹⁰*

To undertake all of these duties there are nine inspectors covering all of the 'designated' stadiums¹¹ and the FLA is funded by the Government and subsidised by any income derived from such activities as the granting of licenses (£100.00 each licence)¹².

The powers that the FLA have are derived from the Football Spectators Act 1989 section 13 and allow the FLA to:

"...require the local authority to include in any safety certificate such terms and conditions as are specified [in writing]...and it shall be the duty of the local authority to comply with the requirement..."¹³.

From this it is clear that the local authority is under an obligation to comply with a request from the FLA, and this gives the FLA sufficient power to guide the local authorities along the path which it feels is the safest for each individual stadium.

The number of stadiums that the FLA currently have to inspect and advise local authorities on, is 94. The FLA Inspector interviewed for this work stated that the current workload with the resources available did not, in his view, give Inspectors enough time as they would like to concentrate on each stadium. Therefore, any expansion of the workload will have an effect on how Inspectors operate in their new form, if there is not an increase in resources¹⁴.

The effectiveness of the FLA in its current guise is not for this piece of work to assess, but it is clear that there have been massive changes throughout football specifically at the areas targeted by the FLA from the outset. With disasters averaging at one every ten years or so, we are about due for the next one, and it is clear from various people interviewed in earlier work that it is unlikely that any such disaster will occur in the top two or three football divisions. Mr Levison (FLA Inspector) felt that the next disaster is likely to:

"...be at a rugby stadium that already has large crowds..."¹⁵,

where there is no regulatory body like the FLA to enforce compliance with the safety regulations available, i.e. the green guide.

It would seem, therefore, that the formation of the SGSA to oversee such sports as rugby and cricket would be both sensible and necessary. But is that what is being proposed? With that question in mind, what now follows is an assessment of Part 1 of the Culture and Recreation Bill introduced in the House of Lords on the 14th December 2000.

WHAT IS THE PROPOSAL?

In July 1999, the then sports Minister Mr Tony Banks MP, stated that:

"...the Football Licensing Authority will be reconstituted as the Sports Grounds Safety Authority and will have an advisory role on safety issues associated with all sports which use outdoor sports stadia, including cricket..."¹⁶.

The very fact that Mr Banks used the word 'reconstitute' indicates that there was never an intention to enlarge the FLA. This is exactly what has been indicated by Mrs Rutherford (Secretariat of the FLA), when interviewed. Mrs Rutherford stated that whilst the Bill is in its early stages, it has been indicated that there will not be any extension of the FLA when it is reconstituted. The only way that the SGSA could expand would be with more funding and resources, but that is not what is intended with the Bill. Clause 1(2) states that:

"...The safety authority [SGSA] shall consist of a chairman and not less than 4 nor more than 8 members..."¹⁷,

and that means the SGSA will be more or less the same size as the current FLA. The implications of this lack of enlargement will be discussed later.¹⁸

The main aim of the Bill is to widen the scope of sports stadiums that the FLA currently covers. The

main change from the Football Spectators Act 1989 is that the term 'sports ground' is used to open the scope of coverage, rather than using more specific terminology like 'where designated football matches are played'. For example, clause 11(1) of the Bill states:

"...The safety authority [SGSA] may...provide advice to the Secretary of State (a) in relation to safety at sports grounds generally...."

This clearly widens the scope of sports and stadiums to which the SGSA will apply. In interview, Mr Levison believes that the number of sports which the SGSA will have the power to influence, will be greatly increased by the Bill. Problems and reasons for the proposed change will be discussed later.

One further major change that the Bill introduces is the repeal of section 1(7), 8 to 12 (inclusive) and Schedule 2 of the Football Spectators Act 1989. These sections relate to the:

"...licence to admit spectators..."¹⁹,

which is currently granted by the FLA, a requirement that needs to be fulfilled for any designated football match to be played in England and Wales. What is now proposed is to treat those licence requirements:

"...as if they were instead conditions included in the safety certificate..."²⁰,

which at present is issued by the local authority's Licensing Officer.

To give some clarification on this point it is necessary to explain the current procedure with regard to safety certificates. The Safety at Sports Grounds Act 1975 brought in to effect the requirement of a safety certificate for a stadium with more than 10,000 capacity. This was altered by the Safety of Sports Ground (Accommodation of Spectators) Order 1996, which reduced the figure of 10,000 to 5,000 but only in relation to stadiums where Association or League football was played (and so here began the disparity between football and other sports). This legislation was then changed by the Fire Safety and Safety at Places of Sport Act 1987, to make it a requirement that sports 'grounds', and not just stadiums, would require a safety certificate.

The importance of the history, is that in the past, the Local Authority has technically only been responsible for ensuring that the sports ground/stadium is 'safe' for spectators to enter (i.e. complies with the non-mandatory regulations contained within the Green Guide). With the Bill, the Local Authority will become responsible for the licensing elements governing whether spectators can be allowed into a specified part of the ground. The advisory role that the FLA has also has a backup provision whereby even if a safety certificate has been issued by the Local Authority for the match to be played, the FLA can nevertheless refuse to grant a licence permitting the admission of spectators into the ground.

An effect of this transfer of responsibility for implementing the spectator licence, is that the Local Authority will have to issue spectator licences and also be responsible for the drafting of conditions specific to each stadium. Also, it is interesting to note that the Bill sets out to widen the availability of knowledge with regards to safety, and yet spectator 'licensing' will still only apply to grounds where football matches are held²¹.

The wider range of sports to be covered by the SGSA, generally include any sports ground which comes within the jurisdiction of the Safety at Sports Ground Act 1975:

"...The Secretary of State may by order designate as [a sports ground] requiring...a safety certificate...any sports ground which in his opinion has accommodation for more than 10,000 spectators..."²²,

There is also provision in the Safety of Sports Ground (Accommodation of Spectators) Order 1996 for 5,000 seater grounds to be included. Even further is the amendment section 1(1A):

"...The Secretary of State may by order substitute, the number...specified in subsection (1)... such other number as he considers appropriate..."²³,

which widens the scope of a 'designated ground' and consequently increases the number of sports grounds that would be covered by both the new safety authority and the Local Authority (who would then be required to issue a safety certificate).

The effect of the Bill will be to bring other sports such as rugby, cricket, athletics, horse racing and dog racing to name but a few, under the supervision of the SGSA, with the possibility of encompassing more grounds, if section 1 (1A) of the Safety of Sports Grounds Act 1975 was used. This increase in scope, is likely to have consequences on the level of safety currently enforced at football ground in England and Wales. These consequences and whether the Bill is a desirable step will now be discussed.

DOOMED TO FAIL?

With the proposed changes having had their second reading at the time of writing, it is likely that there will be some changes made, but the general points will probably stay the same. In the preamble to the Bill's release, a press release gave some general information regarding the content of the Bill and there were two major points that need discussing from that précis.

The first point was that:

"...The Bill reconstitutes the Football Licensing Authority as the Sports Ground Safety Authority so that it can share its expertise with sports other than football..."²⁴.

This is a good point which has to be made, and was agreed by Mr Finny (Trafford Borough Council's Licensing Officer) that it seems sensible to allow other sports where there are large crowds and the associated problems that go with them, to share in the knowledge and experience gained by the FLA over the last 10 years. There should be moves to improve the levels of safety at sports grounds other than simply those where football is played. The problem that arises out of the proposed Bill is that the ability to apply and monitor the shared expertise, will not happen due to the lack of funding and resultant inability of the SGSA to expand. The intention by the Government to keep to a similar number of staff and to maintain the current level of funding, makes a mockery of the stated intention to widen the scope of sport grounds that the SGSA will have to advise. It is just not possible for the necessary attention to be devoted to each individual ground with the implementation of the proposals contained in the Bill.

A fundamental point which I think has not been understood by the legislators is that the 'green guide' has remained non-mandatory, primarily due to the fact that the grounds to which it applies are so diverse that a specific and mandatory set of regulations would be impossible to draft, never mind enforce. Surely a natural extension of that logic would be to state that stadiums are so diverse in their very nature, that they will require detailed analysis and assessment to ensure that a reasonable level of safety as specified in the 'green guide' can be achieved. Inferences that can be drawn from the Bill are that this line of thinking has not been followed by the legislators, as this detailed analysis is not possible with the current proposals.

Also, just because the FLA has been advising on safety at football grounds for the past 10 years does not mean that they are all perfectly safe now. In the FLA's own review of 1997, it was stated that:

"...While a number of clubs have made encouraging progress, progress so far has been uneven..."²⁵,

therefore implying that there were (and probably still are) clubs that have not been progressing fast enough and therefore have required continual encouragement by the FLA. Football has the reputation of being the main sport where disasters occur and so surely it would be sensible to keep a focus on that sport and its safety levels. The FLA's own philosophy states:

"...achieving safety is not a one off but a continual process..."²⁶.

Whilst it could be argued that this philosophy will continue with the SGSA, the proposals only serve to dilute their ability to function as they have done, to date.

The second point made in the press release concerned the licensing system that is currently in place and it stated:

"...The Bill also abolishes the FLA's current licensing regime as the Government believes this is no longer necessary..."²⁷.

As explained above, the conditions contained in spectator licences will be incorporated into the safety certificate used by the Local Authority. One problem that does not seem to have been addressed here is the fact that safety certificates do not expire.

It is for the Local Authority to proactively instigate meetings assessing the current needs of a particular stadium, and then to issue a suitably revised safety certificate which:

"...replaces the preceding General Safety Certificate issued by the Council which ceases to have effect..."²⁸.

Under the proposals, if any changes to the licensing element are needed, the procedure to be undertaken is quite extensive:

"...Before exercising its power...the safety authority shall consult:-

(a) the local authority;

(b) the chief officer of police; and

(c) either:-

(i) the fire authority or

(ii) the building authority..."²⁹.

The implications of this clause, are that for problems where the FLA would currently alter the licence e.g. in relation to specifying that spectators must be seated, there will have to be a meeting of the above-mentioned bodies and a redrafted safety certificate issued. With no increase in resources, and an increased workload (which cannot be easily quantified due to the possible fluctuation of grounds that are deemed as 'designated grounds'), it is difficult to see just how the new safety authority will be able to effectively increase levels of safety at sports grounds.

The SGSA will still be supervising Local Authorities to reduce the possibility of such a lapse in safety management as occurred at Hillsborough when:

"...South Yorkshire Council's supervision of safety measures at the ground were described [by Lord Justice Taylor] as 'inefficient and dilatory'..."³⁰.

Also, if the SGSA so desires, it will be able to exercise its statutory powers under the Football Spectators Act 1989 section 13, but if the FLA's code of practice is followed by the SGSA, they:

"...shall use...legal powers only as a last resort..."³¹.

So what does the Bill deliver? Mr Levison feels that the Bill gives the SGSA reactive rather than a proactive method of tackling safety problems in sports other than football. The SGSA will have to focus their work on immediate hazards in the hope that they can do just enough to avert a disaster, until they can spare the time to do a thorough analysis of the safety management systems in place at an individual sports ground. This is surely a step backward to pre-Hillsborough, when 'knee-jerk' reactions to disasters created inadequate 'tombstone' legislation. Rather than being able to identify and address problems at sports grounds, the SGSA will be stretched to a point where its knowledge and expertise cannot be used to raise levels of safety.

What will happen if there is a disaster 12 months after the implementation of the Bill, where people are injured or even killed? No doubt fingers will be pointed at the very people whose expertise should have been utilised to prevent the incident, but it will not be generally understood that they simply do not have the resources to monitor all of the sports grounds on their respective lists. An interesting point raised by Mr Levison is that the Bill gives the Government a 'political insurance policy' in case of a disaster, an organisation to blame. In my view, this is a very reasonable interpretation of what has

been proposed, when analysed in context with what its role will be, even if it is somewhat cynical. The SGSA will enable the Government to claim it has safety conscious strategies now in place, but what the proposals show is that there is no real intention to raise levels of safety at sports grounds, just provide palliative measures to 'gloss-over' the real problems.

There is a real need for the SGSA, and it should be pointed out that the actual idea of what the SGSA would be, is actually very necessary to raise safety level. The safety of spectators at sports grounds such as rugby and cricket grounds is very important, and therefore the rationale behind the proposals is good. It is clear, though, that for the SGSA to effectively work to raise safety levels, adequate resources should be made available to it. The expertise of the current FLA inspectors should be used to educate those responsible for safety in other sports, but the Bill is not the vehicle that will allow that knowledge to be used and expressed fully.

CONCLUSION

This work does not seek to give a blanket criticism of the reconstitution of the FLA, and it is clear that there is a need for the formation of a body to regulate and improve safety at all sports grounds. In reviewing Part 1 of the Culture and Recreation Bill, it is apparent from the views expressed by Mr Levison and Mr Finney, that the idea of utilising the expertise which has been built up during the FLA's ten year life, is both sensible and clearly required:

"...for securing a basic level of safety..."³²,

that Lord Taylor viewed as necessary for football in 1990. It should not be the case that a spectator attending a football match is 'safer' than a spectator at a rugby or cricket match. The criticisms are not of the ethos behind the SGSA, but of how these proposals seek to create a body which will not have sufficient resources to undertake its role properly.

While the proposals contained in the Bill would put the experienced members of the FLA in a purely advisory role to get on with advising other sports, this alone is simply not enough. There is a real need for the SGSA to be set up, but the Bill in its current guise will not give the necessary boost to sports ground safety, because it is not backed up by necessary resources from the Government.

Another question on attempting to lift the level of safety in sports is - where will the funding come from for the actual changes which are needed to improve the grounds? Funding for improvements is available from the Football Foundation, which is investing:

"...£90 million of new money over the next four years..."³³,

but this funding is only available for:

"...safety work on football grounds..."³⁴,

and only 12.5% of that total will be available for actual safety improvements, with the rest being used for other football-related ventures. Other funding is available under the lottery funded Safer Sports Grounds Programme, and whilst there will be:

"...a total of £1.115 billion over 10 years..."³⁵,

applications for money will be targeting:

"...projects from areas of high socio-economic deprivation..."³⁶,

and as such, it is highly unlikely that large, private clubs that have medium or high capacity stadiums will be accepted under the criteria laid out by Sport England.

As the funding is not likely to be available to implement the seemingly good intentions, it does seem that the whole idea is simply not going to be successful. When the FLA was formed, it was envisaged by the late Lord Justice Taylor that it would take ten years for it to raise safety standards at football stadiums to his required level. Following that period, we now have the current Bill which seeks to

extend the work which was started post-Hillsborough. This is without assessing whether or not the desired level of safety has been reached. If the Bill is passed then we will not have a body that proactively seeks and attempts to rectify problems regarding safety in sports grounds. We will be reverting back to a reactive method of safety management, which by its very nature acts when people are injured, not with the pre-emptive strategy, which the FLA currently works under. This will not be because the SGSA wants to work that way, but because the tools needed to undertake the task as set out in the Bill, are not being made available through extra funding and resources.

The ideas that have led to the presentation of the Bill are not at fault. It seems wholly sensible that:

"...the FLA's expertise in sports ground safety issues should be broadened to enable advice to be provided to Government and local authorities, and across all sports, not just football..."³⁷,

but I do not believe that this objective will be reached through Part 1 of the Culture and Recreation Bill. If the Bill is implemented in its current form, then the Government will be forcing the advisory element of stadium safety backwards to a pre-Hillsborough, reactive method of stadium safety.

If the Government is really committed to raising the level of safety at sports grounds in general, then it should increase the amount of resources available in line with the number of grounds it wishes the SGSA to cover. There is also a need for a sizeable fund to be made available, for the clubs to undertake the improvements that will be necessary after the SGSA has audited the safety systems at each sports ground.

With Part 1 of the Culture and Recreation Bill, we have a real opportunity to make sports grounds safer for all sport. It will be interesting to see if the Government makes any changes to the Bill, which show that it is willing to grasp the opportunity now presented, and not just make a 'half-hearted' attempt at dealing with the issues.

Footnotes

(1) Prepared by the Department for Culture, Media and Sport

(2) Partington, CD 'A study of Football Stadium Safety - Are We Safe Yet?' - Sport and the Law Journal Vol 8. Issue 2, 2000.

(3) Partington, CD 'A study of Football Stadium Safety - Are We Safe Yet?' - Sport and the Law Journal Vol 8. Issue 2, 2000. Page 77

(4) Football Licensing Authority's 'Statutory Remit' - paragraph 1.

(5) Command Paper 962

(6) 'Sports Law' - Gardiner et al -page 539

(7) Command Paper 962 paragraph 22

(8) FLA 'The Statutory Remit' - paragraph 4

(9) FLA 'The Statutory Remit' - paragraph 7a.

(10) FLA 'Code of Practice' - part 2

(11) as stated in the Football Spectators Act 1989

(12) FLA 'Annual Review 1997' - Auditors Report.

(13) Football Spectators Act 1989 section 13(2)

(14) This point is discussed further below.

(15) Partington, CD 'A study of Football Stadium Safety - Are We Safe Yet?' - Sport and the Law Journal Vol 8. Issue 2, 2000 - page 77

(16) House of Commons Hansard Written Answers for 15th July 1999 - Mr. Banks MP

(17) Culture and Recreation Bill clause 1(2)

(18) at page 13

(19) Football Spectators Act 1989 - section 1(7)

(20) Culture and Recreation Bill - clause 3(4)(a)

(21) see Culture and Recreation Bill - clause 4

(22) section 1(1)

(23) inserted by Fire Safety and Safety of Places of Sport Act 1987 section 20

(24) Dept. for Culture, Media and Sport website -

'Sport - forms and Documents -Culture & Recreation Bill'

(25) FLA website - 'Annual Report 1997' paragraph 43

(26) FLA website - 'Introducing the Football Licensing Authority - Philosophy'

(27) Dept. for Culture, Media and Sport website -

'Sport - forms and Documents - Culture &

Recreation Bill'

(28) Trafford Metropolitan Borough Council's General

Safety Certificate - paragraph 2

(29) Culture and Recreation Bill - clause 8(3)

(30) Armstrong, G 'Football Hooligans' page 105

(31) FLA website - Code of Conduct 'Consultation

and communication'

(32) Command Paper 962 - paragraph 58

(33) Press release by The FA Premier League - 25th July

2000 - 'Premier League Welcomes Football Foundation'

(34) Ibid. 'Notes to Editors' paragraph 1

(35) Sport England 'Safer Sports Grounds Programme -

Completing the application form' page 2

(36) Ibid. page 3

(37) Culture and Recreation Bill - Explanatory Notes -

paragraph 15

**Christopher Partington,
Post Graduate Student,
Manchester Metropolitan University.**

DISCLAIMER

It must be noted that the views and opinions given with regard to all aspects of the workings of the FLA by the interviewed FLA Inspector, are the views and opinions of Mr John Levison MICE Ceng (FLA Inspector for certain North-West stadiums) and Mrs Nikki Rutherford, and not necessarily shared by the FLA body.

CONTRIBUTIONS

Contributions for forthcoming editions of the Journal are invited.

Contributions should be supplied on disk (Mac or PC)
and saved as ASCII format. Disk should also be
accompanied by a hard copy of the article.

Contributors are asked to pay particular attention
to the accuracy of references, citations, etc.

Articles should be forwarded to

R. Farrell, Hon. Secretary,
British Association for Sport and Law,
The Manchester Metropolitan University,
School of Law,
Hathersage Road,
Manchester M13 0JA.

SUBSCRIBERS

Anyone wishing to subscribe to the journal
may do so at a cost of £40.00 per annum.

Further details from

Hammicks Bookshops Ltd,
Browells Lane, Feltham,
Middlesex TW13 7EE.



BRITISH
ASSOCIATION
FOR SPORT
AND LAW

THE MANCHESTER
METROPOLITAN UNIVERSITY
SCHOOL OF LAW
ELIZABETH GASKELL CAMPUS
HATHERSAGE ROAD
MANCHESTER M13 0JA

Membership is open to anyone with an interest in the legal
aspects of sport and shall consist of the following categories:

| | |
|--------------------------------------|------------------|
| Corporate Membership | - £470.00 |
| Individual Membership | - £94.00 |
| Full-time Academic Membership | - £35.25 |
| Student Membership | - £11.75 |

All prices include VAT

Ordinary Membership shall be available to groups of individuals,
e.g. firms of solicitors, sports clubs but the organisation
shall nominate one person as the Ordinary Member.

Student Members shall have no power to vote at any
Annual General Meeting or any other meeting.

Honorary Membership may be conferred at the discretion of the governing body.

Please complete the
membership form and return to:

Raymond Farrell
Hon. Secretary
British Association
for Sport and Law
The Manchester
Metropolitan University
School of Law
Elizabeth Gaskell Campus
Hathersage Road
Manchester M13 0JA

Please make cheques payable to the
British Association for Sport and Law.



**BRITISH
ASSOCIATION
FOR SPORT
AND LAW**

THE MANCHESTER
METROPOLITAN UNIVERSITY
SCHOOL OF LAW
ELIZABETH GASKELL CAMPUS
HATHERSAGE ROAD
MANCHESTER M13 0JA
TELEPHONE: 0161-247 6445
FACSIMILE: 0161-247 6309
VAT REG No. 673 5989 73